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**Law in other Contexts:  
Stand Bravely Brothers! A Report from the Law Wars**

**By Oscar Guardiola-Rivera**

***Abstract.** This essay argues against the distinction between ‘well-ordered’ and ‘not so well-ordered’ societies, and the sociological model of the subject as pacified, fearful and isolated that informs current research on legal theory and globalization. It is argued that this model, which presents us with a pacified individual, narcissistic and isolated, portrayed by sociology as alone, conflict-adverse and full of himself –in ‘harmony’- is just an illusion, a reflection of the actual rules of the game of competition, dispute and conflict. In contrast, this essay takes sides with the anthropological and philosophical tradition that conceives the subject as antagonistic and in state of lack, profoundly concerned with the other, whom she imitates and whose standpoint she must be able to share if she is to make sense of the world. Furthermore, it is argued that transitivity or imitation –mimesis- lies at the very origin of conflict and dispute; lack and antagonism remain thus at the core of society, in spite of the surface appearance of harmony that characterises post-modern societies. Because of this, any general theory of law and society that wishes to be relevant at the time of globalisation must make the experience of antagonism and violence, motivated by imitation and envy, and its containment, its subject of study. To do this, it must abandon the dualist conception of subjects and societies expressed in the distinction between ‘well-ordered’ (more violent) and ‘not-so-well-ordered’ (less violent) societies that has informed its investigation to this day, in order to declare in the most general terms a critique of violence from the standpoint of the victim, as of a piece with its demand for global social and political justice. On this aspect, the findings of anthropologists such as Laura Nader and José Gil –that the study of the reality of dispute and dispute resolution is badly served by the model of harmony/equality, and that the pacifying use of this model becomes an obstacle to any politics of common justice- are far closer to the truth than the intuitions of mainstream legal theory and political philosophy. In the mid and final sections, the essay focuses on Nader’s study of the effects of alternative dispute resolution mechanisms (ADR) in the law and politics of common justice.*

1. *The Law Wars: A report on the present state of legal theoretical knowledge.*

This essay arose from a sense of puzzlement at the paradoxical state of socio-legal and legal theoretical knowledge at the time of globalization. On the one hand, it is widely held that processes of globalization have resulted in the hegemony of a certain type of dispute resolution mechanisms and institutions commonly associated with market liberalism and democracy. In mainstream legal theory and political philosophy, societies that feature a commitment to this sort of mechanisms are termed “well-ordered societies”. It is widely understood from this perspective that the point of legal and political theory or philosophy is the justification of the procedures, institutions and dispute-resolution mechanisms of such societies. This understanding is shared by a group of writers that might differ in other respects, from H. L. A. Hart and John Rawls to Ronald Dworkin and Brian Z. Tamanaha.

On the other hand, there is widespread recognition that ‘the beginning of the new millennium has witnessed a groundswell of proposals for the transformation or

replacement of the national and international institutions underpinning hegemonic, neo-liberal globalization'.<sup>1</sup> Put forth by a considerable number of anti-systemic and anti-hegemonic movements and social organizations, articulated as trans-national and trans-modern networks, these proposals challenge the mainstream view that there is no operative alternative to the dispute resolution mechanisms and institutions of market and political liberalism.

Their persistence and global spread since the beginning of the millennium obliges us to reconsider the point of legal theory as understood by the mainstream. Such is the point of this essay: the aim of this piece is to engage with the results of certain ethnographic projects concerning dispute resolution, the origins of modern legal-political institutions and the responses of anti-systemic and anti-hegemonic movements to the present order, with the purpose of widening the present focus of legal theory and socio-legal knowledge. At a more general level, this essay will discuss the explanatory power of the concept of “transition” or mimesis –developed first in ethnography, systems theory and cognitive science- as a tool to better our understanding of demands for social and political justice put forward by disputant bodies and anti-hegemonic movements. The centrality of their antagonism for a widened focus in legal theory means that this enterprise will take the shape of a critique of (state and inter-state) violence, already outlined in the writings of people like Walter Benjamin and Theodor W. Adorno. What the latter means and entails will be the subject of the concluding sections of this paper.

The argument of this paper is that contextual and socio-legal theory today must take into account the demand for social justice at a global scale advanced by social and political actors that, more often than not, come from not so ‘well-ordered’ societies, and which is made concrete in transformed procedures and institutions, rather than the more particular and parochial interest in the justification of the procedures and institutions of so-called ‘well-ordered’ or liberal societies.

This demand, and the challenge that it entails to the hegemony of liberal procedures and dispute resolution mechanisms, remains unnoticed by mainstream legal theory and political philosophy because of its justificatory focus on the procedures of ‘well-ordered societies’. As suggested before, the proposal here is that

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<sup>1</sup> De Sousa Santos, B. & Rodríguez-Garavito, C. ‘Law, Politics and the Subaltern in Counter-hegemonic Globalization’, in their co-edited *Law and Globalization From Below* (Cambridge University Press, 2005) 1.

this focus should be widened. Moreover, since there are reasons to believe that the very dichotomy between ‘well-ordered’ and ‘not so well-ordered’ societies may turn out to be misleading, both in the analytical and the descriptive sense, it is proposed here that we use socio-legal knowledge concerning not so well-ordered or “traditional” societies, mainly ethnography and the theories of self-organization, in order to better our understanding about the origins and fate of dispute resolution mechanisms and institutions in late modern societies.

Such a sense of unease with the dichotomy between well-ordered and not so well-ordered societies stems from the fact that it leaves out any possible comparison condition that would provide sense to the justificatory enterprise. Put in simple terms, mainstream legal theory and political philosophy seems to be engaged in dubious enterprise of justifying liberal institutions (e.g. democracy, rule of law, human rights) to liberal societies already convinced about their worth, a form of self-authorization that shows no regard for the analytical and empirical importance of the experience of alterity in global society. As a result of this situation mainstream legal theory and political philosophy appears unscientific, and is fast becoming irrelevant. This becomes a more serious issue if and when we take into account the widely recognized fact that, as a result of globalization, the experience of alterity and comparison (which entails also the psychological and inter-individual experiences of envy and mimetic violence) takes place within societies frequently organised under the ‘one legal system fits all’ model. This is to say that the conflict-ridden co-existence of well-ordered and traditional societies takes place within supposedly homogeneous cultural, legal and political systems; moreover, this is an intra-national as much as a trans-national experience. Therefore, it is a mistake to assume that the distinction works as a model of planetary conflicts of globalization setting ‘modern’ societies against ‘traditional’ ones (as in the idea of a clash of civilizations, or the modern west v. the rest) or else, as a recourse to multitude (the idea that there are multiple, ordered and disordered, modernities). In both cases, multiplication functions as a form of disavowal of the antagonism that inheres in the notion of modernity as such, as embedded in the liberal market and political system.

It is also a mistake to assume that the ‘one legal system fits all’ model –the ‘western’ or ‘modern’ model of the rule of law- can act as the cause of social harmony against the divisiveness of tradition. Here again, the assumption operates as the disavowal of the real antagonism at the heart of modernity: not modernity v. tradition,

but the antagonism that emerges from the relationship between modernity and the experience of divided life under market capitalism. In any case, power and law are not the cause of social order but merely an expression of it: laws are the expression of the relationships between men; they do not *constitute* social relations but *declare* that such relationships exist. Thus, they are the declaration of an event or a fact, as Benjamin Constant once observed. Actually, it would be more correct to say that the model of equality under law expresses an enhanced experience of division and differentiation.

Under conditions of equality each citizen perceives the other as fundamentally similar in every respect, neither as a superior nor as an inferior, and by the same principle his/her association with the other does not follow the rules of custom or necessity. As a consequence, democratic societies are defined by the reflexive and pacifying affect that disposes each citizen towards the isolation of the mass of his equals and, because of this, 'to withdraw at home with his friends and family'.<sup>2</sup> This is the social affect that anthropologists such as Laura Nader have termed 'harmony', or more precisely 'harmony ideology', in a critical reference to the effects of this real structure upon public life and the management of common affairs.

However, this apparent indifference towards the other masks a true obsession with the fate of our neighbours. Each citizen perceives the other as his/her equal and simultaneously tracks him or her as a rival. This is the logic of competition and envy that modern philosophers have described always in terms of a dichotomy without resolving it: *amour de soi/amour propre* in J. J. Rousseau, or master/slave in the case of G. W. F. Hegel. Mainstream legal theory and political philosophy merely repeats this description in the dichotomy between well-ordered and not so well-ordered societies.

In fact, the problem analysed by these dichotomies is that of a duality that is internal to the modern conception of the subject, which coincides with the duality in the legal conception of equality: on the one hand, subjects are posited as independent and incommensurable. By definition, this understanding of equality (as 'tolerance') corresponds perfectly to the vision of the narcissistic subject isolated from the mass of his others so dear to certain forms of contemporary sociology. However, to emphasize this single term of the duality would result in a rather poor understanding

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<sup>2</sup> De Tocqueville, A. *De la Démocratie en Amérique*, vol. II, 2, II.

of the differentiating process of modern societies, reducing the individual subject to an isolated expression of itself, liberated from any competition with others and any collective criteria of judgment. Thus, on the other hand, subjects are posited as competing against one another under criteria of meritocracy and conditions of equality of opportunities (equality as ‘competititon’, mainly in accordance to the rules of the market, but also in sports, politics and so on), that which presupposes some common criteria to judge and compare the results. This is the second aspect of our mainstream conceptions of equality, inseparable from the first, for under this aspect comparison with the other becomes the very measure and support of the egalitarian aspiration.

The tradition that is put to work in this essay has a very different conception of the subject, monist rather than dualist: the antagonistic subject, in state of lack, moved by desire for the other. This subject has been called with a variety of names in this tradition. It has been called ‘the poor’ (Adam Smith) or ‘the subaltern’ (Boa De Sousa Santos, Sylvia Rivera Cusicanqui); ‘the victim’, the ‘slum-collective’ (Enrique Dussel, Slavoj Zizek) or ‘the scapegoat’ (René Girard); ‘the oppressed’ as the subject of divine violence (Walter Benjamin) opposed to ‘the sovereign’ exceptional decider (in the work of German legal theorist Carl Schmitt). Anthropologists associated with this tradition speak with more or less fortune of ‘the powerful body’ (José Gil) or, in the more concrete context of US civil litigation and the NAFTA agreement, the ‘disputant body’ or ‘the user’ (Laura Nader). Such a variety of names for the subject in this tradition will be used indifferently in the remainder of the essay.

