# A New Authoritarian Cycle: Towards a Multi-Normative Democracy

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## Sumário



## 1. Introduction

One of the central tasks of critical research in Law in a democracy is to monitor the organs of power to demand them the rationality promised by the rule of law that substantiates its legitimacy (RODRIGUEZ, 2012a). After all, the grammar of the law when in operation ensures that all decisions of the power institutions are publicly justified based on collectively produced legal norms. Democracy and the rule of law are the exact opposite of autocracy, a government based on decisions that do not count on the participation of all persons interested or affected by them (RODRIGUEZ, 2013).

In brief, I am referring to the institutions of the rule of law and citizenship as conceived in the West, that is, the institutions created to ensure that:

1. Political power is organized in national states and is justified by guaranteeing a minimum of freedom to all, keeping apart civil society and State by means of the recognition of civil rights, which also establish the same level of equality among all people;
2. Political power always acts based on abstract and universal legal norms that make their behavior predictable;



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3. Political power must produce the rules based upon it will act taking into consideration the interests and desires of all persons affected by them.

Franz Neumann (Neumann, 2013b: 4-16) adds a "fourth function" to the rule of law, the function of concealing the arbitrary exercise of power. In certain cases, the mere form of law can hide the exploitation of working people and hide other forms of domination. For example, the unilateral management of economics can appear hidden by pseudo-contracts that institute relations of domination by one part over the other, the autocratic exercise of political power can be hidden by constitutional masks produced by and authoritarian regimes. I refer to these phenomena as *perversion of the Law* (RODRIGUEZ, 2016)

In brief synthesis, the rule of law may function to (a) *justify political power*, (b) guarantee *legal certainty* regarding the political and the economic power and (c) *democratize political power*, democracy understood here as participation of all rational beings in the creation of legal norms. Finally, the rule of law may also *conceal domination* (RODRIGUEZ, 2017a) or, in my own terminology promote the (d) *perversion of Law*.

Under the rule of law political power is regulated, that is, political power is formalized in legal norms for historical reasons which we have no room to reconstitute here, but which are related to the demand of bourgeois economic agents for more legal certainty. In its 20th Century manifestation, the rule of law equals *constitutional democracy* as it is based upon (a) formal Law: it is justified by legal norms and not by ethical, religious or scientific norms; and (b) a rational Law: all decisions are taken in a standardized way and, they are not taken *Ad hoc*, on a case by case basis.

I will call it *constitutional democracy* the political regime consolidated in the 19th and 20th centuries, which is characterized by the rule of law, national constitutions, the idea of civil society and, in a more abstract perspective, the grammar of the struggle for rights. As it will be argued in detail further, the recent history of constitutional democracy has shown us that political, economic and social power tends to try to *escape from Law* whenever it is possible to act without the control of civil society, far away from the eyes of the public sphere. The struggle to build and reproduce the rule of law is contemporary of the various attempts to escape the limits imposed by Law to power, either through the creation of authoritarian regimes, or with the institution of an

autarchic management of Economy, which tends to abandon the legality and the contract in the liberal sense and to adopt various forms of perversion of Law.

## 2. Two authoritarian cycles

### 2.1. Capitalism and Democratic Law

The beginning of the 20th century was marked by a first authoritarian cycle that consisted in (a) the emergence of the various fascist regimes around the world and (b) the emergence of monopolies, which imposed an increasingly imperial management of the economy, a process analyzed by Franz Neumann in his books *Behemoth*, *The Empire of Law* and in the text "The Change in the function of the law in Bourgeois society" (NEUMANN, 1966, 2013, 2014).

It is not easy to generalize hypotheses for a phenomenon that has spread across several continents and has reached very different countries. However, it may be reasonable to say that these political and economic regimes have sought to counteract the forces of civil society in conflict with the imposition of unilateral peacekeeping by force so as to create obstacles to social actors, including organized workers, to take part on the creation of legal norms (RODRIGUEZ, 2009). In Germany, this process took place by means of an alliance between monopolistic economic interests and openly racist political forces (NEUMANN, 1966).

In Nazi Germany the norms governing social life were created and imposed from top to bottom by a restricted group of people in an institutional environment characterize by serious restrictions on fundamental rights, especially democratic participation, a fact that clearly contributed to the flourishing of Capitalism. The absent rule of law has kept Capitalism safe from civil society demands for social rights, not to mention the demands for radical transformations in the political system, in the economic system and in social life. In this sense, authoritarian regimes and pseudo-contractual models of pure domination immunize the political power and the economic power from the subversive influence of organized civil society.

