LIVING LEGALITY:
LAW AND DUSSEL'S PHILOSOPHY OF LIBERATION

by

JUAN SEBASTIAN OSPINA

A DISSERTATION
Presented to the Department of Philosophy
and the Division of Graduate Studies of the University of Oregon
in partial fulfillment of the requirements
for the degree of
Doctor of Philosophy

June 2023

DISSERTATION APPROVAL PAGE

Student: Juan Sebastián Ospina
Title: Living Legality: Law and Dussel's Philosophy of Liberation

This dissertation has been accepted and approved in partial fulfillment of the requirements for the Doctor of Philosophy degree in the Department of Philosophy by:

Alejandro Vallega	Chair
Colin Koopman	Core Member
Omar Rivera	Core Member
Kristen Bell	Institutional Representative

and

Krista Chronister Vice Provost for Graduate Studies
Original approval signatures are on file with the University of Oregon Division of Graduate Studies.

Degree awarded June 2023.

DISSERTATION ABSTRACT

Juan Sebastián Ospina
Doctor of Philosophy
Department of Philosophy
June 2023
Title: Living Legality: Law and Dussel's Philosophy of Liberation

In this dissertation I examine the theoretical underpinnings necessary for a philosophy of liberation account of law and suggest an alternative conceptualization of the function of law and political institutions, following the normative contributions of Enrique Dussel's political philosophy of liberation. I argue that, while Dussel has not yet developed a complete account of legality proper in his political philosophy, his work contains resources for developing a liberatory philosophy of law. Specifically, this dissertation explores the normative dimensions of this question by offering a systematization of Dussel´s philosophy of liberation of law through which is possible to conceive an alternative form of constituent power and institutions that result from this decolonial tradition. In pursuing this inquiry, I connect concepts from liberation philosophy to questions about the meaning of legal notions that are understood as the basic framework of our political life. I examine the notion of constituent power and its potential to redefine political and legal institutions.

ACKNOWLEDGMENTS

This project would not have come to life without the support of many people. I want to thank my mother and brother, Ileana and Camilo, for their unconditional love and support throughout the years. I hope we can finally make up for our time apart. Meeting a brilliant group of friends here in Oregon meant everything to me. Larissa Petrucci, Cameron Gamble, Kenny Knowlton, and Diego Contreras-Medrano, thank you for your kindness and support throughout these years. You were always there for me. I also want to thank Oscar Ralda, my unfailing friend here in Eugene, who was always available to meet, talk, and entertain me through good and hard times. I feel very lucky to have met you. Mare McLevey, my biking comrade and dear friend. I will never forget our morning writing sessions that allow me to finish this manuscript on time. I am very grateful to have you in my life.

Anyone who starts a writing project knows that planning is essential. During all stages of writing this dissertation, and especially during the last few months, my friend and colleague Valérie Simon provided meticulous help with planning. I cannot thank you enough for your kind and patient encouragement during this time helping me structure the completion of each chapter. also want to thank Michael Murashige for his invaluable commitment to supporting my writing process; your comments and suggestions in each chapter were extremely constructive.

Finally, to Lola Loustaunau. We went through the most challenging stages of grad school together. Your generosity and love helped me never give up through the most stressful moments. A pesar de la distancia, estoy eternamente agradecido por haber podido encontrarte en este lugar remoto y compartir este proceso juntos.

TABLE OF CONTENTS

CHAPTER 1
INTRODUCTION: LAW AND PHILOSOPHY OF LIBERATION

The aim of the philosophy of liberation and the nature of law may initially seem contradictory. While the philosophy of liberation aims to destroy all forms of domination in order to liberate the human subject against acts of repression and force, such as lack of political participation, racism, sexism, economic exploitation, etc., law is forceful and coercive. Within the broad theoretical framework of decolonial thought, the work of the law is often conceived as a mode of oppression and domination by colonial powers, expressed through force. Decolonial scholarship questions the law and its institutions, and points to the ways in which legality inevitably works to reimport the hierarchy, domination, violence, and oppression of law back into the project of liberation. Decolonial theory notes numerous examples throughout the history of colonialism when the law was enforced against subjects and populations it did not fully consider human beings. Even the emancipatory aspirations of modern juridical-political institutions, like notions of the sovereignty of the state, universal rights, or the rule of law, cannot be understood apart from the necessity of violence. This dissertation aims to shift the focus of decolonial thought toward the ways in which laws and institutions can be made to serve liberation and decolonial projects and the ways in which laws and institutions can prevent, mitigate, and stop perpetrating violence.

The law itself demands violence be examined and scrutinized. However, the violence of law is often considered a fact or necessity. As Colombian philosopher Maria Acosta explains, we confront an inherent paradox of the law when we allow that "violence exists not only external to the law […] but also lies at the core of what the law is, at the ground of its own presupposition and

legitimation."[1] Acosta's conception of the paradox of law leads us to the unavoidable questions that decolonial accounts of legality and its institutions propose: Is it possible to measure the violence wrought in the name of the law? How do we account for the untold violence against humans wrought by enforcing prohibitions of all kinds; imposing moral codes and institutional policies; and upholding regulations, edicts, and mandates? How do we begin to calculate the cost of this ongoing interdiction—the continual policing and executing of the law required by the law itself—when this interdiction relies implicitly on coercion and uninterrupted violence? Is it possible to think about the law, as it now exists, without violence and domination? If there is no law, do we conclude that there must be only unjustified violence? And what does it mean to experience the violence that law implies?

To dwell on these questions is to begin thinking about what is at stake in this inherent paradox. These questions form the core of the nature of a decolonial account of law. By rejecting violence as an axiomatic fact and taking seriously the difficulty this ambition presents, decolonial theory presents a challenge to what the law and its institutions would otherwise claim to be. If the philosophy of liberation and decolonial philosophy[2] demand the formulation of another conceptual

[1] Maria del Rosario Acosta López, "Law after the Law: Contemporary Approaches to the Paradoxical Relationship between Law and Violence," *New Centennial Review*, Vol. 14, No. 2, Law and Violence (Fall 2014), pp. 1-10, p. 1.

[2] The debate about what distinguishes the philosophy of liberation from decolonial philosophy is not easy to dismiss. The liberation philosophy, as a Latin American critical tradition of thought, at least partially, has developed through the constellation of authors such as Augusto Salazar Bondy, Ernesto Mayz Vallenilla, Enrique Dussel, Ofelia Schutte, Leopoldo Zea, Horatio Cerutti-Guldberg, Rodolfo Kusch, among others. Liberation philosophy emerged in the context of the hegemonic force of the United States at the beginning of the twentieth century, the decline of the communist Soviet Union, and Latin American revolutions such as the Cuban and Nicaraguan. As a critical and geopolitical-oriented philosophical inquiry, its emphasis was the significance of place (space) and identity as a central concern for the aspiration of the liberation of the injustices of the center, first Europe, and subsequently, the imperial power of the United States against the periphery or global south. As Dussel points out, the philosophy of liberation "ponders the non-philosophical;" the reality. But because it involves reflection on its own reality, its set out from what already is, from its own world, its own system, its own space." Dussel, Enrique D. *Philosophy of Liberation*. Eugene, Or.: Wipf and Stock, 2003. p. 2-3. While philosophy of liberation seems to develop a concern for its own reality of the geopolitical dynamic of global power, decolonial thought instead focuses on a widespread concern, as Maldonado-Torres argues, to a "renewed affirmation of decolonization as a project of nations that were "still colonized (by economic forces and epistemological and symbolic structures)." Maldonado-Torres, Nelson. "Enrique Dussel's Liberation Thought in the Decolonial Turn." *Transmodernity* 1, no. 1 (2011). p. 2-3. Nevertheless, in my view, both

apparatus to break with the reproduction of the "coloniality of power," the role of an alternative conception of legality is crucial to struggle against the inherent determinations of coloniality.

Decolonial theorists such as Anibal Quijano, Walter Mignolo, Maria Lugones, Nelson Maldonado-Torres, Ramón Grosfoguel, and Santiago Castro-Gomez, among others, have explored the historical roots of modern dichotomies created by the rational formalization of principles and the practices of coloniality[3]. However, these scholars did not observe the systematic violence of modern law and its development into new forms of domination.[4] The issue of legality and institutionalization may have been overlooked because decolonial political theory remains situated

modalities of thinking share the same political and epistemological commitments and the instrumental and intrinsic value of the ambition of philosophical thinking to change reality. Following the insights of Grant Silva, I shared the belief that liberation thinkers always "tend to maintain one foot in theories of decolonization predicated on coloniality." Silva, Grant. "'The Americas Seek Not Enlightenment but Liberation': On the Philosophical Significance of Liberation for Philosophy in the Americas." *Pluralist (Champaign, Ill.)* 13, no. 2 (2018): 1–21. p. 10.
Furthermore, both philosophy of liberation and decolonial philosophy, ultimately, for better or worse, as Alejandro Vallega correctly observes, "are born of the living experience and modes of knowledge, the lineages and histories, of the excluded, the poor, the exploited, and the silenced." Vallega, Alejandro A. *Latin American Philosophy from Identity to Radical Exteriority*. World Philosophies. Bloomington, Indiana: Indiana University Press, 2014. p. 12.

[3] See Quijano, Anibal, and Michael Ennis. "Coloniality of Power, Eurocentrism, and Latin America." *Nepantla* 1, no. 3 (2000): 533–80; Quijano, Anibal, and Immanuel Wallerstein. "Americanity as a Concept, or the Americas in the Modern World-System." *International Social Science Journal* 44, no. 4 (1992): 549–57; Quijano, Aníbal. "Coloniality and Modernity/Rationality," *Cultural Studies (London, England)* 21, no. 2–3 (2007): 168–78; Lugones, María. "Heterosexualism and the Colonial/Modern Gender System." *Hypatia* 22, no. 1 (2007): 186–219; Grosfoguel, Ramón. "The Epistemic Decolonial Turn." *Cultural Studies* 21, no. 2–3 (March 1, 2007): 211–23; Grosfoguel, Ramón, and Ana Margarita Cervantes-Rodríguez. "The Modern/Colonial/Capitalist World-System in the Twentieth Century: Global Processes, Antisystemic Movements, and the Geopolitics of Knowledge." Contributions in Economics and Economic History. Westport, Conn. ; Praeger, 2002; Castro-Gómez, Santiago, and Ramón Grosfoguel. *El Giro Decolonial: Reflexiones Para Una Diversidad Epistémica Más Allá Del Capitalismo Global*. Biblioteca Universitaria: Ciencias Sociales y Humanidades Serie Encuentros. Siglo del Hombre Editores, 2007; Maldonado-Torres, Nelson. "On the Coloniality of Being." *Cultural Studies* 21, no. 2–3 (March 1, 2007): 240–70.

[4] To some extent, except for thinkers of Mignolo and Maldonado Torres, often there is a lack on interested in the question concerning the multiple forms of oppression and violence of legal structures. A connection between the theoretical framework of the coloniality of power and human rights, See specifically Maldonado-Torres, Nelson. "On the Coloniality of Human Rights." *Revista Crítica de Ciências Sociais*, no. 114 and Mignolo, Walter D. "The Making and Closing of Eurocentric International Law: The Opening of a Multipolar World Order." *Comparative Studies of South Asia, Africa, and the Middle East* 36, no. 1 (2016): 182–95. Walter Mignolo From "human rights" to "life rights," In Douzinas, Costas, and C. A. Gearty. *The Meanings of Rights: The Philosophy and Social Theory of Human Rights*. Cambridge, United Kingdom: Cambridge University Press, 2014.

in an epistemological commitment to "disobey" the universal signifier of legal and political categories such as the state, the rule of law, rights, and sovereignty.

The necessity of disobeying Eurocentric modernist tendencies is illustrated in the opening of *On Decoloniality. Concepts Analytics and Praxis* by Catherine Walsh and Walter Mignolo: "If 'another world' is possible it cannot be built with the conceptual tools inherent from the Renaissance and Enlightenment."[5] According to this view, to pursue the praxis of decoloniality properly is to 'delink' (Mignolo's vocabulary) from modernity's political and legal horizons. This demand implies that we cannot resort to modern political normative conceptual models. This is partly because all categories seem to have been exhausted, and partly because their nature requires violence and exclusion to be operative. Taking this theoretical orientation as a point of departure to develop a decolonial legal and political philosophy implies that its normative tenets must be constructed without the operation of the logic of coloniality or the rhetoric of modernity.[6]

Law and institutions play a key role in the procedures of our social and political life and in the struggle for more economical, social, and political rights. The law can be both a vehicle of decoloniality and emancipation and a vehicle for oppression, especially considering how that law can work to hide or obscure the role of institutions. I argue that a decolonial account of law limits forms of domination, including state powers, and, more fundamentally, may help organize and regulate social relations that are fundamental to putting into practice decolonial modes of understanding the role of peoples' political participation in institution-making. Decolonial thought constitutes the power of "the people." From Dussel's approach, law's normative and institutional elements of instantiation suggest *transmodern*, anticapitalistic, and institutional forms of political

[5] Mignolo, Walter. *On Decoloniality: Concepts, Analytics, Praxis*. (Durham: Duke University Press, 2018.) p. 7.
[6] Mignolo, Walter, p. 46.

and legal organization. Scholars cannot avoid the necessity of theorizing decolonial forms of legality within the philosophy of liberation. Any form of liberation must have a philosophy of law to ground a new social order and institutions. Rather than leave this important task only to lawyers and political theorists, whose interests often oppose decolonial demands, a theory of law and institutions must be central to a political philosophy of liberation.

This dissertation offers a conceptual examination of law as a fundamental entity for the philosophy of liberation. I underscore the legal and institutional aspects of Enrique Dussel's liberation political philosophy. I claim that Dussel's political philosophy can provide a decolonial version of the law with a normative orientation to develop an institutional framework grounded in the active participation of the people's constituent power. This dissertation aims to articulate a philosophical account of law that does not reproduce the relations and structures of domination that are distinctive of the conceptual framework of coloniality of power. Following the normative contributions of Dussel's politics of liberation, I examine the conceptual ground of the decolonial account of law and suggest an alternate conceptualization of the function of law and political institutions. I argue that, while Dussel did not articulate a complete account of legality proper in his political philosophy, his work contains traces we can use to develop a liberatory philosophy of law. As I show Dussel outlines structures and relations of political power imbricated with a form of law that can offer institutional mediations through what I call a *living legality*. I follow Dussel's goal of going beyond the formalism of abstract procedures of law and foregrounding the idea of an active constituent power that transforms the institutional system permanently according to people's needs and claims.

In order to more precisely illustrate the problem of the relation between law and a philosophy of liberation, I travel back briefly to the sixteenth century to excavate the history of colonial

violence. I insist that there is a continuity, and an intellectual justification, within the paradigm of modern law for institutions as instruments of violence and domination. Looking at the sixteenth century allows us to engage in a philosophical inquiry about law and liberation in our times. In the Americas, both law and institutions mark the presence of colonial powers, as the sixteenth century provided justification of conquest and domination of territories and human bodies.[7] In 1511, in Santo Domingo, Dominican friar Antonio de Montesinos opened the debate about the controversy of violence committed by the legal and political arrangements of the *Encomienda* system—free labor and economic exploitation under the control of the *encomenderos*.[8] In a famous sermon recounted by de Las Casas in his *Historia de las Indias,* Montesinos begins his argument against the *encomenderos* with a set of key questions: "[B]y what right and with what justice do you keep those Indians in such cruel and horrible servitude? By what authority have you made detestable wars on these peoples, who were living tranquilly and peacefully on their lands […] These Indians, are they not human beings?"[9]

All the concerns that Montesinos raised found strong echoes in the theoretical and practical approaches of decolonial and post-colonial studies of Latina America, Asia, and Africa during the twentieth century.[10] Decolonial thinkers pose questions about the violence of colonial institution,

[7] The enslavement of indigenous people was perhaps the most well-known prominent example of the Hispanic colonial institutions regulated by law and administrated through violence and physical harm. At least in the Christian world, slavery was juridically ruled within the purview of the doctrine of "just war" and *ius gentium* (law of nations). It was employed first in the war against Islam in the Iberian Peninsula, and then used later in the 1550s by Ginés de Sepúlveda to justify the war against the Indians in the Americas. See Arias, Santa, and Raúl Marrero-Fente. *Coloniality, Religion, and the Law in the Early Iberian World*. First edition. Hispanic Issues (Vanderbilt University); v. 40. Nashville: Vanderbilt University Press, 2014.

[8] For a historical analysis of the encomienda system see the classical works of Zavala, Silvio. *La encomienda indiana*. Madrid: Imprenta helénica, 1935.

[9] As quoted by Adorno, Rolena. *The Polemics of Possession in Spanish American Narrative*. New Haven: Yale University Press, 2007. p. 107.

[10] For a brief overview of the trajectory of the concepts and methodological debates of what is known as the decolonial turn see Gomez-Castro, Santiago and Grosfoguel Ramón, Prólogo "Proyecto Latino/latinoamericano modernidad/colonialidad)" In Castro-Gómez, Santiago, and Ramón Grosfoguel. *El Giro Decolonial: Reflexiones Para Una Diversidad Epistémica Más Allá Del Capitalismo Global*. Biblioteca Universitaria: Ciencias Sociales y Humanidades Serie Encuentros. Siglo del Hombre Editores, 2007. p. 9-21.

like: Who has the right and the authority to rule others? Who has the right to decide the value and status of the category of 'race' as a central element of the idea of the 'human?' By what principles and prerogatives might states wage wars against others? And, in what ways do such principles and prerogatives appear as a measure of justice? Despite diffuse research agendas, decolonial scholarship often converges at the conditions that sustain the structural forms of what Quijano calls "coloniality of power." Legality is often surprisingly overlooked as one of the central forms of coloniality. I aim to contribute to developing a decolonial perspective of law built from the theoretical reconstruction of Dussel's ethical and political work.

The overarching explanatory goal of the concept of coloniality is to understand the event of colonization as a *longue durée* process, which lurks in the same oppressive colonial ideologies, expressed through different tactics. Following Anibal Quijano's approach, coloniality is a more extensive modality of domination tied to modern race/labor/class hierarchies that constitute capitalism's "global vocation."[11] Quijano describes this global form of domination that has shape our world order as the "coloniality of power." Not only coloniality, he argues, is still a "general form of domination […] once colonialism as an explicit political order was destroyed," but it also "doesn't exhaust, obviously, the conditions nor the modes of exploitation and domination between peoples." The point is that coloniality, as form of global domination, "it hasn't ceased to be, for 500 years, their main framework. The colonial relations of previous periods probably did not produce the same consequences, and, above all, they were not the corner stone of any global power."[12] Santiago Castro-Gomez and Ramón Grosfoguel, offer more precise terms for what is really at stake with this temporal and structural articulation of coloniality: we experience an

[11] See Quijano, Aníbal. "Coloniality of Power, Eurocentrism, and Latin America." *Nepantla* 1, no. 3 (2000): 533–80; Quijano, Aníbal. "Coloniality and Modernity/Rationality," *Cultural Studies (London, England)* 21, no. 2–3 (2007): 168–78; Quijano, Anibal, and Michael Ennis.
[12] Quijano, Aníbal. "Coloniality and Modernity/Rationality," p. 170.

ongoing world transition from "a modern colonialism to a global coloniality, a process that undeniably has transformed the different forms of domination displayed by Modernity, but did not really change the structure that constituted its relations between center-periphery at the global scale."[13] Coloniality recycles old forms of racial and social classification, underscoring the ways in which political and legal conceptualizations still mirror the same structures of conquest and the entire Eurocentric colonial project. As Castro-Gomez and Grosfoguel argue, these continuities suggest a need to seek and elaborate new methods and discourses capable of thinking alternative social structures and mediations that are not subjected to the dominant logic of coloniality.[14]

In the following section, I offer insight into why the legal and institutional questions must not be neglected in decolonial agendas. If we accept that coloniality accounts for the continuity of colonial forms of domination, then we should also admit the importance of inquiring about the rearticulation of legal and institutional forms that help us freeing from the system of coloniality of power itself.

The Question of Legality in Decolonial Thought

Quijano's concept of the "coloniality of power" recognizes the perils of law and its broader commitment to institutions that have justified violent encounters with colonized subjects and continue to shape their relationship to dispossessed land, exploited labor, and the creation and expansion into the global capitalist market. [15] Such racial and social classification and regulation

[13] Castro-Gómez, Santiago, and Ramón Grosfoguel. *El Giro Decolonial: Reflexiones Para Una Diversidad Epistémica Más Allá Del Capitalismo Global*. Biblioteca Universitaria: Ciencias Sociales y Humanidades Serie Encuentros. Siglo del Hombre Editores, 2007. p. 13. My translation.
[14] Castro-Gómez, Santiago, and Ramón Grosfoguel, p. 18.
[15] For Mignolo Quijano, coloniality uncovered the consequences of what Carl Schmitt also spoke of in *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. Schmitt's 'second *nomos,'* links the discovery of the Americas and the development of Europe's assumed role of superior regulator, distributor, and appropriator of the planet's land. In Castro-Gómez, Santiago, and Ramón Grosfoguel. *El Giro Decolonial,* p. 183.

systems configured a "world power distribution," according to which "the world's population was differentiated into inferior and superior, irrational and rational, primitive and civilized, traditional and modern."[16] Elaborating on Quijano's notion of coloniality of power, María Lugones describes coloniality as a process for reducing people into racial categories, and, at the same time, placing emphasis on the gender-differentiated dichotomy of men/women as a normative construction of civilization.[17] As Lugones notes, coloniality infiltrated every aspect of the life precisely through the "circulation of power at the levels of the body, labor, law, and imposition of tribute, and the introduction of property and land dispossession."[18] Nevertheless, following Lugones, if coloniality formed a power structure that circulates at every level of our lives and presupposes the pervasive influence of coloniality within the realm of institutions and law, that does not mean that it is a structure of oppression that is inescapable. As Lugones suggests, we need to consider always within a system of oppression, the necessity of a theory of liberation that enables the " […] collective struggle in the reconstruction and transformation of structures."[19]

From a critical legal perspective, there is a vast literature that has underscored the role of law and its institutions as structures of oppression or plunder for gaining the cosmological and cultural knowledge, natural resources, and territories of Latin American, African, and Asian countries. As many critical scholars have argued, there is a clear persistence of colonial continuities within the global order, such as the World Trade Organization or the International Monetary Fund,[20] as well

[16] Quijano, Aníbal. "Colonialidad Del Poder y Clasificación Social." *Journal of World-Systems Research* 6, no. 2 (2000): 342–86.p. 344.
[17] Lugones, María. "Toward a Decolonial Feminism." *Hypatia* 25, no. 4 (2010): 742–59. p. 754.
[18] Lugones, María, p. 754.
[19] Lugones, María, and Mar Lugones."Structure/Anti-Structure and Agency under Oppression." In *Pilgrimages/Peregrinajes*. United States: Rowman & Littlefield Publishers, 2003. p. 180.
[20] For a critical treatment of the violence operating in the rule of law discourse within the policies and agreements enforced by the World Trade Organization (WTO), the International Monetary Fund (IMF), and World Bank, in the contexts of negotiations of policies and agreements with Latin American countries, and specially with the case of Argentina, See "Neo-liberalism: Economic Engine of Plunder" In Mattei, Ugo, Nader Laura. *Plunder: When the Rule of Law Is Illegal*. Malden, Mass.: Blackwell Pub, 2008.

as the bureaucratic-political web of organs of United Nations.[21] These entities have kept a clear dominant-subordinate relationship towards the countries of the global south, and continue to impose their values and conditions through direct or indirect forms of legal, social, and economic violence. Direct forms of violence include enforcing prohibitions in our political, social, and economic practices; imposing moral codes; and organizing modes of production according to certain global or local neoliberal development programs. By contrast, indirect forms of violence might consist of refusing to allow people under their own authority and legitimacy to find and institute different versions of institutional and political organization.

It would be a mistake to overlook the fact that, within every law and institution, there are remnants of coloniality or that those institutions have left behind the legacy of colonial violence. While it may be true that there is an implicit consensus amongst decolonial thinkers such as Mignolo, Maldonado-Torres, and to some extent, de Sousa Santos, to accept the concepts of the legality, and the institutions which they uphold, these theorists do not interrogate the nature of law itself. To illustrate my point: Mignolo, Maldonado-Torres, and de Sousa Santos's[22] recent contributions to a decolonial approach to the universality of human rights from the perspective of

[21] In discussing the critique of cosmopolitan conceptions of human rights as an instrument of a legal imperialist project see Douzinas, Costas. *The End of Human Rights: Critical Legal Thought at the Turn of the Centur*y. Oxford ; Hart Pub., 2000; See also Bartholomew, Amy. *Empire's Law the American Imperial Project and the "War to Remake the World."* London ; Pluto, 2006; Bartholomew, Amy, and Jennifer Breakspear. "Human Rights as Swords of Empire?" *Socialist Register* 40 (2004).

[22] Another more complicated example is the decolonial legal work of Boaventura de Sousa. As opposed to other decolonial approaches that do not take the question of law and institutionalization of the power of the people seriously, he addresses extensively the question of law's foundation. In the past four decades, the sociological work of Sousa Santos has served as model demonstrating the need for creating emancipatory accounts of the rule of law, democracy, and human rights that challenge the structures of Western global capitalist coloniality both in theory and in practice. While thinkers such as Mignolo, Maldonado-Torres, and Spivak tend to ignore or pretend to move beyond the necessity of inquiring about the normative aspects of the law, de Sousa Santos's commitment to restoring the emancipatory forms of legality has remained firm in his intellectual work as in its political and legal activism around the Global South. As we will see later in chapter 3, both Sousa Santos and Dussel overlap in many aspects of their critique of Modernity, but upon their theoretical presuppositions to rethink the formalism of modern law, Santos's conclusions do not get us to the level of the normativity and ontological dimension of Dussel's theory of law.

the coloniality of power.[23] Their work explicitly questions the limits of the western conception of human rights, and all of them call for a general reconceptualization of human rights, the rule of law, and democracy, as far these concepts prove helpful as a legal instrument to the struggles of decolonization. In their legal reflections, Mignolo, Maldonado-Torres, and, to some extent, de Sousa Santos are confronted with questions concerning how human rights, but only evaluate certain classes of elements of rights that are ancillary to the nature of the law that render possible the content of those rights. Though these thinkers may express and share substantive ideas about rethinking the relation between rights and the value of our human standing on the basis of new broader conception of "humanity," they remain descriptive, rather than normative in their analysis of rights and issues of law.

A more substantial approach to the decolonial theories of the nature of law can be found in recent scholarship in comparative law,[24] in decolonial international law,[25] and in decolonial human rights.[26] However, an alternate interpretation of the decolonial nature of law is somewhat ignored

[23] Maldonado-Torres, Nelson. "On the Coloniality of Human Rights." *Revista Crítica de Ciências Sociais*, no. 114 (December 1, 2017): 117–36 and Mignolo, Walter, "From "human rights" to "life rights," In Douzinas, Costas, and C. A. Gearty. *The Meanings of Rights: The Philosophy and Social Theory of Human Rights*. Cambridge, United Kingdom: Cambridge University Press, 2014; Spivak, Gayatri, "Righting Wrongs," In Rathore, Aakash Singh, and Alex Cistelecan. *Wronging Rights?: Philosophical Challenges for Human Rights*. Vol. 1. Ethics, Human Rights & Global Political Thought. London: Routledge India, 2011.

[24] See, Michaels, Ralf, and Lena Salaymeh. "Decolonial Comparative Law: A Conceptual Beginning." *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 86, no. 1 (2022): 166-.; Maldonado, Daniel Bonilla. *Legal Barbarians: Identity, Modern Comparative Law and the Global South*. Cambridge University Press, 2021.

[25] There is an extensive critical and historical bibliography in the field of internal law studies. See for an overview of contemporary critical debates, Singh, Prabhakar, and Benoît Mayer. "Critical International Law: Postrealism, Postcolonialism, and Transnationalism." New Delhi, India: Oxford University Press, 2014; Pahuja, Sundhya. *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. Cambridge University Press, 2011; Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. 1st ed., 2007; Mignolo, Walter D. "The Making and Closing of Eurocentric International Law: The Opening of a Multipolar World Order." *Comparative Studies of South Asia, Africa, and the Middle East* 36, no. 1 (2016): 182–95; Guardiola-Rivera, Oscar. "Law, Globalisation, and Second Coming," no. 1 (2013): 25.

[26] The topic of decolonial human rights has perhaps one of the amplest ranges of philosophical and legal bibliography. Authors I mostly engaged in this dissertation include: Maldonado-Torres, Nelson. "On the Coloniality of Human Rights." *Revista Crítica de Ciências Sociais*, no. 114 (December 1, 2017): 117–36; Fitzpatrick, Peter. "The Revolutionary Past: Decolonizing Law and Human Rights." *Metodo. International Studies in Phenomenology and Philosophy* 2, no. 1 (2014): 117–33; Ibhawoh, Bonny. *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History*. Albany: State University of New York Press, 2008; Rathore, Aakash Singh, and

and avoided in decolonial political philosophy. As political philosophers, we have not engaged seriously with the normative questions about the nature of law and the imperatives of philosophies of liberation. I examine the legal dimensions of a political philosophy of liberation not simply to pose the topic of law in order to circumvent other phenomena. Rather, the two aspects I'm interested in interpreting via Dussel's political work pertain to the theoretical demarcation of a liberation philosophy of law. Following Andrei Marmor's characterization of the main elements of debate within the philosophy of law, one major issue is the validity of the law—the conditions that make any law 'the law.' The second aspect of Dussel's work that I am interested in interpreting is the normativity of the law—the concern with the nature of the obligations of norms.[27] In Chapter 3 and Chapter 4, I show how these two aspects are central to any philosophy of law, and appear in the relation between Dussel's conception of *el pueblo*, as the constituent power, and the category of *potentia*.

Normative approaches differ greatly from descriptive analysis.[28] I understand descriptive analyzes as accounts of certain classes of elements that are ancillary to the core questions of the nature of the law. In other words, a descriptive analysis comprises, for instance, of either a historical narrative or a sociological explanation of the making of the law. In contrast, normative

---

Alex Cistelecan. *Wronging Rights?: Philosophical Challenges for Human Rights*. Vol. 1. Ethics, Human Rights & Global Political Thought. London: Routledge India, 2011; Santos, Boaventura de Sousa, and Santos Boaventura. *If God Were a Human Rights Activist*. Stanford Studies in Human Rights. Palo Alto: Stanford University Press, 2015; Santos, Boaventura de Sousa, and Bruno Sena Martins. *The Pluriverse of Human Rights: The Diversity of Struggles for Dignity*. Epistemologies of the South. New York: Routledge, 2021.

[27] Marmor, Andrei. *Philosophy of Law* (Princeton, N.J.: Princeton University Press, 2011.) p. 2.

[28] I am following John Tasioulas's elaboration of this distinction. While Tasioulas argues about the nature of the concept of human rights, I found his distinction helpful to the task of decolonial law. Methodologically, he explains the distinction of "descriptive" versus "normative" in the following terms: Purely descriptive approaches, focus on "features of psychological, social or institutional reality." In contrast, normative approaches are "reason- giving, standards of a certain kind." Ultimately, a normative approach implies to attend as to the question of "what it is for a philosophical theory to make sense of […] a defensible species of reason-giving standard, one that earns a place in our general repertoire of normative considerations." See Tassiolas, John, "The Nature of Human Rights," In *The Philosophy of Human Rights: Contemporary Controversies*. *The Philosophy of Human Rights*. De Gruyter, 2011. p. 18.

approaches lead to the development of principles to help us to evaluate the efficacy of a law or an institution. Descriptive analysis neglects a way to ground the normative force of law and provides an account of the very structure of the law to bring about a social order. Such structure guarantees a certain order where there exists a certain conception of economic, political, or universal social rights. In other words, the descriptive approach fails to grasp the force and authority of the law that presupposes those rights or institutions that we possess. I discuss the distinction of normative approaches in Chapter 4 and Chapter 5.

In my view, an ontological and normative dimension is needed in order to initiate a decolonial philosophy of law. I argue that a decolonial philosophical approach to law should try to have an adequate normative dimension, rather than simply a descriptive analysis of law. This I call the "fundamental" decolonial normative view of law and institutions. A fundamental approach is here understood as a philosophical theory unfolding the complexity of the different "co-constitutive mutual relations" of the material and living nature of the law.[29] As I will argue in this dissertation, we can define this second approach through Dussel's view.

Dussel's view about the "open determinations" of concepts (the awareness of their incompleteness) is particularly useful for addressing the ontological and normative aspects in decolonial political and legal thinking to confront the negative character of the law. Dussel's approach is valuable in two aspects. Firstly, Dussel stresses more than just the negative and intrinsic and externally coercive functions of the law. Secondly, Dussel tends to focus on law's transformative and emancipatory powers to fulfill the obligations and needs of its source, "the

[29] Dussel's shows this complex structure in three distinct levels of theory-building: principles, strategic actions, and institutions. This triple articulation is what Dussel calls "mutual determination without last resort," meaning that we should learn to observe "how normative principles inspired our actions and institutions without removing from the former their creative and contingent nature and the preservation and governance of the latter." My translation. Dussel, Enrique D. *Política De La Liberación: Arquitectónica*. Vol. 2. (Madrid: Editorial Trotta, 2009). p. 36.

people." Dussel's legal reflection provides us with sufficient elements to demonstrate a philosophy of law in his work. This fundamental version of a liberation philosophy of law is capable of guiding us to sketch an ontological and normative account of law's principles and institutions that, to follow Dussel, protects the material life of people rather than laws and institutions that oppress life.[30]

Dussel's political philosophy allow us to explicate the need of paying particular attention to the normative relations of a decolonial legality, and the need to extend our focus beyond specific manifestations of it, for instance, in the form of human rights. I discuss why Dussel's view of legality as complex and incomplete can contribute productively to the task of addressing law's foundations and theorizing the power of "the people," moving us from the notion of people's instituting (ontological) power to people's constituting (normative) power. This distinction comes from Dussel's understanding of law and its ontological and normative relationship with the concept of constitute power of the people.

I expand the ontological assumptions of Dussel's account of constituent power and institutions in chapter 4. In his work, Dussel developed a crucial distinction throughout volume two of the *Política de la Liberación* between *potentia* (the power of the people in itself/*el poder-en-sí*) and *potestas* (the people's delegated power of representation through constituted institutions).[31] I examine how the ways in which Dussel's category of *potentia* refers to the instituting and constituting power of "the people," which can be read as "ontological bridge." From Dussel's

[30] I come back later in more detail about this complex and central concept of "life" used by Dussel throughout his philosophical work. Simplifying its definition, Dussel use life to denote, first, "*human* life," and second, by "human" he argues, "we should understand the life of the human being at its physical-biological, historical-cultural, ethical-aesthetic level, including even the mystical-spiritual," and always within a material ethical criterion. Dussel, Enrique D. *Ethics of Liberation in the Age of Globalization and Exclusion*. Latin America Otherwise. Durham: Duke University Press, 2013, p. 438.

[31] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*, p. 59.

ontological framework, it is possible to turn to normative principles in order to recognize and develop the force of people's power within the frameworks of a decolonial legal philosophy.

Dussel's concept of "the people" is particularly useful for addressing the specific challenge of the disjunction between the rule of law and people's authority to overcome the violence and repression as means of legitimate legal and political forms of institutionalization. This disjunction presents as a rupture between the philosophical architecture of principles, legal mechanism, and institutions and the protection of life of people. While there seems to be a progressive politics expanding and driving radical politics on the streets and protests in Latin America in the name of the people, more repressive and arbitrary versions of the ideal of the rule of law have also coalesced around government administrations in Colombia, Brazil, Chile, Argentina, and Peru. In other words, the rule of law becomes self-referential, conveying its legitimacy through repression, violence, and order. Under these conditions, the constituent power stands in durable resistance, arguably trying to think the source of its authority to reclaim a new model to relay the ontological and normative nexus to demand the legal and political transformations via an institutional emancipatory system. From a philosophical perspective, the rule of law's expansive arbitrariness and repression fuse with the current global tipping of the balance of power away from 'the people' and toward a massively capitalized few, reveals the urgency to evaluate how the theorization of the law and the strength of the people is situated in a disjunction.

As this dissertation aims to put forth an account of liberation philosophy of law, I next assess the connection between Dussel's account of law and the notion of *el pueblo*, such as constituent power. Dussel's theoretical conception of law presupposes the source of its foundational solidity: *el pueblo*. His assessment brings significant ontological and normative weight to ground the institutional arrangements towards an emancipatory conception of the rule of law. Through Dussel,

we can methodologically address the passage from legal and political ontology—understood as the fundamental ground that encompasses all the "mediations or internal possibilities" of institutional political spaces[32]—to the topic of normative principles—understood as the justification of our decisions that "motivates, ensures, and stabilizes" the political power externally and internally within the essential components of our social institutions.[33] Dussel's articulation of this distinction between ontology and normativity is key to his utility to decolonial philosophy's inquiry into the philosophy of law and its connection with the topic of constituent power toward the institutionalization of its legal and political force.

Dussel's Philosophy of Law: Life, Institutions, and the Constituent Power of the People

The conceptualization of law and constituent power, predicated on the formal conception of modern law and instrumental rationality, is usually expressed in two variations of opposite constitutional models: the "liberal constitutional model" and "revolutionary material constitutionalism." Both models, I argue, required a normative openness to a decolonial way of thinking about political power and law. The constitutional liberal model values the legal unity and stability that sustain the intrinsic qualities of the law,[34] whereby constituent power is imprisoned by the instrumental rationalization of administrative law and the schema of formal political representation as forms of control. Under this interpretation, constituent power is subordinate to representation and national sovereignty, and enclosed within formal limits to strict constitutionalist legal aims of political democratic procedures.[35] Following Martin Loughlin's typology of what he

[32] Dussel, Enrique D. *Philosophy of Liberation*, p. 2-3.
[33] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*, p. 42.
[34] Alexander, Larry. *Constitutionalism: Philosophical Foundations*. Cambridge Studies in Philosophy and Law. Cambridge; New York: Cambridge University Press, 1998.
[35] There is abundant scholarship on the relation between constituent power and democratic theory. Here the most relevant example of the scope of the liberal constitutional model is the work of Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Studies in Contemporary German Social

calls legal "structural liberalism" (positivist) and "moral liberalism" (anti-positivist), constituent power is an expression of raw power, and hence, "anti-constitutional and of no affirmative constitutional significance."[36] As the argument goes, such understanding presumes the source of law is not an authorized founding moment of shared decision. Instead, a timeless discrete set of rules and its authority is understood to be the basis from the intrinsic qualities that law possesses in itself. The liberal model claims that the notion of constituent power has no affirmative constitutional significance, but only a negative substance, without giving any ontological explanation.

The "material constitutional model," supports a different view, named "material constitution."[37] Material constitution is the active expression of accelerating the constitutional legal form to install transformations led by constituent power.[38] In his book *Insurgencies: Constituent Power and the Modern State*, Antonio Negri offers a second model as direct critique of the hegemonic liberal "bloc of constitutionalism." Negri's understanding of constituent power can be seen as a force that retains the potential for revolutionary transformations.[39] Following Antonio Negri's genealogy, this model takes its contours from the experiences of the French and

---

Thought. Cambridge, Mass.: MIT Press, 1996; See also Kalyvas, Andreas. "Popular Sovereignty, Democracy, and the Constituent Power." *Constellations (Oxford, England)* 12, no. 2 (2005): 223–244. To Habermas, as he points out, the democratic procedures of law forms " the only postmethaphisical source of legitimacy." The legitimacy force of a democratic procedure of the production of the law, as he argues, is premised on "issues and contributions, information and reasons float freely; it secures a discourse character for political will-formation." However, more importantly, from a legal theory perspective, for Habermas, the democratic process "bears the entire burden of legitimation" insofar that the "[…] proceduralist understanding of law thus privileges the communicative presuppositions and procedural conditions of democratic opinion and will formation as the sole source of legitimation." Habermas, Jürgen. " Poscript" *Between Facts and Norms,* p. 448-450.

[36] Loughlin, Martin, "On Constituent Power," In Dowdle, Michael W. and Michael A. Wilkinson. *Constitutionalism beyond Liberalism.* Cambridge, United Kingdom: Cambridge University Press, 2017. p. 157.

[37] See Hardt, Michael and Antonio Negri *Multitude: War and Democracy in the Age of Empire*. New York: Penguin Books, 2005; and Antonio Negri, "Constituent Republic," In Bonefeld, Werner, ed. *Revolutionary Writing: Common Sense Essays in Post-Political Politics*. New York: Autonomedia, 2002.

[38] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. Theory out of Bounds; v. 15. Minneapolis: University of Minnesota Press, 2009.

[39] This is the acceleration of constitutionalizing demands of people in which it is inferred that "time" can be contracted hoping that the horizon of the future coincides with the experience of the present needs for change.

Russian Revolutions—in which the horizon of the system lead to a new beginning of written constitution. Thus, "the formal constitution is superimposed over (and at the same time precedes) a material constitution."[40] The material model thematizes such ontological dimension of the constituent power but without reference to any positive form of institutionalization. Indeed, the material model demands an ontological explanation because it aims to explain the formation of the constituent power as not rooted in any essentialist conception of law. Instead, it is rooted in the material relation of an external continuum of constitutive acts of the power of the people. To follow Negri's view, "[Constitutive power is] renewed in freedom, organized in the continuity of a true praxis."[41] Yet, in Negri's model the constituent power is not about seeking institutionalization. It instead aims to construct "more being—ethical being, social being, community."[42]

I argue that both models share a similar transcendental and formal account of constituent power and of law, leaving unthematized the ontological and normative force of constituent power. In my view, the philosophical treatment of these two models of the relationship between law and constituent power operate under the logic of an anti-normative conception of law and politics. The first assumes that the notion of law is a universal discrete and neutral artifact that rule out the expression of the people's authority and normative living force to institutionalizing its power, and the second considers law to be a non-discrete category and never seeking institutionalization.

