From local tribes and elders councils to global villages and savage judges: Avoiding Babylon

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> … justice is not the law. Justice is what gives us the impulse, the drive, or the movement to improve the law…[1]

It would be interesting to explore the diverse features of judicial mediation and how it relates to the traditional judicial system in an effort to provide a speedy and fair conflict resolution. This requires locating the judicial mediation on the cultural map. For this some fundamental issues need to be addressed: Where judicial mediation is coming from? What kind of "truth" it provides? What justifies it? What makes it a suitable adjudication approach? What can be its future evolution? Where does it take us? Some pragmatic questions could be of interest as well: What should be judicial mediation's legal framework? What is the interest in implementing this alternative mechanism to resolve disputes? To which set of problems judicial mediation can provide a significant solution? What is the purpose that the presence of the judge-mediator can serve? What are the major obstacles in implementing judicial mediation and how can they be overcome? How judicial mediation can contribute to the advancement of the legal science since cases which otherwise would create important legal precedents or doctrinal reports/reviews are taken out of the public realm to be settled in private?

In a fast-changing economic climate, administrators of justice need to bring themselves to a larger understanding of conflict resolution mechanisms in order to properly cope with the immediate and long-term implications caused by the latest occurrences in the global marketplace. Among those: new globalized markets, diminution of national sovereignty and growth of global institutions, internationalization of finance and capital,

[1] *Deconstruction in a nutshell*: a conversation with Jacques Derrida edited by John D. Caputo, page 125

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geographical dispersion of production, transfer of certain economic power from the West to the East, redistribution of world wealth and debt, high-tech market, fragmentation of national space, de-differentiation of civil society[2]. This continuously changing economic climate spurs an enormous amount of new social relationships which generate an increased quantity of national and international legal conflicts. Thus, the reshaping of national and world economy requires reforms to the justice system.

Overloaded with new issues, judges can hardly keep peace with changes within the social-economic environment. This cause unfair delays in the process of restoring justice and may become an incentive to, for instance, not respect the obligations contractually assumed. Breach of obligations in turn can generate more legal disputes to be submitted to an already crowded and lacking resources judicial system. It seems that the classical resolution of the conflict based on the "win – lose" concept may not always be the mechanism most adequate to restore public peace and provide answers to the new reality.

Coping with the emerging issues requires adapting to the new environment, exploring alternative judicial avenues, finding new resources for the justice system, establishing new frontiers to legal territories yet unexplored, all for forward movement. It is necessary to re-think how justice should be served and thus to rethink the legal system. The future of humankind is intimately linked to where we go in reforming the justice system.

It would be then interesting to explore the diverse features of judicial mediation and how it relates to the traditional judicial system in an effort to provide a speedy and fair conflict resolution. This requires locating the judicial mediation on the cultural map. For this some fundamental issues need to be addressed: Where judicial mediation is coming from? What kind of "truth" it provides? What justifies it? What makes it a suitable adjudication approach? What can be its future evolution? Where does it take us? Some pragmatic questions could be of interest as well: What should be judicial mediation's legal framework? What is the interest in implementing this alternative mechanism to resolve disputes? To which set of problems judicial mediation can provide a significant solution? What is the purpose that the presence of the judge-mediator can serve? What are the major obstacles in implementing judicial mediation and how can they be overcome? How judicial mediation can contribute to the advancement of the legal science since cases which otherwise would create important legal

[2] Some of those occurrences are noted by Brendan Edgeworth, in "Law, Modernity, Postmodernity", (Ashgate, 2002), at page 61

precedents or doctrinal reports/reviews are taken out of the public realm to be settled in private?

Judicial mediation needs to be crafted in a way to keep legal procedures simple and speedy, consistent with the fundamental principle of fair trial. Despite the apparent contradiction in terms, a judge is probable the most suitable person to mediate between the parties and help them shape their own solution; his/her authority gives the process dignity. Nothing prevents a judge from accommodating instead of ordering, settling instead of deciding, communicating the law instead of setting it. And nothing can be more consistent with the role of a judge than an effort to adapt the system to better meet the needs of the litigants and to quickly restore the public peace.