After the Second World War, democratic political regimes spread throughout the West. Until very recently, groups opposed to democracy were clearly a minority and the prospect of expanding rights was a real one, at least in the countries of the Capitalist

Centre and in the richest part of the periphery. This expansion of rights, especially after the 60s, included social rights such as labor rights, right to health, education, social security and compensatory and recognition policies in favor of groups vulnerable to discrimination and violence related to race, color, gender, ethnicity, social origin, age, physical condition, among others (RODRIGUEZ, 2017b). One must include in this list demand for rights related to the protection of the environment, animal rights, among other issues relevant to civil society.

The democratization of law gives social agents the means to formulate their demands in the form of rights, a process that tends to increasingly embarrass the freedom of economic agents to use their capital at their own will and to create limits to all private agents to act in several spheres of life. At a more abstract level of analysis, the grammar of rights provides society with a narrative that allows citizens to compare their living conditions one with another, a possibility that is at the origin of the demands for equality between all citizens (RODRIGUEZ, 2009).

For example, the legal protection of black people and of homosexual persons makes discrimination illegal in hiring and in imposing limits on their circulation in the public space. Such legal norms narrow the power of employers and the power of owners of commercial establishments of all kinds. As the enforcement of legal norms is not free, one must hire police agents, lawyers, attorneys and judges to do that, the creation of rights pressure state spending, forcing a significant redistribution of the income collected by taxes.

That's why the universal recognition of many of these rights tend to be fought against by power agents, either by strategies to pervert the law, or by the creation of new authoritarian regimes. In the absence of the political support and of the military force to advance a re-creation of authoritarian regimes, it remains to these agents to try to thwart the effect of rights by furtive means.

I denominate *autarchy spaces* the creation of decision-making spaces totally free from social control, even though under the appearance of legality, and *discriminatory legality* the legal norms that exclude from their scope of protection certain social groups (RODRIGUEZ, 2018). A third figure of the perversion of Law would be the *dehumanization* of certain social groups, which are denied systematically the protection of the rule of law. One may mention incarcerated persons, black people, foreigners,

immigrants, transsexuals, transvestites, among other vulnerable groups that have systematically been denied the protection of fundamental rights in many national contexts.

As I am talking about dehumanization from the point of view of the law, it would be reasonable to say that this is a much more complex process that also involves symbolic, economic and political mechanisms, all combined to demote certain individuals and groups to a hierarchical inferior condition and therefore vulnerable to domination and even to physical elimination. In this sense, there may be isolated cases of discriminatory legality and autarchy spaces that are not integrated into a systematic process of dehumanization of a social group, systematically excluded from the protection of the rule of law. Not all autarchy spaces or discriminatory legality are part of a systematic process of dehumanization.

*The destruction of European Jews* by Raul Hilberg can be an inspiration for an integrated, interdisciplinary vision of the dehumanization of social groups. Hilberg explains and documents the process that culminated in the decision to annihilate all the Jewish people from Europe, starting with the first discriminatory measures which were simply intended to offer criteria to identify the members of the group, until the so-called "final solution", which was preceded by the legal expropriation of their assets. Law was a fundamental part of all these stages of dehumanization – definition, expropriation and elimination - since the editing of statutes that established criteria to identify Jews, authorized the expropriation of their assets and, finally, their determined their physical annihilation (HILBERG, 2016).

Currently, I consider we are experiencing a new escape from Law period that results from the contentious interaction of the various social agents from the 90s on. After the era of authoritarianism and the era of the perversion of state law, we are living now a new authoritarian cycle, marked by the privatization of the production of legal norms, which accompanies step by step the so-called globalization phenomenon and the rise of financial capitalism (RODRIGUEZ, 2009).

In a word, we are experiencing the gradual loss of the power of the national state to create and enforce its norms in favor of private, increasingly decentralized and normative orders, more and more powerful to regulate people's lives (BERMAN, 2012). For example, the various financial agents, including rating agencies, internet searching

mechanism as Google, social networks such as Facebook and sharing networks such as Uber and AirBnb.

The increase of social regulation can signify an equal increase of the freedom to create legal norms as not all self-regulation is autarchic, discriminatory or violent. But the contrary is also true: social regulation is not necessarily a synonym of freedom. Society is marked by economic hierarchies and hierarchies of race, of gender, of age, of ethnic origin, among others, which the State and its coactive apparatus historically helped to fight against.

That's why it is urgent to develop criteria to differentiate democratic social regulation from autarchic social regulation, otherwise, we would risk concealing extremely violent social processes by using seemingly merely descriptive terms that in fact show to be indifferent and incapable to identify any form of domination. As argued by Ulrich Beck's *The Metamorphosis of the world* (BECK, 2018), it seems reasonable to say we are living a metamorphosis of law and politics as we know it that puts in check all the institutions of power control built up throughout the 20th Century, the ones that revolve around the interaction between national State and civil society.