Dussel presents a third model in contrast to the non-normative and material constitutional prevailing models, such the oppressive and arbitrary bureaucratic structures of understanding law and constituent power, and the negative form of the constituent power. Dussel's model is framed under a "transmodern" decolonial conception of law that provides us with an alternative

[40] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. p. 314.
[41] Negri, Antonio. p. 222.
[42] Negri, Antonio. p. 223.

justification to ground the normative and institutionalization of constituent power. This model offers other forms of institutionalization that bring together the rule of law and the constituent power through of what I call '*living legality.'* Dussel's notion of law that has "life" provides a fundamental, rather than abstract, reference to ground its authority. His work can provide a novel normative point of decolonial reference to resolve the rift between the rule of law and constituent power. Dussel's approach allows a dialectic unity of these two normative conceptions by means other than domination and violence. Dussel's ontological framework presents to us with two crucial aspects. First, law emanates from an ontological understanding of constituent power as the *people's strength and legal character of a political communit*y. Second, the normative aspect of law cannot be separated from the demand of the *symmetrical and common participation* of *el pueblo*—in the deliberation and decision about its institutionalization that ought to be attached to the "*satisfaction* of the needs of the living corporeality of the citizenry."[43] Dussel's legal ontology and normativity offers a better critical understanding of how *el pueblo* works effectively grounding emancipatory institutions.

Dussel's ontological insights help us grasp the normative "power of the community—the power of the people" to create institutions.[44] Somewhat a lá Arendt, Dussel's framework offers an account of the power of the people as the "protective wall" and "productive and innovative motor."[45] He describes the power of singularities to join together and act in concert "as free, autonomous, rational subjects with equal capacity for rhetorical intervention so that the solidity of the union of wills might be sufficiently strong to resist attacks and to create institutions that provide

[43] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*. Vol. 2. p. 35; and Dussel, Enrique D. *Twenty Theses on Politics*, p. 61.
[44] Dussel, Enrique D. *Twenty Theses on Politics*, p. 15.
[45] Dussel, Enrique D. p. 15.

permanence and governability."[46] To follow Dussel's approach, institutions must remain grounded in *potentia* (the people), which indicates and exposes the authority to which the *potestas* (institutions) must obey to exact law and protect life. Dussel's philosophical work, then, demonstrates the force of the law to ground itself as the ultimate mediation of life, constituent power, and institutions.

Roadmap of Chapters

In this dissertation, I breakdown the discussion of Dussel's thinking on the law into four chapters: In Chapter 2, "Colonial Legality: Dussel's Critique of Juridical Modernity," I examine the historical legal-theological paradigm of the sixteenth century and how it was connected with the violent expansion of Europe's project of conquest and colonization of the Americas. The chapter traces the origin of Dussel's question of a decolonial legal critique back to the natural law tradition of the scholastic philosophical debate between Bartolomé de las Casas, Ginés de Sepúlveda, and Francisco de Vitoria on the justification of violence. In this chapter, I pay particular attention to each thinkers' views about the nature of colonial law and "universal rights."

I return to the beginning of modern political philosophy in order to elaborate how Dussel's critical position concerning the periodization of the histories of political philosophy enables us to mark a beginning of decolonial legality's historical lineage. An "anti-tradition tradition" begins with the critique of Europe's juridical and political violence from 1492 and travels forward through the current practices of legal and economic imperialism and coloniality of power from which we still suffer in Latin America. To honor the historical breadth of the analysis, this chapter is organized into four specific tasks: (1) proving Dussel's interest in the critique of the conceptual

[46] Dussel, Enrique D. p. 15.

legal structure of the European expansion by examining his insights about natural theories of law and rights; (2) identifying the dimension in which his critique of the natural law tradition anticipates his understanding of *formalism* as a modality of violence within the colonial framework of the law; (3) understanding how the critique of the abstract conception of colonial law and universal rights informed Dussel's phenomenological and Semitic understanding of law as a counter-hegemonic articulation of decolonial thought; (4) and finally, delineating the basic elements of the inquiry of the nature of law and institutions from the standpoint of a philosophy of liberation.

Chapter 3, "Dussel's Political Philosophy of Liberation and Philosophy of Law " gives more detail of the content of the basic elements of Dussel's account of law. In this chapter, I articulate the central inquiry of this dissertation: whether a philosophy of law exists in Dussel's work. I argue that within Dussel's political philosophy of liberation he develops a legal theory in its own right. Recognizing that Dussel only went so far as to declare, but not develop systematically, the foundation theory needed for a philosophy of law (and institutions) of liberation, the task of chapter 2 is to offer a more systematic version of Dussel's account of law. I explain this theory through an exegetical and critical reconstruction of Dussel's ideas of law and its "*transmodern*" aspiration. I bring the legal work of Bonaventura de Sousa Santos and the political philosophy of Enrique Dussel into conversation in this chapter, in order to contrast the differentiated philosophical status of Dussel's normative and ontological theory of law. Finally, I prepare to discuss how Dussel's account of law helps us grasp a relationship between decolonial legality and the creation of institutions that does not replicate the same structures of violence within the logic of the coloniality of power.

Chapter 4, “The Making of the People: Constituent Power and Dussel’s Institutional Ontology,” takes up Dussel's conception of law as the first step toward moving into the ontological and normative terrain of its origin: the constituent power of the people. This chapter aims to position Dussel's account of law along its category of the *pueblo* ("the people") as a pivotal decolonial constitutional model. Such a model allows us to see into work a different legal and political ontology of the institutionalization of the constituting power from the current hegemonic liberal and positivist understanding. I briefly assess the three opposing bodies of scholarship (David Dyzenhaus, Antonio Negri, and Santiago Castro-Gómez) that consider whether or not we should abandon or reconfigure the category of 'the people.' The chapter seeks to link the concepts of law and constituent power with the rule of law. The ultimate aim of adding this third category, rule of law, is to trace the complexities and interdependencies these three categories share. The chapter follows the insights of two decolonial thinkers, assuming the conception of the rule of law and the people's constituent power to be efficient legal emancipatory instruments to dispute both the theory and practice of hegemonic coloniality of power.

Chapter 5, “Living Legality and The Irruption of The People: An Interpretation of Dussel’s Legal Philosophy of Liberation,” uses the concept of living legalities to develop an interpretative form of the legal dimension of Dussel's political thinking. I articulate a form with three key elements: The first element is Dussel's characterization of normativity that attempts to subverts the inherent demand for unique intrinsic qualities of the law, but his definition affirms the lived and embodied experience of people as a central requirement for its foundation. Here it is key Dussel's dialectical method that retains the demands of the regulation of legality without losing its normative force as a vehicle of struggle to reach emancipation and justice. The second element is that law must affirm life and corporeal experience of the people. The third element is the notion of

people as a central requirement for its foundation. For Dussel, the double function of the law was to increase the protection of life as well as to orient its forms by permanently activating the constituent power to reinvent and transform institutions against the current repressive forms of domination and violence and the social relations of coloniality of power and capitalism.

CHAPTER 2
COLONIAL LEGALITY: DUSSEL'S CRITIQUE OF JURIDICAL MODERNITY

Dussel spends a considerable part of the first volume of *Política de la Liberación: Historia Mundial y Crítica* (Politics of Liberation: A Critical World History) examining the theological underpinnings of the conceptual juridical aspects of coloniality. This juridical structure emerged from important figures of scholastic philosophy, like Bartolomé de las Casas, Ginés de Sepúlveda, and Francisco de Vitoria, in early sixteenth century discussions on natural law and just war. This chapter systematically maps Dussel's interpretation of this legal-philosophical tradition, emphasizing a point of departure in Dussel's critique of Modernity and of colonial domination as a juridical-political project. In his work on the critique of Modernity, Dussel recognizes the extent to which these thinkers and this tradition can articulate "a counter-story, as an anti-traditional tradition" of the modern history of political philosophy. In my view, Dussel's exegetical work on these sixteenth century Hispanic theologians provides distinctions from which to generate a decolonial legal philosophy from Dussel's political work.

In the following chapter, I concentrate on Dussel's articulation of this anti-traditional tradition by exploring how the concepts of the law and rights are treated in Dussel's decolonial critique of Modernity. If one follows Dussel's reading of the history of philosophy, the beginning of modern political and legal philosophy does not begin with the classical theorists like Machiavelli or Locke nor Hobbes, but with the early invasion of the Americas and its thematization by the Hispanic jurists and theologians such as de las Casas, Vitoria, and Sepúlveda.[47] Parsing Dussel's considerations on the nature of law and rights requires reconsidering the aforementioned historical tradition of early modern philosophy and scrutinizing its distinctive normative foundations.

[47] Dussel, Enrique D. "Las Casas, Vitoria, and Suarez 1514-1617," In Barreto, José-Manuel. *Human Rights from a Third World Perspective: Critique, History and International Law*. Newcastle upon Tyne, [England]: Cambridge Scholars Publishing, 2013. p 172.

Therefore, the main task of this chapter is to track and clarify Dussel's philosophical legal interest regarding the inquiry concerning the nature of law through how colonial law and institutions created the conditions of the coloniality of power.

The chapter is divided into four sections. In order to prove that Dussel's political philosophy explicitly accounts for questions of the nature of law, the first part traces Dussel's understanding of thinking juridical Modernity and identifies the problems regarding the "first structure of the law" in the colonial world. I want to emphasize how important colonial law and its foundations are to understanding Dussel's philosophical principles for a liberatory philosophy of law. I advance this reconstruction of Dussel's claims of the first structure of the law by borrowing from Carl Schmitt's analysis of the development *of ius gentium Europaeum*, which coincided with the justification for the European expansion and conquest of the colonial Americas.

In the second section, I show how Dussel links the "myth of Modernity" with colonial violence and identifies the rules of modern reason as the only possible mediation to guarantee both the status of "human" and the political-legal entitlements that go with that status. Dussel believes Ginés de Sepúlveda's discourse on the relation between "right of reason" and universal rights presents a contradiction inherent in the "myth of modernity." The contradiction lies at the core of Europeans upholding "the universal rights of modernity against barbarism" while, at the same, rationalizing genocide and violence in the name of universal rights. As Dussel remarks, "Modernity elaborated a myth of its own goodness, rationalized its violence as civilizing, and finally declared itself innocent of the assassination of the Other."[48] In connecting the "myth of

[48] Dussel, Enrique D. *The Invention of the Americas: Eclipse of "the Other" and the Myth of Modernity*. Translated by Michael D. Barber. (New York: Continuum, 1995), p. 50.

Modernity" to colonial violence, Dussel expresses concern with Sepúlveda's approach to natural law and provides us with an early modern understanding of *formalism.*[49]

Against a formalist and positivist understanding of the law as universally neutral, abstract, fair, and capable of being implemented by formalization in trans-historical ways to all societies,[50] I outline the corporeal and Semitic dimensions of Dussel's articulation of the law in the trilogy *El Humanismo Helénico* (1974), *El humanismo Semita* (1969), and el *Dualismo en la Antropología de la Cristiandad* (1974). I show how Dussel's legal insights can contribute to building a conceptual framework for a decolonial legality that diverges from the positivist accounts of law that are characteristic of the colonial juridical framework. Finally, based on the explications and analysis offered in these sections, I briefly sketch the critical elements and methods for questioning laws and institutions that are essential to the decolonial political tradition.

The Origin of the First Structure of Colonial Law: A Eurocentric View of Juridical Modernity

Dussel attributes the origins of the first conceptual structure of colonial law to Francisco de Vitoria. Referring to Vitoria as "the father" of judicial Modernity, Dussel highlights his centrality in questions of European expansion, justifications of the colonial world-system, and "the founder of the *ius gentium europaeum* (as Schmitt understands it)."[51] Dussel explicitly draws on Schmitt's reading of Vitoria to insist that Vitoria shaped what Dussel calls "the first structure of the law, not simply symmetrically 'international,' but strictly as imperial, colonialist, Eurocentric

[49] As I continue explaining in Chapter 3, formalism is here understood as a conception of law as a neutral system of rules which can insulate law from politics, and from any wide-ranging political values that tries to impose content to the law through the contingent notion of the constituent power of the people.
[50] From Laura Nader's approach, based on a broad genealogical work of the idea of the 'rule of law,' this secular tradition conceives the law as a "impersonal, abstract, and fair, because it is applied blindly to anyone society." Ugo Mattei, Nader Laura *Plunder: When the Rule of Law Is Illegal* (Malden, Mass.: Blackwell Pub, 2008). p. 14.
[51] Dussel. *Política de La Liberación. Volumen II,* p. 208.

'Metropolitan law.'"[52] By highlighting Dussel's explanation of the "first structure of the law," I emphasize the necessary legal mediations for realizing the colonial order and institutions, which laid the normative foundation for the asymmetrical beginning of the global "World System."[53] According to Dussel, the world-system unfolds through what he calls the "Iberian world-empire," in which Spain and Portugal played an imperial role in invading the Caribbean and the Americas, and later, in their expansion into Africa and Asia.[54] Dussel writes that European expansion "originated the world-system thanks to the invasion ('discovery') of the American continent," and that in order "to overcome it, will have to be borne 'from *within*' that process of globalization that began in 1492, which has deepened itself through the end of the twentieth century."[55]

Here is useful to take up Schmitt's interpretation of the medieval theory of *ius gentium* (law of nations), which informed Dussel's argument of the first structure of the law. In this framework, Dussel's establishes his critique of colonial law and it's understanding of the relationship between law, violence, and absolute authority exercised and legitimated under the basis of natural law. He tracks how certain forms of political order and universal rights deny

---

[52] Dussel, Enrique D. *Politics of Liberation: A Critical World History. Reclaiming Liberation Theology,* p. 209.

[53] The concept of "world system," developed by the sociologist Immanuel Wallerstein, refers to the global reality that emerged since the sixteenth century alongside with the formation of the capitalist world economy. It is generally understood as the historical framework that resulted of the interconnection of a set of institutions, such as "states and the interstate system, productive firms, households, classes, identity groups of all sorts," which became the basis of a social world system. Wallerstein writes, "This system is a social creation, with a history, whose origins need to be explained, whose ongoing mechanisms need to be delineated, and whose inevitable terminal crisis needs to be discerned." More concretely, Wallerstein suggests that a world-systems analysis "unities of social reality within which we operate, whose rules constrain us, are for the most part such world-systems (other than the now-extinct small mini-systems that once existed on the earth)." Furthermore, world-systems analysis "argues that there have been thus far only two varieties of world-systems: world-economies and world-empires." A world-empire (such as the Roman Empire, Han China) is a large bureaucratic structure with a single political center and an axial division of labor, but multiple culture. Wallerstein, Immanuel Maurice. *World-Systems Analysis: An Introduction*. (Durham: Duke University Press, 2004.) p. 98-99.

[54]Dussel adds here an important precision regarding the place of Europe in what he calls "the first Hispanic European Modernity. He writes, "Europe still had a secondary and quasi-peripheral significance in reference to Asian continental cultural and economic space, although rearticulated for the first time since the fifteenth century. Since the seventh century Muslim expansion, Europe had lived separated from the Afro-Asiatic continent expansion, Europe had lived separated from the Afro-Asiatic continent." *Politics of Liberation: A Critical World History,* p. 137.

[55] Dussel, Enrique D. *Politics of Liberation: A Critical World History*, p. 130.

indigenous people rights by virtue of their lower status according to the Western standard of humanity. Schmitt's legal theory is helpful here for two reasons. On one hand, it allows us to assess the emergence of the modern European colonial law which Dussel rejects in his decolonial philosophy. On the other, it offers a univocal reference to the function of colonial law in producing ontological hierarchies of superiority determined by the "human" status of Christian Europeans. The investiture of an absolute Eurocentric authority relied on normative power to create legal and political spaces for the economic exploitation and land-appropriation of colonial subjects.

In following the work Eurocentric jurists like Schmitt, I elaborate two central aspects that characterize the nature of colonial law. The first characteristic is Schmitt's thesis that law is functional to distinguish and demarcate territorial wars and to define the concept of enemy in a way that legitimates and validates killing and subjugating others under a legal framework. The second distinctive aspect of Schmitt's analysis that I refer to is the function of law to declare unrestrained space free for appropriation and exploitation by colonizers. This constitutive spatialization of law served both to create what Schmitt calls "zones of agonal strength," parallel to the non-recognition and non-location of any law arriving in the Americas. Under Eurocentric legality, colonizers do not "recognize" any law, therefore, no institutional-legal framework is determined to exist. Colonizers conveniently imposed their law and rights as a tactic to exercise their power that ultimately underwrites its colonial violence.

I further highlight some points of Schmitt's analysis of *respublica Christiana* to provide some historical and conceptual background to the early modern understanding of colonial juridical structure. In *The Nomos of The Earth,* Schmitt argues that the founding act of law *par excellence*

is land-appropriation, which aided in founding cities and establishing of colonies.[56] These acts reveal the essential characteristics of law: generally responsive to the prescriptive legality and operating towards the control and rule of the colonized territories. Schmitt's general assumptions describe the crude reality that arises from the sixteenth century characterization of the Americas as a "free space," which Europe relied on the law to justify spatial division, land-appropriation, domination, and economic exploitation.[57]

The spatial divisions and the redefinition implied in the European conception of legality were consistent with what Schmitt calls *global linear thinking*.[58] The exemplars of this global linear thinking were the "rayas" of the Spanish-Portuguese Treaty of Tordesillas (1494) and the Spanish-French "amity lines" in the Treaty of Cateau-Cambrésis (1559).[59] These treatises mandated spatial divisions that organized the military, economic, and political relations among European powers in the *respublica Christiana*. The *respublica Christiana* represents the vision of "law-making power" (in the Middle Ages) that shaped and regulated the relations between Christian and non-Christian nations. In his book *Between Equal Rights: A Marxist Theory of International Law,* China Miéville demonstrates how the law envisioned by the *respublica Christiana* implied a stratified spatial structure that maintained a rigorous demarcation and

[56] Schmitt, Carl. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. New York: Telos Press, 2003. p. 87.
[57] Schmitt, Carl. p. 87-90.
[58] Schmitt, Carl. p. 87.
[59] The *Inter caetera* bill of 1493, issued by Alexander VI, conferred rights of conquest to Spain that started a long process of demarcation of territorial lines upon lands and oceans that began with Portugal's expansion to the west and south of the Atlantic, and later crystallized in a new spatial global order with the Treaty of Tordesillas in 1494. In addition to imposing juridical lines and facilitating the appropriation of extensive areas of territories in America, the 1512 *Leyes de Burgos and the Requirimiento* in 1513 provided the basis of the institution of the *encomienda* system. The *encomienda* system defined the terms of servility of the indigenous to the Spanish authorities, sanctioning extreme forms of economic exploitation. All these juridical examples were responding to a conception of law that served to develop a Christian, imperial form of government and an economy used to expand Christendom. See Arias, Santa, and Raúl Marrero-Fente. *Coloniality, Religion, and the Law in the Early Iberian World*. First edition. Hispanic Issues (Vanderbilt University); v. 40. Nashville: Vanderbilt University Press, 2014.

separation between "*ius divinum*—holy law—at its apex, above *ius gentium*.[60] As Miéville remarks, the legal world represented in the *respublica Christiana* was fundamentally associated with the divisions in "which various polities were defined either as enemies or members of that *respublica*."[61]

Viewed from this angle, it is possible to understand how Schmitt arrives at his conception of a legal consciousness that instantiated global spatial divisions and conceptual structures of the law based upon the ideas of "enmity" or "membership." Indeed, by reading the *respublica Christiana* as only part of the spatialization of those who were on the European side of the line, Schmitt stresses the type of legality that previously functioned as an "encompassing unity" of the members of the *respublica.* As Schmitt writes,

> The essential point is that, within the Christian sphere, wars among Christian princes were bracketed wars. They were distinguished from war against non-Christian princes and peoples. These internal, bracketed wars did not negate the unity of the *respublica Christiana*. They were feuds in the sense of assertions of right, realizations of right, or confirmations of a right of resistance, and they occurred within the framework of one and the same total order encompassing both warring parties. This means that they did not abolish or negate this total order.[62]

Here, Schmitt emphasizes the normative status to claim rights, and the criteria for judging between the justice or injustice of waging internal wars. Schmitt's formulation of what he calls "bracketed wars" points to the differentiation between enemies that are recognized as "just" opponents (Christians) and other, unrecognized enemies (non-Christian). Schmitt's analysis used this latter

[60] Moreover, Miéville stresses the role of the *ius gentium* as an overarching notion of the Roman law carried out by thinkers of the second scholastic. As he notes, the concept of *ius gentium* in its original form did not establish the relation between modern nations, but rather reflected only the law that was "applicable to the division between Roman citizens and non-citizens." Miéville, China. *Between Equal Rights: A Marxist Theory of International Law*. Historical Materialism Book Series 2. Chicago, IL: Haymarket Books, 2006, p. 170.
[61] Miéville, China. *Between Equal Rights.* p. 173.
[62] Schmitt, Carl. p. 59.

division not only for keeping the notion of law and rights only among Christian European peoples. More fundamentally, Schmitt's division reaffirms, as well, the roots of global linear thinking which makes possible the spatial divisions where law would secure the possibilities for European powers to virtually constitute "great areas of freedom were designated as conflict zones in the struggle over the distribution of the new world."[63]

Yet this designation of such conflict zones was not just a regulative solution in favor of just bracketing European wars.[64] Schmitt's understanding of this juridical regulation, and spatial designation of a "conflict zone," entails the maintenance of Europe as an area "of peace and order ruled by European public law from the immediate threat of those events "beyond the line," which would not have been the case had there been no such zone."[65] What this means for Schmitt is that, whereas on the European side, all possible legal regulations between nations and people are governed by the ideas of order, rights of resistance, equality of trade, political treaties that guarantee peace, etc., from the Americas, on the contrary, the only idea of legality that all Christian Europe could agree upon was "the freedom of the open spaces […] where force could be used freely and ruthlessly."[66] In other words, as Schmitt puts it, "everything that occurred "beyond the line" remained outside the legal, moral, and political values recognized on this side of the line."[67]

In fact, part of the repercussions of drawing the amity lines, and designation of a conflict zone where there are no limits for violence, was precisely the historical reproduction of Hobbes's and Locke's state of nature within the Americas. In this state of nature, pictured by Hobbes and Locke, common life without law is nothing but confusion and disorder; and law is always

[63] Schmitt, Carl. p. 97.
[64] Schmitt, Carl. *The Nomos of the Earth.* p. 97.
[65] Schmitt, Carl, p. 97.
[66] Schmitt, Carl. p. 94.
[67] Schmitt, Carl. p. 94.

necessary to preserve an order and peace that would offer the possibility of civilized political discourse and institutions. As Schmitt notes, however, in the sixteenth and seventeenth century, such formulations of the state of nature were not only localized in the Americas but, he emphasizes, "it acquired its own space, recognized by Christian European governments, and, thereby, an unmistakable validity."[68]

Let us briefly consider two implications of designating the Americas as an unrestrained space. First, establishing a space open for appropriation implies a legal mediation that coincides with the European imperialist notion of "freedom." This freedom appears as an indisputable right to designate a territory and its population as an "empty" space where neither law is legible, nor political and moral values are recognized. However, as Schmitt argues, there was "no location of law for Christian Europeans" in the Americas. The colonial law and its struggle for freedom of appropriation and expansion did not know any bounds but only brutal violence. Instead, for them, "there was only as much law as the European conquerors imported and established, either in their Christian missions or in the accomplished fact of a European system of justice and administration."[69] This is the Eurocentric viewpoint—in which the Americas are a "free space" where there is no law, or system of political institutions.

In addition, if we are to fully consider Schmitt's Eurocentric viewpoint, we must also attend to the way he articulates the idea of the Americas as free space without law. Explicitly, Schmitt draws here on his polemical notion of the legal institution of a "state of exception—because it is concerned with the question of law and not simply a juridical mediation, but as "analogous to the idea of a designated zone of free and empty space" where the suspension of the law is the norm.[70]

[68] Schmitt, Carl. p. 96.
[69] Schmitt, Car. p. 94-95.
[70] Schmitt, Carl. p. 98.

With his emphasis on the "exception," Schmitt suggests that law must be constituted in relation to its own negation. So, if, for Schmitt, Christian conceptions of law extend only to the borders of Europe and not to the Americas and, certainly not, its inhabitants, the colonial structure of the law, as he describes it, produces nothing but the excess of the law's inherent violence from which Europeans could safely enact various forms of domination against indigenous people as not being members of that *respublica*.

A second significant implication of seeing the Americas as vast, free space is linked to the inability to recognize the human status of indigenous people. Evidently, the Indian (*Indio*) did not appear formally either as human or as "a new enemy"—but, first and foremost, they were understood as inferior beings of "zones designated for agonal tests of strength." [71] Therefore, the question of whether the inhabitants of the Americas were "just enemies," became juridically and ethically irrelevant.[72] For Schmitt, after 1492, not only "the structure of all traditional concepts of the center and age of the earth had to change," but more essentially, it produced a complete shift of the *respublica Christiana*'s conception of enmity.[73] At the conceptual and practical level, Amerindians were considered more strictly as an "unjust enemy," that is to say, a group or individual to whom the law loses its validity and has no "limits" to deploy its violence.[74] As Schmitt explains, "A preventive war against such an enemy would be considered to be even more than a just war. It would be a crusade, because we would be dealing not simply with a criminal, but with an unjust enemy, with the perpetrator of the state of nature." [75]

[71] Schmitt, Carl. *The Nomos of the Earth,* p. 169.
[72] Schmitt, Carl. p. 309.
[73] Schmitt, Carl. p. 87.
[74] Schmitt, Carl. p. 169.
[75] Schmitt, Carl. p. 99.

Schmitt's understanding of the foundational structure of colonial law, as it expressed intimately bound to its own violence and genocide, demonstrates both the historical and normative implications of the conquest of the Americas to shape the Eurocentric dominant legality. On the one hand, Schmitt's conception of colonial law includes the use of law to facilitate the instantiation of global spatial divisions through the use of force and violence, in the interest of "humanity." America was treated as an isolated territory without human inhabitants, values, law, or political order. On the other hand, Schmitt's sense of legality and colonial law also functioned as an effective instrument to legitimize forms of appropriation without limits, as a proper act that expresses the foundational character of law, and as a fitting legal compromise to the economic "freedom" and "rights" of the hegemonic colonial powers. The exigencies of the structure of juridical modernity appear coupled with the operation and historical specificities of colonial law, and Schmitt's account of American spatial relations ultimately treats America as the agonal space to "pursue free competition and free exploitation."[76]

Dussel's critique of the Juridical Modernity: Vitoria and the Colonial Vision of Universal Rights

The Eurocentric legality vindicated by Schmitt's analysis offers a foil to Dussel's decolonial legal critique. Dussel's decolonial legal philosophy articulates the problematic relationship between law, universal rights, and violence that gave rise to colonialism and the first Eurocentric juridical Modernity. Within the emergence of this first Hispanic Modernity, Dussel (and several others decolonial thinkers), identifies the beginning of the "coloniality of power."[77] Anibal Quijano's

[76] Schmitt, Carl. *The Nomos of the Earth*, p. 99.

[77] I draw my interpretation of the concept of the coloniality of power focusing mainly on Quijano's famous essay "Coloniality of Power, Eurocentrism, and Latin America." Quijano, Anibal, and Michael Ennis. "Coloniality of Power, Eurocentrism, and Latin America." *Nepantla* 1, no. 3 (2000): 533–80. p. 533; Mignolo, Walter D. "Coloniality and Globalization: A Decolonial Take." *Globalizations* 18, no. 5 (July 4, 2021): 720–37. María Lugones. "Toward a

classical framework of coloniality involves a prolonged system of global power distribution since the conquest of the Americas in 1492 that remains operative today. AS we mentioned earlier, in Quijano's analysis, coloniality remains with us through modern institutions which still are shaped by European ideas of power, race, labor, and capital as the natural forms of social classification.[78] As Quijano describes, "the world's population was differentiated into inferior and superior, irrational and rational, primitive and civilized, traditional and modern."[79]

Scholars and decolonial thinkers agreed that coloniality of power emerged through a long, sustained process of colonial practices of racialization, labor exploitation, gender differentiation, social practices of oppression, and economic extraction that continue today.[80] However, what we know about the role of law and its institutions as a crucial sphere of the coloniality of power is notoriously unthematized in decolonial political philosophy literature. In this section, I argue that a systematic understanding of modern natural law is necessary to understand the coloniality of power and the inquiry towards a legal dimension of philosophy of liberation. In this section, I discuss how Dussel connects the notion of universal rights to the foundations of modern natural law tradition as the basis of the juridical Hispanic Modernity. Within this historical oversight,

---

Decolonial Feminism." *Hypatia* 24.5 (2010), p. 742-759; Nelson Maldonado-Torres. "On the Coloniality of Being." *Cultural Studies*, 21:2-3 (2007), p. 240-270.

[78] Quijano concept of coloniality implies accepting that "the hegemonic institutions of each providence of social existence are universal to the population of the world as intersubjective models, as illustrated by the nation-state, the bourgeois family, the capitalist corporation, and the Eurocentric rationality." Quijano, Anibal, and Michael Ennis. "Coloniality of Power, Eurocentrism, and Latin America." *Nepantla* 1, no. 3 (2000): 533–80. p. 533.

[79] Quijano, Anibal. "Colonialidad Del Poder y Clasificación Social." *Journal of World-Systems Research* 6, no. 2 (2000): 342–86. p. 344.

[80] Anibal Quijano's framework of coloniality of power introduces the central debate here, establishing specific axes of colonialism as a bedrock of analysis such as race, class, and knowledge. As a logic of categorization, coloniality of power is a by-product of Western Modernity putting some human beings in a "natural situation of inferiority." Primarily, to some extent, the logic of coloniality is the result of the instrumental understanding of modern "Reason" to construct hierarchies that divide human beings based on people's racialization and class exploitation. See Quijano, Anibal, "Coloniality of Power, Eurocentrism, and Latin America." *Nepantla* 1, no. 3 (2000): 533–80. As Maldonado Torres explains the notion introduced by Quijano's sociological analysis, it refers to the "long-standing patterns of power that emerged as a result of colonialism, but that define culture, labor, intersubjective relations, and knowledge production well beyond the strict limits of colonial administration" Maldonado-Torres, Nelson. "On the Coloniality of Being." *Cultural Studies* 21, no. 2–3 (March 1, 2007): 240–70. p. 243.

Dussel's reading of the first Modernity distinguishes itself, emphasizing the decisive role that natural law plays in securing the better-known forms of violence express by law and Eurocentric rights operating in the Americas. Among the theorization and descriptions of the coloniality of power, Dussel expands on the significance of natural law in the processes of colonial domination, and, more importantly, draws our attention to distinctive categories in order to develop an understanding of a decolonial legality.

Returning to the analysis of Schmitt undertaken so far, concerning the spatialization of law founded on appropriation of land and division of enmity, we can see certain features of the law Dussel and Schmitt identify with the natural law tradition and the colonial theological legal vision. To some extent, Dussel takes a similar historical approach to Schmitt in identifying land appropriation as the principal "precondition of all subsequent economy and law" within the framework of the war and conquest.[81] However, the legal reading of Dussel presented here reveals a solid basis to see how his conception of natural law was shaped by association of law with purely economic exploitation from the standpoint of the concrete situation of the colonized rights. This contrasts Schmitt's view in the way "primitive right to plunder" was justified by European powers.[82]

Thus, it is hard to conceive of Europe's colonial domination without, first, exploring the role of the theories of natural law in facilitating what Dussel calls the domination of "person-to-person relationships"[83] which goes hand-in-hand with the violence and appropriation of land and the negation of any rights in the discovery and constitution of the colonial Americas. In fact, in *Philosophy of Liberation*, Dussel foregrounds colonization and European modern imperialism,

[81] Schmitt, Carl. *The Nomos of the Earth,* p. 328.
[82] Schmitt, Carl. p. 332.
[83] For now, we can say that Dussel uses the relation "person-to-person" as a synonymous of intersubjectivity. It refers. ultimately, to a practical mediation among members of a political community.

specifically, the significance of natural laws and the law's more oppressive institutions. Dussel illustrates how natural law function as a theoretical support to justify land-appropriation and violence in the name of the European colonial project. He explains:

> In the name of those laws, valiantly practicing those virtues, and aiming to fulfil the *proyecto* of the world domination, Europe set forth with Columbus and his ships from the port of Palos in Andalusia in 1492. Fulfilling those laws, Francis Drake, pirate by profession, assassinator of defenseless mestizos and violator of women, devastated the Latin American coasts and received as a reward the right to lock up his thefts in the banks of London and the honor of being a British nobleman—Sir Francis Drake. Behold the magnificence and the first accumulation of capitalism that oppresses us now! Its origin was the gold of Amerindians and the flesh of black slaves![84]

Dussel, in his hypothesis of the role of natural law shaping the juridical structure of Modernity, goes further, criticizing Schmidtian approach that emphasizes the total violence that arises out from colonial law and its institutions. He suggests that such a moment of European expansion represents, simultaneously and necessarily, the progression of world-empire and the development of capitalism and Modernity.[85] With this interpretation, Dussel attempts to provide support for his presupposition that it is precisely this "first Hispanic Modernity," linked to the scholastic natural law tradition of Vitoria, Sepúlveda and others, that favored the "management" of the centrality and superiority of Europe within the world-system. Without giving due attention to the natural law tradition, which clearly lies at the basis of the foundation which produced the coloniality of power, it becomes harder to carry out the fully critique that Dussel's political philosophy of liberation attempts with regards to the Eurocentric/Western account of natural modern law and "universal rights."

The general assumption of the natural law tradition about universal rights is that their content are reasonable universal facts about human beings and cultures, and that the centrality of

[84] Dussel, Enrique D. *Philosophy of Liberation*. (Eugene, Or.: Wipf and Stock, 2003), p. 58.
[85] Dussel, Enrique D. *Philosophy of Liberation*, p. 130.

their articulation is to argue that no human society can exist or survive without having certain rules, contracts, and political orders and institutions with minimum adherence to the idea of being rule by law. I understand here universal rights as a categorical structure which gives expression to a "claim-right" of some activity or interest of a historical particular group that appeals to its universal entitlement to account for all people.[86] Such normative program is deeply connected with a sense of universalization that leads us to think that "rights" comes from a universal morality, which exists independently from and goes deeper than social practices.[87]

Before examining Dussel's reading of Vitoria as the early modern thinker that gestures towards a vision of universal rights that served only the Europeans interests, it is important to point to some of the theoretical orientations of Dussel's engagement with natural law. Primarily, in his book *Ethics and Community,* Dussel offers some theological and philosophical insights about the role of the natural law as the practical reflection of the universal character of ethics and its link with legal rights. As one decisive aspect of Dussel' thought, here "ethics" is used as equal to "praxis," and more specifically, a praxis directed towards the "needs of the oppressed by the struggle with domination."[88] According to Dussel, the ethics of liberation confronts, directly the hegemonic classical "morality" that feeds the justification of the established order as a totality ("a

[86] Kennedy, Duncan. "The Critique of Rights in Critical Legal Studies," In Brown, Wendy, and Janet E. Halley. *Left Legalism/Left Critique*. (Durham: Duke University Press, 2002.), p. 188.

[87] I am not intending to revise this debate. Much has been written on the historiographical origin and philosophical foundations of universal rights. For instance, in its contemporary form in the twenty century it is what we know as universal human rights or the body of obligations between states under the international human rights law. Among philosophers and lawyers there is strong disagreement about the origin of these moral and legal universal frameworks. See for example from a historical perspective of this debate, Tasioulas, John "Human Rights," in *The Routledge Companion to the Philosophy of Law*, ed. Andrei Marmor (London: Routledge, 2012); Costas Douzinas, *The Meaning of Rights. The Philosophy and Social Theory of Human Rights*. (Cambridge: Cambridge University Press, 2014); Hunt, Lynn, *Inventing Human Rights* (New York: Norton, 2007); Moyn, Samuel. *Christian Human Rights*. (University of Pennsylvania Press, 2015); Moyn, Samuel. *The Last Utopia: Human Rights in History*. (Harvard University Press, 2010) For a normative conception of human rights, See James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

[88] Dussel, Enrique D. *Ethics and Community*. Theology and Liberation Series. (Maryknoll, N.Y.: Orbis Books, 1988.), p. 49.

world") from which all "dominant social actions and relationships" are enacted in terms of a relationship to a norm or law.[89]

To focus exclusively on the norm or law allows thinking of morality as an order of compliance that can easily justify actions that are morally questionable, but not formally illegal. On the face of not adequately complying to the established norm, that which present itself as what "lies *outside* any possible moral consideration," specifically, within the laws that have been established by the system of domination, it would be subject of exclusion and seen as immoral, illegitimate, and intrinsically subversive.[90] In fact, at the level of the force of the norms established, is not difficult to see that these norms or laws tend to be confused both in the public and private spheres as the "good" as such.[91] A clear example is how the proscription of communal forms of property regimes, or the socialization of property land rights, etc. take the historical legal form of a "natural law" of part of the protection of property rights and property regimes of capitalism. In this sense, according to Dussel, the type of morality that demands a deep relationship with a law or norm is characteristic of a practical system of reason, based on its own principles and rules. More crucially, as Dussel remarks, this type of morality ends up replacing "the universal human project with its own particular historical project. Its laws become natural, its virtues perfect, and the blood of those who offer any resistance […] is spilled by the system as if it were the blood of the wicked."[92]

Additionally, another crucial distinction that Dussel draws in Chapter 7 of his book *Ethics and Community* is between "moral laws" and "legal laws." In the plane of what Dussel calls a

[89] This is better explained by Dussel's comments against Kant and Thomas Aquinas. In both their classical articulation of morality, Dussel argues, they posit that all of our actions and mediations should organized around the "love" for "the moral law." Dussel, Enrique D. *Ethics and Community*, p. 49.
[90] Dussel, Enrique D. *Ethics and Community*. 31.
[91] Dussel, Enrique D. p. 31.
[92] Dussel, Enrique D. p. 31.

prevailing morality (in contradistinction of an *ethical praxis* that it is under the service of the oppressed and the future universal human project), an action is considered "illegal" or "unlawful" if is contrary to the law promulgated within the prevailing morality. On the contrary, "legal" or "lawful" responds to the strict compliance with the prevailing law but with the coercive power of legal and repressive institutions of the state apparatus.[93] Moreover, Dussel elaborates in more detail the distinction between positive and natural law. One the one hand, he describes positive law as juridical "norm of praxis promulgated by those who wield political power;" and on the other hand, natural law as "what is demanded by nature—what is dictated by God as creator."[94]

Having framed Dussel's considerations about natural law, we can now return to Dussel's analysis of Victoria's scholastic framework, which involves one important legal conceptual imperative: a Eurocentric/Western colonial vision of rights. Rather than focus on the abundance of research on Victoria's medieval theory of international law, I would like to instead consider Dussel's reading of Vitoria as prototypical modern legal thought. The main legal question Dussel poses to Victoria's theories is straightforward: Are Vitoria's philosophical categories legitimate grounds for "'international rights,' in the 'private subjective' level or the 'public' level between states?"[95] Dussel responds to this question negatively and attempts to resituate Vitoria's thought within an earlier inception of the "*ius gentium* of medieval Christendom (of a secondary culture peripheral to the Muslim world)."[96] Beginning with the role of universal rights in foundational Hispanic Modernity, both Schmitt and Dussel identify Vitoria as a central figure of the Hispanic scholasticism and the founder of the *ius gentium europaeum* ('European Law of Nations') framed within the natural law tradition.

---

[93] Dussel, Enrique D. *Ethics and Community*. p. 69
[94] Dussel, Enrique D. p. 70.
[95] Dussel, Enrique D. *Politics of Liberation: A Critical World History. Reclaiming Liberation Theology,* p. 209.
[96] Dussel, Enrique D. *Politics of Liberation*. p. 209.

