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## „Plurality in Legal Development

A Critical Appraisal of Modern and Post-Modern

Models of Legal Development“

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# Introduction

Insofar as law has a certain impact on the organization of social life, it can be understood as a tool to mediate between the plurality of individual needs on the one hand, and the general requirements of a common social life on the other. Legal development can be seen thus as a process in which these often contradictory requests are put in relation to each other in different ways. This does not mean, however, that legal development would always achieve or even strive for a dynamic balance between individual and social needs, by which the satisfaction of these needs would complement rather than inhibit each other. Actually, the development of law is pursued with disparate motivations and perspectives, making the quest for legal development even more challenging.

Consequently, including varied and broad topics like the recognition and respect of Human Rights, the institution of 'real' democracies, the establishment and strengthening of the rule of law, the protection of ecosystems and the liberalization of markets and regional integration, legal development is an all-encompassing and omnipresent concern of our time. The call for legal development is, thus, neither circumscribed to a specific legal field nor to a concrete state or type of law or a particular legal culture. From a more theoretical perspective, understanding law as a functional system, including actors, practices and discourses, to develop law must be one of the main goals of law itself. As a system, it pretends to keep being functional (regardless of the function we as researchers may attach to it) or at least to maintain a discourse of its functionality and necessity for the functionality of society. Interestingly, movement (i.e. development) is thus a tool for stability. As a consequence, the lack of legal development is linked to the maintenance and increase of social conflict and/or the oppression of social growth, understood economically, politically or even as an expression of the individual growth of the citizens.

Law can promise stability for a society only so far as it evolves at the same pace as society does (or, at least as it appears to do so). Today, the fact that social change is speeding up in unexpected and uncontrollable ways is not new anymore, and the consequences for legal systems and for law as a field of study are quite obvious. The answers that were more or less useful until now start to be part of the problem. We do not have recipes prepared for multicultural and intercultural societies, supranational entities, embryonic or GMO research, and many other questions of our time. Legal development is imperative.

However, in the race for development, little reflection is put on the assumptions in which this quest for legal development is embedded. Especially unclear is how the development of which we dream is connected to other dreams of our time, particularly the coexistence of diversity. To know what kind of development *we* want is easy when *we* think all the same (or at least when only *our* answer counts). But when we see plurality as a value, cultural identity as an object of innate rights, and difference as a requirement for a rich social life, when in the name of Human Rights we subscribe to pluralistic societies, then the quest for development turns to be more complex. To what extent is the concept of legal development at the height of our needs, when we strive at the same time for diversity, and thus implicitly maybe also for diverse, perhaps even contradictory, concepts of development?

Thus, it is a worthy enterprise to reflect on legal development as a crucial concept for the use and self-understanding of socio-legal studies, particularly in its relationship to plurality as a social concern. In this work, I elaborate on the relationships amongst law, development and plurality primarily through three main questions. Firstly, I inquire in chapter A how legal development is linked to anthropological and social perspectives that are specifically related to modernity as a socio-linguistic situation marked by a tension between universalism and pluralism. Furthermore, this investigation presents in chapter B how these modern perspectives on legal development are challenged by postmodern research, calling the attention to the elements of power and culture that are present (but insufficiently acknowledged) in modern approaches to law. On the base of these critiques, the third important question addressed to in chapters C and D is how do pluralistic and postmodern perspectives on law and on development allow to envisage new forms of legal development.

Importantly, while legal development can take a variety of forms, I will pay particular attention to one approach that emphasizes legal transfer as its central tool. There are several reasons for this choice. Firstly, processes of legal transfer have been and still are major tools applied in the international practice of legal development. Secondly, also from a scientific perspective, legal transfer has been a major way to conceive of past, present and future legal developments. Consequently, the field of research on legal transfer offers sufficient practical and theoretical research to build a reference point in the following quest. Last but not least, the processes of legal transfer are particularly important for the question of the relationships between legal development and pluralism, because they imply from the outset the encounter amongst different approaches to law. The question on how legal development occurs through the engagement with difference is at the core of research on legal transfer. Nevertheless, while legal transfer builds an important aspect of this endeavor, because of the interest of this

investigation in different approaches to legal development, I will not restrict all my investigation to legal transfer.

Legal development is a topic that can be as specific or as broad as the researcher wants it to be. My intention here will be to find a balance between two extremes where one approach would be too general and the other too specific. Thus, while the emphasis of this discussion relies on a conceptual approach to legal development, I combine philosophic-anthropological questions with specific practical examples. Although, as with any inquiry, endless examples could be chosen, the ones I gathered here seem to me especially important because of their relationship with the question of pluralism, diversity and otherness. I tried to balance the fact of these authoritative and limited choices by presenting them and reflecting on them as clear as possible in the text. Importantly, my investigation is based mainly on a critical reflection of sources found through bibliographical research, and aims to make already existant research in the areas of law, anthropology, cultural studies, philosophy and history, fruitful for an interpretation on the place(s) of pluralism in legal development.

However, in the course of this investigation, I engaged directly with the places, actors and techniques of the processes to which I refer. For example, I had the opportunity to do research abroad, gathering on-site information and interviewing personnel working in the German Association for Technical Cooperation (now German Association for International Cooperation – GIZ, *Deutsche Gesellschaft für Internationale Zusammenarbeit*) in China, within indigenous and non-indigenous courts in Mexico, as well as in the *Centro do Teatro do Oprimido Rio* in Brazil. Moreover, I took courses in Theater of the Oppressed, experiencing directly these techniques at the base of Legislative Theater. These experiential approaches had an important impact on the choices I made for the final version of this investigation. Importantly, it was in the course of this engagement within a variety of fields, that I realized the range of existing ethnographic, anthropological and sociological research of high quality, as well as, quite often, the lack of communication amongst the different (but related) areas. It is in this context, that I experienced the need to address the topic of legal development through a more abstract approach, combining the resources of experts in each geographic and disciplinary field. I am indebted to these authors, and it is my hope that this reflective engagement is as enriching for them as their research was for me.

In this sense I feel deeply thankful to the individual researchers and research institutions that have made this endeavor possible. I have to thank the persons that trusted in me since the beginning, including, first of all, my family. There are, however, also new families, brothers

and sisters, fathers and mothers, uncles and aunts, grandfathers and grandmothers, that life endows to us now and then: the teachers who accompanied and teased me, the friends who cared and supported me, and the love who opened my horizon of life constantly, enriching it at every step. In this long journey, none of the words of encouragement, none of the gestures of love you gave me was dispensable. For that, I thank you from the bottom of my heart.

I thank particularly Prof. Dr. René Kuppe, my adviser at the University of Vienna, and Prof. Dr. Wolfgang Dietrich, my professor at the University of Innsbruck, who accompanied me through the academic and intellectual labyrinths that a doctoral research implies. To my colleagues and friends Catalina Vallejo Piedrahíta and Orlando Aragón Andrade I owe fruitful discussions and important support regarding bibliography and investigation results, besides their constant encouragement. On a special note, I want to thank Shawn Bryant for remaining my caring *compañero* in the ups and downs of an important part of this labyrinth called thesis, and, most importantly in the bigger roller-coaster of life. Importantly, a central part of writing a thesis was to learn to write in a manner that at least some people can understand. For helping me with the English language and for the correction of the final text, I am indebted to Shawn Bryant (again) and to my dear friend Alicia Dueck. Naturally, neither my professors not my helpers could purge my thinking or my writing from all its asperities, for which I take full responsibility.

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# A. Modern Law and Legal Development

## I. Modernity, Rationality and Universalism

### *1. Modernity as a Socio-Linguistic Situation*

As with any inquiry, in this quest for the modern assumptions on 'legal development' and their consequences, the first difficulty consists in clarifying the concepts used. Not only the multiple answers to the question about what is law or what we describe with it can fill several doctoral thesis, but also the question about modernity and its meaning is confusing. It is possible to understand modernity in several different ways. In fact, modernity has been conceptualized at least as an historical epoch, as a process of 'modernization', as an intellectual and cultural movement and as a discourse (Spencer 2006, 376 f.). These different concepts overlap in meaning, and have been deployed differently at different points in science history. Yet, when using one of these concepts to define modernity, necessarily the remaining aspects and, most importantly, the connection between them is neglected, thus reducing the concept of 'modernity' unnecessarily and in a detrimental way to a thorough understanding of the complexity of the issue at stake. Therefore, for this inquiry, I will work with a broad concept of modernity as a specific sociolect, i.e. a socio-linguistic situation that determines the posing of certain questions and answers (Zima 2001, 37). As Peter V. Zima (*1946) shows, this broad conceptualization allows the researcher to observe modernity in its complexity, so that some discursive difficulties can be avoided, like monologuism or Manichaeism, which would hinder the reflexive intention of an academic inquiry as the one proposed here (Zima 2001, 22).

The identification of a socio-linguistic situation that researchers refer to (and construct) as modern can only be done in relation to contrasting socio-linguistic situations. In contrast to late-modernity and postmodernity, Zima characterizes the questions that structure a modern system of thought and action by their ambiguity. Ambiguity, as he argues, is related to but different from the ambivalence of late-modernity, that starts to be stronger around the middle of the 19th century, and the indifference predominant in a postmodern sociolect, more noticeable in the second half of the 20th century (Zima 2001, 41). The main difference relies therein that the modern discursive ambiguity can be, and is expected to be, solved through modern discourse itself, particularly through the application of universal reason. Thus, the discomfort caused by the synchronic presence of two or more (conflicting) meanings as part

of one unity, ambiguity, is (seemingly) overcome, restating the order of binary oppositions like true/false, good/bad, reality/illusion, etc. For this view, the (re-)connection with *one* reality seems possible, there is a right way to understand it, and insufficiencies in this respect depend on the lack of thorough, good, beautiful, true reasoning. Illusion can be set apart, truth can be discovered, the core of reality is accessible. Ambiguity is acknowledged, but it exists only as an undesirable confusion that needs to be overcome.

The late-modern and postmodern perspectives, as part of changing social systems, distanced themselves increasingly from these assumptions turning reflective on the implied contradictions of modernity that *cannot* be solved, finally reacting in front of these assumptions as unfulfillable hopes. It is not possible any more to dissolve the contradictions through the binary opposites of good/bad, beautiful/awful, etc., and thus, the status of legitimative resources of argumentative chains like reason, objectivity or universality change dramatically and seem to be at the arbitrary disposition of the narrator. Hence, the restatement of order and clear differentiation moved from being a guiding (and achievable) goal to be an unreachable hope and ended up later just offering one possibility amongst a free palette of exchangeable choices.

It is my intention here to present the ambiguity of modern thought, the ambivalence it reaches in late-modernity and how these groups of ideas find expression in the legal field. Modern law, as has been stated repeatedly by legal philosophers and historians, is a consequence of the cross-fecundation between diverse currents of thoughts and their continuously renovated interpretation. Despite the diversity of scholarly and politically acknowledged legal systems, however, some main features are taken into account in order to assume their 'modern' character, and, as we will see later, their character as 'legal' in the first place. These elements that make law 'modern' are connected to philosophical understandings with an emphasis on rationality, but modern reason is loaded with contradictions, especially between its universal validity and the particular interests that it includes.

## 2. *Modernity and the One Development*

The early-modern sociolect that called for reason as a tool to solve ambiguity was especially influential in Europe in the 18th century, but it had been developing since much earlier. In fact, the outburst of the Enlightenment, emphasizing the freedom of the subject due to his reason was the zenith of a process that had started, at least in the European continent, in the beginning of the 16th century. The division amongst the different confessional groups in the

church and the many wars in and between states had put in question all standing orders. With the Peace of Westphalia in 1648 that proclaimed the freedom of religion, the dogmatism of one specific religion was no longer recognized as generally binding. In its place, reason should reign, bringing freedom and peace. Absolute dogmas did not match the call for reason, and this was the case also with absolute forms of government. Reason, Humanity, Justice, Technical Development and Free Commerce: these were main concerns of the new free subject that had awoken from the sleep of the Middle Ages. These were the oracles that would provide all answers since the disruption of absolute systems of power in the most diverse fields of society had left so many questions open. If disenchantment of the world was the consequence of the disappearance of God, He was quickly replaced in His enchanting and omnipotent role by Science, the State and Humanity (Supiot 2007, 46).

In scientific research, the arena of enlightening reason *par excellence*, the search for the dissolution of the ambiguity had important consequences. In the now so-called natural sciences, it took the shape of the requirement of scientists to be free of religious dogmatism and remain true to nature when observing and presenting their study objects (Daston/Galison 2002, 35 ff.). Guided by the light of reason, ideal[1] images of nature were created by scientists in their *atlas,* in order to overcome the imperfectness of the individual objects they found in nature. The universal could be represented with one image (Idem, 71) that would necessarily be different from any concrete individual (Idem, 42). Draftsmen would be observed by the professional scientist, who would correct the presentation of nature in order to show its "natural harmony, individual truth and security" (Idem, 47[2]). The ambiguity of concrete experience could be overcome by the power of abstract reason.[3]

Idealism and its power of dissolving contradictions achieved a later heyday with Georg Wilhelm Friedrich Hegel's (1770-1831) argumentative perspective, in which, although an emphasis on the dialectic between opposites is central, this interaction ends up in the '*Aufhebung*' (sublation) of the duality. Thus, ambiguity can be overcome through synthesis. This is what Zygmunt Bauman (*1925) characterizes as the "ideology of the superiority of reason" and Alain Touraine (*1925) as the enforcement of the *idéologie moderniste* (Zima

1 Lorraine Daston (*1951) and Peter Louis Galison (*1955) refer to four different understandings of being true to nature, differentiating amongst approaches with an emphasis on the concepts of typical, ideal, characteristic, and average. However, for our purpose, it will suffice to keep in mind the importance of the encompassing idea of 'true to nature'. The differentiations of Daston and Galison are insofar relevant, as they show the variety of aspects of this notion and the transition towards the concept of mechanical objectivity (Idem, 40 ff.).

2 All translations are by the author except where otherwise indicated in the list of references.

3 Johann Wolfgang von Goethe (1749-1832) refers, for example, to the necessity of definitions in this sense (Daston/Galison 2002, 42).

2001, 41, 58). However, this type of reason in the form of subjective idealism would soon find its own limitations in overcoming ambiguity. Ambivalence appears, thus, when early-modern reason cannot offer a clear solution for the ambiguities of modern man anymore, because he becomes aware that "the law of the market, technical-scientific progress and rationalization on the one hand enable the development of democracy, welfare and individual freedom, and, on the other hand, put them into risk" (Idem, 52). Hence, the values that served as an orientation for the application of reason until then seemed to fall apart. Instead of belief-oriented rationality, thus, purposive, goal-oriented rationality will be leading (Idem, 48). Since the promised cultural progress of modern man, oriented to the domination of nature, conceals the risk of a backlash into barbarism (Idem, 50), it is man's own nature, the one, that has to be dominated.

Consequently, the subjective character of science that once required from the researcher to find the ideal behind the imperfectness of matter was rejected in the 19th century and it was replaced by the call for objectivity. During late-modernity, machines turned thus to represent the ideal type of scientist, photographic cameras turned to be the 'better eye'. However, more than the rejection of universalism, this change expressed the ambivalence in which the new scientist was caught. It just underlined the tension between a plurality of realist machine-produced images and the universality of general categories as well as the universal validity of mechanic processes themselves.

The primacy of the machine is characteristic for this epoch of industrial progress. That the success of rational values of freedom and humanity would lead the emancipated rational subject to be subordinated to the domination of machines and serial production did not match the dreams of modern man. The recognition of the absolute value of the individual ended up in his subordination to social classes and made individual subjects totally replaceable. Man was obviously not such a free creature, constrained in all kinds of socio-economic structures. But at the same time that those structures seem to constrain him, they also seem to liberate him. A solution of this paradox did not appear possible anymore.

In working with the concepts of ambiguity, ambivalence and indifference, Zima highlights the connection between modernity, late-modernity and postmodernity on the one side, and the question of universalism/pluralism as answers in front of difference on the other side. While the 'feudal era' was structured by dualistic exclusivity, and thus in an anti-paradoxical way, modern thinking recognizes and solves contradictions through rational thinking (Zima 2001, 44). Difference in conflict can be solved through universal values. In doing this, early-modern

approaches remain, nevertheless, implicitly ambiguous and unconscious of the paradox they are based on. The paradox resides lastly therein that (absolute) individual freedom is not compatible with (absolute) universal reason. The ambivalent perspective of late-modernity, aware of this paradox, is not able anymore to solve the conflict amongst differences through a higher synthetic universal (Idem, 42). This pro-paradoxical attitude is reinforced in a postmodern approach, characterized by pluralistic indifference and leaving no space for any answer whatsoever that could dissolve the paradox.

Thus, a change and a progressive radicalization of the attitude in front of contradiction can be observed. The ambivalence of late-modernity is an expression of the impossibility to overcome the ambiguity of the coexistence of difference coherently, that is to say, without throwing out the window the same values that serve to overcome ambiguity. The freedom of the individual subject that served as the north for the rational solution of the conflict between diverse attitudes in front of the organization of economy was the same value that was being oppressed by free individuals. Nevertheless, it is not that ambivalence does not answer at all in front of plurality, thus producing indifference in front of difference, as a postmodern sociolect will do later, according to Zima. The awareness of the paradox means for late-modern ambivalence just that it has to refrain from answers through specific contents (values) that would put it back in the paradox. To move out of the paradox of values, late-modern approaches move to another level: from content to form. This move allows it to remain ambi-valent, without getting to be in-different. Now it is the form and not the values themselves that will be guided by reason. Thus, reason is not anymore associated with specific values, but moreover, it is beyond the paradox. Difference, and thus pluralism, has a space, but the form of that space will be delimited by reason. Thus, the reaction of late-modernity in front of difference is ambivalent in a double sense: firstly, differences cannot be solved consistently through values; therefore two contradictory positions can be valid. Secondly, while this is true, only one, a reasonable position, is allowed by formal reason. This second ambivalence ends up, thus, in a solution, a precarious and constrained one, but nevertheless, within its formal limits, a rational answer with universal value. Form itself, thus, turns to be the leading value.

When contradiction is seen as a problem to solve, when unity is the goal, what is at stake is the existence of difference. The characterization of difference itself is in question, because when we manage to make the difference as less radical as possible, in order to overcome the undesired tension between identical/different, we are just looking for the Other to be less other; we are waiting for the difference to disappear. Overcoming ambiguity

through specific values or escaping ambivalence through general formalities, as ways to get rid of contradiction through modern thinking mean both to deny the full legitimacy of the existence of contradiction, and deny thus the legitimacy of the existence of the Other as equally valid.

This is true for all types of others, be it persons, arguments, laws, etc. In all cases, the principal consequence of such a perspective is that a hierarchy of validity must be set. The tool to be applied in order to legitimate arguments regarding validity is going to be, once more, universal reason, this is a rationality that only accepts one winner, either because the better rational argument or the rational structure established with due form and process say so. It is clear thus, what is the link between universalism and rationalism in this perspective. The acceptance of the existence and equal validity of diverse rationalities would be unthinkable for this model. The goal of rational logic in modernity is exactly to provide freedom from, or at least an escape from, contradictions.

Having said that, the form that the movement of life through time takes (or *should* take) from a rationalistic perspective, is clear: a straight line. From lack of reason to reason, from contradiction to resolution, from many to one. If early-modern thinkers spoke about the emancipation of the subject as the core value, late-modern thinkers refer equally, despite the diversity amongst their approaches, to optimist or pessimist arrows of development. The Marxist historical materialism as well as the Darwinist evolutionism and the Comtian positivism, all of them exemplify a vectoral vision on development. In a Cartesian axis, when the time is fixed and divided in units in the horizontal line, and values are quantified from zero to infinity in the vertical one, development can only be imagined as the achievement of an ever-higher position in this bidimensional field. The idea of development *of* something turned thus into the development *towards* something (else), namely towards the realization of an ideal value (as content or form). Reason is what makes the laws of development natural and necessary. Optimist or pessimist, from the modern perspective, we move from fear to hope, from chaos to order, or the other way around, but nothing changes regarding the vectoral structure of time and thus of development.

## II. Modern Rationality and Law

Referring to the field of legal philosophy, Johann Braun, exemplarily for the approach of many contemporaneous researchers, stated that "the modern age is a phase of history, in which we still are today, according to general perception, notwithstanding the occasional invocation of a 'postmodernity'" (Braun 2006, 72). However, law is linked to this tradition not only in legal philosophy. Even more than in this reflexive attitude, in the daily praxis of law and in its disciplinary conception, law continues arguing with the same elements that modernity brought about. Humanity, reason, freedom, equality, the sovereign State, secularity and autonomy of the law, subjective rights and duties and a clear connection to the material world that is accessible to experience here and now, are central to our understanding of law today. We have not left, at least in our official and conscious ways to organize society and deal with conflicts, the realm of modernity. Hence, if this is true, our concept of 'modern law' must be charged with the same load of tensions as modernity itself.

Although the link with early modernity justifies to recall experiences and arguments of the 16th century to understand contemporary law, this does not explain 'modern law' in its complexity. Leading aspects of Western contemporary legal thinking derive from or reflex approaches of both early and late-modernity. What is generally understood today by 'modern law' is thus a combination of propositions that emanate from the belief in the emancipatory power of the subject, who can solve contradictions through the light of reason on the one hand, and the withdrawal from subjectivity towards the universally valid objectification of reason on the other. Both elements can be seen in the never-ending dispute between the philosophies of natural law and positive law, and the practical consequences of these approaches. From this perspective, as the result of an early-modern/late-modern combination, the contemporary category of 'law' developed first as ambiguous and then as ambivalent, especially in regard to its relationship to universalism/particularisms. The labels of natural and positive law are thus expressions of this ambiguity and ambivalence. Superficially, they are different sets of answers, but both are offspring of the same tension. The dispute between the two philosophical extremes just replicates the friction of the inner contradictions that are inherent to each of them. It is in this combination of early-modern ambiguity of natural law and late-modern ambivalence of positive law that 'modern law' serves as an object of reference when it comes to talk about legal development. The maintenance of this contradic-

tory structure is essential, as we will see, for the concept of law and the identity of Western law as a model of reference for development.

Through breaking with absolutism and dogmatism, modern reason opened the door to all potentials of humanity. But the plurality of possibilities did not fit always with the need for post-revolutionary security of modern man. Concerned, as modernity was, with overcoming the contradictions to which free reason had opened the door, the question for the norm was a crucial element. In fact, the key role of law for this process of 'dis-ambiguation' is obvious when we remember the main explicit objective of law, namely to prevent and, more importantly, to solve conflicts; conflict being just another word for contradiction: contradiction of interests, of wills, of statements, of claims, etc. It is no wonder, thus, that 'modern law' has been one of the most strongly developed fields in the last centuries, being a main concern of modernity and contemporaneity that society be rationally organized.

The change from a socio-cultural situation dominated by the omnipresence of God in the Middle Ages to a perspective marked by the primacy of humanity opened up the field for reflection and criticism towards social reality. Natural law responded to this need of justification, developing principles that were seen as binding for all social actors. Innate rights that were independent from the concrete legal system put into force by human institutions served as a protection against the arbitrariness of absolute power. These rights did not need to be created and could not be abolished, because they were seen as pre-existent to human thought and reason, and served thus as a hierarchical guide for the mundane creations of man. They were perceived as part of a truer truth that humans are called to recognize, the same way that other scientists dis-cover the inherent laws of nature. In fact, this law was called 'natural' because it was imagined as an expression of nature that was as given as the laws of physics were supposed to be. The work of the jurist consisted thus merely in the recognition of these truths, without letting his judgment be disturbed by any moral dogmas. Concomitantly, the realms of religious morality and secular law were successively divided. Thus, questions that were previously in the realm of religious morality were turned into matters of law and legal philosophy. This turn materialized into concrete social institutions like the Inquisition amongst many others (Dietrich 2008, 199). Paradigmatic for this exchange of morals for laws is the process of reformation by which the one truth of the universal Church was deeply perturbed. Who should offer the base for stability once the Catholic Church was internally divided and, even more, when it was just one alternative amongst several others? The answer came with a legal pact, the Peace of Westphalia of 1648. Not only was a moral question

answered with a legal statement, but furthermore, law, as an expression of secular power, was clearly separated from the realm of the Church and its moral regards.

The Peace of Westphalia serves as a marker for the strong position that the modern state had already achieved. The concept of the modern state means, on the one hand, that the authority is conceived through the establishment of territorial power, independently from a personal obligation like the fief, and, on the other hand, that it is a centralized entity of power exercised through the autonomous creation of law. As an aspect of internal sovereignty in the sense of Jean Bodin (1530-1596), the state had the prerogative to be the only source of law and to organize structures that would execute the order established and judge on the basis of that law (Braun 2006, 80). This is a clear break with the tradition of God as being Himself the law that led the legal conception in the Middle Ages, as the *Sachsenspiegel*[4] states (Idem, 77). Hence, the secular State would be the new guardian of social stability through law.

Before this shift, as the *Sachsenspiegel* exemplifies, even fixed written law was only a 'mirror' of pre-existing law, or at least it had to present itself as such in order to claim legitimacy. However, at the beginning of the 16th century, this perception started to change and the reference to a rather static concept of law that claimed legitimacy from the identity with the past and from scholastic explications of predetermined authoritative texts was exchanged for the reference to a higher Truth that emanated from the very nature of things first, and of the state later.

However, natural law was invoked equally for the rights of the secular state as it did for the rights of the individuals. The trust in the own reason of the individual and the call to participate in the socio-political order himself that had found expression in the German Peasant's War at the beginning of the 16th century, culminated in the outcry of the French Revolution. It is this subject, aware of his own nature the one that, putting himself in the center of his world, erects himself to claim his own right. Immanent rights of the individual, which remain socially effective with their background of natural law until today in the conception of Human Rights, were the natural consequence of the acknowledgment of the innate value of the subject, and ended up later in the claim for the Rights of the Citizen. Thus, through the figure of citizenship, the individual and the state were entangled in a double tension that last until present times. State and citizen, both need each other, but at the same time each of them claims for himself to be the final source of legitimacy, and, consequently, of social power.

4 The *Sachsenspiegel* was a private record of norms of the 13th century as well as the *Schwabenspiegel* and *Deutschenspiegel.* The name *Sachsenspiegel* means literally 'mirror of the Saxons'.

Nevertheless, the individual that natural law equipped with own rights was ultimately the result of a concept of human being as a creature of God, gifted with specific virtues and goals. Hence, it remained linked to a theocentric perspective that was somehow contradictory to the increasingly distant relationship of modern man to God (Braun 2006, 17 f.). This tension found explicit expression in the 18th and 19th centuries, that brought a severe crisis in the understanding of man and his way of thinking (Idem, 6). Similar to the transition that natural sciences experienced, changing from the precept of being true to nature to the paradigm of objectivity, the initial subjective idealism that characterized the modern approach in social sciences transformed increasingly into objective idealism.

The idea of 'reality' was increasingly reduced to the sensible material world and law performed that step equally in the positivization of natural law. Through the concretization of natural law thinking into positive law, natural law had both achieved its goal and lost its reason to be. This is the case with the codifications of natural law, including the Bavarian Civil Code of 1756, called *Codex Maximileaneus Bavaricus Civilis*, the Prussian *Allgemeines Landrecht* of 1794, the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 and most of all the *Code Civil* of 1804. While the Prussian and Austrian codes were written by outstanding natural law experts (e.g. Karl Anton Freiherr von Martini (1726-1800) and Franz von Zeiller (1751-1828) in the Austrian case), the French code was embedded in the modern ideas of freedom and equality that had led the revolution against the old system. Thus, in these codifications as well as in uncountable simple laws, natural law became positive law (Braun 2006, 15). Concomitantly, the accent of the legitimizing power of law moved from absolute values to absolute forms. The 19th century witnessed thus the appearance of an ever-increasing amount of laws that had to be collected in 'law journals'.[5]

In the end, this change came to weaken natural law in its traditional self-understanding. While natural law had been a rational alternative to the law in force, confronting absolutist states with the 'right law', the moment it united itself with the power of the state, the rhetoric power of the better – because rationally less contradictory – argument was replaced by the material power of the state and its compulsory apparatus (Braun 2006, 16). Thus, the work of convincing changed from an ideal question, to a material one.[6] As a consequence, later, the perspective on the eternal absolute values of the Good, the True and

5 For example, in the German speaking territories, the *Kur-Badische Regierungsblatt* in 1803, the *Gesetz-Sammlung für die Königlich Preußischen Staaten* in 1810, and the *Regierungsblatt* in 1806.

6 See e.g. Friedrich W. J. Schelling's (1775-1854) statement in his 'New Deduction of Natural Law' (1795): "natural law destroys itself necessarily in its consequence (so far it turns into mandatory law), i.e. it sublates all law. Because the latter, which is trusted with the preservation of law, is physical superior strength" cit. in Braun 2006, 16.

the Beautiful were criticized as products of power structures (Idem, 18), and equally the existence of the 'right law' was seen as a *façade* for the use of power.

Natural law was equally challenged by a change in the concept of nature at the beginning of the 19th century. While nature during the 17th and 18th centuries referred to an inner true being that expressed itself in plural concrete ways, the nature of the 19th century scientist was mute in that regard. From the perspective of modern empiricism, nature was 'just' the factual existence of things, directly accessible through senses, measurable and void of moral or meta-physics. Nature was not normative, and thus '*Sein*', how things are, and '*Sollen*', how things should be, were to be strictly divided. Suddenly, law was not a consequence of the nature of man, but a cultural tool needed to control the problematic nature of man. The purpose of law turned to be a central question, as Rudolf von Ihering (1818-1892) stated in his 'Purpose in the Law' of 1877: "The purpose is the creator of the whole law; there is not one single legal rule which was not framed with a view to a purpose, i.e. a practical motive" (cit. in Strömholm 1985, 277). Similarly, for Jeremy Bentham (1748-1832), a key figure in the development of legal positivism, law followed the objective of "the greatest happiness of the greatest number" (Idem, 250).

The positivist approach had equally an important connection with the commencing idea of nation to which the historicism of Friedrich Carl von Savigny (1779-1861)was central, because, although the Historical School explicitly opposed the positivistic turn, which pretended to create law 'from nothing', the history it referred to was a history of documents, more specifically of written documents, and their interpretation built their focus of attention. The importance that (this particular form of) history acquired, especially in the beginning of the 19th century, was a reflection of the general movement towards worldliness and empiricism. Equally, the connection to Roman law, especially through the pandectistic turn in law, served as a unifying historical source and, more importantly, as an explicit or implicit reference for interpretation of contemporaneous legal understandings.

Interestingly, the nation was the one that was now carrying a spirit, replacing nature. The perception on the work of the jurist changed thus from understanding and recognizing an ideal norm to realize its content through law, into recognizing already existent secular law properly. While natural law was linked to an idea of development, so that the law-maker had to be reminded of the ultimate principles that should guide his doing, with the turn to historicism, law was an expression of national history. In the sense of Savigny, the work of the jurist was to understand, rejuvenate and maintain fresh this matter that was given as a necessary result of national spirit (Braun 2006, 22).

Thus, while this modern law referred to an origin that legitimized its status, it had to actualize this national truth continuously through an uninterrupted flood of laws, running after the ever-changing social reality. The tension inside natural law, due to a conflict of values, was transposed to the tension between positive laws, a tension with which lawyers could deal more easily once a hierarchy of norms was fixed, as Hans Kelsen (1881-1973) did later in his 'Pure Theory of Law' (1934). The problem of the 'proper law' turned, thus, to be a matter of its position into a system of hierarchies, and of the form and process that brought about that positive law into existence. In the end, these hierarchies tried to combine the positivist structure with the naturalist quest for innate rights, as the German *Grundgesetz* (lit. basic law, constitution) with the inclusion of *Grundrechte* (basic rights) in its first articles exemplifies. Modern law unifies, thus, the naturalist and positivist approaches to normativity as an expression of modern reason that pursues to solve conflicts through the subsumation of reality under generally valid normative statements.

## III. Legal Development and Pluralism from a Modern Perspective

### *1. The Development of Modern Law and Identity*

Needless to say, the struggles for organizing normativity around rationality had consequences for the position that law could take in front of difference, since these differences were the ones that law was called to solve in order to prevent a conflict or react to it. This is the result of a modern rationality that compels equally to the rejection of dogmas as it compels to the fixation of one position that is argued as 'the' (most) rational one. Nevertheless, the same rationality aims to be a liberation from dogmatism and absolutism and thus it proclaims an invitation to the discussion. Hence, it assumes and accepts plurality and contradiction, even if the final goal is to solve the conflict between opposites. The parliamentary democratic ideal is, as a modern proposal, a reflex of this premise: all participants have a position that is put into discussion and the result of a rational procedure, be it an argumentative discussion on values and/or a formally fixed process, will offer an adequate solution. Who or what determines what is to be seen as 'proper' arguments or procedures is another question.

The modern perspective is, thus, in the middle of a tension between a call to plurality and interaction on the one hand, and a setting of the limits up to which plurality and interaction are allowed on the other hand. All arguments are invited to be discussed – as long

as they follow a specific reason. This perspective can be seen as a conscription of the validity of arguments, and thus as a reduction of possibilities under one model, as well as it can be seen as an aperture to plural possibilities, because all arguments are, in principle, invited to participate: not one idea can be rejected arbitrarily, but only reason shall be the measuring stick. Stating reasonable *rules* to differentiate between valid and non-valid arguments first, and then between valuable and non-valuable arguments, the apparent contradiction between content and form of the call for freedom, is solved – at least in a modern perspective. Modern law, with its strained combination of natural and positivist approaches, is basically the valve that will regulate the interaction of universalism and pluralism in modern societies.

One of the aspects that derive from modern law's main concern to negotiate in the tension between universal reason and multiple wills or needs, is that reform turns to be a crucial constitutive element of law. The question of reform goes, in fact, beyond law and society. It is actually linked to the all-encompassing project of Enlightenment that involves the control of irrationality in the psychological as well as the social realms. From this perspective, "both our law and ourselves appear as projects of self-construction that require an endless process of reform" (Kahn 1999, 8). The task of reform in a legal environment is to subordinate not only the diversity of present wills and needs under universal reason but also to reconfigure the relationship between the present diversity and the past products of a similar subordination (Idem, 17). As a result of reason, generally, those products of the past cannot be totally dismissed. Thus, reform feeds a never-ending cycle of reason reformed by better reason.

It is important to remark that the role of reform subordinating plural wills to universal reason is central for different forms of governments and political organizations, because the tension with a general reason remains the same if we are talking about the will of the monarch, the will of the people or the will of the party. Similarly, it is irrelevant for this matter if we refer to different economical-political models, such as capitalism or socialism, as long as they are based on the assumption of one true rationale beyond particularisms. Not surprisingly, the assumption of a straight line of development towards more freedom, however this freedom is interpreted, is suitable for both conceptions.

In any case, the question remaining is always who is empowered to talk in the name of reason. As Paul W. Kahn[7] observes for democratic societies, "in the modern state [...] there is a much greater diversity of claims about the content and institutional locus of reason's norms

7 In this academic work I have taken much care in introducing the main authors I refer to in at least their temporal context. However, some of the birth dates of contemporary authors are not accessible. In all cases, these are authors that are still alive.

and of the people's will. Reform is the common ambition of legislatures, executive agencies, and courts – as well as of popular political movements [...]" (Kahn 1999, 8). In this sense, the re-form of inherited law does not only take place via legislative procedures, but it is inherent to every application of law, as some currents of legal realism and critical legal studies have argued. Thus, the judicial interpretation of formal law continuously renews the meaning of stated law, reading in it the answers for contemporary questions. Equally, a present decision is always linked to a remote past and invested with its legitimizing power. The more a system makes a strong emphasis on the interpretation of law, the more that "reform and interpretation are one and the same process" (Idem, 55). Hence, paradoxically, it can be said that "judicial review creates the permanent Constitution" (Idem, 77).

Through reform and interpretation, modern law follows the constantly renewed yearning for catching up with present and, even more, to foresee the future. The prospect of stabilizing social relations would be empty if law would not look forward to develop elements that would allow it to stay valid beyond the immediate present. Of course, this expectation will never be fully matched. Hence, reform is needed on the road of progress. Although these concepts of reform and progress are related, they do not mean the same. While the idea of progress, inherited from the Enlightenment, envisages a *telos*, a final desirable state, the reform is not necessarily thought as stable and final aim, but as an achievable, concrete mid-term goal. It is nurtured by a positivist idea of law and a late-modern ambivalence. Progress, however, does not disappear, rather it is multiplied in each of the reform proposals. Consequently, "the rule of law supports multiple narrations of progress, as well as decline" (Idem, 107).

This ambivalence created by a plurality of narrations of progress activated anew with each new reform is not only inside the legal concept of progress, but at the same time is relevant for the position of law in front of progress. Otherwise stated, the ambivalent character of a modern concept of progress materializes also in the field of law through the necessary connection between the goal to achieve through new law in a future time and the implicit legitimacy of progressing towards that goal, given by a timeless (or at least original) law. Modern law (also new or reformed law) requires, for its own legitimation, an anchor in the past, an *original reason* to be. This reason can take the shape of the *Grundgesetz* in the Kelsenian sense of the word, or the original *contrat social*, God's revelation or a revolution, amongst many other elements that work as *primum movens*. In any case, "legal decision-making differs from other kinds of policy formation in just this way: it always begins from a set of sources that already have authority within the community's past" (Idem, 43).

Consequently, the first question to answer by any representative of the law in front of a case is whether he has been given, through a specific norm, the competence to take a decision. All present rules are traceable to an original statement that gives meaning and legitimacy to it.

This conception of law has not broken its bonds with the moral and the divine totally; actually, it takes over a religious theme, by which God expresses Himself through the gift of sacred norms. Moses descended with the law as a divine gift to save *his kind* from chaos and thus, "law is simultaneously a product and a continuing representation of the divine origins of the community" (Idem, 47). Not surprisingly, similarly as Auguste Comte's (1798-1857) positivism developed into a 'Religion of Humanity', law is often experienced as a 'civic religion', that requires holy respect.

This theme of revelation, as we know it from pre-Enlightenment conceptions of order and law, is replaced, in a post-Enlightenment world by revolution (Idem, 48). It is a revolution that we recognize because it marks a rupture with the past that is conceived as *radically different*. This rupture is embodied in a *corpus* of founding laws, a constitution, that functions as a "revelatory act of the sovereign" (Idem). It is the memory of that revealed truth the one that gives unity, consistency and a legitimizing weight to all the comparatively little decisions that come next and recall its authority.

This unity with an authoritative past is the one that allows legal coercion to appear as just(ified). When that link cannot be perceived, the legal decision is questioned. In that case, the argument is, of course, that that decision does not follow reason, a reason that is generally embodied by the interpretation of a higher set of rules, pre-existent and authoritative. To argue outside of this set of arguments is only possible when the speaker stands outside of that community. (Idem, 44). Law is thus an element in the process of identification in the sense of Stuart Hall (*1932): a never-ending process of articulation of the relationship between the subject in formation and discursive practices that always entail certain politics of exclusion (Hall 1996, 2 f.).

Since modern law in its self-conceptualization requires an authoritative and unifying referent in the past, it "creates a single identity in what would otherwise be a changing community, or communities, through time" (Kahn 1999, 47). This way, differences occupy a subordinate space in front of a unifying law. "We, the people", "our past" – this is the language of law (not very different, in fact, from the divine gift Moses brought to *his kind*), through which a unity between the original community and the present is constantly recreated; this is the continuously renovated call to new life of an actor, namely 'we', 'the people', 'the nation', of which each citizen is part (Idem, 45). The radical difference between those past

allegedly pre-legal times and now is thus transposed to the radical difference in the present between our legal community and those outside of that community, the non-legal others. These others can be in the same national territory as *our* community, implying thus a danger not only for social order but most of all for social (national) identity, or, easier to argue, outside of the national territory. Thus, it is possible for researchers feeling their social identity endangered to argue like T. B. Smith, who wrote: "Since her Union with England in 1707 Scotland has in a sense survived as a nation by and through her Laws and Legal System" (Watson 1974, 21).

Beyond mere states, though, at an international level, "law is a crucial element in the constitution of the modern Western subject" (Ruskola 2005, 270), and this identification requires an 'other' to differentiate itself from which is necessarily defined in negations. Take, for example, the case of China. Analyzing the example of Hegel's account of history, Teemu Ruskola observes thus at least three elements of dichotomizing division between conceptions of the Western and the Oriental that find expression in arguments about law: staticism/progression, community/subjectivity, and moral/law. While China is characterized as timeless and static, the West is dynamic, changing and progressive – a perspective that we can find equally in Weber's and Karl Marx' (1818-1883) approach (Idem, 286). Remarkably, the part of Chinese history referred conventionally as 'modern' in opposition to 'traditional' China, usually refers "to the period of significant contact with the modern West" (Cohen 2003, 48). This difference regarding the relationship to time is interlinked with the other two of subjectivity and 'real' law, because only a progressive 'modern' subject can make use of reason to abandon mere morals and create autonomously true law.

Hence, as an example of the exclusion of the Other from the realm of 'real' law, Ruskola, following Edward W. Said's (1935-2003) critique, claims the existence of legal orientalism, arguing that the "putative absence of law in China [has] become part of the observers' cultural identity and, in turn, contribute[s] to the contents of the observations themselves" (Ruskola 2005, 272), creating a "fabulous Western jurisprudence of Chinese law" (Idem, 273). Despite countless investigations on the 'truly legal' aspects of China's present and past, China, according to a long-standing tradition, is perceived as lacking 'law'. The argument to deny the 'legality' of Chinese law varies, referring sometimes to the lack of formal legal rationality in the Weberian sense, and at other times to a liberal legal order (Idem, 271). In any case, for contemporaneous research and praxis, "Chinese law [...] provides a paradigmatic example of [...] 'law without law': a normative order that falls radically short of

'real' law [...]" (Idem 2003, 655). The rule of law means 'not the rule of men' because we are 'not the Others'. Or, at least, we do not want to be them.

In the end, this is an argument that must follow from the place of reason in law, because if modern law and thus the rule of law are the outcome of universal reason, then the other of these categories must be the other of reason, and being unreasonable must be an undesirable state. Thus, "the underlying structure of the debate remains remarkably constant: my reason against your desire. […] Such a world that never advances beyond desire to reason is exactly what we have in mind when we contrast law to the merely political or when we contrast the rule of law to the rule of men" (Kahn 1999, 18). Noticeably, this advancement is the only thing that can protect us from turning unreasonable. The fears around all that the (legal) subject might turn to be (namely irrational, mad, and unintelligible due to his lawlessness) and from what law (hopefully) protects it are projected in an image of an Other that is radically different. It has to be radically different, because, if not, our own social identity is endangered, we are not really safe from madness. Our fears might turn to be true.[8]

Not surprisingly, Ruskola argues that "the shortcomings of Chinese law are often blamed on a putative confusion of categories – the tendency of the Chinese to conflate law and morality, or law and custom, for example. Such claims have great intuitive appeal [since] they accord with expectations of Chinese taxonomical madness and irreducible cultural difference" (Ruskola 2005, 272 f.). If modern law as a rational creation separates itself from morality and unpositivized custom, the Other's shortcomings must be related to these elements that a modern law has given away. Otherwise, we, the rational ones, would be doomed to failure too. The question of otherness is, thus, implicitly a question of truth and value. These perceptions are not just imaginative matters. On the contrary, they are the *reason* for concrete consequences, as, for example, the legal exclusion of Chinese immigrants from US-American territory because of an assumed cultural disqualification for citizenship in the late 19th century and the beginning of the 20th century. "That is, the Chinese were so radically 'un-legal' that they were simply not capable of the kind of self-governance that was required by America's 'republican form of Government'" (Idem, 287).

Thus, modern law contributes to the formation of subjectivity in determinant ways, linking it equally with an ultimate reference, rooted in a stable, remote, even sacred past, as well as with a constant dynamic of reforms that differentiate it from the past. While law needs an ultimate

8 In this respect, see also Balkin 1993, 11, who refers to the need to believe in the coherence of our own social world.

reason to refer to, it requires also continuous reform to be reasonable, and thus, to affirm its own validity. As it constructs the identity of 'modern man' and 'modern nations', it equally constructs the 'others' of these categories. These are others that are necessarily away from the reason that gives life to this law; away from its dynamic and away from its stability. When this ambiguous movement to an 'always-the-same' becomes part of processes of identification connected to an idea of universal reason, the call for bringing the Other into this movement towards being 'the same' gains appealing power.

### 2. *Developing the Other Through Modern Law*

As part of the process of transmutation of religious matters and themes into legal matters and themes, it is a legal question on the development of the Other that will dominate one of the first and most important debates at the outset of the modern age, namely the discussion on the treatment of natives by the Spanish Monarchy.[9] Since 1513, the '*Requerimiento de Palacios Rubio*'[10] was read (generally without translation) to the native peoples in the American Continent, a text explaining to them the content of the papal bull of 1493 regarding the concession of the American territories to the Spanish Kings and their prerogative and duty both to govern and convert the inhabitants of those lands. If the natives did not accept that decision, they were violently subjugated and killed. This invasion, understood in the frame of a thinking permeated by the concept of 'just war', was opposed by several theologians and jurists, and thus a discussion started around the question of what means were legitimate for the Spanish Kings to convert the natives to Christianity (González 1983, 26 f.). The positions on this discussion were epitomized by the debate between Bartolomé de Las Casas (1484[11]-1566) and Juan Ginés de Sepúlveda (1489-1573) in Valladolid in 1550. While Sepúlveda argued, following Aristotelian tradition, that there exists an inherent hierarchy amongst men, Las Casas followed an egalitarian principle marked by the platonic and Christian ideas of betterment that allowed for the improvement of all human beings. For Sepúlveda, a difference from the ideal image of man, which he equated with the Spanish moral man, meant automatically an insurmountable inferiority, and justified thus the subjugation and destruction of the 'other'. On the contrary, for Las Casas, arguing with natural law, the value of any

9 For a classical account on the legal and moral questions raised in the context of the conquest of America, see Hanke 2002. Importantly, the author emphasizes in his work that the Spanish conquerors sought a just and appropriate treatment of the native peoples.

10 After 1542 this 'Requerimiento' was changed into a "letter asking for [the] friendship and collaboration" of the natives (González 1983, 27). The physical abuses, nevertheless, did not stop or decrease.

11 Regarding the discussion about Las Casas' birth date, see Parish/Weidman 1976.

human being was innate because of the potential he had to access the Good, as any other creature (Dietrich 2008, 204).

In this example, it is possible to see the logic of natural law in action, according to which the 'other' has the same innate rights so far it is possible to conceive him as similar (and so as equal), and consequently non-different. Even if right now, the otherness might be obvious, he can develop to achieve the same ideal from which the speaker is judging. The equality or at least the possibility of the development towards a specific ideal, which has universal validity, is precondition for the acceptance of plurality under an umbrella of universal protection. Furthermore, this example shows that the formalization of law, that will get special strength in the 19th century, is not in contradiction with natural law arguments. The written authoritative document just transposed and hardened the legitimizing point of reference.

The same combination of ostensible opposites can be found in the further development of law. The principle of equality proposed by natural law was one of the main instruments to disseminate Western perspectives, while the idea of the inferiority of the Other remained as a central part in real politics (Idem, 206). The creation of international law itself depends, in fact, on the idea of the universal validity of European concepts. Thus, arguing with the idea of the need for the enforcement of *lex humana,* Francisco de Vitoria (ca. 1492-1546) , assumed the idea of a 'just war'. And although Hugo Grotius (1583-1645) realized later, that a war could be a 'just war' for both sides of a conflict at the same time, he did not oppose the idea of a 'just war' itself, but he transposed the problem to the formal question of the proper authority to make war, and he directed his concern to the arrangement of the *form* of the war (Grotius 2001). Thus, the legitimacy of colonial wars was given and the development of international law had the effect of a "necessary catalog of norms for the expansion of the capitalist world-system" (Idem, 207).

The legitimacy of colonial wars depended equally on an explicit link made between modern law and development stages through the assumed determinacy of the laws of a society by the main ways of subsistence used, which were in turn put on a scale of linear development. This perspective has been broadly accepted since the 18th century, and was adopted amongst several others by Montesquieu (1689-1755), a fundamental reference for socio-legal thinking even today (Fitzpatrick 1998, 92). According to these unidirectional perspectives of evolution, the trajectory goes from disorder, irrationality, and savagery to order, rationality, and civilization.

This perspective can be found in several other relevant authors, like Adam Smith (ca.

1723-1790), who, in his 'Lectures on Jurisprudence' of 1978, asserted that law increased in quantity and complexity according to the progression of societies, relating this progression with the consolidation of property (Idem, 93). From a sociological perspective, Max Weber (1864-1920) operated with the idea of a progression of law according to an increasing rationality (Idem, 112 f.). Even if his approach towards progress remained ambivalent in tune with the late-modern atmosphere (Henrich et al. 1988, 170), in Weber's argument, abstract formalism of legal certainty constitutes itself in the negation of the 'informal law', for which he found modern examples in any form of 'popular justice' and any type of intense influence of public opinion, which were both incompatible with the rational course of justice (Fitzpatrick 1998, 112).

Similarly as it is the case with the constitutive role of law in the formation of the subject, the evolutionist approach in law was not a consequence of a mere social evolutionism, but a constitutive element of it. Interestingly, the study of primitive society was not considered, in general, as an aspect of natural history; moreover, it was treated as a part of legal studies (Kuper 1988, 3). Especially, the questions investigated to inquire into the development of society included marriage, family, private property and the state, concepts that were thought from a legal point of view. Therefore, a specific legal thinking gave form to the idea of socio-anthropological evolution.

Furthermore, some of the most influential researchers of this progressive perspective were lawyers, including the renowned Sir Henry Maine (1822-1888), who advocated a vectoral movement from the dependency of the family or clan to the individual obligation, and assumed consequently a movement from the 'status to the contract' and from the primitive family to the modern territorial state. His work was accepted generally and is still very influential despite massive critiques (Watson 1974, 12). The development along the lines of what Maine considered the progress of Roman law was the ground to establish which were the 'progressive' societies, a term that Maine used to refer to the civilizations of western Europe, and which were the stationary ones (Maine 1931, 18, 64). From this perspective, Roman law served as the link between a remote past and a progressive present, promising a future as brilliant as the imagined past of the Roman Empire.

Although the factors of progress varied according to diverse theories, the concept of vectoral evolution of law and society was a common paradigm. Progress in law was seen as the realization of an order that was innate to social life itself. According to this premise, law develops as an elaboration of a primordial and predetermined order (Fitzpatrick 1998, 92 f.).

This allows that modern law has a strong referent in the past with which it identifies and, at the same time, a historical 'other' from which it distinguishes itself. This silent unity of contradictions in the conception of law is what post-modern critics like Peter Fitzpatrick have identified as the mythological basis of modern law.

In terms of the role of law at an international level, the most important aspect of this analysis, is that the present 'other', who had a different socio-normative perspective, was automatically linked with that 'historical other', from which an ever-developing modern society needed to be differentiated in order to continue maintaining its modern character. The evolutionist model of law served to categorize the past of 'Western' societies, exercising a retroactive taxonomic power, as well as to rank contemporary 'non-Western' societies according to the same classificatory model. The 'other' remained thus separated from the absolute universal norm, only connected to it through a link of negation (Fitzpatrick 1998, 68). The one thinkable evolution interpreted into the past, transformed therefore into a plan for the future, for the 'development' of the Other.

This development meant, in the sphere of law, the export of modern law to the ostensibly undeveloped other. As usual for modern law, this movement was marked, as we have seen, by a naturalistic approach to law, and, at the same time by a positivistic attitude. It is a positivistic understanding of law that makes the transplant of law first necessary and then possible. It made it necessary because, if the existence of universal natural law beyond all positivized law was sufficient, the idea of a transplant of law would make no sense; natural law would simply outlaw any human law. Equally, a positivistic perspective made legal transplant possible, because transfer is only thinkable if a specific object can be found in one place but is non-existent somewhere else; it is 'here' but not 'there'. It is impossible to transfer something omnipresent and pre-existent like natural law. However, if a positivistic understanding is needed to see legal transplant as necessary and possible, it is a naturalistic approach that gives sense to it. Whatever legal transplant is made, it is made in the name of a higher value like equality, freedom, etc.

The consequences of the link between the idea of a vectoral development of law and the transfer of law, becomes obvious when we look at legal history. In Ruskola's account of legal orientalism in China, he argues that "in the view of nineteenth-century international lawyers Chinese law was so 'uncivilized' as to exclude China from the 'Family of Nations,' which in turn served as a justification for reducing the country to a semi-colonial status under a regime of Western extraterritorial privileges" (Ruskola 2005, 271) Later, these extraterritorial privileges served as an instrument to pursue the incorporation of 'Western' law in the territory

of the Qing Dynasty first, and later in the Chinese Republic in an attempt to develop them. In fact, the categories of 'civilized' and 'uncivilized' nations is still in use in some formal texts of international law[12], meaning by civilized those who practice a specific type of modern law. Hence, "the story of international law was, accordingly, one of progressive civilizing of states" (Kahn 1999, 109).

In the same line, it is interesting to observe that Maine's book, 'Ancient Law' (1931), in which he developed the ideas of legal evolution, implicitly participated in the debate around the most adequate way to govern India as a British colony (Stokes ref. in Fitzpatrick 1998, 110). From Maine's point of view, India was placed in a pre-set linear scale of progression and could only evolve in the singular way that progress was thinkable: the way that Romans and British had gone in the past (Fitzpatrick 1998, 110). If India were to have a chance for its evolution, then it had to follow the normative example of the model states, which had already blazed the trail of universally rational law. The practical consequence of this linear vision was devastating, since it built the primordial justification and the tool for imperialism.

The consequences of a modern understanding of law regarding development, however, go beyond colonialism and imperialism. Moreover, nationalism was equally, from a modern point of view, a representation and a result of a universal need for freedom and progress (Chatterjee 1986, 2). Seeing the creation of the nation as an essential part of the evolution, the perspective continued to be the same as during colonialism. In turn, this 'national' model was also a main element to be 'transplanted' as part of the imperialistic modern project (Fitzpatrick 1998, 119). All internal diversity was subordinated to an abstract and general concept of law with a national character, opposing and at the same time reproducing the approach to law applied by colonialism and imperialism.

This process was taken over in the early years of the law and development movement that I will present later in more detail, when "legal assistance was often perceived as an administrative mechanism for 'nation building' and as a forum for stable and predictable commercial transactions within an implicit liberal capitalist economy" (Gardner 1980, 6). Thus a clear purposeful idea on the nature of law gave life to the legal assistance after the Second World War, after the 'imperialist paradigm' in international relations was replaced by the 'development paradigm' (Esteva 2006a, 183 f.). In the course of time, the more the fascination for development as it was understood in terms of economic progress faded away, the more legal assistance gain on rhetoric importance (Gardner 1980, 7). As Gardner remarks,

12 See, for example, art. 38, 1 (c) of the Statute of the International Court of Justice, referring to "general principles of law recognized by civilized nations" (United Nations 1945).

this international activism, that was very powerful in the United States of America but also in post-colonialist Europe, was marked by "overriding technical and humanitarian 'missionary' notions" (Idem). Government institutions cooperated with the most renowned universities in order to help the 'Third World'[13] to "reach the stage of development" accomplished in the First World (Bronheim cit. in Gardner 1980, 7).

In this context is clear the role of law as a tool, and thus, the perspective of legal realism in which it is embedded. As "technicians of democracy" (Malone cit. in Gardner 1980, 7), lawyers are assumed to be able to solve the dysfunctions of society, of any society. In other words, law is a tool for social engineering, a vehicle for modernity. If law is a tool, once imperialism had exported the tool itself, what is needed, is to teach the recipients to use that gift, thus legal education and training became a central topic in the rhetoric of legal development.

Of course, the colonial rhetoric faded away following the *detours* of political changes, but, nevertheless, the perspective on legal development remained. It was partly seen as the continuation of a civilizing project started with colonialism (Gardner 1980, 44). Most importantly, the development of the Other continued to be necessary and difficult, and followed what was seen as a successful model of modern law guided by reason.

Interestingly, the perspective on legal transplants as an advancement towards reason is not exclusive of the 'donors' of law. In fact, non-imposed legal transfers, might be seen as an expression of the solution of the tension amongst a plurality of possible developments within the discussion of legal reform. Recurring to a 'higher' legitimizing legal system, more developed and thus more reasonable (or the other way around), puts the weight of reason clearly on one side. Take as an example the process of reforms of the law of the Qing Dynasty, which had started long before foreign laws were officially incorporated at the edge of the 20th century, but when the discussion on 'Western legal transfer' started, they were put in the light of a more developed European law (Huang 2001).

This attitude of relying on others' reason resonates with the traditional arguments of natural law and with the mythology of several legal traditions that claim to have received the law from a divinity (Watson 1974, 88). Reason is thus a high authority in the pursuit of the modernization (Seidman and Seidman 1994, 58). But what is understood by reason is still ambiguous and tautological at the same time. For example, contemporary authors like Ann W. Seidman and Robert B. Seidman, with several others, argue that "in our time [...] increasingly

13 The term 'Third World' was coined apparently by Alfred Sauvy (1898-1990) in his article '*Trois mondes, une planète*' ('Three Worlds, One Planet') in 1952 (Sauvy 1952).

a valid decision must appear rational, that is, one that 'can be explained and defended by arguments acceptable to a reasonable audience'" (Idem).

### 3. *Theorizing Legal Development and Legal Transplants*

Similarly to the approach taken in legal aid, the conception of legal transfer in academics follows generally also a mechanistic concept of law. One of the most prominent researchers in this field is Alan Watson (*1933), who, highlighting the role of legal transplant in legal development,[14] argues that law is "like technology" in the sense that it "is very much the fruit of human experience. Just as very few people have thought of the wheel yet once invented its advantages can be seen and the wheel used by many, so important legal rules are invented by a few people or nations, and once invented their value can readily be appreciated, and the rules themselves adopted for the needs of many nations" (Watson 1974, 100). Consequently, it is possible to propose a specific approach towards sources of law in order "to achieve modernity" (Watson 1984, 106), which is seen as a value for itself. This development resides, unsurprisingly, in the overcoming of ambiguity, as he assumes when he states: "It would not be difficult to devise a system in which the law would be much less ambiguous, kept up to date, and yet subjected to judicial, juristic and comparative criticism which could lead to further development" (Watson 1984, 102). In this line, he develops his proposal of a 'two-tier law'. Despite the fact that "it would be disingenuous to pretend that the code and commentary [foreseen in the 'two-tier law'] will ever be so well drafted as to provide automatic answers on the law in every case which arises or that all eventualities will be foreseen" (Idem, 121), it remains clear, that that automatism is central for the ideal of law that he imagines.

The mechanical view on law in the context of academic work around legal transfer is not exclusive of Watson. Moreover, it can be equally found in one of his most ardent critics, namely Otto Kahn-Freund (1900-1979), who relates the transplantability of law to "organic" and "mechanical" aspects of law as well as to geographical and sociological factors (Kahn-Freund 1974, 17). Similarly, Watson does not only use mechanic metaphors, but, like Kahn-Freund, he refers also to organic metaphors, when he states, for example, that "a successful legal transplant – like that of a human organ – will grow in its new body, and become part of

14 Even if his approach and the concept of 'legal transplant' has been criticized by several other researchers (e.g. Twining 2004), which we will analyze in the next chapters, his perspective continues to be highly influential in theory and praxis. See, for example, Alan Watson Foundation 2008.

that body just as the rule or institution would have continued to develop in its parent system" (Watson 1974, 27).[15]

The incidence of these metaphors in theory and praxis is not casual, moreover, these rhetoric tools are connected with specific understandings of law and social reality in general. While mechanic metaphors are embedded in Newtonian mechanics and the Cartesian axes, the organic metaphors recall the time when Social Darwinism and positivism paired with romantic nationalism referred to an organic development of society. Obviously, these two approaches differ clearly one from the other. Particularly, the machine metaphor suggests that "all events are expected to be under the control of someone or something", while "in an organic metaphor, systems are considered to be autonomous or self-regulating" (Tesson 2006, 93). However, these rhetoric tools were alternatively used by functionalist approaches (Overton and Horowitz 1991, 27). From a functionalist perspective, the researcher identifies a problem, which is seen as common or universal, and all results from the investigation are organized around their function and functionality to confront that question. Although functionalism might be useful when its epistemological limits are acknowledged, amongst other problems, it depicts apparent neutrality, while specific values are hidden behind the selection of a 'universal' problem. Most importantly, it is insufficient to address those aspects of social experience that are linked to communication, complexity and the symbolic aspects of human behavior. Questions regarding different systems of meaning, especially the one of the researcher, remain outside of the inquiry, the same as the specific interests of different social actors (and the researcher himself).

Similarly, as the critiques that have been stated against the use of organic metaphors, and thus of functionalism, because of their proclivity to justify and legitimate "the unjust power apportionment of the status quo" (Santa Ana 2002, 259), the law-and-development movement, based on diverse types of legal transplants, was equally criticized because its technocratic approach served to maintain authoritarian systems: "The handmaidens of democracy sometimes turned out to be the handmaidens of a dictatorship or authoritarian state" (Gardner 1980, 281). This is not surprising if we recall that the approach to legal development, as envisaged by Watson, in the development of sources of law is exemplified "to a startling degree" by "powerful national, often dictatorial, leaders […] What is significant is not so much that the dictator has the power to force through the reform as that he is untrammeled enough by group culture to see the defects and force reform through" (Watson 1984, 109).

15 See also the analogy with the transplant of tomatoes in Watson 2000, 9.

Thus, the technical usefulness of modern law for oppressive regimes was not just the consequence of a 'wrong' transfer, but rather the model of law upon which the law-and-development movement drew allowed itself for this abuse. The flaws that US-American law might have, and might have taken to other states (Gardner 1980, 280 f.) in its race for a capitalist version of development, are just an expression of broader and deeper difficulties regarding questions of law and development as understood from a modern perspective. Understanding law as a mere tool that fulfills a function, disregarding the symbolic world connected to normativity, law is doomed to be manipulated.

Even if social sciences, embedded to a great extent in functionalism, suffered a paradigm crisis in the 1980's, when functionalist theory was increasingly criticized, this break did not hit legal inquiry with all its force. On the contrary, "it animates much of law-and-society scholarship and legal history as well, where it implies an evolutionary paradigm, for the understanding of legal change" (Ruskola 2005, 274). This is, in the end, also Watson's approach, which would seem, in the beginning, anti-functionalist, since he assumes the lack of connection between social needs and law.[16] However, he can only see therein a 'dysfunction' because he constructs a function of law, and, consequently, it is towards that function that development has to go.[17]

It seems contradictory, that while Watson assumes that "what rule actually is adopted is of restricted significance for general human happiness", and "usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter for great concern" (Watson 1974, 96), he is so dedicated to international legal development and law's technical usefulness. Watson argues, for example, "the *illogicality* of legal development," referring to the contradiction between the fact that "there would be little disagreement among *modern lawyers* that direct representation is of considerable advantage to *a* society. […] But Roman law never accepted agency or direct representation", even if they knew about the concept (Watson 1974, 34; emphasis added). The generality of Watson's statement is possible, because he, as a 'modern lawyer', knows what is best, what is a 'logical development'.

16 This is, for example, the view of Ruskola, who characterizes Watson as "an ardent foe of functionalism for decades" (Ruskola 2005, 280).

17 See also Watson 1984, xi:

> "Humans are social animals, and various mechanisms, […] have developed to enable them to live (relatively) peacefully in society. Law is one such mechanism […]. Within the context of the process law has two necessary roles: a claim of legal right or power is needed to call the process into being, and law is used to validate the decision. To fulfill these functions, law […] has to achieve some express linguistic formulation."

Watson's relationship with the pair ‘law’ and ‘development’ is clear when he states, on the one hand, that “the doctrine of a general pattern of development has come […] to obscure the actual development of the legal system” (Watson 1974, 15), and, on the other hand, he believes in a proper development to be achieved. He argues thus that legal systems have not developed all following a general pattern, but they could, and most importantly they should, develop towards qualitatively better law; that is law that is increasingly beyond ambiguity, following specific reasonable requirements such as responsiveness, comprehensibility, and comprehensiveness as his model of two-tier law allegedly does.

This contradictory approach, however, is not only a problem of Watson’s arguments. Moreover, the modern concept of development brings this tension in itself. The word ‘development’ refers etymologically to the idea of un-wrapping, and thus to unfold innate potentials and latent possibilities. Since it refers to a change in time, this concept can refer to what already has been the path of chronological change, or it can refer to the path something takes in the future, which from a mechanistic or organic point of view, is foreseeable or at least imaginable and maybe even manipulable by human beings. It encompasses thus, the nature of things and the manipulability of reality. The uncertainty of the future and the ambiguous meaning of ‘development’ is solved, from a modern perspective, by equating both meanings of development: the one referred to the past which is one in its factuality, unchangeable and universally true, and the other referred to the future which is plural in its potentialities, unknown, unreachable, subject to change and thus different from the known – like the ‘other’ of any identity. This equation synthesizes both aspects through one key: rational development. One specific development, namely the rational, which is necessarily the one undergone by reasonable people, namely the speaker, can unfold properly. This is the belief at the core of movements like Law and Development as well as academic proposals like Watson's approach to legal development and legal transplants.

Despite the failure of the law-and-development movement, in the present, the relevance of legal transfer as a tool for international development has not decreased. In fact, the role of legal development and legal aid projects continues to be determinant. One clear example can be seen in the requirements that were formulated for China’s entry in the World Trade Organization (WTO; Kong 2002). As Ruskola states, the rule of law projects offered to China “draw implicitly on the idea that China’s indigenous legal resources are inadequate to the task of governing China and that China is dependent on Western assistance in putting together a ‘real’ legal order” (Ruskola 2005, 292). According to an impact-response paradigm, that recovers the dichotomies between West and East, “China is essentially static and would be

consigned to the dustbin of History, but for the interventions of the West" (Idem). However, as Donald C. Clarke suggests, the claim that China lacks a system of 'rule of law' typically "leaves [...] unjustified its most crucial component: the ideal against which the Chinese legal system is identified and measured" (Clarke 2003, 99).

However, beyond the traditional legal aid amongst states, the legal development aid[18] has gone further, achieving the dimension of regional integration. As an answer to national 'underdevelopment', the development of regional integration, for example through institutions like Mercosur, the Southern Common Market, is set as a new goal[19]. Arguably, it "contributes to diminish the historical dependency of Latin America in relation to developed countries" (Vieira/Reschke de Borba 2010, 216), but the path of development is equally preset by 'developed countries'. Again, the arguments for a 'true' regional integration sound ambivalent: the states should give their sovereignty, in order to defend, as a supranational entity, social interests in front of the developed nations. At the same time, integration is alleged to be the only way for the state to remain autonomous, since for now, they are seen as provinces of hegemonic states (Idem, 218).

The wished direction for this development, however, is clear: "with an optimist perspective, even if Mercosur is yet a very incipient project, the tendency is that it continues advancing towards a more complete integration, *following the example* of the European Union, conserving the needed proportions and respecting the differences, even if slowly" (Idem, 217; emphasis added). Thus, also here it is true what Ruskola concluded for the Chinese case: "there is an implicit assumption […] about the self-evident Western-ness of all possible forms of legal modernity, and the expectation that the expansion of markets will naturally 'civilize' [Chinese] subjects of despotism into (liberal) legal subjects" (Ruskola 2005, 293). How is it possible then, that we expect the development of modern law to be able to encompass socio-cultural diversity, if, because of the mere concept of the development of modern law framing our question, only one legal development assumed as rational and functional, is imaginable?

18 It is important to underline that nowadays, the concept of 'development aid' has been replaced by the allegedly more politically correct 'development cooperation'. While the use of the term 'cooperation' seems to respond adequately to some of the critiques presented by postdevelopmental authors, putting the 'Third World' in a cooperation effort amongst equals, it is not possible to say that this change in the name given to the project is reflected in the carrying out of the project itself.

19 See for example, the professional development seminar '*Diálogo Jurisdiccional entre las Cortes de Integración Europeas y Latinoamericanas*' ('Jurisdictional Dialogue between the Integration Courts in Europe and Latin America') in Foz do Iguaçú, Brazil (27-29 October 2010), which was co-founded by the German Konrad Adenauer Stiftung, the Austrian University of Innsbruck and the Institute for Judicial Training of Paraná (Konrad Adenauer Stiftung 2010).

## IV. Closing Remarks

The aim of this first chapter was to inquire the place of pluralism in a modern perspective on law and legal development. Starting from a perspective on modernity as a specific socio-lingusitic situation characterized by ambiguity and later by ambivalence, law showed to play a major role for the understanding of modernity and for the self-understanding of modern man. Most importantly, in this process of identification of modern man and modern society, understood as a new man and a new society, radically different from the past ones, law not only forms 'modern man' and 'modern society', but in order to do this, it also necessarily has to form the non-modern as radically different, as opposite.

In this context, I have presented modern law as a perspective on normativity that is marked by the intention to overcome ambiguities through a higher reason. Equally, this normative system is marked by a certain ambivalence regarding its content to which law itself has to respond with procedural and formal strategies in order to maintain its claim for solving conflicts. Thus, it is this strained position the one that seems to give law its validity.

Between overcoming ambiguity and maintaining a certain ambivalence, what remains present is the purpose of overcoming opposition – an opposition that is determined as such as the result of the radical difference stated by the same reason that later pretends to overcome it. But if that reason is seen as universally valid, any difference equals opposition, an opposition to be overcome. Difference and thus diversity itself are, thus, aspects of reality that turn problematic from the perspective of a law that requires a position to be taken on one side, the side of the truth. Many truths, or many rationalities, are not thinkable for this model. This finds expression equally in the perspective of law towards development.

According to this analysis, the concept of modern law is linked directly to a unidirectional conception of development. The more ambiguity is overcome, the more developed is law, conceived as a formal/moral structure. The consequence of this thinking was the export of legal paradigms in the name of development, that was practised through colonial imposition as well as in processes that were apparently separated from questions of international hegemony, like the creation of the Nation-State. The abstract and universal perspective on law itself turned to be the goal of modern development, creating a hierarchy of legal systems according to an Eurocentric modern approach.

Modernity, law, and progress form thus an inseparable triad. Without a law understood as modern law, the idea of social and economic progress, and therefore social development itself, are not conceivable. In this context the legal development through 'legalization' and 'legal transfer' turned to be an essential part of the idea of social and political development.

Problematic is, however, that if we envisage the development of modern law as a progression towards ever less ambiguity and less chance for conflict, towards more clarity through positive law as well as towards truer values, development is incompatible with the existence of the radical difference that it assumes to exist incarnated in the Other. Encountering this other will always imply conflict; it will always mean to put these values and our self-image into question. It is this tension that is overcome by the apparent neutrality of conceiving of law as a mere tool with universal validity and with trade-value. Developing the Other or helping it to develop, or the other way around, to develop according to pre-stated standards of good law, assumes this neutrality and disregards the symbolic world connected with normativity in general. Most importantly, in this way, reflection regarding which are the cultural implications of specific legal understandings that are 'exported' or 'imported' is avoided and diversity is subordinated to 'good law' in the name of development. These are the critiques that postmodern thinkers will pose and which I will discuss in detail in the next chapter.

## B. Postmodern Critiques on Law and Development

### I. Postmodern Approaches and Pluralisms

In the first chapter, I presented some elements that are relevant for the question of law and development. Mainly, these were questions addressed to the most prevalent understandings of law in academy and social life, that names itself as 'modern'. Referring to several researchers who investigate diverse legal fields, I inquired into some of the premisses that these understandings of 'modern law' assume explicitly or implicitly. However, this presentation, as any other inquiry, responds itself to a specific understanding of law, language, development, transfer, social organization, etc. Necessarily, all these ideas addressing 'modern law' as a topic of discussion, do not develop in a void space. One of the basic assumptions made is, for example, that something like 'modernity' exists and that the writer can talk about it, what requires some distance from the object observed. In fact, the reflections that I presented are closely related with several approaches that are usually put together under the umbrella-concept of postmodernity.

But what makes them actually postmodern? Continuing with Zima's approach, it makes sense to interpret these perspectives as postmodern because of the socio-linguistic situation in which they are embedded and that they reflect. Reviewing the discussion of last chapter, some of the most salient concepts and topics that I, referring to several authors, have used to address the question of law and development critically, are: identity, modernity, reason, myths, legitimacy, subordination, a rhetoric of augmentation ("towards more"), the possibility of an argument, exclusion, vectorality (or linearity), the normative or ideological aspects of seemingly neutral definitions and categories, the Other, the superposition of historical and present 'others', authority, law as a tool, and paradigm, amongst others. Equally, one of the most clear strategies to develop my argument has been to blur the difference between seemingly opposites, showing, for example, that positivistic and naturalistic approaches to law are expressions of the same underlying endeavor. I have pointed out equally to blurs between written and non-written, as well as between moral and reason, and even blurs regarding time like in the expression that constant (legal) review in pursue of a different future recreates the past.

All of these are elements that remit to a critical and distantiated attitude of what, from the same perspective, is recognized as not anymore sufficient to understand experience, and

which is subsumed under the label of 'modern approaches'. Confronted with clear differentiations, I took a skeptical position in front of the divisory limit that created the difference, and revised the context in which this limit was created, as well as which were the assumptions that made those differences necessary. An important element in these perspectives of inquiry to which I refer as postmodern is that they search to formulate questions that somehow step back from the 'actual' topic of discussion and ask what is implicit in the way *chosen* to envisage this topic in this specific way and discuss it in this manner. This is why some authors see the beginning of postmodernity "with the first doubt in the thought of the eldest of the forerunners" of modernity, like Thomas Hobbes (1588-1679), René Descartes (1596-1650) or Isaac Newton (1642/3-1727) (Dietrich 2008, 253). In this sense, postmodernity is envisaged as a "state of mind and soul" based on doubt, in the non-belief in the all-encompassing explanations, the big narratives or *méta-récits*, of modernity. In the words of Jacques Rancière (*1940), "somehow postmodernity was simply the name under which a number of artists and thinkers have become aware of what modernity was" (Rancière 2006, 47)[20].

Equally, criticism in front of law, and more specifically in front of law's hierarchy, is not new in legal philosophy and legal theory. On the contrary, already classics of legal sociology like Karl Marx, Max Weber, Eugen Ehrlich (1862-1922) and a myriad of contemporary theories have confronted the paradoxes of law. In fact, as I have argued before referring to the role of reform in law, this critique is part of the functioning system of law and the state, which as constructions designed to develop always in direction to an ever better world, require opposition. As Gunther Teubner (*1944) writes, the paradoxes within law were long known "jurisprudential conundra" (Teubner 1997, 771). As an example, "noncontractual foundations of contract and nonorganizational foundations of organization have been politicized by Hobbes, historicized by Savigny, and socialized by Durkheim" (Idem). Equally, Ruskola states regarding the presence of Orientalism in law, that the assertion of a 'real' civil law beyond the West is a figure that legal scholars have been offering for sacrifice and resuscitating cyclically (Ruskola 2005, 271). Nothing different is the case with many other aspects of the most wide-spread conception of law, that have been put as the background for legal research and practice. How come that now we, researchers and practitioners of the law, but also other individuals and social groups outside of the rather small circle of persons related immediately with the field of law and legal theory, develop again new critical

20 Importantly, referring to art, he states, that modernity was the "desperate attempt to base the 'particular of the art' on a simple teleology of evolution and of historical breaks" (Idem).

perspectives in front of law and return to the elder questionings with increased impetus? Is it this time any different than in the past, when all these critiques were raised? Why is it worth to reflect now again on these questions? Why would they make a difference now?

I would not go as far as Teubner, when he states that all the past critiques have been insufficient to provoke changes in the practice of law (Idem, 767 f.). Especially using a broad concept of law that includes more than the actions of state officials, and taking into account the political developments at an international level, it is possible to assert that a lot of changes have happened, even if they were seldom made explicit or if they passed unnoticed by civil society or even by legal scholarship. However, what is easy to perceive is an increasing nervousness in the academic and political field around the question on how is it possible to justify the ways to deal with law as we have been doing until now. The calls for a different approach have turned louder. The need for a change of perspective, and thus, a change in how we do things, has become more urgent, even if the question about the direction of that change is still unresolved.

Some authors ascribe the main changes in legal practice to the challenges that globalization poses, understanding globalization as the development of a worldwide legal system that emerges from the fact that "legal communication takes place on a global scale" (Idem, 769). The main factor in the questioning of legal hierarchy could be the existence of a 'fragmented globalization', meaning "the difference between a highly globalized economy and weakly globalized politics", so that "a global law" emerges "that has no legislation, no political constitution, no politically ordered hierarchy of norms which could keep the contractual paradox latent" (Idem, 771 f.). The globalization of law, bringing about laws that are being produced without the state, even though partly in interaction with it, as Teubner exemplifies with the *lex mercatoria*, is accounted as the phenomenon "that is killing the sovereign-father and making the legal paradox visible" (Idem).

Nevertheless, the same can be said about the local level. While at a global level, the state seems to loose its role as only protagonist in regard to the development and enforcement of a working normative system, also at an intra-state level it starts to evidence fractures that cannot leave the perspective on a monolithical state-law system intact. For example, the outburst of claims of regional autonomy made mainly by indigenous groups in the most different regions of the world (Gabriel/Latautonomy 2005) as well as the relentless critiques stated against the abuse of the state power argued by politically engaged NGOs, and the existence of social groups with enough power to enforce their own normative parameters

beyond the state's concern[21] have been scratching the state's image as the only legitimated authority which could grant a guarantee in terms of normative enforcement. Wider awareness of these local scratches within the state and local perception of the effects of situations at a global level beyond the state, change equally the actions taken within, without and beyond the state (law) system. Globalization and vernacularization are two strains of the same impulse. In any case, the predictability and certainty of law with its center in the Nation-State is rent.

This crisis of the certainty of law is just an aspect of a more comprehensive struggle. At a more general level, the socio-political developments in the aftermath of the Second World War have been decisive in creating a field where all these questions became decisive. The alternatives available after 1945 were restricted basically to two positions in clear opposition, that became more and more hardened.[22] The social movements critical of the state as a source of repression gained force and their combative attitude from this circumstance, pluralizing the *foci* of tension. It is the generation which grew up in this context of post-World War II and the parallel building up of the Cold War the one that was going to be the leading force of strong social rights movements in the 1960's.0's. Several revolutionary movements reacted in front of their social environment, which they perceived as oppressive. Thus, freedom and peace turned to be leading claims, framed, nevertheless, by a contestatory attitude. The movements fighting for civil rights, for women's rights, for nuclear disarmament, against racism, against the Algerian War, against the Vietnam War, amongst many others, can be seen as expressions of different types of resistance; a resistance that is always defined by its opposite. This resistance found expression equally in diverse movements with revolutionary character at both sides of the divide of the Cold War, like the Prague spring (*Pražské jaro*) and the French May (*Mai 68*). In Germany, the students protests were directly linked to the critical engagement with the Nazi-past of contemporary society, most directly with state institutions, and to the theoretical background offered by the Critical Theory of the School of Frankfurt. While in France the protests almost caused the collapse of the president General Charles de Gaulle (1890-1970), and in Germany they formed the base for the creation of the terrorist organization *Rote Armee Fraktion* (RAF), in other contexts the movement acquired anti-dictatorship character, like in Spain against Francisco Franco (1892-1975) and in Argentina against the ongoing dictatorship presided at that time by Juan Carlos Onganía (1914-1995). Hence, the oppositional character

21 A well known example in this regard is Sousa Santos' research on the *favela* (slum) of Pasárgada in Rio de Janeiro, Brazil (Sousa Santos 1977).

22 In fact, belonging to a 'third party' of Non-Aligned countries was a position difficult to maintain and it did not mean the non-involvement in the conflict between Union of Soviet Socialist Republics (USSR) and United States of America. The price to be paid, as we will see later, was to be doomed into the category of the underdeveloped Third World.

and the radical attitude of the social movements in this period can be found in very different socio-political environments. This time, a period of big turmoil had been ignited without a formal war declaration with clear battlefields.

It is important to remark that the majority of the most combative movements were either successfully suppressed by the state (partly in cooperation with paramilitary forces), like in Spain, Argentina and Mexico, or lost their force quite quickly, like in France after the call for parliamentary elections. In fact, after the outburst of radical critique, some of the opposed structures of power emerged with more force than they had originally, as it was the case with the Gaullist party. Equally, in the United States as well as in other parts of the world, the diverse social movements calmed down, mostly because the rebellious momentum faded away and the rhetoric of civil rights, women's rights and racial equality was incorporated in the main structure of the state (the same as the *hippie* style was partly incorporated in mainstream culture in the United States). The movements basically lost their opponent and their reason to be. Thus, an overwhelming resignation and disappointment on the one hand, and a sense of meaninglessness and loss of all reasons to fight for was established amidst the same groups which once were leading in their resistance. Despite the fact that these movements produced some social changes, the political flop was patent. This failure of the protestors, who were to a large extent linked to intellectual circles with leftist political perspectives, caused a deep reflection and a determinant turn in political criticism and intellectual engagement, as can be seen even in personal vitae, for example in Michel Foucault's (1926-1984) intellectual trajectory. Many of the intellectuals who lived this shift, when the concept of *being against* changed its meaning and lost great part of its appeal, formed a central element of what developed then as postmodernist approaches. To be against a specific model of state or of economy was not enough. In turn, the whole conception of the world, including the left/right pendulum of politics, which then would be labeled as ‘modern’, was going to be put in question.

In order to become aware of that ‘modern condition’ and exercise critique on it, however, the question of what does ‘modern’ mean had to be answered. In other words, the object of ‘the modern’ is constructed along with the formation of the ‘postmodern’. As the concept of ‘postmodernity’ makes explicit, whatever postmodern might mean, it is not detached from modernity. In fact, modernity builds its main point of reference. Being modernity its main concern, postmodern thinkers move around it, play with it, twist it. Postmodernity can thus be

conceived as twisting[23] and radicalizing modernity through a critical engagement and not as a movement that says goodbye to 'the modern' (Dietrich 2008, 253).

Friedrich Nietzsche (1844-1900), often seen as the forerunner of postmodern critical attitude presented the problematic engrained in the premisses of modernity, stating: "This is in fact the characteristic of that 'break', of which everybody speaks as the primal affliction of modern culture, namely that the theoretical man is scared of his own consequences […]. He realizes how a culture that is based on the principle of science, has to perish, when it starts to be illogical, this is when it starts to withdraw from its own consequences" (Nietzsche 1983, 650). However, what is interesting to observe in this context is that, using the terminology of Zima, the concept of postmodernity itself depicts an ambiguous relationship towards modernity, because it is a result of modern thinking that yet tries to be *different*, thus it recovers modernity's ambiguity and ambivalence. It tries to be critical of the same thinking from which it emerges. In other words, postmodernity "twists rationality with rational means" (Dietrich 2008, 300). Through this procedure plural postmodern approaches develop that often contradict each other. Consequently, the label of postmodern is in itself elusive and contradicts partly postmodern thought itself, since it creates a unity that can (and even, measured by its own rule, it should aim at) disintegrate itself.

Nevertheless, it is not sufficient to say that postmodern thinking is just a name to gather some critical thoughts about past assumptions. As Zima underlines, this critical engagement takes with it a change in the way to deal with critique itself. Critique develops when reflection is made from a different standpoint, with a different method, using different examples, achieving a different conclusion or when a difference in any other respect is present. When a socio-linguistic situation allows for a clear-cut difference amongst the concepts used and the values used to measure arguments, it is possible to confront an opinion giving a different value to or shifting the content of the concepts used. But when the critique stated refers to the mere existence of the concepts and values themselves on which a statement is grounded, the argument of the other simply disintegrates. Nothing remains to be opposed to. The differences proposed by the person talking to us are blurred and they do not have a meaning by

23 Dietrich refers in this context particularly to the German term '*Verwindung*', which is used explicitly by the key thinker of post-modern philosophy Gianni Vattimo (*1936) in his interpretation of Martin Heidegger, who utilized this word in his 'The End of Philosophy' (1973). Referring to the relation than can be established with metaphysics from a contemporaneous perspective, Vattimo argues that, instead of aiming at a futile negation of them or 'overcoming' (*Überwinden*) them, assuming a continuous movement to an ever better, ever higher, ever truer idea, one "cannot do otherwise than establish a relation of *Verwindung*: one of resigned acceptance of continuation, of distortion" (Vattimo 1997, 53). In this sense, the term refers to an incorporation that does not produce a more elevated result, but a transformed, distorted or twisted one (Koppensteiner 2009, 18 ff.).

themselves anymore, but their meaning resides exactly in the manipulation they are open to. The focus is not anymore in what the other says, but in what he does not say, the differences he does not make explicit, the continuities he leaves unstated. Thus, the discussion turns a bit spectral. I do not only discuss with you and the arguments you present. I discuss with you and all the phantoms of the things you consciously or unconsciously did not say but are present, behind your words. Even more, it is not only about your phantoms, but my own ghosts are part of the exchange. Is it possible to exchange at all? Who is the subject speaking if he is directed by all sorts of ghosts? And, most relevant for our topic, once differences are blurred, why would be one decision better or a statement more true? If it is not the argumentative difference, then what makes a decision better than another one? In short, after overcoming ambiguity turns impossible, what remains is the question on how to deal with the impossibility of justifying a generally valid differentiation; absolute differentiation and total lack of difference are two sides of the *cul-de-sac* of the postmodern malaise. Postmodern sociolect is thus marked by the game with particular standpoints, and in its radical variants, with their exchangeability. Thus, the twist of critique has serious epistemological consequences, being critique – together with observation, which requires equally a clear subject in front of a clearly limited world outside of the observer – at the base of science. At the same time, this twist is of great importance for political life, a realm based often on the exercise of critical opposition.

Assuming that the standpoint taken is the result of a choice of (or at least of a subordination under) a set of ideas, implies that this standpoint taken is only one possibility amongst many others with equal validity in their own context. Thus, it is no wonder that the concept of postmodernity itself includes a plurality of different and even contradictory practices and expressions, since postmodern discussion itself puts the focus in alterity, plurality and diversity. As Wolfgang Welsch (*1946) underlines, "plurality is the key concept of postmodernity. All the *topoi* known as postmodern – the end of the meta-narratives, dispersion of the subjects, decentralization of meaning, synchronicity of the asynchronous, impossibility of synthesizing the varied lifeforms and patterns of rationality – are understandable in the light of plurality" (Welsch 1991, xv). In fact, according to Zima, although the topic of globalization is central for postmodern discussion in different areas like ecology, political studies and technological research, the tendency towards particularism is even stronger (Zima 2001, 31). In any case, these two elements, globalization and particularism, are not exclusive of each other, but they refer to each other. A perception of increasing interaction at a global level, remits to the question of the entities that participate in

that interaction and that, while forming the Oneness of the globe are somehow beyond its uniformity. Who forms the globe? Who has agency in the globe? If recognizing that interaction has increased in a way that it involves the whole globe implies that we leave the national state in the second row of our spectrum of attention, then what remains are groups that do not respond anymore to the criteria of a Nation-State. The focus of attention goes thus to the broader (the globe) and to the more specific (particular entities) at the same time, because it is the same motor that gives force to these moves from a centralized perspective to one that is decentralized or shows plural centers.

Most importantly, there is no clear unified criteria to determine which groups are relevant and thus the categories used for addressing particularity are not exclusive. Consequently, the particularistic tendency Zima talks about refers equally to indigenous groups as to women or homosexuals. All of these categories are referring to groups that are not mutually exclusive. Mirroring this attitude, postmodern critiques are made from as many particular perspectives as possible. Thus, postmodern quests can be found equally from feminist perspectives, as in the field of anthropology and cultural studies, in queer studies and in post-colonial studies, in neo-Marxist, politically conservative or ecological research. All of them though, have a strong focus in the question for the role of the particular and set it in the context of their own field of study. Naturally, contradictions amongst postmodern approaches are part of the results that can be expected of such a situation. However, this 'problem' of the existence of contradiction is no longer as serious, because from a perspective that puts in question monolithic rationality, contradiction is not anymore a no-go zone, as it is for a mindset oriented to overcoming ambiguity.

This tendency towards particularism is a result of the rejection of the model of universal reason, that has been formulated by Jean-François Lyotard (1924-1998) clearly: there is no one reason, but only several reasons. This is an approach to reason that cannot and does not want to offer final truths. In fact it mistrusts itself and calls for a continuous reinterpretation. Consequently, Francisco Muñoz reasons that "events reach the human consciousness through a symbolic or conceptual mediation. […] In a certain sense, there are no events as such, just symbolically measured interpretations" (Muñoz 2006, 251). The central role of interpretation underlines the importance of context for postmodern research. Seeing experience as a never-ending text that can be read in different ways, the context, which is outside of the text itself, gains a central position in order to develop and understand different interpretations.

These continuous new interpretations imply a pluralization of meaning and, even more, postmodern thought invites to a pluralization of the interpreter himself, since it is him the one

who is called to doubt of himself, of his own reasonable interpretation and create a new one. In the end, he has to abandon the coherent unity of himself as subject since it is based on an identity that was never given as such in its totality and absoluteness, but was always delineated through specific practice in specific contexts. It is just one amongst many possible subjects (Foucault 1996, 10), one amongst many possible identities that can be chosen, putting in question the structure they depend on. Thus, subverting that structure becomes an essential element of postmodern approach. Some of the most renowned exponents for this exercise of subversion are Judith Butler's (*1956) critique to the concept of identity and subject of normative heterosexuality ('Gender Trouble: Feminism and the Subversion of Identity', 1990) and Said's equal critic of the construction of Western and Oriental subjects ('Orientalism', 1978). As we will see later, the pluralization of meaning and the crisis of the subject will affect also the modern concept of legal development, and the structure of modern law will be equally subverted. But first, I will recall the changes produced regarding the academic treatment of identity, otherness and plurality in light of this new sociolect.

The problematic of identity expressed itself with particular gravity in a field of research that defined itself by the study of 'the Other' as such, namely anthropology. The process of self-reflective engagement in this field had been developing increasingly from the 1950's. Parallel to the revision in 1951 of 'Notes and Queries on Anthropology'[24], an important resource for academic anthropological research at the time, several publications appeared that are symptomatic for the change of perspective, like Oscar Lewis' (1914-1970) 'Life in a Mexican Village: Tepoztlán Restudied' (1951), who revised previous work on that area and questioned the clear division between urban and rural, a division at the base of anthropological studies.[25] It was also around this time, that the field of legal anthropology received a major impulse. At the same time, in 1951, Edward E. Evans-Pritchard (1902-1973) argued that "a combination of the notion of scientific law and that of progress leads in anthropology […] to procrustean stages, the presumed inevitability of which gives them a normative quality", rejecting thus that "social life could be reduced to scientific laws" as,

24 First published in 1874 with the subtitle "For the Use of Travelers and Residents in Uncivilized Lands", Notes and Queries was produced by the British Association for the Advancement of Science, and published by the Royal Anthropological Institute of Great Britain and Ireland.

25 In tune with the call for development, this author would engage later in the research of what he named the 'culture of poverty', which in turn, conformed the base for social programs for economic-cultural development 'out of poverty' like the program '*Oportunidades*' in Mexico (World Bank 2004, 2009 and 2010). Interestingly, thus, the division urban-rural that he questioned originally was replaced later by the rich-poor dichotomy. 'Culture' was no longer determined by the space and type of work, but by the economical question – a reduction that the same concept of development would suffer.

according to his presentation, was the perspective taken by previous anthropological research (Evans-Pritchard 1951, 42). As he asserted for the new generation of anthropologists in comparison with their predecessors, “we are less certain today about the values they accepted” (Idem, 41), including the belief in progress and “the assumption they had inherited from the Enlightenment that societies are natural systems, or organisms, which have a necessary course of development that can be reduced to general principles or laws” (Idem, 42). In fact, in previous research on ‘Witchcraft, Oracles and Magic Among the Azande’ (1937), he inquired into the meaning of reason and rationality, taking a position of cultural relativism.

This tendency of self-inquiry continued with titles like the more encompassing revision proposed in ‘Reinventing anthropology’ edited by Dell H. Hymes (1927-2009) in 1969. Later, Clifford Geertz’ (1926-2006) works on interpretative anthropology (e.g. ‘The Interpretation of Cultures’, 1973) and David M. Schneider's (1918-1995) research of symbolic anthropology, started a movement that would lead, lastly, to a radical turn in the 1980's, exemplified by James Clifford's (*1945) ‘Writing Culture: the Poetics and Politics of Ethnography’ (edited with George Marcus in 1986), a milestone of postmodern anthropology. From this standpoint, anthropology was seen as a “representational genre” (Nugent 2006, 442). Central concepts of anthropology were presented as illusions, as Adam Kuper (*1941) exemplified in 1988 with his publication ‘The Invention of Primitive Society: Transformations of an Illusion’. The problematic of engaging with the Other is expressed clearly also in the title of Nicole Polier and William Roseberry: ‘Tristes Trops: Postmodern Anthropologists Encounter the Other and Discover Themselves’ (1989). Nevertheless, postmodernism had a very differentiated influence in anthropology and developed differently in the various fields according to the different roles of the field of anthropology in academic traditions (Idem, 443). Partly, the development of postmodern anthropology has been presented as an opening into the new field of Cultural Studies (Idem).

This connection is not surprising, since also Cultural Studies dealt critically with the interplay between ‘the Other’ and ‘the observer’, taking distance, as a research field, from the traditional academic environment. It started its academic career parallel to the change of perspective experienced in anthropological research, making its presence official in the 1960's 0's with the establishment of the Centre for Contemporary Cultural Studies at Birmingham in 1963. Originally combining sociology and literary criticism, it attempted to overcome the elitism that marked the idea of ‘high culture’ inherited from humanism in social research. In turn, scholars of Cultural Studies engaged in the research of areas left unattended until then,

like mass-media, and concentrated equally in the research of highly political questions involving, for example, class inequality. The influence of Louis P. Althusser's (1918-1990) structuralism and Antonio Gramsci's (1891-1937) concept of hegemony in the 1970's prepared the terrain for the reception in 1980's of poststructuralism and psychoanalytic theory (Franklin 2006, 134). Thus, with the participation of figures like the Jamaican Stuart Hall, very critical works around topics of racism, postcolonialism and feminism developed, power and inequality being the main *foci* of attention.

Through an eclectic methodology and an interdisciplinary approach, Cultural Studies are dedicated to research diverse practices, especially practices of resistance to hegemonic authorities. Most importantly for our concern, is that the perspective in front of otherness and violence as something embedded in language and daily activities, takes a central place. In fact, Cultural Studies defines itself through plurality and the coexistence of diversity already through the varied personalities who took part in this field as active researchers, as well as in the academic form they chose to present their interests and in the questions they asked. Firstly, they aim to access research through a variety of perspectives related more loosely with each other than the form of a clearly delineated discipline would require. Secondly, they aim to ask questions about particular and concrete practices rather than to address coherent all-encompassing unities identified as ‘a’ culture. In this sense, Cultural Studies can be seen as an expression of the concern for plurality in a postmodern context.

Importantly, the approaches mentioned until now are connected in one way or another with the current of thought of poststructuralism. Poststructuralism, as most ‘posts’ here discussed, derives and reacts to its predecessor and name-giver, in this case structuralism. Although, the concept of ‘structuralism’ designates a number of different currents, it is most generally applied to a tradition in linguistics leaded by Ferdinand de Saussure (1857-1913), that influenced several fields of knowledge, most importantly anthropology through the work of Claude Lévi-Strauss (1908-2009) in the 1960's. Importing into the field of anthropology the ideas of Roman O. Jakobson (1896-1982) regarding ‘structural linguistics’ that based on Saussure's phoneme theory, where units were defined “by means of establishing conventional arbitrary contrasts” (Bloch 2006, 530 f.), Lévi-Strauss organized cultural knowledge in sets of contrasting oppositions. Following the idealistic tradition of Immanuel Kant (1724-1804), structuralism is based on the assumption of an existing structure behind singular events, i.e. an “order of relations and dependencies of parts in relation to each other and to a whole” (Dietrich 2008, 286). Thus, meaningful communication was seen as the result of the

placement of units into a structure and their relationship with each other, which was framed by binary contrasts. Understanding culture as shared information in the minds of individuals, culture itself had to be organized equally in structures. Rejecting functionalist theories of the time, it proposed that anthropology had to concentrate on the patterns that allowed human beings to "operate mentally in, and with, their environment" (Bloch 2006, 532). Although Lévi-Strauss himself always underlined that culture "never forms coherent wholes", that "it is a matter of continual communication and modification between individuals which leads to endless transformation, and how its nature is a consequence of specific neurological requirements of living people" (Idem, 535), the concept of structure acquired a life of its own in social research. Most importantly, it was linked with neo-Marxism in the 1970's and 1980's, providing a theoretical background for leftist social criticism.

The notion of structure was equally developed and strengthened by Sigmund Freud (1856-1939), who operated with the metaphor of the iceberg, that was going to be marking for the way experience was thought from then on. Behind what we see stands an immense, overwhelming and unknown structure that exerts power over us without our knowledge about it and which is always ready to emerge again from the darkness of the sea, whenever we cut the exposed part. This image might serve to understand an underlying question of the context in which structuralism developed, namely the interest to understand what was it, that, hidden in the basic structure of human beings, guided the participation of whole societies in fascist violence. In the end, it was this historical and political situation which determined the exile of many intellectuals and pioneers of anthropology an other social science, like Franz Boas (1858-1942), Ernst Cassirer (1874-1945) (who is seen also as a forerunner of structuralism because of his work on symbolic forms), and Lévi-Strauss himself.[26]

Later on, in conjunction with new social experiences, structuralism's general theory was destabilized. Following the failed revolts of 1968 in Paris, this current transformed partly in what is called today poststructuralism. Michel Foucault, referring to academic Marxism – a main field of the application of structuralist approaches –, formulated the basic shortcoming that was reproached to this current: it "supposes, lastly, that the human subject, the subject of knowledge, even the forms of knowledge, are somehow previously and definitely given, and that the economic, social and political conditions of existence do not do anything but be deposited or imprinted in this subject that is given in a definite way" (Foucault 1996, 3). Thus, it was not sufficient to inquire the pure linguistic, structural, regular elements, but also the

26 It was as an exile that he co-founded in 1942 the *École Libre des Hautes Études* (Free School for Advanced Studies) in New York, a sort of university-in-exile for francophone academics, where also Jakobson, equally a political exile, taught.

polemic and strategic aspects of discourse should be considered (Idem, 4). The main attention moved thus from investigating an overarching structure, in which all elements are neatly placed, to the discontinuities in the structure that had not been regarded and questioned the notion of structure itself. The problem pointed at now was that any structure refers to a certain basic center or central axiom around which the structure is organized. But who decides what is this center? The binary oppositions were created and implied a certain hierarchy, predefined quitely by the conscious or unconscious position of the scientists that pretended to formulate generally valid conclusions based on the principles guiding objective observation.

In order to avoid the violence towards difference implicit in assuming an universal center, post-structuralism puts particularism at the center of attention. Taking this thought to a radical expression, Bauman asserts that postmodernity is "incurably pluralistic" (Bauman 1992, 30) and "a plethora of multiple realities and universes of meaning" (Idem, 40). According to him, postmodernity recognizes that the "diversity of lifeforms is irreducible" and sets this "in the rank of a highest positive value" (Bauman 1995, 127). In this particular case, however, it is interesting that while Bauman argues for the pluralistic character of postmodernity, he remains skeptical of the concept of culture, which he relates to hierarchy and the tendency to standardization. Thus, he rejects the idea of a "postmodern culture" because it would imply an oxymoron, a contradiction between the radical plurality of postmodernity and the homogenizing force of culture. However, the topic of culture has been central to the development of postmodern critiques. At a level of conceptual and institutional academic development is exactly the development of Cultural Studies and research institutes dedicated to this field, what marks the establishment of a rhetoric of pluralism, particularism and diversity from a postmodern critical approach. Equally, in law, the reference to culture is, as we will see, the one that inquires into the violence of law and lastly puts in question the concept of law itself.

Basically, this is the question that postmodern approaches in all their guises will have to deal with in the end, and which many of these perspectives leave open. Because, however particular these perspectives of postmodern research might be, they cannot remain only particular. They refer constantly to categories that are set with a certain general validity at least in the eyes of the researcher. Also these particular approaches claim somehow general validity. That is the reason for poststructuralists' fighting against an overarching structure. This is the reason why, in the eyes of Dietrich, some of the postmodern authors continue dealing with postmodern problematics in a somehow dualistic and idealistic way and thus, the critics to the existent situation degenerate in an idealistic "vision of the beauty of the small,

the plural, the weak, the slow, the vernacular" (Dietrich 2008, 308). If their research is not oriented towards a broader claim of validity, the research itself is compelled to dissolve in the meaningless void of indifference. This other option, however, is the point that Zima remarks as dangerous, since indifference does not offer any *happy end* for the question of human interaction. In fact, it takes with itself the problem of incommunicability and a big potential for violence in all its forms.

## II. Law and Postmodernity

After all these remarks around postmodernity, is it possible to speak of a postmodern concept of law? The first problem is, like for any concept, that it covers up the variety and diversity amongst the elements that it pretends to include and label. Most importantly, in this specific case, we confront the problem that the postmodern approach puts in question exactly the validity of unitary, homogenizing and seemingly uniform concepts, paying special attention to the violence implicit in them. Law, as a term related directly with questions of violence and representation cannot stay immune to this affront. In fact, what I will present here under a conceptual umbrella of 'postmodern legal thinking' are the different ways to problematize law as a unified coherent concept.

To start with, we can underline that all of the questions presented in the first chapter are related to questions about the "mystic foundation of authority", as Derrida puts it (Derrida 1992). Paul Kahn as well as Ruskola and other critics on which I based my analysis of 'modern law' in the first part of this investigation, refer to the founding authority of law not as something given, but as something created. In fact, as something created and invested with the label of 'normality' and 'givenness'. The common basic structure of their arguments is to say that there is something else guiding the ways in which law is presented, perceived and developed. There is something behind the assumed normal state that not only creates and maintains its authority but also makes us, as subordinates to that authority, believe in its necessity and in its status as universally valid standard, and, most importantly, it compels us to recreate constantly that authority of the 'normal', which is in necessary opposition to the Other's exoticism. "What is that 'it'?" is the question. Is 'it' a matter of identity? Is 'it' a perspective on time? Is 'it' a matter of power? Is 'it' a combination of all of this? Is 'it' just we – a 'we' lost in language? If the normality of law is a story we tell ourselves, who is the

storyteller? Why are we asking for a story? Can we step out of this story? Can we maybe just change the story, when we get at results that we do not like anymore?

In this section, I will present some of the theoretical discussions that put these questions on law to the foreground. Thus, I will first highlight some of the socio-linguistic elements that inform this critical approach to law, and, next, I will elaborate on some of the currents of legal theory that develop from this background. I will organize this review on postmodern approaches to law around some particular nodes that I see as recurrent in the questions posed in front of mainstream legal theory and practice. It is not my intention here to propose a classification of postmodern topics, but rather to point at elements, actions and trends forming a thick fabric, where some aspects overlap, while others differ completely from each other. Of course, choosing these aspects evidences my own focus, which is determined by my interest on law's relation to plurality, on the one hand, and development, on the other. Although any other choice could be equally justifiable, with this approach, I just aim to offer an arguable interpretation that may be helpful at the time to understand some features of the ways we chose to deal with law, development and plurality. This inquiry will allow me later to ask how do these perspectives on law had an impact on approaches to legal development.

### 1. *One Justice for Many Subjects?*

Michel Foucault once summarized what could be named the 'postmodern turn' saying: "the Greek truth was once shocked by the simple sentence 'I lie'. The sentence 'I speak' put the whole fiction of modernity to the test" (Foucault 2003, 208). While the confusion in the first case grounds lastly on the identity of the subject speaking and the object pointed at by the spoken 'I', in the second sentence, the apparent absolute certainty leaves the speaking subject disappear into an infinite echo – 'I' deludes into language. Is there an 'I' outside of language? If silence is its space, what are its boundaries, where its outside and inside, how can it take action, make decisions, be free and thus responsible? Thus, looking at his environment in France in the 1960's, Foucault asserted that it has turned "important to think this fiction – while in former times it was all about thinking the truth –, because the 'I speak' works in the contrary direction of 'I think'. The 'I think' led to the undeniable certainty of the I and its existence; the 'I speak' recedes this existence into the distance, disperses it, erases it and allows only an empty space to appear" (Idem, 210).

Postmodern thinking, as I have addressed it here, is the process and result of the tragic loss of certainty. It is tragic because it is a way of no return, the hero is dead. The critique is

no longer directed to an object outside the inquiring subject, who could achieve more knowledge through further, more intense and accurate research. Moreover, the uncertainty, the mistrust, the inquiry, is uphold in front of the inquiring being itself. Postmodernist scholars argue that the conception of the primacy of the subject, based on Cartesian and Kantian approaches to the subject, lies at the core of a modern perspective, setting it as the origin of the possibility of knowledge and, consequently, as the one that, through application of universal reason, made possible the access to truth (Foucault 1996, 4). But knowledge does not have *an* origin, argues Michel Foucault. Referring to Nietzsche's 'Gaya Scienza' (1887), he criticizes this concept of *one* origin, and accentuates the role of invention as a result of the struggle amongst *plural* forces that achieve a compromise, which is essentially a result of a game of power. Hence, the idea of a truth to be searched loses its foundation. Each truth has its 'infamous' characters, the non-represented and non-representable in the established order of things. For law, the question can be formulated in terms of judgment and justice. Which truth is the judge to seek for? Which justice are we looking for? If law and justice are just power-games, where is their legitimation? What is left out of the (allegedly all-encompassing) frame of law and justice?

If the origin of knowledge is doubted, equally, the correlation between knowledge and the object of knowledge is put into question. According to Foucault, the only guarantee for the modern assumption of the identity between the content of knowledge and the things of the world was God (Idem, 9). Once God was put in question by rational skepticism and put aside in regard to the justification of socio-political life, this certainty about the identity of the known with the outer world vanished. Applying this thought to the legal field, major problems arise. First, the conception that laws are created based on and addressing social facts turns void. Equally, we could say that there is no correlation between the judicial procedure and the final decision on the one hand, and the object of its decision on the other. How is it possible then to justify law and its application? Law as well as the subject are parts of an empty, silent, unreachable and unspeakable outside. Hence Foucault asserts that "law is not the foundation or inner prescription of behavior, but encloses it from the outside and deprives it thus of every interiority" (Foucault 2003, 220). Consequently, the law "is the dark, that wraps our behavior, the emptiness that involves it, that unconsciously transforms all its particularities into the gray monotony of the universal and that creates a room of misery, of dissatisfaction and of relentless eagerness" (Idem).

Loosing the subject's unitary identity has major consequences. Rights, understood as entitlements, always need a subject, and thus one of the main concerns of modern law was the

quality of the subject of rights: Who can have rights? And, more detailed, who can have what kind of rights? From the question of who is a (natural) person and which are the minimal limits of age according to the law, to the problem if there exists a juridic person, and in international law the assertion of the state as a legal subject of law, the question about the subject of law is still central to legal theory and praxis. But postmodern approaches put in question this unified concept of the subject and its primacy. Thus, one of the main points on which the thought of law based, crumbled. If subjects are not anymore the governing owners over their rights, the powerful kings that make conscious use of their legal positions, how can law be conceived? Thus, the attention of postmodern approaches to law turned away from the subject of rights to the making of the law, the forces involved in that process (that surpassed the individual deeds even of judges) and the context in which they are embedded.

In this respect, Foucault's concern with the subject and its relation to law is shared by other postmodern authors like Jacques Derrida (1930-2004), whose influence on legal theory will be treated later. For now, it suffices to state that Derrida took a different stance on this respect. In fact, also for him, the subject as a category is blurred, with the result that there is not a 'deconstructor', as some followers of Derrida's work named themselves later (Balkin 1994, 67). However, Derrida underlined the importance of bringing out the paradoxes of the subject, "and so of the responsible subject, of the subject of law (*droit*) and the subject of morality" (Derrida 1992, 8), thus invoking the subject back into his philosophy for matters of responsibility. Equally, the question on the accessibility to the category of legal subject, and thus to rights in the sense of formal law, was a central concern of Derrida (Idem, 18 f.). Bringing the subject back, as Derrida does, however, takes with it a plurality of difficulties, that I will examine in detail in the next section.

Also Foucault reincorporated the subject into his later philosophy. But this move did not mean a "return to a pre-archaeological – i.e. humanist or phenomenological – concept of the subject endowed with an inner essence or originary will that precedes and stands apart from the social" (Best/Kellner 1991, section 2.3.2). In fact, Foucault underlined that even assuming that "the subject constitutes himself in an active fashion, by the practices of the self, these practices are nevertheless not something that the individual invents by himself. They are patterns that he finds in his culture and which are proposed, suggested, and imposed on him by his culture, his society and his social group" (Foucault cit. in idem). In this sense, Foucault's reborn subject, still embedded in a web of power relations, has his own power to define his own identity with certain freedom. Before he came back to the notion of subject and experience, however, his critique of an ultimate core of the subject inspired a review of

legal theory and many of the forming elements of law as formants of identities and specific forms of subjectivity, as the previously presented critics of Teemu Ruskola and Paul W. Kahn exemplify.