This article provides a rough philosophical overview of the judicial mediation. At first it follows the co-evolution of two mutually constitutive and logically inseparable cultural manifestations: philosophy and law. Nowadays it is hard to even imagine that the law can retain any conceptual or ontological identity separated from other social occurrences, among those: philosophy. Given the reciprocal determination between *law* and *social*, "law is both a producer of culture and an object of culture."[3] Moreover, a comparative analysis has its advantages: puts things in perspective, can provide interpreting principles, helps filling-in the gaps etc. It also facilitates locating judicial mediation, the phenomenon at the heart of our interest, on the contemporary cultural map. A legal-philosophical analysis leads us to better understand the globalization (the postmodern background where judicial mediation happens) with its specific traits: deconstruction, fragmentation, legal pluralism, subjectivism, compartmentation of the *social*, privatization of justice and increasingly informal procedures. Although legal postmodernism seems and looks like a complete mess, unity and coordination are provided by new modes of communication.

Communication bridges a fragmented society and keeps it in coordination. With the advent of the legal pluralism, conflict based on the imposition/recognition of a certain substantive norm is less likely to happen since neither the legitimacy nor the content of those norms are contested. Permanent agreement on the content of a substantial norm is reached (and useful) essentially within a certain interest-driven community where its observation is meant to maintain a positive order and promote particular economic interests. Outside an individual community, its substantive norms rarely have pertinence. Conflicts happen not because the content of a substantive norm is debated but because lack of its proper communication.

In the legal world, judges are the most suitable to ensure the integrity of the process of communication between

[3] Pierre Schlag, The dedifferentiation problem, Cont Philos Rev (2009) 42:35–62, at page 42

the participants to the legal discourse. Since about 30-40 years ago it has been common to speak about judges assuming mediators' roles and so from public institution switching to the status of private actors. Nowadays, in a global yet fragmented society, the normative gaps need, more than ever, to be mediated. And judges are to be regarded as communicators, interpreters and translators of those legal signs and messages exchanged between transacting parties. As always, minds have to meet.

I. SYSTEMATIZATION ERA

During modernity, law evolved and went through a systematization process in simultaneous correspondence with other human mind's manifestations, philosophy in particular.

Modernity is characterized by the dominance of the culture of control and order imposed through categorizing, classifying and regulating. Throughout the 19th century and part of the 20th, the term was used to suggest a "dynamic, changing and updating process"[4]. This is an era organized around the search for general principles, laws of the mind, society and history and the quest for certainty and foundations.

A: For the modern philosophy, the leading concepts are those of system, order, reason, objectivity. The approach is constructive, globalizing, unifying, led by social engineers. The hierarchic structure, justified in terms of an ultimate, fixed truth, is the final goal. Clarity, simplicity, faith in "rational planning and scientistic pretensions"[5] correspond to a modern philosophy of a universe submitted to materialism and causality where future events are necessitated by a precise combination of past and present events.

Modernism is the structural, systemic age. Structuralism was a fashionable movement during the modernity (particularly in France). It studied the underlying structures inherent in cultural products and utilized analytical concepts from linguistics, psychology, anthropology and other fields to understand and interpret those structures.

At the beginning of the XXth century, Levi-Strauss promoted the principle of co-evolution and co-determination of social systems. His structural analysis of various social structures (language, kinship, myths) provided evidence of certain analogies and correspondences between the structure of language and the structure of kinship within certain south-American tribes. This correspondence, according to Levi-Strauss, is due to the unconscient activity of the human spirit which consists in imposing forms to all the human mind manifestations. Those forms are fundamentally the same for spirits of all ages: ancient, middle-eve or moderns. Once those forms figured out, a universal interpreting principle is achieved, valid for all manifestations of the human brain such as art, religion, law, language, literature, customs, habits etc[6].

[4] Joe Doherty, Elspeth Graham & Mo Malek, *The Context and Language of Postmodernism*, in "Postmodernism and the Social Sciences", edited by Joe Doherty, Elspeth Graham & Mo Malek, at page 7

[5] Brendan Edgeworth, "Law, Modernity, Postmodernity", page 171

[6] Levi-Strauss, "Structural Anthropology", page 17-18

When we look at how "… law has changed in ways that closely parallels trends in other social spheres …,[7] the similarities between the forms imposed by the human spirit to its manifestations in law and, for instance, philosophy, are evident. This puts forward the idea of a trans-systemic analysis based on which a guiding, interpreting principle could be inferred to fill in the gaps where those appears in one or the other discipline or to import solutions to impasses from one discipline to the other (*mutatis mutandi*). It also makes it easier to predict a future evolution of those human mind's manifestations.