In a word, it is a metamorphosis that dismantles the institutional mechanisms whereby the West has established an effective relationship between law and democracy. For example, some financial and internet agents tha occupy a monopoly position no longer need the alleged farce of the liberal law to legitimize its actions and relations. These agents are currently using mechanisms that establish an almost direct domination over its counterparts: completely unilateral relations that abdicate the legality and the formalization of social relations though contracts in the liberal sense.

The liberal conception of contract implies an agreement between the parties in which both are recognized as autonomous to establish mutually advantageous exchanges. It unlikely to call a contract a relationship in which one of the parties can change the rules unilaterally, for example, as Uber can when relating to it drivers and users. The consequence of an eventual insubordination is the summary shutdown of the worker or client, who are totally disposable before the mass of people interested in exercising the same function and use the service. Uber can as well establish patterns of price variation and of driver's remuneration based on obscure and opaque criteria (SLEE, 2015).

This type of pseudo-contractual relation appears to be a form of modernized servitude in which drivers and users are obliged to bear any capricious variations of the monopoly agent's will. A form of servitude that passes away from reciprocal ties of loyalty founded on blood, tradition and honor because it is the service of one of the parties exclusively.

This new manifestations of escape from Law demands more detailed research to reveal its main strategies and of constructing new critical categories and renewed institutional utopias beyond State law that projects a new horizon for social control over power. In recent years, my personal research agenda has addressed several of these problems, both from a theoretical standpoint and from an empirical standpoint, aiming at developing a model of criticism that unravels the logic of domination in its most diverse manifestations.

It is the task of a critique of Law to unravel the arbitrary acts practiced by the power agents in detail, explaining their internal logic to reflect on the possibility to build more effective power control mechanisms. After all, the 20th Century has shown us that the abuses practiced by the State is a problem that regard political agents from all the ideological spectrum. Law critique must develop a model of research engaged in the defense of the rule of law and radically critical of power and that does not fall into the excessive simplifications of certain analyses that circulate freely among intellectuals and political agents from the Left.

There is no room in this text to investigate this problem, but it seems reasonable to say that the current transformation of Capitalism, which dates to the oil crisis of 1973 and to the rise of neoliberalism in the United States and England, bring to light the visceral opposition between Capitalism and the democratic rule of law. It is difficult to think of a solution to balance this opposition either in ethical terms or even in legal terms. If the current form of Capitalism implies rapid and constant innovation, Law becomes an almost insurmountable obstacle to its full development (SCHUMPETER, 2017).

The rule of law and the idea of acquired rights combined with an electoral democracy tends to keep the economic change at a slower pace and to distribute Capital through the constant creation of new rights. Innovation requires concentrated Capital

to invest massively in research and technology: that is why the State has been having a central role in scientific and technological development, even in the capitalist center.

The rule of law is responsible for establishing a fundamental link between human sociability and the speed of the market, preventing the latter to work in a completely autonomous manner and to assume destructive features (POLANYI, 2000). After all, as Schumpeter made us notice, the neoliberal utopia of free markets may result in socialism, as no society would be able to endure such a high degree of insecurity and exploitation (POLANYI, 2000).

Unfortunately, these metamorphosis of contemporary law found Critical Theory poor in analytical instruments, which has led authors linked to this tradition (a) to wager in an unreasonable way in the classical structures of the rule of law, as in the case of Jürgen Habermas (HABERMAS, 1997, 2006; SCHEUERMANN, 2014), (b) to insist on traditional Marxist criticism of the rule of law and of the contract in the face of open combat to these institutional forms carried forward by agents of political and economic power, (c) to propose in a very unlikely way the construction of totally different institutions, based on the grammar of love and friendship (HONNETH, 2007, 2015; SCHEUERMANN, 2017), diverting the focus of research (c. 1) of the forms of contemporary domination and (c. 2) of the currently existing possibilities of democratizing legal institutions.

For this reason, it is necessary to revisit the Marxist tradition of Law critique to identify its virtues and failures and to build a model of criticism adequate for a multinormative and policentric power context. To accomplish this task, as we have already said, it is necessary to examine in detail the existing institutions and to imagine institutional alternatives from their own elements, that is, to imagine institutional utopias that are already present in current institutions.