The point of this tradition is not just an inverse platitude to that of contemporary sociology, but rather, that the pacified individual, narcissistic and isolated, portrayed by sociology as alone, fearful, conflict-adverse and full of himself –that is, in ‘harmony’- is just an illusion, a reflection of the actual rules of the game of competition, dispute and conflict. If, on the contrary, the subject is posited, following this tradition, as antagonistic and in state of lack, the result is an active, rebellious, antagonistic and engaged subject. This is so because he/she is profoundly concerned with the other, whom she imitates and whose standpoint she must be able to share if she is to make sense of the world. David Hume and Adam Smith identified this faculty early on and called it “sympathy”; contemporary cognitive scientists such as Humberto Maturana and Francisco Varela speak of “transition”, striking a chord that

resonates with the anthropologists who study forms of mimesis among societies confronted by the challenges of modernity.

Transitivity or imitation –mimesis- lies at the very origin of conflict and dispute; lack and antagonism remain at the core of society beneath the surface appearance of harmony, even more so in post-modern societies. Because of this, any general theory of law and society that wishes to be relevant at the time of globalization must make the intra- and trans-national experience of antagonism and violence, motivated by imitation and envy, and its containment, its object-matter of study.

To do this, it must abandon the dualist conception of subjects and societies expressed in the distinction between ‘well-ordered’ and ‘not-so-well-ordered’ societies that has informed its investigation to this day. Not in order to justify the sovereign’s monopoly of violence as the cause of social harmony, but rather, in order to declare in the most general terms a critique of violence from the standpoint of the victim, as of a piece with its demand for global social justice.

On this aspect, the findings of anthropologists such as Laura Nader and José Gil –that the study of the reality of dispute and dispute resolution is badly served by the model of harmony/equality, and that the pacifying use of this model becomes an obstacle to any politics of common justice- are far closer to the truth than the intuitions of mainstream legal theory and political philosophy. In the following sections, let us shall focus on Nader’s study of the effects of alternative dispute resolution mechanisms (ADR) in the law and politics of common justice. Her case study concerns the actual effects of the dispute mechanisms of the free-trade agreement known as NAFTA in the politics of North-American civil litigation. I emphasize the response to these effects by an anti-systemic movement, the EZLN of southern Mexico, and enquire if and how the movement’s demands can be relevant to socio-legal and legal theoretical knowledge. Given the global spread of such mechanisms and responses, travelling on the back of the World Bank’s jurisprudence and the theoretical-political practice of the variety of agents gathered together under the umbrella of the World Social Forum, her findings and questions can be generalized. However, as observed already, the focus of this paper will be on the status (within legal theory & political philosophy) of the political demands of common justice made by social subjects in the context of their refusal to enter the exceptional space of conflict management proposed under treaties such as NAFTA.

In turn, this will lead us towards the mid-part of the essay to a more general focus on the question of transitivity and violence, and from there on to the possibility that socio-legal and theoretical knowledge may benefit from taking the form of a generalized critique of violence; such is the end point of this essay. Its starting point is that the legal model of equality enhances the experiences of alterity, envy and conflict. The study of conflict, dispute and dispute resolution must take this fact into account if it wishes to be relevant once again.

*2. Stand Bravely Brothers! Laura & the Anthropologists on the Pure Politics of the Law.*

Laura Nader's *The Life of the Law* is the result of a series of ethnographic projects focusing on the current fashion of alternative and exceptional dispute resolution mechanisms (ADR) in the global legal and political arena. As she reminds us, this fashion was initiated by the introduction of such mechanisms in Chapters 4 and 11 of the NAFTA treaty signed by Mexico, Canada and the United States in the context of trade and security integration in the Americas. Nowadays, such mechanisms have been exported to other jurisdictions such as the UK, where large City-based legal firms involved in trade-related dispute resolution have started to use them in the handling of their trans-Atlantic cases, and London-based law lecturers teach them as the last word in dispute resolution, the law of natural resources, and potentially –if included in treaties concerning integration for the purposes of security, or fused with the notion of a generalised duty to protect in international law- the treatment of armed conflict and terrorism.

Such mechanisms include the use of off-shore venues and exceptional 'particularist' measures required by the urgency of the times and the peculiar characteristics of certain situations, including the circumventing of regulatory powers of parliaments by emergency regulation and the creation of apparently law-free, but in fact law-saturated zones, or "states of exception" where the law of the states involved does not apply or is replaced by ad hoc regulation. In the particular case of Chapters 4 and 11 of the NAFTA treaty, for instance, dedicated to the protection of foreign investment and dispute resolution, the signatories are committed to concur at an 'off-shore' arbitration tribunal in order to resolve ensuing disputes under principles of law which may effectively suspend the application of their sovereign legalities and even some accepted rules of international law.



As it happens, the majority of the disputes resolved through these mechanisms, involving multinational investors and “sovereign” (well-ordered and not so well-ordered) states, concern the regulatory powers of the state. Due to a mixture of fairly established principles of international law and some radically new ideas on the definition of property, there is the possibility that when the exercise of such regulatory powers affects in any way the value of its investment, the multinational investor can claim that a ‘regulatory’ taking has occurred and ask for monetary compensation by the state.

As a result of the treaty’s obligations, states find themselves facing investors in ‘equal’ conditions, that which may result, and has resulted, in enhanced antagonism, the state having to pay a foreign investor a considerable amount of taxpayers’ money for the exercise of its regulatory powers. The point is that NAFTA arbitrators, to return to Nader’s case study, unable to overturn domestic legislation, can award huge damages that may be nearly as crippling, ‘chilling governments from acting once they realize they will be “paying to regulate”’.<sup>3</sup>

That is not all. Investor-to-state dispute resolution also provides a way for foreign litigants to seek government compensation for damages ordered by domestic courts in ‘civil wrongs’ cases; if successful, the result would do away with the potency of the civil plaintiff acting under the modern law of torts in these cases.<sup>4</sup> Furthermore, conflicts that are by definition public, insofar as they involve what will be later called the ‘unpayable debt’ that the state owes to individuals, end up being decided by private, closed-doors tribunals. The potential political consequences are not difficult to imagine.

Take for instance the case of Mexican involvement in NAFTA: when President Carlos Salinas de Gortari announced that his country had finally joined the ‘First World’, an assertion explained by Mexico’s signature of NAFTA together with the US and Canada, the so called *Ejército Zapatista de Liberación Nacional* (EZLN) occupied the south of the country and declared that the whole of the Mexican society was actually reflected in the mirror-image of its outcasts and victims, who refused to enter into the space inaugurated by the treaty.

It would be a misunderstanding to consider this event from the point of view of mere failure of democratic procedure or representation. Rather than representation,

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<sup>3</sup> Ibid.

<sup>4</sup> The reference is to the Loewen case.

the logic that is operating here is one of exception, subtraction or substitution. The opening words of the EZLN First Declaration were ‘we are the product of 500 years of struggle’. They used a politically charged language in order to speak to the question of the rights of women, to ‘the just struggle of rural Mexico for land and freedom’, to the Laws of Rights and Obligations of Peoples in Struggle, and went beyond the language of law & human rights in their explicit refusal to become the sacrificial victims of the newly proposed global governance arrangement. In effect, they said, like Melville’s Bartleby, ‘I rather not’, and turned that act of situated refusal into a sign of the general condition of the societies involved in NAFTA. Whether Canadian, Mexican, or American, the ‘losers’ in this new game called free-trade would have no part to play. The political intervention of the Zapatistas attempted to turn their ‘residual’ status into the basis of another order, which was not only possible but actually necessary if these people were to subsist or exist at all.

As an analyst, one must question this use of legal and political discourse. Where do these ‘Laws & Rights’ come from? What do the Zapatistas mean when they speak of ‘just struggle’, ‘obligations’, ‘freedom’ and, crucially, ‘peoples in struggle’? Why do they speak in global terms, addressing the peoples of the world and the outcasts of the nations of the Earth, rather than just their fellow Mexicans? Can their opposition to the new international law of trade and security mean anything in terms of radical political subjectivity at a time when radical politics is itself in question? That sort of investigation would have to reject outright condemnation or justification, but also a form of re-description of the legal and political phenomena that would cease to make these subjects and queries problematic to us. Research does not seek to domesticate its problems, glorify them or dismiss them. It aims at achieving a superior understanding. To achieve such a superior perspective, the researcher would have to meet the Zapatistas in the space that they have posited themselves.<sup>5</sup>

This is not the space of the political or the legal as understood by mainstream legal and political theory (conceived as either philosophy or social science). For

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<sup>5</sup> I have already mentioned Laura Nader’s work in anthropology as a source of inspiration. The present work is inspired by and located at the interface between law, theory and anthropology. For other examples of the kind of research that I have in mind see De Sousa Santos, B. & Rodriguez, C. *Law and Globalization From Below: Towards a Cosmopolitan Legality*. Cambridge University Press: 2005; Rajagopal, Balakrishnan. ‘International Law and Social Movements: Challenges of Theorizing Resistance’, in *41 Columbia Journal of Transnational Law*, 2003; also his *International Law From Below*, Cambridge University Press, 2003; and importantly, Escobar, Arturo. ‘Other Worlds Are (Already) Possible: Self-organisation, Complexity and Post-capitalist Cultures’ in *World Social Forum: Challenging Empires*, The Viveka Foundation, 2004.

instance, if the point of political philosophy is ‘to justify the monopoly of violence in the hands of the state’, as Ronald Dworkin claims, by assuming such a perspective the investigator has already precluded any understanding of the phenomena under investigation. Thus, in respect to its discipline, field or perspective, such phenomena would be unthinkable, undeserving of attention, in a word, exceptional.

But the problem with exceptions is that they are resilient. No matter how strongly the analyst believes its object to be a non-object, it returns forcefully (usually in the form of a categorical refusal) to remind him or her of its existence, or rather, to put an end to its inexistence. That is not all. The issue at stake in these sorts of phenomena is not recognition within the community, but rather, a break with any form of communitarianism, the shattering of the community (self and other) as it is (legally) organized in the present situation.

The question is not ‘is this a normal usage of the term ‘law’?’, but rather, ‘just what falls under the term ‘law’? Postulated in this manner, the question becomes one of understanding what is lost in the enquiries about the normal usage of a term, that is, how a term is re-appropriated from below. If normal research results in the average being taken for general knowledge, then we must aim for a kind of research that accounts for those events in which the exceptional, in its particular exteriority, takes on the form of universal knowledge. The emergence of the EZLN is precisely that kind of event; it is one of the clearest examples of re-entry of lacking, antagonist bodies in the social, legal and political system(s) of modernity unleashing the beyond of modernity. However, this movement beyond particularity and generality, this *eskhaton*, must not be understood as an overcoming in the sense of utopian openness bringing forth the accomplishment of a forever-delayed promise. This would be to repeat the form of indefinite deferral and revolution that is the very mechanism at work in capital and empire. Rather, this movement is nothing more than a ‘small adjustment’: the unexpected and uninvited **transition**, the intrusion (which, paradoxically, has the form of a refusal to enter, á la Kafka, á la Bartleby) of the so-called Third World or ‘Global South’ (labour, anti-globalisation, the many-headed Hydra) into the First World or the ‘Global North’.<sup>6</sup>

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<sup>6</sup> The point here is that the object cause of desire in the foundational fantasy of the West is the ‘Third World’, particularly the New World. Thus, John Locke writes in the Second treatise on Government: ‘In the beginning all the world was America’.