As already noted, Dussel paid close attention to Vitoria's views on the universal rights to travel (*ius peregrinandi*), to trade, and to become a member (*cive*) of a political community.[97] However, he rejected the exigencies of certain "universal rights" that appeared to be coupled with the colonial operation and historical conditions. He described Schmitt's account of spatial relations in the Americas as ultimately aimed at allowing native Europeans to "pursue free competition and free exploitation."[98] According to Vitoria, "[I]f there are any things among the barbarians which are held in common both by their own people and by strangers (*hospitibus*), it is not lawful for the barbarians to prohibit the Spaniards from sharing and enjoying (*communicationem et participationem*) them."[99] As Dussel observes, the rights Vitoria refers never favor the interests of colonial subjects.[100] Only Europeans are fit subjects of such rights. Dussel explains that it would be a euphemism to speak of the *Encomienda* as a symmetrical right to trade where "the indigenous gave free labor without receiving anything in exchange; and the gold and silver they extracted became the private property of the metropolitan subject or the crown without any exchange or reward for the indigenous."[101] He determines that the contents of these rights can only be expressed by relations and practices of "death, offenses, violations, domination of all types."[102]

In an earlier essay titled "Derechos Básicos, Capitalismo y Liberación" (*Basic Rights, Capitalism, and Liberation*), Dussel sketches an important distinction between the exigencies of

[97] According to Vitoria, "The Spaniards have the right to travel (*ius peregrinandi*) and dwell in those countries, so long as they do no harm to the barbarians and cannot be prevented by them from doing so. […] The Spaniards may lawfully trade among the barbarians (*negotiari apud illos*), so long as they do no harm to their homeland. In other words, they may import the commodities they lack, and export the gold, silver, or other things which they have in abundance. […] If [the] children born in the Indies of a Spanish father wish to become citizens (*cives*) of that community, they cannot be barred from citizenship or from the advantages enjoyed by the native citizens." In Dussel, *Politics of Liberation*, p. 209. Vitoria, De lndís, p. 2; p. 705; 3; p. 708; 5; p. 710 (Translation: Pagden, p. 278-81).
[98] Dussel, Enrique D. *Politics of Liberation*. p. 99.
[99] In Dussel, p. 209, Vitoria, De lndís, III §4; Vitoria, 1960, p. 709 (Translation: Pagden, p. 280).
[100] Dussel, Enrique D. *Politics of Liberation: A Critical World History. Reclaiming Liberation Theology,* p. 209.
[101] Dussel, Enrique D. *Politics of Liberation*. p. 209- 210.
[102] Dussel, Enrique D. *Politics of Liberation*. p. 210.

any *proyecto*, and how legal and moral mediations can set the basis for certain rights (like the right to life, the right to work, or the right to establish sovereign political and legal institutions). Dussel makes explicit a necessary thesis to the analysis of universal rights, namely, that the hegemonic power of the Europeans allows them to define the totality of social relations through the imposition of its laws and rights.[103] For instance, Dussel explains that, if the *proyecto* is a result of an alliance or a negotiation, the determination of any right is also negotiated. An example of this negotiated alliance in which people join to assert rights is the drafting a constitution. In a constitutional process, negotiation is central to the praxis. People enter into a normative discussion of how to empower the people to establish new rights. Conversely, if a right is the product of custom, established by a specific group, the right will tend to be seen as natural. For example, capitalists assume private property to be a "natural" right. As Dussel argues, such a right "is elevated as a *natural* human right," and, therefore, "the structure of property, and possessions, as well the regime of power remain[s] locked by fetishized law insofar the very idea of custom law or positive law comes frequently to be elevated as a divine law."[104]

Dussel general critique of rights posits an argument about how certain "natural rights" have been achieved across space and time through the concealment of its distinctly violent praxis. For instance, the same logic used to support the contemporary universalist understanding of "human rights" has long provided justification for covert, efficient, and brutal military interventions in the name of the "rule of law," "political freedom," "democracy," or "free trade." In the recent past, this logic (capitalist interests and a double standard for certain fulfillment of human rights) has been used by the U.S. government to justify military and economic interventions in wars against

[103] Dussel, Enrique D. *Politics of Liberation*. p. 149.
[104] Dussel, Enrique D. "Derechos Básicos, Capitalismo y Liberación," In Dussel, Enrique D. *Praxis latinoamericana y filosofía de la liberación*. (Bogotá: Editorial Nueva América, 1983.) 149. p. 9. My translation.

Iraq and Afghanistan. Legal anthropology scholars Laura Nader and Ugo Mattei have determined this imposition of political and legal values constitutes a classical form of legal imperialism.[105] Nader notes that the legal imperialism of Americans assumed that their human rights policy could "save Eastern countries from irrationality, illegitimacy, and unchanging immortality by imposing "modern" Euro-American neoliberal law. The usurpation is legalized in this case not by *terra nullius*, but by *lex nullius*. Assuming Eastern countries need to possess something the civilized world possesses becomes a justification for invasions."[106]

Similar to Nader, Dussel's analysis seeks to give an account of how the discourse of rights is deployed globally as a tool of universal domination, imperialism, and capitalist appropriation. For Dussel, it is crucial to explain at the level of justification how natural rights hides its original violence within ongoing universal enforcement. As Dussel remarks, "[S]uch concealment becomes more explicit at the moment in which both dominant law and rights cease to perform their function under the basis of their ideological hegemony, but function only throughout the orientation of the brutal objective force of police apparatuses, military domination, pure *repressio*n)."[107] He makes a distinction is necessary between a "ideological hegemony" and "hegemonic power of the bloc of the oppressed." Ideological hegemony finds and remains embedded in an instrumental logic of violence and repression based upon notion of enmity in order to keep managing the opposition and inclusion of broader demands of claim rights of all groups, cultures, races, classes, genders, etc. Hegemonic power of the bloc of the oppressed is constructed from "below," through the broader

[105] According to Nader and Mattei, this model consists of a top-down legal intervention approach where some legal systems perceived "themselves (and often being perceived by local elites) as providing a superior model, a sophisticated recipe for progress." Additionally, it is an intervention premised on "the hegemonic use of "lack," with the emphasis on what the subordinate context lacks (institutions, civilization, human rights, resources, elections, manpower, technology, skills, etc.), in order to legitimize oppressive colonial or neo-colonial practices and plunder." See Ugo Mattei, Nader Laura *Plunder: When the Rule of Law Is Illegal* (Malden, Mass.: Blackwell Pub, 2008). p. 128.
[106] Ugo Mattei, Nader Laura *Plunder: When the Rule of Law Is Illegal* (Malden, Mass.: Blackwell Pub, 2008). p. 110.
[107] Dussel, Enrique D. "Derechos Básicos, Capitalismo y Liberación," My translation.

consent of "the people," to promote political and legal forms based upon solidarity.[108] Dussel proposes that a legal normative discourse of rights should be found through

> [a] future dialectical limit, the final criterion of all rights, and certainly the identification at the universal level of the normative aspects of a project that do not reproduce any form of domination of men over men, class over class, nation over nation. This utopic limit is the foundation of the possibility and humanity of the oppressed. It is under this utopic project where the realization of the law and rights of the oppressed is grounded.[109]

Here, Dussel's emphasis on critique of theories of natural law becomes important in fashioning a theory of decolonial legality. Dussel's insights allow us to formulate a decolonial legality and a critique of natural rights that it required to alter the mainstream account of a Eurocentric/Western colonial vision of law and natural rights mediated by death, domination, and exploitation. For example, the colonial regime of the *Mita*, under which a brutal labor system enslaved indigenous people in the mines of Potosí, demonstrates how Europeans justified such a regime as a legal enforcement of taxes owed to the Crown as "free workers," it only make apparent that it cannot arise any universal right from that imposition. Rather, the "rights" asserted by the colonizers where only the expression of "offences, violations, domination of all types" of Europeans were exercise against the colonial subjects.[110] Unlike the natural law framework aiming to fulfil the *proyecto* of the European world domination during colonization, Dussel's critique attempts to reactivate the problematic character of natural law raised "from a renewed historical dialectical perspective of projects which, precisely, are these through which rights are grounded." [111] What is a stake in specifying Dussel's legal-philosophical dimension, therefore, has to do here with Dussel's

[108] Dussel, Enrique D. T*wenty Theses on Politics*. Latin America in Translation/En Traducción/Em Tradução. Durham: Duke University Press, 2008. P. 36-42.
[109] Dussel, Enrique D. "Derechos Básicos, Capitalismo y Liberación," p. 149. My translation.
[110] Dussel, Enrique D. *Politics of Liberation: A Critical World History. Reclaiming Liberation Theology,* p. 210.
[111] Dussel, Enrique D. "Derechos Básicos, Capitalismo y Liberación," p. 149. My translation.

universal demand which concerns a vision of a "humanist project that could correspond with the normative exigencies of our species as humans." [112]

To adequately address the development of Dussel's critique, I now move to the Eurocentric/Western ideal of rationality behind the account of colonial law and of natural rights. As Dussel reminds us, the first Hispanic Modernity was an essential theological-juridical context that paved the way for modern rationality and its emancipatory potential. The following section of this chapter describes Dussel's reading of Ginés de Sepúlveda as another key early modern figure. I examine the version of rationality Sepúlveda invoked, which allowed Europe to proclaim itself as the center of the world.

Natural Law and the Colonial Concealment of Violence

Turning to Dussel's interpretation of Sepúlveda, the relation between the colonial framework of the law and the discourse of "rules of reason," supported by the notion of modern "Reason" and the emancipatory potential of Modernity, will become clearer. In his early book published in 1995, *The Invention of Americas: Eclipse of The Other and The Myth of Modernity*, Dussel distinguishes between two faces of Modernity. One is the paradigmatic famous Modernity as emancipatory project. In general, here Dussel is signaling the project of Modernity as a unique Eurocentric phenomena originated by the faith of "Reason" as a principle of reality and subjectivity to scape "of a state of "self-incurred immaturity" in order to reach the universality of the equality of all persons as such."[113] Against this rational horizon of progress by means of reason is the other negative side of Modernity, which takes the form of an "irrational sacrificial myth" that "hides the

[112] Dussel, Enrique D. "Derechos Básicos, Capitalismo y Liberación," p. 149. My translation.

[113] Dussel, Enrique D. *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation*. (Atlantic Highlands, N.J.: Humanities Press, 1996.), p. 51.

domination and violence that modernity exercises over cultures"[114] in the periphery to destroy any opposition to the common sense imposed through the European "civilizing" project.

To Dussel, Sepúlveda's positions embodies the very "irrational myth of Modernity" and exemplifies what Dussel calls the "sacrificial paradigm of violence," which calls for the sacrifice of all other peoples that remain outside the universal trajectory of European progress.[115] This paradigmatic justification of violence, has been expressed, according to Dussel, in the following philosophical way since the times of Sepúlveda to Locke:

> (a) we have 'rules of reason,' which are 'human' rules in general (by being 'ours'); (b) the Other is a barbarian because s/he does not fulfill these 'rules of reason,' his/her 'rules' are not rational 'rules;' because one does not have civilized rational 'rules,' one is a barbarian; (c) being a barbarian (not fully human) one does not have rights.[116]

Here the self-referential rules are the measure for judging what counts as human. The association of (a) as the necessary attributions of human beings, which in practice also correspond to have rights, defines the logical relation with (c) that indicates that he classifier to either have or nor have rights relates to the 'human' rules of colonizers. The ontological divide between the "human" and "civilized" Europeans on the one side and those "non-human" and "uncivilized" inhabitants of the colonized territories grew out of the "rules of reason"—as the formal mode of colonial classification. As Dussel writes, "The recently discovered "Indians" were not identified with the 'barbarians' of the Greeks or with the Muslim 'infidels' of Latin-Germanic Christendom." Instead, "[T]hey were *world* barbarians, non-bordering, peripheral and uncivilized with respect to the

[114] Dussel, Enrique D. "Eurocentrism and Modernity (Introduction to the Frankfurt Lectures)." *Boundary 2* 20, no. 3 (1993): 65–76. p. 66.
[115] Dussel, Enrique D. "Eurocentrism and Modernity," 65–76. p. 66.
[116] Dussel, Enrique D. *Politics of Liberation: A Critical World History.* p. 193

'center' of the new world-system and considered 'inferior' (underdeveloped, according to the European criteria) to western civilization."[117]

Furthermore, Sepúlveda's view exemplifies these different degrees of "underdevelopment," and as well the "inferiority" of the world barbarians, by making the connection between reason and the human quality that was uniquely Christian European. For example, Linda Lange sees Sepúlveda's thought as the continuation of Aristoteles's political philosophy and his contentions that "barbarians" were natural servants of the "civilized peoples." Lange juxtaposed Sepúlveda's view with Aristotle's theses on the idea of the "barbarians," and asserts that such historical and philosophical meaning appears in Sepúlveda enabling him to argue "that the Indians are "natural servants" and that therefore it is good and right for them to be governed by those who are rational, more perfectly developed as human beings, and better."[118]

Sepúlveda's perspective reinforces the justification of colonial legal violence. According to him, when people meet European or Western values and laws, they must follow a trajectory to achieve full humanity. Sepúlveda argues,

> "[I]t will always be just and conform to the natural law that such people [barbarians] submit themselves to the empire of princes and nations more cultured and human, so that by their virtues and the prudence of their laws, they abandon barbarism and are re-educated to a more human life and to culture and virtue."[119]

In order to highlight the contrast between the fully human and barbarian, Sepúlveda describes the life and culture of the Indians of the Americas as an absence of the European's values and virtues, pointing to contradictions in their institutions. For example, the colonizers' notion of private

[117] Dussel, Enrique D. *Politics of Liberation.* p. 193
[118] Lynda Lange, "Burnt Offerings to Rationality: A Feminist Reading of the Construction of Indigenous Peoples in Dussel's Theory of Modernity," In Alcoff, Linda Martín, and Eduardo Mendieta. *Thinking from the Underside of History: Enrique Dussel's Philosophy of Liberation*. (Lanham, Md.: Rowman & Littlefield Publishers, 2000.) p. 138.
[119] Quoted from Dussel, Enrique D. *Politics of Liberation: A Critical World History. Reclaiming Liberation Theology*. London: SCM Press, 2011. p. 194.

property was indicative to Sepúlveda of their superiority over the Native Americans. Sepúlveda explains, "[T]he Indians know nothing of private possession (*ut nihil cuiquam suum sit*), personal inheritance contracts, and, above all, modernity's supreme characteristic: subjective liberty (*suae libertati*), autonomously resistant to the arbitrariness of rulers."[120]

Dussel emphasizes the continuities between Sepúlveda's early modern views regarding private property and individual liberties with the tradition of Hobbes and Locke and political contract theory[121]. If we take into account, Dussel's challenge of the Eurocentric reading of political philosophy, and demonstration that it falls within Sepúlveda's justification of violence as the means to "reeducated to a more human life." Thus, we must accept that it is through Sepúlveda that is possible to see better the "*explicit beginning of modern philosophy*, at the level of world political philosophy, not by its method, but certainly by its geopolitical and modern thematic."[122] The connection between Sepúlveda and modern political philosophers like Hobbes and Locke lies the desire of each of them to equate private property with civilization. Let's remind that both Hobbes and Locke locate the state of nature in America, which, as we showed from the Eurocentric point of view, is allowed simply to be seen as "free space," where there is no law, or system of political institutions.

Sepúlveda's position provides a lens through which we can view the Eurocentric normative force, which assesses political and legal institutions alongside the distinction between human and

[120] Dussel, Enrique D. *The Invention of Americas: Eclipse of The Other and The Myth of Modernity.* p. 65.
[121] Particularly, from Locke's political theory: "The end of law is not to abolish or restrain, but to preserve and enlarge Freedom. For in all the states created beings capable of Law, where there is no Law, there is no Freedom. From Liberty is to be free from restraint and violence from others which cannot be, where there is no Law. But Freedom is not, as we are told, a Liberty for every Man to for what he lists: (for who could be free, when every other Man's humor might domineer over him?) But a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is: and therein not to be subject to the arbitrary Will of another, but freely follow his own." Locke, John. *Two Treatises of Government*. Cambridge; England: University Press, 1960. [sec. 57 lines 20-25] p. 306.
[122] Dussel, Enrique D. *Politics of Liberation*. p. 192.

nonhuman. In the next section, I turn to examine Dussel's reading of de Las Casas in order to highlight Dussel's alternative account of what counts as human (and having rights). As Dussel describes these others, "the peripheral colonial world, the sacrificed indigenous peoples, the enslaved black, the oppressed woman, the alienated infant, the estranged popular culture: the victims of modernity, all of them victims of an irrational act that contradicts modernity's ideal of rationality."[123]

De Las Casas's Critique of Colonial Violence: An Early Modern Praxis of Liberation and the Rights of the Other

While De las Casas's general criticisms of colonial juridical framework are explicit in Dussel's work, I have lingered here to his counter-discourse against the conception of law and rights that emerged within the Eurocentric vision of rights against the periphery outside Europe. This section I examine Dussel's reading of de Las Casas's work against the early modern Hispanic theological-legal tradition of Ginés de Sepúlveda and Francisco de Vitoria. Moreover, Dussel's key insights about de las Casas's "ethical critical consciousness" are crucial here in order to reveal the ways in which Dussel makes some important methodological distinctions between abstract principles of reason and a "corporeal" understanding of such principles. It is these principles that contribute to clarifying and assessing the philosophical legal dimension of his work. In this final section, what I aim to demonstrate is that by looking to Dussel's interpretation of de Las Casas it is possible to find indications not only of his Semitic understanding of the law, but also of his phenomenological thinking of law as a productive site of theorization for a liberation philosophy of law.

[123] Dussel, Enrique D., Javier Krauel, and Virginia C. Tuma. "Europe, Modernity, and Eurocentrism." *Nepantla* 1, no. 3 (2000): 465–78. p. 473.

This Semitic understanding of the law and the theorization of from a philosophy of liberation, enables Dussel to view the novelty of de las Casas' critique of the arbitrariness and violence of the colonial situation by having lived in "proximity" to the indigenous people and as well as to be "located in America itself, from 'outside' Europe (in its 'exteriority')."[124] It would be useful here to examine briefly how de las Casas's position embodies two fundamental features of Dussel's philosophy of liberation: first, the concept of "exteriority" and second, that of "proximity."

According to Dussel "exteriority" is the most important category of a philosophy of liberation. Simplifying exteriority is an "empirical immediacy" through which it is possible to make sense of a "*new historical reality*."[125] For example, exteriority is at the heart of our understanding of how the Americas was placed outside modernity's system of ideals of rationality, law, rights, etc.[126] Further, Dussel describes exteriority as "the ambit whence other persons, as free and not conditioned by one's own system and not as part of one's own world, reveal themselves."[127] Dussel's methodological formulation, the affirmation of exteriority is necessary "to realize the new, what has not been foreseen by the totality, that which arises from freedom that is unconditioned, revolutionary, innovative." [128]

"Proximity" serves a similar methodological function insofar as it affirms the life of the Other outside the social determinations of the totality of the system. For Dussel, proximity is not discovered through inner rules of truth, but instead is a moment of revelation, an "epiphany," in which the "self-revelation of the absolute Other takes place through the oppressed. The very body,

[124] Dussel, Enrique D. *Politics of Liberation: A Critical World History*, p. 197.
[125] Dussel, Enrique D. *Philosophy of Liberation*, p. 39.
[126] Dussel, Enrique D. p. 41.
[127] Dussel, Enrique D. p. 41.
[128] Dussel, Enrique D. p. 160.

the corporality, the flesh of the oppressed (their hungry, tortured, violated bodies) […] when exposed within the system, is a subversion of the law and order that alienates them."[129] It is by proximity that, according to Dussel, one comes to know "the oppressed, the poor, the one who—outside all systems—cries out for justice, arouse a desire for freedom and appeals to responsibility."[130] Dussel aims to set the fundamental ground of the philosophy of liberation from a "metaphysical exteriority," i.e. the historical and material lived experience of the oppressed and our responsibility for the struggle for their human freedom.[131]

Having briefly defined exteriority and proximity, I now return to the discussion of Dussel's interpretation of de Las Casas, specifically the way in which Dussel takes up de Las Casas corporeal understanding of the situation of the colonial subjects as crucial aspect of his commitment to take seriously the law and rights of Others. De las Casas's position of exteriority is tied with his praxis to strive for liberation and the dignity of Indians and also with "a coherent theory of the universal claim of truth."[132] Following this claim for universality in de Las Casas's ethical position, Dussel asserts that he could articulate philosophically a theory not "only of tolerance (purely negative), but of full responsibility for the Other from a *universal claim of validity*, which ethically and politically obligates one to take 'seriously' the rights (and responsibilities) of the Other, which continues as an example for the twenty-first century."[133]

In opposition to Sepúlveda and Vitoria and their justification of the conquest of the Americas, de las Casas opposes the violence brought to bear upon human lives in the colonies. This includes the violence to enforce prohibitions of all kinds, impose moral codes and institutional

[129] Dussel, Enrique D. "Appendix: Philosophy and Praxis," In *Philosophy of Liberation*, p. 189.
[130] Dussel, Enrique D. *Philosophy of Liberation*, p. 20.
[131] Dussel, Enrique D. *Philosophy of Liberation,* p. 18.
[132] Dussel, Enrique D. *Politics of Liberation,* p. 197.
[133] Dussel, Enrique D. *Politics of Liberation,* p. 197.

systems, and uphold colonial regulations and edicts of forced labor, exploitation, and genocide.[134] It is through his proximity to the quotidian life of the indigenous people that de Las Casas gained a measure of consciousness and was able to provide an accurate description of the colonial violence in the Americas. In fact, while Sepúlveda and Vitoria never travelled to the Indies, de Las Casas witnessed the brutal violence against indigenous people in the midst of the colonial period when he arrived in Santo Domingo (Hispaniola) in 1502, and he took multiple sojourns to Mexico, Cuba, and Venezuela.[135] As Dussel explains, de Las Casas "would not have been able to formulate and articulate his critique of the Spanish conquest of the Americas if he had not himself lived in the periphery and heard the cries and witness the tortures to which indigenous people were being submitted."[136]

To Dussel, de Las Casas becomes "the most radical sceptic of the civilizing claim of Modernity."[137] Indeed, de Las Casas describes the negative aspects of the brutal violence of the colonizers and situates the affirmation and recognition of the life of indigenous people. Consequently, de Las Casas declares the opposite against the prevailing colonial presuppositions of irrationality, inhumanity, and vicious institutions through which the colonizers dominate and kill indigenous people. De Las Casas's defends indigenous people (denied in viewing them as "barbarians"), noting that they were "very prudent people of living and distinguished understandings, having the republics […] prudently ruled, supplied, and justly prosperous."[138] In

[134] Dussel. *Politics of Liberation*, p. 197.
[135] For more about de Las Casas's life and sojourns into the West Indies, Mexico, Cuba and Venezuela see *Symposium Fray Bartolomé de las Casas: Trascendencia de su Obra y Doctrina.* 1a ed. México, D.F.: Universidad Nacional Autónoma de México, Dirección General de Estudios de Legislación Universitaria, 1985.
[136] Dussel, Enrique D. *Ethics of Liberation*, p. 45.
[137] Dussel, Enrique D. *Politics of Liberation: A Critical World History*, p. 206.
[138] Dussel, Enrique D. *Politics of Liberation*, p. 200.

affirming these concrete forms of living and political institutions, de Las Casa becomes the "maximum possible world critical conscience" of the sixteenth century for Dussel.[139]

At a certain level of abstraction, following Dussel's analysis, Las Casas's critique unhides the specific instances of the coercion, killing, exploitation, and land-appropriation of colonizers in the Americas, where the formulation of the structure of the law "becomes an ideology: a representation that for all practical purposes hides the reality."[140] As Dussel argues, the "whole juridical structure of the sixteenth century was a type of ideology."[141] Here Dussel uses ideology as the "formulation (existential or scientific) of the mediations of the project of the system without revealing itself to be a *system of domination*."[142] That is to say that the modern juridical structure of law functions as an instrument to conceal the "real *meaning*" of the violence and domination of the conquering praxis of Modernity.[143] Dussel writes, "All the empires have reasons (void of reason) that permit them to establish their dominion over others. But their reasons are ideological-existentialist at the quotidian concrete level."[144]

Dussel describes de Las Casas's critical position, as well his ethical consciousness, as the embodiment of the "praxis of liberation." At the methodological level, such praxis presupposes the imperative of a crucial negative moment. As Dussel argues, even though the articulation of de Las Casas's critique emerged as double negation, it is not necessarily "negative."[145] While it is clear that de Las Casas proceeds by negating the European Christian's negation of the indigenous forms of life, the status of his double critical enunciation leads to the whole negation of the totality

[139] Dussel, Enrique D. p. 197.
[140] Dussel, Enrique D. *Politics of Liberation*, p. 308.
[141] Dussel, Enrique D. *A History of the Church in Latin America,* p. 309.
[142] Dussel, Enrique D. *A History of the Church,* p. 310.
[143] Dussel, Enrique D. *A History of the Church,* p. p. 309.
[144] Dussel, Enrique D. p. 310.
[145] Dussel, Enrique D. p. 104-105.

of colonial domination as such. Here the "negative" side of his critique coincides with the assumption "that the chrysalis (the old system of domination) has to be superseded for new life to emerge."[146]

According to Dussel, this praxis itself becomes the process by which "the horizon of the system is crossed over and new reality penetrates into the exteriority through which the new order is constructed, a new, more just social formation" can arise.[147] In moving towards the view of exteriority as the possibility of a new order, beyond the boundaries of Europe's colonial system, Dussel develops the notion of "subversive justice." This definition of justice refers literally to the ethical function of subverting any unjust system. In Dussel's view, subversive justice entails a distinct understanding of how to respond to injustices through an ethics of listening the suffering of others.[148] Subversive justice places the self in relation to victims of the oppressive system, recognizing them as others as being worthy of respect.[149] Therefore, Dussel's conception of ethical praxis is coherent with a subversive sense of justice that attempts to break down the contradictions of the established order.

Central to this subversive justice is the double movement of negation, which implies the negation of life by the colonial totality. At the same time, to deny what is denied, dialectically, involves a positive progression in which the victims of the system project their own alternative political and legal organization.[150] The negative aspect of the critique mobilized by Dussel's liberation philosophy calls for a counter-political, legal and ethical system that emerges from the

[146] Dussel, Enrique D. p. 105.
[147] Dussel, Enrique D. *Ethics and Community*. Theology and Liberation Series. Maryknoll, N.Y.: Orbis Books, 1988. p. 63.
[148] Dussel, Enrique D. *Philosophy of Liberation*. (Eugene, Or.: Wipf and Stock, 2003.) p, 65. The Latin root of *Ob-audire,* as Dussel points out, means to listing, to hear, the suffering of the excluded, the vulnerable, the exploited.
[149] Dussel, Enrique D. *Philosophy of Liberation*. p. 58-59.
[150] In Chapter 5, I detail Dussel's method of ana-dialectics.

victims of the dominant system. In other words, taken these negations together is "to deny the denied in the system, concomitant with the expansive affirmation of what in the oppressed is exteriority (and thus was never in the system, because it was distinct, separate, and outside), is liberation."[151] Dussel describes this positive moment of liberation, recovered from the double movement of negation of the totality of the system, as a structural moment where "the victims gradually discern, by virtue of the creative (liberating) imagination, and utopian, feasible alternatives of transformation. These alternatives represent future systems where the victims could live."[152] By radically criticizing the dominant totality of the established order, Dussel makes clear that the ethical praxis needs of the double sense of negation in order to affirm the idea of the absolute other, upon which is possible to ground the foundation of a new "order of the natural, the human."[153]

A rupture of the established system would entail the act of responsibility to the other (the concrete human person) that now is revealed by the new just system. Dussel explicitly links this responsibility with "work" or "service" to the oppressed.[154] While work is rationalized for the oppressed as a function of sheer "duty or legal compulsion," Dussel's praxis of liberation offers a "practical poiesis or poietic praxis," to explain work done for the other with responsibility, for the other's liberation. It uses instruments, including the legal discourse, in service of the poor, to create a new order, a new structure. According to Dussel, liberation praxis honors the functions and beings that compose the structure.[155] He distinguishes between *praxis* and *poiesis*. Praxis involves

[151] Dussel, Enrique D. *Philosophy of Liberation*. p. 62.
[152] Dussel, Enrique D. *Ethics of Liberation*, p. 292.
[153] Dussel, Enrique D. *Ethics of Liberation*, p. 30.
[154] Dussel frames the praxis of liberation in terms of metaphysical or transontological praxis. Linguistically, according to Dussel, while for "Greeks did not have this type of experience," in Hebrew, Dussel writes, " *habodah* means "work," as also "service," in Greek *diakonia*." Dussel, Enrique D. *Ethics of Liberation*, p. 63.
[155] Dussel, Enrique D. *Ethics of Liberation*, p.63.

being-in-relation to one another; it is an action and a relationship. Poesis denotes a doing (a making) between persons and nature.[156] Praxis becomes more salient when it is predicated on "the experience of the nearness of persons as persons."[157]

Close person-to-person experience inscribes "*the other as* one's "neighbor," rather than as merely "a thing, an instrument, a mediation."[158] As Dussel remarks, "[T]he praxis of liberation is "the actualization of proximity, of the experience of being proximate, for one's neighbor. Praxis is the experience of constructing the other person, as end of my action and not as means."[159] To understand praxis as a recognition of the other as "neighbor," as "a friend," and not as an "enemy," offers an alternative way to conceptualize the colonial subject in terms of "*whole* human being."[160] Dussel here disagrees with Schmitt's views of enmity and seeks to move away from his understanding of legality and politics within the framework we discussed above between friends versus foes. Against Schmitt's distinction of enmity, Dussel takes up from de Las Casas the notion of *whole human being* as rooted in the notion of "the neighbor, who is in proximity prevailing in his philosophy of liberation the importance of friendship and solidarity as the alternative categories for a new legal and political paradigm.[161]

Accordingly, for Dussel, "sensitivity (or commiseration, compassion—the capacity to suffer with another) to the pain of another becomes the very criterion of praxis."[162] This framework allows us to connect de Las Casas's corporeal concern with the suffering of others vis-à-vis the

[156] Dussel, Enrique D. *Ethics and Community*. p. 9.
[157] Dussel, Enrique D. *Ethics and Community*. p. 9.
[158] Dussel, Enrique D. p. 9.
[159] Dussel, Enrique D. p. 9.
[160] Dussel, Enrique D. *Ethics and Community*. p. 9.
[161] Dussel, Enrique D. "From Fraternity to Solidarity (Towards a Politics of Liberation) *Anti-Cartesian Meditations and Transmodernity: From the Perspectives of Philosophy of Liberation*. Uitgeverij Amrit/Amrit Publishers, 2018. p. 113.
[162] Dussel, Enrique D. "From Fraternity to Solidarity," p. 63.

concrete and positive "right of the person as person."[163] By giving more credit to his concrete experience and sensitivity to being in proximity with others, Dussel demonstrates how de Las Casas is a situated critical observer, not a "hypothetical observer."[164] For Dussel, de Las Casas's critique reveals what constitutes the lived experience of a "community of life," interpersonal face-to-face relationships grounded in respect and justice toward others.[165]

This corporeal dimension that Dussel borrows from de Las Casas's thought leads us back to another issue mentioned earlier, offering a more direct link between Dussel's phenomenological thinking and his Semitic conception concerning law. To Dussel, Semitic thinking is essentially historical and takes up the notion of "solidarity" among *el pueblo*, who has historically been subjugated. In *Ethical Hermeneutics: Rationality in Enrique Dussel's Philosophy of Liberation*, Michael Barber provides a detailed survey of Dussel's attempt to recover different elements of the Semitic thought over the Hellenic tradition. Barber observes that Dussel's emphasis on the Semitic tradition indicates his "option against rationality and philosophy, which would seem to have done nothing more than misrepresent lived experience."[166]

In his trilogy *El Humanismo Helénico* (1974), *El humanismo Semita* (1969), and *El Dualismo en la Antropología de la Cristiandad* (1974), Dussel offers some key reflections regarding the Semitic tradition, specifically, the relation of law to his larger historical hypothesis of the "ethical-mythical nucleus" among cultures.[167] Following Paul Ricoeur's philosophical symbolism through this mythical nucleus, Dussel articulates a narrative that seeks to create

[163] Dussel, Enrique D. "From Fraternity to Solidarity," p. 39.
[164] Dussel, Enrique D. *Ethics and Community*. p. 104.
[165] Dussel, Enrique D. *Ethics and Community*. p. 15.
[166] Barber, Michael D. *Ethical Hermeneutics: Rationality in Enrique Dussel's Philosophy of Liberation*. Perspectives in Continental Philosophy ; No. 2. New York: Fordham University Press, 1998. p. 24.
[167] Dussel, Enrique. "A New Age in the History of Philosophy: The World Dialogue between Philosophical Traditions." *Philosophy & Social Criticism* 35, no. 5 (June 1, 2009): 499–516.

meaning of the "organic organization of concrete point of views of a group concerning their own existence."[168] Part of Dussel's wider hypothesis consists of explaining that all cultural systems shared a ethico-mythical nucleus, which has evolved following two divergent philosophical lineages (the Hellenic or the Semitic traditions) concerned with the ontic and anthropological question of our existence.[169]

For Dussel, the transcendental impulse within Hellenic and Greek philosophy to grasp the meaning of human existence by going beyond the natural world posits an understanding of humans as "primarily immortal, incorporeal, where its comprehension as human must be accomplished by the ascended journey to what appear as the divine reality."[170] The transcendental impulse is ultimately tied to a metaphysical dualism which equates our existence in this world (the visible realm) with imprisonment. For instance, the first thing we see in the Platonic texts is the philosophical journey out of this world, premised upon being freed from our body[171] to ascent towards the intelligible idea of the Good, wisdom, etc.[172] Dussel believes that the problem with this kind of dualism is that it grounds human existence in a "negativity of the body" that depletes the idea of an "intersubjective life" of any possible "real" meaning. He argues that, by lacking any

[168] Dussel, Enrique D. *El humanismo helénico*. Editorial Universitaria de Buenos Aires, 1975. p. 16. My translation.
[169] Dussel, Enrique D. *El humanismo helénico*. p. 63.
[170] Dussel, Enrique D. *El humanismo helénico.* p. 93.
[171] Elsewhere in *Ethics of Liberation*, Dussel highlights this philosophical anthropology in the Hellenic tradition further to German idealism. He writes, "It is thus that from Greece and Rome to the Persians, from the empires of India and Taoist China, an ontology of the absolute as One, a dualist anthropology of the superiority of the soul over the body (which is always in some way the cause of evil), establishes an ascetic ethics of "liberation" from material plurality as a "return" to the original. This is the movement of Neoplatonic ontology, and later of German idealism, especially of Hegel's Logic. This is the logic- ethics of the Totality." Op. Cit Dussel, Enrique D. *Philosophy of Liberation*, p. 16.
[172] In addition to examine the philosophical anthropology of the Hellenic understanding of the person, Dussel tracks the development of the Greek humanism under the premise that its origin should be found within the explicit tension between a pole of "freedom," and its correlative notion of Greek's law (*nomos*), and its opposite pole of "chaos," and its correlative state of "order." Dussel, Enrique D. *El humanismo helénico*, p. 97.

"recognition of others through their body, and with it the discovery of the entire cultural fabric," the Hellenic culture demoted the role of intersubjective life to a second place.[173]

In contrast to the Hellenic tradition that puts emphasis on the constituent ground of intersubjectivity as concerned with the "I" (the Self), Dussel's philosophy of liberation emphasizes the metaphysical structure of "we" (the people). Dussel traces the Semitic lineage of human intersubjectivity and the experience of embodiment and uses both as the basis of the realization of freedom and life in community. Dussel argues that the foundation (which represents the constituent element of self-consciousness) is a "we" capable of accounting for intersubjectivity through processes of "Alliance."[174] According to Dussel,

> [While] the Greek Law is a universal physical order (taxis), which the city needs in order to constitute itself and affirm its security […] Quite the contrary is the law of the Semite, which is not only intersubjective, but is established among living and free beings, without any intervention or analogy with the created world. […] This Law is absolutely and exclusively intersubjective. It is the opposite of nature.[175]

Greeks law remains fundamentally governed by a natural plan, tied to a universal teleology, in which lies the foundation of the order of the political community. For Dussel, the Semitic understanding of the law entails the necessary immediacy (proximity) of others in an alliance among the assembly of the people. Dussel's view of the law breaks with the Hellenic linage and Hellenic references to the law "as a universal physical order." He instead favors the Semitic understanding of law in which the primary elements are the human being over nature and intersubjectivity over the individual. Drawing on this Semitic lineage, we can understand Dussel's conception of law to be intersubjective and grounded through modalities of lived experience,

[173] Dussel, Enrique D. *El humanismo helénico*. p. 59.
[174] Dussel, Enrique D. *El humanismo helénico*. p, 220.
[175] In Dussel, Enrique D. *El humanismo helénico*, p. 221-222. My translation.

through which the collective bonds of solidarity make freedom possible.[176] At this point, we can see that what matters the most in Dussel's legal understanding is not the law itself, but the collective life of human beings.[177]

In this section, I introduced De las Casas's thought and praxis, and elaborated on the extent to which Dussel uses De las Casas's ideas to frame his critique of the violence of the juridical structure of modernity based on Semitic texts.[178] The triple articulation of de Las Casas's critique of law, rights, and responsibilities from the side of the dominated and colonized subject became the premise for Dussel's decolonial critique, described by him as a " critique with a new strategy in political philosophy: the *first* critique as the 'world-system' is gestating (origin of 'globalization'), a critique of the violence, which establishes the new system."[179]

In this chapter, I have tried to contextualize Dussel's engagement with historic elements of the scholastic philosophical tradition, including the distinction of the human and inhuman, the concept of natural law, the concept of universal rights, and the emergence of what he calls the first Hispanic Modernity. At stake in Dussel's conceptualization of the inception of early Modernity, is the crucial idea that we can locate other lineages as the roots of law, rights, and political institutions. I suggest that Dussel's reading of this early modern anti-tradition tradition—which is

[176] Following Barber, there are at least four elements that help sharpen our understanding of this Semitic tradition. First, as Barber tells us, the Semitic tradition attributes the responsibility of wrongdoings neither to gods nor the nature of Being but exclusively to the realm of humans. Second, Barber argues that this emphasis on the idea of human responsibility posits the human being as self-conscious and autonomous. Third, no dualism of mind/body exists for Semites. And lastly, historicity is integral to the Semitic conception of a person, contrary to Greek philosophy tendencies to confront encounter as mere appearance of phenomenal reality. Barber, Michael D. *Ethical Hermeneutics: Rationality in Enrique Dussel's Philosophy of Liberation*. Perspectives in Continental Philosophy; No. 2. New York: Fordham University Press, 1998. p. 21-24 24.

[177] Dussel, Enrique D. *Ethics and Community*. p. 69.

[178] Here Dussel draws on what Anton de Montesinos and Pedro de Cordoba claimed in 1511 to be the first accusation to the inauguration of Modernity on the basis of Semitic texts from Isaiah and John l, 23. They exclaimed: "*Ego vox clamantis in deserto* [I am a voice in the desert of this island.] You are all amid mortal sin, and in it you live and die, for the cruelty and tyranny that you use toward these innocent victims." In, Dussel, Enrique D. *Anti-Cartesian Meditations and Transmodernity*, p. 80 Dussel, Enrique D. Anti-Cartesian Meditations and Transmodernity, p. 80.

[179] Dussel, Enrique D. *Politics of Liberation: A Critical World History.* p. 198.

not recognized by the history of modern philosophy—can help create a genealogy of the relation of law and liberation. Dussel's historical re-interpretation supports the possibility of a decolonial understanding of the history of philosophy. According to him, "paradoxically, the beginning of the history of the philosophy of Iberian (or Latin) America was not just the first chapter of the history of the philosophy in that region, but together with Spanish and Portuguese philosophy […] was *the beginning of all modern philosophy*."[180]

I have also tried to establish how Dussel centered de Las Casas in the critical genealogy of Modernity. For Dussel, linking de Las Casas's critique with the critique of juridical Modernity is a point of departure in theorizing law and rights, one that opens up the possibility for a philosophy of law connected to the historically material context of the Americas. He also pushes against the universal pretensions that attempt to renew linkages with natural law elements, proposing a nuanced view of legality rooted in intersubjectivity and the experience of the people instead. In order to further elucidate Dussel's liberation philosophy of law beyond the historical interpretation suggested by his critique of the juridical structure of coloniality of power, in the next chapter, I'll explore and add rigor to Dussel's understanding of law and will further parse the ideas of the sovereignty of *el pueblo* in Dussel's account of the foundation of law.

[180] Dussel, Enrique D. *Politics of Liberation: A Critical World History,* p. 209.

CHAPTER 3
DUSSEL'S POLITICAL PHILOSOPHY OF LIBERATION AND PHILOSOPHY OF LAW

A crucial motif in the philosophy of liberation is a want to free from all references to a Eurocentric origin story of political philosophy. As Eduardo Mendieta accurately observes, Dussel situated his view "beyond the constitutive myths that have guided the production of histories of political philosophy and the very thinking of the political in the 'West.'"[181] Mendieta implies that Dussel's critical approach to a history of political philosophy allows us to retreat from "the safe theoretical bunkers of received ideological chronologies and self-serving histories."[182] Rejecting the authority of figures like Hobbes, Locke, and Machiavelli, Dussel instead cites Bartolomé de las Casas, Ginés de Sepúlveda, Francisco de Vitoria. Dussel's philosophical approach considers historical evidence outside the paradigm of modern European political philosophy in order to elucidate the justifications for European superiority over other cultures.

At the beginning of the first volume of the *Politics of Liberation*, Dussel defines the scope and basis of his critique as the history of political philosophy. His critique aims "to put forward a possible history of politics, the history of the people, who are political actors, and the thinking (in the broad sense) or the political philosophy (in the narrow sense), which inspired them."[183] Dussel's central claim is that a critical political philosophy must situate and provide a conceptual framework for "the victims, the south of the planet, the oppressed, excluded, new popular movement, ancestral people, people colonized by Modernity, by globalized capitalism, as is expressed through world networks, from where we can critique the system of the categories of

[181] Mendieta, Eduardo. "Justice after the Law: Paul of Tarsus and the People of Come." *Human Architecture* 11, no. 1 (2013): 19-31. p. 20.
[182] Mendieta, Eduardo. "Justice after the Law: Paul of Tarsus and the People of Come." p. 20.
[183] Dussel, Enrique D. *Politics of Liberation: A Critical World History*. Reclaiming Liberation Theology. London: SCM Press, 2011. p. xv.

bourgeois political philosophy."[184] Dussel is suggesting a new historical narrative of political philosophy, one that locates a new conceptual foundation from which critical political and legal thinking arises in the spatial and historical social situation of the people.[185]

As established in Chapter 2, Dussel acknowledges the colonial violence of natural rights expressed in the "irrational myth of Modernity." In this chapter, I offer a reconstruction of Dussel's theoretical program from an explicitly ontological and normative philosophical perspective. The character of this chapter is expositional and reconstructive, aiming to focus on the ways in which Dussel's conception of law constitutes a central dimension of his normative political philosophy. In the first section of this chapter, I reconstruct Dussel's conception of law within his political philosophy through his collection of essays *Hacia una Filosofía Política Crítica* ("Towards a Critical Political Philosophy") and his two seminal works *Politica de la Liberación* ("Politics of Liberation") and *20 Tesis Sobre la Política* ("Twenty Theses of Politics"). I then bring into conversation features of Dussel's political philosophy and the decolonial legal work of Boaventura de Sousa, in order to clarify the scope of the discussion concerning the inquiry of law from a decolonial perspective. In the second section, I connect the function of Dussel's political philosophy with the problem of the nature of law. Here I argue that Dussel's conception of law is useful for explaining the normative commitments underlying the role of law in organizing and transforming institutions that remain faithful to the power of the people (*el pueblo*) and the protection of life. In sharp contrast to the unthematized role that legality has played in decolonial thought, this chapter offers evidence for the utility of Dussel's conception of legality to the political philosophy of liberation.