First, this task requires a new look on Karl Marx's critique of liberal law to highlight the umbilical link between Marxist criticism, competitive capitalism and its inadequacy to understand the use of law by monopolies and fascist regimes in the first place. In short, Marx criticized liberal law whose main function was to ensure the compliance of contracts and the respect of private property, i. e., legal certainty. Marxist critique aimed at illuminating the fact that this type of Law is used to conceal The

exploration of work under the guise of an exchange of equivalents, i.e., the appropriation of surplus by the capitalist (MARX, 2013).

As Franz Neumann showed, with the formation of Monopolies and its alliance with Nazi-racists to implement an authoritarian regime in Germany, capitalist and fascist political praxis and imagination have already emancipated themselves from the liberal law categories (NEUMANN, 2013, 2014; SCHEUERMANN, 2001; RODRIGUEZ, 2009). Capital and authoritarian power dismissed liberal institutions and developed autarchic forms of domination, even if they are also coated with the varnish of legality. That is why neoliberalism is the greatest enemy of democratic Law.

Nazism was institutionalized not as a means of regulating social conflicts of a civil society, but as a community that should eliminate dissent so as it was oriented by common values defined by the will of the Führer. Nazism did not allow a civil society to exist: there were not independent associations, no trade-unions, no political parties and no social movements (NEUMANN, 1966, 2013, 2014).

Under Nazism, one does not merely hire workers by means of private contracts. Workers are integrated into a community of work formed by entrepreneurs and workers, under the regency of the Nazi Behemoth. Nazim did not also ensured private property in the liberal, individualistic and negative sense. Under Nazism, economic activity should integrate all the efforts of entrepreneurs, workers and people in general, men, women, youth and children, in an organic unit destined to achieve the objectives stated by the Nazi regime.

It is true that Nazism did not eliminate capitalism or private property completely, but it helped to destroy the competition of small businesses to consolidate large monopolies that maintained relative independence from political power but were integrated into the efforts to achieve the objectives of the *Nazi-Behemoth* (NEUMANN, 1966).

According to Franz Neumann, the Nazi regime arose in large measure as a response to the advancement of social demands over the Legislative Power, i.e., as a response to the democratization of Law during the Weimar Republic. The formation of this capitalist-racist alliance was a strategy to stop the struggle for new rights, whose heyday would occur during the 60s of the 20$^{th}$ Century, along with the democratization

of the post-war capitalist center, a process that is at the root of the second authoritarian cycle.

It should be stressed that the struggle for rights completely changed the meaning of legal categories once criticized by Marx. To focus in just one example, the liberal contract was classically seen an accord of wills that should be simply recognized and guaranteed by the State. As the 20th Century advances, the idea of contract turns into something completely different. State regulation of contracts started to impose significant limits on the will of the parties. Under this new model of regulation, parties do not have absolute power over the content of the contract. Instead of the "will of the parties" one should refer to this phenom as the "private autonomy of the parties". “Private autonomy” means “regulated autonomy”: the will of the individuals is regulated by the law. They are only authorized to choose the contractual content previously placed at their disposal by legal norms (FLUME, 1998:24).

It is precisely because of these changes, responsible for creating Labor Law and Anti-Trust Law, legal branches that have imposed important limits on the exploitation of labor and on free competition (NEUMANN, 2017a), that the first authoritarian cycle was settled. Similarly, it was because of the advancement of Social Welfare State in the postwar period that the second authoritarian cycle was established. Neoliberal criticism of the Welfare State advocated it creates serious obstacles to the advancement of the market and to creative innovation by treating workers in a paternal way, diminishing their productivity by concentrating capital on the hands of an inefficient and expensive State and by creating a social spending plateau that limited the development of new technologies and products, maintaining the growth of the economy at low levels (HAYEK 1977).

The weakening of State power, especially its power of taxation, has currently favored the concentration of capital and of all investment decisions in the hands of private agents. As Wolfgang Streek showed in his masterful book *Buying Time*: *The Delayed Crisis of Democratic Capitalism* (STREEK,2014) today, all states depend on funding to make ends meet, including the states in the capitalist center. So national politics has been asked to maintain a double fidelity. National States must govern for its citizens, in view of their increasing demands for new rights, but they must also pay the debts of the financing and thus meet the demands of the financial capital, which

operates increasingly free of the barriers of national legislation and it imposes austerity regimes on its debtors.

## 2.2. Multi-normativity and Democracy

As it has been already said above, the creation of plural, decentralized normative orders is the hallmark of contemporary law, a process that is facilitated by the advancement of the internet, by the development of low-cost means of transportation and by the political action of agents interested in this status quo. For example, financial market agents who are lavish in funding and supporting those political leaders that are increasingly draining the power of the national State and favoring privatization and the fragmentation of Law.

