WHAT IS LAW CRITIQUE?
IMMANENT CRITIQUE, INSTITUTIONAL NIHILISM
AND PROJECTS OF JURIDIFICATION

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Summary
1. Introduction..............................................................p.2
Backgrounds..............................................................p.2
1.2. A theoretical blindness and a normative question..........p.6
2. Theory of Law and middle-range theories ......................p.8
3. Escape From Law and De-juridification:
Why Should Legal Theory Be Critical? ............................p.17
4. Immanent Critique ....................................................p.23
5. Some final remarks..................................................p.27
6. References............................................................p.30

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1. Introduction

1.1. Backgrounds

This paper results from a collective long-term research project on *Risk and Responsibility* developed jointly by Direito GV (FGV-SP Law School) and CEBRAP (Brazilian Center of Research).\(^1\) It gathers Criminal Law, Civil Law, Labor Law and Theory of Law Scholars to study the paradox of an increasingly complex and multi-causal World in which individuals are asked to take more and more responsibility for their own lives. Furthermore, there is a tendency to find out who is to blame for facts treated before as a result of chance. This tendency, identified by Klaus Günther in a paper called “Responsibility in Civil Society” (GÜNTER, 2002), can be currently observed in some changes occurred in many regulatory frameworks. First, there is an increase of individual responsibility in Criminal Law that ignores the influences of society and context in individual behavior. Second, the dismantling of Welfare State protection programs forces individuals to take more responsibility for their health and their future. Third, the current idea of a “risk society” includes a debate on who is to blame for complex and unpredictable facts linked to technological products and processes. Furthermore, the debate on global warming, nuclear weapons etc make us feel responsible for future generations.

Our project considers this broad picture, but has decided to study some specific regulatory frameworks to observe how these abstract questions are embodied in concrete institutions. For the last four years, we have been studying the Brazilian regulation of Criminal and Civil responsibility. This investigation has been focusing on the creation of rules on punitive damages by Brazilian courts and on parallel

\(^1\) The other researches of this project are Professors Flávia Portella Püschel [Torts: Direito GV CEBRAP], Maíra Rocha Machado [Criminal Law, Criminology: Direito GV CEBRAP], Marta Rodriguez Assis Machado [Criminal Law, Theory of Law: Direito GV CEBRAP].
modifications on Criminal Law regulation, especially the victim’s indemnification as a criminal sanction or as a substitute for criminal sanctions. The project identified this phenomenon and is exploring their theoretical and normative consequences.

What strikes you the most is that these changes in Brazilian Law are been denied by Legal Scholars because they do not fit traditional Dogmatic concepts. This behavior blocks the possibility to rationally reflect on their implication for Crime and Torts theory, and what is worse, makes them almost invisible to the public sphere. To discuss the effects of these changes on people’s lives it is necessary to make them visible. That is our main task.

Our first step was to show that Torts scholars are ignoring punitive damages judge-made rules and the indemnification of victims’ damages are being treated as an excrescence by Criminal Law Scholars. Because of that, both phenomena have had almost no impact on Torts and Criminal Law theory so far. This fact raises two sets of questions regarding Torts and Criminal Law:

Torts:

a) Why does not Brazilian theory of Torts consider cases central to its investigations?

b) What is the impact of these judge-made norms on the justification of the imputation of responsibility?

Criminal Law:

a) Why is indemnification treated as a non-Criminal Law institute?

b) Why didn’t these normative changes have any impact on the justification of punishment?
These questions led us to investigate the Legal Dogmatics of Torts and Criminal Law and the role of Theory and its relation to empirical research. The question is: what are the theoretical consequences of these changes to the theory of Torts and to the theory of Crime, especially regarding the concept of responsibility? To what degree can these two Dogmatic domains still be clearly differentiated and why should they be anyway? Wouldn’t it be better to abandon these two iron cages, “Torts” and “Criminal Law”, and start thinking in different terms?

To put these questions properly, it is necessary to look at Legal Dogmatics from the inside and evaluate its capacity to figure these new phenomena. That is why the “Risk and Responsibility” project, besides identifying this gap between law on books and law in action, is trying to reconstruct the theory of Torts and Crime to accommodate these new realities in the figurative realm of its concepts. To do that, it is necessary to reevaluate the legal concept of responsibility.

In Brazil, according to the civil code and a long standing doctrinal tradition, the goal of Torts liability is to indemnify the victim for damages caused by someone else. Punitive damages impute responsibility not to indemnify, but, in the name of prevention, to punish. That is why Brazilian Theory of Torts has been having difficulty to treat punitive damages as a Torts institute. To include punitive damages in the theory of Torts it seemed a good idea to look for inspiration in the Criminal Law regulation of responsibility as one of the main arguments used by Courts to justify punitive damages rules is prevention and it is common knowledge that Criminal Law and Criminology have been studying this concept for a long time.

This theoretical move seemed even more justifiable when we identified the above mentioned trend in Brazilian Criminal Law statutes to use indemnification as a response to some crimes, leaving aside the reference sanction of the system: incarceration. It seemed we had before us the parallel phenomena of a Crime like Torts institute and a Torts like criminal response. The existence of this parallel
institutes permitted us to compare Crime Law and Torts theories, but the comparison needed a common ground. It was impossible to describe Torts institutes with Crime Law categories and vice-versa, as they have a completely different vocabulary and rationale. To compare these institutions and evaluate their meanings and consequences it was necessary to abstract their particular characteristics and find a common ground for the analysis.

