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## The Neoliberalism and the Crisis of Critical Legal Studies

*O neoliberalismo e a crise dos Critical Legal Studies*

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**Abstract**

The objective of this paper is to analyze the factors that led to the decline of Critical Legal Studies from the 1990s. At first, we will analyze the emergence of critical theories of Law in the 1960s. We will then investigate the emergence of postmodern legal movements, placing Critical Legal Studies in this process. Finally, we will evaluate the impact of neoliberalism on the work of Critical Legal Studies.

**Keywords:** Critical Legal Studies; Postmodern legal movements; Neoliberalism.

**Resumo**

O objetivo deste trabalho é analisar os fatores que levaram ao declínio dos *Critical Legal Studies* a partir da década de 1990. Em um primeiro momento, analisaremos o surgimento das teorias críticas do Direito na década de 1960. Em seguida, investigaremos o despontar dos movimentos jurídicos pós-modernos norte-americanos, situando os *Critical Legal Studies* nesse processo. Finalmente, avaliaremos o impacto do neoliberalismo sobre a obra dos *crits*.

**Palavras-chave:** Critical Legal Studies; Movimentos jurídicos pós-modernos; Neoliberalismo.

## 1 Introduction

This study aims to offer a historical reconstitution of the rise and fall of North American Postmodern Legal Movements, specially the *Critical Legal Studies*. First, it will analyze the dawn of *Critical Legal Studies* within the context of postmodern Critical Legal Thinking (as opposed to the hegemonic view of Legal Education). In sequence, it explores possible reasons for *crits* (name given to participants of *Critical Legal Studies* movement) recrudescence. Although situated in the Anglo-Saxon Legal System (characterized mainly by customs and precedents as sources of Law), the *crits* movement provides important insights that can be used by legal scholars in the Romano-Germanic Legal System (characterized mainly by positive codifications and doctrine).

Nowadays, one lives undeniably in a moment of ideological crisis. Since the fall of the Berlin Wall, neoliberalism has sought to impose itself as the only feasible *ethos* in a globalized context, marked by both the decay of dictatorial political systems in the Second and Third Worlds and the affirmation of cultural diversity. The progressive *intelligentsia* strove to *adjust* itself to the demoliberal system and to the logic of the market<sup>1</sup>, adopting paradigms of "weak reformism,"<sup>2</sup> such as those promoted by social democracy. However, advancing conservatism (stimulated by the economic recession) is a sign that the paradigms of "savage capitalism" and "capitalism with a human face" spread over the last few years are not enough to afford the needs of the population. Therefore, the failure of the Soviet Union did not represent the "end of history,"<sup>3</sup> the triumph of the United States, and the *pax americana* achievement. Nevertheless, the theoretical indigence of established political parties (right-winged and left-winged in the political spectrum) prevents the community from enjoying new models of social organization able of overcoming the aporias of the Democratic Rule of Law.

Legal education has its share of the blame in this process: presenting the normative order as an autopoietic, rational and necessary system, devoid of contradictions or gaps (and not as the result of contingent and reversible political

<sup>1</sup> ZIZEK, Slavoj. 2001. 'Did somebody say totalitarianism? Five interventions in the (mis)use of a notion.' London; New York: Verso, chapters 2 and 3.

<sup>2</sup> SINGER, André V. 2009. 'As raízes sociais e ideológicas do Lulismo.' *Novos Estudos/CEBRAP*, São Paulo. Available at: <<http://www.scielo.br/pdf/nec/n85/n85a04.pdf>>, accessed on: sept. 02, 2016.

<sup>3</sup> HORTA, José Luiz Borges et. al. 2012. 'A era pós-ideologias e suas ameaças à política e ao Estado de Direito.' *Confluências*, Niterói, vol. 14, n. 02, p. 120-133.

decisions, commitments assumed in the struggle for power), law schools eventually convinced their students that this would be the best (or "least worst") of possible worlds, the inevitable consequence of a logical evolution. This process explains the success, in recent years, of doctrines such as the Economic Analysis of Law, which seeks to *naturalize* the most harmful characteristics of the bourgeois legal order and to represent man as "eternal rational utilities maximizer"<sup>4</sup>. In such a scenario, it is necessary to rehabilitate critical legal thinking in order to foster the transformative and emancipatory dimension of Law. Considered by many as the most radical view of postmodern legal movements, *Critical Legal Studies* can bring fundamental contributions to the transformation of the current institutional arrangement.

## 2 Critical Theories of Law

According to Antônio Carlos Wolkmer, critical theories of Law<sup>5</sup> have begun to emerge in Europe and the Americas since the 1960s, in face of the inability of normativist doctrines to respond to elementary questions - notably of moral and ideological nature - indispensable to comprehend the legal universe<sup>6</sup> in force during that period. Its rise was

<sup>4</sup> A sum of the theoretical assumptions held by Economic Analysis of Law can be found in: POSNER, Richard. 2007. *'Problemas de filosofia do direito.'* Tradução Jefferson Camargo. São Paulo: Martins Fontes.