Instead of assuming a core of the subject, the discourse analysis of Foucault asked for the continuous formation of this subject through discourse, understood as an ensemble of strategies that are part of social practices (Foucault 1996, 5). In this context, law plays a major role as a social practice, or, better, as a complex of social practices, that allows to "locate the emergence of new forms of subjectivity" (Idem). Far from the restriction to formal, apparently fixed, pre-established law, judicial practices are conceived as ways to define types of subjectivity and relations between man and truth that go beyond the legal sphere (Idem). In fact, Foucault adduces that several forms of accessing and formalizing knowledge developed first in administrative and legal environments to be transferred later to the areas of science, like the inquiry during the Middle Ages and the later development of the examination in the 19th century.

Here, truth can be seen as having (at least) two stories: the first one as one that "corrects itself from its own regulatory principles", the second one as one of the formation of truth through social interaction (Idem, 5). It is noteworthy that while the first form of truth that Foucault mentions, despite (or because of) its continuous re-alimentation for betterment, is identical with itself, and forms thus a unified entity, the second perspective on truth, has, from the start, a pluralistic character. Firstly, being a second truth, it creates plurality itself in the field of perspectives on truth; secondly, Foucault speaks of "other places" where truth is formed (Idem). He speaks thus of the "politics of truth" (Idem, 11). Knowledge and truth exist only in the "form of certain acts that are different of each other and multiple in their essence" (Idem, 12).

Thus, the concept of 'truth', like many others, disgregates, loses its *reason* to be. In fact, truth becomes plural, it replicates itself in an infinite myriad of truths. As Gilles Deleuze (1925-1995) states: "We have the truth that we deserve, according to the place that we hold, to which time we are awake, in which element we are" (Deleuze 1991, 113). In this sense, truth is contingent, it is dependent on time and space, and thus cannot claim universal validity (Dietrich 2008, 301). If truth is particularized and plural, it cannot build the base to solve any kind of conflict. Why should one truth weigh more than the other? As Jean-François Lyotard (1924-1998) reasons, understanding arguments as elements of heterogeneous language games to solve conflicts through a language that is beyond them, would be an act of injustice, it would perform illegitimate violence. Through this move, the parts involved in a conflict

would be subordinated to a language invested with a higher position in the hierarchy, disregarding the intrinsic heterogeneity of language games, which Lyotard holds as a value for itself.

In this sense, the use of law as a source of authority, subordinating the conflict to a specific language that declares itself as valid in the name of justice, would mean to commit injustice. Consensus, as, for example, Jürgen Habermas (*1929) puts it at the center of his philosophy of legitimation, does, in Lyotard eyes, "violence to the heterogeneity of language games" (Lyotard 1984, xxv). The search for universal consensus is put in question by Lyotard as basing on two wrong assumptions. Firstly, that "it is possible for all speakers to come to agreement on which rules or metaprescriptions are universally valid for language games, when it is clear that language games are heteromorphous, subject to heterogeneous sets of pragmatic rules" (Idem, 65). In front of diversity, how can we assume that consensus is achievable without exerting a form of violence? Secondly, Lyotard doubts that consensus is the goal of dialogue. In fact, for him, "consensus is only a particular state of discussion, not its end. Its end, on the contrary, is paralogy" (Idem, 65 f.). In the realm of science, this request for accepting different rules for the language game of knowledge finds its legitimation in the argument that "it will generate ideas, in other words, new statements" (Idem, 65). In social interaction, it is equally a matter of renovation and life, but, most importantly, it is a matter of justice, which, unlike consensus, has conserved its validity in Lyotard's view. In the context of the assertion of the value of heterogeneity, Lyotard argues that postmodern knowledge "refines our sensitivity to differences and reinforces our ability to tolerate the incommensurable" (Idem, xxv). Law, as an instrument of standardization, would thus do violence to the justice it proclaims to enact, a justice that requires the interaction of different language games.

Through his remarks, Lyotard reacts in front of a perspective in front of conflicting diversity that is oriented to consensus, as Habermas proposes in his pursue for a balance in a world of pluralities. In his own terms, Habermas aims for the completion of the project of modernity, for a reconcilement of modernity with itself. Holding to a self-critical concept of modernity, he puts to the front the need to realize the emancipatory potential of the Enlightenment into modern societies. Although he sees contemporaneous society from a critical perspective, he, different than Lyotard, regards Enlightenment highly for its contribution to the emancipation of the individuals from feudalism. Thus, modernity is, from Habermas' perspective, directly linked to the coexistence of diversity, even more, to the coexistence of diversity beyond (illegitimate) oppression. In his eyes, the problematic

situation we find us today in derives from a lack of emancipation, from the fact that humans continue to be objects, now not anymore of feudalism, but of money and power.

Thus, he invokes a liberation of humanity from that reification (*Verdinglichung*) postulating the lifeworld (*Lebenswelt*) as a common horizon of understanding that is reproduced by the medium of communicative action (Habermas 1986, 546). Interestingly, Habermas resorts to a differentiation between an ideal concept of lifeworld on the one side, and, on the other side, a sociologically 'real' lifeworld, which is the one where dissent and power play a role. The ideal abstract lifeworld is the one which poses the horizon of an ideal situation of dialogue as a universal constant. To be more accurate, we speak here about the generalized ideal that Habermas has of a dialogue, which presupposes a sahred will to understand our interlocutor and a shared presupposition of our interlocutor's corresponding will (Habermas 1971, 136). Most problematic seems to me, Habermas' assumption that in this ideal situation, which is itself – as an ideal – supposedly shared, the best argument wins. But the question is still: the best argument for whom, according to which standards? Who is going to say which is the best argument? Ideally, it does not matter, because there is 'a' better argument valid for 'all' interlocutors. In an ideal lifeworld where power strategies are not embedded in the dialogue, no one has to take a decision of what is better, arguments simply 'are' better or worse. In other words, in the ideal world, to be in dissent is just a looming, otherness just a mirage. This is the horizon of communicative action that Habermas proposes.

A subsequent problem is, as Zima observes, that "the 'usage of sentences according to pragmatic rules'", which builds the ground for Habermas proposal, "does not obey only to the rules of natural language and the communicative situation, but also to the norms of *group languages* (*sociolects*) and to the resulting discourses as semantic-narrative structures that are teleologically oriented" (Zima 2001, 206, emphasis in the original). Again, this sociological level is neutralized and universalized in Habermas' conception. Most troublesome is this step, if we see subjectivity, and thus identity, difference and otherness, as being constituted exactly through games of inclusion/exclusion in certain sociolects, in certain ways to live and ways to speak in relation to others. In other words, the infrastructure of communicative situations cannot be reduced to a universal scheme, since "sociolects and discourses, that obey their own *specific* (terminological, ideological, religious) rules" (Idem; emphasis in the original) are equally part of the infrastructure of communicative situations. We cannot simply think discourse, as the place where subjectivity is articulated, away.

While creating a space beyond the conflict of heterogeneity, Habermas reinstalls the oppression he wanted to get rid of as part of the completion of the 'modern project'. Thus, he

can speak of a "peculiar unconstrained constraint of the better argument"and searches to explain it through the "formal characteristics of the discourse" (Habermas 1986, 161). Now it is him who establishes a universally valid strict monosemic rule: "diverse speakers must not use the same expression with diverse meanings" (Habermas 1983, 97). Why would be dialogue possible, why would be dialogue needed then? Zima summarizes the problem accurately when he states that: "In decreeing an abstract universalism, Habermas negates the discursive subjectivity of the interlocutors and sacrifizes their peculiarity to the indifference as exchangeability of roles and acts of speech" (Zima 2001, 207). Thus, he simply exchanges the oppression that he considers illegitimate for one that he calls legitimate and true.

It is in response to this universalistic and universalizing violence that Lyotard calls for the recognition of the Other, or, in his own words, for "the recognition of the heteromorphous nature of language games" (Lyotard 1984, 66). Consequently, Lyotard pleads for the principle "that any consensus on the rules defining a game and the 'moves' playable within it *must* be local, in other words, agreed on by its present players and subject to eventual cancellation" (Idem). To be sure, this consensus differs clearly from Habermas' proposal. Thus, remarking the unstable and local character of this always provisional consensus, Lyotard argues in favor of "a multiplicity of finite meta-arguments", referring to argumentation concerning the rules regarding the admissibility of certain language moves, which is limited in space and time (Idem). The plurality of local sets of rules is going to be, as we will see later, a core question to be posed in legal philosophy, sociology and anthropology.

While asserting the relevance of "an idea and practice of justice that is not linked to that of consensus" (Idem), Lyotard rejects an emancipatory approach to knowledge and thus to justice in the sense of Habermas', whom he understands as assuming that "humanity as a collective (universal) subject seeks its common emancipation through the regularization of the 'moves' permitted in all language games and that the legitimacy of any statement resides in its contributing to that emancipation" (Idem). On the contrary, Lyotard calls for an approach that sees the plurality as the only base for justice, and thus, lastly, he invokes a plurality of justices (Dietrich 2008, 302).[27] This concern is translated in the sphere of legal philosophy, legal anthropology and social movements as approaches on 'legal pluralism', advocating the principle that each culture should be judged according to their own settings of norms.

In this sense, justice does not derive from the access to a generally valid truth, but is a result of the observing of plurality. As Dietrich points out, strangely, this perspective equates

27 In the same sense, see also the critical formulation of Jacob Rogozinski: "But how is it possible to think of a 'justice of the multiplicities' without thinking of a 'multiplicity of the justices'?" (Rogozinski 1989, 64).

the concept of justice with the situation of conflict: a plurality of positions that are subjectively seen as correct (Dietrich 2008, 302). In this case, a solution of the conflict through interpretation of the truth or of the law is not sufficient. Neither the formal aspects of the law are decisive for determining the justice of a solution. Moreover, the question is how to engage with these pluralities in their dissent. Non-consensus is justice.

The approach of Lyotard sounds compelling, at first, when it comes to open the space from oppression to diversity. Nevertheless, it presents some basic problems. On a basic level, Lyotard's assumption of incommensurable languages would not suffice to explain the daily exchange between heterogeneous discourses. More troublesome is the fact that his pleading for plurality does not seem to apply to his own philosophical authority or to all of his objects of study, since he equally subordinates the diverse discourses he criticizes, like Christianity, Enlightenment and Marxism, under his own story-telling.

In fact, this is one aspect of a broader problematic that has to do with the perspective he develops on difference itself. Emphasizing difference and particularism, Lyotard disregards the logical point that the statement of difference requires the statement of commonalities.[28] I do not speak here about the banal point that difference with 'you' implies commonalities within 'us'. I mean that talking about 'us' implies commonalities and differences amongst 'us' as well as between 'you' and 'us'. And the same applies to statements on all imaginable 'you's'. Translating this to the frame of conflict, which is determined by the creation of differences/commonalities, this means that an argument, "a contrariety or a conflict between cultures is only conceivable, if these […] have something to say to each other" (Zima 2001, 199). In other words, to state a difference means to imply commonalities, et vice versa; a commonality is a form of difference, et vice versa. Thus, the question of identity grounds on the diverse combinations of difference/commonality, and to emphasize one of the two is 'just' a game between fore- and background – a game that, for sure, can have drastic implications. The point is that talking about difference, as well as about commonalities, is a choice. And also this choice of Lyotard is, as any choice, an exertion of power.

This is not only a matter of the objects observed. The way we identify difference and commonality, and thus plurality or unity, amongst them might differ. But in any case, the objects observed share at least one thing: the observer. The observer herself is the last point of encounter of the diverse. The subject as such might be deconstructable, but it is her, the observing subject, who sees herself as observer, who deconstructs herself, who remembers,

28 To this point see also the analysis of Manfred Frank (*1945), who states that "no 'différend' can be total' … [O]ne must go further and say: a 'différend', as determined by Lyotard, is logically impossible" (Frank 1988, 79).

compares, classifies, uses, deconstructs, reconstructs, questions and answers. Necessarily, because she cannot escape from being through herself (independently of what that means to her), she will stay always, however plural she might be, at the center of her own reasoning, her own feeling, her own perception, however constructed it might be and however aware she might be about it. Even to put herself in the shoes of other's, she can only do this as herself. Thus, the perspective assumed will necessarily maintain a certain priority *de facto*. In fact, this is the reason why Lyotard is able to write *about* something at all.

If despite all this, we accept Lyotard's call for plurality, more serious difficulties arise, since the acceptance of colliding standpoints as equals leads to a 'tolerant indifference', which can easily turn into violence. As Zima puts it: "Where there are no generalizable measures, the other or the incommensurable must seem sometimes as meaningless, sometimes as destructive for the own identity and thus as menacing" (Zima 2001, 154). Actually, violence is inbuilt in Lyotard's approach, since he, as Foucault in the 1970's, calls for an uprising of the particularisms *against* the universals, disowning every expression of centralism, including reason, the state and capitalism. This call is explicit in Lyotard's work on the "patchwork of minorities", where he invokes a movement of splintering that applies for nations as well as societies (Lyotard 1977). As the centralized administration of the negated 'minority others' turns increasingly complicated and difficult, the tendency of these groups to organize themselves without going through all the "intermediations of the CENTER" grows (Idem). Thus, Lyotard underlines the importance of social movements and their capability to 'radicalize the difference', as he states for the feminist movements (Idem, 64). Similar to Foucault's and Deleuze's approaches, Lyotard calls for a "pluralizing disruption of the power" (Zima 2001, 144). But while these French authors, continuing a long tradition of anarchism, envisage the patchwork of diversities as a bliss, Zima fears a "taking over of the power by one or more mafias – possibly together with army and secret service" (Zima 2001, 145). This is also the result of an extremely particularized view on languages, cultures and society groups. If particularisms are regarded as incommensurable, fragmentation is the natural result, and this leads either to total indifference in front of the cloistered away other or to a constant opposition in front of him. Unintelligible 'otherness' can not be seen as fully valid; no engagement and no recognition are possible. Communication is unthinkable (Zima 2001, 200).

This is exactly the point where Habermas starts his critique and proposal of a further going emancipation through the consolidation of those elements that Lyotard rejects. As we can see, the criticisms against Lyotard take us to Habermas' universalistic position, and those

against Habermas end up close to Lyotard's particularism. As readers, we are caught in a vicious cycle of counterarguments. Isn't it paradoxical, that these two authors, seeing their environment from a highly critical standpoint, argue in opposite ways and end up in the same problematic space of indifference, exchangeability, and lastly, violence? Ending both in exchangeability, these answers are themselves equally exchangeable. In the midst of our struggle to be just in front of otherness, whatever we do, we end up destroying the bond with the Other and the possibility of encounter. This is the paradox, in which postmodern approaches to law are caught.

### 2. *Speaking the Law*

One of the main motors of postmodernist approaches in law has come from the application of deconstruction on legal texts in very diverse contexts and following varied purposes. As Jack M. Balkin (*1956) puts it, "the deconstructive dictum that 'iterability alters' seems to apply particularly to deconstruction itself, for the meaning and importance of deconstruction in legal theory has continuously changed as it has been employed in different contexts and situations" (Balkin 1996, 9). Developed firstly and with particular force in academic fields related to the study of language and literary criticism, deconstruction became associated with other trends and came to be the name under which diverse currents of discursive analysis in various fields of knowledge found a common roof. Its approach, as characteristic for other postmodern currents, is oriented to put in question those assumptions that make certain arguments possible. Analyzing language and making prolific use of word-games, this type of inquiry sets out to make explicit and put in question the whole structure that supports modern thought as well as structuralism itself. Not surprisingly, it is always moving around concepts such as 'the Other', 'the limit' and 'the difference', emphasizing the connection between power and language.

Deconstructionist emphasis lays in the blurring of differences taken for granted (and in the possibility of creating new differences). In this context, law becomes a central field of attention, since "legal distinctions are often disguised forms of conceptual oppositions, because they treat things within a legal category differently from those outside the category" (Idem, 2). Since deconstruction enables a new understanding of the relationship between these opposite categories, it allows scholars to study how the "instability or fuzziness [of these conceptual oppositions] is disguised or suppressed so that they lend unwarranted plausibility to legal arguments and doctrines" (Idem, 4). The consequences of this blur, however, are not

understood in the same way by diverse authors that claim to use deconstruction. For the Anglo-American current of Critical Legal Studies (CLS), it offered a tool of criticism against legal liberalism as an ideology. Later on, partly because of the diminishing presence of Critical Legal Studies at the end of the 1980's, deconstructive scholarship built a field of study of its own with figures like Jack M. Balkin and Pierre Schlag. In France, equally, figures like Pierre Legendre (*1930) developed deconstructive studies of law.

In any case, one of the reflections on law from a deconstructionist approach that left a strong impact in the whole development of postmodernist legal thinking, was made by Jacques Derrida in his key note to the Colloquium 'Deconstruction and the Possibility of Justice' held in October 1989 at the Cardozo Law School. The place and time of the meeting is not unimportant. In fact, it presets a specific environment for the discussion on deconstruction and law. The Cardozo Law School, founded in 1976 by the Yeshiva University (New York), was named after Justice Benjamin Nathan Cardozo (1870-1938) who was a renowned US-American lawyer and Supreme Court Justice and who is considered one of the main representatives of the current of Legal Realism. As we will see later in more detail, this current of thought is directly connected to questions of the then emerging critical perspective on law, as well as to the search for legal development, of legal development aid and of the further approaches in legal transfer. Interestingly, the school of Legal Realism started to lose force after the Second World War at the time when the concept of development started to take new contours. It can be said that Legal Realism did not disappear, but its claim turned more specific through the development of Critical Legal Studies, feminist legal theory, economical analysis of law and critical race theory. These research fields, which were deeply interlinked with the social and academic movements of the 1960's and 1970's, are in one way or another intimately related to the postmodern perspective in general, particularly to the deconstructionist approach, that formed part of the revision of academic structuralism.

Derrida refers directly to the connection of his work with Critical Legal Studies, exemplified by the authors Stanley Fish (*1938), Sam Weber, Barbara Herrnstein-Smith and Drucilla Cornell (Derrida 1992, 8). In his eyes their work responds

> "to the most radical programs of a deconstruction that would like, in order to be consistent with itself, not to remain enclosed in purely speculative, theoretical, academic discourses but rather […] to aspire to something more consequential, to *change* things and to intervene in an efficient and responsible, though always, of course, very mediated way, not only in the profession but in what one calls the *cité*, the *polis* and more generally the world" (Idem, 8 f., emphasis in the original).

The conjunction of Critical Legal Studies and deconstruction was thus "inevitable" (Idem, 9). In fact, Derrida underlines that deconstruction has addressed the problem of law and justice continuously, even if, at first sight it could seem that it has been avoiding the realm of law (Idem, 9 f.). In this perspective, Critical Legal Studies developed the deconstructionist claims into more specific legal concerns, that I will address in the next section.

For now, I will sketch Derrida's presentation, where he refers to some of the contradictions embedded in the category of justice from a deconstructionist perspective which form the background for the reflections that I have posed about the tension implicit in the concept of law and its relationship to difference. In his speech he schematizes some of the key elements of postmodern approaches to law and legal development, or, in other words, some of the main questions that were posed in front of modern law, and that I refer to as postmodern according to the remarks I have made before. Relevant for the relationship of these postmodern arguments to modernity, is that Derrida refers explicitly to the fact that these contradictions at the core of justice were recognized long before deconstruction was constituted as a method, as a practice, as an attitude or as a discourse of postmodern thought. In fact, as he observes regarding the works of Blaise Pascal (1623–1662) and Michel de Montaigne (1533-1592), the mistrust towards law and justice because of its inherent connection with violence and force was an important topic of discussion already in the 16th and 17th centuries (Idem, 10 ff.). Derrida, re-elaborating on this skepticism, deconstructs the concept of law as well as the concept of justice, demonstrating a way of questioning that can be found in Critical Legal Studies as well as in other contemporaneous critiques of law.

In a similar way as Kahn does, Derrida argues the lacking (or even undecidable) legitimacy of a past revolution that serves as legitimation for the present legal *status quo* (Derrida 1992, 6), linking the deconstructability of law with its very process of transformation or amelioration (Idem, 14). This is related to what Derrida names *épokhè* or moment of suspension, "which is [...] the interval of spacing in which transformations, indeed jurídico-political revolutions take place" (Idem, 20). At the same time this *épokhè* characterizes any just decision because the appreciation as just or unjust presupposes the freedom of the judging individual, and thus the rule as an obligatory demand must be suspended in order to pronounce any kind of judgment on the justice of the decision (Idem 22 f.). Judgment implies thus always a performative act (Idem, 26 f.).

Elaborating on that, Derrida makes a point of the inherent violence of law saying that "the operation that amounts to founding, inaugurating, justifying law (*droit*), making law,

would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate" (Idem, 13). Equally, he builds a link of necessity between law and the use of force, when he refers to the expression "to enforce law", arguing that "applicability, 'enforceability,' is not an exterior or secondary possibility that may or may not be added as a supplement to law. It is the force essentially implied in the very concept of *justice as law* (*droit*), of justice as it becomes *droit*, of the law as '*droit*' [...]" (Idem, 5 f.). Consequently, also the *état de droit*, the *Rechtstaat*, are paradigmatic for a problem of justice that has been posed and violently resolved in the founding of law or in its institution (Idem, 23 f.). The 'rule of law', although partially different in its semantics from the French and German expressions, equally bases on a violent founding of law and thus, also in this context, law has no other way to be than being violent. It is in this repression and dissimulation of violence that Derrida speaks of the 'mystical foundation of authority', as he titled his conference. He asserts that "even if the success of performatives that found law or right (for example, and this is more than an example, of a state as guarantor of a right) presupposes earlier conditions and conventions […], the same 'mystical' limit will reappear at the supposed origin of said conditions, rules or conventions, and at the origin of their dominant interpretation" (Idem, 14).

Derrida's claim of the violence of law is related directly to the question of alterity. According to him, similarly to Lyotard's arguments, to subsume a concrete example under a general rule is an impediment at the moment to recognize the Other in its difference:

> "[...] Justice, as law (*droit*), seems always to suppose the generality of a rule, a norm or a universal imperative. How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case?" (Idem, 17)

Consequently, Derrida gives a new form to the 'idea of justice' and asserts that, beyond an appeal to a third party who would suspend the singularities in dialogue, "to address oneself to the other in the language of the other is, it seems, the condition of all possible justice", (Idem, 17). The proposal of legal pluralism, which I will examine later in detail, can be seen as an intent to follow this principle of addressing the Other in his language, even if, lastly, it might fail in its pursuit for the abolition of violence (as epitomized in formal state law), since any kind of generalizing law can be understood as violence towards the particularity of otherness exactly because of its general claim.

Putting the concept of justice close to Emmanuel Levinas' (1906-1995) understanding as the relation to others, Derrida characterizes justice as "infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic" (Idem, 22). The infinite character of this concept of justice derives from its understanding as something that is "irreducible, irreducible because owed to the other, owed to the other, before any contract, because it has come, the other's coming as the singularity that is always other" (Idem, 25). Thus, the meaning of justice seems to be equated with the protection of particularisms. It is twisted and put against an idea of rationality and lawfulness: "This 'idea of justice' seems to be irreducible in its affirmative character, in its demand of gift without exchange, […], without calculation and without rules, without reason and without rationality. […] This kind of justice, which isn't law, is the very movement of deconstruction at work in law and the history of law [...]" (Idem). Justice is, from this perspective, exactly the process of questioning, the attitude of questioning the questioning itself, destabilizing oppositions, like natural law/positive law, and bringing out the paradoxes (Idem, 8). Thus, he identifies justice with deconstruction itself (Idem, 15). In taking this step, Derrida rejects to equate deconstruction with a "quasi-nihilistic abdication before the ethico-politico-juridical question of justice and before the opposition between just and unjust" (Idem, 19) as many of his critiques have done. Moreover, he twists their argument, making of deconstruction the only possible 'truly just' way to deal with otherness.

Although Derrida was supportive of Critical Legal Studies, other researchers who recognized themselves as deconstructionists and who partly were involved in the Critical Legal Studies movement, launched harsh critiques around the appropriation of deconstructivism by legal-political critical studies. Thus, Balkin argues that "the CLS argument seemed to assume an autonomous subject who was manipulating indeterminate language; this was in tension with deconstruction's antihumanist assumptions" (Balkin 1996, 5). Pierre Schlag, in turn, makes also a point of the self-deconstructive force of legal doctrines and pleads for a more general and radical banishment of the fantasy of rational autonomy from legal theory, criticizing Critical Legal Studies also because of its instrumentalization of deconstructivism for a political agenda (Schlag 1990, 1991). Equally, Balkin argues that also the oppositions underlined and utilized by scholars of Critical Legal Studies to back their arguments can be deconstructed, and thus deconstruction has not an intrinsic political position as this critical movement had and which was mainly opposed to legal liberalism. Furthermore, he criticizes that the ideas of contingency, instability and mutability of concepts have been confused by

scholars of Critical Legal Studies, assuming, via a deconstructionist argument, the contingency or mutability of certain concepts when deconstruction permitted only to assert their instability (Balkin 1996, 5). The analysis of rhetoric figures to show their ideological support to injustice, as performed for example by Peter Goodrich in 'Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis' (1987), is, in Balkin's eyes, equally problematic, because alternative legal constructs would equally need a rhetoric that would be equally supportive of an ideology.

'Liberating' deconstruction from a political bias as Balkin aims to do leaves, however, the floor open for recriminations of nihilism. In other words, if every argument is deconstructable, and insofar 'it does not make a difference' what or how we argue, because any concept we might use is unstable, how can a critic of violence be coherent, make sense and thus claim attendance? Thus, a certain political quietism has been a reproach made against deconstructivism, which denies the "certainty of all truths" (Balkin 1996, 7). In terms of Zima, Balkin underlines the problem of the exchangeability of arguments that deconstruction can arrive at. Exemplarily, he argues that the instability of the boundaries of subjects of justice might be expanded through deconstructivism as Derrida reasons, but,

> "one can expand the boundary in two opposite directions — by expanding the scope of what is assigned to the "human," who is a subject of justice, or by expanding the scope of what is assigned to the "nonhuman," which is not a proper subject of justice. In this way, the instability of these boundaries might well be used, as it has in the past, to show that […] the distinction between women and animals, for example, is so unstable that it cannot fully be maintained" (Balkin 1994, 18).

Thus, deconstructivism can be used for arguments with a certain political motivation or with the opposite one, in order to justify their claim. In this sense,

> "the egalitarian claims to rediscover the true similarity of the subjects of justice by reclaiming those who were wrongly grouped with nonsubjects; the bigot claims to rediscover the true similarity of nonsubjects of justice by rejecting those who were wrongly grouped with the subjects of justice. Both deconstruct boundaries and categories, and the act of deconstruction does not decide between them" (Idem, 18).

In other words: "Deconstructive argument does not cease to operate when the conclusions one might draw from it are inegalitarian" (Balkin 1994, 17). However, Balkin argues, Derrida's speech makes it seem this way because he is partial at the moment of finding examples for his "mystical equation" of deconstruction with justice: "Derrida tends to pick targets for deconstruction that correspond to the injustices he perceives" (Idem, 56). Actually, he has made choices that allow him to argue in favor of an emancipatory and egalitarian role

of deconstruction. In turn he evaded "to deconstruct or problematize the distinction between justice and injustice, between liberty and slavery, or between tolerance and bigotry" (Idem, 17).

Recognizing this 'trick', Balkin states that interpreting Derrida's argument as "an approach that asserts the infinite difference of each situation" leads to "normative nihilism and a failure of understanding" (Balkin, 1994, 39). This is the "dead end" of deconstruction of which Teubner speaks, saying of postmodernist legal researchers that "with growing unease they experience the open epistemological situation in which meaning worlds and knowledge systems are arbitrarily invented, varied, collapsing, reinvented, varied, collapsing..." (Teubner 1997, 773). Derrida, however, argues that deconstruction is not nihilism and it is not futile, it is justice itself. But what kind of justice can it be that it is not on one side of an opposition and therefore it escapes the force of deconstruction? Or, the other way around: Is every questioning legitimated and just? Is every deconstruction just?

Derrida's statement that deconstruction is justice has created great confusion. In fact, Cornelia Vismann (1961–2010) has criticized this "affirmative" deconstruction as "caught in the paradoxical relation between an immanent law and transcendent justice" (Vismann 1992, 261). Similarly, Teubner has denounced that "it is the direct experience of the demands of the Other, as a nonlinguistic, noncommunicative, nonmediated perception, the experience of the nonbridgeable alterity, the infinite uniqueness of the Other which throws the objective and general order of law into chaos but at the same time remains there as the continuing call for justice" (Teubner 1997, 774).

The question remains open of whether deconstruction reinforces the dichotomies it puts into question. Is deconstruction "complaining about a lost tradition and becoming, by this very complaint, dependent upon this tradition" (Luhmann 1993, 766)? Although Derrida claims the phenomenological symmetry of the Other, it relies equally on an Other which is always particular (Derrida 1992, 25) in front of the generality of the I. Does deconstruction truly deconstruct everything or does it rely on the enemy it opposes? In this line, Teubner accuses deconstruction, a movement born out of an anti-humanist attitude, to end up in a humanitarian appeal: "What else than a vague humanitarian impulse can one expect for law from phenomenological symmetry as deconstruction of the philosophy of alterity?" (Teubner 1997, 776).

The critiques of Niklas Luhmann (1927-1998) and Teubner are specially relevant because they allow us to hear the perspective of legal systems theory in front of law and its relation to

deconstructivist approaches. Usually, both currents are depicted in opposition to each other, contrasting “the antirational gesture of deconstructivism with the superrationalism of systems theory” (Idem, 766). However, as Teubner himself underlines, systems theory also “does away with any stable identity of law”, seeing law “as an iteration of recursive events that are transformed through their resonance with changing contexts” (Idem). When “diverse contexts construct multiple fictions of law”, “law's constructed identities change chameleon-like with the change of observation posts, each of which has an equally valid claim to truth” (Idem, 764 f.). Since system theory “reveals that law's hierarchy is in reality a self-referential circularity” (Idem, 766), it recognizes the foundation of law in a paradox, and, lastly, in the “violence of an arbitrary distinction” (Idem, 765). Thus, the paradox and the foundation of law in violence have equally a prominent place here as in deconstructivist approaches. Resultants of the same crisis, both theories, “while rejecting unity, identity, and synthesis, begin with difference and end with difference”, claiming “a postmetaphysical, postdialectical, and poststructuralist character” (Idem, 766). The result of this self-referentiality is equally, that it leads directly into “a paradoxical oscillation that paralyzes the observer” (Idem, 765).

Nevertheless, Teubner looks at deconstruction as “modernity's carnival, a funny, exciting, and at the same time sad and desperate reversal of its tangled hierarchies, but basically an entertaining enterprise without consequences, in its negative mirror image of entangled and reversed hierarchies ultimately affirming the order of modernity” (Idem 1997, 767). Basically, the critique against deconstructivism is that it is “not sufficiently critical, not radical enough!”, exclaimed Teubner (Idem, 767). Remaining in the field of semantics, he argues, deconstructivist approaches lack of the capacity to see links between discourse and reality, legal semantics and social structures. In the end, Teubner asks for a sociological base for deconstructivism, for a sociologically (useful) unfoldment of paradoxes and for a return to sociologically relevant reality after deconstructivism. He asks thus for the “structural conditions so that at a certain historical moment, law's foundations are suddenly seen as paradoxical” (Idem, 771), criticizing the post-structuralist current of deconstructivism for its blindness towards the structures it is embedded in. Lacking this self-reflection, deconstructivism cannot offer the guidance and direction that Teubner, like many other contemporary scholars, is looking for (Idem, 779).

Systems theory, aims thus to base its perspective on law on the link of semantic critique to social structure, in Teubner's case specifically to globalization, which “exposes law directly and without the mediation of democratic politics to the fundamental social condition of today's world society: to its ‘double fragmentation’ – cultural polycentrism and functional

differentiation" (Idem, 780). Thus, the question in this case is "what does law look like in a doubly fragmented world society?" (Idem).

However, if this version of systems theory dissolves the founding paradox "into a multiplicity of paradoxes of self-validation" connecting it to a plurality of social discourses and structures (Idem, 777), it does not give either an answer to the way we could deal with a patchwork of equally valid forms of law production. Reorienting legal theory to a "heterarchically relational logic of linkage" (Idem, 780 cit. Ladeur) still does not provide us with tools to engage into a dialogue in diversity. Faced with the "impossibility of constitutionalizing legal multiplicity in the language of legal restraints on the arbitrariness of the sovereign" (Idem, 784), what remains? Although this approach to law from a specific reading of systems theory opens up the realm of the legal to be in mutual influence with another subsystems of society, it still depicts law as an extremely stiff structure that is not permeable to changes at a small scale. The nodes of reality Teubner deals with are limited, and so, the social matrix he portrays does not have the depth a dynamic conception of system could provide. Having a pre-established *numerus clausus* of social systems, it is possible for Teubner to see that "social systems", in this sense, "stick to their institutionalized 'iron laws' of superspecialized rationalities", "are highly rational in themselves, but with regard to the whole society they are blind, uncoordinated, selfish, chaotic, expansive, and imperialistic", so that "world society tends to develop self-destructive tendencies" (Idem). It is clear that Teubner speaks here of a specific 'law'. In all its polycentricity, this systemic understanding of law does not include many of the ways of normativity outside of formal state law. The possibility that this self-destruction of 'world society' allows the emergence of new patterns of behavior in the systemic web, of new ways to approach normativity and social order is thus underestimated. In my opinion, the diversity present in the 'world society' is overrun, and so, the re-generative power of the exchange in diversity is overlooked. It is possible to follow Teubner in his claim to redefine the focus of law "from the sovereign's abuse of power to self-destructive tendencies of colliding discourses" (Idem). But it is equally possible to go beyond self-destruction to envisage ways of transforming the patterns in which these collisions emerge. This means, however, to change the perspective on law and order itself, since it is this law the one that participates in the creation of the collisions Teubner points at.

### 3. *Justice as Value*

Naturally, the pragmatic difficulties of deconstructivism put to the front by Teubner, have not been overlooked by deconstructionists either. “The urgent question how law copes with the demands of justice in today's supercomplex society” (Teubner 1997, 776) has also come to the center of deconstructionists’ inquiries. Following these concerns, the blurring of differences has led partly to a pragmatist (re-)turn to transcendental values in deconstructionist analysis (Balkin 1996, 4; Balkin 1994). Thus, making an emphasis on the needs of a functioning socio-legal system and reasserting the meaning of justice, Balkin offers a reinterpretation of deconstruction and its relationship to justice. Differently from Teubner, however, he develops this new understanding in the name of deconstruction itself, arguing that he, “as a deconstructionist”, is “naturally skeptical” especially “about the necessary utility and goodness of deconstructive practice” (Balkin 1994, 1). Thus, he handles with deconstruction in order to make sense of it for the practice of law.

The pragmatist attitude of Balkin is clear from the start, when he explains that emphasizing some features of Derrida's texts and de-emphasizing others, which he regards as mistaken, is the only way in which deconstructive argument can be made a “useful tool of critical analysis” (Idem, 2). Furthermore, he is concerned about escaping the criticism of nihilism addressed to deconstructionist critics in general and most importantly, he aims to deconstruct Derrida's approach to justice. His quest regarding “what Derrida *really* thinks about justice” (Idem, 7; emphasis added) allows to sense already the problem that we will face with this perspective. Because while Balkin, as a deconstructionist, argues against a conception of originality and purity; he still wants to get to the ‘real core’ of things, to a truth that is beyond text. Paradoxically, he does this applying deconstruction to Derrida's deconstruction. If deconstruction can be deconstructed, then the law and justice it has blurred can be revived.

In a deconstructionist manner, he emphasizes what Derrida has silenced in his text on the ‘mystic’ foundation of authority and denounces thus his own subtext, his own exercise of power, his own violence in talking about violence. In fact, the address of Derrida refers to broad and hypothetical questions of justice, but does not refer at any point to a remarkable issue of justice in which he was involved and which was decisive in the further development of deconstruction, namely the scandal on Paul de Man (1919-1983), a key figure in the development of literary deconstruction and a close friend of Derrida. In 1987, four years after de Man's death, some articles were discovered, that he had written when he was in his

twenties, and which conformed to the official Nazist rhetoric or were even overtly antisemitic (Idem, 5 f.). The academic war went beyond de Man's personal history, because deconstruction itself was accused to serve as a tool for covering, distorting or devaluing totalitarian violence. Its nihilism, so the critiques, served to justify violence.

In this debate, Derrida himself played a major role, specially with the publication of two important articles: 'The Sound of the Deep Sea Within a Shell: Paul de Man's War' (1988) and 'Biodegradables: Six Literary Fragments' (1989). In these articles Derrida, using deconstructivism, tries to defend his friend, deconstruction, and lastly himself from what he perceives as an unjust accusation. As Balkin argues, independently of the position we prefer to take in this debate, it is obvious that also these arguments are made from a particular perspective on what is justice, which place is given to the Other, what makes a legitimate judgment, and how is it possible to deal with responsibility. According to Balkin, the accusations of nihilism that were originally raised against deconstructivism gained new force with this debate, and were present ghosts in Derrida's talk at the Cardozo Law School that he was trying to exorcize with his "mystical equation" that "deconstruction is justice" (Balkin 1994, 58).

Putting this speech in this specific context, Balkin pretends to find a proper interpretation of Derrida's understanding of justice, that at the same time justifies Balkin's own ideas on deconstruction, justice and law. Thus, Balkin destabilizes Derrida's arguments around law and justice using Derrida's texts regarding de Man's scandal, which are more explicitly loaded with all sorts of emotions. Doing this intertextual exercise, he argues, it is easier to understand or to develop deconstruction's contribution to legal theory than if we, reading his 'Force of law' isolated, just assume that Derrida was merely making a deconstructionist analysis in front of a random topic, law, taking a distantiated academic perspective, from where he observes oppositions, plays with them, blurs them and lets the game of the eternal return of paradoxical oppositions start once again. According to Balkin, if deconstruction is not to be a nihilistic game, then the justice Derrida calls for in his writings on de Man, must be part of the understanding of justice that he develops in 'The Mystical Foundation of Authority'. In fact, Balkin argues, this is the only way of making sense out of Derrida's text. A "charitable" reading is required "to avoid confusing and self-contradictory interpretations" (Idem, 10). Thus, he arrives "at an important variant of deconstructive practice, which relies on the existence of human values that transcend *any given culture*" (Idem; emphasis added). This understanding calls thus for a certain universality of values that

could help to rebuild the puzzle of particular interpretations without original that deconstructionist practices have left us with.

Balkin's interpretation is only one, a contested one, amongst many, but it results particularly interesting for this inquiry, since it poses an interpretation of deconstruction and postmodernity that, recognizing this current as particularly valid, calls for the return of values into law. In terms of Zima, it could be interpreted as an intent to move out of indifference. This movement between nihilist critiques on postmodern approaches and reinterpretations with moral-pragmatical arguments reappears in different guises in philosophical and socio-legal discussion, like for example in Habermas' work. It is as if the specter of the antagonisms that we inherited and recreated, like the opposition between iusnaturalism and iuspositivism, would never leave us. In fact, these are expressions of the need to ask the ignominious question: what happens after deconstruction? If doubt is king and meaning is non-existent by itself, but a void subjected to power structures and deconstructability, how can we live together? Both the theory and the practice of law have tried equally to give some answers to this conundrum. In this sense, Balkin calls for a transcending understanding of justice and deconstruction.

The first argument to take into account is Balkin's critique to Derrida, where he asserts that "deconstructive argument is a species of rhetoric, which can be used for different purposes depending upon the moral and political commitments of the deconstructor" (Balkin 1994, 9). Secondly, he argues "that a transformation of deconstruction becomes inevitable when deconstructionists begin to confront real questions of justice and injustice" (Idem, 10), and thus, he introduces a "transcendent idea of justice, which human law only imperfectly articulates" (Idem, 9). Derrida's arguments against the existence of a "transcendental signified" and his statement that "there is nothing outside of the text" (Derrida 1976, 158) can not be valid for matters of law and justice, Balkin argues. In fact, according to him, this step is one of the major developments in Derrida's thinking (Idem, 10)[29].

Hence, in his work, Balkin reasserts justice as a value. Noticeably, his conception of values differs from a a specific eternal and unchanging Idea in Platonic Heaven. Moreover, equally founding on Platonic concepts, Balkin pleads for justice as an indeterminate longing (Balkin, 1994, 12), that human creation can never satisfy. Transcendence, in this sense, describes the "relationship of inadequacy between culture and value" (Idem, 13). Consequently, the goal of transcendental deconstruction is to "rediscover this transcendence

29 See also Balkin 1994, 68 ff., where Balkin asserts for example that "the antihumanist vocabulary that has for so long been associated with deconstruction must be abandoned when deconstruction confronts questions of justice in the real world" (Idem, 68).

where it has been forgotten", and thus its aim is "not destruction but rectification" (Idem ref. to Seung). In fact, the "deconstructor" seeks "betterment" of an unjust or inappropriate conceptual hierarchy (Idem). Contesting the criticism of nihilism, he admits that his deconstruction is founded on faith (Idem, 14), a faith on human values. This perspective on the value of justice does not help us though to decide which way of "rectification" would be appropriate, it just states that there is one, or at least that there is always a better one.

Equally, when Balkin refers to the problem of speaking the language of the Other, he argues that Derrida cannot refer to a theory of absolute difference, because "it would be impossible to decide any case, because no case can be compared to any other" (Balkin 1994, 36). On the contrary, Derrida's claim can be understood in the sense that "each case is both similar to and different from every other, depending on how we look at it. The difficulty of just decision-making lies precisely in deciding what is the appropriate context of judgment" (Idem, 37). What still remains unclear is who will decide on the appropriateness of a specific context to make a judgment and how this choice is going to be taken. Similarly, what deconstructivism amongst other postmodern approaches points at and what Balkin leaves unaddressed is the question of what defines which context is appropriate or not. Most importantly, what do we do when the legal system itself is responsible for defining the context of the appropriateness of its own application?

Equally problematic is Balkin's assessment of the question about the possibility to speak the language of the Other. Contrasting Derrida's analysis of justice with his own reaction in the scandal on Paul de Man, Balkin concludes that "justice, it seems, does not always demand that one speak in the language of the Other, especially when the Other is not playing by the same rules" (Balkin 1994, 41). Basing on this contrast, Balkin argues that "all of the difficulties with the ethics of Otherness arise from the assumption that our responsibility to speak in the language of the Other is infinite" (Idem, 43). In turn, he proposes that this duty should be seen only as indefinite but not infinite. Consequently, he opens a space for the Other insofar as he states that "when we try to understand what another person means, we usually do so by trying to envision how what they are saying makes sense" (Idem); we have to assume that the argument of the Other is coherent and might be more truthful than our own. We have to do our best to find the sense in the Other's argument. However, in the context of Balkin's interpretation, this means that the Other's argument has to make sense for whom? For Balkin, naturally. The claim of coherence must defend its validity in a world accessible to Balkin. The possibility that coherence can have a different meaning for the Other is not part of Balkin's perspective on the Other. Thus, he asserts that "there is the danger that our drive to

understand the truth in the other person's views will lead us to be co-opted by those views and brought into agreement with things we should not agree with, because they are false, misleading, or unjust" (Idem, 45). In the end, this means that, when the Other's arguments do not make sense at all (in Balkin's mind), we should stop trying to make sense of them. Finally, there is a limit to this engagement with the Other, a reasonable limit: "An infinite responsibility to speak in the language of the Other can easily lead to perpetual justification of the Other, no matter how unreasonable their position. This is not what justice requires" (Idem). Again, Balkin appropriates justice's voice.

As he argues later, "it is people who demand justice, and who demand it of one another" (Idem, 66), but the point missed in his argument is the same that Hugo Grotius already addressed more than 400 years ago: that justice can be on both sides, that everyone demands his own justice, what they consider as just. The possibilities of interaction in this tension have, for Balkin, clear restrictions. It is important, he emphasizes, that we do not succumb to 'hermeneutic cooptation' nor to 'hermeneutic masochism', and consequently, beyond the "right amount of effort to understand the Other", it is "necessary for us to recognize that the Other's views are incoherent or unjustified, and that our own position is more reasonable" (Idem, 46). Justice, finally, can only be Balkin's justice. It is quite puzzling to observe how these arguments based on undefined and unquestioned concepts of reason and comparative reasonability, find their place in the speech of a declared deconstructionist. But it only makes sense, if we remember that Balkin's aim is to reinterpret deconstructivism in a way that it is practical for law's implementation, in a way that law can be somehow just. If the duty to speak in the language of the Other is indefinite but not infinite, what is the conclusion? That making justice is difficult because it is based on indefinition? But this is clear for any decision, because a decision is only needed when there is indefinition. Instead of explaining that judges have a difficult job, this argument could equally express that judges form part of a problem of indefinition within our system to deal with conflicts.

In the end, following Balkin's approach, deconstruction "as practiced by human beings always arrives at a conclusion", when the "deconstructor believes that she has reached an appropriate degree of enlightenment" (Idem, 59). In the world of law, this means that justice is there, where the judge feels that he has found it. However, this decision to outline conclusions "leaves unspoken the many further steps that could be taken" (Idem). Actually, if we assess deconstruction this way, it looks much more like Balkin's law, with its deciding judges, than like Derrida's justice. A law that works with a judge that has to come to a decision into a specific frame, leaving unspoken many other possible decisions and even steps

outside of the legal system. And thus it calls for a legitimizing value. Balkin's alliance with a iusnaturalist perspective is clear when he states that “to say that positive norms are inadequate — and hence in order to deconstruct them — we must refer to values that lie beyond the norms we are critiquing and that serve as the source of our criticism” (Idem, 55).

It is not my aim here to answer the question about how far Balkin deviated from Derridean deconstructivism, or if Balkin's approach can be called deconstructivism at all. Let us leave these questions for the coming generations of deconstruction's taxonomists and dogmatists. Balkin's work has other relevant features for our purpose. One of the accomplishments of Balkin is to put Derrida's approach in a particular context. Most importantly, Balkin's arguments are relevant for this inquiry because they allow us to see some serious difficulties that legal scholars face when dealing with deconstruction and law. There is a struggle that goes beyond an uneasy feeling in front of the gambling with meaning in law. Balkin renders account of the perception of a limit in the deconstructionist approach to law. Thus, he searches for a new way, for a twist of the twist; in fact, for a deconstruction of the deconstruction. It is interesting to note the place where he lands with this search: the constant question for justice as a transcendental value. Equally interesting, of course, are the limitations that this interpretation faces.

The struggle with legal deconstruction relies therein that if there is no generally valid truth to be discovered by the judge or the legislator, the whole system deludes into a plurality of (positive) laws than can claim equal legitimation. What do we do after acknowledging that the (democratic) state is only one possible law-giver and it is not by itself closer to reason or truth than the mafia it condemns? If truth and reason disappear as measure sticks, what can we rely on to avoid chaos? If we admit that justice is deconstruction, no law of whatever type can ever be just, so what remains to do? How can we deal with something that never ends, like Derrida proposes for deconstruction and justice, using a system that proclaims the end of a conflict (Idem, 33)? In other words, the problem is how to “mediate between a deconstructed law and deconstructing justice” (Teubner, 1997, 779). Either we forget about the link between law and justice, assuming a semi-arbitrary but always violent law and a contestatory (deconstructive) justice, or we search for a way in which we can stick to a certain legitimation of formalized social norms.

While Derrida makes a point of a deconstructive justice in front of law, Balkin looks for a transcendental justice that may allow for a relative coordination of law and justice. Nevertheless, it is worth noticing that both Derrida and Balkin set out to deconstruct law and

end up talking about a specific perspective on justice. Importantly, Derrida underlines the relevance of talking the language of the Other as justice. But this is it: there is one justice. To do something *different* would not be just. Derrida's and Balkin's justice is a justice that is thought in singular, even though it might change with time. Here are again the mirages of modernity: a rational universal value that might change according to a linear perspective of time.

In fact, Derrida's appeal to deconstruct is equally violent as the violence he pretends to deconstruct. His justice would then, in his own terms, be unjust. But for Derrida, as Balkin remarked, it is not always imperative to talk the language of the Others. There is one justice, the one of deconstruction. What kind of difference is the one that deconstruction can accept when it wants to "*change* things" (Derrida 1992, 8; emphasis in the original)? Although deconstruction works with instabilities, it refers equally to the same categories that it brings out of balance, like law and justice. In fact, Derrida's search for justice guides his endeavor with deconstruction (Idem, 25). Consequently, he can imagine that, in engaging deconstructively, he can take a position that is without prejudice (Idem, 8), unbounded, free — a privileged position indeed.

Despite all differences, Balkin is equally monolithic in his approach when he, following his interpretation of relative justice, underlines that "we are always uncertain — at least to some degree — about the justice of our decision" (Balkin 1994, 39). It is clear, in this expression, that the position that Balkin takes is the one of the judge that has to take a just decision. If he would, however, take the position of the involved parties, he could perceive that justice, most of the times, is a matter of interacting, maybe contradictory justices, which for each of the parties are equally certain. Equally, Derrida, reflecting on the role of language in a judicial context, thinks of legal language as being outside of dialogue, and of law as being void of dialogue (Derrida 1992, 17 f.), reinforcing the category of law that he criticizes.

Summing up, the critical force of deconstruction turns into a self-questioning circular movement, into a whirl, without offering any possibility to transform that force *against* dichotomy into a generating force *towards* innovative responses in front of conflict. Nevertheless, Derrida asserts the positive side of the deconstructability of law, stating that it builds the political chance of historical progress (Idem, 14), a concept that has been fought by deconstructivism continuously. Equally, Balkin speaks of an increase of justice (Balkin 1994, 23) following a model of progressive augmentation. But the problem relies therein that justice cannot be augmented if the concept of justice is unstable, or, in other words, if justice in the eyes of one party means injustice in the eyes of 'the Other', especially if the Other is the

opponent. In calling for the recognition of more legal subjects as more justice, Derrida disregards the problem that more rights means also 'more people against *other* people'. Rights never come alone, they also have their counterpart, it is always a right 'to' something and 'against' somebody, somebody else, the Other. This is a structure of dichotomic opposition in which modern law, but also Derrida's justice that aims to deconstruct this law, are engrained. Nevertheless, Derrida assumes that being recognized as a legal subject is better, is more just, than not being recognized, because access to a certain discussion field is granted. However, the recognition as subject does not mean *per se* a state of more justice in everybody's eyes. In fact, to be recognized as a subject of law means equally to have certain duties, to be subjected to an order and to be potentially restrained in the exertion of freedom. Beyond that, access to the law system as a legal subject might equally imply a concentration of political power, that does not lead necessarily to more justice in terms of the individuals or groups who have no access to such a position or who are subordinated to that power.[30] These are points that turn obvious, when we put law in its socio-political context.

When it comes to matters of interpersonal and social conflict, the deconstructive approaches of Derrida and Balkin are exponents of how postmodern thinking remains, equally as the modern thinking they criticize, in a dichotomous divide, between the language of the Other and my language, oppressed victims and oppressors (Derrida 1989, 820; Balkin 1994, 39 ff.), law and justice, and justice and nihilism. Although Derrida underlines that he cannot give a satisfying answer to questions put in the form of "either-or" (Derrida 1992, 4), he remains playing on that seesaw. In fact, Derrida is overtly in favor of the classical emancipatory ideal (Idem, 28) that requires a perspective of certain universal ideals towards which emancipation shall bring us."

Consequently, it is not surprising that, also in this frame, justice is always away from the present (Derrida 1992, 23 f.), that it remains always to come (Idem, 27).[31] As Teubner argues, deconstructive approaches, equally as the modern approaches they oppose, remain in this longing for the future: The demands of justices are "infinite demands of the uniqueness of the Other [...]. Thus, justice is impossible but at the same time cannot be disconnected from law. It is 'haunting' the law [...]" (Teubner 1997, 774). Through this demand for an impossible, deconstructive justice "reformulates a relation of law to the sacred that has been lost with secularization", although "it is remarkably different from the usual bridging of law and

30 In this sense, see also Balkin's discussion on the recognition of corporations as legal subjects (Balkin 1994, 19 ff.).

31 On time and deconstructive justice see Teubner 1997, 776.

religion" because it "opens the experience of an areligious, an atheological transcendence" (Idem, 775).

Thus, how can I ever be just in front of the Other, right here, right now? How can law ever support a fair dealing or even an encountering with alterity, plurality or difference? This conflict within law found a clear expression in debates around the concept of law and its capacity to include or segregate 'the Other'. Particularly, this question materialized in the proposals of 'alternative law' and 'legal pluralism', which derived from critical approaches in legal theory that I will present in the following section.

## III. Critiques on Law – Twisting the Vertical Vector of Authority

Although Derrida's speech does not mark a founding date for the emergence of an academic movement of critical legal thought, it does present a variety of elements that are recurrent in diverse fields of contemporaneous critical legal research. Summarizing, Derrida underlines the inherent connection between law and violence, the apories implicit in juridical legitimation at a legislative and judicial level that form a 'mystical' authority, and the tension (if not the incompatibility) between modern law and the recognition of the Other. Finally, he tries to find his way out of the total aporetical paralyzation in front of the question: How can justice ever find materialization (through law) if law can never be just? So, what should we do? Dismiss law? Dismiss justice? Being an expert on speech acts, the only response he can call for is a speech act: deconstruct! Or, if we follow a more anti-humanist, subjectless perspective: Let self-deconstruction happen! Point at self-deconstruction! Recognize the self-deconstruction!

Legal researchers developed concrete analysis and proposals highlighting similar problematics and envisaging new perspectives in front of these questions. Antônio C. Wolkmer, recognizes four influences for the development of critical theories on law: the Soviet economical perspective of Pēteris Stučka (1865-1932) and Evgeny Bronislavovich Pashukanis (1891-1937), the interpretation of Marxist theory with Gramsci as developed by the group of Althusser, the Critical Theory of the Frankfurt School and the archaeological thesis on power of Michel Foucault (Wolkmer 2003, 31). Equally, the works of Hermann Kantorowicz (1877-1940) and his School of Free Law as well as processes within Latin American history like the *Revoluciones Universitarias* (University Revolutions) were central

to this development. Many of the new perspectives on law often referred to the research of Foucault sketched above or took as their base and ally deconstructivist reflection.

I will present here some of the main currents that evolved critical thought within legal discourse with an important impact in academia and politics. Clearly, many of these critiques came accompanied by intents to develop better ways to answer social needs, this is, to develop better concepts, better practices, and thus, better law. If the existent law was perceived as insufficient, the search aimed to find alternatives. Thus, these critical perspectives start recognizing that, from a plurality of available ways, it is possible and necessary to choose one which is different from the one in practice. The currents referring to plurality and alternativity in law are, consequently, specially interesting for this inquiry insofar as they open the question for matters of alternative and plural (legal and social) developments.

In the search for another law, the idea of alternativity, has been used in many different ways. Following authors like Luciano Oliveira (Oliveira 2003, 211 f.)[32] it is possible to differentiate two main ways to deal with the problem of the lacking unity of law from a perspective in search for alternatives. Often, these two approaches have been presented as 'the alternative use of law' and 'alternative law', separating both fields strictly from each other. Thus, on the one side we can find a movement like the one in Spain or Italy, started basically by judges who propose an application of law in the sense of social justice, while on the other, a more pluralistic proposal, developed largely by scholars in conjunction with popular movements, aims to have a more radical character, doubting of the capacity of state law to deliver justice within culturally diverse societies.[33] While one approach asserts the determinant role and the capacity of the judge to interpret the (state) law, calling for the judges to use their power with a specific perspective in favor of social justice, the other approach, puts in question the position of the judge and the state law in general as a universally legitimate way to solve social conflicts. This last concern is actually linked to the

32 Amilton Bueno de Carvalho, however, makes a different classification of the movement of 'Alternative Law', dividing it into three currents: 1. the Alternative Use of Law, utilizing the "contradictions, ambiguities and lacunae of the positive law" in order to interpret it from a point of view oriented to democracy and social justice; 2. the Combative Positivism, through which positive law is used in the battle for making effective rights already stated in the law but not being applied in social reality; an 3. Alternative Law in Strict Sense, which refers to a "parallel, emergent, insurgent, found on the street, non-official law", that coexists with the state law. "It is a living law, active, which is in constant formation/transformation" (Wolkmer 2002, 143 cit. Carvalho). Although de Carvalho's differentiation might be more useful for a detailed observation of the different groups active in Brazil, in the context of this work, it suffices to highlight two different spheres according to the role of the idea of plurality and its relationship to law.

33 In the words of Botelho Junqueira, while the first one has been developed from a group of judges and makes emphasis on the judicial praxis, the second one pursues to value normative praxis outside of the state legal system and underlines the importance of legal and political education of popular classes in order to develop an insurgent law (Botelho Junqueira 1993, 115).

proposals of ‘legal pluralism’, which aimed equally to address an idea of social justice with the difference that the emphasis was directed now to a cultural understanding of law.

Although the differences between the two currents are clear at first sight, it is important to remember that they developed from the same critical impulse. In fact, both currents are connected historically as well as by their rather leftist tendency (Guanabara 1996, 404). Hence, the passage from one form of alternativity, in which law can be given meaning in alternative ways, to the other one, in which alternativity is put in the concept of law itself, is smooth. A clear example of this, is the work of alternative legal services, which, exploring ways to use the law of the state in alternative forms oriented towards social justice, developed equally alternatives to the state law, including forms of mediation and arbitration as well as forms of political protest. The step from mediation and political protest in favor of the rights of socially marginalized groups and individuals (including the vindications of large indigenous groups) to the recognition of forms of conflict resolution different from law (for example indigenous law) as equally valid, is not a big step. The interrelatedness of these spheres of knowledge and praxis has been testified by compilations like the one elaborated by Óscar Correas in ‘*Pluralismo Jurídico, alternatividad y derecho indígena’* ('Legal Pluralism, Alternativity and Indigenous Law’, 2003).

While paying attention to the different emphasis of the various currents, the aim of this section is not to present a clear differentiation between one type of proposals and another one, but to show the complex emergence of alternative approaches to law and their relation to concepts of development and plurality. I will address thus some important examples from the US-American, European and Latin American contexts, which, despite their differences, are all connected by their critical perspective on a modern concept of law, and often by their search for new alternatives.

### *1. Critical Legal Studies*

In the development of critical legal thought, the contribution of deconstructivism has been central. Emphasizing the political aspects of judicial decision, some scholars recurred to deconstruction to support their claim of the instability of meaning arguing that legal ideology “rested on claims of the ‘false necessity’ of social and legal structures that seemed reasonable in theory but were oppressive in practice” (Balkin 1996, 5). Equally, deconstructivism has been used by Roberto Mangabeira Unger (*1947) to inquire into specific legal doctrines and show how they undermine themselves (Unger 1986). Also Robert W. Gordon and Jack M.

Balkin have been using deconstructivism to inquire into “political and legal ideologies” that operate “as a form of constraint on individuals”, constructing “a way of thinking about society that prevented individuals from considering other alternative orderings of social and legal structures, and thus limited their thought” (Gordon 1987, Balkin 1991). Similarly, feminist theory was combined with deconstructivism for an ideological critique of law. Drucilla Cornell is a main representative of this current who supported Derrida's argument of the inherent justice of deconstructivism, arguing that his approach “values the Other as different, indeed as difference” (Cornell 1992, 88).

What all these authors have in common, is that they take a contestatory attitude in front of the mainstream study of law. Embedded in the context of the civil rights movement, the women's rights movement, and the anti-war movement of the 1960's and 1970's, the first group of legal scholars that started this inquiry in the field of law, transposed this combative force to the critical assessment of the legal system as it is understood most commonly in legal academia and legal practice. Many of the scholars of the first generation of this critical wave gathered in the group of the Critical Legal Studies (CLS), formed partly by participants of the Law and Society Association, which had been founded in 1964. In general terms, their criticisms based, besides poststructuralism, on two elder groups of ideas. On the one hand, they ground on the works of Karl Marx, Herbert Marcuse (1898-1979), and, most importantly on the Critical Theory of the Frankfurt School, developed amongst others by Theodor W. Adorno (1903-1969) as a theory concerned with the criticism of pervasive ideologies in the whole society. Not surprisingly, postmodern approaches in other areas, including both the perspectives of Foucault and Lyotard on the one hand, and, for example, the standpoint of Habermas on the other hand, are connected equally to this critical strand. Equally, Critical Legal Studies referred to the current of Legal Realism with the works of Oliver W. Holmes (1841-1935), Benjamin N. Cardozo (1870-1938), Roscoe Pound (1870-1964) and Karl Llewellyn (1893-1962), who emphasized the socio-political environment in which law was embedded and how it affected legal results and legal development.

For several reasons, it is worth here, to take a closer look at the current of Legal Realism. Firstly, its socio-historical role is less known in Europe than the Critical Theory of Frankfurt. This account will allow us to see how the struggle between modern and postmodern approaches found expression in the US-American environment, a setting that is interesting for this research not only because it is ruled by common law, offering a different background than the presented above. It is even more relevant, because it builds a center of development of the

most widely spread contemporary legal theories and equally, a political and financial center for international legal aid. Moreover, some of the scholars involved in this current, were equally important for the conception of legal development, which I will treat later. Legal Realism is known, namely, as a turning point both in legal scholarship, orienting research towards a more sociological and critical view of the role of law, and in US-American socio-political development, posing resistance against "obstructionist reactionary courts […] and helping to pave the way for the New Deal" (Tamanaha 2009, 731).[34] As John Henry Schlegel puts it, "the combination of the death of progressivism in World War I, the swing to a socially conservative national government, and the gathering economic dislocation that by the end of the twenties had become the Depression, brought to the fore renewed left political activity", which "joined with the twentieth century notion of science as empirical inquiry into a world 'out there' to produce American Legal Realism" (Schlegel 1984, 404).

To be sure, the socio-critical approach of Legal Realism was neither the result of a rebellious band of scholars in the war against US-American traditional legal scholarship sunken in the "'formalist' age" (Leiter 2008), nor was it an outburst of outrageous skepticism. As Brian Z. Tamanaha develops convincingly, "skeptical-realistic insights about judging regularly emerge in the U.S. legal tradition, often linked to heightened social and political turmoil" (Tamanaha 2009, 783). He refers in this context to a chain of criticisms that use very similar arguments across time, from the first half of the 19th century, passing by the legal realists in the 1920's and 1930's and Critical Legal Studies in the 1970's and 1980's until the present. Tamanaha's account is insofar interesting for this study as it mirrors the perspective presented above about the mutual conformation of postmodern and modern approaches. Self-reflection and an attitude of critical inquiry was continuously present with more or less dominance in the legal discourses prevalent in the academy as well as in the courts. Interestingly, political realms do not seem to be truly relevant for the assumption of a critical attitude. In fact, Tamanaha underlines the fact that while in the late 1950's and 1960's conservative critics accused the Supreme Court of reading liberal values into the Constitution, in the 1970's and 1980's it was the leftist Critical Legal Studies who embraced skeptical realism (Idem, 784).

Equally, Tamanaha shows a clear overlap between Legal Realists and Historical Jurists, who are commonly taken to have set the base for a 'formalistic' view of law and thus to be the enemies that Realism opposed. It might seem counter-intuitive, that Historical Jurists,

34 The 'New Deal' was a combination of social and economic reforms put in practice during the presidency of Franklin D. Roosevelt (1882-1945) that sought to level the difficulties after the crisis of the 1930's.

connected to socio-historical research, are positioned as formalists. However, the link between Historicism and Positivism is very tight, as I have argued above for the European current of the Historical School of Savigny. In fact, positivism and a historical or developmental perspective are not contradictory but complementary perspectives. Nevertheless, this connection does not change the fact that Historical Jurists and Legal Realists are connected by their common argument in favor of the primacy of society and social factors: "The Realists insisted that law is not autonomous from society, and that law must evolve with and serve social needs. Historical jurisprudence championed the same propositions" (Idem, 756). This link between law and society was equally determinant for the developmental approach in law. Thus, it is not surprising that Karl Llewellyn, as well as his wife Soia Mentschikoff (1915-1984), participated in the wave of national legal development started in the 1940's acting as a principal drafter of the Uniform Commercial Code (UCC).

The fact that Tamanaha asserts, in this context, that the "formalist-realist divide" cannot be taken to be as strict as it is usually portrayed (Idem, 755 f. and 782), recalls the ambivalent character of late-modern approaches and mirrors the presentation I have made above of legal positivism and legal historicism as two expressions of the same perspective. Equally, this blurring of differences that Tamanaha pursues, reflects the contemporaneous postmodern concern about the insufficiency or exchangeability of the differentiations used until present. He underlines, for example, that both Realists and Historical Jurists shared the notion that law's "function is to serve social needs", and that "law was and ever must be receptive to, infused by, and permeable to morality and politics produced by society" (Idem, 757 f.). Therefore, according to Tamanaha, the conceptualization of Historical Jurists as formalists and as totally opposite to Legal Realism, is inaccurate. Although the two currents were separated by political stands as well as by several decades and thus by diverse social transformations that determined some of the points on which they made emphasis, it is important to understand, that formalism and skeptical criticism are not two opposite and incommensurable realms, but, moreover, they base on the same ground of a certain trust in the development of law that they pursue.

Specifically, Tamanaha refers to the fact that Legal Realists were committed to the law and were not only driven by an attitude of (destructive) critique (Idem, 764 ff.). In fact, "Realists believed in the law and they fervently labored to improve it" as he demonstrates citing, for example, Llewellyn, who proclaimed his "faith about the Good in this institution of our law" (Llewellyn cit. in Tamanaha 2009, 764). This attitude is not surprising from the standpoint of social critique as a means to achieve a better law, in other words, in the pursue

of legal development. Thus, Legal Realists were both seen as "devoted and effective reformers" (Rostow cit. in Tamanaha 2009, 764), and they acknowledged themselves as such. Their interest for practical engagement with social concerns turns clear in the professional careers of many Legal Realists, who were very involved in the development of legislation as well as in judicial careers. Tamanaha summarizes the "constructive orientation" of Legal Realism: "The various goals of the Realists were to increase the certainty and predictability of law; to train better lawyers; to advance legal justice; and to reform the law to better serve social needs" (Idem, 765). To achieve a better law was the reason for legal realists to be skeptical-critical about it (Kalman 1986, 231). A big part of the scholars of Critical Legal Studies inscribed themselves in this tradition.[35]

There is however, a meaningful breach between Legal Realism and Critical Legal Studies, which at the same time can be seen as an expression of the twist that postmodern approaches apply to modern ones. Historically, this shift, included in a certain continuum, can be seen in the relationship of both research perspectives with the Law & Society Movement. This movement, started in the United States of America at the end of the 1950's, aimed to study law as an expression of social behavior. Naturally, it was influenced by Legal Realism in its approach to law as embedded in society. After the criticisms of Legal Realism were seemingly incorporated through "questions of process [that] were thought to have laid to rest questions of power" (Schlegel 1984, 406), socio-political disillusion called for an approach that dealt with more than policy analysis, focusing on what was 'really' going on 'out there'. Furthermore, it reflected main concerns after the Second World War: How to direct societies to the right path? If positivism could not be the answer in front of an authoritarian state, and at the same time, a secularized society requested something different from moral law, what could law still offer? In fact, the success of the New Deal, a legal step that changed the face of US-American society, called for the explanation of society as a result of law. In response to that call, the research of David Trubek grounded to an important extent "on the belief in the possibility of an objective and neutral knowledge that was at the base of North-American Realism" (Botelho Junqueira 1993, 38). Being embedded in a reformist discourse, the movement of Law & Society received financial support from diverse agencies with interest in such reforms, like the Ford Foundation. Later on, some figures of this movement, like Richard Abel (*1941), and participants of the Law and Modernization group of David Trubek, like Tom Heller (*1944), were central to the foundation of the project of Law & Development.

35 Beyond matters of content, which will be developed immediately, see for example the parallelization of discussions about CLS with the so called Great Realist Debate (Schlegel 1984, 673).

Political struggle as well as the decay of the functional-structuralist paradigm led later to a revision of the perspective of neutrality stated by the Law & Society movement. It is from this new generation of legal scholars concerned with society but critical to the bias of their teachers, that the movement of Critical Legal Studies (CLS) emerged.

In fact, the Conference of Critical Legal Studies formed out of an intent to gather the younger researchers like Duncan Kennedy (*1942), who had studied with Trubek and participated in his Law & Modernization group, with the older advocates of law and social science, like Lawrence Friedman (*1930). Richard Abel, David Trubek and Stewart Macaulay, all important figures of the Law & Society Academy, participated in the organizing Committee of the First Conference of CLS in 1977 (Botelho Junqueira 1993, 41 cit. Kelman). Furthermore, Mark V. Tushnet (*1945), who according to Schlegel's account was then "a relatively orthodox, Scientific Marxist", was included in the organizing committee "out of material necessity, so that a "third leftist perspective achieved prominence in the group" (Schlegel 1984, 396). In the invitation, the "critical perspective in the study of law in society" underlined the "convergence between the two groups in their opposition to traditional law school teaching and scholarship" (Idem, 395), although it was clear from the start, that critique meant very different things at the same time. While Trubek elaborated a Weberian assessment of law, CLS emphasized the independent character of law in front of 'society' (Botelho Junqueira 1993, 42 cit. Thompson), making emphasis on the ideological character of legal doctrine. The new generation conceived of itself as more concerned with the internal structure of law "than with a perspective that points to latent social functions", as the invitation to the conference in 1977 stated (Idem, 41). The dynamic was thus marked by partial epistemological superpositions and simultaneous nemesis amongst the different groups.

Summarizing, it is possible to say that the movements of Legal Realism, Law and Society and Law and Development based on related positions that contributed to a perspective on law centered on its connections with society. All of them tried to avoid the naturalist/positivist divide, speaking of 'realism' instead. However, they followed equally a positivistic approach with iusnaturalistic purposes incorporated in the idea of the betterment of society through law. Although the CLS developed from the Law & Society movement, it evolved in response and in rejection of its epistemological bases and its "call to work harder to perfect society" (Schlegel 1984, 397). It is in reference to this tension that Schlegel recounts an "attack on social science at the first meeting (and ever since)", and points at the denunciations made by members of the Law and Society Association calling CLS scholars as

“the new doctrinal barbarians”, finally remarking that the “rapprochement Trubek and Kennedy sought with the law and social science group has been a conspicuous failure” (Idem, 408).

Boldly stated, the difference between Legal Realism and Critical Legal Studies is fruit of the same shift that caused a passage from the paradigm of ‘the social’ to the paradigm of ‘the cultural’. It is not difficult to admit, that this is a sliding change. What is the difference if I state that a judge takes certain decisions because of the social class it needs to be loyal to, or if I assume that a judge takes certain decisions because of the concept of law he has, the legal culture he is embedded in (and which is a result, at least to a large extent, of the social positions the judge has been in throughout his personal history)? There is a difference, and this difference can be understood as a difference of the plural. Because while the social paradigm understands behavior as an expression of a certain role in one society, the cultural approach speaks of one culture available amongst a plurality of possibilities, or even an individual as a result of an intersection of cultures. While differences can be addressed in terms of ‘how things are done’ and what results they have for other parts of a social group from a social perspective, from a cultural perspective, the question is about how things are understood, are given meaning. But, where is the place of meaning? Meaning is elusive, changing, relational, constructed in interaction and, at first, intangible. Of course, from a perspective of concerns for ‘social justice’ and the like, the problem is that a question of meaning can be used in terms of more or less equality, more or less freedom, more or less justice, as Balkin will argue later against what he understands as an ideological misuse of postmodernist deconstruction. If Legal Realism and Critical Legal Studies both claim to a certain extent that law is politics, politics in the 1930's is related to a specific social class, while, in the 1970's it goes beyond class and includes all sorts of power-relation, referring thus to the politics of language, the politics of the body, the politics of normality etc. As Botelho Junqueira argues, CLS goes beyond “accepting the criticisms formulated externally pointing at the fragility, fragmentation, the incoherence and dispersion of a law that now, because it is perceived as ideology, mixes itself with society” (Botelho Junqueira 1993, 40).

Thus, with the first official meeting at the University of Wisconsin-Madison in 1977, a critical reflection on the relationship between law and society elaborated since the 1960's by the intellectuals linked to the Law & Society Association, was introduced. Naturally, this engagement with law and society, changed importantly in the course of time. As Wolkmer

puts it, after a short period of engagement with classical authors of Marxism like Pashukanis, CLS scholars distanced themselves from the deterministic currents of Marxism[36] and dedicated their efforts more towards the study of a "relatively autonomous superstructure: law as ideology [...], as legitimacy [...] and as hegemonic force [...]" (Wolkmer 2002, 34 cit. Abel).

In an effort to organize the contributions of the movement and following the lines of two of the central inspirational backgrounds of CLS, namely Critical Theory and Legal Realism, some authors distinguished still in the 1980's between two main tendencies in the Critical Legal Studies movement. The divide would rely therein that, while one side emphasized "the contradictory and manipulable character of doctrinal argument", the other departed from the standpoint that "law and legal doctrine reflect, confirm, and reshape the social divisions and hierarchies inherent in a type or stage of social organization such as 'capitalism' (Unger 1983, 675), focusing on the contradictions, paradoxes and complex patterns of law itself. The first group would include researchers like Duncan Kennedy, whose writings 'The Structure of Blackstone's Commentaries' (1979), 'A Critique of Adjudication: Fin de Siècle' (1997) and 'Legal Education and the Reproduction of Hierarchy: A Polemic Against the System. A Critical Edition' (2004), reflect some of the main fields of interest of Critical Legal Studies. In the same vein, Mark G. Kelman (*1951) wrote his 'Interpretive Construction in the Substantive Criminal Law' (1981). In turn, the second trend comprises, for example, the works of David M. Trubek, who wrote 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law' (1977), and who edited books like 'The New Law and Economic Development: A Critical Appraisal' (with Alvaro Santos, 2006). To this strand would belong equally Morton Horwitz (*1938), who in his 'The Transformation of American Law, 1780-1860' (1977) sought to give a 'thick description', in the sense of Clifford Geertz, of the transformation of US-American law in the turn of the 19th century.

Divisions amongst diverse perspectives are not reduced only to these two strands. Naturally, the more the movement grew, the more diversified it became. In any case, Unger emphasizes that "the contrast between these tendencies should not be overstated", since both of these "tendencies criticize the dominant style of legal doctrine and the legal theories that try to refine and preserve this style. Both repudiate in the course of this critique the attempt to

36 Regarding Critical Marxism, see for example, Trubek's expression at the end of the first meeting of CLS in 1977, who "attempted to sum up 'the problem' with which the group had been grappling as 'whether we are Marxists'" (Schlegel 1984, 398). However, even this question was put into question at the same meeting by Tushnet, who emphasized more questions around the relevance of material economic culture (Idem). In any case, the question remained a matter of identity in front of other research currents.

impute current social arrangements to the requirements of industrial society, human nature, or moral order" (Unger 1983, 675). In fact, despite these divisions, the direction of the criticisms is in general to inquire into the relationships of power and the ideological background of law, and more specifically of judicial decision. The main point of criticism is the fallacy of neutrality and objectivity of judicial discourse. Thus, at the same time as CLS analyzes the result of judicial decision-making process, it puts in question the formation of these paradigms through education and socialization. Although rejecting the reformist impetus of their predecessors, one important aspect present in large parts of the work of CLS researchers, is the intention of their critique to serve as a board of broad social change starting by the development of a critical attitude and envisaging a change in the function of law in society.

Summing up, the topics at the center of CLS' criticisms marked the further development of law in academy, in particular its understanding in relation to power, alterity and plurality. Equally, some of the methods applied by critical scholars influenced the further course of legal research, for example the emphasis put on diverse aspects of interpretation and culture, which determined both methodological perspectives and objects of investigation. It is exactly the matter of interpretation that was at the center of one of the main debates between scholars of CLS and their colleagues, namely the 'indeterminacy debate', meaning the question on how far positive law determines the outcome of a legal dispute. Summing up, CLS scholars put the relationship between law and politics to the front, arguing like Legal Realism that law can be understood as the expression of politics, and thus as a matter of power and force. The assumption that the legal subject or the judge are basically autonomous was challenged, highlighting the political and social structures, in which it is embedded. Consequently, it was discussed how far law tends to protect, in the name of justice, the *status quo*, and thus the powerful and wealthy strata of society, disregarding and even opposing any social change in favor of the poor and the subaltern (a term that was borrowed from Antonio Gramsci's work). The capacity of social reform through law was put into question, emphasizing that the needed change was of more radical character. Equally, legal education was criticized as a factor of reproduction of the social oppressive system to which it allegedly belonged.

Despite the central importance of CLS for the present inquiry on postmodern approaches to law, it is important to remark that critical positions in front of law in the United States of America were not restricted to this movement. Take for example the movement of 'law and economics' (e.g. Richard Posner's 'Economic Analysis of Law' of 1973), John Rawls' 'Theory of Justice' (1971), Robert Nozick's 'Anarchy, State and Utopia' (1974), and Ronald Dworkin's 'Taking Rights Seriously' (1977) or 'Law's Empire' (1986). Neither was

political criticism of law restricted to academia, as the case of Cappy Silver shows. He once characterized the CLS as a "lonely hearts club for left-wing law professors", while being himself a "paralegal welfare advocate and antinuclear organizer who decided not to become a lawyer" (Schlegel 1984, 411). This anecdotal comment depicts the specific situation in which the concern for and the critiques of law went beyond the border of academic disciplines. In fact, the connection of different forms of art with law marks an important aspect of a postmodern approach to law, that aims to envisage law in new ways, using another language that allows to reconnect legal theory with life, and that permits to leave behind old hierarchies, including the hierarchy that put law and academics above art.[37]

After the CLS movement had reached its highpoint in the 1980's, its force as a distinct movement diminished. However, its critical power continued to be present in legal academy. Tamanaha speaks, in the US-American context, for example, of a contemporaneous "steady drumbeat of skeptical realism" directed especially to the Supreme Court "from both the left and the right" (Tamanaha 2009, 784). In fact, that critical force seems to have changed places with mainstream conceptions on law in the United States of America. Thus, Tamanaha underlines as a main difference between present and past criticisms, that "the skeptical emphasis appears to have become a normalized aspect of discourse about judging" (Idem) — a tendency that he regards, in turn, with equal skepticism.

The innovative power of approaches of scholars of CLS is not restricted to their contestatory gesture nor to their preferred objects of discussion. In fact, as Schlegel states, "the CLS movement may be less important as an event in the history of legal thought, than as an event in the history of legal education (Schlegel 1984, 403). As he puts it, "the central job of legal education has been to justify existing rules of law to the nascent members of the legal elite. The task is an important one; no society wants its priests wandering around doing their magic while doubting the one true faith" (Idem referring to Al Katz).

Beyond legal education, though, from a perspective of the development of academic institutions, it is remarkable that CLS emerged as part of a new tendency since the 1960's and 1970's, that tried to access research beyond the limits of traditional 'disciplines'. Thus, Cultural Studies, Gender Studies and Critical Legal Studies emerged emphasizing, through the form of their academic endeavor, the defiant attitude of their critiques. Negation, critique

37 As we will see later with more detail, this search was oriented not only to develop new forms of law but also, in a broader sense, to develop new ways to think about social relations. It is not just a coincidence that the progressive rock band in which Silver was the singer, had the name 'Balance of Power' (Schlegel 1984, 411).

and opposition are common elements of these academic movements. CLS, as the other area studies, emphasized its interdisciplinary perspective, connecting law with other fields of study like literary criticism, psychoanalysis, aesthetics, post-colonialism, feminist theory and queer theory, amongst others. Its basic claim, namely that "LAW IS POLITICS" (Schlegel 1984, 411, emphasis in the original), is as well an echo in resonance with the voices that conformed other contemporaneous perspectives in academia as well as outside of it.

### 2. *Critique and Legal-Political Activism in Europe*

While the movement of CLS became renowned in the United States and beyond, it is important to emphasize that this movement of criticism was not by far restricted to US-American and British academy. Also in continental Europe and other parts of the globe, the criticism of predominating positivism put law more and more in relation with matters of state ideology and power.[38] Although this review cannot encompass neither the width nor the depth of critical movements in law, it aims to provide a certain sensibility for the variety of approaches, their contexts of emergence, their connections, and, most importantly, their relationship with postmodernity as a reactive gesture in front of an universalizing foundation of law.

As with the movement of Critical Legal Studies in the United States of America, in Europe, equally, it was in the 1970's that critical movements in the legal field found a certain consolidation. In 1978, for example, the French *Association Critique du Droit*[39] (Law Critical Association), created that same year, started publishing '*Procès. Cahiers d'analyse politique et juridique*' ('Trial. Journal of political and legal analysis') (Kaluszynski 2010, 1).[40] A year before that, in 1977, a collection was created with an equal critical perspective: 'Critique du droit'.[41] Several conditions fostered this turn of perspective, mainly, the strong presence of the Althusserian-Marxist school in the 1960's, the re-discovery of Gramsci's work, the appearance of the first works of Foucault, the French May in 1968, the process of decolonialization and the organization of critical seminars and epistemological reflections in law faculties (Botelho

38 For an interesting account on the transfer of Critical Legal Studies into Europe, particularly through the field of Comparative Law, see Mattei 2001.

39 For an account on the development of the critical movement in France with special attention to one of its main proponents, Michel Miaille, see Kaluszynski 2009.

40 The journal was published at the *Centre d'épistémologie juridique et politique de l'Université de Lyon II* (Manaï 1979, 290).

41 The collection was published by the University Press of Grenoble and Francoise Maspéro (Manaï 1979, 290). For a good resume of the development of critical theory on law, see Kaluszynski 2010.

Junqueira 1993, 33; Wolkmer 2002, 36 f.). On the side of the praxis of law, so called *Boutiques de Droit*, i.e. civil associations that offered legal services and conflict resolution outside of the state apparatus, emerged, participating in the increasing process of state deregulation and social regulation (Botelho Junqueira 1993, 34). Equally, the appearance of associations of judges and lawyers similar in their form to workers unions, shaped the relationship of law and society anew. On the side of the academic work with law, these changes encouraged the formation of a movement of critical research by jurists from Lyon (*Centre d'Epistemologie Juridique et Politique – CEJEP*), Montpellier (*Centre d'Etudes e de Recherches sur la Théorie de l'Etat – CERTE*), Saint-Etienne (*Centre de Recerches Critiques sur le Droit – CERCRID*) and Grenoble (Wolkmer 2002, 36 f.). With a clear socialist perspective[42], in its first period, the critical movement in France argued against a neutral perspective on law as a way to reinforce the domination of capitalist ways of production. Equally, it criticized the arbitrary distinctions between private and public law, legal science and political science and, lastly, between individual and collective (Idem, 37 f.). The criticism that it offered, argued Michel Miaille (*1941), who was a figure at the epicenter of the movement, went beyond idealistic 'criticism', but through a perspective of historical materialism, gave social and political content to the critical movement (Botelho Junqueira 1993, 36 cit. Miaille). The French association, source of inspiration for many critics in Europe, changed from a rather general perspective on law with a Marxist perspective towards analysis of concrete modalities of social production of legal norms and their relationship with institutions and subjects (Wolkmer 2002, 39 cit. Jeammaud). After the first critical impetus, especially after the victory of the political left in 1981, a transition took place and it became a priority to underline the opposition against an authoritarian state, even if this meant, in the words of Antoine Jeammaud, "to take position in favor of the bourgeois Etat de Droit" (Botelho Junqueira 1993, 37 cit. Jeammaud).

The changes and fragmentation of the critical jurists, together with the political developments in France, led finally to the silent vanishing of the movement as such (Wolkmer 2002, 40; Kaluszynski 2009, 7). Nevertheless, it remains clear that it exerted a strong influence in the academic field. In France, for example, the CERCRID (*Centre de recherches critiques sur le droit*) (Mission de recherche Droit et Justice 2008), founded by Antoine Jeammaud in the University Jean Monnet (Saint-Etienne) in 1982 remains an important space,

42 For an example, see the expression in its manifest, published in the collection '*Critique du droit*': "Through a privileged use of historical and dialectical materialism, the collection will seek to contribute to the understanding of legal phenomena from the perspective of a transition to new social relations, to socialism" (cit. in Manaï 1979, 290).

appreciated highly for its scientific performance (Aeres 2010). Equally, at an international level, the French impulse had great repercussion, for example in Belgium, the Netherlands, Germany, Italy and Great Britain, as well as in Mexico and Brazil. Some texts produced by the Association were translated into Spanish, Portuguese, Italian and Greek by journals with a similar perspective to '*Procès*', like the Mexican '*Crítica*' and the Brazilian '*Contradogmàticas*' (Kaluszynski 2009, 8).

Regarding francophone literature, it is important to mention the Belgian engagement in legal criticism through the *Séminaire Interdisciplinaire d'Études Juridiques (SIEJ)* (Interdisciplinary Seminar for Legal Studies). In this context, François Ost (*1952) underlined the importance of Legal Ethnology and Comparative Law to demonstrate the plurality of legal forms, turning impossible to talk about a sole essence of law, and desacralized law as the only way to regulate society. Interpretation, the plurality of approaches and the dialogue of disciplines appear again at the center of discussion as well as the struggle with a seemingly generally valid reason and its reconceptualization as a myth from an epistemological-psychoanalytical meta-discourse[43].

The French socio-political agitation had found thus its expression in law, and turned into a main reference for developments in other countries. In this line, the Swiss jurist Dominique Manaï-Wehrli weened in 1979 that the critique on the institutions and disciplines in which lawyers and political scientists exercised teaching and research, as aimed by the French journal '*Procès*', would allow to debunk the institutional machinery from inside (Manaï 1979, 290). The militant perspective of the French critics gave her hope in front of the legal landscape she confronted, where she noticed with surprise "the scarcity and poverty of Marxist thinking about the legal phenomenon" (Idem, 279). In this vein, she underlined that the existence of "some works on Soviet law" were not sufficient, and remarked further that "Marxist Western perceptions of the legal phenomenon [were] embryonic and recent" (Idem). Thus, she encouraged an engagement with law from a socialist perspective, referring to the French development as well as to Ernst Bloch's (1885-1977) writings (Idem, 290 ff.).

The critical efforts in Switzerland allowed to develop an association concerned with the "democratization of the law" in collaboration with political organizations and trade unions. This claim was received with critical concerns and warnings regarding an supposed threat of anarchy and dictatorship linked with this 'democratization' (Albrecht 2003). This was the association '*Juristes Démocrates de Suisse*' *(JDS)*, founded the 11th of November 1978 as a

43 See, for example 'Droit, mythe et raison' ('Law, Myth and Reason') published in 1980 with Jacques Lenoble.

union of associations in the regions of Basel, Bern, Geneva, Waadt and Zurich as an answer to multiple disciplinary procedures started against lawyers (Schweizerisches Sozialarchiv 2010).[44] Several participants of this association are active in the collective of lawyers, that functions since 1975 in Zurich-Aussersihl[45], providing immediate accessible support in legal questions. Thus, this movement is also inscribed in the tradition of Legal Services as many of the critical voices who claimed in general for a need to combine a theoretical position with an emancipatory praxis.

Also in Germany, referents like Ernst Bloch and Antonio Gramsci were equally determinant for the development of critical currents in legal thought. Thus, during the 1970's, Wolf Paul, influenced partly by Jürgen Habermas, developed Marxist theory into a critical theory of law (Paul 1974), concentrating later on questions around the formation of jurists in Germany as well as in other countries.[46] Interestingly, his focus developed later towards topics of environmental law and indigenous rights, maintaining a critical position in front of law and a certain focus on the role of the judiciary while getting more and more involved with social developments in Latin America, especially in Brazil. He engaged equally with innovative proposals in the Latin American legal philosophy, like the 'Tridimensional Theory of Law' ('*Teoria Tridimensional do Direito*', 1968) proposed by the Brazilian legal philosopher Miguele Reale (1910-2006). It is not a coincidence that Paul was a researcher of legal philosophy and criminal law at the university of Frankfurt, where once the Critical Theory in Germany found an institutional form through the Institute for Social Research.

Of course, not only legal philosophers looked for new perspectives on law. Besides the internationally renowned Jürgen Habermas, also other philosophers like Dietrich Böhler (*1942), presented relevant critical approaches inviting for a new reflection on the position of law in contemporary society. Most interestingly for this research, however, is the space occupied by jurists and law students linked with the social movements of the 1960's and 1970's. Symptomatically, it was the year of 1968 when the journal '*Kritische Justiz*' ('Critical Justice') was founded. The circumstances are remarkable: it was founded in the *Akademie der Arbeit*[47] (Academy of Labor) in Frankfurt Main following the impulse of Jan Gehlsen, a

44 The association publishes its own journal since 1976. Tellingly, until 1982 it was published by the local group in Basel as '*Volk+Recht*' (People+Law), and since 1983 JDS is co-publisher of the national journal '*Plädoyer*' ('Pleading'). These changes reflect a transformation of context and attitude of the journal editors, showing a movement from a local publication in the name of 'the people's law' and fighting for popular justice to a more dialogical plea.

45 Since 1981 the collective is an association and uses the name "*Rechtsauskunft Anwaltskollektiv*" (Collective of Lawyers Legal Advice).

46 For a complete list of his work until 2003, see Paul 2007.

47 The Academy for Labor was founded on the 3rd of March 1921 at the University of Frankfurt. As its official web page declares: "The students, who were mostly workers, should receive here […] a special high school

recently graduated lawyer, Fritz Bauer (1903-1968), a renowned public prosecutor whose engagement was decisive for the Frankfurt Ausschwitz trials, and Hans G. Joachim, the president of the State Labour Court. From the perspective of some of the editors of '*Kritische Justiz*', this was the response in front of the situation of legal academy that rejected critical approaches and the engagement with the crimes during the national-socialist regime (Buckel et al. 2008, 235). More specifically, many of the positions at university were occupied by professors with a national-socialist perspective and democratic-socialistic oriented scientists were relegated to the periphery of the law academy (Idem). But the moment of crisis went beyond law faculties. The whole social model was undergoing an important transformation, as Buckel and her colleagues affirm: Not only the socio-economic phase of the *Wirtschaftswunder* (economic miracle) was starting to decline, but with it also "the bureaucratic welfare state, the male-breadwinner-model[48] and not least: the bourgeois nuclear family, the *ordinarius*-university" amongst other socio-cultural bases (Idem).

In this situation of radical change, groups of extraparliamentary opposition like the *Kampfgruppe Jura* (Fighting Group Law) and *Republikanische Hilfe* (Republican Help) as well as collectives of lawyers developed. In turn, the '*Kritische Justiz*' aimed, according to its foundational document, at the "uncovering of the relationship between law and society, its political, social and socio-political implications" (cit. in Idem, 236), and connected Marxist theory with an orientation to democracy and the rule of law. In the 1980's accumulated concerns on feminist perspectives on law confluenced to found the law journal '*Streit*' ('Struggle') and also further topics were put to the front of critical legal approaches by the environmentalist and nuclear disarmament movement.

Interestingly, it was in the end of 1980's, the time when also Derrida was presenting his speech at the Cardozo Law School, that '*Kritische Justiz*' suffered an important inner break, which reflects a more general turn and is related partly to the US-American development of the Critical Legal Studies. While some adopted a "deconstructive aversion in front of the tradition of rational law", others opposed this position arguing the danger of fascism embedded in this attitude (Idem, 238). However, other initiatives started, like the *Bundesarbeitskreis kritischer Juragruppen (BAKJ)* (Federal Working Circle of Critical

education. This educational experience with focus in social policies, economy and Labor Law should strengthen them in order to exercise the manifold democratic participative rights in State, society and industry in the interest of the workers" (Europäische Akademie der Arbeit 2012). Since 1951, the academy is organized as a foundation of the State of Hessen and the Confederation of German Trade Unions and cofinanced by the city of Frankfurt. In 2009 its name was changed into *Europäische Akademie der Arbeit in der Universität Frankfurt am Main* (European Academy of Labor in the University of Frankfurt Main) (Idem).

48 English in the original.

Groups of Jurists), which, according to its own description, works since 1989 through legal-political congresses and the journal '*Forum Recht*' ('Forum Law'), for an "antifascist, basis-democratic and emancipatory society" and against any form of discrimination (BAKJ 2012). Equally, it was in 1989 when the first number of the Austrian critical journal '*Juridikum*' appeared (Oberndorfer 2008, 244).

Slowly, the critical research in law lost its aggressivity, was incorporated into broader legal discourse and by the 1990's, the '*Kritische Justiz*' was reconsidered as socially acceptable in the academic environment and quotable in legal research (Oellers 1998). This process is read by some critical legal jurists in terms of the Gramscian *transformismo*, in other words, as the domestication of an anti-hegemonic project by incorporating it into hegemonic discourse (Buckel et al. 2008, 240). Interestingly, this change, and the consequent loss of force of the critical project, reminds of the loss experienced by natural law with the positivization of some of the main principles that it postulated. In both cases, it is possible to say, in general terms, that the loss of identity went hand in hand with the loss of a clear opponent.

Despite all these changes and many others, including important renovations in the publication background, '*Kritische Justiz*', as many other contributions, still calls for a critical attitude in front of mainstream law. Interestingly, Buckel and her colleagues refer to the process of internationalization and more explicitly to the Zapatista's movement in South Mexico as a marking point for the renewal of its critical power (Idem, 241). Following this example, it is remarkable the conception of critique that the editors of the journal, in occasion of the 40th anniversary of the publication, underline as a perspective for future development of critical studies: "there is always a chance for emancipatory legal science, when it does not only criticize the judicial system, but also binds its critique to social forms of resistance" (Idem, 241 f.). Equally, the authors recall a Gramscian rhetoric of critique to the hegemony developed by organic intellectuals in constant process of self-reflection (Idem, 242). Thus, critical research in this context is envisaged as a counter-hegemonic endeavor and thus perceived predominantly as an attitude of opposition, resistance and negation.

The pursuit for emancipation was equally guiding for the Italian critical movement, which developed in a context of strong social revolts and terrorism, and was formalized by a group of judges united under the name of *Magistratura Democratica* (Democratic Bench) in 1964.[49]

49 *Magistratura Democratica* was founded the 4th of July of 1964 in Bologna by 27 judges (Pepino 2002, 1). The group *Magistratura Democratica* has developed greatly since the 1960's. Today it counts with circa 900 adherents (Magistratura Democratica 2007a). It forms part of the National Association of Judges

*Magistratura Democratica* is not only a strong critical association with socio-political relevance in Italy and abroad until today, but it builds also a common referent of critical jurists in diverse countries in Latin America, reflecting the internationally pervasive character of critical legal currents. An overview of its goals will suffice to give an idea about the main aspects of the Italian movement.[50] These goals, as written in the official homepage of *Magistratura Democratica*, underline the importance of the development of a *judicial culture*, on the respect for the principles of the democratic *Statto de diritto* (*Etát de droit*, rule of law) (no.1), the support of European integration as concerned with *social justice* (no.3), the defense of the *independence* of the judicial power from other powers and *particular interests* (no. 4), and the democratization of the bench, *replacing the hierarchical* principle by the democratic one (no. 6). Most importantly for the question of this research, *Magistratura Democratica* declares as its goal also the "protection of the *differences* amongst human beings as well as the protection of the rights of *minorities*, especially the rights of *immigrants* and the *less well off*, in a perspective of social *emancipation of the weakest*" (Magistratura Democratica 2007b; emphasis added).

The emphases that I added allow to perceive that if, on the one hand, this movement was and is embedded in a leftist rhetoric of emancipation of specific portions of society, on the other hand, it holds strongly to the idea of a state with a certain legitimacy as long as it responds to social justice. Equally interesting is that the first of these goals makes a point of a 'judicial culture', referring to a certain way to do things, to understand the position of the judge and the law. This perspective is, thus, in tune with the concerns mentioned above regarding the possibility to choose a culture, to develop a certain culture. 'Judicial culture' implies at the same time a way to perceive, a way to interpret the world, and refers thus to the problem and chances of judicial hermeneutics as Horácio Wanderlei Rodrigues will relate later for the Brazilian critics (Wanderlei Rodrigues cit. in Guanabara 1996, 408). In this sense,

(Associazione nazionale magistrati – ANM – and, at an European level, it participates in the association *Magistrats européens pour la démocratie et les libertés* (Medel). Nevertheless, it seems to maintain a certain autonomy from these broader associations. In fact, *Magistratura Democratica* produces its own publications like '*Il Notiziario*' ('The Bulletin'), '*Questione Giustizia*' ('Justice Matters') and '*Diritto, immigrazione e cittadinanza*' ('Law, Immigration and Citizenship' together with ASGI – *Associazione per gli Studi Giuridici sull'Immigrazione*). For a detailed historical perspective from the inside of the movement, see Pepino 2002.

50 Interestingly, despite its claim of autonomy, regarding its goals, *Magistratura Democratica* refers to the statute of the European association Medel of 1985. However, the quote of art. 3 of the Statute in general and of the specific goals in particular as cited in the official homepage of *Magistratura Democratica* is wrong. It refers, in fact, to art. 2, which has actually a very different formulation. In this sense, it is possible to underline the claim of *Magistratura Democratica* of its autonomy, understanding these principles as its own. In this paragraph, my quotation refers exclusively to the Italian version 'quoted' in the official homepage of *Magistratura Democratica*. It is important to remark that, despite the changes on the political orientation of the movement since the 1960's, some aspects have remained equally strong.

it reaffirms the power of interpretation of the judge and its freedom to interpret in a certain frame. The questions of freedom and interpretation are, as I showed above, central to postmodern approaches, and they will remain at the core of critical perspectives on law.

According to its goals, *Magistratura Democratica* pursues the ideal of a democracy, where the differences are protected, but where, at the same time, particular interests do not subordinate the independence of the judge.[51] If the *Statto de Diritto* shows thus a certain dynamic in interaction with social plurality, at the same time, it has to be strong enough to work as a protector of rights and to maintain, in the field of jurisprudence its independence from the exercise of power from the side of some of the particular positions present in society. The movement of *Magistratura Democratica* developed as a movement *against* the prevailing repression perpetrated by the executive power and availed by the lacking judicial control, which was supported partially on the aura of the judge and the dogmas of neutrality and apoliticity (Pepino 2002, 9 f.). In other words, also this voice claims that law is politics. Neutrality and apoliticity are the elements that the *Magistratura Democratica* pursued to oppose, first in a move for democratization and then with an emphasis on demystification (Idem, 12 ff.).[52] Finally, its activity was oriented to use the existent state legal and judicial system in a way beyond hierarchical oppression; its proposal was thus the 'alternative use of law'. In the background of this development is, of course, also an academic movement. Its founding stone was set by the work of Pietro Barcellona '*L'uso alternativo del diritto*' (The Alternative Use of Law) in 1973, which was a reference to many other movements.

We are going to encounter similar topics and tensions in currents like '*Direito Alternativo*' ('Alternative Law') and '*Jueces para la Democracia*' ('Judges for Democracy')[53], which developed in contexts of political transition in Brazil and Spain respectively. As Wolkmer, with a leftist spin, remarks, these critical movements in Italy, Brazil and Spain do not propose "an alternative or substitute paradigm for the positivist legal science, but only the different application of the predominant dogmatic, exploring the contradictions and crises of the same system and searching for more democratic ways that overcome the bourgeois order"

51 Regarding the struggle for 'judicial independence', it is interesting to remember, that *Magistratura Democratica*, after its third congress in 1977 in Rimini, when the excessive politicization of judicial decisions was criticized, turned more to the current of *garantismo giurídico*, as developed mainly by Luigi Ferrajoli (*1940), who was himself connected to *Magistratura Democratica* (Souza 1998, 233 ff.). Regarding the further changes in the perspective of the Italian movement, Wolkmer asserts that "in its more ideologically orthodox phase, the movement of Alternative Use of Law had repercussion principally in the areas of Civil Procedural Law; while, later, it incurred more frequently in Criminal Law and criminology, advancing in direction of pluralistic, analytical and neo-Marxist variants" (Wolkmer 2002, 45).

52 To the different tendencies within the Italian movement, see also Sousa Santos 1989.

53 The Spanish association was founded officially in 1983 and the first number of its homologous journal was published in 1987. As an example of the academic production of this critical group, see Andréz Ibáñez 1978.

(Wolkmer 2002, 42).[54] In this context, several Spanish authors developed critical perspectives on law in the time after the death of Franco in 1975. Many of them combined a social-democratic or Marxist perspective with methodological principles of the analytical philosophy, that, due to its claim of neutral formalism, would allow to justify a disempowered leftist discourse (Idem, 48 f.). The elaboration of Gramsci's theories as well as questions of democratization and social pluralism were in the center of discussion. Importantly, some of the researchers of critical legal thought were directly connected with the development of critical thought in Latin America. It is worth noticing for example, the participation of Joaquín Herrera Flores in the *II Encontro Internacional de Direito Alternativo* (2nd International Meeting of Alternative Law) in Florianópolis, Brazil (1993), which in turn was published in the journal *Jueces para la Democracia* (Herrera Flores 1993). Equally, his former student, David Sánchez Rubio[55] based his proposal of an alternative legality on the teachings of the Latin American liberation philosophy[56].

If an increasing interest for Latin American political and academic developments can be noticed in the diverse critical approaches to law in the 1980's and 1990's, it is the work of the Portuguese jurist and law sociologist Boaventura de Sousa Santos (*1940), professor at the University of Coimbra graduated from Yale and distinguished professor of the Institute for Legal Studies of the University of Wisconsin-Madison, which became most renowned for his fieldwork in Brazil. In his prolific work, Sousa Santos criticizes current perspectives on law as dependent of a capitalist and state-bound conception that results in oppression of society. Thus, he underlines the need for alternative forms of justice that allow the "creation of processes, instances and institutions relatively decentralized, informal and deprofessionalized, which substitute or complement ,[...] the traditional administration of justice and turns it, in general, quicker, cheaper and more accessible" (Sousa Santos cit. in Wolkmer 2002, 61). Throughout his work, Sousa Santos underlines, like many of the contemporary critics, the need for an emancipatory and liberating change in the treatment of law, invoking a new

54 In fact, 'alternativists' in this line have always emphasized that it is not their wish to "break the legal harmony, which is considered as nonexistent, neither is the intention to drag a judge in the political game (…) because the truth is that neither the limits between Politics and Law are so clear, nor is it possible that the magistrate stops being [...] judge-citizen, with all that it implies" (Andréz Ibáñez cit. in Wolkmer 2002, 44).

55 See also his doctoral thesis of 1994: '*Proyección Jurídica de la Filosofía Latinoamericana de la Liberación. Aproximación Concreta a la Obra de Leopoldo Zea y Enrique Dussel*' ('Legal Projection of the Latin American Liberation Philosophy. A concrete approximation to the *oeuvre* of Leopoldo Zea and Enrique Dussel'), published as '*Filosofía, Derecho y Liberación en América Latina*' ('Philosophy, Law and Liberation in Latin America') in 1999.

56 The Latin American Liberation Philosophy is a contemporary philosophical current related to the Liberation Theology. Its main exponent is Enrique Dussel (*1934), who wrote '*Filosofía de la Liberación*' ('Philosophy of Liberation') in 1975.

paradigm emerging in post-modernity. The connections with other thinkers of the time are quite obvious, since Sousa Santos not only visited the University of Wisconsin-Madison several times (1982 onwards), where the Critical Legal Studies held their foundational meeting, but he also participated in the CIDOC ('*Centro Internacional de Documentación*', International Documentation Center) founded and directed by Ivan Illich (1926 – 2002) in Cuernavaca, Mexico (1974) and in post-doctoral training directed by Immanuel Wallerstein (*1930) at the Fernand Braudel Center in Binghamton (1994).[57] Equally, through his writings, his association with a postmodern critique of law, is patent. Take, for example, his book '*O Discurso e o Poder – Ensaio sobre a Sociologia da Retórica Jurídica*' ('Discourse and Power – Essay on the Sociology of the Legal Rhetoric', 1988), where he analyzes the structure of law as the articulation of the components of rhetoric, bureaucracy and violence.

However, from the beginning of his academic career with the research of alternative normativities in a slum in Rio de Janeiro in the beginning of the 1970's (Sousa Santos 1977), his focus of attention has not been only the critique of a certain approach to law, the violence it implies at a socio-political level or the vision of a better or alternative law, but, most importantly, all of these aspects can be connected through the quest for pluralistic approaches to law. This is the case not only for Sousa Santos' research but it is equally a mark of many critical approaches. The question on pluralism in law is central for the postmodern critique, but it is equally at the core of the creative development of new approaches. I will highlight the importance of the question for pluralism in legal praxis in chapter C, focusing on the meaning that this change of paradigm had for the legal development in Latin America. Nevertheless, before taking that step, it is mandatory to review the spectrum of critical approaches in this region, what will allow me to situate the concern for alternativity and pluralism in a wider context of criticisms against a modern and dogmatic approach to law.

### *3. Critical Thought in Latin America*

Very often the Latin American developments are portrayed as derivations of processes in Europe and the United States. Nevertheless, although it is important to underline the influence of Critical Legal Studies, *Uso Alternativo de Diritto* and the *Association Critique du Droit* in the critical currents in Latin America, especially in Argentina, Mexico and Brazil, it is equally decisive to see that the criticism in this region had an own context. Furthermore, the new

57 Ivan Illich and Immanuel Wallerstein are, as we will see in the next chapter, key thinkers of postmodern reflections on development.

perspectives were also built upon own stories and had thus their own struggles, which were, to a certain extent, independent of other currents. In turn, the developments in this region inspired and influenced academic reflection in other parts of the world, as I have already mentioned, for example regarding the theoretic currents of 'Tridimensional Theory of Law' of Miguele Reale or the Liberation Philosophy as well as political struggles like the Zapatista's movement.

One clear example of the early development of critical thought in Latin America is for example the contribution of the Argentinean Carlos Cossio (1903-1987) in the 1940's who developed his egological theory of law in the aftermath of the university reform of 1918 ('*Teoría egológica del derecho y el concepto jurídico de libertad*', 'Egological Theory of Law and the Legal Concept of Freedom', 1944) Combining some aspects of the thoughts of Kant, Husserl, Heidegger, Roscoe Pound amongst others, and in response to the then popular theory of Hans Kelsen, he developed a concept of law as the study of conduct in intersubjective interference. This was thus a search to transcend the Kelsenian formalism, according which law was reduced to the study of the (positive) norm. Cossio connected law thus explicitly with a certain axiology, this is with certain guiding principles or values that needed to be put in balance through the exercise of law. Remarkably, his concept of justice, the guiding principle for the whole axiology changed with the passage of time, transforming from "creations of equalities in freedom" to "a better social understanding" in the end of his work (Parma 2012, Parma 2009). The critical vein pervades the whole enterprise of Cossio. In fact, he is not satisfied with a mere naturalist or a positivist approach and develops this perspective in order to formulate critiques of legal practice. It is no coincidence, thus, that Cossio's most renown work was entitled '*Ideología y Derecho*' (Ideology and Law, 1943). His work, as typical for the critical currents presented until now, is directed to the judge in an attempt to change the praxis of law. However, naturally, his position of critique was very different from the approach of Critical Legal Studies and its predecessors of Legal Realism and is more related to a relationalistic approach that goes beyond mere opposition to an established order. Interestingly, regarding 'order', which is a value in his axiology, Cossio remarks that this value has two counter-values, namely disorder and ritualism (Parma 2012). Thus, the idea of order here is distant from an idea of oppression, but rather incarnates the search for balance. This search for balance permits to relate Cossio's work rather to newer approaches of conflict transformation that envisage a relational perspective oriented to re-create balance in inter-subjective interaction (Lederach 1995), than to the movement of reactive criticism described above.

Another interesting development in the Latin American region was marked by the critiques of the philosophical current of Latin American thought, that addressed questions of socio-cultural identity and with them also the validity of an imported social order hereditary of the colonial rule. These critiques do not derive in a linear manner, as could be assumed for other currents, from European or US-American perspectives. While these discussions will become more relevant in the next chapters, mentioning this perspective now allows to put the Latin American criticisms in a context of their own, that is often neglected from a 'Western'-centric approach to the development of law and legal theory.

In any case, it is important to remark that these critiques and any other critique regarding the status of law, particularly state law, were, in the political context of Latin America, extremely difficult to pose in the 20th century, since several dictatorships affected most countries of the region. The development of critical voices had to wait until the re-opening of political space in the 1980's to unfold openly its whole strength. During this period, many currents of critical thought took, during this period, the shape of political resistance in the margins of law, meaning, on the one hand, that they operated in the limit of the legally permitted and, on the other hand, that they worked at the limit of what can be considered the realm of legal research, turning for example towards artistic work. In many cases, this was a subliminal and indirect critique, or, in other words, a critique that used another language than law and academic argumentation like the language of music and other arts. This is an approach that has been continued until present as I will show here and in chapter C.