Before introducing Laura Nader's critique of the dispute mechanisms referred to in the opening of this essay, it is necessary to clarify the researcher's standpoint and the conceptual apparatus so abruptly introduced in the previous paragraph. As suggested above, the standpoint of the writer of this paper is less than (social) scientific, but also, more than simply 'theoretical'. One could say that it is somewhat historical and therapeutic, which is to say that it is analytical in inspiration, anthropological in substance, and critical in aspiration. It is an example of transpositional work. Let us explain.

The concept of 'transition' belongs to the application of the model of the cured body of the possessed, of therapeutic practices and rituals, to the study of the emergence of violence, acquisition and the state in so-called traditional societies.<sup>7</sup> In the sense in which it is used here, 'therapeutic' refers to a liminal space created in order to allow the suspension of the desire to wholeness, the spread of all-out mimetic violence, and it is to be opposed to the set of (medicalised) techniques that in the form of 'treatment' permit the management of human conflict via the surveillance, securitization and harmonisation of the potentially disputant body. This meaning pervades the understanding of dispute resolution mechanisms among tribal or traditional societies set out throughout this paper; what will be called hereafter 'tribal justice'.

The latter ritualises the agonism of the egalitarian circuit of social exchange and debt, and by doing so allows each singular individual the production and social expression of its potency; put otherwise, it recognises the individual's sole right to use violence but makes it circulate in a peaceful mode.<sup>8</sup> This is a thesis whose implausibility seems so obvious to us 'moderns' that we do not realise it is a standpoint whose possibility is without doubt, and hence we do not consider it. One simply has to give up the standpoint of the state's legal centrality to see this: rather than pacification through harmony and integrity, which imply the pacification and integration of radical otherness, the therapeutic model referred to here teaches us that all the features we consider essential in ourselves and for others, stem from the

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<sup>7</sup> José Gil. *Metamorphoses of the Body* (Minneapolis, University of Minnesota Press, 1998). Gil observes that talk of "tribal societies" could 'mean that it is as much about us as it is about exotic peoples' (p. ix). The concept also echoes Varela's use of the term, see n 4 below.

<sup>8</sup> For an instance of this, see the analysis of a protojudicial process among the Eskimos in n 2 above, 273-278. I suggest we read Nader's "plaintiff" as a later-day variation on the model of the powerful disputant body. In this respect, her argument against the pacifying use of ADR would be better understood as a defence of the social expression of potency.

unrealisable desire to consider whole and substantial that which is virtual and fundamentally incomplete.<sup>9</sup>

Harmony and the unrealisable desire to be whole (to get for myself the very thing that my rival desires) will be conceived here as intricately related, and they will be seen to provide the context for the current vogue of so-called alternative and exceptional dispute resolution mechanisms (ADR) in the local and global arena. Laura Nader's stance can be better understood from this perspective. Moreover, this standpoint may allow us to provide an answer to the question concerning the connection between local histories and global designs through/in the legal and political system. This question seems particularly relevant in respect to ADR, given the striking parallelism present at the local and transnational levels of its global widespread.<sup>10</sup>

The basis for the study of the emergence of the state in the sense previously explained is to be found in a diversity of ethnographic sources: from Kuper's descriptions of the Swazi *Incwalla*<sup>11</sup> and Gil's account of the role of *Vendetta* in Corsican oral tradition,<sup>12</sup> to Comaroff & Roberts's observations on dispute settlement among the Tswana.<sup>13</sup> These sources are crucial in order to understand the resistance of 'justice' to complete systemic absorption (its 'anti-political' character), at the very same time that it provides a pivot for the emergence of political systemic closure by imposing itself and controlling the social source of conflict in authoritative manner (its 'proto-political' character).

Transition, in the sense understood here, is associated with 'trance' and the metamorphoses of the singular body that take place in it (the becoming-animal, the becoming-object and the becoming-king's body of the body), but more importantly, with 'exfoliation'. This is 'the diversification of the space where the body molts in

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<sup>9</sup> See on this Francisco J. Varela, *La Habilidad Etica* (Barcelona, Debate, 2003)110-113. I have deliberately paraphrased Walter Benjamin at the beginning of the paragraph. See n 26 below, 232.

<sup>10</sup> Although I will not elaborate the point here, it interests me the degree to which the phenomenon of ADR seems to challenge Boaventura de Sousa Santos' distinction between "localised globalisms" and "globalised localisms" even at the analytical level. For the distinction see Boaventura de Sousa Santos, *Towards a New Legal Common Sense* (London, Butterworths/Lexis Nexis, 2002).

<sup>11</sup> Hilda Kuper, *An African Aristocracy: Rank Among the Swazi* (Oxford, Oxford University Press, 1947). See also T. O. Beidelman, "Swazi Royal Ritual", *Africa* 36 (Oct 1966), n. 4.

<sup>12</sup> José Gil, "Vendetta et pouvoir dans la tradition orale corse", *Les Temps Modernes* (August-September, 1978)

<sup>13</sup> John Comaroff & Simon Roberts, "The Invocation of Norms in Dispute Settlement: The Tswana Case", in *Social Anthropology and Law* (London, Academic Press, 1977).

leaves or scales that allow the direct branching of the body with things'.<sup>14</sup> The space of the body is exfoliated or moulted so that it can enter into a relation with an object or another symbolically different space. The feeling of ubiquity described by participants in possession rituals is explained in just such a way. The same goes for historically famous experiences with political significance such as that of Saint Paul on the road to Damascus, but also for the ordinary feeling we try to express when some experience of alterity pushes us to change our pre-determined direction.<sup>15</sup>

The property of the body to exfoliate is thus at the basis of the capacity of the body to translate forces into signs and to transfer them from one set of signs to another. Since 'power' is nothing other than the capacity to translate forces into other forces and into signs, state (legal) power can be represented as a body which inscribes certain signs and forces onto itself: the political body. This body comes about, more precisely, through the fixing of some sort of floating signifier –a sign that circulates freely in the social arena- into a 'master' or dominant signifier –a sign that takes itself as the place of inscription of all signs and forces-. The king's body, for example, the sovereign, is just such a kind of signifier.

### *3. Ballad of Immoral Earnings: In State of Exception*

The concept of a 'sovereign' body is central to modern legal and socio-legal theory. Its clearest formulation can be found in the 1920's constitutional theory of the state of exception developed by Carl Schmitt. According to Schmitt 'sovereign is he who decides on the state of exception'.<sup>16</sup> 'State of exception' is the constitutional legal term for a declaration of emergency followed by the suspension and/or limitation of rights and laws. It entails a re-concentration of power in the hands of the Executive who can therefore issue decrees to the detriment of the legislative function of Parliament or Congress; such decrees are known in the UK as issued under the 'royal prerogative' (for instance the mobilisation of troops in state of war) and in the USA as 'executive orders' (for instance those related to the treatment of 'illegal

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<sup>14</sup> n 2 above, 291

<sup>15</sup> I have in mind two different but related examples. Both come from analytical jurisprudence: The first one is H. L. A. Hart's reaction after having read Wittgenstein's *Blue Book*. The second one is the experience of William Twining, Hart's student, in the Sudan. If we are to believe the biographical accounts, they were expressed in exactly the same way: 'scales fell from my eyes'. The phrase is a description of the experience of exfoliation.

<sup>16</sup> Carl Schmitt, *The Concept of the Political*. Chicago University Press: 1996.

combatants' and the myriad regulations for Camp X-Ray in Guantánamo Bay after 9/11). This constitutional figure runs counter to the 'normal' division of powers; as such, it is considered to be a transitory measure and therefore it marks the time of its being in force as a time of transition.

Interestingly, Schmitt's theory set up to demonstrate that far from being occasional, the state of exception had the potentiality of becoming the rule. In this sense, the time of transition threatens to become a permanent feature of the modern legal system. The realisation of the normality of the state of exception, or its potentiality, introduces a paradox at the very core of modern legality. The paradox dormant in the definition of sovereignty 'consists in the fact that the sovereign, having the legitimate power to suspend the law, finds himself at the same time outside and inside the juridical order',<sup>17</sup> which also means that 'the law is outside itself or: "I, the sovereign, who am outside the law, declare that there is nothing outside the law"'.<sup>18</sup>

This means that the quasi-transcendental conditions that establish any system, in this case the system of legal power grounded on the fixity of a master signifier (such as absolute sovereignty, Hart's rule of recognition, Kelsen's *Grundnorm* or Kant's moral law), always imply a beyond. This implication suggests that there is a differential between the space-time of the legal system (the time of transition) and that of its beyond, i.e., they do not correspond. Put otherwise, this means that the space-time of the law is, to abuse Shakespeare, 'out of joint'.

Walter Benjamin, entering the discussion of 1920's German legal theory ensued by Schmitt's challenge (in turn, spawned by the constitutional crises of the Weimar republic), attempted to respond to the problem of the non-correspondence of space-time by distinguishing between the state of exception (the time of transition) and what he called the 'real' state of exception (the time of redemption). His reference was to distinctions contained in the Jewish legal tradition that opposes the situation of exile to that of return. The event of return, the re-entry of the exiled body that unleashes the real, is Benjamin's answer to Schmitt's logic of exception.

This is precisely the kind of event whose logic is at work in the emergence of the EZLN, referred to previously. But this realisation is only the starting point of our enquiry. Further, we shall focus on the following implications of the logic of re-entry:

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<sup>17</sup> Giorgio Agamben, *Potentialities. Collected Essays in Philosophy*, ed. by D.Heller-Roazen (Stanford, Stanford University Press, 1999) 161.