Jürgen Habermas's analysis on the relationship between law and democracy refer to the last century and are therefore unable to explain the current situation. It is not plausible that State law and the structures of the classic International Law, that are also dependent on the strength of the national States, are able to impose themselves in the face of the phenomena we have already mentioned, even if one admits, as Seyla Benhabib argues in her enlightening *Another Cosmopolitan*, that we are watching a dispute between pro-fragmentation forces and pro-cosmopolitan forces (BENHABIB, 2006).

Habermas' *Law and Democracy* articulates an important critique of the pathologies of the paternalistic and bureaucratic Law of the Welfare State, advocating correctly for its democratization. Habermas shows the importance of Law in the transmission of the demands of the public sphere to the management of the State and of the economy, which should respond to the demands of society and not function as mere instruments of the bureaucracy and of powerful economic agents. However, the author has not overcome the institutional imagination of the last century to address the issues that afflict us today.

Even considering the problems about the relationship between the organization of State and the radicalization of the 20th Century democracy, Habermas' book adopted an overly defensive posture, which merely reaffirmed in abstract the potentials of the classic liberal national States (SCHEUERMANN, 2014). A more promising path, abandoned by Habermas already in the first chapters of his book, would have been the

one that seeks to establish a productive dialogue of Critical Theory with authors who think Law decentralized from national States.

Building on such a dialogue, it would be possible to imagine the possibility of to create a multi-normative democracy, that is, a democracy that explicitly admits the existence of several regulatory centers, without abdicating the objective of ensuring that all rational beings affected by the legal norms participate or are taken into account in their production. Here lies the importance of debating the work of Robert Cover (COVER, 1983), as well as contemporary authors such as Paul Schiff Berman (BERMAN, 2012), as I had the opportunity to start doing it in a recent article (FLORES, RODRIGUEZ, 2017).

According to Klaus Gunther (GUNTHER, 2016), in many social fields interconnected globally by communication technologies, for example, the internet, the sports and the science, we can identify autonomous and non-state normative standardization processes that often include the creation of institutions and monitoring procedures with coercion power. The same can be said of various religious, ethnic or cultural communities that adopt their own norms and institutions as an expression of their autonomy. This last case makes it clear that any legal order, even if at the national State level, exists and develops besides other normative orders.

Gunther also explains that actors, private or public organizations, can freely create patterns of behavior to which they are linked, accompanied by means of monitoring and imposing their compliance, for example, codes of conduct of multinational companies and certification procedures that guarantee that organizations follow certain compliance standards and quality procedures. In this sense, any social space can be considered a multi-normative space in which different normative orders collaborate and collide.

Such a statement, of course, brings to the center of Law research agenda the need to create criteria able to distinguish legal orders from other types of normative orders, for example, moral, ethic, religious and social orders. The best theories of legal pluralism usually answer this question saying that a normative order will be considered legal if its participants claim that it is legal and are willing to defend it in the face of any conflict with other normative orders (TAMANAHA, 2008; COVER, 1983).

But the most relevant issue regarding this specific point is to investigate why certain agents make a point in saying we are dealing with legal norms and not any other type of

norm in a certain context. What are the interests, what are the goals that motivate these social agents to take this stance? For it is evident that with this type of behavior such agents may either aim to fail to comply with certain legal norms in favor of others, for example, to avoid paying state taxes or administrative fines, or simply practice discrimination and violence.

The best point of view to investigate these phenomena seems to be the attempt to observe and evaluate the collisions between normative orders and the attempts to manage these multi-normative environments, without assuming States should be at the center and would be capable of producing legal norms for all purposes. Such an investigation must also develop criteria to distinguish between cases in which multi-normativity is desirable or undesirable, i.e., in which cases we are facing a normative order that is serving to adequately resolve a relevant social problem or, on the contrary, is serving an autarchic, discriminatory or violent power. In other words, it will be necessary to build up step by step a series of principles that guarantee the respect and tolerance of the various normative orders, serving as a criterion to manage possible conflicts between them.

This line of analysis does not look back to 20th Century normative regimes but aims to update the idea of democracy to face contemporary institutions and is certainly very different from a certain theological critique of Law and power drawn up with inspiration from texts of the young Walter Benjamin (Benjamin, 2005, 2011) and claimed by some contemporary authors (AGAMBEN, 2004, 2011). It is a theoretical posture that directs all its energies to the construction of a completely different Law, for example, thought of the image and similarity of relationships of friendship or of love, which would serve as counterposed to the alleged violence atavistic characteristics of the Law as we know it today.