The connection of law with society on which was made a clear stress in the movements presented above, was, of course, not totally new in the Latin American region. In fact, Rodríguez and García Villegas underline the fact that "law in Latin America has always been seen as an important social and political phenomenon" (García Villegas/Rodríguez). Probably, this aspect of a Latin American perspective on law is the result of the colonial environment in which law, understood as the law of one of the first European modern states, was introduced in the region. The question of legitimated domination determined the socio-political relevance of law ever since the question of ruling on the Americas was posed. As we have seen, this was in fact one important aspect of the argument between Las Casas and Sepúlveda. For the indigenous groups first and for the '*criollos*' or settlers later, the question of 'who ruled' made all the difference. Reflection on law as a socio-political issue has been thus required since the very entrance of Latin America into the European ruling sphere and political consciousness.

Moreover, from the beginning of colonial rule, a new category of law was founded in the portions of Latin America governed from Spain, namely the *Derecho Indiano*[58] which was a response to the obvious challenges posed by the intersection between social reality and the Spanish rule in the New Provinces. The need to reflect on the connection between social reality and law was, thus, prevalent in the region, and, most importantly, was part of the duty of any person linked to law in the time.

With ups and downs, the concern for the complex law/society remained alive during the building of the Latin American Nation-States (Botelho Junqueira 1993, 17 ff.). In this context, taking the beginning of the life of Latin American states in the 19th century as their starting point, Rodríguez and García Villegas identify three main currents in the reflections on law from a socio-political perspective. Firstly, they point at the classical institutionalist view on law, according which law, and thus the state, has to be strong to compensate social weakness. Secondly, they identify visions of Marxist inspiration according to which law has to be strong in order to compensate the weakness of the political system. Finally, they speak of a perspective on law as an emancipatory tool for social movements and minorities. As the authors argue, studies of alternative law and legal pluralism appeared in Latin America during the 1970's and 1980's following the second perspective mentioned and opposing the first one. Later, in the 1990's, vast literature with an emancipatory perspective, i.e. the third strain identified, has been produced, developing the earlier criticisms further.

As Botelho Junqueira, a Brazilian legal sociologist shows, institutional changes happened in interaction with the development of critical theories on law. Taking the example of Brazil, she argues that, more specifically, the development of critical theories of law is directly linked to the development of the academic field of legal sociology[59] or sociology of law.[60] Thus, it was in the 1970's and 1980's when sociology of law started its career in the

58 For a detailed account on '*Derecho Indiano*', see Bonifaz 1961.

59 The same is true for other states as well as for the development of international associations, like the Research Committee on Sociology of Law of the International Sociological Association, the International Institute for the Sociology of Law (Oñati, Spain) (created in 1989) and the Law & Society Association, created in 1964, which institutionalized the movement of Law & Society. The interest for social reform drew foundations like the Russell Sage Foundation to support this kind of initiatives following an interest for public policies.

60 Some scholars explicitly draw a line between the concepts of 'legal sociology' and 'sociology of law', suggesting that the perspective of legal sociology, different than for sociology of law, is oriented to investigate law as defined in legal academy. Sociology *of* law would allow, on the contrary, to deal with law as redefined by social sciences through the theoretical and epistemological schemes of thought developed by them independently of the discursive field of law (Botelho Junqueira 1993, 4). Since this particular division is not made necessarily in the whole academic endeavors dealing with law and social sciences, and despite the importance of this conceptual division for a study that concentrates on the institutional link between these fields, like Botelho Junqueira's work, in this text, I use both terms as synonyms, pointing out the different emphases of the relevant approaches.

academic curricula of the law faculties of the country[61], hand in hand with "the principal movements of *deconstruction of the traditional legal paradigms* that influenced the professionals [...] compromised presently with the 'idea law and society'" (Botelho Junqueira 1993, 29; emphasis added). Importantly, one of the main impulses that Botelho Junqueira identifies for this 'deconstruction' in Brazil relies in the political context of the authoritarian regime of the 1960's and 1970's, where the questioning of a legal order experienced as illegitimate served as a uniting motor for diverse approaches. During the subsequent process of political democratization, this united force impulsed multiple developments in the law faculties. Key actors in this political transformation were the social movements which gained force in the end of the 1970's, multiplying their social impact through the occupation of land in urban and rural areas, and making explicit a new capacity of social vindication and the "urgency to widen the defense mechanisms of collective interests through a profound questioning of the liberal *legal culture*" of Brazil (Idem, emphasis added).[62] The concern for victims of political persecution was thus reoriented to a wider range of marginalized groups. Equally, through the process of re-democratization, the study of constitutional law was revitalized as a law with eminently political character, as guarantor of citizenship (Idem, 26 f.), and the critiques to law from a perspective of human rights gained central importance. In the same line, popular legal counseling turned into a priority in the context of critical approaches to law in the region (Wolkmer 2002, 60). While a sentiment of collective citizenship arose in the 1980's, also the pressure for recognition and protection of collective rights increased, and thus, the figure of the popular lawyer compromised with social movements turned more and more important, both as a consultant and as a key participant in the "conscientization of the subalternalized sectors" (Idem). In this role of educators, the lawyers mirrored at the national social level the structure of development aid, important at that time at an international level, as we will see shortly.

61 As Botelho Junqueira remarks, this development was not welcomed by everybody, since incorporating legal sociology in the curriculum of law would make it even more a domain of lawyers. In the same vein, Botelho Junqueira criticizes that Brazilian sociology of law was then and even later in the 1990's rather a concern of jurists who appropriated some research techniques of social sciences than a field of intellectual production of sociologists. In her view, the scholars involved in these heterogeneous critical movements, adopted rather a philosophical than a strictly sociological approach, since the main representatives of these critiques on law were not formed in social sciences (Botelho Junqueira 1993, 49). Sociology of law remained thus a discipline with little recognition by lawyers and sociologists (Idem). In this concern, Botelho Junqueira depicts the Brazilian institutional development as different from the one occurred in the United States of America, where Legal Realism "opened the closed world of law to the social sciences" (Idem, 11, cit. Trubek).

62 In this sense, see for example the title of Joaquim Falcão's work: '*Cultura jurídica e democracia: a favor da democratização do Judiciário*' (Legal Culture and Democracy: In Favor of the Democratization of the Judiciary) of 1981.

A central expression of this link between legal criticism and re-democratization in Brazil, which exemplifies a variety of processes of politicization of law in the whole region, is the current of *Direito Alternativo* (Alternative Law), more accurately described as 'Alternative Use of Law'. While the movement drew its main strength from judicial praxis, the concept of 'alternative law' appeared in Brazilian legal literature first in the book '*Direito Alternativo do Trabalho*' ('Alternative Labor Law') of Carlos Arturo Paulon in 1984, where the author underlined the critical perspective of his work and called for the utilization of the contradictions of the state legal order at the service of the workers (Oliveira 2003, 211).

Naturally, many of the aspects of Brazilian Alternative Law were nurtured by other critical currents. In this sense, Hermann Kantorowicz' works on 'Free Law' ('*Der Kampf um die Rechtswissenschaft*' – 'The Fight around Legal Science' – under the pseudonym Gnaeus Flavius, 1906, and 'The Definition of Law', 1958) were an important inspiration and, clearly, the influence of the Italian movement *Magistratura Democratica*, was determinant. Equally, the French critical movement had particular influence in Brazil, and Latin America in general, through the work of Michel Miaille, who argued that the obstacles in the legal world were derived from ideological ties (Botelho Junqueira 1993, 35). In this context, both iusnaturalism and iuspositivism were perceived as ideological constructs that should be replaced (Idem, 29). Thus, the presentation of Miaille in 1981 in the VI Meeting of ALMED at Rio de Janeiro is a marker of the ties with the French critical production, which, in the words of Jeammaud, had more influence outside than inside of France (Jeammaud 1986, 77). In interaction with these critical ideas, Brazilian law scholars and practitioners looked for new approaches to law, that allowed them to envisage a new space of law beyond the oppression of authoritarianism.

The quest for alternative approaches to law gave birth to diverse critical currents, which, nevertheless, are intimately connected. As Wolkmer puts it, the expression of 'Alternative Law' (*Direito Alternativo*) configurated the plurality of professionals who formed part of diverse battlefronts inside of the established legality and the insurgent legality requesting to be established, this is, the 'alternative use of law' of the judges, on one side, and the claims of 'legal pluralism', on the other (Wolkmer 2002, 142). Hence, the concept of alternative law was from the beginning charged with ambivalence. In any case, the aspect that needs to be highlighted here is that all these alternativist currents intended a transformation of the practice of law following the criticisms posed against modern law. As Horacio Wanderlei Rodrigues states: "Traditionally the critique on law was concerned about showing the effects of law as domination, however, 'Alternative Law' pretends to rescue the transforming possibility of the legal, posing it at the service of liberation" (Wolkmer 2002, 142 cit. Wanderlei Rodrigues).

Regarding the idea of alternativity and its later division into at least two currents, the one proclaiming an 'alternative use of law' and the other searching for a pluralistic more radical approach to alternativity, it is interesting that Paulon referred in his work to writings of Roberto Lyra Filho (1926-1986), the driving force of the Brazilian New Law School (*Nova Escola Jurídica Brasileira* – NAIR). In fact, it was through the work of Lyra Filho and, in a more general sense, through NAIR and its publication '*Direito e Avesso*' ('Law and the Other Way Around'[63]), that mainstream legal thought suffered important critiques in Brazil. Although Lyra Filho's work went more towards the development of a pluralistic approach to law, advocating for the recognition of a 'Law of the Street' (*Direito da Rua*), the influence of his work right in the beginning of the elaboration of alternative law shows the link amongst the 'Alternative Use of Law', the search for alternative ways to think of conflict and law, and 'Alternative Law' or 'Legal Pluralism'.

Regarding the concrete development of the Brazilian movement itself, first steps towards a more profound solidification and institutionalization of *Direito Alternativo* were made in the 1980's, starting with a congress of the Association of Judges of Rio Grande do Sul in 1986. Tellingly, the aim of this meeting was to collect suggestions for the "*Assembléia Constituinte*" (Constituent Assembly) held between 1986 and 1990, which should develop a new constitution to restart democracy in Brazil. Recognizing common interests and points of view, some of these judges formed the group of Philosophy of Law of the Judicial College of Rio Grande do Sul. In this setting, a Chair of 'Alternative Law' was created in 1989, the only

63 Tellingly, to find an accurate translation is, in this case, considerably difficult, since English language equates with the term 'law', what in other languages, like Portuguese and other Romance and non-Romance ones (exemplified here by German), is clearly differentiated with two terms: *direito* and *lei*, *Recht* and *Gesetz*. What in Latin is called respectively *ius* and *lege*, is in English all 'law'; and 'right', as a noun, is conceived only in a subjective sense. In turn, *direito* or *Recht* could be translated as 'the just', even if, in our examples, there exist specifically different translations for 'just' and 'justice', like *justiça* and *Gerechtigkeit*. Equally, *direito* can be understood as the 'legal order', like in the reference to national legal orders: *Direito Brasileiro*, *Deutsches Recht*. Arguably, this *direito* and this *Recht* go beyond the mere written norms and encompass not only the judicial decisions and the doctrine, but also customary law and with them certain valorative perspectives expressed through all these forms of law.
In this case, a possible translation of '*Direito e Avesso*' would be 'Right and the Other Way Around', '*avesso*' meaning the inside of a piece of cloth in opposition to its outside, called '*direito*'. However, the title refers to the totality of law and to its valorative aspect, and not just to 'rights'. Thus I have chosen a translation that seems to me easier to understand than the rather rare use of the singular 'Right' in the English language for this context.
Going beyond the linguistic difficulties, the (non)existence of concepts like '*direito*' and the difference amongst languages and with them, amongst (legal) cultures, lead to a philosophical discussion about the identity between 'what is right' and 'what is stated'. This is, actually, the confrontation between legitimacy and legality, and even more, between the Kantian categories of *Sein* (what is) and *Sollen* (what should be), which are equally at the core of the discussion of the *meaning* of law and its identity. In fact, the problem of *derecho*/*ley*, *Recht*/*Gesetz*, but law/law contains the whole discussion on positive law/natural law presented above in a nutshell, and exemplifies once again the ambi- or polivalence existent within modern legal understandings.

one in the country, by the judge Amilton Bueno de Carvalho.[64] Just a year before that, the new constitution had been promulgated, including 'progressive' elements, that stated clearly the principle of social responsibility and the aim of social justice (Oliveira 2003, 215). Thus, the (re-)interpretation of the law according to parameters of social justice claimed by the movement of 'Alternative Law' could be grounded in constitutional (positive) law.

It is important to highlight here the relevance of the idea of 'progress' as linked to the process of redemocratization. Interestingly, this progress seems to be intimately connected with attitudes of defiance in front of the *status quo* enacted in the (state) law. The right and desirable development is not linked anymore directly with the compliance with the norm itself as a trustworthy frame for social organization, but, on the contrary, social development is connected to a certain insurgency. Nevertheless this insurgency is guided by certain preestablished hierarchical values. Lyra Filho, a main referent for diverse critical alternative approaches to law in Brazil, was very clear about this point already in 1982: "In the hypocrisy of doing the contrary of what they say (this is, to say that they will realize justice in the norms, at the same time that they keep their privileges), the powerful contradict themselves, leaving 'holes' in their laws, customs and doctrine, through which the most capable jurists of the vanguard can prepare the avalanche of *progress*" (Lyra Filho cit. in Oliveira 2003, 212, emphasis added). Thus, it is an idea of progress in a modern sense the guiding line for a specific interpretation of law, namely one that is perceived as the just one.

What made 'Alternative Law' a popular issue and settled its concept as the name of a broader movement towards a better society, was an unexpected turn of events. The rather anecdotal account that follows shows firstly the environment in which the movement developed, and which determined the self-image presented by alternative jurists until today. Secondly and most important, the form of the development of 'Alternative Law' is, as we will see, already an expression of methods and contents characteristic for postmodern critical approaches to law.

According to Lédio Rosa de Andrade, who participated in the group of critical jurists, it was in October 25th 1990, that a journalistic article was published in the renowned '*Jornal da Tarde*' (Evening Journal) of São Paulo, where Luiz Maklouf pretended to demoralize the critical studies group of judges. The title of the article denounced: 'Southern Judges place rights above the law' ('*Juízes gaúchos colocam direito acima da lei*')[65]. The journalist denoted

64 Carvalho inspired himself in the title of Paulon's book (Oliveira 2003, 214).

65 Similarly as in footnote 63, also in this case the translation of the word '*direito*' is very difficult. Here it seems to me that the value-judging content of *direito* is what the author tried to highlight. Thus, although literally the title could be translated as "Southern judges put the right above the law", or even "Southern judges put the law above the law", I have chosen here the concept of 'rights' that is more related to the

the movement then as 'Alternative Law' (*Direito Alternativo*) and alluded through his title a sort of rebellious attitude on the part of the judges against the law, from which participants of this movement try to distantiate themselves until today. As a consequence of the discussion of the article by the critical group, which counted with around 30 judges and a similar amount of sympathizers (Guanabara 1996, 405), the First International Meeting of Alternative Law was organized in September 1991 in Florianópolis. Consequently, the book '*Lições de Direito Alternativo I*' ('Lessons in Alternative Law I') was published, setting a key stone for 'Alternative Law' in Brazil. The response went beyond all expectations and thus the idea of 'Alternative Law' became internationally renowned and epitomized, in Brazil, all of the critical approaches that preceded its appearance (Oliveira 2003, 215). Later on, however, this current that aimed at interpreting the law in a socially just way, was characterized as '*Uso Alternativo do Direito*' (Alternative Use of Law), like the Italian and Spanish movements they were linked to. The conceptual confusion around the meaning of 'alternativity', however, remains until today along the lines on the question about the identification and aims of the movement.

Interestingly, these events say something about the nature of this critical current, which is shared by many critical counterparts of the time. It is important to underline that the leading force in this case came from a group of practicing judges, who, in response to a socio-political need of transition and transformation, recovered academic works with leftist critiques against social hierarchies. It was *against* a past of repression and recognizing themselves as forming part of that repressive system, that the judges looked for another place for themselves in society. It is the awareness that there is a *plurality* of possible understandings and that they could *use* their position differently, what led to an 'alternative use of law'. Equally, a different interpretation of themselves as representative figures of justice and law could lead to a different interpretation of the law. However, this does not mean the rejection of the authoritative position itself or the validation of all possible understandings of law. In fact, in front of this plurality of possibilities, the movement of an alternative use of law, pleads for the use of one understanding, which is more correct, more just. The political pursue for democracy, after a period of strong repression, was linked thus with an economic notion of social justice. That is why we need *a* judge, namely one who uses law 'alternatively', because someone has to decide on things the right way. Plurality and the authority of the right (use of) law were, from this perspective, still in conflict.

meaning of '*direito*' in this context.

The interaction with socio-political discussion is clear equally in the role of media in the development of the movement, which, in the beginning, had a skeptical position. Both, the article of Maklouf itself and the use of its critique as a propellant for discussion, have an ironical character (Paupitz Dranka 2005, 3), since they take the original statement, dislocate its meaning and thus, finally, the original intention is turned into its opposite. These are strategies that we know from other postmodern approaches, like the deconstructivist one. In fact, the blurring and the irony are already present in the idea of 'Alternative Law' itself, since it refers to a law that is different from the one expected (Idem, 3 f.). Thus, many researchers of alternative law are concerned firstly with clarifying what 'alternative law' is not. However, since alternativity is defined by an otherness (an *alter*), always related to plural possibilities in front of the clear and seemingly monosemic central term, here 'law', the tension does not disappear, it multiplies. This is a tension that will persist and which is possible to recognize equally in other currents of critical movements in law, like legal pluralism.

Although the initially ardent debate has calmed down, 'Alternative Law' has not ceased to exert influence in discussions on law and justice, inside the courts and legal academia as well as outside of these spheres. While some of the representatives of the movement require the consolidation of an alternative legal praxis and the beginning of a new theory of law, for the movement to continue growing (Andrade 1998, 26), others underline the present role of the movement as a renovation of the 'legal culture' (Oliveira 2003, 216). In fact, the movement has gone from being formed mostly by judges to include professors, students and lawyers amongst individuals from other social sectors. Interestingly, these changes and the penetration of the movement in the faculties of law and *Escolas da Magistratura* have been seen, different from Tamanaha's skeptical statement on the current presence of critical Legal Realism in the United States, as fruitful evolutions of the alternative project, since they could mean a certain 'normalization' of the movement (Idem). In fact, the obligatory introduction of legal sociology in the curricula of law faculties in Brazil has opened a space in the established institutions for this critical perspective in Brazil (Idem, 216 f.). Thus, the critical efforts in legal academia mingled with the development of alternatives in legal praxis, resulting in a more encompassing view of law as embedded in society and, consequently, in the power-structures that conform it. Most importantly, the call to see 'law as politics', as formulated by scholars of Critical Legal Studies, found expression in *Direito Alternativo* as the search for alternative understandings of law in order to produce alternative politics and, through these means, an alternative society.

Still related to the Brazilian context, it is worth mentioning some important aspects of this process of increasing criticism in the academic field concerned with law and society, which had an impact in the whole Latin American region. In 1979, for example, the *Grupo de Trabalho Direito e Sociedade* (Working Group Law and Society) was created, which lasted for ten years, amongst increasing institutional tensions in the field of sociology. From the list of works presented already in the first reunion of the working group, its connection with the critical movement exposed above is evident. In 1979 Nelson Eizrick presented his '*Notas para uma teoria crítica do direito*' ('Notes for a Critical Theory of Law'), Joaquim Falcão talked about '*Cultura jurídica liberal e ordem política autoritária*' ('Liberal Legal Culture and Authoritarian Political Order'), José Eduardo Faria inquired legal education with his talk on '*O ensino jurídico e a função social da dogmática*' ('Legal Education and the Social Function of Dogmatics'), and Otávio Frias Filho and Pedro Paulo Cardoso de Oliveira presented an '*Exercício contra a teoria geral do direito*"' ('Exercise Against the General Theory of Law'). It is noteworthy, in this context, that not only critique itself is explicitly mentioned, but also other elements that have been discussed as central for the development of postmodern perspectives like the central role of 'culture', the question for its relation with order, the confrontation with liberalism and authoritarianism, the inquiry of education as a central aspect of a particular culture, the questioning of dogmatics, the emphasis put in positioning research 'against', and most specifically against something considered as generally valid, in this case a legal theory. Later on, matters of ideology and economic order (de Souza, 1982), ethnology of judgment (Kant de Lima, 1982; Pastore Schritzmeyer, 1989), connections with psychiatric order (Cittadino, 1982), Marxism (Lyra Filho, 1983), femininity and sexuality (Muller, 1983), legal assistance (Botelho Junqueira, 1985), customary law (Moura and Barbosa, 1986), informal courts (MacDowell dos Santos, 1988), amongst other topics appeared in the discussion of the Working Group as critical approaches to law under the name of sociology of law.[66]

Another important part of this development was marked by the work of the Latin American Association of Methodology of Legal Education – ALMED (*Asociación Latino-americana de Metodología de la Enseñanza de Derecho*) organized in 1974 on occasion of a meeting of Argentinean and Brazilian jurists. Based in Santa Catarina (Rio Grande do Sul, Brazil), a region that later would be known for the approaches to 'Alternative Law', the association created the journal '*Contradogmáticas – Revista Latino-Americana de Estudos Políticos e Jurídicos*' ('Counterdogmatics – Latin American Journal of Political and Legal

66 For a detailed list of the works presented in the Working Group see Botelho Junqueira 1993, 200 ff..

Studies')[67], as well as the journal '*Seqüència – Estudos Jurídicos e Políticos do Curso de Pós-Graduação em Direito de Universidade Federal de Santa Catarina*' ('Sequence – Legal and Political Studies of the Postgraduate Course in Law of the Federal University of Santa Catarina').[68]

Amongst the principal objectives of ALMED, as formulated by Luis Alberto Warat (then president of the association) in 1984, stand out the ideas of revision of the traditional concept of legal science, as a discourse that, organized in the name of truth and objectivity, looses sight of the socio-political conflicts (Warat cit. in Botelho Junqueira 1993, 45). Warat criticizes the conceptualization of these tensions as individual relations which can be harmonized by law. Equally, he criticizes the prevailing reductionist perspective on law, conceiving of it namely as a punitive discourse, morally commanded, disregarding the role of law in the organization of specific types of relations of economic, political and ideological production. These critiques derive in the inversion of the "dominant legal reason", characterized by an apolitical analysis of the state, putting in its place a discourse that aims to talk politically about law (Idem). As we have seen in other critical approaches to law, Warat intended to insert categories as "the spoken, the unspoken, the repressed, the things that we are obliged to say or interpret from a legalistic culture" (Idem). He proposed to elaborate a "semiology of power" using a Foucaultian approach (Idem). Regarding the role of lawyers, Warat envisages a change by which a participative conscience can be created, so that lawyers can act as the transmitters of social demands and not, as he puts in contrast, as "state agents" (Idem). Equally, he was concerned with the education of lawyers. Clearly, this concern derives from the position of the legal profession during 20 years of dictatorship that Warat experienced himself in Argentina before his emigration to Brazil. As we will see for several Argentinean critical approaches, the critiques and proposals of ALMED have mixed academic affiliations. In this sense, Eliane Botelho Junqueira characterizes the approach of ALMED presented by Warat as a strange and curious combination of statements derived from Freudian, Marxist perspectives, from the pragmatist semiology of Pierce and from the Levy-Straussian project of deciphering myths (Idem, 46).

Despite these regionally relevant efforts in theory and praxis, García Villegas and Rodríguez, whose perspective on the development of Latin American socio-legal studies I have presented above, argue that the field of critical study of the relations between law and society in Latin

67 The journal was edited until the end of the 1991, no. 9 (Wolkmer 2002, 76).
68 ALMED organized its last conference in 1988 (VIII *Jornadas Latinoamericanas*) in Santa Cruz do Sul (Brazil).

America has not, in the beginning of the new millennium, consolidated yet. In this strive for consolidating the field from a regional perspective, the congress '*Bases para la construcción de una sociología jurídica latinoamericana*' (Bases for the Construction of a Latin American Legal Sociology), was held in July 2001 at the International Institute for Legal Sociology in Oñati, Spain. Regardless the awkward situation created by the fact that a congress occupied with the development of an 'own' regional legal sociology was organized in another continent, and in fact, in a country that still symbolizes a common referent of colonial oppression, the conference marks an important point for the development of a regional idea of socio-legal criticism. The conference gathered all sorts of approaches, and not only traditional sociological ones, but also perspectives on discourse theory, legal culture and systems theory.

This is an interesting example for the continuation of the criticisms developed mainly during the 1970's and 1980's, and allows further to see some connections amongst the diverse international movements of critical legal research. In this sense, the background of the two authors who played a major role in this calling for a regional consolidation of legal sociology and critical legal studies is telling.[69] Mauricio García Villegas has, as affiliated researcher of the Institute for Legal Studies of the University Wisconsin-Madison important ties to the place where Critical Legal Studies developed. Equally, his stays as visiting professor at the University of Grenoble and at the International Institute of Legal Sociology in Oñati relate him with the institutions participating in the broader critical debate on law in Europe. In his works, some aspects appear that we already know from other regional developments. For example, in his title '*La eficacia simbólica del derecho*' ('The Symbolic Efficacy of Law) and '*El caleidoscopio de las justicias en Colombia*' ('The Kaleidoscope of the Justices in Colombia'), which he co-edited with Boaventura de Sousa Santos, make the personal connection to the critical movement clear. Equally, the reference to the realm of the 'symbolic' as well as the use of the plural when speaking of 'justices', and the associations that the word of 'kaleidoscope' conjures, underline the intellectual kinship with currents presented above. Similarly, César A. Rodríguez was related to the University of Wisconsin Madison, where he studied, and participated as well in the above mentioned work of García Villegas and Boaventura de Sousa Santos. Equally important is his membership in the *Instituto Latinoamericano de Servicios Legales Alternativos* (ILSA – Latin American Institute of Alternative Legal Services), which co-published the work of García Villegas and Rodríguez that followed the conference in 2001 in Oñati (García Villegas/Rodríguez 2003). This short

69 In 2001 García Villegas and Rodríguez initiated the above mentioned congress in Oñati submitting a paper to general discussion by many Latin American researchers with diverse socio-legal perspectives.

presentation of two contemporaneous researchers of the field of socio-legal research might serve as an exemplary presentation of the strong links between Latin American and other currents of critical legal thought and their strength until present.

Common to most of the Latin American cases is that it was the dictatorial context which marked the development of critical social theory of law. A very important aspect of this situation is that the movement of criticism was marked by important migrations amongst diverse countries determined by the increasing dictatorial violence, an experience that became central to the development of a certain skepticism in front of mere positive law. Thus, in the case of Argentina, several of the social critics of law ended up emigrating to Mexico (Óscar Correas and Graciela Bensusan), Brazil (Luis Alberto Warat, José María Gómez) and Spain (Roberto Bergalli) amongst other countries.

For example, one of the leading Mexican groups of legal critique is coordinated by Óscar Correas, who left Argentina in the context of military dictatorship. In Mexico, he founded at the University of Puebla the journal '*Crítica jurídica*' ('Legal Critique'), which nowadays is published in Curitiba, Brazil. In his work '*Ideología jurídica*' ('Legal Ideology', 1983) as well as in '*Introducción a la Crítica del Derecho Moderno*' ('Introduction to the Critique of Modern Law', 1982), Correas analyzes and criticizes law from a Marxist perspective. Interestingly, in his work on legal pluralism and indigenous law, he pursues to elaborate an interpretation of the Kelsenian theory in support of legal plurality. Furthermore, he includes an interesting difference between 'Legal critique' and 'Critical theory', emphasizing his interest for 'legal critique' as a social research that aims at a transformative political praxis (Wolkmer 2002, 62).

Although using different referents, the Mexican philosopher Jesús Antonio de la Torre Rangel (*1952) aims equally at an emancipating praxis, when he bases his critique on Latin American Liberation philosophy. Recalling the proposal of Enrique Dussel (*1934), an Argentinean philosopher and theologist living in Mexico since the 1970's, de la Torre Rangel puts the law at the service of a political liberating ethic. While putting law in the context of Latin American Liberation theory, he calls for a law that is 'born out of the people', organizing socio-political struggle according to categories of center/perifery, dependency/emancipation, domination/liberation, amongst others (Torre Rangel 1986, Wolkmer 2002, 63). Assuming that the present injustice in Latin American society derives from the application of unjust given law, de la Torre Rangel, in tune with an emancipatory approach, searches for a law that has "the oppressed" as creators, and which is oriented to serve as an instrument of social struggle and change (Torre Rangel 1984, 14 f.). While he

argues for a variety of iusnaturalism oriented by the concept of justice, he emphasizes equally that it is a different justice than the 'conservative justice' present in current legality (Idem, 29). In his proposal, he aims to criticize the concept of justice starting from the experience of social reality, in order to overcome modern law by "the truly just" (Idem 1986, 55). "The modern juridicity", he continues, which in his eyes exists to maintain profit and power, "will be overcome at the level of philosophical reflection [...], when the other is recognized as other" (Idem, 55 f.).

It is remarkable that, in this argument, while criticizing 'modern law', the author equally utilizes dichotomous pairs of categories which are at the base of modern thought. Not different from other critiques I have presented above, he pretends to overcome the problems he sees in social practice with the statement of a truer justice. The logic, in this case recovers the idea of a vectoral development. Equally, as typical for other critiques of the time, he incorporates the problem of the recognition of 'the Other' at the center of his proposal. Thus, his approach is marked by questions of identity and recognition.

The idea of law as an obstacle for social change, as Torre Rangel posits it, is rather consistent throughout Latin American criticism. In fact, this concept of law was portrayed clearly in the book 'Law as an Obstacle to Social Change' of the Chilean researcher Eduardo Novoa Monreal (1916-2006) ('*El derecho como obstáculo al cambio social*', 1975), who was a legal assessor of Salvador Allende's government between 1970 and 1973. In his renowned text, the author developed severe critiques against a plurality of legal mechanisms which, reproducing the principles, concepts and values of capitalism, end up making the development and change of social structures more difficult. Later on, his association with other postmodern critical currents was made clear in the work titled '*Elementos para una crítica y desmistificación del derecho*' ('Elements for a Critique and Demystification of Law', 1985). Interestingly, although arguing in opposition to the idea of law as an instrument for development, Novoa Monreal puts law as an obstacle for development. The common base of this positions is evident: Not only both assume the existence of one correct development, but both conceive of law as an instrument, a tool, a technique, which can be used in one way or the other.

Remarkably, several critiques in the Latin American environments start from a criticism against capitalism as an oppressive form of socio-economic organization, a position that is understandable from the position that most Latin American countries held in the international order of the 20th century. However, Latin American legal thought was not constrained to that political view. In fact, the development of new perspectives on law, be it as alternative law or

as pluralistic approaches to law, is a central aim of the project of these critiques oriented to a change in the praxis.

One of the most important examples for this, is the Latin American Institute for Alternative Legal Services (*Instituto Latinoamericano de Servicios Legales Alternativos*, ILSA), with seat in Bogota, publisher of the journal '*El Otro Derecho*' ('The Other Law'). One of the biggest merits of this organization lays in its emphasis in the study of informal legal cultures as well as in the incentive for the national coordination of new and insurgent legal practices in all Latin America. These informal and insurgent groups that propose alternative approaches to law, will be focused on in the next section as examples of the struggle to overcome the difficulties of a modern model of law. What is important for now, is to emphasize their proactive attitude in developing new ways to deal with law beyond socio-political criticism.

In a similar vein, it is important to remark that many of the authors and currents presented, going beyond Marxist critiques, present a clear perspective on law as relation. While many of the approaches develop a relational notion of law starting from a critical Marxist approach of 'relations of production', the idea of law as relation goes much further than that, pointing at the socio-cultural context of law and its creative power to enhance new relations, as elaborated, for example, in Carlos Cossio's work. Furthermore, see, for example, the publication '*El Derecho como Norma y como Relación Social. Introducción al Derecho*' ('Law as Norm and Social Relation. Introduction to Law', 1989) by Jorge Rendón Vásquez from Peru. Equally, Óscar Correas speaks of law as a 'social form', meaning one of the forms of existence of social relations (Wolkmer 2002, 61).

As part of this search for new perspectives on law and new relations, the proposals of some other Argentinean authors can also be seen. Naturally, the strength and type of critique took diverse shapes following the changes in the international political arena and national political developments. In this sense, Wolkmer equates the situation of 'antidogmatist' thought in Argentina in the 1980's with the situation of Spain in its transition to democracy after the death of Francisco Franco (1892-1975): "The same way that Spanish critical iusphilosophers transformed, with the arrival of socialism to power, in analytical justifiers of the legality in force, many insurgent jurists in Argentina ended up compromising and exercizing high functions during the administration of Raúl Alfonsín", the first democratic president of Argentina elected in 1983 after decades of dictatorship (Wolkmer 2002, 70). Thus, the political-ideological intention of some critical theories has been put in question by authors like Warat, himself of Argentinean origin, and Wolkmer.

Nevertheless, the variety of epistemological and critical orientations resulting in this environment is impressive. In the Argentine environment, the spectrum goes, for example, from Ricardo Entelman who uses an interdisciplinary approach and works partly with a Foucaultian perspective and with a psychoanalytical inspiration, to Enrique Zuleta Puceiro who reflects law from a historical-sociological perspective with systemic character (Idem, 71, 73). Amongst these, a current with particular strength has connected law and psychoanalysis in direct exchange with French authors like Pierre Legendre. Being the Freudian and Lacanian theories of psychoanalysis a central area of academic and public interest in Argentina (and France), the intersection between law and psychoanalysis has been pervasive in many research approaches, like in the works collected by Entelman ('*El discurso jurídico. Perspectiva psicoanalítica y otros abordajes epistemológicos*'; 'The Legal Discourse. Psychoanalytical Perspective and Other Epistemological Approaches', 1982) and Enrique E. Marí ('*Derecho y psicoanálisis. Teoría de las ficciones y función dogmática*'; 'Law and Psychoanalysis. Theory of the Fictions and Dogmatic Function', 1987). In this vein, it is important to mention also the work of Alicia E. C. Ruiz regarding feminine identity and legal discourse ('*Identidad femenina y discurso jurídico*', 2000).

In any case, seeing these examples from Argentina, it is remarkable the importance put on an interdisciplinary approach for the revision of law. Thus, Carlos M. Cárcova points that while, in the beginning of the critical movement in Argentina, the researchers searched for an answer to legal problems from a materialistic perspective, later on, the intention was put towards understanding law as a 'moment' of the social totality, that could only be explained from a transdisciplinary discourse, a discourse of intersection of different knowledges (Wolkmer 2002, 72). Carlos Cárcova himself expressed the need for a new paradigm and the crucial role of articulating for its constitution a new notion of scientificity, referring to Bachelard, as well as to Gramsci, Legendre, Lefort, Castoriadis and the School of Frankfurt (Cárcova 1991).

The epistemological question around a new notion of science, and thus of legal science is, in fact, at the core of critical currents in and beyond the realm of law. Remembering Foucault's argument, it is the same problem of the 'subject' in its different forms, the one that lies at the base of the postmodern struggle regarding knowledge as well as law. The subject looking for justice is the same one who is looking for truth. And the difficulties that law envisages in front of the loss of a subject that can know what is justice are expressions of broader difficulties with a lacking unifying subject who could be able to state a final truth or find perpetual peace.

This is the struggle of identity, unity and unicity at the core of post-modern critique that pervades the criticisms of law. One major aspect of this struggle with identity in the realm of law can be formulated with the question on 'whose law', this is: 'can I identify myself with these norms?', 'to what extent are they part of my own system of meaning?', in other words: 'is this law my law?',' is this law part of my system of meaning, of my culture?'. Another major aspect of this struggle can be resumed with the question on 'which law', and refers to the possibility that a choice between laws might be needed, that law does not equal law, this is, that 'law' is not identical to itself. In other words, it questions that the idea of 'one law' is true, necessary, real, just, good or even possible. These struggles are the nourishment for questions on the internal (in)coherence of law, as well as the starting point for the search for 'other laws'. In this search for another law, which implies an existent plurality of laws and the possibility of choice, a strong movement of proactive criticism started, which I will present in the following pages focusing on some examples of alternative and pluralistic approaches to law.

### *4. Legal Pluralism*

I started this thesis discussing a specific development of a variety of related concepts of law as classical, traditional or particularly widespread which I called, following the description of most key authors in the academic legal field, 'modern law'. In turn, I presented how this perspective on law, because of the contradictory claims it poses, suffered ground-breaking criticisms that put in doubt its legitimacy both in the academy and in legal practice. As I have shown, it is a central aspect of these criticisms that these two fields, academia (or theory) and practice, can in no way be considered autonomous or independent from each other without neglecting the political importance of legal argumentation in the judicial and parliamentary decision-making process, the normative role of (legal) education, and lastly, the political aspect of language at all. These critiques go hand in hand with the blurring of the assumed lines dividing not only (legal) theory and (legal) practice, but also academy and politics, abstraction and concretion, and, as we will see later, law and custom, amongst other grounding epistemological divisions. As I have been arguing, these unquestioned dividing lines at the ground of reflection and action have been questioned by postmodern approaches and presented as deliberated and interconnected choices, and thus as results of exercises of power, in other words: as political decisions.

Putting the mirror of self-reflexive criticism in front of this whole debate and thus twisting the vector of the question posed to 'modern law', we have to ask where does the present inquiry draws questionable divisions. As the author of this work, I made certain choices, this is exertions of power. I chose to tell you a story, a somehow coherent story I believe, about changing visions of something I called (modern) law. But why is the choice of speaking about law in this way legitimate? Certainly, I invoked various recognized authors in my support, so that my choice could be justified in the environment I am presenting this work. But, in the end, who author-ized me to compose this story? Otherwise stated, why should you, why did you, dear reader, follow me until here? Some implicit basic aspects of what I have stated here to begin my research must be valid for you too, if only the mere semantics and grammar of the sentences I wrote, maybe even the traditions of thought I invoked, and, most probably the law I started to speak about. The question is why does this story *make sense* to you? Why does this story mean something to you (and to me) at all – and so far unites us, even if we may not agree? And if it does not make sense to you – and so far it divides us, why is this so?

Meaning-making − this is a common aspect of the questions of postmodernist authors: How is it that 'things' (for lack of a better word) become meaningful. In other words, how is it that 'things' become at all, this is, some things become so relevant that we identify them as such, they receive a name, a reference, an entry in the dictionary. And, furthermore, how come that they are attributed a specific meaning and not any other possible meaning? Formulated in a more individualized and polemic way: Who makes the dictionary of the existent, the usable, the right words and the correct grammar? And, consequently, who has the power to correct, to right wrongs?

To get to the important point for our inquiry, how is it that 'law' means something to us? How come that 'law' means law and not 'something else', i.e. something that you and me with our 'law-eyes' identify as *different*. When, where, how was the decision made and who was the author-ity that put law in a space that is not the space of (what we now consequently call) morals, religion, custom, manners, or for that matter, crime? How come that 'law' means law, being that it could have meant law in *so many other ways*, or better, being that it could have meant so many other things?

From a variety of possibilities, one has been chosen, but who has chosen? Have you taken that decision out of the blue? Was I *responsible* for this constitutive act of dividing the world between 'law' and 'non-law'? Whatever decision you or I have taken, it has not emerged from nothing in a void space. And in most cases we probably have not made that

meaningful decision even consciously. But even if we may not be responsible at last for deciding on the meaning of law, you still can follow and hopefully understand my language and my story because we share some forms of meaning; we share enough meaning that we can engage in creating further meaning. In other words, this encountering around the topic of 'law' is possible, because we participate of a community of meaning, we share certain cultural aspects. Thus, we are talking about a realm that although it forms part of you and me, it superseeds the individuals, the 'you' and the 'me'. In this realm, there is something natural about writing and reading texts that operate quoting other texts; there is something logical about arguing in favor or against positions taken; there is something expectable in telling a story about law and about its ups and downs, criticizing, pondering and assuming authorship. All of this transcends the individual although it is performed by individuals, like you and me. Summing up, 'law' means law in this particular way because there is a certain shared understanding. We live and participate within a culture where 'law' is this law.

At least, 'culture' is one possible answer – an answer that has occupied postmodern researchers intensely. If meaning and meaning-making, with all their implications on power, are at the core of the postmodernist endeavor, 'culture' is the leading figure in the framing of questions and the inspiration of answers. Not in vain the twist of postmodernity has been referred to not only as the 'linguistic turn' because of the constant reference to language and speech, but also as the 'cultural turn'. Despite the location of these 'turns' in particular historical moments, especially after the second half of the 20th century, it is worth remembering that this inquiry is based on the idea of postmodernity as a socio-linguistic situation which goes hand in hand with modern approaches. Thus, to say that 'culture' plays a major role in postmodern approaches does not mean that questions on 'culture' were nonexistent before the 20th century. Quite the contrary: the concept of 'culture' itself played a major role in Kant's philosophy of the second half of the 18th century, whose rationalist claim is put often at the core of modern approaches; 'the' definition of 'culture' that was valid in academia for decades was presented, following Darwin's natural evolutionism, by Edward Tylor (1832-1917) in 1873; and the idea of a national culture was central in the political developments of the 19th and 20th centuries. What makes 'culture' a central concept for postmodern approaches is that it is used as a tool to put in question an alleged universally valid rationality, arguing that rationality is dependent on specific systems of meaning, i.e. rationality is contingent and thus cannot serve anymore as a tool for overcoming ambiguity. In other words, through the understanding of social diversity in terms of culture, the possibilities of rational justification and legitimization according to a guiding principle are pluralized.

Moreover, the emphasis on ‘culture’, with all its ambivalence, has allowed for an inquiry into the position of the observer, who can never get rid of her culture as the sets of meaning she is embedded in and which provide the tools for her observation. As a consequence, the perspective on the formation of meaning changed and does not respond anymore only to the conceptualization of points of authoritative decisions enlisted in encyclopedias, nor as historical lines of a development through stages, but to rather cartographic approaches, that aim to *represent*, in a (more or less conscious) incomplete manner, complex geographies of particular understandings through pluridimensional maps.[70] With this choice over a specific map of representation, enriched by the awareness of the contingency and the power that both allow and limit this decision, equally the notion of responsibility gains new importance. Questions on the power of ‘representation’ and resulting problems on ‘responsibility’ turned visceral to inquire the role of law and lawyers, justice and judges.

In this sense, it is important to remember Foucault's reflection on the role of the intellectual, who taking distance from a Marxist perspective and questioning the Gramscian postulate of an ‘organic intellectual’, does not bestow him with representative power. In other words, the researcher is not anymore “a subject, a representing or representative consciousness” (Foucault 1978, 129). Echoing Foucault's concern, researchers dedicated to the study of (cultural) diversity in law have increasingly seen their own position as intellectuals in the discussion on the law ‘of the Other’ as problematic, and turned to act rather as doormen for (in their eyes) marginalized groups to access spaces of academic and political reflection, relate their normative systems and request recognition or autonomy, like for example indigenous communities. Consequently, as we have seen already in the currents of Alternative Use of Law, the limit between academic work on the connections between law and culture and socio-political activism blurs increasingly.

In fact, the slogan of ‘law as politics’ of Critical Legal Studies (which is also implicit in other critical currents I have presented above) is just an expression or a derivative of an understanding of ‘law as culture’. To make use of power in order to make a decision requires that there is the possibility to choose, i.e. that there are diverse meanings available and arguable. To speak of the political choice over the meaning of law implies that ‘law is meaning’. Only if law can mean different things, i.e. if it is a linguistic creation, a cultural feature, can someone chose one of these meanings. Only if the meaning of law is created, can

70 For an extensive reflection on the role of cartography in relation to postmodern and symbolic conceptions of law, see Sousa Santos 1991, 213 ff. The same author develops the idea of legal systems as maps in Idem, 221.

an authority create a specific meaning for the legal, the lawful and the law. Thus, it is not surprising that the view on 'law as politics' found manifestation in works that researched the creation, establishment and maintenance of a particular legal culture, in other words, of specific forms through which law acquires a certain meaning.

The problematic of culture, this is the problematic of the creation of meaning(s), appears in postmodern concerns around law in a variety of forms, in academic discussions and social confrontations as well, and is naturally accompanied by political questions. Amongst a myriad of approaches, it is possible to name, for example, questions regarding the taxonomy of legal cultures in comparative law, the philosophical concern with law as culture[71], the reflection of human rights as expressions of a culture encompassing all humans, the political concern with 'cultures of illegality', the emergence of anthropology and ethnology of law as fields of research, and last but not least the discussion of pluralistic approaches to law.

While all these aspects are somehow related, in the following pages, I will focus on the connection between law and culture as a starting point for currents arguing for vernacular approaches to law, and, consequently, for legal pluralism. The relevance of this discussion will become more clear when we observe that pluralistic reflections on law are at the core of important concrete changes in the judicial structure and the legal argumentation in diverse countries, like Mexico and Colombia (chapter C). Importantly, the pluralization of 'law' is, as I will present in the next section, coincidental with the pluralization of perspectives on development. As a result, we will see in chapter D how the modern models of legal development are put in question and, particularly, legal transfer is challenged both as a practical tool for social progress and as a conceptual tool for academic research. But before that, I will engage with the conceptual development of pluralistic approaches to law as a central element for the further inquiry.

First of all, it is important to underline that the approaches to legal plurality are plural in themselves, and their practical consequences differ in many aspects. However, the question at the outset of the variety of approaches subsumed under the title 'legal pluralism' can be summarized as: 'how far and under which conditions does it *make sense* to call 'law' a

71 In this sense, also the contribution of Hermann Kantorowicz (1877-1940), who influenced the movement of '*Direito Alternativo*' mentioned above, was decisive. As Monika Frommel (*1946) highlights, specially his text 'The Definition of Law' (1958), originally meant to be the introduction to a broader work on antique, oriental, middle-age and modern legal science, shows the basic outline for a 'cultural study of law', that aims to interpret normative orders in the context of their own culturally bound perceptions of justice (Frommel 1993, 631). Importantly, Kantorowicz' approach intended to transcend Kant's binary division of the realms of 'to be' (*Sein*) and 'ought to be' (*Sollen*), putting these two spheres in relation through the integration of a third one: meaning (*Sinn*) (Idem).

specific type of normativity and not other types?'. Beyond all differences, common to these pluralistic approaches is the understanding of social normativity as composed by a variety of forms, amongst which state law has a limited role: it is only one regulative force in social interaction, while other forms participate equally in regulating (the same spheres of) social activity, engaging with state law in a variety of ways. The following questions are naturally '(why) *should* we call 'law' this type of normativity and not all the other types?', 'what are the conditions and consequences of choosing this particular type of normativity as 'law'?, if we accept the coexistence of diverse 'laws', 'how can we think of normativity in a different, maybe more encompassing way?', and 'how do these 'systems of normativity' or 'legal systems' interact?.

Legal pluralism represents thus the recognition of the 'classical' or 'modern' concept of law, i.e. law as state-law, as particular. As a consequence, it problematizes the encounter of the own with the alter, the own understanding of law and social order from a modern perspective, with other understandings of law and order. In other words, legal pluralism deals with the encounter of a culture around law (or ways to understand and give meaning to law) as state-law with other ways to understand and give meaning to law or to what, according to a 'modern' understanding, could be seen as 'law'. Thus, the questions of legal pluralism point at least in two directions, one with a conceptual emphasis and one with a more socio-anthropological emphasis: 1) what is meant by 'law', and 2) what is the role and form of normativities that would, from a 'modern' understanding, have a similar function or effect as 'law'.

But behind the question on diverse approaches to law, which has been to a certain extent a traditional part of philosophical discussion, another important problem is actually at work. This is the question of legitimacy. If other people accept and follow something as law that is totally different from the own approach is irrelevant as long as that other is seen just as a curious exotic stranger living far away and disconnected from our own reality. But the difficulties start when it comes to arguments about whose law is (more) legitimated for addressing an issue that involves both, the Other and me; when the interests and thus the objects of the diverse normative approaches overlap, then it turns relevant to speak about the legitimacy of one or more perspectives on law. In other words, the problem is the same as in the old discussion about the 'just war'. In both cases the question is who is legitimized, and under which conditions, to exert power, be it physical, military, political or symbolic.

It is in this sense that the question over the meaning of 'law' acquires a particular meaning and weight and becomes virulent, as the discussion of 'legal pluralism' in the context of law sociology and law philosophy made by Óscar Correas (*1943) underlines. According to him, the idea of the 'legal' came to define, in the particular context of normative systems of the 'developed capitalist world', the line between "state and civil society, between state and citizen, between public and private, and, at bottom, between moral and law, between ethics and politics" (Correas 2003, 107). This divisory line between law and morals (non-law) was marked by the element of sanction, organizing thus (the exertion of) violence. Law is legitimated to exert violence, non-law is not. However, the trick in modern law resides therein that the one entity determining which violence is legitimate and which is not, is the same as the one exerting that violence, i.e. the sanctioning state. Thus, the legal system, which proclaimed itself as exclusive, "showed to have its *others*-than-it. [...] And in studying them from an hegemonic position of the exclusive system, transformed the others in *the other* of the system that proclaimed itself as *juridical* [legal], this is, in *no-juridical"* (Idem). From this perspective, 'juridicity' or 'legality' "is nothing else than the qualification that allows to legitimate and to privilege a normative system above any other, which is thrown to anti-juridicity" (Idem, 109).

It is this core question regarding the legitimate exertion of power, and its organization around pairs of opposites – legal vs. non-legal, just vs. unjust, I vs. other(s) –, the one that links the modern question around the 'just war' and the postmodern question around 'legal pluralism'. In one case, the question is how to determine which one is a 'just war', in the other, the problem is the impossibility to determine exclusive legitimacy for one system, without reinforcing the hierarchy, power and violence of an authoritative self-legitimation that postmodern approaches criticize in the modern model of law. The main difference relies, however, in the starting point or the perspective of these discussions. The theory of the 'just war' started as an attempt to argue for the justice of the claim of one party in front of the injustice of its opponent, to later arrive to the problematic conclusion that two conflicting states can both, in their own eyes, fight a just war. In other words, two conflicting understandings of justice encounter with each other, and the question remains how these conflicting understandings can be dealt with.[72] Legal pluralism takes, in principle, the contrary starting point, arguing that the claim of justice (and of a legitimate law) is not owned by one entity in its totality to arrive at the same problem. Both discussions result thus in the same question: how is it possible to decide who is more legitimated when each party can argue for

72 Already Hugo Grotius (1583-1645) recognized the paradox present in this problem (Grotius 2001).

himself, according to their own standards, that justice (i.e. the legitimatory force behind the exertion of diverse forms of power, including law) is on their side?

The connection between 'just war' and 'legal pluralism' is neither superficial nor a mere conceptual game. It is possible to say that the issue of the 'just war' and the pluralistic approaches to law are two sides of the same coin. While the arguments around the 'just war' involve a conflict between two entities separated *per definitionem* (in space but not in time), 'legal pluralism' refers to conflicting entities that participate *per definitionem* in the same whole (sharing the same space and time). To state the point bluntly, the discussion under the title 'just war' referred in its simplest version to the legitimation of one state to act beyond its formal limits, mostly against another state, while 'legal pluralism' addresses, again in its simplest form, the struggle between normative understandings of communities (e.g. indigenous communities) and state law within a state. Obviously, the division between these two fields of discussion depends on the *definition* of state – a definition that can be authoritatively changed.

It can be said also that, basically, the issue of a 'just war' and the issue of 'legal pluralism' refer to the same problem, phrased in the first case in moral iusnaturalistic terms, where the claimed space of application of a concept of justice was the whole universe, and in modern iuspositivistic terms in the second case, where the claimed space of application of a concept of law (and justice) is delineated by a law on the national territory. In any case, both questions refer to the same problem of legitimacy in the encounter with a different perspective on who can determine and which is the right order of things.

Summing up, the questions at the core of the arguments on 'just war' and on 'legal pluralism' are intimately intertwined through the basal issue of legitimacy. The question on the legitimacy of a certain rule can be framed, for example, as a 'simple' question about whose law is more entitled to rule a group of people. If we take subjects of the Spanish Kings in the 15th century (or, for that matter also subjects of the current Spanish Monarchy) as an example, it might seem easy to answer that the Spanish state is entitled to rule their interactions through Spanish (state) law. More problematic turns the same case if we look at the same Spanish subjects closer and see them as Catholic or Muslim or Jewish subjects, whose religions make equally normative claims to them as their adherents – claims that might not only differ amongst themselves but which might also be different or even in contradiction with Spanish law.[73] This is a discussion that could be framed today in the field of 'legal

73 It is important to note, however, that the emphasis does not lay in the difference between claims, but that, even if the diverse systems of normativity request the same action, the justification or the demand to take that action derive from different sources.

pluralism'. However, the discussion if the Spanish Kings were legitimated to rule over inhabitants of the Americas (formulated in a modern fashion, for example, the subjects of the Aztec Empire) developed around the question if that was a 'just war' (Haggenmacher 1992). Independently of the recognition of the Aztec Empire as a comparable state in front of the Spanish Kingdom, the question that remained after the annexation/invasion/conquest was if there existed entities, for example traditional indigenous authorities or European religious entities, with (legitimate) normative claims parallel to the Spanish Kingdom – again a problem framed in terms of 'legal pluralism'.

The model for the colonization of vast regions of the world has been similar, and consequently the difficulties have been comparable. Once that periods of military or political conquest finished, the question of conflicting orders of legitimacy remained within the newly created administrative units, be it colonies, protectorates, countries, etc: Whose law is more legitimate to rule over the people in the (Spanish) West Indies, the law of the Spanish Kings or laws of the conquered tribes? Whose law is more legitimate to rule over people in the Presidencies of British India: the British, Hindu or Islamic Law? Whose law should rule over the people in South Africa, the British, the Dutch or the diverse tribal rulings? How far and in which cases is it possible to accept the legitimacy of two or more of these systems to rule in the same time and space? Taking these examples into account, it is not surprising that an important aspect of the contemporary discussion of legal pluralism emerged in colonial contexts. The debate over legal pluralism is, in other words, a debate over a 'just war from within'. The questions on legal pluralism are intimately intertwined with historically and psychologically entrenched issues of cultural identity and political history, reviving the discussion on the just war and carrying all its characteristic emotional commotion. Thus, to address the problem of legal pluralism implies to deal with historically and emotionally loaded questions of identity and power, which unsurprisingly reenact entrenched political struggles.

Despite the fact that we must imagine that discussions around the legitimacy of more than one normative system in a shared space and time exist since the first encounterings of two groups of people, the current academic reflection on 'legal pluralism' has its own referential stories. The center of attention of pluralistic approaches to law has been to put in question the homogeneous and unified concept of law most widespread in legal academy and practice, where law is understood as a system of general norms, that is legitimized by an authority and which is applicable and enforceable in a specific territory. This unified concept of law was

problematized through the history of legal philosophy, but it was especially during the 20th century, that a general 'crisis of law' or even a 'decadence of law' was perceived and discussed in academic circles as well as in the environment of political activism (Jeammaud 1993). All the diverse critical approaches including a perspective of alterity and alternativity regarding law, contributed to the development of the concept of 'legal pluralism'. In fact, as we will see, it is possible to envisage pluralism in law in various ways and thus, it is not accurate to speak of 'legal pluralism', but rather, it is helpful to recognize the existence of manifold approaches, in order to grasp the complexity of the discussion and its political expression. Legal pluralism exists itself in a postmodern manner, only in the unconsensual form of the plural, as legal pluralisms.

The contemporaneous discussion on legal pluralism found nourishment in diverse elder intellectual currents and social experiences, which generated the question on the unicity of the concept of law. In European academy, this question appeared with increased force in the end of the 19th century. Unsurprisingly, at the same time, the question on legal cultures started to acquire more academic relevance when, with the beginning of the century, comparative law was presented as a project of worldwide unification (Zweigert/Kötz 1984, 2 f.). In the realm of legal pluralism, as we will see, the arguments posed at that time serve even today as the foundation for contemporary discussions in law and other social sciences. Also the political questions that have been formulated more recently in other contexts, come nowadays back in a new shape. Amongst the most important are, for example, the question on the priority of a discursive model in front of socio-cultural diversity and the problem of the participation of social groups in the legitimate building of law beyond the formal structures of the modern state. It is interesting to observe that the discussion on 'legal pluralism' unfolded in a plurality of research forums and in diverse social spheres. Here, the main threads I will follow are the discussions of the concept of 'legal pluralism' in the academic fields of jurists, of anthropologists and of sociologists. Firstly, I will present several of the social experiences that pluralistic approaches to law intend to address along with some of the academic contributions that marked the conceptualization of pluralism in the socio-legal field. Secondly, I will refer to a few of the conceptual difficulties and to the plurality of 'legal pluralisms' which arose in the process of the discussion. Lastly, I will address some of the problems that these pluralistic approaches open up.

One of the first well known references for these inquiries is the work of the Prussian jurist Otto von Gierke (1841–1921), who dedicated himself to the legal-historical study of the law

of associations. In the four volumes of his '*Das deutsche Genossenschaftsrecht*' ('The German Law of Associations', 1868-1913), he argued on the base of historical research that human associations are capable of collective wills and acts beyond the fictitious personality attributed to them by law. On a more general note, his investigations on the Germanic aspects of the law in force in the Germanic territories, which by then were in the transition to build the German Empire and later the Republic of Weimar, show his position in the legal discussion of the time. In those years, a common private law for the whole German Empire was being drafted[74], following mainly the German Historical School of Savigny, and being thus coined to a great extent by Romanistic studies.[75] In this process, Roman law was recreated and used as a unifying model for the legal unification of the German Empire, neglecting the existing variety of legal customs. Gierke's study of the law of associations was relevant for this scientific and political conflict, because German law, according to his argument, was based on established legal customs which not only were of non-Roman origin, but even more, were the result of the continuous interaction between diverse social groups.

While Gierke opposed through his research the Romanistic oriented 'conceptual jurisprudence' (*Begriffsjurisprudenz*) he participated not only into a disciplinary discussion in the frame of legal history[76], but, most importantly, he took part in a political discussion about the legal development of law in the Germanic territories, putting his main focus on the social role of law and in contemporary social politics. However, despite being acknowledged by many scholars as a historical reference for political pluralism, he never abdicated of the need for the monarchic state nor of the clear supremacy of Prussia (Bader 1964, 375). At the same

74 Until the Civil Code (*Bürgerliches Gesetzbuch*) of 1900 came into force, in the territory of the German Empire diverse laws were applied, amongst them the '*gemeines Recht*' (common law derived from the interpretation of Roman Law), the 'General State Laws for the Prussian State' (*Preußisches Allgemeine Landrecht; ALR*) of 1794, the French *Code Civil* of 1804, the Code of Baden (*Badisches Recht*) of 1810, the Bavarian Code (*Codex Maximilianeus Bavaricus Civilis*) of 1756, the Jutisch Code (*Jüttisches Recht*) of 1241, the *Sachsenspiegel* and later the Saxonian Civil Code (*Sächsische Bürgerliche Gesetzbuch*) of 1865. Because of the plurality of territories with diverse traditions and formal laws, the organization of the German Empire posed very clearly the problematic of what we today call 'legal pluralism' as a question of socio-political organization.

75 As Pier Giuseppe Monateri argues in detail, the idea of 'a' Roman Law developed firstly at this time (Monateri 2000). The pandectistic elaboration of Roman sources and the Romanistic School put these historical documents into a certain structure and a system of meaning. The motivations for this structurization were diverse, but, in any case, the need to legitimize the contemporary political system was extremely relevant. This process resulted in the myth of Roman law as the original source of legal thinking and thus as one central element for the development of all civilizations in Europe. This myth is one of the founding stones of contemporaneous research in legal history as well as in legal discourse in general. It is not surprising that, in a time in which referents for the identification of whole Europe are in need, this perspective wins new strength.

76 Interestingly, these two fractions in Legal History, namely Romanists and Germanists are still clearly divided in German and European academia. See, for example, the different sections of the German publication 'Zeitschrift der Savigny-Stiftung für Rechtsgeschichte', which is divided in three sections: the Romanistic, the Germanistic, and the Canonistic (Böhlau Verlag 2012)

time, emphasizing the Germanic aspects of law, he was making a claim for a unified cultural identity of the nation and the law.

Another of the often cited European pillars of pluralistic approaches to law is the law sociologist Eugen Ehrlich (1862-1922), who developed the idea of 'living law' as coexistent with case law and state law (Ehrlich 1989). He underlined the "sociological contingency of legal norms recurring not only to Roman jurisprudence, but also to the Austro-German law and Anglo-American legal thinking" (Döhring 1959). 'Living law' develops, according to Ehrlich, on the base of diverse organizations in which individuals take part. These organizations can, for example, be religious groups, families, associations or political parties. Important in this context is that they interact with each other and with the state and, in doing this, maintain a certain autonomy in front of the state. According to Ehrlich, the law develops in the internal order of these institutions, and thus the development of state law can not put in question neither the existence nor the socio-legal relevance of these other sources of social order. This 'living law' is independent of the state and is grounded on measures that are different from the state sanctions. For example, sanctions consist of the social pressure that the same organizations exert, for example through exclusion, lack of credit or loss of honor, or, in commercial relationships, the loss of clientele. Most importantly, these measures are, in general, more effective than regular sanctions that the state can apply. Ehrlich underlines the role of law as an instance of organization of relations in every human interaction, including those beyond legal conflict. Consequently, Ehrlich opened the concept of 'law' as a product of social organization.

Equally, the theory of law sociologist Georges Gurvitch[77] (1894-1965) (Gurvitch 1932 1935 and 1942) is recognized as one of the most important founding stones for the development of pluralistic approaches in socio-legal academy. Less known is, however, his

77 It is interesting for this research to remember shortly Gurvitch's personal background. Born in the czarist Russia, he participated actively in the revolution of 1917, an experience that marked his academic interests to a great extent. In 1920, due to his opposition to the treaty of Brest-Litovsk and his position in favor of the self-government, he left the USSR to continue his academic career first in Prague and since 1925 in France, where he received the '*nationalité*' in 1929. The year of the publication of his '*Éléments de sociologie juridique*' (1940), a text that built the foundation for his renowned 'Sociology of Law' (1942), he left Europe to settle down in the United States until 1945. After the publication of the '*Déclaration des droits sociaux*' (Declaration of Social Rights, 1944), he returned to France. His social and political engagement in favor of the colonies and particularly in favor of Algeria ended up in a bombing attack at his front door, which resulted lastly in a heart attack causing his death in 1965. For a concise but more detailed account on Gurvitch's biography and bibliography, see Cramer 1986.
What I find interesting in his biography is not only that he, as many of the social researchers I have mentioned above, had the experience of a personal 'transplant' through the emigration to the United States. Moreover, beyond that transatlantic experience, he experienced a previous (and also a later) process of cultural transfer, all of which went hand in hand with his political and social engagement. The context of the Russian revolution as well as the circumstances of his death allow us equally to envisage the socio-political landscape in which these critical reflections on law developed in Europe.

primal source of intellectual inspiration for a pluralistic approach to law, namely the works of the Polish philosopher, jurist and sociologist Leon Petrażycki (1867-1931), who studied and lived in Russia until 1917, influencing Gurvitch greatly. In his research, Gurvitch argued the coexistence of multiple legal orders that are independent from the state. He differentiated between a *social law*, that was the product of an organized society, and an *individual or intergrupal law*, that he described as the product of bilateral relations, for example the state law. Because of the development of this thesis, Gurvitch is acknowledged amongst legal pluralists as a researcher that sketched legal pluralism as an expression of a "liberal, democratic, decentralized and anti-state socialism" (Treves 1978, 72).

In the Italian context, a contemporary colleague of Gurvitch that equally fostered the research of legal pluralism was Santi Romano (1875-1947), who in his '*L'ordinamento giuridico*' ('The Legal Order', 1918) pleaded for a broad understanding of law that went beyond the mere state norm. Throughout his work he presented his institutional theory of law, according to which law, "before being a norm, [...] is, above all an organization, a structure and a position of the society in which it develops" (Romano 1969, 113). Identifying the law with the institution, he questioned the monist perspective on law and researched on a variety of forms of normative orders, from the ecclesiastical to illicit or marginalized ones. Although the works of Santi Romano are less acknowledged in most of the literature on legal pluralism as those of Gurvitch or Ehrlich, his socio-legal proposal is equally relevant, especially in countries of Romance tradition like Brazil. For our purpose, his work allows to add an example more to sense the geographical and theoretical broadness of proposals with a pluralistic orientation regarding law existent already in the first half of the 20th century.

It is important to note, however, that the interest for (cultural) plurality in law existed, also at an academic level, long time before the innovative theories of the then emerging social science appeared. In fact, legal comparativists, whose work is basically to discover and research the plurality of approaches to law, go back to ancient Greece when they recount the eldest legal comparativist researches (Zweigert/Kötz 1984, 54 f.), what in the frame of the widespread 'classical' understanding of law from an European/euro-centric perspective is the cradle of (legal) reasoning. The concern with plurality and with the different cultures of law, was obviously a longstanding interest of jurists, historians and politicians. The emphasis, however, varies, because while legal pluralism started asking for a variety of normative orders within (or beyond) a state, comparative law asked originally for the variety of normative orders amongst states (or comparable political units). The methods applied were, nevertheless, similar. The difference relies basically in the concept of law used: Using a concept of law

bound to the Nation-State, plurality necessarily will mean to deal with the differences between Nation-States, but when this concept is loose from the state, plurality gains a totally different perspective.[78]

It can be said that these two different approaches are incarnated in academia by the disciplines of 'Comparative Law' and 'Legal Anthropology/Sociology'. Interestingly, the research of different (state) legal systems and the research of (non-state) normative orders are connected through a certain dynamic. As Konrad Zweigert (1911-1996) and Hein Kötz (*1935) relate, after 1850, the interest for 'Comparative Law' (in the academic centers of Europe and North-America) declined to a minimum. The concept of 'Comparative Law' remained however in use with a different meaning, namely attached to 'Legal Ethnology' or to the study of an 'Universal History of Law' with an ethnological perspective (Idem, 65). With the turn of the century, however, the interest for current foreign state law increased, "parallel to the first bigger efforts for the unification of law and international cooperation" (Idem, 66). The year 1900, in the frame of the *Exposition Universelle*, where the progress of modern man was to be shown in all fields, the 'International Congress in Comparative Law' took place with the intention to contribute to the development of a "*droit commun de l'humanité*", i.e. a universal law (Lambert ref. In Zweigert/Kötz 1984, 3). The widespread aim of legal comparison, "to search for and find better solutions" (Idem, 56), which Zweigert and Kötz still claimed in 1984, was already at the center of the Parisian proposal to "gradually eliminate accidental differences of the legislations, that separate the peoples of the same civilizatory level and economic composition" (Lambert ref. in Zweigert/Kötz 1984, 3). Importantly, Zweigert and Kötz underline that Comparative Law still "means to see the big common ground above all particular divergences and so to deepen the belief on the existence of a uniform thought of justice" (Idem, 3), acknowledging a certain "affinity to iusnaturalistic speculations" (Idem, 56). The calls to think about law in plural terms (within and beyond the state) in the first part of the 20th century respond partially to this impulse of unification. The perspective of a common civilizatory progress and of law as a wheel in the machinery of this modern progress, demanded to 'eliminate the accidental differences' and to see the core of a common civilization beyond the limits of the state. In turn, the strengthening of the Nation-State required a call to the cultural unity of the nation, and thus of the national law. But this connection to culture meant at the same time that law could be seen as not necessarily

78 The relation between the research of plurality in the sense of 'legal pluralism' and in the sense of 'legal comparison' is thus similar to the relation between the legitimacy claim discussed through legal pluralism and the one discussed in terms of a 'just war' stated above.

connected to the state, and, in turn, had to be seen in connection with diverse ways of life within, beyond or without the state.

Naturally, the new life that Comparative Law gained in the beginning of the 20th century was reinforced by the need to deal with the consequences of the First World War and the international agreements signed on that occasion, by the increasing academic institutionalization of 'Comparative Law', and by new perspectives on the object of research, including topics like common law. Especially this last development implied to change from a focus on the structures and dogmatics of the legal systems to be compared to the insight that "the true base of comparison lies in the equality of the function and the legal-political needs" (Idem, 70), i.e. it invoked a functionalist approach. It is easy to see that through the inclusion of the political realm and through the openness to a diversity of structures (assuming a determined function), law became increasingly intertwined with the political and the cultural realms. Once law is turned into a function of social order, the division between studies of 'Comparative Law' and the questions of legal pluralism connected rather to 'Legal Anthropology' and 'Legal Sociology' blurs.

If the realm of law opened up, it opened equally for inquiries on the conceptual/political issues of law and plurality from other disciplines. Parallel to this development in (socio-)legal academy, the most commonly accepted concept of law presented serious difficulties when anthropologists and ethnologists in the beginning of the 20th century investigated diverse ways in which indigenous and often colonized groups dealt with law and social organization. In this context, the work of Bronislaw Malinowski (1884-1942), specially his 'Crime and Custom in Savage Society' (1926), was decisive in confronting the universal and evolutionary scheme of Henry Maine, and calling for detailed ethnographical studies. But soon the difficulties of putting 'the primitive' in a determined scheme showed to be embedded in the language of the ethnographer and his audience. The discussion between the anthropologists Paul Bohannan (1920-2007) and Max Gluckman (1911-1975) regarding the conceptualization of social orderings as 'law' inquired how far the categories of research were adequate to investigate and understand a different social life.[79] In other words, when law is seen as a cultural object,

79 The main aspects of the different approaches of Bohannan and Gluckman can be appreciated in the book of Laura Nader (*1930) (Nader 1997), containing Bohannan's work 'Ethnography and Comparison in Legal Anthropology' [1969], at pp. 401-418; and Gluckman's 'Concepts in the Comparative Study of Tribal Law' [1969], at pp. 349-373. In a nutshell, Bohannan sustained that the use of legal terms with alleged universal value in indigenous socio-cultural contexts impeded the understanding of the native forms of social organization and misrepresented them. He advocated in turn for the use of the 'original' native terms, while Gluckman considered this approach as a limitation for legal comparison.

its form and content can vary endlessly up to the point that legal categories, including 'law' itself, loses its epistemological unity. How can I understand the Other's culture if I only think in my own culturally determined categories? In concreto, one of the central problems these discussions pointed at was: where should the division between 'law' and 'custom', or between 'law' and other 'normative systems' be drawn? Until then, in general, while custom was seen as a "spontaneous, traditional, personal, commonly known, corporate, relatively unchanging […] modality of primitive society", law was characterized as "the instrument of civilization, of political society sanctioned by organized force, presumably above society at large, and buttressing a new set of social interests" (Diamond 2007, 260)[80]. However, when ethnographic research showed how dense and formalized the webs of 'customs' could be, it turned increasingly difficult to divide them from the organized power of law. And when the notion appeared that the position of the observer changes the observation and its object[81], this is, when the categories of the observer are put in question, the inquiry of the Other's law turned into an inquisition of the own perspective.

Anthropologists researching law recognized, that this was not merely a conceptual problem. There lay a much more critical question implicit: If one would assume that customs were sanctioned by an authority that was sufficiently legitimated so that they equaled law, then the law of the colonial states saw itself in front of an equal autochthonous law, and not merely in front of loose customs or foreign morals. It was not anymore the opposition between a rational unity, law, in front of a plurality of unclear or pre-rational customs and religious ideas. Who should state if indigenous law was sufficiently legitimated? How was it possible then to reasonably justify the subordination of these type of 'legal systems' under the colonial rule? Was it necessary then to include a moral element in the concept of law, in order to re-state the order and the hierarchy between civilized and primitive? The division between law and morals was, however, a dogma that was at the base of the modern (positivistic) understandings of law and state, and which, at the same time, protected their autonomy from religious institutions.

80 However, this dichotomic division does not lead necessarily to an evolutionistic perspective in terms of custom evolving eventually into law. Custom, in this sense could be a sort of 'primitive law'. Moreover, Diamond argues that law contradicts custom and erases it.

81 Associated with the realm of physics, this idea is usually addressed in connection with the 'uncertainty principle' formulated by Werner Heisenberg (1901-1976) in 1927. However, this problem is more accurately described by the so called 'observer effect' with a much broader application than Heisenberg's principle. The 'observer effect' is intimately linked with the concept of observer in quantum mechanics, where several interpretations give the observer a key role. What is interesting for us is, though, that Heisenberg's principle, together with other aspects of quantum physics developed in the first half of the 20th century, had a pivotal impact in the change of perspective on science and, at a more general level, in the view on human experience, as basically and inevitably uncertain. For more information about the role of the observer in quantum physics from a philosophical perspective, see Sonenthal 2005.

If the concept of law should be also applied to indigenous normative systems, suddenly, the singular position of state law was weakened. Consequently, the monopoly on violence of the state[82], which is a founding stone of general legal security as a legitimation for the state and its law, was put in question. If 'custom' was not that easy to separate from law, then it turned theoretically thinkable that several legal systems existed parallel to each other being equally legitimated. Consequently, the modern understanding of law (and of state) found itself in a *cul-de-sac*, from which it could not find a way out until today.

More challenges for the conventional concept of law arose when the consequences of colonialization and decolonialization processes for legal interaction were investigated. After the declaration of independence of several African states, it became crucial to find answers to the question of normative plurality: How could the oppressed but never abolished autochthonous normative structures be arranged with the forms of social organization that originally were imported by the colonial rulers? During processes of decolonialization, the indigenous traditions were explicitly underlined and a recognition, if not a return to the 'true' original roots was demanded. However, it was not possible to simply uproot the institutions, that, once they were introduced, formed part of social life for decades. Thus, normally, several indigenous systems and, additionally, one or more imported legal systems would coexist (Daanaa 1994, Nina/Schwikkard 1996).

But the problems that pluralistic perspectives on law aim to address are not limited to the environment of indigenous groups or colonialism. As we have seen in the context of the references that are generally taken as initiators of the academic discussion on legal pluralism, none of these elements, which gained particular attention with ethnographic research, were central to the discussion. Also experiences with different normativities within the frame of state law, amongst states as well as in urban environments inspired or even required pluralistic conceptualizations of law. In the end of the 1970's, as part of the general wave of epistemological crisis and critical approaches to law, the idea of a unified law was increasingly put in question. This change meant an expansion of legal pluralism from the investigation of the environment of the colony, with colonized and colonizers, to the relations

82 Following Max Weber (1864-1920) ('*Politik als Beruf*", 'Policy as a Vocation'), the concept of 'monopoly on violence' (*Gewaltmonopol*), or 'monopoly on the legitimate use of physical force', which is valid in legal scholarship until today, means the renunciation of the citizens to use their own physical force to carry their claims through. Instead of the private use of violence, the organized and legitimized force of the state takes over the responsibility of solving interpersonal and social conflicts. Thus, at least in theory, the security of the citizens is insofar enhanced as everybody is brought to account only by specific legal institutions of the state and undergo specific preset processes and norms (Weber 1919 and 1980, 29).

between “dominant groups and subordinate groups, such as religious, ethnic, or cultural minorities, immigrant groups, and unofficial forms of ordering located in social networks or institutions” (Merry 1988, 872 f.). From this last perspective, the superposition with politically engaged research connected to the Critical Legal Studies is clear. This change, however, did not mean a clear-cut break with the ‘classical’ (post-)colonialist tradition. Moreover, it was a smooth process of innovation in the field of research. It is not by chance that researchers of this *new pluralism*, like Richard Abel, David Engel, Marc Galanter, Peter Fitzpatrick, Sally Falk Moore (*1924), Boaventura de Sousa Santos, and Francis Snyder began their socio-legal investigations in post-colonial societies, where legal pluralism could not be overlooked because of its historical importance (Idem, 874).

An important part of the approaches on legal pluralism that concentrate on topics beyond colonial and postcolonial backgrounds studies the fractures of the unified concept of law inside of state law. Formal state law is itself composed of a variety of diverse fields that develop, execute and enforce norms quite autonomously. A clear example of these fractures can be seen in the federal approach to law, that has been applied in different ways in diverse countries of the world, for example in Germany, the United States and Mexico. In Germany for example, areas like culture and education are to be ruled, in principle, solely by the federal states (*Bundesländer*) (Art. 30 *Grundgesetz* – GG, ‘Basic Law for the Federal Republic of Germany'; Maihofer 1995, 1233 f.). Consequently, diverse legal orders coexist in the national territory and these can collide in different ways with federal law. At the same time, these systems are organized with own institutions to enforce and control their own normative systems. The possibility of collisions, however, is taken into account within the system of state law and addressed through provisions establishing primacy and processes for settling disputes over competence (Art. 70 ff. GG for the regulation of competence between federal states and the German federation, and Art. 93 I and II GG for the competence of the Constitutional Court to decide in case of disputes over the competence). However, different laws within the federal system are generally seen as belonging to the same legal system and therefore seldom treated as forms of ‘legal pluralism’.

In addition to that, there is also the relation of state law with the international field, which has gained crucial relevance from the second half of the 20$^{th}$ century onwards. It is known that international agreements have to be transformed into national law in order to be effective in national territory. However, it is equally clear that the reference to international law is a reference to an order which creates its own norms, follows its own rules to create law, has other addressees and in many cases other goals, is subordinated to a different logic, goes

beyond national ideas and customs regarding law, has other enforcement methods at its disposal, utilizes other forms of legitimation and, last but not least, uses other agents like courts and administrative organs than national law.[83] Beyond the relation between international law and state law, it is also important to notice that the field of international law is itself structured by the actions of a variety of institutions and is controlled by a plurality of tribunals, producing a certain 'fragmentation of international law', which has been criticized consecutively by the presidents of the International Court of Justice (Koskenniemi/Leino 2002).

In this context, institutions of regional integration require special attention, especially the European Union. The complex of institutions that form the European Union, goes beyond traditional international law, since it creates 'supranational law'. The difference relies therein, that an important part of the law of the European Union does not require any transformation into national law, in order to be effective. In fact, in some cases, national measures might be even improper. Furthermore, due to the 'direct effect' of supranational law, even if national law might collide with it, the law of the European Union has primacy (Hartley 2007, 192 ff.). Also the activity of the Court of Justice of the European Union has evident consequences on the national orders (e.g. when the 'direct effect' of a norm is established), even if the rulings it produces do not come into being as it would be expected for national law.[84]

Beyond questions on the plurality within positive state law, from a legal-sociological perspective, it is also relevant in the context of legal pluralism, that one norm of formal state law can be interpreted in various ways. If we take the standpoint that law creates a relevant reality only from the moment when it is applied, then the question of the implementation turns to be the central question of every concept of law. Laws are namely formulated as general abstract norms, that require specification for the particular case. They are supposed to allow diverse possibilities to deal with daily life. As long as two diverse interpretations coexist, the unity of law is in question.[85] Consequently, diverse systems are built in, in order to avoid these incongruities, like, for example, the outstanding position of the constitution or the hierarchical structure of courts, that culminate in the national courts or even a constitutional court. In a

83 For a pluralistic approach to international law, see for example Berman 2007, 301 ff.; for a short discussion of this kind of pluralism in the context of globalization, see Tamanaha 2008, 375 ff.; and for a broader approach regarding the connections between law and globalization, see Twining 2000.

84 For two different approaches on the role of legal pluralism in the context of the law of the European Union, see: Barber 2006, 306 ff. and Avbelj 2006, 377 ff.

85 This is, lastly, the line of thought of Legal Realism as well as an important part of the criticisms of Critical Legal Studies presented above.

tautological way, these institutions have the role to guarantee the security and unity of *state law* through their high authority *recognized by the state and its law.*

Nevertheless, it is obvious that these inconsistencies can only be solved in this way if a case actually arrives to the court and makes the long and difficult way through all courts until it reaches the national courts or even the constitutional court. 'Legal life' is, until then, full of insecurities and ambiguities. In fact, exactly these insecurities are the ones that allow law to live, including all the legal professions, institutions, guilds, journals and the individuals working within them. In any case, it is not to be taken for granted that these incongruities can be decided unequivocally and definitely. In fact, inside of the interpretation of a norm diverse cases can be built in, that divide again the diverse possible solutions. With a judicial decision, only the plurality of (legal) interpretations is somehow limited, bound to certain criteria and thus, legitimized by the state, but unity is not secured and plurality itself is not at all out of the world.[86]

As Correas argues utilizing a reinterpretation of the positivistic concept of law of Kelsen, in the frame of pluralist approaches to law is equally important to address the role of social institutions as well as private endeavors, like firms and universities, which have written (but naturally also unwritten) and hierarchically organized norms, as well as forums of decision and methods of enforcement, that allow them a certain autonomy and are comparable to a state order. Also these orders are an integral part of *one* national legal system, in coordination with elements of state law like courts and legislative bodies (Correas 2003, 99). Regarding the role of firms and corporations in the pluralization and globalization of law, Teubner has made a central argument for understanding law in the context of global financial interaction (Teubner 1997).

In addition to the regulations of institutions within and beyond the state, also 'informal' normative orders, which have norm-giving, norm-control and norm-enforcement instances, have been at the center of research on legal pluralism. In this sense, the already mentioned Portuguese sociologist Sousa Santos, renowned for his investigation of the normative structures in a slum (*favela*) in Rio de Janeiro (Sousa Santos 1977)[87], recognizes four different

86 Similarly, David Sugarman (1983, 230 f.) argues that state law as such is plural, since it incorporates diverse elements, including processes and general norms as well as ideological and symbolic dimensions.

87 It is an interesting detail for us that the title of Sousa Santos' influential article was 'The Law of the Oppressed: The Construction and Reproduction of Legality in Pasárgada'. The idea of 'the oppressed' is a recurrent element in several of the critiques and proposals in a postmodern context. Particularly in Brazil, we will refer later to the 'Theater of the Oppressed' of Augusto Boal and to the 'Pedagogy of the Oppressed' of Paulo Freire. In fact, the argument I am presenting in this work is that the emancipatory ideas that pushed for breaking the limits of monolithic perspectives on law and justice (but also on theater, on

spaces in society, each with its own form of law, which not only coexist but also interact, as I will elaborate later (Sousa Santos 1991, 182 ff.). Importantly, Sousa Santos sets his pluralistic proposal in the context of a paradigmatic transition towards a postmodern science (Idem, 13 ff.), ”a critical science and a science of opposition, capable to recover the utopian and emancipatory energies that modern science lost” (Idem, 11 f.). Through his critical approach he searches to transcend a modern epistemological and political scheme, incarnated in the state monopoly on law. Interestingly, he argues that

> “the centrality of the official state law does not contradict and, on the contrary, it presupposes the existence of other legal[88] orders. [...] The social and political domination of the modern state is based on two premises: the functioning of state law presupposes its articulation with other non-state legal orders; through ideological manipulation, the legal character is negated to these latter, resulting that the state law emerges as exclusive and as the monopoly of the state” (Sousa Santos 1991, 16).

In Sousa Santos’ research, the oppression of certain conceptual understandings and the oppression of certain social groups are linked intimately. Consequently, his approach aims to a social transformation through a theoretic reconstruction of law (Idem). This reconstruction involves broadening the social space of communication and distributing in a more equitable way “argumentative competencies” through a reformulation of the concept of law that allows to recover and empower local knowledges instead of delegitimizing them (Idem, 14).

Remarkably, following the broadening path of legal pluralism, law can easily include illegal organizations, which (like the state) have a clear normative order, with a strict hierarchy of norms, as well as pre-established and hierarchical institutions and methods for its enforcement, as it has been researched already in the 1970's (Blok 1974). From a contemporaneous perspective, equally problematic for a classical understanding of law, is the inclusion in pluralistic approaches to law of social movements like the *Ejército Zapatista de Liberación Nacional* (EZLN, Zapatist Army of National Liberation) in Mexico and the *Movimento dos Trabalhadores Rurais Sem Terra* (MST, Landless Worker's Movement) in Brazil. Particularly problematic in these cases is the fact that several of their actions and methods are clearly against the state's normative frame.

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pedagogy, on science, etc.), this is ideas of liberation from oppression, produced an explosion of infinite plural approaches, that could not, because of the very emancipatory pluralistic call of postmodern critics, claim the lack of validity of positions with opposite perspectives.

88 Sousa Santos, as it is typical for scholars writing in Romance languages uses the term *‘jurídico*’, meaning the context of *ius,* of ‘*derecho*’, of ‘law’ as a whole. Unfortunately the rare use of this term in English requires, for an easier reading and a better understanding, to translate ‘*jurídico*’ as ‘legal’, a term which obscures the amplitude of the author's object of research and critique. For the discussion on ‘*jurídico*’ see further footnote 63.

What I have presented in the last pages is a variety of social experiences that pluralistic approaches to law aim to address, arguing that the division between state law and other normativities is unsustainable beyond a mere authoritative statement that equates law with state-law, and inquiring the usefulness of such a definition. In the search for appropriate concepts that would allow for a broader and, at the same time, more differentiated perspective on regimes of normativity, various proposals were made. In this sense, one of the main problems that the first legal-ethnographic investigations in (post-)colonial contexts posed was the necessity to question the limit between 'law' and 'custom', while, at the same time, allowing to address (and control) adequately the social realities, including the role of the state and the types of power involved in social interaction, that were beyond formal state law. To a certain extent, from the colonizers' perspective, the existence of what was called later legal pluralism was part of a legitimizing scheme associated with the ideas of Enlightenment, by which the colonial rule would bring law to primitive peoples. It was because of practical and moral reasons that indigenous 'customs' were tolerated. Thus, indigenous customs entered the legal system as 'customary law'[89] as long as they were not "repugnant to natural justice, equity, and good conscience" or "inconsistent with any written law" (Merry 1988, 870).[90]

The 'solution' of customary law, however, as a hybrid composition of the opposites law/custom, only developed the tension of this dichotomy further. The characteristic feature of this law seemed to be that it generally developed as custom out of an oral tradition and that the source of its authority was different from the colonial ruler (Snyder 1981, 49). However, although it was assumed that customary law was preexistent to colonial rule, its validity depended on an additional recognition by the colonial state. In the end, they were (and still are) jurists who determined if a certain behavior was part of relevant customary law or merely a legally irrelevant custom. Hence, customary law was itself an aspect and a product of a process of colonialization, where customs and customary law were perceived as closed, rather

89 Naturally, 'customary law' is not a term that derives exclusively of the colonial context. The problematic that appears in the colonial context is, however, paradigmatic for the whole discussion of 'customary law' which cannot be addressed in this context fully. For a discussion on the topic from the perspective of the end of the 19th century, see Brie 1899, for a contemporary analysis: Perreau-Saussine/Murphy 2007.

90 These are examples of formulations that limit the validity of a system of norms to specific cases, being the first one a 'repugnancy clause' and the second one a 'supremacy clause'. Lastly, both formulations aim at the same goal, namely to give priority to the official formal (state) legal system, although the emphasis vary in an interesting way: while the 'repugnancy clause' has a rather moral tone to it linked to a perspective of natural law, the 'supremacy clause' refers rather to a positivistic argument more classical for modern mechanistic argumentation on law.
It is important to remark that these formulations are very similar to the contemporaneous expressions of recognition of indigenous legal systems in several national orders. See for example art. 2, A II of the Mexican Constitution (Estados Unidos Mexicanos 2005; for the original version in Spanish, see Estados Unidos Mexicanos 2011, and for the text of the decree referring to the whole constitutional reform regarding indigenous matters see: Estados Unidos Mexicanos 2001).

static, historically and culturally determined unities.[91]

Following these questions, Snyder posed the thesis that customary law was not an adapted version of autochthonous law, but rather a form of law, that had the colonial rule as its necessary context. He worked on the development of Senegalese customary law, where Senegalese, who had access to European languages and customs, acted as communicators and translators of *the* indigenous law. The European colonists, in turn, accepted the versions that were most useful to them. Snyder summarizes the result of his research as follows:

> "Produced in particular historical circumstances, the notion of ‚customary law' was an ideology of colonial domination. The concept of 'customary law' itself manifested an attempt to reinterpret African legal forms in terms of European legal categories, which formed part of the ideology of those classes most closely associated with the colonial state. The designation of African law as 'customary' because it was oral, though apparently technical, embodied and masked an essentially political conclusion that it was subordinate to the colonial law of European origin" (Snyder, 1981, 74, 76).

Thus, 'traditional law' was, at least from this perspective, a construct of European expansion, similarly as the ideas of 'tribe' or 'chief' amongst many other 'characteristic' features of seemingly traditional social systems (Wolf 1982). As a result, the idea of 'custom' and 'customary law' as something essentially different from 'real' law was increasingly put in question. The problem was not merely to propose a new concept of 'law', but, most importantly, to find expressions that could take into account the plurality (and legitimacy) of normative systems and, at the same time, could serve as dividing categories in front of the plurality of social practices.

One proposal was to use the concept of 'imposed law' as a means of differentiation.[92] Lastly, this proposal was rejected, because, on the one hand, law is generally experienced as imposed in one way or another. On the other hand, any law is always accepted up to a certain degree and it is not only imposed (Burman/Harrell-Bond, 1979, 2). Also the concept of 'external law' was discussed (Kidder 1979, 296), through which diverse levels of legal organization were identified with diverse levels of externality. Although this proposal allowed to have a perspective of interaction amongst the diverse levels, it was still problematic regarding which criteria should determine these externality levels and how far they implied a certain hierarchy. One of the most popular proposals was to characterize the normative

91 Regarding the interaction between 'custom' and 'official law', see for example Fallers 1969, 59. Equally, see Falk Moore 1986 and Chanock 1985 for a perspective on customary law as an artificial creation of the colonial state.

92 See, for example the symposium 'The Social Consequences of Imposed Law' in 1978 at the University of Warwick.

systems outside of the official state law as ‘indigenous’ (Galanter 1981, 17). This approach was criticized especially with the argument that ‘indigenousity’ in the sense of an uninfluenced unchanging (legal) culture does not exist in reality. In fact, the idea of ‘indigenousity’ was often used to mark the exotic other of an otherwise dynamic law.[93] Another suggestion was the concept of ‘folk law’ (Bergh 1986). However, beyond the question if through this approach the so called *folk law* was actually romanticized or trivialized, the biggest difficulty resided therein that a clear limit could not be found. Moreover, the opponents of this approach argued that *folk law* and *state law* build a continuum, in which only the way changes, in which norms are differentiated and their processes of generation and application are organized.

The lack of success of these concepts in finding general acceptance even amongst the advocates of legal pluralism can be interpreted as an expression of a more profound and more subtle problem: is it possible to address plurality starting from a binary division? Especially problematic is the fact that these binary divisions implicitly draw on the basic perspective of law as state-law, putting ‘the rest’ of law as its antonym. Pluralism requires by its own claim of plurality something beyond a binary divide. In other words, a pluralistic approach implies that a plurality of variables are valid and relevant at the same time, and thus, linking plurality merely to one decisive variable will never be convincing to a consequent pluralistic approach because it contravenes its own premises. Consequently, a proposal that draws a line, be it a divisory line between categories or a grading line that marks fluid stages, can always be legitimately challenged by another proposal that draws a similar line from another perspective. *One* line will always be an easy object of criticism for approaches that are based and define themselves by the *many*. Furthermore, because of the dichotomy created by these forms of conceptualization, the variety of situations are overseen, in which ‘non-state-law’ (e.g. ‘custom') and ‘state-law’ develop, constituting and influencing each other.[94] Moreover, the position of the observer as an imperceptibly active participant in the process of shaping the Other and ‘his law’ or ‘her custom’ was often disregarded. These insufficiencies called for a constant renewal of conceptual proposals.

Lastly, the diverse divisions proposed, and with them the diverse concepts of law introduced by pluralistic approaches, made explicit the variety of perspectives on what should actually be understood by ‘legal pluralism’ and which was its heuristic or academic value as

93 In this sense see also the arguments of Said and Ruskola regarding the tendency to see the Western's ‘other’ as static and monolithic (Said 1978 and Ruskola 2005, 275 ff.).

94 For an account arguing the existence of diverse relations between state law and “other social forms”, see particularly Fitzpatrick 1984, and Sousa Santos 1991, 182 ff.

well as its political and social contribution. In other words, the formulation of the questions that legal pluralism tries to address, not only created the field of 'legal pluralism', but with the recognition or non-recognition of these questions as part of research on legal pluralism, diverse perspectives on what is legal pluralism were stated, or, in other words, they determined different 'legal pluralisms'.

What is then legal pluralism? This is the question that John Griffiths addressed in his seminal article of 1986 (Griffiths 1986), where he asked how far the diverse interpretations on legal pluralism were 'truly' pluralistic. In this writing, Griffiths developed the argument that there exist a traditional ideology that decisively molds the study of law, which he called 'legal centralism'. According to him, this ideology follows the principle that law is and can only be the law of the state, which is administrated by a group of state institutions, excluding at the same time all other norms (Idem, 3). This finds expression not only but most clearly in the education of jurists, who are specialized during their law studies on state law, as if this were the only true, only valid, only possible and the most relevant form of normativity that rules social interaction. Griffiths connects this perspective on law with the philosophies of Jean Bodin (1530-1596), Thomas Hobbes and John Austin (1790-1859), as well as with the positivist approaches of Hans Kelsen and Herbert L.A. Hart (1907-1992). As a conclusion, he argues that the factual power of the state is the condition on which this type of 'law' bases.

An important aspect of Griffiths' argument is that he characterizes 'legal centralism' as an ideology, in which ideas about what 'is' and what 'should be' according to a certain perspective are confused. Instead of observing normative plurality as it is given in 'real life', the observation of 'law' within the paradigm of 'legal centralism' starts, according to Griffiths' critique, from a clear postulate on how normativity 'should be' organized, namely through state law. Moreover, this postulate is presented as if it was the result of an disinterested objective observation of social events, while it is the result from a perspective of the hegemonic institutions, gathered under the state. Through the 'trick' of combining 'what is' and what 'should be'[95], these hegemonic institutions present the conditions of their existence as a given reality (or as a needed medium for a functioning society). In Griffiths'

95 Interestingly, Griffiths recovers with this differentiation between 'is' and 'should be', which he puts at the core of his analysis, a basic division formulated by Kant, which relies at the base of the understanding of law according to a modern perspective. Law, in this sense, does not deal with questions of what 'is', but states what 'should be'. Hence the apparent conclusion of the normative character of law as a field of study in opposition to descriptive sciences. From the beginning, thus, Griffiths argument against a modern state-bound understanding of law is based on a modern worldview, where science deals with 'what is'. In this sense, this is a revival of the question on how far legal studies build a 'true' science.

eyes, while ‘legal pluralism’ is a fact, ‘legal centralism’ is a myth, that poses a decisive obstacle for an appropriate observation and description of normative reality, i.e. of ‘legal pluralism’.

All these are arguments that echo the critiques presented above. From this perspective, the question of naming something law or not is a matter of power. Most importantly, this is a power that legitimizes itself. In formulating this critique, however, it is remarkable that, although the criticism of legal scholarship as an ideological product appears in Griffiths’ account, he, nevertheless, claims the pluralistic perspective (this is, actually, his perspective on legal pluralism) to be non-ideological, to be real and true. In this sense, Griffiths repeats the attitude he puts in question on his object of criticism, namely ‘legal centralism’, because he does not inquire the ideological background of pluralistic approaches to law. Consequently, at least in this article, Griffiths lacks the self-reflection he asks of his opponents. Equally, he approaches law as if its aim and function should be necessarily to rule social interaction. Thus, the pluralism Griffiths argues for is directly linked to a certain essentialism as well as to a functionalist perspective on law. This is one of the main critiques against pluralistic models, which I will present later.

Basing on this perspective, Griffiths examines and criticizes diverse pluralistic approaches to law existent by the 1980's, differentiating between ‘weak’ and ‘strong’ perspectives. The ‘weak’ approaches are connected with the contexts of colonialism and postcolonialism and aim at the recognition of customary laws or customs by the state. Griffiths argues that this is only an adaptation inside the oppressive system, that remains truthful, nevertheless, to a centralist ideology. Even the question for ‘recognition’ is, in Griffiths’ eyes an expression of the idea that law, in the end, has to be dependent of a single source of validation, namely the state.[96] Contrary to that, a descriptive investigation of law would be necessary, that would present a ‘strong’ legal pluralism, assuming the existence of legal pluralism as a given fact.[97]

Naturally, parallel to the division weak/strong, other classifications of approaches to legal pluralism have been offered. Also Sally Engle Merry has identified basically two different approaches to ‘legal pluralism’. On the one hand, she gathers researches in the (post-)colonial context under the concept of *classic legal pluralism*, while she reserves the term *new legal pluralism* (Merry 1988, 872 ff.) for approaches more linked to urban and intra-state pluralism. Another relevant proposal in academic discussion has been the one advanced

96 This ‘state legal pluralism’ has, nevertheless, major relevance. See for example the international importance of the case ‘Otieno’ in Kenia in Doren 1988.

97 In this context, he refers explicitly to Sally Falk Moore's research, which I will address later.

by Gordon Woodman dividing between ‘deep’ legal pluralism and ‘state’ legal pluralism (Woodman 1996), which, although linked to Griffiths’ approach, accepts the validity and importance of pluralism within state-law, emphasizing that “a straightforward distinction between unitary and plural legal situations will not be possible because unitary situations do not exist” (Woodman 1998, 54). Moreover, he argues that “all ideas of a tightly structured model of legal pluralism are indefensible”, addressing legal pluralism as a “continuous variable” (Idem).

But besides offering a classification of ‘legal pluralisms’, what has been key in Griffiths approach, causing admiration and rejection, has been the clear political emancipatory aim he linked to the project of (strong) legal pluralism. This call inspired many researchers with similar political interests and affiliations. Similar to Griffiths’ call to liberate academic research from the chains of ‘legal centralism’, another approach to legal pluralism that claims the need to go beyond state recognition to advance a more profound form of pluralism was developed by the Brazilian legal sociologist Antônio Carlos Wolkmer. In his argument, Wolkmer advocates for a pluralist perspective not only as a result of scientific interest in order to understand social phenomena, but, most importantly, he follows with his proposal explicitly a political program of ‘emancipation’. Naturally, his reflections derive from the situations that he perceives in his socio-political environment in Brazil and other Latin American countries as a dysfunction of social institutions. According to him, “if and as long as the totality of the institutional models are unable to fulfill their functions so that they make social relations foreseeable and regular, a series of dysfunctional symptoms trigger a crisis of the system. Consequently, new alternative forms emerge, that still lack an appropriate recognition” (Wolkmer 2006, 32 f.). Hence, he links the existence of legal pluralism explicitly with the crisis of the state as a regulative and legitimizing social institution.

Importantly, criticizing naive perspectives on pluralism that perceive it necessarily as a turn towards more social justice, Wolkmer underlines that the acceptance of a multiplicity of equally valid competing normativities might be equally oppressive. This is the case particularly with legal pluralism in the context of a neo-liberal model, in which resorting to a common normative system that could protect powerless individuals or groups could be easily dismissed. Consequently, he pleads for the creation of a ‘new pluralism’ that goes beyond the diverse modalities of pluralism that have been drafted until now. The challenge of our time lays, according to Wolkmer, in making a connection between this ‘new pluralism’ and a process of participative democracy. Hence, he highlights the need for the coexistence of the new concepts that arise from this pluralistic perspective, which should be supported by a

variety of and autonomous associations conscious of their capacities and social role, on the one hand, with a state that is "transformed, controlled and organized by the democratic society" (Wolkmer 2006, 33), on the other hand. Thus, he does not reject the idea of a state as such, but he demands a process of transformation of the existing institutions and methods. So far, he aims to develop a legal pluralism with a participative and integrative character (Sánchez Rubio 2006, 18; Wolkmer 1991, 29 ff.).[98]

Naturally, these conceptions of legal pluralism, as well as Griffiths' combative proposal, have been contested in diverse occasions. What is relevant for us for now, is to note that there have been argued diverse pluralistic approaches to law. Most importantly, it has become apparent that the discussion over plurality in law requires, for political and academic interaction, a certain theoretical organization of the categories 'legal pluralism' is expected to deal with. In other words, to exchange meaningfully about plurality in these terms, we need to agree on *one* common concept. The same is valid for critiques that aim to go beyond academic reflection. Problematically, these theoretical settings, i.e. also the categories to organize approaches to plurality in law, are varied and difficult to combine because they respond to different interests and different perspectives on the socio-political role of the discussion on 'legal pluralism' and of academic research as a whole.[99] Consequently, pluralistic approaches have become hindered by their own plurality.

Because of the own dynamic of claims basing on pluralistic perspectives, once the monolith of 'law' as a feature only linked to the state was put in doubt, the fields of observation of legal pluralism increased constantly. Pluralism multiplied itself. Here relies, I think, one of the main reasons why the concept of legal pluralism is impossible to grasp: because it defines itself through the negation of a monolithic concept of law. The negation of an established definition opens the door for all the elements that were so far excluded from the definition. As a result, 'legal pluralism' itself claims the validity of diverse approaches and, in one of its extreme versions, the incommensurability of categories of validation amongst different legal systems. Problematically the negation of the one model of law does not set by itself a defining limit or a new category. To create a new definition would imply

98 Similar in its conception and political stance is Sousa Santos' differentiation between 'progressive' and 'reactionary' forms of legal pluralism (Sousa Santos 1991, 16).

99 Beyond the discussion on the term 'legal pluralism', it is important to note the existence of other related approaches which I have not addressed in detail in this chapter. Take for example the concept of 'legal polycentricity' or 'polycentric law', developed by Bruce L. Benson (*1949) (Benson 1990) and investigated further by a research project titled 'Polycentric Law' under the coordination of professor Lars D. Eriksson at the University of Helsinki from 1992 to 1995 (see Hirvonen 1998). For a Danish approach on polycentricity, see also Bentzon 1992.

again the authoritative imposition of a limit, and, with it, a certain undesired exclusion. If through the blurring of the concept of law, everything can theoretically be framed as law and the concept loses its analytical value, through the blurring of 'legal pluralism', its communicative and heuristic value vanishes. The result is, as Tamanaha sums up, that "legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level" (Tamanaha 2008, 375)[100]. Thus, the once combative statement of 'legal pluralism' turned into a mere statement of the co-existence of various normative systems that results somehow trivial when we do not integrate the central question of the conflicts of legitimacy that result from the relationships existing amongst these normative systems.

Going beyond the mere statement of the existence of coexisting legal systems, what becomes important to ask is how these diverse orders relate to each other, especially if and how they interact with each other. Interestingly for our inquiry, in the later research of the 1960's and 1970's, state law was presented as having the power to shape the other social orders (Diamond 1973; Burman and Harrell-Bond 1979).[101] It was this perspective on law that encouraged a range of developmental practices through law that I have mentioned above. This hierarchical perspective on normative systems was, however, criticized later on (Trubek/Galanter 1974). The consequences of the transfer of legal models in order to change 'undeveloped' societies, were often unforeseeable and undesirable. After several studies, the impression arose that while state law was changed with difficulty, the vast majority of the population remained untouched by legal changes and followed their 'customs', even if they were incompatible with the new law.[102] Sally Falk Moore explained this problem saying that: "new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence. Legislation is often passed with the intention of altering the going social arrangements in specified ways. The social arrangements are often effectively stronger than the new laws" (Falk Moore 1973, 23). With this argument, the assumption of the all-pervading force of state-law was clearly weakened.

100 This claim, naturally, has not been made exclusively by Tamanaha. See, for example Woodman 1998, 54: "Plurality of laws exists everywhere, because everywhere there are 'different rules for different situations' (Griffiths), or 'cultural heterogeneity and normative dissensus' (Geertz […]). Consequently legal pluralism exists everywhere". Tamanaha, however, takes this ubiquity of legal pluralism as a starting point for a thorough critique of the concept of 'legal pluralism', which I will present at the end of this section.

101 To this perspective could be counted, for example, Pospišil's proposal of 'legal levels' which I will present shortly.

102 See for example the work of June Starr and Jonathan Pool to the consequences of the incorporation of the Swiss Civil Code in Turkey in 1926 (Starr/Pool 1974, 534).

Especially some researches from the 1980's onwards underlined a reciprocal effect between state law and other normative systems of order. The perception of this interplay went hand in hand with new perspectives on the law itself, which was seen, for example, as a symbolical and ideological system.[103] The investigation of the symbolic aspects of state law and their influence on other normative systems turned to the center of attention. Mirroring these investigations, the corresponding strategies of resistance, the possibilities of evasion or appropriation of state law, and the idea of the hybridization of legal systems were put at the center of research. Equally, the question on how non-state normative structures constitute state law, gained academic relevance.

One of the basal works regarding the relationship amongst several normative orders from a broad theoretical perspective was developed by the Czech ethnologist Leopold Pospišil (*1923), curator and professor at the University of Yale, who presented an encompassing view for the coexistence of diverse normative systems in his 'The Anthropology of Law: A Comparative Approach' (1971). There he assumed that the society is a mosaic of subgroups, in which "every functioning subgroup [...] has its own legal system which is necessarily different in some respects from those of the other subgroups" (Pospišil 1971, 107). With subgroups, he referred to unities like the family, the clan, the community and the political confederation. According to his proposal, each society has as many legal systems as functioning groups conform it. Moreover, he conceived these systems as organized hierarchically, depending on how far they were more or less inclusive. Inside this hierarchy, Pospišil collected the subgroups of equal kind and inclusivity in 'legal levels'.[104]

Despite the fact that his proposal at first sight allows for some clarity on the social organization and interaction of diverse legal systems, it is the hierarchical structure of his approach the aspect of his work that was most challenged (Griffiths 1986, 15 ff.). In fact, Pospišil was guided by an idea of a hard structure, which was organized vertically and had state law at its highest vertix. Thus, his model does not allow for sufficient place to notice and analyze different influences that come, so to say, from 'lower' unities to the 'higher' spheres. Pospišil's proposal is grounded furthermore on a certain stasis, which does not consider the changes inside the *levels* nor the superposition between some of them.

Taking distance from Pospišil's structuralist viewpoint, the anthropologist Sally Falk

103 The relevance of this perspective on law can be seen, for example, in the edition of a Special Issue on Law and Ideology by the Law & Society Review in 1988. In this field belong naturally also the critical approaches to law referred to above.

104 Naturally, Pospišil's contribution to socio-legal studies goes beyond the legal-anthropological elements that are most known and that I can highlight in this particular inquiry. For an account of the broader and less recognized influence of Pospišil's *oeuvre*, see Goodale 1998.

Moore (*1924) developed a perspective on social organization that conceives of diverse groups which are not only organized vertically. In her 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973), she elaborated the concept of 'semi-autonomous social fields', the limits of which can be marked not only according to their organization, but according also to the procedures through which norms are developed, applied and enforced. According to her proposal, these fields can articulate with each other, so that a complex chain of social relations emerges. While this approach has been a central reference for questions on the interaction of diverse normative systems, including the state, the problem of Moore's proposal relies in the difficulty to state the boundaries of the 'social fields' she sets at the beginning of her argument. As Woodman states, "Moore's field may have ragged, vague or undiscoverable edges", and thus, he concludes, "[i]t seems unlikely that the concept of the semi-autonomous social field can restore to legal pluralism that feature of defined constituent elements which was lost when the bounded, self-consistent 'legal system' dissolved into the indiscriminate ocean of social norms" (Woodman 1998, 53 f.).

An equally 'horizontal' approach to the interaction amongst diverse normative spheres has been made by the Portuguese sociologist Boaventura de Sousa Santos (*1940), who posits his research in a clear political line oriented towards the emancipation from neo-liberal social models. Summing up, he postulated that the functioning of state law itself implies its articulation with other normative orders of non-state character (Sousa Santos 1991, 16). Interestingly, Sousa Santos concludes that some of these orders complement and support the order of the state, while others pose resistance and open spaces for conflict, so that social change is made possible. Importantly, Sousa Santos recognizes the state order itself as fragmented and heterogeneous turning turns the opposition between *one* homogenous state law and *other* forms of normativity void of meaning (Idem, 17).

A key element in Sousa Santos' research is a "structural map of capitalist societies" (Idem, 181), where he distinguished amongst four autonomous structural spaces, each corresponding to one form of law: the domestic space governed by domestic law, the working space governed by the law of production, the civil space governed by territorial law and the world space governed by systemic law (Idem, 183 f.). Importantly, while he conceives of these spaces as structurally autonomous spheres, Sousa Santos underlines that they are articulated with each other in different ways, limiting, selecting, mediating and reproducing (or not) developments in the other spheres. Since each sphere has its own forms to set law, through their interaction, a relationship of 'interlegality' arises, with different legal spheres

intermingling, overlapping and penetrating each other (Sousa Santos 2002, 97 and 417 ff.).

Similarly to Sousa Santos' argument that the functioning of state law requires the articulation with other social orders, the legal theorist Peter Fitzpatrick developed the concept of 'integral plurality', arguing, in a Hegelian tradition, that "modern law exists in certain relations of opposition and support with other social forms" (Fitzpatrick 1984, 115). Consequently, and in the same line of what he called later 'the mythological character of modern law'[105], he takes the interesting standpoint that state-law is constituted through various relations to other social forms, including relations by which (state-)law and the other social forms support each other's existence, difference and validity as well as relations by which (state-)law as well as the other social forms reject each other. Thus, Fitzpatrick argues the existence of a continuous process of co-constitution of law and other social forms, stating that "law is the unsettled product of relations with a plurality of social forms. As such, law's identity is constantly and inherently subject to challenge and change" (Idem, 138).