<sup>5</sup> Wolkmer defines *Critical Theories of Law* as follows: "In this way, one can *conceptualize* critical theory as the operative pedagogical instrument (theoretical-practical) that allows a historical take of consciousness for stagnant and mythical subjects, triggering processes that lead to the formation of social agents possessing a rationalized, anti-dogmatic, participatory and transformative world view. It is a proposal that is not based on abstractions, on *priori* reasoning of pure and simple mental elaboration, but on historical-concrete experience, on daily insurgent practice, on conflicts and social interactions, and on essential human needs." Loosely translation of: "*Desse modo, pode-se conceituar teoria crítica como o instrumental pedagógico operante (teórico-prático) que permite a sujeitos inertes e mitificados uma tomada histórica de consciência, desencadeando processos que conduzem à formação de agentes sociais possuidores de uma concepção de mundo racionalizada, antidogmática, participativa e transformadora. Trata-se de proposta que não parte de abstrações, de um a priori dado, da elaboração mental pura e simples, mas da experiência histórico-concreta, da prática cotidiana insurgente, dos conflitos e das interações sociais e das necessidades humanas essenciais*" (WOLKMER, Antônio Carlos. 2002. *'Introdução ao pensamento jurídico crítico.'* São Paulo: Saraiva, p. 05).

<sup>6</sup> As Wolkmer describes: "The beginnings of the critical legal movement were developed in the late 1960s through the influence of European legal scholars on ideas arising from the Soviet legal economy (Sucka, Pashukanis), on Gramsci's retelling of Marxist theory by Althusser's group, on Frankfurtian critical theory and on Foucault's archaeological theses of power. Affected by neo-Marxist and counterculture theories, the movement began to call in question the solid juspositivist way of thinking that prevailed in academia and institutional bodies. Thus, in the field of law, investigations were carried out by demythologizing traditional and dogmatic legality and introducing sociopolitical analyzes of the legal phenomenon, enabling a more direct interaction between Law, State, power, ideologies, social practices and interdisciplinary criticism." Loosely translation of: "*Os primórdios do movimento de crítica no Direito foram gestados no final dos anos 60, através da influência sobre juristas europeus de ideias providas do economicismo jurídico soviético*

driven by the decolonization of Africa and Oceania, the demonstrations against the Vietnam War, the social customs revolution and the counterculture. Events, such as the rise of *hippies* communities, confronted the imposed Law from an imaginary Law perspective: before being lived, the legal system was conceived and, at that moment, it was imperative to call into question the theoretical framework of traditional doctrine<sup>7</sup>. Kelsen's definition of the legal norm as a coercive command aimed at social pacification begins to be questioned<sup>8</sup>. Gradually is restored the perception conforming to which in the collective life exists a diverse range of spontaneous forms of conflicts resolution, beyond positive Law<sup>9</sup>. Thereby, some scholars become more aware to the *historical* and *political* views of Law (moving away from the belief of a transcultural "legal rationality", capable of justifying jurisdictional decisions at any time or place).

Wolkmer refers to a transcontinental wave of legal criticism, "heterogeneous plurality of insurgent movements," which despite procedural differences, faces common gnosiological and political-ideological problems: in an effort to rescue the *sociopolitical sense of the Law*, all these currents will oppose legal positivism, jusnaturalism and sociological realism. The three main approaches to the legal phenomenon that have developed in the history of Western civilization share the common effort to "de-ideologize" the jurisdictional activity, to interpret it as a technical (the belief that the sentence would represent a syllogistic operation, etc.) or prudential activity (the practical reason, the Aristotelian *phronesis* applied to the lawsuit). Legal Dogmatism is based on "founding fictions of truth" - such as the belief according to which legal knowledge would be neutral and impartial, standing above the conflicts of interest that cross the social body. For the critical theories of Law, the desacralization of normative

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(Sucka, Pashukanis), da releitura gramsciana da teoria marxista feita pelo grupo de Althusser, da teoria crítica frankfurtiana e das teses arqueológicas de Foucault sobre o poder. O movimento afetado por teses de inspiração neomarxista e de contracultura começava a questionar o sólido pensamento juspositivista reinante no meio acadêmico e nas instâncias institucionais. Projetavam-se assim, para o campo do Direito, investigações que desmistificavam a legalidade dogmática tradicional e introduziam análises sociopolíticas do fenômeno jurídico, aproximando mais diretamente o Direito do Estado, do poder, das ideologias, das práticas sociais e da crítica interdisciplinar" (WOLKMER, Antônio Carlos. 2002. 'Introdução ao pensamento jurídico crítico.' São Paulo: Saraiva, p. 16).

<sup>7</sup> ARNAUD, Jean André. 1991. 'Utopia dos anos 70 e Direito de Família Contemporâneo.' Tradução de Sílvia Donizete Chagas. *Contradogmáticas*: Revista Internacional de Filosofia e Sociologia do Direito, São Paulo, n. 09, p. 10-21.

<sup>8</sup> KELSEN, Hans. 2009. 'Teoria pura do Direito.' Tradução de João Baptista Machado. São Paulo: Editora WMF Martins Fontes.

<sup>9</sup> With regard to the contemporary rediscovery of a parastatal (and even anti-state) normative order, it is impossible not to mention the classic study of Santos: SANTOS, Boaventura de Souza. 1977. 'The law of the oppressed: the construction and reproduction of legality'. *Pasargada. Law & Society Review*, vol. 12, n. 01, p. 05-126.

myths has revealed itself as a necessary stage in affirming the primacy of politics, that is, the revelation of legal discourse as a discourse of power, operationalized by specific groups in order to maintain their own ambitions.

Wolkmer identifies four major methodological axes of critical legal thinking: a) the *Association Critique du Droit*; b) the *Alternative Use of Law*; c) the *Epistemological Approaches to Legal Pluralism*; and d) *Critical Legal Studies*. Founded in the United States in the late 1970s, the *Critical Legal Studies* movement assembled phenomenology, social historicism, legal realism, frankfurtian Marxism, French structuralism and interdisciplinary analysis. In the face of *Common Law*, it assumed a demystifying stance: aimed to break with the classical rationality of Western legal culture. Its many supporters include Morton Horwitz, Duncan Kennedy, Mark Tushnet, Karl Klare, Robert Gordon, Peter Gabel, Mark Kelman, Richard Abel, Thomas Heller, David Trubek, Willian Simon and Mangabeira Unger. At this point, a brief picture of the genesis and structure of *Critical Legal Studies* may be of some value.

