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Longing for Better Law – On Legal Development and the Plurality Issue

Añorando un mejor derecho – Sobre el desarrollo jurídico y la cuestión de la pluralidad

FLORENCIA BENITEZ-SCHAEFER*

Abstract

Amidst plural claims for the recognition and respect of diversity, not only the structures but also the very rationale of modern law have shown problematic limitations. In this paper, I argue that a core challenge for contemporary socio-legal transformation relies on how modern law is called to relate to difference and development in order to fulfill its promise of preventing or resolving conflicts. This is, I argue, the result of law's embeddedness in a modern sociolect that pervades social interaction with a double appeal. It compels equally to reject dogmas as much as to fix one position that is argued as 'the' (most) rational one.

This paper combines the socio-linguistic theory of Peter V. Zima with an inquiry on the relation between modern law and development in the historical context of world-encompassing colonialism and sociological research on legal development in recent Latin American history, more specifically using the example of the Colombian Constitutional reform in 1991. On this basis, I argue that the strained relation of law with plurality is determined by the modern sociolects it is embedded in along with the notion of 'development', independently of the political ideology that concrete projects pursue. While 'early-modern' conceptions of law aim to (dis)solve differences, 'late-modern' ones are trapped in ambivalent 'solutions' that leave the door open to all sorts of power-abuse. On this transdisciplinary ground the paper aims to provide tools for reflection on current processes of legal reform.

Keywords: *Legal Development in Latin America; Pluralism; Constitutional Reform; Legal Transfer; Post-Modernity; Socio-Linguistics.*

* florencia.benitezschaefer@googlemail.com. ORCID: https://orcid.org/0009-0002-2527-3913. I am indebted to the anonymous reviewers for providing meaningful feedback that helped to improve this contribution. Article received on May 19th, 2023 and accepted for publication on July 21st, 2023.

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Resumen

En medio de diversos reclamos por el reconocimiento y respeto de la diversidad, no sólo las estructuras, sino también la razón misma del derecho moderno ha mostrado limitaciones problemáticas. En este artículo, sostengo que un desafío central para la transformación socio-jurídica contemporánea se basa en cómo el derecho moderno está llamado a relacionarse con la diferencia y el desarrollo para cumplir su promesa de prevenir o resolver conflictos. Este es, propongo, el resultado de la incrustación de lo jurídico en un sociolecto moderno que impregna la interacción social con un doble atractivo. Obliga tanto a rechazar los dogmas como a fijar una posición que se defienda como "la" (más) racional.

Este artículo combina la teoría sociolingüística de Peter V. Zima con una investigación sobre la relación entre el derecho moderno y el desarrollo en el contexto histórico del colonialismo mundial y la investigación sociológica sobre el desarrollo jurídico en la historia reciente de América Latina, más específicamente utilizando el ejemplo de la reforma constitucional colombiana de 1991. Sobre esta base, sostengo que la tensa relación del derecho con la pluralidad está determinada por los sociolectos modernos en los que está incrustada junto con la noción de "desarrollo", independientemente de la ideología política que persiguen los proyectos concretos. Mientras que las concepciones "modernas tempranas" de la ley apuntan a resolver (o disolver) las diferencias, las "modernas tardías" están atrapadas en "soluciones" ambivalentes que dejan la puerta abierta a todo tipo de abusos de poder. Sobre esta base transdisciplinaria, el documento tiene como objetivo proporcionar herramientas para la reflexión sobre los procesos contemporáneos de reforma jurídica.

Palabras clave: *Desarrollo jurídico en América Latina; Pluralismo; Reforma Constitucional; Transferencia Jurídica; Postmodernidad; Sociolingüística.*

INTRODUCTION

Amidst plural claims for the recognition and respect of diversity, not only the structures but also the very foundations of contemporary law are experiencing dramatic challenges. In response, along the last decades, several legal reforms have aimed to address this issue in Latin America. To be sure, the challenge of plurality goes beyond the realm of law as much as it transcends the geopolitical boundaries of Latin America. Thus, this paper explores the issue from a relational perspective, connecting different fields of research: socio-linguistics, global colonial history and its influence on our understandings of law and development, as well as socio-legal research on recent Latin American history. Situating legal struggles within broader (epistemological) contexts might offer some orientation regarding

where we are and which questions might be important to pose when addressing current challenges.[1]

I. LAW WITHIN MODERN SOCIOLECTS

In this section, I propose to use Peter V. Zima's (*1946) socio-linguistic theory as an orientational framework to address the tensions between law and (cultural) plurality. In relation to the issue of engaging with difference, he identifies three different sociolects, i.e. socio-linguistic situations that determine the posing of certain questions and answers.[2] According to his analysis, within an early-modern sociolect, difference is encountered with ambiguity, meaning that the tension created by difference is envisaged as one that is possible to overcome. In turn, a late-modern sociolect, is characterized by ambivalence, meaning that the certainty of a possible overcoming of the tension has banished and the tension is held within an (seemingly) all-encompassing discursive frame. Finally, a postmodern sociolect, that became more prevalent in the second half of the 20th century, confronts difference with indifference, meaning interchangeability.