If something remains clear after this potentially infinite map of plural pluralistic approaches to law, is that the idea of 'legal pluralism' was developed from a variety of perspectives and sources, which differed in their disciplinary and political conditions. In this sense, it is remarkable that 'legal pluralism' has become a relevant notion in a variety of disciplines, what is rather unusual since each research project tends to posit itself in a specific field and each scientific field tends to demarcate its limits through the establishment of its own paradigms and knowledge base. The polyvalence of 'legal pluralism' has allowed the concept to penetrate a variety of disciplines successfully (Tamanaha 2008, 376). Insofar, the discourse of 'legal pluralism', as it has been carried until today, appears as a typical postmodern endeavor that aims to dis-cover mechanisms of power behind seemingly self-evident concepts and to deconstruct them, taking their context as a starting point of inquiry. Therefore, it is no surprise that this project of re-contextualization is carried out in diverse disciplines with a variety of results. In this sense, Sousa Santos names the concept of legal pluralism "the key concept in a post-modern view of law" (Sousa Santos 1987, 297).

As postmodern drafts, however, these pluralist approaches suffer basic difficulties. We, as readers, are left in a vacuum, in which the old can not stand anymore, but a real outcome out of confusion is not put in sight either. The old definition of law as monolithic cannot stand, but an approach to social life from a pluralistic understanding of law seems to dissolve in a myriad of particular perspectives that appear as incommensurable and irreducible. Once

105 Regarding this argument see chapter A.

we recognize the normative of language as contingent and law as plural, which shall be the ordering concept, the constant variable around we can organize our own thought, our intellectual exchange, our social interaction and our political participation?

With the blasting of the unified concept of law, suddenly, law could refer to all sorts of social control (Comaroff/Roberts 1981).[106] In this sense, main advocates of 'legal pluralism' referred to the undesired possibility of a trivialization of law, because "if law is everywhere it is nowhere" (Sousa Santos 2002, 384). Consequently, the usefulness of the project of pluralistic approaches to law has been put in question. Is this broad perspective actually helpful when it comes to research social processes or is it just a source of confusion and arbitrariness because of its incapacity of delimiting a sphere of research? How far have been and are pluralistic perspectives on law actually useful in order to create categories, organize data and analyze it, and, lastly, to formulate conclusions that can be combined with other results of research and make possible an improvement on insight and knowledge? If we desist from these goals, the remaining possibility is to reduce legal research on pluralism to a mere interpretative game that does not aim to produce specific generalizable insights and social changes.[107]

In response to these difficulties, while a big part of the literature on legal pluralism has been concerned about opening up the concept of law to go beyond a state-bound idea, concomitantly, a certain cautionary retreat from that broadening movement started. Already Merry pointed out, that it might make sense to maintain the category of state law as a clearly distinguishable concept, since it "exercises the coercive power of the state and monopolizes the symbolic power associated with state authority" (Merry 1988, 879). Moreover, the state-law "shapes other normative orders as well as provides an inescapable framework for their practice" (Idem). To abandon the concept of law as state-law would blur differentiations that are needed both for academic as well as for political purposes. From another viewpoint, regarding 'law' and 'legal pluralism' in the context of sociology of law, Griffiths stated in a more recent reflection that "the word 'law' could better be abandoned altogether for purposes of theory formation in sociology of law. [… 'L]egal pluralism' can and should be reconceptualized as 'normative pluralism' or 'pluralism in social control'" (Griffiths 2005, 64). Specially interesting is this statement because, back in the 1980's, Griffiths was one of the most important advocates for 'legal pluralism'.

In this sense, Brian Z. Tamanaha asserts that the main problem in the discussion on legal

106 In fact, Griffiths writes that "all social control is more or less 'legal'" (Griffiths 1986, 39).

107 Legal pluralism confronts thus the same criticisms that have been posed traditionally in front of cultural relativism.

pluralism relies in the lacking unity in the definition of law used by the different approaches (Tamanaha 2000, 296 ff.). Of course, this is not an exclusive characteristic of the pluralistic perspectives. Nevertheless, this lack of clarity determines the usefulness of pluralistic approaches to law. Continuing with his critique, Tamanaha poses a fundamental critique against approaches of 'legal pluralism', arguing that they are based on functionalist and essentialist concepts of law.[108] In general, Tamanaha asserts, legal pluralist approaches assume that "law is a fundamental category which can be identified and described, or an essentialist notion which can be internally worked on until a pure (de-contextualized) version is produced" (Tamanaha 1993, 201). On the contrary, he argues, "law is a thoroughly cultural construct. […] Law is whatever we attach the label law to […]" (Idem 2000, 313). Consequently, "concepts that [...] specify what law is, and what legal pluralism entails, are not testable or falsifiable: they are more or less useful, and their use value is a function of the purposes for which they are constructed" (Tamanaha 2000, 300). In this sense, law cannot "be formulated in terms of a single scientific category" because the "various manifestations of law do not all share the same basic characteristics – beyond the claim to represent legitimate normative authority" (Idem, 2008, 396).

On this base, instead of delivering a specific concept of 'law', he specifies the criteria according to which 'law' can be identified and limited. According to his suggestion, "law [is] whatever people identify and treat through their social practices as 'law' (or recht, or droit, and so on)" (Idem 2000, 312). The decision on what should be understood by 'law' remains by the people themselves that deal with a specific form of normativity (Idem, 314). Nevertheless, it remains dubious, if this approach is sufficient to contain diverse understandings of 'law', which are not mere translations of the word 'law', but imply other understandings of human interaction as a whole. Most importantly, who should identify that something is 'identified as law'? Tamanaha argues that it is possible to avoid the conceptual problem of positing a definition of law "by accepting as 'legal' whatever was identified as legal by the social actors" (Tamanaha 2008, 396). But who are the social actors to look for and which are the characteristics of such an identification remain unclear.

For our purpose specially interesting is that Tamanaha gives up on finding *the* identity of law, recognizing law as a cultural feature and taking this thought allegedly to its final conclusion. Law turns hence into an apparently infinitely polyvalent and thus hollow concept. In fact, it turns into a mere claim, a 'claim to represent legitimate normative authority'. In

108 In a similar vein, Sharafi spoke of "the legal-pluralist sequel to the 'what-is-law' debate between legal positivists and natural-law advocates" (Sharafi 2008, 141).

doing so Tamanaha intends to value the perspective of the Other, subjectivizing 'law' – a radical turn from a monolithic seemingly objective and neutral concept of law. Problematically, he assumes that a researcher is able to find what some 'other', i.e. some social actors, see as law in 'their own terms'. A following problem is the question on the capability to accurately or even transparently *represent* that 'other' in academic research. Arguing that the problem of 'law' is solved by just accepting and recognizing the Other's truth, Tamanaha seems to present the observer as transparent, as an observer that does not pre-set the conditions of observation and can thus find the Other's 'claim to represent legitimate normative authority', similarly to the way a (naively conceived) archeologist or a biologist find a temple or a bee.

Somehow, framing the problem of legal pluralism in these terms, the discussion seems to return, in an infinite cycle of self-reflection, to its origins in unresolved debates around the then emerging 'anthropology of law' (Roberts 2005, 21). Bohannan argued equally to privilege the perspective of the observed 'other' through what he called the 'folk system' (Bohannan 1957, 6), while Gluckman argued a common rationality in approaches to law and an analytical need for a unifying concept of 'law'. Tamanaha, apparently, sets out to recover the idea of a 'folk system', while obscuring that the frame he puts to read the Other's understanding of law is equally dependent on concepts that implicitly claim universal existence in order to have analytical value, this is concepts like 'claim', 'representation', 'legitimacy', 'normativity' and 'authority' to start with. In other words, what Tamanaha seems to forget is that to look at 'the Other' he uses his own eyes.

This is a difficulty that pervades the whole discussion on legal pluralism and, noticeably, does not disappear in Tamanaha's argument just because he transforms the 'legal pluralism' into a 'pluralism of claims to legitimate normative authority'. The difficulty relies therein that, once the absolute difference of the Other is stated, two contrary but complementary approaches are possible: either the Other turns completely inaccessible, or, following the pragmatical argument that we constantly relate with a variety of 'others', the Other is accessible only through my (conceptual) frame of experience.

In fact, 'weak' approaches to legal pluralism in Griffiths' sense posed this problem from the beginning, when they fought for a recognition of diverse normative orders as law from the perspective of state law. While they claimed a 'radical otherness', they argued for its equal validity in front of state-law following an argument of sameness. But also Griffiths own proposal of a 'strong' legal pluralism, that criticized this approach and pretended to pluralize 'law' itself, included the Other into *his* frame of what law *is*. That is the only way he could

argue that a perspective that recognizes law merely as state-law is ideological and false, while his legal pluralism is (allegedly) purely descriptive. Tamanaha tried to avoid this definitory violence, but setting the 'criteria' to identify law, does not result in a freer observation of the Other.

In this sense, the postmodern search for pluralization ended in the same modern violence it rejected. Going back to what this basic problem means for 'legal pluralism', Roberts hits the nail on the head when he argues that approaches on 'legal pluralism' "self-consciously privileg[e] the folk categories of Western law" (Roberts 1998, 105). Importantly, addressing the emergence of 'legal pluralism' as "a creature of the law school" (Idem, 97), he argues that "[i]naugurating an explicitly *legal* pluralism, lawyers have done more than register their interest in a particular field of study: they have marked some rather varied forms with the distinctive imprint of 'law'" (Idem, 99; emphasis in the original). While law as a particular category has its own history bound to a large extent to the emergence of secular government in Europe and the management of colonial expansion, it "is now, in its contemporary enlargement, graciously embracing others in its discourse, seeking to tell those others what *they* are" (Idem, 98; emphasis in the original). Importantly, in 'telling them what they are', legal pluralists re-enact the violence they criticize in modern state-law. While 'legal pluralism' aimed to transcend the dichotomy 'tradition'/'modern', it built on another dichotomy based on oppression/emancipation: "'formerly suppressed discourses' are identified, appropriated, represented in a particular way – as law" (Idem, 98). In other words, what Roberts claims is that "negotiated orders have their own rationalities" (Idem 2005, 23). Consequently, no one makes any 'other' any favor addressing diversity in terms of *one* encompassing rationality, which is always our own.

The problem is if we make anyone any favor *not* addressing diversity in terms of one encompassing rationality (assuming that it is possible at all). Noteworthy, addressing different 'normative rationalities' as legal, responded, as Correas highlighted, to a claim of legitimacy that remains at the core of the problematic of 'legal pluralism'. Therefore, in front of Tamanaha's proposal (as well as of other pluralistic approaches that take a broad perspective on 'law' to the extent that naming it 'law' or not turns irrelevant), it is worth asking what does a radical subjectivization of 'law' means for social activity. Even in the case that we would accept that we can observe plural claims to represent legitimately a normative authority, what remains problematic is how to deal with these plural equally valid claims. If, from a point of view of legitimacy, we accept two competing claims as valid, an argument which was at the core of the political aspect of the discussion over 'legal pluralism', then how is social

interaction possible without continuous and violent clashes of power? From the perspective of a modern paradigm, contradictory claims of legitimacy could be solved by a claim of legitimacy regarded as superior, as more legitimated and/or more powerful – in its positivistic version, state-law, in its naturalistic version, natural law. Thus, the claims of legitimacy were organized according to a certain process of recognition, usually, in our contemporary context, a formal legal recognition. When the legitimacy of that superior claim of legitimacy falls apart, who is going to legitimately decide on the legitimacy of any claim?

In this sense, Tamanaha addresses a variety of conflicts amongst 'systems of normative ordering in social arenas' (Tamanaha 2008, 400 ff.), arguing that clashes can exist within or amongst coexisting normative systems. Most importantly, he identifies questions of identity and power on the one hand and strategic choices on the resort to a normative system on the other hand, as two main sources of fuel for these conflicts. Equally, he addresses diverse forms of interaction and various strategies in case of inconsistency, be it that it derives into a clash or not. Similarly, Fitzpatrick argues a variety of relationships amongst diverse social forms (1984). What remains, lastly, is a palette of possibilities to engage into conflicts of legitimacy.

The problem from the perspective of political participation is that the mere statement of this pluralistic approach does not contribute directly to argue for a change in the relationship established between different claims of legitimacy, because any type of relationship, including an oppressive relation between different normative systems, can be legitimated. In other words, what does the statement that there exist conflicting 'systems of normative ordering' say about the way we shape the world with our conflicting claims of legitimacy, and if or how we can change that? It might be easy to understand that an indigenous normative system relates to a (obviously complex and even self-conflicting) state normative system in various ways of tension, mutual support, etc. And it might be important to grasp how certain aspects of those indigenous understandings of law are doomed to illegality with all its consequences for social life (from legal security to cultural segregation, from personal assimilation to social disruption, from reinforcing group identities to all sorts of negotiations, including very practical matters like political corruption and intransparency). And it might be equally relevant to see that this strategy of state-law is contingent and is responded in turn by other strategies of the indigenous normative system in question. But what remains unaddressed, and this was a key reason for the outburst of 'legal pluralism' in the 1970's and 1980's, is the desire to change that relation. The claim of the indigenous groups that argued for the recognition of their normative practices as law, and thus argued in favor of legal pluralism,

was oriented (amongst other interests) towards the recognition of a way of life as equally valid in order to avoid being thrown into illegality and the social disruption this generally meant.

However, from a practical perspective, the shattering of law in a plurality of legal orders carries evident complications, some of which can be seen exemplarily in the context of the debate over the 'cultural defense' (Sharafi 2008).[109] The cultural defense, employed both in civil and criminal contexts, refers to the resort to arguments regarding the belonging to a specific cultural group in order to justify an action that, according to official state-law, would be illegal. This type of defense has played an important role specifically in circumstances of domestic violence, and particularly in cases that led to accusations of murder. While this defense became relevant specially in contexts of immigration, the questions around how far the invocation of 'culture' is legitimate are also valid regarding 'home-grown subcultures', showing the potentially infinite field for pluralistic arguments. Most importantly, some feminist scholars have recognized that "the cultural defense decriminalizes violence against minority women" to the point of arguing that "multiculturalism (in this particular form) is indeed bad for women" (Sharafi 2008, 145). Interestingly, Sharafi argues that while discussion on legal pluralism seems to be detached of colonial questions, "this multicultural turn has meant that work on nonstate, nonethnic norms in western contexts has been drowned out by the deluge of work on immigrant and indigenous people's normative orders, themselves replete with post-colonial resonances" (Idem). Most importantly, what the example of the 'cultural defense' puts to the front is the problem that relies, as Sharafi underlines remembering Marc Galanter's concerns (1981), in celebrating "nonstate law as inherently less objectionable than state law" (Idem, 146). As with the whole problem of pluralism, what is at the bottom of this discussion, is the question of how is it possible to determine that one objection is more legitimate than another objection in the contrary direction. If neither state-law nor any other approach to law is the beacon of truth and justice, then how are we supposed to judge legitimately and feel secure about (potential) judgments made on us?

Despite the lack of conclusive answers for these questions, the importance of the debate and of the increasing questioning on 'law' as a monolithic concept is undoubtful. In any case, as Merry assured already in the end of the 1980's, through the questions of legal pluralism (and, we have to add, through the general criticism of modern law), the relation between law and

109 For an example of this topic in the context of the presence of the indigenous groups of the Guarani in the border area of Argentina, Paraguay and Brazil, see: Moreira 2005, 137 ff.

society has been moved to another level. A key result of the critical approaches to law that I have presented in this section is that the 'official' and 'unofficial' methods of social order have been conceptualized from a more complex and interactive perspective, as for example Boaventura de Sousa Santos and Peter Fitzpatrick have elaborated. From there, it results that instead of observing two separate entities, namely 'official law' and 'unofficial normative systems', or 'law' and 'politics', or 'law' and 'culture', a plurality of forms of order can be seen, that participate in a *common* social interaction.

This determines, in turn, that the ways in which these relations take shape are always contingent and never static. Features like hybridity and fluidity gain importance in the legal field (Tamanaha 2008, 403). And, most importantly for our research, the concepts of 'transfer' and 'development' change meaning in a radical manner, as we will see in the next chapters. Moreover, after having recognized that a plurality of systems exist parallel to law, and that there are diverse strategies put in practice amongst the normative systems to exert their claim on legitimacy, it seems totally 'normal' that 'state-law' does not always 'work' in an all-encompassing way as it is presented, because it actually 'works' *within* a context of relations with other claims of legitimacy, it 'works' *through* continuous fights over demarcation of legitimacy territories with a variety of social orders.

Lastly, what results of this 'normality' of the plurality of entities and relations in tension, is that the mere one-sided claim of legitimacy results insufficient to address the whole complexity of conflicts. Mere power supporting such a claim results equally insufficient, because every sort of power is based on interaction with other sources of power; it is brittle and it is fragile because it is embedded in a wider system in continuous flux. In this sense, we are speaking always of an adjectivized power, a contingent power, it is always power *within* a system of relations. Being aware of the fields of tension in which power, and with it all types of law and their claims of legitimacy develop, the question we need to address is how do we want to engage in this system of relations. Because, while plurality might create confusion, it requires us to become aware of our pick. Diversity demands choice. Importantly, a diversity of legitimate approaches to law requires us to choose not only amongst mere norm systems, but, at the same time, it requires us to consciously choose an approach on the role of these norms in social change, it requires us to choose an approach to development.

## IV. Critiques on Development – Twisting the Horizontal Vector of Time

I have presented already the connections between the idea of development and a rationality conceived in modern terms that aims always to overcome previous irrationality, and works thus with a vectoral perspective on time. When human groups are positioned in this straight line according to certain characteristics that differ from the ideal goal, then the originally diachronical division becomes equally relevant for a hierarchization of differences. From there, it is only a small step to a hierarchization of groups sharing the same historical moment. In other words, recognized plurality is categorized according to one model that claims universal validity. This is the base for the idea of development that justifies development aid, while the 'aid' part of it requires, in addition, a moral type of argumentation: 'aid' requires an extra step from this perspective on time and development to the actual conception that the one assumed to be less advanced needs to be helped by the one considered more advanced; that there is a humanitarian duty of the more developed one to help the less developed one towards achieving a higher stage of development. But what happens, when the vectorality of time and development are twisted in the sense of self-reflective inquiry?

We have seen so far some of the consequences that this twisting had for the concept of law as a system intended to establish generally valid norms. Summing up, self-reflexivity led to the acknowledgment of two seemingly contradictory aspects of the concept of law: on the one hand, that it is empty, and, on the other hand, that it is full and runneth over of superposed and more often than not conflicting meanings. Remembering the link between law and development I have presented in the first chapter, it is possible to envisage some of the difficulties that this self-reflexive twist has had for the idea of development. If law's promise is justice, equality and order, the promise of development is equally access to that true justice, economic equality and social order and security. The question of development is a matter of access because development implies a passage, a change: from lacking to having, or, in a negative sense, from having to lacking. To achieve development can only be just, and to access justice can only be a marker of development. And since justice, from a secular modern perspective has to be realized through positive law, development is a matter of access to law, and law is an expression of development.

Having set a standard for the possible and the desirable in terms of law, justice and development, the way to achieve a good mark according to that standard was more or less delineated, and the question was only related to the concrete steps to take. But once the norm

is lost, once we shift the question from how to get a better mark, or even which is the better measure stick, to who is the creator, the user and the object of the measure stick, once it is possible to think of a multitude of measure sticks with the same legitimacy, then the goal of a *better* mark becomes a matter of definition and thus of power. Consequently, the need to achieve that *better* position changes from being the unquestioned base for action to be the content of the question at stake. The question of how can someone achieve development changes into why does anyone needs (a particular) development at all. Consequently, questions arise regarding the 'invention' of the need for development, the hierarchies it creates, maintains and serves, and the silenced alternatives to that development or to development at all. These are the problematics that emerged when development researchers started asking themselves when, where, why and how 'development' developed.

To understand the relevance of this moment of self-reflection, it is important to realize that the twist of the idea of development is, at its core, the twist of the idea of time itself, a time that could only be conceived as a straight line from past to present to future to its further future to its further future … It touches, thus, directly upon deep questions of becoming, and thus, necessarily upon questions of identity and agency. Questioning the source of development presents an aporia, in which time stops moving forward. It is as if development researchers needed to hasten down an escalator that goes upwards towards infinity.

As we have seen, the intellectual and political arena experienced an important crisis at the end of the 20th century in different parts of the world, in which not only mere concepts were reviewed, but the capacity of the subject to access knowledge, truth and justice were put in question. The critiques of law I have presented took special force from philosophical and politically activist currents that, on the one hand, underlined the power of discourse and the incoherence of language, and, on the other hand, referred to realities that did not match the promises of the models proposed. Equally, deception with the means and results of development strategies, and an awareness of power, accompanied by the interest to overcome that deception and subvert power-structures, was at the core of critiques of the concept of development. In this section, I will present some of the most prominent critiques on the concept of development, linking them to questions of plurality. Later on, in chapters C and D, I will concentrate on critiques and new approaches that emerged in the area of legal development.

## 1. From Development to 'Development' or 'Who Needs Development?'

To state this question might sound cynical and disconnected from the actual, real, immediate needs of a vast majority of humanity. Thus, at a first glance, it seems to be the perfect argument of socially disinterested or egotistic, powerful orators satisfied with their position at the center of socio-economic structures. All the more relevant it becomes to look at these critiques, since they were put to the front especially by scholars who did not occupy the most powerful positions regarding their academic or their geopolitical environment. In terms of the developmental discourse, the positing of the problem in these new terms was supported and repeatedly enforced by thinkers and activists of the so called Third World, those who were theoretically in need of development. The call was: 'Please do not help! Your help is not helping'.[110]

This was the dramatic expression of a radical attitude in front of the idea of development. Importantly, the critiques on the modern concepts of development and development aid started almost at the same time that development began to be an important issue in the international political agenda. It is noteworthy, that, although the term 'development' was widely used in diverse environments, it was just after the World War II that it turned central to the international order pervading all fields of human life. A clear example of this turn in international politics can be found in the preamble of the Charter of the United Nations from 1945 that states the determination of the UN "to promote social progress and better standards of life in larger freedom" and, for this end, "to employ international machinery for the promotion of the economic and social advancement of all peoples" (United Nations 1945).

The idea of an underdeveloped Other that needed help to achieve development was envisaged more concretely in 1949 when US president Harry Truman gave his inaugural address (Truman 1949). There he emphasized the duty to "embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas" (Idem). After underlining the miserable living conditions of these "victims of disease", and the threat that their poverty meant "both to them and to more prosperous areas", Truman stressed the given capacity, "for the first time in history" to "relieve the suffering of these people", pointing at the timeless suffering of them in opposition to the rapidly evolving US-American "we" he identified with (Idem). Importantly,

110 In fact, one of the first shocks that the world of 'development' suffered with this kind of critique was stated by Gustavo Esteva in 1988 with his text '*Detener la ayuda y el desarrollo, una respuesta al hambre*' ('To Stop Help. An Answer to Hunger') (Esteva 1995, 65 ff.). Similarly, Dambisa Moyo, a Zambian economist, who once worked at the World Bank, made a call to stop help in 2009 (Moyo 2009).

Truman made a point of differentiating his aim "to help the free peoples of the world" "to lighten their burdens", from two different forms of international engagement (Idem). Firstly, this form of help was clearly differentiated from the programs for 'world economic recovery', culminating in 1948 in the Marshall Plan in Europe, that followed the hope that the European partners would "achieve the status of self-supporting nations *once again*" (Idem, emphasis added). Development was oriented to enhance a growth that has not been there ever, while in contrast, Europe just had to recover its old strength. With this impetus, the World Bank's original institution was founded, namely, the 'International Bank for Reconstruction and Development': reconstruction for the developed and destroyed, development for the undeveloped.[111] In fact, it is possible to see these two approaches to the socio-economic growth of different geo-political regions as complementary, since the reconstruction of Europe depended to a great extent of the materials that actual or former colonies could supply. Thus, while in the 1940's the politics of the United States, interested in the recovery of Europe for its own exports, "supported European efforts to maintain control of the colonies" (Escobar 1995, 31), after the anti-colonial struggle led to the formal political independence of several states, these interests and efforts were redirectioned in terms of development.

Secondly, and most relevant for the subsequent critiques, Truman underlined the difference between his development project and "the old imperialism-exploitation for foreign profit" (Truman 1949). Against the model of colonialism, he envisaged "a program of development based on the concepts of democratic fair-dealing", inviting thus to the transfer of technological knowledge as well as to the investment of capital (Idem). As Gustavo Esteva (*1936) argues, "what Truman succeeded in doing was freeing the economic sphere from the negative connotations it had accumulated for two centuries, delinking development from colonialism" (Esteva 2006a, 199). The justification for this program relied on the combination of a capitalist argument with a belief in science and technology. The core idea was that "greater production is the key to prosperity and peace. And the key to greater production is a wider and more vigorous application of modern scientific and technical knowledge" (Truman 1949). The duty to offer this help was finally reinforced by the call: "Only by helping the least

111 The name 'World Bank' is used to refer, in a broad sense, to the World Bank Group as the parent institution of the International Development Association – IDA, the International Finance Corporation – IFC, the Multilateral Investment Guarantee Agency – MIGA, the International Centre for Settlement of Investment Disputes – ICSID and the International Bank for Reconstruction and Development – IBRD. However, in a strict sense, the World Bank consists only of the IBRD and the IDA (Worldbank 2011). The agreements to set up the IBRD, the General Agreement on Tariffs and Trade (GATT), which later became the WTO, and the International Monetary Fund (IMF) were signed during the United Nations Monetary and Financial Conference, commonly known as the Bretton Woods conference (1-22 July 1944), where the international monetary and financial order was regulated after the conclusion of World War II. Consequently, these institutions became known as the 'Bretton Woods institutions'.

fortunate of its members to help themselves can the human family achieve the decent, satisfying life that is the right of all people" (Idem). The logic is obvious: there is no right without a respective duty, *ergo* development aid is the burden of the developed man, who is enjoying *the* decent and satisfying life that everybody should enjoy. Through this logic, the 'natural law' of all human beings was connected with the 'natural development' of all human beings, and the consequent duty of the developed man was to enforce that law.

It is necessary to underline that Truman's speech is just one expression of a whole school of thought concerned with the topic of development, that unsurprisingly takes the name of 'modernization theory'. This approach was theorized later, especially in the 'Non-communist Manifesto' (1960) of Walt Whitman Rostow (1916-2003), but international institutions referred continuously to the idea of development in the sense of the modernization theory already before the theory was established as such. Truman's speech is a key testimony of the modernization doctrine and of the political environment it emerged in, not only because it was at the base of the further institutional development of development, but also because its rhetoric makes reference to many aspects that were central to the postmodern critiques on development, as we will see shortly.

Before postmodern critiques could start to question the way to speak about development, however, other critiques emphasized problems regarding the way to access development, and started to foster doubt around the certainty of the development path that modernization theory propagated. The critiques were first articulated in form of a different development theory that emphasized the structure of power existent in international economics and international politics: the dependency theory. Raúl Prebisch (1901-1986), one of the main advocates of this theory, argued that the economic and political scheme of power present in international relations was an impediment for the development of the Third World, and thus he proposed a different economic approach for the development of the region.[112] This theory was further developed in the frame of the Economic Commission for Latin America (ECLAC or CEPAL) based in Santiago de Chile, which Prebisch directed from 1950 to 1963. The difference between modernization and dependency theory can be reduced to the diagnosis of the cause for underdevelopment and to the resulting necessary treatment for the disease of underdevelopment. Arturo Escobar (*1952) resumes the difference between these approaches stating that dependency theory "argued that the roots of underdevelopment were to be found in the connection between external dependency and internal exploitation, not in any alleged

112 The titles that gave the kickstart for this proposal were Prebisch's 'The Economic Development of Latin America' (1950; unpublished original in Spanish of 1949) and Hans Singer's (1910-2006) paper 'Post-War Relations between Under-developed and Industrialized Countries' (1949).

lack of capital, technology or modern values. For dependency theorists, the problem was not so much with development as with capitalism" (Escobar 2006a, 447). Naturally, this characterization of modernization and dependency theory does not take into account the diversity of opinions within each of these currents. However, this short overview might suffice to present some of the elements present in the critical engagement with development, that are going to be central for the later contributions of postmodern thinkers to this discussion.

Even if the modernization theory had a liberal character, and the dependency theory was very linked to Marxist theory, both approaches shared obviously some basic assumptions. Firstly, they operated with the category of development, which is not something to be taken for granted. Moreover, both theories saw development as expressible in quantifiable economic standards. Secondly, both argued that some nations or states were better, higher or further developed than others. In other words, subsuming different nations under one universally valid concept of development, they determined a hierarchy and a line of development. At the same time, a dichotomy between developed and underdeveloped was created. Thirdly, these theorists assumed that it was possible to transcend from one stage of less development to one of more development. Even if dependency theory aimed to go beyond the logic of stages presented by the modernization theory, it based its proposals on stages of dependency. In other words, it put the question of development in negative terms of non-dependency. Finally and probably most relevant, both of them assumed that this transition towards development is desirable.

Because of the mechanistic underpinning of both theories, Dietrich presents these approaches as expressions of modern thought (2008, 281). However, the previous statement that, basically, the first modern thinker was also the first postmodern thinker, is valid also in this context. In fact, it is possible also to envisage the emergence of the international discourse on development itself as an expression of the 'postmodern condition'. For itself, development was a buzz-word that was created in the process of the invention of a whole new structure after colonialism crumbled down and thus a plurality of new states were created. In the middle of the century, World War II had left massive destruction and the ruins of the promises of human progress on the ground. Colonial rule could not show a good saldo either and the cruelty against humanity shown in the colonized areas just underlined the humanitarian failure of that modern project. Development came, in this sense, as an attempt to restructure the world in front of the insecurity caused because of the crumbling down of the old order. In this sense, the modernization theory and the dependency theory can be conceptualized as

responses to that uncertainty, responses that are reminiscent of modern mechanicism, and thus, inadequate to respond to the challenges posed by the diversity and insecurity of the postmodern social environment where they pretended to be used.

Dependency theory, which argued relying on the idea of power-structures at work *behind* the developmental strategies and called for a flight from the domination schemes, had a structuralist conception at its base, and thus allowed later, as I have shown for structuralist proposals in other fields also, for post-structuralist critique on development. In the case of dependency theory, one concrete expression of this change can be seen in Immanuel Wallerstein's proposal[113], where he visualized capitalism as a world system amongst many other possible systems, taking thus an important distance from seeing international politics and thus international development as the result of the mechanics of states. However, also his model as well as dependency theory itself remained lastly caught in a concept of development that in one way or another was organized around quantifiable standards that could be achieved, provided the right analysis, prognostic and diagnostic (Dietrich 2008, 282 ff.).

In search for alternative conceptualizations, the critics ended up adjectivizing development remaining, lastly, caught in the worse/better division it proposed. Rahnema emphasizes that these differences relied only "on the ways development had to be implemented": While for one group "*economic* development" was central, for another, "*culture* and the social conditions proper to each country had to prevail in any process of development" (Rahnema/Bawtree 2008, ix; emphasis added). Equally, some advocated for an "expert-based and professionally managed development and others [...] for an 'endogenous', 'human-centred', 'participatory', 'bottom-up' or, later, 'sustainable' form of development" (Idem). But these were merely "'policy-oriented' divergences" (Idem). This was a clear expression of the fact that "development had achieved the status of a certainty in the social imaginary" (Escobar 1995, 5).

Summing up, despite the postmodern context and the further attempts of development research to respond to an ever increasing certainty of the failure of the principle of linear growth, the reflection on development and the implementation of the new conceptualizations did not formulate a complete turn of the subject matter. The most radical critiques of development, that went beyond mechanistic conceptions and beyond the analysis of power-structures from a structuralist point of view, were still to come.

113 Amongst his prolific work see: 'The Modern World System' (four volumes; 1974-2011) and 'Geopolitics and Geoculture: Essays on the Changing World-System' (1991).

On the political-practical side of the development of development, the 1950's and 1960's saw, parallel to the implementation of the theoretical fight between modernization theorists and dependency advocates, the continuous increment of institutions dedicated to enhance growth, development and progress, and, later, the increment in the revolutionary virulence connected with the fight for social justice. A myriad of development institutions were created, both at the global as well as at the bilateral and national level, while new and ever newer theories on 'better developments' challenged each other introducing, in turn, new institutional approaches. That 'development' could be used to speak about a variety of processes from a plurality of contradictory points of view became evident for many. It is thus not surprising that, in the end of the 1970's, the first ideas on development as a myth were published.[114]

The assertion that development is a myth does not have to mean for us, that it is rejectable or invalid from the outset. This statement gives us, certainly, a tool to understand the scope of the critique expressed by anti- and post-developmentalists. To start with, this 'mythification' puts 'development' in the realm of symbolic narrative, a sphere that is rather associated with religious belief and traditional custom. At the same time, the concept of the myth is related to the figure of the hero as well as to extraordinary events (Encyclopedia Britannica Online 2011). According to the most common understanding of this concept, a crucial characteristic of a myth, is that it "presents itself as an authoritative, factual account, no matter how much the narrated events are at variance with natural law or ordinary experience", and thus, "there is no attempt to justify mythic narratives or even to render them plausible" (Idem). In this sense, "the unquestioned validity of *mythos* can be contrasted with *logos*, the word whose validity or truth can be argued and demonstrated" (Idem). Naturally, "myths that are dominant in one's own time and society" are always difficult to recognize. The mere presence of a myth is sufficient to provide it with authority and requires no proof. Hence, "the myth can be outlined in detail only when its authority is no longer unquestioned but has been rejected or overcome in some manner by another, more comprehensive myth" (Idem).

Making use of this short but common understanding of the principal elements of a myth, it is possible to track down the new layer of meaning put on 'development', when considering it a 'myth'. Firstly, its meaning changes from the sphere of presumably rational, formal and thus questionable science to the sphere of religious symbolism, where this type of justification is neither possible nor needed. As a consequence, more than a process to be proven scientifically, development is connected to beliefs, and, as such, it becomes extremely

114 See for example Attali 1977.

resilient to rational argument. The rationality of development is here at stake. In mythologizing 'development', thus, the developmentalist argument that called for an abandonment of outdated beliefs in the name of science and technology[115] is put on its head; what is presented as the most *log*-ical turns out to be a myth. Secondly, the content of the myth, while presented as 'natural' depicts extra-ordinary circumstances, a time-space out of palpable reality. In other words, 'development', based on a specific perspective on what is the 'natural' evolution of a society, is seen, from a 'mythological' perspective, as a story circumscribed to a specific time-space, moreover, to a time-space that only exists at a symbolical level and is not attached to empirical experience. Consequently, 'development' is, from this perspective, neither empirically 'real' nor 'natural'. Thirdly, a *mythos* requires a hero, who, in his (generally speaking a modern hero is usually a 'he') journey not only fulfills impossible tasks but also sacrifices himself in the name of a cause, often rescues the weak, and re-establishes order. This corresponds to the figure of the developer that, as the active protagonist of the story, requires an antagonist for *his* journey, a victim to save, an oppression to overcome.[116] Furthermore, development mythifiers, point at the difficulty of being aware of 'development' as a myth exactly because of its mythical qualities, because it justifies the own way to see the world, the own cultural identity, and putting it in question implies risking the coherence of the way one is able to live and understand the own environment. Subjectivity and identity are at the core of the problem of 'development as a myth'. Last but not least, the recognition of 'development' as a myth, implies that there is already a breach in the authority of the denounced myth. Thus, Wolfgang Sachs (*1946) started his renowned compilation 'The Development Dictionary' (1992) stating the death of 'development' (Sachs 2010, xv). Most importantly, one aspect of the 'mythification of development' (and for that matter also of the 'mythification of law' elaborated for example by Fitzpatrick 1998) that has not been fully acknowledged by most of the mythifying critics is that, at the same time that a breach in the authority of a myth is produced, a different myth evolves, which justifies the fall of the old

115 The primacy of rapid economic progress, and particularly its incompatibility with a variety of cultural approaches, was clearly stated by the Department of Social and Economic Affairs of the UN in 1951 in its 'Measures for the Economic Development of Underdeveloped Countries': "There is a sense in which rapid progress is impossible without painful adjustments. Ancient philosophies have to be scrapped; old social institutions have to disintegrate; bonds of caste, creed and race have to burst [...]. Very few communities are willing to pay the full price of economic progress" (Escobar 1995, 3 f., cit. United Nations).

116 There are many other important and interesting elements in this aspect of the mythology of development, which I cannot present here in detail. A central reference to this topic is naturally the research on 'heroes' to which Joseph Campbell (1904-1987) dedicated his life. As the key-stone of his writings, which aimed to understand the *structure* of heroic myth, see Campbell 1949. It is no coincidence that Campbell's seminal research on heroes was published parallel to the establishment of a new international order after World War II, as well as at the beginning of the 'development era', receiving an important amount of attention of the public, both inside and outside of academic circles.

(now visible) myth. Remarkably, this happens in an unacknowledged way, in the same form as the preceding myth operated before. Hence, in terms of 'development', it is legitimate to ask which myth is allowing for 'post-development' to emerge, and 'development' to be seen as a myth and fall. Equally problematic are questions like where is the profit of identifying 'development' as a myth, and – in the case we assume that myths are unavoidable, unjustifiable and irrational – how is it possible to have a direct experience with or beyond myths, act in consequence, and engage truthfully with each other. In a nutshell, these are some of the biggest challenges of post-developmental critique, echoing the difficulties of other post-structuralist critiques I have presented above. Before we deal with these questions, however, it is worth understanding post-developmental argument and its context of emergence in detail.

After having presented shortly the dimension of the 'mythical' understanding of 'development', the coordination between international politics and the political aspects of religion becomes an important field to look at. In many ways, the questions on the belief on 'development' were accompanied by a crisis of the belief in (Christian) religions, and most prominently a crisis of their institutionalized structure. This link turns even more important when we observe the relevance of theological argumentation in matters of development, especially if we remember that one of the main impulses for the first European colonial enterprises, which functioned as a foundation and/or as a blueprint for the later imperialist endeavor, was guided by theological arguments of religious and human development, as it was the case with Latin American colonies.

By the end of the 1960's, the Church and the science of theology were facing an increasing amount of destabilizing criticisms. Confronted with the dramatic situation after World War II and the crumbling of the colonial order, the Church was questioned on its role as one of the most powerful institutions in the midst of worldwide use of immense violence. The Encyclical *Populorum Progressio* of 1967 intended partly to react in front of these important criticisms, when, in the climax of developmental discourse, the pope Paul VI (1897-1978) spoke the language of international politics and declared development to be "the new name for peace" (Paul VI 2007, 76 f.), underlining as well the central role of international social justice (Idem, 5 f.).

Parallel to that, the concept and project of Theology of Liberation was being developed by Gustavo Gutiérrez Merino (*1928) (Gutiérrez 1971), who argued that the concept of development was insufficient to address the immensity of the social situation in underdeveloped countries, where conflict and injustice decimated the population. Liberation

was, in this sense, more reflective, in Gutiérrez' eyes, of the need for radical change, and furthermore, opened the idea of development to spheres that went beyond the economical perspective. The II General Conference of the Latin American Episcopate made its appeal in the same line when it stated in 1968: "For our true Liberation, we humans need a deep change, so the empire of Justice, Love and Peace may come" (cit. in Dietrich 2008, 295). Thus, the modern concept of development found a radical expression: Liberation. This liberation, however, did not call only for an emancipation in a linear sense of evolution, but at the same time, pretended to recover the value of vernacular traditions as valid ways of life subjected to oppression by traditional theological (and developmental) interpretations. In this sense, the proposal of liberation was, on the one hand, dependent on a project of development as liberation, while, on the other hand, it posed itself against a developmentalism that aimed to violently overrun vernacular cultures in the name of science, technology and capital. Liberation of oppression and suffering in pursue of a better world in peace and justice was not only the goal of Marxist theologians, but was also set as an aim of philosophical engagement and, with it, of all efforts of the humanities and the arts. In this context, the 'Pedagogy of the Oppressed' (1970) of Paulo Freire[117], together with the 'Philosophy of Liberation' (1975) of Enrique Dussel, appeared, amongst many other contributions in different battlegrounds. In the arts, Augusto Boal's 'Theatre of the Oppressed' was, as we will see, equally a remarkable proposal that emerged in this period carrying as well the message of liberation.

Being close to this struggle for liberation, particularly to the Latin American 'Liberation Theology', a key figure in the postmodern turn of development in the second half (and more dramatically towards the end) of the 20th century, was the Austrian philosopher, theologian and catholic priest Ivan Illich (1926-2002). While working in diverse institutions of the Vatican, he held an extreme critical attitude regarding its participation in the modernization of the 'Third World', especially through the CIDOC, or Intercultural Documentation Center, which he founded in 1961 in Cuernavaca, Mexico. Interestingly, Illich speaks himself of his paradox relation to tradition and institution, two concepts which, being he a theologist, have a special link with the environment of the Church (Illich/Cayley 1992, 242 f.). This inner division resonates with similar expressions of inner division of other late modern and post-

117 It is worth mentioning here, that Ivan Illich, whose work I will present immediately, and Freire were initially close friends, political allies and colleagues. Nevertheless, while both engaged in radical criticism against the school system, they had different views on the topic and engaged in overt theoretical and political disputes during the 1970's. However, what unites them for our purpose is their critical impetus, which, as I have stated above for other postmodern critical approaches, often take not only plural forms but contrary stands. For a contemporary perspective on a critical engagement with education and schools that recovers inputs from Ivan Illich and Paulo Freire (as well as John Dewey), see Kahn/Kellner 2007.

modern critics, who, in the realm of law, for example, criticized the institution of law recklessly while, at the same time, it seemed unthinkable for them to reject legal traditions and/or their justice totally.

While Illich's most renowned areas of criticism are education, health and transportation, his research is particularly valuable for questions on development and growth, which were at the core of his concern in these very diverse fields. Specially health and education are good examples of applied notions of development: a linear movement from sickness to health, from ignorant to educated. As such, these are key areas and aims of international development aid. In fact, in an interview conducted in 1997, he explicitly said that he refused to do an analysis in the areas of law or social work like the one he had done, for example, in the area of education, adding that he "refused to restrict [his] analysis to the unwanted technical and social consequences of education, health and productivity" (Rahnema/Bawtree 2008, 107), thus pointing at the broad complex and the implicit critique of other areas his work aimed at.

Starting from the primary role of economics for the concept of development, Illich and many others engaged in a critical appraisal of modern economics, investigating its basic assumptions, and how they permeated all sorts of relations that were seemingly independent from economical concerns. One of these basic assumptions, and probably the most important in the analysis of economic growth, is the assumption of scarcity, which according to Illich began to spread into all aspects of life in Europe in the Middle Ages. Development meaning "the transformation of subsistence-oriented cultures and their integration into an economic system", it "always implies the propagation of scarcity-dependence on goods and services perceived as scarce" (Illich 2006, 178). With the appearance of the idea of scarcity, the idea of conflict, the ways to confront it, and finally the idea of peace, changed. Naturally, law being arguably presented as a means to deal with conflict in pursue of social peace and order, also the meaning of law changed.

The main argument of Illich is that, under the assumption of scarcity, which is at the base of the concept of development, "peace came to mean *pax economica*", meaning a "balance among formally 'economic' powers" (Idem, 176). In contrast to that concept, peace had a very different meaning before the definitive transition from a subsistence economy to a trade-based economy.[118] As Illich argues, in Central Europe, before the breakthrough of a trade-based economy, the peace to be guaranteed aimed "to protect the poor and their means of subsistence from the violence of war" (Idem, 179) in order to sustain also the war itself.

118 For a variety of profoundly reflected testimonies of diverse concepts of peace, see Dietrich et al. 2011.

"The 'peace of the land'[119]", Illich continues, "was thus distinct from the truce between warring parties" (Idem), as it is basically understood today.

The big change started to be noticeable with the rise of the nation-state, when peace changed its meaning of protecting "that minimal subsistence on which the wars among lords had to be fed", thus protecting concrete real communities, to mean the protection of production and trade as abstract entities in the pursuit of an utopian perfect peace (Idem). The basic idea behind this last peace through economic relations, was that states which are trade-partners, and thus economically dependent of each other, do not wage war against each other.[120] Development as the organization of all communities under this scheme, is thus, a deadly needed element for the *pax economica*. In this context, it is worth remembering for example the 'threat' of poverty mentioned by Truman in his speech. Consequently, development and its particular form of peace is in opposition to all other sorts of peace and equally of economies that are not based on those specific ideas of scarcity, of the nation-state, etc. Hence the title of Illich's text: 'Peace vs. Development' (1981).

It is not surprising, thus, that the main outburst of post-developmental arguments, at least at the level of academic publications in the Euro-American centers of intellectual production, emerged in the 1990's, recovering and deepening to some extent Illich's early critiques. After the so-called 'lost decade of development' of the 1980's, the contrast could not be starker: While researchers cried out the failure of development programs, the United Nations', and with it, the new post-World-War II world order, celebrated its 50th anniversary and the delegates unanimously declared their full support to 'development', setting it as "one of the founding pillars of the modern 'global village' programmed for the twenty-first century" (Rahnema/Bawtree 2008, x). In this sense, Rahnema speaks openly about the bitter experience of disillusion experienced my the majority of the contributors to his reader. As one of the reasons for his writing, Escobar equally expresses the frustration experienced in the struggle for development: "The debt crisis, the Sahelian famine, increasing poverty, malnutrition, and violence are only the most pathetic signs of the failure of forty years of development" (Escobar 1995, 4).

119 Illich refers here particularly to the German concept of '*Landfrieden*', which literally translated means 'peace of the land'.

120 This is the same assumption at the origin of the formation of the European Coal and Steal Community (ECSC), and the subsequent European Economic Community (EEC).

This effort to put in question the concept of development itself, resulted for example in Majid Rahnema's course on 'The Myth and the Reality of Development' at the University of California at Berkeley in the 1980's, and his text 'Global Poverty: A Pauperizing Myth' (1991). Later, Rahnema would explain in the introduction to the influential compilation 'The Post-Development Reader' (1997), what he considers to be a central element in the creation of this myth: "the myth of development emerged as an ideal construct to meet the hopes of" three categories of actors: the leaders of the independence movements, who "were eager to transform their devastated countries into modern nation-states", the 'masses', who "were hoping to liberate themselves from both the old and the new forms of subjugation, and the former colonial masters, who "were seeking a new system of domination, in the hope that it would allow them to maintain their presence in the ex-colonies, in order to continue to exploit their natural resources, as well as to use them as markets for their expanding economies or as bases for their geopolitical ambitions" (Rahnema/Bawtree 2008, ix). Thus, Rahnema continues, development "mainly served to strengthen the new alliances that were going to unite the interests of the post-colonial foreign expansionists with those of the local leaders in need of them for consolidation of their own positions" (Idem, x).

From a similar starting point, Escobar wrote his 'Encountering Development. The Making and Unmaking of the Third World' in 1995, which, as he stated in the preface to this publication, could "be read as the history of the loss of an illusion [the illusion of development], in which many genuinely believed" (Escobar 1995, 4). Equally, he refers to the idea of development as a "dream" that "progressively turned into a nightmare" (Idem). According to him, more than a reality that had to be fought against, the Third World was a product of "the discourses and practices of development" which was incepted in the early post-World War II period (Idem). Therefore, Escobar explained, it had to be put between quotation marks, as it was the case with many other 'phenomena' that postmodern critics reflected as created concepts.

In this line, Escobar depicts his own perspective on development along three axes which Foucault proposed before (1986), and which also can be seen equally as three main aspects of post-developmentalist's analysis in general. Escobar aims thus to research 'development' in terms of "the forms of *knowledge* that refer to it and through which it comes into being and is elaborated into objects, concepts, theories, and the like; the system of *power* that regulates its practice; and the forms of *subjectivity* fostered by this discourse, those through which people come to recognize themselves as developed or underdeveloped" (Escobar 1995, 10; emphasis added).

Putting development in this specific context, it loses its implicit aura as universal truth, turning into one of many possible ways to understand human, social, cultural and political moments and their change. Thus, the psot-developmental proposal can be summed up in terms of speaking of "development as a historically singular experience, the creation of a domain of thought and action, by analyzing the characteristics and interrelations" of these three axes (Escobar 1995, 10). I will present some of these post-developmental voices in the next pages.

## 2. *Post-Developmental Voices*

A central question for 'development' critics has been its connection with a particular perspective on economy, as I have presented briefly above for the case of Ivan Illich's reflections, particularly with a discourse of development that defines underdevelopment by economic standards. However, a major point of attention of post-developmentalists relies on notions of poverty and economic disadvantage, so that many of them remain trapped in questions over economy in a similar manner as the developmentalism they criticize. Arturo Escobar, for example, presents his book as an "attempt to develop a cultural critique of economics as a foundational structure of modernity, including the formulation of a culture-based political economy" (Escobar 1995, vii). In this short sentence, Escobar makes explicit his aim to criticize the 'structure of modernity' ascribing special relevance to the idea of 'culture'. This is another example in line with others that we have seen in different post-modern critiques, where 'culture', its contingency, its connection to power, and the variability of the creation of meaning determine the perspective of the critique.[121]

Following this concern with economy, Esteva, as well as Escobar, present how especially during the 19th century, the economic sphere was excised from society and culture as an autonomous sphere, "installing it at the centre of politics and ethics" (Esteva 2006, 199). In turn, both authors try to incorporate this sphere, that had become disconnected, into a cultural, symbolic and discursive inquiry. While according to the model of the 19th century, scarcity was put at the center of the economic theory, as an universal condition, and thus transformed into a 'law of scarcity', what post-developmentalist critics emphasize, is that "it is precisely the universality of this assumption that is no longer tenable" (Esteva 2006, 201). Responding to the omnipresent logic of poverty, Escobar states that "vernacular societies had developed ways of defining and treating poverty that accommodated visions of community,

121 For this aspect of Escobar's work, see especially Escobar 1995, 58 ff.

frugality, and sufficiency" (Escobar 1995, 22), and did not subordinate to an allegedly universal 'law of scarcity'.

Equally interesting for the development critique is the diversity of ways to deal with the assumed poverty. In colonial times, Escobar argues, "the concern with poverty was conditioned by the belief that even if the 'natives' could be somewhat enlightened by the presence of the colonizer, not much could be done about their poverty because their economic development was pointless. The natives' capacity for science and technology, the basis for economic progress, was seen as nil" (Escobar 1995, 22 ref. to Adas). However, according to Escobar (1995) and Rahnema (1991), in the following epochs, these conceptions of poverty, and thus its management, went through two important breaks. Firstly, they refer "the advent in the nineteenth century of systems for dealing with the poor based on assistance provided by impersonal institutions", that transformed 'the poor' into 'the assisted' (Escobar 1995, 22). According to Escobar, this change made appear 'the poor' as a social problem, produced new mechanisms of control and intervention, and reshaped "ways of thinking about the meaning of life, the economy, rights, and social management" (Idem). Thus,

> "pauperism, [...], was associated, rightly or wrongly, with features such as mobility, vagrancy, independence, frugality, promiscuity, ignorance, and the refusal to accept social duties, to work, and to submit to the logic of the expansion of 'needs'. Concomitantly, the management of poverty called for interventions in education, health, hygiene, morality, and employment and the instillment of good habits of association, savings, child rearing, and so on" (Idem, 23, ref. Procacci).

Most importantly, this perspective led to "the setting into place of apparatuses of knowledge and power that took it upon themselves to optimize life by producing it under modern, 'scientific' conditions" (Idem).

In a second turn, according to Escobar and Rahnema, poverty was globalized, and thus the parameters applied to individual persons was amplified to the international arena, constructing, based on the annual *per capita* income, "two-thirds of the world as poor after 1945" (Escobar 1995, 23). In fact, in 1948, the World Bank defined as poor the countries with an annual *per capita* income below $ 100, creating poverty as the "result of a comparative statistical operation" (Sachs cit. in Idem). Consequently, "poverty became an organizing concept and the object of a new problematization" (Idem, 24), bringing "into existence new discourses and practices that shaped the reality to which they referred" (Idem). Through this conceptualization based on an allegedly universally valid standard, the development strategy "became a powerful instrument for normalizing the world" (Idem, 26).

Problematizing the concept of ‘poverty’ as an instrument created under specific circumstances, and not as a given fact, is a main element in the post-developmental enterprise. But not only ‘poverty’ has been scrutinized as a dominating concept. In the renowned book ‘The Development Dictionary: A Guide to Knowledge as Power’ (1992) edited by Wolfgang Sachs, a variety of contributions in the same line around concepts like ‘progress’, ‘One World’, ‘production’, ‘standard of living’, and, explicitly ‘development’ were included. It was the Mexican Gustavo Esteva, who developed in this volume a concise and thorough example of the post-structuralist critique on development, which is oriented to put not only one theory of development in question, but moreover, to inquire the validity of ‘development’ at all, including all the newer versions of the concept. In fact, Esteva argues that the critiques of authors like Julius Nyerere (1922-1999), Rodolfo Stavenhagen (*1932) and many others who called for a new perspective on development, claiming the relevance of a development according to the own objectives and the own culture, are counterproductive because they are based on the same assumptions on which the development they criticize is grounded (Esteva 2006, 185). His radical critique, in turn, is against the assumptions of development as such, namely, that it assumes the need for a movement from an underdeveloped stage to a developed one. For two thirds of the inhabitants of this planet, this means, Esteva argues, that they have to conceive of themselves as underdeveloped and of their own position as subjugated and undesirable. Basing on this conception of their self, the simple fact of associating with development one's own intention tends to annul the intention, to contradict it, to enslave it. Thus, thinking in one's own objectives or having confidence in oneself and one's own culture becomes impossible, because the own objectives and the own culture are stained with the *macula* of underdevelopment.

Representative of many other detailed critiques of development, in the following paragraphs, I will introduce Esteva's argument, which emerges from a genealogy of the concept of ‘development’, and which is still one of the most influential in the field of developmental and political studies and practice. His influence derives partly from his intellectual activism in diverse fields. One of the most important outcomes of his work has been the creation of the *Universidad de la Tierra*[122] or Unitierra (University of the Earth) in the Mexican city of Oaxaca, which takes into practice Ivan Illich's teachings amongst other alternative educational proposals. Renowned as a main advocate of post-development for his theoretical work in the tradition of Ivan Illich, he was also politically active as an adviser for

122 For more information about this project, which differs greatly from formal schools, see Unitierra 2011, as well as Unitierra 2008 and Esteva 2007.

the Zapatista Army for National Liberation (EZLN) in Chiapas during negotiations with the Mexican government. Taking into account this political engagement, which is connected specifically with the struggle of indigenous groups in Oaxaca, it is easy to understand Esteva's point of view as one that is concerned with cultural diversity and economico-political oppression, as well as with the remnants of the colonial rule in the modern nation-state and its political and social institutions.

As Esteva argues from a perspective of discourse analysis, the 'era of development' started officially as an international political discourse the 20th of January of 1949, with the inaugural speech of Harry S. Truman I presented above, where he stated: "the old imperialism – exploitation for foreign profit – has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair dealing" (Truman, 1949). With that token, according to Esteva, the 'imperialist paradigm' in international relations was replaced by the 'development paradigm'. Furthermore, Truman used in the same speech another relevant and new word in this context: 'underdevelopment', changing drastically the meaning of 'development'. From then on, the diversity of two billion people disappeared behind an inverted mirror of the assumed unified reality of a selected 'developed' group (Esteva 2006a, 184). That is to say that, with the introduction of the concept of 'underdevelopment', a large majority of human population turned into the negation of a 'developed' minority that was presented as being homogeneous and unified.

Naturally, 'development' had previously a different semantic than the one it acquired during the 20th century. Esteva points out that 'development' describes in colloquial language a process through which the potentialities of an object or organism are liberated, until it achieves its natural, complete form (Idem, 186). The idea of development, thus, refers to a 'natural way to be'. This idea of development, however, changed more and more from the idea of progress towards an 'appropriate' form to the idea of progress to an evermore 'perfect' form.[123] Finally, the originally biological approach was incorporated as a metaphor in the social sphere in the 18th century. In this context, Esteva mentions, for example, the historian Justus Möser (1720-1794), who used the term *Entwicklung* (development) in 1768 ('*Osnabrückische Geschichte*', 'History of Osnabrück') to refer to the gradual process of social change (Esteva 2006, 186). Later on, in 1774, Johann Gottfried von Herder (1744-1803) related the life phases to social history, applying "the organological notion of development" as part of his attempt to combine the theory of nature with the philosophy of history (Idem, 186

123 Esteva refers here to the works of Caspar Friedrich Wolff (1734-1794) and Charles Darwin (1809-1882).

f.). For him, “the historical development was the continuation of natural development; and both were just variants of the homogenous development of the cosmos, created by God” (Idem, 187). With the later secularization, development became autonomous of a divine image, and the capacity to ‘self-development’ of human beings became central. Lastly, Marx explained development “as a historical process that unfolds with the same necessary character of natural laws” (Idem).

Importantly, Esteva emphasizes that the transformation of the metaphor of development “acquired a violent colonizing power” when it “returned to the vernacular”, converting “history into a program” (Idem). Social evolution had a clear destiny: the industrial mode of production “came to be seen as the natural culmination of the potentialities existent in Neolithic man” (Idem). Consequently, the metaphor of development gave global hegemony to a specific genealogy of history which Esteva identifies with the West. According to Esteva, after a period in which ‘development’ was overloaded with meanings, “dissolving its precise significance“ (Idem) during the 19th century, by the beginning of the 20th century, ‘urban development’ became widespread promoting “massive, homogenous industrial production of urban space”, and thus anticipating Truman's developmentalist missionarism.

After his thorough analysis, Esteva reaches the conclusion, that nowadays, the concept of development evokes a web of meanings in which the user of the word is caught, no matter how specific his alternative proposal might be. While the specific contours of ‘development’ are unclear, it means always “a favorable change; from simple to complex, from inferior to superior, from worse to better” (Idem, 189), implying at the same time that there is a right path, unchangeable and universal, a necessary law that leads to a specific and good goal. For two thirds of the world, however, this positive meaning of the word ‘development’ is just “a reminder of *what they are not*” (Idem, 189; emphasis in the original).

The diverse reflections on development that I have mentioned above, can be understood as a reaction in front of the uncritical general assumption of the existence of ‘underdevelopment’, which required an explanation of the ‘phenomenon’. Assuming the reality of underdevelopment, a search for real, material, historic reasons for that problem turned imminent. At the same time, at a political level, while in the context of the Cold War ‘evolution’ became an antidote for revolution, a myriad of programs and institutions rooted the complementary pair of development-underdevelopment in public consciousness.

Importantly, also critical theories participated of the creation of ‘development’. Interestingly, Esteva is specially critical of leftist theories, that criticizing all development strategies, ended up adopting in an uncritical matter the concept of ‘development’ and therefore strengthening the “colonizing force of the metaphor” (Idem). It becomes clear here the determinant role of language and the relative irrelevance of political (left/right) and social (theory/praxis) positions in this argument is clear, and underlines the pervasiveness of the discursive critique of postmodern arguments on development. As Esteva argues in the Spanish version of this fundamental text, “the word defines a perception. And this transforms, in turn, into an object, a fact” (Esteva 2006, 333).

Summing up, Esteva's main concern is that no one contested fully the apparent reality of underdevelopment. As he underlines, nobody realized “that it is a comparative adjective whose base of support is the assumption, very Western but unacceptable and indemonstrable, of the oneness, homogeneity and linear evolution of the world” (Idem, 190). On the contrary, development was put more and more at the center of attention in national and international politics, as Arturo Escobar, with the same post-developmental worry puts to the front, particularly in his seminal work ‘Encountering Development. The Making and Unmaking of the Third World’ (1995).

Being Escobar's works a central reference for both postdevelopment critiques and critiques on postdevelopmental approaches, it is worth to recover here also his analysis of 1995 as a major voice in the postdevelopmental endeavor. Importantly, also this figure of postdevelopment research, as well as Gustavo Esteva, presents a marked political activity, combining his theoretical work with active support of the struggles of diverse groups, like for example the social movement of black communities in Colombia, where he was born, as well as, on a more international level, of the World Social Forum (Escobar 2006b). This active participation is a clear consequence of his critique on development, which I present in the following paragraphs.

First of all, Escobar strengthens Esteva's analysis affirming that “it is possible to speak of the invention of development in the early post-World War II period”, because while “during World War II the dominant image of what was to become the Third World was shaped by strategic considerations and access to its raw materials”, the postwar transformation reorganized drastically the relations between rich and poor countries creating an “entirely new strategy for dealing with the problems of the poorer countries” (Escobar 1995, 31). In a complementary manner to Esteva's critical genealogy of development, Escobar emphasizes the relations of power that played a major role in the development of ‘development’. Amongst

the most important factors that shaped the development discourse, Escobar counts the anticolonial struggles in Asia and Africa, growing nationalism in Latin America, the cold war, the need to find new markets, the fear of communism and overpopulation, and faith in science and technology (Idem, 32). As a consequence of the emergent constellation of forces, "forms of power in terms of class, gender, race, and nationality thus found their way into development theory and practice" (Idem, 43). With the post-World-War II arrangements, colonies, ex-colonies and countries under state intervention were all put in a new frame, the Third World, as part of a redefinition of the actors of world politics. The notion of underdevelopment and Third World, Escobar argues, "emerged as working principles within the process by which the West – and, in different ways, the East – redefined itself and the rest of the world" (Idem, 31).

That 'underdevelopment' was presented in a politically effective manner with the speech of US-American president Truman and through a variety of institutions with headquarters in the 'First World', serving particular interests, does not mean that these concepts were unilaterally pushed onto the so called 'Third World'. Regarding specifically the Latin American context, Escobar underlines that intertwined with the demise of the good neighbor policy[124] of the United States in the mid-1940's, representatives of Latin American countries referred increasingly to the need for development. The end of the 'good neighbor policy' reflected the increasing divergence between the interests of the United States and Latin American countries, which was manifest especially during the three Inter-American Conferences held during the decade of 1940: "while the United States insisted on its military and security objectives, Latin American countries emphasized more than ever economic and social goals" (Escobar 1995, 29 ref. to López Maya). Interestingly, the 1945 conference in Chapultepec (Mexico) as well as the one held in Rio de Janeiro (Brazil) in 1947 should concentrate, according to their titles, on the problems of war and peace and the need to maintain peace and security. However, Latin American presidents made emphasis, during these meetings, on the importance of industrialization in the consolidation of democracy and asked the United States to help with a program of economic transition from the production of raw materials to industrial production (Escobar 1995, 29). Development was clearly part of 'Third World' countries' agenda. As a response, doctrines of national security an pacts of

124 The 'good neighbor policy' was launched officially by US-American President Theodor Roosevelt in his inaugural address of 1933, and was based on the principle of non (armed) intervention in Latin American countries, after a period characterized by military interventions since the end of the 19th century. One of the main aims of this policy was to create new economic opportunities through the enforcement of trade agreements with the region. As a consequence, the Export-Import Bank of the United States (Ex-Im Bank), i.e. the official export credit agency of the United States, was established in 1934.

military assistance were linked to development strategies. In fact, "the fear of communism became one of the most compelling arguments for development" (Idem, 34).

Finally, during the 9th Pan-American Conference held in Bogotá (Colombia) in 1948, the Organization of American States (OAS or OEA) was created as a continuation of the Pan-American Union and, most importantly, as a response to the pledge to fight communism. The motto adopted by the OAS makes clear how far questions of peace and security became entangled with questions of socio-economic and politico-legal development: "Democracy for peace, security and development" (OAS 2011). Regarding the role of law in this context, it is interesting to observe that in the same meeting where the OAS was created, also the American Declaration of the Rights and Duties of Man, the world's first general human rights instrument, was adopted. According to Escobar, these Latin American demands for socio-economical improvement in the 1940's, reflect "changes that had been taking place for several decades", like the beginning of industrialization, the growth of the organized labor, the modernization of the state, some of which "were becoming salient in the 1920's and accelerated after 1930" (Escobar 1995, 30).

Equally as a response to these demands, the Inter-American Development Commission was established in 1940 in order "to encourage Latin American production geared toward the United States market", while the founded programs "often involved large-scale technical aid and the mobilization of capital resources to Latin America" (Idem, 32). Naturally, this aid and capital investment was loaded with some requirements: "The Third World was instructed to look at private capital, both domestic and foreign, which meant that the 'right climate' had to be created, including a commitment to capitalist development; the curbing of nationalism; and the control of the Left, the working class, and the peasantry" (Idem, 33). This right climate included, later on, also a legal dimension as Gardner elaborated (Gardner 1980).[125]

In the context of increasing tension at an international level, it is important to remember that, as Escobar argues, the "Third World, far from being peripheral, was central to superpower rivalry and the possibility of nuclear confrontation" during the Cold War (Escobar 1995, 34). Not only the several proxy-wars, but also a variety of pacts of military assistance made of the Third World one of the main arenas for the cold struggle. In this context, the fear of losing support of former colonies if they fell into the Soviet camp, determined the "ambivalent acceptance of the independence of former European colonies" (Escobar 1995, 34). AT the same time, the ghost of communism was used as a central argument for development, and "doctrines of national security [were] intimately linked to development

125 For these reflections on the role of law in the modern race for development, see chapter A.

strategies" (Idem). Correspondingly, Esteva cites some Latin American examples of institutions and programs that emerged at the intersection of security and development, like the Peace Corps, the Point Four Program, the War on Poverty, and the Alliance for Progress, which "contributed to root the notion of underdevelopment into popular perception and to deepen the disability created by such perception" (Esteva 2006, 190). Thus, regarding the importance of the 'Third World' during the Cold War, Escobar concludes, the "system that generates conflict and instability and the system that generates underdevelopment are inextricably bound" (Idem, 34).

An important aspect of this underdevelopment generating system was the creation of the science of underdevelopment understood as a long standing but possibly curable economic disease. As Escobar recovers from John Kenneth Galbraith's (1908-2006)[126] account, "a different field of study, the special economics of the poor countries" was created with the strong support of diverse foundations (Escobar 1995, 57 cit. Galbraith). As Galbraith relates: "Over a somewhat longer period, the Ford Foundation contributed well over a billion dollars between 1950 and 1975, and the Rockefeller, Carnegie, and some CIA-supported foundations added smaller amounts. [...] Intellectual interest in the problem of mass poverty had also greatly expanded" (Idem).

As a result of the tense international political context, and as a reaction to the restrictive economic perspective, the concept of 'social development' was soon used as a counterpart of 'economic development', and so, reality was clearly divided between 'social' and 'economic', marking with this division the First Development Decade (1960-1970). In this context, the ECOSOC (United Nations Economic and Social Council) was created in 1962 and the United Nations Research Institute for Social Development (Unrisd) in 1963. The then formulated 'Proposals for Action' established that the change needed was "social and cultural as well as economic, and qualitative as well as quantitative" (United Nations 1962), marking the division between social and economic concerns as well as maintaining the primacy of the GNP (Gross National Product) for development measures. Summing up, in the 1960's, social development was "seen partly as a precondition for economic growth and partly as a moral justification for it and the sacrifices it implied" (UNRISD 1979).

126 John Kenneth Galbraith was one of the most renowned Canadian/US-American economists of the 20th century. He served also as diplomat and adviser of diverse politicians and presidents of the United States, like Franklin Roosevelt, Harry S. Truman, John F. Kennedy, Jimmy Carter and Bill Clinton. Amongst his most influential writings, it is worth citing here 'The Affluent Society' of 1958, and 'The Nature of Mass Poverty' of 1979, as well as 'The Voice of the Poor', 'The Anatomy of Power', and 'Essays from the Poor to the Rich' all published in 1983.

Nevertheless, with the passage of time, the social aspects turned into 'social obstacles' for development. After the failure of an approach that divided between social and economic questions, quite naturally, the next step in the development of 'development', was to integrate both concepts. And thus, the 'Second UN Development Decade' (1970-1980) witnessed a variety of proposals for a unified approach, "which would fully integrate the economic and social components in the formulation of policies and programs" (Unrisd 1980). The question was, however, what topic, what problem, what concept should serve as unifier. This is the decade when a variety of 'developments' appeared like 'participative development', 'integrated development', 'human-centered-development' and, interestingly, 'another development' as the Dag Hammarskjold Foundation suggested in 1975 (Dag Hammarskjold Foundation 1975). The appearance of 'anotherness' in this context is not to be taken as a superficial aspect if we remember the political-intellectual context of the 1970's, which was embedded in struggles for the recognition of diversity and the respect of the Other. Equally, the Declaration of Cocoyoc of 1974[127], underlined the importance of diversity in the sense of the need of "pursuing many different roads of development" (Cocoyoc 1975, 897). Parallel to the "basic needs approach", proposed by the Conference on Employment, Income Distribution and Social Progress, organized by the ILO (International Labor Organization) in 1976[128], also the 'endogenous development' became a central proposal on the discussion on what is the best development to foster. Interestingly, as Esteva points out, if the concept of endogenous development as a development that corresponds to the "particularities of each nation", is applied to its last consequence, it "leads to the dissolution of the very notion of development, after realizing the impossibility of imposing a single cultural model on the whole world" (Esteva 2006, 196).

The theoretical disorientation was paired by the practical failure of the development programs put in practice until then. Thus, the 1980's were called the 'Lost Development Decade' and the 1990's had to answer with a new concept of development. This form of 'redevelopment', as Esteva calls it, took the shape of 'sustainable development', a concept inaugurated by the World Commission on Environment and Development (WCED)[129] in its

127 The declaration of Cocoyoc was the result of a symposium on 'Patterns of Resource Use, Environment and Development Strategies' with participants from the UNEP (United Nations Environment Programme) and UNCTAD (United Nations Conference on Trade and Development) held on October 8-12 of 1974. For the complete text of the declaration see Cocoyoc 1975, 893 ff.

128 The 'basic needs approach' aimed at the achievement of a certain specific minimum standard of living. In 1977 this approach was adopted equally by the Development Assistance Committee of the OECD.

129 This commission, which was convened by the United Nations in 1983, is better known as 'Brundtland Commission' because of its Chair Gro Harlem Brundtland (*1939). Consequently, the resulting report is often presented as 'Brundtland Report'.

renown report titled ‘Our Common Future’, published in 1987. Despite all the positive voices on the creation of ‘sustainable development’ as a compromise of economists and environmentalists, of First- and Third-Worldlers, etc., Esteva argues that “sustainable development has been explicitly conceived as a strategy for sustaining ‘development’, not for supporting the flourishing and enduring of an infinitely diverse natural and social life” (Esteva 2006, 198).

One more twist was given to ‘development’ in 1990 by the UNDP (United Nations Development Program) in its first ‘Human Development Report’ (UNDP 1990). While the concept of ‘human development’ is intended to include social and cultural aspects, it nevertheless remains in a quantitative structure, where ‘human development’ is expressed by an “'internationally comparative level of deprivation’, which determines how far from the most successful national case are the other countries” (Esteva 2006, 198). The linear perspective of the endeavor is salient in the goal of creating a Human Development Index, “synthesizing, along a numerical scale, the global level of Human Development in 130 countries” (UNDP 1990), led by levels of deprivation of three variables: life expectancy, adult literacy and real GNP *per capita*. As it is obvious, despite several efforts for the “dethronement of GNP”, economic development continues to be referred to as an universal yardstick. In this sense, the turn of the century saw the First UN Decade for the Eradication of Poverty (1997-2006), and, most importantly, the creation of the Millenium Development Goals,[130] which inherited the development work of the 20th century. While they focus on specific progress in the fields of poverty and hunger, universal education, gender equality, child health, maternal health, combat of HIV/Aids, environmental sustainability and global partnership (United Nations 2011), covering thus a broad variety of fields, the basic principles remain the same as in the past. Not only is the GDP explicitly the measuring stick for progress in many of these fields, specially in the first one (poverty and hunger), but also the logic of a linear progress towards a universally set ‘good life’ standard serves as the justification for the projection of ideals onto anonymous others through millionary projects.

As it has become clear in the last pages, while the connection with a specific understanding of economy is central to post-developmental critique, its inquiry does not stop at a mere conceptual controversy with the discipline of economics. Moreover, the criticism against a monetarization of development is rather a superficial aspect of a more profound concern of

130 The Millenium Development Goals (MDG) were established following the Millennium Summit in 2000, where the United Nations Millennium Declaration was adopted. The target date has been fixed for 2015.

subjugation of human diversity beneath a universal ougth-to-be standard. Most interesting for the objective of linking the concept of development to pluralism and diversity on the one hand, and, on the other hand, to law and to legal transfer in a modern sense, is the connection between development and colonialism specified by most post-developmental researchers. Esteva, for example, refers to the transformation in the change of the name of the 'Law of Development of the Colonies' into the 'Law of Development and Welfare of the Colonies' in 1939 as a milestone in the emergence of developmental discourse. According to Esteva, this simple change is one expression of a broader interest: giving "the philosophy of the colonial protectorate a positive meaning, the British argued for the need to guarantee the natives minimum levels of nutrition, health and education" (Esteva 2006, 188 ref. to Arendt and Hancock). With this change, the role of the 'beneficiary' of this law was somehow shifted from Britain as the colonial power with interest in exploiting its own colonial possessions, to the natives as objects that needed to be developed (and thus become more civilized, i.e. more 'British') for their own sake. Consequently, "after the identification of the level of civilization with the level of production, the dual mandate collapsed into one: development" (Esteva 2006, 188 ref. to Sachs).

In the same line, Escobar argues, from a political perspective, that development was "a strategy to remake the colonial world and restructure the relations between colonies and metropoles" (Escobar 1995, 26). Following Frederick Cooper (1991), who investigated especially African cases, Escobar underlines that the British Act mentioned above, was "the first great materialization of the development idea" and responded "to challenges to imperial power in the 1930's and must thus be seen as an attempt to reinvigorate the empire" (Idem). Similarly, the process of decolonization, as Escobar continues arguing along with Murphy and Augelly (1993), was related to the system of mandates used by the League of Nations after World War I, and the promotion of development by international organizations later (Idem, 27)

In a more general sense, it is arguable that the concept of development has been present in one way or another in diverse colonial enterprises. As I have presented above, the discussion between Las Casas and Sepúlveda on the justification for the invasion of the Americas in the end of the 15th century turned around the question if (and how) natives of the Americas were capable to transcend their religious, social and thus human stage. While there are clear differences between the colonial enterprise and the developmental one, for example in the type of power exercised and the discourse employed, it would be naive to deny any connection between both political-military endeavors. Thus, one of the primary concerns of

the critical currents around the idea of development questioned the innocence with which the term was used, and which covered, as the critics emphasized, the continuity of colonial oppression through the discourse and the institutions at the service of development. While the relation '(independent) colonizer – (dependent) colonized' was officially in regression in many regions of the world during the zenith of decolonization in the middle of the century, colonialism and the asymmetry of power connected to it where transferred to the relationship between '(developed) developer – (underdeveloped) beneficiary'.

In the same vein, Arturo Escobar refers to the work of Timothy Mitchell and argues that the regime of order and truth by which the colonial world was observed as an object "is a quintessencial aspect of modernity and has been deepened by economics and development" (Escobar 1995, 8). Thus, he argues that, assuming that the colonial world could be observed "from a position that is invisible and set apart", the world was divided into "a realm of mere representations and a realm of the 'real'; [...] into an order of mere models, descriptions or copies, and an order of the original" (Escobar 1995, 7 cit. Mitchell). This position, in turn, reflected in the world of 'development' "in an objectivist and empiricist stand that dictates that the Third World and its peoples exist 'out there', to be known through theories and intervened upon from the outside" (Escobar 1995, 8). It is worth noticing that this intervention from the outside refers not only to economical programs for development imposed as a result of negotiations with international institutions, but it reflects a prescriptive model of the solution of conflict, which implies not only a standard universally valid answer for problems, but also requires a hierarchically positioned prescriptor, who judges the situation and establishes the proper solution to take. This is, in other words, the scheme of modern law I have referred to previously, that founds expression in the environment of social conflict and international development. The resulting image of an underdeveloped subject portrays him as "endowed with features such as powerlessness, passivity, poverty, and ignorance, usually dark and lacking in historical agency, as if waiting for the (white) Western hand to help subjects along and not infrequently hungry, illiterate, needy, and oppressed by its own stubbornness, lack of initiative, and traditions" (Idem). That this image exists, Escobar underlines "is more a sign of power over the Third World than a truth about it" (Idem).

Understanding the production of discourse "under conditions of unequal power" as a 'colonialist move' (Idem, 9 ref. to Mohanty), and assuming that the development discourse takes place "in a world system in which the West has a certain dominance over the Third World", most efforts for development can be understood as being part of a 'colonialist move'. "This move", Escobar continues, "entails specific constructions of the colonial/Third World

subject in/through discourse in ways that allow the exercise of power over it" (Idem). Referring to Homi Bhabha's (*1949) definition of colonial discourse, as "an apparatus that turns on the recognition and disavowal of racial/cultural/historical differences", Escobar argues that "the development discourse is governed by the same principles", creating "an apparatus for producing knowledge about, and the exercise of power over, the Third World" (Idem). Transposing Homi Bhabha's argument for the colonial context, it is possible to argue that through this apparatus, a form of governmentality is deployed that in marking a subject world, "appropriates, directs and dominates its various spheres of activity" (Bhabha 1990, 75)[131], creating at the same time a geopolitical imagination that found expression in the concepts of 'First World and Third World', 'North and South', 'center and periphery'. Importantly, as I have shown, law has played a major role in the "production of differences, subjectivities, and social orders" that result in this subject-space (Escobar 1995, 9). As we have seen, the establishment of 'legal cultures' paired with the division between legal orders and normative regimes of 'practices and customs' defined a line that law comparativists still have difficulties trespassing.

At this point, it is important to emphasize that, while other parts of the world, like most of Latin America, had become officially independent from the Spanish and Portuguese monarchies during the 19th century, 'development' played there equally the role of transforming a regime of political-economic dependency into a regime of development aid. In this sense, Paul Drake, studying the period between 1912 and 1932, underlines that US-American politics towards Latin America were oriented to "ideological as well as military and economic hegemony and conformity, without having to pay the price of permanent conquest" (Drake 1991, 34). After the 'good neighbor policy' of the 1930's and 1940's, 'development' turned as relevant for maintaining the established hierarchy between the United States and most of Latin America as it was central for the European ex-colonial powers. Thus, institutions like the OAS, the Ex-Im Bank and Inter-American Development Bank (IDB or BID) were created in the name of development, maintaining, however, a surreptitious US-American hegemony. Equally, the rhetoric of a helpless, hopeless and childish character of Latin American cultures was at the base of this development aid as it was in a colonial/post-colonial context. Hence, it was natural that George Kennan (1904-2005), the head of State Department policy planning could speak in the 1940's of the "unhappy and

131 Bhabha's text referring to the colonial context is: "the objective of colonial discourse is to construe the colonized as a population of degenerate types on the basis of racial origin, in order to justify conquest and to establish systems of administration and instruction. [...] I am referring to a form of governmentality that in marking out a 'subject nation', appropriates, directs and dominates its various spheres of activity" (1990, 75).

hopeless" background in Latin America and "pursuing the motif of the 'childish' nature of the area" argue "that if the United States treated the Latin Americans like adults, then perhaps they would have to behave like them" (Kolko 1988, 39 f.). In this sense, Escobar argues with Ashis Nandy (*1937), that "the infantilization of the Third World was integral to development as a 'secular theory of salvation' (Nandy cit. in Escobar 1995, 30).

This critique has not remained unacknowledged by development institutions and development research. In this line, Ilan Kapoor portrays several dilemmas that he has to confront as a development theorist and practitioner, referring specifically to Gayatri Chakravorty Spivak's (*1942) work and to post-colonial critique in general. In a self-critical manner, he asks himself:

> "What are the ethico-political implications of our representations for the Third World, and especially for the subaltern groups that preoccupy a good part of our [i.e. developmentalist's] work? To what extent do our depictions and actions marginalize or silence these groups and mask our own complicities? What social and institutional power relationships do these representations, even those aimed at 'empowerment', set up or neglect? And to what extent can we attenuate these pitfalls?" (Kapoor 2004, 628).

Kapoor makes a clear argument in connecting developmental research with the field of literary criticism, which was the main discipline of Spivak as well as other well known postcolonial critics like Edward Said. Similar to Said's argument on literary criticism, Kapoor states that working on the field of development, be it as an academic or as a practitioner, reproduce already forms of Western hegemonic power. In the case of development work, to be involved in this field implies necessarily to take a position "within a 'development discourse', where the North's superiority over the South is taken for granted, and Western-style development is the norm" (Kapoor 2004, 629). In this discourse, he argues, a clear us/them division and power relationship exists, where "'we' aid/develop/civilise/empower 'them'" (Idem).

Making echo of Esteva's and Escobar's arguments, Kapoor emphasizes that in the modernization theory of the 1950's and 1960's the connection of development aid with colonialism was not made and thus, the oblique power relationship in development theory and practice was not understood. As Kapoor continues, modernization theory, like the one developed by Rostow (1960), barely refers to colonialism, making Third World history begin after World War II, putting "First World growth patterns" as "history's guide and goal", and obviating the colonialist background that allowed the incorporation of the colonies into the

international division of labor and their inclusion in a global capitalist system that put them necessarily in a subordinated role (Kapoor 2004, 629).

Interestingly, Kapoor underlines the expression of this pervasive discourse in contemporary practice, referring to the "structural adjustment and 'free-trade' policies of the Bretton Woods institutions, under which countries must liberalise socioeconomic and trade regimes" (Idem). This reference to the Bretton Woods institutions like the IMF and the World Bank is central to this inquiry, since the agreements and credits offered by these institutions to countries in financial difficulty require systematically legal changes in several fields, both related and unrelated to the economical question at stake. The same is the case for the membership in the WTO, which was equally founded as a consequence of the Bretton Woods-System. One of the contemporary better known cases in this sense is the membership of the Popular Republic of China in 2001, that encouraged a wide range of expectations regarding the development of the 'rule of law' (Kobayashi 2011, Lam 2009). The development strategies usually linked to economical progress are thus intimately connected to ideas of legal development. In fact, the establishment of the rule of law has been seen as a main player in the economic growth of a country due to the trust that it can develop in foreign investors.

As Kapoor argues, the work of the Bretton Woods institutions is clearly embedded in the modernization thinking when it states in its structural adjustment and 'free-trade' policies a duty to liberalize socioeconomic and trade regimes. As a criticism against this type of procedure, Kapoor argues that these policies "proceed by a disavowal of the history of imperialism and the unequal footing on which such a history has often placed Third World countries in the global capitalist system" (Idem, 629). In this sense, recalling Spivak's work, Kapoor underlines that these institutions, in doing this, buy "a self-contained version of the West", which amounts to ignoring both its complicity in, and production by, "the imperialist project" (Spivak 1988a, 291). Importantly, if the economic agreements of the Bretton Woods institutions aiming at the development of Third World countries rely on classical modernization thinking, their legal demands are based equally on this developmental paradigm. Thus, the imperialism implicit and silenced in the development project put into effect through these international institutions finds expression equally in the demands on legal changes that are put as a condition for the closing or continuation of the agreement.

While Spivak recalls the role of imperialism and colonialism for the initiation of a process of global inequality in the so called Third World, she equally points at the creation of the 'Third World' as a semantic-cultural aspect of colonialism, through which "the Western superiority and dominance are naturalized" (Spivak 1999, 114 ff.). According to Kapoor, this

'worlding'[132], allows "the Westerner to overlook the interrelationships between the West and imperialism or globalization and the conditions of homeworkers" while at the same time it reinforces Western ethnocentrism and triumphalism (Kapoor 2004, 629 f.). Consequently, the developmentalist's intention to 'help the Third World' is embedded in a logic of disavowal. In the same line, Linda Alcoff argues that "though the speaker may be trying to materially improve the situation of some lesser-privileged group, the effects of her discourse is to reinforce racist, imperialist conceptions and perhaps also to further silence the lesser-privileged group's own ability to speak and be heard" (Alcoff 1991, 26).

In other words, while development programs and the worldwide campaign of conscientization for the support of developing countries in all social spheres portrays development as an engagement between two predefined identities representing generally the First World on the one side, and Third World on the other, the argument of Kapoor and Spivak states that both entities in interaction are constructed through the engagement in development. This institutionally and geopolitically embedded representation circumscribes equally "what and how we can and cannot do (i.e. development discourse defines our type and mode of encounter)" (Kapoor 2004, 635). In the words of Spivak, "if the lines of making sense of something are laid down in a certain way, then you are able to do only those things with that something which are possible within and by the arrangement of those lines" (Spivak cit. in Idem). What remains clear with this formulation is that the place of the lines to make sense of things is not preset but can be extremely divergent. In other words, any sense, any meaning of 'us' and of 'the Other', and lastly any 'common sense', is only a certain type of sense, for which specific lines have to be laid down; the 'making sense' of something is not natural, monolithic, unified and universal. The frame chosen to make sense, consequently, is central to the possibilities of action that can be visualized. Emphasizing the importance of 'making sense' for establishing that frame of action remits lastly to the question of culture, or better of 'cultures' as a key element of post-modern reflection. Attaching meaning to things is what enables us to engage with them, as well as it constrains our interaction. So is it equally when we deal with markers of (un-)development, like specific types of economy and law. In other words, 'development', a 'good' economy, a 'good' law, all of these are not matters of 'common sense' but of one specific type of voluntarily established and maintained 'common sense' that can change. Most importantly, attaching meaning determines the type of engagement with any imaginable Other, be it the Third World, the First World, the global

132 With 'worlding', Spivak refers to the fetishization of the 'Third World' that obfuscates the production that brought it about, as well as the disavowal that it produces (Kapoor 2004, 629).

South or North. Thus, the lines of meaning do not only mark the limits of "what and how we can and cannot do" but also determines the subaltern, the Other and the 'underdeveloped' as well as the 'developed' as such. Referring to Said's 'Orientalism', Kapoor concludes that "we *produce* the Third World or subaltern" (Idem, 635). Most problematic, however, are the parameters and mechanisms involved in this production, because "to a large extent", he adds, "we produce them to suit our own image and desire", so that we "construct the Other *only in as far as* we want to know it and control it" (Kapoor 2004, 635). Continuing with this argument, Kapoor (following Spivak) challenges the altruistic perspective on development aid arguing that the concern of knowing the Other, usually with support of anthropologists, ethnographers and native informants, is entangled equally with a question of power. To frame the Third World discursively, and for that matter any Other and any difference, aims lastly, to "have a more manageable Other", as Kapoor puts it (Idem, 632).

Continuing with the argument, that development organizations should not be seen as the realm of pure altruism, Kapoor argues that "the construction of development as 'aid' and 'assistance' to the Third World is belied by what can be called the 'business' and 'conditionality' of development" (Idem, 634). In this sense, he details the case of the Canadian International Development Agency (CIDA), that, in order to justify the aid budget to Canadian 'tax-payers' "boast[s] that 70 cents on every Canadian aid dollar returns to Canada through the creation of jobs and the purchase of goods and services […], ant that such aid sustains 30.000 Canadian jobs and provides contracts to 2000 Canadian businesses, 50 universities and 60 colleges" (CIDA cit. in Kapoor 2004, 634). In the end, it might be unclear if this aid helps the global South, but what becomes obvious is that it helps the Canadian helper, maintaining in the end the global inequality that it claims to level. Furthermore, as Kapoor argues, the aid program is laced with power by dint of its conditionality. While in this case the conditionality means "tying the recipient to procurement of Canadian goods and services, in other cases […], it could mean [that] the recipient must buy into an ideological programme (neoliberalism) and carry out serious socioeconomic structural reform" (Idem). Important for us is the fact that the ascription to a new ideological program as well as the socioeconomic structural reform are mainly linked to the structures of social order, and thus to law and legal reform. Kapoor refers here exemplary to IMF structural adjustment programs. In the same sense, Kapoor adds that "an aid programme can be used as a pretext to open up developing-country markets for Western businesses" (Idem, 634). In this vein, he recalls Spivak's argument against the promotion of access to new technologies by the World Bank,

stating that the by-product of 'selling access to telecommunications-as-empowerment' is capitalist penetration by global computing and telecommunications industries (Spivak 1999, 419).

While the content of development programs and the interests of the helpers, based in the First World as well as in the Third World, are central to the critique on development, equally, the form and process of development programs depict the power relationship in which developed and developing, helper and helped are engaged. Through the technicality of this form and process, the power relationship remains often sublimated by an alleged and unquestioned 'good', 'proper', 'transparent' way of doing things. Despite the apparent cultural neutrality of technicality, this aspect of development expresses equally the idea of what is best, and thus higher up in a linear and vertical hierarchy, what is the standard and what the abnormal.

This disciplinary power of the form of projects is rooted in the outset of the development project. See, for example, the comment of one of the World Bank economists that participated in the first loan made to an 'underdeveloped country' in 1948, namely the financing of a project in Chile: "we found that what we had really was more of an idea about a project, not a project sufficiently prepared that its needs for finance, equipment, and manpower resources could be accurately forecast" (Escobar 1995, 86 cit. Meier). As Escobar concludes from this example, "for World Bank economists, this was a clear indication of how far they would have to go to bring Latin American social scientists and government officials to the point where they could prepare a satisfactory project proposal" (Escobar 1995, 86). Similarly, regarding the form and process of development programming, Kapoor underlines the argument of postdevelopment analysts, who maintain that the bureaucratic procedures and interests (like technical requirements, deadlines, budgetary time frames and funding priorities) "are integral to the disciplinary and regulatory character of development institutions" (Kapoor 2004, 634). The construction and strengthening of the bureaucratic and technical apparatus allows for the maintenance of spaces for development workers.

The most important aspect of this critique for the individual helper is probably the recognition of the impossibility to be beyond the institutional interests and the whole mechanism that links them, as Spivak emphasizes. Moreover, to pretend "to have pure, innocent or benevolent encounters with the subaltern […] is to perpetuate, directly or indirectly, forms of imperialism, ethnocentrism, appropriation" (Idem, 635). But what turns this conclusion even more problematic, is that this impossibility is given not only for the

classical developmentalist, but also for the post-developmentalists. In their critique, post-developmentalists argue that 'developmentalism' does not listen to the Third-World-Other envisaged merely as underdeveloped, and, that it, consequently, cannot answer to the existent needs. In doing this, however, the post-developmental researchers claim that they can see and present these needs more transparently. The problem posed is thus, if post-development is equally at the search for a benevolent or naive encounter with the Other as the developmentalism it criticizes.

### 3. *Development as a Culture of Oppression and the Challenge of Listening*

While 'The Post-Development Reader' (1997) might not serve as the unique authoritative source for post-developmental thinking, a thinking that claims to go beyond mainstream academic forms of communication, it does present a broad overview on some of the main fields of interest of post-development researchers existent by the end of the 20th century. Looking at the included essays, following topics appear: the vernacular, development as a paradigm and a discourse as a whole and through specific fields and concepts like 'growth', the 'state', 'education', 'science and knowledge', 'media' and 'technical assistance', concrete practices of development and their consequences, and the creation of new perspectives through social movements, grassroots actions and local 'home' perspectives.

Observing this broad field of topics and interest areas, we can say that one of the most important merits of the post-developmental approaches was to put development in connection with other discourses and fields of knowledge, putting them, in turn, in a new light. Most importantly, post-developmental arguments refer to colonialism as a power relationship determined by the unequal value attributed to differences established primarily along the parameters of race and culture. Secondly, to capitalism as a socio-economic and political system that gravitates around the value of monetary capital, and thus gives a particular meaning to poverty while at the same time creates the recipe for its betterment, namely messianic assistance and philantropy. Last but not least, postdevelopmental researchers connected development with a scientificism that promised the optimization of life according to preset standards by following specific quantifiable parameters of truth. In all these spheres, concepts recovered from religion acquire special relevance, prominently ideas of salvation and sacrifice for the weak (Escobar 1995, 25).

Importantly, while the ideas of poverty and philantropical assistance explicit in the concept of 'development aid'[133] derive from an interest for the social, the criticisms of postdevelopmentalists emphasize the importance of a cultural perspective. In other words, what is at the center of attention is the power of (giving) meaning. Thus, in his critique, Escobar states, for example, that: "development was conceived not as a cultural process (culture was a residual variable, to disappear with the advance of modernization) but instead as a system of more or less universally applicable technical interventions intended to deliver some 'badly needed' goods to a 'target' population" (Escobar 1995, 44). Answering to this perspective that had a very constricted perception on the role and space of culture, postdevelopmentalists put the realm of the symbols and their power at the center of their attention, expanding the field of cultural research. The emphasis of their research relies, thus, in studying the mechanisms through which development as a historical construct becomes an active, real force (Escobar 1995, 45). Understanding these mechanisms as "structured by forms of knowledge and power", postdevelopmental research aims to study the "processes of institutionalization and professionalization" (Idem) that sustain development. The mechanisms and procedures sought by these professionals are a central object of criticism because of their intention "to make societies fit a preexisting model that embodied the structures and functions of modernity" (Idem, 52). Significantly, in questioning the idea that one model of good life is suitable for all diverse forms of life, postdevelopmentalists do not only put the 'structures and functions of modernity' in question, but also their founding theoretical currents of structuralism and functionalism, aspiring to go beyond their bipolar debate through post-structuralist argumentation.

This radical critique of development and the discourse of the 'Third World' responded, as I have shown, to broader changes in the epistemological perspective during the last decades of the 20th century. It is not surprising, thus, that these critiques based explicitly or implicitly on the work of Michel Foucault and other researchers of discourse, specially in the field of post-colonial studies. Escobar refers exemplarily to works of Edward Said, V. Y. Mudimbe (*1941), Chandra T. Mohanty (*1955), and Homi Bhabba (Escobar 1995, 5).[134] Equally, the anthropological revision that I have outlined above contributed to this change of perspective

133 It is important to underline that nowadays, the concept of 'development aid' has been replaced by the allegedly more politically correct 'development cooperation'. While the use of the term 'cooperation' seems to respond adequately to some of the critiques presented by postdevelopmental authors, putting the 'Third World' in a cooperation effort amongst equals, it is not possible to say that this change in the name given to the project is reflected in the carrying out of the project itself.

134 Another good marker for the intellectual orientation of many of these authors is given by the use of certain words, like for example in Wolfgang Sachs' 'The *Archeology* of the Development Idea' (Sachs 1990, emphasis added).

regarding development. Making use of discourse analysis and other tools in order to single out 'development' "as an encompassing cultural space", postdevelopment theorists envisaged "development as a regime of representation" (Idem, 6).

Naturally, not only in their critique but also in their proposals, postdevelopmentalists aim to focus the "attention on values and institutional patterns – in short, on the symbolic universe of society", instead of highlighting "the physical energy processes, in short, the world of material quantities" as other proposals for revision of 'development' have (Sachs 1999, 88). It is due to the importance given to the symbolic universe, that the possibility of imagination, and thus to reimagine the core elements of development, gives a strong impulse for post-developmentalist's projection into the future. 'Reinventing the Present', as one of the essays in 'The Post-Development Reader' is titled, invites thus to re-invent and re-imagine not only the future, but the present itself, and in this sense also the own as well as the Other's identities, subverting previous meanings of an occupied signifier.

It is interesting that, in this title, Emmanuel Seni N'Dione and his colleagues call to reinvent the present, putting again the question of time on the table. While modern development envisages an ought-to-be-future based on a specific (vectoral) understanding of the past, the authors situate themselves and the reader in the only moment where action is possible: the present. This calling for an awareness of the here and now can be understood as an answer to postmodern uncertainty. Equally, turning to the local level, Escobar underlines that "the concepts of development and modernity are resisted, hybridized with local forms, transformed, or what have you; they have, in short, a cultural productivity [...]" (Escobar 1995, 51). This never-ending culturally diverse re-shaping of universalistic proposals, like the development Escobar opposes, builds the hope that guides postdevelopmentalists' vision of a new perspective.

Related to the cultural stance of post-development scholars, but different from it, is the systemic and relational perspective assumed in many of their works. This becomes evident, for example, in the exposition of Rahnema that I presented above, where he underlined the relation between diverse interests and needs that result in the efficacy of the myth of development (Rahnema/Bawtree 2008, ix f.). Similarly, Escobar affirms that development was "the result of the establishment of a set of relations among" certain perspectives on the need of economic growth and the position of underdeveloped countries in the world, institutions like the international banks and the international organizations in general, and practices conformed by policies and programs of these institutions to enhance economic growth and

education oriented to foster modern cultural values (Escobar 1995, 40). In this sense, Escobar emphasizes that the establishment of these relationships and their systematization to form a whole, formed the development discourse and gave it its own force. The importance of a relational perspective is explicit in the following paragraph:

> "The development discourse was constituted not by the array of possible objects under its domain but by the way in which, thanks to this set of *relations*, it was able to form systematically the objects of which it spoke, to group them and arrange them in certain ways and to give them a unity of their own. To understand development as a discourse, one must look not at the elements themselves but at the *system of relations* established among them. [...] The *system of relations* establishes a discursive practice that sets the rules of the game: who can speak, from what points of view, with what authority, and according to what criteria of expertise; it sets the rules that must be followed for this or that problem, theory, or object to emerge and be named, analyzed, and eventually transformed into a policy of plan" (Escobar 1995, 40 f.; emphasis added).

Thus, Escobar argues that "what is included as legitimate development issues may depend on specific relations established in the midst of the discourse", for example, relations "between procedures of assessment of needs [...] and the position of authority of those carrying the assessment (this may determine the proposals made and the possibility of their implementation)" (Escobar 1995, 44). Furthermore, he emphasizes that although the development practice regulated by these relations "is not static, it continues to reproduce the same relations between the elements with which it deals" (Escobar 1995, 44).

It is this emphasis on the relations what allows Escobar to state that "although the discourse has gone through a series of structural changes, the architecture of the discursive formation laid down in the period 1945-1955 has remained unchanged, allowing the discourse to adapt to new conditions" (Escobar 1995, 42). At a political level, this means that diverse development strategies have been put into practice over and over up to the present "always within the confines of the same discursive space" (Idem), this is a relational space, a space where a specific relation of power is acted out. It is because of this stable web of relations that development discourse achieved a certain "coherence of effects" that was central to "its success as a hegemonic form of representation" (Escobar 1995, 53).

While underlining the importance of the symbolic and the relational, it is important to emphasize that post-development critiques do not claim generally that development strategies did not benefit people at any time. Neither is the goal of post-developmentalists to reject a specific materiality of unsatisfied needs. Rather, their point is that this materiality, meaning the conditions "baptized as underdevelopment[,] must be conceptualized in different ways if the power of the development discourse is to be challenged or displaced" (Escobar 1995, 53).

The accent of the critique is less oriented towards a missing material change, which nevertheless has been a starting point for many of the postdevelopmental reflections. The question is rather the type of relations that the discourse of development produces and re-produces. The point is that "the work of development institutions has not been an innocent effort on behalf of the poor. Rather, development has been successful to the extent that it has been able to integrate, manage, and control countries and populations in increasingly detailed and encompassing ways" (Escobar 1995, 46 f.). In other words, the established relationships have enhanced unilateral control rather than equal understanding and mutual recognition. The problem relies therein that while "development assumes a teleology to the extent that it proposes that the 'natives' will sooner or later be reformed, at the same time, however, it reproduces endlessly the separation between reformers and those to be reformed [...]. Development relies on this perpetual recognition and disavowal of difference [...]" (Escobar 1995, 53 f.). Interestingly, the recognition of difference in this context is not only one of the interests of this postmodern critique, but it equally turns into a central aspect of the problem of 'development'. It remains here clear that it is not the mere recognition of difference what poses a problem for development, but most importantly, a question of *the type of relations established with that difference*.

Equally, it is possible to read in the line of relationality one of the central conclusions (and starting points for further inquiry) of postdevelopmental approaches, namely that "the ends are always affected by the means" (Rahnema/Bawtree 2008, xix). Against a Machiavellian oriented goal-perspective that can conceive of an abstract goal, a relational perspective puts at its center the type of relations created in order to achieve a goal, while the goal itself is defined particularly in terms of a specific relation. It is this redefinition of the idea of development in terms of a non-hierarchical relation as well as in terms of the relation between economic development, respect for cultural diversity and environmental concerns, that Sachs advocates for focusing "the social imagination on the revision of goals, rather than on the revision of means" (Rahnema/Bawtree 2008, 297).

Despite all emphasis made on the importance of the symbolic level as well as on the relations of interdependence within a dynamic system, post-developmentalist approaches return often to questions of overcoming oppression in a structural sense. It seems to me that Rahnema made explicit quite well some important aspects of many post-developmentalist perspectives, when he stated that "depending on the oppressive regimes to which the subjugated belong – be they developmentalist, totalitarian, 'post-totalitarian' or fundamentalist – people indeed

have their different ways of preparing for the day when they all together cry out 'the emperor is naked!'" (Rahnema/Bawtree 2008, xviii f.). Firstly, he refers to oppression as a main aspect of the situations post-development deals with. Interestingly, he refers to an emperor, thus equating the development-oppression to an empire-like situation. Moreover, in his account, he speaks of a selection of political forms of organization and includes development in the same group as a political form. Thirdly, he foresees a day in the future, when (finally!) liberation will come. And how will liberation come? Through a desperate speech act: people will cry out. A speech act that 'they' will express 'all together', regenerating "the old ideal of a community" as he states some sentences before. What they will shout will be, like in the story, a truth that everybody knows but no one wants to state, the naked truth, an obvious and measurable truth, the real truth.

As it is easy to notice in the arguments that link development with colonialism, in post-developmentalist works, the concept of oppression and the image of victimization play a central role. Sentences like: "Millions of men and women were thus [through development] mortally wounded in their bodies and souls, falling *en masse* into a destitution for which they had never been culturally prepared" (Rahnema/Bawtree 2008, x) invoke the oppressive power of development, claiming equally for the need to overcome that oppression. In doing so, some post-developmentalist approaches end up calling back into discussion categories like "the Truth", even when they refer to an "autonomous capacity to search for" it that has been colonized (Idem, xii; emphasis in the original). Only from the perspective of a truer truth, Rahnema can refer to a text in his postmodern reader as an 'unbiased testimony' (Idem, xiii). Thus, invoking equally hierarchical and modern models of organizing knowledge, Rahnema can warn resistance groups "not to fall into ideological traps, the false promises of which often prevent their followers from seeing things around them *as they are*, and to learn from their own experiences" (Idem, xvi; emphasis in the original). Thus, as we often found in other 'post'-argumentations, as well as in arguments for 'legal pluralism', an opposition between ideology and true reality is created, relegating into oblivion one of the central premises of post-modern critique that reality is only insofar as it is interpreted, created and constructed. Who can say that the 'own experiences' of resistance groups, meaning 'their own interpretations' if interpretations can be owned at all, are more truthful than the developer's or the colonizer's ones? Rahnema can, because, putting himself outside of the struggle, he can, in an 'unbiased' way, observe, have a clear picture and judge from the distance. Taking this

stance, we are now in the problem field of representation, and the questions on who can represent, and how can that representation be authentic or at least adequate.

Being post-developmentalist's interest to question the power exercised by regimes of representation, it is worth remembering that one main problem in the realm of the research of colonial discourse and its link with development, has been "the suggestion that colonial power is possessed entirely by the colonizer, given its intentionality and unidirectionality" (Bhabha 1990, 77). Translating this to the realm of development, the danger relies therein, to see development advocates and development institutions as the only ones in power in front of powerless objects of development. The result of this perspective is, however, the re-silencing of the colonized/underdeveloped voices.

There are different ways to deal with this threat. Firstly, it is possible to argue that the colonial subjects are resistant and thus active agents in a struggle. Secondly, it is possible to argue that the colonial subject is himself active and intentional in his own identification which might match colonial subjectivity. Escobar, on the other hand, concentrates on the resistance and the struggle to create alternative ways of being and doing. However, as Spivak has pointed out, it is equally difficult, in following these strategies, to avoid the tendency to essentialize the colonial subject, the West, the struggling Third World, etc.

The problem of re-silencing colonized/underdeveloped voices, i.e. the question on the representability of the colonized Other, the subaltern or the oppressed[135], presents itself equally to the researcher, who, embedded in his own struggle for liberation and emancipation, can easily become himself a re-silencing instrument while using the same language that he criticizes. Similarly, Escobar, referring to Stacey Leigh Pigg, argues that, for anthropologists, "the task is to trace the contours and cultural effects of development without endorsing or replicating its terms" (Escobar 1995, 15). However, one of the basic criticisms stated against post-developmental critique is exactly that in taking the 'not-anymore-underdeveloped' under protection, emphasizing the value of the vernacular forms of knowledge of the 'not-anymore-Third-World', their perspective turns not only essentialist but also patronizing, disregarding, in the end the subaltern's own voice. The basic problem is thus the impossibility to hear the subaltern's own voice, be it that we take a 'native', a colonial, or any other perspective. In this context, Spivak says, referring to the status of women as subaltern (particularly in her critiques regarding "white men saving brown women from brown men"), that "[b]etween

135 Although Spivak makes a difference between otherness, oppression and subalternity, for our purpose, the important shared aspect of these categories is that they have been used in the realm of underdevelopment and the 'Third World', and that the response in front of them has been a similar call for liberation. The problematic of an authentic or adequate representation appears in any of these cases.

patriarchy and imperialism, subject-constitution and object-formation, the figure of the woman disappears", thus putting subject-constitution and object-formation as two aspects of the same silencing of the subaltern (Spivak 1988a, 297, 306).[136]

These representations of the Third World, Spivak argues, conflate two related but discontinuous meanings of 'representation' (1988a: 275-276): 1) 'speaking for', in the sense of political representation; and 2) 'speaking about' or 're-presenting', in the sense of making a portrait" (Kapoor 2004, 628). More problematic even is the fact that through this conflation, the participation and complicity of the speaker in the representational process is made invisible. "Representing them, the intellectuals represent themselves as transparent" (1988a: 275). Interestingly, Spivak notes that this is also the case for Western diasporics, like Spivak herself as well as Escobar and Kapoor, who can easily become "complicitous in the perpetration of a 'new orientalism'" (Kapoor 2004, 631 cit. Spivak).

While speaking for the Other, this is speaking for the subaltern, oppressed, colonized or underdeveloped other, might be the echo of an imperialist voice, placing oneself as an outsider in front of an authentic or even exotic 'insider' is, in the eyes of Spivak, equally dangerous. Most importantly, this is a way to "duck [the] own complicity in North-South politics, often hiding behind naïveté or lack of expertise, all the while congratulating themselves as the 'saviors of marginality'" (Kapoor 2004, 631 cit. Spivak). As a result, "when the investigating subject, naively or knowingly, disavows its complicity or pretends it has no 'geo-political determinations', it does the opposite of concealing itself: it privileges itself" (Kapoor 2004, 631).

In relation with this argument, it is interesting to observe the post-developmental critique against the authority of the (development) expert. The discourse of development in most of its expressions has been marked by the idea that there are experts who can address specific problems, be it experts in economics, in 'poor economics' as Kenneth named it, in social issues, in education, in legal engineering, in health, etc. While "the professionalization of development [...] made it possible to remove all problems from the political and cultural realms and to recast them in terms of the apparently more neutral realm of science" (Escobar 1995, 45), at the same time, the political and cultural realms themselves turned into expert's

136 This short discussion of subject-constitution and object-formation reminds of Boal's struggle with a Hegelian conception of the theatrical character and the Brechtian objectified character (Boal 2010,137 ff.). As a consequence of his critique, Boal searches for the own voice of the 'oppressed', which is to come through their action on stage. In fact the whole discussion on the representations of the 'Third World' reminds over and over of Boal's work, since it is from the same concern for misrepresentation and disavowal, that Boal invites the 'oppressed' of his 'Theater of the Oppressed' to speak and act himself. For a more detailed account of Boal's work, see chapter C, section I.

knowledge. Lastly, development as such became a field of interdisciplinary expertise, where, for example, it became natural that "institutions such as the United Nations [...] had the moral, professional, and legal authority to name subjects and define strategies" (Escobar 1995, 41). Emulating Illich's and Freire's critiques on education, the basic objection of post-developmentalists against this world of experts is that their authority sublimates at the same time, the own capacity of the 'poor' and the 'Third World' to recognize and deal with their own needs in their own way.