### 3 Post-Modern Legal Movements

Traditionally refractory to political and social tensions, American law schools were eventually affected (in degree, of course, inferior to that of other college spaces) by the vanguards of the 1960s and 1970s. The Socratic Method<sup>10</sup>, proposed by Chistopher Columbus Langdell at the end of the nineteenth century, dominated the legal education scenario almost incontestably. Supported by a formalist perspective - which sought to stimulate "legal reasoning" in students, it set aside moral and political-ideological issues associated with the normative universe - the Socratic method seemed to be the most appropriate for a liberal cosmovision. It shared the belief that for every legal problem there would be a single adequate, technical and accessible solution to any rational subject. In its question-and-answer game, it would stimulate hierarchy, paternalism, and

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<sup>10</sup> The Socratic Method espoused by the American law schools has little relation with the maieutics developed by Socrates in Classical Antiquity. It is based on the case study: by analyzing emblematic common law cases before the classes, the students undergo daily oral assessments made by the teachers. In this way, they must learn to identify the essential elements of the investigated precedents, by debugging the fundamental principles that rule the legal system.

alienation<sup>11</sup>. In the wake of counterculture and student insurgencies (stimulated by the Civil Rights Movement and the reaction against the Vietnam War), *Ivy League* students and young teachers will revolt against the established pedagogical model<sup>12</sup>.

In this way, "postmodern legal movements" (in the definition of Gary Minda) are born, marked by eclecticism, diversity, fragmentation, competition and rivalry. Postmodernism is defined, first of all, by the refutation of the idea, disseminated in Classical Modernity, that all individuals, regardless of time and place, would be endowed with the same mental structure: the *self*, transparent to itself, (*cogito, ergo sum*), could thus serve as a starting point for the elaboration of an objective knowledge (undoubtable, clear and distinct)<sup>13</sup>. Modern rationality, aspiring to impose the same exacting demands of mathematics and physics upon all the dimensions of human life, will seek in the epistemic subject (which permanently bends itself, fostered by *certainty* about its own mental representations) a solid foundation for the construction of knowledge. The rationalist and empiricist ramifications of modern philosophy, in spite of their uncountable divergences, are united in the attempt to recognize in the (solipsist) *self* the source of universal truth. The collapse of this perspective, stimulated by the awareness that different forms of subjectivation and rationality are possible (if we take into account the plurality of existing cultures), will guide Western intellectuality towards the postmodern. It would be decisive, by the way, the claim that the "great narratives" (the effort to interpret the trajectory of humanity within the framework of a univocal analytical grid) would have ended. The very question of *quiddity* – which means *quid est*, "what is," the essence - remains committed, in an age that embraces moderate and

<sup>11</sup> In an autobiographical work, Scott Turow (best known for detective novels) recalls his experiences as a law student at Harvard, denouncing the oppressive teaching didactics inspired by Langdell's influence. See TUROW, Scott. 1977. *'O primeiro ano: como se faz um advogado.'* Tradução de A. B. Pinheiro de Lemos. São Paulo: Record. Criticism of the Socratic method is also the starting point for the movie *The Paper Chase* [1972, USA, directed by James Bridges]: the film finds in Edward "Bull" Warren (one of the most famous teachers of Harvard history), an inspiration to play the character of Professor Kingsfield, who condenses the virtues and vices of Langdell's technique.

<sup>12</sup> KALMAN, Laura. 2005. *'Law school and the sixties: revolt and reverberations.'* Chape Hill: The University of North Carolina Press.

<sup>13</sup> A historical account of the genesis of 'postmodernism' concept is provided by ANDERSON, Perry. 1999. *'As origens da pós-modernidade.'* Tradução de Marcus Penchel. Rio de Janeiro: Jorge Zahar Editor. An effort to demarcate the historical evolution of the postmodern movement can be found in SALVI, Rosana Figueiredo. 2002. 'Movimento pós-moderno e cultura: periodizando e discutindo suas fases.' *Semina: Ciências Humanas e Sociais*. Londrina, vol. 23, p. 79-92. A critique of the postmodern ideology - in an attempt to reconstruct metanarratives, relegated by postmodernism - is developed in MAYOS, Gonçal. 2008. *'L'alienació postmoderna.'* Barcelona: DeBarris. Available at: <<http://www.ub.edu/histofilosofia/gmayos/PDF/Alienaci%F3%20PostmodernaUPEC.pdf>>. Accessed on: may, 02, 2015.



radical forms of epistemic and moral relativism. There is no single truth, as there is no pre-established set of basic values shared by all men.

In this scenario, Minda highlights five aspects that, appearing almost simultaneously, compete for space in American law schools: a) *Law and Economics*; b) *Critical Legal Studies*; c) *Feminist Legal Theory*; d) *Law and Literature*; and e) *Critical Race Theory*. Despite the countless theoretical and practical differences, these currents share similar pluralistic, contextual and non-essentialist conceptions of Law. The element of faith, typically modern in a self-transparent and self-legitimizing juridical consciousness, the basis for the construction of a legal order based on coherence and integrity, is rejected by the five groups, which is why they are associated to the postmodernism<sup>14</sup>.