The natural candidate for the task was, of course, the Theory of Law. But as we will see with more detail in the first part of this paper, the Theory of Law in Brazil is functionally compromised with the operation of legal institutions and not with evaluating the similarities and dissimilarities between different Dogmatic champs. Its main task is to be useful to judges and lawyers. As Theory of Torts and Theory of Crime, Theory of Law studies Law from the point of view of adjudication. It organizes legal material preoccupied with the act to decide cases. What was need for our objectives was a Theory of Law able to compare, evaluate and even invent new institutions, one that studies Law from the point of view of the legislator.

This line of thought opened a new area of investigation for us. The effort to compare institutions structurally and evaluate their effects and normative grounding made us imagine how to evaluate their adequacy. We started asking, as Legal Scholars, which form of regulation is adequate to each social problem and why? Of course, the final answer to this kind of question is given by Politics, but what is the role of Legal Scholarship in the process to reach such decisions? Its job is only to describe and analyze the several institutional designs and their effects as if they were equally equivalent and leave the choice between them to the will of the concrete legislator? Or is it her duty to defend Democracy by pointing out which institutional designs favors it and which don’t? Should a legal Scholar be indifferent to the values connected to each and every institution or should she adopt normative stands?
Is it enough to describe the several ways to regulate social problems, reduce them to a general grammar, evaluate their effects in terms of efficiency, distribution or whatever criteria he is asked to use and, after doing that, put the results on a menu and serve them to their clients at their will? Or is it her duty to criticize institutions to establish clear links between models of juridification and Democracy? In doing so, isn’t it Legal Scholar’s job to show that some institutional arrangements are clearly authoritarian? But how can someone do that without leaving the Scholar position and acting as a militant?

1.2. A theoretical blindness and a normative question

This paper is divided in three parts. The first one discusses the role of Theory of Law and its relation to middle range theories, trying to overcome the theoretical blindness mentioned above: the incapacity to see institutions as a hole and compare them in a common ground. The second and third parts will explore the relation between institutional designs and Democracy.

In the first part, I will argue that the traditional task of middle range theories in the continental tradition is to describe and reconstruct institutions to be useful to judges and lawyers. They are mainly preoccupied with operating institutions and not reforming or discussing their normative groundings. Furthermore, each middle range theory keeps insulated in its own logic and does not provide Scholars theoretical instruments to relate their work with other areas of Law. Because of that, Legal Scholarship has few theoretical instruments to compare the various regulating structures and their effects.

I will also argue that this deficiency has authoritarian potential. If Law is not able both to preserve its code and to mediate new social conflicts, it tends to be de-legitimized in the long-term. Social agents may prefer to escape from Law and try to self regulate its own interests if institutions are not able to deal with social
conflicts properly. The plasticity of Law’s grammar is crucial to the functioning of The Rule of Law. One of the solutions to overcome this situation is to develop a new Theory of Law which task will be to develop a general grammar of Law able to reconstruct institutions using the same vocabulary, in close dialogue with empirical research. Such a Theory of Law would provide legislators and society theoretical instruments to reflect on the reform of institutions, overcoming the theoretical blindness of middle range theories. I will not discuss in this paper the causes of this blindness that seems to be related to the confusions of the social roles of lawyers and Judges with the role of Legal Scholar (NOBRE, 2003), that result in the subjection of Law Theory to the interests and needs of the legal professions.

The second and the third part of this paper will discuss the relation between institutions and Democracy and propose a model of Critical Law Scholarship based on the work of Franz Neumann. The second part will focus on Franz Neumann’s insights and its usefulness to connect institutional designs and Democracy. The third part will criticize his concept of democratization and propose to combine his institutional analysis with a theory of social pathology to solve better the problem discussed in the second part.

Franz Neumann’s insights are the following: First, Law is not only form, but also content. Not every form of institutionalization by rules can be considered as Law. Neumann developed this argument in his analysis of Nazism. Second: the existence of the Rule of Law favors Democracy as it allows society to control power and to use it as a common ground to debate its conflicting demands. Neumann states that the existence of this institutional structure is a partial realization of Socialism, as for him, Socialism was not the end of conflict and the creation of a uniform society (RODRIGUEZ, 2004), but the taming of conflict through Democratic institutions.²

² This statement is founded in the diagnosis that Law became central to that reproduction of Capitalism with the development of monopolies; and that Law stopped functioning as ideology in the moment positive Law recognized social rights to promote the social distribution of wealth (NEUMANN, 1986). The changes in Capitalism caused changes in Law’s structure. Neumann shows that formal law was materialized, but it did not lose, as Weber thought it would, the
Third, if the Rule of Law is already Socialism, the emancipation of humanity must be pursued within it. For Neumann, the emancipation of humanity is the possibility and the result of conflicts of interests embodied in projects of juridification; projects of institutional design. To accommodate this pluralist institutional dispute I will argue, based on Neumann, that it is necessary to conceive the Rule of Law in two level of abstraction: Law’s form and the several concrete institutions, its micro foundations.

The last part of this paper is a critique of Franz Neumann’s concept of Democratization. It will argue that his concept is too imprecise and vague to fulfill that needs of the Legal Scholarship as I conceive it. I will state that it may be useful to combine Neumann’s insights with a theory of social pathology able to relate principles of justice with institutional frameworks.