<sup>18</sup> *ibid*

- (a) That the non-correspondence of space-time and the antinomy of the law it founds, originates in certain events for which the body would be the seat. A small adjustment in the lexicon of therapeutic rituals concerning the body of the possessed in tribal societies, for example, allows the accumulation of forces and symbols in the emerging political body. The excess accumulated by the political body, the state, represents the surplus-value of state legal power. This surplus, or standing reserve, results from the deduction of goods and forces in specific social units (other object-bodies). Among these accumulated forces is time, coded in the form of determined work for the production of more and more goods. Power becomes power to make bodies work and the time of society becomes one of indefinite deferral: the normality of transition that underlines Schmitt's speculation about the persistence of the state of exception. Countering this movement, re-entry must entail closure, the de-coding of coded time.
- (b) Re-entry or 'transition' always takes the form of a demand for justice; not this or that (ideological) conception of justice but a perennial requirement for justice, its universal declaration, as confronted with the imperatives of power. That is, the part of justice that resists ideological and/or systemic absorption. 'Where does the universal declaration of justice come from? ...The requirement for justice, hardly founded in natural or positive law, finds its origin in the emergence of people into society (their transition from particularity and generality into concrete universality). The protojudiciary processes of certain stateless societies would only be the return of mechanisms at the origin of the beginnings of social relations. This is to say that it is in the nature/society connection that justice is born'.<sup>19</sup> These mechanisms have to do with the establishment of the circulation of singular forces or potentialities in the communal circuit and the commencement of the system of exchanges (the first controlling

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<sup>19</sup> n 2 above, 280



the second). ‘Potentialities’ refer here to direct relations between a body and its environment considered from the perspective of the system itself.<sup>20</sup> ‘Exchanges’ are circuits (of goods, services, language, beings) ruled by reciprocity; such rules are indeterminate and thus, the possibility of conflict is inscribed in the indeterminate space opened up by such rules to the social expression of affects. Conflicts or disputes are translated into a break in the exchange cycle, and dispute resolution –marked by flexibility born out of indeterminacy- aiming at restoring the cycle, attempts to do so by producing juridical ‘values’ (modifications of quantities exchanged: goods) and allowing debt (the affirmation of specified embodied potentiality: persons). The relation between these two levels of exchange is inversely proportional. The two-level and proportional nature of exchange is crucial to understand that every requirement of justice is about the affirmation of embodied potentiality (what ethnographers call ‘honour’ or ‘prestige’) as much as it is about the (re)establishment of values. This observation is important for the fleshing-out of what Laura Nader calls ‘the justice motive’,<sup>21</sup> a key notion in her conception of the life of the law.

- (c) Judiciary dispute processes aim at the affirmation of the potency of bodies in the communal circuit and the continuation of the system of exchanges, and in particular at the maintenance of the agonistic context for the formation of debt (the surplus of a gift in relation to a counter-gift as a exact translation of individual honour), for the

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<sup>20</sup> That is, the environment as it impinges upon a body and is made significant by such a body. The body valorises such encounters (impingements) as having effect or not. The result is “affect”, an excess of meaning in respect to the perspective that constitutes the world of the cognitive agent. Affects (signified forces) are expressed in such terms as “ambition”, “vanity and self-regard”, “pride”, “desire of self-enhancement by display”, etc, and as such circulate. The circuit of affects, giving place to exchanges of know-how regulated by norms of reciprocity, we will call culture or, the nature/society connection. See on the cognitive aspect Francisco Varela’s *La Habilidad Etica*, n 4 above, 28, 96-97, in particular his use of “transitions” and “intentions”. Notice the use of affective terms like those cited before in Bronislaw Malinowski, *Crime and Custom in Savage Society* (London, Routledge and Kegan Paul, 1926) 58.

<sup>21</sup> Laura Nader, *The Life of the Law. Anthropological Projects* (Berkeley and Los Angeles, University of California Press, 2002)15, 170. Her use of the term is related to the work of social psychologist M. J. Lerner, ‘The Justice Motive in Social Behaviour’, *Journal of Social Issues* 31 (Summer 1975) 1-19. Also with Sapir’s work on linguistic drift, see Edward Sapir, *Language* (New York, Harcourt, 1921) and less directly with Karl Llewellyn’s treatment of drift.

circuit of debts denies the accumulation of goods and disallows potency to found itself on such accumulation.<sup>22</sup> Equality is here that of not being able to accumulate, of not having. Disputes are thus defined, narrowly, as a take over without any obligation for return.<sup>23</sup> ‘There is conflict because the victim has been denied his exchange capacity for giving or deploying potency (on the basis of the item that has been “taken” from her. The agonistic exchange context thus finds itself overturned’.<sup>24</sup> Injustice takes the form of a proposition such as ‘He has accumulated to the detriment of my potency or honour’, that is, to the detriment of my possibility to take part in the agonistic exchange that would allow me to control processes or change everyday life by means of the law. It must be remembered that ‘law’, in the sense it is being used here, is that normativity which opens up a space for the social expression of forces or the indetermination of behaviour (that Malinowski described as second group of norms or ‘civil law’).<sup>25</sup> Thus ‘law’ here is the exact opposite of pacification; protojudiciary dispute processes correspond to a sort of agonistic ceremony that re-establishes the circulation of power in the specified bodies of individuals, against its abstract singularisation in a (single) body. Justice is ‘first of all the right to singular potencies’,<sup>26</sup> and thus it is universal in respect to the social relation: ‘If justice recreates social links with the same solidity (or the same fragility) that they had before the conflict, is this not because it puts into action originary mechanisms of the general social relation?’<sup>27</sup> If justice is the right to ‘singular potencies’, and such potencies can be freely expressed only in the social space of conflict or dispute, exchanges and debt

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<sup>22</sup> N 2 above, 270. Contrary to what happens with economic exchanges after the emergence of the state, in the logic of debt it is the surplus of the goods given and of expenditure that becomes a surplus of potency. See on this Georges Bataille, *The Accursed Share*, translated by R. Hurley (New York: Zone Books, 1988).

<sup>23</sup> It may be interesting to observe here that in international law the customary rule regarding takings of property is, precisely, that of no taking without compensation, although nowadays there is a move to strip the rule of its agonistic context.

<sup>24</sup> N 2 above, 271

<sup>25</sup> n 14 b, 80

<sup>26</sup> n 2 above, 279

<sup>27</sup> *ibid*

(and/or its ritualised form in the protojudiciary process of dispute resolution), then pacification –understood as the political deduction or extraction of singular potency and the disavowal of agonism in dispute resolution- is profoundly unjust, in the sense that it allows for accumulation without return and the quieting of powerful bodies. Let us argue that this clarification allows a better understanding of what lies at the basis of Laura Nader’s critique of ‘harmony ideologies’ and the centrality of the role of the plaintiff in her theory.<sup>28</sup> The plaintiff, and in particular the civil (subaltern) plaintiff in the context of torts law and corporate power in the USA (personal injury actions by workers, passengers and pedestrians), is an specification of the affirmative singular powerful body fighting political extraction in the post-industrial revolution nation-state and/or the global marketplace.<sup>29</sup> This clarification also helps to understand what was at stake in Schmitt’s theory of the sovereign as it developed into the concept of ‘nomos’, after the connection between the local crisis of the Weimar republic and the global arena became clearer: the new ‘*nomos*’, set to replace the Westphalian concept of law, is precisely one of pacification and hegemony<sup>30</sup> at a planetary scale; but that new *nomos* was announced already in the very ‘original’ act of taking: the conquest of the New World. From this perspective, the single most important cross-cultural misunderstanding spawning the modern *nomos* (or *Ius Publicum Europeum*) can be seen in relation to the exchange of gifts between the American indigenes and the newly arrived Europeans; particularly as considered (or ignored) by so-called colonial ‘missionary courts’.<sup>31</sup>

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<sup>28</sup> See n 15 above, 32-34, 53, 164. For an analogous theorisation, this time in the realm of Human Rights see Upendra Baxi, *The Future of Human Rights* (Oxford, Oxford University Press, 2002). Notice the centrality of the affective notion of “suffering” in Baxi’s (counter)historical theory.

<sup>29</sup> n 15 above, 171-211

<sup>30</sup> n 15 above, 5. For Schmitt on “nomos” and pacification as the basis of modern international law see Marti Koskenniemi. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, Cambridge University Press, 2001) 47-57.

<sup>31</sup> On missionary courts see n 15 above, 29, 31, 126-128.

#### 4. *I Read About Tank Battles: On the Use of Force*

Walter Benjamin understood the role of the plaintiff just too well. One of his early forays into the problem of law dealt with the question of the exclusive right to the use force by the state in connection to the lack of potency of individuals. Almost eighty years on, ethnographer José Gil shows the actuality of his analysis. He writes:

In the reverse of tribal justice, which considered misdemeanours, or at least conflict, as a sort of normal illness in the social body, all violent acts are henceforth banned from society. *A dual culpability will weigh on this domain*, that which deals with the damage caused and that which is attached to the right to violence. The main culpability is to have violated the exclusive right of the state (i.e., to have stolen violence from the state), which makes everything prejudiced, guilty of being guilty. A strange process begins. Because potencies are deprived of symbolic counterparts, surfaces for social investment, they disappear; buried in the ideological bazaar of fantasies and the discourse of the state: it becomes a matter of “instincts”, “animal drives”, “passions”, “vices”, “bestial nature”-in short, the criminal body. Elsewhere we see emerging little by little the search for intention as the principle of responsibility...where honour used to control violence came to be placed the whole arsenal of evil and the crimes of a now profound conscience, an abyss, *a well of guilt for having failed to remain vigilant over the body*. Now the aporias of justice also begin.<sup>32</sup>

In his 1920's *The Right to Use Force*,<sup>33</sup> Benjamin sets up to review the arguments of one Herbert Vorwerk concerning the right to use force, published in the *Blätter für religiösen Sozialismus*. It is a short piece, four pages in the English edition of Benjamin's *Selected Writings*; the style is that of a brief commentary following the citation of the key propositions in the argument. However brief, it holds a key insight when compared to Gil's statement (and furthermore, in relation to Nader's claims). The point is, in both cases, to emphasise that the context of dispute resolution after the emergence of the state is in the antipodes of that of tribal justice. More plainly, that

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<sup>32</sup> N 2 above, 287. Emphasis mine.

<sup>33</sup> Walter Benjamin, 'The Right to Use Force', in M. Bullock & M. W. Jennings (eds.) *Selected Writings. Volume 1, 1913-1926* (Cambridge, The Belknap Press of Harvard University Press, 3rd ed. 2000) 231-234

dispute resolution has become impossible after the emergence of the state insofar as the original dispute, the foundational inequality, i.e., the differential between the accumulation of forces by the state and the loss of potency of singular bodies, will always remain unsolved. In this context, every form of dispute resolution, including those that go under the label of being 'alternative' or 'exceptional' (to the state's law) become varieties of law-preserving violence and, ultimately, part and parcel of a program of pacification which consists in the permanent vigilance and taming of the body.

Notice that the very realisation of the context of post-state dispute resolution throws light on the centrality of the disputing body, a centrality that was already at the core of findings in ethnographic research on the nature and social function of justice. However an object of surveillance, the disputant body remains the 'limit concept' of modern day legal theory and practice, for it reveals the latter to fall pray to an unrealisable desire to wholeness: law is torn apart between its desire to dispense of the disputant body, to 'dissolve the people' in order to become whole, and its dependence on the creativity of the disputant body for its own existence. This is the 'double guilt' referred to by both Benjamin and Gil: law is guilty of failing to be whole and hence doubly guilty of failing to do justice to the disputant body.

Nader's powerful case against the pacifying use of ADR, what she calls 'harmony ideology', is based precisely upon the recognition of the failure of the state towards the disputant body. To the extent that the state *does* fail to repay its debt to singular bodies, she is correct. However, she does not see that this failure is necessary, that the state is less concerned with justice than it is with its own survival.

