



Multinormativity as Philosophy of Law: A View from Brazil

José Rodrigo Rodriguez^{1,2}

¹Escola de Direito da UNISINOS, São Leopoldo, Brazil

²CEBRAP, São Paulo, Brazil

Email: jrodrigorodriguez@gmail.com

How to cite this paper: Rodriguez, J.R. (2025) Multinormativity as Philosophy of Law: A View from Brazil. *Open Access Library Journal*, 12: e12765. <https://doi.org/10.4236/oalib.1112765>

Received: December 4, 2024

Accepted: January 18, 2025

Published: January 21, 2025

Copyright © 2025 by author(s) and Open Access Library Inc.

This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).

<http://creativecommons.org/licenses/by/4.0/>



Open Access

Abstract

This text shows how the tradition of legal pluralism may help one to construct a democratic view of law in a culturally diverse country as Brazil. A multinormative view of law may be able to include social demands from the most diverse social agents and groups, averting the violence linked to homogenizing and centralized conceptions of law. This article also argues that it is not necessary to break up with the tradition of liberal law to conceive a multinormative model of law that opens space for the coexistence of various forms of community life. It is enough to reformulate its institutions to include the demands of all citizens and social groups in the form of normative orders, using the Western tradition as a “hybrid universalizing code” intended to deal with the conflicts between them, a code with formal qualities that should change as it must be responsive to social conflicts.

Subject Areas

Theory of Law, Philosophy of Law

Keywords

Law, Pluralism, Democracy, Diversity, Multinormativity

1. Introduction

This text will propose a new theoretical framework capable of offering a legal response to violence that remains alive in contemporary Brazil, affecting, for example, the descendants of native peoples and quilombolas. A response points to a form of political unity that does not aim to centralize all power in the hands of the state; a non-homogenizing form of democratic rule of law allows different values to co-exist, organized in different legal normative orders.

Based on Franz Neumann and Robert Cover, this article shows in its first part that it is not necessary to break up with the tradition of liberal law to conceive a multinormative model of law that opens space for the coexistence of various forms of community life. It is enough to reformulate its institutions to include the demands of all citizens and social groups in the form of normative orders, using the Western tradition as a “hybrid universalizing code” intended to deal with the conflicts between them, a code with formal qualities that should be sensitive to the materiality of social conflicts.

In its third part, this article presents the outline of a multinormative model of law inspired by the work of jurists in the tradition of legal pluralism, especially Robert Cover, Brian Z. Tamanaha, Paul Schiff Berman, and Klaus Günther. I interpret the work of these authors as a renewal of the liberal legal tradition, which allows us to think about the design of the democratic Rule of Law that allows the coexistence of worlds with a strong normative sense, that is, that impose themselves mainly because of their substantive community sense.

For such renewal to be effective, it is necessary to construct criteria to distinguish not only the legal and the illegal in each specific normative order, but also the legal from the non-legal, so that it is possible to compare the validity of pertinent legal norms to different normative orders.

This text proposes that such criteria be formulated in accordance with the aforementioned “hybrid legal code”. Such a code must be able to function both as a universalizing language, that is, one that renews itself with the conflicts faced, and as a situated language, capable of expressing singular experiences. In the language of Ivan Illich, which serves as inspiration for the text in this part, it is a matter of constructing a manageable and non-manipulative law, that is, one that is not limited to treating people and nature as mere objects.

A multinormative view of law must recognize that communities may be free to live under their own legal normative order and, therefore, that the text of the Brazilian Constitution of 1988 should be interpreted differently by multiple discourses of justification. In this sense, instead of a unitary constitutional law and interpretive tradition, Brazil must recognize the existence of different “constitutional gospels” that integrate our constitutional order alongside the text of the 1988 Constitution, gospels that express different narratives about what is legal and what is non-legal, all based upon the same constitutional norms.

This reflection on the legal problems faced by a culturally diverse country such as Brazil can be useful to think about the function of law in other countries with the same characteristics.

2. Legal Formalism and Democracy

As Franz Neumann stated in *The Rule of Law* [1], one of the central functions of the democratic rule of law is to keep the spheres of sovereignty and society separate but in communication. Law establishes procedures for power to gain access to anyone’s body and property, such as collecting a debt, limiting a person’s right to come

and go, or applying the death penalty. Law also separates the public from the private world. Even Hobbes [2] stated that, in the state of society, upon concluding the social contract, it is possible to secretly be free, although, for the author, the word of the sovereign is responsible for determining the space destined for the freedom of the subjects.

It is precisely for this reason, as Robert Cover [3] taught us, that the best viewpoint to understand the law is from the executioner's point of view. By generalizing this idea beyond the categories of criminal law, it is worth reflecting on law from the point of view of its execution on the body, on people's individual or social esteem, and on their property (*i.e.* on their existence in a relationship of coexistence). Law should not be studied from the point of view of the abstraction of the norm but from the point of view of the materiality of the social conflicts on which it will have an impact, especially when facing specific cases, that is, the moment of producing effects directly on those involved in the conflict.

From legal modernity onward, the bodies and property of citizens are protected from power by a burden of justification required by both public and private powers. According to this order of reasons, even an absolute sovereign, in Hobbes' terms, cannot dispose at their will of the existence of their subjects, whose lives, after all, the sovereign promised to protect through a contract that institutes the sovereign power, competent to enact laws. After Kant, liberal thought argues that such limits must be provided for in laws that result from all rational citizens' participation in a rational, public, and free discourse [4].

For such protection to be considered universal, everyone who effectively participates in a certain political community will necessarily need to see themselves as equal and considered as such by society and the State. For this very reason, the philosophical debate cannot be separated from sociological analysis, more specifically, from legal-institutional analysis, under penalty of seeing advanced egalitarian ideas coexist with exclusionary societies and institutions, that is, institutions that do not live up to their socially incarnated public justification. The legitimacy and reproduction over time of a democratic rule of law depends on its empirical plausibility, that is, on its progressive realization, its growing ability to redesign its formal institutions to encompass the interests and desires of agents and social groups. Let me explain.