B: For the modern law the leading concepts are those of reason, structure, extensive codification, stability, generality.

Legal modernists advocate (mainly) naturalism and positivism. They univocally apply a code of coherence and consistency to a discourse based on faith in hierarchic legal order.

The continental legal tradition is the product of a highly institutionalized Roman empire with a written down legal tradition whose sources were the Roman *Corpus Juris Civilis*, a prestigious jurisprudence and a collection of glosses. Law is a social construct, a hierarchic system of general application and universal validity:

"The term "system" came to be an appropriate epithet for the legal order, as it became a unified structure, was governed by a distinctive type of reasoning and came to be formally accessible to all citizens."[8]

Unlike the continental, civil law tradition, the common law doctrine of Anglo-Saxon origins emphasizes primarily the precedent set by previous judicial decisions. In order to extract a rule, it proceeds from particularities and not from abstractions. Statutes and codes of legislative source are usually supplemental to judicial opinions (the case law). However, despite the different methodical approach, for the common law tradition the systematization of law has also been the tendency throughout the modernity:

"[T]he bindingness of precedent linked with important work of doctrinal synthesis, contributed very effectively to the stability and generality of solutions adopted. It was as if, in its diverse forms (codification, customs, cases, and doctrine), modern law had necessarily to take the form of a system. Moreover, this phenomenon probably extends beyond legal sphere itself: it shares the rationalist and systematized form adopted by Western thought since the advent of modernity."[9]

Reason is the factor that causes the passage from the state of nature to the civil state where instinct is substituted by justice[10]. The legal modern thinking bestows law with reason, another legal foundation than the revelation or the faith. If reason constitutes a unifying factor, it allows the creation of an axiomatic system common to all

[7] Brendan Edgeworth "Law, Modernity, Postmodernity", page 133

[8] Idem, page 160

[9] "Legal system between order and disorder", by Michel van de Kerchove and François Ost, Oxford University Press, 1994 (reprinted 2002) page xi

[10] Jean-Jacques Rousseau « The Social Contract » Book I Chapter 8

individuals. Thus we see the apparition of various codes of laws, "summum" of clarity of which the modern era had been so proud of[11]. Modern codification has been strongly dominated by the figure of the Sovereign.

The old English jurisprudence speaks about the image of Sovereign. In his *Commentaries*, Blackstone notes that the king exemplifies both types of legal personhood. He is both a natural person as a man with physical attributes like all humans and yet a corporate person, as head of the body politic of the kingdom that transcends the earthly and serves as a majestic symbol of his office with the divine right to rule. The same view is reported in the XVI-th century case *Willion v. Berkley*[12]:

"[T]he King has two Capacities, for he has two Bodies, the one whereof is a Body natural, consisting of natural Members as every other Man has, (...); the other is a Body politic, and the Members thereof are his Subjects"

Early modern legal scholars (such as Hobbes, Locke, Bentham, Rousseau) also addressed the position and status of the Sovereign. Later they had been followed by Hans Kelsen, Ernst Kantorowicz and others. […]

The Sovereign has the authority to make codes of imperative, clear and simple rules. And so, in 1804, the French Napoleonic code (*Code Civil*) had been enacted. The Napoleonic Code gave the image of a monument well closed, of a unified law within the national frontiers[13]. It sets a predetermined number of legal "operations" susceptible to happen between a limited number of players. Its monolithic[14] character is in close relation with the relative simplicity of the society which it had been regulating. The Napoleon's juridical universe is closed, limited and any action happens within its limits.[15] Neither the *Codex Maximilianeus Bavaricus Civilis* of 1756 in Bavaria, nor the incomplete Codex Theresianus (1766) nor the Prussian Code[16] came close to the perfection of the French Napoleonic code.

The Napoleonic Code knew such success in France that it was soon followed by a Code of civil procedure (1806), Commercial Code (1807), Criminal Code (1810) and a Code of criminal procedure (1811). Outside France, the Civil Code had been imposed as a privilege upon the territories occupied by the Napoleonic armies. Later it made career in countries such as Italy, Belgium, Luxembourg, Pays-Bas, Greece, Romania, Spain, Portugal, some Latin American countries, the province of Quebec and the state of Louisiana in the United States.