2. Theory of Law and middle-range theories.

The Theory of Law, especially in countries of the Civil Law tradition, is dedicated to describe, analyze and propose solutions to legal problems using the material provided by law sources. Its task is not to criticize norms and cases, but to identify and organize norms to solve cases. A good theory is a useful one. As there are always new cases to face and new norms being produced, the Theory of Law should be dynamic. It should reconstruct and reorganize its material constantly to provided lawyers and civil society good tools to figure and solve its conflicts. Lawyers should be able to translate social problems to the grammar of Law and capacity to produce security to markets. Security was not guaranteed anymore by abstract norms of conduct, but through the combination of substantive and adjective rules. As a result, it became clear that formal law was not the only institutional design that favored the development of Capitalism (JAYASURIYA, 1996 uses Neumann’s framework to analyze Capitalism in East Asia). The indeterminacy of materialized substantive rules can be compensated by the creation of procedures to decide social conflicts. This new configuration of Law does not function as ideology because it does not hide social exploration. For example, under competitive Capitalism, labor relations were presented as a fair trade by contract, that hided the extraction of the surplus value. Social rights and Labor Law were created exactly to compensate workers for their exploration. As a result, Law hides nothing, as it is not anymore part of the super-structure (NEUMANN, 1986).
claim for rights. Civil society agents should also be able to use Law grammar to formulate its demands.

The plasticity of Law grammar and its power of figuration are crucial to the maintenance of the Rule of Law. Social agents should see Law as a means to conform and express its demands as civil society is not a place of completely informal interactions: a place of no law. Only at traditional societies civil society remains untouched by Law. The modernization process resulted in the juridification of civil society with empowering results, destructing arbitrary forms of private power. Juridification is not a process that destroys the spontaneous organization of community, though it transforms the pattern of relations between individuals (COHEN & ARATO, 1999).

As it will be discussed later in this paper, a Critical Theory of Law should not be preoccupied in preserving “authentic” social relations and keep them untouched by Law, as it seems to be implied by some versions of the concept of “juridification” (TEUBNER, 1988; HABERMAS, 1989). The challenge is to find criteria to construct the proper institutions to regulate the various social facts in a complex pluralistic world, without destroying the communicative potential present in civil society, a potential that was partially created by the existence of the Rule of Law (HABERMAS, 1998).³

I will deal with this question latter. For now, my purpose is to show that the richer Law’s grammar is the more society will be able to choose Law as mediation to its conflicts. If the Theory of Law and the middle range theories of Law are not able to favor both the conservation of Law’s code and its transformation, they will contribute to de legitimize Law as a mediation of social conflicts. It is crucial to expand Law’s figurative capacity to face new social problems. To do that, Franz Neumann’s work is a major contribution. Based on his work, one should talk about

³ See also BUTLER, 1997 for a demonstration of the empowering effect of normalization.
the Rule of Law in two different levels. In the macro level one can distinguish Law from no-Law, finding the least elements necessary to identify what is the Rule of Law. I will call this \textit{Law's form}. In the micro level, one can describe and criticize how the social facts are regulated according to the several grammars of Law, embodied in concrete institutions.

\textit{Law's form} is the institutionalization of the separation between sovereign power and society. One can say that Law’s form exist if civil society can resist and influence sovereign power (NEUMANN, 1986). Neumann does not consider the traditional separation of powers and its related institutions as essential to Law’s form. What is crucial is the institutionalization of the tension between power and liberty, sovereignty and society. This institutionalization can occur historically in many forms. One of its versions is the one that identifies Law with general norms and the organs responsible for creating and applying them. But there can be Rule of Law even if this structure does not exist.\footnote{I agree with NONET & SELZNICK, 2001 in their critique of Dworkin when they say he limits his Legal Scholarship to the point of view of Judges. It is necessary to construct a Theory of Law that embraces other points of view and other state organs, as the Judiciary is not the sole responsible to apply rules to concrete cases (BALDWIN, 1995). Without doing that, the Theory of Law will never be able to describe and analyze international institutional phenomena that do not follow State models (TEUBNER, 1996; BRAITHWAITE & DAHOS, 2000).} One can think of a society in which social conflicts are all decided by specialized organs that concentrate executive, legislative and judicial functions. The Parliament, if it would exist, would only design these organs in broad lines through standards of conduct and principles. One can also think of the institutionalization of areas of self-regulation in which the State does not influence directly, but through indirect incentives and by imposing limits. For example, a great part of contractual relations are already developed without reference to State norms, but it does not mean that the State cannot influence their regulation (COLLINS, 1999). The same pattern can be followed to regulate other areas of society.

I will call the micro-foundations of the Rule of Law \textit{grammars of juridification}. Each one of these grammars translates social facts into Law’s grammar in a certain
way, producing effects that can be observed, measured, evaluated and compared. The various Law areas (Criminal Law, Torts, Contracts etc) combine different grammars to regulate its objects. To make the theory of these several areas means to describe, analyze and eventually propose solutions to cases manipulating and reconstructing its concepts and the norms they refer to.

It is the General Theory of Law job to reconstruct this various regulating areas in a general grammar of Law. This grammar would allow one to evaluate comparatively the impact of the concrete institutions in society and, eventually, to propose new projects of juridification to regulate certain social facts. The possibility to invent new institutions is crucial to the General Theory of Law and to the ongoing capacity of the Rule of Law to mediate social conflicts.

It is important to say that to study Law in the terms of the several particular grammars is both necessary and undesirable. It is necessary because only by doing that one can expand the capacity of these particular grammars to figure new social conflicts. For example, it is Torts scholars task to use Torts traditional concepts to solve soft and hard cases. This effort contributes to the predictability of Law and diminishes the need for new norms, keeping the system simple and manageable (TEUBER, 1988). Nevertheless, this effort can be counter productive if it remains insulated in the rationale of this particular Law area, ignoring aspects of the same social problem that are being regulated and discussed simultaneously by other areas. This can lead to a proliferation of regulating structures in subsystems that treat the same social problem with different and conflicting rationales.