Historically, the denial of rights to a range of social groups—for instance, indigenous, black, working, and Jewish peoples, gypsies, foreigners, sexual minorities, and those with disabilities—was based on the attempt to deny them the status of equal humans and citizens, reducing them to a supposedly inferior condition. The struggle for the universalization of rights is the struggle for humanizing all human beings and the struggle for the conferral of citizenship on all bodies. Therefore, the evolution of liberal law in recent centuries can be seen as a conflict between increasingly universal affirmations of humanity and conservative tendencies that seek to make the *universal* a private club. The meaning of what is “universal” varies with history and the context of social struggles.

The historical affirmation of liberal law is contemporary with its perversion: there have always been entire categories of human beings left outside the scope of protection of the apparent universality of fundamental rights. Liberal law was born with a perceptible deficit of legitimacy by the agents who built the institutions that are at the origin of our democratic state of law [5].

Historians such as Georges Lefebvre illustrate the fact that the tension between the realization and perversion of the universality of rights has accompanied Western tradition since its birth. During the French Revolution, the bourgeoisie never doubted itself as the revolutionary class destined to bring about the good of the human species, but even so, Lefebvre [6] informs us of fears, during the Revolutionary Assembly, that the mention of “general satisfaction” in the Declaration of the Rights of Man caused legal or civil equality to be interpreted as “equality of resources”, threatening the power of the richest classes, including the bourgeoisie.

This fear motivated ecclesiastical deputies such as Grégoire to demand that a declaration of duties be added to the declaration of rights, a suggestion that was not accepted. Even so, in Lefebvre’s assessment, it would have been prudent from the bourgeoisie’s point of view to adopt the distinction proposed by Sièyes between equality of rights and equality of resources, in addition to having clearly defined what is property to avoid the Declaration being interpreted in the socialist sense, as it was. Michel Vouelle’s *The French Revolution* examines the differences between the 1793 and 1795 French Declarations of Rights and detects the same fear of equality as a menace to private property [7].

The simultaneity between enforcement and perversion of the law can also be perceived by the erasure of the influence of the Haitian Revolution from the Western legal experience, a problem recently addressed by scholars from various areas of the Human Sciences, including Law [8]. There is a vast literature on the coexistence in Brazil of slavery with liberal institutes and its consequences [9], including reflections on the impact of this fact on the difficulty in approving a Brazilian Civil Code [10].

It is worth noting that it is the liberal grammar of rights that allows the conflict to be structured in this way, as a tension between the realization and perversion of the democratic rule of law. Therefore, Franz Neumann stated in the introduction to his *The Rule of Law* that the liberal tradition, based on workers’ demands, shows itself as a double-edged sword, that is, it starts to serve the interests of other social groups, different from of the bourgeoisie. As stated elsewhere, provocatively, the working class may be considered the true inventor of the democratic rule of law by highlighting the potential of this institutional form of universalizing citizenship beyond the desires and interests of the bourgeoisie [11].

The promise of guaranteeing equal rights for all rational beings, formulated by the bourgeois revolutions, had to be formalized so that the humanization of law could expand to reach, tendentially, all people and, as we will see, non-people. According to the tradition of modern political philosophy, the right to have rights was attributed to the rational human being, thus conceived from a substantive scientific

investigation capable of identifying their characteristics and needs.

From investigations of a non-experimental, markedly speculative science, it would supposedly be possible to conceive a political model suitable for all human societies, as evidenced by the divergences between authors such as Hobbes, Locke, and Rousseau regarding the characteristics of the state of nature, the contract, and the state of society.

As Ian Hacking has shown, modern political philosophy is characterized by a visual conception of thought. For this mode of perceiving the world, ideas could be the object of “mental vision”, analogous to the vision of a material object. For this way of thinking, “signification is a precedence-or-consequence relation of a quasi-causal kind” in which words precede ideas, albeit their meaning depends on the “vision” of the idea [12]. Therefore, the investigation of human nature was aimed at identifying the idea of humanity in its essence and, from it, building political systems.

The formalization of law and the idea of the person as a “person of law” has as a landmark the Kantian concept of human dignity and is radicalized with the creation of democratic states of law, with the tradition of democratic constitutionalism. Well, a formal conception of rights does not presuppose the verifiable existence of a concept of a person, a “mental vision” of the person, so that it is possible to attribute rights to him/her and, therefore, breaks with the substantive vision of modern philosophy. The definition of “person under the law” is no longer linked to a substantive or mental idea of a person and becomes an object of social dispute.

Moreover, as Franz Neumann showed in the last part of his “The changing function of law in bourgeois society” [13], the concept of person allows one to impute moral and legal responsibility to certain entities for economic exploitation and, I would add, responsibility for racial and gender violence, among others. Adopting a communitarian-organic—as the Nazis wanted—or functionalist vocabulary to describe social interactions would prevent conflicts from being deemed this way. In this sense, the liberal grammar of rights provides elements to construct claims of (in)justice, which can dispute the meaning of law, for example, the meaning of “person under law”.

In sum, it is precisely because of formalism that Franz Neumann stated that Kant’s thought contains some of the most progressive elements of modern legal thought, provided, of course, that we overcome the historical-sociological deficit of the Kantian view of formal institutions and, according to Neumann, its deleterious effects on the study of law [1] (pp. 245-262). After all, this way of conceiving law allows numerous individuals and social groups subjected to situations of oppression to struggle to be considered “persons under the law” and to be integrated into the same constitutional narrative, thus broadening the concept of citizenship. More recently, it has become clear that formalization also allows normative orders other than the national state to be recognized as legal.

Legal formalism authorizes any being capable of rational thought to claim equal rights without any form of discrimination. Today, it is already admitted that other

entities, even inanimate ones, at least in Western eyes, are considered “persons under the law”. For instance, the 2008 Constitution of Ecuador explicitly incorporated the vision of indigenous nature called “Pachamama” as a person under the law [14].

It should be clear that what I am calling the formalization of law, which favors its increasing universalization, that is, a democratic formalization, is not a purely intellectual movement. The social construction of this concept and its transformations is related to the state of social struggles. The idea that rights are created and transformed by human will was created in the struggle against the supposedly natural privileges of the nobility and the church and against the hierarchical society in which they made sense.