Put otherwise, Nader does not seem to consider to what extent the failure of the state towards the plaintiff is of a piece with its failure to be whole. In any case, and here one must part ways with her conclusions, the life of the law seems to be determined by the creativity of the disputant body as much as it is by law's own will to power; the same holds for ADR.

In other words, ADR becomes an instance of the state of exception in the context of (post)state dispute resolution, for it is both outside and inside the law. The implications of the paradox thus introduced have already been highlighted. It will suffice to emphasise again that, if this is the case, then the discourse of harmony does not correspond to the reality of alternative dispute resolution. At the very least, such a discourse should always be considered suspicious when uttered in relation to ADR,

for it obscures the unresolved character of the original inequality that allowed the appearance of the state in the first place.

It also functions as a disavowal of the fact that every requirement of justice issued by a disputant body returns us to a justified indictment of the system as such (the 'universal declaration'). Thus, there is a fundamental antagonism between the disputant body and the state that is never done away with, no matter how many or how strong rhetorical energies are invested in the 'selling of ADR' and/or in legal reform.<sup>34</sup>

To this extent, Nader's analysis of the arguments put forward during the Pound Conference in 1976 –the official launch pad of the contemporary ADR movement- is correct. The fact that the same arguments are present in the attempt to sell ADR in the UK civil jurisdiction nowadays means the latter can only be received with a healthy dose of scepticism. Between Chief Justice Warren Burger and Lord Wolff the only difference seems to be in the deepening of the desire of wholeness in the legal system.

Further, ADR demonstrates the normality of the state of exception insofar as, on the one hand, it is an instance of its appearance beyond the realm of constitutional law (in civil law, as Schmitt predicted) while on the other, it lays bare a structural feature of legality as such (Schmitt's 'nomos'). That this structure is associated, theoretically and practically, with the twin experiences of colonialism and capitalism is a finding that we owe to the re-entry of anthropological observation into the legal system, and one that cannot go unnoticed.

The effects of this irritation in the system are just starting to become apparent. To start with, we have to ask what the connection is, if any, between local ADR and inter- or trans-national ADR in the present context. Nader's findings suggest that there is a connection and that it is to be found in the intersection between law and modern/colonial cultures. Let us suggest that this is perhaps the most important contribution of Laura Nader's user theory to the study and practice of law in modernity, from the perspective of ethnography. Let us now try and pursue this problematic keeping in mind what we have already learned from our parallel reading of 1920's German legal theory. It is in this spirit that we return to Benjamin's *The Right to Use Force*.

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<sup>34</sup> On the "selling of ADR" and the Pound Conference, see n 15 above, 47-54

Reading Benjamin's piece in relation to Gil and Nader is indeed a fruitful experience. A few of the more detailed developments in the argument can be useful in order to try an answer the question concerning the connection between the local, the global and the universal. We will deal only with two of them:

Firstly, there is the question of the early appearance of a distinction between spatio-temporal orders in relation to the law in Benjamin's piece. Benjamin claims that this difference in temporalities is the 'subordinate reality which the law addresses'.<sup>35</sup> We have already seen in relation to this point that the difference or non-correspondence of space-time founds the antinomy of the law, and also that such a minimal difference was the consequence of certain events for which the body is the seat. Those events included the accumulation of force in the political body as opposed to that produced by and circulated amongst specific individual bodies.

Tellingly, that is precisely the connection that Benjamin explores: following his distinction between the time of transition in which state-law exists ('the violent rhythm of impatience')<sup>36</sup> and the cyclical or retroactive time of return ('the good rhythm of expectation')<sup>37</sup> Benjamin moves onto the possible combinations of the right to use of force by the state, on the one hand, and by the individual on the other.

Let us suggest to understand the time of return in a sense equivalent to the space of agonistic exchange (dispute), debt and gift –justice and protojudiciary processes- as described by ethnographers such as Gil and Nader; put otherwise, Benjamin's standpoint in 'moral philosophy' is that of (in)justice as the right to singular potencies or, put in the terms of our case study, the power of the victim-plaintiff as the generative mechanism of the legal system. It can be argued that this standpoint is persistent; it can be found again in the later Eight Thesis of the *Theses on the Philosophy of History* ('the tradition of the oppressed...').<sup>38</sup> This is the standpoint that allows the bringing forth of the connection between the local and the global in the universal.

As we will see, using for our purposes an analogous standpoint taken by certain recent developments in the humanities and the social sciences in Latin America (particularly concerned with the rise of ADR in the trans-national regional

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<sup>35</sup> n 27 above , 231

<sup>36</sup> *ibid*

<sup>37</sup> *ibid*. Notice the question mark after the evaluative term: Does it indicate that in this temporal order "values" are not pre-given or transcendent but produced, for it is the space of circulation of forces?

<sup>38</sup> Walter Benjamin, *Illuminations*, ed by H. Arendt (Pimlico, 1999)

arena, specially after the signature of NAFTA and the proposal of the Free Trade Zone of the Americas, FTAA or ALCA, by the US), that connection has to do with the management of the differential in temporalities or, put otherwise, with what anthropologists call ‘the denial of coevalness’.<sup>39</sup> The point is that the denial of coevalness has become the regional (and now planetary) hegemonic ideology in dispute resolution with the rise of trade-related & security-related ADR. The case in point is dispute resolution under Chapter 11 of NAFTA, a legal recipe that is becoming global through the international law of natural resources and investment protection and nowadays, also through security-related measures and policies. The former, supposedly marginal aspect of international law is the equivalent in the transnational arena of US anti-trust law in that it is becoming rapidly de-differentiated or else, it is effecting a basic shift (led by the Chicago school of economics) in the kinds of questions that count and that lawyers therefore feel are relevant to legal analyses.<sup>40</sup> The connection with colonialism and capitalism becomes just all too clear from this perspective. We will come back to this point.

Secondly, out of the four ‘critical possibilities’ or propositions on the question of the right to force by the state and/or the individual distinguished by Benjamin, it is the fourth, the most seemingly counter-intuitive, that should be of interest to us: The fourth proposition states ‘to recognize the individual’s sole right to use force’<sup>41</sup>. This proposition is counter-intuitive only from the standpoint of the state legal system, but it makes sense if considered from the standpoint of the victim-plaintiff or that of tribal justice taken alternatively by Nader and/or Gil.

Moreover, it is worth noticing that Benjamin associates this standpoint to stateless societies (even though he is thinking about state societies) and to the logic of gift and debt:<sup>42</sup> he argues that the monopoly over force (that characterises state societies as opposed to stateless) is ‘a gift bestowed by a divine power’.<sup>43</sup> The ‘divine power’ referred to here is social rather than theological.<sup>44</sup> More important, because it

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<sup>39</sup> The reference is to Johannes Fabian’s term for “a persistent and systematic tendency to locate the referents of anthropology in a time which is different from the present of the producer of the discourse of anthropology”. See J. Fabian, *Time and the Other. How Anthropology Makes Its Objects* (1983) 31

<sup>40</sup> For Nader on the Law in economics movement, see n 15 above 106-108.

<sup>41</sup> N 27 above, 232

<sup>42</sup> n 27 above, 233

<sup>43</sup> *ibid*

<sup>44</sup> Compare to the following proposition found in the ethnographic work of Laura Nader: ‘As one plaintiff put it: “The act of God (which the defendants had argued against these practicing Christians!)



is an absolute gift (bestowed by divine power) the monopoly over force creates an *absolute debt* and therefore, an absolutely agonistic context.

Put otherwise, the individual (as singular universality) is fundamentally ‘against the state’, to paraphrase Pierre Clastres, for the latter’s debt towards the former is absolutely unpayable.<sup>45</sup>

This realisation is crucial in many respects: as a basis for a critical discourse and practice of Human Rights, as a critical argument against the use of ADR and exceptionality in the context of harmony ideology or pacification, as an explanation of the relative autonomy of the legal system and/or the imbalance between legal power and social power, as a counter-argument in respect to the proposition according to which ‘in a constitutional state, the struggle for existence becomes a struggle for law’ insofar as state-legal recognition will never amount to the lack of potency introduced in society by its own emergence. Benjamin writes in this respect:

It is quite wrong to assert that, in the constitutional state, the struggle for existence becomes a struggle for law. On the contrary, experience shows conclusively that the opposite is the case. And this is necessarily so, since the law’s concern with justice is only apparent, whereas in truth the law is concerned with self-preservation. In particular, *with defending its existence against its own guilt*. In the last analysis a normative force always comes down in favour of existing reality.<sup>46</sup>

What does it mean to say that every struggle for law becomes a struggle for existence? What does it mean to say that normative force is on the side of existing reality? It means, on the one hand, that the absolute debt in favour of the individual plaintiff makes him/her/it the creative force of the (post)state legal system, always unleashing the real against repeated attempts to pacification; while, on the other, the legal system will claim authority (self-efficiency out of the impossibility to repay its debt to society) over and against the affirmative victim-plaintiff. Thus, if on the one side dispute resolution provides the creating force of the legal system, if it is ‘the life of the law’, as Nader says incarnated in the figure of the civil plaintiff (exercising

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was when people banded together for a right and just cause through the processes of law”’. See n 15, 185

<sup>45</sup> n 2 above, 308-309. See also Pierre Clastres, *Society Against the State* (Oxford, Basil Blackwell, Mole Editions, 1977).

<sup>46</sup> N 27 above, 232. Compare to n 26 above.

law-making violence, to use Benjamin's parlance) on the other it is a constant threat to its integrity (it is law-destroying violence) and thus it obliges law to engage in pacification (law-preserving violence) *against its own guilt*. Laura Nader's user theory of law correctly emphasises law-making potency at a time of widely spread efforts to quiet the plaintiff, but in doing so she pays less attention to the necessity of the other moments of the society/law dynamic, the darker ones if you like. She forgets that law is affected by a desire to be whole. (Post)state law is a failed integrity, a 'failed unity'.<sup>47</sup> In that respect her conception of the law may be less nuanced than those found in Schmitt or Benjamin. But we will not pursue that issue here; what matters is to examine whether or not Nader's critique of dispute resolution allows us to learn something else about the actual moment of the socio-legal dynamic; about the actual *nomos* of the law.

##### 5. *Ballad of Sexual Dependency: ADR in Steroids. The NAFTA Case*

The signature of NAFTA sent wave-shocks throughout the Americas and the rest of the world. Formally a multilateral trade agreement, its greater repercussions were soon to be felt at many different levels: from the word *maquiladoras*, never before heard of, entering the vocabulary of activism and the media with the force of a natural phenomenon to the rise of the first post-modern guerrilla movement. The gesture of the EZLN seemed counterintuitive: firstly a (failed) attempt to exercise the individual's sole right to use force, it successfully reinvented itself as a call for tribal justice aiming straight at the heart of modernity as embedded in capitalism.