In fact, modern legal theorists believe in the existence of 'right answers' and 'right interpretations'. Applying instrumental rationality to the Law, they expect to give legal knowledge "scientific objectivity." Their works are marked by great dichotomies: subject/object; Law/society; substance/process; core/penumbra etc. Grotius, for example, emulating geometry reasoning, intends to construct a Natural Law that would subsist "even if God did not exist", that is, a self-evident normative system, capable of sustaining itself exclusively by its rationality. There would be a trans social order of Law, not linked with cultural values, but composed of rules, principles and doctrines. By means of deontic logic (in conceptual models such as Langdell's) or by practical reason (in normative models such as that elaborated by Oliver W. Holmes's legal realism, which replaced formalism with pragmatic instrumentalism), the jurist would be able to access such order.

In the 1970s, this paradigm began to collapse, being replaced by new models capable of coordinating Law and culture:

The problem [in the 1970s] was that traditional legal analysis had failed to recognize that law contributes to the construction of social reality. Traditional analysis of legal problems adopted a 'naive' understanding of the relationship between law and culture. Most legal scholars assumed that the

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<sup>14</sup> As Minda affirms: "Postmodernism is an aesthetic practice and condition that is opposed to 'Grand Theory', structural patterns, or foundational knowledges. Postmodern legal critics employ local, small-scale problem-solving strategies to arise new questions about the relation of law, politics and culture. They offer a new interpretative aesthetic for reconceptualizing the practice of legal interpretation" (MINDA. 1996. 'Postmodern legal movements: Law and Jurisprudence at the Century's End.' Ney York: NYU Press, p. 03).

directive force of legal rules had an independent existence, such that law could function autonomously of culture.<sup>15</sup>

As argued by Arthur Austin, detractor of "postmodern legal movements," the trajectory of law schools in the 1970s was characterized by the struggle between the "empire," the *Establishment*, largely sponsored by liberal white men, and the "outsiders", the coordination of *crits*, feminists, and *critical race theorists*<sup>16</sup>. *Fem-Crit-Black*: from different approaches, the three currents would united in the intellectual populism, in political correction and in rejection of cardinal precepts of legal education (analytical evaluation, rationality, objectivity)<sup>17</sup>. The *hybrid* of these scholars would be for the purpose of conceiving law schools primarily as platforms for social change. Believing in the *malleability* of institutions, postmodern legal movements embraced the challenge of rewriting social hierarchies.

Among the postmodern critiques of traditional legal thinking, those emanating from *Critical Legal Studies* may have been the most emphatic ones. The movement expanded quickly in the 1980s, with acceptance among its followers of main proposal lines such as curricular reform, university support, and financial assistance from large organizations. For *crits*, juspositivism, instrumental rationality and liberalism are inseparable. Therefore, one can only effectively commit to combating any of these vectors if he accepts the need to break with the others. It is a complete critique of the ethical and dianoetic assumptions of the modern world. This is the perspective that, against the unambiguous way of thinking (effort to naturalize and legitimize the current order), will lead the movement to postulate the absolute historicity of any social structure. Mass democracy and free market are not inevitable needs of reason, but contingent choices, which can (and should) be revised. Liberal opponents of *Critical Legal Studies* see in the movement a "pathological phenomenon," a sort of "Peter Pan

<sup>15</sup> MINDA. 1996. 'Postmodern legal movements: Law and Jurisprudence at the Century's End.' New York: NYU Press, p. 64-65.

<sup>16</sup> AUSTIN, Arthur. 1998. '*The Empire strikes back: outsiders and the struggle over legal education.*' New York; London: New York University Press.

<sup>17</sup> "Young, bright, with egos to match, the Crits saw law as the gateway to power, which had been exploited by the Empire to engage in class oppression. The ostensible objectivity of the legal system protects a market system that marginalizes the underclass, particularly minorities and women. Laws, decisions, and regulations are indeterminate, full of choices and options that are denied the oppressed. The solution: topple the Establishment, break up the monopoly on objectivity, and institute communitarianism" (AUSTIN, Arthur. 1998. '*The Empire strikes back: outsiders and the struggle over legal education.*' New York; London: New York University Press, p. 02).

Syndrome": driven by hidden religious aspirations, the *crits* would refuse to "mature" - which, from a liberal standpoint, means giving up hope of social justice and embrace speculative capitalism<sup>18</sup>. It should not be surprising that the group's program has often been labeled as *utopianism*<sup>19</sup>.

#### 4 Critical Legal Studies

The *Critical Legal Studies* Movement - "the gang of leftists from the 60s and young people with nostalgia for events of 15 years ago", as described by Duncan Kennedy, one of its main articulators - interprets the jurist not as keeper, but as architect of social building<sup>20</sup>. In an authentically democratic community, legal knowledge must assist the population in establishing institutions that in fact represent the potential of citizens. Thus, it needs to commit to *innovation* by exploiting the *utopian counterfactualities of the system*. Influenced by American legal realism and the *Law and Society* movement, the *crits* attempt to present themselves as a third way between liberal formalism and Marxist-Leninist determinism, *Scylla and Charybdis*. Unlike Orthodox Marxism, they do not comprehend Law as an epiphenomenon of the class struggle, devoid of its own density. Between "base" and "superstructure", "mode of production" and "symbols of culture", "factual domain" and "normative domain", there are complex and multidirectional relationships. In this way, the critique of Law not only tears away the imaginary flowers that conceal the currents (to use Marx's terminology), but effectively produces transformative political actions. By giving meaning to social interactions, world

<sup>18</sup> Louis B. Scharztz will reject the movement with the following words: "At the level of style, the authors seemed addicted to jargon, shallow psychologizing, a moralistic preachiness, and the practice of citing each other incestuously when not citing selected paladins of political science, sociology, and psychology such as Hegel, Marx, Engels, Durkheim, Weber, Piaget, and Marcuse. The high moral tone was often compromised, however, by a weakness for misrepresenting law, fact, or history whenever necessary to save the chosen political thesis" (SCHWARTZ, Louis B. 1984. 'With gun and camera through darkest CLS-land.' *Stanford Law Review*, Palo Alto, vol. 36, n. 01/02, p. 414).