In this sense, the formalization and transformations of the concept of “person under law” are related to the struggles of workers, women, and people of color for their way of life to be recognized by the constitutional order in the form of new rights, a process that was theorized in the field of social sciences by Marshall (1991) [15] for Europe and adapted to Brazil by historian José Murilo de Carvalho (2021) [16].

To better organize what we have just said, one may state that the first moment in the process of formalization of law is marked by the idea that rights arise from human will and not from the nature of things or the will of God. The second step of formalization asserts that the tension between natural law and positive law is internal to positive law and therefore, no longer makes sense in its original conception. Franz L. Neumann takes this step by differentiating the ideas of “political view of the rule of law” from a “legal view of the rule of law” to which I refer with the concepts of “social use of law” and “official use of law” [17].

According to this conception, the rationality of positive law is under tension with the state of the social struggles for rights, meaning struggles over the production and interpretation of laws in the face of specific cases. The promise of equality immanent in the democratic state of law, an institution that emerges at a certain historical moment, allows individuals and groups to see themselves as victims of injustice to denounce and demand changes in those formal institutions that do not live up to themselves. In this sense, the idea of the rationality of law is intertwined with the idea of constitutional democracy: law will be rational if it can recognize and establish institutional arrangements and interpretations of laws capable of including and reconciling the various social demands.

Nevertheless, it should be noted that even this formal vision of law still presupposes a single constitutional narrative to which all human experience should refer, a single legal grammar to which all social demands should be translated. Even views, including Franz Neumann’s, have been unable to incorporate into legal thinking the social demands to which I refer with the use of the term “multinormativity”.

The third moment of the formalization of law in its Western conception is taking place on the outskirts of capitalism and in multiethnic, multireligious, and

federalist countries such as the United States, Brazil, Ecuador, and Bolivia with the recognition that norms and categories practiced in certain social spaces and by non-hegemonic peoples, the “others of the nation”, as Rita Laura Segato [18] puts it, are part of the constitutional order in their specificity. Moreover, this moment of the formalization of law has been driven by globalization, which includes the creation of transnational normative orders that regulate a series of issues in parallel and often in conflict with state law.

In these cases, we are not facing the mere translation into Western law grammar of categories born in other human experiences, but the recognition that what we call “law” has a polycentric nature and develops according to its own grammars and centers of power, that is, its own jurisdictions, different from the State Judiciary. What is more, it is also a matter of thinking about how state law may or may not coexist with transnational legal normative orders, which, many times, may be more adequate for solving a series of social problems, such as the ones related to ecological issues, global trade, and technological innovation, as in the case of communities that collaborate in developing open-source software [19].

The social sciences and a plethora of legal theorists and sociologists have used the concept of legal pluralism to refer to this phenomenon. As a rule, these authors adopt a strictly descriptive stance that does not consider the internal point of view of law [20]. For this reason, this tradition does not clearly distinguish “juridical” from “non-juridical”: it has not developed a model of legal rationality that proposes to operate the jurisdiction in a multinormative world, that is, a world in which various normative orders operate in tandem, some of them with the claim of being recognized as legal normative orders.

The tradition of legal pluralism also does not usually investigate why some claim to be recognized as legal and others do not [21]. Investigations of this nature are pivotal because, under the name of legal pluralism, one may find strategies to avoid paying taxes, complying with labor standards and environmental protection legislation, or maintaining privileges and discrimination at the local level. For this very reason, this text prefers to use the term “multinormativity” to refer to these phenomena, a term that does not induce the analyst to conclude beforehand, without analysis, that he is facing several legal orders functioning in parallel.

Hence, it seems necessary to distinguish between *democratic* legal normative orders that intend to expand the space for people to create the norms that regulate their lives and *perverse* or *autarchic* legal normative orders that intend to establish autarchic regimes for the creation of rights.

In another historical context and thinking about the defense of centralism or self-government, Rosa Luxemburg stated that centralism was defended in the name of equality and democracy against medieval localism that favored the hierarchical power of the nobility [22]. In the Brazilian context, localism was also, for a long time, synonymous with electoral fraud and the domination of the oligarchies of the national states against the egalitarian logic of the democratic rule of law [23].

For this very reason, whether in relation to internal pluralism or external pluralism, the most appropriate normative criterion for evaluating normative orders with legal claims in studies concerned with the functioning of democratic states of rights is their capacity or not to broaden people's participation in the creation of the norms that regulate their lives. Of course, this criterion does not by itself resolve the conflicts in concrete, but it serves to guide viable solutions.

Let it be clear that what I am calling the formalization of law, which favors its increasing universalization, is not a purely intellectual movement. Constructing this concept and its transformations are related to the state of social struggles. The idea that rights are created and transformed by human will was built in the struggle against the natural privileges of the nobility and the church and against the hierarchical society in which they made sense. In this sense, the formalization and transformation of the concept of person are related to the struggles of workers, women, and people of color to have their way of life recognized by the constitutional order in the form of new rights, a process that was theorized in the field of social sciences by T. H. Marshall for Europe and adapted for Brazil by the historian José Murilo de Carvalho [24].

The third moment of the formalization/transformation of law, which is extremely complex, has been driven by the anti-colonial struggle that includes the recognition of the rights of native peoples in terms of their cosmology, in addition to environmental disputes, the struggle for animal rights, and the phenomenon of economic globalization that has given rise to normative orders that regulate a series of phenomena beyond and across the borders of national states, often in competition with state legislation.

In this last case, we face normative orders with a weak code that does not clash with the existential aspects of national law, thereby facilitating their global circulation. It does not seem reasonable to say the same about the normative orders of native peoples that do not include private property as a fundamental category and require large territories to survive. In the latter case, at least in Brazil, there is still no politically stable institutional arrangement capable of keeping capitalism functioning without threatening the autonomy of traditional communities or human survival on the planet [25].

3. Towards a Multinormative Philosophy of Law

Robert Cover, Brian Z. Tamanaha, Paul Schiff Berman, and Klaus Günther have contributed to legal pluralism research moving its investigations in another direction from the one followed by Social Sciences. As Robert Cover explicitly stated, it is a matter of renewing the tradition of legal liberalism to think about a design of the democratic rule of law that allows the coexistence of “worlds of strong normative meaning”, which impose themselves by their substantive communitarian sense. Despite the differences between these authors, it is based on this premise that I will employ their writings here.