One good example of this situation is the way Brazil regulates racism (MACHADO, PÜSCHELL, RODRIGUEZ, 2007). Crime Law statutes have been the main instruments to regulate racism in Brazil. Social movements have been demanding the promulgation of statutes on racism and have been putting pressure on Courts for more convictions based on them. As a result, there is a tendency in Brazil to
identify the lack of convictions based on the crime and punishment grammar with impunity. Nevertheless, parallel to Crime Law cases, there have been a significant number of Civil Law cases on racism that remain out of the debate on the relation between Law and racism. They are not being considered by social movements’ strategy and are not being taken into account in the public debate on impunity. Racism has been regulated joint at least by two Law grammars and so far there is no reflection on this fact in Brazilian Law Theory. I believe this situation is partially explained by the incapacity of Legal Scholars to transcend the rationale of middle range theories. Only at the level of a general grammar of Law one could take jointly into account these two strategies to regulate racism and speculate on alternative ways juridify it. For a better comprehension of the relation between racism and Law, it is necessary to take all the grammars that regulate racism into account at the same time, compare its results and maybe propose institutional reforms to make institutions more effective and equitable.

The General Theory of Law as I see it has at least two tasks. The first one is descriptive and analytical: it must organize the various grammars of juridification by abstracting the peculiar characteristics of the many areas of regulation. This theoretical move will show that the various areas of Law result from the combination of elements of the same general grammar of juridification. I will call this task *the construction of a general grammar of juridification*. The second task of theory is critical: it aims at evaluating the regulation of social facts regarding its common structure and its effects and at proposing alternatives modes of juridification that favor Democracy. I will call this second task *the invention of emancipatory projects of juridification*.

Legal scholars should work simultaneously at the level of the General Theory of Law and ate the level of the several middle range theories. A theoretical work like that is extremely difficult as it is nowadays almost impossible for an individual to
know deeply all Law areas. Specialization is inevitable, but it creates the risk of theoretical insulation. To avoid this, it is important that every legal scholar take as her own the task to develop a general theory of law and that they work in teams. A middle range theorist that is preoccupied with the problems of the General Theory of Law and work together with other Scholars will contribute to diminish the insulation of his area of study. This model of Scholarship contributes to Law’s *functional legitimacy* as it enhances Law’s grammar figurative capacity and, as a result, its capacity to deal with new social problems.

Only by using a general grammar of Law one can compare different regulating strategies in the terms of their structure and social effects, and in the terms of their normative grounding. Consequently, the existence of a general grammar of Law also contributes to the *normative legitimacy* of Law. After translating concrete institutions to the general grammar of Law one can compare, for example, how prevention is regulated by Crime and Torts legislation, explore their normative grounding and speculate on alternative institutional designs able to eliminate contradictions between them and favor Democracy.

Legal scholars should work that way if they want to avoid occupying a conservative and passive role. This role seems to be attributed to legal scholarship by Niklas Luhmann (LUHMANN, 1983). According to him, a legal theorist should limit herself to reconstruct concepts with the aim to help judges and lawyers to solve cases. She should not criticize the material she is working with or think about alternative institutions to deal with social conflicts. This would be a political task that must remain outside Legal Scholarship. For Luhmann, social differentiation of institutions seems to be a natural phenomenon. It seems to be no place for human agency in the process of social differentiation (JOAS, 1996).

As we stated above, it is sure desirable that middle range theorists work within the several particular rationales. Only by doing that it is possible to enhance concepts
capacity to figure new social problems out and use the same legal material to deal with them. But only from a more abstract point of view one can re-signify the regulation of social facts in terms of a general grammar of juridification, evaluate their effects and paths of justification, and eventually invent new projects of juridification.

Another good example of the pathological effects of middle range theories’ theoretical blindness is the actual state of criminal law in the Continental tradition. Almost all Criminal Law theorists say that this area of study has been challenged by the utilization of the grammar of crime and punishment to regulate various new social facts (MACHADO, 2007). That being said, all Criminal Law Scholars will attempt to reconstruct or reinterpret the concepts they traditionally deal with to grasp these new regulations without asking if regulating these social facts using the grammar of crime and punishment was adequate in the first place. The creation of new norms appears to middle range theories as natural a phenomenon that theorists should embrace without discussion. I insist that doing that is the only way to give more plasticity to middle range theories concepts. But doing only that may give the impression that human agency is absent from regulation.

This line of thought raises another problem: the lack of critique in middle range theories of Law may be contributing to its dissolution in the general Theory of Law. These theories tend to become completely useless as their concepts become more and more abstract to try to grasp a larger spectrum of norms that regulate the most different social facts. The growing abstraction of concepts and the constant creation of exceptions (LUHMANN, 1983) are symptoms of the self-destruction of middle range theories by their dissolution in a general grammar of juridification.5 Only at the level of the General Theory of Law one can reflect on this phenomenon and evaluate if it is desirable, regarding its social consequences.

5 This seems to be the case of Gunther Jakob’s theory. Its central concept, “objective imputation”, seems to have lost any specificity if compared to the general concept of “imputation” (MACHADO, 2007).
A critical approach to Criminal Law should take an active role on evaluating which social facts should and should not be regulated by the grammar of crime and punishment. This grammar can be both desirable and undesirable, depending on what is being regulated. It may not be reasonable to expect a Criminal Law Scholar to say that a particular social fact should not be regulated by the grammar of crime and punishment. It is her professional and academic interest to see her specialty champ of influence to expand. Although this is sure a crucial problem to the question presented in this paper, I will not discuss it here.