<sup>19</sup> "If the Critical scholars are making the point that utopian fantasy is the only alternative to conventional legal thought, then they are making the strongest possible pragmatic argument for maintaining our conventions" (JOHNSON, Philip E. 1984. 'Do you sincerely want to be radical?' *Stanford Law Review*, Palo Alto, vol. 36, n. 01/02, p. 247-291). From Johnson's point of view, *crits'* rejection to modern legal order is, at the same time, nihilistic and mystical. According to this author, beyond the limits set by the demo-liberal system, there is nothing. Thus, those who reject the institutionalized model necessarily move towards anomie.

<sup>20</sup> EMERSON, Ken. 1990. 'When legal titans clash.' *The New York Times*, april, 02, 1990. Available: <<http://www.nytimes.com/1990/04/22/magazine/when-legal-titans-clash.html?pagewanted=all>>. Accessed on july, 31, 2016.

views can sustain practices of domination. When one emancipates oneself from the illusory *necessity* of existing social arrangements, the pillars of the order in force are shaken. Hegemonic legal consciousness is reifying: by presenting itself as a deductive and autonomous science, it serves as a mask for exploitation and injustice. Exposing the complexity and the normative and administrative contradictions of Law, *crits* open the way to a post-liberal society<sup>21</sup>.

Law schools, directed to dogmatic disciplines, impose the mission of training for judicial activity (through the doctrinal analysis), not to produce knowledge about the history, the meaning and the impact of the juridical in social life. They are fundamentally technical-professional<sup>22</sup>. Both the conservative and the liberal views reduce the Law to an instrumental knowledge. For conservatives, humans are collaborative and supportive creatures by nature, so Law must interfere only when organic links break. For liberals, social cooperation relations are, in fact, means for the pursuit of individual interests, and it is up to lawmakers to harmonize the multiple subjective ambitions of the community members. In either case, the jurist's role is reduced to minimizing the damages of the "social factory" conflict in order to keep intact the current dominant structure. Far from representing a neutral and objective knowledge, Legal Dogmatics is today committed to liberalism (the tacit theoretical background of forensic practice). As Frank Munger and Carroll Seron note:

The Pressures within Professional law schools engage in the perpetuation of conventional legal research are great. In fact, prestige and tenure are earned on the basis of how well one does this type of research. Not only is there enormous pressure to be conventional, it must also be recognized that doctrinal analysis is intrinsically a method of research that legitimates liberal legalism.<sup>23</sup>

Legal dogmatics conceive the "normative authority of Law" as an undeniable fact. Therefore, one does not inquire the ideological assumptions according to which liberal legalism structure is seemed as inevitable. Taking as a starting point a "mapping

<sup>21</sup> KENNEDY, Duncan. 2014. 'The globalisation of Critical Discourses of Law: thoughts on David Trubek's Contribution.' In: BÚRCA, Gráinne de et al (Org.). *Critical Legal Perspectives on global goernance: liber amicorum David M. Trubek*. Oxford e Portland: Hart Publishing.

<sup>22</sup> TRUBEK, David M. 1983. 'A strategy for legal studies: getting Bok to work.' *Journal of Legal Education*, Ithaca, vol. 33, n. 04, p. 586-593.

<sup>23</sup> MUNGER, Frank; SERON, Carroll. 1984. 'Critical Legal Studies versus Critical Legal Theory: a comment on method.' *Law & Policy*, Cambridge, vol. 06, n. 03, p. 262.

of legal doctrine"<sup>24</sup>, committed to exposing the current use of Law in oppressive and alienating relationships, *crits* seek to blur the distinction between professional practice and transformative practice. The false impartiality of legal dogmatics seeks to convince that the distinction between politics and Law would be like the distance between *defining* and *operating* a system. Politicians *create* the body of norms; jurists *only* apply it. *Critical Legal Studies* seek to demonstrate that the boundaries between *defining* and *operating* a normative system are flexible in a way that the legal scholar is not only a server, but also a member of the community that produces the legal order<sup>25</sup>. In fact, *crits'* perspective is a participative one: they militate for others to see Law as the fruit of collective creation and, therefore, struggle for the constitution of communities with non-hierarchical interests. *Crits* redefine the concept of Law, distancing itself from doctrinal tradition<sup>26</sup>.

The discrepancy between Legal Dogmatics and *Critical Legal Studies* is (as numerous scholars have pointed out) similar to that which separates theologians from religion sociologists. *Crits* propose a method of non-doctrinal study, which analyzes the Law "from the outside"<sup>27</sup>. They hold the belief that the task of the jurist must be to show the legal order rationality - the result of contingent commitments (derived from passions, not from logic) assumed by legislators. For some opponents, they would be like priests without religion, living from a "crisis of faith", or atheistic teachers in Sunday Schools. This is the point, it should be noted, that polarized the debate fostered by the release of Paul D. Carrington's controversial paper "*Of Law and the River*"<sup>28</sup>: is it possible to teach Law without believing in the legal order? Should students be

<sup>24</sup> MUNGER, Frank; SERON, Carroll. 1984. 'Critical Legal Studies versus Critical Legal Theory: a comment on method.' *Law & Policy*, Cambridge, vol. 06, n. 03, p. 258.