The main difference between the first two relies therein that the (early-)modern discursive ambiguity can be, and is expected to be, solved by modern discourse itself, particularly through the application of (allegedly) universal standards, like reason. Thus, the discomfort caused by the synchronic presence of two or more (conflicting) meanings as part of one unity, ie. by 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. Ambiguity is acknowledged, but it exists only as an undesirable confusion that ought to be overcome.

The late-modern and postmodern perspectives, as part of changing social systems, distanced themselves increasingly from these assumptions. Acknowledging the implied contradictions of early modernity, this modern promise unveils as an unfulfillable hope: In a world claiming the value of diversity, it is not possible anymore to dissolve the contradictions through the binary opposites of good/bad, beautiful/awful, etc. Consequently, the status of legitimating resources of argumentative chains like reason, objectivity or universality – all key to legal argumentation – change dramatically. Power-mechanisms are unveiled behind the seemingly objective-neutral standing of the speaker.[3]

In relation to legal discourse, early- and late-modern sociolects seem to be particularly strong even if legal praxis might be circulating around postmodern indifference. Hence, modern law assumes and accepts plurality and contradiction, even if (or maybe exactly

[1] I am indebted to the anonymous reviewers for providing meaningful feedback that helped improve this contribution.

[2] ZIMA (2001), p. 37.

[3] Examples of this claim are manifold. Particularly the field of legal anthropology and the approaches of Critical Legal Studies (CLS) have worked on this line.

because) the final goal is to solve the conflict between opposites. It limits the validity of arguments following certain principles, and thus reduces different possibilities under one model. In this sense, it plays a song in early-modern key. However, law also attempts to organize the tense coexistence of difference through specific mechanisms, setting only a process of decision-making allegedly detached from a value-statement at the level of content. Within that process, all arguments are possible. Here is law playing an ambivalent tune.

Understanding which sociolect shapes our legal argumentation, and which it nurtures in turn does not have only theoretical taxonomic value. Particularly in the current context of (demanded and accomplished) legal reforms in Latin America embedded in contentions over cultural plurality, these ambiguous/ambivalent frames allow or prevent forms of debate. In fact, reform itself can be seen as an expression of modern sociolects.

Negotiating the tension between universal reason and multiple wills or needs, reform becomes a constitutive element of law.[4] Moreover, legal philosopher Paul Kahn has observed that 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.[5] As a result of reason, generally, those products of the past cannot be totally dismissed. Reform feeds a never-ending cycle of reason reformed by better reason.

The question remaining is, however, who is empowered to talk in the name of reason. As Kahn 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 and of the people's will. Reform is the common ambition of legislatures, executive agencies, and courts – as well as of popular political movements [...]".[6] [7]

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. 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

[4] In more general terms, the mechanism of reform 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), p. 8.

[5] KAHN (1999), p. 17.

[6] Noteworthy, 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. Similarly, it is irrelevant 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.

[7] KAHN (1999), p. 8.

interpretation of law, the more that "reform and interpretation are one and the same process".[8] Hence, paradoxically, "judicial review creates the permanent Constitution".[9]

But reform does not only validate a mythical past. Also new notions of progress emerge with each reform proposal causing that "the rule of law supports multiple narrations of progress, as well as decline".[10] This ambivalence created by a plurality of narrations of progress activated anew with each new reform is key also for the position of law in front of progress. The claims of legitimacy for a reform and the progress it envisages depend (as much as established law) from an anchor in the past, an original (or timeless) legal 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*. All present rules are traceable to an original statement that gives meaning and legitimacy to it. Thus, Kahn argues, "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".[11]

This conception of law has not broken its bonds with the moral and the divine. 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".[12] Not surprisingly, similarly to 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.[13] In fact, we speak of a revolution because it marks a rupture with a 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".[14]

It is the memory of that revealed truth the one that gives unity, consistency and a legitimizing weight to all the decisions that recall its authority. This unity with an authoritative past is the one that allows legal coercion to be (seen as) just and justified. When that link cannot be perceived, the legal decision is questioned: is it reasonable, ie. does it follow the reason embodied by a higher set of rules, pre-existent and authoritative? To argue

[8] KAHN (1999), p. 55.