Such a way of criticizing Law tends to advocate a utopian and idealistic horizon for social praxis which seems to require us to jump over our own shadows to imagine an unprecedented normative grammar that seems to have not yet manifested as a viable alternative in the contemporary world. After all, such a model of criticism does not bother to investigate for itself the institutions currently in operation or to incorporate any specific literature regarding them.

A critical approach like this, and here lies its main counterindication, tends to ignore the difficulty of dealing with the necessary mediations, presented by reality as we experience it and of which we cannot escape as they constitute the norms that conform our social interactions and our subjectivity. For example, if one revisit the history of the Welfare State from this point of view one will notice that Social Security as a hole was the result of the transformation in public institutions of private mutual assistance funds created by trade unions to support workers. Social Security was not invented out of the blue.

Even if it is reasonable to imagine a totally different Law which does not suffer the problems of the current Law, a form of Law completely free from any form of violence, it would be necessary to reflect on how to build these institutions starting from the institutions already there, i.e., from the elements that constitute our reality and form our way of thinking the world and perceiving our formal institutions and ourselves. In the absence of a consequent thought on such mediations, it will be left to the theory of law and the theory of politics to take a standpoint of a prophet and claim one should expect a sort of redeeming apocalypse or to conform to exercise the institutional imagination in abstract as a kind of sophisticated sport without any consequences to social life.

This model of theological criticism seems to be clearly incompatible with the position of Walter Benjamin himself, an author who does not point to any redemption or transcendence. To freely quote some of the most famous formulations of his "Theses on The Concept of History", quite on the opposite, Benjamin mentions a "small and ugly" theology able only to make us see a tenuous light that illuminates us, but that not from the future, *nota bene*, but from the past (BENJAMIN, 2005).

The redemption for Benjamin refers to the possibilities of emancipation that remain buried in the past, more precisely, in the ruins of the past. A retrospective vision allows us to see these possibilities through certain images that do not project a future Redeemer. They cannot anticipate a reconciled future, what these images do for us is to offer the image of a redemption which is no longer possible, except as a continuous exercise of a retrospective and negative thought (URBICH, 2014: 632, 654, 686). This is precisely why Benjamin is admittedly a critic of the notion of progress in History. That is

an elementary characteristic of his work that gains all meaning in being related to his "ugly and weak" vision of utopia.

A critique of law and politics founded on a future redemption is more likely to an apocalyptic Christian religion, according to the critique of Didi-Huberman to the reading of Benjamin by Agamben (Didi-Huberman: 2014). Walter Benjamin's is radical committed with the materiality of the current world in the figure of his most trivial objects, such as toys and ancient children's books, from which a secular, small, ugly and radically materialistic theology is imagined, always in retrospect and under the shadow of the negative. As Jan Urbich says, to Walter Benjamin "salvation can be divisioned, but not achieved" and "every definition of happiness is doomed to fade" (URBICH, 2014:777, 804).

## 3. Final Remarks: An Experience in Common

A promising Law critique model should be able to:

(a) To describe with acuteness the various normative orders in operation in the contemporary world, the reciprocal relations between themselves and with States and international bodies,

(b) To establish the conceptual and practical distinction between democratic normative orders and autarchic normative orders,

(c) To discuss new alternatives to institutionally connect Law and democracy, beyond the state model and without giving up the emancipatory possibilities opened by the social regulation of conflicts, i.e., by recognizing social power as a creator of legal norms and its capacity to resolve conflicts in an autonomous manner,

(d) To have a theory about the current increase of open violence and of new radical and dehumanizing polarizations that do not seem to project a horizon of universal understanding, endangering democratic sociability.

To construct a new emancipatory horizon, which has been obscured by the emergence of violent forms of fragmentation of Law, may be the great novelty of the second half of this century. The task consists in the capacity to investigate and imagine

new forms of belonging, new types of political community and their legal framework, that do not refer to a xenophobic vision of Nation and its past and its present of racism and exclusion. To imagine a form of life that gives up the imperial and unitary model of creation of most of the legal norms, the centralized and expensive management of the public thing by immense and opaque bureaucratic structures, which most of the time alienate the citizen of political participation and consume scarce social resources instead to mediate the singular and the universal democratically.

It must be remembered that the formation of the national States and their competition among themselves has been marked by bloody wars and genocides around the globe, by the destruction of local traditions and powers, and often by the extinction of the human capacity of solve their autonomously it conflicts abandoning the passive positions of clients of public services. Of course, as we have already had the opportunity to say above, the State was also responsible for tackling power asymmetries present in society, ensuring a minimum of equality for all people when fighting privileges and curbing economic exploitation and violence on the grounds of gender, race, origin, ethnicity, age. The weakening of State power may allow some of these problems to resurface at all force.