One of the main obstacles for developing a general grammar of Law seems to be the character of the General Theory of Law, as we know it. In the continental tradition, the general theory of Law is mostly a Theory of Rights and Duties. Its tasks have traditionally been to describe the several areas of regulation examining how legal norms attribute rights and duties to persons, organizing Law material to facilitate adjudication (REALE, 2005; BOBBIO, 2007; BEGEL, 2001). The Philosophy of Law studies Law’ justification and Legal Sociology, Legal Anthropology, Political Science and Economics study the relation between Law and society.

In a nutshell: the General Theory of Law as we know it investigates Law from the point of view of adjudication. It is mainly concerned with providing a conceptual framework to the application of norms to concrete cases. To think about Law as it should be, to evaluate the effects of regulation and to think of institutional alternatives to the existing legal structures, it is necessary to develop a General Theory of Law from the point of view of the legislator that develops its investigations using data obtained in empirical research. In my opinion, to do that, one has to combine the Theory of Law as we know it with what is internationally known as Theory of Regulation (BALDWIN & CAVE, 1999). The grammar of rights and duties can describe norms but not complex regulatory structures. As far as I can see it, the Theory of Regulation developed a conceptual framework able to do
that. Furthermore, this theory is also preoccupied with investigating what, why, how and when something should be regulated, dedicating a lot of effort to empirical research. Besides that, the Theory of Regulation has normative concerns, searching for criteria to evaluate institutions.

But there is no guarantee that a new General Theory of Law will touch the normative question I raised above. The question is: must Legal Scholarship be the neutral and descriptive activity to organize and compare institutions and their effects as if they were all equivalent? In fact, both Theory of Regulation and Theory of Law adopt a neutral point of view regarding the various regulating structures and their social consequences. These theories provide conceptual frameworks to describe and evaluate the efficiency and responsiveness of different regulatory strategies, but they do not provide a clear cut criterion to choose between them considering their normative grounding. These two theoretical traditions can describe legal structures, but are not preoccupied in relating them with principles of justice and with Democracy.

The relation between institutions and principles of justice is a classical one, but has been addressed only at the level of Constitutional Law, which touches only the level of abstraction of Law’s form. It is a classical Political Philosophy question to debate which form of government is preferred: Democracy or Monarchy? I think it is necessary to start putting this question at lower levels of abstraction. We must ask ourselves what are the desirable relation between Crime, Torts, Contract, Labor etc regulations and the principles of justice in order to deepen Democracy. To do that, as I will show above, one must not split the description of institutions from their normative evaluation. To separate form and content means and ends, regulatory structures and principles of justice equals to lose sight of the internal relation between regulatory structures and principles of justice and their relation to
Democracy. Law is both form and content at the same time. To build up a Democracy there are some institutional choices that cannot be made.

3. Escape from Law and De-juridification: Why Should Legal Theory Be Critical?

Franz Neumann interpreted Nazism as the dismantling of Law’s capacity to allow society to control economic and political power. Nazi “state” was not a state at all and his “Law” was actually non-Law. Nazi “state” is in fact “Behemoth”, an instable system of partial agreements between the army, the bureaucracy, the party and the captains of industry, mediated by the Führer (NEUMANN, 1966). Nazism had to destroy the Rule of Law to establish its totalitarian regime. According to Neumann, the “Behemoth” destroyed the tension between sovereign power and society. In “Behemoth” there was neither State nor civil society. The traditional liberal vocabulary does not apply to this form of governance. In this context, Law does not institutionalizes the tension between sovereign power and society, but it is only a means to transmit the wills of sovereign power. This institutional form immunizes power from social control. The agreements celebrated between industry, the party, bureaucracy and the army are not accountable and it is impossible to legally resist the wills of the Führer. Power can act unilaterally, avoiding the social control of their actions.

Based on Neumann’s analysis of Nazism, one can say that power has the tendency to avoid social control by destroying or escaping from Law. As Law acquired historically the capacity to protect and transmit the wills of citizens to the sovereign power without destroying social pluralism, anyone interested in establishing a unilateral mode of rule will try to escape from it. Law’s capacity to control political, social and economical power may be a problem to social agents pursuing an authoritarian agenda (RODRIGUEZ, 2007).
I am not referring to social claims for self regulation that respect the interest of third parties and that regulate the effects of externalities. The escape from Law is the private ambition to encroach the power to create legal norms. This ambition can be cultivated by international corporations behind slogans as corporate governance and corporate responsibility [SHAMIR, 2004] and by civil society agents in the form of a demand for the empowering of local communities not interested in being accounted by the global political community. The claim to manage social problems privately without social accountability defines the phenomenon of escape from Law. In the case of international corporations, the economic power develops a strategy to externalize risks and internalize profit without considering itself responsible for the impact of their actions on third parties. In the case of local community empowering, social power aim is to escape accountability by claiming his demand will deepen Democracy.

Another example of an attempt to escape from Law is the international strategy of global actors as the USA. USA’s international strategy has been to escape from Law by creating exceptional measures and regimes of exception in which decisions are unilateral, arbitrary and unaccountable. From the lack of support to the International Criminal Court of Justice to the creation of a special court to judge Sadam Hussein; from the suspension of the right to habeas corpus of Guantanamo’s prisoners to other exceptional measures that limit fundamental rights allegedly to combat terrorism, one can say that the USA’s strategy is to escape from Law to escape social control.