The Napoleonic Code pandemic had pretty much established the systematization of law as a world-wide state of affairs. It is the first code of simple and general laws. This

[11] André-Jean Arnaud, « Pour une pensée juridique européenne » (Puf, 1991), at page 116-117

[12] Justice Southcote in *Willion v. Berkley* (1561; 1 Plowden 223; 75 E.R. 339)

[13] André-Jean Arnaud, « Pour une pensée juridique européenne » (Puf, 1991), at page 143

[14] Idem

[15] André-Jean Arnaud, *Du jeu fini au jeu ouvert : vers un droit post-moderne*, dans : « Le jeu: un paradigme pour le droit », sous la direction de Français Ost et Michel van Kerchove

[16] *Allgemeines Landrecht für die Preussischen Staaten* - General National Law for the Prussian States, promulgated by King Frederick II the Great in 1794

impressive legal monument embodies the legal model of the **pyramid**[17]. It draws a pyramid where the most fundamental and authoritative norm (the *Grundnorm*[18]) takes its place at the top and the most particular norms (those which apply to particular concrete situations) at the base. The inspiration for this law is usually tied to a single and supreme author: Lycurgus of Sparta, Solon, Justinian or Napoleon. It was therefore called **Jupiter Law**[19]. Obviously Jupiter law is sacred and transcendent, always uttered from above, from the mountain of Sinai[20]. It draws the eye irresistibly upward, toward the focal point from which radiates all righteousness and, one of the most distinctive values of any legal system: the rule of law. The rule of law, the blood running through the veins of any system of laws keeping the Nation State vigour, states that laws apply to all and are created in a way visible and knowable to all[21]. Nobody is above the law, nobody is exempted from the law and the ignorance of laws does not justify fault and neither does it exclude responsibility. The rule of law is a check against the arbitrary and the abuse of power (Plato, Aristotle, *Magna Carta*, Locke, Montesquieu etc).

In this climate appear Bentham, Austin, Kelsen, Hart, Dworkin and others with a positivist theory where laws ought to be public and positive, general in their application. Law is a hierarchic social construction by human beings and it exists in accord with certain fixed structural relations independent of human subjectivity. The judge's task is to identify the pertinent legal rule/norm and apply it as it is. Law is separated from ethics, morals, politics, sociology, customs or private regulatory (practice-based) rules:

"According to the traditional doctrine of legal sources, normative phenomena outside the legitimating hierarchy, so-called private regimes of normative regulation, are nonlegal - Savigny said so. They may be anything - professional norms, social rules, customs, usages, contractual obligations, (...), or arbitration awards - but never law. The distinction law/nonlaw is based on law's hierarchy of rules where the higher rules legitimate the lower ones. Normative phenomena outside of this hierarchy are not law, just facts."[22]

Law is "pure"[23] therefore universally applicable. It provides security and it constitutes the basic framework of social interaction. Because of this, every citizen knows what is expected of him.

For late positivists law remains a social construct (structure) emanating from the Sovereign but it is not a gapless system. It can be repositioned or even altered when flaws appear. Judges need to interpret the law. The ideal judge[24] would be immensely wise and with full knowledge of legal sources. He is able to find a correct

[17] François Ost, « Dire le droit, faire justice », Bruylant, Bruxelles, 2007, Chapter Two : *Jupiter, Hercule, Hermès : trois modelès du juge*, pages 33-61

[18] Hans Kelsen "Pure Theory of Law"

[19] François Ost, Idem *supra* note 17

[20] Idem

[21] Idem

[22] Gunther Teubner, *The King's Many Bodies: The self-deconstruction of Law's hierarchy* in Law & Society Review, Vol. 31, No.4 (1997), 763-788, at page 768

[23] Hans Kelsen "Pure Theory of Law"

[24] Ronald Dworkin "Law's Empire"

answer for every case (even when a case is not governed by any existing rule) by searching through the 'moral fabric'[25] of the society. Some would even content that judges also need to use their discretion[26] when a case is not governed by any existing rule of law. The language indeterminacy and the general standards used in the rules explain why judges need to exercise their discretion.