[184] Dussel, Enrique D. *Politics of Liberation: A Critical World History*. p. 549-550.
[185] Dussel, Enrique D. *Politics of Liberation.* p. 1.

Towards a Critical Conception of Law of Dussel's Politics of Liberation

Decolonial thought has generally remained reluctant to theorize the normative importance of law and institutions as a set of elements necessary for the task of liberation and decolonization. I argue that a political philosophy of liberation can turn to Dussel's work to assert the relevance of the validity and normative nature of law. More than any other decolonial thinker in the twentieth century, Dussel's theoretical contributions to the criticism of the coloniality of power and knowledge demonstrates the necessity of thinking about legal and institutional mediations as an important normative requirement of the politics of liberation philosophy. Dussel insists that to produce a political philosophy from the vantage point of the oppressed and the excluded, we must criticize the "pathologies of the State" and the strategic legal actions "of the metropolitan institutional systems and the normativity implicit political principles" implicit in the coloniality of power.[186]

Dussel's political philosophy is guided by two intertwined theoretical frameworks—one pointing in the direction of the ontological and normative aspects of the political, and the other indicating a critical moment when new categories rupture the established political order. He calls the former *la arquitectónica* (the architectonic) and the latter "the critical." The architectonic framework considers the ontological and normative aspects of the political, providing a "*fundamental*, ontological, description of the necessary moments of a global politics understood from the periphery, from Latin America."[187] The critical framework entails what Dussel calls the positive character of the political, a new system of categories that would consist of a "creative moment" where the people free themselves and rupture the established political order. This "creative moment," according to Dussel, is rooted in a "new positive conception of political power

[186] Dussel, Enrique D. *Politics of Liberation: A Critical World History*. p. 550.
[187] Enrique Dussel. *Política de La Liberación. Volumen II: Arquitectónica*. Vol. II. Madrid: Trotta, 2009. p. 11.

that *affirms* the life of the community, of each life (authentic biopolitics)."[188] What follows from this critical moment is liberation praxis and the founding of new institutions by the intervention and authority of a popular community. The source of the strength of Dussel's notion of *el pueblo*.

Dussel's critique begins by a radical reconsideration of what he calls the totality of western ontology. In Dussel's work, ontology becomes a totalizing western modality of thought that implies the existence of all "beings" and modes of "thinking" within the boundaries of modern European philosophy.[189] In his seminal work *Philosophy of Liberation,* Dussel underscores the main features of such western ontology: 1) it is a fundamental Eurocentric point of view that situates all men and cultures "within its boundaries as manipulable tools;"[190] 2) it tends to see other's lives and cultures "as known ideas, as mediations or internal possibilities" and imposes itself as the dominant "thinking that expresses Being." As Dussel puts it, ontology is the "ideology of ideologies, the foundation of the ideologies of the empires, of the center."[191]

By rethinking western ontology from a perspective of alterity and through a philosophy of liberation, western ontology becomes a kind of "metaphysics." Ontology is turned inside out, into the comprehension of the exteriority of the other, namely "the peripheral people, the oppressed

[188] Dussel, Enrique, D. *Política de la Liberación. Crítica Liberadora.* Vol. III. (Madrid: Editorial Trotta, 2022). p. 22.
[189] Dussel explicitly speaks throughout his work of ontology in the sense of Levinas, as it refers to the order of a "totality." Totality is the all-encompassing structure of western philosophical categories which neglects the modes of being-in-the-world that are external to European modern thought. The use of the term "totality" in Dussel's work is equated with the notion of a "world." In his classical work *Philosophy of Liberation*, it refers to the "totality of beings (real, possible, or imaginary) that exist because of their relationship to humankind." To put in phenomenological terms, the "world is thus an instrumental totality of sense. It is not merely an external aggregate of beings but the totality of the beings that are meaningful to me." Enrique Dussel. *Para Un Des-Trucción de La Historia de La Ética I*. I vols. Mendoza: Ser y Tiempo, 1972. p. 22. Ultimately, Dussel's philosophy of liberation, understood as a "metaphysics of alterity" seeks to develop a philosophical paradigm that breaks with all the cultural and epistemic dependencies of European modern thought. Instead, philosophy of liberation has trying gradually to discover its own decolonial path through putting emphasis on the liberatory praxis and lineages which arises from and within Latin America's peoples. Dussel, Enrique D. *Para una ética de la liberación latinoamericana*. Siglo Veintiuno Editores, 2014. p. 13.
[190] Dussel, Enrique D. *Philosophy of Liberation*. Eugene, Or.: Wipf and Stock, 2003. p. 3.
[191] Dussel, Enrique D. *Philosophy of Liberation*. p. 5.

classes, the women, the child."[192] Dussel's point is that there is reality and beings beyond and against the Eurocentric totality. In Dussel's view, the "other is the alterity of all possible systems, beyond "the same," which totality always is."[193] The discourse of the logic of totality consists of "the alienation of exteriority or of the reification of alterity, of the other person."[194] According to Dussel, the logic of the metaphysics of exteriority is the immediate reality of persons that have history and freedom; it "establishes its discourse on the abyss of the freedom of the other. This logic has another origin, other principles."[195] Dussel's position goes beyond ontology and instead offers a trans-ontological view from which he begins to sketch a metaphysics. Andrew Irvine argues that this comprehension of the exteriority of the other as "at least means breaching the self-enclosure of ontology by thinking the other otherwise than being, that is, thinking ethically."[196]

We can situate the context of Dussel philosophy of law in the critical side of the politics of liberation and the practice of thinking ethically from the side of the oppressed. The starting point of my interpretation of Dussel's legal philosophy is a section on his collection of essays *Hacia una Filosofía Política Crítica* ("Towards a Critical Political Philosophy"), where he explains how the body of law and the institutions of political systems must always include a "critical" moment par excellence, one that "leaves the door open" for new rights to emerge and become part of the constitution without the need for violent struggle. In these essays, Dussel states the pending and necessary task within the *Ethic* and *Politics of Liberation*, to develop this "chapter of the philosophy of law," that allows "the citizens, rulers, institutions, and specially the system of right

[192] Dussel, Enrique D. *Philosophy of Liberation*. p. 48.
[193] Dussel, Enrique D. *Philosophy of Liberation*. p. 43.
[194] Dussel, Enrique D. p. 41.
[195] Dussel, Enrique D. p. 42.
[196] Irvine, Andrew B. "An Ontological Critique of the Trans-Ontology of Enrique Dussel." *Sophia* 50, no. 4 (2011): 603–24. p. 605.

and its courts of justice to always have access to a serious and honest political exigency of Justice."[197]

In my interpretation, the type of philosophy of law formulated through Dussel's political philosophy is associated with his philosophical conception of the practical spheres of the political. In Dussel's approach, the system of right and law are both practical normative spheres of the political. His work suggests an account of law constituted and codetermined through the same normative principles.[198] I argue that we can reduce the understanding of his philosophy of law to a practical philosophy that justifies the maximization of people's involvement and authority upon moments of institutional transformations of a political order. For Dussel, the system of right, and the law itself, always remained close to an emancipatory claim of the people without rights that find themselves in a structure of oppression. He argues that before we can attribute to those without rights, we must recognize the role of historical agents to struggle in action for the establishment of a new order, the development of new rights. This is important in order to properly describe the processes of political transformation, and to develop a philosophy of liberation that is able to reflect upon the assumptions embedding in the concept of law.

Many philosophers of law, such as legal positivists like H. L. A. Hart, have engaged with the ontological question concerning what makes a legal rule a rule. Hart assumes a reductive account of law. This is to say, he understands law to be grounded its very nature in terms of a foundational truth of what a rule is.[199] According to Andrei Marmor, the idea of a reductive explanation of law "is to show that a distinct type of phenomenon is actually constituted by, and

[197] Dussel, Enrique D. *Hacia una filosofía política critica*. 1st Edition. Bilbao: Desclée De Brouwer, 2002. p. 157.
[198] See a detailed explanation of the material principle, the formal principle, and the principle of feasibility vis-a-vis Dussel's account of legality in Chapter 4.
[199] Marmor, Andrei. "What's Left of General Jurisprudence? On Law's Ontology and Content." *Jurisprudence (Oxford, England)* 10, no. 2 (2019): 151–70. p. 155.

thus fully explicable in terms of, some other, more foundational type of facts."[200] This reductive thinking is evident in Hart's account of law in *The Concept of Law*. Simplifying a complex theory, Hart's famous argument is that, in order to describe and do justice to a modern system of law it, is necessary to distinguish between two related types of rules: primary and secondary rules. According to Hart, primary rules are those that require human beings to do or to abstain from certain actions, and secondary rules are parasitic to the primary rules. Secondary rules specify how new primary rules can be asserted, introduced, eliminated, and modified. They are also concerned with the ways in which conflicts or disputes arising within the primary rules can conclusively be solved.[201] Hart's definition of law can be located in the connection between these two types of rules and what human beings will accept.

Dussel's theoretical approach disregards the reductive philosophical explanation of the law emphasized by the formalist stance of positivism. What such formalization reveals is a reductive aspect of law as only the provision of rules to establish social control. As Gregory Papas observes, in twentieth century Latin America, some strands of positivism, were "used to justify dictatorships and threaten values and beliefs dear to Latin Americans,"[202] such as popular sovereignty. This basis animates Dussel's contentious arguments against formalism. Nevertheless, Dussel does not deny the role of processes of formalization within legal and political systems. Rather, he insists that "[F]ormalism without content is not only one-sided, but it might be a mistaken approach, given that under such circumstances, the political is stripped from the motives to preserve its

[200] Marmor, Andrei. "What's Left of General Jurisprudence? On Law's Ontology and Content." *Jurisprudence (Oxford, England)* 10, no. 2 (2019): 151–70. p. 155.
[201] Hart, H. L. A. *The Concept of Law*. Third edition. Clarendon Law Series. Oxford, United Kingdom: Oxford University Press, 2012. p. 81.
[202] Pappas, Gregory Fernando. *Pragmatism in the Americas*. 1st ed. American Philosophy. New York: Fordham University Press, 2011. p. 5.

commitments in favor of the dominated nations of the postcolonial periphery."[203] Formalism, ultimately, involves the efficacy of abstraction of the experience of people's reality. For Dussel, formalism in philosophy has always been a concern. He writes,

> [W]ith a certain "language" "world," or "system" or horizon of "objects" that have been methodically rendered abstract from the plenitude of reality of the real so that they can be treated analytically. This first step is valid, and frequently necessary. It becomes invalid, however, and insufficient when it forgets, at the stage of a second moment, the previous abstractive movement, and falls into the claim that the original horizon that has been thereby reduced is "reality itself" (and because of this negates "all metaphysics," ordinary language, "objects" of common sense, or the possibility of "normative statements" based upon material "factual judgments").[204]

In this passage, Dussel warns us that focusing exclusively on the formal aspects of a "system," distorts our attention for "the plenitude of reality" or the lived experience of the human subject. Moreover, Dussel's concern with the way formalism destroyed experience and reduced subjects to abstractions also reflects his preoccupation with certain views through which one can only identify sources of legitimation in the intrinsic qualities of the law, without any reference to external determination of the political community or *el pueblo*."[205]

Dussel identifies some of the initial negative consequences of formalism in the face of his critique of Modernity's coercive conception of "Reason." Before accusing Dussel of remaining committed to the same rational tradition that he criticizes, it is important to clarify the type of arguments that Dussel provides in counteracting what counts as "rationality" by modern Western philosophies in the foundation of the political and legal domains. In Chapter 2, we noted how Dussel deploys his critique of Modernity and modern rationality as enablers of external violence necessary to execute the colonial law. Along with Dussel's critique of Modernity comes the

---

[203] Enrique Dussel. *Política de La Liberación. Volumen II.* p. 27.
[204] Dussel, Enrique D. *Ethics of Liberation in the Age of Globalization and Exclusion*. Latin America Otherwise. Durham: Duke University Press, 2013. Footnote 119. p. 545.
[205] Dussel, Enrique D. *Hacia una filosofía política critica*. p. 169.

potential necessity to examine an "amplified rationality." Amplified rationality is a point of reference in which exclusion and violence foreclose the possibility of intercultural dialogue. Correspondingly, to stress an alternative rationality shows the violent aspect of modernity that, in the name of rationality, allowed the extermination, exploitation, and oppression of those who were not "naturally" given human reason.

Such a theory requires a vision of rationality that neither relies upon an abstract universalism nor lapses into a critique of rationality that falls into a postmodern view of reason as terror or plain irrationality.[206] Therefore, a philosophy of liberation must offer a concrete position that "affirms that rationality can establish a dialogue with the reason of the Other, as an alterative reason."[207] Dussel's project affirms another form of universalism and rationality that can contribute toward what Dussel calls a "transmodern" project. Transmodernity differs from a universal Eurocentric project that conflates Western standards with the human in general.[208] This presupposition takes us back directly to the modern negation of the rights of others and its universal institutionalization beyond their self-rule (examined in Chapter 1). According to Dussel, the liberation project of transmodernity stands in opposition to "a universal, univocal project that seeks to impose violently upon the Other."[209] Instead Dussel's project aims to surpass Modernity itself "through a corealization with its once negated alterity and through a process of mutual, creative fecundation."[210] For Dussel there is no project of liberation without rationality, however, he adds that "there is no critical rationality without accepting the interpellation of the excluded, or this

[206] Dussel, Enrique D. *The Invention of Americas: Eclipse of The Other and The Myth of Modernity*, p. 132. For Dussel in general, the critique of instrumental reason has always been, since Horkheimer and Adorno, "at risk of drifting into irrationalism." See Dussel, Enrique D. "From Critical Theory to the Philosophy of Liberation: Some Themes for Dialogue." *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 1, no. 2 (2011). p. 19.
[207] Dussel, Enrique D. *The Invention of Americas*, p. 132.
[208] Dussel, Enrique D. *The Invention of Americas*, p. 132.
[209] Dussel, Enrique D. p. 138.
[210] Dussel, Enrique D. p. 138.

would inadvertently be only the rationality *of domination*."[211] As Linda Alcoff accurately observes, Dussel's proposal of transmodernity is "a positive alternative to the rational reconstructive projects of European modernity, but without sacrificing or conceding the terrain of the rational."[212] Dussel does not deny the idea of rationality outright but suggests that a decolonial philosophy cannot be anchored in the promise of the technical and instrumental domination of hegemonic reason.

Dussel's understanding of transmodernity leads us to argue that he is a proponent of a version of the legal that aims to examine conceptually the importance of a rationality without the logic of domination and concealed violence. What is foregrounded in Dussel's reconceptualization of rationality is the demand to view the codetermination between the material moment of the political (the consensual power) and the formal moment of the founding of the political (discursive rationality). To Dussel, practical reason plays a fundamental role in maintaining the "unification" of the plurality of wills given that "the will is impotent when the power of other wills are radically opposing to each other."[213] This is best expressed by Dussel when he writes that the "formal moment of the linguistic rational agreement (if, before all else, we understand reason as the "creative persistence" of human life through which survival is attained, then, practical and pragmatic reason) is the permanent condition of life."[214]

Dussel's philosophy of liberation focuses our attention on a type of rationality conceived as a "practical-political claim to *truth*" that is universal, practical, and material.[215] Dussel requires a practical-material reason, rather than transcendental notion, in order to ground the obligation of

[211] Dussel, Enrique D. *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation*. Atlantic Highlands, N.J.: Humanities Press, 1996. p. 36.
[212] Martín Alcoff, Linda. "Enrique Dussel's Transmodernism." *Transmodernity* 1, no. 3 (2012): 60–68. p. 66.
[213] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 132. My translation.
[214] Dussel, Enrique D. *Política de La Liberación.* p. 136. My translation.
[215] Dussel, Enrique D. "Six Theses toward a Critique of Political Reason." p. 80.

"production, reproduction, and development of human life for all humanity."[216] Dussel's discussion of a practical-political-material reason echoes here, in his justification of material ethics. From a normative and rational standpoint, Dussel argues that material ethics seeks to "reconstruct simultaneously and systematically both the positivity of the institutions and ethical lives that have developed the life of the human subject […] and the critique of the structures that make impossible the reproduction or development of the life of each human subject."[217] Elsewhere, in the *Ethics of Liberation*, Dussel points out that, when rationality is deprived of "truth material content," it loses the possibility of producing consensus; and without intersubjective consensus, a material content will lose all its force as an ethical obligation.[218]

Insofar as such an obligation to develop the life of each human subject implies the validity of its own existence, such validity must be derived from a democratic form of legitimacy (of a popular sovereignty). Legitimacy here serves "as the source and destination of law."[219] Dussel argues that the material principles of political reason "cannot constitute itself, nor can it willed power without the mediation of the political-discursive reason" through which legitimation is

[216] Dussel, Enrique D. "Six Theses toward a Critique of Political Reason," p. 84.
[217] Dussel, *Ethics of Liberation in the Age of Globalization and Exclusion*. Latin America Otherwise. Durham: Duke University Press, 2013. p. 128.
[218] Since 1991, Dussel maintained a dialogue with Karl Otto Appel and Jürgen Habermas concerning discourse ethics. In this context, as Dussel notes, the philosophy of liberation "affirms decisively and unequivocally the communicative, strategic, and liberating importance of "reason" (with Habermas and Apel)." However, he criticizes and denounces their "eurocentrism and the pretension to universality of modern reason." Against this background, Dussel's philosophy of liberation instead "commits itself to the reconstruction of a critical philosophical discourse that departs from the "Exteriority" (with Marx and Levinas, for example) and assumes a practico-political "responsibility" in the "clarification" of the liberating praxis of the oppressed. Neither abstract universalistic rationalism nor irrational pragmatism (transcendence and synthesis of a liberating *historical reason*) critique the pretension to universality of particular reason or the affirmation of the rational novelty of future totalities constructed by the erotic, pedagogic, political, and even religious praxis of the *oppressed* (women, children, popular cultures, classes, national exploited groups, and the alienation of many in the fundamentalism that is in fashion)." Dussel, Enrique D. *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation*. Atlantic Highlands, N.J.: Humanities Press, 1996.p.x. See also Apel, Karl-Otto, and Eduardo Mendieta. "'Discourse Ethics' before the Challenge of 'Liberation Philosophy.'" *Philosophy & Social Criticism* 22, no. 2 (1996): 1–25.
[219] Dussel, Enrique D. "Six Theses toward a Critique of Political Reason," p. 84.

achieved.[220] Discursive democratic legitimation and validity of political systems, including laws of a legal structure, are attributable to the symmetrical participation of those excluded and oppressed; those who are "outside, like 'specters,' ignored, invisible" within the political system.[221] According to Alcoff, Dussel's political philosophy of liberation can be read "as centrally an argument for a democratic epistemology." This means that a political and legal change is conditioned not to the "perfect procedural processes of deliberation or of theory-making, […] but by the ideas and practices and forms of relationality developed by the activist oppressed working in crisis to defend and secure material life."[222]

This issue of rethinking the framework of rationality and the formal character of the law is underlined also by the decolonial legal scholar Bonaventura de Sousa Santos. There are significant similarities between the conceptions of law in the decolonial legal work of Boaventura de Sousa and Enrique Dussel's political philosophy. But despite overlapping in many aspects of their critique of Modernity and engaging in a rich and extensive dialogue on a variety of issues for decades, Sousa Santos and Dussel lack a theoretical exchange on the broad problem of a decolonial conception of the law and its institutions. Indeed, the idea of law has been associated with a "a construction built according to the rules of scale, projection and symbolization" of the Western canon. According to Sousa Santos,

> [As] there is a literary canon that establishes what is and what is not literature, there is also a legal canon that establishes what is and what is not law […]. People refuse to recognize as legal those normative orders that use different scales, projections, and symbolizations. They are beyond the minimum and the maximum threshold of legal cognition. Some (infrastate, local) legal orders are too close to everyday reality to be viewed as a fact of law (a legal fact), while other (suprastate, global)

[220] Dussel, Enrique D. "Six Theses toward a Critique of Political Reason," p. 84.
[221] Dussel, Enrique D. *Twenty Theses on Politics*. Latin America in Translation/En Traducción/Em Tradução. Durham: Duke University Press, 2008. p. 10.
[222] Linda Martín Alcoff. "Vallega, Dussel, and Radical Exteriority." *Inter-American Journal of Philosophy* Volume 8, no. 2 (Fall 2017): 12–23. p. 18.

> legal orders are too remote from everyday reality to be viewed as a law of fact (a legal fact).[223]

Sousa Santos's decolonial approach called for a political and legal resistance toward "global cognitive justice."[224] For Sousa Santos, this means a commitment to recognizing what he calls "epistemicide"[225]—the long history of the destruction of ways of knowing that were, and continue to be, unfit for the dominant modern Western canon. It also means a commitment (and priority) to recover the conceptions and perspectives of legal emancipation of communities of the South that have grown out of that struggle against coloniality, capitalism, and patriarchy.

Similar to Dussel's critique of modern rationality, Sousa Santos proposes an intervention against the idea of Western rationality. He suggests the notion of "cosmopolitan rationality": a comprehension of rationality as capable of "valoriz[ing] the inexhaustible social experience" of social movements and peoples that suffer in our world today.[226] Sousa Santos wants to encourage the adoption of other forms of social transformation from the perspective of different "normative life worlds, practices, and knowledges" beyond the constitutive assumptions of modern reason.[227] Sousa Santos, as in the case of Dussel, aims to underscore a new form of legality that comes from the margins of the practices, claims, and struggles from the everyday reality of the people. Both

---

[223] Santos, Boaventura de Sousa. *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*. 3rd edition. Cambridge, United Kingdom ; New York, NY: Cambridge University Press, 2020. p. 520-521.
[224] *Epistemologies of the South: Justice against Epistemicide*. Boulder: Paradigm Publishers, 2014. p. 238.
[225] Similarly, following the conceptual notion of the *ego conquiro* of Dussel, Ramón Grosfoguel suggests and defends the idea that what mediates the colonial/modern world between the "I conquer" (Dussel) and the "I think" (Descartes) is the "I exterminate, therefore I am" (*ego extermino*)." According to Grosfoguel, so that these historical conditions of the foundation of modern knowledge could happen, four interlinked "genocides/epistemicides" had to occur in the long 16th century: "against Muslims and Jews in the conquest of Al-Andalus in the name of "purity of blood"; 2) against indigenous peoples first in the Americas and then in Asia; 3) against African people with the captive trade and their enslavement in the Americas; 4) against women who practiced and transmitted Indo-European knowledge in Europe burned alive accused of being witches." See Grosfoguel, Ramon. "The Structure of Knowledge in Westernized Universities: Epistemic Racism/Sexism and the Four Genocides/Epistemicides of the Long 16th Century." *Human Architecture* 11, no. 1 (2013): 73-90. p, 77.
[226] Santos, Boaventura de Sousa. "A Critique of Lazy Reason: Against the Waste of Experience." In Wallerstein, Immanuel. *Modern World-System in the Longue Duree*, 163–204. Routledge, 2004. p. 159.
[227] Santos, Boaventura de Sousa. "A Critique of Lazy Reason." p. 184.

decolonial thinkers are concern with a form of legality beyond modern law and "out of the wrecked emancipatory promises of modernity."[228] At the heart of trying to unthink modern law, is the idea of surpassing its mere emancipatory social formalist character, through which law becomes a set of rules that facilitate its "positivist effective order, an order based on certainty, predictability, and control."[229] According to Sousa Santos, this formalist conception of the law leads to a depoliticization of law by thinking as the system of law, as the "alter ego of science."[230] This tends to reduces legality to "a rational, technical formalism, which was supposedly neutral to ethics and solely concerned with technical perfection, logical coherence, gapless coverage, and total predictability."[231]

Against the background of this understanding of legality as "technical perfection," Dussel develops a vision of law beyond its formalist conception and its relative neutrality to ethics and the political. Dussel's conception depends on a set of normative assumptions that help to limit the expectations of people's political and social dynamics towards the institutionalization of their power. From Dussel's perspective, the law needs to be subservient to people's power, not vice versa.[232] He rejects the decolonial philosophy in which law only ever signals violence and domination, and the creation of a political order always implies the deployment of force. Instead, in Dussel's work, law can be a legitimate emancipatory medium that reshapes all of our institutions, practices, and interest of justice. In this sense, the idea of law cannot be grounded in itself (as an intrinsic or self-referential entity), but its existence arises from the instituting power

[228] Santos, Boaventura de Sousa. *Toward a New Legal Common Sense.* p. 16.
[229] Santos, Boaventura de Sousa. *Toward a New Legal Common Sense.* p. 46.
[230] Santos, Boaventura de Sousa. *Toward a New Legal Common Sense.* p. 7.
[231] This concern with formalization can be traced back to the humanistic Hispanic scholarship of the fifteenth and sixteenth centuries. Santos, Boaventura de Sousa. *Toward a New Legal Common Sense.* p. 28-29.
[232] Dussel, Enrique D. "Legalidad y Legitimidad," In *Carta a los indignados*. México, D.F.: La Jornada Ediciones, 2011. p. 186. My translation.

of the people. Dussel focuses on describing this instituting/constituent power by arguing that "the first ontological foundation, as original instituting power is the power of the political community (*potentia*)."[233]

In Dussel's approach, the content of and reference for the system of rights and law is premised on the political community itself as "the last instance of sovereignty."[234] From the perspective of a politics of liberation, sovereignty is the fundamental site of decisions of the political community. Dussel, however, argues that the political problem of sovereignty consists of always protecting the performative force of the participation of the people in decisions of power. To Dussel, the political community "must always be attentive to exercising sovereignty *in actu*."[235] The political community must maintain an "active practical consciousness concerned to the responsibility of being a full participant or the highest agent of sovereignty—of *potestas*, of the delegated power, and therefore, being the agent of the prior right of all possible fundamental rights, and of deciding to give itself a universal system of laws."[236]

It is important to note that, for Dussel, all "the exercise of power is always a moment of *potestas*, or institutionalization of public functions of political power."[237] Dussel's point is that any exercise of power is institutional, because strategic political and legal actions take the form of "a *constituent power* (*potentia)* as an instituting power in the creation of a constitution."[238] Dussel's formulation of constituent power presupposes a critical moment of rupture that marks the change from the "power-*outside-itself*" of *potestas* to the "power-*in-it*self *potentia*.[239] In his ontological

[233] Dussel, Enrique D. *Política de La Liberación. Volumen II.* p. 280. My translation.
[234] Dussel, Enrique D. *Política de La Liberación. Volumen II.* p. 280. My translation.
[235] Dussel, Enrique D. p. 282. My translation.
[236] Dussel, Enrique D. p. 282. My translation.
[237] Dussel, Enrique D. *Twenty Theses on Politics*. p. 21.
[238] Dussel, Enrique D. *Twenty Theses on Politics*. p. 21.
[239] Dussel, Enrique D. p. 19.

and normative approach to law and the authority of *el pueblo*, Dussel's philosophy develops a theory of constituent power that coheres with his view of institution-making. The constituent power of *el pueblo* is capable of being developed into a "system of future law through which the political community sets and affirms itself limits on how to institutionalize itself in the distribution of political power."[240] The concretization of the constituent power created by participating in making institutions or drafting a Constitution,[241] allows *el pueblo* to proclaim itself as a "government by law."[242]

However, a government by law and its institutions are systems that risk being made perfectible and becoming fetishized. Dussel explains schematically:

> [All] institutions that are born out of demands specific to a determinate political time, that structure bureaucratic or administrative functions, and that define means and ends are inevitably gnawed upon and eroded by the passing of time: they suffer a process of entropy. At their origin is that disciplinary, creative moment of responding to new demands. In their classic moment, institutions effectively carry out their assignment. But they slowly weaken and enter into crisis: the strength necessary to maintain them becomes greater than their benefits and the bureaucracy they initially created becomes self-referential, defending its own interests over those of the citizens they claim to serve. An institution created for the sake of life begins to operate as an occasion for coercion, exclusion, and even death, and as a result, it becomes time to modify it, improve it, abolish it, or replace it with another institution made necessary by the changing times.[243]

Dussel describes the various stages and changing circumstances of institutions. The goal of institutions is to respond to demands of individuals. It is evident that institutions evolved, and the contingency of the historical circumstances made their functions and characteristics change. At some point, institutions, as human artifacts, tend to no longer fulfil their functions and increasingly

[240] Dussel, Enrique D. *Política de La Liberación. Volumen II*. p. 292.
[241] Dussel writes, "The Constitution is the second institutional explicit agreement (*potestas*) of the consensus of the community, which is rooted on the first consensus of the plurality of wills through which a people becomes a people […]. A Constitution, in other words, is the "fundamental law that defines the legal ground of a future system of Right. Dussel, Enrique D. *Política de La Liberación. Volumen II,* p. 293. My translation.
[242] Dussel, Enrique D. *Twenty Theses on Politics*. p. 52.
[243] Dussel, Enrique D. *Twenty Theses on Politics*. p. 109.

"defends its own interests over those of the citizens they claim to serve."[244] Under such conditions, institutions cease to contribute to the protection of life and begin to operate under violence, force, and coercion. At the point of institutional crisis, institutions become "bureaucratic, self-referential, oppressive, and nonfunctional."[245] At this point, Dussel contends, "It becomes necessary to transform or abolish [the institution]. Institutional fetishism becomes attached to the institution as if it were an end in itself."[246]

According to Dussel's reading of Paul of Tarsus,[247] the law has three moments of development to respond critically when crises causing political transformation arise. Dussel traces Paul of Tarsus's critical view of the law in order to articulate the moment in which a political system loses its consensus and becomes pure domination against the power of the people. Let's recall the statement of Dussel, according to which, when law dominates and "kills it is necessary not to fulfill it, because the spirit of the law is life."[248] This insight around the idea that "the spirit of the law is life" is at the core of Dussel's reflections on the symbolic narrative of Paul of Tarsus's Epistles to the Romans and his conception of law.

Following Dussel's reading of Tarsus, three moments prelude a political transformation of the law. First is the moment of justification, the moment of subsumption of the concrete (the actor or the praxis) to the universal (the criterion according to which the evaluative judgment is based). Second is the meaning of the law, as a fundamental imperative or as a limit or framework in order

[244] Dussel, Enrique D. p. 45.
[245] Dussel, Enrique D. p. 45.
[246] Dussel, Enrique D. *Twenty Theses on Politics*. p. 45.
[247] Similar to the analysis of interpretation offered of Tarsus' categories by Martin Heidegger, Alan Badiou, Slavoj Zizek and Franz Hinkelammert, Dussel turns to Paul's Epistles to clarify the critical categories of Paul of Tarsus can offered for the analysis of the political. Dussel emphatically clarifies that his analysis of Paul's epistle "can be abstracted from their religious environment." In fact, one of the tasks of the political philosophy of liberation, Dussel argues, is the philosophical determination of those critical categories "with reference to a secular political community." Dussel, Enrique D, and George Ciccariello-Maher. "The Liberatory Event in Paul of Tarsus." *Qui Parle* 18, no. 1 (2009): 111–80. p. 115.
[248] Dussel, Enrique D. "From Fraternity to Solidarity: Towards a Politics of Liberation." p. 127. My translation.

to discern what is just and what is against the law. And lastly, there is a negative moment where the legitimacy of the law collapse.[249] As Oscar Guardiola observes, this last moment is the proper moment, "when it can be shown that the Law has been affirmed as the single most basic foundation of justification of the present order, thereby becoming the ultimate cause of itself, and thus, absolutely necessary and dogmatic."[250]

This last moment is also crucial in order to recognize that the law, while it is the "criterion of justification within the prevailing order, can nevertheless become fetishized and corrupted falling into contradiction within itself, and thereby producing its own collapse."[251] By fetishization of the law, Dussel means not only where the law become self-referential[252] but, also when law becomes situated "above life itself."[253] Examples of this from history include deliberate and unnecessary killings of "combatants" in the name of freedom and democracy in Iraq or the repressive practices of torture and massacres in modern Latin American history committed in the name of order and democracy, that effectively eliminated the possibility of social and political revolutions. Following Dussel's reading of Tarsus, this moment of "anomia" is when the contradiction of law is revealed; the people can no longer respect it; and they rebel against and overthrow the government[254], beginning "the agonic task of seeking to found a just system."[255]

---

[249] Dussel, Enrique D. "The Liberatory Event in Paul of Tarsus." p. 121-122.
[250] Guardiola-Rivera, Oscar. "Law, Globalisation, and Second Coming," no. 1 (2013): 25. p. 47.
[251] Dussel, Enrique D. "The Liberatory Event in Paul of Tarsus." p. 122.
[252] This fetishization has two profound implications: one that the power becomes self-referential of its authority—whether it is as in the form of a state, the rule of law, the representative government, a judicial system, military force, or police—; and second, the people "become servile rather than be an actor." See "The Concept of Fetishism in Marx's Thought: Part I of II Dussel, Enrique D. "The Concept of Fetishism in Marx's Thought (Elements for a General Marxist Theory of Religion): Part I of II." *Radical Philosophy Review: RPR* 6, no. 1 (2003): 1–28.
[253] Dussel, Enrique D. "The Liberatory Event in Paul of Tarsus." p. 122.
[254] In Chapter 4, I discuss a concurrent moment of awakening of the people to confront the nature and limitations of the law. This moment is a dispute from the most marginal and oppressed individuals and groups of the political community over unfulfilled needs and claims against the prevailing system.
[255] Dussel, Enrique D. "The Liberatory Event in Paul of Tarsus." p. 127.

The scenario of fetishization where the law is situated "above life itself" affects the most marginal and oppressed individuals, and results in a crisis of legitimation. Dussel writes:

> If we understand that the rule of law must also be grounded on the equal rights to reproduce and develop the concrete life of citizens (in the *material* sphere), we would have a concept of real legitimacy and, therefore, also the idea of a *real* rule of law (that is to say, formally founded on the law, the laws, and *materially* demanding in the resolution of social conflicts that arise from non-compliance with the ecological, economic or cultural claims of the entire population).[256]

Nevertheless, Dussel does not suggest an absolute negation of law in this agonic stage. On the contrary, Dussel expresses a realistic view of the historical contingencies of the change and decay of an unjust system[257]. A politics and legality of liberation uses the legal discourse to reclaim the last instance of sovereignty of the political community where the hegemonic power and law lose their consensus.[258] Following Dussel's view, "the entire edifice of the legitimacy of the legal system (and of the State itself) is grounded on the consensual power of the political community (*from below*), the only sovereign."[259]

This means that the material and legitimate source of the law precedes its positivization. From a legal philosophy of liberation, the legitimacy of the positive law is premised on the consensual power of the political community. Dussel emphasizes that such consensus must be understood as "prior and external source" through which the positive law is grounded, where the system of law can be criticized and transformed. Consequently, from this approach, the critical and transformative moment of the law needs to be coached "*historically* and from *exteriority* from the perspective of a popular sovereignty."[260] This means that the notion of "popular sovereignty"

---

[256] Dussel, Enrique D. *Política de La Liberación.* p. 315. My translation.
[257] For a realist interpretation of Dussel's political theory See Ciccariello-Maher, George. "Decolonial Realism: Ethics, Politics and Dialectics in Fanon and Dussel." *Contemporary Political Theory* 13, no. 1 (2013): 2–22.
[258] Dussel, Enrique D. *Twenty Theses on Politics*. p. 80.
[259] Dussel, Enrique D. *Política de La Liberación*. p. 306. My translation.
[260] Dussel, Enrique D. *Política de La Liberación.* p. 303. My translation.

is continuously open because of the varying historical circumstances of those who are excluded from the totality of the system.

In short, from Dussel point of view, the popular constituent sovereignty is expressed by the people in exteriority as the "block of the oppressed." This block of the oppressed challenges the current lack of legitimacy of the legal and political order. Through the "material negativity," expressed mainly by the lack of consolidation and fulfillment of rights of those in the exteriority, Dussel insists that is possible to see the "formal negativity" of the law. He argues that the transformation of the legal system is historically possible at moments in which "the excluded, oppressed subjects, or simply the victims, upon reaching sufficient maturity, moved from dominated objects to subjects—a process of subjectivization that makes them appear in history as transformative (sometimes revolutionary) social actors. In the context of founding and creative moments, it is about transformation and creating new systems."[261]

From Dussel's perspective, law stands in relation to the legitimacy of the public participation in establishing and transforming the political order. He argues, "the force of the law is not based on the fear of external coercion, but on the conviction that law arises as a responsibility for having creating it."[262] Dussel's considers law to be both external and internal.[263] According to

[261] Dussel, Enrique D. *Hacia una filosofía política critica*. p. 166.
[262] Dussel, Enrique D. *Política de La Liberación.* p. 284. My translation.
[263] Here Dussel's argumentation follows closely the Hegelian legal tradition. Specifically, Hegel's relation between intersubjectivity and legality plays a significant role in Dussel's conception of law. It is worth quoting Dussel's use of Hegel's *Philosophy of Right* that he endorses in his argumentation in the *Politics of Liberation*. Hegel's two crucial ideas that Dussel borrows are the following: First, the Hegelian idea that right is an "existence [*Dasein*] in which it is universally recognized, known, and willed, and in which, through the mediation of this quality of being known and willed, it has validity and objective actuality." Such objective actuality "consists partly in its being present to the consciousness and being in some way known, and partly in its possessing the power of actuality, in having validity and hence also in becoming known as universally valid." Hegel, Georg Wilhelm Friedrich. "Elements of the Philosophy of Right." Cambridge Texts in the History of Political Thought. Cambridge [England]; Cambridge University Press, 1991. [§ 209-§ 210], p. 240. In other words, what is external to the law resides in what constitutes the culture of the political community. This turns out to be, according to Dussel, the inter-subjective universalization of the political consensus that maintains and endorses the law given by the people as "real legitimation." As Dussel remarks, " [The] right is not purely external; the external is already within the interiority of a culture which constitutes

him, law does not only oblige public or external source, but is also intersubjective because the public is already a modality of intersubjectivity.[264] He writes, "Far from law obliging externally and situating an action as purely legal, the law obliges normatively and determines the will as a legitimate necessity (legitimation obliges subjectively to the participants of the political field)."[265]

Dussel's conceptual analysis distinguishes between legality and legitimacy. In Dussel's politics of liberation, the legitimacy of and obedience to the law goes beyond simply formal legality. Dussel's concept of legality rests on the formal qualities of the law as well as the legitimacy of the process of the participation of the people in making the law. Legitimacy refers to the ways political theorists grapple with consensus and conflicts amongst citizens. In Dussel's terminology, legitimacy in politics is analogous to the validity in ethics. This does not mean that ethics juxtaposed to law and politics. To Dussel, they are always in a codetermination relationship. As Dussel argues, law and politics spheres "subsume the ethical principles and transform them into a distinct normative principles in each sphere."[266] These principles are embedded in the political and legal institutions in order to "legitimate decisions, actions, institutions, and delegated exercise of power" without the existence of coercion, violence, or relations of domination grounded in a government by law.[267] Institutional system of legitimation differ conceptions of democratic models; some examples include: liberal, social democratic, welfare state, or populist.[268] Yet, Dussel's approach of legitimacy contrasts other systems of legitimation by maintaining a clear link between legitimation and the material aspects of the political community to make decisions

---

the very objective character of intersubjectivity." Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 299. My translation.

[264] Dussel, Enrique D. *Política de La Liberación.* p. 298. My translation.

[265] Dussel, Enrique D. *Política de La Liberación.* p. 299. My translation.

[266] Dussel, Enrique D. "Epilogue," In Allen, Amy, and Eduardo Mendieta. "Decolonizing Ethics: The Critical Theory of Enrique Dussel." Penn State Series in Critical Theory. University Park, Pennsylvania: The Pennsylvania State University Press, 2021. p. 194.

[267] Dussel, Enrique D. *Twenty Theses on Politics*. p. 51.

[268] Dussel, Enrique D. *Twenty Theses on Politics*. p. 51.

about their political life.[269] As he emphasis, legitimacy is ultimately the idea of "will to life + rationality, materiality + formality, sovereign power of the political community that grounds the self-determining decision of sovereignty that constitutes itself as an instituting power."[270]

The connection between law, legitimation, and the need of institutionalization are the central themes that emerges from Dussel's philosophy of law. When Dussel focuses our attention on the moments where institutions and law neglect to respond to the protection of life and against the legitimacy and sovereignty of the expression of authority of the people (*potentia*), we are able to think about law in terms of normative principles that are not fundamentally at odds with the protection of the life. In the section that follows, I suggest that the normative principles of the political informed and contributed to Dussel's account of law as the instrument to preserve people's "sovereignty *in actu*" in order to transformed, changed, or destroyed institutions.[271]

Dussel's Account of Law, Normativity, and Political Philosophy

Law is intimately related and developed as part of the strong conception of normativity of Dussel's political philosophy. As I suggest throughout this dissertation, and in particular in both Chapter 4 and Chapter 5, normativity is a distinctive feature of Dussel's philosophy. In the introduction, I claimed that a basic way to think about Dussel's concept of normativity is to highlight the "principles" that help us to evaluate the ethical efficacy of our institutional life. The commitment to normative principles, Dussel hopes, can serve as the political and legal orientation of the oppressed classes in order to generate a new common sense of politics and legality. To put it differently, normative principles are the fundamental source of "*real* legitimation," "from which

[269] Dussel, Enrique D. "Democracy in the "Center" and the Global Democratic Critique." p. 268.
[270] Dussel, Enrique D. *Política de La Liberación.* p. 285. My translation.
[271] Dussel, Enrique D. *Twenty Theses on Politics*. p. 45.

the conditions of possibility and the very essence of the moment of the political comes to being."[272] According to Dussel, the critical inquiry of the political and the legal always "presupposes ontologically *a priori* its own universal normative conditions, which means, the necessary conditions upon which both political actions and institutions become what they are and not something else."[273] Therefore, Dussel provides us with a theory that allows harmony in the relationship between law and politics by underlining their normative basic principles of their effective reality.