These escapes from Law strategies are evidences of the strength of the Rule of Law and not of its weakness, as it may seem at the first sight. Historically, this phenomenon has had important antecedents that confirm this impression. Franz Neumann’s analysis of Nazism made him conclude that Law was not an empty form that could be filled up with any content. Law’s form is incompatible with
institutions that do not maintain the tension between the spheres of sovereign power and civil society.

Law has historically acquired the capacity to institutionalize this tension. The first episode of this process was the Bourgeois Revolutions. The bourgeois demanded civil rights and political rights that allowed social agents to organize and claim for new rights and created channels to transmit social demands to sovereign power. When the proletariat emerged in history and started to demand for rights, Law was directed to different objectives. Workers conquered the right to organize themselves and to claim for social rights, protected by civil and political rights. But social rights, unlike the others, directly imply the distribution of wealth. Workers demanded less working hours, higher wages; social protection, health protection etc and all these demands were demands to redirect the social surplus to fulfill their interests. These demands resulted, for example, in the change of the legal concept of private property. Originally, private property was seen an individualistic right. The social struggle or worker resulted in its limitation by statutes, with the creation of the legal concept of “social function of private property”. Property could not be conceived anymore as an individualist legal right, as it was subjected to limits in the name of social interests.

The reaction to this change in function of Law was an era of authoritarian and totalitarian regimes. According to Neumann, the bourgeoisie abandoned the defense of the Rule of Law when it became clear that it had the potential to change society (NEUMANN, 1986). Currently, there is a trend to avoid the transformative potential of the Rule of Law by the creation of exceptional measures and regimes of exception. Anyway, the potential of Law to be a vehicle to “undesirable” or “inconvenient” social demands is an evidence of its transformative potential. It is not necessary to destroy Law to implement radical social changes. Neumann’s analysis of the beginnings of German Welfare State suggests that the possibility to
establish the social control of the means of production through Law was real. Conversely, the phenomena of escape from Law suggests that the project of the Rule of Law should not be abandoned by anyone interested in controlling power and implementing social changes.

Within the boundaries of the Rule of Law, social changes can be implemented by the construction of projects of juridification. By this expression I designate the translation of social demands to the various grammars of Law. Franz Neumann showed how the demand to impose limits to private property challenged the interests of the bourgeoisie and favored the proletariat. The conflict between Labor and Capital was also a conflict between different projects of juridification of private property. Following the same logic, one can show how different social interest today can be translated into Law’s grammars and be transformed in opposing projects of juridification.

For example, the social demand for gay marriage can be classified as a project of juridification. This project stands besides another, the one that demands the dejuridification of the definition of marriage by Law. If Law does not define marriage and limits itself to regulate its consequences, society would have power to say which relations could be legally recognized as marriage and which don’t. Gay marriage militancy defends it is important that the State recognizes these relations as acceptable and normal. In opposition to this argument, one could state that the symbolic power to recognize which relations can and cannot be recognized as normal is the problem in the first place (BUTLER, 2002). These two opposed projects of juridification are both legitimate, compatible with Law’s forms and have completely different groundings and social consequences as the opposition between an individualistic and a social concept of private property had.

What is Law Scholarship function regarding the conflict between projects of juridification? As we discussed in the first part of this paper, Law Scholarship can
enhance Law’s capacity to mediate social conflicts by making its grammar more plastic, broadening the realm of its concepts and developing a general grammar of Law that allows society to compare its institutions and investigate their effects and their justification. What about values? Is it the job of Legal Scholarship to prepare a menu of institutions and effects and offer it to her customers?

The example of Hans Kelsen can illuminate the problems I want to address. Kelsen wrote a “Pure Theory of Law” to give Law a scientific status, “science” meaning natural science. To do that, he expelled from legal scholarship any trace of normative questions and transformed the study of Law into a radical formalism (KELSEN, 2002). The task of a Legal Scholar was descriptive and analytical only and Law was seen as a form that could be filled with any content. At the same time, Kelsen was an enthusiastic defender of Democracy (KELSEN, 2000) and a militant for the creation of a Constitutional Court in Austria and a combatant for the social of sovereign power (KELSEN, 1995, 2003).

As a Legal Scholar, he was not allowed to defend anything. He was a scientist. As a defender of Democracy and the rule of Law, he could do so. These two sides of his intellectual activity seem not to communicate theoretically. There seems to be no internal mediation between the “Pure Theory of Law” and his writings on Democracy. Kelsen sure believed that substantive theories of Law did not favor Democracy, as they affirmed some values as true, limiting pluralism (KELSEN, 2000). But this belief does not necessarily imply a value-blind Theory of Law. Hans Kelsen’s Legal Scholarship pretension to have the dignity of the natural sciences is the key to understand its character. When writing about Law, Kelsen made us take part in a logic that leaves all the values behind to look like natural science. When he wrote about Democracy, Kelsen was not in the intellectual position of a legal scientist. He was a citizen. That is why he could defend Democracy and pluralism.
Many criticized the value-blindness of Kelsen’s Legal Scholarship. In “Five Minutes of Philosophy of Law” written in 1945, Gustav Radbruch, that had just reassumed his job at the University in Heidelberg after Nazism, accused the positivism to leave society without criteria to differentiate laws that should and should not be obeyed (RADBRUCH, 1974). For a positivist, Law is enforceable when is promulgated by a recognized source. Considerations of Justice and values are not important, as Law is an empty form. A value blind Theory of Law can transform Legal Scholars in servants of economic, social or political power.