A similar but more radical position is found with legal pragmatists[27] who insist that judges have to interpret the law and adjust it in a way to make sense and reflect the changes within society. The judge interprets the precedent to have sensible consequences and tries to correct the limitation of the legislators' foresight[28]. This approach suggests a reversal of power and authority, it corresponds to the model of *funnel* (inverted pyramid) and it points to a judge-**Hercules**[29] who dares to interpret the law and does not hesitate to cancel and recreate it when it does not correspond anymore to the social reality. This model makes the man, more specifically, the judge, a valid source of law. Hercules, who was subjected to gruelling work, eventually led the world on his arms, thus faithfully reproducing the image of the funnel. It is now the decision of a judge (i.e. the precedent) and not the Sovereign's encoded law that creates the first and foremost authority:

« …from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her. »[30]

II. POSTMODERNISN

Society changed during the twentieth century in ways that had proven that universalism is an illusion; simplicity - dust in the eye, permanency - a utopia[31]. By the middle of the twentieth century the social illusion of certainty, simplicity, clarity and order is gone for the legal theorists as well. The Nation State became too big for the small problems in life and too small for the emerging global issues. The complexity of those required flexibility and networking capacity. In return those qualities required disaggregation of ossified structures.

A: For the postmodern philosophy the key concepts are those of deconstruction, de-structure, fragmentation. The postmodernism denies the possibility of an ultimately objective discourse; the modernist, positivist vindication of a fix truth is questioned. Contrary to modernism, which adopts rules complete and ready for mechanical use, the postmodernism destabilises the absolutization, the ability to reach the ultimate truth[32].

[25] Idem

[26] H. L. A. "Hart The Concept of Law"

[27] See Richard Posner, "How judges think"

[28] Idem

[29] See François Ost, « Dire le droit, faire justice », Bruylant, Bruxelles, 2007, Chapter Two : *Jupiter, Hercule, Hermès : trois modelès du juge* , pages 33-61

[30] *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, para 108 (Supreme Court of Canada)

[31] André-Jean Arnaud, *Du jeu fini au jeu ouvert : vers un droit post-moderne*, dans : « Le jeu: un paradigme pour le droit », sous la direction de Français Ost et Michel van Kerchove

[32] Françoise Michaud, *Deconstruction and Legal Theory* in "Consequences of Modernity in Contemporary Legal Theory" edited by Eugene E. Dais, Roberta Kevelson, ans Jan M. Van Dunné (Dunker & Humblot, Berlin, 1998), at page 185

There is no ultimate goal, no set truth; there are an infinite number of truths. The distinctions between different manifestations of social life are blurred; limits become fluid:

Identities previously thought separate and distinct (e.g. law and culture) turn out to be inextricably intertwined. Each is already inextricably the other – in ways that cannot be disentangled through any definition, specification, stipulation or theorization.[33]

Social entities loose their ontological identities. Preserving distinctions would be "akin to drawing lines with a stick in a Heraclitean river."[34] This phenomenon has been called "de-differentiation" and the result of it is the final recognition of what had been the dislike of the classic positivism: plurality, subjectivity, de-differentiation of law and morals, ethics etc - cultural occurrences that are now established to be in a "mutually constitutive"[35] relation, in "reciprocal determination"[36]:

[P]ostmodernity suffers a process of **dedifferentiation**. (…) the language of the … objectivity, universality and truth passes into a culture organized around the … plurality of knowledges and standpoints… .[37]

The postmodernism recognises the fragmentation before us and it abandons the belief that a strict scientific, rigorous method will help us understand the world[38]. In philosophy, Jean - Francois Lyotard had already proclaimed the death of any systematic metaphysic that claims to account for all reality and experience.

The postmodern method is hermeneutic, the interpreter is a *bricoleur*. Bricolage is the act of using and adapting existing elements, permitting means to be transformed into ends and vice-versa. The bricoleur is goal oriented; he does not possess specialized tools in relation to specific projects. His means are more generalized, having multifunctional use in relation to different situations[39]. An engineer executes tasks and projects depending on a set of theoretical and practical knowledge, trying to transcend constraints when those arise, while the bricoleur is happy to work with renewed materials from the past various construction and demolition projects previously engaged in. The bricoleur has a savage mind, namely a mind in state of nature. He does not follow explicit restrictive rules, nor does he use advanced techniques to increase the quality or the quantity of his intellectual output[40].