For this “renewal of liberalism” to be plausible, one must conceive the rule of

law as a “world of weak normative meaning” imposed by force and not because of its substantive meaning. In this way, the democratic rule of law becomes compatible with other modes of belonging, making room for people to hold, so to speak, several statuses analogous to that of citizens, thus simultaneously participating in several normative legal orders.

Furthermore, it is necessary to adopt non-substantive criteria to distinguish “legal” from “non-legal” in a multinormative context, as Brian Z. Tamanaha, Robert Cover, and Klaus Günther have done. For Brian Z. Tamanaha, a normative order is considered legal when the persons involved in a conflict declare that it is impossible to comply with a certain norm without failing to obey another, both belonging to normative orders claiming the status of legal orders. Robert Cover offers a similar solution by stating that we should consider as legal every norm on behalf of which a person is willing to put his body (their honor and their property, one might add) at risk to assert its legal validity.

Both concepts presuppose that it is possible to recognize conflicting normative orders as legal from the point of view of the jurisdiction responsible for examining the case and from the point of view of the persons involved in the conflict. For this very reason, Klaus Günther suggested that it would be reasonable to postulate the existence, as he puts it, of a “universal code of legality” currently in operation, that is, a code used by various social agents in various countries and institutions and capable of naming this kind of human experience.

Therefore, such a code would allow the various normative orders to recognize each other as legal, or rather, the people involved in conflicts to identify them as conflicts between rights. It would be an indeterminate code, “a metalanguage that contains concepts and basic rules such as the concept of law and due process of law, and the concept of sanction and jurisdiction” [26].

This formulation by Günther advances the construction of an internal view of law inspired by legal pluralism and seems complementary to the views of Tamanaha and Cover. Nevertheless, I must disagree with Günther’s formulation. The presence of a supposed “universal code of legality” may be nothing more than an optical illusion of the West that has imposed, often violently, its institutions on various parts of the world. Currently, the construction of this code is linked to the circulation of English-speaking legal elites around the world, coming from universities located at the center of world capitalism [27].

Such expansion of the West may produce emancipatory effects. After the mass murders and destruction of diverse peoples and cultures, violence that is impossible to undo, one can affirm the existence of a universalizing juridical experience regarding a series of concepts and reasoning of Western origin. This is an inheritance that many consider bloody, albeit it does not seem possible to deny or destroy to redesign institutions from scratch [9].

Even though it is impossible to completely undo the violence with which this code was imposed around the world, in order not to hide the colonial violence responsible for its circulation, I prefer to postulate the existence of a metalanguage composed

of hybrid concepts and norms—with universalizing potential, but not yet universal—that may, at some point, be identified as effectively universal.

At this historical moment, I prefer to affirm that we are facing a “universalizing hybrid code”, whose history dates to the inaugural acts of violence, but from democratic iterations that are increasingly plural and increasingly inclusive [28], it may evolve into a universal metalanguage capable of promoting free communication among a plethora of social and legal experiences.

Such a formulation seeks to maintain the memory of colonial violence as a textual mark, postponing the affirmation of universality, which remains in the condition of a mere potential. Moreover, the universalizing potential of this code does not exclude the possibility that other conceptual constructions may have played or may play a similar role in the future or that they promote profound transformations in its rationality.

For example, I am not sure if the concept of “right” can be pointed out right now as part of a metalanguage that is effectively common to all cultures on the planet. Taking rights excessively seriously in this historical context may mean leaving out the constitutional project of given political community norms that regulate the way of life of different native peoples. In a study that I coordinated for the Legislative Affairs Department of the Brazilian Ministry of Justice, which included jurists, philosophers, and anthropologists [29], for example, we noted the difficulty of finding a holder for a possible credit to be paid in exchange for the use of traditional knowledge.

Firstly, it is quite challenging to identify which peoples are the holders of certain knowledge, spread over large regions inhabited by diverse groups. Such peoples do not relate to this knowledge with the mediation of the category “right”. Thus, imputing a “right to claim” to someone may be unfair to other groups and alien to how these people define their own experiences.

Even if it were possible to identify a people as responsible for developing certain traditional knowledge, the payment of monetary values to these individuals based on a claim might destroy the functioning dynamics of communities that do not recognize individual property rights. For this very reason, one of the solutions pointed out for the problem has been creating funds managed by various indigenous leaderships whose resources should be destined for their communities [30].

Even with all these problems, one can argue that it would be possible to establish a bridge of communication between these diverse legal experiences based on the concept of “right”, in this case, “credit right”. The people involved would be able to perceive the meaning of this term and discuss alternatives so that the legal regime that it represents does not generate unfair or harmful effects on their way of life.

Even so, it seems more appropriate to say that the concept of “law” is working, in this case, hybridlike. The fact is that we do not know how it is understood by the various native cosmogonies that have contact and uses the word, whether in Brazil or other social spaces. And even if all individuals and groups involved in the debates

in the public sphere use the term, we may be facing a merely strategic discourse built to deal with Western categories in a conceptual framework imposed by colonization. It would be necessary to listen to the people involved and deepen the democratic dialogue to understand if the concept of “right” can express all these human experiences.

The idea that this is a “hybrid concept” also sustains the possibility of extending Western legal grammar by using ideas born in other cultural experiences. The apparent juxtaposition of the concepts of “Nature” and “Pacha Mamma” in the Ecuadorian Constitution may indicate that the concept of “nature” is transformed by the thinking of the original peoples and is formulated with another term, with an impact on the legal discipline of private property. Nevertheless, it may also highlight the seizing of this experience to legitimize a legal order that operates from other assumptions, eliminating the tension between the Western and non-hegemonic ways of life.

Finally, it will be necessary to rethink what we call legal rationality considering all these phenomena. Following the insightful suggestion of Paul Schiff Berman [31], if the state jurisdiction and other currently existing jurisdictions can operate in this new context, what are the legal concepts and reasoning that judges should use to promote the coexistence between multiple normativities?

For this to be possible, by closely following Ronald Dworkin’s reasoning [32], it might be necessary to recognize that “epistemic divergences” exist alongside theoretical divergences, which would rule out as violent the project of reducing the Constitution of a certain political community to a single coherent set of principles that would integrate all the normative orders present in the same social space.