In response to this system of experts, post-developmentalists pretend to introduce in their intellectual endeavors, a different attitude. Thus, Rahnema explains his intentions in front of the various authors he and his colleagues convoked for the compilation of 'The Post-Development Reader' as follows: "we acted from the beginning as if we were inviting them [the authors] to a gathering of *friends* [...]. It was important for us to think that even when they disagreed with each other, they did so as friends, not as experts or specialists" (Rahnema/Bawtree 2008, xi; emphasis in the original). But not only the authors are friends among themselves. Moreover, Rahnema underlines that the demand for the reader he is introducing came from a growing number of development students who "were eager to have a view of development from the perspective of the 'losers' and their friends" (Idem, x). Unnamed remain however, the 'non-friends', who necessarily lack a voice in a post-development reader, namely the advocates of development amongst others. This silencing might be absolutely justified, however, the seemingly open attitude of these non-experts obviates the implicit expertise they allege in front of the silenced developer. They, as non-experts take authoritative decisions when they chose to quote one and not another author, one of the alleged oppressed vernacular voices and not one of the alleged oppressors. In the same line, the editor of the post-development reader claims to gather articles that share three characteristics, namely, they are: 1) subversive, in the sense that they look at a situation "'from the other side'; this is, the side of 'people who have to die so that the system can go on'" (Rahnema/Bawtree 2008, xi, ref. to Arns); 2) human-centered, representing "a perception of reality from the perspective of the human beings involved in the processes of change"; and 3) radical in the sense that they aim to go to the roots of the questions (Idem, xii). Hence, these non-experts are allegedly much closer to the revolutionary, the human and the truth, in the same way as their friends, 'the losers', are.

It is no surprise, hence, that post-developmentalists have been often confronted with charges of romanticism, essentialism and misrepresentation. This critique refers not only to the romanticism and essentialism of the 'objects of development', but also for the alleged

friends and intellectual supporters as well as for the dominating subjects of this discourse. Take, for example, the use of the term ‘the West’, that has been repeatedly used by Escobar, Esteva and Kapoor in the examples I have presented above. In a similar sense, Rahnema, when presenting David Shi's article ('The Searchers after the Simple Life'), speaks of roots of ‘simple living’ of ‘vernacular societies’ in “the history of the West, from the early Greeks to modern Americans”, thus reinforcing the validity of vague but powerful terms like ‘West’ to organize a debate that is trying to underline the value of cultural diversity. Being the United States a paramount example for pluriculturality in many of its senses, to label ‘Americans’ first as ‘Americans’ and then as ‘West’ seems rather counterproductive. The ‘West’ ends up being a unifying category repeated over and over again, letting aside the diverse aspects included within it.[137] This essentialism leads, lastly, to the opposition of two incommensurable sides of the dichotomy. On the one side of the boxing ring are the development-oppressed and their friends and, on the other side, the development-oppressors, (who according to this model probably do not have any sense for friendship). Consequently, these postdevelopmental friends of the ‘losers’ are part of a battle and have a clearly demarcated group of enemies. In doing so, they remain within a dichotomy that is at the base of the same oppression they want to get rid of.

Regarding these questions of representation, it is important to underline the relationship between Escobar's and Kapoor's (based on Spivak's) arguments. All these authors refer to the discourses of the Third World and of development as discourses that produce themselves a power-relationship, deceiving lastly the alleged aims of development. Equally, they refer to developmentalism as a continuation of colonialism and imperialism, and, consequently, search for the voice of the subaltern of the Third World. However, Kapoor argues that Escobar's “anti-development stance issues in a blanket endorsement of social movements as political alternative”, romanticising the ‘local’ and presenting social movements as intrinsically benign, essentializing them through a monolithic representation, and forgetting thereby the real strive for development that many of the very diverse Third World movements depict. According to Kapoor, thus, Escobar, as well as Vandana Shiva (*1952)attempt “to produce an ‘authentic’ and ‘heroic’ subaltern” (Kapoor 2004, 638). Finally, Kapoor continues, the critique of development raised by these authors depends on an “hyperbolic construction of the

137 In the same line, it is important to remember, that, while the argument made most commonly put the responsibility for silencing the subaltern on the ‘First World’ or the ‘West’, Spivak as well as Kapoor argue that beyond geographical differences, the new global culture of management and finance equally tends to set dichotomies that work “projecting developmentalist/ethnocentric mythologies onto the subaltern” (Kapoor 2004, 630). Thus, Spivak claims, that “it is as if, in a certain way, we [Western diasporics] are becoming complicitous in the perpetration of a ‘new orientalism"’ (Kapoor 2004, 631 cit. Spivak).

subaltern" inspired by the "desire of the intellectual to be benevolent or progressive" (Idem). Thus, Escobar is, in Kapoor's opinion, ultimately also silencing the subaltern, because he "gives an illusion of undermining subjective sovereignty while often providing a cover for this subject of knowledge " (Idem cit. Spivak).

In this sense, Kapoor underlines that decolonization is an unfinished project even in the cusp of post-developmental arguments. In other words, also the search for emancipation of the oppressed and the subaltern, ends up being an act of oppression of the subaltern. It is very interesting for our purpose that Kapoor stresses the value of Spivak's critique when she reveals "the extent and depth of anti-oppression thinking/acting that we all have yet to learn" (Kapoor 2004, 639). Kapoor claims, thus, that what we need to do is to develop this type of 'anti-oppression'. But if the engagement with the subaltern requires the creation of a subject and of a subaltern, oppression will be present, even in order to develop 'anti-oppression' thinking and acting. Equally, it is necessary to ask for the meaning of this anti-oppression. The prefix 'anti-' denotes an opposition as well as an attitude of rejection. In other words, anti-oppression means to try to get rid of oppression. Does Kapoor's message ends up thus into the paradox of calling for the oppression of oppression? In other words, Kapoor is caught in the same struggle that pacifist movements have to deal constantly with. From a dichotomic perspective on peace vs. violence, peace advocates cannot ever fight for anything, reducing themselves to passivity, stasis and objectification. Fighting for the end of violence, is, as well as the oppression of oppression, oxymoric expressions of a paradoxical call.

What remains clear after this short review, is that one basic problem of the postmodern approach to development relies therein that, on the one hand, it cannot, according to its own premisses, conceive of a transparent representation, but, on the other hand, it nevertheless conceives of an oppressor, or an oppressive discourse, from which the oppressed need to liberate themselves. Moreover, the postmodern approaches have to emphasize this need to overcome oppression, if they do not want to end in indifference and cynicism. However, overcoming oppressionemulates the modern responses criticized by postdevelopmentalists. Despite the contradiction that these modern responses produces in the post-modern argument, this is the attitude that can be found in Rahnema's introduction as well as in many other texts, as I have shown in the above analysis of Derrida's call for justice.

One of the problems that appear, when we assume that all the categories we can use to interpret and thus engage with the Other, result in his silencing, and thus in violence, oppression and justice, is that communication seems impossible. With the intention to defend

themselves from the criticisms of essentialism or cynicism amongst others, and to find a way out from the dilemma between violence or ostracism, many critics of development have formulated different answers and proposals to engage with the Other and his/her needs that I will address in the following paragraphs.

In the context of post-developmental arguments, is especially interesting the analysis that Kapoor makes of Arturo Escobar's work and the dialogue that Escobar establishes with the critics on postdevelopment. Although Escobar did not refer explicitly to the analysis of Kapoor that I presented above, he answered to similar critiques in his later writings (Escobar 2000; 2006). To start with, he identifies three main argumentative strategies of critiques against post-developmental approaches which take three different banners, namely: 1) arguments in the name of the 'real', 2) arguments in the name of a (better) theory, and 3) arguments in the name of 'the people'. According to Escobar, these are expressions of the contrasting paradigmatic orientations taken in contemporary debates on development. Addressing the first main criticism, which claims that postdevelopomentalism forgets about the 'real' problem of capitalism (and which is not presented by Kapoor), Escobar argues that it is based on a naive defense of the real (Escobar 2006a, 448), more explicitely, it bases "on the (Marxist or liberal) assumption that discourse is not material, failing to see that modernity and capitalism are simultaneously systems of discourse and practice" (Idem, 449). Thus, the starting point for this critique rests on a different conception of the "nature of social reality [...] and about the character of political practice and the agent of social transformation" (Escobar 2000, 12). In other words, the critics reject to accept the "importance of language and meaning in the creation of reality" (Idem) resulting from the lingusitic turn at the end of the 20th century.

Secondly, Escobar refers to the question on the homogeneity of the concept of development that post-developmentalist's formed as their object of critique, expressing his clear acknowledgment of the diversity emphasized by other theories and their proposed 'developments'. Equally, he underlines that these criticisms that pluralize the concept of development, could develop, to a great extent, because of the deconstruction of the development discourse provided by post-developmentalists. Nevertheless, he argues that while other currents intend to offer truthful representations of the real and thus made emphasis on the diversity of developments, the "poststructuralist project" intended to debunk the existent "capitalocentrism in political economy" (Escobar 2000, 13). This project intended, thus, to analyze "the overall discursive fact, not how it might have been contested and hybridised on the ground", as a way to construct "an object of critique for both scholarly

and political action and debate" (Escobar 2006a, 449). He refers in this context to the particular needs existent in the historical moment of conceptualization of the postdevelopmental critique, and points out later to the contemporary need to overcome paradigmatic differences amongst the critical approaches in order to encourage an inter-paradigmatic dialogue. In this sense, instead of positioning postdevelopment against other theories, Escobar's proposal is to open the field of criticism and enter in a productive dialogue with these diverse perspectives.

While the strategy of critique against postdevelopmentalism under the label 'in the name of the people' can take many forms, e.g. suggesting that "what is at stake is livelihood and people's needs", or that postdevelopmentalists "patronize 'the people' and overlook their interests", Escobar depicts this critique as being a "reflection of the chronic realism of many scholars who invariably label as romantic any radical critique of the West or any defence of 'the local'" (Escobar 2006a, 449). This strategy of argumentation against post-developmentalism, that is used for the claim that it is 'the people' who build social movements in search of development and that there exist power-relationships that cannot be avoided just by claiming a 'post'-era, is linked to the realism of the first strategy mentioned. While Escobar claims that this strategy leads to a confusion between actual commodities, that might be desired by 'the people' and the search for development, regarding the specific question of power, he also underlines that "in this strategy, there is a triumph of the *realpolitik* at the expense of other visions of the possible" (Escobar 2000, 13). This formulation is interesting because it puts in the center of the argument the need for a pluralizing way to envisage not only our present, but also its developments into unknown futures. While the *realpolitik*, a current in tune with legal positivism, claims to deal with the 'hard truth' of power, Escobar underlines the search for other forms of visualizing social relations in a way by which power, in the sense of *realpolitik,* is not excluded but it is neither the only element worth mentioning. This remark positions Escobar in an attempt for transcending the limits of poststructuralism, emphasizing that the treatment of development proposed within this scheme of thoughtresponded to a specific political strategy in order to address epistemological and political needs of a concrete moment. It is no coincidence, thus, that one of his main texts for this discussion is titled 'Beyond the Search for a Paradigm? Post-Development and Beyond' (2000). Equally, in his later text of 2006, he welcomes the paradigmatical debate as a contribution "to the creation of a lively climate for more eclectic and pragmatic approaches", adopting elements from various paradigms in a context of "growing inter-paradigmatic dialogue" (Escobar 2006a, 449 f.).

Furthermore, Escobar argues that "if we [post-developmental theorists] refused to theorize about 'how things must be instead', it was not because of a relativizing conceit [...], but precisely because, in the spirit of poststructuralist genealogies, we see all too well how this normative stance has always been present in all development discourses, even if naturalized and normalized" (Escobar 2000, 13). Nevertheless, according to Escobar, the journey through the discussion of a variety of paradigms on development, including the postdevelopmental approach, has importance by itself "as a journey of the imagination, a dream about the utopian possibility of reconceiving and reconstructing the world from the perspective of, and along with, those subaltern groups that continue to enact a cultural politics of difference as they struggle to defend their places, ecologies, and cultures" (Escobar 2000, 14). He envisages, thus, a place beyond the post-structuralist discussion of post-development.

In this context, Escobar underlines equally the importance of the emerging awareness that "another development", different from the "kind offered by neoliberalism", is possible (Escobar 2006a, 450). In the process of engaging with post-development, he argues, the production of knowledge itself has changed, putting an end to the "dominance of expert knowledge over the terms of the debate" on development (Idem). He emphasizes in this sense the knowledge produced by social movements that do not accept the conventional notion of development, urging to rethink the base of globalization and other aspects of the neo-liberal developmental agenda. It is in the engagement with the "intellectual and political trends among the movements" that Escobar envisages the role of scholars like himself to deal with contemporary reality, without forgetting the "always important aim of rethinking our own perspectives" (Idem, 451).

The encounter that Escobar envisages with social movements in pursue of the creation of new perspectives on development, is, thus, similar to the ethical encounter visualized by Kapoor through the reading of Spivak. Consequently, Kapoor's text of 2004, ends with a list of elements that he recovers from Spivak's work, and which yield "the possibility of an ethical encounter with the subaltern" (Kapoor 2004, 640). In so doing, Kapoor attempts to strengthen the claim that "deconstruction can lead 'to much better practice'" (Kapoor 2004, 639 cit. Spivak), arguing that while the musing, deconstructive style [of Spivak] tends to be averse" to a systematical layout of this better practice, it is possible to "cull" from her writings an emerging approach that allows for the desired ethical encounter. The deconstructivist position is, as he argues, "*followed* by a process of self-implication" (Idem, 640; emphasis added). Taking this further step, Kapoor regains the hope of the reader to include deconstructivism

and the whole poststructuralist criticisms into a creative engagement with the Other and the realities we live in.

Importantly, while Escobar claims the end of the reduction of knowledge production to the development experts and thus the need to a sincere engagement with social movements, hearing and caring for their voices, Kapoor underlines with John Beverly that "if the subaltern could speak in a way that really *mattered* to us, that we would feel compelled to listen to, it would not be subaltern" (Kapoor 2004, 639). In both contributions, the authors stress, thus, the ability to listen, which completes the speech act (a feature at the center of postmodern research) in the frame of a communicative situation. With this remark, Kapoor emphasizes thus, that Spivak's argument is not disabling of the subaltern but proactive in calling attention for the need to re-learn to listen.

The criticisms regarding the lack of proposals for concepts of development, which could replace the one postdevelopmentalists criticized, argued against theorists like Escobar, have been also addressed against Spivak's critiques on the silencing of the subaltern. Bart Moore-Gilbert (*1952) argued, for example, that "while Spivak is excellent on 'the itinerary of silencing' endured by the subaltern, particularly historically, there is little attention to the process by which the subaltern's 'coming to voice' might be achieved" (Moore Gilbert 1997, 106), thus paralyzing the researcher. Against this understanding, Kapoor presents five Spivakian proposals to engage in this process of self-implication in order to build an ethical encounter with the subaltern in the development theory and practice (Kapoor 2004, 639 ff.).

These proposals consist, firstly, in developing deconstructive critique from the inside of the structures inhabited by the researcher or practitioner, since it is only being inside and acknowledging that relation, that it is possible to avoid a disavowal of one's complicities. In the context of development, and referring explicitly to Escobar's work, Kapoor reads this invitation as a way of cautioning postdevelopment critics against "throwing the baby out with the bathwater by being uncompromisingly 'anti-development' and arguing for 'alternatives *to* development'" (Kapoor 2004, 640 cit. Escobar). Kapoor thus claims that it is possible to "retrieve from within [the 'development business'] an ethico-political orientation to the Third World and the subaltern" (Kapoor 2004, 640 f.). Although he does not continue this argument in his text, it is worth asking how far is it possible to question institutions like the World Bank or the IMF from within, specially regarding the relationship they establish with the so called Third World, if the whole structure is based on a representation of the Other as underdeveloped and is directed by the interests of specific groups. Does criticizing international organizations from the inside automatically makes their development work more

ethical? Certainly, the call of Spivak invites to reflect on the own position within the system. But the rescue mission of international development institutions that Kapoor begins on that base is, clearly, an interpretation that not everybody needs to follow.

As an implicit answer to this concern, Kapoor accepts that these institutions "may well be 'imperialistic' organisations" and thus adds to his argument the possibility to make them accountable to the subaltern (Idem, 641). While accountability might be an important step for developing more trust in the institutions and strengthening them, the question remains if development institutions and the subaltern will have to stand in front of each other for ever, and even more, if the making of a 'good livelihood' necessarily has to do with international financial institutions that gather states around projects on development.

While development "may indeed have become a shady business", as Kapoor (2004, 640) states, the question is not only if we can make this business accountable, but also if development itself can be conceived, experienced and created beyond business. Boldly stated, what if the subaltern envisages his own development in a way that does not consider business, or money, or the IMF? An "ethico-political orientation to the Third World and the subaltern", as the one Kapoor wants to retrieve (Idem), might require from the current development agents, in fact, to transform themselves, their view, their position and their capacity of imagination. Naturally, Kapoor's call for accountability and his intention to retrieve ethics from the shady business of development, a development that he conceives as singular, derives from his own position in the field at stake. While embedded in development through his engagement with projects of the CIDA and UNDP amongst others, it is not surprising that he writes from that experience and for that type of development workers. Equally, in his academic endeavor, the choice of the 'Third World Quarterly' for his periodical publications, sets equally the frame of reference of his work. But that does not mean that all relevant forms of growth and development must be thinkable in this frame. The criticism from within might as well imply that we expand the limits of the possible in our minds first, revising the goals and means of the institutions we take part in.

Nevertheless, what remains important is that the call of Spivak for the critique of the structures that we "inhabit intimately", advocates for an engagement with the subaltern from within, and invites us to deal with our own space, and somehow with our own subalternity in the structures we criticize. Equally, she invites to developing ourselves by "persistently transforming conditions of impossibility into possibility" (Spivak 1988b, 201). This transformation can be pursued for any type of development concept or strategy. Most importantly, this proposal presents a first big step in the passage from the paradigm of

solution of conflicts to a new transformative perspective. In other words, she invites us to be aware, reflective and proactive regarding a change that does not pursue a particular pre-established goal, but moreover is determined by the own understanding of what each one of us desires as a transformation.

After emphasizing the importance of a criticism from within, Kapoor, emphasizes a related issue, namely the need for "acknowledging complicity" and being "unscrupulously vigilant" regarding the structures and discourses that conform our view on things (Kapoor 2004, 641). This vigilance obliges, in turn, to "retrace the history and itinerary of one's prejudices and learned habits [...], stop thinking of oneself as better or fitter, and unlearn dominant systems of knowledge and representation" (Idem). In the words of Spivak, this requires a "transformation of consciousness" (Kapoor 2004, 641 cit. Spivak), and thus a deep and personal transformation of those who want to transform. This internal, mental, and somehow ethereal development of the developers leads further to "stopping oneself from always wanting to correct, teach, theorise, develop, colonise, appropriate, use, record, inscribe, enlighten" the Other, the subaltern, the Third World or the underdeveloped (Kapoor 2004, 642). In turn, the sincere atmosphere resulting from this change, allows a more humble openness in front of the Other and a more clear recognition of the needs at stake, including the needs of the observer.

What Kapoor (still building on Spivak) develops as a third strategy under the name of "learning to learn from below" refers in fact to the need for an openness to listen to and recognize the validity of the ways of the Other to address his needs. Needs, goals and means assumed as universally valid become, from this perspective, relative. In this context, Spivak refers explicitly to the concepts of 'nation', 'democracy' or 'participation', all of them clearly related with contemporary ideas of legal development, calling for caution against assuming the universal usefulness of these terms while forgetting that they were "written elsewhere, in the social formations of Western Europe" (Kapoor 2004, 642 cit. Spivak). A sincere engagement with the Other requires that we put these concepts in standby, as well as their status as universal values that seem to be realizable only through the incorporation of specific strategies.

Developing the capacity to 'learn to learn' is closely related to Spivak's point on the importance of "working 'without guarantees'" (Idem, 644), this is to detach from expectation.[138] In this sense, the voice of the subaltern might as well be expressed through

138 This premise seems to be opposite to Habermas' approach presented in chapter A, which puts at its base the assumption and the guarantee of certain aspects of communication.

his/her silence. There is no guarantee regarding the question if we will understand the Other's language. The ‘non-speakingness’ and the ‘non-narrativisability’ of the subaltern can be aspects of the Other's difference that emphasize “the impossibility of knowing it, accepting that it exceeds our understandings or expectations” (Idem). In terms of development, Kapoor understands this, on the one hand, as a call to learn to be open regarding “the limits of our knowledge systems” (Idem). On the other hand, however, he sees in this lack of guarantees equally a need to be open regarding the idea of “enabling the subaltern while working ourselves out of our jobs” (Idem). Although this last statement makes sense in terms of accepting the failure of understanding as the success of the empowerment of the subaltern as having agency over him/herself, it does leave the reader with a certain awkward feeling. Does the subaltern needs to be enabled? Whose success is his silence? Does developmental work stops when the subaltern ‘speaks’ – or when we hear him/her? Only the kind of development job that Kapoor envisages becomes then useless, because it is a job that is never done by the one in the process of development.

Interesting for us is especially Spivak's emphasis on the importance of opening ourselves to our imagination and to surprise, which Kapoor sets as a fifth strategy. The openness to be surprised is what happens when we listen without particular expectations; imagination takes place when we can envisage that what I understand and see as possible is just one of many options. Abandoning at least some of the pre-established boxes of our established knowledge, we allow ourselves to develop common and new categories and ways of understanding with the Other. In terms of development, this strategy calls, thus, to allow ourselves to be surprised by the perspectives and strategies we encounter in the pursue of a ‘good life’, and, at the same time, to find strategies to enhance our imagination in order to understand and respond to the conflicts we perceive in this pursue.

These five strategies are, in my opinion, Spivak's and Kapoor's versions of Escobar's wish to trascend paradigmatic opposition, in order to engage with political and intellectual trends among social movements. In this sense, the calls of these authors are similar. However, Kapoor addresses some important difficulties regarding the particular meaning of these strategies for the praxis of development. For example, while Kapoor underlines that Spivak does present forms of ethical encountering with the subaltern, he criticizes that her argument lacks “any adjudicative mechanism for sorting among and between greater goods and lesser evils” (Kapoor 2004, 643). Arguing for the practical need to make decisions on which activities are more benign, he wishes to have a tool to distinguish between varying degrees of complicity. In other words, he argues for the hierarchization of complicities: Is a complicity

with the IMF better or worse than a complicity with a local NGO? Certainly, this is no question that an approach that values the personal journey and the particular encounter can respond to in a general manner. The question of Kapoor, again, only makes sense in the context he is coming from and which he envisages as the place where development and development struggles take place: institutionalized international development aid. Thus, he imagines an advocacy group that has to spend "efforts and resources" efficiently for "organising against" diverse activities (Kapoor 2004, 643). The need for finding degrees of complicity that he argues derives from the purposes he has in mind, which are "strategising and prioritising", and finally justifying decisions. Firstly, it is important to observe that Kapoor imagines a group that is trying to do something, basically to speak, *for* the subaltern, because if the advocacy group he imagines was formed or intimately linked with the 'subalterns' themselves, the question would be probably easier to answer: The strategy which allows the subaltern to find the most suitable place according to himself, is clearly the best one. A different advocacy group has probably a more difficult task, but the tools that Spivak gives, are in fact sufficient from a perspective of post-colonial studies that aims at the ethical encounter with the subaltern: The more that a system allows for "learning to learn from below", and thus to listen to the subaltern, completing the speech act and transforming it into a moment of communicative encounter, as well as inviting for a change of the speaker and encouraging to review the own truths, is the most adequate from the viewpoint of post-colonialist subaltern studies. The problem of Kapoor results from his need to engage in the development of the subaltern, making of the encounter with the subaltern a tool, a mean, and not the main goal.

His argument shows, in this point, a clear modern vein, with a certain economic aura. Thus, he writes about '*degrees*' of complicity, about the need for strategising and prioritising actions according to an 'assessment of more or less benign' activities, about 'efforts and resources' that can be better or worse 'spent', and about a need to organize 'against' certain activities. While his arguments might be pertinent for the needs of a practitioner of modern development, they follow nevertheless a linear perspective that goes from evil to good, and from having resources to their devaluation through use. It is no wonder, then, that, in this modern impetus, he emphasizes the need to find "an *adjudicative mechanism* for sorting among and between *greater goods and lesser evils*" (Kapoor 2004, 643; emphasis added). In doing this, however, he shifts the attention from entering into a common dialogue to achieving a better development.

Equally, Kapoor questions the impracticability of Spivak's call for a "necessity of a one-to-one relationship for it to be intimate, caring and non-exploitative" in all sorts of institutions (Kapoor 2004, 643). Thus, he asks "[h]ow does a personalised and micrological approach translate into institutional or macrological politics?" (Idem). The easiest answer is probably: it does not, an intimate relationship does not translate into the type of development that Kapoor imagines, nor in the institutional or macrological politics that could make it effective. A macrological politic of intimate relationships could be envisaged as a politic that encourage this caring exchange, a politic that is embedded itself in an organization built on non-exploitative personal relationships. Most certainly, this is a question that needs to be answered very differently in each context. Kapoor's question, in the end, does not refer to the possibility of macrological politics based on Spivak's proposals, but to the possibility of *achieving development through* a personalized and micrological approach or the correspondent institutional macropolitics. The doors of imagination for envisaging a macro-level through which a transformative encounter is made possible, however, are wide open.

In the line of these proposals, the questions on oppression and who actually is the victim have been reflected in a new manner in the latest phase of post-developmental engagement. In this sense, Illich underlines the idea that to be 'a victim' is not reduced to the worn-out categories of the underprivileged 'masses', but that to be a 'victim' of development can equally happen as an expression of privilege in the logic of development. The privilege of being well insured can derive thus in the unreflected abdication over the ownership of one's body, the privilege of education can derive in the loss of awareness of the ownership of vernacular knowledge (Rahnema/Bawtree 2008, 108). However, it is clear that "these and their like got what they asked for; their fate was not imposed on them" (Idem). Regarding other types of 'victims', Illich answers countering the idea of a 'social responsibility' to engage with 'the powerless'. In this sense, referring particularly to the first attempts of critical appraisal of development, Illich asserts that "the 'social responsibility' that once motivated us was itself the result of a belief in the same progress that spawned the idea of development. Social responsibility, we now know, is but the soft underbelly of a weird sense of power through which we think ourselves capable of making the world better" (Idem). In this sense, Illich recognizes himself as relatively powerless, and in doing so, the concept of an Other as 'victim' or 'oppressed' turns questionable.

The dialogue between Rahnema and Illich during the interview I referred to in the last paragraph, is specially interesting because it shows two different perspectives within post-developmental critique. While Rahnema returns over and over to concepts like 'victim', asking if there is "any chance for the victims [of development] to change their mind" (Idem, 107), or formulating romantic and past-oriented sounding questions like if "there are still some untapped spaces left [...] where the old species of virtue have a chance to grow safely", Illich's answers recall over and over the need for a more radical change of perspective. In fact, in his argument, he moves the center of attention from the 'other-victims' to the 'us-powerless', and turns 'untapped spaces' into the continuously reemerging moment of the very present, where a personal complementarity can grow in a world marked by living 'after virtue'.

It is remarkable, that, being Illich recognized by many as the founding stone of the anti- and post-developmental endeavor, it is also him the one that comes, lastly, to twist (once again) the perspective of post-developmental critique in a radical way, opening the door to unforeseen and unforeseeable experiences of encounter and transformation. In this sense, it is worth recovering Illich's own description of his engagement with development, which reflects diverse phases that not only he himself experienced, but, equally, the critical endeavor he participated in as a whole went through. Regarding his personal experience, Illich recalls:

> "During the 1950's I called on people to recognize the surreptitious injustices implicit in publicly financed professional organizations of teachers, social workers and physicians. In my battles against invasion by volunteers [in Latin America], I appealed to reason. [...] In a second stage, my rhetoric was inspired by the stories of myth. I called attention to the engineering of new mentalities [...]" (Idem).

Illich relates, thus, his own critique against development with the turn I presented above, from a discussion over reasonable arguments, i.e. over who has reason on his side, to a critique of concepts as stories, as myths, as engineered mentalities. As he clearly remarks, in his first phase, his "criticism focused on the procedures used in the attempt to reach goals that [he] did not then question" (Idem, 104). In a second phase, however, he "began to question the goals of development more than the agencies [...]. [His] eyes moved from the process toward its orientation, from the investment toward the vector's direction, toward the assumed purpose" (Idem). With time, his critique became increasingly radical. Taking the example of his work 'Medical Nemesis' (1976), he asserts: "my main concern was the destruction of the cultural matrix that supported an art of living characteristic of a time and place. Later, I increasingly questioned the pursuit of an abstract and ever more remote ideal called health"

(Idem). In the same line, the fight against the stories and myths of development was fueled by the idea that the goals presented by development were “delusional and therefore destructive” (Idem).

Interestingly, in a third moment starting in the 1970's, Illich continues, his “main objection to development focuse[d] on its rituals” (Idem, 104). In other words, not only the goals placed in the name of development are the result of stories, but, furthermore, Illich arrives to the conclusion that the rituals of development generate “a non-ethical state of mind” (Idem, 104). These words of Illich express clearly the power ascribed to language and discourse at the base of post-modern questions. The corresponding answer came to be, naturally, “to tell stories” (Idem, 107).

The self-image of Illich in this context is equally quite telling for the mood that accompanied most of postdevelopmentalist critique. Illich sees himself, as a researcher, endowed with the task “to explore how to trust and love and suffer in a milieu that drowns out our voices and makes our sparks invisible” (Idem, 108). This image depicts accurately the sense of being overwhelmed that arises often in dealing with post-modern critique, turning micrological responses into sadly heroic acts.

It is important to recognize that all these attempts to find new responses, are the result not only of the discovery of the absence of truth in previously unquestioned assumptions, now unmasked as myths, but that they emerge equally from the belief in one truth. Thus, Illich can say that he and other post-developmentalists “have been far too slow in recognizing the truth”, being their mission now “to bear witness to what [they] have come to know” (Idem 107 f.). In this sense, paradoxically, ‘postmodern pluralism’ is an expression of ‘modern unicity’.

Into a new area points, however, Illich's reflection on the “non-ethical state of mind” generated by development. What Illich criticizes is that, embedded in the chase of development, present awareness and satisfaction are frustrated, “so that one always longs for something better that lies in the ‘not yet'” (Idem, 104). Thus, “the unique beauty and goodness of the now” is obliterated, and the ‘we’ is weakened in the sense that it does not refer anymore to a sharing of convivial life (Idem, 106). In his call for an ethical encounter, Illich's invitation echoes also Spivak's latest efforts to engage in a deep personal manner with oneself and with the Other.

The basal critique of Illich is accompanied by the assertion that “we now live ‘after ethos’, or, as Alasdair MacIntyre notes, ‘after virtue'” (Idem, 109). In other words, in this ‘post'-era, “commitment to progress has extinguished the possibility of an agreed setting within which a search for the common good can arise” (Idem). But what remains then? The

awareness of this condition, can in fact explain the nihilistic indifference criticized not only on postmodern intellectuals, but moreover, on the contemporary youth. Rahnema puts this state of mind in words, when he wonders “whether the joy and indeed the inner clarity gained by this type of questioning does not sometimes hinder one's capacity to relate to the outer world and to participate in a meaningful social life” (Idem, 105). Similarly, David Cayley asked “once one has laid bare these certainties [...] what next?” (Idem). In other words, if all around me is just empty of truth, and all my language and my tools to communicate are the result of dreadful stories that can only reproduce violence, what is it worth participating in, how can I avoid indifferent ostracism, how can I engage with the Other, understand his and my needs, be truly care-ful(l) and thus be responsive to the Other and to ‘the social'?

Confronted with this darkness, Illich's allegorical advice is: “Carry a candle in the dark, be a candle in the dark, know that you're a flame in the dark” (Illich ref. in Rahnema/Bawtree 2008, 105). Elaborating on this image, Illich states that: “In a world set on development, no matter the economic stage reached, the good can only come from the kind of personal complementarity which Plato [...] had in mind” (Rahnema/Bawtree 2008, 109 f.). Illich's answer to the problem of ‘a non-ethical state of mind’ furthered by development as it is championing social life, is, similarly to Spivak's proposal, clearly minimalistic: “Dedication to each other” (Idem, 110). As Illich concludes, this “is the generator of the only space” that allows for virtue to emerge: “a mini-space in which we can agree on the pursuit of the good” (Idem). Most importantly, since “the most destructive effect of development is its tendency to distract my eye from your face with the phantom, humanity, that I ought to love”, Illich's advice is to offer “a risky presence to the Other, together with openness to an absent loved third, no matter how fleeting” (Idem, 106). He calls thus, for a return to the present moment, to the own experience of this ‘here and now’ instead of advocating for a perspective based on an elusive ‘we’, where “the ‘I’ who experiences is replaced by an abstract point where many different statistical charts intersect” (Idem). Taking this last reflection of Illich, it is possible to say that after trying to save the world from development, post-developmental critique still has to complete the twist it started, applying self-reflection to a point where the final thing that matters is the shared present.

## V. Closing Remarks

In this chapter I have addressed a variety of approaches that might be called post-modern due to their usage of modern concepts and methods in a new twisting way, emphasizing, amongst others, the elements of plurality, culture and power in the decisions taken that establish certain standards of 'normality' and 'otherness', 'stagnation' and 'development', 'law' and 'custom'. In the realm of law, we have seen for example how law's legitimation has been presented as a question of authority and power. This critique became very concrete in the studies of Critical Legal Studies as well as in the academic and political endeavor of a variety of foundations and activist groups in Europe and Latin America. In all cases, a revision of the established authority to proclaim what is law and what is not has taken place.

Importantly, while the theoretical underpinnings are central to the emergence of this critical mindset and attitude, the socio-political experiences that go hand in hand with post-modern reflection have been indispensable to the emergence and concretion of these new perspectives. Thus, the presence of social movements involved in political struggles in the name of the marginalized others, be it in terms of gender, race, culture, or political and economic status to name a few, has been key for post-modern reflection. Understanding law as politics, law (particularly legal adjudication) have become tools for developing political goals of social justice. The making of the law received special attention both in terms of the choices over authoritative interpretations and in terms of the making of the (appliers of the law), i.e. lawyers and judges. That law is a matter of interpretation is a key thought that results lastly in the validity of a plurality of approaches to law, in a variety of laws.

That law is plural has been highlighted particularly by the advocates of legal pluralism. Even if the approaches collected under this title are themselves very varied regarding the academic fields they emerged in and their political intentions, what remains clear from this discussion is that a variety of approaches to law is arguable, and, importantly, that naming a system of norms 'law' or not is a decisive exertion of power. How to legitimate that decision is a key problem. Importantly, this question of legitimacy has led many thinkers and activists prioritizing plurality over the monolithical authority of modern law, to recover concepts of truth and justice. However, these answers seem insufficient insofar as they return to dichotomic categories typical for the structures they criticize.

Similar observations can be made in the realm of development critique. Authors in favor of a post-developmental approach have argued convincingly that the concept of development participates and recreates a web of meaning where ‘underdeveloped people’ and their way to live are envisaged according to an allegedly universal standard. They are the result of a comparison made according to particular economic expectations. Moreover, in the context of the Cold War, the discourse of development played a key role in reorganizing the world after the breakdown of the colonial system, reinforcing an economically and politically hierarchical relationship at an international level. Despite the crucial importance of these critiques, problematically, the emphasis that critical authors put in understanding ‘development’ as an oppressive culture, run the risk to reinforce the hierarchy they criticize, putting the former ‘underdeveloped’ as victims, and presenting themselves as legitimate representatives of the oppressed's voices. Equally, they present their perspective as more just and more true according to implicit generalized standards of the ‘good’, reenacting the hierarchy of the speaking subject that they contest.

Remarkably, there have been new approaches and reflections in this line that aim for an encounter, an ethical encounter, with the Other. The ability to listen, the openness to surprise and imagination, and the capability to be present are some of the new elements emphasized by few contemporary authors in order to engage with otherness in a way that transcends the postmodern problematic. However, these proposals have remained mostly unattended or have been reinterpreted in developmental practices that recover modern understandings.

In general, it is possible to say that the advocates of a critical attitude within a postmodern sociolect, have blurred a variety of monolithical unities with alleged universal validity into a plurality of changing forms of identification. Insofar they have succeeded in shaking and breaking many of the generalized standards, including the categories and conceptual structures of ‘law’ and ‘development’. Nevertheless, these approaches find also difficulties in dealing with the poly-valence they defend. This process of destabilizing identities has opened the space for many questions, but the answers slip every time from our hands due to the same dis-equilibrating spin of postmodern critique. The gravity of this uncertain situation turns clear at the moment when we formulate the questions: what is lawful, what is right, what is just, who can judge, in which direction should we go and develop, and lastly how shall we live. The relevance of these questions becomes patent when we observe some examples of how these theoretical emphasis on plurality found expression in political demands of recognition, participation and redistribution in the next chapter.

## C. Making Place for the Other in the Law – Between Culture(s) and Politics

When a modern concept and a modern praxis of law are confronted with massive critique in terms of its violence against diversity, a central question that appears next is how is it possible to change those legal practices to incorporate plurality and leave a monolithic, unified and violent law behind. This search for a new law, naturally, goes hand in hand with new approaches to legal development. If law cannot be conceived anymore as the expression of the one justice and truth, then development cannot aim to produce that kind of law. On the contrary, a new aim of legal development becomes to incorporate, integrate, include the marginalized 'other' in a law that is conceived anew. This new perspective requires a participative law.

In this chapter I will address some examples of this search, focusing again in Latin American examples, which, however, had an important international repercussion. I will refer firstly to the project of Legislative Theater developed by Augusto Boal as city councilor of Rio de Janeiro, and, secondly, to changes in the judicial structure and argumentation in other Latin American countries, particularly in Mexico and Colombia.

I chose these cases particularly because of the strength of these movements and the relevance of their consequences. The examples of Brazil and Mexico will allow us to see some of the consequences of the critical approaches presented above from a new perspective. Specifically, these currents are interesting for us insofar as they open the question for matters of development and pluralism from the perspective of 'the ones to be developed yet' according to a modern model of development. The alternative proposals to law in the Brazilian context are specially interesting because of the development of artistic-political practices like Theater of the Oppressed and Legislative Theater, which are influential until today across the world. The pluralistic proposals to law in the Mexican context, on the other hand, have ended in concrete changes in the judicial structure.

Last but not least, it seems to me central for a work dealing with pluralism in law and legal theory, to go beyond the developments made in (critical) theory of law by authors and institutions which have a prominent role in the mainstream academic discourse of law. The Latin American currents of alternative use of law, as well as the proposals of legal pluralism, have strong referents in European developments, and, at the same time, have their own context and genealogy. In other words, if ideas like the proposed by *Magistratura Democratica* in Italy, were so important at a certain time in Brazil, or if the concept of Legal

Pluralism advocated by John Griffiths became so relevant for Mexican indigenous groups, it was also because it was possible to shape them in order to address relevant concerns in that concrete environment. To address this exchange of ideas on law, which could equally be seen as a form of legal transfer, as a one way street is, in fact, part of the assumptions of modern perspectives on legal development that are criticized from a postmodern view, and for which the idea of alternativity and plurality are determinant.

Taking a closer look at these examples, we will have the opportunity to see how new alternatives to modern understandings of law have been developed within a postmodern sociolect, in different aspects of legal work, namely the legislative sphere and the judicial sphere. Importantly, these new approaches show also how law is conceived as a field embedded in political and cultural settings. Their struggle to pluralize law and to create new forms of (legal) development, incorporating a variety of voices as the postmodern critiques claimed, has affected millions of lives. It remains to be seen how far they succeeded in transcending the modern schemes of unicity and hierarchy they opposed.

## I. Making Place for the Other in the Parliament: Searching for Alternatives to the Politics of Law through Cultural Activism through Legislative Theater in Brazil

In the section on critical legal thought, I have presented the current of *Direito Alternativo* or *Uso Alternativo do Direito* that envisaged a different, an alternative approach to law and social order. But this kind of alternative approaches did not develop only inside the law faculties and the courts, two main spheres of socio-legal reflection. Moreover, the critical movement demanded, as I have stated above, a new language for law and thus new epistemological premises. The question was: since law itself delineates the limits of legitimate arguments, how is it be possible to formulate emancipatory arguments with the same language of law? In response to this concern, new aesthetic forms of dealing with social conflicts appeared, looking, in a creative way, for a new language to approach law. Since the space and tools given by modern law were not anymore sufficient, the space was opened for creative game and improvisation as ways to discover something new. The arts played a major role in this inquiry. Importantly, their role went beyond functioning as mere spaces of criticism, a function they often take. Moreover, the art itself turned into a tool of investigation. Doing art

turned to be seen as a method to produce social change, because it implied a change in the way of thinking of society.

At the same time, recognizing law as a universalistic proposal, where the vernacular traditions seldom can find their space, the search for a new way to deal with social conflict and order was oriented equally to the search for answers that were neither imposed nor imported, and in turn, were recognized as own and authentic by the population searching for its own order. This call for the vernacular traditions and for authenticity in the normative organization of society is more clear in the struggles of social and legal activists to be discussed later. However, this tendency to search for authenticity can be recognized equally in other currents looking for alternative approaches to social conflict in the end of the 20th century.

In the case of Brazil, we can find different expressions of this search for new languages. Poetry was and is until present, one of the privileged approaches to articulate social needs in front of law. It is not surprising, thus, that many participants of the current of *Direito Alternativo* have written, in fact, uncountable poems engaging with law and their contemporary struggles. Take for example the book of poems titled '*Da Cama ao Comício. Poemas Bissextos*' ('From Bed to the Polls. Leap-Year Poems', 1984) of Roberto Lyra Filho (1926-1986), or the works of Lédio Rosa de Andrade (de Andrade 2011). All of these efforts look for a change in the poetics of law and social order.

One of the strongest expressions of an artistic approach to social order and social change can be seen in Augusto Boal's (1931-2009) work using theater, which has currently great impact at an international level.[139] Nowadays, his Theater of the Oppressed, Forum Theater and Legislative Theater have acquired recognition and are being practiced not only in Brazil but also in Germany, Austria, France, Portugal, Canada, Peru, Mexico, India, amongst many other countries.[140] Through his practice, Boal invites the open and public reflection on social issues and the participative artistic creation of new proposals in order to find new outcomes. His work is especially relevant for us not only because he developed a thorough theory for this theatrical practice that allows us to enter in dialogue with him also through abstract theoretical reflection, but, most importantly, because he developed this practice with a

139 Given the context of a search for a new language, it is not surprising that Boal wanted to present his theater experiments first in the realm of the work with poetics, this is an aspect of philosophical reflection from the viewpoint of aesthetics. In fact, he originally wanted to name his seminal book, published finally as 'Theater of the Oppressed' ('*Teatro do Oprimido*'), as 'Political Poetics' ('*Poéticas Políticas*'). But following the advise of the bookseller who estimated that that was not a good selling title, he changed it first to 'Poetic of the Oppressed' ('*Poética do Oprimido*') and later to 'Theater of the Oppressed' (Boal 2001, 310 f.).

140 For a complete list of the countries in which Theater of the Oppressed is practiced according to the International Organization of Theater of the Oppressed (ITO), see ITO 2011.

clear political interest to include a variety of voices in the socio-political discussion. His proposal is thus from the beginning pluralistic and addresses conflicts and challenges regarding the use of common social spaces.

It is not the aim of this inquiry to make a monograph on Theater of the Oppressed[141], its history, its participants and its results. Moreover, the aim here is to see how the work with this dramatic method allowed to articulate, on the one hand, a critique of law from a pluralistic perspective, and, most importantly, how it developed, equally, proposals to recreate the idea of law orienting it to pluralistic concerns. Naturally, many forms of social activism share these aims of critique and re-creation. However, Theater of the Oppressed shows at least three interesting characteristics that makes it especially interesting for this inquiry. Firstly, it is a clear expression of a change in the epistemological paradigm, regarding how knowledge, dialogue and social change can be produced. Secondly, it actually worked in explicit direct connection with formal state law through the work in Legislative Theater, and it was successful in developing formal law through theater-work. Finally, it is important to me that Theater of the Oppressed, as well as the critical currents mentioned above, did not remain a local expression, but found response in totally different corners of the world. Equally, it is interesting that Theater of the Oppressed as a proposal of socio-legal development goes in the opposite direction, from a geographic point of view, than developmental work usually aims to go: instead of going from so called ‘developed’ societies to ‘underdeveloped’ ones, it is the other way around, putting in question the traditional idea of development.

In this section, I will firstly present Boal's theater work, which cannot be divided from his political theory nor from his later engagement explicitly with legal development. In fact, as we will see, all the reflections made by Boal regarding the aesthetic aspect of theater, are central elements of his approach to politics and law. After this general review of his approach to theater, I will present particularly his ‘Legislative Theater’, making special emphasis on his approach to development, law and plurality.

To understand Boal's endeavor, it is central to know, that the artistic-political proposal of Boal is marked by the context of dictatorship, in which he was embedded. Since he was politically compromised with the political left, the state censorship of art projects meant to

141 The Theater of the Oppressed includes different groups of techniques like Newspaper Theater, Direct Actions, Legislative Theater, Invisible Theater, Forum Theater, Image Theater and the Rainbow of Desire. In fact, all of these groups of techniques overlap and it is difficult (as well as unnecessary) to make a taxonomy of the diverse aspects of the Theater of the Oppressed. In this text I will concentrate on some of these aspects, that seem to me central to highlight Boal's artistic-political proposal and its relation with development, pluralism and law. For a clear introduction to Theater of the Oppressed as a whole, see Staffler 2009, and for a thorough presentation of all the diverse aspects of his work, see the list of references. Short references can be found at ITO 2011.

him much more than just a difficulty in his professional life. His search started thus as a search for new forms of artistic-political activity and resistance. Furthermore, the political crisis went hand in hand with an economic crisis that demanded creative responses from the artistic sector. In fact, from Boal's perspective, the Brazilian theater was as a whole in a critical moment during the 1960's. Due to insurmountable economic difficulties nationwide, traditional forms of theater not only lost official support but they lost also their audience. Consequently, new forms of making theater had to be found that responded to the new social circumstances (Boal 2010, 239 ff., 246).

Boal's description of the work of the collective *Teatro Arena* in São Paulo, where he directed from 1956 until his exile in 1971, allows us to see some of the late modern questions in action in the field of theater. He starts stating that the Arena's work with realistic theater in the 1950's "meant a 'no' in front of the theater that was being presented" until then, which Boal identifies with a nostalgia for European theater (Idem, 243). In the first place, the negative in front of the pre-established model is, as many other movements of the time, indicative of the social context of rejection of old structures. Although the positioning in front of an established tradition is nothing new in the history of arts, as we will see, the way to articulate this opposition shows particular features, like the blurring of the limits between actor, character and spectator. Furthermore, there is a clear post-colonial attitude in Boal's statement, that echoes a more general process in Latin America during the 1950's. The questions of authenticity, identity, an 'own' culture and the power of the speaking subject that the then new proposals of the current of Latin American Philosophy or Latin American Thinking posed, were themselves a call for emancipation, and found expression in the most diverse fields of social life.[142] From a realist theater that still followed European and North American authors, the Teatro Arena thus went to a period of work with Brazilian pieces that talk about Brazilian realities (Idem, 247). The turning point relies clearly in a change from the Europe that Brazilian art and society had as a model, the Europe that Latin America was supposed to be, to the question of what Latin America was. In terms of development, this is the beginning of the question about the unified meaning of development and its universality. As Boal remarks, this period of artistic work was coincidental with "political nationalism,

142 Some of the main thinkers that developed the idea of a Latin American philosophy are Leopoldo Zea (1912-2004), Arturo Andrés Roig (*1922) and Roberto Kusch (1920-1979) amongst others. In order to illustrate the orientation of this current, two titles of the Mexican philosopher Leopoldo Zea might suffice for now: '*En torno a una filosofía americana*' ('Around an American Philosophy', 1946) and '*América como conciencia*' ('America as Consciousness', 1953). Later on, titles like '*Colonización y descolonización de la cultura latinoamericana*', ('Colonization and Decolonization of Latin American Culture', 1970) and '*Dependencia y liberación en la cultura latinoamericana*' ('Dependency and Liberation in the Latin American Culture', 1974) of the same author would follow.

with the blossoming of the industrial park of São Paulo, with the creation of Brasilia, with the euphoria of the appreciation of everything national" (Idem).

Equally, this type of realistic work implied the new relevance of particularism. The topics treated had to be particular of a region, the techniques used for its treatment underlined the particularity of the acts themselves, reproducing them on stage. No visual metaphor could replace the true, unique, particular, authentic reality, and thus, reality was played on stage.

However, as Boal states for a second phase of the work with the *Teatro Arena*, he and his staff "wanted a theater that was more 'universal', that, without stopping to be Brazilian, would not reduce itself to appearances" (Idem, 249). The question was, thus: how to relink aesthetic experience from the absolute particular to the universal without losing one's own identity? The result was the nationalization of classical works like Niccolò Machiavelli's (1469-1527) 'The Mandrake', interpreting it as a political scheme of power at work in contemporaneous Brazilian society. This means that a reinterpretation and an appropriation of the original text were at the core of the new theater. "[A] classic", so the understanding, "is only universal insofar as it is Brazilian. [...] We are also universe" (Idem, 251).

As Boal underlines, in the search of an appropriate universal, the interpretation itself changed: "The actors turned to construct their figures starting from their relations with others, and not starting from a doubtful essence" of the character (Idem). This step was very meaningful, as Boal describes, in terms of how the conception of a character, of an actor, and of human beings in general changed when figures started to be created "from the outside to the inside" (Idem). The character was seen as a reduction of the possibilities of the actor, that was himself, as a social human being, a reduction of all the possible performances and ways to experience available. Identity, and with it the possibility of action (on and off stage), turns thus into a choice over how to experience and how to perform. The job of the actor is, in this sense, to *liberate* himself from the daily mechanizations and (more or less conscious) choices of experience and performance that he made in his own life, and, after this liberation, to reduce his possibilities to those relations demanded by the character he is presenting (Idem). Already here is clear the emancipatory power that Boal ascribes to theater, since it demands from the actor to rethink his identity and his relations, allowing him to redefine his *plural* possibilities of action. From this perspective, theater work is an exercise in awareness, in the flexibility of identification and in the recognition and creation of plural possibilities of action.

Interestingly, the relationship between realism and the critical theater that the Teatro Arena developed later is not dissimilar from the relationship between Legal Realism and Critical Legal Studies exposed above. While both elder currents claimed to put reality, in a

critical way, to the front, leaving prescriptive, puristic or essentialistic theory behind, the critical movements that followed revised the way to *relate* to that reality. Reality turned into narration. Identity into performance. Essence into interpretation. Norm into culture and choice. Theater and Law into cultural politics and political culture. And the objective universal outside of the researcher, actor and judge, into his subjective inside. The question that both currents in critical law as well as in critical theater try to pose and answer is how to link this subjective inside to an outside that allows us to communicate, to inter-act, and thus, to develop socially meaningful observations, judgments and actions.

According to Boal, it was with the production of '*Arena Conta Zumbi*' ('Arena Tells Zumbi')[143] that "the phase of 'destruction' of theater, of all its values, norms, precepts, recipes, etc." culminated (Boal 2010, 255). As he continues, they "could not accept the practiced conventions, but it was impossible yet to present a new system of conventions" (Idem). 'Arena Conta Zumbi', or, as this play is referred to more commonly in the theater literature, just '*Zumbi...*', was the first play of a series of plays that always started their title with "Arena Tells ..."[144], emphasizing the appropriation and re-telling of specific stories as well as the role of the story-teller. In this case, '*Zumbi...*' is based on the story of encampments of escaped slaves in the northeastern region of Palmares in the 17th century. According to this semi-historical account, when military expeditions were sent there for its destruction, a person called Zumbi assumed the leadership of the resistance against the Portuguese Crown. The hero was killed in 1695, and is remembered today by some sections of the Brazilian society (especially amongst Afro-descendents) as a symbol of resistance and freedom.[145] The story reflects historical verifiable facts, even if some of its elements might have mythical character. Having this background in mind, it is not surprising that this mythical/historical event was selected by the Teatro Arena to be re-told in relation to Brazil's contemporaneous social life, this is in a political context of dictatorship, where resistance and freedom played a crucial role. On the limit between one real history and many true myths, Teatro Arena told the story of Zumbi as their own using diverse historical documents not only as implicit reference but as explicit part of the piece. In the search for a synthesis between the totally particular and the

143 '*Arena Conta Zumbi*' was written by Boal, Gianfrancesco Guarnieri (1934 – 2006) and Paulo José (*1937), and it was musicalized by Eduardo de Góes 'Edu' Lobo (*1943) and Vinicius de Moraes (1913-1980) in 1965. For a more detailed presentation of this theater play and its context, see Milleret 1987.

144 The series was continued by '*Arena Conta Bahia*' (1965, with music by Caetano Veloso (*1942) and Gilberto Gil (*1942)) and '*Arena Conta Tiradentes*' (written with Guarnieri in 1967).

145 Furthermore, in 1995, the anniversary of his death has been declared the day of 'Black Conscience', presenting Zumbi as a symbol of freedom.

universal, '*Zumbi*' juxtaposed the mythic story of Zumbi with documentary material and referred that historical complex to the most recent facts of social life.

As Boal explains, the goal was to tell a story "not from a cosmic perspective, but from a worldly perspective clearly located in time and space: the perspective of the Teatro Arena, and its members. The story was not narrated as existing autonomously: it existed only in reference to who was telling it" (Idem, 253). This statement reflects the intention to make a synthesis out of the work done previously, that swung to and fro between the expression of the particular and the universal (Idem, 252). This link between the particular and the universal was achieved through diverse mechanisms, which at the same time destabilized aesthetic conventions. First of all, the relation actor-character was decoupled, making every actor represent all characters. While each character had particular qualities, they were not dependent on the personal characteristics of each actor, recovering the idea of the establishment of characters through masks in the ancient Greek drama or in the traditional Chinese opera. Consequently, while the individual actors with their particularities could be replaced underlining the universality of the story and its characters, every time the story was retold it became a new and particular story. At the same time, it became more universal and more particular.

As a second mechanism linking the universal with the particular, narration played a central role. Narration itself is nothing new and it has been present in many theatrical proposals, like, for example, in Bertolt Brecht's (1898-1956) dramas. However, while Boal refers to Brecht in several moments, he equally separates '*Zumbi...*' from Brechtian narrations like the one in 'The Decision' ('*Die Maßnahme*', 1930). He makes special reference to the temporal aspect, stating that '*Zumbi...*' , as all the Theater of the Oppressed that followed and different from the Brechtian example, aimed to interpret every moment 'in the present' and in all its controversial nature, while the form of the piece maintained the frame of the narration of the actors. The unity of the theatrical piece was thus destroyed, since "some actors remained in the time and space of the spectators, while others traveled to other places and epochs" (Idem, 258). However, the narration as such was conceived as a 'collective interpretation' (Idem, 259), moving again beyond the individual stories of each character. In this intention to destabilize aesthetic conventions, not only times, spaces, characters and actors were pluralized, moved, exchanged and confused, but also styles and genres. Summing up, the norms of theater were put in question; all the traditional elements were made exchangeable, void or ephemeral. According to Boal, all of this was oriented at the creation of necessary chaos before starting with the phase of proposing a new system (Idem, 259, 262).

This phase of the proposal of new alternatives was inaugurated with the creation of the character and the system of the 'joker' ('*coringa*' in the Portuguese original), an emblematic term and figure for a moment profoundly embedded in questions of identity and authenticity. With this incorporation of a joker, not only a new figure was created, but also a new system of theatrical representation with a specific structure of the dramatic text as well as a determined organization of the dramatic cast (Idem, 268). Characteristically, in this joker-system, besides the figure of the joker himself, the other key element and the only firm character-actor relationship is the one of the protagonist, while all other characters can be exchanged amongst the actors.

It is important to revise the two central figures of the Joker-system created by Boal, which he presents as opposed and complementary *functions*.[146] The protagonist, on the one side, retains the realistic elements that give him an appearance of authenticity with the aim of creating a space for the self-identification of the audience with the dramatic action. While in '*Zumbi...*' the disintegration of all connections amongst actors and characters were destabilized, the recovery of the protagonist as a traditional character, allowed to regain the empathy of the audience that had been lost and that did not allow the spectators to feel identified with the struggle of the character, turning them into cold observers (Idem, 253). The immediate emotional contact with the character was then reduced to rational knowledge (Idem, 275). This joker-system, different than *Zumbi*, intended to regain the connection between the character and the audience, engaging the spectator emotionally and inviting him/her to identify with the protagonist, as well as it aimed to create some distance between character and audience in order to generate a space of rational and critical reflection on the character's actions.

On the other side, it is the function of the joker to interpret, analyze and inquire into the actions of the protagonist. In contrast to the realistic world of the protagonist, the world of the joker is magical. He is omniscient and omnipotent. He can stop the action, rewind it, change the participants, explain the actions to the audience, query the characters etc. And not only

146 The original proposal of the Joker-system, which Boal describes in his text of 1967, included other functions like the Choir, the Orchestra and the Coryphaei. Equally, the structure of the spectacle was divided into seven parts: Dedication, Explanation, Episode, Scene, Comment, Interview and Exhortation (Boal 2010, 279). These other functions as well as the division in parts, lost importance in the later development of the Theater of the Oppressed and, for the limited purpose of this research, it is not central to explain them in detail. What is certainly interesting about them, is that they allow to observe how the model proposed by Boal in the 60's reflected a determined *structure* and, within it, specific functions, while this structure turned later on in a much more flexible *system* of relations and interactions. As we will see later, also the functions thought originally by Boal changed according to the transformation of his perspective from structuralist to post-structuralist (Dietrich 2011, 272).

that, he is, in contrast to the limitation of the protagonist who is doomed to be himself with all the mechanized aspects of his identity, completely polyvalent. This means that the joker, as his name states, can take any role in the dramatic action. This joker is, in terms of space and time, “above and beyond” the conscience of the rest of the characters (Boal 2010, 277).

Hence, the joker, introduced as a figure at the intersection between the aesthetic performance, the interpretative observation and the coordinating direction, was entrusted with several functions at the same time. Being the joker the one interpreting and explaining the theatrical action, he revealed the specific perspective of the play presented. This aspect of Boal's proposal is linked directly with his rejection of the camouflage of the intentions of the presenting actors. While other types of theater use choirs or narrators to analyze the aesthetic action, Boal argues that through the introduction of a conventional narrator in the play, a new character is created that is closer to the fantasy of the play and far away from the audience present. The joker, on the contrary, aims to show in a sincere manner the particularity of the interpretation presented. He is and is not part of the fantasy of the play.

Equally, the joker maintained the unity throughout the play, which was otherwise full of discontinuities, since every scene was presented with different styles according to the particular needs of the performance. Hence, the joker-system, allows for an eclectic freedom, establishing a certain stability through the presence of the joker and a clear structure of interaction that is repeated independently of the styles used in each scene. Interestingly, the joker is an element of continuity and disruption at the same time, allowing for a common ground and a diversified set of expressions.

Importantly, the use of a variety of styles responds not only to a general rebellious attitude. Moreover, Boal explained this plurality of styles in evolutionary terms, what makes it especially interesting for this research. Boal's interest was clearly to be able to use all possible styles created throughout the history of theater. Thus, he aimed to transcend a linear perspective of new styles overcoming past styles, to use them all freely according to the needs of the message to be sent. It is interesting the way he formulates this need in front of the velocity of changes in his time:

> "The modern theater has emphasized too much the originality. The two wars of this century, the constant war of liberation of the colonies, the ascension of subjugated classes, the advancement of technology, defy the artists, who answer with a rain of innovations, specially formal innovations: the velocity with which the world evolves results also in an impressive speed with which theater evolves” (Boal 2010, 269).

However, he argues that this development is self-phagocytazing and detrimental for the theatrical aesthetics. “Each conquest of science,” he states, “is the base for the next conquest, nothing gets lost and everything gets conquered. On the contrary, each new conquest in theater has meant the demolition of what has been conquered before” (Idem, 269 f.). Thus, he emphasizes the need for a structure that is “totally flexible and absorbing of any discovery and, at the same time, unchanging and always identical to itself” (Idem, 270). His aim was thus, to develop an aesthetic that would integrate all previous developments, using them according to the concrete needs of each scene. However, putting all these developments at the service of a linear evolution towards emancipation, Boal, as we will see in more detail shortly, equally assumed a linear idea of development and remained, lastly, ambiguous in his perspective on development.

The joker-system aims, furthermore, to be an answer in front of the opposition between subjectivity/objectivity. While Boal criticizes the Hegelian approach that accentuates the freedom of the character, he equally takes distance from what he understands as a Brechtian determinism, according to which “the character is the reflection of the dramatic action”, which “develops through contradictions” marked at least partly through the economic infrastructure of society (Idem, 272). Boal pretends thus to mediate between the character-subject and the character-object, between the assumption that the action is determined by the subject's mind or the other way around. As he states, the joker-system aims to present a pervasive infrastructural conflict, in which the characters develop their action even if they are ignorant of that “subterranean development”, and thus act as free characters. Thus, it pretends to “restore the full freedom of the character-subject inside of the rigid schemes of social analysis” (Idem, 272). At the same time, Boal tries to transcend a “subjectivistic chaos” through the coordination of the free action, where the figure of the joker plays a major part. For him, this coordination is central in order to evade the supremacy of subjectivity, as well as to make impossible “the presentation of the world as perplexity, as an ineluctable destiny” (Idem). Importantly, Boal rejects explicitly a mechanistic interpretation that reduces life to mere illustration (Idem). Thus, according to the argument presented here, Boal rebels against a modern deterministic mechanicism as well as he rejects a chaotic subjectivism. In the same line, Boal always underlined the importance of theater not only to know about reality, but to transform it according to ‘our’ (meaning the oppressed's) way (Idem, 21). This aim of transformation requires a connection between subjective experience and a web of structures and relations of power beyond the subject.

The same struggle between subjectivity and universality can be seen in Boal's intention to address universal questions from the perspective of a Brazilian reality, as well as in his reflections on the possibility of analysis and judgment on a piece of theater. As he argues, “a play has to be analyzed according to the criteria that it proposes, and not according a general theory of theater”, but also “if there are no ‘universal’ criteria established, the chaos of values overcomes” (Idem, 284). Thus, Boal tried to solve this problem inserting “the particular criteria of each text into more general criteria that do not need to be only artistic” (Idem). He, nevertheless, states which criteria of validity should be used to judge a piece of theater, rejecting, for example, the preference for specific schools, genres, styles, tendencies or epochs. In turn, he calls to take the audience as a starting point for any judgment, and thus measures the validity of a dramatic text according to its theatrical efficacy and social value, which is necessarily the “humanization of humanity” in order to des-alienate society progressively (Idem, 285). In other words, restating the Machiavellian dictum that the means are not relevant as long as they serve the goal (Idem), Boal states the measure of validity of a piece of theater according to its emancipatory effectiveness.

His work illustrates the struggle of the postmodern concern with particularism/universalism posed exemplary by Zima which I presented in chapter A. In theater, the question of particularism/universalism as well as the question of identity and authenticity find expression, for example, in the freedom of the characters as subjects and/or objects of the situation presented, as well as in the position of the critic and judge in front of a piece. At the same time, as we will see, this struggle finds expression in the relation between actor and spectator as a political relation.

As I have mentioned, being embedded in the context of the Brazilian dictatorship, the problems that Brazilian theater had to deal with were not only of financial character, but moreover the strict censorship that hindered the theatrical production. However, the political problem was not by far restricted to a matter of the authoritarian rule of the country. Moreover, Boal claimed that while the dictatorship imposed a corset to the expression in and outside the theater, the theater itself imposed forms on the expression of the actors and spectators, imposing equally authoritarian hierarchies. Thus, usually, he argued, clear distinctions are made between those who are allowed to speak, and those who have to be silent, between the spectators who have to listen to a story, and the actors who do not need to listen to the stories of the audience, between those who do and those who watch them do. The spectator is thus doomed to passivity, anonymity and darkness. He is not invited to participate

and, if he tries, his audacity will be quickly repressed by the majority of obedient participants of the event and, lastly, by the security of the theater – a similar situation to any intention to voice own concerns and participate in political activity in the midst of an authoritarian regime. Thus, for Boal, the division between actors and spectators was one of the most clear expressions of social division, enforced hierarchy and political authoritarianism, no matter how emancipatory the content of the theater play intended to be (Idem 2010, 236 ff.).

Furthermore, Boal argued, the theater played a major role in the education of citizens to take a quiet attitude in front of the political stage. It educates the spectator to watch the story (and with it also his own history, as well as his present and future) as something possessed by a pre-defined group of people, to which he never has access. The story is possessed and told by others and the spectator has nothing to say and could never transform it. The story is one, linear, monolithic, congruent, and belongs to one protagonist, who is always an other, far away from the audience. Clearly, the spectator can never turn into the protagonist or take action in the story. In other words, theater gives power, both the power of action and the power of telling the story, to whom already has that power.

The critiques of Boal, as can be seen specially in his reference to the educative power of theater, were strongly influenced by the Brazilian pedagogue Paulo Freire (1921-1997), who wrote his 'Pedagogy of the Oppressed'[147] in 1968.[148] Hence, Boal developed his Theatre of the Oppressed (TO) in clear allusion to Freire's contribution. Moreover, Boal's work follows Freire's dialogical concept of education, making of theater a search for proper forms of dialogue (Staffler 2009, 30). In Boal's own definition, the Theater of the Oppressed is a system of physical exercises, aesthetic games and special techniques that have always as a goal to "transform society in the sense of the liberation of the oppressed" (Boal 2010, 19). This transforming aim echoes Freire's emancipatory proposal, which he opposes to the traditional domesticating pedagogy. In this sense, the understanding of theater as the posing of the correct answer in front of social conflict for a learning audience is clearly oppressive. In turn, following Freire's invitation to value all the forms of knowledge owned by all participants in the common process of learning and transformation, and thus to transform the one-way teaching into a double-way exchange, Boal developed his Theater of the Oppressed as a tool for asking questions, which, in turn, demands answers, and thus action, from all the participants, most especially from the audience conceived of as a community of active spectators.

147 The Portuguese manuscript '*Pedagogia do Oprimido*' ('Pedagogy of the Oppressed') was written in 1968. However, it would be first published in English in 1970, and later in Brazil in 1974.

148 In this sense, Boal wrote: "For me to exist, Paulo Freire must exist" (Boal 1998, 129).

At the base of these proposals is the idea that every person is "perfectly literate in the languages of life, of work, of suffering, of struggle, [...]" (Boal, 1998, 128), and thus is an expert of his own life, disregarding the certificates that he can show or his level of literacy. Consequently, the aim sought through the method of Freire and also of Boal, is firstly to achieve an awareness of the ownership of that knowledge as well as an awareness of the own relational position in the social environment. This awareness can lead, in turn, to the activation of that subject in the sense of the activation of the wish not only to interpret reality but also, if desired, to change it. What in Freire's terminology is the "theory of the transformative action", results in Boal's approach in transformative theater.

Understanding thus "art as a form of knowledge" (Boal 2010, 261) and as a form of empowerment to change reality, Boal started to develop a critical theater that more than being a mere aesthetic pastime of a passive public, searched to awake the spectators to a participative, reflexive and experimental event. As I have written above, the experiments that started with '*Arena Conta Zumbi*' used already techniques of *Teatro Jornal* or Newspaper Theater. This system of techniques represents, according to Boal, "the first attempt that was made to create the Theatre of the Oppressed, by giving the audience the means of production rather than the finished artistic product" (Boal 2004).[149] The Marxist perspective on which this wish is based, is obvious. The aim of this technique, Boal continues, is "to help anyone to make a theatrical scene using a piece of news from a newspaper, or from any other written material, like reports of a political meeting, texts from the Bible, from the Constitution of a country, the Declaration of Human Rights, etc." (Idem).

From a pragmatic perspective, this type of theater allowed Boal to avoid censorship, since the plays were based on texts that had already been published (Staffler 2009, 71). Secondly and most importantly, Boal aimed through this technique to "demystify the alleged impartiality of the media" (Boal 2010, 18). The aim of demystification is itself a motif that reappears throughout the different approaches that I have presented as postmodern. Equally, the questions regarding 'who is speaking' and 'who has the power to speak' resonate in Boal's statement. In other words, the accusation of partiality of a player that should be impartial and the concern for the power of language and speech that was put to the front in critical currents of legal thought found expression as well in dramatic research. While in law that player might be the judge, for Boal, he can be the actor, author, journalist or art critic.

149 For an explanation of the twelve basic techniques, see Boal 1989, 30 ff.

In any case, from the beginning with Newspaper Theater, Boal's work aimed to liberate those oppressed by the myth of impartiality, who are therefore unable to see their own reality and, consequently, to change it. This impulse for "social transformation in the sense of the liberation of the oppressed" (Boal 2010, 19) remained key in all the forms of his theater, even if his perspective suffered diverse changes that led him from a traditional Marxist structuralist view to a rather poststructuralist one (Dietrich 2011, 272). Dramatic art as a form of knowledge and as a transformative process are the tools that he put at the service of liberation through his Theater of the Oppressed.

Beyond the question regarding who is the oppressed to be liberated, which I will treat shortly, what is worth mentioning here is that Boal, taking the emancipatory call not only to the content but to the form of the theatrical expression, rejects the division between spectator and actor. In turn, he argues that the passive spectator has to turn actor, moving from being object to being a protagonist subject of the story, assuming it as his own. According to Boal, to be actor and spectator is the essence of the human being, who while acting sees himself acting (Boal 2007, xx), reflects and adjusts his action again to the reality in which he is the protagonist. Therefore, the theatrical exercise permits the humanization of the participants. Following this idea, Boal created the *spect-actor*, inviting the old spectator to enter the scene and act his alternatives to the conflict presented (Boal 2010, 19). This is an invitation to the creativity and improvisation of all participants, including the ex-spectator, as well as the ex-actor and the ex-director, who is now a joker in the interactive game of creativities.

As Boal explains, the emergence of the figure of the spect-actor was preceded by the recognition that he had to stop making theater pieces "to give advice" or transmit specific messages, unless he was taking the same risks as his spectators (Boal 2004, 15). In other words, Boal abandoned a prescriptive perspective in front of social conflict. With this abandonment, the figure of the joker as omniscient interpret and educator changed drastically. Equally, the exchangeability of participants on stage was not anymore reduced to the cast of actors. Neither was the protagonist excluded from the possibility of being replaced, but, on the contrary, it was he who was thought to be replaced more naturally, since he represented the (main) oppressed in search for an alternative behavior. Equally, the conception of art as well as the idea of the artist and the author suffered a transformation. As Boal states: "I experienced the pleasure of asking. Before, I thought that the Artist was master of the truth. I discovered that I was merely an artist, that's all! [...] My theatre would be, from then on, the theatre of questions. [...] The people who would have to give answers would be the *spect-actors*!" (Boal 2001, 310).

Naturally, this implied not only changes in the actors and spectators, but also demanded big changes in the form of the theater play itself. In the proposal of the Theater of the Oppressed, Boal abandoned thus the traditional form of beginning, crisis and resolution. Instead of the catharsis and subsequent rest that this form aimed for, ending in a reestablished equilibrium, Boal, building at the beginning on Bertolt Brecht's work, claimed that theater must open the doors to a disequilibrium that leads to action (Boal 2004b, 95). Thus, in the most well known form of Theater of the Oppressed, namely Forum Theater, the play, which contains a real current problem to be solved, develops only until the moment of crisis, and there it ends. After that, the play is presented once more, but the spect-actors in the audience can stop the presentation at any moment when they have a proposal of how the action of one character can be changed in order to change his situation of oppression.

Hence, in Forum Theater, the proponents themselves have the possibility of acting their ideas on the stage, what allows them to experiment the possible consequences of their proposals. Most importantly, the process of acting differently on stage permits the spect-actors to imagine themselves differently in front of their conflicts. The importance of this process relies therein that “when it is the spect-actor himself who gets on stage to show HIS reality and transform it as he pleases, he returns to his seat changed” (Idem, emphasis in the original). In this sense, Boal asserts, “the act of transforming is transformative” (Boal 2004b, 19), turning the spectacle into “the beginning of a social transformation” (Idem 2010, 19). Theater changes thus from being an end on its own to be a “rehearsal for the action in real life” (Idem). This is a rehearsal in which all participants learn together (Idem 2004b, 15) through the authentic search for appropriate answers to the situation as it is experienced by those who participate in the theatrical creation.

Despite the explicit aim of a common learning, a division remained clear in Boal's work beyond all changes that he continuously made to his original proposal. The division at the core of all of his work is the one between oppressed and oppressor. Interestingly, Boal blurred, on the one hand, some of the most central dichotomies in theater-work, but, on the other hand, he built up a social difference and made it to the main concern and the basic assumption of his theater. But what does Boal mean with ‘the oppressed'?

Regarding the name of his participative theater, he stated that although he had doubts for some time about naming it ‘Theater of the Oppressed’, he finally warmed up to it. In a jokingly manner, Boal presents his position in front of the name ‘Theater of the Oppressed': “Still today, for some, it sounds like ‘Depressed’, even if it is about uprising, about what you

consider worth struggling for, about being happy. Imagine if I had called it *Theatre of Happiness*, *Theatre of Revolution*, *Theatre of the Invented Future*! – pretentious" (Boal 2001, 311).

In fact, Boal's choice for 'Theater of the Oppressed' and not, for example, for a 'Liberation Theater', in the line of other innovative and related currents of the time like Liberation Theology and Liberation Philosophy, has an epistemological relevance, as Staffler points out. Importantly, Boal underlines, through this qualification, an ownership and with that also the space of emergence of this type of theater, instead of making emphasis on the aim, on the 'where-to' (Staffler 2009, 17). The awareness of the own position is the starting point for any action, and it is in this learning that theater fulfills its primary function as a form of knowledge. As David Diamond has highlighted, the importance of awareness and analysis for a further action and reflection (in theater as well as in social life) is directly linked to the work of other revolutionary thinkers like Antonio Gramsci (1891-1937) (Diamond 2007, 176 f.).

From a socio-historical perspective, the oppression Boal referred to had its most immediate background clearly in the context of dictatorship that he experienced in Brazil, but went equally beyond that particular historical moment. Oppression is, in fact, a recurrent element in the narrations of Brazilian history, creating several superposing layers of oppression across the decades. From a perspective of political oppression, at the level of political rule, already the 'New State' ('*Estado Novo*') had exercised oppression from the end of the 1930's, shortly after Boal's birth, onwards. But this oppression was not separated from other ones, especially the one resulting from economic dependency of the United States of America, which was present since the United States of Brazil was created in 1891. In fact, the national political development of Brazil was directly linked to the vertical economic relationship between the two countries throughout the 20$^{th}$ century. Thus, while the military dictatorship increased its repression from the end of the 1960's onwards, Brazil, as many other Latin American authoritarian regimes of the time, experienced an economic boom, which was dependent on the interests of foreign investors. This complex of socio-political circumstances, amongst several others (like the historical trade with slaves that has left deep marks in the Brazilian society up to present times), formed the accumulating oppressions that Boal searches to overcome through theater in the same way as many of his contemporaries expressed their search in political, philosophical and pedagogical calls for liberation.

It is from this historical, political, economical and cultural perspective that the idea of ‘oppression’ becomes meaningful for Boal and his theater. Thus, while proposing a pluralizing perspective that allows for the recognition of the equal validity of a variety of positions, while putting the polysemy of the images at the base of his project, while emphasizing the importance of the subjective experience and wisdom, once Boal finds ‘the oppressed’, the strive for their emancipation necessarily draws a line that reduces plurality to two opposing categories: oppressors and oppressed. Again, as we have often found in other politically active currents of the time, the stance taken is one that defines itself by ‘being in opposition to’. In Boal's theater this clear division means, concretely, that only the oppressed character(s) can be replaced. Everything else, Boal assumed, was magical thinking. According to him, the oppressor would never try to change the situation which was always in his favor.

What is interesting about this position is that Boal's approach is embedded in a logic of finding oneself in the Other, of an existent relation between the different participants. According to Boal's rules, however, that other, in which the spect-actor might find him/herself, is never the oppressor. Understanding works and is sought in relation to the oppressed and his/her situation, but never in relation with the character presented as oppressor and his/her situation or his/her view. While a flexible relation between elements of a network is assumed, the figures of oppressor and oppressed seem rigid and, apparently, an oppressor could never be embedded as oppressed in a web of oppressions, or, the other way around, an oppressed could never be oppressive himself. In presenting a character as oppressed from the outset, who is right and who needs understanding is clear from the start, and the understanding of the antagonist of the oppressor is precluded.

But this clear division between oppressed and oppressor does not derive from blunt blindness in front of social complexity. Boal does refer to the problematic of dividing between oppressors and oppressed. He clearly recognized that “oppressed and oppressors cannot be candidly confused with angels and demons. They almost do not exist in pure state, not the ones and not the others” (Idem 2010, 23). His determination to divide between oppressors and oppressed results actually from the consequences he fears might come out of the blurring of these categories. What Boal rejects, in the end, is to absolve oppressors with the argument that they are the “product of a society”, taking away from them the responsibility for their actions (Idem, 24). Consequently, he dismisses the arguments of those who want to “'see the two sides of matter’ or ‘see the matter from all sides’, those who try to justify the reasons of the oppressors” as immobilizing (Idem, 25).

Understanding society as the interaction of conflictive structures, Boal recognizes that it is impossible to take a position *outside* of those conflicts. What he follows from that is, however, not that every element in the system maintains or changes the whole it is embedded in, but that any possible position to be taken is either as "allies of the oppressed... or accomplices of the oppressors" (Idem). In this sense, "to do Theater of the Oppressed is already the result of an ethical choice, it already means to take the party of the oppressed" (Idem). To position oneself "by the side of of the humiliated and offended" is conceived by Boal as a civic duty (Idem, 29). Thus, while he does not oppose to work with "people who exert functions or professions that offer the possibility and the power to oppress", he equally reminds the reader: "But we have to be very careful... and know to chose our side" (Idem, 31).

In using this language, Boal draws a line between 'us' and 'them' – 'us, the oppressed', where he is always included, and 'they, the oppressors', where he never takes part. In other words, the reader gets the message: you choose, either with us or against us! This dichotomic choice presented to the reader is, however, as tricky as the dichotomic choice Boal criticizes throughout his work. If Boal has insisted on one thing through his theater, it is that there is more than one or two possible answers, there is more than either/or, more possibilities for 'the oppressed' than 'either you subordinate or you starve'. His Legislative Theater seeks, in fact, to develop ways by which citizenship can go from voting for yes or no, to creating norms, from being caught amongst options that others created, to creating new alternatives for the own lives. Nevertheless, he ends up stating the same limiting question he rejected in the first place: are you with us, the oppressed, or against us?

Hence, despite the fact that Boal goes beyond a mere understanding of class, and thus recognizes the individual and his/her own struggles, as well as the unclear boundaries between oppressor and oppressed, and even the need to transcend dichotomic divisions like actor-spectator, his theater, deriving from a Marxist perspective, is a prolongation of the struggle of classes. Later on, during his stay in France, the division between oppressor and oppressed will become even more nuanced, allowing him later to take the position of a legislator, which, in former times, represented for Boal a main place where oppression was rooted (Boal 1989, 117). In any case he would never give up his 'either-or', 'us-them', 'oppressed vs. oppressor' perspective fully, in favor of a more encompassing view that would take fully into account the complexity of relations he recognized. This is a field that remains for the newer generation of practitioners of Theater of the Oppressed to develop.

Due to his theatrical-political engagement, Boal eventually was kidnapped, imprisoned and tortured by the Brazilian dictatorship, and, as a consequence, he escaped into exile in 1971. He moved first to Buenos Aires (Argentina) and in 1976 to Lisbon (Portugal), where he stayed for two years and moved then to Paris until 1986.[150] It was during this stay in France that he founded the Center for Theater of the Oppressed (CTO) in 1978, with which he organized diverse courses, seminars, interventions, shows and festivals with community groups. Most importantly, during this period, Boal went beyond his struggle with exterior oppressions, like the police repression he knew, and discovered for himself the 'policemen in the head', i.e. the internal forces of psychological oppression, that, in terms of oppression, worked as effectively as exterior repression. As a consequence, he developed introspective techniques of theater like 'Cops in the Head' and 'Rainbow of Desire'[151] that have been used mainly in the field of psychotherapeutic work.

For our concern here, the important aspect of this creative phase relies therein, that, in this context, Boal started to transform his perspective on oppression and began to emphasize a less schematic and more fluid interaction between agents of desire and agents of fear as parts of the same complex system. Envisaging a 'rainbow of desires and fears' in the inside of human psyche, it is not as easy to divide schematically between those oppressed desires that struggle to appear and those oppressing fears. Boal's aim, thus, makes a subtle change from concentrating on the struggle of desire in front of fear, in other words, on the struggle of oppressed *against* oppressor, to focusing on the harmonization of the colors of this rainbow so that they are more in tune with the happiness of the holder of those dreams and fears (Idem 2004, 29). In search for a wider harmony and understanding, the relation between oppressed and oppressor as complementary aspects of the same whole, is, lastly, what will allow Boal to move from taking position solely with 'the people on the street' as oppressed to taking part in the legislative chamber of Rio de Janeiro after his return to Brazil.

From the beginning, Boal's return to Brazil was related to new political developments in his home country. It was upon the invitation of Darci Ribeiro (1922-1997)[152], then Vice Go-

150 Boal was granted amnesty in 1979 (Superior Tribunal de Justiça 2002).

151 For more detail specifically on these techniques, see Boal 2004.

152 It is worth remembering that Ribeiro is a highly renowned anthropologist, writer and politician of Brazil who was influential in the creation of (amongst other institutions) the Universidade de Brasília and its first rector. Furthermore, as Minister of Education he carried out important reforms in Brazil and was in turn invited to participate in the university reforms in other countries like Chile, Peru, Venezuela, Mexico and Uruguay. In 1992, Darcy Ribeiro was elected to the Brazilian Academy of Literature (*Academia Brasileira de Letras*).
Interestingly for our topic, in his fields of academic specialization, namely anthropology and sociology, Ribeiro argued for a global evolutionist perspective and a 'civilizatory process' along diverse revolutions, e.g. in '*O processo civilizatório – etapas da evolução sócio-cultural*' ('The Civilizatory Process – Stages of Socio-Cultural Evolution', 1968). While technical progress was a key for Ribeiro's conception of evolution,

vernor of Rio de Janeiro, to work in Integrated Centers for Popular Education (CIEPS, *Centros Integrados de Ensino Público*) that he returned to Brazil to work with a group of cultural animators on topics like "unemployment, health, housing, sexual violence, incest, the oppression of women, of young people, mental health, drugs, etc." (Boal 1998, 8). Though this project ended with the next election period half a year later, it gave start to a plurality of Theater of the Oppressed groups around the city, and in 1989 the CTO (*Centro do Teatro do Oprimido*) Rio was created, constituted then as "an informal body, working from time to time, with internal meetings to study the 'arsenal' (the collection of techniques, games and exercises) and external work when a contract could be obtained" (Idem, 11). After some years of work, the CTO could not continue, and, in 1992, the theater group was ready to close the project. However, this goodbye would not be in vain, and, in turn, it kick-started the project of Legislative Theater.

As Boal recounts, "we wanted to lay to rest the dream of the CTO by helping either a party or a coalition to realise a larger dream: to change the country" (Idem, 12). As a consequence, the CTO proposed theatralizing the campaign of the Workers Party (PT, *Partido dos Trabalhadores*). In the end, the CTO went from burying their artistic dream to developing the campaign of Augusto Boal for *vereador* (legislator in the city council), who, at first, did not have any intention to be a candidate or to be elected for that position[153] (Idem, 12 f.). However, the theatrical campaign under the slogan 'With Courage to be Happy' ('*com coragem de ser feliz*') got unexpected resonance, and the participants became aware that this was a must in order to make the longstanding dream of transcending the mere field of political reflection through theater come true. The campaign succeeded and in 1993 Boal took one of the six seats that the PT had won. Different than other artists that dedicated later to politics, Boal did not want to change his profession, and continued proposing the democratization of politics through theater (Heritage 1994, 27). Following his premise that "theatre is political and politics is theatre" (Boal cit. in Heritage 1994, 25), he proposed to unite theater with

the stages he conceived of were not organized in an obligatory sequence and, most importantly, Ribeiro did not proclaim a vectoral tendency to progress or a teleology like many other perspectives of evolution or development. In this sense, the contingency of the historical process was central to his thought. Furthermore, in his '*As Americas e a Civilização*' (The Americas and Civilization, 1970), he studied "theories of backwardness and progress" (Ribeiro 1970, 13), and proposed a classification scheme according to the degree of 'transplantation' and 'mixture' of their population. In this sense, he identified 'New Peoples', where ethnic-cultural mixture predominated, like Colombia; 'Testimony Peoples', where the language and culture of pre-Colombian groups existed along with European languages and cultures, like in Mexico; and 'Transplanted Peoples', where aborigine population was essentially replaced by European settlers. It is from this perspective of development, identity, authenticity, cultural mixture and transfer, that Ribeiro created the CIEPS, building the context in which Boal went back to Brazil and applied his Theater of the Oppressed.

153 To start with, Boal had basically no chance to win, since, as he relates, there were 1200 candidates from 22 parties for only 42 seats (1998, 12). As we will see though, improbable things happen all time.

politics in the praxis. In doing this, not only the CTO and its participants were saved, but, at the same time, the project of Legislative Theater was born.

In the words of Boal, "Legislative Theater is a new system" within the Theater of the Oppressed, "a more complex form, since it includes all the previous forms of Theatre of the Oppressed plus others which have a specifically parliamentary application" (Boal 1998, 5). At the core of Legislative Theater is the creation of plays of Forum Theater that focus on a current social concern. The different proposals acted by the participants are discussed amongst the audience, and, as far as possible, with legal and political advisers present at the event. After the discussion, the participants elaborate proposals of laws that are submitted to vote. The different solutions and concerns presented are recorded and analyzed by a 'metabolizing cell' of assessors, that decides which actions should be taken, most importantly, those proposals approved in the communal assemblies can be elaborated more in detail and taken to the corresponding legislative organs in form of drafts for laws. Through the creation of Legislative Theater, Boal applied the principles he had already developed for his Theater of the Oppressed and proposed a democratic theater where not only the spectator transforms himself into the protagonist, but most importantly, the elector becomes a legislator and proposes the law. This is, in the words of Boal, a system through which the "street theatre becomes the Chamber and the Chamber is in the street" (Boal cit. in Heritage 1994, 26). In this sense, Boal makes clear the important change he saw from the practice of political theater, which he had been doing for years before, to the practice of theater as politics: "In the '60's," he argued, "theatre politicized itself; today in the '90's, the moment has arrived to theatricalize politics" (Idem).

In more concrete terms, Boal and his team had to develop a structure that permitted to bring the Chamber to the street. The three major institutions at work were the mandate as *vereador* of the Workers Party, the CTO Rio and the Commission of Human Rights. The mandate itself acted as the central directorate coordinating the actions of an internal cabinet, composed, as any other usual cabinet, of legal and parliamentary business, press and office support; and, in addition, of an external cabinet, formed by the jokers[154] and other responsible collaborators for the areas of dramaturgy, images, sound and laboratory. Beyond these small groups of assistants, forms of interaction at larger levels were created, this is, naturally, a permanent company rehearsing and performing plays of Theater of the Oppressed, the

154 These were five full-time and ten part-time jokers according to Heritage 1994, 26.

specific shows of the mandate, an interactive mailing list[155], and the method of a 'Chamber in the Square'[156]. While all these forms of interaction are dependent and mainly related to the mandate and its activities, at the same time, nuclei[157] and links were built in diverse parts of the community as partners of the mandate. The nuclei collaborated with the mandate in a frequent and systematic way, offering workshops and shows for their community, and participated in inter-community dialogues, theater festivals, and other festive events. The base for a nucleus is the community, be it a geographical community or a thematic one, formed along a common interest or objective (for example CENUN, a group of black students), or a combination of a geographical and a thematic community. The links, in turn, being groups of people from the same community, "communicated periodically with the mandate, setting out its opinions, desires, and needs" in a less systematic manner, through the mailing list or any other means (Boal 1998, 40). The diverse activities of these different working groups were recorded in summaries that were brought to a 'metabolizing cell', from which projects of law, legal actions and direct interventions were initiated. With this method, in the four years of Boal's mandate, 33 law projects were presented as a result of the work with Legislative Theater, from which 13 municipal laws were enacted, which are still in force (Santos 2001, 9). At the same time, several other public actions were started, which determined legislative discussion in the Chamber.

Despite the fact that Boal lost his mandate (as unexpectedly as he got it) in 1996,[158] the CTO Rio restarted working with Legislative Theater in 1998, now formed as a non-profit organization[159] and with the support of the Ford Foundation (Bendelak 2001, 14). Naturally,

155 It is important to underline, that this interactive mailing list, as banal as it may sound for a contemporary reader who is regularly overwhelmed by all sorts of electronic 'mailing lists', was pursued through the postal service, and was, as such very original and interactive.

156 Olivar Bendelak, who has been accompanying the adventure of Legislative Theater from the beginning and is currently in charge of this project in the CTO Rio, refers to this 'Chamber on the Street' ('*Câmara na Praça*'), as a presentation of Forum Theater on the street in front of the building of the Legislative Chamber (*Câmara dos Vereadores*). According to him, the city councilors were invited to participate, "because the idea was to reproduce what happened (or should happen) in the plenum", even if, in fact, only "four or five of them (around 10%) at the most" appeared (Bendelak 2009). Bendelak underlines, in this context, the importance of Legislative Theater in "activating the FULL EXERCISE OF CITIZENSHIP" through inviting the citizens to enter the Chamber in days when the Plenum was gathered to vote, when the large majority had never entered the building. In the end, this process encouraged the citizens to return and to engage with Forum Theater and Legislative Theater (Idem, emphasis in the original).

157 During Boal's mandate, 60 nuclei were formed, from which 33 remained stable according to Bendelak 2009; by 1998, two years after the end of Boal's mandate, 16 remained active according to Boal (1998, 82). For a list and a short description of the nuclei working with Boal's mandate, those that disappeared and those contacts which did not reach the stage of becoming nuclei by 1996, this is by the end of Boal's mandate, see Idem, 106 ff.

158 Amongst other reasons, it is interesting Boal's account of a defamatory campaign against him (Boal 1998, 100).

159 This non-profit organization was built by the team of the CTO Rio, which was composed then, as Bendelak remembers, by Boal as Artistic Director together with the jokers Bárbara Santos, Claudete Felix, Geo Britto, Helen Sarapeck and Olivar Bendelak himself (Bendelak 2009).

the influence of this project diminished compared to the force it had in the beginning, when Boal functioned as a direct correspondent in the city council. Now, the CTO is obliged to find allies as other interest groups or NGOs have to do.[160] The network of (theater) groups created since 1993 still exists in part, and is still actively working with legal and political advisers. This is the case with the group '*Marias do Brasil*', which includes domestic employees and has achieved some progress in the law projects regarding rights for this working sector (Doc. Nr. 29/2009 of the Commission of Participative Legislation, Félix 2010, 95). Most importantly, the theater group '*Corpo em Cena*' ('Body in Scene') achieved the promulgation of the first state law, law 2068/2001, regarding rights for students, including the recognition of hours of internship and courses free of cost in some cases (Bendelak 2001, 14 f.). A second state law was approved in 2004, which originated from the presentations of the group '*Panela de Opressão*' ('Opression Cooker') regarding the obligation to provide female condoms in motels, hotels, etc.[161] (Bendelak 2009). Furthermore, in collaboration with the *Comissão de Legislação Participativa* (Commission for Participative Legislation, CLP), the CTO Rio has proposed in its character as NGO three law drafts at federal level and one has been addressed as an indication to the Executive.

Furthermore, the CTO Rio produces equally Solemn Symbolic Sessions of Legislative Theater, where plenary sessions of the Legislative Chamber are reproduced and acted by the citizens, who argue their points taking the role of city councilors after a presentation of a Forum Theater play. According to the ideas presented, the proposals are directed to the Legislative Chamber or they are translated into a 'Continued Concrete Social Action' (*Ação Social Concreta Continuada*), when not a law but a social mobilization is required[162]. In order to exchange the diverse experiences of the groups participating in projects of Legislative Theater, the CTO coordinates also Festivals of Legislative Theater (FESTEL).[163]

In coordination with other projects of Theater of the Oppressed, Legislative Theater has expanded thus beyond Rio de Janeiro, organizing especially Symbolic Sessions in the presentations at state or regional level. Furthermore, new perspectives beyond Legislative

160 The connection between the CTO and the Legislative Chamber has worked since then with the support of specific assessors of the Chamber and through specific meetings arranged with the councilors and their staff as well as with the members of diverse popular groups, besides the usual request for the councilors to attend and participate in the presentations of Legislative Theater (Bendelak 2009).

161 This presentation equally kickstarted the project of a municipal law that did not achieve the necessary majority in the Plenum of the Municipal Chamber (Bendelak 2009).

162 Bendelak mentions exemplarily the claim for new equipment in healthcare institutions, when what is needed more than a law, is to exert pressure on the Municipal Secretary of Health. A Forum Theater play can be presented in front of the Secretary in order for him to receive the representatives of the community and achieve a promise of action (Bendelak 2009).

163 Until 2009 five festivals of Legislative Theater took place (Bendelak 2009).

Theater emerged like the work with techniques of Forum Theater in the context of the Executive Power of the city of Santo André[164], nearby São Paulo, where a project of 'participatory budget' has been carried out for years including assembly discussions stimulated by Forum Theater sessions, in which the public presented their opinions regarding the distribution of the municipal budget.[165] At an international level, the work with Forum Theater as a tool for legislation is being implemented in several European countries. Some examples of these groups are in France[166], Italy[167] and Germany[168]. Most interestingly, the Legislative Assembly of Portugal is currently developing a project to insert Legislative Theater in the National Chamber.[169]

While all these developments in the last fifteen years serve as testimonies for the broad impact of Boal's proposal, and allow an outlook in its further development, it is especially important for us to inquire more on the perspective that this aesthetic proposal takes in front of law, legal development, and, more specifically on the role of plurality and diversity in this aesthetic-political context. In order to do this, in the next paragraphs I will inquire which were the concrete achievements of this practice in terms of development of positive law and political participation in Brazil, to continue later with questions on the perspective on development and plurality that Boal's practice brings about.

Although the importance of the original experience with legislative theater in Brazil is not limited to the promulgated laws, it is still essential to emphasize, especially in the context of a legal research, the concrete result that in the period of four years, thirteen laws were promulgated, which were proposed through the method of legislative theater.[170] This does not only demonstrate that Legislative Theater is much more than a naive proposal of participatory

164 In 1998, Santo André had a population of 625 000 inhabitants (Macedo Soares 1998). At a political level, this city is renowned for its political presence, being the birthplace of the CUT (*Central Única dos Trabalhadores*, Unified Workers' Central).

165 Interestingly, in this project, the civil servants participated from the beginning in the development of the theater play, different from other projects where the first impulse came from communities beyond the state institutions (Duran 1997). For an account a year after the project started, see Pontual/da Silva 1998, and for an academic detailed discussion of this project see Cleber Cecheti 2004.

166 For the example of a 2005 project on floods in Grasse, see Cie. Les Echomédiens 2008.

167 On the project on the reform of Parco XXII Aprile in Modena, see N.N. 2011.

168 To one of the most recent productions in Germany, see Clausen/Hahn 2011. As an historical reference, it is worth remembering an important moment for the development of Legislative Theater in Germany, namely Boal's visit in Munich in 1997 in the context of a workshop organized by the Paulo Freire Association, when Boal presented a Forum Theater session in the City Hall with the presence of the Deputy Mayor and the Secretary of the Green Party for Bavaria. Although this session had only a symbolic value, and only part of the process of Legislative Theater could actually be carried out in the short time, law proposals were presented, and, most importantly, a theatrical-political dialogue took place amongst the civil society and its political representatives. For a personal account of Boal on this experience, see Boal 1998, 118 ff.

169 For more information on this project, see Estudantes por Emprestimo 2010.

170 For a complete list, see Boal 1998, 102 ff.

legislation made by romantic theater players, but even more, it brings results also in the sense of modern legal-political measure methods. While some of them may touch topics that do not seem, for an external observer, central to the social problems of Rio de Janeiro, like the law to name a Rio state school 'Free Timor' (Law 2449/96), other legislative decisions exemplify the gravity of the problems Legislative Theater can deal with, like the amendment to the Constitution of the City 43/95 to allow the promulgation of Law 1245/95, which supplied means for the protection of witnesses of crimes. Equally, Law 2384/95 and 2384b/95, which took compulsory measures for municipal hospitals to have doctors and infrastructure specially for geriatric attendance, reflect the important legislative results achieved through the work of Boal's mandate. Furthermore, the amendments to the Constitution of the City of Rio de Janeiro 33, 35, 36, 37, 38 and 42/95 deserve special mention, because of the importance of the prohibition of all treatments for mental illness which produce irreversible consequences that they stipulated. In addition, other laws resulting from Boal's mandate deal with questions of gender equality (Law 1119/95), school facilities (Law 1485/96), and measures for the cleanliness of the city (Law 1308/95) and its organization in accordance with the needs of blind persons (Law 35/95 and 848/96). Whatever their content, what is clear about all these laws, is that they responded to specific needs expressed by the communities that had to live under them, and thus were endowed with a particular form of broad popular legitimation, since the citizens were not only imagined as participating through the power delegated to their representatives, but moreover, were participating in the elaboration of the proposals themselves from the start.

Beyond the concrete laws brought about with this method, naturally, the work of Boal with Legislative Theater had other consequences.[171] Relevant at a socio-legal level is that, in many cases, the discussion of social concerns in conjunction with the presence of legal assessors led to the explanation of the actual legal situation to the population and how they could demand their already positively established rights. In this sense, the work with Legislative Theater took an educative role. Politically and legally more important is probably the work with legislative theater in the context of discussions regarding the vote for or against legislative projects discussed in the Chamber which were not proposed as a consequence of projects of Legislative Theater. In this context, the institution of the 'Chamber in the Square' played a major role.[172]

171 For a cartographic presentation of the mandate's intervention in the city of Rio de Janeiro, see Boal 1998, 82 f.

172 From Boal's account, it seems that he used this type of consultation also for the building of his opinion as President of the Commission for the Defense of Human Rights, e.g. in the case of the discussion about the sterilization of women in municipal hospitals (Boal 1998, 92 f.).

This Chamber is a form of popular consultation, which took place in different forms. At a basic level, the 'Chamber in the Square' aims to know the opinion, including hopes, fears and concrete experiences, of the participants on a specific topic (like the proposal of arming the Municipal Guards, Boal 1998, 72 f.). More specifically, this meeting allows to discuss the specific text of the law and the position to be taken by the counselor in the Legislative Chamber. In order to do this, the 'Chamber in the Square' requires in advance the certainty about the question to ask in the specific community, the presence of legislative assessors who can clarify the legal aspects of the topic in discussion and put the propositions into legal terminology, and, as far as possible, the timely availability of written material on the particular subject. While the specific form of the 'Chamber in the Square' depends on the particular topic and the concrete situation when the meeting takes place, Boal emphasized the importance of the theatricalization of the discussion. He argued especially that "the theatricality of the scene stimulates creativity, reflection and comprehension", producing that the participants are more careful in formulating and explaining their thoughts and suggestions with precision (Boal 1998, 93). Importantly, after the 'Chamber in the Square' session took place, the community participating received a feedback about the final outcome of the consulted matter, this is, the actions taken following concrete suggestions or the position presented by the counselor in the formal legislative session. While the counselor was not obliged to accept the proposals, and has to state his own opinion in the Council, the sessions allowed him/her to interact with the community directly, see different aspects of the problem, understand the different opinions, check the information he has available, and, later on, make clear his decision in response to the concerns voiced in the community. Equally, the feedback allowed the participants to know that their opinions have been taken into account, and which were the reasons of the *vereador* for taking a particular position.

Another important formal aspect of these sessions includes the writing and collection of summaries (not protocols) which allow to have an account of the themes discussed, the terms of the discussion and the particular suggestions expressed. The aim of these summaries is not only to have a written reference of the particular sessions, but moreover, to deliver important information to the cabinet, where legal projects or other actions will be decided on. In other words, the summaries build a membrane between the internal area of the legislative mandate and the external nuclei and links. Interestingly, Boal underlines that these summaries, which the joker who leads the session has to present, should be more than mere accounts and should "attempt to *understand* what happened, to theorise" (Boal 1998, 93).

Naturally, in this context, it is important to be aware of the power that the joker comes to represent, through his summary, the perspectives, the memory, and the proposals of the community. Like any other procedure of transference of information from disperse units to a gathering center, the problems of transmission, selection, translation and interpretation appear with every extra step of transference. One possibility for minimizing the consequences of these problems, could be the creation of a more specific procedure, reading of the summary at the end of the session, and further, opening it to public access. However, the risk of purposeful or accidental misunderstandings, misinterpretations and dismissals of specific perspectives is naturally given. Insofar, the 'Chamber in the Square' is just a semi-formalized procedure, which intends to adapt itself to the different needs and particular circumstances in which it takes place. Nevertheless, from a legal perspective, it is easy to argue that the 'Chamber in the Square' is a minimalistic or primitive lay version of formal consultation processes that could get as formal, complex and finally inaccessible to the vast majority of population as any other step of a 'normal' legislative process.

One could argue, for example, that the 'Chamber in the Square' just does not get that complex and complicated as formal law (yet) because it is in an initial phase, and, most importantly, because, as a political process, it has not been reflected sufficiently regarding questions of transparency and legitimate representation. The formal law would consequently be a more advanced state in organization (for more complex situations) as the Chamber in the Square or, for that matter, as comparable procedures in indigenous law. According to this argument, a more thoroughly thought popular 'Chamber' would have to include, for example, a specific form of writing and making public the outcomes of the session, a right to protest in case the summary is argued to be incomplete or false, a secret form to vote in order to avoid the exercise of power on the will of the participants, etc. In the end, the machinery of ever more detailed formalization of procedures cannot be avoided. Thus, formal (and ever more formalized) law would be the last standard in a chain of increasing complexity.

In fact, these forms of theater as politics stand in opposition to some political and strategic principles from the moment they invite each participant to appear on the stage, and most specifically, particularly when vote sessions are included, they overrun the principle of secrecy of the vote. This is a major problem in the prevalent discussion on political participation and voting rights. In this sense, one could argue that instead of being an instrument of liberation from oppression, the request for the open presentation of one's opinion through the techniques of the Theater of the Oppressed are tools for the reinforcement of that oppression. Which person, under serious threat of violence in case of voicing her/his

opinion, would actually go to the stage and speak up? On the contrary, she/he would likely act in order to be seen as obedient and loyal to her/his oppressor, creating an example for the whole audience and community.

Indeed, the risk of misrepresentation and restatement of oppression exists. However, there are at least three points to take into account, which build the core of Legislative Theater and its main innovative collaboration to legal development, and which relativize the judgment of these theatrical techniques as naive and/or as tools of oppression from a formalistic point of view. Certainly, the value of Legislative Theater is to be seen in the way it puts back the legal into social interaction.

Firstly, the aim of Theater of the Oppressed and its combination with formalized procedures of legislation through Legislative Theater, is not primordially to be a voting station. The principal aim is to create dialogue — the openness of which might be constrained by several forms of power, and which, nevertheless, can, if practiced continuously, become more flexible and open. To create that openness is part of the work that the techniques of theater might develop.

Secondly, we have to remember that the work of Legislative Theater depends on the works of specific nuclei and links that gather geographic or thematic communities with a common interest. These nuclei and links need at first, to develop, and later and most importantly to hold, a space of safety for themselves. That is why the ‘oppressed’, in Boal's terminology, gather first among themselves: there is a nucleus of black students, a nucleus of housemaids, a nucleus of disabled persons, etc. Most of them are considered to be and consider themselves in a space of vulnerability, and, therefore, they have gathered in associations and use theater to their advantage. The strength of the individual to claim what she/he considers to be lacking, is reinforced through her/his community of resistance.

Finally, a similar aspect of the public experience of a session in Legislative Theater or any other form of Theater of the Oppressed must be highlighted. Being the main aim of these techniques to open up a discussion, and thus become political, one of the main tasks of a joker and the theater staff is to create a climate for discussion, including principally a sense of safety and an urgency to participate. At first, it is difficult to imagine how this space could look like, when ‘oppressor’ and ‘oppressed’ are part of the same audience. Nevertheless, the fact that it is a public event, and specifically in the context of Legislative Theater also an official event, creates by itself a certain sense of protection because the perpetrator of any oppression can become as exposed as her/his victim, the moment the latter enters the stage. Moreover, after the first person has presented her/his story, the moment of solitude that

characterizes the psychological and material weakness of any victim loses strength and alliances are created between persons that do not know each other but recognize themselves in the same character, i.e. they recognize each other.

Last but not least, these considerations can create a space where expression is possible, and, due to the particularity of this situation, the consciousness about the uniqueness of the possibility to express oneself arises. If it is not here, where? If it is not now, when? In many cases, the presentation of Theater of the Oppressed is one of the rare opportunities that appear for people in vulnerable situations to be heard, because someone (in fact, a whole audience!) is ready to listen. Thus, a space is created, where communication is more possible.

Hence, what remains important for the 'Chamber in the Square' as well as for the whole project of Legislative Theater, is that it intends to create a flexible and open membrane that allows for communication, at least for more and more diversified communication than the mere existence of a city counselor allows. During the process of the development of a play and its presentation, equally, the self-reliance of the citizens is strengthened, so that the will and the capacity to communicate are enhanced. Thus, even if the joker would not transmit the diverse opinions voiced as all participants of the meeting would have wished to, the possibility to relate to the mandate directly is not only given, as it is formally anyways, but, it is also existent as an accessible reality in the minds of each of the persons that form the community. The idea that it is possible, that it is worthwhile, and that it is desired and expected, that the community participates, changes the way the community relates to its political and legal representatives. The possibility of being heard turns lastly into a demand of civil rights. In this sense, Legislative Theater cannot be seen merely as a semi-formal consultation process, since its intention is to go beyond and reach deeper.

What Boal, together with a variety of assistants and jokers who put Theater of the Oppressed in practice renewing it constantly, elaborated through these theater techniques, especially with the Legislative Theater, is an aesthetic-political approach. Thus, the notions of dialogue and debate, of reflexivity and transitivity, and of the personal and the communal are neither to be understood in a merely aesthetic manner, nor separately as a political and legal reflection. Not only aesthetics is politics, but politics is aesthetics, and, being law the result of political forces, law is a matter of aesthetics too. From this aesthetic-political perspective, which are then the possibilities envisaged by Boal for plurality to relate to law, and how does he think of law as a system of formal social order? In this context, how does Boal envisage 'social deve-

lopment' and what role does his aesthetic-political perspective and the resulting law take into that vision?

To start with, development, in the world of Boal, takes the form of political action. As I have mentioned above, Boal's theater is political, first of all, because it takes a stance in front of the reality he, and through the theatrical practice the other participants too, experiences. It is because of his discontent with political oppression, economic insufficiency and social inequality, that Boal started to develop Newspaper Theater and ended up putting theater techniques at the service of legislation. It is a "desire for change" that he wants to develop in the audiences (Boal 1998, 20). That is why with his theater, he aims to "produce not catharsis, but dynamisation" (Idem) in the not anymore passive spectators. Taking the wish for change to an extreme, Boal points out, Legislative Theater seeks to "transform that desire into law" (Idem).

This transformation emanates actually from another transformation, the transformation of the spectator into an artist, and of the citizen into the legislator. In this sense, Boal says that "the theatre creates a space in which potentialities can be 'act-ualized' or *developed*: the potential becomes actual" (Idem, 68; emphasis added). That this development is not necessarily dependent on an outer marker in a linear perspective, becomes even more clear with Boal's clarification: "The person can re-dimension himself, investigate himself, find himself, recognize himself" (Idem). The development of which Boal speaks, seems to be a development that goes to the inside, this is, to find something that was all the time there (restating the ancient oracle 'know thyself'), to see oneself with new eyes.

Seeing oneself is, in fact, the corner stone of the whole of Boal's theory of theater as a main characteristic of being human, as "the human language *par excellence"* (Idem, 7). To see oneself in action (Idem), to see one reflected in the action of an other person on stage, and, in turn, to reflect on that and try again, to try other forms to be, to see and to be seen — this is the core of the whole Theater of the Oppressed and the development it proposes. It is no wonder thus, that Boal insists with the value of images, being Image Theater one central technique in his 'arsenal'. The images that Boal searches for, act as symbols because their aim is not to be the "exact image of reality", but, moreover, "the important thing is the reality of the image" (Idem, 54). In other words, the purpose of recurring to these images is to "show things not the way they are, but the way" the image-maker feels them (Idem, 77), in order to achieve a deeper understanding and enter in genuine dialogue. Somehow, Boal's aim is to find a path between the concrete and the abstract, through which meaning becomes more accessible, so that seeing, we can understand. Development derives thus from a more

encompassing understanding of oneself and the role one plays in a scene and in the theater of life.

His whole search can thus be understood as a search for images, “Subjunctive or Conditional images” — as he names them — “that is, images which allow us to think, to imagine, to invent, images which instil doubt or allow fancy” (Idem, 81). And thus the concept of an artist that he has, and with which he identifies, is of the artist as “a person who helps us to see what we tend only to look at, and to listen to what we tend only to hear” (Idem, 81). Understanding seeing as “an act of conscience” (Idem, 79), to create images about oneself, about our environment, about our desires are moments of developing consciousness. This process of self-understanding and self-consciousness seems to be at the core of the development that Boal envisages to support with theater work. However, the desired development does not end there. Being theater a rehearsal for ‘real life’, Boal continuously emphasizes the need for a further action as part of this development. From seeing and reflecting, new ways to act can and need to be born, that, from Boal's perspective overcome real oppression.