Dussel describes the contingent character of principles and deploys them as "universal limits of all actions."[274] To Dussel, principles are either: "a) *negative*, those which delimit the political field as such; b) *positive*, those that constitute the abysmal assumptions or absolute conditions of possibility of *potentia*—the first moment of consensual power in itself."[275] Dussel's approach can shed light on the normative dimension of the political and legal through which societies develop their universal ideas of power, law, and institutions within the ethical horizon of the ever-present tension between what can and can't be accomplished. As he makes clear, principles are like a safety nets for political actions and institutions in order to mark "a limit of possibility (of the political) and its impossibility (as political)."[276] Dussel's normative principles (understood as practical principles) enable coherence of political actions to the extent that they guarantee the political pretension of justice of those actions and their institutionalization.[277] Dussel writes,

---

[272] Dussel. *Política de La Liberación.* p. 347. My translation.
[273] Dussel. *Política de La Liberación.* p. 16. My translation.
[274] Dussel, Enrique D. *Política de La Liberación.* p. 351. My translation.
[275] Dussel, Enrique D. *Política de La Liberación.* p. 348. My translation.
[276] Dussel, Enrique D. "Democracy in the "Center" and the Global Democratic Critique," In Enwezor, Okwui. *Democracy Unrealized: Documenta 11, Platform 1.* Ostfildern-Ruit, Germany: Hatje Cantz, 2002. p. 270.
[277] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 354.

> We will affirm principles as constitutive norms (or practical-political rules), as rules that set limits to the political field, and that from within animate the institutions and the exercise of political actions, generally speaking, in a non-intentional way, invisible to the consciousness of the agent. However, these norms are implicitly valid to the institution or the action itself. Through these principles, the agent can frame the political empirically and provide a normative force to organize the institutions. Otherwise, the institution or the action would be located outside the political space, lacking the normative force to develop power structures. It would only create power structures in a pathological, self-centered, and fetishistic way. A sense of power as domination towards a despotic authoritarian understanding of power would begin to produce unexpected adverse effects, including that political actions and institutions would gradually disappear as such, or would be negated, dismissed, or supplanted by other types of activities or institutions that would become part of another type of action in another field (for example, the field of war or that of mere technocratic or totalitarian-police manipulation).[278]

This means that normative principles are fundamental in setting limits to political and legal actions. Moreover, from this perspective, it is possible to see Dussel's focus on how these principles, as constitutive norms, can help to transform reality by keeping the tensions between ethics and the political and between ethics and legality well-defined. In other words, his idea of political philosophy addresses principles in practical-political terms: ethical principles are subsumed into the domain of the political in their own way.[279] This conception of principles therefore presupposes and cannot be disassociated from the ethical demands to act within the boundaries of political rationality. For Dussel, if constitutive normative principles (or practical-political rules) are denied as fundamental norms that confer validity and legitimacy to the political and legal fields, they move us away from the crucial task of exercising a critical-emancipatory rationality that grounds a new transmodern political and social order.[280]

---

[278] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 354. My translation.

[279] This is what Dussel calls the "principle of coherence" (*principio de coherencia*). According to Dussel, the principle of coherence is that through which the ethical and political situated concrete subject is "obliged (normatively with the force of a duty) to subsume or justify by analogy the same practical principles and the same universal criteria in each "field," in systemic, institutional reference, and in the actions of those who engage in specific activities and functions." Dussel, Enrique D. *Materiales para una política de la liberación*. Universidad Autónoma de Nuevo León, 2007. p. 155.

[280] Dussel, Enrique D. *Materiales para una política de la liberación*. Universidad Autónoma de Nuevo León, 2007. p. 162.

In Dussel's view, a political philosophy of liberation works through the lens of "the oppressed, excluded, new popular movements." However, while Dussel proposes his perspective as a way to counteract to the history of modern political philosophy, the ultimate task is the articulation of a "*positive* ground that allows us to describe political will and power in its strong sense, with a claim to truth and legitimacy, from where it is possible to *criticize* the defective, reductive descriptions of political power."[281] The task of political philosophy is to conceive the description of political power, not only from its "dominating tendency of the will-to-power," but from the "will-to-live," which entails a "positive essence—that content as a force and as capacity to move, to restrain, and to promote."[282]

Dussel's "positive ground" has multiple dimensions. On the one hand, Dussel's emphasis on the positive conception of power relates to his concern about how to recognize the significance of normative principles for thinking the political. These normative principles, Dussel argues, have a political ontological core that "opens up from the reality of living beings, as a human corporeality; it opens up from the fundamental ground as living-will […] with the capacity to put forward the entities, the mediations, the conditions of possibility that allow the permanence and augmentation of life."[283] The task of the political philosophy of liberation, then, is to gain an understanding of those entities, mediations, and conditions of possibility in order to develop principles and institutions to protect human life. These principles and institutions, according to Dussel, are rooted in the idea of power "held, always and only, by the political community—*el pueblo*."[284]

[281] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 47. My translation.
[282] Dussel, Enrique D. *Twenty Theses on Politics*. p. 13.
[283] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 52. My translation.
[284] Dussel, Enrique D. *Twenty Theses on Politics*. p. 16.

Dussel's political philosophy and philosophy of law is the aspiration to develop, at the theoretical level (ontological and normative), institutional arrangements that involved the allocation of power and authority in the people to implement transformations to fulfill human needs. Dussel's intuition is simple: social movements and oppressed or excluded people have a responsibility to "fight against the system's truth and validity in light of the impossibility of living and of their exclusion from the discussions that affect them."[285] According to Dussel, the content (material) of all the political and its institutions ought to deal with "creating the conditions of possibility for and advancement of the life of the community and each of its members: a possible life, a qualitatively better life."[286] A political philosophy of liberation as conceived by Dussel aims to support social and popular movements in transforming institutions that oppress them or exclude them from deliberation, social and economic rights, and political participation in institution-making.

Dussel valued the critical constructive support for aiming such institutional transformation of political and legal orders above all other tasks of political philosophy of liberation. In this dissertation, I want to highlight the notion of "transformation" within the overarching discourse of Dussel's political and legal philosophy. For Dussel, transformation refers to "a change in the form of the innovation of an institution or the radical transmutation of the political system in response to new interventions by the oppressed or excluded."[287] Throughout all his political work, Dussel emphasizes the normative explanation of political transformations. The explicit goal of a political and legal philosophy from a liberation standpoint of view is, therefore, to "explain principles, the fundamental criteria for transformation […] necessary for the material reproduction of life, for the

[285] Dussel, Enrique D. *Ethics of Liberation in the Age of Globalization and Exclusion*. Durham: Duke University Press, 2013. p. 347.
[286] Dussel, Enrique D. *Twenty Theses on Politics*. Durham: Duke University Press, 2008. p. 60.
[287] Dussel, Enrique D. *Twenty Theses on Politics.* p. 112.

possibility of legitimate democratic action."[288] These principles, grounded in strong normative commitments, provide the basic resources for and adequate interpretation of Dussel's legal philosophy and account of law.[289]

As demonstrated in this chapter, the concrete life of each human being is the normative base of Dussel's politics of liberation. Life itself and the positive orientation of political power must constitute Dussel's conception of the law. Thus, a philosophy of law from a liberation perspective highlights the necessity of rethinking the categories of constituent power. And legal praxis of liberation requires the reorganization of the authority of the constituent power into an uninterrupted, active, collective agent capable of participating in the transformation of the fetishized legal and political institutional system.

[288] Dussel, Enrique D. p. 108-109.
[289] Dussel, Enrique D. p. 16.

CHAPTER 4
THE MAKING OF THE PEOPLE: CONSTITUENT POWER AND DUSSEL'S POLITICAL AND INSTITUTIONAL ONTOLOGY

In this chapter, I propose the hypothesis that there is a legal and institutional ontology underlying Dussel's account of law and politics. I begin by clarifying Dussel's commitments to political ontological and legal norms and institutions by presenting a complete picture of Dussel's institution building approach expressed by its relationship with the concept of constituent power (the people's power). In Dussel's formulation, we should understand the political and institutional ontology as the inquiry of the very fundamental principles that ground the law and politics but retaining contingency and co-constitutive mutual relations of the principles as such. Some of the ontological questions I explore in this chapter include: How do legal or political institutions find their status in Dussel's account of law? What is Dussel's conception of the relationship between the ontological and normative status of the category *el pueblo* ("the people") and emancipatory institution-making?

I begin by introducing the current debate about whether legal philosophy should avoid or embrace the idea of constituent power. Like many other modern political and legal ideas, constituent power is a contested concept. Since the eighteenth century, discourse on political foundations embodied the idea of constituent power as the source of authority and sovereignty of political and legal power.[290] It was a revolutionary idea for the people "to make and remake the institutional arrangements through which they are governed."[291] Constituent power is a distinctive feature of modern constitutional theory and philosophical thinking about the emergence of legal

[290] An analysis of the relationship of constituent power and foundational moments, see Tekin, Serdar. *Founding Acts: Constitutional Origins in a Democratic Age*. Philadelphia, Pennsylvania: University of Pennsylvania Press, 2016.
[291] Loughlin, Martin. "The Concept of Constituent Power." *European Journal of Political Theory* 13, no. 2 (2013): 218–37. p. 219.

and political orders. As the legal philosopher Hans Lindahl explains, constituent power refers to "the capacity to bring forth a new legal order, whether by revolutionary means or otherwise, in contrast to the capacity to enact legal norms within an extant legal order: constituted power."[292]

The treatment of the authority presented under constituent power confronts a host of difficult normative and ontological paradoxes. At the normative level, one of the essential challenges is the problem of "legitimation," and more specifically, the differing accounts of the "validity" of the relation between authority and law's legitimation as we show earlier (Chapter 3).[293] They vary across multiple dimensions, including: Who has the authority to make any institutional arrangements? Who does this power refer to? Must this power remain in accordance with the law, or does it operate as the only legitimate form of political action and political institution-making? Additionally, since authority also refers to the origin of law itself, it must be determined what conditions would authorize constituent power.[294] Would the authority of constituent power be authorized by any fundamental law?

From an ontological perspective, it becomes harder to address the capacity of constituent power considering it implies temporal suppositions of "change" or "rupture."[295] Following Lindahl, if constituent power is the capacity to construct a new order, whether by a revolutionary

[292] Lindahl, Hans. 2015. "Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change." *Constellations* 22 (2): 163–74p. 163.
[293] According to Dyzenhaus, the dimension of legitimacy is key because " is not merely about the possibility of the triumph of power over law, but also about the way in which law must prepare the way for legitimate that triumph." p. 131.
[294] R.B Friedman, " On the Concept of Authority in Political Philosophy," In Joseph Raz (Editor), Authority. (New York: New York University Press, 1990), p. 72.
[295] Lindahl focus in presenting the ontological underpinnings of modern conceptions of constituent power. Specifically, Lindahl's view helps to illustrate the need to articulate the normative conception of constituent power vis-à-vis the ontological assumptions that are at stake with the idea of change or rupture between a constituted institutional order and the demands and capacity to institutionally enact other new order. As Lindahl argues, and we will expand some points of his discussion later, the change of a "normative state of affairs wrought by constituted power already moves on the ground of an ontology according to which the actual does not exhaust the possible: a legal order is but the default setting of the normative point of joint action." Lindahl, Hans. 2015. "Possibility, Actuality, Rupture," p. 169.

event or a formal process, this process implies that there must be a division between an old institutional order (constituted power) and a different order afterwards. Consistent with constituent power theories, Lindahl raises a number of ontological legal questions, namely: "What is the temporal structure of law-making, and in what sense can it bring about a fracture or rupture in time? How is law-making related to possible and actual legal order, and in what sense can law-making call forth or bring into being a novel legal order?"[296]

The above set of normative and ontological questions leads the path to our inquiry in this chapter concerned with the relationship between law and constituent power. I raise a concern related to the prevailing approach of mainstream legal and political scholarship that tends to highlight the negative role of constituent power in the making of institutional arrangements of political institutions and ideals of the rule of law.[297] Specifically, I consider two theoretical accounts in which the role of constituent power cannot secure any ontological theoretical significance to account for its authority and legitimacy in building political orders and institutions anew. First, I focus on David Dyzenhaus as a promoter of the negative account of the constitutional role of the constituent power that offers us a kind of archetype, of what I call the 'formalist

[296] Lindahl, Hans. 2015. "Possibility, Actuality, Rupture," p. 163.

[297] The rule of law entails the authority of law above all other domains of the political; its general aspiration is that all people and institutions ought to be governed by law. Accepting these statements as true, we find that there are at least two crucial components that serve the rule of law. On the one hand, the nature of the rule of law is interpreted as a necessity to organize the structure of society. This dimension sets the ground for a foundational view of the rule of law. On the other hand, the rule of law appears as a principle of governance that regulates the power and institutional relations within the state through a variety set of techniques, practices, procedures that encapsulate its function—which leads to a prescriptive dimension of the rule of law which delineates distinct forms of government: how governments ought to limit their power in order to constrain official abuses and institutional violence. To many legal historians we own to Albert Venn Dicey's work the popular expression "rule of law." To Dicey, the rule of law means three things. First, the supremacy of law against arbitrary power or discretionary authority on the part of the government; second, every man, whatever be his rank or condition, is subject to the ordinary law; third, that courts are the authoritative apparatus that creates law. Santoro. Emilio, "The Rule of Law and The Liberties of the "Liberties of the English": The Interpretation of Albert Venn Dicey," In Costa, Pietro, Danilo Zolo, and Emilio Santoro. *The Rule of Law: History, Theory and Criticism*. Law and Philosophy Library. Dordrecht: Springer, 2007. p. 153. Dicey, A. V. Albert Venn. *Introduction to the Study of the Law of the Constitution*. New York: Macmillan and Co, 1889. p. 172

transcendental model' of liberal constitutionalism. In this model, Dyzenhaus treats constituent power's authority as limited to intrinsic elements already instituted or recognized within a given state or constitutional law. In contrast to the liberal model, I examine the revolutionary constitutional model that presupposes the nature of constituent power as foundational, legally unlimited, and sovereign.[298] This is the account offered by Antonio Negri's inquiry into the nature of the concept of constituent power.[299]

Though both models seem to differ in important ways, they share a key omission: each overlooks the productive link between constituent power and institutions. I contend that both liberal and revolutionary accounts have not dealt with the ontological and normative dimensions of the role of constituent power in establishing more radical forms of government and emancipatory institutions. In my view, this theoretical omission reveals a formalism which wrongly leads us to view constituent power as simply a moment of the "will of people" that should be reduced to the formal aspects of positive law and representation. As we introduced earlier, the term formalism, taken as a minimal definition, is used here to refer to the internal reduction of the qualities of constituent power (that characterizes or envisions the idea of the *el pueblo*) to constituted institutions. Here formalism is formulated as an internal relation of the law itself, not as the continuing movement of the authority of people's common interests and struggles to achieve the transformation of the prevailing constituted institutions, and to organize for their unfulfilled material needs.[300]

[298] Kalyvas, Andreas. "Popular Sovereignty, Democracy, and the Constituent Power." *Constellations (Oxford, England)* 12, no. 2 (2005): 223–44.
[299] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. Theory out of Bounds; v. 15. Minneapolis: University of Minnesota Press, 2009.
[300] Dussel, Enrique D. *Twenty Theses on Politics*. (Durham: Duke University Press, 2008. p. 75.

Finally, in the third section, following Dussel's account of law that we have offered in chapter 3, I excavate Dussel's legal and political ontology to show the centrality of the category of constituent power in developing and consolidating a decolonial legal and institutional framework. Dussel's conceptualization of constituent power does two things, simultaneously: first, it opens up ontological possibilities for articulating the theoretical architectonics of a political and legal institutions and, second, it privileges the centrality of the protection of life and needs through people's emancipatory political force. At this point, I will turn to Santiago Castro-Gómez's criticism of Enrique Dussel. Concretely, I criticize the vantage point from which the Colombian philosopher considers Dussel's analysis of the category of *el pueblo* vis-à-vis its connection with constituent power and institutionalization.

Against Castro-Gomez's analysis, in the final section of this chapter, I argue that Dussel's political philosophy makes a better case for recasting the link between the ideal of the rule of law and a decolonial political and legal philosophy. I argue that this latter aspects of Dussel's work can help in developing a decolonial conceptualization of the category of constituent power and the rule of law by addressing the challenges that Castro-Gómez to rethink the normative grounds for a decolonial emancipatory politics.

Framing the Problem of Constituent Power and the Rule of Law

I begin by sketching the basic fundamental premises and methodological approaches concerning the concepts of constituent power because they are in opposition to Dussel's theorizations of legality. This tension finds its philosophical and historical roots in a critique against a type of fidelity to formalism and the internal relations of the law itself. In theorizing the procedural and substantive characteristics of the relation between constituent power and the law, I hope to elucidate how this kind of formalism has historically been used to discredit the counter-discourse

of liberation philosophies. In what follows, I survey some of the main theoretical concerns in legal and political philosophy about constituent power and make visible the broader legal problem against which Dussel's perspective can claim a new understanding of constituent power from the point of view of the philosophy of liberation.

Martin Loughlin and Neil Walker, map four competing conceptions of contemporary political philosophy:

> (i) **the juridical containment thesis**, whereby constituent power is exhausted by and absorbed within the settled constitutional form, as for example, in much contemporary liberal theory based on contractarian assumptions (e.g., Rawls);
> (ii) **the co-originality and mutual articulation thesis**, whereby the legally constituted power of the polity operates in productive tension with a continuing background commitment to popular sovereignty (e.g., Habermas);
> (iii) **the radical potential thesis**, whereby constituent power is neither colonized by nor in symbiosis with the legal, but remains a latent revolutionary possibility which lies behind and shadows the legally constituted authority of the polity (e.g., Negri);
> (iv) **the irresolution thesis**, which rejects the first two norms of accommodation, but also dismisses the possibility of isolating the radical potential of constituent power from the constituted forms of sovereign power, and instead views constituent power as an irreducibly supplement which irritates and challenges rather than transcends the specific forms of constituted power (e.g., Benjamin, Agamben).[301]

All four theories, at least conceptually, focus on the tensions between whether constituent power is actually compromising or even surpassing the existing established institutionally order (constituted power). In this theoretical disagreement lies the tension within the capacity of constituent power itself. Since constituent power is focused on its normative capacity to change a

[301] Loughlin, Martin, and Neil Walker. 2007. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford (New York: Oxford University Press.), p. 6.

political order, the "openness" and "containment" of constituent power becomes one of the key problems through which the debate is delineated.[302]

Though it shares some commonalities with "mutual articulation thesis" and "irresolution thesis," Dussel's conception of constituent power diverges from the normative and ontological understanding of constituent power. While these theoretical understandings of constituent power overlook the productive normative and ontological link between constituent power, law, and institution-making, Dussel's robust legal framework accounts for this. Dussel's account of law (which I reconstructed in chapter 3) can help articulate an alternate conception of constituent power that can challenge other overly-narrow views that draw limits around its normative capacity to make changes within the principles of the rule of law. To demonstrate the uniqueness of Dussel's account of law, the next two following subsections parse the views of two proponents of the "containment thesis" and "potential thesis." First, I briefly present an examination of David Dyzenhaus's analysis of constituent power as an illustrative defense of the former; and second, I present an analysis of Negri's metaphysical attempt of holding latter as an influential understanding of constituent power.

The Containment Thesis and the Normative Exclusion of Constituent Power

In what follows, I focus on Dyzenhaus's account of constituent power, which advocates not only for its containment, but also for its exclusion from any normative inquiry by legal and political philosophy. Dyzenhaus's position clearly exemplifies an extreme version of the containment thesis. Evaluating a series of arguments against constituent power, John Grant considers that such views go far beyond the strategies of containment. Grants argues that, while standard views of

[302] Patberg, Markus. 2017. "Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment." *Constellations: An International Journal of Critical and Democratic Theory* 24 (1): 51–62.

containment of constituent power aim to "strip its instituting force by recasting it as the effect of constituted power," Dyzenhaus's theory "enacts a prohibition on constituent power by excluding it from consideration as a legitimate concept and political tool."[303] To illustrate Dyzenhaus's extreme articulation of "the containment thesis,"[304] I briefly reconstruct his argument, concentrating on two of his essays ("The Politics of the Question of Constituent Power," and "Constitutionalism in Old Key: Legality and Constituent Power") and his book *The Constitution of Law: Legality in a Time of Emergency*.

Dyzenhaus's position allows us to explore the link between constituent power and the rule of law. Much of his elaboration about this connection aims to respond Carl Schmitt's attack to liberal legality and the principles of the rule of law, specifically, its claim that "a response to an emergency situation has in the nature of things to be partly or even wholly exempted from the requirements that we associate with the rule of law in normal times."[305] Against Schmitt's challenge, in *The Constitution of Law: Legality in a Time of Emergency,* Dyzenhaus outlines how to keep law in the midst of emergencies, "without creating an exceptional legal regime," by standing in favor of "a substantive conception of the rule of law."[306] This substantive conception

[303] Grant offers a useful and thorough typology of conceptual models of constituent power and offers some normative principles of legitimation of constituent power. Grant, John. *Lived Fictions: Unity and Exclusion in Canadian Politics* (Vancouver: University of British Columbia Press, 2018). p. 10.

[304] By examining assumptions in which constituent power shapes institutional and political change, Markus Patberg highlights the generality of these two perspectives of the tension between constituent and constituted power. He assumes a *boundless* capacity of constituent power in its linkage with expectations about making substantial changes or founding political order anew. This assumption about constituent power's boundless freedom to enact transformations or founding new political orders is problematic insofar as it is assumed, as Patberg argues, that its authority may "open the doors to arbitrary actions of dominant social groups." Patberg's perspective also rests on the idea that any transformations constituent power aims to achieve must preserve certain *boundaries* in order to avoid dismantling its democratic legitimacy. Patberg observes that the implied necessity of preserving boundaries "implies that not every procedure and not every result of constitution-making can be deemed acceptable." Patberg, Markus. 2017. "Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment." *Constellations: An International Journal of Critical and Democratic Theory* 24 (1): 51–62. p. 5; p. 52.

[305] Dyzenhaus, David. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge; New York: Cambridge University Press, 2006. p. 9.

[306] Dyzenhaus, David. *The Constitution of Law*, p. 16.

refers to the commitment of enforcing the law in accordance with formal and procedural requirements of due process and human rights protection.[307] From Dyzenhaus's perspective, this conception finds its foundational roots in "a kind of justice located within the law."[308] This entails accepting that normative ground of authority is self-reflective and justified by internal qualities of the law. As Dyzenhaus argues, any entity outside of the law has no authority.

Under this internal understanding of the nature of law's authority, Dyzenhaus contends that there is not much normative significance in the notion of constituent power. Given that the authority of law is intrinsic to the law itself, Dyzenhaus claims that simple constituent power does not arise as a question for normative liberal accounts of the rule of law. This is because, as we show above, for Dyzenhaus the authority of law is located inside the law. Dyzenhaus writes, "In order to understand law, including the role of written constitutions in legal order, we need to understand why a claim to authority is always also a claim to legitimate authority, legal theory has to engage with the question of what justifies the claim as a matter internal to law."[309] In his essay, "The Politics of the Question of Constituent Power," Dyzenhaus distinguishes between "negatively prescriptive theories" and "normative legal theories" of constituent power.[310] One set of theories are negatively prescriptive theories, such as Schmitt, that presuppose that constituent power's authority is located outside the normative legal order.[311] If we look through the lens of these latter theories, the quality of the law loses any of its intrinsic qualities—such as those

[307] Dyzenhaus adds that those requirements at least are: "the officials who implement it can comply with a duty to act fairly, reasonably and in a fashion that respects the equality of all those who are subject to the law and independent judges are entitled to review the decisions of these officials to check that they do so comply." Dyzenhaus, David, p. 14.
[308] Dyzenhaus, David, p. 12.
[309] Dyzenhaus, David, p. 260.
[310] See Dyzenhaus, David. "Constitutionalism in an Old Key: Legality and Constituent Power." *Global Constitutionalism* 1, no. 2 (2012): 229–60, p. 233; Dyzenhaus, David. "The Politics of the Question of Constituent Power," In Loughlin, Martin, and Neil Walker. 2007. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford (New York: Oxford University Press.), p. 130.
[311] Dyzenhaus, David. *The Paradox of Constitutionalism*, p. 231.

advocated by the legal positivism advocated by Dyzenhaus. The second, contrasting set of normative legal theories hold that both the legal order and the law are better understood from the intrinsic qualities of the law.

Dyzenhaus offers an insightful critical analysis of the negatively prescriptive theories. His main criticism against these theories is its normative inability to explain the context in which authority appears beyond the legal form. For Dyzenhaus, for instance, the abstraction of "the people" imposes difficulties to defining its external political and legal existence. Even with robust versions that draw on the notion of people, one might question if it is legally authoritative or quasi-legal. For example, explaining authority under the perspective of an externally "random assemblage of individuals"[312] cannot be considered to have any identifiable authority or represent any legal form to make or remake the law. According to Dyzenhaus, by considering the authority of law as an external aspect (as people's decision) these negatively prescriptive theories do not see the idea of constituent power as essential; they see it "as entirely extra-legal" and "transcendent of any positive law, including the positive law of constitution."[313]

Moreover, the negatively prescriptive theories are usually associated with a certain confusing circularity regarding constituent power, which finds its expression in the paradox of authorship. Dyzenhaus writes, "[F]or a people to act as author of the legal forms of constitution power, it must already exist as an author—an entity capable of authorizing."[314] This debate inevitably leads to chicken-egg territory, since the distinction between what gives an agent the authority to enact law becomes simply a consideration about what comes first. Was the law that codifies an "artificial entity capable of authorizing" first or the assembles of people that already

[312] Dyzenhaus, David, *The Paradox of Constitutionalism*, p. 234.
[313] Dyzenhaus, David. "Constitutionalism in an Old Key: Legality and Constituent Power." *Global Constitutionalism* 1, no. 2 (2012): 229–60, p. 237.
[314] Dyzenhaus, David. "Constitutionalism in an Old Key," p. 234.

existed capable of enacting the law? From Dyzenhaus's perspective, constituent power is unable to find justifications to locate authority in an external decision. Following this, it would be a theoretical mistake to impose the vision that constituent power can be "substitute for both the ancient idea of natural law and the modern idea of social contract, and then equate the idea with technical validity." According to Dyzenhaus, if the intrinsic qualities of the law are the conditions that give the validity to the authority of the law, constituent power is legally and political irrelevant and "at best a distraction for legal theory."[315] The authority of law, and its relation to the normative conditions of procedures of the rule of law, is found in the law's intrinsic qualities, rather than treat the authority as an external aspect (such as the people's political will). The people (the subject of constituent power) "hang around, threatening to disrupt" the constituted power and the rule of law. For Dyzenhaus, this represents a lack of any normative explanatory reach to settle the understanding of the authority of the law and how to maintain the legal and political order.

Negri's Constituent Power and the Revolutionary Possibilities of Constituent Power

The second view I wish to address is Antonio Negri's account of constituent power, labeled in Laughlin's and Walkers typology as a clear illustration of "the radical potential thesis." Negri's intervention guide us to review the understanding of constituent power under a new light, emphasizing his discussions of constitutionalism and reflecting on his engagement with the modern legal tradition. Negri's theoretical legal insights, though somewhat similar to Dussel's extensive observations about law, don't get as much recognition among what traditionally has been considered the core canon of philosophy of law—dominated exclusively by the analytic tradition. For instance, Pablo Carrazzo finds two characteristics which illustrate the problems both to

[315] Dyzenhaus, David, "Constitutionalism in an Old Key," 257.

elucidate and to recognize Negri's constitutional work *tout court*.[316] Carrazzo argues that, one the one hand, Negri does not provide any positive understanding of the constitution and constituent doctrine, neither employ the "terms in ways familiar from constitutional scholarship" at the center of the modern legal debate.[317]

In my view, Negri can not only be read as a legal theorist, but also as an extremely valuable thinker that calls attention to the importance of the ontological aspects of any critical undertaking of the law. In that sense, having examined in the previous subsection how Dyzenhaus's position foreclosed the link between constituent power and constituted power (to the point of prohibiting the normative significance of constituting power), Negri's view reveals as totally opposite articulation of constituent power favoring its understanding as a radical democratic potentiality. This subsection aims to examine some of elements of Negri's account of constituent power's revolutionary possibilities in order to continue developing some distinctions that are, ultimately necessary to distinguish Dussel's account of constituent power and the specific account of law that shapes its nature and role within a legal philosophy of liberation. In what follows, I examine two aspects of Negri's analysis of constituent power. First, I focus on Negri's intention to explain the limitations of constitutionalism to understand the praxis of constituent power; and second, on Negri's rejection of institutionalization of constituent power.

I will begin by considering Negri's skepticism on defining constituent power in terms of constitutionalism ignoring its non-juridically mode of radical democratic power. In turning back to Dyzenhaus, what is important for us to recall here, is the puzzling circularity at work with the question of whether constituent power is the expression of the authority of law or if the law

[316] Carrazo, Pablo. "Constitutionalism's Post-Modern Opening," In Loughlin, Martin, and Neil Walker. 2007. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford (New York: Oxford University Press), p. 171.
[317] Carrazo, Pablo. "Constitutionalism's Post-Modern Opening," p. 171.

somehow produces its existence. The opposition between Negri and Dyzenhaus revolves around the crucial distinction between constituent power and constituted power. While Dyzenhaus rejects the claim that in order to account for constitutionalism, it is necessary to accept constituted power, Negri posits that constituting power neither derives from the constituted order nor can it be bound by formal instituting procedures, including the rule of law. Negri's book *Insurgencies: Constituent Power and the Modern State* starts with the claim that "to speak of constituent power is to speak of democracy," and at the same time, "constituent power resists being constitutionalized."[318] In other words, constituent power cannot be enclosed to constitutional forms that restrict its fundamental aim for democratic construction and a vehicle of liberation for social and legal change.[319]

Negri's paradigm of constituent power connects its interrupting force with the ontological dimension of the "social preconstitution of the democratic totality."[320] In contrast to Dyzenhaus view, as Michael Hardt explains, Negri's constituent power "requires understanding of *constitution* not as a noun but as a verb, not an immutable structure but an open procedure that is never brought to an end."[321] Constituent power is understood by Negri as the locus of "permanent revolution." Negris notes the constitutional paradox that this type of power relies "on the fact that the constituent process never closes, that the revolution does not come to an end, that constitutional law and ordinary law refer back to one single source and are developed unitarily within single a democratic procedure."[322] This means that Negri's account of constituent power always keeps

[318] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. (Minneapolis: University of Minnesota Press, 2009.) p. 11.
[319] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. p. 138-139.
[320] Negri, Antonio. *Insurgencies*, p. 21.
[321] Negri, Antonio, p. viii.
[322] Antonio Negri. "Constituent Republic." In Bonefeld, Werner, ed. *Revolutionary Writing: Common Sense Essays in Post-Political Politics*. New York: Autonomedia, 2002. p. 253.

alive the revolutionary social-political imagination of making and remaking new legal/political orders. "The paradigm of constituent power," Negri writes, "is that of a force that bursts apart, breaks, interrupts, unhinges any preexisting equilibrium and any possible continuity."[323] This specific temporal dimension explains why Negri's account is radically distinct from *constitutionalism* since "constitutionalism is a juridical doctrine that knows only the past: it is continually referring to time past, to consolidated strengths and to their inertia, to the tamed spirit. In contrast, constituent power always refers to the future."[324]

However, Negri does not reject legal abstraction or the possibility of formal determinations of constituent power. Negri goes beyond the need of shaping the formal possibilities of existence of constituent power by principles of the rule of law. He underscores an original ontology of constituent power. This original ontology of constituent power is understood by Negri as the analysis of the material structure of the conditions of possibility of how acting subjects come to being. This ontology can be broadly characterized as offering an account of the strength of constituent power without reducing it "to mechanical behaviors and the inert repetition of a preconstituted social base."[325] For Negri, constituent power belongs to "juridically preformed" social forms. He argues that to reduce the aims of constituent power to the dominant discourse of positive law is to be subjugated, is to become "merely a cog in social machinery of the division of labor."[326]

By emphasizing the fact that constituent power cannot be absorbed by the constitutional form, Negri thinks that constituent power is prior to any sovereignty or law-making decision that

[323] Negri, Antonio. "Constituent Republic," p. 20.
[324] Negri, Antonio. "Constituent Republic," p. 10. Furthermore, such description of constitutionalism, according to Negri, "poses itself as the theory and practice of limited government: limited by the jurisdiction control of administrative acts and, above all, limited through the organization of constituent power by law."
[325] Negri, Antonio. "Constituent Republic," p. 20.
[326] Negri, Antonio, p. 13.

allows us to grasp the ontology of its authoritative force.[327] Methodologically, this means that Negri's account takes the concept of constituent power beyond its formal abstraction, and attempts to find its determination by inquiring as we mentioned above the "social preconstitution," the ontological properties of constituent existence. Rather than affirming only the rules of administrative procedures of the law, Negri suggests the importance of reaffirming a form of analysis from "below," that is, "from the base of the process of production […] where living labor arises, that is, where the social finds its vital breadth—on the place where the sequences of acting and the creative impulses are formed."[328]

Let me now consider the second aspect of Negri's analysis of constituent power concerning its rejection of its institutionalization. Although Negri acknowledges the key democratic role of constituent power that does not mean that he is in favor its institutionalization. Negri's radical thesis of constituent power, as I have attempting to delineate, display its force without producing an ontological synthesis of closure; in Negri's version, constituent power does not have any continual commitment from institution-making. Given that constituent power is determined by its "ceaseless movement," institutionalization would ultimately block its strength and constitutive temporality.[329] For Negri, the problem of constituent power should not be concern with

[327] Here Negri's is also distancing his thought from other strands of critical accounts of constituent power, like those offered by Giorgio Agamben. Agamben claims in the first line of his chapter of "Potentiality of Law" in *Homo Sacer* that "nowhere else does the paradox of sovereignty who itself so fully as in the problem of constituting power and its relation to constituted power." He adds, "[I]n the context of the general tendency to regulate everything by means of rules, fewer and fewer are willing to claim that constituting power is originally and irreducible that cannot be conditioned and constrained in any way by a determinate legal system and that it is necessarily maintains itself outside every constituted power." Agamben, Giorgio. *Sovereign Power and Bare Life*. *Homo Sacer* 1. (Stanford, Calif.: Stanford University Press, 1998.) p. 64-65.
[328] Negri, Antonio. *Insurgencies.* p. 329.
[329] Negri, Antonio, *Insurgencies.* p. 11.

institutionalization, but only with the ontological constitutive strength (*potentia*) of the "multitude."[330]

It is easy to see the theoretical distance between Negri's radical potential thesis and Dyzenhaus's containment/exclusionary thesis presented above.[331] From Negri's perspective, constituent power is neither a product of intrinsic qualities of the law—like Dyzenhaus's theory—nor a decision imposed from above by the sovereign (such as Schmitt's and Agamben's theories). Negri's version place emphasis on the idea that constituent powers is an open entity, and endless movement, that negates any form of exclusiveness institutionalization ("the constitutional form of the multitude").[332] Against any form of institutionalization or a basic norm that grounds the nature of constituent power, Negri prefers to put all his theoretical efforts toward explaining the ontological and metaphysical underpinnings of constituent power as a terrain to build a new form and strengths of a community comprised of a "multitude of cooperating singularities."[333]

Returning, to Dussel's legal philosophy, I would like to sum up two limitations of Negri's radical potential thesis and Dyzenhaus's containment/exclusionary thesis. First, I have discussed Dyzenhaus's position to abandon constituent power as a normative idea for understanding the authority of law, given that such power only can explain its existence outside the established legal order. I have shown that, for Dyzenhaus, the authority of the law cannot exist beyond its intrinsic qualities. The legal and moral qualities of the law itself are what enables the normative justification

---

[330] Negris adds, "The desire for community is the spirit and soul of the constituent power—a desire for a community that is thoroughly real as it is absent, the trajectory and motor of a movement whose essential determination is the demand of being, repeated, pressing on and absence." Negri, Antonio, p. 22.
[331] According to Grant, Negri's attempt to separating constituent power and sovereignty is wrong. As he explains, this latter conceptual opposition is a false dilemma because "if sovereignty is always in opposition to constituent power, then the struggles to achieve self-governance of so many people around the world seem to be fantastically mistaken, for we should not believe that self-governance somehow manages to avoid calling sovereignty into being." Grant, John. *Lived Fictions: Unity and Exclusion in Canadian Politics*, p. 108.
[332] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. p. ix.
[332] Negri, Antonio. *Insurgencies*. p. 332.
[333] Negri, Antonio. *Insurgencies.* p. 332.

of any authority within a legal and political order. Thus, Dyzenhaus's account aims to restrain the external force of constituent power and call into question the of such a category, itself, within legal and political philosophy. However, the questions we should be asking are: Why is the theoretical strategy to abandon the normative significance of constituent power so problematic for a philosophy of law of liberation? Can the collective force be absorbed into the principles of the rule of law from the perspective of decolonial legal and political philosophy?

In Dyzenhaus' position—that a law's authority lies in its intrinsic qualities and not in any external source—the idea of normativity can only appear as an adequate element for legal theories when it is subjected to "intrinsic criteria" that justifies the law's authority. A key feature of this type of legal formalism, it's ascription of the authority of law to intrinsic qualities, reduces the myriad aspects of social and political life into a set of formal procedures and constraints. In other words, legal formalism is a strategy to defuse the tensions that constituted power when face with the challenge to the living force that characterizes constituent power itself. Dyzenhaus's insistence on formal procedures and the intrinsic qualities of the law neutralizes the external source of its material content. This removes any material analysis of people's lives, needs, and claims that make discernable the exclusions of the established order. By limiting any kind of authoritative agency external to the law, Dyzenhaus's formalism occludes what already exists in the formal operation of the law: the identification of law with actual people and with a broader set of values, needs, and agency external to the law. Hence, Dyzenhaus's internal perspective of the law, becomes extremely individualistic, self-referential, and instrumental toward retrieving law from its external, communal, and emancipatory import.

By contrast, Negri's theoretical limitations allow us to see the extent to which Dussel's account of constituent power supplies us with routes to resolve the absolute rejection of

institutionalization. For Negri, constituent power is a movement, an absolute power that is coeval with democratic totality. Negri assumes that the democratic expansion of constituent power cannot be constrained in any simple way or made equal to other modes of formal political representation. Yet, while Negri's account may be attractive for a legal philosophy of liberation, it fails to account for the material and ethical discourse of institutions beyond its understanding as an oppressive instance of the authority of law. More generally, Negri understands constituent power as a "radical democratic will" that responds to a "*the ontological strength of a multitude of cooperating singularities*."[334] Negri argues that this collective subjectivity is "the continual antithesis of any constitutional progression its birth and also its rupture pose themselves against the constitutional process, and in no case does the constituent subject submit itself to the static and constricting permanence of constitutional life."[335]

The two accounts of constituent power we have been examining seem to point in opposite theoretical directions. Dyzenhaus saw constituent power as something extra-legal, not belonging to democratic processes, and disruptive of principles of the rule of law. As Geneièvе Nootens puts it, Dyzenhaus's position is grounded in the "assumption that democratic iteration and the rule of law also support each other, and that one must take into account norm-generation process."[336] Negri, in turn, is absolutely opposed to this perspective of constituent power. Not only does Negri ascribe to the ontological properties of constituent power a "social creativity," but also its underlying radical strength to transform itself as democratic procedure. And precisely because it is determined by the ceaseless movement of struggles, Negri's conception of constituent power involves a different paradigm of democracy—which carries within itself the opposite ontological

[334] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. p. 333. (Negri's emphasis)
[335] Negri, Antonio. *Insurgencies*. p. 324.
[336] Nootens, Geneviève. "Constituent Power beyond the State: Democratic Agency in Polycentric Polities." New York: Routledge, Taylor & Francis Group, 2022. p. 38-39.

character that defines Dyzenhaus's relationship between constituent power and the rule of law (or constitutionalism).

For Negri, democracy cannot be equated with constitutionalism. Arguing against the idea of democracy as being attached to constitutionalism, Negri stresses its negation by trying to understand democracy as identical to the multitude.[337] Not only does Negri identify democracy as the theoretical and practical "project of the multitude, a creative force, a living god;" but he also speaks of "a real democracy of right and appropriation, equal distribution of wealth, and equal participation in production becomes the living god."[338] Here we see Negri's ontological characteristics of constituent power not as "immanent" to principles of the rule of law. Negri considers the transcendental understanding of constituent power that pertains to compromise, through institutional forms, its immanent strength and freedom. In Negri's words, constitutionalism ensures that constituent power gets transformed into transcendental constraints and formal administrative procedures. Constitutionalism is, according to Negri, "the police that transcendence establishes over the wholeness of bodies in order to impose on them order and hierarchy. Constitutionalism is an apparatus that denies constituent power and democracy."[339] Thus, for Negri, constitutionalism takes the form of repressive apparatuses of violence that enables a process of formalization (rationalization) over the strength of the multitude.

Here, we get close to seeing how Dussel's account of constituent power supplies us with routes to solve both the anti-normativity of Dyzenhaus' position and Negri's rejection of the

[337] For Negri democracy refers also to "the onmilateral expression of the multitude, the radical immanence of strength, and the exclusion of any sign of external definition, either transcendent or transcendental and in any case external to this radical, absolute terrain of immanence." Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. p. 322.
[338] Negri, Antonio. *Insurgencies*. p. 305.
[339] Negri, Antonio. *Insurgencies*. p. 322.

ontological institutionalization of constituent power.[340] The constituent power still must show strategic routes of action towards maintaining either the principles of the rule of law that Dyzenhaus suggests or Negri's rejection of constitutionalism ignoring the institutionalization aspect of constituent power. As Dussel insists, an account of constituent power must provide us with normative principles as well with a conceptual map for creating a future landscape of emancipatory institutions. In *Política de la Liberación Arquitectónica* (*Politics of Liberation*), Dussel explains, "The conception of politics that declares institutions non-transformable is reductive, like other conceptions that conceive them solely as instances of oppression. A more complex, necessary, and sufficient vision of institutions will allow us to circumvent the unilateral positions of many political theories."[341]

In the section that follows, I describe in more depth, Dussel's ontological theory of institutions and his definition of constituent power (*el pueblo*), which are both crucial elements at the foundations of a legal philosophy of liberation. By turning to Dussel's institutional ontology and political and legal normativity, I show how these key elements of his legal philosophy of liberation can help reframe the problem of constituent power as a theoretical tension between either non-normative accounts (Dyzenhaus) or non-institutional approaches (Negri) of the concept of constituent power.