None of the more westernised models for the understanding of modern law and politics, of dispute resolution, seemed to account for such a possibility: to change the very terms of our discussions on economic, political, and even sexual dependency in the direction of a backwards leap in time. 'Modernity' was supposed to either having sublated traditional societies or being in the process of doing so; that 'tribal justice' could still have a place in the modern order of things was simply non-processable information. Terms such as 'anachronism', 'pre-modernity', 'backward

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<sup>47</sup> I have borrowed the notion of "failed one" from both Ernesto Laclau & Slavoj Žižek. The reference to the former is to an unpublished lecture delivered in June 2003 at the IV Graduate Conference on Political Theory at the University of Essex. Slavoj Žižek's notion of the failed one, or as he says 'fragile absolute' can be found in his *The Fragile Absolute* (Verso: 2000, 128) in connection with a critique of law & human rights that, against a common trend in mainstream political philosophy, engages with the historical legacy of non-sacrificial violence and the sacred.

societies’, ‘primordial violence’, and ‘underdevelopment’ only masked the impotence of the experts’ apparatuses of knowledge.

Just that it was not the first time: the descent of Shining Path from the high planes of Ayacucho into Lima and the extent of the hold over southern Colombian territory by the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) had already taken Latin American social scientists off guard before. Legal Anthropologist Sylvia Rivera Cusicanqui,<sup>48</sup> whose fieldwork in the High Andes had taken her back and forth between Colombia, Peru and her native Bolivia, had been warning long ago about the need for a switch of standpoint as a condition for the understanding of these phenomena that seemed unthinkable at first. Lawyers and politicians only paid attention when the bombs started exploding.<sup>49</sup>

Her point was simple: by placing these phenomena in a time that is inferior to our present we are not merely avoiding conflict, but we are actually denying its existence. It is not the case that we would simply prefer to avert confrontation (that which presupposes from the start that ‘we’ are peaceful, harmonious, i.e., civilised) but rather, that we have stripped existing reality from its normative force.

It is the same lack of potency in our societies that explains both the appearance of such phenomena as Shining Path (FARC, EZLN or the Palestinian resistance) and our inability to relate to their existence. This lack at the heart of our societies is an enduring consequence of modern colonialism, for it is our very standpoint, our perception of ourselves –our will to see ourselves from the outset in the image of the civilised, our rival/model- that blinds us from the truth. The screen that has been set in front of our very eyes in order to blind us from the truth is thus the denial of coevalness.<sup>50</sup> The mechanism at work in such an elaborate deception, and that Rivera Cusicanqui associates with the (gendered/literate) Andean postcolonial *persona*, is the same that Franz Fanon described as ‘transitivity’ in the context of North African decolonisation. Put otherwise, what social scientists were missing, what they keep missing, is the connection between the local ‘we’ and the global ‘them’, and the fact

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<sup>48</sup> Her work pertains the notion of law in the context of postcolonial modernity; in particular the role of patriarchalism and literacy in the construction of a “gendered” conception and practice of the law.

<sup>49</sup> ““The legal system tends to react to attempts to destroy it by resorting to coercion, whether it be coercively to preserve or to restore the right order.” This statement is correct in itself, but it is a mistake to explain it with reference to the internal tendency of the law to establish its authority. What is at issue here is a subordinate reality, which the law addresses’; this is W. Benjamin. See n 23 above, 231.

<sup>50</sup> See n 33 above.

that they both incarnate in the same *persona*. Hence the call for a switch of standpoint, in the form of a denial of the denial of coevalness.

That call has been answered. In the years following the events mentioned before, sociologists, anthropologists, activists, plaintiffs and academic lawyers developed conceptual frameworks and policy-oriented strategies that took into account transitivity, the affirmation of coevalness and the absolute character of conflict from a world-historical perspective.<sup>51</sup> Among them, perhaps the most fruitful in terms of explanatory power and plaintiff activism have been the concepts of ‘trans-modernity’ and ‘coloniality of power’.<sup>52</sup> From the perspective opened up by such concepts, a series of events that for many were simply unthinkable (e.g., the fall of socialism, globalization, 9/11) started to make sense. Clearly, explanation did not lead to justification but rather, to careful appreciation of geo-historical antagonisms arising with the emergence of the state in (post)colonial contexts: the unpayable debt. Particular attention was given to the way in which such conflicts were being ‘resolved’: analysts found dispute resolution mechanisms wanting, more a stronger form of pacification than dispute processing, leading to increases in violence.<sup>53</sup>

Notice that the form of causality that is implied by terms such as ‘emergence’ or the notion of an unpayable debt, is retroactive. Retroactive causality is the mechanism at work in the EZLN invocation of the microworlds and the microidentities of the Mexican Revolution and the 500 years of indigenous resistance against colonial rule in order to provide a meaning for its actions in the 1990’s. It

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<sup>51</sup> For the emergence of this perspective in the context of Latin American traditions of thought see Eduardo Mendieta, *Latin American Philosophy. Currents, Debates, Issues*. Indiana University Press: 2003.

<sup>52</sup> “Trans-modernity” is a term coined by philosopher Enrique Dussel. It refers to the the double character of modernity, the two waves of agonistic modernisation resulting in the emergence of the Atlantic circuit, the first true world-system. “Coloniality of power” and “modern coloniality” refer to ongoing processes of (primitive) accumulation as the engine of modernity. Practices associated with or interpreted through these notions include indigenous plaintiff and political activism (e.g., Colombia v. U’wa, anti-FTAA activism, the World Social Forum) and the setting up of network-academic projects such as subaltern legal studies in the context of the emergence of the Indigenous University in Ecuador or the coloniality of power studies group. See Enrique Dussel, ‘The Architectonics of the Ethics of Liberation. On Material and formal Ethics’, 23 *Philosophy and Social Criticism* 3, 1997, 1-35, also available at <http://168.96.200.17/ar/libros/dussel/artics/archi.pdf>. Also, Edgardo Lander (ed.) *La Colonialidad del Saber: Eurocentrismo y Ciencias Sociales*, CLACSO: 2000.

<sup>53</sup> See O. Guardiola-Rivera, D. López, C. Sandoval et al. (eds.) *La Otra Guerra. El Derecho Como Continuación del Conflicto y Lenguaje de Paz* (Bogotá, Plaza & Janés, 2000). Also S. Castro-Gómez & O. Guardiola-Rivera. “El Plan Colombia, O de Cómo Una Historia Local Se Convierte en Diseño Global”, in *Revista Nueva Sociedad* 175 (Caracas, Venezuela, Editorial Nueva Sociedad, 2001). The broader perspective in Enrique Dussel, *Ética de la Liberación en la Era de la Globalización y la Exclusión* (Madrid, Trotta, 1999) and Walter D. Mignolo, *Local Histories/Global Designs. Coloniality, Subaltern Knowledge and Border Thinking* (Princeton, Princeton University Press, 1999).

entails that there is no prime mover, and therefore no hierarchical ordering of being, any (spatial or temporal) primacy or priority, no linear continuity, no origin and no genealogy, no myth of inheritance, no self-constitution and thence, no transcendence. Therefore it entails also the denial *of the denial of coevalness*<sup>54</sup> in space and time. Put otherwise, it entails the reality of a simultaneity of practices of temporality and space and hence the inevitability of world-historical conflict. To put it in other terms: it is not the case that there are several modernities, some more or less primitive, each of them irreducible to others, but rather, that *since the fifteenth century every single community on the face of the earth has been affected by the differentiating processes of modernization*. The point is that faced with this conflict (how to contain the antagonism of society?) the state legal system is impotent, the unpayable character of its debt to society revealed. Its reflex-like reaction is to (re)claim authority over and above the victim-plaintiff and to engage in pacification.

Back to NAFTA: Chapter 11 contains a series of rules for the protection of foreign investment in the context of the treaty. As said before, it is a heady mix of fairly well known principles of international law concerning the protection of property and some radically new ideas about what may count as expropriation and what the mechanisms for the resolution of potential disputes may be. The central situation under consideration by this body of regulation is that of the taking of the property of a foreign investor by a state, a situation that is of particular importance in the supposedly marginal but hugely important field of the (international) law of natural resources.

The law of natural resources deals with the circulation and exchange of the forces of nature signified as 'resources' or standing reserve; and in this circuit states, corporations and individuals inevitably clash. Put otherwise, this is the site of the translation of natural forces into signs; what once used to be the reserve of the magical-religious establishment.

No wonder then, the first step following decolonisation in the heavily politically invested projects of state-building of the 1960's and 1970's included the taking of natural resource industries. We have learned already that the state seems to have come to occupy the place reserved before for the magical-religious establishment by making itself the site of inscription of all potencies; today however,

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<sup>54</sup> n 33 above

it seems that the state must share its place, increasingly, with the foreign investor in the form of the multinational corporation. We have also learned that the monopoly on legitimate violence overturns the regime of exchange. Thus ‘we could be led to believe that this “division” that magical-religious potencies installs between gods and people *tends to reproduce itself in the heart of society*, and this would be partly true, but it does not happen without some essential changes’.<sup>55</sup> Another way to put this is to say that after the debunking of the place of the sacred in tribal societies, *men will become gods for each other*.<sup>56</sup>

On the other hand, experience tells us that the extraction and circulation of natural forces, and their accumulation in the form of a standing reserve brings power. There is of course some truth to this common sense; however, only when considered in the context of the monopoly of violence, the overthrow of the sacred and the reproduction of division within society, we can understand the importance of the role played by states, investors and individuals in the regime of exchange of natural resources and the centrality of the body of rules that regulates such an exchange in post-traditional societies.

NAFTA’s Chapter 11 is just such a kind of regime. Its particularity derives from the peculiar nature of its conception of standing reserve (or ‘property’ object of a taking) and the mechanisms it introduces for the resolution of disputes which, when

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<sup>55</sup> n 2 above, 289, also 253-254. It would be very interesting, although it is beyond the scope of this essay, to enquire about the “essential changes” that are needed for the reproduction of the division between gods and people within society, firstly with the emergence of the state and secondly, with that of the multinational corporation. There are already two hugely interesting anthropological advances on the first direction: Fernando Coronil, *The Magical State. Oil, Modernity and Power in Venezuela* (Ann Arbor, University of Michigan Press, 1999) and Michael Taussig, *The Magic of the State* (?).