Taking a closer look to Boal's treatment of this sphere of action, of the social sphere, however, the dimension of self-understanding gets soon lost and a more prescriptive form of development gains ground. From the beginning, Boal presents his arguments on the ground of a division between oppressor and oppressed, and consequently, sets this separation in line with a division of the world that points at the conception of development that accompanies his work. An example of this divided perspective can be seen in the statement that his book on legislative theater “talks about a very specific reality, in the southern hemisphere. Geographically, politically and economically the *southern hemisphere*!” (Idem, xii; emphasis in the original). What he means by the ‘southern hemisphere’ becomes clearer in examples he uses later to present Rio de Janeiro and Brazil, for example recalling rankings that present his home-country as “a divided society, with a distribution of wealth that is among the world's most unjust, ranking alongside Botswana, Central Africa and Zaire” (Idem, 24), partially quoting the International Bank for Development (Idem, 29), and presenting ‘historical photos’ of the Vietnam war, Tiananmen Square, the civil war of Rwanda, Baghdad or Bosnia as evocations of life in Rio de Janeiro (Idem, 33). Similarly, at an international level, he refers to the injustice provoked by an immense external debt (depicted implicitly as illegitimate to its most part, since it was increased sixfold during the years of dictatorship) that affects the sectors of education and health badly, and an outraging privatization as the result of the

extreme dependency of European and US-American politics (Idem, 36). As a consequence, in earlier texts of Boal[173], Brazil is included in the group of "underdeveloped and dependent countries" (Idem, 225). Although he seldom speaks about 'social development' as such, these internal injustice and external dependency are clearly main oppressions that his work aims to overcome, and present insofar the development he aims for. On this ground, it is arguable that while Boal seldom refers explicitly to 'development', in fact, his whole work is based on the hope and the desire for 'development' from oppression to liberation, turning unnecessary to mention 'development' as a separate thought. A linear 'development' is the unnamed assumption from which he starts, and the whole Theater of the Oppressed, including Legislative Theater, is a complex of techniques at its service.

In this context, law plays a key role. It is not by chance that it is in the field of law that he presents a clear line of historical development, when he asserts that "as far as law is concerned, the drugs trade functions as if we [in Brazil] were living before the Code of Hammurabi", prior to which, according to him, "justice was administered at the whim of the king, and in accordance with his power, which was measured by the weight of the club that he carried" (Idem, 29). Similarly, it is in a speech where Boal presented the 'Law of Protection of Witnesses of Crimes' (Law 1245/95) and where he comes to speak about Human Rights, that Boal speaks of the progress of Humanity "by means of the struggle between barbarism and civilisation" (Idem, 161).[174] "Civilisation," he argues, "is only made possible by the invention of Ethics", in contrast to "the law of the jungle, [where] brute force wins" (Idem, 159).

After the perspectives I have presented in chapter A relating modernity to law, it is not surprising that this "advent of humanity comes about by the invention of Ethics", and is directly linked to notions of justice and law. Thus, Boal sees as an essential progress, a foundational step of Humanity, that "the individual [is] judged by the norms of society"

173 Although included in his book 'Legislative Theater' of 1998, Boal makes a point of underlining that the texts corresponding to pages 211-246 were "written in 1971, when everything in Brazil was black or white; this explains the simplicity of the analysis" (Boal 1998, 211). It is interesting for our research, that, while 'underdevelopment' does not appear explicitly many times in the rest of his work, and more specifically in the rest of his presentation of 'Legislative Theater' (see, however, Boal 1998, 254 quoting Noam Chomsky), it does appear in this text of the beginning of the 1970's. This detail is a minute example of a time when the concept of 'development' was, as we have seen, at the highpoint of its career (especially in combination with the political monologue of the dictatorial regimes in Latin America in tune with development agencies) before getting into a deep crisis during the 1980's.

174 Boal's engagement with Human Rights is not only the result of his presidency of the Commission for Human Rights. As the end of this speech shows exemplarily, particularly his own experience during the dictatorial regime is crucial for his engagement. Thus, he comes to speak about the need to find the truth for crimes of the past and political crimes, about the law of amnesty, about torture and the need for memory (Boal 1998, 163). Equally, in another speech against the demolition of the Tijuca police headquarters, where many Brazilians were tortured, he makes explicit reference to his personal experience, his support for the law and his belief "in the rule of law" (Boal 1998, 150).

instead of being, like “in far-off times, the subjective will of the king, who was the strongest and the most powerful [..., the one which] was the reality of the law” (Idem, 160). Thus, it is “as civilized people” that “we know that a man in uniform who carries a weapon is the arm of justice, but not the judge” (Idem, 161). Categories of knowledge about the established authority, this is here policemen and judges, but also more generally about the division of powers, and at an even more abstract level about ‘the truth’ and ‘what is just’ are mingled thus with the idea of being civilized, in contrast to a remote barbaric past that we have overcome in pursuing the next step in the line of development. It is in this perspective of the advancement of the complex of truth-justice-civilization, that Boal reviews the story of civilizing law from Hammurabi's Code, where “Shamah, the Just, The God of Reason” makes its appearance proving that “civilisation's preoccupation with a notion of Right already existed in that epoch” (Idem, 160), through the US-American Constitution of 1789, and the “Universal Declaration of the Rights of Man and the Citizen” of 1791, up to the humanitarian intervention and the ‘Duty to Intervene’ during the Gulf War. This is the road Humanity has been walking, from the barbarian to the civilized.

As a consequence, Boal concludes (in his speech presenting the Law of Protection of Witnesses of Crimes), “anyone who turns against Human Rights, is turning against civilisation and revealing their primitive side” (Idem, 161). Those against Human Rights, those who “declare that such Rights must protect only such and such a category of person”, wish, according to Boal, “to divide us into castes, relegating the majority to the condition of untouchables and keeping for themselves the privileges of the Brahmin” (Idem, 162). The question remains open, however, of which ‘us’ is Boal speaking now about. Is this the ‘us’ of the witnesses he was trying to protect with the new law?, of the victims of the crimes witnessed?, of the civilized?, of the morally advanced? In any case, he is putting himself on the side of the relegated majority, like in all the references in his books where he presents himself as being always on the side of the ‘oppressed’. However, at the same time, he is putting himself on the side of the civilized. Thus, through the participation in a rhetoric of a value scale of civilization, at the same time that he argues against oppression, he reinforces a division of humanity between better and worse on which the oppression he opposes is based.

In the concrete case of the debate over the protection of witnesses, this means that the decision for yes or no is the result of a decision over the developmental stage one wants to posit oneself, and thus, the answer is always pre-given, because the measure for the ‘more civilized’ and the better is already established, and even has an own reference in the realm of international law, namely ‘Human Rights’. While at first sight, the advantages of the

protection of witnesses might be obvious, it is important to understand the debate in which Boal participates with these arguments. If, on the one hand, we can imagine a totally innocent witness and thus the need to protect her/him turns obvious, on the other hand, we can also imagine, in a more realistic way, that many witnesses are embedded in the same field they become witnesses of. From a dichotomic perspective that draws a clear line between innocence and culpability, between good citizens and criminals, the defense of the witness presents thus a paradox, where defending her/him as 'innocent' means to defend, at the same time, a (potential and more often than not known) 'criminal'. Only from this background is understandable that Boal needs to defend his position stating: "None of us is asking for clemency for criminals, kidnappers, drug-traffickers" (Idem, 161).

This exchange of reasons is important to us insofar as it highlights the structure in which Boal takes position. In his struggle to achieve support for what he thinks is just, namely the protection of witnesses, he accuses his opponents of "placing themselves on the same moral plane as those who they wish to accuse, they commit the same crime they are trying to punish" (Idem, 162). In other words, blurring the limits, Boal argues that while the opponents of the law for protection of witnesses apparently posit themselves against criminality, they actually come to take part of it. Most importantly, in doing so, they place themselves in a moral plane which Boal implicitly characterizes as lower, because it is the moral plane of the criminals. Interestingly, this might be the moral plane where also the witnesses he is trying to defend, might be situated. According to this structure of thought, in a seemingly natural manner, the planes of morality succeed each other like steps of a staircase, and taking the position of a lower moral level is not acceptable for civilized humans. The legislator should be civilized and thus he could never be comparable with a criminal.

But how far is a certain position not acceptable for Boal and all other civilized citizens? Apparently, as far as law is not involved. Thus, Boal criticizes the moral standards of his opponents presenting them as "those who plead the case for the assassination of assassins, the kidnapping of kidnappers, without the mediation of the judiciary power" (Idem, 162). And if there was a judiciary power mediating the assassination and kidnapping? That that would be probably the wrong type of law becomes clear, when he claims that he was defending the law, an usurped law, when he was opposing the dictatorial regime decades ago (Idem, 150). Consequently, law plays the role of the hinge between barbarity and civilization, even if what Boal sees reflected in law are his own ethics and morals. That law is a placeholder for a specific conception of civilized morals is what allows Boal, in the end, to praise the 'Duty to Intervene' as a natural and desired consequence of the supremacy of Human Rights. In any

case, be it a national or an international matter, Boal's invocation of good or true law is explicitly aimed at offering "a little bit of terra firma in the midst of all the moral turbulence of the new international order" (Idem, 163).

Going back to the particular case of the Witness Protection Law, this search for *terra firma* does not allow Boal to go beyond the problem of a lost security on who is the innocent witness, and who the guilty criminal, or, in other words, who is innocent enough to be protected and who is criminal enough to be punished. In fact, he restores simplicity, articulating his pledge in terms of imperative needs: "In the triad of crime − criminal, victim, witness − for the first of these to be punished, the last must be protected" (Idem, 162). If the witness is also criminal or not turns secondary, because truth arises as the lighting star that "must shine before Justice can be done" (Idem). Presenting the witness as the "restorer of the truth", it is clear what a civilized person should think, because "by protecting the witness, we are defending Human Rights, civilisation against savagery" (Idem). With the same logic, it is this common fight against primitivism, what can transcend the separation by ideological differences and party loyalties: "together, for civilisation and against barbarism" (Idem, 163). Finally, because of this dimension beyond ideology, Boal adjudicates this task to the State, seeing in it the legitimate protector of civilization.

Summing up, Boal believes in "the humanisation of man" concretized in the Human Rights (Idem, 162), and thus in a progress towards more humanity. How shall it be brought about? Through ethics and social norms, that found form in law. And who shall be responsible for that? The State as a protector of civilization (against barbarity) and humanity, and lastly as the author of the law. His theater and his search to open dialogue is a result of this belief: "To enable people to speak is to enable them to become part of the struggle of this century, to become involved in the highest human objectives of this historic moment: the humanisation of mankind" (Idem, 224).

That he is skeptical of this progress at the same time that he advocates for it, becomes clear in the 'extra-information' that Boal supplies to the reader, for example the sentences in brackets and the words between quotation marks. Thus, regarding the 'Duty to Intervene', Boal adds: "(This duty has only been applied when dealing with one oil-rich country trying to annex another even richer country, and was never contemplated during the bloody regimes which strangled so many countries in Latin America. Or in Free Timor, today, in the stranglehold of Indonesia, under the nose of a greedy Australia.)" (Idem, 161). With this clarification, Boal relativizes (and thus devalues) the absolute validity of what he stated one sentence before

regarding the equality amongst human beings that the Human Rights and the politics of the United Nations have brought about. While Boal searches for a civilizatory progress towards more humanization, the question that Boal states and leaves unanswered is how far does that advanced civilization he speaks about reach for him and his Brazil as much as he is trying to reach it. Thus, can the higher level of humanization he strives for ever actually include Brazil? At the same time that he claims the validity of the 'Duty to Intervene' in terms of the defense of Human Rights, he equally asserts the contingency and the limits of this 'protection' by international law of economic interests and political power.

The same ambivalent relationship can be seen already in Boal's references to progress and (under)development, when he criticizes the "subliminal ideological propaganda" of the cinema and theater of the beginning of the 1970's for their vast "examples of 'natives' depicted with great 'charm', with great gusto, especially in respect of any of their characteristics which relate to their 'underdevelopment'" (Idem, 231). The linear development of civilization he draws in other context, becomes suddenly surrounded by relativizing quotation marks. He rejects that 'natives' are depicted as 'underdeveloped' but at the same time has no problem in referring to opponents of what he considers as civilized, as primitive, using equally a personal scale of 'moral development'. As another example, criticizing samba performances which, subsidized by the state tell "the history of Brazil from the *descobrimento* (discovery) up to the establishment of the Bolsa de Valores do Rio de Janeiro (Rio Stock Exchange)" (Idem, 220 f.), he writes that "those who sing of this 'progress' are the same exploited and starving people who made it possible, thanks to the inhuman exploitation of labour of which they are victims and which made the stock markets more lucrative" (Idem, 221). So, Boal believes in progress, but not in this progress. Of what progress and development, does Boal dream of, then? Of a liberating one, in which every individual can pursue his own desire. But is this not the same dream at the root of the liberal individualist world Boal criticizes?

Similarly, while he praises the advancement of humanity and civilization through putting in practice Human Rights for *all* human beings equally, he criticizes the legal homogenization in the European Community (Idem, 169) and the unification of the world through globalization (Idem, 250 f.). This case of unification in an "immense global village" implies for him, "to atomise, to isolate individuals", and thus, to turn "into a formless mass, without character" (Idem). His argument in these cases is against the "imposition of a single culture on all other cultures, under the auspices of the God Market" (Idem, 169). Thus, he remembers, that "all hegemonic powers have always been globalising", and that

“imperialisms have always sought to monopolise the world”, and brings the examples of the Pax Romana, Incas, Aztecs, British and American empires, as well as Hitler's Thousand-Year Reich (Idem, 36). This process is obviously not part of Boal's idea of progress. On the contrary, as he asserts in the context of his globalization critique: “there is nothing modern about the modern world; there are still troglodytes!” (Idem), and, in this sense, “a large part of the world still lives in pre-history” (Idem, 169).

Progress has to be, thus, a progress in the right way. It is not just natural, we cannot just wait. On the contrary, it has to be fought for. Oppressed have to fight for their liberation. And law is a powerful tool for that aim. But also in respect to this tool Boal takes an ambivalent stance. Because if, on the one hand, Boal claims that he has “always been a believer in the rule of law” (Idem, 150), he also points out that “equally, sometimes the oppression is actually rooted within the law” (Idem, 9). Often, to deal with law becomes a void endeavor, as he expresses after making a detailed account of the successful laws proposed by Legislative Theater: “I should make it clear that, in Brazil at least, laws do not apply in themselves; even if they are promulgated, they are not necessarily enforced” (Idem, 104). He claims thus several times, the absurdity of the *vereador*'s duty (Idem, 98). Actually, his skepticism in front of law and lawyers (Idem, 27) and his ambivalence in front of them, reflect the position of law in the social environment Boal refers to, where law has been discredited (Idem, 27 f.), or, in the words of Boal, “where immorality is legalised and law is made immoral” (Idem, 158).

Boal's concept of law, as we could observe already in his arguments around the protection of witnesses, has clearly a moral background, and thus, he states: “If neither God nor law exists, everything is possible, even random killing” (Idem, 31). From this perspective, while law has replaced God, it continues working in the same moral (and hierarchical) way. Naturally, Boal's need for this moral law finds expression also in his concept of justice, which functions as the link between the realm of morals and the realm of (positive) laws. Hence, in a similar way than the absence of God/law makes everything possible, Boal states that “where justice is weak, disobedience is possible” (Idem, 171), and this, in turn, is a source of disorder and hate, since “with no justice, everyone thinks they are just; and everybody hates each other – since the absence of justice allows many possible objects for hatred” (Idem).[175]

The way to state clarity about what is just, about the strength of that justice and about who is to make justice and how, is marked, in the plays of Forum Theater, by the choices of possible action presented in front of the conflict. Since the impulse for a just change, a change

175 Interestingly, this sentence appears in the context of an analysis of ‘Romeo and Julia’ of William Shakespeare, when Boal refers to the mild justice of Prince Escalus, clearly a paradigmatic figure for hierarchical and monolithic power.

that overcomes the one-way oppression Boal envisages, can only come from the ‘oppressed’, identified as such through the structure of the play, it is only the ‘oppressed’ who can be replaced by spect-actors, the ‘oppressors’ cannot. The aim of this (spect-)actor's exchange is to find ways to achieve justice, which can only be on the side of the ‘oppressed’.

Equally, in Legislative Theater, this need for a clear just law of the oppressed finds also its expression. Following Boal's account, it becomes apparent that his participation in law derives to a certain degree from experiencing law as a form of oppression, and thus, the trick Boal develops is to put the ‘oppressed’ as authors of the law. But, while this move changes some aspects of law, it does not change its hierarchical character which derives directly from the prescriptive structure it presupposes and which it feeds. The liberation Boal strives for, works, thus, within a structure of oppression that he (only) aims to put at the service of the oppressed identified in advance. Consequently, the transformation of “desire into law” (Idem, 20) that Legislative Theater seeks to produce is meant for the just desires, i.e. for those of the oppressed. All the rest is necessary haggling.

From this perspective on law as morals and as a lever in the social machinery, which is the role of plurality that Boal envisages? Importantly, acknowledging that law is always someone's desire, a similar position to the one we could observe in Critical Legal Studies, Boal's call is to “make our desire become law too!” (Idem). This statement is an expression of Boal's emphatic call in favor of plurality, in favor of a social polyphony. In order to make our various desires come true, we have to express these desires, and for that, as Boal argues further, we have to come to recognize our “individual desires” instead of having “prosthesis of desire” (Idem, 37), implanted or manipulated from the outside. In fact, Boal's book on Legislative Theater is itself, through its own form, equally, a call for the manifestation of the desires of the reader. Thus, already in the first pages of his book, Boal underlines: “don't let these suggestions act as limitations to your own desires – create your own style at your own risk!” (Idem, xi).

Through this call to find and fulfill the true individual desires, Boal not only speaks of a plurality of ways to be, but he also invokes the individual, that should not give up to the manipulation from the outside, for example through a global market. In doing so, Boal responds to a postmodern concern regarding power, particularly the cultural power of creating identities, with the perspective of an underlying true individual, an individual that is what he/she desires (Idem, 149). This is the same model he uses to create the figures of ‘the oppressed’ and ‘the oppressor’, which depend on a clear sense of identity. Thus, when this

sense of identity is endangered, he claims in front of his opponents: “For you to continue being who you are it is necessary that we be who we are. For you to be you, I need to be me” (Idem, 152). This stance seems to be in clear opposition to the dissolution of the individual that Foucault, for example, argued. In other words, what is a true desire, a non-cultural or culturally manipulated desire?

But it is true that Boal, at the same time that he calls for this reassurance of specific forms of identity, linked to categories of confrontation (like you/me, oppressed/oppressor), he also invites us to re-imagine our ways to be. In other words, Boal's political aesthetics invite to imagine and to create a plurality of identities for ourselves, to pluralize ourselves. The central function of the work with images derives from this interest for plurality, because the image, unexplained, permits plural meanings to arise. This plurality of meaning allows the participant not only to understand and to a certain extent to identify with the struggle presented, but, in the dialogue, it allows him/her to understand that the meaning he/she gave to the image is just one possible interpretation amongst many. Consequently, a change of perspective and thus a different answer is possible, which may take the participant closer to the results he/she desires. It is because of the plural meanings that we can give to the image, that it enhances the imagination of plural developments, and thus, the ‘oppressed’ can find new ways of action. Only the expression of different views allows for a dialogue, and only this dialogue allows Theater of the Oppressed to find new answers to old problems.

The topic of dialogue as a result of the interaction of a plurality of expressions and as a producer of a plurality of possibilities is, in fact, at the core of Boal's theatrical and political practice. Thus, Boal asks: “In reality, does dialogue exist, ever? Or is the contrary the case – that what we think is dialogue never actually goes beyond parallel or overlapping monologues?” (Idem, 4). In other words, Boal's question is: Is communication possible? By now, this is a question we are used to find in postmodern approaches which aim to emphasize the existence of difference. How is it possible, to transcend the “interpersonal monologues” and “attain the supreme status of genuine dialogue” (Idem)?

Interestingly, Boal, echoing contemporary authors concerned with alterity and subalternity like Spivak as well as psychologists and communication theorists like Carl R. Rogers (1902-1987) and Marshall Rosenberg (*1934), emphasizes in this context the relevance of listening, when he states: “Could it be that we merely speak and cease speaking, intermittently, rather than speaking and listening? We know the word we speak, but we do not know what will be heard. What we say is never what is heard” (Idem).

Boal's own attempt to resolve the problem of transitivity, the conundrum of communication, this is the accessibility of the Other, manifested in forms of theatrical language. In this sense, the playwright claims that "the Theatre of the Oppressed, in all its various modalities, is a constant search for dialogical forms, forms of theatre through which it is possible to converse, both about and as part of social activity, pedagogy, psychotherapy, politics" (Idem, 4). In fact, Boal's attempt to enhance a more careful listening (as well as a way to speak with more chances to be understood) was directed to broaden the spectrum of stimuli consciously involved in the communication, including, beyond rational argumentation, the body, the voice, the rhythm, etc. It is because of this concern with communication, that he challenged conventional theater as a practice "governed by an intransitive relationship, in that everything travels from stage to auditorium, everything is transported, transferred in that direction – emotions, ideas, morality! – and nothing goes the other way" (Idem, 19). Hence, his life-work aims as a whole to transform this intransitivity in manifold communication, to 'democratise the stage space' (Idem, 67) both in the theater and in the Chamber.

His theater  not only aimed to open new channels of communication through the corporal expression, but, at the same time, Boal searched for an empathic connection that, through the work with symbols and structures of the unconscious, goes beyond rational communication or an intellectual exchange of arguments. Hence, similar as in the case of Rogers' and Rosenberg's theories, the realm of emotions gained, in Boal's approach to communication, and thus in his perspective on plurality and politics, a protagonistic role.

In order to achieve this empathic connection that goes beyond rational interaction, the performances of Theater of the Oppressed start usually with some *gamexercises*, a neologism created by Boal to refer to exercises that prepare for the theatrical interaction while intending to enhance playfulness. Boal emphasizes that the "exercises with actors and audience [serve] not only as a 'warm-up' but also to establish a degree of theatrical communion" (Idem, 8). This idea of communion, a form of sharing with sacred connotations, appears again in the tasks of the joker, who "must show, by means of examples – preferably solicited from other participants – that no problem is UNIQUE and EXCLUSIVE to one person alone", because "at the very least there will be a resonance, always" (Idem, 46). A plurality of experiences becomes linked through communion with a bigger whole. It is no surprise then, that in the dramatic action, "particularity must be inscribed on the universal" (Idem, 59), and thus the goals of the characters need to "be at the same time objective and subjective" (Idem, 57), as Boal argues quoting John Howard Lawson (1894-1977). This connection between the particular and the universal, the subjective and the objective, takes the shape of a

communication triangle amongst the two characters in dialogue on the stage and the audience as a third point (Idem, 66).

In order to build and strengthen these communication links, Boal uses especially the symbolic language of images. It is through the capacity of reflecting oneself in the image of another that a link is created between actor and spect-actor, between the subjective experience and a broader struggle. It is through giving shape to an image, that the creator of the image sees himself reflected and realizes his position. Moreover, Boal argues in this sense, that it is the capacity to see our reflection, to see ourselves in action, to see ourselves seeing, what makes humans theatrical beings *per se*. In other words, "all of us 'are' theatre" (Idem, 7), because all of humans are actors and spectators of their own drama. Moreover, this capacity of seeing ourselves from the outside (i.e. to see our reflection) and to reflect on it, has consequences for our further doing: "This possibility of our being simultaneously Protagonist and principal spectator of our actions, affords us the further possibility of thinking virtualities, of imagining possibilities, of combining memory and imagination […] to reinvent the past and to invent the future. Therein resides the immense power with which theatre is endowed" (Idem). As a consequence, when we can imagine us differently, we can also act differently. Thus, referring to Shakespeare's 'Hamlet', Boal recalls the idea that "theatre is a mirror in which may be seen the true image of nature, of reality. I wanted to penetrate this mirror, to transform the image I saw in it and to bring that transformed image back to reality: to realise the image of my desire" (Idem, 9 f.). Theater becomes thus a tool for social transformation (Idem, 9), a social transformation that is directly linked to the debate amongst diverse perceptions, and, so far, lives out of the relations created in a space of pluralities.

Boal's idea of this connection with a larger community through the work on stage is at the base of his social practice with theater. Not only the particular is embedded in the universal in each show, but also Boal's theater relies from the beginning on this connection. As he relates regarding his experience with the CIEPS, the plays created through the workshop dealt with "issues of most concern to the cultural animators (and their families and neighbours in all the areas we were working in)" (Idem, 8). From the outset, thus, the idea is that the issues that appear in a certain group are expression of questions at a bigger scale. The cultural animators speak and act not only for themselves, but for a much larger community. The individual concerns are embedded in a net of relations that make their particular issues relevant for the whole.

The concept of a network returns equally, when Boal argues that Legislative Theater works through a "network of partners" (Idem, 40) built by the nuclei and links. He emphasizes, furthermore, the need for dialogue and connection amongst the different communities. It is in this sense, that he encourages the travel of the different shows "from the originating community to other communities, so that everyone may share their knowledge" (Idem, 88). Thus, at a practical level, it is possible to build a 'network of solidarity' through inter-nuclei dialogues and festivals (Idem, 52, 87 f.).

Hence, the Theater of the Oppressed aims to make explicit the existing connections between individuals and the communities they inhabit, as well as it searches to strengthen these links through theatrical activity, and to build furthermore a network between these communities. At an intrapersonal level, equally, through the work with techniques like 'Rainbow of Desire', what becomes visible is a net of fears and desires within a person, that, in turn, have consequences at other scales. At every level, the intention is thus, to coordinate the interaction of plural entities into networks of relation, engaging diverse needs, desires, interests, questions, and, importantly, diverse fields and amounts of power with each other.

In this sense, plurality, embedded in an network of interactions, enhances growth for the community as such and for the individual. A network of different entities as envisaged by Boal allows for a development that furthers more plurality in a way that their differences are not intractable, but remain in relation. So far, social conflict could be understood as an element of dynamic balance. In other words, the conflict amongst pluralities turns central for peace, because it is only through the conflict amongst their different approaches, that new perspectives can arise. Legislative Theater is thus the result of plural actions and reflections in interaction that strive for social transformation. With this approach, Boal gives the modern concept of law and its authoritative universalizing modus a twist, incorporating, through theatrical interaction, the plural voices engaged in one society.

Problematic is, however, the frame in which Boal envisages these 'networks of solidarity', these fields of empathy, these dialogues in difference, and, with them, the peace, justice, law, development and plurality they strive for. Because, despite all his efforts for dialogue and the understanding of otherness, Boal's 'understandable others' (others who are accessible to and worth understanding) are always predefined as oppressed. Insofar, they are not 'others', but are always the same, Boal's team, Boal's constantly invoked 'we'. They are Boal's 'oppressed'.

His network is thus a network of solidarity only with those accredited as oppressed, the dialogue he envisages is a dialogue for the sake of the oppressed and their desires. The empathy he pursues is empathic with the oppressed's problems. Lastly, the development he strives for is one that goes from oppression to liberation, but what does that liberation look like? Does this liberation look like the oppression of the oppressor? How far does this liberation allows the interacting characters to see the variety of relational networks they are embedded in and transcend a relationship marked by a fight for oppression/liberation? How is liberation conceivable beyond oppression? Although Boal envisages development also as a more encompassing understanding of oneself and the own role in a network of relations, and as the capacity to reinvent oneself, his claim for fighting against oppression as something external, epitomized in the unmovable figure of the oppressor, attaches development to a fixed outer standard, through which oppression, liberation, development, and lastly humanity is standardized.

Problematically, Boal can see an oppressor, because he does not acknowledge the arguments of this ‘other’ as valid — the same attitude he criticizes in the oppressor himself. Boal's call for plurality is thus embedded in a dichotomic perspective, and his development is embedded in a moral setting, excluding the others beyond his own moral limitations and setting again a very monolithic limit to his call for plurality. From this perspective, the dialogue he envisages is monological, and the community he aims for is divided. As a result, the peace he envisages is partial; it is the result of a ‘just war’. In Boal's world, the oppressed will fight against the oppressors ever after, because the change he envisages is framed by a structuralist perspective and not a systemic one.

In this sense, while it is possible to say that Boal's approach participates in a postmodern critique through his questions on particularism and pluralization, his post-colonial stance, his emphasis on reinterpretation and appropriation, his play with myth and reality, his attitude of resistance and rejection of modern paradigms of order, and his interest for underlining discontinuities, and while the role that interaction, relation, power, communication and the plurality of meaning acquire in his work is determinant, Boal's response to the instability created by these challenges, is marked by a moral and modern approach.

Legislative Theater is embedded in this problematic, and thus includes its own limitation from the beginning: being dependent on the strict legislative process, it has the same downsides as the process itself. The biggest difficulty in this sense is the need of the will of the legislators to actually pay attention to the proposals made in a session of Forum

Theater. In other words, while Forum Theater may reveal the complexity of a social problem, point at the need for specific strategic steps and even propose creative solutions, it is still a part of an authoritatively and hierarchically organized system of social order that follows the inherited modern model of law. Furthermore, it is also questionable that the creation of a new law, even supported by a previous session of Legislative Theater, does not imply always a (desired) change in the social reality, even if it can further it greatly.

Nevertheless, the critical point relies in the process more than in the result of Boal's artistic-political proposal. Through the public, open and direct discussion, in the process of putting in action proposals, several goals are achieved that further not only social cohesion, but even more, they give law and social order a totally different base for its legitimacy. The legitimacy supporting a law that results from this process is the consequence of the inclusion of diverse voices in a dialogue, or better, in a *polylogue*[176]. Thus, this proposal goes further than the direct democracy system, in which it is possible to vote directly for every legislative matter. The participants are not put in front of a pre-established alternative, to which they have to answer by 'yes' or 'no'. In Legislative Theater, the participants are involved from the elaboration of the question on 'what is the problem?' onwards, most importantly creating their own proposals of resolution. It is this process of discussion of opposing positions, their negotiation, but more than nothing their encounter, that permits to pose diverse needs, inviting to a common search of solutions. If there is no understanding of the social need of change, there is little that the law can do by itself. But if there is an understanding of the complex web of relations and of the possibility to act differently, the law might not be the most decisive element.

While, in the end, a law might not be enacted following the proposal of the Legislative Theater group, still, in the process, the participants have appropriated the power of voicing their position, of interacting with other citizens, of presenting their ideas to people related to the government that they would normally neither meet nor discuss with. They have regained the conscience that they are active part of a society and that they can create spaces to listen to each other and react in front of it. This is the strength that Legislative Theater pulls out of its grounding on Theater of the Oppressed. As an example of the importance of this encounter, Paul Heritage states regarding a piece of Forum Theater presented at the 7th International Festival of the Theater of the Oppressed in Rio de Janeiro in July/August 1993: "a simple

176 Regarding the concept of 'polylogue' in the context of intercultural philosophy, see Wimmer 2004, as well as the journal 'Polylog' (Polylog 2012).

piece of Forum Theatre provided one of the few actual dialogs between the children of the streets and the citizens of Brazil who daily pity, ignore, mourn, and fear them" (Heritage 1994, 31).[177] Of course, a law resulting from an approach marked by pity, ignorance, mourning and fear, results into an authoritative response aimed to the eradication of the cause of all of these unpleasant experiences, as many social campaigns pursue the eradication of poverty, for example. It is doubtful, however, that eradication might be the best response in front of social conflict, since it is led by the fear and pity of the eradicator, disregarding the actual needs of the eradicated other. Stated bluntly, the massacre itself was a form of eradication of poverty street children. In contrast, this specific presentation of street children through Theater of the Oppressed achieved to include them in a face-to-face discussion, to open a door in the society that, in their fear and pity, excluded them even when it allegedly intended to address their needs.

In Legislative Theater, this pursuit of dialogue is broadened and acquires new and more specific goals, combining techniques of Theater of the Oppressed with specific tools offered by the political and legal system. However, the core of the work and the motor for the concrete legal and political actions rely on the work with theater itself, on the social interaction it enhances, on the changes it produces in the performers, both actors and spect-actors.[178] Furthermore, the investigation of which are the needed and desired changes through theater allows to put concrete conflicts into a broader context while connecting it to a myriad of particular stories. For example, the work of the group 'Marias do Brasil' links, in the diverse presentations, the fight of domestic servants for standard labor rights with problems like lack of formal education and gender discrimination (Félix 2010, 95). The group has participated in the project of Legislative Theater achieving, with the support of the Commission of Participative Legislation, to introduce the federal law project no. 6030/09, regarding the rights of housemaids, as a priority in the discussion of the Legislative Chamber

177 The piece was presented on the occasion of the massacre of eight children shot by members of the Military Police on the 23rd July 1993 at the Church of the Candelaria in the very center of Rio. As Heritage relates "The blood-stained pavement was only a few meters from the doors of the Festival and the impact on all the participants was profound, finding expression in various theatrical responses on the streets over the next few days […]. However, within the Festival, a Forum presentation by a group of the street children themselves had the greatest impact of the various responses. Working with CTO the children produced a play about the way in which one boy is forced to leave his family and live on the street. Using an eclectic style that mixed rap and *capoeira* with naturalistic dialog, they dispensed with many of the myths surrounding the street children while simultaneously presenting the individual trajectory of a particular protagonist" (Heritage 1994, 31).

178 For examples of these processes, see the Journal of CTO Rio, called 'Metaxis'. Especially in its no. 6, dedicated to the memory of Augusto Boal, who died shortly before this edition, it is possible to read a variety of experiences with Theater of the Oppressed. Take for example the account of Claudete Félix on the group '*Marias do Brasil*', which in 2010 completed 11 years of trajectory (Félix 2010, 93 ff).

(Câmara 2011). But beyond this concrete political achievement, which is the result of eleven years of continuous work with Theater of the Oppressed, the participants underline how the work with theater serves as a way to search for new approaches. Thus, Maria José, answering why she does Theater of the Oppressed, asserts: “In order to find a solution for our problems. After doing this theater, we always look for another form of solving things and do not give up. I didn't know that life had so much solution...” (Félix 2010, 94). Maria Vilma, another of the participants, who represented the employer, states: “it is difficult to be the employer, but I like very much to know that I can change my role” (Idem). In these statements it turns clear that, although the legal change is naturally a central desire of the ‘Marias’, the change they pursue and the reason of their engagement relies on the theatrical interaction itself.

The strength of Legislative Theater relies thus, basically, in two key elements. Firstly, it allows for the configuration of platforms of strong legitimacy for social norms. Secondly, and more fundamental, it opens the door for a dialogue usually disregarded when it comes to deal with social conflict. This dialogue is by itself empowering and transformative beyond the concrete legal achievements. Certainly, this type of interaction is not to be underestimated in terms of social order. The fact that no written law comes out of a transformative process does not diminish its transformative character. Moreover, it allows us to remember that social interaction, social order, the finding of possibilities for a common life, the solution of conflicts, and thus social and normative development depend only to a very limited extent on law. Rather, it is our own belief in law that gives its force, this is symbolic power, to the legal system we live in.

The work of Boal opened a door for envisaging new approaches to social order and, more specifically, to law. In the context of general socio-political crisis and incredulity in front of the law, embedded in a process of re-democratization, what Boal achieved was to go beyond mere criticism. In turn, he, together with his team of colleagues, elaborated forms to establish contact and develop a dialogue in the civil society and between parts of the civil society and the state institutions. In other words, he developed a practice for alternative approaches to law and social order, that aimed at including a plurality and diversity of expressions.

## II. Making Place for the Other in the Court: Searching for Alternatives to the Culture of Law through Political Activism in Indigenous Justices in Mexico and Colombia

Concomitantly with the breakdown of a modern concept of law that aimed to be universally valid, also the practice of law experienced a crisis in the diverse fields of engagement with law. As an example, in the last section, I have presented one of the most innovative attempts to incorporate plural perspectives in legislative practices. Naturally, the proposals were not limited to this aspect of legal practice. Another legal environment where the presence of 'the Other' was claimed emphatically was the judiciary. In this section, I will address the discussion on the inclusion of 'the Other' in judiciary practices, focusing on the example of the place given to 'indigenous law'. There are at least four main reasons to address this topic as a field in the pursuit of our research interest regarding the connections between plurality, law, and legal development. Firstly, the role of indigenous law has been gaining importance in the international debate increasingly, resulting in documents of international as well as national law, which allow an approach to the problematic from the perspective of positive law central to contemporary discussion and current understanding of law in a modern sense. Secondly, the formulation of these documents brought with itself a heated discussion in various spheres of society, including already existing formalized political structures and emergent civil organizations, which underlines the importance of this topic not only for law as a distinct discipline, but moreover for law as a field of socio-political debate. Thirdly, development agencies, both national and international, have participated actively in the socio-legal process of introducing 'the indigenous' as a particular category within state law and its institutions. Last but not least, these discussions allow us to see the link of legal-political changes with the more theoretical discussion on legal pluralism presented above.

While a variety of changes have appeared in this field worldwide, I will take the examples of the constitutional recognition of indigenous law in some Latin American countries, particularly Mexico and Colombia, where this discussion had particular impact. I will present here some of the manifold connections between plurality and the place of indigenous peoples and their laws in the state judicial system, the context in which these reforms took place, which were some of the main socio-legal consequences and which are some of the central questions that these proposals for including the Other in a legal frame posed in terms of legal development.

### 1. *Complex Claims in a Complex Global Context*

In the previous chapters, we have been following a transformation in the discussion about law, what it is and what it should be, in a variety of centers of production of knowledge and power. It is true that the modern approach to law is not the only one existent, and it is exactly the point of post-modern reflection and of this research to investigate the question of how far this conception is a universally valid one or even a hegemonic one. Nevertheless, it is also clear that the crumbling down of a concept of law that pervaded an important part of the practice and politics of law had important concrete consequences at a global level. In this sense, Willem Assies, scholar of legal pluralism and indigenous law in Mexico, underlined that,

> "if we speak of the recognition of indigenous rights and of a quality legislation, a first thing to do is to leave back the decimononic imaginary on the state; this is the image presented by Hans Kelsen according to which the state and law are the same thing, the Weberian vision of hierarchical bureaucracy within a certain territory as well as the Westphalian notion of a system of sovereign states" (Assies 2003, 3).

Within broad processes like globalization, that put in question the notion of sovereignty and legal monism, as well as the increasing decentralization and the appearance of new forms of public management, which destabilized the Weberian model of social institutional organization, the claims of indigenous peoples, as one group of players amongst many, have challenged the standing columns of legal-political thought.

The indigenous claims are thus as much a result from vernacular historical, political and economic circumstances as they are embedded within global processes. In this sense, Donna Lee van Cott enumerates three crises as key to the constitutional changes, including indigenous reforms, that took place in Bolivia and Colombia in the 1990's, namely

> "a representation crisis, generated by nonrepresentative political parties that monopolized access to the state; a participation crisis, owing to the absence of means for most citizens to participate in decision-making; and a legitimation crisis, arising from discriminatory access to the protection of the law and equal membership in the nation, and to the absence of effective bases of legitimation to unite and guide the political community" (Cott 2000, 1).

All of these, but particularly the crisis of representation and the crisis of legitimation, are aspects of the wide change I have been delineating so far, and build the context of claims of representation and redistribution (of economical goods but also of political power) voiced, exemplarily, by indigenous communities.

The indigenous claims are, hence, one aspect more of a broad transformation of basic concepts regarding social organization and, even more, they are one aspect of a more general upheaval in which old certainties are deeply questioned. Thus, it is no surprise that even the

rhetorics of indigenous representatives resonate with academic questions I have presented above. For example, Jesús Enrique Piñacué, representative of the Nasa people in Colombia and former senator, argued that

> "the written law bases its existence in a negation, in the ignorance of the language of the other, which, because of reasons of the principle of equality, has been abolished in favor of the obligatory language of the law. [...] The law enforces its grammar. The written law rests on a basic wrong assumption: the utilization of a common language. The written law works through a hidden mechanism: the *a priori* of the typification of cultural practices as a necessary condition of legal equality. [...] [T]he legal discourse works thus on the basis of the wounded culture of the other" (Piñacué cit. in Kuppe 2010, 9).

It is interesting to observe the recurrence of the topic of the language and its grammar, as well as the idea of their wrongly alleged unifying character. Equally, the intention of uncovering hidden mechanisms of a machine of legal discourse that works at the cost of wounding cultural difference, reappears in this short example. The negation is, finally, at the center of Piñacué's argument: the negation of the Other and his language. All these are figures that we are familiar with from previous discussions and that allow to see not only the contextual socio-political closeness of the indigenous claims and other postmodern concerns, but underline also their discursive connection.

Importantly, the different elements of the three crises identified by Cott and linked to Piñacué's critique, configure a profound transformation, where diverse claims of social justice play a crucial role, pulling sometimes in the same and sometimes in contradictory directions. Within these crises, it is possible to recognize, following Nancy Fraser (*1947), two main types of claims: ones oriented to redistribution and others oriented to recognition (Fraser 1997, 83). To state boldly the tension in which these two approaches are caught, the first ones are guided mainly by a principle of similarity and equality, while the second ones base on a recognition of difference. The challenge of the contemporary transition consists, as Assies develops, in coordinating these two types of claims.

In the case of indigenous peoples, the two types of claims are particularly visible if we take a look at contemporary indigenous politics in Latin America. On the one hand, the claim for *recognition* of the existence of various cultures in the state territory aims at fostering an environment of awareness and respect and at securing a space for the free exertion of cultural practices. On the other hand, these claims are embedded also in an international web of economic-political struggles, where questions of *redistribution* are central. The link between socio-cultural recognition and economic-political redistribution is given particularly because indigenous peoples are often in weak positions from a perspective of the current market

economy because of a long-standing socio-cultural discrimination. For example, since indigenous peoples live often away from urban centers and are often employed in the field of agriculture, their struggles for cultural respect in a specific territory are frequently linked to conflicts regarding the exploitation of natural resources by international corporations, particularly in the field of the forest and mining industries, which are part of a wider process in the global economy.[179] The settings in which the indigenous claims take place are thus determined by a wide variety of tensions at local, regional and global levels, all of them intertwined in a long history, which is worth reviewing shortly in order to understand contemporary discussion.

In this sense, while questions regarding cultural and legal plurality in Latin America do not start with the European invasion of the region, this process, and the subsequent institutionalization of colonial power had a drastic impact and is a central reference in the contemporary discussion. As René Kuppe underlines, even the name currently used for the middle and southern part of the American continent, 'Latin America', is associated to a negation of the plurality within this geographic sphere, putting the emphasis on a definition by the linguistic tradition of the conqueror, which was used later to create a cultural and linguistic identity for the emerging nation states of the 19th century in contrast to Anglo-America (Kuppe 2010, 2).[180] Under this homogenizing denomination, however, are hidden 43 million people that belong to 657 ethnolinguistic indigenous groups, building around 10% of the whole population in Latin America (Noguera Fernández 2007, 1 cit. Barié).[181] Beyond these groups considered as original inhabitants of the region, or at least as prior to the European invasion in the 15th and 16th century, the diversity of migrant groups that settled in

179 For a very recent example of these struggles see the case of the protests in Panamá (CLOC 2012 and Meléndez 2012). For one amongst many Mexican examples see Ferrer 2011, and for factual information of 2011 in Colombia, see Mingorance 2011. For an international cooperation of more than 40 organizations dealing with this topic and for an international declaration in this regard see the '*Declaración del Foro de los Pueblos Indígenas: Minería, Cambio Climático y Buen Vivir*' ('Declaration of the Forum of Indigenous Peoples: Mining, Climate Change and Good Life') of 2011 (OCMAL 2012).

180 As far as historical accounts can tell, the term *América Latina* was used firstly in Paris in 1856 in a conference of the Chilean philosopher Francisco Bilbao (Moniz Bandeira 2005) and, in the same year, in the poem of the Colombian writer José María Torres Caicedo '*Las dos Américas*' (The Two Americas) (Torres Caicedo 1857). It is important to remark the political weight of the term '*América Latina*' (or Latin America), the promotion of which was supported by the French Empire of Napoleon III during the French intervention in Mexico (1862-1866) as a strategy to include France in the countries with influence in the continent excluding, at the same time, the Anglo-Saxon and, separating linguistically the middle and southern part of the continent, also named '*Hispanoamérica*' ('Hispanic America') from Spain (Moníz Bandeira 2005). Naturally, from then on the story continued adding further meanings to the diverse concepts referring not only to the geographic configuration but also to the political, social, cultural and economic field related to it.

181 These statistics are from a study published in 2003. While the definition of 'indigenous' is highly problematic, this piece of information serves here as a general reference used often in the international debate on questions around the indigenous population in Latin America.

the area during colonial times and in various waves after that period also has to be considered. Plurality, cultural plurality and with it legal plurality, were thus present before, during and after the colonial time.

Importantly, during the 16th century, the modern concepts of state and law as I have presented them above were not yet stable and all-encompassing. On the contrary, the coexistence of diverse legitimate legal orders that applied according to the different estates, the different regions or the different matters in discussion, was the usual state of affairs. This logic was continued, in general, in the context of the Spanish colonies, when indigenous institutions and authorities kept working (to different extents according to the particularities of the regions) under a certain control of the Spanish Kings and their developing administrative bureaucracy, which nevertheless was too far away to keep track of the situation on-site or of the real implementation of their decisions. In any case, under the encompassing rule of the Spanish Kings, the idea of a plurality of legal systems working at the same time in the same region was not something strange to the political imaginary of that time (Ceballos Bedoya 2011).

Central to the process of the creation of a discourse based on the unity and only validity of one encompassing state-law, and the corresponding lack of recognition for indigenous normative orders, was the process of nation building started in the beginning of the 19th century. It is this process of 'nation building', that "could secure, that the institutions of liberal law which are empty on their own become alive and are recognized and followed by the people of the state" (Kuppe 2010, 9). From a perspective of a general Latin American constitutional history, Raquel Z. Yrigoyen Fajardo emphasizes that "the monocultural Nation-State, the legal monism and a model of census suffrage (for learned white male landowners) were the vertebral column of the horizon of the liberal constitutionalism of the 19th century in Latin America" (Yrigoyen Fajardo 2011, 140). Following this author, it is possible to distinguish three main techniques in the Latin American constitutional texts of the time to create the unity of the nation state: "a) to assimilate or transform the *natives* into *citizens* without individual rights, through the dissolution of 'Indian villages' ['*pueblos de indios*'[182]] – which were endowed with their own collective lands, their own authorities and indigenous jurisdiction ['*fuero*'] – in order to avoid indigenous upheavals, b) to reduce, civilize and Christianize the natives not yet colonized […] in order to expand the agricultural border; and

182 The '*pueblos de indios*' were the basic administrative unit of the so called '*República de Indios*' which were supported by the Spanish authorities in order to be more efficient in the collection of tributes and concentration of workforce, amongst other reasons.

c) to make offensive and defensive war against indigenous nations […] in order to annex their territories to the state" (Idem, emphasis in the original).[183]

As a result of the homogenizing discourse of the nation and the practices it involved, the indigenous other in all its forms was condemned to disappear.[184] At the same time that the administrative nonexistence and political irrelevance of indigenous cultures was established, a criminalization of activities which were typically connected to indigenous social circumstances or cultural practices took place. Importantly, the free access to lands which were originally in indigenous hands was denied through a limited recognition of ownership titles, making their utilization an object of criminal prosecution. This criminalization of indigenous activities was further justified by an academic discourse on race, which, in the end, brought with it a special treatment of indigenous peoples.[185] While this special treatment implied a certain recognition of the existence of indigenous groups and of the existence of difference, at the same time, it meant the official positioning of these groups in a hierarchical scale. In formal law, this found expression in the assumption of the lack of criminal responsibility similar to cases of mental insanity. But the result was not necessarily the exculpation of indigenous defendants. As Rene Paul Amry explains for the case of Peru in the beginning of the 20th century, "the judge could order as an alternative to punishment the confinement to a penal colony, which in the case of the 'savage' ended in his assimilation" (Amry 2004, 14).

The process continued with the increase of politics of integration for the natives oriented towards the development and modernization of the New World. In this sense, Yrigoyen Fajardo speaks of a 'social integrationist constitutionalism', which had the objective to "integrate the natives to the state and to the market without breaking neither the Nation-State identity nor the legal monism", and which did not put in question "the authority of the state to define the model of indigenous development within a tutelary frame" (Yrigoyen 2011, 140). Interestingly, as Kuppe remarks, these indigenist policies were central for a process of awareness, recognition and self-identification that nourished the later indigenous mobilizations. Thus, while "the indigenism purposed the integration and the final disappearance of indigenous peoples as socio-culturally perceivable groups within the nation-

183 The difference between the cases meant under b) and c) is subtle, but even more so, central to understanding the hierarchically differentiated variety of 'otherness'. While the first group of natives not yet colonized was referred to as 'savages', the second category received the name of 'barbarians'.

184 This perspective has consequences until present. For an example of the 1970's see the case of Guatemala explained in Garcia Fong 2005, 73.

185 This scientific justification was importantly inspired by Joseph Arthur de Gobineau's (1816-1882) '*Essai sur l'inégalité des races humaines*' ('Essay on the Inequality of the Human Races', 1853-1855).

state[, i]t has, however, participated in the creation of the conditions for the opposite of these goals" (Kuppe 2010, 6).

The 'indigenous question' was thus from the beginning linked to questions of social modernization and economic development and thus it is not surprising that one of the first internationally relevant documents on the topic was related to the native as worker, in other words as participant in the globalizing economy. The documents to which I am referring are the conventions of the International Labor Organization (ILO)[186] no. 29, namely the 'Force Labor Convention' of 1930, and no. 50, namely the '(Shelved) Recruiting of Indigenous Workers Convention' of 1936 (ILO 1936).[187]

Revising the history of the involvement between international organizations and indigenous peoples, it is important to remark that while indigenous peoples and their conditions of life were a concern of international organizations, especially the ILO, almost from their establishment onwards, the discussion on these topics gained importance, particularly regarding independent countries (in contrast to rules regarding only colonial territories), only after the Second World War. In 1946, a commission of experts in the field was created and worldwide studies regarding their life conditions were promoted[188], producing one of the first legally relevant definitions of 'indigenous' at an international level. Importantly, the approach followed by these institutions and the agreements they produced was based on an evolutionist perspective that saw the indigenous populations as part of a problem of social and cultural backwardness, and resulted in the conviction that "the protection of the natives had to lie necessarily in their integration into national societies" (Aragón Andrade n.d., 44).

Consequently, the most important convention produced then, which maintained its legal force until 1989, was the ILO 'Convention on Indigenous and Tribal Populations' (no. 107) titled 'Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries'. This convention was founded on the assumption that indigenous populations "were temporary societies destined to disappear with 'Modernisation'" and "encouraged integration" in the National State as part of the modernization model (ILO 2012). In this sense, the convention was meant to apply to the

186 The ILO was created, as an agency of the League of Nations, in 1919 with the Treaty of Versailles. It started from 1921 onwards to make studies on indigenous workers and formed in 1926 a committee of experts that produced several conventions and recommendations in this field.

187 The convention came into force the 8th of September of 1939.

188 The first published study of that kind was 'Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries' of 1953. For a short review on the work of the ILO on this matters, see González Galván 2000.

"members of tribal or semi-tribal populations in independent countries *whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community*, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations [...]" (ILO 1957; emphasis added) amongst others.

In this context, the concept of development was a key aspect of the convention. Thus, regarding the lands where indigenous populations were settled, the convention stated in art. 12 that "[t]he populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of *national economic development* or of the health of the said populations" (Idem, par. 1). Equally, for the case of an imperative (and exceptional) removal, again, one of the main concerns to take into consideration was of developmental character. Thus, paragraph 2 of the same article stated that "they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and *future development*" (Idem; emphasis added). Furthermore, art. 7 stated that: "These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes", underlining the primacy of the integration into one modern Nation-State (Idem). Importantly, while underlining the importance of customary law, this convention did not recognize any legal claim of indigenous populations to exert their own law.

Keeping the integrationist context towards a unified Nation-State in mind, it is not surprising that these legal instruments regarding indigenous groups were driven first by the states participating in international institutions, and only later an increased activism of the indigenous organizations took place affirming their claims on these documents. Furthermore, this move strengthened the position of the Nation-State as the unifying entity of reference and as the active role player in international discussion as well as in social action, be it to repress or to protect, taking ownership over these issues from the outset.

At the same time that the Convention no. 107 was developed within the ILO, the United Nations, founded after the Second World War, started to participate equally in the debate over indigenous rights through the discussion on Human Rights, which put the protection of all people not anymore under the custody of the Nation-State but also as addressees of the protection of the United Nations and the international community it represents (Aragón Andrade n.d., 48). In this context, the discussion over indigenous groups took place under the

rubric of the protection of minorities and the protection of collective rights. In the context of the Cold War, this discussion involved a struggle between socialist advocates and their counterparts, who succeeded in putting an individualistic perspective on Human Rights to the front and relegating the idea of collective rights (Idem, 49). A first group of experts on minority issues within the structure of the United Nations Commission on Human Rights (UNCHR) was the Sub-Commission on Prevention of Discrimination and Protection of Minorities created in 1947.[189]

Importantly for the indigenous groups, understood then as minorities, in 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[190], as concrete specifications of the Universal Declaration of Human Rights of 1948 that could foster its implementation. Art. 27 of the first covenant explicitly referred to the right of persons pertaining to a minority "to enjoy their own culture, to profess and practise their own religion, or to use their own language" (United Nations 1966). This recognition, while in the context of minority rights, enhanced the further debate on indigenous claims that would unfold with greater force during the following decades.

The last third of the 20th century brought, on the ground of these international recognitions, and in the context of an increasingly globally intertwined economy and a destabilization of the Nation-State, a variety of political struggles and new legal instruments around the recognition and engagement with indigenous peoples. Taking into account this situation, Kuppe convincingly puts the further discussion of indigenous rights in terms of ensuring legitimacy of the exertion of public violence in a culturally pluralistic society (Kuppe 2010, 7). Under the circumstances of an increasingly visible and politically active diversified society, the mere implementation of representative democracy and the anchoring of individual general basic rights were insufficient, and thus the claim arose that the specific interests of the diverse groups and their particular institutions should find entrance in the configuration and organization of public life. The recognition of the entitlement of indigenous peoples to an independent legal status as well as social, cultural and economic rights became the center of the discussion, creating a movement that struggled for the 'right to the own rights'.

189 In 1982 a Working Group on Indigenous Populations (WGIP) was created amongst the six working groups of this institution.

190 Both documents have been in force since 1976.

Recognizing that the discrimination against indigenous groups was not sufficiently addressed in terms of the general frame of the discrimination of minorities[191], from 1969 onwards, an increasing amount of conferences and reports was organized and commissioned regarding concrete interests of indigenous groups, most importantly the 'Study on the Problem of Discrimination against Indigenous Populations' written by José R. Martínez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities[192]. Equally, in 1977, as a result of the first International NGO Conference on Discrimination against Indigenous Populations in the Americas, the demand for the "right of self-determination" was emphasized, as well as the revision of the ILO Convention no. 107 "with the purpose of changing its integrationist approach by one of respect and protection of the indigenous cultures" (Aragón Andrade n.d., 53). Interestingly, in this simple formulation we can observe a request to fulfill a twist from a unitarianist perspective, where diversity is subsumed to a bigger whole, namely the Nation-State, to a pluralist approach, where respect amongst cultures (in plural) is demanded.

The question was thus posed in terms of the relation of the state with the indigenous peoples. At a political level, six basic forms of relationship between the state and the indigenous others were recognized in the influential study of Cobo: segregation, assimilation, integration, fusion, pluralism and autonomy (Idem). Importantly, Cobo stated that while the model of integration impulses the recognition of legal equality amongst indigenous and non-indigenous members of the national society, it requires the modification of "those cultural elements which hamper the *progress* of these groups and of the State as a whole" (Idem, 54 f.; emphasis added). The discussion of the question of whether this was the desired relation between the state and indigenous peoples within the frame of the UN would have to wait, however, until the 1980's, when the report was concluded and the work on the 'Declaration on the Rights of Indigenous Populations' could be started.

In the decade of the 1980's, not only the indigenous claims gained force in the international debate, but a plurality of social movements claiming for recognition and acceptance of diverse areas, from gender to ecology, took force synchronically and interacted with each other creating political alliances to support their goals while the development paradigm, as we have seen[193], went into a deep crisis. While all these social movements involved claims regarding

191 For the tense relations between the concepts of 'minority' and 'indigenous people' and their consequences for the international political development, see Kymlicka 2009.
192 The study was launched in 1972 and completed in 1986.
193 See chapter B, section IV.

legal matters, this aspect is especially clear in the field of indigenous movements, particularly regarding the right to self-determination (as formulated in the UN Human Rights Covenants mentioned above in their art. 1).

Importantly, the right to self-determination serves as a basis for claims of indigenous groups not as particular privileges towards 'special cases', but as the consequent enactment of a principle valid for all peoples (Kuppe 2010, 2). In legal questions, this autonomy means, as Kuppe underlines, not only the social control over the issues in the community, but also the control over the "adaptation of a society to social change and to new external challenges" (Kuppe 2010, 9). In this sense, the claim is oriented to change from a recognition by exoticization or particularization to a recognition by 'normalization' or 'universalization', i.e. by subsumption under a common principle. Nevertheless, the question regarding who can count himself as addressee of this universal principle remains. This is particularly the case in regards to the question of cultural minorities that are not recognized as indigenous peoples (Kymlicka 2009). In other words, also this universal principle of 'self-determination' has exclusionary aspects. Furthermore, it is important to notice that this allegedly universally valid principle equally requires a legitimization, and the legitimizing source is lastly an instrument of positive international law derived from a particular understanding of the authorities involved and their relations.

At the same time, while the right to self-determination addresses a collective interest key to the indigenous claims, the recognition of indigenous law responds equally to a "newer principle of Human Rights", namely that legal norms can only create a legitimate obligation against the subject, when these norms are based on a adequate respect in front of the cultural background of that individual (Goransky ref. in Kuppe 2010, 9). It serves thus the 'subjective right' to be free of legal arbitrariness and discrimination, which is equally understood as a universally valid principle. Thus, Kuppe concludes that: "In general, the recognition of indigenous law presents itself as part of a broader social project, which is about less discrimination and repression and more participation and democracy" (Idem). This is also the perspective that allowed the indigenous organizations to find allies in other social movements.

From a human rights perspective, besides these basic rights which are explicitly in connection with a cultural approach, also the other aspects of a social situation of discrimination and economical marginalization in which indigenous people often live become relevant for their claims of recognition of the own normative understandings. In fact, the socio-economic situation translates in a particular condition in the judicial context, where certain obstacles might appear more likely or have heavier consequences. Take for example

the lacking personal and financial endowment of the courts in the countryside, linguistic barriers, spatial distance from the institutions, and the consequent inefficiency of the judicial apparatus (Kuppe 2010, 10). All these circumstances in which indigenous peoples are often embedded because of their cultural practices on the one hand and because of historical marginalization on the other, derive into situations with certain proclivity for misinformation and abuse. In the end, the access to the official state justice system can turn particularly difficult. In this context, instead of being a tool against repression and arbitrariness, the state legal system ends up incarnating their most clear expression. Thus, the claim for a recognition of the validity of indigenous law is addressed as a key element for dealing with this kind of social imbalance.

Importantly, from a perspective of identity politics, this social imbalance finds expression also in the fact that the public order of the state supports the need and the identities (only) of specific ethnic and national groups. In this sense, Kuppe, referring to Kymlicka, argues that "[t]he liberal state is thus [...] not neutral in front of all cultures, but brings forward some and discriminates others. Moreover, the culturally oblique foundation, on which statehood is based, produces unavoidably, that some cultural identities are furthered and, as a consequence, others are necessarily disadvantaged" (Kuppe 2010, 9). Legal researchers have argued that the recognition of the special status of members of cultural minorities, and thus the recognition of their legal autonomy, allow to balancing this cultural tilt of the state.

It is noteworthy that while the recognition of indigenous law could be seen as contradicting the principles of equality, fairness and justice because it enables diverse forms of treatment according to cultural backgrounds, it is also possible to argue that it is this recognition that enacts these principles to their most advanced level. Thus, Kuppe underlines that

> "it corresponds to liberal basic principles that citizens can follow their own life script. These life scripts are, however, connected with concrete cultural models and contents. Exactly from a liberal perspective is it possible to derive a composition of social life, according which minority cultures are not only recognized, but their life drafts are encouraged and institutionally anchored" (Kuppe 2010, 9).

In the line of the approach proposed in this research, it can be argued that it is because of the ambivalent structure of modern law that both contrary claims are arguable with the same argumentative tools: the answer to the question regarding what is 'equal' and therefore of what should be treated equally in the name of justice is externalized but not solved. This is a parallel situation to the academic discussion around Kelsen's positivism, which can be used

as a tool against or in favor of the claims of indigenous groups.[194] Similarly, for indigenous organizations it has been problematic "the paradox of invoking Human Rights in order to justify their autonomy and, at the same time, be criticized for violating Human Rights in certain cases" (Assies 2003, 9).[195] Importantly, an adaptation of the two normative bodies is achieved through reinterpretation, so that "the result is often the adjustment of indigenous law to Human Rights and a reinterpretation of the indigenous law as well as the Human Rights" (Idem). The questions, however, remain present: Who can reinterpret what and how much interpretative instability can endure the system?

In the end, this ambivalent character finds expression also in the diverse streams of interests entangled in the struggle for legal reform in favor of the recognition of indigenous law. In this sense, Boaventura de Sousa Santos and others have addressed the contradictory character of globalization arguing the coexistence on the one hand of a 'globalization from below' and, on the other hand, of a 'hegemonic neoliberal globalization', which, as we will see, found expression in the concrete institutional developments planned to incorporate the indigenous 'other' in the judicial system (Sousa Santos 2003, 209 ff.).

The concrete development of international law regarding indigenous and minority issues continued (after the report of Cobo was finally presented in its totality in 1983) with the project of a declaration on the rights of the 'indigenous populations'. This endeavor started in 1985 with a clear emphasis on an open politics of participation. In 1993 the draft of the 'UN Declaration on the Rights of Indigenous Peoples' (United Nations 2008) appeared, which would finally be approved in 2007. In a parallel development but with a contrasting approach in terms of public participation, the revision of the ILO Convention no. 107 took place, culminating in the ILO Convention no. 169 in 1989. In this case, the organizations of employers and employees were consulted by the corresponding state administrations, while the consultation of indigenous representatives and organizations remained facultative, and thus only four countries took that opportunity, namely Australia, Canada, Finland and Sweden (Aragón Andrade n.d., 57)

Importantly, while the integrationist spirit of the ILO Convention no. 107 was unanimously rejected, the emphasis on the unity and sovereignty of the state remained present throughout the discussions as well as in the final version of the document. In this context, the

194 In this latter sense see for example the argument of Correas 2003, 19 ff.

195 See for example the discussion around the decision of the Colombian Constitutional Court T-523, where the court justified the use of physical violence as a form of indigenous sanction.

change of the term ‘indigenous populations’ for ‘indigenous peoples'[196], associated with the idea of sovereignty of the people in terms of international law, and the change of ‘indigenous lands’ for ‘indigenous territories’ built the core of the controversies. Thus, the new model oriented the discussion around particular concepts and their meaning within a specific system of positive law, taking the role of the state as a formal entity to the foreground. The question over a unifying identity in the frame of the integrationist model of a Nation-State gave way to the discussion over a formal frame that could include, under its sovereignty, a variety of self-determined (and changing) identities. Thus the preamble of the ILO Convention no. 169, puts the new document as the result of the recognition of “the aspirations of [the indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live [...]” (ILO 1989). This general intention results, importantly, in the more concrete recognition of “the right [of indigenous peoples] to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development” (Idem, art. 7.1). Thus, a limited autonomy was accepted, even if the document makes no explicit mention of the right to self-determination (Rodríguez-Piñero cit. in Kuppe 2010, 7). That these identities are meant as self-determined identities, is a consequence of the introduction of the criterion of self-identification as native at the base of the applicability of the Convention. Thus, art. 1 par. 2 states that “[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply” (ILO 1989).

While these recognitions are very important at a level of international politics, ambivalence (or polyvalence) is present throughout the text as well as throughout its preparation. Allegedly, a movement away from the integrationist model was a central goal of the new convention, however, the participation of indigenous groups was not at the base of the procedure. At the same time that the term ‘peoples’ is included in the text, it is emphasized that this term does not have any implications on the rights according to international law (art. 1 par. 3). Similarly, the concept of ‘territory’ was included, while at the same time the term ‘lands’ was used “in order to limit the scope of the prerogatives that the indigenous peoples could invoke” (Aragón Andrade n.d., 61). Finally, while the convention aimed to address and

196 The term ‘population’ was rejected insofar as it carries the meaning of “temporary (and possibly soon to disappear) demographic category [*Erscheinung*], while the concept of ‘peoples’ has also socio-cultural connotations, including the recognition of “long-term political rights” (Kuppe 2010, 7).

respect the institutions and socio-cultural practices of indigenous peoples, the art. 8 par. 2 underlines that: "[t]hese peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. [...]" (ILO 1989), thus iterating the 'repugnancy clause' typical for colonial regimes. This limitation is reinforced regarding indigenous legal systems in article 9 par. 1: "[t]o the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected" (Idem).

Various authors emphasize the need and importance of overcoming this tension through an interpretation of these documents according to an all-encompassing emancipatory approach or, at least, according to the values they claim. So for example, Kuppe argues that "the norms must be interpreted in the light of the general aim of the convention: legal self-control, at least over those issues which affect the interests of these peoples, is the consequent outcome of the meanwhile recognized principle of the self-determined development of indigenous peoples" (Kuppe 2010, 8). In this sense, while he recognizes that the concrete limit is unset, he argues that "the states will have to let themselves be guided by the own understanding of the affected peoples, since general extensive obligations of the state to consult indigenous peoples are enshrined in the convention" (Idem). Similarly, Yrigoyen Fajardo put a similar point to the front for the case of the national constitutions at the beginning of the 21st century (Yrigoyen Fajardo 2011, 141, 150, 154). While this possibility of the interpretation of positive law according recognized (and thus allegedly universally valid) principles is always open as long as we deal with a modern legal understanding, the tension (both in the text and in society) does not disappear through interpretation, it is just displaced to spaces of power beyond the word of the law. One interpretation is just one amongst many and cannot by itself claim more legitimacy without referring to a specific system of meaning; the argument turns in the end into a problematic statement: my interpretation is always (more) correct, when I use my standards of good and just.

If the resulting document was ambivalent, so too were the reactions in front of the final document. While indigenous organizations who assisted the revision process rejected almost unanimously the process and the convention itself, other organizations, particularly Latin American ones, expressed satisfaction regarding the new document (Aragón Andrade n.d., 62). This differentiated response, as Aragón Andrade argues, derives from the diverse national contexts in which these organizations were embedded, so that for some organizations from

Europe and North America, the recognitions of the convention meant a re-statement of rights already clarified in national legislation, while for others it worked as an engine for new or better national legislation.

In any case, also the description of Aragón Andrade reminds us of an interesting turn in the discussion, because while in the context of the ILO Convention no. 107 the diversity of the indigenous peoples does not seem to be a central element in the discussion, in the debate over the latter convention, the image of one group of people with similar concerns, splits up into a variety of groups with diverse backgrounds and interests. This diversity was more visible in the 1980's because of the variety of indigenous groups that presented themselves as formalized organizations and became politically active at the surface of the international debate. In fact, this pluralization marked already the claim in the early 1970's in favor of the differentiation of the indigenous groups from the term 'minorities'. The argument was not only that in some cases the indigenous groups were not only not a minority but actually a majority of the population (like in Guatemala and Bolivia), but also that 'indigenous peoples' were an-other type of others (Kymlicka 2009, 18 ff.). This diversification of 'indigenous peoples' results also from a shifting of the perspective taken: while in the case of the ILO Convention no. 107, the document responds to a perspective of the state as subject in front of 'the natives' as the object of international ruling, in the ILO Convention no. 169, the activism of indigenous organizations positioned themselves as the claimers and subjects of a right of self-determination on their own. We are thus in front of a process of diversification of otherness, which goes hand in hand with the process of a diversification of sameness or own(ed) identities.[197]

It is this perception of a variety of others the one that the process of a draft of the 'Declaration of United Nations on the Rights of Indigenous Peoples' intended to address through mechanisms of participation, even if the UN Declaration does not create new rights and freedoms unforeseen in other instruments of Human Rights but it just transfers these rights to the special conditions of indigenous peoples (Stavenhagen cit. in Kuppe 2010, 9). However, while the participative character of this process gave the document allegedly more legitimacy than the ILO Convention no. 169 had, an analysis of the various drafts presented in 1988, 1994, 2006 and the final text of 2007 like the one Aragón Andrade provides, shows a sloppy blurring of the proposals and claims that the indigenous organizations made as a response to

197 Regarding the political connotations of the pluralization of state organization, see the discussion on legal pluralism above as well as the reflections of Assies at the beginning of this chapter.

the invitation to participate (Aragón Andrade n.d., 63 ff.). As the author argues, this process of blurring responds especially to the declining participation of indigenous organizations along the process of formulation of the document, due to the hierarchical functioning of the United Nations (Idem). In other words, the participatory approach proposed was not sustainable because it was embedded in a particular logic that filtered gradually the invited and participating perspectives, in the end negating, to a certain extent, the claims for recognition of particular forms of 'otherness'.

Just to take an example, we can look at the aspect of state sovereignty, which had not been made explicit in the first versions of the text, while art. 46 of the approved version emphasizes this point. Also in this context, the elements of the sovereignty of the state and its titularity to demand the proper implementation of the Declaration prevailed over the titularity of indigenous peoples to demand the actualization of their rights in front of international tribunals (e.g. art. 37, art. 19; Aragón Andrade n.d., 65 ff.). Regarding the recognition of indigenous law, however, the strict subordination of indigenous law to the state seems to have loosened insofar as art. 34 states that: "[i]ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards" (United Nations 2006, 70). Even if there is still a supremacy clause of a legal system determined by a particular socio-cultural background based on the Nation-State and embedded in a specific system of restricted authoritative interpretations, at least, in this way, the indigenous legal systems are recognized as legal systems[198] and put, the same as the national legal systems, under the standard of the dispositions on Human Rights of the United Nations.

In the last pages, I have presented the historical and political international context in which indigenous rights and indigenous law have been discussed and regulated. Summing up, while the struggle for more international recognition of indigenous rights has achieved some important changes in the regulatory statements of international law, the resulting legal instruments did not meet the expectations they created. They remained, as products of a system that is designed according to particular mechanisms of hierarchy and exclusion, distant from demands of recognition amongst equals. Under these circumstances, it was impossible to produce an encompassing transformation of the relationship of international law to plurality.

198 Note the difference with the ILO Convention no. 169 where still the term "customary law" (art. 8 par. 1) is used, which invokes a certain cultural evolutionism (Aragón Andrade n.d., 72 cit. Yrigoyen Fajardo).

Importantly, these documents responded to a particular understanding of 'otherness' that was equally exclusionary in front of other others, like minorities which did not fit under the concept of 'indigenous peoples' (Kymlicka 2009). Nevertheless, they offered an international foundation for national discussions that had concrete consequences in the further development of law in several Latin American countries, which I will discuss in the next pages.

### 2. *National Changes*

These changes at an international level had as a main consequence the reform of national laws in a context in which several countries in Latin America started transition processes from dictatorships to democracies. Importantly, these transitions were marked by big projects of legal transfer (towards 'better' law) during the 1980's. If the passage to official democracy and the recognition of rights for indigenous groups and other social movements present these reforms as movements towards more social equality and emancipation, it should not be forgotten, that this political project was accompanied by strategies of loosening market regulations and by the privatization of social services. Remarkably, these measures were officially promoted, if not requested, as loan-conditions and through experts assessment by international financial organizations like the IMF and World Bank, as tools for rebuilding the state and making its machinery more efficacious. As a consequence, social claims and their institutions were weakened, neutralizing the new rights. Take for example the Peruvian Constitution of 1993, which, the Peruvian scholar Yrigoyen Fajardo relates:

> "on the one hand, recognized the pluricultural character of the state and legal pluralism, but, on the other hand, eliminated the guarantees of inalienability, imprescriptibility and unseizability which the indigenous lands had since the Constitutions of 1920 and 1930. In practice, this enabled a big number of transnational corporations to install themselves in the indigenous territories to carry out their extractive activities, giving way to new forms of territorial dispossession similar to those of the 19th century" (Yrigoyen Fajardo 2011, 143).

As a result, the incorporation of these recognitions "generated, somehow, an inflation of rights without correspondence with institutional mechanisms apt for making them effective" (Idem).

Including these broader socio-economic concerns and from a perspective of positive constitutional law, Yrigoyen Fajardo distinguishes three main phases of transformation of the state in relation to cultural (and thus, also, legal) plurality, "a) the *multicultural constitutionalism* (1982-1988), b) the *pluricultural constitutionalism* (1989-2005), and c) the *plurinational constitutionalism* (2006-2009)" (Yrigoyen Fajardo 2011, 140 f.). These phases progressively put in question the "monoculturality, the legal monism and the indigenous

tutelary model" inherited from a colonial and a nationalist past, proposing thus a "long-term decolonizing project" (Idem).[199] In the following, I will address these three phases of legal development that aim towards an inclusion of the 'indigenous other' in a pre-established legal setting, or, even more, towards a transformation of the 'legal identity' of some Latin American countries.

The first phase of constitutional reforms with a certain pluralizing impetus, which Yrigoyen Fajardo characterizes as 'multicultural constitutionalism' (Idem, 141 f.), started with the recognition of 'multicultural heritage' in the constitution of Canada in 1982 and the explicit incorporation of 'rights of aboriginal peoples'. As part of processes of social pacification in war contexts, also Guatemala in 1985 and Nicaragua in 1987 made explicit recognitions of the 'multi'-character[200] of these countries in their constitutions.[201]

Taking the example of the constitution of Guatemala of 1985 and the constitution of Brazil of 1988, it is important to remark that the reformed documents referred to the need to respect 'forms of social organization' or to 'customs' but not to 'indigenous law' as such, a problem which, as we have seen in the debate on legal pluralism, is central for questions on the legitimacy of the indigenous normative orders. Importantly, as Yrigoyen Fajardo underlines, the constitutional norms of recognition of indigenous judicial functions did not create a new social phenomenon, but moreover resulted from the recognition of already *de facto* existing and exerted functions (Yrigoyen Fajardo 1999, 132).

Some years later, in 1991, the influential Constitution of Colombia was enacted, which derived from the workings of a constitutional assembly including indigenous representatives. With this document, the cycle of 'pluricultural constitutionalism', in the terminology of Yrigoyen Fajardo, was inaugurated. In this phase, the character of the state itself starts to be redefined, and pluralism and cultural diversity became constitutional principles (Yrigoyen Fajardo 2011, 142). In this sense, the rights recognized by the Colombian text went clearly further than the recognized in other contemporary constitutions, including that the authorities

199 For a comparative chart of the three cycles recognized by Yrigoyen Fajardo, see Yrigoyen Fajardo 2011, 155 ff..

200 While this formulation might seem quite ambiguous, it depicts a common (and equally ambiguous) element of the new documents of this period. 'Multi-' appeared in several forms as 'multiethnic', 'multicultural', 'multilingual', etc, with unclear and overlapping boundaries. The important feature for us is exactly this emphasis on 'the many'. Equally, the ambiguity of terms like 'ethnic' and 'cultural' and the opacity of the prefix 'multi-', behind which an undifferentiated bunch of 'many' hides, is an important aspect of these formulations.

201 It is important to remark, however, that also previous to these reforms, in some countries with constitutions that did not recognize explicitly legal pluralism, "secondary or political norms existed […] which recognized indigenous law, even if reduced to the resolution of minor conflicts amongst natives and with competencies no broader than the ones of the 'Justice of Peace', like the one contemplated by the Law of Native Communities of 1978 in Peru" (Yrigoyen Fajardo 2011, 142). For a detailed compilation of norms in this line see Clavero 2007.

of indigenous groups exert, within the territory of their jurisdiction, judicial functions according to their own norms and procedures (art. 246). Importantly, the Colombian constitution based this judicial function of the traditional authorities on the own norms and procedures of indigenous groups, and not, as it had been done previously, on state law. The scope of this recognition was, however, as usual also in colonial times, restricted by a sort of supremacy clause: "as long as these [indigenous norms and methods] do not contradict the constitution and the laws of the Republic" (Idem). In any case, the formulation of the Colombian norm became a model for a variety of other constitutions which were reformed or created afterward[202], expanding the model of recognition with limiting formulas "which not always were implemented in an organic and systematic way" (Yrigoyen Fajardo 2011, 143).[203]

Regarding the constitutional reforms in indigenous matters in Latin America before the new millennium started, it is possible to find, following Kuppe (2010, 2), five major commonalities:

1. the definition of Nation-States as an expression of pluricultural, multiethnic realities,
2. the recognition of the right of indigenous (and Afro-American) groups to development in the frame of their own cultural identity and according to self-given criteria,
3. the establishment of institutional conditions in order to secure the rights of these groups to the lands traditionally used by them, as well as certain controls over natural resources,
4. the establishment of political rights regarding self-government within the states, and
5. the recognition, in general, of collective rights, in order to establish and protect the interests of ethnic groups within the state.

Importantly, while through these reforms very similar expressions of legal pluralism are incorporated "which achieved to break the identity State-law or legal monism" (Yrigoyen Fajardo 2011, 142), the political environments of the different developments were quite diverse covering a spectrum from the mobilization and participation of indigenous groups in the elaboration of the new norms like in Colombia, to the draft of norms without participation

202 Important reforms in this line took place in Mexico and Paraguay in 1992, Peru in 1993, Bolivia and Argentina in 1994, Ecuador in 1996 and 1998 and Venezuela in 1999.

203 A counterexample of this development is depicted by the situation of Guatemala, where a public referendum regarding similar constitutional reforms made these changes impossible. It is important to mention however, that the public participation in the vote was of 18,6 % (Kuppe 2010, 15). For further analysis on this topic, see Warren 2002.

of the civil society under authoritarian regimes like in the case of Peru. Beyond these differences, however, it is a common aspect of these processes that the indigenous reforms form part of a more general development of state reform. Importantly, within the frame of judicial structures, models of alternative dispute resolution played a major role. For example, in the Ecuadorian constitution of 1998, the clause regarding the recognition of indigenous law is in the same article 191 as the regulations regarding "judges of peace" in charge of individual, communal or neighborhood conflicts, as well as regulations on "arbitration, mediation and other alternative procedures" (Gobierno Nacional de Ecuador 2009). Even clearer is the connection in the case of the Bolivian Constitution of 1994, where art. 171 explicitly mentions the application of indigenous law as a form of alternative conflict resolution (Honorable Congreso Nacional 2008). In both cases, as in the Mexican example that I will address in more detail shortly, this normative bundle responds partly to the claim for a relief of the overwhelmed courts of the excessive amount of cases, while also permitting, particularly through the incorporation of arbitration techniques, to take transnational corporations out of the realm of state judiciary. Thus, while indigenous practices are included and intertwined with practices of alternative resolution, they are put prominently in a context of maximization of the effectiveness of state-courts and thus at the service of their good functioning. It is questionable if this primacy of the principle of effectiveness and the functionalistic goal-oriented approach at the base of these reforms is in harmony with a pluralized concept of law, particularly with concepts of law oriented more towards a holistic social balance, as indigenous approaches are claimed to be.

Importantly, Kuppe recognizes the constitutional developments of the 1990's as the "formation of a new model of state with institutional free spaces for the unfolding of cultural diversity" (Kuppe 2010, 14 f.). However, it is questionable, how far the space is open to the 'unfolding of cultural diversity' in general. Rather a selective and restricted engagement with legal and judicial otherness took place through the establishment of normative as well as to the incorporation of cultural diversity in pre-given structures, following specific procedures. In other words, the practice of this opening of free spaces set at the same time clear boundaries that responded to limits formulated within a particular cultural scope.

The most obvious because formally explicit limit for the exertion of the judicial authority by indigenous authorities as recognized in the diverse constitutions, is the clause regarding contradictions with the respective constitution and national laws which is present in almost all Latin American documents. In the case of Venezuela even the contradiction with 'public order' conforms a limit, and the Peruvian *magna carta* includes equally the

"fundamental rights of the person" as a boundary of the constitutional recognition (Idem, 14). Importantly, while this limitation is decisive for the practical relevance of the indigenous law and its role in judicial practice, it is remarkable that in none of these normative limitations, the monetary, legal or moral relevance of the case at stake seem to play a role for the determination of the proper jurisdiction: there is no limitation of the indigenous jurisdiction to *causae menores* (Idem, 15).

Furthermore, the constitutions do not only set themselves limitations, but they open also the floor for further regulation through ordinary laws, specially regarding the coordination of indigenous judicial activity and state judicial activity. It is interesting to notice the status that this open regulation to the future acquires in the discussion of the recognition of indigenous law. Kuppe, for example, argues that this kind of clauses express that the indigenous authorities own a significance that makes a real coordination with the ordinary courts necessary (Idem), while Yrigoyen Fajardo speaks equally of an "horizontal relation between the ordinary jurisdiction and the indigenous (or special) one" (Yrigoyen Fajardo 2011, 148), since the indigenous legal and judicial organization is recognized as part of the public (state) legal system. In other words, the state seems to take indigenous law serious, at least as serious as its own judicial system. At the same time, taking the same clause as the starting point, it is possible to see this promise of future regulation as an open gate for increasing restriction in a way that the practice of indigenous law would be hollowed out. Furthermore, it is doubtful how far the recognition of indigenous authorities as part of the public (state) system supports the engagement and self-understanding of the indigenous groups considered. The inclusion within a structure means also that the same pre-existing constrictions apply to the newly included 'other', and, equally, that the new realm of indigenous law will be subordinated to the future changes of the general structure.

Noteworthy, there has been so far only one official legislative regulation of this type in Venezuela in 2005 within a general law on the rights of indigenous peoples. In the other cases only drafts of corresponding legislation exist.[204] However, the exertion of indigenous judicial authority is not impeded by this gap.[205] As Kuppe argues, the laws to be enacted regarding the limits of the indigenous jurisdiction do not originally constitute it, and insofar it is not dependent on any national law to come but it is already authorized directly by the constitutions (Kuppe 2010, 21). Importantly, these laws to be yet enacted cannot establish the

204 See for the case of Colombia the 'Proyecto de Ley Estatutaria No. 003 de 2000' and the 'Proyecto de Ley Estatutaria No. 140 de 2000', and for Ecuador the draft for a 'Ley de Administración de Justicia Indígena en el Ecuador' and similar efforts in Bolivia and Peru in 1999 and 2000.

205 In this sense, see for example the ruling of the Colombian Supreme Court T-254/1994.

content or procedure of indigenous law, but their function is merely to rule the interaction between that jurisdiction and the sphere of state courts.

One important aspect of this equalization of state law institutions and indigenous law institutions is that, putting the indigenous legal authorities at the same level than other public institutions, implies that the indigenous authorities cannot be prosecuted for their decisions within the frame of their function. Here relies an important divergence between theory and practice that shows the quandary in which indigenous courts are entangled. Because, while in theory we are dealing with two separate legal fields, in practice it is not uncommon that persons participating in procedures of indigenous law as authorities or their representatives are accused of crimes according to non-indigenous law, namely ordinary state norms. Thus, accusations of deprivation of personal freedom and unlawful assumption of public authority still happen (Kuppe 2010, 21). In other words, while on the one hand the freedom of exerting judicial authority according to own communal principles is granted within the (demarcated) indigenous community, erasing apparently the homogenizing oppression of state law, the pressure to be submitted to state law is displaced to the individuals exerting that indigenous judicial authority.

It is easy to agree with Kuppe on the point that this type of accusations are absurd following the logic of the constitutional recognition (Idem). However, it is imperious to see also that this absurdity is not a mere irrational or unexpectable aspect, but it is a natural consequence of the setting in which the door for indigenous law has been opened *within* the state legal system. The limit of state law explicit in the constitutions has thus a double significance, because it not only puts a limit to the legitimized content of indigenous law, but it also puts indirectly a limit to the form and procedure of indigenous judicial authority and opens the door for individual prosecution of the participants in such procedures. In such a case, suddenly, the whole concern with a communal perspective understood as an asset of indigenous cosmological understanding gives way to the 'traditional' individualistic perspective anchored in modern state law. The behavior of indigenous authorities is not understood with the lenses of indigenous communal legal understanding, but it is subordinated to non-indigenous state law and its procedures. While this might appear absurd from a specific understanding of the *telos* of the constitutional general statements, it might appear equally logical to lean on the general restrictions of the constitutional normative arguing that specific decisions of indigenous authorities infringe basic constitutional rights. Given the ambivalence of the constitutional texts, that leave all doors open for further legislation and interpretation, this 'absurdity' is an expectable result.

Interestingly, the hope to deal with this tension is often put in the enactment of the implementation laws envisaged in the constitutional texts. This would, so the hopeful perspective, "in the characteristically positivistic legal environment of Latin America" (Kuppe 2010, 21), protect definitely the persons participating in the indigenous judicial procedures of legal problems.[206] It seems to me curious that the answer to a problem regarding the different interpretations of a positive norm, namely the constitution, could be solved somehow with more or more detailed positive norms. Also these last ones will require interpretation, even more so since their detailed character would derive into a matrix of particular interpretations. Furthermore, as I have argued before, positive constitutional norms as well as ordinary norms are always necessarily in need of interpretation. Importantly, naturalistic arguments, which are regularly part of the basic norm or constitution, are the ones which can give more or less legitimacy to one or the other interpretation. Therefore, while adding more law might be useful in the beginning, in the end, it just adds more steps within the same closed circle of interpretation of positive law according to positivized naturalistic understandings of law.

In this line, it is important to remark that, while the capacity of indigenous legal decisions to have the *same* immediate relevance, status and consequences than state law, invites to argue for the need of the recognition of indigenous judicial decisions regarding the entry in registers of property and the like (Yrigoyen Fajardo 1999, 138), this type of claims equally poses questions regarding the autonomy and the 'new legally legitimated freedom' of indigenous people to use their own norms. How far does that freedom go, if, in the end, the whole apparatus around that freedom integrates the different 'other' within the hegemonic logic? Similar questions arise regarding the discussion on the incorporation of indigenous law within the frame of administrative assistance. In general, the result is a legalization and a judicialization of portions of society which were until now beyond the field of state law. The protection that the state offers, in this sense, requires the subordination under its rules. As a result, the recognition resulting from the creation of an 'indigenous jurisdiction' implies also an incorporation within a particular preexisting system and this restricts, in turn, its possibilities of action according to its own terms.

One central aspect of this tension is right at the beginning of the whole discussion around the indigenous jurisdiction, namely the question on the personal and territorial jurisdiction. With this problem we go back to the question regarding the divisory line between indigenous/non-indigenous, us and them. Problematic is, to start with, that the property titles

206 In a similar line, see Yrigoyen Fajardo, who criticizes the lack of institutional mechanisms apt to make the new indigenous rights effective (Yrigoyen Fajardo 2011, 143). Therefore, she agrees with Kuppe regarding the need of these implementation laws.

for particular regions have not been completely elaborated, and it remains equally unclear how to determine the belonging of a person to an indigenous group. Furthermore, the question remains on how far indigenous normative conceptions would be applicable for non-indigenous peoples within a specific geographic area and, equally, how far these conceptions could be applied for indigenous peoples beyond the geographic jurisdiction specified for indigenous law. In the same line, it is also an important topic in the discussion if the indigenous jurisdiction has an obligatory character for indigenous people (in other words, the question regarding the so called 'forum shopping'). Summing up, the incorporation of indigenous law to the state system depends on the definition of who is 'native' and what is 'indigenous territory'. How far the indigenous law is valid depends, thus, on categories preset in state law, like territorial and personal jurisdiction, which derive, in turn, from a particular understanding of individual, community and territory. Importantly, even the determination through self-identification has some limits, insofar as it has to correspond with other criteria that are argued to justify that self-understanding as indigenous, like personal history, lingusitic capacity, place of residence, etc. Strangely enough, the criterion of self-identification itself needs to be preset within state law, determining legitimate ways and testimonies of self-identification, and even, at an abstract level, forms of understanding and expression of 'self' and 'identification'.

This is in part connected to the fact that, during the 1990's, the process of international recognition based on a treatment of indigenous peoples as minorities, determining later the national documents. This treatment of indigenous peoples as minorities induced the incorporation of new rights of these communities *as complements*, including political approaches and institutional practices that aimed to add to existing state institutions and practices, not to change them or transform them in their core. This approach has been characterized thus as a 'complementing multiculturalism' (Walsh 2002, 25). Problematically, while this shift made the variety of cultures more visible, legitimizing and, to a certain extent, recognizing as equally valid public institutions with different logics, values and norms, it also demarcated a limit for the participation of these minorities in the broader realms of the social, political and economic life of the unified state. The practical aspect of this situation finds expression in the process of constitutional reform, where indigenous groups participated only in a restricted way, as well as in the subordination of indigenous law under the judicial authority of courts of final appeal that are conceived as monocultural entities (Kuppe 2010, 26).

Furthermore, since the possibilities of indigenous groups to influence the bigger picture of national politics was clearly restricted to specific areas and procedures related to the political sphere of the state, Kuppe concludes that "privatization, deregulation, [and] the retreat of the state from several areas of life undermined in a certain way the new public status [of indigenous peoples] and the commitment to pluralism" (Idem).[207] However, it is worth remembering that the retreat of the state is not a completely different or disconnected movement from the recognition of indigenous law, that affects the pluralistic claims from an opposite side or from the outside. Moreover, the pluralistic claims of indigenous groups request equally a retreat of the state in terms of pulling out from indigenous social and legal spheres, and this retreat has been identified and supported as such by the international community. It is from this retreat, that the state and its judicial system hope more efficacy and reduction of costs as well as, possibly, a better socio-cultural balance. This 'undermining' is not the result of a new force, but is part of the same force. In this sense, the claim of a legal pluralism without a political, economical and social de-regulation and weakening of the state, seems contradictory from a perspective that fights for the coexistence of different systems with equal validity.

Importantly, the legislative changes of the 1990's were connected to a particular approach on development aid and the role law took in it. While the democratic state (under the rule of law) is not *per se* equated with a unitary state, this equation has been implicitly accepted in the politics of international development. In this sense, Kuppe highlights three main aspects of international development politics that entered in tension with the indigenous claims (Kuppe 2010, 32):

1. the creation of a unified state as a goal, taking the governments as the primary partners in development projects,
2. the unitary state as a condition for the realization of the Human Rights of the population (ideal of equality, formal legal security, and emancipation for discriminated groups)
3. the assumption that the allocation of resources is more transparent with a unitary democratic state, which creates the political and organizational ground for the intended economic development.

207 Similarly, Yrigoyen Fajardo speaks of the "neutralization of the new conquered rights" as a consequence of "the simultaneous adoption of neoliberal postulates and indigenous rights in the constitutions" (Yrigoyen Fajardo 2011, 143).

In the same line, Chivi Vargas describes the longstanding perspective on "the judicial systems [sic] of Bolivia and by extension in Latin America" as follows:

> "[...] the cooperation agencies see only problems in: judicial education of the operators, institutional corruption, excessive support personnel, inadequate technology, etc., which would have a direct bearing in the lack of 'access to justice'. [... T]he self-diagnostics lead us to point out that the biggest problem is the budgetary one and – in descending scale-, the judicial training, the systems of selection of judges, etc., etc., consequently problems in the 'access to justice'. Without doubt, these two perspectives have been the ones that marked the agendas of modernization of the systems of justice administration in Latin America, since already almost fifty years, but – and most particularly – in the neoliberal age" (Chivi Vargas 2010).

From this perspective centered in a unitary state system, the movement towards non-state laws and conflict resolution beyond state control has been interpreted, in part, as a paradox in front of the seemingly unifying movement of globalization understood as a homogenizing movement along the lines of these developmental assumptions. In front of the clear goal statement of a unified state, the success of other forms of resolution has been seen as a failure that endangered democratic and human rights standards as well as the socio-economic development of the specific countries (Kuppe 2010, 32). However, the creation of a modern unitary national state became equally problematic, since it took with it that different non-modern conceptions of social organization, and with them different cultures, would be displaced and removed.

The main problem that development institutions feared was that the particularization of law and non-state decisions with judicial validity would undermine the capacity to act and the legitimacy of the actions taken by the state, particularly in the cases where the transition from authoritarianism was still in process, giving way to abuses of power and unregulated forms of violence and social sectarianism. In other words, the destatization of the realm of law would put in risk the fulfillment of Human Rights, the effective allocation of resources, the access to justice, and, lastly the efficiency of the state as such, which is entrusted with the duties to protect its citizens. At the same time that development aid in the realm of law oriented its efforts towards an unitary model of state law with these arguments, however, the same concerns founded a seemingly contrary approach: it is as a response to this search for efficiency, that development institutions fostered the implementation of new ways of conflict resolution connected with state structures.

Importantly, this is a process that goes beyond the national realities or even beyond the situation in the Latin American region as a whole. As Sousa Santos remarks, during the 1980's a sense for a crisis in the judicial systems was present in the Western European and North

American countries (the so called ‘global north'), that produced two types of reform proposals: some oriented to technocratic changes, and others aiming for the informalization of the judicial system (Santos 1982, 10). Also this sense of crisis and this reformative approach reached Latin America, producing a big wave of reform proposals. The proposed reforms use since then a variety of arguments that go from the offensive against corruption to the enhancement of the ‘rule of law’, from the promotion of Human Rights to organizational and administrative re-adjustments of the judicial machinery. However, as Aragón Andrade emphasizes, they form a unified package that is presented not only “as the solution to the crisis of the state tribunals, but it is also claimed as a necessary condition in order to guide the States of the global south through the path of free market and by extension of democracy” (Aragón Andrade n.d., 8 ref. Przworski).

It is in the frame of these judicial reform projects, that the ‘indigenous reforms’, this is the recognition of indigenous rights particularly regarding their own legal systems, took place. As Aragón Andrade puts it, the indigenous reforms participated in the process of production of “a different conception of the role of the tribunals of the State in society, and, consequently, a different conception of their organization, administration and internal logic” (Idem, 7). Importantly, this process of transformation of the judiciary was embedded, in turn, in the context of international political and economic reorganization.

To understand the links between the international political situation, the various judicial reforms, and their corresponding indigenous reforms in Latin America, it is central to be aware of the role played by the Washington consensus and its re-evaluation during the 1990's.[208] The ‘Washington consensus’ had been formulated in the context of a search “to look ‘beyond the debt crisis’ in an effort to chart a path for restoring sustained prosperity in the region” of Latin America in the 1990's (Kuczynski/Williamson 2003). In the famous paper, where the concept was coined, John Williamson (*1937) “identified 10 areas where policymakers and scholars in ‘Washington’ could arguably muster a fairly wide consensus as to the character of the policy reforms that debtor countries should pursue” (Williamson 1990, 9).[209]

208 The term ‘Washington Consensus’ was coined in the “background paper for a conference that the Institute for International Economics convened in order to examine the extent to which the old ideas of development economics that had governed Latin American economic policy since the 1950's were being swept aside by the set of ideas that had long been accepted as appropriate within the OECD” as Williamson, an US-American economist and the author of that paper, tells us (Williamson 2004). The proceedings of this conference, including the text of Williamson who edited the publication, were published in 1990 with the title ‘The Progress of Policy Reform in Latin America’ (Williamson 1990).

209 Importantly, “‘Washington’ was defined for these purposes as encompassing ‘both the political Washington of Congress and senior members of the administration, and the technocratic Washington of the international financial institutions, the economic agencies of the US government, the Federal Reserve Board, and the

However, some years later a phase of assessment of the economic principles in the region started, since economic transformation towards the free market was seen as unsuccessful, particularly due to institutional obstacles. The new (intermediate) goal was thus to transform those institutions, as the paper issued by the World Bank 'Beyond the Washington Consensus: Institutions Matter' makes clear (Burki/Perry 1998). In harmony with this concern for institutions, a paper of the Inter-American Development Bank stated also:

> "In recent decades, the economic science has become increasingly convinced of the need to incorporate institutional factors in the economic analysis. In particular, the New Institutional Economics (NIE) postulates the important role institutions play in the functioning of an economy and its possibilities of growth" (Eyzaguirre 1996, 2).

With some more detail, Burki and Perry remark that

> "institutions matter for development because they determine the efficiency and existence of both markets and organizations, public or private [...] [B]oth the rate of capital accumulation (physical and human) and their quality and efficiency depend on formal and informal institutions. And thus, we expect institutions to influence the rate of economic growth" (Burki/Perry 1998, 15).

Particularly interesting for us in these quotes is not only the specific reference to development, most importantly to development as economic growth, but also the emphasis put on formal *and* informal institutions. This opening of the 'institutional frame' object to reform and development, was also clear for the Inter-American Development Bank: "Institutions can be formal (constitution, laws) or informal (social norms, codes of conduct)" (Eyzaguirre 1996, 2). Furthermore, the overwhelming presence of the principle of efficiency in both private and public spheres shows the centrality of this concept for a linear thinking oriented towards one goal: economic growth. It is in these terms that *one* ideal of law is formulated: "Good institutions, in summary, should provide rules that are clear, widely known, coherent, applicable to all, predictable, credible, and properly and evenly enforced" (Idem). Needless to say, this is just one side of a circle, where good law is, in turn, defined as one which creates, enhances and supports this kind of 'good institutions'.

Importantly, while informality and the private sector play a major role in this new concept, the state has a clear function within this paradigm, namely to guarantee the institutional frame "in order that the market works adequately" (Aragón Andrade n.d., 10). Hence, Burki emphasizes: "Still, with the greater reliance on markets and the private sector, the state will play an important role in providing basic services, and as a facilitator and arbiter

think tanks'" (Williamson 1990, 9).

of private sector development" (Burki 1995, 11). In this line, institutional reform, driven by the state, was seen as a process subordinated to the goal of functioning markets:

> "[s]ince markets need an adequate institutional framework to perform well, a program of institutional reforms should be an important element in the new development strategy that is being shaped in Latin America. [...] The failure is [...] on the lack of the necessary conditions for the markets to work. It is there where the role of the state must be important, generating such conditions" (Eyzaguirre 1996, 3).

Following this perspective, where the state failed to guarantee these conditions, i.e. where the institutional infrastructure was *less developed* according to the standards set by international banks, the market economy was dysfunctional. In terms of the report of the Inter-American Development Bank:

> "following the NIE model, we can observe that in the Less Developed Countries (LDC) institutions can not adequately assign and protect the agents' rights, generating high transaction costs and restricting the functioning of the market economy. As a result, markets can not expand, specialization is low, monopolic or oligopolic markets are very frequent, individuals have fewer possibilities to reach more complex contractual agreements, have to resort to more costly contracting and to more costly ways of organizing their economic activities" (Eyzaguirre 1996, 2).

For "rapid and sustainable development", one major recipe with "worldwide" validity was thus "the clarification and protection of property rights, the enforcement of contractual obligations, and the enactment and application of rigorous regulatory regimes" (Shihata 1995, 13). In other words, having or not having rights, and most importantly, having or not having rigorous regulation, was reflected as a question of more or less costs, more or less investment, and more or less economic growth. Matters of law become relevant so far as they promote specific forms of financial transactions. The implicit assumption is that those transactions will bring prosperity, and, in turn, prosperity will enhance a socio-cultural development towards the better fulfillment of Human Rights.

With this perspective on law, the judiciary took a crucial role within the policies, assessments and recommendations of international agencies. Therefore, the World Bank supported strongly processes of judicial reform according to this new perspective on economic growth, starting from the conviction that:

> "[j]udicial reform benefits all users. It benefits the private sector by making business transactions more predictable, and it benefits the public sector by establishing better regulation and accountability. Finally, it benefits the people by increasing access to legal aid programs and services. The rule of law establishes the basic principle essential for a sound economy. In particular, judicial reform directed at achieving effective implementation of the law is of central importance in reforming the role of the state and implementing development strategies"

(Burki 1995, 11-12).

Importantly, the reform proposed was addressed directly as a process of 'modernization' against the "risk of 'antiquate' legal normative" (Iglesias 1993, 9). As the then president of the Inter-American Bank of Development concluded determinately, "[i]ts modernization is an essential ingredient of development" (Iglesias 1993, 9).[210]

The justification for this change in the international development agenda and for the wave of institutional reforms was provided by a consequent reference to worldwide studies, statistical charts and the construction of indexes, which proved the scientific truth of the "alleged link between a good economy and the development of public institutions" (Aragón Andrade n.d., 26). This form of addressing experience and justifying the maintenance or change of practices, was soon taken over within the judicial institutions (Idem, 16 ff.). However, the same claim to 'scientificity' resulted in a protection shield against every doubt regarding the legitimacy of these decisions, the process through which they were taken, the assumptions they were based on, and the further consequences they could have in the socio-cultural environment.

A complex approach to the questions of 'why', 'how', 'where from' or 'where to' was swept aside by the mere management of clearly categorized and structured behaviors. This impulse towards the judicial reforms marked equally their content, which can justly be addressed as a transition from the paradigm of justice to the paradigm of management. In this sense, Aragón Andrade underlines that the current ways to approach the demands of effectiveness, including predictability, speed and accessibility which these reforms try to respond to, changed the conception of the judiciary itself. Referring to Lavados y Vargas, Aragón Andrade, argues that there is a transition from "a justice incarnated in goals and transcendental values, to one at the service of the 'people' that turn to them for an 'efficacious' solution of their conflicts", thus conceiving of 'people' as agents of the market (Aragón Andrade n.d., 17 cit. Lavados y Vargas).

Amongst others, this step implied understanding 'justice as a service' (USAID 2010, 29), that needs to be offered to the clients in the service market as part of an exchange of values, organizing the professional structure, like a business branch, according to the principle of 'meritocracy' (Aragón Andrade n.d., 22), and incorporating statistics as the tool to measure the service of the structure as well as the merit of its elements, and thus as the central method

210 Remarkably, Enrique V. Iglesias (*1930) made this statement during the inauguration of a seminar sponsored by that institution, named '*La justicia en Latinoamérica y el Caribe en la década de los 90. Desafios y oportunidades*' ('Justice in Latin America and the Caribbean in the Decade of the 90es. Challenges and Opportunities'). This is just one example of a myriad of seminars of the sort that took place during the decade.

to measure state-justice (Idem, 23 f.). Statistics turned thus into nearly the only reference for performance of tribunals and even grew into specialized institutions within the tribunals.

There are, however, deep quandaries behind this 'progressive' reforms. Particularly, the method of developing judgments on the institutions and their functioning based on statistics, which is at the core of the reforms, results in serious problems regarding the necessary homogenization and standardization of parameters and registers. A statistic does not make the definition of the object of measurement unnecessary, but it makes it less visible and questionable. Moreover, there is an important connection between the 'scientificity' claimed through statistics and the traditional discourse in the judicial field of neutrality, objectivity and apolicity, which has been already questioned above (Aragón Andrade n.d., 24). However, with this impulse and as a result of the rejection of public monopolies and the traditional 'hierarchical model' of the administration of public institutions, the paradigm of 'public management', based mainly in perspectives on the functioning of the private sector, became central .

Importantly, this process meant also to follow the US-American example, separating between administrative and jurisdictional functions within the judicial institutions, what, despite the fact that its universal applicability was assumed, created immense tensions not only in the Mexican context Aragón Andrade investigates primarily, but also, for example in Spain (Idem). In this line, the judicial reforms in Latin America created, with diverse nuances, the 'Councils of the Judiciary' as separate institutions in charge of the administration of the tribunals. As we will see, it is no coincidence that these changes in the judicial institution went hand in hand with the indigenous reforms in the region, which brought in the Mexican case the incorporation of indigenous tribunals to the judicial structure of the state. Along these lines, and making use of Aragón Andrade's recent field research, I will address, in the following pages, the particular constellation of judicial and indigenous reforms in the case of Mexico as projects of legal development that were promoted in the name of plurality and cultural diversity.

*a) The Creation of Indigenous Courts in Mexico within the Global Context of Judicial Reform and Legal Development*

In line with the international developments and the consequent constitutional reforms in Mexico, which I will refer in some more detail soon, in the end of the 1990's some of the federal states of Mexico started processes of official state validation of indigenous justices. The first state reform in this sense took place in Quintana Roó in 1997, building the model that other states followed in turn. Importantly, this process was connected to a more encompassing project of judicial reform, so that the same day that the law on indigenous justices was published, also the law creating the Center of Alternative Justice of Quintana Roó was established (14th August 1997, Aragón Andrade n.d., 102). Importantly, as Aragón Andrade remarks, the "'indigenous courts' were born incorporated to the own state system of justice and operated formally under the regulation of the 'Law of Indigenous Justice of the State of Quintana Roó'" (Idem). Taking this indigenous reform as a model, also other states formulated a "recognition within the structure of the state judicial power and under the normativity of the tribunal" (Idem, 103). In the following, I will use the example of the reforms in Michoacán investigated in detail by Orlando Aragón Andrade, in order to put in question contemporary alternative approaches to legal development that, embedded in a late-modern or even postmodern sociolect, are promoted as key elements in the incorporation of plurality within modern law.

In the same line of the arguments I have presented above regarding the manifold connections between the recognition of 'indigenous law' at an international level and the changes in perspectives of development, particularly legal development, Aragón Andrade argues that the Mexican indigenous reforms are equally linked to the process of globalization, understood as a process of intensification of connections, in a twofold way. On the one hand, the establishment of 'communal tribunals' developed in the context of a general judicial reform, which included also new mechanisms of management of the tribunals and methods of alternative justice. The introduction of these elements was successful under the influence of international development organizations and agencies oriented towards modernization, more efficacy, and a transformation from justice to management in the sense I described above (Aragón Andrade n.d., 15). While the 'success' of the reforms according to their own parameters is questionable, Aragón Andrade points out that they produced a dramatic change

in the fundamental priorities and values set as goals by the system of justice. In this sense, he puts in question the assumption that the Mexican judicial reform, or other similar reforms in the region, was the "materialization of a 'pure or neutral' better administration of resources" (Idem, 19). Put differently, he rejects a mechanistic and instrumentalistic perspective characteristic for a modern approach to law, development and legal development. In the terms of Sousa Santos and Aragón Andrade, this judicial reform and the changes in legislation regarding indigenous groups it included, are an expression of the aspect of globalization that they label as "hegemonic neoliberal globalization" (Aragón Andrade n.d., 4 f. and Sousa Santos 2003, 209).

On the other hand, these authors remark the parallel existence of a "globalization from below", which involves the "transnational organization of the resistance of Nation-States, regions, classes or social groups victimized by the uneven exchanges which nurture" the hegemonic neoliberal aspect of globalization, "using in its benefit the possibilities of transnational interaction created by the global system in transition, including those which derive from the revolution of the information and communication technologies" (Sousa Santos 2003, 209). It is in the context of this type of globalization, that Aragón Andrade puts the increasing presence of indigenous organizations, their interconnection and their international political activism, recognizing the actors as historically oppressed characters, who, acting from the margins, have made use of the limited spaces in which they could act (Aragón Andrade n.d., 37 f.). In this sense, he recognizes the role of an 'indigenous diplomacy' in promoting "the production of legal instruments on rights of the indigenous peoples in the international system as a strategic tool to promote, in turn, the change in the legal bodies of the diverse national states where they live" (Idem, 38). These efforts were themselves embedded in a variety of processes that include, amongst others, the recommendations issued by the committee in Human Rights of the United Nations and the judicial activism of indigenous organizations in cases against the state.[211]

Utilizing this differentiating approach on processes of globalization, Aragón Andrade addresses the elements of a 'hegemonic neoliberal globalization' included in the Mexican reforms through an interesting analysis of the alternative mechanisms of conflict resolution (usually named 'Alternative Dispute Resolution', ADR) and their role in the processes of judicial reform, specifically regarding the creation of 'communal tribunals' in Michoacán. In

211 Note for example, the presence of indigenous organizations from diverse Latin American countries in the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights and their effect in the treatment and decisions on topics related to indigenous peoples (Aragón Andrade n.d., 39).

this sense, he conceives of the alternative[212] mechanisms of dispute resolution basically as methods of negotiation, mediation (or conciliation) and arbitration developed in the United States, the worldwide expansion of which results from processes of judicial reform promoted by international development organizations and agencies.[213] Importantly, Aragón Andrade characterizes the approach of Alternative Dispute Resolution as ambivalent, since it integrates different types of tools with almost opposite goals under a common title: while mediation is presented as a tool for groups of people with difficult access to the official state system to exercise their rights, arbitration is oriented to be useful to economically powerful actors to avoid state law (Idem, 29). Including these two groups of addressees, needs, goals and relations at the two ends of the spectrum of social power, the Alternative Dispute Resolution swing between a popularization of justice and its privatization.