Dussel's Political and Legal Ontology: The Making of Institutions and the People as Constituent Power

So how do legal or political institutions find their ontological and normative structure in Dussel's account of law? And what is Dussel's conception of the relationship between the ontological and

[340] Negri, Antonio. *Insurgencies*. p. 322.
[341] Dussel, Enrique. *Política de La Liberación. Volumen II: Arquitectónica*. p. 192. My translation.

normative status of "the people" (*el pueblo*) and the emancipatory effort of institution-making? As explained in Chapter 3, Dussel's work is deeply engaged with philosophical work with normativity. Dussel's commitment to the concept of normativity lies at the root of its conceptual architectonic within the philosophy of liberation. From Dussel's point of view, the importance of normativity relates to the type of principles, actions and institutions that supply the conditions for norms that define our ethical, political, legal, economic, and other concerns as *living human subjects*.[342]

I argue that Dussel's political and legal ontology can contribute to a conceptualization of the category of constituent power from a decolonial perspective. Dussel's political and legal philosophy enables us to address two issues: first, whether or not constituent power is a normative criterion that allows us to rethink the authority of law, and second, whether the democratic character of *el pueblo* can enable a form of legality from which is possible to derive political institutions. Dussel highlights the need for the normative link between legality and *el pueblo*, and, as I seek to show, his account of constituent power is inseparable from the question about the origin of the authority to create laws and institutions.

Let me begin by introducing important distinctions between some categories. Specifically, I would like to distinguish the notion of constituent power and *el pueblo*, the relation between *potentia* and constituent power, and the relation between *potentia* and *el pueblo*. These multiple distinctions will help us to understand the tension that lies between Negri's and Dussel's

[342] Dussel writes, the life "is human life. By "human," we should understand the life of the human being at its physical-biological, historical- cultural, ethical-aesthetic levels, including even the mystical-spiritual level […] This is all far from either simplistic biologisms or cosmological materialism. The human life of which we speak is not a concept, an idea, or an abstract or concrete ontological horizon. Nor is it a "way of life." Human life is a "mode of reality;" it is the concrete life of each human being from which reality is faced, constituting it from an ontological horizon (human life is the preontological point of departure of ontology) where the real is actualized as practical truth." Dussel, Enrique D. *Ethics of Liberation in the Age of Globalization and Exclusion*. Latin America Otherwise. Durham: Duke University Press, 2013. p. 434.

frameworks. For both Dussel and Negri, the same questions regarding the agent of constituent power arise: "[W]hat *popolo* or people could be counted on today for the creation of a new constitution? Do we have a generation opening itself to a new institutional compromise that will go beyond the welfare State?"[343] While Negri identifies "multitude" as the principal agent of constituent power, Dussel takes a different approach by focusing both on the description of the concepts of *potentia* and *el pueblo*. In what follows, I offer a working definition of these notions in order to make more comprehensible the way in which Dussel and Negri speak differently about the "agent" of constituent power.

Let's consider first briefly the key concept of "multitude,"[344] which Negri claims is "terribly unclear."[345] While the original aim of the idea of multitude, he explains, was to present a concept that could help to dissolve the idea of "the people," elsewhere (specifically in his book *Empire*) he explicates the difference between these two concepts.[346] Negri defines multitude as a "set—an almost infinite set—of singularities."[347] This definition is important for what it excludes; it rejects all recourse to identity or unity to characterize the multitude.[348] In this sense, Negri's definition highlights the fact that the "multitude is a multiplicity, a plane of singularities, and open set of relations, which is not homogenous or identical with itself and bears and indistinct, inclusive

[343] Antonio Negri. "Constituent Republic."p. 247.
[344] There are countless debates about Negri's development of this notion. For a relationship between multitude and the idea of "the people," See Paolo Virno, "Virtousity and Revolution: The Political Theory of Exodus" In Virno, Paolo, and Michael Hardt. "Radical Thought in Italy: A Potential Politics." Theory out of Bounds; v. 7. Minneapolis, Minn: University of Minnesota Press, 1996; Bardini, Thierry. "On Multitude and Beyond: An Interview with Paolo Virno." *Cultural Politics (Biggleswade, England)* 10, no. 2 (2014): 206–25.
[345] Negri, Antonio, and Cesare Casarino. *In Praise of the Common: A Conversation on Philosophy and Politics*. NED-New edition. Minneapolis: University of Minnesota Press, 2008. p. 92.
[346] Hardt, Michael and Negri, Antonio. *Empire*. Cambridge, Mass: Harvard University Press, 2000. p. 102.
[347] Negri, Antonio, and Cesare Casarino, p. 93.
[348] Scholars such as Isabell Lorey, suggest that Negri's framework of "multiple singularities" attempts to break with the liberal form of gaining democratic legitimacy, forms of political action, representation, and state apparatuses. According to Lorey, the nature of multitude, as form of constituent power, focuses on "the process of self-constituting, not on a subject of representation but on democratic modes of subjectivation." Lorey, Isabell. "Constituent Power of the Multitude." *Journal of International Political Theory* 15, no. 1 (2019): 119–33. p. 126,

relation to those outside of it."[349] Negri's emphasis on the rejection of any link with identity, helps to capture the key difference between multitude and the people. For Negri, *el pueblo* is reducible to "identity and homogeneity," and poses a problem for its own "difference from and excluding what remains outside."[350]

To Negri, *el pueblo* tends more to be modeled by ideas of sovereignty and constitutional rule. In contrast, multitude is incompatible with the sovereignty as a mechanism to construct a political order. As Negri puts it, "Whereas the multitude is an inconclusive constituent relation, the people is a constituted synthesis that is prepared for sovereignty."[351] For Negri, the multitude is a form of subjectivation (political praxis) that activates practices of resistance and rebellion in historic scenarios of radical change. In understanding the multitude as a "constituent relation," Negri stresses the idea that each iteration of constituent power "reveals, at its beginning and its end, a tension of the multitude to become the absolute subject of the processes of strength."[352] His account of constituent power, which characterizes multitude as a processes of strength, is replicated, to some extent, in Dussel's view of the constituent relations between the processes that depends on the differentiation of *potentia*, *el pueblo,* and *potestas*.

Against Negri's idea of the multitude, Dussel attempts to understand the crucial move of the formation of the constituent power from its ontological to normative level and the relationship between constituent power, the concepts of *potentia,* and *el pueblo*.[353] Dussel forms his ontological

---

[349] Hardt, Michael and Negri, Antonio. *Empire*. p. 103.
[350] Lorey, Isabell. "Constituent Power of the Multitude." p. 103.
[351] According with this vision, he identifies two fundamental operations in the genealogy of the notion of the people. The first operation concern with the mechanism of terror and violence that marked by Europe's modern state-nation formation during 17h and 19th centuries. In practice, this corresponded with political experiences of "racial subordination and social purification." The second operation is the association of people through the "representation" of a hegemonic class, group, race, or similar categories. Lorey, Isabell. "Constituent Power of the Multitude." p. 103.
[352] Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. p. 307.
[353] Dussel explicitly says that his account of the split between *potentia* and *potestas* moves beyond Negri. In reference to Negri, he argues, that "It is thanks to this scission that all political service becomes possible, but it is here that all corruption and oppression also begins its uncontrollable course […] The anarchist dreams of the lost paradise of

account by describing the move from *potentia* ("the hidden being, the power of the political community itself") to *potestas* ("the phenomenon, the delegated power by representation and exercised through institutional policies").[354] This move represents to Dussel a description of the process whereby *potentia,* as the foundational and driving force, finds the mediation of "the people" to make institutions. As the critical legal theorist Illan Rua notes, for Dussel, *potentia* "flows into *potestas* which seeks to free itself of its relation to *potentia*."[355] If we follow Rua's analysis, we find a condensed version of Dussel's relation of *potentia* to "the potential of the people, to which the state must remain faithful."[356] When the political and legal institutions remained faithful to the people is what Dussel calls "obediential power." This is a positive conception of "the delegated exercise of the power of all authority that fulfills the political justice claim. Put differently, this characterizes the upright political actor who aspires to exercise power in order to have the necessary subjective position to struggle in favor of the empirically possible happiness of a political community, a *people.*"[357]

Because Dussel articulates this process around the formation of the strength of the people, I want to outline in more detail this movement which reveals what Dussel describes as the formation of the constituent power and its institutionalization through the political power of "the people." According to Dussel, in order to avoid abandoning the concept of "the people" as a

potentia, of undifferentiated power in-itself (in which injustice is impossible), and the conservative adores the fixed and controlled power of *potestas* (and accordingly exercises institutional power as domination). Politics will be the long history of the proper or corrupted use of *potestas.* The *noble vocation of politics* is a possibility that opens up only with this primary scission" Dussel, Enrique. *Twenty Theses on Politics*. p. 20.

[354] Dussel, Enrique D. *Política de La Liberación.* p. 59.

[355] Wall, Illan rua. "Notes on an '"Open"' Constituent Power." *Law, Culture and the Humanities* 11, no. 3 (2015): 378–92, p. 388.

[356] Wall, Illan rua. "Notes on an '"Open"' Constituent Power." p. 389.

[357] Dussel, Enrique. *Twenty Theses on Politics*. p. 26.

normative complex notion for emancipatory democratic projects, we need to elucidate the aforementioned distinctions between *el pueblo*, *potentia*, and constituent power.

Because Dussel's ontological approach of political power and legality departs from the account of *potentia,* we can locate Dussel's political and legal interest concerning the problem of constituent power within this category. But how does Dussel's notion of *potentia* relate to the concept of *el pueblo*? What is the conceptual role of *el pueblo* in an understanding of constituent power? Any attempt to examine this question should not ignore Dussel's legal and political ontological commitments. As we have shown, Dussel insists on the significance of the ontological passage of *potentia* to *potestas*. Here, in this split, we can see how the manifestation of *el pueblo* expresses "an internal frontier or fracture within the political community."[358] Under this description, *el pueblo* is *not* the political community. It is instead seen as a "fracture" within the political community. It is an internal fracture that allows a better grasp of Dussel's account of the split between the moment of indetermination of the subject (*instituent power*) and the social intersubjective (*potentia*) determination of political and legal institutions (*potestas*).

The notion of *potentia* is at the heart of Dussel's understanding of legality and opens a way to bridge what appears to be an abyss between the authority of constituent power, as the potential of *el pueblo* and the established political and legal order (*potestas*). Specifically, Dussel writes, *potentia* is not "an initial empirical moment in time but rather a foundational moment that always remain in force *beneath* institutions and actions (it manifests itself in the world insofar as it is a

[358] Dussel, Enrique D. *Twenty Theses on Politics*. p. 74. Elsewhere, interestingly, Dussel speaks of the notion of community as a description of a "communitarian intersubjective" agent. This agent, according to Dussel, is embodied in the struggle of current social movements. Dussel argues that community does it negate individuality, but it should be, as Marx indicated in the Grundrisse, the third stadium that would reach full individuality in full community. Currently, there is an anticipation of an "after" to modern-liberal individualism, where "individuality," liberated from the metaphysical isolation in the competition of the market, progresses toward the recovery of a "communitarian" intersubjectivity. This would be the full singularity (individuality) in full community (in the future), that are being initiated by the very social movements." In *Anti-Cartesian Meditations and Transmodernity: From the Perspectives of Philosophy of Liberation*. Uitgeverij Amrit/Amrit Publishers, 2018. p. 324, note 626.

phenomenon or being *potestas*)."[359] From this perspective, Dussel argues that "the people" is "the potency or force that emanates from the convergence of wills joining together under the rational-practical discursive reason."[360] This potency requires institutional mediations (*potestas*) that enables the effective actualization of the convergence of wills to join collectively (*potentia)*.[361]

To address the second question of the relationship between *el pueblo* and constituent power we must first examine the ontological moments from which *el pueblo* comes into being. As Dussel notes, "phenomenally, that is, it makes itself "present" or "appears" to the political conscience of the public-ontological sphere."[362] He details how "the people" manifests itself in the political as a strength or force beneath its real constitution. Dussel shows the underneath movement of a "passive obedience" of "the people," within an existing legitimacy of a constituted political order, to the stage of gaining consciousness of the different concealed forms of domination of the "bloc in power" against different excluded or oppressed groups. In other words, for Dussel *el pueblo* coincides with the oppressed and excluded in assessing their denied material needs. This movement of consciousness entails a self-reflective articulation of the material needs that may be communicated by others (formulating explicitly by people's political, social, economic demands). This new critical consciousness is a form of collective force that begins to organize itself, on the one hand, "in opposition to the elites, to the oligarchs, to the ruling classes of a political order;"[363] and on the other (as Dussel notes) as a "living corporeal determination of the intersubjective human

[359] Dussel, Enrique D. *Twenty Theses on Politics*. p. 21.
[360] Dussel, Enrique D. p. 198. My translation.
[361] For example, Alejandro Vallega stresses that antithetical to the view of *potestas* as self-referential and autonomous, Dussel's thought offers the relocation of political power to its origin, to the community. Given the dependence of the *potestas* on the power of the community, this is not an idealistic argument but a practical one: "The moment the system at work becomes oppressive and exploitative, the government begins to lose power, until a change or total collapse occurs." See "Latin American Philosophy and Liberation. Enrique Dussel's Project of a Philosophy of Liberation" In Vallega, Alejandro A. *Latin American Philosophy from Identity to Radical Exteriority*. World Philosophies. Bloomington, Indiana: Indiana University Press, 2014. p. 66.
[362] Dussel, Enrique D. "Five Theses on Populism," p. 200.
[363] Dussel, Enrique D. *Twenty Theses on Politics*. p. 75.

subject."[364] He refers to the narratives of different oppressed and excluded groups, which are always rooted in the lived experience of their negated needs. For example, the feminist tradition has described the inequitable rights and experiences of violence and domination expressed through *machismo* and patriarchy; the antiracist tradition has described discrimination and xenophobia; the working and peasant classes have described the struggle to secure rights to overcome exploitation.[365] In Dussel's framework, these social movements, in their *difference*, embody the formation of the "people-for-itself."[366] This means that social movements generally seem to provide an immediate experience of the living representation of the people, as the constituent power. Thereby, social movements are "the active interstitial fabric that unifies and allows for presenting itself as a *collective agent*."[367]

According to Dussel, so-called social movements, by definition, appeal to heterogenous demands of people's material needs. Against the position that a demand caused by a need will turn univocally equivalent to all "the people," Dussel proposes that we think about which particular needs meet the threshold to be considered the key demand, which the unified consciousness of "the people," must give priority to fight in order institutions fulfill those demands. Dussel develops the idea that the heterogenous demands of social movements must be assumed by a hegemonic political projects capable of articulate effectively each particular need into a "process of dialogue and translation."[368] In other words, the hegemonic project entails a "transversal comprehension"

---

[364] Dussel, Enrique D. "Five Theses on Populism," p. 203.
[365] Dussel, Enrique. "Five Theses on Populism," p. 203.
[366] According to Dussel this is the role of social movements. He argues that a demand articulated by the new social movements—those "popular groups that manifest in the political (ontological) field the presence of […] unfulfilled material needs." Moreover, Dussel continues, "Demanding is not the same as need: there is no demand without need. A demand is the political questioning of a social need in the economic field. Need is the material content of the political protest. The social movement is, moreover, the first social institutionality, which could cross the threshold of the civil society (the expanded state for Gramsci) and also the threshold of the political society (the state in a restricted sense)." Dussel, Enrique D. "Five Theses on Populism," p. 203.
[367] Dussel, Enrique D. "Five Theses on Populism," p. 203.
[368] Dussel, Enrique D. p. 204.

of all people's demands.[369] Dussel's solution to the problem of emptying the demands of one movement over the supremacy of others—or the assumption of impossibility of unifying a constituent project to convey one demand—is to understand such unity of the consciousness of "the people" in terms of a dialectical relation. As a logic with both the singular relation of "similitude" and "distinctions," each movement's demands do not have supremacy over the others. As Dussel writes, the people "can be described as a collective act which demands the emergence of social movements that serve as catalysts for the unity of the whole of the oppressed population, the plebs, a unity that is constructed around a project which progressively includes all of the political demands articulated on the basis of economic material needs."[370]

So far, I have identified a few key distinctions in Dussel's ideas about the formation of *el pueblo*. First, *el pueblo* cannot be confused with "political community,"[371] the economic category of "class,"[372] or (least of all to) with any given national identity ("nation").[373] In contrast to these concepts, in Dussel's ontological formulation, *el pueblo* "originates in the critical moment in which the political community splits, when the "historical bloc in power" […] does not constitute a

[369] Dussel, Enrique D. p. 204.
[370] Dussel, Enrique D. "Five Theses on Populism," p. 204.
[371] The short definition of Dussel's concept of "political community" pertains to the intersubjective referent of established order. Dussel's political ontology tends to understand the complex idea of community beyond a metaphysical individualism and the shortcomings of "substantive collectivism." Actually, community, Dussel writes, indicates the "originary intersubjective insertion of the singular subjectivity of every citizen." Dussel, Enrique D. *Twenty Theses on Politics*. p. 71.
[372] Dussel adds that the people cannot identify with the working class, which is, ultimately, "the group of the subjects of the "economic field" that are subsumed by capital transforming them into wage laborers that actually produce (materially and formally) the surplus value of the goods." Dussel, Enrique. "Five Theses on Populism," p. 200.
[373] Nevertheless, in his early work *Philosophy of Liberation*, when it comes to examine the geopolitical relationship between *el pueblo* and the category of "nation," he claims that as a social formation, *el pueblo*, also can be understood as "an oppressed nation; it can also be the oppressed classes within a nation." Dussel, Enrique D. *Philosophy of Liberation*. Eugene, Or.: Wipf and Stock, 2003. p. 71. Dussel defines the political category of "nation" as "all of the population born in a territory and organized under the institutional political structure of the state, a political community." Dussel, Enrique. "Five Theses on Populism" p. 206. For a detailed analysis of the relationship between the configuration of a "decolonial nation," and Dussel's formulation of the people, see specifically the theoretical work of Ciccariello-Maher, George. *Decolonizing Dialectics*. Radical Américas. Durham: Duke University Press, 2016.

leading class anymore."[374] This means that *el pueblo* emerges from a fracture/split, and in contrast to a dominant historical totality, is contained in a fraction or part of the political community as the "social bloc of the oppressed." Following Gramsci's framework, Dussel's notion of *el pueblo* is constituted in the crisis of the legitimacy and hegemony of the "historical bloc in power."[375] As Dussel argues, the phenomenological appearance of *el pueblo,* in itself, presents to the political conscience of the bloc of the oppressed in that precisely moment of crisis of legitimacy of the dominant class or political elite in power. It is in that crucial moment of crisis where the excluded and oppressed, as Dussel observes, "becomes a "people for itself," or takes on the conscience of being *el pueblo*.[376]

Second, According to Dussel, it is when *el pueblo* expresses (or demands) the material content of their needs, that emerge what Dussel calls a *state of rebellion.*[377] Some examples of what Dussel meant by *state of rebellion* were the massive demonstration of protest in 2019 in Chile that resulted in a complete restructuration of president Sebastián Pinera's government cabinet and Colombia's massive national strike in against the tax reform in 2021.[378] In short, in those collective reactions of people's dissimilar social and economic demands, putting into question the "state of exception" in each political circumstances, is the indication of the movement of the experience of the "conscience of the people" found in the midst of political action.[379] Dussel's idea of the state of rebellion, as embodied in the manifestation of "the people" gaining consciousness "as people-in-itself," implies a rupture. The Spanish edition of the essay of "Five Theses on Populism" keeps

[374] Dussel, Enrique D. "Five Theses on Populism" p. 199.
[375] Dussel, Enrique D. "Five Theses on Populism" p. 200.
[376] Dussel, Enrique D. p. 202.
[377] A classic example of this state of rebellion goes back to the experience Argentineans in 2001 when President Fernando Rúa was forced to resign by the volcanic manifestation in the political field of the "people as people', […] as *potentia.*" Dussel, Enrique D. "Five Theses on Populism" p. 202.
[378] Leopoldo Múnera. "A Multitude in Precarious Conditions." *Spectre Journal*. Accessed December 5, 2022. spectrejournal.com/on-the-colombian-strikes.
[379] Leopoldo Múnera. "A Multitude in Precarious Conditions." p. 203.

a key phrase that illustrates this manifestation of the "conscience of the people" as rupture, when Dussel says that "the people, which gains conscience, breaks the whole and produce a fracture."[380]

Another example of this fracture is the repressive and arbitrary invocation of the rule of law in response to those emancipatory struggles around the world in countries as diverse as the United States, Hong-Kong, Ecuador, Colombia, and Chile, since 2019. These political experiences contain the lines of ruptures that are consistent with Dussel's legal ontology and material description of a decolonial form of constituent power. This conception of rupture, which is the entire critique of the established order (*potestas*), coupled with the potency or force that emanates from "the people," entails not foreclosing the moment of "exteriority' within the social totality. The totality is never *total*. Consequently, Dussel maintains that communities that are "dominated and excluded" from the current order can take up a whole "new process of struggle for the accomplishments of their revindications that the excluded groups demand"[381] (the working class, the peasant class, indigenous people, feminists, anti-racists, and marginalized groups). In Dussel's politics of liberation, it *is* this exteriority the movement that leads us to see how "the people" becomes the central collective agent to justify the rupture with political and legal institutions of oppression and dominance.[382] Therefore, it is from the "negated singular subjectivity" of the excluded groups and oppress people where "the consciousness of being a people," ultimately, comes to being.[383]

---

[380] Dussel, Enrique D. "Cinco Tesis sobre el Populismo," In *Filosofías del Sur y la descolonización: Obras selectas 29*. Amazon Digital Services LLC - KDP Print US, 2021. p. 140. "El pueblo que irrumpe con consciencia escinde el todo, produce una fractura." In Dussel, Enrique D. "Cinco Thesis." My translation.

[381] See Dussel, Enrique Dussel. *Política De La Liberación: Arquitectónica*. Vol. 2. p. 44 and Dussel, Enrique D. *Twenty Theses on Politics*. p. 80.

[382] Or, as Omar Rivera puts it, *el pueblo* "is anchored in the historically determined exteriority of the oppressed… [Dussel] grounds this exteriority in the historical awareness of the people, in which history is constantly rewritten from the point of view of the oppressed. "Rivera, Omar. "Political Ontology (and Representative Politics), Agamben, Dussel… Subcomandante Marcos." *Epoché (Provo, Utah)* 16, no. 1 (2011): 125–38. p. 136.

[383] Dussel, Enrique D. *Twenty Theses on Politics*. p. 80-81.

Having identified some key aspects of Dussel's account of constituent power and the idea of "the people," it is now necessary to look at how Dussel's normativity and ontology of institutions may addresses the missing elements I have attempted to examine in this chapter. According to Dussel, institutions must always be conditioned by principles of fraternity, solidarity, respect, and protection of the political community. Particularly, Dussel views fraternity as a form of friendship that "unites wills and provides solidity for power."[384] These principles guide the actions of agents within certain limits of political power. Moreover, these principles organize agents and institutions under the parameters of what is politically operable and feasible.[385]

To get a better sense of Dussel's model of constituent power, I contrasted his work against Dyzenhaus and Negri. On the one hand, against an anti-normative view like Dyzenhaus's resistance to consider constituent power as normative relevant concept for legal theory, Dussel draws his normative position arguing that without certain normative assumptions we cannot understand how law and institutions are formed through the intersubjective articulation of the lived experience of people's motivations and needs. Moreover, without some articulation of normative principles the role of Dussel's critique of political philosophy risks to collapse into a formal technique of the exercise of political power and legality without content. On the other, against Negri's dismissive position of constitutionalizing the "creative force" of constituent power, Dussel offers a clear route to transform the people's strength and power into institutions of liberation.

Without any normativity, is not possible to adequately criticize the effects of a self-referential authority that characterizes the fetichized conception of political power, law and institutions as we showed earlier in Chapter 3.[386] In his primary work, *Ethics of Liberation,* Dussel

[384] Dussel, Enrique D. *Twenty Theses on Politics*. p. 49.
[385] Dussel, Enrique D. *Twenty Theses on Politics*. p. 57.
[386] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*. Vol. 2. p. 378.

insists in the central aspiration of his philosophy of liberation of not forgetting the significance the philosophical reflection on normativity. Dussel argues that beyond its theoretical explanatory power of our actions, normativity also "can play a strategically necessary role in another dimension, which is especially important in collective learning process where critical consciousness can be developed as part of the political, economic, and social organizing efforts of new emerging social movements in civil society."[387] Therefore, to emphasizes the importance of normativity, it is important in Dussel's political philosophy because leads then to analyze our actions and institutions with a pretentious of political justice.[388] It is in light of a universal pretention of political justice that, according to Dussel, is necessary that principles—grounded on universal ethical principles, for him, developed under the maxim of protection of concrete "human life"—can subsumed others fields such as legality and politics.

According to Dussel, the subsumption of ethical principles within the political and legal domain, refers, ultimately, to the articulation of three mutually-determined normative principles (without a last instance of determination). First, the subsumption of the *material principle* (the production, reproduction, and development of human life in community) takes the form as an obligation to the "material practical truth" of wanting to live and organize a political order in accordance with the *political principle of fraternity and solidarity*. Again, as we indicate earlier, fraternity is for Dussel, a material aspect of the political power: namely, "unifies the wills and "binds" them into a collectivity that multiples its strength."[389] Second, the *ethical- formal principle of discursive reason* obliges in the political as the reference to *the formal principle of democracy and legitimacy* by guaranteeing the conditions of equality and legitimacy for the participation of

[387] Dussel, Enrique D. *Ethics of Liberation in the Age of Globalization and Exclusion*. Latin America Otherwise. Durham: Duke University Press, 2013. p. xix.
[388] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*. Vol. 2. p. 374.
[389] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*. Vol. 2. p. 446.

people in decision making at different levels of power and institutions.[390] Lastly, the subsumption of the *ethical principle of feasibility*, in the case of the political, holds as the *strategic factibility principle* that we should act in obedience to do what is necessary to attempt not crossing the limits of the impossible/possible, that is, the freedom in praxis to make feasible the transformations necessary for preserving and developing the life of the political community.[391] In arguing for the importance of these normative principles, Dussel provides this conclusion:

> To comply seriously these three political principles allows the political agent (or the institution) to have at least a "political pretension of justice" that is intersubjective (in terms of the validity of their political normative consciousness) and objective (that entails real legitimacy, not just legal or formal). But more importantly, to comply to these principles constitute the real possibility of what we call the non-fetishized consensual power as mediation for survival (not only as permanence of human life, but at the same time a historical-qualitative increase of life)[392]

These normative principles provide us with a better insight to access Dussel's account of law and institutions. Dussel's normative political principles of materiality, fraternity, the formal principle of democracy and strategic factibility principle are the basis for delimiting the political and the legal from a philosophy of liberation, as well they are potentially the justification of Dussel's legal thinking that enables us to grasp the making of emancipatory institutions. I now move to Dussel's understanding of institutions vis-à-vis the relationship of "the people," as constituent power, and the question of its institutionalization.

Dussel claims that institutions are, ultimately, "conditioned and conditioning conditions."[393] Any determination of a legal and political institution is necessary but never is

[390] Dussel, Enrique D. p. 407.
[391] Dussel, Enrique D. p. 470.
[392] Dussel, Enrique D. p. 374.
[393] Dussel, Enrique D. *Twenty Theses on Politics*. p. 45. In the *Politics of Liberation* Dussel uses Marx's idea about circulation of "fixed capital" to illustrate the permanence of institutions. Just as the value of objects it is transferred to its use and the object is destined to serve for certain amount of time, same would happen with institutions; at a certain point, objects as institutions must be replaced. Dussel writes, "The "stability" of institutions (with respect to the "contingency" of the strategic-political actions that are "exhausted" by "produced" *in*

sufficient.[394] Institutions refer, then, to a synthesis of both the accumulation of diachronically strategic political actions (deposited historically in the past) and synchronic actions of "the people" (actions that could expand with respect to future the struggle for liberation against systems of domination and oppression). This synthesis creates the necessary conditions for making institutions to protect material life itself. Dussel's account of law and political power opens up to a positive ontological account of institutions.[395] In Dussel's conceptual understanding of political power, institutions amounts to intersubjective relations that create systems aiming to the reproductive and protective conditions of collective human life.[396] Dussel's ontological examination of institutions brings us back to the question about whether an "institution" is derived from the agent (constituent power), or on the contrary, the agency derived from the "institution," itself.[397]

Dussel's ontological assumptions regarding institutions are related to the differentiation between the abstract stage of under-determination (of subjective wills) and the stage of determination by which institutions are constituted (an intersubjective process of wills acting

actu), nevertheless, in the long run, they will also have to be transformed, and therefore, both will be equally "exhausted" in their "being-produced-on." Ultimately, institutions are less "contingent," or their "contingency" has a greater scope in time." Dussel, Enrique. *Política de La Liberación. Volumen II: Arquitectónica*. p. 322.My translation.

[394] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 25.

[395] Dussel, Enrique D. *Política de La Liberación*. p. 184.

[396] Dussel's account of the institutional level of the organization of the political is develop through all the chapter 2 of *Política de La Liberación* ("Politics of Liberation") as articulated in his seven to nine theses in *Twenty Thesis on Politics*. I will exclusively focus in these two works. See Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 189; 181-322 and Dussel, Enrique D. *Twenty Theses on Politics*. (Durham: Duke University Press, 2008. p. 43-49.

[397] We can trace Dussel's ontological perspective of institutions back to Hegel's *Philosophy of Right* and his insights concerning the reconciliation between the form of the State and the wills of individuals. Dussel's legal philosophy relies and benefit from Hegel's insights on the emergence of social beings. The key aspect where Hegel seems to be helpful is concerning the understanding of the "logical and necessary passage" between the undetermined subjectivity (that has not yet incorporated in any political or legal order) to a determinate political subject aiming to create institutions as member of a political community. This ontological passage is key to providing us with elements to grasp the movement from Dussel's ontological legality to the normative dimension of constituent power and its relation to the institutionalization said power.

collectively). This movement is expressed more properly through a "synchronous and co-determining" relationality. This relation aims to designate the meaning of the relation between intersubjectivity and institutions. Dussel explains this relationship:

> It is a circular relation where the subject is both a determined moment (by the institution) and determinant (of the permanence or transformation of the institution), and where also the institution is, in itself, a determined moment (in which subjects are aware of their function as actors) and determinant (of the future actions of the actors). Both moments are at the same time synchronous and co-determining. One the one hand, one is a subjective-functional determination (of the subject), and on the other hand, the other is systemic objective (the institution). Substantially, as exercise of pure subjectivity, however, and in light of the ultimate material determination (the node of the network of relationships), the subject is the absolute material ground of the institution. On the contrary, inter-subjectively or relationally, that is, by seeing the network of relationships in their heterogeneous functions, an institution is the intersubjective condition produce by the political existence of subjects as political actors. Ultimately, institutions serve the legitimate and feasible reproduction of the life of actual beings, the living corporality of flesh and blood of a political community. It is the human life the criterion of "truth" and "validity" of any political institution.

This passage demonstrates the fundamental relation of institutions and agents, the fact that it is mediated by a relationality that is "synchronous and co-determining." This relationality points to the meaning of the relation between intersubjectivity and institutions. The subject does not engage in creative institution-making simply as a functional practice of its individuality, but instead, the subject might objectively be determined both by institutions and norms understood as intersubjective constructions of a political community and sociality. On the one hand, Dussel describes the subject as "the absolute material ground of the institution." On the other, he describes the institutions as the realm of intersubjective practices that procure the protection and reproduction of human life. To put it another way, it is to inquiry into the ontological process that starts from an undetermined "will-in-itself," and the social and historical crystallization of the ontological ground from which institutions arise.

For Dussel, it becomes crucial to grasp the moment prior to the concrete emergency of the subject, the ontological moment where a "will-in-itself" appears as undetermined or without empirical existence. Viewed from this standpoint, the undetermined "will-in-itself" is subsumed into the function of a political institution, the political subject is "created as an Other (the Other ("alienated" not in an ethical definition), or determined by this and, thus, not-in-that other way."[398] Dussel examines that precise moment where "the potential political subject has not yet [been] incorporated by any political system" or become functional to the social totality. As Dussel puts it, "All determination is negation, alienation, narrowing our possibilities (those that can no longer be fulfilled due to a certain determination). But, also, all determination is the possibility of the exercise of second-degree of possibilities (those that open up from the new and positive)."[399]

Dussel shows a clear methodical route towards the ontological and normative making of our institutions. He claims that "all definitions must go through a dialectic movement producing an open system of determination which has its own inevitable consciousness."[400] While it is important to keep in mind that, for Dussel, the whole analysis of the political and the legal is entangled with concrete life, from his dialectical perspective it is always crucial to move from the abstract to the concrete, knowing as well that "the abstract form would need to be integrated into the concrete multiple."[401] The concrete multiple is a detailed moment of abstraction that determined the way in which we are immersed in intersubjective networks of multiple relationships. The idea of the 'concrete multiple' is connected with Dussel's most ambitious

[398] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 192. My translation.
[399] Dussel, Enrique D. *Política de La Liberación. Volumen II: Arquitectónica*. p. 192. My translation.
[400] "No podremos por ello tomar ninguna definición como ejemplar. A todas deberemos ponerlas en movimiento dialéctico, generando un sistema abierto de determinaciones que tiene consciencia de su inevitable inacabamiento" Dussel, Enrique. *Política de La Liberación,* p. 25.
[401] "Nuestro método consiste, en este punto, en repetir una otra vez: una determinación puede ser necesaria pero nunca suficiente. Lo abstracto habrá que integrarlo en lo múltiple concreto." Dussel, Enrique. *Política de La Liberación. Volumen II: Arquitectónica*. p. 25.

proposition in his politics and ethics of liberation: the concrete life of each human being. To Dussel, human life is the only last instance of all instances or fields.[402] Dussel implies that the political and legal worlds or fields opens up from the life itself, as "human corporeality," this is as the ontological *desire* of life."[403]

I now consider an opposing view to Dussel's position concerning the relationship between institutions and "the people" as a political and legal normative category. Some scholars, like the Colombian philosopher Santiago Castro-Gómez, may object to the position described above based on assumption that Dussel's philosophy of liberation romanticizes the idea of "the people." Castro-Gómez thinks this because considers that Dussel tends to see exclusively "the 'people' and 'popular culture' as a subject of revolutionary change ignoring the emancipatory potential of modern political institutions."[404] Though Castro Gomez acknowledges that Dussel's political philosophy advances some useful ideas for elaborating a transmodern political project—especially pertaining to the idea of the people's authority—for methodological reasons he parts ways with Dussel's conception of politics and account of constituent power. Questioning the generalizations and the ontological conundrums that Dussel's philosophical orientation allegedly poses to universalism, Castro-Gómez finds Dussel's approach too narrow to adequately grasp the institutionalization of constituent power. In my view, equivocally, Dussel's dialectical (ana-dialectical) account of this relationship between institutions and constituent power is problematic for Castro-Gómez, given that for the Colombian these concepts must serve the aims of a political ontological project based on its "incompleteness."

---

[402] "La política se juega en un campo de relativa autonomía, propio, insustituible, sin última instancia. La vida humana es la sola última de las instancias de todas las instancias o campos." Dussel, Enrique. *Política de La Liberación*. p. 25
[403] "El mundo o el campo político se abre desde la realidad como viviente, como corporalidad humana; se abre desde el fundamento de la vida humana como voluntad, como el querer ontológico de la vida." Dussel, Enrique. p. 52.
[404] Castro-Gómez, Santiago. *El Tonto y los Canallas: Notas para un Republicanismo Transmoderno*. (Editorial Pontificia Universidad Javeriana, 2019). p. 131.

Both Dussel and Castro-Gómez take an interest of reinscribing some modern institutions and values in a transmodern scenario.[405] How can we understand a decolonial model that would reconfigure modern political and legal logics and the return to universals without collaterally bringing back violence and exclusion? In Castro-Gómez's view, the answer to this question lies in the revival of the emancipatory character of modern political rationality, but from a transmodern register. To Castro-Gómez this transmodern register is not a "return" to the values of pre-colonized cultures, but rather he argues would be a decolonized modernity: that is, the "negation of the negation" of European modernity. This means that is transmodernity is not an anti-modern project, but "a critical and emancipatory project against the institutions developed by modernity itself."[406] Moreover, to move forward towards a transmodern scenario entails to accept that the struggles of "colonial subjects" effectively reappropriated the promise of a non-Eurocentric universalism otherwise.[407] One can foresee this decolonial move toward universals already in Castro-Gómez's earlier works. In his book *Revoluciones sin Sujeto*, we find the development of Castro-Gómez's claims to reembrace universality from a decolonial perspective—partly because of his analysis of Slavoj Zižek's rehabilitation of the term as productive notion to emancipatory politics.

Here the political thinking of the Colombian philosopher comes close to Priyamvada Gopal's criticism of decolonial thinking. In her book *Insurgent Empire: Anticolonial Resistance and British Dissent*, Gopal notices precisely that a "disproportionate emphasis on radically different 'categories of thought' obscures the extent to which many 'liberation' struggles were committed to universalism." Gopal's analysis helps reveal new ways to see the relationship

[405] Castro-Gómez identifies at least four institutions distinctively of modernity that need such transmodern reinscription: science, the rule of law, democracy and criticism. Castro-Gómez, Santiago. *El tonto y los canallas*. p. 86.
[406] Here Castro-Gómez is following Dussel's conception of transmodernity closely. Castro-Gómez, Santiago. *El tonto y los canallas*, p. 85, p. 238.
[407] Castro-Gómez, Santiago, p. 198-199.

between particular decolonial struggles and universals. As she describes this relationship with universals "had to be embodied through experience and resistance, not refused as 'European.' This often entailed working with the 'logic of modernity,' decolonizing rather than repudiating it, teasing out its revolutionary promises."[408]

Similarly, without risking losing this kind of universality, Castro-Gómez shows the possibility of bringing to certain versions of decolonial commitments the idea of disputing state institutions without necessarily appealing to ontological and normative claims about a historical unitary transcendental subject to renew our faith in an upcoming revolution. This entails non-adherence to the presupposition of a collective subject (the "people") as a mode of being or representation of a historically privileged form of legitimation to transcend the constituted political and legal order. The core issue here is his focus on the role of universality as a political and legal criterion that allows us to challenge the human/non-human distinction between 'subjects' in metropolitan societies and 'non-subjects' in colonial territories. Ultimately, Castro-Gomez seeks to elaborate categories that take issue with the very conditions of formation of subjects and account for the division between those who have access to public goods and 'those who have no part,' and are cast aside without access to any public distribution.[409] As he puts it, "[R]ather than accepting the market's erosion of the emancipatory pole, and the impossibility of extending it towards the 'zone of non-being,' we should instead rehabilitate the short-circuit between the universal and the particular through which the people is democratically constructed, because here lies the possibility of developing a progressive republicanism."[410]

[408] Gopal, Priyamvada. Insurgent Empire: Anticolonial Resistance and British Dissent. (London: Verso, 2019). p. 83-84.
[409] Castro-Gómez, Santiago. *El tonto y los canallas*, p. 191-197.
[410] Castro-Gómez, Santiago, p. 198.

Let us examine more closely Castro-Gomez's ideas on how *el pueblo* is democratically constructed. He offers the "refunding the modern state" in Bolivia's and Ecuador's constitutional experiences at the beginning of the 21st century as exemplary of the plebeian transmodern experience. These constitutional processes recognized both the place of republican ideals embodied through the experience of the operation of abstraction, and how the latter is concretized through an institutionalization of collective action. According to Castro-Gómez, the new constitutionalism of Bolivia and Ecuador illustrate how the people "performatively appropriate the principle of equality," demonstrating the upshots of using a counter-hegemonic modern republican principle to advocate for anticapitalistic-logics, that is, new forms of redistribution of material, social, political, and cultural goods. These experiences were grounded, he argues, in the presupposition that equality is the democratic principle invoked by those who are "a part without part."[411] Thus, their demands are not linked to their difference, but to their unequal concrete conditions from the equality invoked by the democratic universality of their respective Constitutions.[412] Consequently, a decolonial emancipatory politics is premised on the need for the "universalization of particular interests" in order to combat the unequal character of capitalist societies.

Yet emphasizing the conceptual and political strategy of shaping a universality through particularity opens contentious issues. For example, one critical concern comes from a decolonial feminist critique in the specific case of Bolivia. Some feminist scholars and activists such as Raquel Gutiérrez and Silvia Rivera Cusicanqui question this kind of republican discourse. Apart from whether or not this discourse can reconfigure universality to values such as "equality" or

[411] Castro Gomez's here follows Jacques Rancière's notion of 'those that have no part.'
[412] Castro-Gómez, Santiago, p. 80.

"freedom," the transmodern republican discourse, they claim, uncritically appeals to values that have served to reinforce patriarchy. They argue that this discourse fails to interrogate the sexism that fundamentally runs through even the (re)appropriation of these political and legal values.[413] Under a similar line of criticism, there are other set of concerns that extent more specifically to the ontological dimension of building this universality vis-à-vis the reconsideration of the philosophical category of 'constituent power.'