Evidently, the mere description and analysis of institutional structures and their effects can have a huge impact in the pretensions of the powerful. It can show that some promises were not fulfilled and that certain means are not efficient to reach certain ends. This kind of Scholarship can also indicate which institutional models are adequate to radicalize Democracy and which don’t, though its intellectual habit to split means and ends may make it difficult, but it cannot defend Democracy in normative grounds. One can sure defend Democracy based on functionalist arguments, stating that it is the most effective way to deal with the complexity of a certain society. But this argument is not normative, but pragmatic. If someone proves empirically that Dictatorship is a better way to deal with complexity, this functionalist defense of Democracy would be defeated.

To escape the value-blindness without having to abandon the point of view of a Legal Scholar, it is necessary to construct a different concept of Law, both descriptive and normative, and develop a new model of Legal Scholarship. Franz Neumann’s The Rule of Law, his Doctoral thesis of 1936, written under the orientation of Harold Laski in The London School of Economics, was an attempt to do it. His concept of Law has an internal link with Democracy (as it protects liberty and pluralism and allows social agents to claim for rights) and his intellectual project was to show how the Rule of Law could deepen democratization. When he
stated that under Nazism there was no Law (NEUMANN, 1986), he was making both a descriptive and a normative point. Neumann described Nazi institutions saying they were institutionalized by “technical rules”. There was no Law under Nazism, only “technical regulations”. Besides saying that, Neumann felt obliged to invent new categories, in fact, a whole new conceptual framework to describe Nazism better.

One of the most interesting insights of The Rule of Law was that the German Rechtsstaat tradition conceived Law exclusively as an instrument of State. That is why he avoided translating “Rechtsstaat” and used the world in German to clearly differentiate it from the English tradition of the “Rule of Law” in which he saw a necessary connection between Law and the social control of power. Neumann transformed this historical and descriptive statement into a normative principle and identified the emancipation of society with the democratization through the Rule of Law. A Legal Scholarship coherent with this conceptual construct should aim to deepen democratization. All its efforts of institutional analysis must be directed by this normative principle. But what does democratization mean? And how does one create institutions to deepen Democracy?

4. Immanent Critique of Law

“At this point it is clear that immanent critique is based upon a classic ’modernist’ assumption that is also made by dialectical analysis more generally. It is presupposed that modern societies have become increasingly open to a reflexive self-critical form of self understanding, which allows scholarship to develop a genuinely critical standpoint upon the limits of their various ideological practices.” (PEARSON, SALTER, 1999)

In The Rule of Law, Franz Neumann traces the history of the Occidental experience of Law in Germany, France and England to show how Law became self reflective. The process has three crucial moments: a) The invention of the Rule of Law by the bourgeoisie; b) the proletariat entrance in the Parliament; c) the destruction of the
Rule of Law by Nazism. As we said before, Neumann showed how the proletariat used the liberty of organization and the right to claim for rights to give the Rule of Law a new bias towards social rights, managing to direct the social surplus to fulfill its interests. Nazism was a reaction to this, a reaction to the social transformations that were been conquered by workers through the Rule of Law.

My main objective in this paper was to develop a model of Legal Scholarship coherent with Neumann’s analysis to avoid the institutional nihilism: the indifference regarding institutional designs. As Neumann showed that a certain legal conception of private property favored the interests of the proletariat, I think one can relate projects of juridification and principles of justice, always respecting Law’s form. To do that, it is necessary to describe and analyze institutions empirically and to reconstruct them in the terms of a general grammar able to compare their structure and their effects in a common ground. By doing that, one can create the conditions to imagine new institutions, according to the principles of a Democratic state.

The problem is that Franz Neumann’s concept of democracy is way too vague to give a precise direction to the objectives of a Critical Theory of Law. The goal is to find institutions capable of deepening Democracy, but what does it mean? The concept of “democratization” in Neumann is not precise. He states that the Rule of Law should control power, but he does not explore the social groundings of Democracy, especially regarding its relation with civil society. If an immanent critique of Law is a critique that connects models of juridification with principles of justice in the name of democratization, it is necessary to construct a better concept of democratization that Neumann’s.

A good possibility seems to be to combine Neumann’s complex analysis of institutions and normative insights with the concept of “social pathology” developed by Jürgen Habermas and Axel Honneth (HONNETH, 2004). I have no space to fully...
develop this line of thought here, but I will sketch its main steps. First of all, it seems fair to say that there is a “sociological deficit” in Neumann concept of democratization, as he does not fully explore the social groundings of the Rule of Law. In two of his last articles, “Angst and Politics” and “The Concept of Liberty”, he started doing that using a psychoanalytic framework, but he died before having time to fully develop this line of investigation [NEUMANN, 1957].

To fulfill this sociological deficit, it is necessary to develop a theory able to show how institutional designs can favor Democracy, meaning Democracy the communicative potential present in every form of life. Habermas was responsible for a turning point in Critical Theory as he developed a model of critique based on the communicative potential present in society [HABERMAS, 1989]. This potential is grounded in a non manipulative use of language that gives place to a process of communication that aims at mutual understanding. This form of communication has the potential to give place to a collective praxis of deliberation through the institutionalized procedures of the Rule of Law, directed towards the rational transformation of society [HABERMAS, 1998].