[9] KAHN (1999), p. 77.

[10] KAHN (1999), p. 107.

[11] KAHN (1999), p. 43.

[12] KAHN (1999), p. 47.

[13] KAHN (1999), p. 48.

[14] KAHN (1999).

outside of this set of arguments is only possible when the speaker stands outside of that community,[15] belongs to the 'non-us', embodies the 'Other'.

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.[16] 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".[17] This way, differences occupy a subordinate space in front of a unifying law. "We, the people", "our past" – this is the language of law, 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.[18]

Regarding the issue of plurality, this means an important transposition. The radical difference between those past allegedly pre-legal times and now (the historical boundaries of the community) is transposed to the radical difference in the present between our legal community and those outside of that community, the non-legal others within or outside the community's present borders.[19] In the international realm, in turn, law becomes a crucial element in the constitution of the modern 'Western subject' while its 'Other' is defined through negations.[20] This issue, that has been intensely discussed in the debates over legal pluralism and autonomy struggles in Latin America,[21] is an expression of a broader challenge.

Analyzing the example of Hegel's account of history, Teemu Ruskola observes at least three elements of dichotomizing division between conceptions of the Western and the Oriental that find expression in arguments about law and fit as well the Latin American context: staticism/progression, community/subjectivity, and moral/law. It is common to the Chinese as much as it is for the Latin-American context that the part of vernacular history referred conventionally as 'modern' in opposition to 'traditional', refers usually "to the period of significant contact with the modern West".[22]

The difference regarding the relationship to time (static/progressive) is interlinked with the other two of subjectivity and 'real' law, because only a progressive 'modern' subject

[15] KAHN (1999), p. 44.

[16] KAHN (1999) (1996), p. 2 f.

[17] KAHN (1999), p. 47.

[18] KAHN (1999), p. 45.

[19] The importance of law for holding a sense of the own community is exemplified by T. B. Smith's statement on the Scottish identity: "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), p. 21.

[20] RUSKOLA (2005), p. 270.

[21] See eg. SIERRA *et al.* (2013).

[22] COHEN (2003), p. 48.

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",[23] creating a "fabulous Western jurisprudence of Chinese law".[24] The advocates for the recognition of indigenous legal systems within Latin American juridical rhetoric, argue similarly when they point at the restrictive usage of the term 'legal' for state law.[25]

Naturally, if modern law and the rule of law are the outcome of universal reason, then the 'other' of these categories must be the 'other' of reason: unreasonable desire. 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".[26] From this stance, advancement towards 'real' law 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 depicted as radically different.[27]

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 reason to refer to, it also requires 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 production of identities becomes connected to an idea of universal reason, the call for bringing the Other into a movement towards becoming 'the same' gains appealing power.

II. ENVELOPING AND DEVELOPING THE OTHER THROUGH MODERN LAW

This 'movement towards becoming something different from what already is' summarizes a core idea of the notion of development. Noteworthy, the very formation of the

[23] RUSKOLA (2005), p. 272.

[24] RUSKOLA (2005), p. 273.

[25] CORREAS (2003), p. 110 ff amongst many.

[26] KAHN (1999), p. 18.

[27] In this respect, see also BALKIN (1993), p. 11. who refers to the need to believe in the coherence of our own social world.

concept of 'development'[28] in terms of social or rather civilizational betterment is entangled with processes of legal change as well as with historical, philosophical, and anthropological discourses on them.

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 on the Americas by the Spanish Monarchy if they did not comply with the '*Requerimiento de Palacios Rubio'*.[29] This invasion, understood in the frame of a thinking permeated by the concept of 'just war', was opposed by several theologians and jurists, starting a discussion around the question of what means were legitimate for the Spanish Kings to convert and subjugate the natives to Christianity.[30] The positions on this discussion were epitomized by the debate between Bartolomé de Las Casas (1484?-1566) and Juan Ginés de Sepúlveda (1489-1573) in Valladolid in 1550.