For instance, is it reasonable to keep working with the idea that in Brazil, there is a single constitutional text and a unitary hermeneutic of this text, both founded on coherent principles that should be weighted according to some criterion, capable of resolving conflicts in the name of the integrity of the constitutional project?

Or is it necessary to recognize that the same constitutional text can give rise to a series of constitutional narratives that start from different presuppositions—even if they refer to the same text—and, for this very reason, will necessarily come into conflict? Conflicts that will often be resolved by jurisdictions that operate in tandem, such as state and indigenous jurisdictions? Even in the case of constitutional narratives whose conflicts are resolved by the same jurisdiction, for this way of conceiving law, is it desirable to aim to unify the narratives? Or is it more interesting to promote arrangements that allow them to coexist side by side?

For example, the guarantee of a standardized and universal education can mean equal opportunities for citizens but also a threat to the culture and beliefs of indigenous peoples and religious groups [33]. An indigenous constitutional narrative, for instance, might consider that the teaching of Western science and history should be integrated into their way of living and thinking about the relationship

between nature and culture, after all, this way of thinking and living is responsible for their survival [33] (pp. 36-37). The constitutional text, which guarantees everyone the “right to education”, would give rise, in this case, to different legal norms based on different narratives of justification, adapted to the needs of these communities.

On the other hand, the teaching of indigenous traditions in traditional educational institutions is integrated into the syllabus under the aegis of diversity, without central references in the scientific disciplines of the primary and secondary school curricula. In this case, the potential homogenizing and manipulative character of the education system understood as a standardized “right to education” becomes quite evident [34].

Robert Cover taught us that electing an ancestor “is a serious matter, of substantial consequences” [3]: should the US Constitution always be read in the light of the Founding Fathers when many may claim to understand it in the light of Frederick Douglass or Roger Williams? In the limit, I would add, would it not be better to argue that the Constitution should have no known father or mother—neither Founding Fathers, nor Supreme Court justices, nor constitutional theorists—and could it be interpreted considering diverse narratives about what should be considered right or wrong, constitutional, or unconstitutional?

Could it be that what we know today as “Constitutional Law” cannot represent an obstacle to the democratization of law? Instead of attempting to construct a single constitutional narrative, a chain novel unified from common principles, as Dworkin says, it might be more appropriate to organize constitutional law as a set of “Constitutional Gospels”, so to speak, parallel narratives that interpret the same text from different human experiences and through different jurisdictions, when applicable. The same text, it should be said, will have different meanings, importance, and hierarchy in each of these narratives.

This does not mean denying, on principle, a possible constitutional unit, just as we can think of an organized interpretation of the various gospels. Nevertheless, I consider it important to rethink how to construct such a unit, which must accept inconsistencies and not fight them in the name of integrity conceived from a single table of values. Nevertheless, it is strenuous to imagine a minimally democratic hermeneutic unit in a country whose writings of the greatest black jurist of the 19th century, Luiz Gama [35], remain mostly inaccessible and ignored and scattered in newspapers of the time.

A jurist who, at the request of the students, was turned down by the São Paulo Law School, now the USP Law School. Even so, studying on his own, he became a “rábula”, someone that, at the time was allowed to pursue a career as a lawyer even without a diploma. Luiz Gama played a prominent role in the abolition of slavery in Brazil, an information that do not appear in our official constitutional narrative, even regarding the racial issue.

We are now in a historical moment in which apparently universal constitutional narrative, constructed with broad popular participation, is still being criticized and

transformed by the desires and interests of Brazilian society. A process that only began with the promulgation of the 1988 Constitution and continues apace, further expanding the participatory process at the origin of our constitutional text.

We must celebrate and encourage the proliferation of narratives to propose a new unit ahead. A unit that, to be effectively democratic, cannot be homogeneous to the point of closing the doors to new agents and social groups that emerge and feel excluded from it. Nor for social groups that prefer to remain relatively isolated, practicing what Robert Cover calls “insular constitutionalism”.

To deal with the conflicts between the various constitutional narratives internal or external to a given normative legal order, it will be necessary to develop interpretative canons that indicate the possibility or not of certain norms living side by side. In certain cases, it will be impossible to prevent the jurisdiction from acting to eliminate a norm incompatible with its most fundamental principles.

An example may help clarify what I am proposing. Rather than interpreting the conflicts between Jehovah’s Witnesses and certain Brazilian legal norms as a conflict between fundamental rights, for instance, religious freedom versus protection of life, it seems more appropriate to argue that it is a conflict between legal normative orders that need to negotiate the terms of an arrangement so that both can function in parallel.

Hence, Brazilian law recognizes this religious group’s autonomy, admitting that its rules can be classified as legal norms. However, this arrangement cannot include the right to refuse blood transfusions to incapacitated minors. Capable people, in general, on their part, have the right to refuse to receive blood transfusions [36]. Arrangements such as these can be constructed to guarantee many social groups a non-subordinate relationship with the Constitution. A concrete relationship in which the constitutional text is perceived as a manageable instrument, to use the concepts of Ivan Illich, an instrument that expresses their way of thinking and living and never as an exclusively manipulable technology destined to completely dissolve such human experience into abstract categories.

Illich considers that a situation of “institutional equilibrium” combines manipulative and manageable technologies to promote what he calls “conviviality”, that is, in short, the coexistence in freedom of multiple ways of living. In fact, the mere enunciation of this goal does not prescind from a general and abstract language, and it requires coercive means capable of constraining or punishing individuals and groups for acting under it. In the example we are discussing, the condition of the possibility of multinormativity seems to be an arrangement in which some norms of Jehovah’s Witnesses yield in the face of the Brazilian Constitution. As Illich puts it:

What matters is that a society must promote a balance between, on the one hand, the tools that produce a demand for which they were built to satisfy and, on the other hand, the tools that stimulate personal achievement. The former materializes abstract programs concerning men in general; the latter favor everyone’s aptitude to pursue his ends in his own, inimitable way [37].