Deconstruction of structures is one of the most evident traits of the postmodernism. Using deconstructive techniques, the postmodern method dispenses with binary values (rationalism-empiricism, natural-divine,

[33] Pierre Schlag *The dedifferentiation problem* Cont Philos Rev (2009) 42:35–62, at page 37

[34] Idem, page 47

[35] Idem, page 36

[36] Idem, page 39

[37] "The Postmodern Turn", edited by Steven Seidman, page 14 (Introduction)

[38] *Postmodernism and International Relations*, in "Postmodernism and the Social Sciences", edited by Joe Doherty, Elspeth Graham & Mo Malek, at page 143

[39] Claude Lévi-Strauss, "The Savage Mind", 17-18

[40] Idem

truth-false, presence-absence, objective-subjective etc), rigid logic constructions, hierarchies and ever-lasting meaning of things:

"Deconstruction has challenged the hierarchies and dialectics so central to western thought and culture: man/ woman; mind/body; presence/ absence; speaking/writing. Deconstruction has demonstrated that reality is encountered through an open-ended cluster of "signs" of meaning, in which the continuous movement and play of meaning undermines the possibility of ever "finaly" fixing a meaning to anything."[41]

Deconstruction "provides a means of unmasking the hidden and the absences in our existing accounts and explanations of social relations."[42] Deconstruction needs to be understood "not as destroying but as "un-doing", "de-sedimenting" the various layers intervened in the building of a structure in human thought[43]:

…deconstruction used as a French word, means not "destructing" but "undoing" while analyzing the different layers of a structure to know how it has been built. Everything that is not natural has a structure, and has been built; and deconstruction is, to some extent, a way of analyzing the structure. Deconstruction ... emphasizes the history of the construction and the different layers which have built this construction.[44]

Postmodernists appreciate linguistic philosophers like Saussure or Wittgenstein for their critics of language and of how language is structured. They believe that the meaning of words in sentences is derived from their place in context of a web of beliefs and desires, and not from their literal meaning.

Derrida, Foucault and other postmodernists are post-structural theorists. The general assumptions of post-structuralism derive from critique of structuralist premises. Specifically, post-structuralism holds that the study of underlying structures is itself culturally conditioned and therefore subject to myriad biases and misinterpretations. To understand an object (e.g. one of the many meanings of a text) it is necessary to study both the object itself, and the system which produced the object. The world is a text and there is nothing beyond the text. In Derrida's conception, every text is penetrated with traces of other texts so neither is the single text the ultimate locus of meaning, nor does the author determine the meaning of the text. The ultimate locus of meaning becomes the culture itself as encoded in the text. If the text becomes the object of study and the text is a tissue of all other texts, then the task becomes the deconstruction of the writing. This approach has been adopted by legal theorists as well. It inspired the

[41] Helen M. Stacy, "Postmodernism and Law"(Ashgate Dartmouth, 2001), at page 12

[42] Nick Rengger and Mark Hoffman, *Postmodernism and International Relations*, in "Postmodernism and the Social Sciences", edited by Joe Doherty, Elspeth Graham & Mo Malek, at page 140

[43] Françoise Michaud, *Deconstruction and Legal Theory* in "Consequences of Modernity in Contemporary Legal Theory" edited by Eugene E. Dais, Roberta Kevelson, ans Jan M. Van Dunné (Dunker & Humblot, Berlin, 1998), at page page 183

[44] J. Derrida, *Deconstruction, A Trialogue in Jerusalem*, 1986

deconstruction of the modern legal monuments, mammoths lacking flexibility and inadequate to account for the new occurring phenomena and to contain them:

"**Deconstruction** offered a new theory for what had been intuitively grasped. And the conception of text reached by Derrida, which is not limited to written texts but integrates all discourses and, one might say, all possibilities of discourse, may seem particularly well adapted to law which always functions with a reference to something deem authoritative we call "a text" in this perspective: it may be an already written source but it may also be a source of text (morals, for example)."[45]

B: "Legal postmodernization shares characteristics analogous with those which have occurred in the various social domains"[46]. Legal theorists had emphasized the increasing inadequacy of the modern legal hierarchies unable to contain any longer the increased complexity of the global practices and behaviours. They needed to be, just as the other modern institutions, decentred, deconstructed, disorganized a bit. Scholars like Le Moigne see the loss of order and unity as necessary and creative moments in the evolution of the law. He refers to:

the capacity that legal systems should have, to tolerate – and even create- some ambiguities and equivocations, some redundancies and even some disorders within their internal as well as external articulations, so as to facilitate the conditions for some innovative moments of self-organization."[47]