While Sepúlveda argued, invoking Aristotelian tradition, that there exists an inherent hierarchy amongst men, Las Casas followed an egalitarian principle marked by the Platonic and Christian ideas of improvement of all human beings. For Sepúlveda, to differ from the ideal image of man, which he equated with the Spanish moral man, automatically meant an insurmountable inferiority, and justified thus the subjugation and destruction of the 'other'. On the contrary, Las Casas argued with natural law that the value of any human being was innate because of the potential he[31] had to access the Good, as any other creature.[32]

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[28] The scope of this article does not allow for a thorough discussion on the many understandings of 'development'. Rather, the approach taken here addresses and challenges the actual use of this concept in the context of legal reform and points at the emergence of this notion as a frame of thought marked by modern ambiguity and ambivalence in terms of Zima. This is a quality shared by many versions of 'development', including, for example, newer ones like 'human development'. The pitfalls and imbalanced power dynamics that derive from the ambivalence of the leading current within the 'human development' approach, reenacting problematics of preceding 'developments', have been highlighted broadly by postcolonial and post-developmental research. An early critique was posed by Gustavo Esteva already in 1991, within his thorough discussion on the concept of 'development' and the processes entangled in its emergence. ESTEVA (2006).

[29] Since 1513, the '*Requerimiento*' was read (generally without translation) to the native peoples in the American Continent, a text explaining 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.

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.

[30] GONZÁLEZ (1983), p. 26 ss.

[31] In the historical context, the male subject is certainly the holder of 'human value', even if the argument as such is nowadays clearly expanded to multi-gendered humanity.

[32] DIETRICH (2008), p. 204.

Here is visible the logic of natural law in action, according to which the 'other' has the same innate rights so far it is possible to conceive of it as similar (therefore equal), and lastly as non-different, not 'really' different. In other words, even if right now, the otherness might be obvious, he can develop to achieve the same ideal embodied by the judging speaker. 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 documents, ie. the Requerimiento and the papal bulls, just transposed and hardened the legitimizing point of reference, introducing a legal-positivistic aspect.

In its last consequence, 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.[33] 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.[34] 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".[35]

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. In turn, these were put on a scale of linear development. This perspective has been broadly accepted since the 18th century and was adopted amongst others by Montesquieu (1689-1755), a fundamental reference for socio-legal thinking even today.[36] According to these unidirectional perspectives of evolution, the trajectory goes from disorder, irrationality, and savagery to order, rationality, and civilization.

Following the same perspective, also Adam Smith (ca. 1723-1790) in his 'Lectures on Jurisprudence' asserted that law increased in quantity and complexity according to the progression of societies, relating this progression with the consolidation of property.[37] From a sociological perspective, Max Weber (1864-1920) operated with the idea of a progression of law according to an increasing rationality.[38] Even if his approach towards progress

[33] DIETRICH (2008), p. 206.

[34] GROCIO (2001).

[35] DIETRICH (2008), p. 207.

[36] FITZPATRICK (1998), p. 92.

[37] FITZPATRICK (1998), p. 93.

[38] FITZPATRICK (1998), p. 112 ff.

remained ambivalent in tune with the late-modern atmosphere,[39] according to Weber's argument, the abstract formalism of legal certainty constitutes itself in the negation of the 'informal law'. He found contemporary examples of it 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.[40]

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. 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.[41] 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.

Some of the most influential researchers of this progressive perspective were lawyers. Amongst them the renowned Sir Henry Maine (1822-1888), advocated a vectorial movement from the dependency of the family or clan to the individual obligation, assuming 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.[42] 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, in contrast to stationary societies.[43] 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.[44]

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.[45]

This way, 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

[39] HENRICH *et al.* (1988), p. 170.

[40] FITZPATRICK (1998), p. 112.

[41] KUPER (1988), p. 3.

[42] WATSON (1974), p. 12.

[43] MAINE (1931), p.18, 64.

[44] In fact, this is a replay of the effort and logic of the Renaissance, or Early Modern Age (starting around the invasion of America at the end of the 15th century), in which the glory of Ancient Rome was re born to give the new Italy a glorious past and catapult it away from its ruinous present. On this issue, see: KICKPATRICK (2002), HUIZINGA (1953).

[45] FITZPATRICK (1998), p. 92 ff.

identified as the mythological basis of modern law.[46] In terms of the role of law at an international level, the most important aspect of this analysis, is that the present 'other', who has a different socio-normative perspective, is automatically linked with that 'historical other', from which an ever-developing modern society needs 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.[47] Once the 'Other' had been enveloped in this way, it was clear that this anachronic Otherness needed to be overcome. The one thinkable evolution interpreted into the past, transformed therefore into a plan for the future, for the 'development' of the Other away from its Otherness.