Note that the idea of “institutional balance” is promising to bring closer the concept of “conviviality” and the Philosophy of Law amenable to constitutional democracy. It is enough to think that, in such a democracy, both the legislator and the judge should seek to reconcile the needs of society at large—seen as marked by multinormativity—with the interests and desires of all individuals to propose solutions to the tension between “legal text and social reality” and between “the rule of law and specific case”.

Ivan Illich’s thought has been revisited nowadays by various theoretical traditions, even though sometimes his name is not expressly mentioned [38]. One of the possible explanations for this resumption—important for the problems addressed in the field of law and politics—is the author’s view of the problem of social coexistence between different individuals and groups. Unlike republican views of politics and democracy, Illich does not address this question seeking to discover or construct a common set of values for political communities. He does not consider conflicts as a pathology that deserves to be eliminated.

On the contrary, his starting and ending points are social conflicts, like the agonistic theories of democracy [39]. Such a view makes room for a constant reassessment of the capacity of legal categories and institutional designs to temporarily reconcile the desires and interests of society, amid conflicts over the technologies adopted by society to solve conflicts. And since conflicts renew, formal institutions must be renewed; social technologies must be renewed. Law remains in a process of constant democratization.

Illich does not only postulate an abstract ideal of conviviality, but he also shows the need to reflect on the institutional arrangements necessary for this ideal to be effective adequately. His thinking shows that a society can nominally value conviviality without having developed technologies capable of realizing this ideal. According to him, the debate on values and the debate on the institutionalization of values, that is, on the use of legal categories and institutional designs to give these values a practical application, are linked, but are independent.

Illich conceptualizes conviviality as follows:

I chose the term “conviviality” to designate the opposite of industrial productivity. I intend the term to mean autonomous and creative relationships between people, and the relationship of people to their environment; And this contrasts with people’s conditioned response to the demands placed on them by others and by a man-made environment. I consider conviviality as an individual freedom realized in personal interdependence and, as such, an intrinsic ethical value. I believe that in any society, as conviviality is reduced below a certain level, no degree of industrial productivity can effectively satisfy the needs it creates among the members of society [37] (p. 20).

The term “conviviality” for him designates a social experience that is opposed to what the author calls “industrial productivity”. The former term refers to creative and autonomous relationships between people in a diverse social environment.

“Conviviality” does not propose a state of harmony in which all desires and interests would find a state of equilibrium.

On the contrary, it must work as a criterion to construct tools to deal with social conflicts. Tools must legitimize and give room to non-instrumental relationships. For Illich, interactions must not be totally determined by the place one occupies regarding the institutions that regulate work, school, health, nature, all subjects addressed by Illich’s work.

Illich saw in the development of information and communication technologies the possibility of creating technologies that could reverse the disciplinary and standardizing tendencies of the modern age. In these networks, information would be able to escape the laws of the market and circulate freely, stimulating the building of creative relationships between people. The main limit to this potential for him resides in the current economic structure: market economy in general, technoscience and the commodification of knowledge resist the free dissemination of information.

As already said above, it is worth remembering the distinction made by Illich between “manipulative tools” and “manageable tools”. Illich uses the term “tool” to refer to utensils, complex machines, and institutions that are at the service of people-defined goals and help produce material things or immaterial entities such as ideas, information, or, in the case of law, judicial decisions.

Illich is neither a technological determinist nor a naïve. He believes technologies can be convivial depending on political decisions and, at the same time, he does not admit society could organize itself without technologies. He is not anti-institutions; he believes they can be democratic. “Conviviality” must normatively guide the creation of technologies capable of promoting a harmonious exchange between people and groups, including welcoming new desires and demands born of social conflicts.

For their part, “manageable tools” foster democratic coexistence by allowing their users to express their intentions through their action. On the other hand, “manipulative tools” put its subject in the position of a mere object, suppressing its power to make value judgments. The latter have their ends predetermined by others or by technical needs and therefore invert the relationship between people and tools: people are the ones who put themselves at their service. But that does not mean they should disappear. A democratic coexistence requires both manageable and manipulative tools.

This distinction invites us to think of law as a technology composed of 1) manipulative tools designed and allocated autonomously by citizens, with the purpose of achieving certain social objectives without the active participation of their recipients; 2) manageable tools designed to allow people to create for themselves arrangements capable of maintaining the cohesion of plural, diverse, and dynamic societies.

As Illich states in his critique of industrial society, the main obstacle to this utopian vision of society is that we have moved out of the age of the tool and into

the age of systems, an age in which one no longer thinks in terms of causality. The manipulative aspect of technologies tends to prevail in the age of systems. For example, doctors no longer listen to what their patients feel, they no longer take an anamnesis of symptoms. They become professionals trained in the functioning of certain subsystems of a human body, conceived abstractly. The patient is now a “life” that emerges from his genes into an ecology of lives that must be manipulated under the imperative of efficiency [40]. In effect, people begin to objectify themselves: they consider themselves “producers” of their bodies and as part of the cybernetic text of society.

Ilich notes that transformations in language attest to such changes. People cease to “have needs” and are defined as “needy”, they no longer work, they “have a job”, they no longer learn, they “have schooling”: the concrete and autonomous subject ceases to be the center of communication. Conflicts are now seen as disputes over scarce resources and not as a problem of fair distribution among individuals. Language itself works only as a means of communication and not as a tool of expression.

Similarly, we can think of a manipulative law, eminently instrumental, systemic, in which there are solutions predetermined in rigid normative texts that must be applied mechanically, without any adaptation to the characteristics of the concrete case. A law that puts legal certainty even above the desire to obtain an appropriate solution for each specific case. In a law such as that, jurists would always be able to find the appropriate legal text to solve the concrete case, limiting themselves to subsuming the concrete cases to the abstract norm.

On the other hand, one may think of a democratic law as a technology through which interested persons may take part in defining the meaning of normative texts through argumentative procedures. In this case, based on standards of behavior contained in the legislation, society can deliberate the best solutions for its problems, and, in the context of the judicial process, the parties can dispute the meaning of the texts in view of their desires and interests.

4. Final Remarks

In his book (*A Realistic Theory of Law*), Brian Z. Tamanaha [41] proposes that we recover a third way of thinking about law that he calls the *social theory of law* as an alternative to jusnaturalism and legal positivism. For this way of thinking, which originates from the historical school of law, law must be considered a historical phenomenon. It can and must be the object of conceptual analysis, albeit its definition and rationality should change according to the context and historical moment.