<sup>56</sup> René Girard explains this in the context of the demise of the magical-religious by the legal-political during the French Revolution. According to him the previous acceptance of the Divine Right of Kings structured a certain kind of (magical-religious) transcendence that underwrote other forms of social differentiation. This very tangible presence of the King was offset by his status as a quasi-divine figure (the instantiation of an “immense spiritual distance” between him, his subjects and the rest of the population). ‘When this divine right was abandoned with the overthrow of the monarchy, another equally secular theology took its place: “idolatry of one person is replaced by hatred of a hundred thousand enemies: Men will become gods for each other”’. The point is that, absent the absolute figure of the sacred-external mediator, mediation becomes “internal”; that is, men start to look at each other as models and rivals and violence spreads as a result of the combination of competition and emulation, involving valuable objects only secondarily. The primary variable is the desire/envy of other that makes objects valuable in the first place. See on this Fleming, Chris. *René Girard: Mimesis and Violence* (Polity, 2004) 30. It is important to remember that one of the decisive elements in the overthrow of the monarchy in Europe is the “discovery” of societies “without state” (that is, without Kings) in the Americas.

combined, produce a legal recipe like no other for the withering away of the (civil) victim-plaintiff. Some may say the withering away of law as we know it.<sup>57</sup>

It was only after the *Methanex* and *Metalclad* cases attracted the attention of the media and the public that the wider implications of the dispute resolution mechanisms included in NAFTA's Chapter 11 were confronted. In November 17, 2001 a journalist named William Greider posted an article in the web site of the US weekly *The Nation* under the provocative title "The Right and US Trade Law: Invalidating the 20<sup>th</sup> Century". The article sparked an ongoing debate on the internationalisation of ADR and globalization in the context of trade ideology, which suggested that the stakes of the question concerning the direction of the law and extra-legal or exceptional processes were higher than previous analyses had ventured.<sup>58</sup>

*Methanex v. The United States* originated in the mid-1990's in California. The facts are not unlike those of the civil wrongs cases that appear in Nader's literature, in Jonathan Harr's novel *A Civil Action*, or in the Hollywood film of the same name in which John Travolta plays the leading role: a group of neighbours notices high levels of pollution in the water sources; the alleged culprit is a Canadian company called Methanex which may have been spilling an unregulated chemical component called MTBE in the water sources.

After the fact-finding phase is completed and pollution is confirmed, the state government acts quickly in order to ban the substance. Then the script goes wrong; the corporation sues the state under Chapter 11 for the violation of investor's protection provisions. Methanex Corporation, which manufactures methanol, principal ingredient of MTBE, claimed that banning the additive in the largest US market violated the foreign-investment guarantees embodied in Chapter 11 of the North American Free Trade Agreement.

Under Chapter 11, foreign investors from Canada, Mexico and the United States can sue a national government whenever a company's property assets, including the intangible property of expected profits, are damaged by laws or

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<sup>57</sup> At least of law in the sense described by Nader (see n 15 above, 171-198). The point is that the ongoing reactionary revolution in the regime of natural resources threatens to make factually impossible the kinds of "civil wrongs" cases described so passionately by Nader and others. Put otherwise, the doctrine of "regulatory takings" which according to some, as we will see, is at the basis of the ongoing revolution on the notion of property could be understood as the most radical project of "legal wholeness" to date.

<sup>58</sup> E.g. Laura Naider, 'The Direction of the Law and the Development of Extra-Judicial Processes in Nation-State Societies', in P. Gulliver (ed.) *Cross-Examinations: Essays in Memory of Max Gluckman* (Leiden, E. J. Brill, 1978) 78-95

regulations of virtually any kind. This doctrine, the brainchild of Chicago Law in Economics Professor, Richard Epstein, is known as ‘regulatory takings’.

‘The company did not take its case to US federal court. Instead, it hired a leading Washington law firm, Jones, Day, Reavis & Pogue, to argue the billion-dollar claim before a private three-judge arbitration tribunal...’, Greider tells us, ‘...an "offshore" legal venue created by NAFTA’<sup>59</sup>. The nature of these tribunals has allowed the relatively obscure doctrine of ‘regulatory takings’ –which has been consistently rejected by the US courts- to become a rising paradigm in international property law.

*Metalclad v. Mexico*, a similarly argued case involving a waste processing multinational corporation facing stringent environmental measures in the Latin American country, was decided also by a private ‘Chapter 11’ arbitration tribunal. The tribunal awarded the multinational \$16 million dollars of Mexican taxpayer’s money. In 2001, there were 18 cases pending under NAFTA. In a letter sent to the then US Trade Representative Robert Zoellick, 29 major multinational corporations urged him to push for the same NAFTA investor provisions in the Free Trade American Agreement (FTAA) negotiations: the way forward is going global.

The letter claimed the necessity of ‘providing protection from regulations that diminish the value of investors’.<sup>60</sup> Asked to comment on the content of the letter, former deputy NAFTA negotiator and USTR civil servant Charles Roh exclaimed: ‘...if they are doing that, they’re going to put Middle America on the barricades alongside the environmentalists’.<sup>61</sup> Not everyday an obscure legal theorist such as Richard Epstein can be charged with the accusation of having the potential to spark a revolution.

The point is that NAFTA arbitrators, unable to overturn domestic legislation, can award huge damages that maybe nearly as crippling ‘chilling governments from acting once they realize they will be “paying to regulate”’.<sup>62</sup> Not only that, investor-to-state dispute resolution provides a way for foreign litigants to seek government compensation for damages ordered by domestic courts in civil wrongs cases; if successful, it would do away with the potency of the civil plaintiff acting under the

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<sup>59</sup> William Greider, ‘The Right and US Trade Law. Invalidating the 20th Century’, in *The Nation*, November 17, 2001.

<sup>60</sup> Cited by Greider, see n 52 above.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.



modern law of torts in these cases.<sup>63</sup> Furthermore, conflicts that are by definition public insofar as they involve the ‘unpayable debt’ that the state owes to the individual end up being decided by private, closed-doors tribunals.

Interestingly, the arguments used to sell ‘regulatory takings’ and alternative dispute resolution mechanisms always link foreign investment protection to ethical issues regarding security and corruption: there is lots of corruption and political instability in their ‘not so well-ordered’ countries, hence the need to protect ‘our’ investors. Whether or not Mexican courts are actually ‘notoriously corrupt’<sup>64</sup> becomes irrelevant. Even more ironic, not even US courts have been deemed to be sufficiently ‘neutral’ and the cases have been taken to the ‘offshore legal venue’. What is of interest to us here is the manner in which a global (in this case hemispheric) design of pacification is linked to a local history, through the imaginary construction of the other as ‘unlike us’. Franz Fanon, writing in the context of the struggle against colonisation, described this mechanism with the term ‘transitivity’. His analysis provides a way to clarify Nader’s association between the rise of ADR and what she terms the ‘therapy paradigm’. This association explains, in turn, the parallelism between the domestic and the transnational forms of alternativity and exceptionality in dispute resolution: there is a particular philosophy of history at work here, one of time unleashed and projected in linear manner towards the future. The analysis of a particular case of the pacifying use of ADR bring us back, in full circle, to the non-correspondence of space-time and to the state of exception where the missionary courts of then and now situated their jurisprudence.

#### 6. *Solidarity Song (Finale): A Critique of Violence*

In *Black Skin, White Masks*, Frantz Fanon demonstrated how colonial subjectification involved the pathogenic incorporation of the white other as Ideal-ego. According to Fanon, as the black subject entered the phenomenal world of the white gaze, he was rejected at the level of body image and differentiated in comparison to the exemplary white subject whom he then attempts to emulate and compete with. As a result of this process the white double is then interiorised as ideal-I by the black

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<sup>63</sup> The reference is to the Loewen case.

<sup>64</sup> Dan Price, top trade lawyer at Powell, Goldstein et al. and chief US negotiator of NAFTA, cited by Greider as explaining investor-state provisions to the US Congress.

subject, that which results in an obsessive neurotic formation and widespread violence. Thereafter the black subject becomes engaged in constant self-reproach and despair, always trying to become what he/she can never become, condemned to an illusion of transcendence.<sup>65</sup>

‘Transitivity’ is therefore a case of the rival/model dynamics that we discussed before in the context of Girard’s explanation of the results of the overthrow of the monarchy and the emergence of liberal democracies based upon equality. The persistence of this generative mechanism is indeed remarkable: it can be used as a basis for a better understanding of similar latent transfers that transpire in today’s broader politico-legal field. Certain unreflective scripts, such as Human Rights universalism and ADR (as we have seen in the NAFTA case) can be seen as imposing transitivity in more or less benign ways, by assuming the relative other as mimicking the liberal civilised subject’s moral gestures at the imaginary level. Such scripts do not reflect upon the spread of mimetic war and violence that follows the inscription of the law (as human rights and ADR) at a planetary scale.

Nader’s argument regarding the relation between ADR and the therapeutic paradigm, and the sort of widespread passive violence that results from it, can be understood in this sense. According to her, representatives of the therapy community who have played an important role in the debates over ADR (but also international lawyers, as we have seen) emphasise a certain ego-ideal which clearly corresponds to the attributes of the civilised, literate *persona*: self-aware, harmonious, avoiding polarization, always in place, in control of his emotions, a moral manager of conflict, a gentle civiliser of nations. This is a long cry from the social expression of affects involved in tribal justice; however, in a reversal of sorts, this *persona* is usually presented as ‘traditional’. Nader writes in relation to the work of linguist-cum-therapist Deborah Tannen: ‘[She] holds that Americans argue too much and we ought to stop arguing and emulate Asian traditions (Asians, by the way, do not have state democratic traditions) that avoid polarization and focus on harmony to manage conflict.’<sup>66</sup> The reversal involved in Tannen’s argument is of course a case of orientalism, but the transitivity mechanism is still in place: the ego-ideal is to be mimicked. Nader’s judgement on the matter is straightforward:

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<sup>65</sup> We are reminded of Mexican president Salinas de Gortari’s ‘we have entered the first world’.

<sup>66</sup> n 11 above, 148-149

One might call [this] position Machiavellian or categorize it as a form of conflict prevention. I would prefer to call it a cop-out, an avoidance of root causes by means of human management techniques. The United States went through this same ideological movement at the turn of the century –again pacification- a movement not too far from Roger Fisher’s “getting to yes” (1981) through negotiation practices.<sup>67</sup>

After reading this passage it is worth to remember how months before the breakdown of the ‘peace process’ in Colombia, the conflict resolution process involving the Revolutionary Armed Forces of Colombia (FARC) and the government in 2002, Roger Fisher was invited by the office of the President in order to guide official ‘negotiators’ to get the stubborn *guerrilleros* to ‘say yes’. The picture of Roger Fisher and/or his trainees’ harmony discourse –‘negotiate’, ‘strike a deal’, ‘let’s get to a win-win situation here’- would be a sad, even laughable case of transitivity if not because it revealed something more alarming at work in that particular case: that this was never a conflict resolution situation but rather one of pacification. Indeed, never has harmony seemed more coercive than in the years following the breakdown of the peace process in Colombia.