III. MODERN LAW AS COMMODITY – THE IMPORT-EXPORT OF DEVELOPMENT

The en- and de-veloping logic in and through law continues to a large extent in the frame of processes of legal transfer throughout the 20th century until today. In the same way as the dynamic of reform is a key self-referential mechanism for the progress(es) of modern law, legal transfer – a type of reform explicitly presented as based on 'foreign help' – works for the eternal development of the (non-legal) Other. Importantly, this is not to say that legal transfer is the 'wrong' way to reshape socio-legal landscapes. I argue, however, that we, as actors in the legal field, need to recognize (and eventually counterbalance) the forces at play when we make use of this key tool of legal reform.

As usual for modern law, the import-export project is marked by a naturalistic approach to law, and, at the same time by a positivistic attitude. A positivistic understanding is necessary to pursue legal transfer. If the existence of universal natural law beyond all positivized law was sufficient to ensure 'good law', the idea of a transplant of law would make no sense; natural law would simply outlaw any human law. Equally, a positivistic perspective makes legal transplant factually possible because it understands that 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 conceive of and carry out legal transplants, 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. As outlined above, colonial history exemplifies well the link between the idea of a vectoral development of law and the justification of legal transfer. But, if "the story of international law was […] one of

[46] FITZPATRICK (1998).

[47] FITZPATRICK (1998), p. 68.

progressive civilizing of states" (Kahn 1999, 109),[48] [49] this is not only a feature of colonialism and imperialism.

Nationalism was equally, from a modern point of view in line with Zima's analysis, a representation, and a result of a universal need for freedom and progress.[50] 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 (reformed) imperialistic modern project.[51] 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, 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".[52] Thus, a clear purposeful idea on the nature of law gave life to legal assistance after the Second World War, after the 'imperialist paradigm' in international relations was replaced by the 'development paradigm'.[53] 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 gained on rhetoric importance.[54]

As Gardner remarks, 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".[55] Government institutions cooperated with the most

[48] KAHN (1999), p. 109.

[49] From a global perspective on colonial processes, 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), p. 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), p. 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 practical tool for imperialism.

[50] CHATTERJEE (1986), p. 2.

[51] FITZPATRICK (1998), p. 119.

[52] GARDNER (1980), p. 6.

[53] ESTEVA (2006), p.183 f.

[54] GARDNER (1980), p. 7.

[55] GARDNER (1980), p. 7.

renowned universities in order to help the 'Third World'[56] to "reach the stage of development" accomplished in the First World.[57] 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",[58] 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 was needed, was to teach the recipients to use that gift, making legal education and training a central topic for legal development.

Of course, the colonial rhetoric faded away following the detours of political changes, but the perspective on legal development remained.[59] Most importantly, the development of the Other continued to be necessary, and followed what was seen as a successful model of modern law guided by reason. Importantly, the perspective on legal transplants as an advancement towards reason is not exclusive to the 'donors' of law. 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.[60] Consequently, 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.

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.[61] Reason is thus a high authority in the pursuit of modernization.[62] But what is understood by reason is ambiguous and tautological, producing statements like "in our time [...] increasingly a valid decision must appear rational, that is, one that 'can be explained and defended by arguments acceptable to a reasonable audience'".[63]

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[56] The term 'Third World' was coined by Alfred Sauvy (1898-1990) in his article '*Trois mondes, une planète*' ('Three Worlds, One Planet') in reference to the non-aligned countries during the Cold War. SAUVY (1952).

[57] BRONHEIM cit. in GARDNER (1980), p. 7.

[58] MALONE cit. in GARDNER (1980), p. 7.

[59] GARDNER (1980), p.44.

[60] The tendency to presuppose a higher quality of commodities imported from Europe or the United States goes beyond Latin-American wide-spread preconception. 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).

[61] WATSON (1974), p. 88.

[62] SEIDMAN & SEIDMAN (1994), p. 58.

[63] SEIDMAN & SEIDMAN (1994), p. 58.

IV. LEGAL PLURALITY BEYOND THE COLD WAR

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'. Importantly, the name 'Law and Development Movement' can be misleading insofar as the processes addressed are not equivalent to an independent social movement. Rather, this is a project launched with the financial driving force 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' as part of their institutional strategies.[64]

Gestated in the context of the Cold War and nurtured by modernization theory, by 1982 the 'movement' was declared to be 'almost dead',[65] harshly criticized as inefficient and counterproductive.[66] Notwithstanding, the project was partly reformed and partly paused to be continued later in a similar way.[67] By the 1980's, the 'fourth wave of constitution making' was rolling in Latin America, combining re-democratization with economic reforms.