<sup>25</sup> "If the victories of the civil rights movement are to be attributed to intrasystemic practice, then calling out the troops, group trespass, intentionally provocative mass demonstrations, violations of judicial injunctions, and public defiance of magistral authority are integral parts of the system" (SIMON, William H. 1984. 'Visions of practice in legal thought.' *Stanford Law Review*, Palo Alto, vol. 36, nº.01/02, p. 499).

<sup>26</sup> "In the doctrinal tradition, the 'science' of law was defined as the study of rules and principles, largely through analysis of cases. As John Henry Schlegel has pointed out, this definition of the province of legal study gave the law professor a clear and exclusive domain within the university for his work: No other field could claim competence to study 'pure law'. (...) It is only natural that when the non-doctrinal rebels sought to escape from this approach, they had to seek a new definition of their domain of study and develop an alternative set of methods. An alliance with the social sciences offered one solution to this problem" (TRUBEK, David M. 1984. 'Where the action is: Critical Legal Studies and Empiricism.' *Stanford Law Review*. Palo Alto, vol. 36, n. 01/02, p. 584).

<sup>27</sup> TRUBEK, David M. 1984. 'Where the action is: Critical Legal Studies and Empiricism.' *Stanford Law Review*. Palo Alto, vol. 36, n. 01/02, p. 587.

<sup>28</sup> Related to this paper, Peter W. Martin made a wide digest wrote by authors like Robert W. Gordon, Paul Brest and Philip Johnson. See MARTIN, Peter W. 1985. "'Of law and the river", and of nihilism and academic freedom.' *Journal of Legal Education, Ithaca*, vol. 35, nº 01, p. 01-26.

encouraged to nurture respect for the judicial system? For Carrington, the aim of *Critical Legal Studies* is not to deny the existence of Law, but to show that the legal order, far from being a natural phenomenon, is a social construction that serves to a wide range of purposes and can be contemplated in new and unfamiliar ways<sup>29</sup>. In a review of Mark Kelman's *A Guide to Critical Legal Studies*, Eugene Genovese will blame the *crits* for disseminating disbelief, fostering a total politicization of social life in an effort to interpret all intermediary institutions between the individual and the state as spheres marked by power relations<sup>30</sup>. *Critical Legal Studies* adepts would respond that this political dimension of social life was not their own creation - social life is essentially *political* in its immanent nature<sup>31</sup>.

### 5 Deconstruction and utopia

Many, supportive or contrary to the movement, will say that *crits*, though skilled in framing obstacles, are hesitant in proposing alternatives. For Owen M. Fiss, for example, the *Critical Legal Studies* movement would be nothing more than a "radicalism for yuppies", which, rejecting the notion of Law as a common ideal, the grammar of public morality, would be linked to nihilism and negativism. Fiss does not support *crits'* thesis that the Law would not be able to provide "correct answers" (in his view, the primary function of legal knowledge is to guide the activity of judges)<sup>32</sup>. Genovese, in his turn, argues that the concepts of "participatory democracy" and "equity", repeatedly invoked by *crits* as opposed to the liberal order, remain captiously uncertain<sup>33</sup>. The utopian imagination of the movement would not be able to become executed in feasible projects and would be lost in the autophagic deconstruction of reason. This is also Stuart Russel's perception, according to which the *Critical Legal Studies* would be less a

<sup>29</sup> MARTIN, Peter W. 1985. "Of law and the river", and of nihilism and academic freedom.' *Journal of Legal Education*, Ithaca, vol. 35, nº 01, p. 24.

<sup>30</sup> GENOVESE, Eugene D. 1991. 'Critical Legal Studies as radical politics and world view.' *Yale Journal of Law and Humanities*, New Haven, vol. 03, n. 01, p. 147.

<sup>31</sup> TUSHNET, Mark. 1990. 'A Critical Legal Studies Perspective.' *Cleveland State Law Review*, Cleveland, vol. 38, n. 01, p. 137-151.

<sup>32</sup> FISS, Owen M. 1986. 'The death of the law?' *Cornell Law Review*, Ithaca, vol. 72, n. 01, p. 01-16.

<sup>33</sup> GENOVESE, Eugene D. 1991. 'Critical Legal Studies as radical politics and world view.' *Yale Journal of Law and Humanities*, New Haven, vol. 03, n. 01, p. 147. The author does not realize that traditional legal thinking is also sometimes vague, utopian, and not concrete. Even a pragmatic theory, such as the Economic Analysis of Law, is based on conjectures: after all, it *assumes*, but does not *prove*, that individuals *always* seek to maximize their own interests.

jusphilosophical school than a methodological procedure for criticizing the analysis of Western Philosophy of Law:

The CLS [*Critical Legal Studies*] approach thus exposes the illegitimacy of our legal system and allows us to consider a different legal philosophy. The critique is, however, much more fully developed than the formulation of a coherent alternative theory to liberal legalism<sup>34</sup>.

This observation is by no means unfounded: a substantial part of the intellectuals associated with the movement is committed to the practice of *trashing*, a form of analysis, which, inspired by Derrida's deconstructionism, seeks to expose the mystification techniques underlying legal formalism. It is a tactic to destabilize rationalizations, showing that legal education is not a scientific activity, rather, it is a form of advocacy:

Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-comic); and then look for some (external observer's) *order* (not the germ of truth) in the internally contradictory, incoherent chaos we've exposed<sup>35</sup>.