In an earlier work, the brilliant *Beyond the Formalist-Realist Divide* [42], Tamanaha demonstrated that the current debate regarding realism and formalism in the US is mistaken and must be overcome. The classical American authors, both realists and formalists, practiced conceptual analysis and, at the same time, were sensitive to history. This observation leads Tamanaha to propose that these two

schools should be transformed into moments of the same legal analysis model, whose task is to construct and reconstruct its concepts according to the context and history.

This way of looking at law, as far as I can understand, bears great resemblance to the “new legal realism” school proposed by authors connected to the Law & Society field, such as Victoria Nourse and Gregory Shaffer:

This new legal realism emphasizes the importance of institutions not as essences but as mediating influences and seeks to explain variation in the manifestations of law by studying and theorizing such mediating forces. This new legal realism emphasizes the importance of empirical engagement, including the emergent bottom-up analyses we have highlighted, but does not accept that social science is always impartial. All social science is biased and cannot help but be so, that is the dilemma of social science. However, a new realism embraces empirical study because (again) there is no choice if we are to make more informed decisions [43].

In both cases, it is about situating the legal experience and working on the concepts according to this experience without universalizing the analysis beyond the limits of the material analyzed. Such a posture does not nullify the pretension of building a theory of law of universal reach, a theory that intends to build concepts valid for the entire world. Nonetheless, it requires that projects of this nature be accountable for their sociological basis, that is, they be presented as situated and without leaving their explanatory scope between the lines.

As I have shown throughout this text, a social analysis of law involved with democracy, besides situating its conceptual analysis, will also be concerned with the exercise of institutional imagination. After all, it is the role of democratic normativity to recognize and deal with the most varied social demands. In this sense, contrary to the tradition of Brazilian legal thought, which to this day is greatly influenced by the European civil law tradition and, as far as I can understand, contrary to the analytical tradition, which is increasingly influential in Brazil, legal reflection must also adopt the perspective of the “to come to be”, to use Robert Cover’s expression, that is, it may also propose to invent concepts.

One of the great challenges of Brazilian legal thought is to leave aside its traditionally past-oriented gaze, the classic dogmatic procedure of dealing with new conflicts by reinterpreting old categories, taken as unquestionable dogmas, to adopt a creative, future-oriented perspective [44]. In my formulation, such a perspective should not only be concerned with the goals that society intends to achieve through law but also its democratic character, which requires the inclusion of the experience of all forms of life present and yet to emerge, which must be formalized in new legal categories and institutional arrangements.

In the name of democracy, it is a matter of avoiding, even at the level of the most abstract conceptual analysis, an *autarchic formalism* that naturalizes legal categories and reasoning, making them immune to social conflicts. In this sense, the central task of a democratic state of law is to ensure that all people are considered equal before the law, which requires a constant transformation of institutions. As Luís Robert Warat says in a late text, “Why not accept that dogmatics can also inquire,

discover, create?” [45]. Why not research and teach law as an eminently creative task, making the conceptual work continuously sensitive to each situation and specific case?

As already stated in this text, this objective does not necessarily eliminate the coercive or even violent character of law, which will not always be able to encompass all legal demands and experiences under the aegis of the same concepts and institutions. However, and herein lies the normative and philosophical core of all legal theory committed to a multinormative democracy, it does not seem reasonable to leave aside or remain morally indifferent to the objective of making law progressively less violent (*i.e.* progressively more inclusive) and therefore, in Franz L. Neumann’s sense, increasingly rational.

To resume the story of the beginning of this text, what is at stake in this discussion is the life of people like my grandmother, one of the victims of the “crimes of nationality” (homogenizing), as Euclides da Cunha says in “*Os Sertões*” (The Backlands), a novel that tells the story of the destruction of the religious community of Canudos by the efforts of centralization and homogenization of the population undertaken by the Brazilian State. Canudos had up to twenty-five thousand people, although there are other similar episodes that occurred around the same time, including the so-called “Muckers’ Revolt” that took place in the current municipality of Sapiranga (at the time, São Leopoldo), very close to the UNISINOS campus, the university where I currently work [46].

The beautiful book “*Viagem ao País do Futuro*” (Journey to the Country of the Future) written by Portuguese journalist Isabel Lucas [46] brings together a series of reports about Brazil from its writers with the indirect objective of explaining the Bolsonaro phenomenon. The work begins precisely with “*Os Sertões*” (The Backlands) by Euclides da Cunha. Brazil is an extremely violent country; Isabel Lucas reminds us; it is no surprise that it has chosen a President linked to neo-Nazi currents and autarchic regimes around the world and is sympathetic to fundamentalist religious leaders who deny science and intellectual activity in general. The first step in confronting our current situation is to face this reality head-on without relapsing into mythical narratives that present us as a diverse, happy, and tolerant country.

The part that falls to me in this task is to reflect on the role of centralized law in the production of Brazilian institutional violence. More specifically, it aims to reflect on the difficulty of imagining different institutional models due to the naturalization of a series of concepts born from the centralizing and homogenizing experience of the Brazilian national and developmentalist state. For it may be that the overcoming of what the sociologist Francisco de Oliveira provocatively called the Brazilian “platypus” [47], that is, a country in a situation of deadlock, incapable of reaching the core of world capitalism and of regressing to a pre-colonial way of living; a country that articulates modern and traditional, capitalist, and non-capitalist, rational and irrational elements, also passes through this categorical renovation.

Conflicts of Interest

The author declares no conflicts of interest.