In 1994, when 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.[68] The '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, taking new shape as the New Law and Development Movement, reaching record amounts.[69] [70]

Because of the increase and scattering of development agencies dealing with law reform, the new development activities were of a far larger scale than ever before and were

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[64] For a more detailed elaboration on this issue see amongst others ARAGÓN ANDRADE (2016), RODRÍGUEZ-GARAVITO (2011) and BENÍTEZ-SCHAEFER (2012).

[65] SNYDER (1982), p, 373.

[66] Regarding the trajectory of the movement: GARTH 2002. For a critical assessment: TRUBEK/GALANTER (1974), p. 1084.

[67] RODRÍGUEZ (2001), p.23.

[68] See eg. BURKI (1995), BURKI/PERRY (1998).

[69] RODRÍGUEZ-GARAVITO (2011), p, 164.

[70] The main international actors in this context were 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), p, 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.

directed by "a wide range of multilateral, governmental and private actors that advance multiple reforms, oftentimes in an uncoordinated way".[71] Furthermore, the new generation emphasized as part of their self-image "a holistic approach which is developed by the local legal communities",[72] [73] recovering critiques expressed by advocates of 'another development'.[74]

Nevertheless, the first and second wave of law and development projects,

> 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.[75]

Despite the 'big consensus', disappointment and doubt appeared in theory- and praxis-oriented research soon after the launching of the 'second wave'.[76] Nevertheless, "[t]he lack of success has neither shaken the field nor diminished the enthusiasm for further efforts".[77] 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.[78]

The conglomeration of these varied aspects of law into this blurry expression links us again with Zima's analysis of ambivalent late modernity. 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

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[71] RODRÍGUEZ (2001), p. 27.

[72] DAKOLIAS (1996), p. 69.

[73] 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.

[74] On this approach in its origins, see: NERFIN & CARDOSO (1977).

[75] RODRÍGUEZ (2001), p. 27.

[76] GARTH (2002), GINSBURG (2000), P. 830.

[77] GARTH (2002), P.388.

[78] DAVIS (1998).

Economic Development',[79] that conflates constitutionalism, human rights, democratic reform, and rule of law.[80]

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".[81] To these two elements, we can add that the equalization of development with economic development became even stronger, and the emphasis on the need to develop towards a certain goal remained central.

Looking 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. 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.[82] Law, in this sense, is part of "technical institutional arrangements (which provide an environment for individual entrepreneurs)".[83] 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".[84]

The role of plurality in this context, is, consequently, a very constrained one. There is an emphasis on the need to incorporate the 'recipient's' perspective to the planning and implementation of such programs. Equally, 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"[85] persists. The idea of what a developed law should provide to society and what development should mean remain, nevertheless, rather stable.

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[79] DAVIS (1998).

[80] Interestingly, his gloss quoting Alexis de Tocqueville (1805- 1859) (which sets the frame for his text) as well as the main reference for the argument he contests, namely an article by Bilahari Kausikan, the then Singapore's permanent representative to the United Nations, refer only to 'democracy'.

[81] RODRÍGUEZ (2001), p. 37 ff.

[82] GINSBURG (2000), p. 831 y ss.

[83] GINSBURG (2000), p. 833.

[84] GINSBURG (2000), p. 833.

[85] GINSBURG (2000), p. 833 ff.

Importantly, the relation between law and economic development, is primordially one in which law is subordinated and at the service of a specific economic growth. In the end, 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 are encountered, from this perspective on law and development with a clear answer. This response, allegedly valid for all, is lastly subordinated to the requisites of the globalized free market.

V. NEW, NEWER, NEWEST

This type of development proposals has been criticized as part of the revival of an imperialistic project. Exemplarily, the Mexican reforms of the turn of the century have been addressed as a "process of legal reform [that] does not pretend, as its promoters have asserted, to make a series of measures to correct 'the flaws' of the judicial system, but actually […] is about putting in motion a project and a different conception of the role of the State tribunals in society and thus of their organization, administration and internal logic".[86] Aragón Andrade conceives of these reforms as part of the 'hegemonic model of globalization' addressed above. Based on Slavoj Žižek, he 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".[87]

A different approach for legal change and the rule of law has been researched and conceptualized by Rodríguez-Garavito as 'global constitutionalism' referring specifically to the constitutional reforms at the end of the 20th century.[88] 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 at the same time related 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.[89] There have been different approaches to these reforms, including more or less the element of judicial review and the model of market economy and democracy. Particularly remarkable is that this project goes

[86] ARAGÓN ANDRADE (2016), p. 7.