In Castro-Gómez´s framework, contrary to Dussel´s approach, such (re)appropriation cannot refer to a fundamental foundation. This distinction demonstrates the central difference between Dussel´s dialectical fundamental political ontology and what Castro-Gómez (following Žižek) calls the ontological incompleteness of the political. In my own interpretation, Dussel's idea of dialectics of concepts offers a different picture of such ontological "incompleteness" by attempting to preserve the possibility of a totality that resist closing. He claims that "all definitions must go through a dialectic movement producing an open system of determination which has its own inevitable consciousness."[414]

Dussel's normativity offers a better way to understand Castro-Gomez's demand of reconstructing our republican institutions and identifying the ontological nexus between the rule of law and constituent power. Dussel's political ontology builds a better critical understanding of how *el pueblo* becomes a 'dialectical complementarity' that allows for the institutionalization of its liberatory political structures exemplifying in the movement mentioned above between the multiple and the concrete. Specifically, Dussel offers an alternative criterion of orientation to

[413] See for instance, Aguilar, Raquel Gutiérrez. Rhythms of the Pachakuti: Indigenous Uprising and State Power in Bolivia. Duke University Press, 2014; Cusicanqui, Silvia Rivera. Ch'ixinakax utxiwa: una reflexión sobre prácticas y discursos descolonizadores. Tinta Limón, 2010.
[414] Dussel, Enrique D. Twenty Theses on Politics. (Durham: Duke University Press, 2008). p. 25.

transform the institutions and organs of the state and not simply use them "as an instrument of domination (even against the classes and groups of the old regime)."[415]

At this point, let me conclude by returning to my initial aim to challenge Castro-Gomez's interpretation of Dussel's conceptualization of the people. Castro Gomez's claim that Dussel's construction of the category of the people stems exclusively from ontological generalizations that fail to reckon with Dussel's overall normative project of a philosophy of political liberation. As I have argued, Castro Gomez's emphasis on the necessity of developing a political common sense that revitalizes plebeian republican values would actually benefit from attending to Dussel's political and legal normative understanding of the people. Dussel's normativity regarding 'the people' in connection with the notion of 'constituent power' as the site of permanent contestation for legal liberation, can accelerate the transformation of law's values down to its affirmation of the exteriority of the people; elucidating more concretely the particular interests of the marginalized from the vantage point of the "concrete multiple." I would argue that Dussel's conception of ana-dialectics does not presume and end point or closure but remains as dialogical interplay between the particular and universal or the concrete and abstract remain open and mutually responsive.

Moreover, it is precisely the connection between the philosophical ideal of the rule of law and the category of "the people" that bears significantly on the possibility of positing alternative institutional arrangements. Rejecting the dichotomy of the oppressive and arbitrary bureaucratic structures of law and the collective power of the people as a negative and unlimited space of freedom, Dussel presents a model that offers other forms of institutional mediations that bring together the rule of law and the constituent power force into political life. I contend that, by mobilizing Dussel's legal position about the formation of "the people," it is possible to flesh out a

[415] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*. Vol. 2. p. 35.

philosophical ground that aims to make good a *transmodern* model of making institutions from people's claims and demands through. I will argue in next chapter that the philosophical basis of Dussel's model consists of the combination of a normative and ontological understandings of institutionalization of constituent power, emerging from the material content and the experience of its mode of collective appearance in the political world in the form of want I call, as a category of interpretation of Dussel's work, '*living legality*.'

CHAPTER 5
LIVING LEGALITY AND THE IRRUPTION OF THE PEOPLE: AN INTERPRETATION OF DUSSEL'S LEGAL PHILOSOPHY OF LIBERATION

Our inquiry opened with a series of interpretative claims about the ways to trace the legal dimension in Dussel's political philosophy of liberation. From there, I engaged with Dussel's account of law and constituent power (*el pueblo*) in order to offer an interpretation of Dussel's legal philosophy in terms of its relation with a project of legality that protects the material life of the people.[416] Dussel's liberation philosophy puts forward an account of law conducive to a normative and ontological connection between "the people" as the living agent of constituent power and institutional frameworks in which life is the ultimate material criterion. This line of interpretation grounds the political and legal dynamic of Dussel's praxis of liberation. To continue to mobilize this line of inquiry of Dussel's legal philosophy, and take my intervention a step further, I conclude this dissertation by elaborating Dussel's conception of legality and how it addresses the tension between various decolonial critiques and his apparent valuing of the law. In contrast with the unthematized role that legality plays in some strands of decolonial thought, in this final chapter, I provide more evidence for the possibility of reading Dussel as a decolonial legal philosopher and delineate the ways in which he crystalizes his legal thought through the concept of *living legality*.

In order to reintroduce the notion of living legality, I want to begin by highlighting the aspects of Dussel's work that are foundational to this concept. One of the main aspects of this category of living legality is facing up to the tension of a normative discourse of legality and

[416] "The immediate life of which we are speaking needs to be recovered from Marx's position, and it is directly related to a theory of needs. Indeed, the living being must constantly restore natural elements that metabolically are incorporating into his organism, that is, a living being that needs to refill life itself as an activity consumes. Life, thus, produces productive consumption; life itself as production." Dussel, Enrique D. *Política de La Liberación. Volumen II,* p. 458. My translation.

institutions that inevitably reimports a crucial element of the coloniality of power, the colonial seeds of hierarchy, domination, violence, and oppression of law. Contrary to this view, throughout my reconstruction and interpretation of Dussel's political and legal thought, I have insisted that his conception of legality relies on a specific ontological and normativity expression of power and authority of the people for transformation and creation of institutions with the vision to affirm the material protection of human life. While Dussel's conception of law (described in Chapter 3) seeks to provide a basis for the development of his philosophy of the law of liberation, the elaboration of the idea of living legality in this chapter aims to consider the place of certain elements to which such conception of legality can be interpreted and organized at Dussel's fundamental conceptual level of his politics of liberation.

In the first section, I return to some versions of decolonial critique, rooted in the framework of the coloniality of power to explore some lines of inquiry of decolonial thought regarding normativity. I then consider what Dussel's philosophy intends to offer in response. Moreover, I bring two methodological elements, *anadialectics* and *hyperpotentia*, which as I will argue, are key to deriving the concept of living legality from Dussel's philosophy of liberation. My aim in the first section, is to focus on Maldonado-Torres's critique of Dussel in order to tease out some elements against the normative basis of our interpretation of Dussel's philosophy as justifying "a sort of dogmatism or into a problematic foundationalism."[417] I argue that Maldonado-Torres's inference that Dussel's thinking rejects phenomenology (in order to take the perspective of a normative account of the genesis of the Other) ignores Dussel's commitments to normativity. In contrast with Maldonado-Torres, I show the centrality of reading Dussel's work in a normative

[417] Maldonado-Torres, Nelson. *Against War: Views from the Underside of Modernity. Latin America Otherwise*. Durham: Duke University Press, 2008. p. 17.

and dialectical manner. I argue that, from this line of interpretation, it is possible to trace the methodological aspects of his philosophy of liberation in order to elucidate the connection between Dussel's idea of *el pueblo* and the concept of living legality. In the second section, I sketch the insights I have been exploring in the previous chapters before proceeding to explain the stakes and plausibility of the main concept of living legality I want to elaborate on my interpretation of Dussel's legal dimension. Finally, in the last section, I present, in three steps, the cluster of elements that make up the concept of living legality: 1) Dussel's normative commitments; 2) the central notion of *el pueblo* as foundational category of the philosophy of liberation; and 3) the notion of living corporality.

An Anti-Normative View Against Dussel's Philosophy

In this section, I examine the anti-normative view of Dussel's philosophy of liberation offered by Nelson Maldonado-Torres. Maldonado-Torres's anti-normative and undialectical understanding of Dussel's philosophy shows Dussel's formulation of his normative conception of legality. I argue that, by failing to adequately account for normativity, these anti-normative decolonial strands also undertheorize the possibility of a new social and political order from a decolonial perspective. In the following section, I would like to consider Maldonado-Torres's reading of Dussel's philosophy and the critique he levels against Dussel's articulation of normativity. However, rather than expanding our normative concepts and commitments, there has been an opposite tendency to rearticulate the importance of normativity in decolonial terms.

The decolonial philosopher Lewis Gordon identifies the anti-normative position in prominent decolonial scholars like Quijano and Mignolo. As Gordon rightly observes, both Quijano and Mignolo conceptualize coloniality as a form of power that is predicated on the form of an "epistemic" colonization only. Gordon considers how such a form of coloniality is implicated

in both the conquest of our epistemic reality and the broader scope of the colonization of norms and normative thought itself. He argues that a suitable task of decolonization requires a more comprehensive and serious theorization.[418] However, in spite of the social and political reality that shows us the necessity to inquire about the coloniality of law and norms and the institutional responses under which it is possible to think normativity from a decolonial perspective, somehow decolonial thought lacks sufficient theorization. As Gordon notes, we are continuously relating to each other in the world in ways in which it is necessary to question our "normative capacities" to create new norms, values, and political procedures. As he argues, the task of decolonial political philosophy, must face "the challenge, expand our concepts, and build new sets of normative relations attuned to a world where justice, in the end, is not enough."[419]

In *Against War: Views from the Underside of Modernity* Maldonado-Torres articulates the connections between the work of Levinas, Fanon, and Dussel proposing a "parallel and complementary" project to Dussel's philosophy of liberation.[420] In that sense, Maldonado-Torres attempts to expand the link between ethics and politics. For Maldonado-Torres, such a link assumes that there is another way of thinking about how to counteract what Maldonado-Torres calls the modern "paradigm of war and violence."[421] In Maldonado-Torres's perspective, this paradigm produces a pervasive "death ethic of war." This ethic of war, according to him, is deeply

[418] Gordon, Lewis R. "When Justice is not Enough: Towards the Decolonization of Normative Life," In, Bragato, Fernanda Frizzo, and Gordon, Lewis R. *Geopolitics and Decolonization: Perspectives from the Global South*. Global Critical Caribbean Thought. London, [England] ; Rowman & Littlefield International, 2018. p. 32.
[419] Gordon, Lewis R. "When Justice is not Enough," p. 45.
[420] Maldonado-Torres, Nelson. *Against War: Views from the Underside of Modernity. Latin America Otherwise*. p 236.
[421] As Maldonado-Torres observes, the consequences of the naturalization of this paradigm not only refers to a continuous state of affairs where is normal the exercise of war. Rather, as he clarifies, "the term here, the naturalization of war involves a qualitative change that makes even ordinary life take the form of a selective suspension, or even a reversal of ethics as normally understood. This suspension is premised on ideas of natural difference that render some subjects or populations not only dispensable but excessive and necessarily *eliminable*." Maldonado-Torres, Nelson. *Against War,* p. xii.

linked with the juridico-political project of colonization, racism, and the different dynamic of exclusion and oppression characteristic of the geopolitical expansion of modernity.[422] As Maldonado-Torres puts it, "Colonialism, or better put, coloniality (of power, knowledge, and being) is the spinal cord, as it were, of the modern paradigm of war."[423] It is against this dominant paradigm, in which human relationships are determined by mere relations of objectification, through which Maldonado-Torres's aims to respond to the link between ethics and politics.

The interrogation of such a link between ethics and politics assumes not a normative stance, but predominantly phenomenological. In fact, Maldonado-Torres rejects Dussel's general features of normativity in his philosophy of liberation as he consider that Dussel expresses in terms of a symptomatic problem of "technical vocabularies,"[424] common, for example, to some strands of transcendental philosophy that, according to Maldonado-Torres, tend to "encapsulates the totality of human experience"[425] beyond the concrete level of social and political struggles, and thereby, making very problematic its application to any concrete reality to lived experiences.[426] For him, ultimately, Dussel's discourse "gains normative force a priori" because he portrayed himself as the Other.[427] This kind of normativity leads Dussel's thinking, according to Maldonado-Torres, to repeat "the gesture of the master" which only seeks "in legitimizing his own discourse a priori."[428] This anti-normative position toward Dussel's philosophy implies other important critiques to his methodological approach. Indeed, for Maldonado-Torres, it is possible to identify Dussel's problematic articulation of the category of exteriority. In Maldonado's interpretation, while

[422] Maldonado-Torres, Nelson*, Against War.* p. 4.
[423] Maldonado-Torres, Nelson, p. 239.
[424] Maldonado-Torres, Nelson, p. xiii.
[425] Maldonado-Torres, Nelson, p. 177.
[426] Maldonado-Torres, Nelson, p. 183.
[427] Maldonado-Torres, Nelson. p. 183.
[428] Maldonado-Torres, Nelson, p. 183.

Levinas's conception of exteriority unfolds in the form of alterity of the Other as *qua* Other—that beyond Being or essence that highlights difference—but never visible as a ground but facing up always as "a source of destabilization," and thereby, "can only inspire a critical philosophy of reduction."[429] Maldonado-Torres discusses this conception of reduction in terms of Levinas's understanding of the term. In *Totality and Infinity*, Levinas defines this term in the following phenomenological terms: "The breakup of the formal structure of thought (the noema of a noesis) into events which this structure dissimulates, but which sustain it restore its concrete significance, constitute a *deduction*—necessary and yet analytical."[430] It is in fact this particular category on the background of Levinas's ethics, that Maldonado-Torres questions Dussel's rejection of a phenomenological approach. Maldonado-Torres's criticism consists of arguing that Dussel, largely cannot go beyond "the realm of genetic considerations," neglecting therefore the experience of social reality.

According to Maldonado-Torres, it becomes hard not to see the problematic appropriation of Levinas by Dussel's high level of abstraction. In his view, Dussel commits two interrelated errors of interpretation of Levinas's ethics. First, the idea that Dussel, by assuming that Levinas's account of the Other in exteriority can be use directly to understand geopolitical issues, he inevitably deploys an anti-Levinasian position. "For Dussel," Maldonado-Torres writes, "the Other becomes first a concrete subject, then a certain people with a history, and finally *myself*, that is, the poor of Latin America and the philosophy of the periphery. For Levinas, in contrast, the Other qua Other is *always* other than myself."[431] Dussel also fails, according to Maldonado-Torres, to grasp Levinas's foundationalism—obscuring the distinction between "trans ontological and sub-

[429] Maldonado-Torres, Nelson*, Against War.* p. 181.
[430] Lévinas, Emmanuel. *Totality and Infinity: An Essay on Exteriority*. Martinus Nijhoff Philosophy Texts; v. 1. Pittsburgh: Duquesne University Press, 1969. p. 28.
[431] Lévinas, Emmanuel. *Totality and Infinity: An Essay on Exteriority*. p. 183.

ontological alterity."[432] By not retaining this distinction, Maldonado-Torres argues that Dussel is wrong in the central tenet of his philosophy of liberation in trying to consider the Other as "the ground for the articulation of a new philosophy."[433]

At this point, I'd like to elaborate on these two critiques of Maldonado-Torres: first, the idea that Dussel confuses the application of Levinas's metaphysical categories means that Maldonado-Torres finds problematic Dussel's conception of how the Other is constructed by virtue of his normative *a priori* discourse. As Maldonado-Torres argues, for Dussel the Other is the oppressed. Dussel identifies the Other with a history that transcends its individuality, and thus, it is constructed or understood as part of "the people." According to Maldonado-Torres, what distinguishes Levinas's analysis of the Other from Dussel's approach are the ideas that the Other always intervenes in its own existence and that the Other "is always already disturbing and dislocating the contentment of the self. The Other becomes a continuous source of destabilization. That is why the Other in Levinas never becomes a ground and can only inspire a critical philosophy of reduction."[434] This reduction is not given any normative *a priori* articulation to the Other in Maldonado-Torres's approach—contrary to Dussel's terms in which the Other exists as the oppressed and poor. Instead, according to Maldonado-Torres, it is necessary to make the Other appear in the context of their lived experience. That is why he insists that subordination, oppression, and suffering always requires an enquiry "into the lived experience of those involved."[435]

---

[432] According to Maldonado Torres this distinction refers between Being (trans-ontological) and that to which its very being is denied (sub-ontological). He argues that such distinction, ultimately, "highlights the appearance of the non-being/non-Other, or what I would refer to as the sub-alter. The sub-alter is not the Other qua Other, not even the alter ego—the Other like myself—but that "other" that is no-Other; it is not the irreplaceable and loved, or the replaceable and respected other, but the eliminable Other." Maldonado-Torres, Nelson. *Against War: Views from the Underside of Modernity. Latin America Otherwise*. p. 182.
[433] Maldonado-Torres, Nelson. *Against War: Views from the Underside of Modernity,* p. 183.
[434] Maldonado-Torres, Nelson. *Against War*, p. 181.
[435] Maldonado-Torres, Nelson. p. 182.

I now move to Maldonado-Torres's second critique, namely that Dussel's reflections on normativity leads him to make the mistake of using the Other as the ground for his articulation of the foundations of philosophy of liberation. From my perspective, against Maldonado-Torres's interpretation, the acknowledgement of this normative connection may be framed better to understand Dussel's thinking by focusing on the relationship between Dussel's analectical method and the configuration and enduring strength of *el pueblo*. Building my interpretation upon this methodological relation, it is possible to see the effect of understanding a key aspect of Dussel's foundational framing, and to identify how such a relation highlights how Dussel's foundationalism cannot be sustained without drawing from his own understanding of phenomenology. As Dussel insists, "the mere phenomenological categories, are not sufficient in political or economic philosophy."[436]

In chapter 1 and chapter 2, I showed how such a phenomenological approach is conceived in Dussel's legal thinking through combining Bartolomé de las Casas with a general semitic approach to law. In what follows, I show how Dussel's method of analectics supports the philosophy of liberation through its articulation of *el pueblo*, which is always placed dialectically in exteriority, the realm where "other persons, as free and not conditioned by one's own system and not as part of one's one world, reveal themselves."[437]

Dussel's philosophy of liberation finds its methodological point of departure through the analectical method (ana-dialectical method).[438] As he acknowledges in the prologue of *Método*

[436] Dussel, Enrique D. "'The Politics' by Levinas: Towards a 'Critical' Political Philosophy" In Horowitz, Asher, and Gad Horowitz. *Difficult Justice: Commentaries on Levinas and Politics*. Toronto: University of Toronto Press, 2006. p. 84.
[437] Dussel, Enrique *Philosophy of Liberation*, p. 40.
[438] Dussel start developing this methodological discussion of his dialectical methods from 1972 to 1974 in his seminars at the Philosophy department of Universidad de Cuyo in Argentina. As Dussel explains, his examination of Hegel's dialectics aimed first to develop the basis of a critique of a Heidegger's totalizing ontology. Drawing on Hegel's dialectics, he seeks to open his philosophical thinking to the realm of the metaphysical alterity. Dussel, Enrique D.

para una Filosofía de la Liberación: Superacion Analectica de la Dialectica Hegeliana, the analectical method allows the philosophy of liberation to depart from its thinking about the alterity of Latin American's history and political reality. As George Ciccarielo-Maher observed of Dussel's aim to decolonizing dialectics, his "commitment to concrete struggles generates analectically enriched dialectics, one that draws upon exteriority as its source does not find its motive force in the dynamic movement of oppositions."[439] Dussel's method entails a specific reformulation of Hegelian dialectics. It seeks to discuss the "false" Eurocentric understanding of dialectics that functions as a "movement of domination and conquest;" a method that is conditioned by the system itself in which the Other only appears only as the colonized subject.[440] He characterizes Hegelian dialectics as a "process of movements," (from the abstract to the concrete) with three fundamental negative qualities beyond which the philosophy of liberation must go. According to Dussel's critique, dialectics "is the path that the totality takes in itself; from the entities to the foundation and from the foundation to the entities;" it "unfolds as the expansion of domination of the totality itself;" and lastly, "the point of departure of a true dialectics (there is, then, a false) is dialogue with the other and 'not the solitude of the thinker within himself."[441] In search of a method proper of the philosophy of liberation, Dussel argues for a dialectics that transforms the totality of the Eurocentric system of concepts into a project of the Latin American people, one in which the "dialectician deals with any issue starting from the common sense of the people."[442]

Método para una Filosofía de la Liberación: Superación Analectica de la Dialéctica Hegeliana. (España: Salamanca Ediciones, 1974).

[439] Ciccariello-Maher, George. *Decolonizing Dialectics*. Durham: Duke University Press, 2016. p. 113.

[440] Ciccariello-Maher, George. Decolonizing Dialectics. p. 182.

[441] Dussel, Enrique D. *Método para una Filosofía de la Liberación.* p. 182.

[442] Dussel argues, "Dialectics is part of everyday life. It is an existential understanding or an historical appearance. For us it consists of the fact of being Latin Americans." Dussel, Enrique D. *Philosophy of Liberation*, p. 23. My translation.

This approach provides Dussel's philosophy with a new ground to establish a method that considers the ethical dimension. The common sense of the people, as a given identity of a political and historical formation, is projected as the ontological positive foundation that aims to overcome the negative movement of the system that denies the Other. Against the three negative qualities mentioned above, Dussel offers analectics as a positive vantage point for thinking dialectically about the Other. From an ethical perspective, Dussel emphasizes the possibility for interpreting the Other both from an positive ontological domain, and as well from a praxis of liberation that seeks to ensure a sense of justice for the oppressed people in the exteriority of the system of domination.[443] As he critically observes in the *Philosophy of Liberation* the analectical method consist in recognizing that every person or people is always "beyond (*ano*) the horizon of totality," opening up to "the metaphysical sphere […] referring us to the other. Its proper category is exteriority" and its "principle is not that of identity but of separation, distinction."[444] Dussel's critique seeks to account for a positive method through which is possible to go beyond the understanding of the Other in terms of its lack of recognition in exteriority—contrary to the negative expression of the foundation of totality on which identity and difference work. Dussel explains analectics as "a method (or the explicitly determination of the conditions of possibility) that departs from the Other as free beyond the system of totality; it departs then from the Other's words, from the revelation of the Other, trusting in the Other's word one can act and create."[445] In other words, Dussel suggests his method as a way to develop a new conception of freedom through which the conditions of possibility of the recognition of the Other may respond to another context

[443] Dussel, Enrique D. *Philosophy of Liberation*, p. 184.
[444] Dussel, Enrique D. p. 159.
[445] Dussel, Enrique D. *Método para una Filosofía de la Liberación.* p. 182. My translation.

different from oppression and domination sustained by the totality. In this sense, analectics points us to think positively of the Other, from the Other.

As mentioned above, Dussel proposes the common sense of the people as a point of departure through which his critique of the Hegelian dialectics finds a positive anchor. Moreover, at a fundamental level, Dussel understands this positive ground in ethical and anthropological terms. In this respect, he sees analectics as a way to affirm "an anthropological moment for justifying a philosophical, metaphysical, ethical, or alterative thinking."[446] In Dussel's view, the analectical movement allows us to describe "first, the anthropological status of the Other, and second, the methodological conditions that enables the interpretation of such status."[447] This move of Dussel's has the potential to open onto "an anthropological ethics or to a metaphysical sense of history."[448]As Dussel argues, if the Other reveals itself in relation to a new dialectical comprehension of such anthropological status, and if the task of the dialectician deals with the common sense of the historical specificities of the identity of the people, it follows, that the philosophy of liberation goes beyond a totalizing ontology of the Other.

Dussel draws on Levinas's work deeply, to establish the ethical relationship with the Other that is sustained through the conditions of Dussel's articulation of the analectic method. While it is clear Levinas's ethics is important through all Dussel's work, specifically because of his understanding of dialectics, we can also see the differences between Dussel's and Levinas's approaches to dialectics regarding the comprehension of the Other.[449] Let me highlight two key differences concerning Dussel's category of the Other as presented in Maldonado-Torres's

[446] Dussel, Enrique D. *Método para una Filosofía.* p. 176. My translation.
[447] Dussel, Enrique D. p. 176. My translation.
[448] Dussel, Enrique D. p. 176. My translation.
[449] See Dussel, Enrique D. and Daniel Guillot. *Liberación latinoamericana y Emmanuel Levinas*. 1. edición. Buenos Aires: Editorial Bonum, 1975.

interpretation: On the one hand, that the Other is seen within Levinas's approach as the "absolute Other" and, on the other hand, as the Other is absolutely incomprehensible, makes it difficult from Levinas's view to provide any vision in which the Other can emerge as the ethico-historical subject to transform a political order. First, Dussel argues that while Levinas speaks of the Other as the "absolute Other," previous to any totality—setting out its comprehension beyond any ground—Levinas misses the point of thinking that the Other is also the indigenous, the Asian, the African, etc.[450] In contrast to Levinas, as Dussel stresses, the Other is primarily […] Latin Americans in relation with the European totality; it is the oppressed people from Latin America that are excluded by the oligarchies which are heavily dependent of the poor."[451] Dussel makes clear that Levinas lacks the historical openness to the idea of the Other conditioned by its freedom in exteriority. This entails to underline the historical specificities prior to any theorization against the totalizing understanding of the Other. From Dussel's point of view, the Other never appears as "one," but always as a "we." Against Levinas, Dussel argues that the face-to-face is first like the "the epiphany of a family, of a class, of a people, of an era of humanity and of humanity itself as a whole."[452] Put it in other terms, "The face of the other, primarily as poor and oppressed, reveals a people *before* it reveals an individual person."[453] As Dussel highlights, the importance of the analectic method departs from a material and historical view of the people and does not exclusively present itself as theoretical. The analectic method operates in opposition to Levinas's absolute understanding of the Other, as an a priori historical-material and ethical recognition of the other.

The second difference that I want to highlight refers Levinas's de-politized approach that led to a lack of seriously consideration of the historical and material conditions of the existence of

[450] Dussel, Enrique D. *Método para una Filosofía de la Liberación.* p. 181. My translation.
[451] Dussel, Enrique D, p. 181. My translation.
[452] Dussel, Enrique D, p. 182. My translation.
[453] Dussel, Enrique D. *Philosophy of Liberation*, p. 44.

the Other. In this sense, Levinas ignores the possibility of adopting a political and legal attitude towards the Other which, then, results in a complete withdrawal of a critical political philosophy from the vantage point of the Other. This critique against Levinas is best captured at the beginning of Dussel's work *Hacia una Filosofía Política Crítica.* Dussel writes:

> Levinas was caught in an ethics of absolute responsibility for the Other, but he could never think about how to "give bread to the hungry, a home to the homeless, a new political system to the excluded […]. Levinas did not want to "get his hands dirty" in building any totality "for the Other." In this sense, his politics never went beyond recommendations, and for this reason, he could never be considered the poor Palestinians in Israel as the political "Other."[454]

Here it is important to notice the significance of historical and material conditions as the source of the connection between a liberatory ethical praxis and a political-legal normativity that goes deeper than describing only a totality that negates the Other. Not only is it necessary for the liberatory praxis to engage normative commitments that guide the ethical and politico-legal praxis towards the Other; but, in order that that the Other would effectively arise as Other, requires us to begin a historical and material ethical point of departure. That is, the claim of *a priori* obligation, as Dussel notes in the quote above, is to provide for the needs of those who, for example, are hungry, housing to those who are homeless, or a dignified life to those who are oppressed and exploited.

As Dussel argues more emphatically, this lack of awareness of the normative content of the material conditions, which informs our disposition towards the Other, is the reason why he parts ways with Levinas's approach. "The philosophy of Liberation," Dussel writes, "breaks with Levinas because of the necessity to think critically the responsibility towards the vulnerability of the Other as part of the task of shaping a new order."[455] Going back to Maldonado-Torres interpretation, it is in the context of seeking to shape a new political and social order in the image

[454] Dussel, Enrique D. *Hacia una filosofía política critica*. 1st Edition. Bilbao: Desclée De Brouwer, 2002. p. 12. My translation.
[455] Dussel, Enrique D. *Método para una Filosofía de la Liberación.* p. 445. My translation.

of the Other (as the oppressed), that he sees in Dussel's normativity a problematic move. On the one hand, not only does he think that Dussel displaces Levinas's phenomenological approach capable of examining properly "the world of subordination;" but, on the other hand, also make clear the depiction of Dussel's philosophy as a "dogmatic and arrogant" because of the way it requires him to cast his normative commitments by "portraying the role of the Other himself."[456]

However, by neglecting Dussel's normative commitments, in my view, Maldonado-Torres makes three missteps in his understanding of Dussel's thinking. First, that the historical *a priori* reconstruction of the configuration of the Other enables Dussel's normative determination to speak in the name of the Other; second, that Dussel's association with normative principles opens the path to his abandonment of phenomenology; and finally, that such theoretical distance from phenomenology, and instead, a proximity to normative principles, bring him more closely to the "totalizing European modern thought."[457] The first misstep in Maldonado-Torres's analysis has to do with his claim that when Dussel speaks of the Other, he is speaking in the voice of the Other. In Dussel's philosophy of liberation there is no sense at all of speaking *on behalf of* the Other. In fact, as Dussel clearly insists, the "philosopher of liberation neither is a "representative" of anyone nor does he speak on behalf of others."[458] Contradicting Maldonado-Torres's interpretation, what Dussel has in mind for the philosopher of liberation, and eventually their normative commitments, is someone with the responsibility to fight for the Other and their situated ethical consciousness—predicated on a recognition of the material conditions that produce subordination and oppression.

A second misstep focuses on Dussel's alleged rejection of phenomenology. Even though it may seem insightful to follow Maldonado-Torres's claims about a phenomenological approach

[456] Maldonado-Torres, Nelson. *Against War: Views from the Underside of Modernity,* p. 183.
[457] Maldonado-Torres, Nelson. *Against War*. p. 184.
[458] Dussel, Enrique D. *Hacia una filosofía política critica*, p. 445. My translation.

and what it might enable in order to explain forms of oppression and dehumanization of the Other, missing Dussel's normative side we also risk creating an account that cannot grasp more broadly the historical and material conditions of oppression. If there is in operation a grand Eurocentric universal narrative, as it is generally assumed by decolonial thinkers, still, its existence does not justify a praxis of liberation on the basis of lived experience. A praxis of liberation, as Dussel insists, demands that we should also attach political and legal normative principles that can enable the categories of such praxis to allow for the articulation of a new order—a social, economic, legal, and epistemic order. By confining normativity, as Maldonado-Torres argues, to a circular "gesture of the master," the problem of the explicit forms of violence is further concealed. It can be produced by such narratives of the "master," rather than being solved by them. Denying the importance of normativity for a praxis of liberation is a serious mistake. Instead, the core of the argument is that normativity somehow cannot be denied—within the frame of Eurocentric philosophy—whereas that possibility remains negated or undertheorized in a political and legal context when speaking for the emancipatory interests of the people as demonstrated in Chapter 4.

Maldonado-Torres' third misstep lies in the fact that Dussel's normative principles can also be read from outside the Eurocentric totality by considering the analectical method itself. In order to see that Dussel's approach has something unique to contribute to the efforts of reflecting on normativity from a decolonial perspective, it is important to recognize the analectical form through which Dussel conceives such normativity, which Maldonado-Torres questions but does not acknowledge in his critique. Indeed, Maldonado-Torres provides us with an undialectical reading of Dussel's work. This means that within such a line of interpretation, the Other is always conceived as an identity, but never within the framework of the principles of "separation and distinction," both principles emphasized by Dussel's thought.

Dussel's formulation of the analectical method makes clear how the Other appears as distinct from and in relation to the totality. The methodological moment of the analectic that we explored earlier—the characterization of the analectical moment as opening us to the exteriority of the Other—is the beginning in Dussel's approach of considering the Other as free to self-rule, as free to choose to think of its own mediations.[459] This version of the analectical moment means that the " other is the exteriority of all totality," and "Others are other insofar as they are exterior to the totality (an in this same sense they are suppliant human faces–persons). Without exteriority there is neither freedom nor personhood."[460] Therefore, the recognition of the Other as Other entails the negation of identity and requires (as Dussel argues) the excess of freedom of the Other, of alterity, within which the affirmation of such exteriority enables the Other to create "the *new*, what has not been foreseen by the totality, that arises from freedom that is unconditioned, revolutionary, innovative."[461] The analectical moment in Dussel's work reclaims, through the affirmation of the exteriority of the Other, the universality of the Other's freedom and the conditions of possibility through which people might create a new order.

At this point let me conclude this section by considering what is at stake in my interpretation of Maldonado-Torres's anti-normative analysis and how it might lead us to the concept of *living legality*. Thus far we a have examined a recurrent theme in certain contemporary decolonial thought related with the problem of normativity—which is arguably presented in Dussel's work as a sort of dogmatism or a problematic foundationalism. Maldonado-Torres's reading of Dussel deserves consideration because it illustrates the error of describing the issue of normativity as departing substantially from the concrete experience of the dominated subjects. On

[459] Dussel, Enrique D. *Philosophy of Liberation*, p. 44.
[460] Dussel, Enrique D. *Philosophy of Liberation*, p. 45.
[461] Dussel, Enrique D. p. 159.

this reading of Maldonado-Torres, to be committed with normative principles as we shown, seems to be negatively associated with Eurocentric universal abstractions, ruling out the significance of lived experience or people's actual political struggles.

The problem of Maldonado-Torres's approach, and holding up to Levinas's existential phenomenological side only, misses the necessity for the philosophy of liberation to establish normative principles. As we demonstrated in Chapter 3, Dussel insists that normative principles are "limits" that animate the space of the political and legal for the praxis of liberation.[462] By emphasizing only the negative aspects of the experiences that testified against dehumanization, Maldonado-Torres forgets the need to indicate the necessity of normative assumptions to dismantle the order of oppression and create a social system anew. This affirmation of a new order and the normative oriented principles for such praxis of liberation is one of the main concerns of Dussel against Levinas's work that Maldonado-Torres completely overlooks. As Dussel observes, Levinas's phenomenological approach is incapable of articulating "how to build an economic order for the poor, how to reconstruct the structure of the law in a political order that functions as a closed totality."[463] Or as Dussel concludes, "Levinas is the genius of negativity, yet he cannot articulate a positive architectonic of the mediations in favor of the Other. Phenomenology should be 'mediated' by categories belonging to other epistemic disciplines."[464] Both Levinas and Maldonado-Torres cannot go beyond a negative critique because they both fail to present analytically "the positive construction of the 'new' Totality."[465] In other words, by overemphasis on taking up Levinas's phenomenological approach against Dussel's analectical method,

[462] Dussel, Enrique D. *Hacia una filosofía política critica*, p. 9-10.
[463] Dussel, Enrique D. "The Politics' by Levinas: Towards a 'Critical' Political Philosophy," p. 80.
[464] Dussel, Enrique D. "The Politics' by Levinas," p. 81.
[465] Dussel, Enrique D. "'The Politics' by Levinas: Towards a 'Critical' Political Philosophy," p. 88.

Maldonado-Torres ends up displacing the possibility of eventually using other normative categories that could help to shape a liberating praxis that could create a new order.

Further differentiated from the view of Maldonado-Torres, Dussel's liberation philosophy continually recognizes the connection between normative categories and lived experiences. For example, as I have examined in Chapter 3 and Chapter 4, Dussel's relationship between law and *el pueblo* centers the attention on that precise unification of the lived experience of social movements and the unification of their power to create new institutions or rights. My claim is that such unification makes sense in Dussel's work, and that it can be displayed by offering the concept of living legality as an interpretive framework that makes it easy to grasp the connection between normativity and people's struggles against domination and exclusion.

Closing the Interpretation Circle: Dussel and the Legal Dimension of Philosophy of Liberation

At this point, it is important to recall what we have mentioned throughout this dissertation regarding the reluctance of some decolonial thinkers to take seriously the reflection of legal normative categories such as the law, the State, the rule of law, sovereignty, as repressive and arbitrary structures of the coloniality of power which must be rejected as part of the Eurocentric ideals of Modernity. To reflect and articulate as part of the task of a liberatory political and legal philosophy, to conceptualize new forms of normative institutional orders and values in the context of decolonization, is (as Mignolo suggests) to disavow the very moment of delinking from the colonial logic of power. It dismisses the embodied experience of marginalized peoples.[466] In this view, to invoked ideals such as the rule of law, the State, or even the development of the universal

[466] Mignolo, Walter. "Epistemic Disobedience and the Decolonial Option: A Manifesto." *Transmodernity* 1, no. 2 (2011).

character of law, is to worked in tandem with what Mignolo calls "discourses and managerial technologies," modes of control through Western ideals of the project modernity/coloniality expressed through laws, edicts, and institutions.[467]

Against this view, I offered in this dissertation an account of the significance of legality for Dussel's philosophy of liberation. The need to articulate a concept of legality stems from the main thesis of this project: namely, that there is within Dussel's political philosophy a legal dimension, which describes the nature of law for liberation framed within the power of the people. It is crucial here to insist that the concept of living legality, as I will show soon, is linked to Dussel legal framework insofar this concept aims to weave together different key conceptual and normative elements of Dussel's political and legal philosophy that we put emphasis throughout this dissertation.

Historically, as we examined in Chapter 2, Dussel makes clear the extent to which the juridical structure of Modernity contains within itself, what would become the dominant way of thinking about the law as an instrument of violence to establish a political and social world-system. This claim has been illustrated by Dussel as an essential part of the configuration of natural law and universal rights in order to justify the various institutions that facilitated forced labor, exploitation, and genocide of indigenous people in the Americas. His critique of the abstract and empirical practice of violence through colonial law and universal rights during the expansion of European powers in the Americas, allows us to identify Dussel's phenomenological and Semitic understanding of Bartolomé de las Casas as the beginning of a general counter-hegemonic articulation against coloniality. It is this phenomenological and semitic background which both

[467] Mignolo, Walter. "Cosmopolitanism and the De-Colonial Option." *Studies in Philosophy and Education* 29, no. 2 (March 2010): 111–27.

forms the basis of Dussel's critique of Eurocentrism as well as opens him up to attacks of Eurocentrism, himself. Critics of Dussel's philosophy like Maldonado-Torres, label this tendency in Dussel's work as "semitic-centrism." According to Maldonado-Torres, though the semitic ethos tends to privilege a corporeal dimension of human beings and an ethical concern with the experiences of the oppressed, in Dussel's philosophy of liberation, it also becomes a contradiction that ends up being "complicit with the European vision of history and being" beyond which he wants to move.[468] I argue that Maldonado-Torres's interpretation falls into a false contradiction and confusion of Dussel's normative thinking.

Beyond the historical narrative of Eurocentrism, Dussel's analysis of the juridical structure of Modernity assumes more than a critical consideration of the historical colonial character of modern law. Dussel offers a more developed, but unsystematic, formulation of a theory of law that I have examined and reconstructed in Chapter 3. To counter the critical conception of colonial modern law as a violent apparatus of domination, Dussel takes up as a point of departure elements of his reading of Paul of Tarsus's account of law.[469] Antithetical to the repressive formulation of the nature of law, I show that Dussel's conception of law, is portrayed as a mediation or instrument for the protection, reproduction and development of life. On this view, the law (and the system of right it entails and taken together with all its political and legal institutions) has non-ethical or legal value when its normative basis "begin[s] to be parasitic upon that *very* life and to produce death."[470] Accordingly, the aim and end of the law from Dussel's perspective ought to be always grounded in a law towards the protection of life.

---

[468] Maldonado-Torres, Nelson. *Against War: Views from the Underside of Modernity. Latin America Otherwise*. p. 192-194.
[469] Dussel, Enrique (trans George Ciccariello-Maher). "The Liberatory Event in Paul of Tarsus." *Qui Parle* 18, no. 1 (2009): 111–80. p. 114.
[470] Dussel, Enrique D. *Twenty Theses on Politics*. p. 114.

The attempt to explain these tendencies in which law began to be parasitic upon life, that is, where institutions become autoreferential and fetishized to be used arbitrarily for private individuals or class purposes against *el pueblo*,[471] I presented a different understanding of the democratic character of *el pueblo* as the ultimate ground of law in Dussel's work. More specifically, in chapter 4, drawing in the idea of constituent power (*el pueblo)*, I consider briefly Dussel's idea of a *state of rebellion*—the manifestation of "the people" gaining consciousness "as people-in-itself" in claiming their demand against unfilled needs.[472] From this perspective, Dussel's conception of *el pueblo* includes a process of articulating heterogenous demands to reclaim people's authority and public power for institution-making. At the theoretical level, these demands are both legal and ethical obligations with a material universal criterion in order to protect human life.[473] As Dussel claims, "Human life, as the material criterion par excellence, is the ultimate content of all political actions and all institutions."[474] In this sense, the emphasis of the necessity of affirming human life against exploitation and oppression offers a specific conception of normativity and legitimation. Dussel argues that such a sense of normativity is important to seeing it dialectically: "From the recognition of the impossibility to fully live at some material level (as a woman in a patriarchal society, as a non-white race in a world dominated by whiteness,

[471] Dussel adds that, in cases where " the self-referential exercise of power is performed for the benefit of the governor and his or her group, "tribe," sector, or bourgeois class, etc. The representative in this case is a *corrupt bureaucrat* who turns his or her back on and oppresses the political community, the *people."* Dussel, Enrique D. *Twenty Theses on Politics*. p. 29.
[472] Dussel description of such stage od rupture is not the same as Agamben see the moment of indistinction of the "state of exception." In *Twenty Theses of Politics* Dussel emphasizes that it is the people that can "suspend the "state of exception" through what Dussel calls the state of rebellion." "The 'state of rebellion,'" Dussel writes, "disarmed the 'state of exception.' The will of delegated *auctoritas to* recall Agamben's distinction-ended up being annulled by a prior will: the will of the *people,* power as *hyperpotentia.*" Dussel, Enrique D. *Twenty Theses on Politics*. p. 82.
[473] Dussel, Enrique D. *Ethics of Liberation in the Age of Globalization and Exclusion*. Latin America Otherwise. Durham: Duke University Press, 2013. p. 101-102.
[474] Dussel, Enrique D. *Twenty Theses on Politics*. p. 85.

etc.), the excluded victims of a legitimate system of needs (positive) gain consciousness of their lack of rights precisely in the possible fulfillment of such needs (negativity)."[475]

What primarily matters for Dussel's legal philosophy has been too focused on the importance of prescribing the material affirmation of life within law and institutions, rather than considerations of the formal processes of legitimation. The interpretation defended here enables us to support the hypothesis that the people's constituent power hinges not only on an abstract notion of legitimacy. As Dussel insists liberatory power tends to something beyond validity and legitimacy. Dussel writes, "Necessarily, given the finitude of the human condition, all legitimacy is relative, imperfect, and fallible."[476] He argues furthermore, saying that the "critical consciousness" of the people "creates a *critical* consensus within their oppressed community, which now stands opposed to the *dominant* consensus from a position of dissidence." This is what Dussel calls a "crisis of legitimacy" and a "crisis of hegemony," the moment of chaos that emerges prior to and in anticipation of the creation of a new order."[477] The exercise of the constituent power of the people, through the consensus of the oppressed, is grounded in a normative material principle that allows the transformation of the inefficiency of the political order into one that fulfills their needs.[478]

[475] Dussel, Enrique D. "La transformación del Sistema del Derecho," In Dussel, Enrique D. *Política de la Liberación. Crítica Liberadora.* Vol. III. Madrid: Editorial Trotta, 2022. p. 641.
[476] Dussel, Enrique D. *Twenty Theses on Politics*. p. 80.
[477] Dussel, Enrique D. *Twenty Theses on Politics*. p. 80.
[478] Here a follow closely the interpretation offered by Alicia Hopkins Moreno in "La Ruptura Mesiánico Comunitaria del Pueblo (plebs). La Praxis del "resto," In Dussel, Enrique D. *Política de la Liberación. Crítica Liberadora.* Vol. III. Madrid: Editorial Trotta, 2022. p. 108-132.