This anecdote –which is really an amateur exercise on participant observation- is not digressive: what interests this researcher about Nader’s position on the role played by the therapy paradigm in the rise of ADR and exceptionality is the possibility of a generalisation concerning two phenomena that seem over present and under theorised in her rendition of a user theory of law. Firstly, the increasing presence of what she calls ‘human management techniques’ in the legal system and secondly, the issue of pacification. It can be argued that these questions hold the key for understanding the connection between the local and the global that lies behind planetary spread of the ADR/Exception phenomenon.

‘Pacification’ is, on the one hand, related to the role played by therapy talk in the discursive articulation of ADR and exceptionalism as part and parcel of ‘a reactionary law reform movement’:<sup>68</sup>

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<sup>67</sup> n 11 above, 149

<sup>68</sup> n 11 above, 140. The context of Nader’s statement is the analysis of the hegemonic discourses at the 1976 Pound Conference that launched the ADR movement in the USA. The law reform movement is “reactionary” against the rights movements of the 1960’s.

Relationships, not root causes, and interpersonal conflict resolution skills not power inequities or injustice was, and still is, at the heart of ADR. In ADR, civil plaintiffs are perceived as “patients” needing treatment, and when the masses are perceived in this way, policy is invented not to empower the citizen but to treat the patient.<sup>69</sup>

At a deeper level, pacification relates to transitivity as the mechanism through which the other is constructed in the image of the ideal-I, but also, the containment of the political potential of the masses. We have learned with Fanon that this mechanism was at the core of the colonial enterprise. More generally, following Girard and Žižek, we have learned that this is the generative mechanism of our ‘law & order’ and ‘security & progress’ arrangements, based upon sacrificial violence and unable to contain it.<sup>70</sup> At this point, the connection between the local story and the global design becomes all too clear: the rhetoric ‘our courts are too crowded, and our lawyers and people are too litigious; the solution has to be the multidoor virtuous agencies of settlement or reconciliation’, symmetrical to ‘our investors must be protected from their corrupt courts; the solution has to be the virtuous agencies of arbitration’ gets translated into ‘we are unlike them’, a proposition that takes a whole different meaning whether it is uttered by the subaltern or the hegemon, as Gil, Fanon, Girard and others carefully explain.

That proposition becomes the very criterion for the definition of one’s province at the same time that it defines what lies beyond and is excluded from the province, and the desire to encompass (as victim-scapegoat) the excluded outside. It sets in motion a logic of inclusion/exclusion that constitutes the very space of judgement. It is ‘the judgement of Hercules’,<sup>71</sup> the ‘sovereign decision’ in the language of Carl Schmitt, the ‘hard choice’ in the language that glorifies certain versions of cost-benefit analysis. The sovereign body and the ideal-I incarnate in the

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<sup>69</sup> Ibid, 141

<sup>70</sup> See on this, Mark Duffield. *Development, Security and Unending War*. London, Polity press. 2007.

<sup>71</sup> In 1776 US President John Adams proposed the judgement of Hercules to be the seal of the United States. The reference is to the mythical figure with whom the architects and rulers of the circuit of the Atlantic identified themselves. It meant territorial centralisation, imperialist ambition and economic progress. The identification was in relation of opposition to the many-headed Hydra, which in turn, identified a motley crew of sailors, slaves, pirates and women who resisted the imposition of order in the Atlantic and , while doing so, invented the modern definition of “freedom” possibly by reference to tribal justice. These two figures are the persistent mythical lexicon of modern law to these days: the first one lurks behind the judge protagonist of Ronald Dworkin’s story titled, adequately Law’s Empire; the second is the basis for Laura Nader’s plaintiff as the life of the law.

political body emerging out of the modified possession ritual, in the accounts of ethnographers, presenting itself as the place of inscription of the potency of singular bodies.

‘But the hegemonic elements of this control are far more pervasive than the direct extension of state control’, says Nader.<sup>72</sup> ‘Human management techniques’ refers to a set of strategies that make the sovereign’s decisions not only acceptable but actually desirable; the interiorisation of the ideal-I, as explained by Fanon in the context of colonisation, the capacity of the (political) body to exfoliate through rhetorical oratory techniques, as explained by Gil,<sup>73</sup> and the rival/model dynamic explained by Girard, go a long way to explain the phenomenon of the coexistence of widespread violence and voluntary servitude in our societies of law and order. Nader refers to it with the more politically sounding term ‘hegemony’ and the perhaps trivialising but equally effective ‘mind colonisation’.<sup>74</sup>

Decision is invariably uttered in the state of exception by a desired/desirable sovereign body. As we know already, the term ‘state of exception’ refers to the law being in force without significance, a condition that expresses both the (use of) accumulated violence of the state (or *Gewalt*) and the affective response of people under threat, in emergency. The response to that condition by the resistant disputant body can only take the form of a critique of violence (*Kritik der Gewalt*).<sup>75</sup>

As we have learned before –thanks to Benjamin- this sort of critique seeks to elaborate on the structural origin of the law in the constitutional ‘state of exception’, law’s term for foundational sacrificial violence.<sup>76</sup> But it is very important to acknowledge that the object of such a critique is not just in the past. Recent appeals to law’s originary resort on sacrificial violence can be seen, for instance, in the current arguments concerning the ‘justification’ of torture in the context of the war on terror. Thus, a critique of violence operates by revealing the logic of exclusion and surrogate victimage at work in the functioning of the law and its location in a time of transition, suspension, or ‘missing time’.

According to this logic, that which is excluded is not, for this reason, simply without relation to the rule since the rule maintains itself in relation to the exception

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<sup>72</sup> N 15 above, 141

<sup>73</sup> See n 2 above, 187-194.

<sup>74</sup> On “mind colonisation” see n 15 above, 5; on “hegemony” n 15 above, 117-121.

<sup>75</sup> Walter Benjamin, ‘Critique of Violence’, in M. Bullock & M. W. Jennings, *Selected Writings, Volume 1, 1913-1926* (Cambridge, The Belknap Press of Harvard University Press, 2000) 236-252.

<sup>76</sup> On sacrificial violence, see Fleming, Chris. *René Girard: Violence and Mimesis*, Polity: 2004.

in the form of suspension. Put otherwise, the rule maintains itself (and reintroduces order in the social) by subtracting the exceptional element from the set of society and focusing on it the violence of the whole of society, represented by the state. In order to do so it introduces in society forms of internal differentiation or mediation, more often than not in the form of distinctions between what is normal or standard (and is thus on the side of order and society) and what is pathological (and becomes thus disorder and the outside of society).

When used as norms, these distinctions go by the name of ‘standards’; importantly, the particular force of a standard is its formal/empirical character, i.e., its being empty from any content while relating to a huge breadth of data: they are formal, empty, signifiers that become master signifiers when connected to certain forms of probabilistic reasoning. This is not the place to question the possibility and validity of such forms of reasoning. It will suffice to recognise their normative potential. Having become an empty signifier that is also a living value within society, a standard takes the form of a transitory rule in perpetual change (its destiny to replace and be replaced, disposed of) and psychically desired (it is asked for by the people at risk, used as a model). As standards, these rules are shaped by our desires and thus indicate what such desires are, eventually yielding the rudiments of the fantasy that founds us as ‘people at risk, asking to be defended’.<sup>77</sup>

Insofar as time is central in this fantasy, the time of catastrophe, the time of the end, hence the apocalyptic character of contemporary politics, let us consider first the desire of instant gratification realized in the proliferation of legal standards. Just like vending machines, fast-food restaurants and dot.com banking, standardised law (law in state of suspension) promises the abolition of waiting time and thus acquires a messianic feature: that of overcoming, in an instant, the imminent threat.

But that is not all. This law is also marked by an attitude of appealing availability. One is reminded of the final line in Kafka’s *Before the Law*: ‘No one else could enter here, since this door was destined for you alone’. This law offers more than the abolition of waiting time; you will be served and waited upon. Finally, the consumer of the law –the body that defines its power in accordance to the standard- is catered to via the fantasy of getting to ‘it’ with little or no effort, power becoming the

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<sup>77</sup> The reference here is to Michel Foucault’s *Society Must Be Defended* (1997-2003), which traces the rise of the power of police-knowledge (biopolitics) and exceptionality (the normal and the pathological) in the language of ‘blood’ and ‘culture’ (what I call ‘singularities’).

capacity to identify oneself with that the pacified individual, narcissistic and isolated, portrayed by sociology as alone, conflict-adverse and full of himself –that is, in ‘harmony’- is but an illusion produced by the actual rules of the game of competition, dispute and conflict. If, on the contrary, the subject posited by this tradition is antagonistic and in state of lack, this is so because he/she is profoundly concerned with the other, whom she imitates and whose standpoint she must be able to share if she is to make sense of the world. David Hume and Adam Smith called this faculty “sympathy”; contemporary cognitive scientists such as Humberto Maturana and Francisco Varela speak of “transition”, striking a chord that resonates with the anthropologists.

Transitivity or imitation –mimesis- lies at the very origin of conflict and dispute; lack and antagonism remain at the core of society beneath the surface appearance of harmony, even more so in post-modern societies. Because of this, any general theory of law and society that wishes to be relevant at the time of globalization must make the intra- and trans-national experience of antagonism and violence, motivated by imitation and envy, and its containment, its object-matter of study.

To do this, it must abandon the dualist conception of subjects and societies expressed in the distinction between ‘well-ordered’ and ‘not-so-well-ordered’ societies that has informed its investigation to this day. Not in order to justify the sovereign’s monopoly of violence as the cause of social harmony, but rather, in order to declare in the most general terms a critique of violence from the standpoint of the victim, as of a piece with its demand for global social justice.

On this aspect, the findings of anthropologists such as Laura Nader and Jose Gil –that the study of the reality of dispute and dispute resolution is badly served by the model of harmony/equality, and that the pacifying use of this model becomes an obstacle to any politics of common justice- are far closer to the truth than the intuitions of mainstream legal theory and political philosophy. In the following sections, we shall focus on Nader’s study of the effects of alternative dispute resolution mechanisms (ADR) in the law and politics of common justice. e standard; in the case of war-time suspension, for instance, by watching t.v. depictions of the war going on in some place between fantasy and this pressing reality. The rise and expansion of value-standardisation, spectacle and the power of policing the body, amounts to a generalised form of suspension, a hallucinatory visual world where

instant gratification is paramount but short term, and the need increases quantitatively. This leads to unpleasure (Freud), destruction tied up to the will to know and fear of retaliation (Klein) and ultimately to a paranoid-schizoid position that deposits its own aggressive desires in the other (Girard). The end result is an impoverished ego, which can only 'recover' by reclaiming that which has been cast out. This is the point of this essay's talk of the discovery of a logic of exclusion/inclusion at work in the schema of suspension.

A critique of violence relates this logic and the entire schema of suspension to a 'crit' historical ontology of the present and its actual transformation via the re-entry of the other (the cast out, the innocent victim or scapegoat), not as reclaimed or included (as in our fantasy landscapes of multiculturalism and harmony) but as [him/her/itself] the powerful victim-claimant.