[87] ARAGÓN ANDRADE (2016), p. 7.

[88] Rodríguez-Garavito studies referred to here address specifically socio-legal processes that reach into the first years of the current century. While since then, important legal, political and conceptual shifts have taken place, this analysis is valid for our aim to address some key tensions between law as a (conceptual and factual) field, its reform processes and (cultural) plurality. Amongst many socio-legal analyses, his work stands out due to its broad scope, detailed survey and the useful conceptual categories he develops on this base. Related thoughts can be found exemplarily in SOUSA SANTOS (2002 and 2005).

[89] RODRÍGUEZ-GARAVITO (2011), p. 164 ref. TATE.

beyond Latin America, 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).[90]

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. According to Rodríguez-Garavito these courts hold two main tasks: strengthening the citizens' liberties in front of the state ('negative rights'), and protecting or enhancing social rights ('positive rights').[91] Both aspects challenge a thin version of the rule of law that the author 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.

These movements, nevertheless, are not separated from foreign interests and investments from abroad. On the contrary, they are based 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".[92] [93]

Regarding the conceptual foundation of this constitutional project, Rodríguez-Garavito underlines the movements within and beyond Latin America of 'alternative use of law' as well as the constitutional traditions and judicial activisms in Europe and the United States.[94] However, research shows that this project suffers the same structural flaws as the neo-liberal model they aim to contest (and to which it is intimately connected to). Even if a part of their supporters had the intention to make basic rights effective and transform society

[90] HIRSCHL (2004). p, 7 S.

[91] RODRÍGUEZ-GARAVITO (2011), p. 165.

[92] RODRÍGUEZ-GARAVITO (2011), p. 166.

[93] 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', where the author participated. Funded to an important extent by the German foundation Konrad Adenauer Stiftung (KAS) and the Austrian University of Innsbruck, the event gathered 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.

[94] RODRÍGUEZ-GARAVITO (2011), pp. 166 ff.

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.

Rodríguez-Garavito develops his argument in the same line as Sousa Santos and Aragón Andrade, identifying two basic lines of law reform projects. Firstly, 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 led by institutions like the World Bank. This stream is related with what Sousa Santos, and with him Aragón Andrade, name the hegemonic globalization project.

At the same time, these authors exemplify the existence of another stream pursuant of legal reform. They all support a certain variety of legal pluralism and endorse, in terms of the rule of law as a form of development, 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. In practical terms, we can say that the Colombian reform of 1991 and other changes in the Latin American region respond also to and derive from these calls of alternativity.

Nevertheless, 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.[95] In praxis, these connections meant the launching of projects that include a mixture of approaches and resulted in 'combined solutions'.

VI. CONSTITUTIONAL REFORM – TRAPPED IN AMBIVALENCE?

A good example is the reform of the Colombian criminal justice system in the frame of the already mentioned constitutional reform of 1991,[96] which Rodríguez-Garavito investigated in his detailed account.[97] The context of this reform was marked by the presence of both reformist approaches. On the one hand, the Constitutional Assembly of 1991

[95] RODRÍGUEZ-GARAVITO (2011), p. 159 ss.; GARTH (2002), p. 387; SOUSA SANTOS y RODRÍGUEZ-GARAVITO (2005), pp. 19 ff.

[96] Since 1991 the Colombian Constitution has been reformed on many occasions, and particularly thoroughly in 2015. Nevertheless, this key reform in recent Latin American legal history is relevant to reflect upon contemporary struggles. For the argument of this paper it serves as an example on which the interplay amongst plural forces, their tensions and compromises can be observed using existing sociological research.

[97] RODRÍGUEZ-GARAVITO (2011), p. 167 ff.

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 also incorporated a neo-constitutional strain through the "unprecedented representation of leftist parties [...] and the influence of constitutional lawyers within the government elite" (Idem, 168).[98]

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 latter 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,[99] 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, allowing, in turn, 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".[100] Naturally, the result of this composite assembly was a composite 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)".[101] Here we find again ambivalence as a characterizing feature of late modern endeavors in terms of Zima.

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

[98] RODRÍGUEZ-GARAVITO (2011), p. 168.

[99] RODRÍGUEZ-GARAVITO (2011), p. 170.

[100] RODRÍGUEZ-GARAVITO (2011), p. 171.

[101] RODRÍGUEZ-GARAVITO (2011), p. 171.