In Latin America, it has been particularly USAID the institution that has promoted the Alternative Dispute Resolution as a beneficial set of mechanisms to be incorporated in judicial reforms, arguing for example that "ADR programs can […] manage disputes and conflicts that may directly impair development initiatives" (USAID/Center for Democracy and Governance 1998, 7). Importantly, USAID shares with the World Bank or the International Development Bank that all of them have equally fostered 'informal' mechanisms of dispute resolution. However, it is characterized by the fact that it is one of the agencies which, differently from other institutions, have explicitly presented their aid not only as linked to the economical growth of the region where their development plans are put in action, but particularly to economical, political and security interests of the United States. Consequently, it is not surprising that this promotion of the Alternative Dispute Resolution is also linked to a clear economic focus (Aragón Andrade n.d., 27).

Importantly, Aragón Andrade argues in his thesis that there is a link between "the implementation of ADRs as part of the judicial reform and the recognition of the indigenous normative systems in Mexico", particularly in the case of the creation of the indigenous courts in Quintana Roó (Aragón Andrade n.d., 29).[214] To start with, USAID has argued that "ADR

212 Importantly, the concept of 'alternative' is itself, as Aragón Andrade recognizes, very ambivalent, since its meaning depends on an assumed idea of 'what is normal'. This instability echoes the instability of 'otherness' and, in our context, specifically the instability of the term 'legal pluralism' I presented above. As Aragón Andrade points out, for indigenous communities it is possible to argue that the official state-law is the alternative system, since they usually resort to a variety of other means before recurring to the state tribunals in order to deal with a conflict (Aragón Andrade n.d., 31 f.). In these cases, the alternative is the state.

213 Importantly, Willem Assies has characterized the 'alternative conflict resolution' as a "concept taken from US-American theories of law focused on the privatization of justice" (Assies 2003, 8). In this line, it is possible to say that justice is an example for a larger process, through which social services provided by Latin American states were privatized during the 1990's.

214 Also Manuel Buenrostro Alba makes a link between the establishment of an alternative system of justice

programs can provide a reasonable degree of justice if a tradition of informal dispute resolution exists" (USAID/Center for Democracy and Governance 1998, 27). Thus, this agency acknowledges the "importance of these traditions as a background condition for success" of their reform policies(Idem). From the perspective of this development agency, not only are these "supportive cultural norms" important for the "acceptance of informal processes" but also to build "appropriate standards for settlement" and, most importantly for the "enforcement through community customs and sanctions" (Idem).

However, as Aragón Andrade remarks, there are important differences between the indigenous forms of justice and the Alternative Dispute Resolution mechanisms, most importantly "because the objectives pursued, the ideologies that drive them and the form in which they are institutionalized are different to a great extent" (Aragón Andrade n.d., 31). Key is, for example, the difference between the role of the 'mediator' in Alternative Dispute Resolution mechanisms and in 'indigenous justice systems', that Aragón Andrade identifies stating that:

> "while, in general, the persons in charge of doing the mediations under the scheme of the ADRs are persons with a technical and formal preparation to hold their position, the 'mediator' in the indigenous justices is characterized generally by being the bearer of another symbolic capital, which, under the context of indigenous communities, seems to be more appreciated, like the work trajectory of that person in the community and his public prestige" (Idem, 32).

Furthermore, the author argues that the inclusion of Alternative Dispute Resolution mechanisms in the same 'package' with indigenous law due to their alleged common aspect of informality, is a result of the comparison of both groups of legal understandings with state law, while the procedures of Alternative Dispute Resolution show to be very formalized in comparison with indigenous processes of justice (Idem).

Most importantly, this scholar underlines the 'pedagogic function' of basing mechanisms of Alternative Dispute Resolution on indigenous understandings of law, linking this relation to the experience with 'popular tribunals' under socialist regimes. In this last case the traditions of indigenous law were utilized as a base on which "popular tribunals were established that worked in a similar way as the customary law in an environment of informality and with mediations as the mechanism to solve controversies, but which, naturally, had also as their goal to disseminate and promote in the population the legislation, the values and the organization driven by the revolutionary regime" (Aragón Andrade n.d., 33 ref. Sachs/Honwana). Hence, this author argues, that the inclusion of Alternative Dispute

and the recognition of indigenous justices in Quintana Roó (Buenrostro Alba 2009).

Resolution on the base of indigenous legal practices has a similar aim and impact, because their presentation in connection to indigenous practices is oriented lastly to the dissemination of the very different perspective on law they adhere to. Importantly, while the promotion of the own values and normative understandings is necessarily part of any legal practice, and insofar the indigenous groups cannot be addressed as pure and authentic, what Aragón Andrade underlines is the contradiction between a discourse of alliance, similarity and mutual support on the one hand, and a clear intention and deliberate practice contrary to the values and interests identified with 'tradition' and invoked as legitimazing factors on the other hand. Thus, the researcher concludes, "the mediations in the style of ADR can be informal, flexible and with lay discourses more or less similar to the indigenous justices; but they do not disseminate, reproduce or recreate the same principles, values, ideologies and cultural practices which the indigenous justices promote" (Aragón Andrade n.d., 35).

On a more theoretical tone, he puts these observations in line with Sousa Santos' statement that the development of hybrid structures is manipulated and dominated by the interests of the agencies that foster them (Idem, 36). This is valid also for the judicial reform which introduced Alternative Dispute Resolution mechanisms at the same time than a new approach to indigenous law within the Mexican legal system (Idem). Consequently, Aragón Andrade argues that USAID developed an "expansion strategy of the new legal orthodoxy based on the hybridization that aims to put the local normatives at the service of the ideology and the interests that promote the judicial reform at a transnational level" (Idem, 36). Regarding the hybridization of law, there is also an important similarity between the implementation of Alternative Dispute Resolution allegedly in the line of traditional local understandings of justice on the one hand, and the "role of customary law in the invention and reproduction of a certain order of legitimacy that favored the colonial regime and the empowerment of the 'traditional leaders' as local authorities" on the other hand (Aragón Andrade n.d., 33 ref. Meneses and Sango).

Importantly, despite these differences and tensions between Alternative Dispute Resolution mechanisms and indigenous understandings of law, in the discourse of development of agencies like USAID as well as in the new constitutional texts, the indigenous reform was conceived as part of a legal (and often judicial) reform that followed a particular conception of legal development. This approach included alternativity, informality and, to a certain degree, the retreat of the state, as tools for efficacy and management. In other words, better law is quick, effective law, and therefore, legal development must strive for relieving the courts, while still making justice. According to this perspective, good law, and therefore

developed law, is one that gets out of the way of international investment (and with it of economic development), and one that does not asphyxiate under an immensity of petty cases. Guided by the goal of efficacy in the context of the 'paradigm of management', legal development was promoted in form of judicial reforms. It is in this context that the indigenous reform in Mexico produced the creation of 'communal courts' or indigenous tribunals.

Concretely, the main modernizing federal judicial reform in this line took place in 1994[215] (Aragón Andrade n.d., 72 f.), when the Supreme Court structure was changed radically with the creation of the Federal Judicature Council as a new and supreme administrative body of the judicial power.[216] More recently, in 2006, the Supreme Court published the '*Libro Blanco de la Reforma Judicial*' ('White Book of the Judicial Reform') establishing a variety of modifications oriented to the modernization of the tribunals and including amongst others, the "judicial decentralization, the specialization of the tribunals, and the adoption and use of the alternative mechanisms of conflict resolution" (Idem, 74 ref. Suprema Corte de Justicia de la Nación).

According to several socio-legal studies[217], this process of profound reform can be explained in the context of democratization of the Mexican state. Aragón Andrade insists, however, that the mere frame of a democratizing process is insufficient to address this *complex project*. Against the perspective on the reform as a step towards democratization speaks the fact that it was "concretized in an express manner, with almost no public discussion and taking advantage" of the position that the political party PRI still had from its authoritarian regime (Idem, 76). Furthermore, it resulted in the dismissal or replacement of all the judges of the Supreme Court (Idem). Consequently, Aragón Andrade speaks of "the realization of (allegedly) democratizing reforms in an authoritarian way" (Idem, 75) and envisages this process as a result of the contradictions present in the 'neoliberal democratic discourse'.

215 There was however an important antecedent of this reform in 1987.

216 Mexico is, again, just one example for the more general situation in Latin America. Another example of this process is the Colombian constitutional reform, which created a *Consejo Supremo de la Judicatura* (Supreme Council of the Judiciary). This institution would later, in cooperation with the Indigenous National Organization of Colombia and other institutions, develop projects for implementation laws of the constitutional recognition of indigenous rights (Kuppe 2010, 24).

217 Take for an example the article of the renown director of the Institute for Legal Research (*Instituto de Investigaciones Jurídicas*) at the UNAM, Héctor Fix-Fierro 'Judicial Reform in Mexico: What Next?' (Fix-Fierro 2003a, or, for the Spanish version cited here later, 2003b).

Importantly, the lack of critique is a direct result of the context in which the reform took place, since the conception of this reform was linked intimately with recommendations by international organizations like the World Bank, the IMF and the International Development Bank as a sort of medicine against authoritarianism and underdevelopment (Aragón Andrade n.d., 116). Problematically, this conception of the reforms inhibits critiques on its ends and means (Idem, 76), depolitizicing the decisions to be taken under an invisible shield of alleged universally valid scientificity, and ending up in arguments that assume a "natural progress of law" (Aragón Andrade n.d., 77). As a result, while the amount of inquiries on the reasons of the judicial reform is small, those which actually study them often argue, like Fix-Fierro, that one important reason for the reform was the demands and expectations of the Mexican society towards a better judicial system (Fix-Fierro 2003b, 265). Aragón Andrade, however, criticizes these studies which "do not question the own content of the reform and share the perception that it is an instrument for democratization as the global imperatives suggest it" (Aragón Andrade n.d., 80). On the contrary, he underlines that the judicial reform of 1994 "shares with all the big constitutional reforms of that decade a very strong external drive" (Idem, 81). In this sense,

> "the majority of these measurements encouraged by the international agencies mentioned above, are not, as their advocates continuously assure, neutral and depolitizised adjustments with the only end of the betterment of judicial institutions; but they also represent the expansion towards the judicial field of a particular form of knowledge and the displacement of others, basing not necessarily in their 'scientific' merits, but in the relationships of power. In other words, we are in front of a manifestation of Knowledge/Power in the terms described by Michel Foucault" (Idem, 25)

Importantly, these reforms took place at the time when NAFTA (North American Free Trade Agreement) came into effect (1st of January 1994), and, simultaneously, the Zapatista Army for National Liberation (Ejercito Zapatista de Liberación Nacional, EZLN) started its first uprising and issued the first '*Declaración de la Selva Lacandona*' ('Declaration of the Selva Lacandona'). Thus, it is not surprising that, in the frame of this judicial reform, important institutional changes regarding the status of indigenous law took place, reverting some aspects of the historical relations of the indigenous groups to state law and reaffirming others. In accordance with the general perspective I have been presenting before, Aragón Andrade argues that during the 19th century, "the natives where seen as groups that ought to be exterminated in honor of the progress and civilization of the Mexican nation" (Aragón Andrade n.d., 97), while in the first decades of the 20th century, as a consequence of the

'Mexican Revolution' (started in 1910 and lasting for several years[218]) the strategy changed to "integrate the natives in a 'Mexican nation'. Thus the politics of direct extermination gave way to a politics of cultural integration, which in the end aimed at the same final goal, the disappearance of native in order to achieve the consolidation of the 'Mexican nation', this time in its '*mestizo*' version" (Idem, 98).

This situation changed gradually with the increasing pressure of diverse indigenous mobilizations from the 1970s[219] onwards. These visible claims and the new economic model of development gave form, finally, to the new art. 4 of the Constitution in 1992. Relevant to this reform process is equally the increased sensitivity of Mexico, like other 'Third World' countries immersed in a profound debt crisis, to economic 'recommendations' of organisms like the IMF, the World Bank, the IDB, as well as the influence of instruments of international law issued by organizations like the UN or the ILO (Aragón Andrade n.d., 100). Amongst other consequences, the constitutional change required giving up social politics, including the indigenist ones (Idem, 99). Thus, through this reform, the ILO Convention no. 169 was given constitutionality, breaking with a legal tradition regarding the indigenous groups in Mexico (Aragón Andrade n.d., 100).[220] In this sense, the art. 4 of the Constitution declared the "pluricultural composition of the Mexican nation" (Hernández Martínez 1993, 102). Importantly, it also established the obligation of the Mexican state to promote the *development* of indigenous cultures (Idem, emphasis added).[221] As we can see, the perspective on development continued to be central while seemingly changing its character from a unifying 'one development' to a 'development of the cultural features of the Other'. However, it remains unclear what is meant by 'development' in this sense, or what does the "protection and promotion" of this development by the law implies. The next reform would make the actual content of this (still singular) development of plural cultures more explicit.

Only two years after the reform, the EZLN raised up in arms, what derived lastly in a document known as the '*Acuerdos de San Andrés*' ('San Andrés Accords'), which should be the base for a constitutional reform in favor of indigenous claims beyond the guarantees

218 The question regarding when this revolution ended is part of an important historiographical dispute. One of the important dates taken into account is the declaration of the Constitution of 1917.

219 Importantly, the relevance of these movements increased in this period due to the agricultural crisis, becoming thus more visible at a national and international level.

220 For an overview of subsequent drafts for the reform of the Mexican Constitution and the final text of the reform of 2001 as well as reforms in the Mexican federal states before 2003, see Assies 2003, 10 ff.

221 The complete text of the art. 4 in 1992 was : "The Mexican Nation has a pluricultural composition sustained originally on its indigenous peoples. The law will protect and promote the development of their languages, cultures, customs, resources and specific forms of social organization and will guarantee their members the effective access to the state jurisdiction. In the agrarian trials and procedures in which they participate, their legal practices and customs will be taken into account according to the law" (Hernández Martínez 1993, 102).

established in the 1992 constitution. After this Peace Process failed, the project of a peace agreement and a constitutional reform had to wait until 2001. However, the content of the new art. 2 of the Constitution did not correspond to the San Andrés Accords. The constitutional reform was carried out[222], but it was not accepted by the EZLN or the big majority of indigenous organizations.

Importantly, the new article 2 begins with the statement of the unicity and indivisibility of the Mexican Nation, to state in a second paragraph its pluricultural composition (Honorable Congreso de la Nación 2012). In this first and more general part of the article also the criteria to establish who is native and what is an indigenous community are established according to 'subjective' and 'objective' elements. Equally, it puts the right to self-determination in a constitutional frame of autonomy, emphasizing the need to secure national unity, and orders the further recognition of the indigenous peoples in the federal states. This autonomy is detailed in section A, the second part of the article, stating that indigenous peoples have a right to "apply their own regulations and solve their own conflicts according to their own rules", while setting at the same time the clear limit of the general constitutional principles and the fundamental rights. Despite this recognition, the supremacy of the state law and its judiciary is underlined by the Constitution, when it states that "the law shall establish the ways in which judges and courts will validate the aforementioned regulations" (Estados Unidos Mexicanos 2005). This scheme is repeated regarding the election of authorities, which has to take place "within a framework respectful of both this Constitution and the States' sovereignty" (Idem). In this sense, Aragón Andrade argues that there exists a "line of continuity with the colonial dispositions in the area" (Aragón Andrade n.d., 102).

In its last section (section B), art. 2 of the Constitution establishes the duties of the Mexican State, which, through agencies and policies "shall enforce the indigenous' rights as well as an integral *development* for indigenous peoples and indigenous communities alike" (Estados Unidos Mexicanos 2005; emphasis added). This support for development includes diverse aspects: increasing (bilingual and intercultural) education, fostering local economy and improving standards of living, and advancing health and nutrition programs, as well as living conditions and communication infrastructure, mentioning particularly the promotion of "indigenous women's incorporation in development" (Idem). Last but not least, the agencies and policies at stake have to "take into account indigenous peoples' opinions and recommendations in order to include those adequate ones in the National, state and municipal

222 Unfortunately, the article is too long to be reproduced here. In the text I will address those parts that are most important for this inquiry. For the whole text, see the Constitution of the Mexican States (Estados Unidos Mexicanos 2005 for an English version, or Estados Unidos Mexicanos 2011 for the original one).

development plans" (Idem)[223]. Even in this short review, it turns obvious that while making explicit statements regarding the recognition and appreciation of indigenous ways of life, the constitutional article not only sets explicit limits, but also creates structures in which the exercise of these 'new' rights have to fit in order to be actualized. The how of 'diversity' is clearly determined, from who is native to how to develop. What development 'has to be', even development in 'an indigenous way', is already pre-determined. This element at the core of the constitutional reform had important consequences for the development of state reforms as well as for the concrete implementation of the rights recognized to the indigenous communities in the diverse legal documents. In the following paragraphs I will address this tension in the context of the reforms in the state of Michoacán.

The first constitutional reform in indigenous matters in Michoacán in 1997 (art. 3) responded to the reform of the national constitution in 1992, and was equally limited. Importantly, "practically no indigenous organization or community participated in its elaboration, discussion and approbation" (Aragón Andrade n.d., 104), what at a legal level, violated even the rights recognized to the indigenous peoples and communities of Michoacan established in the (by then ratified) ILO Convention no. 169 (Idem). Other small reforms in the Criminal Code and the Code of Criminal Procedure followed, but none of all these changes met by far the indigenous claims. In the subsequent years, diverse proposals for a new reform of the Constitution of Michoacán were presented, however, the project of a new reform was finally rejected in 2005.[224] More important are, however, the new institutions that were created on the line of these political and legal changes, after 2000, like the Interinstitutional Coordination for the Attention of the Indigenous Peoples and Communities of Michoacán de Ocampo (CIACPI – *Coordinación Interinstitucional para la Atención de los Pueblos y Cidades Indígenas de Michoacán de Ocampo*), the Advisory Council of Indigenous Authorities (CCAI – *Consejo*

223 While the translation of Pérez Vázquez reads "take into account" (Estados Unidos Mexicanos 2005), the original in Spanish states "*consultar*", which can be better translated, in my opinion, with 'consult', what implies a more active attitude in addressing the indigenous communities instead of just receiving comments that the state agencies would 'take into account'. An argument in favor of my proposal is also the official translation of art. 6 ILO Convention no. 169, which equates the English 'consult' with the Spanish '*consultar*', and is arguably the international reference for this particular right of indigenous peoples recognized in the Mexican constitution (ILO 1989 and OIT 1989).

224 For a detailed account of the whole drafting procedure and the various irregularities it presented causing the repudiation of indigenous organizations, see Ventura Patiño 2010. Three of these drafts proposed different approaches to the officialization of indigenous justice systems: one proposed the creation of 'traditional judges', another one planned the creation of a "court of original peoples", which would have a special jurisdiction for all sorts of conflicts in the indigenous communities, and the final version voted and rejected in congress envisaged 'courts of peace and indigenous conciliation' which would depend fundamentally on the Superior Court (Aragón Andrade n.d., 109 f.)

*Consultivo de Autoridades Indígenas*)[225], and the Intercultural Indigenous University (*Universidad Intercultural Indígena*). Through this process, several leaders of indigenous organizations were incorporated to the governmental structures, and thus an 'indigenous bureacracy' was created (Aragón Andrade n.d., 107 ref. Jasso and Ventura Patiño).

The long expected reform would finally be issued in the frame of a judicial reform in 2007, which was object of intense institutional struggles, particularly between the members of parliament and the magistrates at the Supreme Court of Justice of the State. One of the main reasons for this struggle was the creation of a Judiciary Council in the line with the 'management paradigm' described above (Aragón Andrade n.d., 112f.). Another problematic point was the creation of communal tribunals for indigenous peoples. Importantly, "the idea of including the creation of 'communal courts in the package of the judicial reform in Michoacán and with them the officialization of the indigenous justices, did not emerge from the proposal or demand of an indigenous organization, movement or community" (Idem, 117). Neither were previous initiatives of constitutional reform taken up again. The key factor for this incorporation was the proposal of a member of the state congress, which "was the principal operator of the judicial reform in the State's [Michoacán] congress, and who furthermore did not have in his political career any major antecedent of work with indigenous communities" (Idem). The inspiration for his proposal derived, as he explained in an interview with Aragón Andrade, from "one occasion [when] the Supreme Court invited him to one of the seminars on alternative mechanisms of justice sponsored by the European Union together with other transnational entities and it was from there that the idea emerged that the 'usos and customs' of the indigenous communities could be considered as a part of those auxiliary resources of state justice" (Idem, 117). Importantly, this reform did not include either any consultation with indigenous communities (Idem, 117 f.).

Following the intense dispute between the congress members and the high magistrates regarding the judicial reform, the Supreme Court was included in the formulation of the secondary norms within the new constitutional frame as a way to relax the institutional tension (Idem, 118). Thus, it was the Supreme Court the one that established the new implementation laws regarding the communal tribunals within its Judicature Act ('*Ley Orgánica*).[226] This regulation assigned the competencies, established the nature and the

225 Despite its name, this institution practically did not participate in the creation of public policies regarding indigenous issues or presented legislative initiatives (Aragón Andrade n.d., 107 cit. Ventura Patiño).

226 A further law was developed by the Congress, namely the '*Ley de Justicia Comunal*' ('Law on Communal Justice'), which aimed to regulate the function of the communal judges in detail. At the same time, however, vast aspects of communal justice remained without legislation and under the discretionality of the Supreme Court (Aragón Andrade n.d., 121).

limitations of the communal courts, including the requirements to become a communal judge and, above all, stated the dependency of these courts on the Supreme Court. Importantly, the foundation for this legislation was, naturally, the understanding of a (indigenous) system of justice *within* the state system. As a simple example, taking the classification of conflicts of current state law, the Judicature Act of the Supreme Court allowed the communal courts to judge in questions related to criminal, civil, familial and commercial law. However, this delimitation of legal spheres is not the one used in the communities, neither is the communal practice homogenous or stable (Idem, 121).

Equally, the communal judges were selected and appointed by the Supreme Court, and they were not elected in the way that the indigenous communities usually do with their communal authorities (Idem). The process started with a call for applications for communal judges to participate in a course which served as a means of selection. The topics of the course had been designed also by the Supreme Court according to the division established by the Judicature Act along the lines of the scheme of state law, namely criminal, civil, commercial and familial law, plus a course on Alternative Dispute Resolution. These modules were imparted by judges of the Supreme Court (Idem, 122). While the CIACPI was involved to a certain extent in the development of the course, introducing modules on indigenous law and legal pluralism, it equally excluded indigenous authorities despite their practical experience in the field (Idem, 122 f.).

Unsurprisingly, the call for applications to occupy the position of communal judge was made public as any other call for applications, namely via the official newspaper of the state, the internet and a newspaper of 'state circulation', forgetting those sectors of the population which do not buy the newspaper, use internet, can read or live in places where newspapers or internet are accessible, as it is the case in several indigenous communities (Idem, 124). Equally, the selective courses lasted almost two months and were held in Morelia, located far away from the communities, without envisaging any support for aspirants coming from outside of this city. The requirement to prove the spoken and written proficiency in the corresponding indigenous language through an exam, was also a determinant filter which, from an indigenous perspective, was very problematic; not only the Purépechas communities do not have a unified grammar, but the Nahuas communities almost do not speak the language (Idem, 125).

Furthermore, the Supreme Court decided where the new communal courts should be opened and for which communities, selecting only the Purépechas and Nahuas of the four indigenous peoples recognized officially as 'original' from Michoacán (that include also

Otomís and Mazahuas) (Idem, 123). It disregarded equally the big amount of migrant indigenous peoples that inhabit Michoacán (Idem), thus establishing a clear differentiation according to a certain principle of 'originary otherness' and leaving aside the 'others of the Others'. Unsurprisingly, the placement of the courts was decided also by the Supreme Court according to the convenience for its own structure. Hence, the communal courts were placed where the state judiciary had already infrastructure, disregarding the fact that they were far away from indigenous communities.

Clearly for the formal state-law thinking, these courts were invested with a territorially limited jurisdiction. Regarding its internal organization, the courts were composed like any other court: with a judge, a secretary, etc., this is they were formed according a preset organizational structure that is unitary for all courts and that does not resemble the organization of indigenous communities. In contrast with the provision regarding communal judges that did not need to have a legal background, but needed to be native, the other co-workers of the court did not need to be native but "rather *mestizo* lawyers with a career within the Supreme Court" (Idem, 125). While this decision was justified with a 'judicial logic', arguing that the indigenous 'judges' needed to be oriented and helped in their duties within the state judicial system by someone that was familiar with that structure, the whole context of the indigenous reform suggests, as Aragón Andrade elaborates, that these decisions aim at the internal surveillance, "standardize the working procedures, and establish within the communal courts the routine practices that internalize and reproduce the existent hierarchies in this bureaucratic body" (Idem).

Summing up, while at a political level and at a general legal level the cultural and legal plurality was recognized, in the concrete regulations, the communal courts, and with them the recognition of indigenous law, were subjected to a narrowly understood state-law system and its judiciary. As a result, legal diversity was constructed only within the frame of the state (Aragón Andrade n.d., 116). Equally, if legal development meant for the advocates of indigenous law to open the realm of the legal and the officially legitimate to a plurality of understandings, for the producers of the judicial reform within which the project of indigenous law took place, legal development meant many other things, including more efficacy, better management, and a better functioning state. The connection between these diverse and often contradicting approaches to legal development reproduced lastly the hierarchical structure that called it into being, putting the claims for plural understandings of law in a corset of one state legal system oriented towards ever more efficacy and ever better management.

This is the result of a reform that, on the one hand, addressed the indigenous claims as a reaction to the political tensions that required a certain response, but which also, on the other hand, responded to an international model of legal and judicial development that had different purposes, and touched the indigenous communities as the secondary result of a judicial reform, where alternativity and informality were envisaged as a form of modernization. The struggle for the regulation of indigenous courts mirrors the tensions between a certain trend for de-statization and the established institutions of the modern state, as well as between the demands for respect of otherness and its normative understandings on one side, and their subjection to own standards of state-law and the mechanisms of international organizations on the other.

The results are inadequate responses to the demands for recognition of otherness. The inadequacy of these approaches derive from their basic modern character oriented still towards a unitary idea of state, including its legal and judicial system. The other option would lead to an increasing de-statization, which might give more freedom for the indigenous peoples to make use of their own understandings and practices of law responding to the demands of what Sousa Santos has called a 'globalization from below'. However, this de-statization implies also the free participation of other role-players, with interests that might contradict the interests of indigenous peoples, and which are more in line with a so called 'hegemonic neoliberal globalization'. Without any authority to settle the tensions between the different role-players, the resulting power struggle leads easily to an escalation of violence and oppression, as the ongoing conflicts over territory and resources between indigenous peoples and transnational firms as well as amongst different indigenous peoples show. This is the conundrum in which post-modern approaches that emphasize the value of plurality are caught into.

In this sense, Aragón Andrade's research is a good example. His work, which I have presented summarily in the last pages, is not only important for us because of its very recent completion or due to its detailed account, its concrete research, and the complexity of entangled processes it presents. Moreover, the arguments he develops are themselves an expression of the tension produced by the paradox of a postmodern sociolect, in which it is embedded.[227] Thus, his own approach criticizes, on the one hand, the submission of indigenous law under state institutions, while at the same time, it rejects the de-statization process encouraged by international (development) organizations and agencies. This tension,

227 Aragón Andrade refers himself to the "paradoxic convergence" of different types of globalization in his case study (Aragón Andrade n.d., 5).

however, is embedded in the plural and contradictory character of postmodern sociolects themselves. Interestingly, while the alternative methods of dispute resolution derive from an impulse to go beyond a monolithic perspective on state law, arguing in line with critical (postmodern) approaches to law, in the analysis of Aragón Andrade they undermine a postmodern approach to law that addresses pluralism from the perspective of the situation of indigenous peoples in Latin America.

In the same line, it is noteworthy, that there is a connection between the legislators' argument for equality using a dichotomic 'weak/strong' discourse during the indigenous reforms and Aragón Andrade's rhetoric in his critical approach to these reforms. Victor Manuel Tinoco, governor of Michoacán at the time of the implementation of the ILO Convention no. 169 in that state, declared that the constitutional reform of the state of Michoacán "should not break the principle of equality between the parties but, on the contrary, serve in order to auxiliate the weak in front of the strong one" (Aragón Andrade n.d., 104 cit. Tinoco). Thus, the constitutional recognition of indigenous rights was seen as a "help for the weak party, when it really is such" (Idem). Importantly, Tinoco remarked, this reform should not lead to "the extremes of strengthening the weak and weakening the alleged strong, generating thus a new inequality" (Idem). In his academic research Aragón Andrade uses equally a rhetoric of 'weak vs. strong' in the shape of 'oppressed vs. oppressor', and applies it consequently in the conception of globalization as 'emancipatory anti-hegemonic' or 'hegemonic anti-emancipatory'. As a result, while the modern state and its exclusionary institutions can be criticized for their self-validation with reference to 'one truth', 'one justice', and 'one nation'. Aragón Andrade, runs the same risk in the moments when he claims for the emancipation of the oppressed through the recognition of indigenous systems that reflect their authentic character. While he criticizes the limitation of state recognition to particular pre-set others, he also understands under 'indigenous law' particular understandings of communal authority, rejecting, implicitly, others.

Beyond the questions we may pose Aragón Andrade regarding his position in the determination of the Other, what remains clear, is that the attempts to include the 'indigenous other' in the Mexican judicial system through the creation of indigenous courts produced, lastly, the subordination of indigenous authorities and understandings of law under the state legal and judicial system, as well as their subsumption within a universalized concept of legal development. It is possible to state that this particular judicial reform (including the indigenous pluralizing reform it included) has been done in a 'wrong', 'undemocratic' or 'unfair' way. But the more problematic question is if any reform in this line is capable to

respond to the needs at stake. As we have seen, there are basic structures in conflict which, going beyond their relevance as social facts, are connected to systems of understandings of identity and otherness. In the next pages, we will see the struggle of these understandings also in another famous intent to incorporate the 'indigenous other' in the state judicial system, namely the Colombian process.

*b) Radical Otherness in the Rulings of the Colombian Constitutional Court*

As we have seen, the pluralistic approach has brought practical consequences to the development of law. Since the recognition by the ILO Convention no. 169, several states of the world have issued documents stating their self-image as multicultural states. Regarding the judicial system, while some states have launched concrete reforms of their judicial system creating new institutions, like Mexico, others have elaborated this reform particularly through new judicial interpretations of the written law. A key example of the importance of the latter type of processes took place in Colombia with the innovative rulings of its Constitutional Court since the end of the 1980's. In the following pages, I will address some important aspects of this process, paying particular attention to the ways in which otherness and plurality were incorporated within the frame of modern law.

The Colombian Constitution of 1991 marked a central change in the national and regional legal development not only because it recognized cultural diversity (art. 7), as some other countries in the region would do later. Most importantly, this constitution forms part of the deeper transformation "of an unconsolidated democratic regime into a distinctly different model of democracy via a radical constitutional reform guided by normative criteria" (Cott 2000, 3).[228] In the context of the crisis of the nation-state in the late 20th century that I have mentioned above, this transformation has been seen as an example of a "construction of national identity and unity around diversity [that] opens a new era of 'post-nationalist' constitutionalism" (Idem, 10), participating in the so called 'fourth wave' of constitution-making (Lane 1996, 74).[229] This constitutional reform was highly legitimated in the official

228 For a review of the history of this constitutional process, see, for example, Cott 2000, 39 ff.

229 The previous 'waves', meaning periods of intensive constitution-making processes are, according to Lane, 1789-1799, 1914-1926 and 1945-1965 (Idem). The fourth wave refers, in turn to a certain increase in constitution-making in the 1980's, which Norberto Bobbio (1909-2004) named 'new contractarianism' (Cott 2000, 13).

presentation and in academic circles, that underlined its participative character, praising that

> "seventy-four diverse delegates […] considered 131 reform projects emanating from the delegates and the government, and around 200.000 proposals from municipalities and civil society groups that were generated during the working tables at the end of 1990 or were presented during the ANC [*Asamblea Nacional Constituyente*]. As President Gaviria observed, there are few countries that could argue as convincingly that their constitutions resulted from a collective creative act or represented a consensus of opinion among such a diverse and representative constituent body" (Cott 2000, 89).

While being based on a participatory principle from the outset, as the preamble of the document emphasizes, its first article already stated the conception of a republic which, being unitary, adheres to the principles of decentralization and, most importantly, to pluralism. Article 7 explicitly stated that "the state recognizes and protects the ethnic and cultural diversity of the Colombian Nation"[230].[231] Furthermore, art. 246 stated the right of indigenous peoples to exert jurisdictional functions according to their own norms and procedures, with the usual limitation by the Constitution itself and, importantly, the "laws of the Republic", promising as well a future law regarding the coordination of this special jurisdiction and the national judicial system.[232] Furthermore, art. 329 allowed for the creation of indigenous territorial entities and recognized indigenous territories as collective and inalienable property, and art. 330 established not only the attributions of the indigenous governments over those territories, but also the limits for the exploitation of their natural resources as well as consultation rights of the indigenous peoples. Importantly, also a national two-seat senatorial district for indigenous communities was created by art. 171.[233]

On the base of this constitution, the Colombian Constitutional Court had to decide in several cases, specifying the new recognitions, since there was no implementing legislation for these indigenous rights. Naturally, these resolutions had an immense impact on the

230 In the Spanish original: "*El Estado reconoce y protege la diversidad étnica y cultural de la Nación colombiana*" (Asamblea Nacional Constituyente 1991).

231 Importantly, this recognition amongst other more specific ones, had been previously included in the Decree no. 1926, "which codified the understanding among the major parties prior to the ANC with respect to the content of the reforms" (Cott 2000, 85).

232 "*Artículo 246. Las autoridades de los pueblos indígenas podrán ejercer funciones jurisdiccionales dentro de su ámbito territorial, de conformidad con sus propias normas y procedimientos, siempre que no sean contrarios a la Constitución y leyes de la República. La ley establecerá las formas de coordinación de esta jurisdicción especial con el sistema judicial nacional*" (Asamblea Nacional Constituyente 1991).

233 It is important to remark that in the case of Colombia, also the communities "from African origin" play an important role regarding the cultural diversity of the country. Also these communities were endowed with certain specific rights in the Constitution of 1991, even if they were not as many as the ones dealing explicitly with indigenous peoples. Interestingly, according to Cott, this difference was due to the perception in the majority of Colombian society, that Afro-Colombians "are more integrated into society than indigenous peoples and that black Colombians do not suffer discrimination" (Cott 2000, 86 cit. Cepeda). Despite the interesting constellation that results from this situation, and in line with the perspective of this chapter, I will rather concentrate the further reflections on the developments regarding indigenous communities and the consequences of the constitutional recognitions made to them.

situation of indigenous law within Colombia as well as in the whole continent. For an example, we can take the renowned decision T-254/1994, where the Court interpreted the limitation of art. 246 so that only specific 'laws of the Republic', namely those that protect fundamental constitutional rights limit the usage of indigenous law according to indigenous understandings. This ruling that strengthened the status of indigenous law, was however complemented by later rulings that constricted the indigenous rights. Thus, the same Constitutional Court stated in its decision T-349/1996 that, in accordance with the constitutional right to 'due process', the indigenous authorities "should follow – more or less, since every culture is dynamic and subject to changes–, the usual procedures and that the sanction should be predictable for the offender" (Assies 2003, 7). However, the problem relies therein that, following this understanding, the Constitutional Court decides, to a certain extent, which are the customs to be followed and when changing a custom is constitutionally possible.

The same problem arises with the division that the court established in T-254/1994 amongst different indigenous groups, stating that "there exist indigenous groups with functioning own institutions, which have to be respected (according to the constitution), while there exist other groups which – through extreme external influences – have suffered a more or less important destruction of their institutions and thus their issues have to be ruled by the general laws" (Kuppe 2010, 17). The resulting problem of this approach is that a certain 'cultural purity' is assumed, limiting thus the scope of the rights recognized to indigenous groups. In the same line, and equally problematic, is the effort of the government "to prepare Colombian courts for the challenge of applying the new standard [by commissioning] a study of twenty indigenous ethnic groups" (Cott 2000, 113 f.), provoking strong critique on the side of anthropologists "for imposing Western positivist categories and concepts onto more flexible, oral traditions that defy such categorization, and for separating the practice of customary law from the fabric of indigenous society" (Idem, 114).

Summing up, while the reform as well as the rulings of the Supreme Court with an innovative opening character created great expectations, the later development brought increasing doubts and a heated discussion regarding the real consequences of the constitutional clause protecting indigenous law and its institutions. An important element in this debate has been, for example, the venue to appeal decisions taken by indigenous authorities at state law courts. Equally problematic is the fact that the final decision over any case lies in the hands of a court with no indigenous representation restating a clear hierarchy between indigenous law and state law. Thus, Yrigoyen Fajardo concludes that

> "many of the limitations end up resembling the pattern of colonial subordinated legal pluralism, concealed under the discourse that the indigenous jurisdiction can only be explained because of cultural diversity: a justice amongst natives, circumscribed to the communal territory, for minor cases, and without touching the white, even when the white infringe indigenous legal goods" (Yrigoyen Fajardo 2011, 148).

However, the critiques that interest me most for this research do not refer directly to Yrigoyen Fajardo's concern with the concrete limitation of indigenous law, but, moreover to the social and cultural changes that these reforms and their constitutional interpretation produced. In other words, how the 'speaker' and the 'other', the 'own' and the 'alien', the 'original' and the 'modern', and thus how 'plurality' and 'law' are (re-)defined in this process of legal development towards 'recognition of (legal) plurality'. As Juan Pablo Vera Lugo argues, the change in the Constitution and the further development of law through the constitutional court had consequences for the present concepts of Colombian cultural diversity in and beyond the legal sphere. The constitutional court has, for example, created categories around the protection of cultural diversity that express the specific historical and cultural perspective in which the whole reform process as well as the practice of the court itself is involved. In this sense, the 'recognition' of cultural diversity is embedded in a discourse that develops in a context of tensions between diversity and unity.

This struggle can be followed in the legal categories created or used by the court, such as 'collective subject', 'territorial field' and 'collective property', which express implicit understandings about culture, property, territory, subjects etc. Importantly, when subsuming under these categories the idea of indigenous community (or communitarian cultures) and communal ownership of land, the social reality that the legal concepts aim to refer to is put in a formalized and normed manner (Vera Lugo 2006, 207), that responds to the language of state-law and follows what I have presented as a modern legal approach. Furthermore, Vera Lugo argues that these categories express an essentialist perspective linked to an idea of the 'primitive man', fundamentally related with nature as his habitual space of realization. The special and protective treatment that state law provides, pretends, thus, to conserve the Other's specific exoticism, negating thus his contemporaneity (Idem, 211). In this sense, the Other's characteristic is that it *is* a-modern, outside of modernity and modern law.

Similar to Ruskola's arguments on legal orientalism[234], Vera Lugo links the legal development of the Colombian constitutional law to the construction of the Other, particular-

234 See chapter A, section III.

ly, the 'indigenous Other'. The question that he poses is of extreme relevance, insofar as it refers to a legal development that is supposed to take into account the legal-cultural diversity according to a pluralistic perspective on law. Through the new rhetorics about 'cultural diversity' elaborated by the Court, this concept has been translated to a specific rationality of law, "introducing conceptions that refer to a static and self-contained perspective on culture" (Idem, 207). Furthermore, this process has contributed to fix a static notion of indigenous culture (Idem, 210). On the one hand, cultural diversity is conceived basically in terms of indigenous groups, disregarding other cultural groups and social movements. On the other hand, the constitutional interpretation of difference produced "an 'official' way to think about diversity [as well as] legal procedures that were developed to regulate those cultural contexts that are seen as diverse (Idem, 208). As a result, "traditional values or stereotypes of 'the' indigenous, like its communal character and its special connection with the earth", are incorporated in the legal discourse and, at the same time, reinforced and formalized through it (Idem, 210). Thus, Vera Lugo concludes that the concept of cultural diversity that has been materialized through the jurisprudence of the Colombian constitutional court is linked to perspectives rooted in an overcome classical period of anthropology, when biological and evolutionist perspectives on culture and society abounded (Idem, 208). Consequently, the legal concept of cultural diversity refers to an essentialist and hierarchical way to think 'the Other'.

Moreover, cultural diversity is linked to exoticism and radical difference. What is assumed as diverse is, consequent with a modernist need for identity based in dichotomies, always far from the defining center. Therefore, diversity is always far away, be it in a time or in a space scale. Diverse are those people who are "supposed to live 'away' from the center of the majority or 'hegemonic' society (urban and civilized) [and/or] those people who are at a previous 'moment' of development of that society (Idem, 209). In other words, the concept of cultural diversity used and reinforced by the constitutional rulings, that aims to revise and reform a modern approach to law, is based on a modern perspective of development.

Importantly, Vera Lugo explains that the construction of cultural diversity, and therefore of the Other, in the case of Colombian constitutional law, has been linked, following a long tradition, with the question for territory – a problematic that is key for the socio-economic claims of indigenous groups. While so far we have referred mostly to the economic, historical and political role of territory, according to him, the alleged cultural and spiritual connection with the earth has been taken as a key element to state 'radical otherness', and thus to recognize

diversity and grant rights. Importantly, the strength of this link between the 'indigenous way to be' with the earth is also a result of the place given to it in the ILO conventions and doctrinal sources (Idem, 214).[235] The Colombian Court based its rulings partially on these internationally accepted sources, what is not surprising considering the international role in determining the form and content of the national legislation.[236]

Regarding the Colombian constitution of 1991 itself, 'territory' is a central concept for the specific interests of legal pluralism, because, according to art. 246, the authorities of indigenous peoples can exercise their jurisdictional functions within their "territorial field" ('*ámbito territorial*').[237] What is actually meant by 'territorial' has been concretized by decision T-634/99, where the Court positions a 'territorial field' between the mere 'earth', which "within Western jurisdiction [cannot] be a subject of law", and the (administratively delimited) territorial entity (Idem, 220). Importantly, the Court emphasizes the cultural character of such a 'territorial field', and only insofar as the culture is an object of special protection, the indigenous territory is considered an entity to be protected by the Constitution (Idem). It is this cultural connotation the one that transforms indigenous territory into the legal category of 'territorial field'.

More explicitly, the Constitutional Court of Colombia asserts in its ruling T-188/93 that "the right of collective property exercised over the indigenous territories has an essential relevance for the spiritual values and cultures internationally approved by the Congress", underlining the "special relationship that indigenous communities have with the territories they occupy" (Idem, 213). Remarkably, the relevance of territory is justified in various rulings of the court not only by the fact that it is the main means of subsistence of indigenous peoples, but because it "constitutes an integral element of the cosmovision and religiosity of the aboriginal peoples" (Idem). This idea of collective property of indigenous groups through the link created between culture and territory has been progressively substantiated throughout the jurisprudence of the Court, like the decisions C-058/94, that "states how the principle of ethnic and cultural diversity should be understood and applied, stressing the importance of

235 Equally, the argument of the natives' special connection with earth and ecology is present in the Rio Declaration on Environment and Development of 1992 (principle 22). Vera Lugo criticizes with Peter Wade the assumption of a generalized 'environmental ethic' of indigenous people understood as a homogeneous unity. Arguing against this stereotype, Vera Lugo states: "[t]he 'myth' of ecological wisdom of indigenous groups is based on the assumption that these groups are geographically isolated and that they are part of nature [...] similarly to animals" (Vera Lugo 2006, 214).

236 Take, for example, the decision T-257/1993, where the arguments of the Court regarding collective property are based on the ILO Convention no. 169, especially to articles 13 to 19 (Vera Lugo 2006, 216).

237 The term '*ámbito territorial*', which is already quite ambiguous in Spanish, has been translated as 'territorial jurisdiction' (Asamblea Nacional Constituyente 1991). However, the constitutional text refers to a much less legal and much more ambiguous understanding of '*ámbito*', which, in its most simple translation, means 'field' or 'area'.

territory for the cultural identity", and the decision T-634/99, that "establishes the characteristics of the territorial entities as well as the applicable principle to indigenous territories" (Idem, 217).

In the first case, the Court requires from natives that they have to live in their territory and conserve their cultural, social and economic integrity in order to be exempt of the obligation to do military service. The Court argued that in the corresponding national law, "the native is not protected as individual but as native in his specific territorial context and with his specific identity. Following this argument, it is conclusive that the protection introduced by the law is oriented towards the ethnic community. The final message of the norm is a stimulus for the natives to continue perpetuating his species and culture" (Idem, 218). The result is, as the Court correctly concludes that those "natives that live with the rest of the Colombian nation or with the same customs as the latter, are not exempted of the service" (Idem). In this sense, the 'non-natives' or 'non-sufficiently-natives' are submitted to the general laws, considered 'normal citizens' with a role in the social project, and therefore bearers of social duties like the military service.[238]

The category of native is imagined, thus, as linked with a communal type of life and with its specific link to the earth. 'The natives' and 'their' culture are therefore defined in their essence as static categories, that are supposed to remain identical to themselves through time. Living with or with the habits of 'the non-indigenous rest of the Colombian population', automatically makes 'the natives' essence' disappear. The imaginary of the Court, and thus of the law as concreted by judicial decisions, works again in a dichotomous scheme of indigenous/earth-connected/community/them/far/rural vs. non-indigenous/earth-disconnected/ individual/we/here/urban. Problematically (and similar to the difficulty we found regarding 'communal courts' in Mexico), these entities are conceived as self-contained, because the interaction between these two imagined opposites is not taken into account. It is as if Colombian society would be divided between the 'real' indigenous and the 'real' non-indigenous, and, most importantly, as if it should stay so. Cultural exchange or a dynamic concept of culture are not part of this anthropological conceptions of society and law.

Now, if 'their culture', meaning 'the culture' of 'the natives', is considered basically in terms of an 'ethnic-cultural integrity' consistent with indigenous customs, including a connection with a specific community and a specific territory, where is 'the culture' of the speaker of the law (and all the Others assumed as 'non-indigenous') considered to be located?

238 For an profound analysis of the consequences in terms of social peace of this differentiation in the context of constitutional objections to military service in Colombia, see Vallejo Piedrahíta 2011.

Either it is equally conscripted to a different space and a different set of 'cultural, social and economic integrity' or, what is more plausible given the exceptional character of the normative for indigenous groups, it is beyond locality and specificity – it is what can be assumed as general, universal and normal.

Another central concept, through which the 'communal connection' as an 'essential' part of 'the indigenous' way to be, has been judicially laid down, is the term 'collective subject', which has been elaborated in the decision T-380/93. The creation of the 'collective subject' is a consequence of the impossibility of the legal system to put the indigenous community within one of the pre-existing categories of right-holders, namely natural or legal persons. The Court, following the dictum that 'the whole is more than the sum of its parts', understands the 'indigenous communities' as more than "simple aggregates of its members, who […] realize themselves through the group and assimilate as theirs the unity of meaning that emerges from the several communal experiences" (Vera Lugo, 224 ref. T-380/93?). Remarkably, Vera Lugo describes this incorporation of the traditional or communal society into the legal sphere as a paradigmatic change within the cultural context of Western law, and the constitution of the collective subject as the "most clear appropriation of the non-modern cultural contexts" (Vera Lugo, 224). Doubtless, the concept of 'collective subject' is a tool that allows many requests of indigenous groups to materialize. Nevertheless, in doing this, "the hegemonic law imposes itself upon this form of relativity as it transforms the other in object of the legal sphere" (Idem).

The question at stake is clearly not if it is 'good' or not that indigenous groups acquire access to the judicial system with collective concerns, but what are the implications of the underlying constructs and assumptions that are connected to outdated anthropological views. But even more preoccupying than the backwardness present in the static anthropological perspectives used in this legal understanding, are the social (and legal) consequences of such an approach. From the moment that this perspective is legally fixed, it sets a scheme that requires much more argumentative (and political) effort to be changed in the future as 'mere' beliefs or even as scientific assumptions. Creating a category of technical character, and turning it into a legal principle, the universalizing criteria to determine cultural difference are progressively neutralized and fixed (Idem, 226). The creation of legal precedents, more so if they are developing constitutional doctrine, produces a formal and an informal pressure not only on other courts and future decisions, but also they anticipate the chances of future legal

cases and so open or close the door for the idea itself regarding *if* a social conflict has a chance to enter the legal debate.

But even beyond the realm of legal debate, the creation of the legal categories does not only determine the answer to a legal question, but even more, it determines the possibility to think and pose particular questions. Equally, this process has consequences for the way in which diverse groups, represent themselves, because "the vision of the concept of 'culture' and 'cultural diversity' developed by the jurisprudence, is restrictive for cultural manifestations that are not founded on the values and believes that are implicit in the conceptualization carried through by the Court" (Idem, 226). The idea of diversity is conceptualized with a universalistic perspective, holding down claims for a diversy of diversities. In other words, while cultural diversity is presented as a supreme value to protect, a universal ethical consensus is assumed and created, that overruns that primacy (Idem, 230). The creation of the 'collective subject' and the other conceptual elaborations presented "resignify the meanings of difference, keeping them subjected to the terms in which the law exercises its own praxis, this is the telos of its rational manifestation and the universalism it produces" (Idem).

As Vera Lugo argues, through the development of concepts like the 'collective subject', the Court assumes a posture in front of 'Otherness', that puts the Other in a space of radical difference. Similarly, in its definition of 'community', the constitutional Court of Colombia bases its argument on a strict division between community and society as developed by the evolutionist currents of the 19th century anthropology. Interestingly, in the case T-254/94, the Court had to decide on the legality of the expulsion of a member from his indigenous community by its authorities, dealing with the tension between the right to due process and the judicial autonomy of the indigenous community. In its argument, the Court first differentiated between civil associations with an '*animus societatis*' and indigenous communities, that are a dynamic and historical reality (Idem, 226). In other words, belonging to an 'indigenous community' is, at least according to the Court, not the result of a spontaneous act of will, like when a civil association is created. It is central to remark that, in this context, the Court refers explicitly to Ferdinand Tönnies[239] (1855-1936), an "eminent sociologist", and states with him that "the community is a form anterior to society, that develops from the family and, generally, in small populations, where the acquisition of economical benefits does not prevail, but the blood bounds and the costums" (Idem, 227). "Urbanism", the Court continues its argument along Tönnies' division, "makes the

239 Tönnies' most renowned work is 'Community and Society' (1887).

communities evolve into societies. This mutation is produced under the sign of abstraction [...]" (Idem). With this references to Tönnies, the Court appropriates for legal reasoning the basic dichotomy that this author made between the 'traditional' and the 'modern'. As I have stated above, the evolutionist vision presented here, assumes a teleological conception of cultural development and an ethnological perspective on culture, both typical for a thinking that has been criticized harshly during the whole 20th and 21st century. Of course, also the constitutional court changed with time and so did its rulings. Take for example the decision T-1022/01, which introduced the idea of a 'dynamic identity' of the indigenous community. However, the general tone and the basic concepts presented here remain present within the constitutional imaginary.

Concluding, Vera states that the perspective of linear evolution of the 19th century present at the core of the culture politics and the authoritative documents of the epoch, is not transformed radically through the creation of the principle of ethnic and cultural diversity, because, "although the categories and the forms to name the other change, the values or contents of the cultural difference remain" (Idem, 233). This is clear also regarding the concept of the 'native', which "pertaining to the European referents of otherness, is homogenized and homogenizing", "including all native men originary from the American continent", and thus hiding "the diversity within that category" (Idem, 235).

Arguing in the line of 'radical otherness', the attitude of the Colombian constitutional court does not go beyond the critiques posed by pluralistic approaches to a modern understanding of 'law'. It is still a de-localized, true, unified 'law' the one that is referred to as a base of normality, against which the Other and the Others' law is made visible. While indigenous law is recognized, it is incorporated within a specific language and hierarchy of law, as well as within the already existent legal doctrine. In the same line, the concept of property as conceived here is, despite all adaptations, the concept of property stated in the Civil Code, even if a spiritual connection is put in the forefront.

We find here, thus, the same difficulty as with the inclusion of indigenous courts in the Mexican judicial system. While concrete recognitions of rights and authority are stated, these recognitions refer, lastly, to an understanding of 'the indigenous' that is determined by the state law and its authorities. As a result, these reforms produce an adaptation but not an encompassing systemic transformation. They include the Other within an existing system, but do not engage with otherness in an open and transformative dialogue. In the end, this adaptation reinforces not only the monolithically understood categories of 'self' and 'other', but also their oblique power relation. Under these circumstances, there is little chance for

transcending a pre-set hierarchical relation, which is maintained and reinforced by modern law, towards a deeper understanding of the Other and the Self which could lead to a more peaceful and respectful coexistence in diversity.

### 3. *The Persistence of the Problem of 'Who is the Real Other'*

There are, as we have seen in the last pages, several difficulties in making space for the 'indigenous other' in the judicial system. From my point of view, these difficulties are, certainly, a reflection of particular political situations, but, at a deeper level, they are also an expression of a profound identity struggle, through which the more the Other is 'included', the more the Other is fixed to a specific way to be, namely the way that the including subject determines. Furthermore, once 'radical otherness' is recognized, or better, created, how to include this 'radical other' *within* an established system for which he is outside?

As Kuppe points out, "the fact that the normative orders of indigenous peoples differ in general so clearly from state law, means [...] that they cannot adequately be comprehended with the approaches of descriptive positivism of legal science" (Kuppe 2010, 13). According to him, it is problematic even to address these normative orders as 'systems', evoking so "not only a relatively clear-cut boundary between the things it includes and its outside, but also, in the case of legal systems, logic coherence and, at least in terms of its claim, an internal closeness of its norms" (Idem). While it could be argued that this concept of system is not the only one valid, it is important to realize that in the legal field these connotations are often implicit in the current use of the word.

Equally, the content of indigenous normative orders is difficult to comprehend following positive legal categories. Take for example the problematic case of criminal law. The discussion involves not only the quality of behavior liable to prosecution, but also the question on how is to be dealt with conflicts and which are the aims of criminal prosecution and, if necessary, of punishment. In this sense, Piñacué argues that the sanctions established serve, in the context of an indigenous cosmological understanding, to restate the social balance and to uphold harmony within society as well as the legitimacy of the current authorities (Piñacué ref. by Kuppe 2010, 12). This differs from a reference to abstract rules regarding competencies, crimes and punishments. In other words, what Piñacué argues is that "in the context of an indigenous cosmological understanding" relies a different understanding

of law, authority, crime, punishment, etc. Thus, the first problem we confront in the 'inclusion of plurality' is that the prevalent 'language' of law is insufficient for this aim.

Problematic is, at the same time, that once the idea of a certain 'type of Other', for example an Other guided by a principle of harmony, has been settled as characteristic for indigenous law, the Other's diversity is blurred or even erased. All encounters have to be divided in the categories of encountering the 'normal' and encountering 'the particular other', with the result that any third option seems to disappear. The recognition of something beyond the bipolarity of 'normal (I)' and 'particular other' as an aspect of a different type of otherness is disregarded and its legitimacy to being protected is not imperative. 'Otherness' has to respond to how the speaker envisages it. As a consequence, the possibility of change, the possibility of exchange and mutual adaption and learning, and the possibility of dynamic development make the protection of the resulting 'new other' more unlikely. The Colombian court put it bluntly, when it set as an interpretation rule that "the more conservation of customs, the more autonomy" (Vera Lugo 2006, 228).

In this sense, it is important to remember also a point made by Assies, namely that "the acknowledgment of indigenous law often implies a transformation of this law" (Assies 2003, 9), not only because certain contents and procedures are fixed, but also because the way in which this process takes place changes the dynamic of the indigenous norms at stake. Indigenous law is thus reconfigured in the process of the struggles for its acknowledgment, consequently establishing new relations with state law. Thus, Assies states that "we can observe that, in the frame of that dynamic, the indigenous peoples often elaborate statutes and compilations of regulations which describe their political organization and their administration of justice and even codify some contraventions, prohibitions and sanctions, as well as procedures" in order to "delimit the state influence and construct an own jurisdictional space in front of the state" (Assies 2003, 10). Importantly (and similarly to the cases of international legal transfer), this formalization which is mainly motivated by a dynamic in relation to state law, has equally consequences within the indigenous communities, changing their social, political and cultural dynamics, particularly their approach to conflict, and producing an increasing 'bureaucratization'. In this sense, the new formalized legal documents of reference, "are not directed only to the 'exterior' (this is, to the broader society and the state), but have at the same time effects towards the 'interior' on the local communities and their components which incorporate this new logic to their political dynamics and ways of conflict resolution" (Idem).

This increasing assimilation of indigenous law to mechanisms of state law and the explicit dependency of its implementation and interpretation on state institutions and processes, result in the re-statement of an uneven relationship between 'state'/'non-state', 'non-indigenous'/'indigenous', 'normal'/'other'. Thus, it is not surprising that the bill regarding indigenous courts for the state of Quintana Roó has been presented as "a real nationalization of the Indigenous Law as well as the establishment of a kind of indirect rule through the designation and control over the indigenous authorities" (Idem, 15). This results in a problematic situation which Assies labeled as "internal legal colonialism" (Idem).

As a result, the difference of the new legal frame with previous attitudes in cultural politics that did not acknowledge 'cultural diversity' as the reformed Latin American constitutions of the 1990's do, resides mainly therein that, previously, the Other was supposed, if possible, to evolve towards (through being included within) 'real law'. In contrast, now, the Other is either acknowledged with his culturally diverse normative conceptions and conserved in his particular form of a-legality, on the outside of the 'real law' – conserved as 'Other', or he is subjugated to 'normal' state-law, its infrastructures and procedures. As a result, acknowledgment, understood this way, is at the exact distance between an oppressive inclusion and an oppressive exclusion, allowing the powerful speaking 'I' to judge without getting truly engaged with the 'Other' he defines. Through this process, the speaking 'I' is absolved from the criticism of domination because, through the magnanimous gesture of recognition, he exercises his power in a subtle manner, underlining with this generosity its alleged superior character and position. Moreover, acknowledgment is insofar more violent than the mere oppression as it makes appear the oppressive inclusion (You as I) or exclusion (You as Not-I) as a free choice, when, actually, the possible options were predetermined.

What remains unspoken, however, is who states the conditions for this acknowledgment, what is the exchange good requested in turn for that noble recognition. In other words, through the constitutional reforms I presented, the legal acknowledgment of the Other, in this case the 'indigenous other', is conceded but not in an unconditional way. If the Other is not 'Other' the way that the 'I' states, he cannot legitimately exist as 'Other' at all, and his normative perspective loses legitimacy to exist. As a result, the diverse approaches to conflict and their resolution are homogenized through "a pan-indigenous discourse about the characteristics attributed to the indigenous law *in front of* the Western and state law" (Assies 2003, 9; emphasis added). The center of reference is thus the alleged normal case, in front of which otherness is homogenized. The result is a cultural critique of this "Western and state

law" (Idem), and not a truthful exercise of listening to what the Other says in his own way to speak.

Because of these and other reasons, this approach to law and its perspective on plurality has been criticized strongly in the last years. In response, the advocates for legal pluralism in the context of a 'New Latin American Constitutionalism'[240], underline that the main problem of the judicial system resides in their colonial heritage and in a way to think that is "trapped in an Anglo-Euro-centric tutelage mentality" (Chivi Vargas 2010). Comparing this statement with the critiques of post-developmental thinkers presented above, it is possible to see this approach as the legal version of Escobar's reasoning on economic aid. Following this line, the questioning of the legal and judicial system cannot be oriented merely towards a reform process but requires a more radical approach. As a result, the problem statement is oriented towards a revolution that consists in the overcoming of a colonial perspective, turning the case of indigenous law, and the claims for their autonomy, to parts of a bigger movement towards the redistribution of social, economic and political power. As an example, Chivi Vargas argues against the term and the conception of 'communitary justice', since it "represent[s...] the neoliberal coloniality of the academic and later normative treatment of a model of justice that has its own history, its own cultural sensibility of good and bad, its own internal development and its own dynamic of modifications in its practical exertion" (Idem).

These critiques result, partially, of the dissatisfaction with the previous reforms, where 'legal pluralism' was acknowledged, but in a way that was not organic or systematic enough, so that it did not pervade all the sections of the constitutional document (Yrigoyen Fajardo 2011, 146), and it did not find expression in all the ordinary laws under the constitution, making the implementation of the new rights very difficult. Most importantly, "the principle of equal dignity of cultures remained without institutional translation, since only the hegemonic legal institutionality retained the capacity to decide in conflicts between systems" (Idem, 148). As Yrigoyen Fajardo continues, "the pluralist constitutionalism laid principles the effective implementation of which is beyond the sovereign monocultural traditional institutions, that do not represent in their institutional structure, composition and functioning the diversity of peoples and cultures [...]" (Idem, 148 f.). Thus, with the millenium, new perspectives on the role of plurality in society became increasingly relevant in the international political and legal debate.

240 For a resume on this political development, see Kuppe 2010, 27.

In general, the emerging variety of social movements with a critical perspective on socio-political development included under the 'New Latin American Constitutionalism' is characterized, amongst other elements by a more direct participation of the population in political decisions and by the incorporation of indigenous peoples in political life beyond a 'complementary' multiculturalism. Moreover, cultural diversity became a main column, an organizational principle, of a new conceptualization of the state, moving from a 'multicultural' to a 'plurinational' model (Kuppe 2010, 26, 30), and breaking thus with the fiction of the cultural unity of the Nation-State. Importantly, within this approach, that aims to decolonialize Latin American states envisaging the state beyond national unicity, indigenous peoples play a particularly important role. On the one hand, the term of 'decolonialization' refers itself to the historical colonialization, during which the social organization of indigenous communities living in the 'New World' was violently destroyed and oppressed; de-colonialization refers thus implicitly to a process of giving those communities the spaces back, that were taken from them or that they lost during the colonialization. Furthermore, indigenous groups become particularly relevant, because some of the social and political practices associated with them are interpreted as expressions of the goals and ideals of the new model of state and society, for example a community-oriented participative model of social organization.

Examples of these new developments are the constitutions of Bolivia and Ecuador. Yrigoyen Fajardo remarks that, in contrast with the Colombian model, these documents are "founded not solely on the cultural diversity, […] but above all in the acknowledgment of the right of indigenous or originary peoples to self-determination (Ecuador) or free determination of the peoples (Bolivia)" (Yrigoyen Fajardo 2011, 150). But, even beyond that, these new constitutions base on the idea to "produce a decolonialization of the national legal order" (Kuppe 2010, 3) and thus aim for a "new foundation of the state" (Yrigoyen Fajardo 2011, 149). While in previous constitutions a recognition of the right to cultural self-determination of particular indigenous groups was outspoken, the new documents aim to make indigenous law a central pillar of the order of these states that are conceived as plurinational. In these texts there are several specific articles regarding indigenous law and the topic pervades the whole of the constitutional texts.[241] Especially in Bolivia, the question on indigenous groups goes clearly beyond questions over national minorities and "legal pluralism becomes a foundation of the country" (art. 1), putting indigenous legal decisions and decisions of the state judiciary as equally valid. Interestingly, as Kuppe remarks, these changes have important

241 For a short synopsis of the content of these constitutions see Yrigoyen Fajardo 2011, 151 ff.

consequences in the context of international cooperation, demanding to include the aspect of cultural diversity in development projects. (Kuppe 2010, 3)

While these political developments are very innovative in their approach and in the tools they incorporate, particularly in the form and scope of indigenous participation, it is important to reflect how far they are capable of transcending a modern understanding of law, but most importantly a modern approach to otherness and plurality. In this sense, it is worth remembering the warning Assies' expressed in the beginning of the century: since the claims of indigenous groups form part of a wider and contended transformation of the state in an international context, it is crucial to keep in mind that this global struggle "can lead to the hate amongst ethnic groups if it is not appeased by politics of redistribution and participative equity in the frame of a reconstructed and, so to say, 'post-national' state" (Assies 2003, 3). While the vision of a 'post-national state' is starting to take shape, the connected vision of social peace in diversity (Chivi Vargas 2010) is increasingly endangered. Unfortunately, also in the cases of Ecuador and Bolivia, the more the vision of overcoming colonial structures is linked to ethnic and cultural identities, the higher is the risk of a cultural and social division in hate.

This is the conclusion of Andrés Solíz Rada, the first Minister for Energy of the government of Evo Morales (*1959) in Bolivia[242], which, in turn, was a key leader of the constitutional transformation. Thus, Solíz Rada states that the "assignation to one of the 55 indigenous peoples (or 'nations') and the intention of impeding the Bolivians to declare themselves '*mestizos*', as it was the case of the census of 2001, have sharpen the polemics with ethnic content, in front of the new inquiry programmed for this year" (Solíz Rada 2012). To be 'indigenous' has been used as a category set as opposite to 'mestizo', deriving into expressions of official representatives like the one of the vice-president Álvaro García Linera (*1962) "the 'kharas' (or mestizos) can return to the power if the indigenous brothers fail [... If that happens] it will be for us, again, 500 years of silence and obscurity" (cit. in Idem). Importantly, not only representatives of a "radical indigenism" discuss about politics putting clear identity claims to the front, but also their counterparts, the advocates of "eurocentric *mettisage*" in terms of Solíz Rada, produce arguments like, for example, that "we are all *mestizos*, thank God" (Idem cit. José Gramunt de Moragas). From the outset, this statement is

242 Importantly, he participated already in the nationalization of petroleum in 1969 as the adviser of the socialist minister Marcelo Quiroga Cruz. Solíz Rada resigned his position in the government of Evo Morales in 2006. For an interview after his resignation, see Dilger 2007, 36.

doomed to create a division starting by the 'we' it imposes on the reader, telling her who she is.

In this sense, if many constitutions and international documents were criticized because of their discrimination of indigenous peoples, the new Bolivian constitution has equally been presented as "ethnicist, since it privileges the natives, then the intercultural communities, while the rest is considered like third class" (Idem 2010a, cit. Víctor Hugo Cárdenas). Even considering the various political interests embedded in these criticisms, and leaving aside the question regarding who is right or wrong, who is conservative or not, which way would be just or not, beyond all these questions, what is important to see is that the debate is dividing by the mere dichotomies it presents. Therefore, the question is still how to reestablish the coexistence in this divided society, as Solíz Rada pointed out already in 2010.

From a perspective of the post-modern understanding of state and nation, it is easy to criticize Solíz Rada regarding his vision of Bolivia, which comes over and over back to the concept of the nation, even if he addresses this perspective as part of a 'defensive nationalism' (Idem 2011), emphasizing as well the intercultural aspects of the nation he envisages (Idem 2010b). However, dismissing his critique simply because he formulates social 'cohesion in diversity' in terms of 'the Bolivian nation', will not help us to understand the current social tension he makes explicit, neither will it allow us to envisage something new.

More important is his argument that the conjunction of the claims of a 'radical indigenism' and an equally radical emphasis on the 'mestizo' quality of Bolivia have a common result because they are propelled to a great extent by the same financial interests and the same ideological standpoints. Thus, he presents the recent agreement between transnational oil companies and indigenous communities (Idem 2012 and 2011c) as well as the financial support of USAID, the World Bank and European NGOs to the project of the current plurinational state (Idem 2010c) as examples of a coincidence of interests and an overlap of alleged opposites: "the eurocentrism sponsors the NGOs, that, through indigenism, contribute to subjugate the oppressed people, while also trying to obstruct the emergent nations" (Idem 2012). It is obvious that his concern is marked by a political position and by concerns of international economics (and politics). From a more abstract level, it is worth to ask who is the real indigenous other under this conditions? Who speaks for whom and who is the addressee and the beneficiary of political measures? And, most importantly, considering this type of social polarization, are this socio-political (post-modern) transformations, particularly the changes regarding the position of law, capable of transcending the modern hierarchical thinking they criticize?

To conclude this short review of an example of a critical position both in front of the supporters of the Bolivian attempt to open the realm of law and social order to a diversity of cultures, as well as in front of its detractors, I would like to highlight an aspect that seems particularly interesting to me in Solíz Rada's approach. When he criticizes this polarization, what is it that he envisages as an alternative or as a valid goal? Interestingly, he tries to formulate a common goal for (the non-radical understandings of) the "national thinking and the endogenous indigenism", namely to "conquer [the] self-esteem as country, as people and as human beings" (Idem 2011b). Importantly, this self-esteem is not necessarily linked to a limited concept of identity, but, on the contrary, Solíz Rada underlines that the "coexistence of several *mestizajes* within the same person" is possible, since he can, easily feel, at the same time indigenous and belonging to many other groups at the same time (Idem 2012). Taking this position he puts to the front the value of interculturality beyond plurinationality. The fight over which of these two latter concepts is more appropriate is not our main concern, but what remains at the core of this approach is, in any case, the search for a coexistence of diversity beyond a model that understands identity only as an exclusionary asset.

Coming back to our point, are the constitutional and political innovations in Bolivia an example of a better inclusion of 'the Other' in political life? Certainly they are the expression of new and enriching approaches to plurality and the state. However, they confront, in my opinion, the same problems that the other phases of these policies of pluralization have gone through: they refer lastly to a dichotomic division between us and them, where one type of 'us' has always the prerogative to state what is true, what is right, what is just, and, most importantly, who is 'not-us'. While it opens the floor for 'the indigenous' (meaning the recognized ones), it also puts limits to 'recognized otherness'. As a result, the perspective on diversity is based on a social dichotomy between indigenous/non-indigenous. One of the most clear examples for this point is the establishment of "parity of representatives of the indigenous jurisdiction and the ordinary jurisdiction in the formation of the judiciary and the constitutional tribunal" in the Bolivian constitution (Yrigoyen Fajardo 2011, 150). While these mixed tribunals, on the one hand, open the space of legal praxis in a way that just some years ago was unthinkable, on the other hand, they still function clearly on the base of a dichotomic divide.

Similar reflections can be made regarding the academic conceptualization of the subsequent transformations towards the 'pluralistic principle' in Latin America. For example, in Yrigoyen Fajardo's proposal of historical cycles from the perspective of a pluralist

constitutionalism since the end of the 20th century, it is noteworthy that while she addresses a variety of changes in the quality of constitutional approaches, speaking for example of 'multicultural constitutionalism' in the 1980's and then of 'pluricultural constitutionalism' until 2005, the element of 'constitutionalism' remains untouched even in the last emancipatory phase of 'plurinational constitutionalism'. It is worth asking thus, what a constitution in this context means, and how far it can still be addressed as a certain guarantee for multi- or pluri-, -cultural or -national dialogue. Is it still useful for these perspectives, and can it respond to the persistent search for coexistence in diversity? Is it coherent with the rest of the contemporary discourse in favor of socio-cultural diversity to understand a constitution in the traditional positivistic form of a *Grundnorm* at the edge of a hierarchically organized set of norms?

Furthermore, it is also interesting to notice that Yrigoyen Fajardo ends her critical appraisal of the constitutional development in the region with an important call for a "pluralist interpretation to save the limitations [of the constitutional texts] and resolve the tensions in a favorable way for the fulfillment of the objectives and principles of the pluralist constitutional project", underlining that "that exercise of interpretation is an exertion of power" (Yrigoyen Fajardo 2011, 141; 150). However, the question remains: who is legitimized to exert that power and how does that legitimation comes into being?

In this context, it is important to remember that the reference to the right to 'self-determination of the peoples' (according to Chapter 1, Article 1 UN Charter and Article 1 International Covenant on Civil and Political Rights – ICCPR – and International Covenant on Economic, Social and Cultural Rights – ICESCR) as a base for these new constitutional and legal developments does not respond by itself the question about who are the 'peoples' it refers to and how are they to be determined. Therefore, definitory questions gain particular strength, for example regarding the division between national minorities and indigenous peoples (Kymlicka 2009, 23 ff.). It is no surprise that "this asymmetry is generating instabilities" (Idem, 23), because

> "once we start applying the category of indigenous peoples beyond the central case of the colonial states of the New World, there is no clear point to stop. […] Under these circumstances, the attempts to establish a categorical distinction between national minorities and indigenous peoples will seem arbitrary. Moreover, any category, would be politically untenable" (Idem, 26).

In other words, the problem of socio-cultural (and with it also legal) plurality, its exclusion and subordination, has not been solved. It has just been displaced; and the violence behind that exclusion and subordination has been just seemingly neutralized behind

international documents, legal categories and more or less preset decision mechanisms. In any case, an interpretation of the concepts used in these attempts to 'include plurality' will mean a conceptualization of the Other that puts limits to his/her way to be, and, at the same time, it excludes authoritatively forms of plurality with the same arguments of supremacy that are now allegedly repudiated because they served in the past against the now recognized 'peoples'. In this sense it is legitimate to ask: Are we not anyways trapped into the scheme of a legal system that understands itself as a structure of hierarchical power, of positive law and authoritative interpretation? And does this correspond to the claims of a plurinational state to achieve social peace in diversity?

Also in these political and academic processes the question of Spivak remains valid: how far do these new approaches present themselves as transparent for the Other's presence and how far do the mechanisms utilized are successful in this sense. How far do they allow to see the complexity of forces involved in this process? And, most importantly: where is the possibility to listen, to dialogue amongst peoples with different understandings. In this sense, Yrigoyen Fajardo herself underlines the importance of "improving the capacity of all actors to participate in authentic processes of intercultural dialogue which allow to build effective plurinational spaces" (Yrigoyen Fajardo 2011, 154). But how is an intercultural dialogue possible when I preset the Other I am supposed to be not only talking to and speaking with, but, most importantly, listening to? This is the aporia where those approaches are stuck which, coming from a post-modern impulse towards the blurring of identities and hierarchies, search for an answer in the securities of a modern concept of identity and otherness. Consequently, the way to deal with social conflicts and norms resulting from these impulses is embedded within this reductionist frame and doomed to be social and culturally violent.

## III. Closing Remarks

In this chapter I have addressed some examples of projects that put in practice pluralistic approaches in the realm of law, elaborating new forms of legal development. Boal's work proposed a conception of legal development that was based on the participation of a plurality of perspectives through theatrical exercise, creating for the resulting legal proposals a strong legitimacy. With a similar invocation of the importance of plurality, and embedded in an international context of political struggles and economic models and interests, the projects in the judiciaries of Mexico and Colombia aimed to open state-law to the consideration and incorporation of indigenous perspectives on law. The first one permitted the creation of courts, the declared aim of which is to recognize the authority of indigenous law at least within a certain frame. The second one invoked the value of difference and plurality within the Colombian state resulting in a variety of rulings directed to protect and enhance the plurality of cultures. Through these reforms and changes in judicial interpretation, legal development is envisaged, at least at first, in a new way that is connected to opening law to a variety of approaches instead of setting one form of law as the only possible goal of development

In this short overview over these projects, we could see that they recall some elements that were of importance in philosophical and theoretical discussions on plurality, like for example the claim for the recognition of legal pluralism which took form in the Mexican and Colombian developments. Equally similar questions arose, like the problematic of the pluralization of the subject, which was an important part of Boal's anthropological conceptions, and the questioning of an authority that can set which is the right interpretation. Most importantly, in these examples we found similar difficulties as in the theoretical discussions on the pluralization of ‘law’ and ‘development’. While they, in principle, aim to incorporate plurality, to open up for diversity, to emphasize the value of the particular, the results are more often than not the return to modern models of law and development.

Boal, for example, although blurring bipolar concepts, proposes lastly a dichotomic divide between oppressor and oppressed, and his legal-political endeavor ends up in the statements of ‘new truths’, returning to a unitarian form of justice that becomes the new goal for ‘true’ development. Equally problematic results the fact that the recognition of indigenous law and indigenous rights is embedded lastly in a frame that determines what kind of indigenousity, what kind of otherness the Other must have to actually access a space within

the legal frame. Remarkably, in the case of indigenous courts, the institutional structure and the determination of profiles of the authorities involved, is a decision taken from an authoritative position that is still clearly occupied by state law representatives. In other words, the place, time and form of proper plurality is determined by the logic of the just and true one law towards one common development. Most importantly, the newest constitutional developments in the region, which search to engage with the deep past of colonial socio-cultural division and oppression, and which aim to be more radical in their affirmation of plurality in the cultural, social, political and legal organization of the state, have shown to be equally trapped in essentialistic and dichotomic perspectives on identity. The result in the case of Bolivia has been the collision of perspectives that argue in the same terms as the approaches they started rejecting, namely with a hierarchization of the 'us' as the proper authority to state the just and true. Outbursts of violence and social division have been the consequence of emphasizing plurality while determining identities in a schematic way.

Summing up, we can say that the alternatives posed to modern perspectives on law and development within a postmodern sociolect, result insufficient in their own terms of opening up to plurality and diversity. The endeavors in this line result consistently in a return to the modern schemes they rejected in the first place. But, even more problematic is that this return has resulted in an increase of social division and violence, that reminds us of Zima's critique of postmodern approaches. How is it possible to imagine an engagement with the Other, when he is conceived as radically different?

## D. Pluralizing Legal Development and Legal Transplants

In the last chapter I have presented some examples of how postmodern approaches have changed theoretical and practical forms to engage with law. In other words, modern law has been *developed* in a variety of directions through these new perspectives. Along with these philosophical and political changes, also the concept of 'legal development' and the projects with this particular orientation have been reflected anew. Complaints have been raised that the modern approach to international development aid in the area of law has disregarded the actual existence and action of structures beyond the state and beyond state control, which had their own procedures of legitimation and organization (Benda Beckmann et al. 2005, 198). In doing so, the legal development project supported the ideological dominance of the Nation-State that made these other practices, in turn, less visible. As a consequence of the new political movements and the new pluralistic approach to society, law, and development, the former perspective oriented to a strong nation-building process is confronted today with new conditions (Kuppe 2010, 33). As Kuppe (Idem) points out in detail, for development projects this means that

1. the cooperation partners have to be broadened and diversified in order to contact decentralized state institutions, NGOs, social movements and indigenous peoples,
2. new cultural identities have to be addressed, and are addressed as part of new approaches to Human Rights, that require a pluralistic approach,
3. concrete guidelines for international cooperation emphasize the cooperation with indigenous peoples and their organizations, and
4. the criteria of transparency is addressed as a broader concept that includes the need for taking into account aspects like the protection of investors, private interests of economic and financial actors and the protection of natural resources.

Thus, echoing the problematic posed by Escobar regarding a vectoral economic development but this time in relation with the instrumentalization of law for this purpose, Kuppe stresses that "law should not be only 'lubricating grease' for the competitive attraction of businesses and economic growth" (Idem, 34). In this sense, if the idea of a 'democratic *Rechtstaat*' remains, meaning a democratic state under the rule of law as the abstract goal of the international cooperation (Idem), it can do so only as an aspect of a redistributive and participatory endeavor. In other words, while for a long time development was seen in the

rhetoric of international organizations as something different from indigenous claims for legal pluralism and the utilization of creative techniques in law-making, the changes that accompanied these socio-political processes in law, meant equally important shifts in the conceptualization of development and its implementation strategies. In particular, this change occurred in the connection between development and law.

In this chapter, I will address these shifting perspectives in development and the role of law in this process. In turn, I will refer to the particular aspect of legal transfer, which was a central tool in projects of legal development. Importantly, this topic has received increased attention by politicians and academics in the context of social transformation in regions as varied as the European Union, East Asia and South America. Going back to the beginning of this investigation, where I referred to Alan Watson's approach to legal transplants as a central element of legal modernization, I will engage with other approaches to legal transfer which emphasize cultural and social diversity in line with post-modern critical reflection. While we have already seen examples of some new approaches to law, development, and legal development in the previous chapters, here we will observe the process and consequences of particularization in the realm of international development referring particularly to law and legal transfer. Again, the leading question in this chapter is how do these approaches to law and development engage with plurality.

## I. Plurality within New Perspectives on Law and Development

As I have shown above, law played an important role in development discourse after the Second World War, with particular strength from the early 1960's (the ‘first development decade') to the mid 1970's. Influenced by the theoretical current of legal realism, law came to be seen as a tool for social engineering in ‘developing countries’ by the advocates of the so called ‘Law and Development Movement’. To be clear, the ‘Law and Development Movement’ was not an independent social movement, but rather a project launched in the United States with the financial support of institutions like the United States Agency for International Development (USAID) and the Ford Foundation, that focused primarily on legal education and training in ‘developing countries’. In this sense, the context of its appearance is

determinative, since this endeavor was embedded in the political frame of the Cold War and it is also marked in an economic and academic perspective by modernization theory.

As we know, this current of international political strategy was harshly criticized as a failure during the 1970's, thus marking, at least temporarily, the end of the hopeful project to bring development through law. The development programs themselves not only they in their main aims, but also they showed that changes in the realm of law might be counterproductive for the desired social reforms. Thus, by 1974, David Trubek and Marc Galanter argued that

> "legal changes ostensibly designed to reform major areas of social life and achieve developmental goals may in fact be a form of symbolic politics, the effect of which is not to cause change but to defeat it by containing demands for protest, thereby strengthening, rather than weakening groups committed to the status quo. And increased instrumental rationality in legal processes together with governmental regulation of economic life may contribute to the economic well-being of only a small elite, leaving the mass no better, or even worse, off" (Trubek/Galanter 1974, 1084).

The disappointment in the potential of law to engineer society in the expected ways, reinforced by critical currents in other areas of philosophy and politics, produced waves of self-criticism[243] provoking studies like 'Legal Imperialism', which I cited above (Gardner 1980). Importantly, this moment of internal decline of the Law and Development movement went along with processes of international politics, through which 'Third World' countries gained more autonomy in front of the two powers of the Cold War, which in turn began a phase of some relaxation.[244]

At the same time, these international developments and this perception of failure paralleled a change in the emphasis of the organizations supporting the Law and Development movement within the United States. In this sense, Bryan G. Garth underlines that "[a]s the Ford Foundation moved further into legal strategies consistent with the civil rights movement in the United States, the emphasis shifted to public interest law. Those favoring the new public interest law in the United States found themselves in opposition to programs investing in corporate law in the service of Latin American states" (Garth 2002, 394). In other words, there was a struggle within the 'donor' side of the 'development machine' on the role of law

243 This disenchantment would later foster the development of critical legal scholarship in the United States (Rodríguez 2001, 23).

244 Take for example the increasing influence of the Non Aligned Movement which grew from 54 member countries in 1970 to 96 in 1979. Importantly, in this last year of the decade, under the presidency of Fidel Castro (which lasted until 1983), the 6th Summit of the organization was held in Havana, Cuba. In this decade, the Movement expanded and produced declarations that show its presence in the international agenda. See, for example, already in 1970, the Lusaka 'Declaration on Peace, Independence, Development, Cooperation and Democratisation of International Relations' (Institute of Foreign Affairs of Nepal 2011, 29) and the 'Declaration on Non-Alignment and Economic Progress' (NAC/CONF. 3/RES. 14; Idem, 42), which were emphasized in 1973, 1976 and 1979, as well as in later decades (Idem).

in state politics, economics and their reform. Consequently, "[w]hen the approach changed in the United States, it also changed in Latin America" (Idem).

As a result of this combination of elements, the movement of Law and Development was declared to be 'almost dead' in 1982 (Snyder 1982, 373). However, as César Rodríguez remarks "from the perspective of Latin American lawyers and scholars" he sees himself in, "the concrete, vital tasks related to the improvement of legal institutions and the creation of legal mechanisms empowering marginalized sectors of the population did not disappear" (Rodríguez 2001, 16). So, while the 'Law and Development Movement' ceased to boom from the perspective of the 'donor' USA, the endeavor towards more development continued to be central for the activities on the 'recipient' side of these development aid projects.

In fact, the (legal) development project never disappeared totally, but it was, on the one hand reformed, and on the other hand, paused to be continued later in a similar way. For example, at an institutional level, the International Legal Center which was an agency that promoted the aims of the Legal Development Movement in Latin America with the support of the Ford Foundation (Idem, 23), was replaced in 1974 by the International Center for Law in Development (ICLD). As the founder and director of this new institution underlines, comparing the new with the previous structure: "[t]here were two major changes. From an administrative point of view, Third World lawyers and scholars took over the Center, and we decided to seek funding in Europe, rather than in the US. From an ideological point of view, we decided to substitute a bottom-up approach to development for the top-down perspective that dominated the projects previously undertaken" (Dias cit. in Rodríguez 2001, 23).[245] This change is the institutional result of the emergence of an "alternative law and development movement" in the spirit of dependency theory and along the lines of the proposal of 'another development' supported by the Dag Hammarskjöld Foundation (Idem).

A central argument of this alternative approach was that the type of law emphasized by the Law and Development movement has a proclivity "to centralize power in the hands of the state, thus encouraging bureaucratization and specialization", and consequently, "when transplanted to Third World countries, it tends to reduce the potential for self-reliance that exists in the informal practices of local communities and constitutes an order that is alien to most people" (Idem, 24). As a result, the emphasis of this legal strain of the 'another development' movement, relied on "informal, communal varieties of regulation and dispute

245 Remarkably, the new institute was established with the funds remaining from the old International Legal Center, and, despite the change of perspective, it had its seat in New York (Dias cit. in Rodríguez 2001, 23).

settlement" as means "conducive to self-reliant economic activities and to the cultural and social strengthening of local communities" (Idem). Importantly, this perspective is different from other approaches I have presented above which emphasize vernacular practices, as it still works within formal state law, understanding law as a tool for social and economic development of the 'Third World'. The concrete result was the execution of a variety of projects "providing legal assistance to marginalized communities, as well as [...] lobbying for changes in legislation and promoting social change through adjudication" (Dias 1981, 187) focusing, geographically, in Southeast Asia.[246]

Importantly, this approach of an 'another development' as something 'radically different' from the first approach of the Law and Development movement, has not dominated most of the political efforts and financial investments on legal aid in the last decades.[247] Rather, the bulk of this endeavor was dedicated to projects that, as we will see, resemble to a great extent the discourse of the Law and Development movement of the 1960's and 1970's, embedded in modernization theory. Interestingly, however, the alternativist approach appeared in conjunction with these perspectives within contemporary projects of legal and judicial reform.

If the 1980's, development's lost decade, gave space for alternative approaches to law, they also gave opportunity to reorganize the modernization approach according to the new political and economic circumstances. Regarding the United States, Garth underlines the importance of the human rights movement during the 1980's "as a tool directed against President Ronald Reagan and Jeanne Kirkpatrick and their policy favoring authoritarian states in a renewed Cold War" (Garth 2002, 394). This boom of Human Rights led to the new wave of Law and Development under a new sign. In the same line, Garth remarks on the relevance that the investment in law and legal institutions during the 1990's had as a form of legitimizing the policies and the position of economists in the state administration. As a result, "[t]he economics profession shifted the center of gravity from anti-state policies to investment in

246 It is an interesting observation that the change from the International Legal Center to the ICLD, as a result of the failure of the Law and Development movement and the emergence of an 'alternative development' approach, produced a double geographical reorientation, this is a shift from 'donors' in the United States to 'donors' in Europe and from 'beneficiaries' in Latin America to 'beneficiaries' in Southeast and East Asia. These institutional changes remind us of the international and globalized political context in which legal development and legal development aid take place.

247 Nevertheless, from a point of view of 'dependency theory', the elements of law and development became intertwined also through the discussions on a 'right to development', which was first recognized in 1981 in Article 22 of the African Charter on Human and Peoples' Rights, and subsequently proclaimed by the United Nations in 1986 in the 'Declaration on the Right to Development' (A/RES/41/128; United Nations 1986).

institutions to support markets and the neo-liberal policies of the 1980s" (Idem, 395). It is important to recognize here the important impact that the tensions and struggles within the United States had on the development activities supported in Latin America and elsewhere: The engagement in the political processes abroad was an important tool used to gain power in national discussions.

To these elements which have favored the redesign and relaunching of law and development programs, Garth adds two key blocks of pressure actors towards the new wave of law and development reforms. One of them is linked to an emancipatory call related to 'alternative development' as I mentioned above, and which I will address with some more detail later. The other one draws on economic or business approaches resulting from the increasing global interconnection and participation of business firms and the corresponding worldwide expansion of advisory expertise (Idem, 386). This constellation creates a "remarkable pressure for legal convergence" (Idem).

At the same time, in Latin America, the 'fourth wave of constitution making' was taking place in a general environment of re-democratization and played a key role. Importantly, this social and political movement went hand in hand with economic reforms. As Rodríguez-Garavito puts it, "[t]he turn of national elites toward the democratic variant of the thin conception [of the rule of law] resulted from the twin processes of democratization of the polity and the second wave of neoliberal reforms in the 1980's and 1990s" (Rodríguez-Garavito 2011, 163). By the middle of the 1990's, the neo-liberal reforms found a new shape in institutionalist thinking. In 1994, when the NAFTA came into force synchronically with the Zapatista uprising in a context of economic crisis, it became obvious that the model of the Washington Consensus required change, and thus the re-evaluations of this approach started, as I mentioned above citing the works of Burki and others.

In summary, during the 1990's, in a setting beyond the Cold War, in a time when liberal capitalism expanded increasingly and the Washington Consensus gained political strength and stability, in a general context of global reorganization, the Law and Development Movement found good conditions for a conceptual and political re-launch based on the harmonious couplet between good economic results within a globalized free market and good law. As a result, the setting for the contemporary reforms in the frame of a New Law and Development movement, is quite different from the context of the first Law and Development endeavor, since

> "the consensus [in development circles] is far stronger in favor of reform and the legal approaches identified with the United States, including the core idea of a

> strong and independent judiciary. […] Economists have come to see the importance of legal institutions to the markets that they now promote. Political scientists see the rule of law and independent judiciaries as key components of 'transitions to democracy' and even to the production of 'norms' central to international relations" (Garth 2002, 385 f.).

In fact, the 'rule of law' is emphasized as an antidote against 'crony capitalism' by different portions of the group of experts on economic development (Idem, 386). As a result, while data regarding the concrete amounts differ, what is certain is that the investment in legal reforms in Latin America has reached record amounts (Rodríguez-Garavito 2011, 164).

Despite contrary political stances and opposing social projects, Garth correctly puts to the forefront, "a field that all tend to support, with debates about how the major institutions should best approach legitimate reform efforts that include a commitment to build strong and independent judiciaries" (Garth 2002, 388). However, the broad support has not resulted in a perception of more success in comparison to the first wave of law and development. Disappointment and doubt have appeared in theory and praxis oriented research (Garth 2002, Ginsburg 2000, 830). Nevertheless, "[t]he lack of success has neither shaken the field nor diminished the enthusiasm for further efforts" (Garth 2002, 388).

The main international actors in this context were already mentioned in the context of the Latin American constitutional and judicial reforms I presented above, namely the World Bank, the Inter-American Development Bank and USAID. We can add furthermore the United Nations Development Program (UNDP), the United Nations International Drug Control Program (UNDCP) and the governments of Spain, Germany, France, Great Britain and Italy (Rodríguez 2001, 26), including the collaboration with NGOs and academic institutions. Main actors from the importer's side were often Latin American economists and lawyers who were educated and trained in the United States, and who occupied elite positions within the state and supported the reforms from within the national systems.

As a consequence of the increase and scattering of development agencies dealing with law reform, the new development activities are of a far larger scale than ever before, and are directed by "a wide range of multilateral, governmental and private actors that advance multiple reforms, oftentimes in an uncoordinated way" (Rodríguez 2001, 27). Furthermore, the new generation emphasizes as part of their self-image "a holistic approach which is developed by the local legal communities" (Dakolias 1996, 69), recovering critiques expressed by advocates of 'another development'. Rodríguez summarizes the similarities of the first and second wave of modernizing law and development projects, stating that:

> "Both generations share the pillar of modernization theory, i.e., the conviction that underdevelopment can be overcome if countries in the South adopt the institutions typical of Western capitalism and democracy. They also share the basic features of the proposed model, that is, liberal legalism [...], and economic development through private initiative in a free market. And they view law as an important instrument for the construction of institutional settings conducive to development" (Rodríguez 2001, 27).

The new wave of political and financial investment in legal development was accompanied and supported by a new wave of academic reflection in the field, which was nourished by the new post-Cold War global environment. Interestingly, as Ginsburg has remarked, the resurgence of the interest on 'law and development' (in 'donor' countries and their academic institutions) is connected, beyond the national and international aspects underlined above, with questions around the rapid economic growth in East and Southeast Asia (Ginsburg 2000, 830). Importantly, these cases did not offer a vindication of the instrumental perspective on 'good law' that results in a 'good economy', but – rather – they seemed to falsify it. Naturally, this observation increased doubts on the role of law in development, since this region did not present an 'advanced law' although its economical growth was patent, at least according to the prevailing discourses on development. In other words, it seemed to be proven that 'law does not matter for development'. After having discussed post-developmental approaches and legal pluralism, it is worth asking the meaning of law and development which this statement aims to debunk and which challenges the premise of the Law and Development movement.

To be more precise, the doubts regarding the importance of law for development do not concern in general the role of law as normative social tool, but rather the role of a particular type of law, meaning a 'human-rights-rule-of-law-constitutionalist' approach to law in contrast to authoritarianism (Davis 1998). The conglomeration of these varied aspects of law into this ambiguous expression is not just a play on words. Moreover, it reflects the fact that analysts conflate very different aspects into one model and bound them with one allegedly clear concept: 'law' – whether arguing for or against its role within an equally universal concept of development. Take for example Davis' analysis on 'Constitutionalism and East Asian Economic Development' (Davis 1998). The title of his paper uses relatively clear concepts, however, things start to get mixed up, when he starts presenting the context and aim of his research asserting that:

> "Central to the assertion that authoritarianism is an essential component of East Asia's 'economic miracle' are the claims first, that *human rights* and the *rule of law* are dispensable in pursuit of economic development [...]. [T]his authoritarian developmental challenge to *democratic* and human rights reform can be expected

> to persist. This article will challenge this authoritarian developmental claim and will affirmatively offer *constitutionalism* as an avenue for East Asia's continuing economic development" (Idem, 304; emphasis added).

Davis is clear about some differences between the concepts he uses of constitutionalism, human rights, democratic reform and rule of law, however, he quickly dismisses them as practically irrelevant (Idem).[248] Interestingly, his gloss quoting Alexis de Tocqueville (1805-1859) (which sets the frame for his work) as well as the main reference for the argument he contests, namely an article by Bilahari Kausikan[249], refer only to 'democracy'.

More important for us than Davis' argument itself, is what happens on the basis of such conceptual packages. Exemplarily, Ginsburg, referring to Davis' paper, summarizes that "having drawn on evidence from Asia, some have claimed that the *rule of law* is dispensable in the pursuit of economic growth" (Ginsburg 2000, 830; emphasis added). However, the title of his own paper is 'Does *Law* Matter for Economic Development?' (Idem; emphasis added). So, what is this discussion actually about? Constitutionalism, democracy, the rule of law, or just law? Or maybe human rights? And, more importantly, what particular type of constitutionalism, democracy, rule of law, or law are they referring to? Or maybe the idea at stake is a *particular* combination of all of these, which is a recipe for economic growth as a *particular* form of development?

If we are just talking about law in terms of positive law, from the beginning of Davis' (and Ginsburg's) arguments, the answer to the question of whether law matters for economic development, is clearly 'yes!'. Law matters because what is characterized as authoritarian law has allegedly brought *de facto* the economic development they have in mind, while "the alleged price of human rights is the destruction of the Asian social fabric and the resultant political and economic chaos" (Davis 1998, 304). In other words, for Davis' and Ginsburg's question to make sense, we have to read it differently. The problem they analyze is not if positive law as such matters, but if a conglomerate of ideas that they put together and name law (excluding implicitly other forms of normativity from this loaded concept) affects economic development.

248 Davis explains his concept of constitutionalism as follows: "The fundamentals of constitutionalism are taken to include three core institutional components: democratic elections with free and fair multiparty contestation; human rights and freedom of expression; and the rule of law, including adherence to principles of legality. In addition to these core components, this article argues that constitutionalism must take on indigenous institutional extensions that attach it to local social conditions and concerns. This dualistic structure supports the notion of universal human rights and, at the same time, allows for a degree of diversity in constitutional practices" (Davis 1998, 307.

249 Kausikan was then Singapore's permanent representative to the United Nations.

What I am trying to show here is that 'law' in terms of the debate on development (and its practical consequences) conflates a variety of aspects producing in the end an understanding of law with a very particular character that becomes generalized.[250] If the New Law and Development movement is seen to an important extent as an expression of the revival of modernization theory, the new detractors of law-and-development based their arguments equally on modern approaches to law and development. They used similar strategies of conflating different terms in ambiguous concepts that were declared as generally applicable.

Similarly, regarding the concept of development, it is important to keep in mind that both in academic reflection as well as in policy design, the point of reference continues to be economic growth. Understanding the 'human-rights-constitutionalism-rule-of-law' approach as a means subordinated to this end, Davis' can argue that

> "[a]t an early stage, proper economic policy sometimes may be more important than whether a regime is authoritarian or democratic. [… U]ltimately, the success of a regime depends on its ability to generate the conditions favorable to economic development […]. As economic development succeeds, however, a degree of social complexity and stratification arises such that authoritarian state institutions [...] may become overtaxed and no longer able to afford the degree of order, reliability, and participation sufficient for continued economic success in a free market system. It is at this stage that many regimes may be called upon to initiate democratic reform" (Idem, 306)

At the same time, a specific form of economic development tied with the proper law is supposed to serve social order. Thus, the warning for East Asian governments/economies is that "[u]nder the circumstances of rapid development, if formal channels for interest representation are not available and fully functional, cronyism, corruption, and social disorder are likely to occur" (Idem).

The positioning on a clear path towards economic growth is not just an aspect of scientific reflection on the role of the rule of law or constitutionalism in international development, but it is also a central aspect of the policies and strategies of the international organizations financing legal aid and promoting legal reforms towards more development. While the first generation of law and development has been characterized as having a "more encompassing notion of development […] which entailed greater social equality and participation" (Rodríguez 2001, 27), this new generation of developers framed development clearly in terms of economic growth. Thus, one of the most important aspects that differ between the two generations of law developers is that now the main field of law and development is not anymore legal education, but institutional reform. Adding to the examples

250 For a more detailed discussion of the same problem regarding the ambiguous use of the concept of 'rule of law' in the context of development and an attempt to create some minimum consensus, see Ringer 2007.

referred to in the last chapter in the context of the Mexican legal reform, the emphasis on an economic perspective and its connection with an institutional perspective can be found also in the argument that Maria Dakolias[251] put forward for prioritizing the modernization of legal institutions: "such institutions contribute to economic efficiency and lead to growth which in turn alleviates poverty" (Dakolias 1996, 71). Following this perspective on development, law is understood more like a "facilitator of development, rather than its source" (Rodríguez 2001, 28).

In sum, while the new wave of law and development has sought to overcome the criticisms posed against their predecessors of the 1960's and 1970's, both groups of reforms are very similar. The new model might emphasize institutional reform and intend to incorporate the participation of local actors, be more scattered and have a more concise approach to development as economic growth. However, as Rodríguez criticizes, the core is the same: "the new programs focus narrowly on promoting foreign investment and capital accumulation as conditions for economic development. [... They] have clearly adopted a top-down perspective" (Idem, 37 f.). To these two elements, we can add that the equalization of development with economic development did not change (but became stronger), and the emphasis on the need to develop towards a certain goal remained central to this endeavor.

Looking a bit deeper into the philosophical and theoretical underpinnings of these proposals, it is no surprise that the similarities with the first wave supersede the differences. Both approaches, one emphasizing legal education and the other institutional reform, correlate, in fact, to two strains of Weber's understanding of the relation between legal reason and economic development. In this sense, Tom Ginsburg argues that while the first wave emphasized rather the aspect of legal rationality as a cultural aspect that could allow the transition from traditional ways of life to modern ones, the second one, revitalized by the new institutionalist approach of the economic historian Douglass North, emphasized law as an effective institutional constraint (Ginsburg 2000, 831 ff.). Law, in this sense, is part of "technical institutional arrangements (which provide an environment for individual entrepreneurs)" (Idem, 833). Due to this technical neutrality, "[t]oday's development policy assumes that a country must adopt the proper institutions to facilitate growth and that institutions can be transferred across borders" (Idem).

251 Maria Dakolias was the World Bank official in charge of the Latin American programs from 1992 until she joined the legal vice presidency of the bank in 1996.

The role of plurality in this context, is, consequently, a very constrained one. While there is, on the one hand, an increasing awareness of the need to incorporate the 'recipient's' perspective to the planning and implementation of such programs, and, on the other hand, a scientific claim to pay more attention to "the different roles of law in later-developing countries" and the "widespread use of informal alternatives to law" (Ginsburg 2000, 833 f.), the idea of what a developed law should provide to society and what development should mean remain rather stable. Importantly, the relation between law and economic development, is primordially one in which law is subordinated and at the service of economic growth. In the end, however, this alliance of law and economic development is supposed to support social order and 'full functionality' of the society. What social order means, how or when a society is functional, or for what it should function are questions that receive, from this perspective on law and development that encompasses the biggest international investments, one answer which is allegedly valid for all, and which is lastly subordinated to the requisites of the globalized free market.

Importantly, this type of development proposals has been criticized as part of the revival of an imperialistic project. Thus, Aragón Andrade has stated regarding the Mexican reforms of the two last decades, that "this process of legal reform does not pretend, as its promoters have asserted, to make a series of measures to correct 'the flaws' of the judicial system, but actually it is about putting in motion a project and a different conception of the role that the tribunals of the State in society and thus of their organization, administration and internal logic" (Aragón Andrade n.d., 7). In other words, he conceives of these reforms as part of the 'hegemonic model of globalization' mentioned above.

These criticisms do not oppose every kind of legal development, they do not aim to maintain the legal and political *status quo*. Neither is this an expression of antiquate state nationalism in front of the all-powerful globalization, nor is this type of claim reduced to Latin American thought. On the contrary, this type of critique is well in line with international philosophical and political concerns and calls lastly for a different type of reform. In this line, based on Slavoj Žižek (*1949), Aragón Andrade asserts that

> "the idea of the 'good justice', that overcomes the flaws of the current justice apparatus of the State, has been filled by the specific content of an idea promoted [...] by several international agencies as if these were the only possible options to achieve this objective […. T]he solutions proposed from the agenda of the judicial reform driven by the prevailing economic order are part of this bet" (Aragón Andrade n.d., 7).

From this perspective, the challenge is to open the notion of 'good justice' beyond that 'specific idea' promoted by international agencies, and to boost reforms in a different direction.

As we can appreciate in this critique and in the discussion of the examples regarding the recognition of indigenous law and indigenous justice, the approach to development identified with the enhancement of globalized free market and the rhetorics of economic growth, is not the only one pushing for legal development through judicial and legal reform. Sousa Santos and Rodríguez-Garavito have addressed this critical stream of political and legal activism as 'subaltern cosmopolitan legality'. According to them, this perspective is based on a participatory approach, "seeks to expand the legal canon beyond individual rights and focuses on the importance of political mobilization for the success of rights-centered strategies" (Sousa Santos/Rodríguez-Garavito 2005, 15).

Most recently, Rodríguez-Garavito has referred to this current in the context of an approach to the rule of law from a perspective of 'global constitutionalism'. To be more precise, the author envisages this perspective as a transnational ideological and political project with roots in the human rights movement which, interestingly, is related, at the same time, to a project of 'global neoliberalism'. The concrete expressions of this 'global constitutionalism' can be seen in extensive constitutional bills of rights, an emphasis on judicial review (particularly through the express means of a *tutela* claim) and the spreading of judicial activism (Rodríguez-Garavito 2011, 164 ref. Tate). While there have been different approaches to these reforms, including more or less the element of judicial review, the model of market economy and democracy, what is remarkable is that this is a project that goes beyond Latin American reforms, including the incorporation of judicial review into new constitutions, like in the cases of Spain (1978), Portugal (1976), and South Africa (1993), the more encompassing transition of former socialist countries like Hungary (1989-90), Poland (1986) and Russia (1991), as well as softer reforms as it was the case in Canada (1982) and New Zealand (1990) (Hirschl 2004, 7 f.).

Due to its institutional focus, and more clearly to its emphasis on rights and their enforcement through judicial review, the main object and means of (legal and social) reform of this current was the activist constitutional court, or the supreme court. Rodríguez-Garavito divides between two main tasks of these courts, namely the strengthening of citizens' liberties in front of the state (or 'negative rights'), and the protection and enhancement of social rights (or 'positive rights') (Rodríguez-Garavito 2011, 165). Both of these aspects challenge a thin version of the rule of law that Rodríguez-Garavito identifies with the global neoliberal

project: The first one is insofar challenging as it goes beyond a mere understanding of law as a tool for financial and legal security and political stability, while the second one takes hold on the state and its duties to protect and provide certain goods.

Importantly, these movements, according to Rodríguez-Garavito, are not separated from foreign interests and investments from abroad. On the contrary, they base on international human rights networks and work with key financial support from private foundations and governments located in the financial and political centers of the globe. Equally, the transnational formal and informal networks of lawyers and constitutional court judges have played a major role in this context. Particularly the latter connections lay at the foundation of "cross-citation among constitutional courts, the growth of comparative constitutional law, and the migration of ideas on constitutional interpretation and enforcement mechanisms across borders" (Rodríguez-Garavito 2011, 166). A concrete example of the role of these networks can be seen in the professional development course for magistrates organized by the Judicial College of Paraná (Foz do Iguaçu, Brazil) in 2010, titled 'Jurisdictional Dialogue between the European and Latin American Integration Courts'. In this seminar, which was funded to an important extent by the German foundation Konrad Adenauer Stiftung (KAS) and the Austrian University of Innsbruck, judges from different parts of Brazil gathered with some Austrian and German academics, representatives of the KAS and the German judge Günther Hirsch (*1943, former president of the Federal Court of Justice and judge at the European Court of Justice) to discuss the interaction and cross-citation between the European jurisdiction and the Mercosur (Konrad Adenauer Stiftung 2010). The emphasis was put, naturally, in the development of better justice in the Latin American region following the European model.[252]

Naturally, this constitutional project is connected with traditions I have presented above. Regarding the conceptual foundation of this constitutional project, Rodríguez-Garavito underlines the movements within and beyond Latin America of 'alternative use of law' and the constitutional traditions and judicial activisms in Europe and the United States (Rodríguez-Garavito 2011, 166 f.). We have already seen the results of this approach in the case of the role given to indigenous law and indigenous justice in Mexico and Colombia. The results in these cases, as well as the result in the current of Alternative Law in Brazil, have shown that this project suffers the same structural flaws as the neo-liberal model they aim to contest, at the same time that they are intimately connected. Even if a part of their supporters

252 The author participated in this course as a speaker, and could thus appreciate through direct experience the functioning of this transnational network of judges of diverse levels and law scholars.

had the intention to make basic rights effective and transform society through active courts, at the same time, they have provoked new hierarchical divisions within society that reflect the new hierarchies established by their conceptual frame. If, on the one hand, they present themselves as contrary to the neo-liberal approach, on the other hand they support the same scheme of thought. This is due, to an important extent, given the connections between the two models, that, as we will see shortly, did not escape scholarly attention.

Summing up, according to Rodríguez, who develops his research in the same line as Sousa Santos and Aragón Andrade, there can be identified two basic lines of law reform projects. On the one hand there is a 'neo-liberalist' stream, connected to a thin vision of the rule of law and arguments of technical neutrality of judicial reform, and leaded by institutions like the World Bank. This stream is related with what Sousa Santos, and with him Aragón Andrade, name the hegemonic globalization project. All of these authors recognize, at the same time, the existence of another stream pursuant of legal reform towards more development. From this other perspective, the conceptualization of development, and sometimes of law is partially different from the one presented by the first stream. Importantly, in line with this last approach, Sousa Santos, Aragón Andrade and Rodríguez-Garavito support all a certain variety of legal pluralism. In terms of the rule of law as a form of development they endorse furthermore a participative and distributive perspective in contrast to an approach only or mainly oriented towards economic growth. Rodríguez-Garavito, for example, identifies with an alternative approach to law, relating it to a conception of development based on dependency theory. All of these researchers, as well as other legal scholars working on the field of legal pluralism and in the frame of the current of New Latin American Constitutionalism invoke Human Rights through a perspective of cultural diversity. Regarding the practical consequences of this approach, it is possible to say that the Colombian court reform and other changes in the Latin American region respond also to and derive from these calls of alternativity. Going beyond mere alternativity, also the Bolivian legal and political development addresses a call for emancipation to leave behind centennial dependency and subordination.

Importantly, both currents are, as the advocates of this 'alternative' approach accentuate, interlinked through institutions, biographies and concepts participating in this move towards better law and better law-enforcement through legal and judicial reform (Rodriguez Garavito 2011, 159 ff.; Garth 2002, 387; de Sousa Santos and Rodríguez-Garavito 2005, 19 ff.). Concretely, this connection meant the launching of projects that include a mixture of approaches and resulted in 'combined' results. Take, for example, the reform of the

Colombian criminal justice system in the frame of the already mentioned constitutional reform, which Rodríguez-Garavito investigated in his detailed account (Rodríguez-Garavito 2011, 167 ff.). The context of this reform was marked by the presence of both reformist approaches: on the one hand, the Constitutional Assembly of 1991 included a neo-liberal strain visible in the government's proposal to the assembly incorporating the central elements of the Washington Consensus, on the other hand, it incorporated as well a neo-constitutional strain through the "unprecedented representation of leftist parties [...] and the influence of constitutional lawyers within the government elite" (Idem, 168). Importantly, Rodríguez-Garavito underlines that both groups participating in the constitutional drafting were trained or educated in the United States. While the first ones were occupied with the provisions that would permit the implementation of neo-liberal economy, trade liberalization and privatization of state firms, the latters elaborated the bill of rights of the constitution and key institutional arrangements. Importantly, this bill of rights and the institutional arrangements were developed through an intense exercise of comparative law, inquiring into the corresponding sections of the constitutions of Germany, Italy, the United States and Spain (Idem, 170), and permitting the incorporation of ideas found in these documents.