However, even considering these emancipatory achievements of constitutional democracy, considering the metamorphosis of contemporary Law, there seems to be no alternative: one must imagine a democracy beyond the national State, a democracy that considers the State as a normative order among others and that takes into account the fact that we are united today by a common experience, something that the climate crisis, the scandals about privacy and the manipulation of public opinion on the internet and the latest economic crises has made it very clear.

But this "common experience" has not yet become an "experience in common", because it concerns only the external, superficial effects that certain phenomena are capable to cause on us, sometimes simultaneously. Such an experience still does not concern the common affirmation of our identity and the common expression of our affections. Despite its universal claim, the narrative of human rights is in a large degree the result of the State and the national experience of postwar. Such a fact helps to explain the crisis of this narrative when it faces accusations of ethnocentrism and

inability to incorporate the perspective of the various peoples of the planet in its process of construction and implementation.

Despite beautiful attempts, such as that of Boaventura de Souza Santos in *If God was a human rights activist* (2014), who sought to search in other cultures ideas that would allow us to unite all people in a common experience to help construct an effectively universal concept of human rights that could be a milestone from which we could create institutions that guarantee a minimum standard for the operation of the various relatively autonomous regulatory orders.

In this sense, it is very interesting to note that the encyclical *Laudatio Si '* by the remarkable Pope Francis seeks to convince all people of the need to think our interconnection from the ecological problem point of view and not from the raw recognition of the humanity of the other in all its difference, which seems to me a smart, meaningful and probably effective, dodge strategy. After all, it is perhaps more palatable to people to recognize the moral right of the other to live in a dignified manner as part of a buffeted nature by the capitalist surpluses than to guarantee him, in a dry way, the legal right to be herself, after all, nature, for the Christian faith, is a manifestation of the will of the Creator and compromise his integrity a sin. But even leaving aside faith and public theology, the destruction of nature will also mean our physical destruction.

Scholars as Judith Butler (2018) have turned to categories like that of *vulnerability* to try to establish an "ethical minimum" capable of founding the universal in other terms. There are attempts to perform a similar task with the use of the concept of *intersectionality*, as we can see in the most recent writings of Patricia Hill Collins and others (Collins & BILGE, 2016). From these attempts, instead of dichotomies like national and international, citizen and foreign, universal and private, me and other, perhaps others will be created that allow to build institutional designs that leave behind the state and national imagery.

Some final remarks, to be investigated and argued in detail in another opportunity: first, the task of building a common experience is not strictly theoretical, but rather eminently practical. The idea of human rights and its national and international institutionalization were born from the world trauma of the great wars (HABERMAS, 2006). It is important to notice that such institutions were not born from the genocidal experience of slavery, the open violence of colonialism, the genocide of

black and indigenous people around the world, gender violence against women, trans people and transsexuals, not even from the exploitation of work, an issue that remains the object of a specialized and separated international organization. We do not have, until today, a common institutionalized experience of the exploitation of human labor, as many important countries do not take part in the International Labor Organization (ILO). The universality of fundamental rights is remarkably void as it abstracts from just a few social phenomena.

Judith Butler seeks to anchor her reflection on vulnerability on 9/11 and other events such as the meeting of bodies in public assemblies that perhaps are able to move people all around the world – or at least the people present in these spaces – by producing subjective disruptive experiences that would force us to face our vulnerability and the vulnerability of the other so as to integrate self and other into a reflective and affective bond in common (BUTLER, 2018). Or maybe these encounters could to create a seed for a universal practice more entrenched in social struggles to fight against the current crisis of the available void universality of human rights

However, faced with the escalation of violence and the political and economic aggressiveness in which we are currently immersed, such acts of barbarism appear not yet to be capable of producing a true experience in common. To some extent, they seem to be sharpening even more the desire to attack by demonstrating that lives that seemed protected and invulnerable, rich and inaccessible to physical elimination lives, the lives of New York, Paris, Berlin and London, can now be reached. After all, the perception of the vulnerability of the other can sharpen, in some cases, the necrophiliac thirst to vulnerate or to kill.

The idea that public demonstrations in the assembly increase the degree of sensitivity in the face of violence is nothing but a bet. As Butler says at the beginning of her book, the neoliberal ideology which states the complete autonomy of the individual, an ideology according to witch one must become fully responsible for her well-being, one must act as entrepreneurs of oneself, without the right to any kind of social support, does not seem to show signs of weakening, even if the mentioned public assemblies can be interpreted as attempts to affirm that these lives matter.