According to this line of thinking, some institutional designs would be classified as “pathological” and others as “non pathological”, depending on how they affect communication. A “pathological” juridification would be the one that destroys the conditions for the full development of communicative action. There is, though, occasions in which a “systemic” rationale is necessary to fulfill social ends. To simplify this exposition, I will call “systemic” all instrumental interactions in which one treats the other as means to an end. Habermas recognizes that this kind of interaction is indispensable to deal with the problems of complex and pluralist society. Consequently, not all forms of instrumentalist juridification would be classified as pathological. For example, Klaus Günther developed a theory of the rationality of adjudication inspired in Habermas that has a deliberative and a
systemic component. The deliberative component is the “sense of appropriateness” by which the Judge justifies which norm will be applied to solve a concrete case. The process of application occurs in a limited period of time: that’s the systemic component of adjudication (GUNTHER, 1993).

The juridification of social facts is not essentially good or bad. The challenge is to find the criteria to know if it is good or bad, regarding each and every concrete institution. Furthermore, it is necessary to know how to juridify each social problem and evaluate its effect in the strengthening of communicative action. Of course this can only be done in a case by case basis, but the problems seems to be to find general criteria to judge each form of juridification without dictating from up down abstract principles that don’t take into account the specificity of each form of regulation or self regulation and their related social sphere.

Axel Honneth’s remarks in Suffering From Indeterminacy (HONNETH, 2007) seem to be a good starting point to try to construct these general but concrete oriented criteria. The book attempts to renew Hegel’s Philosophy of Right as an effort to identify the social conditions to realize the free will of each individual. According to Honneth, to do that Hegel examined how each social sphere should be organized. I have no space to develop this analysis here, but the spheres were organized in a way that one would compensate for the pathological effects caused by the other. The ultimate goal was to realize individual liberty inter subjectively. Neither negative liberty nor the purely individualistic free will should dominate society (HONNETH, 2007). “Right” for Hegel according to Honneth, seems to mean the institutional design of such a society, the way each social sphere is organized to permit the inter-subjectively realization on individual liberty.

How should one organize social institutions to reach that goal? Would it be necessary to reform the regulation of Crime, Torts, Contracts, Labor, etc? Should we continue to think in the terms of Crime, Contracts, Torts, Labor, etc? The
spheres Hegel examined in his *Philosophy of right* (abstract right, morality and ethnicity) mean the same today or should we reconstruct them differently? These are questions that must be put by anyone interested in following this path of investigation.

5. Some final remarks

This text sketched a model of Legal Scholarship inspired by Franz Neumann’s work. This model proposes a form of Law Critique that is preoccupied both with the maintenance and the transformation of the Rule of Law. Within the realm of Law’s form, it is possible to invent projects of juridification to develop the communicative potential present in society. To do this one has to expand Law’s grammar beyond formal law and the three traditional powers and think in other institutional designs compatible with Law’s form. Middle-range theories of Law can be an obstacle to expand Law’s grammar as they can naturalize certain concepts and models of juridification. The development of a General Theory of Law and the construction of a general grammar of Law are crucial to increase Law’s legitimacy. The comparative analysis of institutions and their effects depend on it. The results of such an analysis would provide society the necessary information to rationally evaluate and reform institutions.

Such a model of Legal Scholarship combines themes that today are studied separately by Social Sciences and Economics, Jurisprudence and middle range theories. Empirical research is necessary to describe and analyze the structures and the effects of institutions (their efficiency, legitimacy etc) and organize them in a general grammar. That being done, it is necessary to relate these institutions with principles of justice, differentiating pathological and non pathological models of juridification to deepen Democracy. Besides, with this information, one can invent new institutions beyond the limits of the iron cages of the various areas of Law and their respective theories. The public debate of projects of juridification
within the realm of Law’s form will be strengthened by this kind of Scholarship that will also help to discredit the radical negation of Law’s potential to transform society and institutional nihilism, the indifference regarding institutional designs.

Both these positions seems inadequate if put before the current efforts of power to escape from Law. These manifestations confirm Law’s capacity to control power and give form to social claims. This evidence is important, especially for peripheral countries, in which the political debate on economic development sometimes points the State and the Rule of Law as obstacles to economic measures claimed to be essential to their future. Neumann’s critique of Weber (which was not develop in this paper, see JAYASURIYA, 1996) and the consequent demonstration of the plasticity the concrete institutions that give content to Law’s form allows one to argue that it is both efficient and legitimate to transform society through Law. The several grammars of juridification can give place to different economic, social and political claims within Law’s form, which means, within reach of social control. The normative stand to invent emancipatory projects of juridification to realize liberty inter subjectively benefits from Law’s growing capacity to figure social conflicts.

Maybe my formulation of a Critical Theory of Law may be a contribution to help left wing imagination to overcome its excessive dependency on the French Revolutionary model (THOMPSON, 2001) and maybe give more content to the defense of the importance of imagination to the left wing tradition (CASTORIADIS, 1982, 2007). It can also be considered an attempt to put limits to the radical defense of a selvage and on going process of institutional reform that does not take seriously into account the social need for security and that do not establish clear criteria to decide when the reform is needed and when it is not (UNGER, 1996). Neumann observes in The Rule of Law, that Marx was mostly preoccupied with ruptures than with continuities (NEUMANN, 1986) as he defended a theory of the
collapse of Capitalism. That is why he did not pay any attention to institutional change, but only to institutional destruction. If one thinks well about the current efforts of the powerful to escape from Law and in the Nazi model of institutionalization, maybe it would not sound too daring to try actualize Marx’s famous phrase to our times and say: “Everything that is powerful must be continuously institutionalized”.

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