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".[102]

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).[103]

If, in the beginning, this ambivalence seemed to be the solution closest to consensus, soon both projects clashed, starting with the debate 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.[104] 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. 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.[105]

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[102] RODRÍGUEZ-GARAVITO (2011), p. 171.

[103] RODRÍGUEZ-GARAVITO (2011), p. 172.

[104] RODRÍGUEZ-GARAVITO (2011), p. 174.

[105] RODRÍGUEZ-GARAVITO (2011), p. 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 accommodation of the neoliberal emphasis on property and public order and the neoconstitutionalist focus on redistribution and guarantees of individual freedoms".[106] 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".[107] Importantly, he remarks that this convergence has "effectively reproduced elite privilege",[108] showing again a way by which the alleged integration of diverse approaches in one combined rule working within the ambivalent sociolect of modern law, re-enacts the displacement of diversity.

It could be surprising that such, at times clearly opposed perspectives on law and development like the ones Rodríguez-Garavito depicts as neo-liberal and neo-constitutional, are able to share projects, concepts, professional careers, and political moves.[109] However, remembering the approach proposed by Zima regarding the ambivalence at the core of concepts in a late modern approach, this unstable combination is 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.

The already historical Colombian example stands for many reforms in Latin-America (and other regions) in the last decades. 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.[110]

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[106] RODRÍGUEZ-GARAVITO (2011), p. 176.

[107] RODRÍGUEZ-GARAVITO (2011), p. 177.

[108] RODRÍGUEZ-GARAVITO (2011), p. 178.

[109] To be sure, this is not a dynamic reserved to the legal field. Just to take an example, see SOLÍZ RADA (2011) assessment of indigenous claims in Bolivia, addressing how indigenous groups signed agreements with transnational firms of the mining industry with the aim to get support their claims.

[110] 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 FITZPATRICK (1998).

These new approaches constellate the complicit tension between iusnaturalism and iuspositivism anew. 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 –, will create better law and thus the right (or a better) development. While there are differences with the historical debate between iusnaturalism and iuspositivism, the structure and dynamic of the two sides in action are almost the same. Their relation and their combined success are equally 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 finally 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 based 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 thus jump between one mirror-image and the other, but we are not creating a different world beyond that.

In this sense, none of the new options transcend a modern model. Although the new approaches orient their efforts towards incorporating a plurality of perspectives, 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.

VII. CLOSING REMARKS

In the last pages, we have explored some key aspects of the struggles of law in front of plurality from an interdisciplinary perspective. Envisaging law within a socio-linguistic situation, through which some questions and answers are possible (and others not), allows us to situate the legal challenges and their sociological and historical analysis within a broader frame. Moreover, this approach might enhance our understanding of current processes of legal reform and their consequences.

Taking Zima's framework into account, the relationship between a 'modern law' and plurality is strained from the outset. The creation of 'modern law' has served to shape the self-understanding of 'modern man' and 'modern societies', making law a key field in colonial and later in development projects. Problematically, the reforms aiming at a modern development of law depend on a single orientational model that dissolves the tension amongst diverse perspectives. Once we have accepted plurality as a necessary feature of lively societies,

or at least as an empirical reality to be respected, however, (re)solving ambiguity (through early-modern law) becomes insufficient.

The ambivalence inherent to late-modern perspectives on legal development, does not offer salvation either – despite all the emphasis put in 'engaging both sides'. As the example of the Colombian reform of 1991 and its socio-legal analysis by Rodríguez-Garavito showed, late-modern approaches rather foster discursive illusions that lead to the solidification of the reasons justifying the same projects that, lastly, attempt against encountering plurality. We cannot remain naiv about the promises we as lawyers would like to believe.

But maybe there is something to gain out of this loss of naïveté; there is an invitation lurking within this seemingly hopeless review. Firstly, I believe this proposal has shown how much it is worth to understand law and legal inquiry as part of socio-cultural life and research. Secondly, if we see ourselves and our field as nested within socio-cultural interaction, then also our approach to (socio-cultural) plurality might take a turn and our understanding of our roles as law-practitioners and researchers might shift.

If we cannot deal with plurality (only) in authoritative terms of reason and linearly evolving better reason, then it might be meaningful to assess current struggles in terms of a broader and deeper conflict transformation. In this line of thought, it is worth asking ourselves, what does it take for us lawyers, to get off the development-staircase and sincerely engage with our many 'Others'? How could it look like to encounter our own 'Otherness' within legal work? How can we jointly create through our legal work, nurtured also by our differences, processes of shared human unfolding?

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