Anthony Chase's stance may serve as an example. In the author's view, legal language - like ordinary language - is fraught with ambiguity. The scholar committed to anti-formalist orientation needs to expose the indeterminacy, contradiction, and marginality of legal discourse, revealing how the apparent technicality of jurisdictional activity conceals class interests: "(...) law is an open-textured and infinitely "manipulable" system (at least at the level of language and the understood meanings of words) whereby virtually any judicial result can be "logically justified" on any given set of facts".<sup>36</sup>

The *trashing* is not meant to be positive or edifying - it projects, on the legal order of liberalism, the look that a structuralist ethnographer would devote to the myths and rites of a silvicultural population. Opposing to the exegesis commonly defended by

<sup>34</sup> RUSSELL, J. Stuart. 1986. 'The Critical Legal Studies challenge to contemporary mainstream legal philosophy.' *Ottawa Law Review*, Ottawa, vol. 18, n. 01, p. 22.

<sup>35</sup> KELMAN, Mark G. 1984. 'Trashing.' *Stanford Law Review*, Palo Alto, vol. 36, n. 01/02, p. 293.

<sup>36</sup> CHASE, Anthony. 1986. 'What should a law teacher believe?' *Nova Law Review*, Davie, vol. 10, n. 02, p. 412.

Legal Dogmatics (of a reconstructive and justifying matrix), *trashing* is presented as a purely descriptive procedure, a catalog of micro-practices. Already in the first *Critical Legal Studies* conference in 1977, this "cynical" perspective of Law was perceived by some *crits* as suspicious.

Outlining a *Critical Legal Studies* typology, Kelman differentiates between utopian and analytic approaches<sup>37</sup>. For him, analytical researches (among which the *trashing* increases) forms an extensive part of *crits'* theoretical production. *Trashers* - the author will say - are skeptical of major theories, which they see as naturalization (universalization) attempts of contingent constructs. However, there are at least two notable examples in the utopian specification movement: Peter Gabel and Unger, philosophers that Kelman defines as *anti-trashers*<sup>38</sup>. Although conceiving himself as a *trasher*, Kelman stresses the need for *Critical Legal Studies* to construct utopias, otherwise they will be swallowed up by inertia or complacency. The deconstruction of liberalism can not be seen as an end in itself: it must be directed towards the preparation of an alternative system. *Trashing* operates as a function of utopian thinking. Here, Unger occupies a prominent place, on account of his ability to transform the negativity of criticism into the positivity of vision - a constructive theory, a political program that assembles *crits'* diffuse expectations<sup>39</sup>.

## 6 Neoliberalism and the crisis of *Critical Legal Studies*

In the 1990s, a neoliberal wave took over American law schools. The Harvard case will be emblematic: under the leadership of the *Federalist Society*, the institution will dismiss

<sup>37</sup> KELMAN, Mark G. 1984. 'Trashing.' *Stanford Law Review*, Palo Alto, vol. 36, n. 01/02, p. 330.

<sup>38</sup> Genovese argues for the existence of an irreconcilable contradiction between Unger and the other *crits*. The Brazilian legal philosopher would be the only one to recognize the need of a *new metaphysics* to support his program of dismantling liberal ideology. There would be a cleavage between the *Critical Legal Studies* as a radical policy and *Critical Legal Studies* as a world view. In the author's words: "A long shadow falls between Unger's stimulating explorations of the property question and state power and the politically incoherent stand of CLS as a movement" (GENOVESE, Eugene D. 1991. 'Critical Legal Studies as radical politics and world view.' *Yale Journal of Law and Humanities*, New Haven, vol. 03, n. 01, p. 155).

<sup>39</sup> GODOY, Arnaldo Sampaio de Moraes. 2007. 'O Critical Legal Studies Movement de Roberto Mangabeira Unger: um clássico da filosofia jurídica e política.' *Revista Jurídica da Presidência*, Brasília, vol. 08, n. 82, p. 49-63.



a substantial portion of teachers associated to *Critical Legal Studies*<sup>40</sup> from its administrative body. The fact is that in several legal education centers in the West, the same process will take place in an effort to restrain critical theories of Law. As suggested in the introduction to this paper, neoliberalism presented itself, when confronted with socialist decline, as the only feasible alternative, the anti-utopian utopia that would reflect an era of disenchantment. Not a few legal scholars held this proposal, recovering a formalist and dogmatic view of Law. *Crits* will be disarmed in the face of this new juncture, when countless intellectuals will proclaim the emergence of a post-ideological time.

In 2009, Peter Gabel will list some factors that, in his opinion, would have contributed to the collapse of the *Critical Legal Studies*. By the way, the author teaches:

In my view, CLS "stopped", or perhaps "paused," about fifteen years ago because it lost track of this spiritual and moral foundation. One reason for this was the dissipation of the social movements of the spiritual dimension visible to CLS teachers and writers and audible to our listeners and readers. A second reason influencing the dissipation of the movements themselves was the collapse of socialism and the Marxism that had supported it, which for 150 years provided the principal metaphor for the morally transcendent communal horizon against which the shortcomings of the present society had been measured. A third factor intimately bound up with the other two was the rise of the New Right as a conservative moral response to the social challenge and disruption that the movements of the '60s had introduced into public space, with the Reagan Revolution championing that the movements of the '60s had introduced into public space, with the Reagan Revolution championing deregulation, an attack on entitlement programs, and an originalist, new-federalist constitutionalism that sought to delegitimize the public sphere itself as an arena of collective moral action.<sup>41</sup>

Speaking of that, what would characterize Gabel's "moral and spiritual foundation" of *Critical Legal Studies*, which would have been degraded by the neoliberalism consolidation? In a word: utopianism. For Gabel, the Utopian spirit is the

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<sup>40</sup> About the subject, see: HICKS JR, George W. 2006. 'The conservative influence of the Federalist Society on the Harvard Law School student body.' *Harvard Journal of Law & Public Policy*, Cambridge, vol. 29, nº 02, p. 623-718.