At the end of the day, it may be that this alleged dominant individualist ideology be nothing more than a smokescreen, an illusion or a localized phenomenon. There is

some evidence that at least in the US the liberalization of markets is moving alongside with the revaluation of the family and traditional values, as the important book of Melinda Cooper shows, *Family values: Between neoliberalism and New Social Conservatism* (COOPER, 2017). It is probable that the advancement of financial capitalism and the destruction of welfare states are not being justified only by a radically individualistic and non-solidarity ideology, but by a conservative ideology which advocates solidarity practiced through the family, the community, the institutions of good-will, a way of thinking fully compatible with the idea of that it is necessary to destroy the grammar of rights.

Following this order of ideas, nobody will state aggressively that people should not live in a dignified way. Nobody will deny solidarity and empathy to the ones that suffer, on the contrary. Even so, the defenders of capitalism are almost obliged to argue that is not reasonable to guarantee rights that impose a level of material equality by force, because it is necessary to keep capitalism functioning efficiently and innovatively. Leaving aside, of course, the fact that we are living a process of radical concentration of wealth, diagnosed by Thomas Piketty in his *The Capital in the 21st century* (PIKETTY, 2014). Less and less people are being able to achieve a materially comfortable and safe level of existence, which will make the idea of social protection via good-will something materially impossible or simply cynical.

This structural indifference to human suffering helps to justify the need to privilege the economic protection of certain groups at the expense of others, for example, the family must be protected at the expense of strangers, nationals should be protected at the expense of foreigners. Capitalism seems therefore to maintain a clear incompatibility with the idea of democratic law and a clear elective affinity with the idea of identity. This fact may help explain the increase of the violence of national identities against foreign people, the violence of certain religious identities against certain manifestations of gender, among others.

As Achille Mbembe shows in his *Criticism of the Black Reason*, the relegation of the Black People's humanity was one of the justifications for their economic exploitation and for the denial of access to the grammar of rights (MBEMBE, 2017, WILLIAMS, 1991, Neris, 2018). The affirmation of certain identities in the spite of others to secure privileges in the distribution of richness may run without the systematic relegation of

the humanity of certain social groups. Such a relegation may facilitate the development of such processes, but it's not a necessary condition for them to evolve.

One may sincerely mourn the luck of someone, one may mourn their pain and recognize it actively, one may even publicly manifest solidarity and help these individuals by all possible means. But if capitalism presents itself as an economic war of one against the other, a war in which rapid innovation imposes the radical destruction of every idea of security, one will have no means to prevent nobody to die for this would be above one's strength. Following such a course of action would be comparable to a suicidal act.

In short, even assuming the other is "vulnerable" and deserving to live well, this mere fact does not give rise to a duty to help anyone if my physical survival is also supposedly at risk. In such a situation, it makes no sense to guarantee anyone the right to survive or to live a dignified life. It makes no sense to recognize to all people a right to work and enjoy a certain standard of living when it becomes clear the incompatibility of this capitalist development logic with the ever-expansive grammar of democratic law.

Without a minimum level of security, including economic, there is no possible humanity, at least in the sense of a universal right to live and survive with dignity. In this sense, neoliberalism today is one of the main engines of the escape from Law, it is an essential mechanism to propel all forms of perversion of Law. Following this order of reasons, against the apologists of necrophilia and this apparent structural indifference to exploitation, there seems to be reasonable to use force.

Even Thomas Hobbes considered violence a legitimate means of resistance against those who seek to take a person's life. Necrophilia, moral or structural, must not be fought against just by using public argumentation and public performances. For example, a lot of blood was shed so that a working day of 8 hours was transformed into a right, a battle that is being currently lost with the easing of precarious forms of hiring, even in the Capitalist center.

It may be that the joint reflection on all oppressions from the same intersectional frame will helps us to create over time a mutual perception of oppression and vulnerability able to produce a foundation from which to build a new idea of universal. Without a universal narrative that serves as a measure for the various forms of sociability and normative orders it will be very difficult to differentiate emancipatory

from regressive courses of action. The mere description of social arrangements, the mere description of the various strategies of conviviality between people and their strategies of conflict resolution, all of them certainly very rich and exuberant, has absolutely nothing to say about their democratic character.

Maybe a new World War will be necessary to produce a new emotional and bodily experience that could come up with something like a World in common. I personally hope such a trauma of epic dimensions is not necessary to form new forms of universal connection between people, but I don't know. At this point, everything seems to me excessively at risk.

This situation only increases in my view the urgency of taking a critical stance, an attitude that refuses to merely register in real time and with impressive scholarly creativity the continual emergence of new disasters. An attitude that clearly defends the centrality of democratic law, even if not in the form of a national state, against the obvious increase of dehumanization processes.

## 4.References

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