Conclusions: Living Legality as a Concept of Interpretation of Dussel's Legal Philosophy of Liberation

Living legality is exclusively an interpretative concept that tries to only define the features of Dussel's legal dimension in terms of its grounds and institutional expectations. I now focus on the description and content of the three main intersecting categories that allow us to recognize Dussel's legal philosophy: 1) Dussel's normative commitments; 2) the central notion of *el pueblo* as a foundational category where a new form of institutions can emerge; and 3) the notion of living corporality. These three elements, recapitulated throughout this project, provide the conceptual outline of living legality.

1) Normativity in Service of the People

I have focused on the general claim that normativity does not play much of a role in the decolonial approaches to transforming the social and political order. These approaches tend to affirm the political and legal task of decolonization exclusively as an epistemological effort, or as we know from Maldonado-Torres's view, are approaches that commit solely to a phenomenological attitude. The view that I take in this project follows Dussel's work to revitalize normative categories to confront the global reactionary and anti-republican populist ethos of contemporary politics. Following Dussel's insights, without normative principles, "the exercise of delegation of power, that is to say, the possibility of liberation"[479] cannot exist. Therefore, it is difficult to determine from the point of view of the philosophy of liberation what the content of law and how just institutions are made if we do not consider subscribing to certain principles of materiality, solidarity, or the protection and reproduction of human life.

[479] Dussel, Enrique D. *Política De La Liberación: Arquitectónica*. Vol. 2. p. 347.

Central to my argument concerning the importance of normativity in Dussel's philosophy, has been to show the way in which such a conception projects the ethical and legal demand to increase the power of *el pueblo*. Moreover, for Dussel, normative principles enable the provision of boundaries in people's political and legal actions. In this view, Dussel, in an attitude towards "principles" akin to that of Rosa Luxemburg, wants to call our attention to a sense of normativity that is not purely procedural. Instead, principles seek to justify restrictions into its original source which is the obligations and actions of *el pueblo*. Dussel endorses Luxemburg's understanding of principles at the beginning of Chapter 3 of *Politics of Liberation*. According to Luxemburg, principles "marked limitations to practical activity—insofar as it concerns the aims of this activity, the means used in attaining these aims, and the method employed in this activity. It is quite natural for people who run after immediate "practical" results to want to free themselves from such limitations and to render their practice independent of our "theory."[480] In the articulation of a praxis of liberation—as the task of transforming the hegemonic structures of the political system—the normative principles take the form and function of the ethical limits and authority of the people in action to organize a new order. It is in this respect that Dussel draws upon Luxemburg to claim that the power of the people reveals, and it persist, as a strategic form of action towards institutionalization, to the extent that it keeps clear its normative principles to determine and constraint its actions as the people are "the motor, the force, the power that make history."[481]

Another way to look Dussel's conception of normative principles is that there are essential for mobilizing people's actions. As such, Dussel's idea of normativity is a different mode of understanding politics and legality; principles move beyond the procedural and fuse with a sense

[480] A quote by Dussel, Dussel, Enrique D. *Política De La Liberación,* p. 350. English edition, Luxemburg, Rosa. *The Essential Rosa Luxemburg: Reform or Revolution & the Mass Strike*. Chicago, Ill.: Haymarket Books, 2008. p. 101.
[481] Dussel, Enrique D. *Twenty Theses on Politics.* p. 94.

of normativity that is, according to Dussel, "*intrinsic to* and *constitutive of potentia* (the power of the community) as well as of *potestas* (the delegated exercise of power)."[482] The normative principles that Dussel has in mind revolve around "being-in-community." "Principles," Dussel, writes, "constitute, fortify, and regenerate the system from within, forcing the agents to affirm the Will-to-Live in the feasible consensus of the entire community, and to act with an eye to hegemony (as obediential power) and encouraging the fulfillment of the tasks of each institutional sphere"[483] Since we are communal, intersubjective beings, our will-to-power emerges from certain principles. At the same time, these principles reflect the way in which this intersubjectivity is, for Dussel, associated with a historical coordination and organization of the conscious participation of the "social bloc of the oppressed."

2) The People as a Foundational Category

As we have argued, *el pueblo* discloses itself as a collective body in action establishing the grounds for a new totality beyond the exploitative and oppressive institutional forms of power. What is at stake here with the kind of normativity involved in Dussel's work is the question of people's authority to transform institutions and the ability to make a new *potestas* within the paradigm of the hegemonic power of the people. We show early in this chapter that approaches such as that of Maldonado-Torres, which put exclusive emphasis on the phenomenological aspect of liberation, has limitations and, at the same time, provides us with a misleading version of Dussel's political philosophy. Dussel maintains, against Maldonado-Torres or Levinas, that "phenomenology ought to be "mediated" and "developed" through categories of other epistemic disciplines"[484] in order to find the necessary mediations that would protect the life of the people.

[482] Dussel, Enrique D. *Twenty Theses on Politics*, p. 57.
[483] Dussel, Enrique D. p. 57.
[484] Dussel, Enrique D. *Hacia los orígenes de occidente: Meditaciones semitas*. Kanankil Editorial, 2012. p. 105.

To get a better grasp of the moment of necessity in the passage from the ontological/and phenomenological to the normative content of social and institutional structures of liberation in order to protect the life of the people, I want to return in more detail to Dussel's articulation of the *state of rebellion* and *hyperpotentia*. On the one hand, the *state of rebellion* is the manifestation of the people that begins to subvert the established order due to the fetishization of the power and inefficiency of the prevailing order to deliver goods to address basic needs. On the other hand, Dussel identifies the concept of *hyperpotentia* as the strength of the exteriority of the people. Here the introduction of *hyperpotentia* does not mean the disappearance of the people as such. Rather, this category of *hyperpotentia* shows us precisely the limits of political power as it exists as a whole. It better describes the continual force of the people aiming to achieve a renewable form of power and transformation of institutions. From this point of view, when the constituted power (*potestas*) does not function as a social mediation to deal with the needs of the people, Dussel argues, "*hyperpotentia* confronting *potentia*, effectively carries out the transformation of *potestas,* now in service of the people."[485]

Hyperpotentia actually reveals the complexity of the different determinations of the power of the people. To Dussel *Hyperpotentia* is an "anti-power in the face of the power of domination."[486] In other words, this anti-power captures that moment of people's determination, within the political community, in which they agree that the laws and institutions have become mediations of domination against the people, and thereby, forgotten the normative demand to "produce and reproduce the lives of the oppressed and excluded, the victims."[487] This general normative principle direct us towards Dussel's understanding of the praxis of liberation and the

[485] Dussel, Enrique D. *Twenty Theses on Politics*. p. 80.
[486] Dussel, Enrique D. *Twenty Theses on Politics*. p. 81.
[487] Dussel, Enrique D. *Twenty Theses on Politics*. p. 86.

authority of the people in transforming institutions. Moreover, it allows us to understand that Dussel's normative dimension must be read through its analectical method: Normative principles are first *negative*, namely, discovering the causes of their suffering and adequately transforming institutions to fulfill their needs. This is the instance of determination of "the *location* of the system's pathology, the injustice that we need to know how to repair."[488] Furthermore, there is also in Dussel dialectical approach, a decisive moment of the *positive*, the constructive institutionalization passage, where the people, affirming the life of the victims, simultaneously, affirmed "the historical improvement of the entire community."[489]

The account of normativity examined in this dissertation tells us that Dussel's normative principles take the form of obligations that constrain the determination of the power of the people and fulfill the needs of the "living corporality" of each person. This idea of living corporeality, according to Dussel, becomes "the last instance of human life, the concrete live of each person."[490] As I discuss in the next section, what follows from this view is how Dussel's normative attitude is predicated, first and foremost, on the requirement of a sense of living corporeality as a fundamental element that guides his political and legal philosophy.

3) The Notion of Living Corporality

Since Dussel gives great importance to the notion of "corporeality" by taking up de Las Casas's semitic understanding of colonial subjects as a crucial aspect of his commitment to take seriously the rights of others. In *El Humanismo Semita*, he refers to the category of corporeality (*corporealidad*) as "being a body" rather than "having a body." It is the former connotation that, according to Dussel, allows us to investigate the very mode of being of our existence in

[488] Dussel, Enrique D, p. 85.
[489] Dussel, Enrique D, p. 85.
[490] Dussel, Enrique D, p. 61.

community.[491] Moreover, in *Philosophy of Liberation*, Dussel argues that corporeality constitutes the most important category of concrete reality for the philosophy of liberation. As he writes, "The very body, the corporality, the flesh of the oppressed (their hungry, tortured, violated bodies), when exposed within the system, is a subversion of the law and order that alienates them. […] The person, the corporality, the flesh (*basar*) of the poor is itself is the originating word (*dabar*) from which arises the philosophy of liberation. Philosophy of liberation does not think about words; it thinks about reality."[492] Dussel here locates the corporeality of the oppressed (as a to appeal to the unsatisfying needs of those who are hungry, displaced, or homeless) as the first affirmation of alterity—exterior to the system of totality and domination—which subverts the law and order that oppresses the people as a collective living body. As such, in Dussel's thinking, the category of corporeality points us to concrete situations in which the reproduction and development of life is exposed to the direct violence of systems of domination and law. Therefore, corporality is constitutive of the founding dimension of a new order that precedes and subsumes the legal and political experience of the people to transform the established order.

In relation to the notion of *el pueblo*, this category of corporality also indicates a common ground where a consciousness of life and radical transformation can emerge. This process is what in the *Ethics of Liberation* allows Dussel to describe, by virtue of laws and/or different systems of oppression that alienate people. He calls this universal character the "community of the victims," referring to a community of "all those dominate as workers, indigenous people, African slaves, or exploited Asians in the colonized world; as the bodily reality of women, of those who are not white, of the future generations […] all those excluded because they are foreigners, immigrants or

[491] Dussel, Enrique D. *El humanismo semita: estructuras intencionales radicales del pueblo de Israel y otros semitas*, p. 190.
[492] Dussel, Enrique *Philosophy of Liberation*, p. 189.

refugees, etc."[493] According to Dussel, such community gains consciousness through the corporality, enabling them to organize in order to contest the negation of their lives through their own embodied suffering. Dussel's conception of corporality also draws attention to other forms of oppression that precisely targets the corporeal basis of their reality, namely, their racialized bodies, gender, and age of all those excluded as part of the community of victims. As Dussel puts it, "The definite point of departure for the entire framework of criticism […] is the relationship produced between the negation of the corporeality, the bodily reality (*Liblichkeit*) reflected in the suffering of the victims […] and the process by which the victims become conscious of this negation."[494] In Dussel's approach, corporeal suffering and pain enables the people, as living corporeality, to recognize others in their alterity.

Ultimately, Dussel's emphasis of the notion of corporeality has to do to with limits of formal reason and the extent to which rationality is not enough to articulate the construction of a new political and social order. For example, Alejandro Vallega has pointed out the importance of the corporeal aspect of Dussel's description of our sensibility, which is "situated at the limit of fact and reason."[495] Nonetheless, this sense of corporeality against formal reason, goes deeper than simply configuring other modalities to understand our sensibility. As discussed in Chapter 2 and Chapter 3, this sense of corporality is linked with Dussel's semitic interpretation of both de Las Casas and Paul of Tarsus's conception of law for justice. Dussel's reading of de Las Casas and of Paul of Tarsus focuses on the ways in which both offered a different anthropological understanding of the "human." Dussel wants to substitute the anthropological Western view of the human being

[493] Dussel, Enrique D. *Ethics of Liberation in the Age of Globalization and Exclusion*. p. 215.
[494] Dussel, Enrique D. *Ethics of Liberation*, p. 215.
[495] Vallega, Alejandro A. *Latin American Philosophy from Identity to Radical Exteriority*. World Philosophies. Bloomington, Indiana: Indiana University Press, 2014. p. 72.

as "singular body" to instead take up semitic vision of the human as an intersubjective "flesh" where regeneration and transformation may take place.[496]

While the idea of the singular body situates us within the established order of reality as it is, the semitic category of flesh offers him a double meaning, namely, the possibility of political action to transform reality. In a strictly philosophical analysis, as Dussel argues, Paul's understanding of flesh offers a comprehension of the suffering of living subjectivities against the totality of the established order. To some extent, this mirrors the insights of Vallega's interpretation of Dussel's work: while corporeality "touches all normative and conceptual determinations," it is also necessary in order to shape a politics and ethics of liberation that "tell us that institutions and the gathering of communities into a people's political consciousness depend on other levels of experience in life."[497] The corporeal aspect of Dussel's thinking is relevant to other modalities of experience that are often ignored in the examination of the construction of legal and political theories that serves the interest of liberation. This specific view of corporeality, therefore, provides an additional element to make sense of the concept of living legality. By incorporating this category of corporeality, I attempt to signal how Dussel's conception of the people is deeply linked with a material dimension of corporeal unsatisfied needs of a community.

As an interpretative category of Dussel's legal philosophy, living legality can illustrate the often-neglected character of Dussel's normative principles and intuitional mediations that serve the protection of life through institutional transformations. Through this lens of interpretation of living legality, I have intended to highlight the significance of law and institutions in Dussel's philosophy of liberation. Dussel offers a clear statement of such conception of institutions as

[496] Dussel, Enrique D. "The Liberatory Event in Paul of Tarsus." p. 117-118.
[497] Vallega, Alejandro A. *Latin American Philosophy from Identity to Radical Exteriority*. p. 72.

central to his political philosophical program in his most recent book *Siete Ensayos de La Filosofía de la Liberación*:

> For the long transition towards a trans-capital and trans-liberal society, a political philosophy that accounts for new institutions is necessary. Such an account is complex given that such a transition would require time and intermediated processes of new militants, new theory, new movements and organizations, of new institutions that, indeed, must arise from below and be achieved through the consolidation of political actors that make them possible. The institution is ambiguous but not intrinsically dominating […] The possibility of a State at the service of life is not a moralizing idealist assumption. Instead, the institution is precisely an ethical, normative, critical, and realistic conception of politics that understands its configurations […] It is not a description of what is possible within the limits of the current system, and instead, it must suggest that "another world is possible beyond the established order.[498]

Let me emphasize Dussel's conception of the praxis of liberation as a continuing struggle and irruption of the people to enact institutions of non-domination within a trans-capital and trans-liberal society. The power of the people as constituent of, as well as transformer of, our institutions force an examination of the normative sources of the institutions of social life. In seeing the role that these institutions have played in systematic oppression in states throughout the capitalist world, and globally as well, it is tempting to jettison all. However, the significance of law and institutions of Dussel's approach is in the creative and positive moment of institutionalization of people's power. In his normative approach to law and the authority of the people, Dussel's philosophy develops a model where his theory of constituent power goes hand-in-hand with his view of institution-making. By looking the people as a "living legality," Dussel's intersubjective account of the people describes the foundation of a new order. In the view defended here, I have shown how Dussel's offers to us a legal dimension in which the people stand in continuing "state of rebellion."

[498] Dussel, Enrique D. *Siete ensayos de filosofía de la liberación: hacia una fundamentación del giro decolonial*. Colección Estructuras y procesos. Serie Filosofía. Madrid: Editorial Trotta, 2020. p. 21-22. My translation.

The category of living legality offers a way to bring that insight about Dussel's legal dimension. We are able to understand the authority of *el pueblo* as an effective collective actor with the power to institutionalize itself, reinventing and establishing new grounds for institutions rid of all systemic elements that contribute to oppression and violence of the inequality or unequal conditions experienced in capitalist societies. Under this consideration, the people build an institutional actor where the link between the delegated exercise of the constituted power and the people's political power go separate ways and break off. When democratic institutions as constituted power becomes incapable of delivering and fulfilling the people's claims and needs, it risks the fetishization of political power, law, and institutions. The concept of living legality works from an awareness of the political community of victims that recognized that "*cannot live fully*," and *hyperpotentia* becomes the collective actor that "tears down the walls of Totality and opens a space of the limits of the system through which Exteriority burst into history."[499] Dussel's legal dimension invokes the moment of people's claim of authority as constituent power; it is the experience of people's authority positing a unified consciousness around material demands to realize the institutional transformations required to fulfill the interests and needs of *all*.

Putting the above elements of interpretation together, I have tried to show the legal dimension in Dussel's work as an important vehicle to help in the struggle to reach emancipation and justice within a philosophy of liberation perspective. To return to the beginning of the dissertation, the philosophy of liberation and the law are not contradictory. On the contrary, I have suggested that Dussel's political philosophy of liberation offers a very different articulation of legality that is productively conceptualized through the political actions and experiences of the oppressed and the material commitments to protection, reproduction, and development of people's

[499] Dussel, Enrique D. *Twenty Theses on Politics*. p. 79.

lives. A philosophy of law of liberation help us to build an account of law focused on its relationality with the material protection of life and the constituent power of the people.

REFERENCES CITED

Adorno, Rolena. “The Polemics of Possession in Spanish American Narrative.” New Haven: Yale University Press, 2007.

Agamben, Giorgio. *Sovereign Power and Bare Life*. Homo Sacer 1. Stanford, Calif.: Stanford University Press, 1998.

Aguilar, Raquel Gutiérrez. *Rhythms of the Pachakuti: Indigenous Uprising and State Power in Bolivia*. Duke University Press, 2014.

Alexander, Larry. *Constitutionalism: Philosophical Foundations*. Cambridge Studies in Philosophy and Law. Cambridge ; New York: Cambridge University Press, 1998.

Allen, Amy, and Eduardo Mendieta. “Decolonizing Ethics: The Critical Theory of Enrique Dussel.” Penn State Series in Critical Theory. University Park, Pennsylvania: The Pennsylvania State University Press, 2021.

Anghie, Antony. “Imperialism, Sovereignty, and the Making of International Law.” Cambridge Studies in International and Comparative Law. Cambridge, UK ; Cambridge University Press, 2007.

Apel, Karl-Otto, and Eduardo Mendieta. “‘Discourse Ethics’ before the Challenge of ‘Liberation Philosophy.’” *Philosophy & Social Criticism* 22, no. 2 (1996): 1–25.

———. “‘Discourse Ethics’ before the Challenge of ‘Liberation Philosophy.’” *Philosophy & Social Criticism* 22, no. 2 (1996): 1–25.

Arias, Santa, and Raúl Marrero-Fente. *Coloniality, Religion, and the Law in the Early Iberian World*. First edition. Hispanic Issues (Vanderbilt University) ; v. 40. Nashville: Vanderbilt University Press, 2014.

———. “Coloniality, Religion, and the Law in the Early Iberian World.” Hispanic Issues, Volume 40. Nashville: Vanderbilt University Press, 2014.

Barber, Michael D. *Ethical Hermeneutics: Rationality in Enrique Dussel’s Philosophy of Liberation*. Perspectives in Continental Philosophy ; No. 2. New York: Fordham University Press, 1998.

Barreto, José-Manuel. *Human Rights from a Third World Perspective: Critique, History and International Law*. Newcastle upon Tyne, [England]: Cambridge Scholars Publishing, 2013.

Bartholomew, Amy, and Jennifer Breakspear. “Human Rights as Swords of Empire?” *Socialist Register* 40 (2004).

Bonefeld, Werner, ed. *Revolutionary Writing: Common Sense Essays in Post-Political Politics*. New York: Autonomedia, 2002.

Bonilla Maldonado, Daniel. *Legal Barbarians: Identity, Modern Comparative Law and the Global South*. Vol. 157, 157. Cambridge Studies in International and Comparative Law. Cambridge: University Press, 2021.

Bragato, Fernanda Frizzo, and Lewis R. Gordon. *Geopolitics and Decolonization: Perspectives from the Global South*. Global Critical Caribbean Thought. London, [England] ; Rowman & Littlefield International, 2018.

Brown, Wendy, and Janet E. Halley. *Left Legalism/Left Critique*. Durham: Duke University Press, 2002.

Castro-Gómez, Santiago. *El tonto y los canallas: notas para un republicanismo transmoderno*. Editorial Pontificia Universidad Javeriana, 2019.

Castro-Gómez, Santiago, and Ramón Grosfoguel. *El Giro Decolonial: Reflexiones Para Una Diversidad Epistémica Más Allá Del Capitalismo Global*. Biblioteca Universitaria: Ciencias Sociales y Humanidades Serie Encuentros. Siglo del Hombre Editores, 2007.

Ciccariello-Maher, George. “Decolonial Realism: Ethics, Politics and Dialectics in Fanon and Dussel.” *Contemporary Political Theory* 13, no. 1 (2013): 2–22.
———. “Decolonizing Dialectics.” Radical Américas. Durham: Duke University Press, 2016.
Cistelecan, Alex, and Aakash Singh Rathore. *Wronging Rights?: Philosophical Challenges for Human Rights*. Ethics, Human Rights & Global Political Thought 1. New Delhi [India: Routledge, 2011.
Costa, Pietro, Danilo Zolo, and Emilio Santoro. *The Rule of Law: History, Theory and Criticism*. Law and Philosophy Library ; v. 80. Dordrecht: Springer, 2007.
Cusicanqui, Silvia Rivera. *Ch’ixinakax utxiwa: una reflexión sobre prácticas y discursos descolonizadores*. Tinta Limón, 2010.
Dicey, Albert Venn. *Lectures Introductory to the Study of the Law of the Constitution*. London, Macmillan and Co., 1885.
Douzinas, Costas. “The End of Human Rights: Critical Legal Thought at the Turn of the Century.” Oxford ; Hart Pub., 2000.
Douzinas, Costas, and C. A. Gearty. *The Meanings of Rights: The Philosophy and Social Theory of Human Rights*. Cambridge, United Kingdom: Cambridge University Press, 2014.
Douzinas, Costas, Peter Goodrich, and Yifat Hachamovitch. *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent*. London ; Routledge, 1994.
Dowdle, Michael W., and Michael Wilkinson. *Constitutionalism beyond Liberalism*. Cambridge: University Press, 2017.
Dussel, Enrique. “A New Age in the History of Philosophy: The World Dialogue between Philosophical Traditions.” *Philosophy & Social Criticism* 35, no. 5 (June 1, 2009): 499–516.
———. *Anti-Cartesian Meditations and Transmodernity: From the Perspectives of Philosophy of Liberation*. Uitgeverij Amrit/Amrit Publishers, 2018.
———. “Eurocentrism and Modernity (Introduction to the Frankfurt Lectures).” *Boundary 2* 20, no. 3 (1993): 65–76.
———. *Hacia los orígenes de occidente: Meditaciones semitas*. Kanankil Editorial, 2012.
———. *Filosofías del Sur y la descolonización: Obras selectas 29*. Amazon Digital Services LLC - KDP Print US, 2021.
———. “From Critical Theory to the Philosophy of Liberation: Some Themes for Dialogue.” *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 1, no. 2 (2011).
———. *Hacia una filosofía política critica*. 1st Edition. Bilbao: Desclée De Brouwer, 2002.
———. *Política de la Liberación: Volumen III. Crítica creadora*. 1st edition. Madrid: Editorial Trotta, S.A., 2022.
———. “Las Casas, Vitoria, and Suarez 1514-1617,” In Barreto, José-Manuel. *Human Rights from a Third World Perspective: Critique, History and International Law*. Newcastle upon Tyne, [England]: Cambridge Scholars Publishing, 2013.
———. “Six Theses toward a Critique of Political Reason: The Citizen as Political Agent.” *Radical Philosophy Review : RPR* 2, no. 2 (1999): 79–95.
———. “The Concept of Fetishism in Marx’s Thought (Elements for a General Marxist Theory of Religion): Part I of II.” *Radical Philosophy Review : RPR* 6, no. 1 (2003): 1–28.
———, and George Ciccariello-Maher. “The Liberatory Event in Paul of Tarsus.” *Qui Parle* 18, no. 1 (2009): 111–80.
———. *A History of the Church in Latin America: Colonialism to Liberation (1492-1979)*. Grand Rapids, MI: WmBEerdmans, 1981.

———. *Beyond Philosophy: Ethics, History, Marxism, and Liberation Theology*. New Critical Theory. Lanham, Md.: Rowman & Littlefield Publishers, 2003.
———. *Carta a los indignados*. 1. ed. Nuestros (Jornada Ediciones). México, D.F.: La Jornada Ediciones, 2011.
———. *El humanismo helénico*. Editorial Universitaria de Buenos Aires, 1975.
———. *El humanismo semita: estructuras intencionales radicales del pueblo de Israel y otros semitas*. Editorial Universitaria de Buenos Aires, 1969.
———. *Ethics and Community*. Theology and Liberation Series. Maryknoll, N.Y.: Orbis Books, 1988.
———. *Ethics of Liberation in the Age of Globalization and Exclusion*. Latin America Otherwise. Durham: Duke University Press, 2013.
———. *Materiales para una política de la liberación*. Universidad Autónoma de Nuevo León, 2007.
———. *Para una ética de la liberación latinoamericana*. Primera edicion Mexicana. Filosofía. México: Siglo Veintiuno Editores, 2014.
———. *Philosophy of Liberation*. Eugene, Or.: Wipf and Stock, 2003.
———. *Politics of Liberation: A Critical World History*. Reclaiming Liberation Theology. London: SCM Press, 2011.
———. *Praxis latinoamericana y filosofía de la liberación*. Bogotá: Editorial Nueva América, 1983.
———. *Siete ensayos de filosofía de la liberación: hacia una fundamentación del giro decolonial*. Colección Estructuras y procesos. Serie Filosofía. Madrid: Editorial Trotta, 2020.
———. *The Invention of the Americas: Eclipse of "the Other" and the Myth of Modernity*. New York: Continuum, 1995.
———. *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation*. Atlantic Highlands, N.J.: Humanities Press, 1996.
———. "Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation." *Transmodernity* 1, no. 3 (2012): 28–59.
———. *Twenty Theses on Politics*. Latin America in Translation/En Traducción/Em Tradução. Durham: Duke University Press, 2008.
———, and Daniel Guillot. *Liberación latinoamericana y Emmanuel Levinas*. 1. edición. Enfoques latinoamericanos: sección filosofía y teología ; serie filosofía ; no. 3. Buenos Aires: Editorial Bonum, 1975.
———. Javier Krauel, and Virginia C. Tuma. "Europe, Modernity, and Eurocentrism." *Nepantla* 1, no. 3 (2000): 465–78.
———. *Método para una filosofía de la liberación: superación analéctica de la dialéctica hegeliana*. Agora. Salamanca: Ed. Sígueme, 1974.
———.*Anti-Cartesian Meditations and Transmodernity: From the Perspectives of Philosophy of Liberation*. Vol. 9. Decolonizing the Mind. The Hague: Amrit Publishers, 2018.
———. "Fortalecimiento del Estado del Estado desde el Horizonte del Postulado de la disolución del Estado." Consejo Latinoamericano de Ciencias Sociales, 2018.
———. *Para Un Des-Trucción de La Historia de La Ética I*. I vols. Mendoza: Ser y Tiempo, 1972.
———. *Política de La Liberación. Volumen II: Arquitectónica*. Vol. II. Madrid: Trotta, 2009.
Dyzenhaus, David. "Constitutionalism in an Old Key: Legality and Constituent Power." *Global Constitutionalism* 1, no. 2 (2012): 229–60.
Dyzenhaus, David. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge ; New York: Cambridge University Press, 2006.
Enwezor, Okwui. "Democracy Unrealized: Documenta 11, Platform 1." Ostfildern-Ruit, Germany: Hatje Cantz, 2002.

Fitzpatrick, Peter. “The Revolutionary Past: Decolonizing Law and Human Rights.” *Metodo. International Studies in Phenomenology and Philosophy* 2, no. 1 (2014): 117–33.

Friedman, R.B“On the Concept of Authority in Political Philosophy,” In Joseph Raz (Editor), Authority. New York: New York University Press, 1990

Gopal, Priyamvada. *Insurgent Empire: Anticolonial Resistance and British Dissent*. London ; New York: Verso, 2019.

Grant, John. “Lived Fictions: Unity and Exclusion in Canadian Politics.” Vancouver, BC: UBC Press, 2018.

Grosfoguel, Ramón. “The Epistemic Decolonial Turn.” *Cultural Studies* 21, no. 2–3 (March 1, 2007): 211–23.

Grosfoguel, Ramon. “The Structure of Knowledge in Westernized Universities: Epistemic Racism/Sexism and the Four Genocides/Epistemicides of the Long 16th Century.” *Human Architecture* 11, no. 1 (2013): 73-.

Grosfoguel, Ramón, and Ana Margarita Cervantes-Rodríguez. “The Modern/Colonial/Capitalist World-System in the Twentieth Century: Global Processes, Antisystemic Movements, and the Geopolitics of Knowledge.” Contributions in Economics and Economic History. Westport, Conn. ; Praeger, 2002.

Guardiola-Rivera, Oscar. “Law, Globalisation, and Second Coming.” *Human Architecture* 11, no. 1 (2013): 33–55.

Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Studies in Contemporary German Social Thought. Cambridge, Mass.: MIT Press, 1996.

Hanke, Lewis. *All Mankind Is One; a Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians.* DeKalb: Northern Illinois University Press, 1974.

———. *All Mankind Is One; a Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians.* DeKalb: Northern Illinois University Press, 1974.

———. *Bartolomé de Las Casas: An Interpretation of His Life and Writings*. The Hague: MNijhoff, 1951.

Hart, H. L. A. Herbert Lionel Adolphus. *The Concept of Law*. Third edition. Clarendon Law Series. Oxford, United Kingdom: Oxford University Press, 2012.

Hegel, Georg Wilhelm Friedrich. “Elements of the Philosophy of Right.” Cambridge Texts in the History of Political Thought. Cambridge [England] ; Cambridge University Press, 1991.

Horowitz, Asher, and Gad Horowitz. “Difficult Justice: Commentaries on Levinas and Politics.” Toronto: University of Toronto Press, 2006.

Hopkins Moreno, Alicia “La Ruptura Mesiánico Comunitaria del Pueblo (plebs). La Praxis del “resto,” In Dussel, Enrique D. *Política de la Liberación. Crítica Liberadora.* Vol. III. Madrid: Editorial Trotta, 2022.

Ibhawoh, Bonny. “Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History.” Albany: State University of New York Press, 2008.

Irvine, Andrew B. “An Ontological Critique of the Trans-Ontology of Enrique Dussel.” *Sophia* 50, no. 4 (2011): 603–24.

Kalyvas, Andreas. “Popular Sovereignty, Democracy, and the Constituent Power.” *Constellations (Oxford, England)* 12, no. 2 (2005): 223–44.

Kennedy, Duncan. “The Critique of Rights in Critical Legal studies” In Brown, Wendy, and Janet E. Halley. *Left Legalism/Left Critique*. Durham: Duke University Press, 2002

Leopoldo Múnera. “A Multitude in Precarious Conditions.” Spectre Journal. Accessed December 5, 2022.

Lévinas, Emmanuel. “Totality and Infinity: An Essay on Exteriority.” Martinus Nijhoff Philosophy Texts ; v. 1. Pittsburgh: Duquesne University Press, 1969.

Linda Martín Alcoff. “Vallega, Dussel, and Radical Exteriority.” *Inter-American Journal of Philosophy* Volume 8, no. 2 (Fall 2017): 12–23.

Lindahl, Hans. “Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change.” *Constellations* 22, no. 2 (2015): 163–74.

Lynda Lange, “Burnt Offerings to Rationality: A Feminist Reading of the Construction of Indigenous Peoples in Dussel’s Theory of Modernity,” In Alcoff, Linda Martín, and Eduardo Mendieta. *Thinking from the Underside of History: Enrique Dussel’s Philosophy of Liberation*. Lanham, Md.: Rowman & Littlefield Publishers, 2000.

Locke, John. *Two Treatises of Government.* Cambridge [England: University Press, 1960.

Lorey, Isabell. “Constituent Power of the Multitude.” *Journal of International Political Theory* 15, no. 1 (2019): 119–33.

Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13, no. 2 (2013): 218–37.

——— and Neil Walker. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford ; New York: Oxford University Press, 2007.

Lugones, María. “Toward a Decolonial Feminism.” *Hypatia* 25, no. 4 (2010): 742–59.

_____. “Structure/Anti-Structure and Agency under Oppression.” In *Pilgrimages/Peregrinajes*. United States: Rowman & Littlefield Publishers, 2003.

———. “Heterosexualism and the Colonial/Modern Gender System.” *Hypatia* 22, no. 1 (2007): 186–219.

Luxemburg, Rosa. *The Essential Rosa Luxemburg: Reform or Revolution & the Mass Strike*. Chicago, Ill.: Haymarket Books, 2008.

Maldonado Torres, Nelson. “Against War: Views from the Underside of Modernity.” Latin America Otherwise. Durham: Duke University Press, 2008.

Maldonado-Torres, Nelson. “Enrique Dussel’s Liberation Thought in the Decolonial Turn.” *Transmodernity* 1, no. 1 (2011).

———. “On the Coloniality of Being.” *Cultural Studies* 21, no. 2–3 (March 1, 2007): 240–70.

———. “On the Coloniality of Human Rights.” *Revista Crítica de Ciências Sociais*, no. 114 (December 1, 2017): 117–36.

María del Rosario Acosta López. “Introduction: Law after the Law: Contemporary Approaches to the Paradoxical Relationship between Law and Violence.” *CR (East Lansing, Mich.)* 14, no. 2 (2014): 1–10.

Marmor, Andrei. *Philosophy of Law*. Princeton Foundations of Contemporary Philosophy. Princeton, N.J.: Princeton University Press, 2011.

———. “What’s Left of General Jurisprudence? On Law’s Ontology and Content.” *Jurisprudence (Oxford, England)* 10, no. 2 (2019): 151–70.

Martín Alcoff, Linda. “Enrique Dussel’s Transmodernism.” *Transmodernity* 1, no. 3 (2012): 60–68.

Mattei, Ugo. *Plunder: When the Rule of Law Is Illegal*. Malden, Mass.: Blackwell Pub, 2008.

Mendieta, Eduardo. “Justice after the Law: Paul of Tarsus and the People of Come.” *Human Architecture* 11, no. 1 (2013): 19-.

———. “Política en la Era de la Globalización: Crítica de la Razón Política de enrique Dussel,” Dussel, Enrique. *Hacia una filosofía política critica*. 1st Edition. Bilbao: Desclée De Brouwer, 2002.
Michaels, Ralf, and Lena Salaymeh. “Decolonial Comparative Law: A Conceptual Beginning.” *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 86, no. 1 (2022): 166-.
Miéville, China. *Between Equal Rights: A Marxist Theory of International Law*. Historical Materialism Book Series 2. Chicago, IL: Haymarket Books, 2006.
Mignolo, Walter. *On Decoloniality: Concepts, Analytics, Praxis*. On Decoloniality. Durham: Duke University Press, 2018.
Mignolo, Walter D. “The Making and Closing of Eurocentric International Law: The Opening of a Multipolar World Order.” *Comparative Studies of South Asia, Africa, and the Middle East* 36, no. 1 (2016): 182–95.
Mulqueen, Tara, and Daniel Matthews, eds. *Being Social: Ontology, Law, Politics*. Oxford: Counterpress, 2015.
Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. Theory out of Bounds ; v. 15. Minneapolis: University of Minnesota Press, 2009.
———. “Constituent Republic.” In Bonefeld, Werner, ed. *Revolutionary Writing: Common Sense Essays in Post-Political Politics*. New York: Autonomedia, 2002.
———, Hardt, Michael. Empire. Cambridge, Mass: Harvard University Press, 2000.
———. *Multitude: War and Democracy in the Age of Empire*. New York: Penguin Books, 2005.
Nootens, Geneviève. “Constituent Power beyond the State: Democratic Agency in Polycentric Polities.” New York: Routledge, Taylor & Francis Group, 2022.
Pahuja, Sundhya. “Decolonising International Law: Development, Economic Growth, and the Politics of Universality.” Cambridge Studies in International and Comparative Law. Cambridge, UK ; Cambridge University Press, 2011.
Pappas, Gregory Fernando. *Pragmatism in the Americas*. 1st ed. American Philosophy. New York: Fordham University Press, 2011.
Patberg, Markus. “Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment.” *Constellations: An International Journal of Critical and Democratic Theory* 24, no. 1 (March 1, 2017): 51–62.
Quijano, Anibal. “Colonialidad Del Poder y Clasificación Social.” *Journal of World-Systems Research* 6, no. 2 (2000): 342–86.
Quijano, Aníbal. “Coloniality and Modernity/Rationality.” *Cultural Studies (London, England)* 21, no. 2–3 (2007): 168–78.
Quijano, Anibal, and Michael Ennis. “Coloniality of Power, Eurocentrism, and Latin America.” *Nepantla* 1, no. 3 (2000): 533–80.
Quijano, Anibal, and Immanuel Wallerstein. “Americanity as a Concept, or the Americas in the Modern World-System.” *International Social Science Journal* 44, no. 4 (1992): 549–57.
Raz, Joseph. *Authority*. Readings in Social and Political Theory. Oxford, U.K: B. Blackwell, 1990.
Rivera Cusicanqui, Silvia. “Ch’ixinakax Utxiwa: On Practices and Discourses of Decolonization.” Critical South. Cambridge, UK ; Polity, 2020.
Rivera, Omar. “Political Ontology (and Representative Politics), Agamben, Dussel… Subcomandante Marcos.” *Epoché (Provo, Utah)* 16, no. 1 (2011): 125–38.
Santos, Boaventura de Sousa. *Epistemologies of the South: Justice against Epistemicide*. Boulder: Paradigm Publishers, 2014.
———. *If God Were a Human Rights Activist.* 1st ed. Stanford Studies in Human Rights Ser. Palo Alto: Stanford University Press, 2015.

———. *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*. 3rd edition. Cambridge, United Kingdom ; New York, NY: Cambridge University Press, 2020.
Santos, Boaventura de Sousa, and Bruno Sena Martins. *The Pluriverse of Human Rights: The Diversity of Struggles for Dignity*. Epistemologies of the South. New York: Routledge, 2021.
Schmitt, Carl. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. New York: Telos Press, 2003.
Shklar, Judith N. *Legalism*. Cambridge, Mass.: Harvard University Press, 1964.
Silva, Grant. "'The Americas Seek Not Enlightenment but Liberation': On the Philosophical Significance of Liberation for Philosophy in the Americas." *Pluralist (Champaign, Ill.)* 13, no. 2 (2018): 1–21.
Singh, Prabhakar, and Benoît Mayer. "Critical International Law: Postrealism, Postcolonialism, and Transnationalism." New Delhi, India: Oxford University Press, 2014.
Souza Santos, Bouaventura. "A Critique of Lazy Reason: Against the Waste of Experience." In *Modern World-System in the Longue Duree*, 163–204. Routledge, 2004.
Symposium Fray Bartolomé de las Casas Transcendencia de su Obra y Doctrina. *Symposium Fray Bartolomé de las Casas: Trascendencia de su Obra y Doctrina.* 1a ed. México, D.F.: Universidad Nacional Autónoma de México, Dirección General de Estudios de Legislación Universitaria, 1985.
Tasioulas, John. "On the Nature of Human Rights." In *The Philosophy of Human Rights*, 17–60. Berlin, Boston: DE GRUYTER, 2011.
Tekin, Serdar. "Founding Acts: Constitutional Origins in a Democratic Age." Philadelphia, Pennsylvania: University of Pennsylvania Press, 2016.
Tierney, Brian. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. Emory University Studies in Law and Religion ; No. 5. Atlanta, Ga.: Scholars Press, 1997.
Vallega, Alejandro A. *Latin American Philosophy from Identity to Radical Exteriority*. World Philosophies. Bloomington, Indiana: Indiana University Press, 2014.
Virno, Paolo, and Michael Hardt. "Radical Thought in Italy: A Potential Politics." Theory out of Bounds ; v. 7. Minneapolis, Minn: University of Minnesota Press, 1996.
Vitoria, Francisco de-. *Political Writings*. Cambridge Texts in the History of Political Thought. Cambridge [England] ; New York: Cambridge University Press, 1991.
Wall, Illan rua. "Notes on an '"Open"' Constituent Power." *Law, Culture and the Humanities* 11, no. 3 (2015): 378–92.
Wallerstein, Immanuel. *Modern World-System in the Longue Duree*. London, UNITED KINGDOM: Taylor & Francis Group, 2004.
Wallerstein, Immanuel Maurice. *World-Systems Analysis: An Introduction*. Durham: Duke University Press, 2004.
Zavala, Silvio. "La encomienda indiana." Junta para ampliación de estudios e investigaciones cientificas. Centro de estudios históricos. Sección hispano-americana. [Publicaciones] II. Madrid: Imprenta helénica, 1935.