<sup>41</sup> GABEL, Peter. 2009. 'Critical Legal Studies as a spiritual practice.' *Pepperdine Law Review*, Malibu, vol. 36, n. 95, p. 528.

movement restrained quality, which needs to be rediscovered in order to be reborn. Gabel believes that society's criticism can not be sustained unless it is based on utopian representations. According to the author: "A successful critical approach to the present - or, in the case of law, a successful critical legal studies - requires the illumination of the injustice of what is, that is anchored in a transcendent intuition of the Just world that ought to be"<sup>42</sup>. *Crits* demonstrated fragility, against its opponents, precisely for abandoning a substantive vision of the community. *Trashing* is an analytical technique of deconstruction, destituted of value content. Useful in explaining liberal legalism weaknesses, it has little use in promoting alternative ideologies. It can drag its followers into the School of Resentment<sup>43</sup>, condemning them to a deep spiritual emptiness. Thus, despite of their efforts, the stance of some *crits* ends up mirroring the worst characteristics of modern liberal culture: moral displacement, social isolation, lack of sense...

This is the evaluation that Unger<sup>44</sup> develops in the most recent edition of the classic *The Critical Legal Studies Movement*. Appointed as the mentor of the group - *Knowledge and Politics*<sup>45</sup>, the first work of this Brazilian intellectual will be the main and fundamental reference for the studies of *crits* -, Unger believes that the "utopian approaches" were the least explored by critical theories of Law, so that the *iconoclastic* face of Postmoderns was not sufficiently complemented by their *planner* dimension. Therefore, they could not mobilize subsequent generations, forcing them into action.

## 7 Conclusion

Liberal left-wing, refusing to advocate in the name of absolute values or to unite totalizing world views (which, in its judgment, would be fatally "totalitarian"), allows

<sup>42</sup> GABEL, Peter. 2009. 'Critical Legal Studies as a spiritual practice.' *Pepperdine Law Review*, Malibu, vol. 36, n. 95, p. 521.

<sup>43</sup> The term was used by Harold Bloom to designate authors limited to scholar run-ins, with pessimistic views about revolutionary projects and/or radical transformations of the political order (BLOOM, Harold. 2010. 'O cânone ocidental'. Tradução de Marcos Santarrita. Rio de Janeiro: Objetiva).

<sup>44</sup> UNGER, Roberto Mangabeira. 2015. *The Critical Legal Studies Movement: another time, a greater risk.* London; New York: Verso.

<sup>45</sup> UNGER, Roberto Mangabeira. 1978. *Conhecimento e política.* Tradução de Edyla Mangabeira Unber. Rio de Janeiro: Forense.

itself to be seduced by procedural (i.e., empties) conceptions of democracy. The result is, as Žižek ponders, the lack of "passion":

[...] when leftists deplore the fact that today only the Right has passion, is able to propose a new mobilizing imaginary, and that the Left only engages in administration, what they do not see is the structural necessity of what they perceive as a mere tactical weakness of the Left. No wonder that the European project which is widely debated today fails to enflame the passions: it is ultimately a project of administration, not of ideological commitment. The only passion is that of the rightist reaction against Europe – all the leftist attempts to infuse the notion of a united Europe with political passion (such the Habermas-Derrida initiative in the summer of 2003) fail to gain momentum.<sup>46</sup>

Recovering the utopian dimension of Critical Legal Studies would be precisely inflating them with passion. Against the principle of reality, the mark of liberalism, it would revive the principle of pleasure. Future in the past: had it not been hindered by the rise of neoliberalism, the development of *Critical Legal Studies* could have led to more dense programs of democratic planning and institutional rearrangement. This path, which was projected beyond the *trashing*, was still discouraged in its early moments, remaining as a latent track that must be followed. In Gabel's view, this way could overcome the standoffs faced in the 1990s by *crits*.

Unger and Gabel's attempts to foster social order rearrangements were not enough to preserve the utopianism of *Critical Legal Studies*. To protect themselves from the rationalist and falsifying approaches typical of liberalism, *crits* have embraced, more often than not, *irrationalist* convictions, viewing with distrust any measure of social planning. Gabel believes that such an orientation eventually weakened the group; the legal scholar longed for the restoring of *Critical Legal Studies* as a "spiritual practice," a source of faith:

"We [CLS] really were motivated by love, but it was a love that dared not speak its name. And in my opinion, that is because our movement was infected with the same fear of the other that underlay the injustices that we criticized in the wider society"<sup>47</sup>.

<sup>46</sup> ŽIZEK, Slavoj. 2008. *'In defense of lost causes'*. New York; London: Verso, p. 101.

<sup>47</sup> GABEL, Peter. 2009. 'Critical Legal Studies as a spiritual practice.' *Pepperdine Law Review*, Malibu, vol. 36, n. 95, p. 516.

Although indispensable, *trashing* (which shakes the belief in the fixity of institutions) needs to be complemented by utopia, designed to *reveal the meaning* (purpose) of transformative action. In Gabel's understanding, the main thesis of *Critical Legal Studies*, which postulates the imaginary character of categories taken as static, must be closely related to the recognition that *each of us is the unique incarnation of a common humanity*. It is, of course, an ethical call, which reconnects critical legal thinking to the *principle of hope*, to the broad tradition that projects its longings for social change in its future.

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