References

- [1] Neumann, F.L. (1936) O império do direito (Translated by Melo, R.S.). Martins Fontes.
- [2] Hobbes, T. (1968) Leviathan. Pelican Books.
- [3] Cover, R. (2003) Derecho, narración y violencia: Poder constructivo y poder destructivo en la interpretación judicial. GEDISA.
- [4] Terra, R. (2004) Kant e o Direito. Zahar.
- [5] Rodriguez, J.R. (2018) Perversion of Law Six Cases. *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, **101**, 127-149.
<https://doi.org/10.5771/2193-7869-2018-2-127>
- [6] Lefebvre, G. (1789) O surgimento da Revolução Francesa. Paz e Terra, 182.
- [7] Vouelle, M. (2020) A Revolução Francesa (1789-1799). UNESP, 67.
- [8] Queiroz, M. (2023) Constitucionalismo Brasileiro e o Atlântico Negro. Lumen Juris.
- [9] Rodriguez, J.R. (2014) Como Decidem as Cortes? Para uma crítica do direito (brasileiro). Editora FGV.
- [10] Grimberg, K. (2001) Código Civil e Cidadania. Zahar.
- [11] Rodriguez, J.R. (2009) Fuga do Direito: Um estudo sobre o direito contemporâneo a partir de Franz Neumann. Saraiva.
- [12] Hacking, I. (1999) Por que a linguagem interessa à Filosofia? Cambridge University Press.
- [13] Neumann, F.L. (2014) A mudança de função da lei no direito da sociedade burguesa. *Revista Brasileira de Estudos Políticos*, **109**, 2 13-87.
<https://doi.org/10.9732/P.0034-7191.2014v109p13>
- [14] Zaffaroni, E.R. (2011) La Pachammama y el humano. Colihue-Ediciones Madres da Mayo.
- [15] Marshall, T.H. (1991) Citizenship and Social Class. Pluto Press.
- [16] de Carvalho, J.M. (2021) A Cidadania no Brasil: O longo caminho. Civilização Brasileira.
- [17] Rodriguez, J.R. (2019) Direito das Lutas. LiberArs.
- [18] Segato, R.L. (2021) La Nación y sus otros. Prometeo.
- [19] Wachowicz, M. (2004) Propriedade Intelectual do Software e Revolução da Tecnologia da Informação. Juruá.
- [20] Tamanaha, B.Z. (2021) Legal Pluralism Explained: History, Theory, Consequences. Oxford University Press. <https://doi.org/10.1093/oso/9780190861551.001.0001>
- [21] Günther, K. (2020) Normative Legal Pluralism: A Critique. In: Fabra-Zamora, J.L., Ed., *Jurisprudence in a Globalized World*, Edward Elgar, 84-99.
<https://doi.org/10.4337/9781788974424.00012>
- [22] Luxemburg, R. (2008) A centralização e o autogoverno. In: Luxemburg, R., Ed., *A questão nacional e a autonomia*, Oficina de Livros, 107-140.
- [23] Leal, V.N. (2012) Coronelismo, enxada e voto. Companhia das Letras.
- [24] Marshall, T.H. (2021) Cidadania, Classe Social, Status. UNESP.
- [25] Zhou, A. and Valencio, N. (2014) For an Overview of Brazilian Socio-Environmental Conflicts and the Permanence of a Developmentalist Economic Model That Threatens the Environment and the Survival of Traditional Communities. Formas de matar de

- morre e de resistir. Limites da resolução negociada de conflitos ambientais. Editora UFMG.
- [26] Günther, K. (2008) Legal Pluralism or Uniform Concept of Law? Globalization as a Problem of Legal Theory. *Journal of Extreme Legal Positivism*, **5**, 5-21.
- [27] Kennedy, D. (2016) *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*. Princeton University Press.
<https://doi.org/10.1515/9781400880591>
- [28] Benhabib, S. (2006) *Another Cosmopolitanism*. Oxford University Press.
<https://doi.org/10.1093/acprof:oso/9780195183221.001.0001>
- [29] Rodriguez, J.R. (2011) *Propriedade intelectual e conhecimentos tradicionais*. Secretaria de Assuntos Legislativos do Ministério da Justiça do Brasil.
- [30] da Cunha, M.C. (2017) *Cultura com aspas e outros ensaios*. UBU.
- [31] Bermann, P.S. (2018) Global Legal Pluralism as a Normative Project. *University of California Irvine Law Review*, **8**, 149-171. <https://doi.org/10.2139/ssrn.3288690>
- [32] Dworkin, R. (2014) *Império do direito*. Martins Fontes.
- [33] Silveira, E.D. and da Silveira, S.A.D. (2012) *Direito fundamental à educação indígena*. Jurua.
- [34] Ilich, I. (2018) *Sociedade sem Escolas*. Editora Vozes.
- [35] Azevedo, E. (2005) *O Orfeu de Carapinha*. Editora da UNICAMP.
- [36] Flores, M.P. and Rodriguez, J.R. (2008) Dogmática e controvérsias religiosas à luz de Robert Cover. A recusa de transfusão sanguínea por parte das Testemunhas de Jeová. *Juris Poiesis*, **21**, 52-83. <https://doi.org/10.5935/2448-0517.20180014>
- [37] Ilich, I. (1973) *La convivialité*. Éditions du Seuil, 48.
- [38] Costa, S. (2019) The Neglected Nexus between Conviviality and Inequality. *Novos Estudos—CEBRAP*, **38**, 15-32. <https://doi.org/10.46877/costa.2019.17>
- [39] Mouffe, C. (2005) *On the Political*. Routledge.
- [40] Illich, I. (1975) *Medical Nemesis: The Expropriation of Health*. Calder & Boyars.
- [41] Tamanaha, B.Z. (2017) *A Realistic Theory of Law*. Oxford University Press.
<https://doi.org/10.1017/9781316979778>
- [42] Tamanaha, B.Z. (2009) *Beyond the Formalist-Realist Divide. The Role of Politics in Judging*. Princeton University Press. <https://doi.org/10.1515/9781400831982>
- [43] Nourse, V. and Schaffer, G. (2009) Varieties of New Legal Realism. Can a New World Order Prompt a New Legal Theory? *Cornell Law Review*, **95**, 61-138.
- [44] Ferraz Jr., T. (2014) *O direito entre o futuro e o passado*. Noeses.
- [45] Warat, L.A. (1997) *Introdução geral ao direito III. O direito não estudado pela teoria jurídica moderna*. Sérgio Antônio Fabris, 140.
- [46] Amado, J. (2009) *A revolta dos “Mucker”*. Editora Unisinos.
- [47] Lucas, I. (2021) *Viagem ao País do Futuro*. Cepe Editora.