The moderation of the discussion that emerged in this tension was led by some key political figures participating in this project who acted as 'brokers' between the two groups. Besides the role of these particular agents, Rodríguez-Garavito emphasizes also two basic mechanisms for the management of potential clashes: Firstly, the agreement between both groups regarding the need to make effective a thin version of the rule of law, and, secondly, the fact that the two groups had a common educational and personal background that provided the possibility of understanding, identification, respect and dialogue to a certain extent. At the same time, both groups were in a similar situation regarding their own professional field, trying to establish themselves with perspectives beyond the mainstreams of Keynesianism and French legal tradition leading in Colombia. This urge for positioning themselves in their own areas resulted in a common struggle against other groups, what, in turn, allowed for a certain understanding and connection between the two positions.

In sum, "[a]lthough differences between the two camps were evident, agreement over the core civil and political rights included in the thin version of the ROL [rule of law] combined with social and professional affinities to avert an open confrontation over the constitutional text" (Idem, 171). Naturally, the result of this combined assembly was a 'combined' Constitution: "the Assembly ended up adopting *both* norms enabling neoliberal reform (e.g. enhanced protection of property and prosecution of crimes) *and* norms enabling

contestation of the former (e.g., enforceable social rights and strong procedural protections for criminal defendants)" (Idem). Importantly, this combined approach expresses a theme that I have been advancing throughout this research, namely the ambivalence characteristic for the late modern endeavors.

This Constitutional Assembly intended to respond to the crumbling down of traditional social, economic and political order in the midst of a context of globalized economic crisis, continuous struggles with guerrilla groups and marginalized parts of society, and an international tension around the production and smuggling of drugs. The response however, did not transcend the models that were at the base of these conflicts. It 'combined' the different forces and interests in an ambivalent solution that tried to keep everybody happy by delaying the outburst of the tension. Thus, it is not surprising that Rodríguez-Garavito reports that "once the exceptional political circumstances surrounding the enactment of the 1991 Constitution shifted, the consensus [between the two groups of reformists] was also shaken" (Idem, 171).

If we take the example of the transformation of the criminal justice system, the clash between the two approaches found expression in the opposition between security-oriented reformers, that aimed to improve crime investigation through the inclusion of an independent prosecutor belonging to the executive branch, and rights-oriented reformers, who feared a limitation of judicial independence and advanced the protection of citizens' rights. The result was the introduction of a hybrid prosecutor with judicial functions. As the author remarks,

> "[r]ather than a satisfactory compromise for both camps, the hybrid embodied a 'catastrophic tie', in that the result was an all-powerful Attorney General whose judicial functions [...] would come to worry both neoliberal reformers (who would later see them as an obstacle to the district attorneys' focus on efficient investigations) and neoconstitutional lawyers (who would come to view them as a source of arbitrary power)" (Idem, 172).

While in the beginning, this ambivalence seemed to be the solution closest to consensus, both projects, soon clashed, starting with the decisions on the course of the reform programs. On the one hand, the funding institution of the reform project, USAID, advocated for the improvement of efficient crime investigation, and, on the other hand, the local administrator FES (*Fundación para la Educación y el Desarrollo Social*, Foundation for Education and Social Development) criticized this approach, emphasizing the need to allocate resources on other branches of the judiciary and in citizen access to justice (Idem, 174). In the end, the cooperation between both institutions was abandoned in dispute.

The clashes regarding judicial reform escalated in national academic and professional circles, as well as in the implementation of other reform programs funded by USAID, leading finally to the abortion of several of them, e.g. the reform of the Attorney General's Office. In a later phase of the reform process, neoliberal and neoconstitutional interests gathered again to reform the criminal justice system established in 1991. Importantly, this reform implied the completion of "the institutional transplant that had been promoted by USAID for more than ten years", including an Attorney General's Office with minimal judicial functions, focusing on criminal investigation and working through oral procedures (Idem, 175). Furthermore, this project, accompanied by other endeavors strengthening access to justice programs and the legal aid system for 'the poor and marginalized', combined a 'chastened neoliberalism' with a 'chastened neoconstitutionalism', entailing "a mutual accomodation of the neoliberal emphasis on property and public order and the neoconstitutionalist focus on redistribution and guarantees of individual freedoms" (Idem, 176). This is the consensus at the foundation of the contemporary support of the rule of law – unsurprisingly, a consensus dominated by tense ambivalence. In the words of the Colombian expert, "the result of this ongoing inter-elite struggle is a provisory reformist hybrid that tones down both the neoliberal and neoconstitutional projects and integrates them into an unstable amalgam of neoliberlism-cum-rights" (Idem, 177) Importantly, he remarks that this convergence has "effectively reproduced elite privilege" (Idem, 178), showing again a way by which the alleged integration of diverse approaches in one combined rule, re-enacts the displacement of diversity.

It could be surprising that such, at times clearly opposed perspectives on law and on development like the ones Rodríguez-Garavito depicts as neo-liberal and neo-constitutional, are able to share projects, concepts, carriers and political moves, such as it is surprising at first sight that indigenous groups sign agreements with transnational firms of the mining industry as a support for the claims of vernacular communities (Solíz Rada 2011c). However, remembering the approach proposed by Zima regarding the ambivalence at the core of concepts in a late modern approach, this unstable combination seems a quite logical result. The mere concepts used, amongst them the 'rule of law', are maintained in a certain ambivalence because otherwise the whole project would collapse. Also alternative approaches need to invoke the rule of law if they aim to receive the support of their own guilds as well as the backing of international financial institutions. Both groups aim to change the state, developing it according to their own ideals and perspectives, and hence it is not surprising that

they are both interested in the same reform techniques, use similar language etc. In other words, the two approaches to legal reform can connect with each other because their argumentative tools are ambivalent. Terms like 'rights' or 'law' have the capacity to make everyone agree even when they dissent on what are the specific features invoked.[253]

Furthermore, these new approaches recreate a complicit tension that we know from before. While the neo-liberal approach elaborates on the promise of legal positivism promising that a certain structure, and most importantly certain institutions, produce better law, the neo-constitutional approach, echoing old naturalistic perspectives on law, promises that laws that follow certain principles – humanitarian principles and principles of the respect of different cultures, amongst others –, that these moral guidelines will create better law and thus the right or a better development. Naturally, these confronted arguments differ from the older discussion in important points. Besides the particular context of increased worldwide interconnectedness and the specific economic context, both are embedded also in a discourse of law as politics typical for currents that find support in legal realism. Being the judge at the center of this approach, it is natural that both currents put strong emphasis in judicial performance. It is not surprising, thus, that both approaches agree on an institutional approach, since both depend on a concept of better institutions that respond to specific structures. These are important differences that contrast with the discussion between postivism and naturalism in its original form. In their basic approach as well as in the form of their interaction, however, they do not differ dramatically from the naturalism-positivism debate. Nor is their relation (and their success) less ambivalent.

Summing up, the approach to contemporary legal development that Rodríguez refers to as neo-liberal, or as a re-enactment of the modernization theory, deals with plurality in a form that a hierarchy is conserved and, lastly dismisses the pluralistic critique. The neo-constitutional approach, in turn, starts from a pluralistic critique: a holistic approach is needed, an alternative development is possible. But, lastly, it ends up emphasizing one form of alternativity, is equally oriented towards the idea of a particular development and a better law. The criteria for *better* law and *more* justice are set basing on specific clear standards. Even in cases when these standards might be opposite to the ones of a neo-liberal approach, they function in the same way, require a similar authority and establish stable hierarchies in the same form. To take an image, one approach is the negative mirror of the other. We can

253 In this sense, see also the discussion of Fitzpatrick presenting modern law as a myth, meaning a complex that due to its ambiguity acquires and recreates its validity (see chapter A).

thus jump between one mirror to the other, but we are not creating a different world beyond that.

In this sense, and remembering what has been said regarding the New Law and Development movement in the beginning of this section, it can be said, that none of the new options transcend a modern model. Although the new approaches orient their efforts towards incorporating a plurality of perspectives, operating within a postmodern sociolect, they engage with plurality in ways that reduce it. This reduction can take many forms: sometimes a hierarchy is determined from the beginning, sometimes it is the result of an unsatisfying compromise. Consequently, legal development is subordinated to a modern model of the one good law, or it vanishes into a web of compromises that leaves the door open to all sorts of abuses of power.

## II. Pluralizing Legal Transplants

The critiques of what Rodríguez-Garavito and others have framed as 'neo-liberal' approaches, have found also expression in the discussions on legal transplants, which, as we have seen, were crucial tools for legal development and development through law. In this context, for example, Ugo Mattei (*1961) has advanced the thesis of an 'imperial law', which "subordinates local legal arrangements world-wide" through the "penetration of U.S. legal consciousness", and which "despite its absolute lack of democratic legitimacy, [...] imposes as a natural necessity, by means of discursive practices branded 'democracy and the rule of law,' a reactive legal philosophy that outlaws redistribution of wealth based on social solidarity" (Mattei 2003, 383 f.). Importantly, according to Mattei, these legal changes serve particular economic interests that manifest also in international development models, since "[p]redatory economic globalization is the vehicle, the all-mighty ally, and the beneficiary of imperial law" (Idem, 383, 394).

His emphasis on redistribution allows us to relate his strong position with the 'neo-constitutional' approaches Rodríguez-Garavito presented. As a consequence, his critique on legal transplants is embedded in the context of 'alternative approaches to law' and of political claims of redistribution. Furthermore, Mattei's work is an important example of the connection between the political stances at work in projects of law and development on the

one hand, and academic theoretical discussion on the form and character of 'legal transplants' on the other hand.

From a theoretical perspective, it is remarkable that Mattei rejects a linear perspective on 'legal transplants' and on the role of law in social development. First of all, he underlines the insufficiency of a cause-and-effect paradigm to understand the relationships of law, politics and economy (Idem, 384), thus putting in question a Marxist understanding of law as a superstructure as well as a simplistic version of development through law. While understanding law and legal change as an endeavor embedded in social, political and economic tensions, he equally takes distance from a strict division between law and society, fitting perfectly well with other post-modern reflections I have addressed above. Related to this rejection of a model that understands influence as a one-way force, on a second line, he rejects a dichotomic division between two patterns of transplanting law often assumed, this is, either as imposed transplants or as consensual receptions. Moreover, he stresses that "[l]aw is a detailed and complex machinery of social control that cannot function with any degree of effectiveness without some cooperation from a variety of individuals staffing legal institutions" (Idem, 385).

The language chosen by Mattei allows, however, to see that, beyond his criticism, he remains bond to modern perspectives in important forms. On the one hand, he rejects a mechanistic view regarding the process of transplant as well as regarding the relation between law and society as typical for a modern sociolect. On the other hand, however, he holds on to a mechanistic metaphor of law, which allows him to work with ideas of functionality and effectiveness. Naturally, general concepts of functionality and effectiveness depend on particular, even if discursively generalized, goals and a specific understanding of what should be. Furthermore, at the same time that he underlines the importance of the staff of legal institutions, understanding law as a machine depersonalizes, dehumanizes and deculturalizes it and the struggles it entails. Culture, and thus human symbolism, enters the stage as a construct that supports a specific form of the law machine and shapes the introduction of new elements in it. Thus, he speaks of fundamental cultural constructs that are utilized by "the imperial model of governance" (Idem, 384). In the same line, while he argues against a "spectacular de-legalization of alternative contexts of legality" and non-western legal traditions (Idem, 446), in this critique, he refers consequently to formal state law and only marginally to legal pluralistic concerns.

Similarly, he criticizes a binary and static perspective that envisages legal transplants as "the result of the choice of one mind that freely or coactively receives the produced model" (Idem, 389). However,t he remains in a dichotomic model also when he argues for the correction of this view saying that "[b]oth in the phase of production and in the phase of reception, legal transplants are a lively dialectic between consent and dissent, between hegemonic and counter-hegemonic forces, between mainstream and critical approaches. In other words, dominant and dominated positions have to be considered in the picture [...]" (Idem). The "high complexity of the picture" (Idem) he wants to underline ends up being weakened by a division of the players in antagonistic pairs, which are not understood just as ideal types for the orientation of the debate, but as concrete ways to be. At the same time, while he argues in favor of the appreciation of diversity, an essentialized view of 'the Other', leads him to statements emphasizing an alleged incommensurability of social and political languages. To take an example, Mattei asserts that "not much needs to be said of Iraq to show the fundamental incompatibility of its social structure with Western notions of legality and Western institutions (Idem, 398). In other words, Mattei remains ambivalent in his approach to a dichotomic model of legal transplant and diversity.

This ambivalence in Mattei's arguments is not surprising but particularly interesting, since his own argument makes special emphasis on the blurring of differences and the ambiguity created in politics and law, particularly since the 1990's (which forms part of what he calls the 'imperial law'). He underlines, for example, that from a "domestic perspective of U.S. Law [which is at the core of the Imperial Law], both the legal process and the economic analysis of law share an *ambiguous* relationship with formalism and realism" (Idem, 410 f.; emphasis added). This 'characteristic' has important consequences for legal development in form of legal transfer, since

> "[l]aw and economics, once transplanted outside of its context of production, displays the high level of *ambiguity* that allows it to flourish. Conservative scholars admire its intellectual elegance; more progressive and liberal scholars see its potential in subverting the highly formalistic and black letter flavor of local law, and claim that the conservative political bias is something that can be left on the other side of the ocean. Many European scholars are attracted to law and economics, and even when attempting to use it critically, are paving the way to scholarly Americanization and *becoming part of the very same world phenomenon of hegemonic imposition that they would like to criticize*" (Idem, 411 f.; emphasis added)

Importantly, Mattei despises this ambiguity, which ends, according to him, being instrumental to the expansion and strengthening of hegemonic interests. Importantly, he criticizes this transition as an aspect of postmodernism which he presents, in turn, as "the logic of late capitalism" (Idem, 428).

His points of critique, and with them some central aspects of contemporary scholarly despair, are patent when he states that "postmodernist legal discourse gives up claims of universality, objectivity, and monism. The nation-state blurs, sovereignty is decentralized, and legal propositions cannot be legitimized in terms of right or wrong. Justice becomes relative, and efficiency becomes expediency, pragmatism, and strategy" (Idem). As a result, "[i]f legal reasoning is a technique of argumentation, a battle of hired weapons, there is no space for the myth of political representation" (Idem), and therefore, the likely scenario Mattei sees in the long run is "lawlessness and a free battleground for exploitive business interests" (Idem, 429). This is the horror-scenario of infinite worlds of poly-valence that Mattei tries to avoid *solving* the tension with his call for the right 'law'.

To take concrete examples, seeing in this ambiguous character an expression of a market oriented project, instead of a project led by political legitimacy, he criticizes the undermining of the prestige of national "hard" European civil codes as a "blank check to corporate rapacity" (Idem, 431). In turn, he argues that "such national civil codes are the only source of principled legitimacy of judicial power in present day Europe", and thus, "the Americanization of the codification process weakens European institutional effectiveness" (Idem). In other words, he favors the return to 'hard' and 'principled' sources of legal argument, deriving legitimacy from an already traditional combination of natural and positive law.

However, as I presented above, this combination is equally ambiguous as the model he criticizes, and carries the same problems of a modern 'ambiguity-solving' approach. Lastly, he bases his argument on the same goals of the approach he criticizes when he refers, for example, to 'effectiveness' as a reason in favor of 'European' law. The cultural essentialization implicit in this kind of statement is also typical for a dualistic oppositional argument, that shapes his perspective on development. In fact, he argues that "dualism, discussed in the development literature devoted to the economics of the Third World, is now a particularly useful notion in understanding changes in the global legal profession" (Idem, 444). The only way he finds to combat "unlimited exploitive patterns" is "re-asserting effective legal (and political) control" (Idem, 448). This is the alternative Mattei presents to the menacing "tragic outcomes" of postmodernist polyvalence (Idem). However, it is

questionable if the return to modern schemes can promise such a messianic salvation. The apocalyptic perspective that Mattei presents makes clear that instead of transcending the models he criticizes, he remains in a linear conception of development and a dichotomic understanding of human interaction that does not allow enough space for engaging with the complexity of plural, variable interactions embedded in contexts of diversified identities.

An alternative to this recurrent imposition of hierarchies is a total opening to plurality and particularism. In this radicality, the pluralizing proposal cannot find expression within a political and social project that is organized around law understood as a system that sets and requires a hierarchy. This possibility appears therefore in other forms. One important role that this absolute opening to plurality takes is (similar as in the view Mattei presents) as a source of fear, an image of disaster that the new proposals present as a chaotic end to which they intend to offer a solution. Total openness to plurality is thus, particularly in political discourses, often embedded in a narrative of horror, anarchy, disorder and apocalypse. Academic reflection, however, offers an open field for a different investigation of the fantasy of total plurality. Thus, absolute plurality finds a place, for example, in the arguments posing the impossibility of exchange, the incommensurability of systems, an ultimate estrangement in front of the Other

An aspect of this academic freedom that allows further questions around plurality can be seen in the formulation of hypothesis regarding the (in-)comparability of systems at a theoretical and practical level. For example, from an academic perspective, the uncertainty resulting from the ‘successful development’ in the area of Southeast Asia in the 1990's despite its contrast with a law model advocated by the law and development movement, has found expression in statements like the following: “If Asia is indeed different, ‘[i]t would suggest that the prevailing social theories, which were derived from the experience of economic development in the West, cannot be generalized. It would also caution against the use of legal technical assistance programs as an instrument to stimulate and support economic growth and development'” (Ginsburg 2000, 838 cit. Pistor/Wellons). Formulated in terms of ‘Asia’ versus ‘the West’, a possible answer to this question is naturally framed in culturally essentialistic ways and addresses constrained understandings of development. However, the aspect that needs to be highlighted here is the profound doubt regarding the connections between law (particularly law as the ‘rule of law'), foreign assistance, and economic development. Moreover, the idea of absolutely different approaches, of experiences that are not transferable or generalizable, appears as a form of absolute plurality and particularization.

A key aspect of this absolute opening is the question of transferability of experiences and models between different systems. If 'our' world and 'their' world are incommensurable, then communication and transfer, including legal transfer, are impossible. However, legal transfer has been a core element in legal development projects of all kinds, old or new, as part of a 'neo-liberal' or a 'neo-constitutional' project in terms of Rodríguez Garvito. It is natural thus, that the concept and praxis of 'legal transfer', particularly as a tool of legal development, has suffered important shocks with the post-modern questionings.

As we have seen, post-modern critique of legal scholarship and praxis has emphasized the contextualization of law, its intrinsically cultural character, and therefore its embeddedness in webs of power. At the same time, development critics and 'post-developmentalists' have advanced similar culture-and-power-oriented reflections. In this context of self-reflection, also the theory and praxis of 'legal transfer' put in question the focus on 'transplants' of positive law, paying increasingly particular attention to complex institutional formations, practices, and principles involved in this process. Also different ways to think, express, interpret, and even criticize 'imported' law became central for the conceptualization of 'legal transfer'. In this context of post-modern critique, lastly, a radical pluralistic approach proposes even the impossibility of legal transplants.

This and other proposals emphasizing the cultural and pluralizing aspects of legal transplants as a result of post-modern reflection will be at the center of my inquiry in the following pages. The question now is how does this tool of 'transplant' has been reshaped by legal theory in the light of post-modern critique. If one of the main criticisms against Watson's model of 'transplants' regarded his understanding of a linear development of a law disconnected from culture and politics, how can legal transfers be explained from a view that emphasizes the particular contexts of cultural diversity in the field of law?

Regarding cultural diversity, one of the most renowned scholars who have stressed its importance for the legal field and particularly in terms of legal transplants, is Pierre Legrand. In fact, he makes diversity a core value for his scholarly praxis as a law comparatist, arguing that

> "since the role of the comparatist […] is to bear witness to another way of life (specifically, another law, another experience of law, another way of life-in-the-law), a comparatist must also be someone who *values* diversity. […] In other words, I argue that the ethics of comparison demands of the comparatist that he be prepared to affirm diversity as a good" (Legrand 2002, 62, emphasis in the

original).[254]

It is important in this regard to understand the place that difference takes in his argument. Unsurprisingly, due to his philosophical parentage in deconstructivism, the emphasis on difference is associated with an emphasis on that which is un-known, un-thinkable, in-accessible, in short, associated with a 'non-', 'un-' or 'in-' -aspect of experience: "difference suggests a dimension unknown to the self, beyond the self; […] difference perhaps partakes in what thought cannot think" (Idem, 68). Resulting from these connotations of negation, the "reality of alternative and contrapuntal worlds" is perceived as "painful" and presents a "trauma" (Idem) for the sentient being and, especially, for the researcher with a cognitive urge to apprehend experience. This situation can be met with different attitudes. Following Legrand, one of the possible attitudes echoes the "return to a pre-Enlightenment cast of mind which denied parity for all before the law and favoured exclusion based on status" (Idem, 68). In this line, we have seen the problems arising from universalistic approaches, even if it might be difficult to consider all these anti-diversity efforts as pre-Enlightened.

Another possible answer, which is opposed to the latter and pursued by Legrand, envisages "difference as complementarity", difference not as a means of separation but of relation (Idem). This proposal envisages thus the "deft management of the cultural heteronomies within the whole, in the assumption of pluralism, in the acceptance of a coexistence of non-harmonised rationalities on [European] territory, in the willingness to enlarge the possibility of intelligible discourse between legal traditions, and in the steady practice of a politics of inclusion [...]" (Idem). He argues therefore for the incorporation of "'culture' within the analytical framework", because, as he details in another part of the same paper, "if one is not prepared to envisage law as a cultural phenomenon one thereby places it, at least to some extent, beyond the bounds of intelligibility" (Idem, 71, 74). It is from this emphasis on difference that Legrand puts questions regarding legal transplants as discussed to begin of this inquiry using Watson's approach.

If we recall Watson's perspective on legal transplants, the main aspects I highlighted were that, in his view, law can be transplanted (successfully) relatively independent of 'cultural' traits of the particular society, and that correct legal development is a path towards objectively better, evermore less ambiguous, law. Importantly, already Kahn-Freund, in dealing with the same problem of transplants as Watson, underlined the context in which law

254 The same attitude is emphasized by Legrand in other relevant earlier texts. For example, he stated, referring to Foucault, that "comparison must involve 'the primary and fundamental investigation of difference'. The priority of alterity must act as a governing postulate for the comparatist" (Legrand 1997, 123 f.).

is embedded, making the success of a transplant dependent on geographical, economic, social, and, most importantly, political factors (Kahn-Freund 1974, 6, 8, 27). Naturally, these understandings of 'legal transplants' depend on a set of assumptions regarding the concepts of law and transplant amongst others. Also Legrand's criticisms of Watson derive from a particular understanding of law, namely as one which is necessarily embedded in a cultural setting that gives meaning to it, emphasizing particularly the role of interpretation and language (Legrand 2002, 74). In his words,

> "[t]he meaning of the rule is an essential component of the rule; it partakes in the ruleness of the rule. The meaning of a rule, however, is not entirely supplied by the rule itself; a rule is never completely self-explanatory. [...] The meaning of the rule is, accordingly, a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned" (Idem).

In line with the theoretical developments in the second half of the 20th century, Legrand makes an emphasis on the elements "beneath consciousness" that are included in the acts of interpretation, as well as the elements of power and ideology (Idem, 115, 120, 122).

Legrand develops his perspective on legal transplants from this idea of an all-pervading cultural contingency of meaning. He argues thus against the perspective that a rule "carries definite meaning irrespective of interpretation or application" (Idem, 120). As a result of this understanding and making use of philosophical arguments advanced by Foucault and Derrida, Legrand takes the statement of the cultural embeddedness of law to its extreme consequence, concluding that "legal transplants are impossible" (Legrand 1997, 114). His emphasis on difference makes of each law a unique, a particular combination of irretrievable past and present material, as well as psychological facts.

However, in Legrand's approach, this emphasis on the uniqueness of legal understandings cannot stand without a notion of identity that supports it and makes it one and unique. His understanding of interpretation sees in it an "'intersubjective' phenomenon" which leads him finally to a key aspect of his approach to law, legal transplants, the discipline of comparative law and contemporary politics: a community's cultural identity (Idem, 115). Thus, despite all emphasis on the value of diversity, the argumentation of Legrand tends to end up in problematic essentialistic (and nation-state dependent) understandings of identity, culture, and lastly, of law. Take for example, following quote from Legrand's section 'Rule as Culture' in his renown paper 'The Impossibility of Legal Transplants' (1997):

> "In enacting a rule for the reasons they do and in the way they do, as a product of the way they think, with the hopes they have, in enacting a particular rule (and not others), the French, for example, are not just doing *that*: they are also doing something typically French and are thus alluding to a modality of legal experience

> that is intrinsically theirs. in this sense, because it communicates the French sensibility to law, the rule can serve as a focus of inquiry into legal Frenchness and into Frenchness *tout court*" (Legrand 1997, 115; emphasis in the original).

After the prominent place of diversity in Legrand's thought, it is worth asking here, who are actually 'they', the 'French', that exercise all their 'Frenchness' in understanding a particular rule. What is the typical and intrinsic aspect of it? Would it be equally 'typically French' if interpreted, applied and understood by a French interpret born in Alger? Or a French raised at the German border? Is there one French sensibility to law? Who is 'they', and, most importantly, who is the implicit 'we' in Legrand's reflection?

According to his argument, law is – like any other meaningful asset (Legrand 1997, 117) – inseparable of its interpretation, understanding interpretation as "the outcome of an unequal distribution of social and cultural power within society as a whole and within an interpretive community in particular [...] and operates, through repeated articulation, to eliminate or marginalize alternatives" (Idem, 115). If we assume this, then, it suits to ask which alternative interpretations of what he has normed as 'French' is he marginalizing, and where does he take his authoritative power from? Where remains his concern for the defense of diversity, and its treatment in equality beyond pre-Enlightenment exclusion in this case? Which is the final element of legitimation that Legrand can present for us to follow not only his interpretation of 'French' but also of 'culture', 'identity', 'law', 'rule' and 'legal transplant'? Reducing his argument to a minimum, the element of legitimation he invokes is 'reality', or, in other words, his privileged capacity to see 'the whole', to access reality.[255]

Despite his use of language evoking notions of very dynamic systemic approaches (using expressions like "the part is an expression and a synthesis of the whole: it resonates", Idem, 116), he returns to arguments that emphasize the univocity of reality, meaning and context, recalling Hans-Georg Gadamer's (1900-2002) statement that "*the* meaning of the part can be discovered only from *the* context – i.e., ultimately from *the* whole" (Idem; emphasis added). Importantly, it is the capacity to see the whole, what stands, according to Legrand, for the quality of the comparatist. And who will be the privileged one to guarantee at the end of the vertical ladder of hierarchy, that this one or that one was the whole whole, or the right whole to look at?

255 In this sense, see for example, Legrand's statement: "Rules *are just not* what they are represented as being by Watson. And, because of *what they effectively are*, rules cannot travel" (Legrand 1997, 114; emphasis added). For a critique of essentialistic understandings of law in general, see particularly Tamanaha's argument presented above and Tamanaha 2000.

This combination of a strong voice for diversity with an univocal perspective on identity has clear consequences for his concepts of law and legal transplant. While Legrand underlines that "law is a polysemic signifier" (Idem), he nevertheless seems to assume that there are specific meanings that law signifies and others not. In this line, it is just natural that, in his arguments on legal transplant, when he speaks about law, he refers to formal state law. In terms of legal transplant, his arguments result in a strange (and ambiguous) combination. Following his argument on this topic, particularity and difference have primacy, and thus, legal transplants are impossible. In other words, the world of law on the one side is incommensurable with the world of law on the other side of the imagined transplant border. Meaning does not go beyond borders. The conundrum then would be, reenacting the problem presented above regarding Lyotard's argument against Habermas, if understanding of and communication with any 'Other' is at all possible.

However, and this is the puzzling part of Legrand's argument, he escapes from this question and its devastating consequences for human interaction, coexistence and survival, through the emphatic assertion of communities' cultural identities. In other words, when he states the existence of an 'other', he also states the existence of an apparently quite homogenous 'we', within which communication 'works'. There is simply no difference within 'us'. Furthermore, identifying 'the Other' as a specific one, and putting boundaries to its otherness, he assumes that I can actually categorize the system of the Other in my language and understand him and his otherness within my own set of meaning.

It is from this combination of contextualized law and limited identities that Legrand argues the impossibility of legal transplants. The remaining 'transplant' as such, this is a transplant that disregards the meaning given to law in the different contexts and refers only to the use of meaning-less word combinations, is explained as a 'rhetorical strategy', due to the fact that "law reformers on occasion find it convenient, presumably in the interest of economy and efficiency, to adopt a pre-existing form of words which may happen to have been formulated outside of the jurisdiction within which they operate" (Legrand 1997, 121). Understandably, this "turn to the past to help [individuals] construct the present" should not be at the center of comparatist reflections.

However, it is problematic that the consequence he draws from this stance results in an invitation to focus on the "particular epistemological framework" that conditions "the fact of repetition" (Idem). This framework does not refer directly to the variable, concrete, specific, diverse and unique conditions of the transplants, but to the '*mentalité*' (Idem). With this concept, Legrand brings again a notion of *the* cultural identity of a community. The question

remaining is thus how are comparatists supposed to perform that work of comparing '*mentalités*', if every interpretation is unique, if meaning is totally contingent, and if, consequently, the Other is understandable only from the inside and, lastly, inaccessible.

In this sense, it is remarkable the stress that Legrand puts on a divisory border when he claims that "the comparatist must never abolish the distance between self and other" (Idem, 123). From this stance, is there any room to find something different in looking at the Other than what the researcher is searching most desperately for, namely non-self? The comparative project Legrand draws, "must depend upon an initial receptivity to the otherness of the Other" (Idem, 124). But is it equally prepared for its sameness with the own self? Is this presumption of difference any better or at least any different from the presumption of similarity that Legrand criticizes? And what if the Other is not so self-contained and homogenous? And what if the Other out there is just an expression of 'the Other within'? And what about empathy and transformative encounterings with otherness? Am I not a bit more other every time I truly understand 'otherness'? This step of transformation is prohibitive for Legrand.

Despite his argument that foreign law turns rapidly into own(ed) law, with new meaning, making legal transplants *de facto* impossible, this process of appropriation and change is not equally true for the researcher in comparative law, who, apparently, remains clearly outside of her research. The observer does not alter her object of observation and her object of observation does not alter the observer. Thus, she can follow Legrand's imperative to "allow the self to make the journey and see the Other in the way he must be seen, that is, as other" (Idem). Who will state that there is an 'other', and the way how he *must* be seen? A privileged outsider only.

The distance between self and other has consequences for disciplinary questions. It is crucial thus, for the comparatist endeavor Legrand proposes, to define a 'legal culture'. But, of course, the ultimate legitimation for this definition according to the result of "finding what is significant in its difference from others" (Idem, 123 ref. Taylor) is dependent again of an alleged privileged perspective. In the same line, Legrand argues that "comparison must grasp legal cultures *diacritically*" (Idem, emphasis in the original). But is not the intention to compare already a result of assuming a particular pre-determined concept of law and culture, of sameness and difference? Is not any comparison the result of a previous diacritic demarcation?

Criticizing the 'tendency to emphasize sameness in comparative legal research, Legrand argues that an attitude that takes the 'legal-change-as-legal-transplants' argument (like Watson) with its specific understanding of law as detached from their cultural context,

"betrays a *political* decision to marginalize difference and correlatively to extol sameness" (Idem, 122). Focusing on "the technical level of law", he argues, this stance "reflects a faith in abstract universalism" (Idem). This critique is no different from the critique against a technocratic version of law and development. Importantly, recalling Sousa Santos, he links the proposition of 'legal-change-as-legal-transplants' to "the production and the perception of empirical regularity [needed] to meet 'the regulatory needs of liberal capitalism'" (Idem).[256]

While this criticism against an apolitical technocratic view of law and legal change might be valid, as I argued above, the question is if Legrand's 'diacritical' attitude is, in the end, more open to diversity and more sincere regarding its political bias. If Legrand criticizes that Watson and others over-emphasize similarities, is it any less problematic to argue that "comparison must involve 'the primary and fundamental investigation of difference'" as its priority (Idem, 123 f.)? This is just an inverted mirror of emphasizing similarities between two objects (which must be previously identified as different).

Difference and similarity are just two names for the results of the same cognitive process that draws a line, disregarding variety within the identities drawn and sameness between them. The question is, lastly, if Legrand is not doing the same imposition of one rationality on disparate experiences, avoiding equally any "critical vocation" (Idem, 122), when he utilizes concepts of cultural identity and otherness, that already pre-form *what the Other is*. The same problem appears regarding his aim to determine "what law *is"* (Legrand 1997, 114, emphasis added) and his search to "uncover the roots of law" (Legrand 2002, 71). He equally claims a certain general technical validity of his argument, while his elaborations are embedded in political stances that he does not make always clear. In fact, his argument that "the gap between an articulated uniformity and local practices can never be bridged" (Idem) is deeply connected with concrete debates around the creation of a Civil Code for the European Union, which not only is a matter of uniformization of law, but also of legal transfer (in several directions) as well as a project of legal development that aims to increase economic performance through better law.

Hence, following a Derridean call for the duty to respect difference, particularly in the context of the European experience (Idem, 62), Legrand criticizes the engagements with legal diversity in Europe, which, according to him "rather than promote understanding across legal cultures and legal traditions, purport to show that the problem of understanding across cultures and traditions is a false one because, in effect, there is very little difference across

256 Further critiques of Legrand against claims that this approach to legal change is non-ideological can be found in Legrand 2002, 71.

laws" (Idem, 63). These are, what he calls 'strategies of simplification', that instrumentalize law and aim to efface the differences, overlooking cultural heteronomies. Significantly, he refers to these cultural heteronomies as "the specificity of Europe" (Idem, 68), a Europe he conceives as formed basically by 'two legal traditions'. We find here the same problem we have found before regarding Frenchness. Is the no-European law, whatever that might be, intrinsically non-heteronomous? Are the 'two legal traditions' of civil and common law homo-

genous in themselves? His project is clear, when he states that what he is "actively trying to 'preserve', as befits a compartist-at-law, is the entitlement of historical communities to maintain a local connection with their law as a legitimate vector of cultural identity" (Idem, 72). But how local and how homogeneous are the historical communities *he* envisages? Here also, Legrand ends up emphasizing diversity through an essentialistic perspective which depends lastly on an universalistic and objectivistic approach regarding otherness and difference.

This modern character of his perspective on identity, tinges also Legrand's concept of change, which he conceives in a linear perspective, either as regressive or progressive (Idem, 71). Progress is, in fact, an important element in his argument in favor of difference in the European context. Thus, he criticizes the idea of a uniformization as a need for progress, not because progress can be conceived in diverse ways or because the idea of progress itself depends on a particular mindset, but because, as he underlines, "[t]here is no discontinuity between localism, on the one hand, and democracy and progress on the other" (Idem, 75). Modernization is also part of his political desires and so, he can "fully agree" with advocates of a legal European unification "that the European Community continues to offer signal opportunities to local communities to modernise their laws against the wishes of local orthodoxies" (Idem, 75).

Importantly, the concepts of progress and modernization that are being invoked here hand in hand with 'democracy' are, however, the same lying at the base of a uniformizing schedule. In this sense, he criticizes, for example, the idea that "a common market requires a common law of contract", adding (in order to strengthen his argument for European particularisms) that in "other common markets such as those of the United States or Canada, [...] legal diversity has been regarded as perfectly compatible with *the development of a sound economy*" (Idem, 66, emphasis added). Thus, Legrand does not oppose a linear pattern of modernization and progress towards a particular form of society by itself, but it is just the 'how' of this development that he aims to change. Despite his emphasis on the protection of

diversity, he still holds to a specific and linear understanding of development towards a unified ideal, connected directly with economic perspectives[257] and with a universalistic and essentialistic posture regarding identity and difference.

In this sense, his theoretical posture resonates with the one present in contemporaneous projects of legal development, which, as I have shown, defending cultural diversity end up defining specific identities and bounding them to particular traits. Development, in turn, continues focusing on economic perspectives, including this time also the maintenance of differentiated and defined 'cultural identities'. Thus, we can find similar oppositions and continuities in the realm of theory as well as in the praxis of legal development. In none of these cases, the approaches that advocate for the value of difference, manage to go beyond the modern assumptions of the positions they criticize. In terms of legal transfer, the questions over the need and consequences of harmonization as a form of legal development are thus caught in a debate with unsatisfying answers. As David Nelken sums up, "[t]he advocates of harmonisation do not deal satisfactorily with the likelihood of their projects producing new differences. And those who claim that difference should be taken as a presupposition do not explain why their concern for difference is restricted to only certain levels of types of difference" (Nelken 2007, 26).

Although the positions of Legrand and Watson are key as researches reflecting on legal transplants trying to deal with the tension between plurality and unity, divergence and convergence, naturally, they have not been the only studies in this line. On the contrary, the tension between the positions presented, and the contemporary political developments, particularly in the context of the European Union, have made of 'legal transplants' a matter of intense discussion amongst law comparatists. In an attempt to transcend the positions of Watson ('legal transplants are the main form of legal development' resulting in increasing convergence) and Legrand ('legal transplants are impossible' and thus legal development does not happen through legal transplant and more convergence), which at first sight contradict each other clearly, new approaches have sought for developing differentiated arguments in front of 'legal transplants'. The concept itself has been challenged and new metaphors have been proposed, including amongst others the concepts of "legal irritants" (Teubner 1998) and "diffusion of law" (Twining 2004).[258] In order to give a wider picture of the contemporary

257 Examples regarding the connections between law and trade can be found in Legrand 2002, 73 f.

258 For a discussion of the multiple metaphors advanced for the study of the influence of one legal system on others, see Nelken 2001.

discussion on ‘legal transfer’, and to underline the recurring difficulties with pluralistic approaches to legal transplants, I will refer succinctly to two of these approaches.

An innovative approach in this field has been Esin Örücü's perspective on law as “a series of transpositions and tunings” (Örücü 2002, 206).[259] According to this perspective, introducing law from a different environment equals changing the key in which a note or a whole melody is played, and “'tuning’ […] is the key to success” in this process (Idem, 207). More important than the details of this musical metaphor[260], is Örücü's emphasis regarding that “all law is mixed and there are no exceptions. It is only that the mixture is different, and the levels of combinations and therefore the extent of the mix varies” (Idem, 221). This is not just a perspective regarding closed results and firm (even if mixed) entities. Moreover, the author envisages legal systems in a constant process of “mixing, blending, melting, then solidifying into new shapes as they cool down while transposition and tuning take their effect” (Idem, 223). Hence, Örücü's work expands the notion of ‘mixed systems’ used in comparative law to all legal systems (Örücü 2008, 2).

Important for us is how she deals with this constant blending, which, in the terms we have been using until now, describes the conjunction of constant and extended processes of ‘legal transplants’ or ‘legal transfers’. As she argues, “[a]n entirely fresh approach is needed today [in comparative law], within which legal systems can be classified according to parentage, constituent elements and the resulting blend, and then be regrouped on the principle of predominance” (Idem, 3). Based on these aspects, she borrows two schemes from linguistic theory in order to address different aspects of legal transposition: firstly, the use of ‘family trees’ to address divergence, and secondly, the use of a ‘wave model’ to address convergence of legal systems, thus giving importance to both movements participating in processes of legal development. Furthermore, she elaborates on four kinds of encounters of legal systems, according to the division between similar or different ‘legal cultures’ on the one hand, and ‘socio-cultures’ on the other hand (Idem, 6). As a result, she argues that when

259 'Transposition’ is notably a term taken from music theory. Örücü explains the advantages of her proposal as follows:

> “The term ‘transposition’ is more apt in instances of massive change based on competing models, in that here the pitch is changed. In musical transposition, each note takes the same relative place in the scale of the new key as in the old, the ‘transposition’ being made to suit the particular instrument or the voice-range of the singer. So in law. Each legal institution or rule introduced is used in the system of the recipient, as it was in the system of the model, the transposition occurring to suit the particular socio-legal culture and needs of the recipient. In fact, there may be a number of ‘transpositions’, since no single model is necessarily used by any one recipient. Even what is called ‘reciprocal influence’, a more acceptable term today among the comparatists, is actually a number of transpositions” (Örücü 2002, 207).

260 Interestingly, this concept goes in line with other acoustic metaphors in contemporary comparative law, like the discussion on the ‘harmonization’ of law shows.

elements from socio-culturally similar and legal-culturally different legal systems come together, they form mixed systems of a "'simple' kind", and "'complex' mixed systems" result "where the elements are both socio-culturally and legal-culturally different" (Idem, 13). She considers, however, that "[m]ore complex mixes might appear in places where the legal system or the law is based on, or heavily determined by, religion or belief" as well as in the case of indigenous laws (Idem, 14).

While it is remarkable that Örücü does not pretend to create a new separate category of 'mixed systems', but accentuates the 'hybrid' aspect of all legal systems, it is important to notice also that she speaks of 'levels of hybridity' that need to be determined. If "[t]he various degrees of hybridity arise from various degrees, levels and layers of encounters, crossing and intertwining" (Idem, 16), the problem appears that also 'levels' of purity are implied. And who will set the categories of purity to understand what has encountered or what is intertwining?

In the end, Örücü resorts to the great divide between civil law and common law as sources from which hybrids are formed that she identifies as 'simple mixes'. Opening up the perspective to 'complex mixes', she incorporates also other three 'basic' categories of law apparently pure (or purer?) at least as ideal types, namely socialist law, religious law and customary law. Importantly, "legal pluralisms" appear as a third category for more rare cases of "dualist systems with layers of law co-existing and applicable to different members of the population" (Idem, 17). From a similar point of view, in another 'map' of categorization, mixes are divided between unstructured and structured mixes (Idem, 18). Importantly, the main elements for that distinction is if civil law is or is not codified, making the central reference points the idea of 'civil law' and the idea of a 'code', both elements dependent on a particular perspective of what law *is*.

It is clear that Örücü speaks here of formalized state law, particularly from a perspective that divides clearly between private/public and codified/non-codified, and all her claims for opening up the perspective to more diversity in the field of comparative law are limited to that conception of law. Her argument can thus be reduced to a minimum in following words: Legal norms are adopted from one (formal) legal system to another, thus a key aspect is to tune these changes with the law and other socio-cultural aspects. These processes create new mixtures, which, when successful, result in "harmony rather than harmonisation" (Idem 2002, 211). Importantly, she makes a claim for the coexistence of diversity when she emphasizes that "[t]o converge does not mean to attempt to create sameness, but to accept diversity. Only

when diversity is accepted can there be 'healthy infusion'. Only then can the transferred norms become 'internalised' and thereby work" (Idem).

In this short resume of Örücü's approach, we can see, once again, how the pluralistic stance hits the limits of positive formal state law and, clearly, of functionalism. Thus, it is not surprising that Örücü justifies the importance of 'tuning' and the 'tuners' involved, this is "those who move the law and help in its internalisation" […], "by the fact that countries which adapt transplanted law have more effective legality, that is, they further develop their formal sources and build effective legal systems, and have effective economic development" (Idem, 208). Other problematic points of her perspective that resonate with critiques presented above, are also the division between 'socio-cultures' and 'legal cultures' that she makes, which is only possible from a de-socialized perspective on law and legal culture, and the technical aura that her proposal of 'transposition' of law entails.

However, the most immediate question for me in front of this approach is how far does it allow us to engage with the identified 'transpositions'. While her explanation of incorporation of new law intends to be merely of descriptive or analytical use, what does it tell us about the power relationships involved and how does it helps us to engage with the transpositions it outlines? The 'healthy infusions' are supposed to be 'healthy' for whom? Is it also possible that 'socio-cultures' dissonate with each other in the same country? How far is this tuning reinforcing the system of power that 'tunes' it in? Even more complex problems arise, when we recover the idea of co-existing legal-cultures within one Nation-State (Benda-Beckmann/Benda-Beckmann 2007, 54f., 67 ff.).

Beyond these questions, however, we have to emphasize the importance of Örücü's perspective, in helping legal researchers to see transfer everywhere. For example, she states that "[o]ne could go further and say that every time a court distinguishes from a prior case, it is undertaking tuning and sometimes transposing a rule of principle from some other area of law to *solve* the problem at hand" (Idem 2002, 208; emphasis added). However, also here a technical, neutral perspective and a linear perspective on the betterment of law are present. In this line, she argues further that "[s]hared human problems require similar responses from legal systems, hence legislatures and courts look to other jurisdictions for inspiration at least, if not for direct borrowing, in an effort to improve these responses" (Idem, 221 f.) Problematically, with these assertions she minimizes and banalizes the moments of exertion of authority presenting them as mere technical and needed 'solutions'. The judge transposes

when he solves and solves when he transposes, but does this approach give us tools to address the way he transposes, what he solves and in whose favor?

The problematic I see relies therein that transposition involves an assortment of choices and, on the way, not only the new key is set, but also the instruments and the range of interpreting musicians that could play them too. On the way, even the melody might change. In other words, Örücü calms us down, showing that 'legal transplant' is nothing new, and that tuning is needed, possible, and constantly ongoing. If this is the case, as I also believe, even more so is it crucial to ask who takes the place of the tuner, who carries that responsibility and power, which cultures are these tuners linked to? Do all have equal access to transpose and tune? And, most importantly, in Örücü's language: What if I do not like the tune?

Summing up, Örücü's proposal of 'legal transfer' as transposition invites us to see plurality and transfer everywhere. In this sense, it is a pluralizing approach to law, and it entails an important critique of mainstream perspectives on comparative law and the prevalent division among 'legal families' or 'legal cultures'. But, at the same time, Örücü bases her approach on delineated cultural unities, that become hybridized. All these processes of pluralization, transfer and hibridization are oriented, furthermore, towards better law, an effective legal system that results in an effective economic development. Even if the idea of a 'better law' is pervaded by a broad understanding of social harmony in diversity, nevertheless, Örücü envisages a road to development, where law is a technical tool. With it, the judge solves conflicts, and the developing politician fixes social disharmony. Importantly, while diversity is at the core of Örücü's approach, all this variety is subsumed under one set of social functions.

Very relevant for the discussion on legal transplants has been equally the proposal of Gunther Teubner to view 'legal transplants' as 'legal irritants', arguing that "'transplant' creates the wrong impression that after a difficult surgical operation the transferred material will remain identical with itself playing its old role in the new organism" (Teubner 1998, 12), so that the only alternatives possible are repulsion or integration. With the metaphor of irritants, Teubner aims to emphasize the aspect that the introduction of foreign law "triggers a whole series of new and unexpected events" within the system of law and in the relationship of the system of law with society, understanding society "as a fragmented multiplicity of discourses" (Idem, 12, 21). The 'legal irritants' force these arrangements "to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself" (Idem, 12). As a result, Teubner concludes that "'[l]egal irritants' cannot be domesticated; they are not transformed

from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change" (Idem).

What is compelling about Teubner's approach, is the diversity he envisages within society, remarking that "different sectors of the globalised society do not face the same problems for their laws to deal with, but highly different ones" (Idem, 13) This diversity will produce in the end, that even a project of uniformization or harmonization results in new differences (Idem, 23 f.).[261]

Problematic remains, as I have mentioned above, the conceptualization of the social system of 'law' as separate from other systems, and the perspective on law from a rather unifying perspective when it comes to particularization rather than to globalization. Equally, a critical perspective regarding the what, how and who of processes of 'legal irritation' stays also off the shore in Teubner's proposal. However, as a tool for organizing analysis of the interaction between 'systems of law' within global discourse the approach of Teubner can be very useful. Particularly, he emphasizes the global connections of national processes which, as we have seen above, are central to contemporary political changes and legal reforms. In this sense, he argues that

> "the transfer of legal institutions is no longer a matter of an inter-relation of national societies where the transferred institution carries the whole burden of the original national culture. Rather it is a direct contact between legal orders within one global legal discourse. This explains the frequent and relatively easy transfer of legal institutions from one legal order to the other. However, at the same time their ties to the 'life of nations' have not vanished" (Idem, 16).

Furthermore, his point regarding the emergence of new differences through any process of 'legal irritation' is a key aspect to take into account in order to develop a perspective on 'legal transplants' that takes plurality sufficiently in consideration. Teubner's demands become quite concrete in this aspect when he reflects about the incorporation of 'good faith' in British law in the context of the jurisprudence of European courts. Regarding this particular example, the author emphasizes that the cleavages amongst diverse interpretations oriented to the particularities of different institutional environments "cannot and should not be papered over by the European zeal for harmonisation of laws" (Idem, 31). In the same line, he is clear about the role he bestows upon European legal authorities, which if any, "would be to strengthen the capacity for irritation of the good faith clause instead of neutralising it when they try to enforce its unitarian interpretation" (Idem).

261 This argument has been taken up by Pierre Legrand in several occasions. See, for example, Legrand 2002, 69.

Teubner's approach thus emphasizes the pluralization of interpretations and advices the support of this continuous process. Importantly, it is worth asking how far does this pluralized and pluralizing freedom go? To start with, does this freedom include the pluralization of interpretations by understandings of local minorities or of non-state-dependent social groups? Does it include the pluralization of the interpretations of norms of interpretation? If this freedom has a limit, then that is also the end of the claim for plurality and the return to a hierarchy that Teubner rejects.

Problematically, in case this freedom goes really so far that the valid interpretations multiply constantly, then the question remains of how can these diverse particular approaches engage with each other, interact. Teubner depicts accurately the problem of the unifying efforts in the European Union as "a question of Euro-paradoxia, the paradox of the unitas multiplex which requests the integrating law against all the rhetorics of an 'ever closer union' to pay utmost respect to the autonomy and diversity of European cultures" (Idem, 31). However, is it less paradoxical and immobilizing the alternative of an ever increasing conflicting multitude of interpretations claiming equal legitimacy? Is it any less dangerous regarding the use of oppressing violence against diversity?

Summing up, we can say that, if postmodern approaches to legal transplant do not provide satisfying responses regarding how to deal with conflicts taking diversity into account, at least they have successfully destabilized a mechanical or even organicist perspective on the transfer of law and the transformations that result from it. William Twining addressed the diverse elements of puzzlement that contemporary researchers encounter when dealing with 'diffusion of law', recovering his personal academic trajectory. His reflections serve as testimony and summary of the problems that modern approaches to law, transfer and change find in the context of a postmodern sociolect. In this context, the aim and dream of modern comparative law researchers (like Twining) to present a *map* portraying the systems of law in the world turns into a nightmare, when they have to abandon a "naïve model of legal receptions" (Twining 2004, 4). With courageous self-criticism, Twining characterized this model, which he himself followed in the past, denouncing:

> "(a) It assumes that there [is] an *identifiable exporter and importer*;
> (b) It assumes that the standard case of a reception is export-import between *countries*;
> (c) It assumes that the typical process of reception involves a *direct one-way transfer* from country A to country B;
> (d) It assumes that the main *objects* of reception are legal rules and concepts;

(e) It assumes that the main *agents* of export and import and *governments*;
(f) It assumes that reception involves *formal* enactment or adoption *at a particular moment of time*;
(g) It assumes that the object of reception *retains its identity without significant change* after the date of receptions.
Other common, but by no means universal assumptions, include the following:
(h) The standard case is export by a *civil law or common law 'parent'* legal system to a less developed *dependent (e.g. colonial) or adolescent (e.g. 'transitional')* legal system;
(i) That most instances of reception are *technical* rather than political, typically involving 'lawyers' law';
(j) That the received law either *fills a legal vacuum or replaces* prior (typically outdated or traditional) law" (Idem, 4 f.).

As Twining regrets, while these assumptions have been put in question from different approaches in social sciences, the legal studies have paid little attention to these challenges. Nevertheless, as Kuppe underlined, some of the criticisms and new perspectives have found expression in changes regarding the development aid strategies concerned with legal matters (Kuppe 2010, 33 f.). Thus, an emphasis has been put in addressing not only states but also NGOs and the civil society in general, and informal interaction has become an important element. At the same time, 'diffusion of law' has been identified as only one form of interaction amongst legal orders (Twining 2004, 16).

Through these discussions, involved in a postmodern sociolect, the notion of 'legal transplant' has been pluralized, addressed from the perspective of varied particular contexts, and criticized in its political instrumentalization. Time and space, identity of the subjects and of the objects, aim and context – all these categories conforming the idea of 'legal transplant' are blurred and destabilized. This is the expression, in the theoretical discussion on legal transplants, of the same tensions we have seen in the more general debates on modern approaches in theory and praxis. When the clear lines and boundaries of these modern perspectives on law, identity, otherness and interaction are twisted, then 'diffusion of law' turns into a complex and dynamic system of a wider variety of interacting elements and relations. But once we have taken that step, going back to a modern model of law, a linear perspective on development, and a simplistic idea of exchange is, if not impossible, always unsatisfying and insufficient to deal with current social needs. The pluralistic turn, however, is not an answer by itself, it is a situation in which our thought and action are embedded. *How* to engage with 'Other' and 'Self', or rather with 'others' and 'selves', is the recurring question at the core of the present time.

## III. Closing Remarks

In this last chapter, I have addressed how the culture-and-power oriented post-modern critiques found expression in the discussion on law and development and in the theorization of legal transplants as a central aspect of development processes. As I have shown, 'legal transplants' have not only played a key role in the rhetorics and in the praxis of legal development strategies, but also have become a central spot in scholarly reflection regarding legal and social change as such and the relationship between law, society and culture.

In this line, I have presented the transition that the 'Law and Development' movement underwent, particularly, how new conceptions of development shook its conceptual pillars, and fostered new 'alternative' approaches to legal development and development through law. Unsurprisingly, the reflection on 'legal transplants' experienced a similar process resulting in new approaches to law that aim to take the cultural aspects, and with it the element of diversity and power, sufficiently into consideration. However, these changes have not resulted in a profound transformation in the structures at the base of the old understandings. Particularly, the vast majority of the projects of the New Law and Development approach is based on the same modernization theory as the last one. Importantly, the newer proposals have been shaped by the realist perspective in the realm of law and the New Institutionalism in the economy field, producing an emphasis on institutions, particularly in the judicial structure. But the basic understandings are not crucially different from old approaches to law and development.

Also other approaches have shown to be problematic, resorting to cultural essentializations, authoritative schemes, linear and economic conceptions of development and dichotomic understandings of law, thus reproducing the modern approach they criticize. The results in praxis and theory have been, as Mattei and Rodríguez-Garavito clearly recognized, ambiguous and ambivalent combinations which not necessarily strengthen the coexistence in diversity. However, the antidote elaborated by scholars and practitioners against these hybrids has been more often than not a clear 'solution' effacing ambiguity, and, by doing this, they have equally dismantled their own claim for plurality.

Another possibility found in response to the disintegration of clear understandings of law, development, and, connected to these elements, of legal transfer, has been the emphatic acceptance of particularism. Consequently, the most radical approach in this line regarding legal transplant, presented by Pierre Legrand, has depicted them as impossible. However,

even this extreme proposal does not bring its emphasis on plurality and difference to an end, recurring again to cultural essentialisms and positivistic understandings of law. Moreover, if we would think Legrand's approach to its end, going beyond the limits he puts, we would come to a perspective of incommensurable and ever increasing particularisms. It seems that Örücü's and Teubner's proposals go in this direction, although they present equally important difficulties in terms of the unities of legal cultures and socio-cultures, or in terms of the system of 'law' and other social systems they assume. Most importantly, these approaches leave us equally with the question on how interaction, understanding, and thus new forms of social balance are possible in an ever more pluralizing and particularizing environment.

Naturally, none of these two basic approaches to plurality is satisfactory, because one draws us, lastly, into the statement of one linear vertical hierarchy, and the other to absolute incommensurability. None of them permits us to engage with other and self consistently in a manner that takes ongoing transformation and interaction, but also inner diversity and change, sufficiently into account. Importantly, an approach that envisages complex systems of influence and transfer should allow us still to engage critically with those processes. This is the point where the less dichotomic and more differentiated approaches often let us down. Is every result the same, are all processes exchangeable? As Zima highlighted in the review I presented at the outset of this inquiry, exchangeability is a core element of the postmodern sociolect, and, most importantly, it bears as much potential for social violence as the modern model that the advocates for the value of diversity aimed to oppose. Summing up, in terms of law, development, diversity and (legal) transfer, we have to recognize that none of these approaches help us to transcend modern perspectives and problems totally. The alternative of infinite particularizations not only is insufficient for social engagement but it is also trapped in exclusionary concepts of identity and culture that it allegedly aims to avoid.

## E. Conclusion – On the Many Laws and their Developments

There is a certain trap in writing a conclusion, namely that it evokes the idea that it concludes or closes something. Here is the place to talk about results. From a linear concept of development applied to academic research, the idea would be to start with a question, search for the truth, and end with an answer that closes the open wound of the question:yes or no, right or wrong, at least in part;to establish a norm, a standard, an answer, that would present a recipe for better future behavior, law or development. Certainly, this chapter is the formal limit of this thesis. But, after the pluralization of the modern subject, after the recognition of the embededdness of each reflection in infinite webs of meaning, after arguing for the value of a variety of interpretations as legitimate in their uniqueness, what kind of truth can I offer with this research? I have presented some arguments, all of them possible to doubt and critique, that is all. Other arguments might be as appealing, legitimate and meaningful for the readers (and even for myself!) as the ones I have presented.

From the start, my aim with this research could not be to find a universally valid truth because of the critical perspective taken. The proposal of this research was to address some questions around law and development, reflecting particularly on the role of plurality in legal development. Importantly, because of my own background and the frame where this doctoral thesis takes place, I referred especially to certain legal traditions I am more familiar with. More than finding a truth, I developed a perspective. I created a system of interpretations, a way to see things, that naturally, has some consequences for ways of acting, asking further questions, and answering them. My aim was to develop an arguable set of interpretations in approaching law, development and legal development, as well as to seduce you (and myself) to revisit the certainties at the ground of our actions. This thesis is an invitation to engage with a variety of perspectives that have shaped my intellectual life, my social environment and my own actions. I believe that this personal search was not only of individual use, but it can, hopefully, inspire some of my readers.

Consequently, this conclusion does not aim to close a question, but, if you wish, to transform it, to use its creative power to give birth to new engagements with life. In the next pages, I will revisit some of the more important aspects of the arguments and connections I elaborated in this journey as well as delineating some of the consequences that could be drawn from them. Most importantly, what remains open after this exercise in persuasion, after this invitation to dialogue, is to listen what others, like you, my reader, might say about it.

Insofar this conclusion more than a closure is a call to open new questions, new approaches, new dialogues.

The leading questions of this inquiry revolved around the problem of how it is possible to incorporate plurality within current perspectives on law and development, particularly regarding processes of legal transfer as a tool for development. Throughout this work 'legal development' was highlighted from different perspectives, including: international development aid;development through legal transfer;legal development as an aspect of social evolution and economic growth; development as an oppressive concept; development as legal-political activism; legal development as the change in judicial institutions;the increase of differentiation in interpretation practices responding to indigenous claims; and legal development as the creation of forms of social order through artistic involvement with the community. It is clear from this summary, that the questions regarding law, development, and their combination were studied in a variety of fields that encompass not only traditional legal research, but also international and national politics, art, philosophy, as well as linguistics and post-colonial studies. The list could continue.

Most importantly, among these diverse views, I focused my attention on a particular aspect of the debates in the different fields, that is crucial in contemporary academic discussion and political engagement: plurality. In this research, I addressed plurality as a key question for law understood as an intermediary between a plurality of human beings with a plurality of perspectives on life, and a social unity within which all their actions take place. How is legal development thinkable when plural norms and norm-systems interact, claiming equal legitimacy in overlapping social contexts? What type of law can respond to the needs of plural concepts of development and what type of development can respond to the needs of plural concepts of law?

In the beginning of this investigation, far from aiming at a complete and conclusive understanding of the relationships amongst plurality, law and development, I envisaged three main aspects, challenges or argumentative lines for this inquiry. Firstly, I proposed that 'legal development' in its most classical understanding is linked to anthropological and social perspectives that are specifically related to modernity as a socio-linguistic situation. Secondly, I aimed to see if and how the assumptions at the base of modern law and modern development were challenged by a postmodern sociolect. Thirdly, I posed the question of whether pluralistic postmodern approaches to law and development envisage new forms of legal development.

With these questions I reflected on the academic work and political developments of several thinkers that were active mostly in the 20th century. Remarkably, I have addressed their arguments based on the assumption of the existence of different sociolects in terms of Peter V. Zima. In this context, I referred particularly to a modern sociolect, marked by ambiguity and the search to overcome it, and a post-modern sociolect, marked by the emphasis on the particular, both mediated by a late-modern sociolect, where ambivalence is prevalent. This frame proved fruitful for developing key questions and arguable answers on different approaches to the connections between law, development and plurality.

Addressing the first question of this research, I presented some central aspects of prevalent understandings of law and development in the environment in which I was educated (this is within academic traditions of law and social sciences in Western Europe) as aspects of a modern sociolect. In turn, showing the connectedness between the two concepts of modern law and modern development, I addressed the problematic results from this perspective in terms of legal development, using the example of the conceptualization of 'legal transplants' proposed by Alan Watson.

In both cases of 'law' and 'development', I emphasized the role of a universal enlightening reason to give these concepts orientation and meaning. Following this line, development finds its aim in an ever increasing enlightenment, in an increase of the rule of universal reason. Applying subjective idealism, ambiguity could be overcome. When the ideal dreams of the early-modern subject showed to be risky for the advancement of civilization, when individual freedom was seen as a potential for barbarism, science – and with it all other aspects of social life – moved to a perspective based on the primacy of objectivity and a mechanistic model. Late-modernity's ambivalence makes its appearance in the (now exposed) tension between the universal validity of the primacy of objective machines and universal categories on the one hand, and plural subjective experiences or even plural mechanic results on the other. Importantly, both subjective idealism and objective positivism, while differing in their tools and legitimation strategies, draw straight arrows of development.

In this setting, modern law is both a carrier and a result of reason that functions as the marker of development. Modern law is marked thus by the intention to overcome ambiguities through a higher reason, be it incarnated in a universal value or in a pre-established and absolutely valid form. Particularly, I referred to the discussion between naturalistic and positivistic approaches to law, drawing a parallel with idealistic and objectivistic perspectives on science and development. In this sense, 'modern law' is the result of combining the belief

in the emancipatory power of the subject, who can overcome ambiguity by applying reason, with an objectification of that reason through legal mechanics. In any case, this strained combination serves to overcome contradiction by finding (within the system) *the* one, true, just, good answer. In other words, law is a tool for developing ever further towards the *one* Truth, the *one* Justice, the *one* Good. Consequently, plurality and its plural concepts of development and of social order, can occupy only a subordinated space.

Importantly, a key element in this process of overcoming that becomes more evident and central with the positivization of law is the constant reform and reinterpretation of law, a topic which is directly linked to the projects of self-construction envisaged by the project of Enlightenment. In this process, modern law plays a central role in the formation of subjectivity of individuals and communities as well, connecting and differentiating them from their past. Importantly, while law constructs the 'modern man', it also participates in the creation of the past non-modern 'other', which is, from a perspective of vectoral development, necessarily far from the universal reason at the base of modern law. Clearly, this perspective on the Other on a vector of time, has consequences for a perspective on the present 'other'. In any case, the Others' norm, must necessarily be different from the one universal reason and the one true, just and good law. The result is a hierarchy of normative systems which works on the one hand historically, as the resulting and proper development through time, and on the other hand synchronically in comparison with present 'others'. The uni-vectoral view on development in terms of time and the validity claim of law for the whole universe, are thus two aspects of the same modern perspective.

In the pursuit of an always increasing rule of universal reason, and law being the carrier of this reason, legal development is a central element in order to maintain modernity (away from past a-modernity) and modernize the present 'other', bringing him closer to universal reason. In turn, conceiving of law as carrying a universal value as well as an objective instrument for solving tensions, legal transplants become a key element for developing the a-modern into the modern. With his impetus to support the technology of law to help nations to achieve modernity, Alan Watson's perspective on 'legal transplants' exemplifies this approach to legal development from a modern perspective.

In this sense, I gathered several arguments that support the claim that 'modern law' as well as 'modern development', including 'legal development' and particularly legal development through 'legal transplants', are connected to a modern sociolect, marked, in its early variant, by ambiguity, and, in its later form, by ambivalence. Importantly, these modern approaches determine contemporary prevalent perspectives on law and development. The aim

of such an approach is to progress towards ever more absolute truth and justice and move ever further away from ambiguity and chance for conflict. However, this perspective of a linear development towards the one better law is incompatible with an understanding, ethical or peaceful encountering with an Other that is envisaged as ‘radically different’. In response, postmodern critiques elaborated important reflections on the violence involved in this model of law and development. I have engaged argumentatively with some examples of these critiques addressing the second aspect of my research question.

I addressed the postmodern discussions on law and development as endeavors nurtured by the philosophical approaches of Jacques Derrida, Michel Foucault, Jean-François Lyotard, and Jürgen Habermas, as well as by the social movements for civil rights and women's rights, and those against racism, authoritarianism and war that burst out in the 1960's around the world. While, at a philosophical level, the certainty of the knowing subject entered into a deep crisis, placing plural interpretations at the forefront, in political terms, this turn resulted in the emphatic claim for the respect of difference. In terms of law, postmodern approaches put in question the unity and autonomy of the judging and the legislating subject; they questioned the legitimate capacity of justice itself, and lastly destabilized the unity and identity of law.

I have addressed particularly two elements in this search which was guided by the idea of plural interpretations, namely the elements of ‘culture’ and ‘power’. As I have argued, these two aspects are intimately related, because if a particular interpretation is a result of understanding experience through a specific system of meaning, every interpretation is the result of one or more choices (of one or more authors), and thus it is the result of an exertion of power. In terms of law, this new perspective had a dramatic impact: if law is culture and law is politics, it cannot be legitimized fully anymore by an absolute value of justice or by a form or method of universal reason. Moreover, it can be seen as ‘just a matter of interpretation’. Certainly, it is a matter of authoritative, and most importantly, an imposed interpretation. In any case, it is not the only one possibility, it is contingent.

Seeing law as language, culture and politics has produced a variety of approaches that concentrated, to a great extent, on the figure of the judge. He, as the most obvious authoritative interpreter of law, became a core object of postmodern reflection. Embedded in the traditions of Legal Realism and Critical Theory, Critical Legal Studies engaged in an important discussion of legal institutions (the ‘making of law'), as well as in a debate on legal actors (including the ‘making of the lawyer and judge’ through legal education). Importantly, the scholars participating in this endeavor continued and responded to the previous

movements of Law & Society and Law & Modernization, which accentuated the link between law and its social environment, with the aim to develop law within the United States and abroad. While critical of this perspective, researchers of Critical Legal Studies were not deterred by an interest to better law and its role in society, even if the emphasis relied on exercising and opening spaces for critique, resistance and otherness.

This search and struggle for spaces of critique and resistance, was equally present in European legal-political activism, where a variety of associations and groups of lawyers worked to put law at the service of social justice. As I have argued, these efforts developed with an emphasis on the rejection of previous hierarchical models, reinforcing with their militant attitude the model of one truth and one justice. This is a core thought in the international endeavor of Alternative Use of Law, which was particularly strong in Italy, Spain and Brazil. At a social, historical and political level, this attitude is understandable within the contexts of transition from authoritarian regimes to democracy. Nevertheless, it remains problematic and re-produces either modern dichotomies in tension with each other that need to be solved, or it results in ambivalent combinations. In other words, once the universal model of modern law is cracked, the question of how to engage with the Other has to be stated. However, the postmodern approaches to that question reestablish allegedly unified, certain, stable categories. The same problem appears in legal philosophical attempts to reintroduce the value of justice as *the* foundation of law. After law has been deconstructed, its inner contradictions highlighted, and its meaning destabilized, Jack M. Balkin interpreting Jacques Derrida's approach, recovers the category of justice and with it a transcending value in the line of iusnaturalism. That many approaches to justice are possible is a problem that remains insufficiently addressed.

The return to modern dichotomies where the speaking subject regains legitimacy and his hierarchical position, is a figure that we encountered over and over again in postmodern approaches and proposals. Another important example is the discussion on legal pluralism, particularly in the seminal presentation of ‘legal pluralism’ made by John Griffiths in the 1980's. Understanding the idea of ‘state law as the only law’ in terms of an ideology of ‘legal centralism’, Griffiths proposed ('strong') legal pluralism as a descriptive endeavor, which had an emancipatory character insofar as it assumed the coexistence of diversity without hierarchical recognition by any state authority. In the end, in his claim for plurality, Griffiths ended up taking the position of being the one recognizing *the* reality and having *the* truth.

With roots in the intersections amongst law, anthropology, sociology and history, the debate on legal pluralism developed in a very interdisciplinary exchange, producing at the same time a variety of approaches. At the core of the discussion is the problem of the power of language in legitimizing a specific system of norms by naming it 'law' and others not. As a result of these new approaches to law, not only parallel normative systems appeared as laws co-existing and competing with state law, but also state law itself was pluralized from within. Its unity and inner coherence, as well as its isolation from other normative systems were addressed as part of a myth and an ideology. Most importantly, the interconnections amongst different systems was emphasized, particularly by Boaventura de Sousa Santos who elaborated on the term 'interlegality' and Peter Fitzpatrick with the concept of 'integral plurality'.

At the same time that different schemes of categorization of laws and legal systems appeared, different perspectives on what 'legal pluralism' *is* or should be, arose. In this process, the imminent risk of making the category of law itself useless, and therefore to trivialize the power exerted by normative systems like state law, became patent. Furthermore, 'legal pluralisms' have been criticized for making use of an essentialistic and functionalistic approach to law. In other words, they recover a modern understanding of law, the Other and the Others' law. Importantly, I have underlined that the alternatives posed to this critique, as was the case with Brian Z. Tamanaha's proposal, ended up equally claiming to have access to the Other and understand what the Others' 'law' was, and thus, in the end, setting 'the Other' in their own frame of reference. In this line Simon Robert's critique is crucial, as he points out that the expansion of 'law' is equally the expression of a concept's imposition on others telling them what they are and what their orders are, namely 'law', thereby negating to some extent the existence of their own rationalities. In summary, the whole endeavor of legal pluralism is put upside down. If the discussion on legal pluralism started as a claim for opening the concept of law to recognize the legitimacy of a variety of normative orders, it is turning now into the question of how the term 'law' entails an oppression of the diversity of normative understandings. The question at stake is 'how can we relate with that which is different without suffocating it at the same time?'.

The same question appears in other contexts, like the discussion on development and development aid. The key critique of post-developmental reflections points at the vectoral perspective that the concept carries, implying a movement from less to more, poor to rich, disorder to order etc. In this line, the concept and the projects for development have been addressed by Gustavo Esteva, Ivan Illich, Arturo Escobar and others as an extension of the

colonial endeavor. As postmodern critiques concerned directly with culture and power, these authors emphasized the transformation of the concept and the creation of the discourse of development in the context of the aftermath of the Second World War, which was marked by political and economic reorganization at a global level. Importantly, economics, understood as abstract standards marking the line of growth, and numeric statistics, are still at the core of measuring development; thus placing all human perspectives on the pursuit of a 'good life' under one measuring system.

While the practical failure of development projects produced a continuous loop of critiques and new developmental approaches, the need for 'a' development was never doubted, emphasizing with every new proposal that there existed a proper goal to achieve by walking a proper path. Contesting this situation, postdevelopment researchers argued that the term 'underdevelopment', that corresponds with the linear vision of development, defines a perception, thereby producing a devaluation of the wishes, choices, and the way to be in the so called 'Third World'. The consequence of such a perspective in terms of plurality is quite clear. The value of plurality is negated, diversity is organized on a straight line and, consequently, violence prevails. In this line, Illich argued the incompatibility of modern development with peace understood as a peace in diversity.

The post-developmental endeavor, however, deserves critique in a similar way to postmodern approaches I have presented before. Amongst the several critiques against postdevelopmental proposals, including charges of romanticism, essentialism, unawareness of the 'real' struggles in the 'Third World', etc., what is more interesting for us are questions on the relationship between the post-development researchers and the 'Third World' they conceptually destabilize.. Because while emphasizing the colonial force present in the discourse of development, most of them argue implicitly or explicitly to be closer to the 'victims' of that violence and to represent their voices accurately, thereby reenacting an oppression that they criticize. In the moment of encountering diversity, the Other is labeled as an oppressed victim (or as an oppressor) within the 'One Development' system, silencing at the same time his voice in a similar way as the modern development they criticized.

A key reference in this context is the work of Gayatri Chakravorty Spivak, who emphasized the question on the possibility of the subaltern to speak, even in contexts that allegedly intend to listen to him. Most importantly, Ilan Kapoor recovers five elements of Spivak's thoughts that can support an ethical encounter with the subaltern 'other'. These very interconnected proposals involve: developing a critique from the inside of the inhabited structures, acknowledging complicity and being vigilant of the discourses on which our views

are based, learning from the Others' perspective an recognizing the value of the Other to deal with his needs, detaching from particular expectations of how the Other might speak or say and opening ourselves to imagination and surprise. Importantly, I argued that Kapoor's interpretations of many of these points permit him to elaborate on new possibilities for his practical endeavor in the 'development business'. Also, I pointed out thathis approach and critiques on the lack of mechanisms for distinguishing better from worse alliances or for taking decisions on development strategies, are expressions of his very intimate connection with a modern notion of development linked to a transition from bad to good. If Spivak's question addressed the capability to engage in a sincere dialogue, develop capabilities for understanding, and enter into an ethical exchange, Kapoor returns to the search for a better development to develop the Other. In turn, I argued that Spivak's points can be read as an invitation to transform speaker and listener, encouraging continuous revision of personal truths. In a similar line, Escobar as well as Illich, seem to have changed, , the emphasis of their critiques in the later parts of their works, turning their interests towards an exercise of imagination, encountering, listening and presence. This perspective, however, remains an intention embedded within a rhetoric of liberation and emancipation. Nevertheless, they contain as well important potentials for future engagement while the vast majority of postmodern approaches produces important twists of modernity but does not transform its foundations.

In summary, addressing my second challenge on the questions of if and how modern law and modern development have been destabilized through postmodern reflection, a differentiated approach is needed. On the one hand, it is evident that the understanding of law as a legitimate tool for solving ambiguities, individual conflicts, and social tensions, has lost an important part of its authoritative appeal. Equally, the critiques presented against a modern vectoral perspective on development hit the core of old development aid approaches. On the other hand, however, the critics in both areas applied the same tools or arguments in their critiques which appealed to universal reason, truth and justice, thereby aiming to 'solve ambiguity' in a modern manner. Importantly, plurality emerged as a key concern guiding the destabilizing critiques made within this postmodern sociolect. However, this claim could not be held thoroughly because it resulted either in a particularism that would put in doubt also the pluralistic approach, or, emphasizing the value of plurality, it resulted in the return to a hierarchy of arguments with alleged general validity.

Quite naturally, this posing of questions and critiques from a pluralistic perspective has been accompanied by manifold attempts to develop practical political answers. Focusing on some of these answers, particularly in the context of Latin America, I addressed the third question in the frame of this inquiry regarding how far postmodern approaches to law and development permit to create new alternatives in terms of legal development. In this part, I focused specifically on proposals that aimed directly at incorporating the Other, and thereby incorporating diversity, in the legal sphere, envisaging legal development as the increase of political participation of a plurality of perspectives: in the legislative realm, I pointed at Augusto Boal's techniques of Legislative Theater, and in the judicial realm I referred to the incorporation of indigenous understandings within legal institutions and jurisprudence in the cases of Mexico and Colombia.

Problematically, the answers delivered through philosophical, theoretical, artistic, legal and political endeavors within a postmodern sociolect have resulted in different forms of returning to certain unities, stable grounds from which it is possible to put one value and one way of being above others, to put one form of reason above the 'less-reasonable'. In other words, these approaches divide again between right and wrong in a way similar to the modern perspective that they criticize, despite the fact that they started searching for exactly the opposite of what they achieved: to put in question clear divisions and monolithic unities. In the same line, we could observe a tendency to essentialize otherness, framing it at the same time in dichotomic models of oppressed vs. oppressor.

A clear example of this is Boal's aesthetic-political proposal of Legislative Theater, which, basing on other techniques of Theater of the Oppressed, blurs many other dichotomies like spectator/actor, but, at the same time, creates another bipolar division which is equally inflexible within his frame of work: oppressor/oppressed. Nevertheless, his theater work depicts an immense innovation not only in the praxis and theory of dramatic art, but, particularly in terms of political-legal dialogue. The joker system he developed allowed for constant interaction between actors and spectators, for action and reflection, for the exchange of proposals from very different and very personal perspectives, aiming at the transformation of the participants. In the same line, his perspective on law was a participative one that aimed to make political actors of marginalized individuals and groups. He made thus, a clear emphasis on the incorporation of plural perspectives in his (always political) theater, particularly in Legislative Theater. However, again we find the problem that the plurality he presents as worth incorporating is always one that he determines, within which he feels included, and which he refers to as the 'oppressed'. Development, in turn, becomes the

transition from oppression to emancipation. The problem that this struggle might mean a new oppression of a different sort of other remains unaddressed. In terms of law, he ends up equally resorting to the authority of a positive law with content legitimized by iusnaturalistic arguments, in order to find and create social justice, which he identifies lastly with the progress of civilization and humanity in general. Nevertheless, it is important to underline that the work of Augusto Boal with his working team at the *Centro do Teatro do Oprimido Rio* as part of the city council is an impressive experience, not only because they impulsed a variety of legal changes. Most importantly in terms of political theory, they achieved to go beyond postmodern critique in a context of social and legal crisis of redemocratization, developing a new theatrical language for legal discussion and including different communities of Rio de Janeiro in a creative dialogue with the law-making authorities.

The incorporation of marginalized communities within legal processes was equally the goal of the political activism fighting for the recognition of indigenous law and diverse indigenous rights. Importantly, this struggle was connected to a variety of other political endeavors for the recognition of rights at the international level, as is the case of national minorities, as well as with other processes of legal change, including a process of reform of judicial institutions around the world. Boaventura de Sousa Santos and Orlando Aragón Andrade put these processes in the context of globalization as a complex process that encompasses hegemonic interests and forces as well as struggles for emancipation 'from below'. In this context, I have presented the elaboration of documents at the international level like the ILO Conventions no. 107 and 169, as well as national reforms as a result of negotiations amongst a plurality of tensions that include political, social, cultural, economic, territorial aspects and questions of identity. In the intersection of these different fields, claims for recognition and redistribution (that do not always comply with each other) appear at the center of indigenous' political activism.

The national responses in Latin America varied, producing, as Yrigoyen Fajardo argues, diverse constitutional approaches since the 1980's, that moved from a 'multicultural constitutionalism' to a decolonizing project in the last years. Importantly, the transition to a 'pluricultural constitutionalism' was marked by important steps towards the recognition of legal pluralism along with the validation of alternative methods of conflict resolution. It is in this phase that key judicial and indigenous reforms took place in Mexico. However, following the research of Aragón Andrade, it is possible to see that, while these reforms were brought about as expressions of a recognition of the plural character of the cultures living in the national territory and their rights, including rights to use and develop their own law, the result

was their accommodation within and their subordination under the structure of state law. Not only is the state law (to a certain extent) an explicit limit for the application of indigenous law, but the institutional embedding itself determines the when, where, who and how of indigenous rulings. Equally, while development is portrayed as a movement towards a society with a harmoniously interacting plurality of particular laws, and while the right to develop according to own convictions is established, the model of how these pluralities should be connected and how this right should be exercised is clearly dependent upon the rule of the state as well as upon the application of mechanistic models of efficiency and the institutional support of international economic strategies.

It is the same tension resulting from an emphasis on the validity of plurality through a reinforcement of the monolithic hierarchy of the one modern state law, that appears in the case of the innovative Colombian Supreme Court. While the process of constitutional reform has been seen as a clear example for a participative experience, and the rulings of the Supreme Court that interpreted the new document allowed indigenous groups to have access to important goods, the rhetorics of this transition is marked by an essentialization and exoticization of the indigenous other. The problem at the core of this process relies not so much in the resort to outdated anthropological theories, but moreover, the resort to these sources is a result of the need to fit the Other within the language of state law and the system of argumentation of its institutions. Concepts like ‘territory’, ‘property’, ‘subject’ and ‘community’ require, and most importantly reproduce, a radical different other in order to be reinterpreted in a context that understands ‘difference’ in terms of an exception to the normal. The division between ‘us’ and ‘them’ at the base of modern perspectives on a hierarchical law and a vectoral development, is not transformed by these pluralizing efforts, it is restated.

Summing up, regarding new approaches to law and development from a pluralizing perspective within a postmodern sociolect, we have seen different examples of movements oriented to the inclusion and recognition of marginalized others in political life, be it through their participation in law-making or in law-enforcement, putting in question at the same time the mere concept of law, of state, of nation, and equally of development. The result, however, has been the renewed delivery of clearly delimited categories of cultural identity, law and development, of ‘we’ and ‘the Others’. In this context, the original critique reemerges: Who decides on the form of redistribution of power, who shall be the participating others, who recognizes, and how and who is recognized? Who is the speaker that delimits the clear borders between ‘us’ and ‘others'?

As I have pointed out from a philosophical perspective in the beginning of this inquiry, the redefinition of new (allegedly more inclusive) standards is not the only type of possible answers in front of plurality claims. There is also the possibility of emphasizing diversity *ad infinitum*, of reinforcing particularization over and over again. In fact, we have seen already a proposal that intends to go in this line, namely the new political attempts in Bolivia. However, the problem of the authoritative definition of 'who is the Other' and its consequent subordination under a scheme owned by the speaker, does not disappear with the emergence of plurinational constitutionalism in the new millennium.

It is true that through this approach law and development are envisaged, notably, in a new way, namely from a decolonizing perspective. And the 'New Latin American Constitutionalism' does allow more and more direct participation of the different sectors of the population, making of cultural diversity an organizational principle of the new state and society. The example of the Bolivian constitution is, in this case, paradigmatic for an important turn in the modern political, social and legal systems. However, the result of this explicit constitutional foundation of the country on legal pluralism, has resulted not only in a validation of the (legal) culture of indigenous communities, but it has also reinforced the lines of dichotomic division between indigenous and non-indigenous. Importantly, the result of this return to identity demarcations, has been the emergence of increasing cultural, social and political clashes.

Beyond the question of whether this is a desirable situation in terms of social stability and freedom, it is worth asking if this is truly an alternative to the modern hierarchical models of social organization. In the end, also this model relies in ever more increasing and ever more detailed demarcations of identity, including cultural, ethnic and linguistic identities. Remarkably, while it supports a variety of development perspectives, it rejects as well many others, and therefore the openness to plurality is open only to certain types of others. But, most importantly, conceiving of unitarian entities with specific cultures, laws, and development perspectives, it bases identity on an opposition in front of otherness. The engagement with the Other, empathy, the capacity of understanding, all of these become more and more difficult, once the identity boundaries are set definitely. While this model aims to enable the coexistence of self and other, the question remains on how far does it foster the engagement with self and other, their constant interaction and transformation.

The academic engagement with these processes is as well embedded in the problematic of this authoritative definition of 'who is the Other'. For example, they emulate the gesture of compliance with the 'weak other' in order to support him to emancipate himself, as many

post-developmental authors have done. At the same time, the trust and emphasis that they put on interpretation as a tool to achieve true pluralism, does not take into account that these new interpretations equally need legitimation, and that a pluralistic approach is based on the legitimacy of plural interpretations, particularly those that are truly different to mine, those that I recognize as belonging to an 'other'. If the goal is to improve the capacity for a pluricultural dialogue, or rather a polylogue, how can I ever sincerely strive to achieve it when I am still defining which 'other' is worthy of having the power to speak and the right to be listened to?

With these examples I have addressed some contemporary legal developments that are based on a postmodern pluralistic approach. In turn, these changes in a socio-political sphere, but also in a philosophical sphere, have produced important changes in the conceptualization of 'legal development' and projects of international aid with that goal. In this sense, René Kuppe has highlighted a variety of changes in institutional terms, in guiding lines, in transparency criteria, and in the diversification of partners present in these projects. In other words, the form of thinking of projects of legal reform at an international level has changed radically since the decay of the Law and Development movement.

Importantly for us, also the changes at an international level recovered the notion of 'another development' at the same time that other sectors rebuilt international legal development on the base of a modernizing perspective that had marked already the development wave of the 1950's and 1960's. The last approach, which has been at the center of projects of international organizations like the World Bank, differs partly from the first wave, in terms of the diversified institutions taking part, their emphasis on a holistic view and the incorporation of local legal communities as agents of the projects. But its advocates, as well as the opponents of the idea that law is indispensable for economic development, are equally based on a modern view on law and development at the service of a 'good economy' in the frame of a globalized free market.

At the same time, another approach on law and development has emerged that underlines the importance of the recognition of, access to, and enforcement of rights often in the search for protecting individuals and groups in front of the overwhelming imposition of the particular economic model propagated by the globalized free market. Importantly, despite their apparent opposition, these two approaches are connected by international networks and personal biographies. Deriving strength from both sources, and as a result of the interaction of particular group interests within the specific context of the 'donor' countries on the one side,

and within the ‘beneficiary’ countries on the other, the idea of Law and Development has experienced a revival during the 1990's. This new combination, that reenacts old tensions between iuspositivism and iusnaturalism in the context of an institutionalist approach, has resulted in an increase of the consensus around the need for legal development, utilizing a common language based on concepts like ‘rule of law’, ‘constitutionalism’, ‘democracy’ and a ‘human-rights approach’ with ambiguous connotations. In line with César Rodríguez-Garavito's studies, it is possible to observe that the result of this combination has been the production of ambivalent (and insufficient) responses to the social struggles.

In any case, the perspectives on plurality at the core of these interacting approaches to legal development, are as problematic as the other postmodern perspectives I have presented. If neo-liberal approaches to legal development deal with plurality in a form that a specific legal hierarchy is conserved, subordinated to a linear perspective on development, the neo-constitutional approaches orient their efforts equally towards a better law conceived in terms of the increase of one particular understanding of justice. The last approach sets as well its particular standards, which require an authoritative subject and a stable hierarchy as much as the first one. In their combination, these approaches appear as seemingly exchangeable, but when it comes to understanding the meaning of the (ambiguous) concepts they use, their modern base shows up again. While, due to the ambivalence these conceptions show, they could be understood as late-modern, it is also important to underline their emphasis on the value of plurality and diversity, which I have presented as a key aspect in postmodern thought. It is in the name of plurality, that modern models are revived. Furthermore, it is important to remember that the division amongst sociolects does not pretend to set strict limits, but rather to show different configurations that determine key aspects of thought, action and their connections.

In the context of postmodern reflections on international legal development and development aid, legal transplants have been equally put in question. Because, if a crucial result of legal transplants is lastly the convergence of legal understandings, they imply equally effacing different legal approaches, or at least minimizing their efficacy. The risk is thus the use of legal transfer at the service of an ‘Imperial Law’, as Ugo Mattei argued. With a similar emphasis on the cultural embededdness of law, Pierre Legrand has presented legal transplants as simply impossible. If each law is unique, then the incorporation of foreign law can never result in the same law as it was in the original setting. These approaches reject the value or even the existence of legal transplants in the name of plurality, diversity and particularity. Importantly, while the first one produces, in a similar way to other postmodern approaches, a

return to modern dichotomies, to the essentialization of difference and law, and to a restatement of a line of development, Legrand's radical call for plurality to the point of asserting the incommensurability of differences, seems to avoid this problem. However, his argument showed to be dependent on a perspective of law that restricts it to the national state, returning over and over to an essentialistic idea of a unified cultural identity of each (national) community. Plurality in these terms is reduced to the coexistence of unities that Legrand, as an external observer with an omnispective (or 'holospective') view, sees and categorizes.

Other approaches to legal transfer, such as Esin Örücü's proposal of the transposition of law do not manage either to transcend the idea of legal and socio-cultural unities, even if she explicitly addresses the constant process of blending. In its dynamic perspective, this approach is similar to the interactions that Gunther Teubner presents, which, however, also assumes a system of law as separated from other social systems. Nevertheless, what is more important about these two last approaches is that with these dynamic perspectives that enhance and support constant pluralization and particularization (and, at the same time, try to avoid an essentialistic and static perspective of cultural identities), a key problem becomes more apparent, namely *how* can plural particular contradicting understandings engage with each other in a way that is still respectful of the constantly new emerging forms of difference. How is it possible to avoid or go beyond the risk of indifference lying underneath a plurality of constantly changing differences?

Summing up, what new possibilities to approach law and legal development, particularly the tool of legal transfer, can be advanced from a postmodern perspective emphasizing plurality? Legal development has certainly become a much more diversified endeavor compared to the modern Law and Development project, thus connecting a plurality of proposals, interests and approaches. However, it is exactly this combination that was pointed out in important critiques from pluralistic academic perspectives. Because, while plurality is at the core of the arguments and present in the projects' design and participating institutions, the ventures result either in the oppression of plurality or in ambivalent compromises, in the end opening the door for similar violence. In this sense, the academic critical conceptualization of legal development and legal transfer are equally problematic.

Therefore, in my opinion, the postmodern approaches to legal development, including legal transfer, can offer only limited new possibilities. They can offer what they are, a twist, a twist of *modern* conceptualizations, but, lastly they get caught in linear perspectives of development and essentialistic understandings of law and otherness. The interaction between legal systems and the incorporation of new legal understandings always remains a tool

subordinated to these visions. If, however, we emphasize the aspect of pluralization of these postmodern endeavors, which in general are not followed through to their final consequences, the result is quite problematic, because the emphasis on plurality alone leaves us with incommensurable differences and a myriad of unintelligible others. If understanding is impossible, then what remains beyond indifference and the never-ending confrontation in the name of the (own) truth?

Then, how can we encounter difference and how can we pursue a development that considers it sufficiently? Under these conditions, can legal development and interaction between legal systems be conceived as a multifaceted cultural and political process without resorting again to notions and methods that reinforce vectoral perspectives and hierarchical structures? The search for new answers has just started, and it is not the aim of this work to give a conclusive response. But what remains clear after this inquiry is that the perspectives advanced until now are certainly insufficient since they are trapped in schemes of thought that they themselves aim to contend. In other words, postmodern approaches to law, development, culture and transfer, as necessary as they are to put in question modern views, are not as radical in their proposals as they purport. They do not transcend the violence resulting from a modern hierarchy. And this turns extremely relevant in the context of law, justice and development, where our utmost intimate concerns are touched upon.

In the course of these reflections, one recurrent aspect has been that the claim for *one* development and the claim for the recognition of *plurality*, be it a general claim or one regarding particularly the legal field, can both end in the same establishment of difference from a hierarchical perspective. Both can, lastly, put one model of truth and justice as their goal. Even more, the emphasis on the absolute value of particular interpretations can end up in a vision of plurality as a bunch of self-contained and particularized confronted views. However, because in a plural society all these particularities interact, even if their exchange is an encounter amongst unintelligible others, each with his own language of truth and justice, the result is indifference and violence. Lastly, with the absolute and constant pluralization of others, which makes them unreachable and incomprehensible, the 'I' itself becomes meaningless, plural and, in the end, it disintegrates. The call for the recognition of plurality and the critique of a modern unitary model are key for understanding contemporary struggles and engaging in social interaction in new ways, but what really is at stake is the *relationship with difference*.

In other words, at the core of the question of the value of law and the goals of legal development is a matter or identity, or, more accurately, of identification. As long as we conceive of 'self' and 'other' in self-contained forms of identity related by opposition, little will change in the relations we can imagine and practice. Little will change in the violence governing the supremacy of the speaking self in categorizing the mute 'other'. Little will change in the ways we envisage to listen to the Other. We need to develop understandings of 'self' and 'other' that allow for recognizing difference and the limits of understanding the intimate world beyond the own, *at the same time* that they allow for dynamics of change and transformation, if you wish, for an 'othering' of the Self and a 'selfing' of the Other, for empathy and a sense of communion.

In the search for respecting difference, and emulating the arrow of economic growth characteristic for modern economic perspectives on development, the continuous pluralization promises a continuous expansion of particularities, always ever more diversity. But how do we connect again? My idea is that the internal division of the subject through his pluralization and the external division of society through its particularization, end up underlining only dividing borders, when it does not incorporate elements that allow for moments of *integration* within this dynamic of constant diversification into plural others.

Integration has meant until now the subordination of the Other within 'my' model of life. But can we imagine forms of integration of the confronting particularities that result from a common interaction and transformation? Can we envisage a dynamic system where these particularities coexist and enter in dialogue constantly? How can we create platforms that allow for the concrete agents in this encountering to find their own momentary and dynamic *understanding*? Can the norms that so far have served to divide proper from improper, and my justice from your crime, support also processes of social transformation, contribute to building spheres to engage with plural understandings of justice, and participate in finding ways to coexist *in dissent*? Is it possible to reshape our understanding of development into forms of adaptation and transformation at the service of the concrete needs of the participants, in each moment, in each place? I believe that if we do not manage to ask these questions and search for common (even if momentary and dynamic) answers, we will remain stuck in forms of unity that result in being violent in their universalism as well as in forms of plurality that result in being violent in their particularism.

In order to do this, we have to revise and reshape the concepts and tools we use, as well as the aims and needs we try to address with them. But, probably most important, we have to learn to engage with each other and with our own experience in different ways, this is in ways

that enable us to relate to the particularity of each circumstance and to its relevance for the wider system in which they are embedded. The door for attempts that complete the twist, transcending modern hierarchies and postmodern critiques is wide open.

# Epilogue[262]

So, the question that remains is how can we engage with diversity differently? And, secondly, what can the role of law be in this new engagement? As I said, I have no clear or final answers, and it is not the aim of this work to present one. In fact, I do not believe that there is *one* appropriate answer for this query. Diversity requires namely diverse forms of engagement. I think, we have to learn to live with it: to live with the insecurity of the unknown, to live expectant and open for the surprise. In other words, to be open to that which we do not know, that 'other', which is always conflictual. Conflict is an essential part of life; it is the encounter with the different what allows transformation and growth within a dynamic system. And it depends on our engagement with those conflicts if and how we achieve a certain balance again or not. Consequently, recalling Gayatri Chakravorty Spivak's call to listen and Ivan Illich's invitation to be present, here and now, what remains for us, is, in the end, the duty to be aware, the duty to be mindful in engaging with that conflictual otherness.

But what does this mean in praxis? What does this mean for conflict and development? There are at present a variety of approaches searching for new answers, searching for techniques that allow us to use conflict in productive, transformative ways, permitting us to transcend the dichotomy of 'I' and 'Other', and to find moments of integration of the particularities. After having gone through this research, it is for these new perspectives that I strive, and I believe they are a rich source of inspiration that enhances the capacities of each individual to engage with her own situation in her own way. In this line, I believe it is our responsibility as researchers to incorporate these new approaches and envisage ways to deal with a reality that poses new questions to our anthropological and social perspectives on law, conflict, development, plurality and identity.

Therefore, in the awareness of the importance of the particular, I am convinced that the model of social normativity we use in contemporary legal studies in Europe and the Americas, the one that is at the core of strategies for international legal development and legal transfer, needs to be complemented. An approach to conflict that aims to solve it, that aims to cancel the dissent, is insufficient in societies that conceive of themselves as plural and dynamic. Rather, I believe that we are in need of a change of perspective that allows us to see conflict

262 This epilogue is dedicated to the facilitators, colleagues and friends of the Master of Arts Program in Peace, Development, Security and International Conflict Transformation at the University of Innsbruck (UNESCO Chair for Peace Studies), with whom I remembered how to listen, how to engage in transformation, how to dance between balance and chaos.

(and otherness) as a possibility to transform relations, like the one John Paul Lederach (Lederach 2005) proposes.

It would require another doctoral thesis to inquire in detail into a transformation of law in this sense, but one thing is clear: If a universalistic perspective is insufficient in terms of conflict and law, so too is the corresponding approach that is limited to rational engagement, neglecting the human experience in its own (integrated and often conflictual) diversity. Therefore, I believe that artistic approaches, like the ones envisaged through poetry by many of the advocates of the current of '*Direito Alternativo*' as well as the ones elaborated through theater as a holistic practice in the experiment of Augusto Boal's 'Theater of the Oppressed', are key for us to find new possibilities for engagement, new questions, new forms to listen, new ways to answer, and new points of view. Most importantly, I think that the strength of these proposals does not rely only in their capacity to produce something new and original, but in their capacity to elicit perspectives linked directly to the present individual experience in the concrete encounter with difference, to the here and now that Illich invoked. For anyone who has experienced it, the power of theater in this sense is obvious. It is this generation's moment to recover these tools to engage with social conflict anew, going beyond the perspectives of the previous generations when they no longer respond to the actual needs of transcending dichotomies. An example of the newest attempts in this line is the 'Theater for Living' of David Diamond (Diamond 2007), which explicitly aims at envisaging social (and always personal!) conflicts in a systemic and dynamic view of conflicts through theater. The research and practice of social normativity and conflict cannot disregard anymore powerful tools like this if it aims to transcend the unsatisfying state where it is now.

Naturally, these are just two examples of a variety of possibilities that open constantly in front of us today. In this moment of transition, when the old models cannot respond anymore to the present needs, many groups and individuals have advanced their own proposals to engage with the challenges they face. More than anything, it is important that we are aware of these changes and challenges. In this sense, Wolfgang Dietrich speaks of a 'transrational turn' (Dietrich 2008, 319 ff.) that carries the potential to produce profound changes in our ways to engage, at a global as well as at a personal level, with politics, economics, law, development, philosophy, culture, peace, etc. In this process, what becomes key is the capacity to incorporate the various approaches existent and to be able to choose mindfully when it comes to respond to present needs. Therefore, this is not necessarily a time to dispense of modern law, neither a moment to reject the postmodern pluralism absolutely. Rather, the contemporary search needs to be oriented to find dynamic ways to approach

conflict, in order to use those tools and find those responses that in the moment, for that specific situation, in its specific context is more appropriate for the needs of those involved in the conflict according to their own perspectives, but taking into consideration their embededdness in a bigger whole.

In other words, this is a time when we, researchers and practitioners of social conflicts and norms (who are at the same time participants in these conflicts and norms!), are invited to encounter new forms of being, reflecting, and acting that are often put aside and rejected in legal academia. It is a time when our creativity is required, our personal expertise in our vernacular environments is central, and our individual way to engage with the different, the Other, the plurality beyond and within us are key. In this sense, it is my wish that this work is an invitation and an inspiration to engage with the different and encounter the unknown.

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Abstract

This project investigates diverse understandings of law and development, particularly regarding the role of plurality in this context. On one hand, the author questions modern understandings of law that envisage it as a system of general norms, which demands and establishes normatively a certain form of generally valid rationality and, therefore, universality and unity. Importantly, the idea of normativity is put in connection with the concept of development, that co-determines the modern perspective on legal development and international development cooperation. However, on the basis of the failure of these projects in many ways, and in the context of new political situations, as well as a general questioning of modern categories of law and development, a plurality of critical voices from a postmodern perspective have emerged. These critiques are oriented against vectoral understandings of development and against hierarchical understandings of law, and advocate for an approach that embraces cultural and legal plurality. This research deals particularly with this critical turn and the practical alternatives that it inspired.

Summarizing, the author investigates mainly three questions. Firstly, how far does a hierarchical and universalistic idea of law and a vectoral idea of development determine the modern understanding of legal development, and particularly, what role does cultural plurality play in this context. Secondly, if and how post-modern critiques have challenged and changed this perspective, and thirdly, what kind of new approaches has emerged that allows for a new understanding of legal development that enhances cultural plurality. As examples for these contemporary developments, the research will inquire into some key political and legal changes in the context of Colombian and Mexican courts as well as the project of Legislative Theater in Brazil.

Zusammenfassung

Dieses Projekt untersucht unterschiedliche Verständnisse von Recht und Entwicklung, insbesondere im Hinblick auf die Rolle, die Pluralität in diesen Zusammenhängen spielt. Zunächst befasst sich die Autorin mit dem modernen Verständnis von Recht als einem System von allgemeinen Normsätzen, das eine gewisse allgemeingültige Rationalität und somit Universalität und Einheit für sich beansprucht und normativ festlegt. Diese Idee von Normativität wird in Verbindung mit dem Begriff von Entwicklung betrachtet, der die moderne Perspektive auf Rechtsentwicklung und internationale Entwicklungskooperation mitbestimmt. Allerdings ist auf der Grundlage des Versagens dieser Rechtsentwicklungsprojekte in vielerlei Hinsicht und im Kontext neuerer politischer Ereignisse sowie einer allgemeinen Hinterfragung von modernen Kategorien von Recht und Entwicklung, eine Vielzahl von kritischen Einwänden aus einem post-modernen Blickwinkel entstanden. Diese Kritiken richten sich gegen vektorale Verständnisse von Entwicklung sowie gegen hierarchische Verständnisse von Recht und plädieren für die Berücksichtigung von kultureller und rechtlicher Vielfalt. Diese Arbeit berücksichtigt insbesondere diese kritische Wende und die praktischen Alternativen, die sie angestoßen hat.

In diesem Kontext befasst sich diese Untersuchung hauptsächlich mit drei Fragen: Erstens wird analysiert, inwieweit eine hierarchische und universalistische Idee von Recht sowie eine vektorale Idee von Entwicklung das moderne Verständnis von Rechtsentwicklung bestimmt, insbesondere welche Rolle kulturelle Pluralität in diesem Zusammenhang spielt. Zweitens untersucht die Autorin, ob und wie post-moderne Kritiken diese Perspektive geändert haben, und, drittens, inwieweit daraus Entwürfe entstanden sind, die ein neues Verständnis von Rechtsentwicklung ermöglichen, das kulturelle Vielfalt unterstützt. Als Beispiele für diese zeitgenössischen Entwicklungen werden einige zentrale politische und juristische Änderungen in kolumbianischen und mexikanischen Gerichten sowie das Projekt des *Legislativen Theaters* in Brasilien analysiert.

# CURRICULUM VITAE

## 1. Persönliche Daten

| | |
|---|---|
| *Name*: | Florencia Benitez-Schaefer |
| *Geburtsdatum*: | 13. September 1982 |
| *Geburtsort*: | S. C. de Bariloche (Argentinien) |
| *Staatsangehörigkeiten*: | argentinisch/deutsch |

## 2. Bildungsweg

| | |
|---|---|
| *März 1994 – Dezember 1998* | Sekundarschule Deutsche Schule Bariloche<br>S. C. de Bariloche, Argentinien<br>Diplom: Bachiller Mercantil (Note: 9, 25) |
| *September – Dezember 1999* | Studienkolleg Comenius Kolleg – Mettingen, Deutschland<br>Diplom: Feststellungsprüfung* (Note: 1,0) |
| *April 2000 – Juli 2005* | Rechtswissenschaftliche Fakultät – Universität Passau<br>Diplom: 1. Juristisches Staatsexamen (Note: 7,66)<br>*Akademischer Titel: Diplom-Juristin (Univ.)* |
| *April 2009 – September 2010* | Master of Arts Program in Peace, Development, Security and International Conflict Transformation<br>UNESCO Chair for Peace Studies – Universität Innsbruck |
| *Seit April 2010* | Graduiertenkolleg „Das Reale in der Kultur der Moderne“<br>Universität Konstanz |

## 3. Forschungsaufenthalte im außereuropäischen Ausland

| | |
|---|---|
| September 2005 – Mai 2006 | Institut für Deutsch-Chinesisches Recht; Universität für Rechts- und Politikwissenschaften; Peking, Volksrepublik China |
| Dezember 2006 – April 2007 | Rechtsfakultäten der Universidad de Cuyo, Mendoza (Argentina), und der Universidad de Santiago de Chile |
| Juni 2007 – Juni 2008 | Instituto de Investigaciones Jurídicas, IIJ,<br>Universidad Nacional Autónoma de México, UNAM |

* Prüfung zur Feststellung der Eignung ausländischer Studienbewerber für die Aufnahme eines Studiums an Hochschulen in der Bundesrepublik Deutschland.

## 4. Wissenschaftlicher Werdegang

| | |
|---|---|
| *Mai – Juli 2000* | Lektorin für Spanisch<br>Programm „Studenten als Dozenten“ – Universität Passau |
| *Oktober 2000 – Februar 2004* | Studentische Hilfskraft<br>Lehrstuhl für Bürgerliches Recht und Deutsche sowie Europäische Rechtsgeschichte; Prof. Müßig – Univ. Passau |
| *August 2002* | Tutorin für ausländische Studenten<br>Akademisches Auslandsamt – Universität Passau |
| *April – Juli 2005* | Studentische Hilfskraft<br>Lehrstuhl für Bürgerliches Recht und Deutsche sowie Europäische Rechtsgeschichte; Prof. Müßig – Univ. Passau |
| *Februar – Juni 2009* | Wissenschaftliche Assistentin in Ausbildung (Stellvertretung)<br>Institut für Rechts- und Verfassungsgeschichte;<br>Prof. Dr. Brauneder – Universität Wien |
| *April – August 2009* | Working Student / Assistentin<br>UNESCO Chair for Peace Studies – Universität Innsbruck |
| *August 2009 – März 2010* | Universitätsassistentin<br>Institut für Europarecht und Völkerrecht;<br>Prof. Dr. Schröder – Universität Innsbruck |

## 5. Stipendien und Auszeichnungen

Vollstipendium für das Studium an der Universität Torcuato di Tella – Auszeichnung im Rahmen des V. Modells der Vereinten Nationen (Argentinien, 1998)

DAAD – Preis für hervorragende Leistungen ausländischer Studierender (2002)

Aufnahme in die Studienstiftung des deutschen Volkes (2003)

1. Preis beim Wettbewerb junger Lateinamerikaforschern im Rahmen des IV. Europäischen Kongresses von Lateinamerikaforschern – CEISAL (Slowakei, 2004)

Promotionsstipendium der Studienstiftung des deutschen Volkes (Dez. 2005 – Nov. 2008)

Förderungspreis des Theodor Körner Fonds zur Förderung von Wissenscahft und Kunst (Österreich, 2010)

Promotionsstipendium der Deutschen Forschungsgemeinschaft im Rahmen des Graduiertenkollegs “Das Reale in der Kultur der Moderne“ (seit April 2010)

## 6. Veröffentlichungen

„Viaje al centro de la periferia o el pensamiento latinoamericano y los desafíos de América Latina en el siglo XXI“, in: *Acta Scientiarum Socialium* – Tomus XVIII./2004; Horváth, Gyula (Hrsg.); Universitas Kaposváriensis; Kaposvár, Ungarn, 2004

„Hin und Her im Zentrum der erweiterten EU – Offizielle und inoffizielle Initiativen zur Zusammenarbeit mit Lateinamerika an der Universität Passau“, in: *¡atención! – Jahrbuch des Österreichischen Lateinamerika-Instituts* – Band 7; Dietrich, Wolfgang und Stefanie Reinberg (Hrsg.); Brands & Apsel Verlag; Frankfurt am Main, 2004.

„Reflexiones en torno a la transferencia de elementos jurídicos en China” – in: *Actas del Congreso ALADAA*, Mexiko, 2007

„Reseña: 'The Cultural Study of Law: Reconstructing Legal Scholarship' de Paul Kahn“ (Rezension), in: *Presencia Jurídica – Revista de la Univ. Michoacana*, Nr.1, 2008

„Introducción al pluralismo jurídico y su relevancia para los pueblos indígenas en México“ in Zusammenarbeit mit Orlando Aragón Andrade, in: *Los derechos de los pueblos indígenas en México. Un panorama*; Aragón Andrade, Orlando (Koord.); Fondo Editorial Morevallado, Morelia, Mexiko, 2008

„Bericht zur Ostasien-Sektion des 37. Rechtshistorikertages (Passau, Sep. 2008)“ – in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Nr. 126

„Exporting European Law – Some Theoretical Remarks on ‘Legal Transfer’“; in: *Minutes of the International conference for PhD-candidates and young scientists – “The milestones of law in the area of the Central Europe”* (International section) (im Druck)

„Die europäischen Einflüsse in die chinesische Gesetzesentwicklung bis 1949“; in: *Interpretation of Law in China – Roots and Perspectives*; Tomašek, Michal and Guido Mühlemann (eds.), University of Chicago, 2011

„Transformation Through Transfer – Legal Developments between Monarchy and Republic in 20th Century China“; in: *Legal Relations and Power Structures in History*; Augusti, Eliana, Markus Prutsch and Norman Domeier (eds.), AV Akademieverlag, Florenz, 2011

Konstanz, 20. Mai 2012