Rigid social structures needed to disaggregate and re-organise as to reflect the movement towards globalization. The postmodern condition became the cultural background of the globalization and thus, of the Western society itself. Globalization erodes the Nation State and its territorial pretensions of legal supremacy. "An increasingly interdependent and globalized world ... rendered strict territorial limits on jurisdiction increasingly unworkable."[48] Law cannot be contained within the national borders, it is now without a State. During the postmodernism the unity and systematic hierarchy of the law, characteristics of its modernization, fracture:

The name of the great paradoxifier is neither "Jacques Derrida" nor "Niklas Luhmann". Its name is "globalization". The recurrent doubts about law's hierarchy so easily silenced in the nation-states' past can be silenced no more. They explode in the face of the "statelesness" of *lex mercatoria* and other practices that produce global laws without the state. It is globalisation of law that is killing the sovereign-father (...).[49] (citations omitted)

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[45] Françoise Michaud, "Deconstruction and Legal Theory" in *Consequences of Modernity in Contemporary Legal Theory* (Dunker & Humblot, Berlin, 1998), at page 182

[46] Brendan J. Edgeworth, Legal Postmodernization, in Consequences of Modernity in Contemporary Legal Theory (Dunker & Humblot, Berlin, 1998), page 117

[47] Cited in "Legal system between order and disorder", by Michel van de Kerchove and François Ost, Oxford University Press, 1994 (reprinted 2002)

[48] Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, (2005) at page 2512

[49] Gunther Teubner, *The King's Many Bodies: The self-deconstruction of Law's hierarchy*, Supra note 22, at page769

The one single – now overwhelmed - Sovereign dissolved into a multitude of sovereigns - equally valid forms of law producing[50] that made The One King to have Two, Three, Four, ... Many Bodies![51] The emergent legal landscape has an unsystematic plurality of sources of law."[52] The modern law's metaphors of autonomy, unity and closure give way to plurality and openness[53]. Limits between "public" – "private", "state rules" – "self-imposed rules", "subjective" – "objective" become blurred. The legal system as a whole becomes de-differentiated:

"…norms by which disputes are resolved are now much more difficult to classify with precision as legal and non-legal discourses become institutionally intermeshed."[54]

The diversification of legal sources matched the increased informalism of legal procedures. More cases are now solved at the mediation table. Legal norms of plural sources are taken seriously by the court officials. Trials before the courts of law are perceived now to be failed mediations:

(…) the traditional courts are imposing ever-widening obligations on parties to conciliate their differences before coming to court. This may take the form of reference to a specialist negotiator or direct mediation by judges.[55]

This represents a break with the modern belief that the formal objective law is the supreme form of justice and that it should be extended as far as possible[56]. Peace is now restored primarily by alternative modes of dispute resolution, foundation of the new *pax americana*. The postmodern law minimizes the role played by the *paix bourgeoise*[57] encrypted in hierarchic legal systems and codes of laws.

Thus, the postmodern judge is a mediator, the apostle of the *pax americana* based on alternative modes of dispute resolution. He is a *bricoleur*, reconstructs the precedent and performs various "legal construction" tasks with whatever "materials" happen to be at hand. While the engineer executes tasks and projects guided by a set of theoretical postulates and practical knowledge, the *bricoleur* is goal oriented. The judge *bricoleur* has a savage mind (Levi-Strauss) in a sense that he does not follow explicit restrictive rules or procedural techniques. He is in charge of fast, flexible and efficient procedures - see for example Art. 46 of the Quebec Code of Civil Procedure:

The courts and judges have all the powers necessary for the exercise of their jurisdiction. They may, at any time and in all matters, whether in first instance or in appeal, issue orders to

[50] Idem, at page777
[51] Idem, at page 777
[52] Brendan Edgeworth, *"*Law Modernity, Postmodernity*"*, at page 203
[53] Idem, at page 165
[54] Idem, at page 165
[55] Idem
[56] Helen M. Stacy, "Postmodernism and Law" (Ashgate Dartmouth, 2001), at page ???
[57] André-Jean Arnaud, *Du jeu fini au jeu ouvert : vers un droit post-moderne* , dans : « Le jeu: un paradigme pour le droit », sous la direction de Français Ost et Michel van Kerchove

safeguard the rights of the parties, for such time and on such conditions as they may determine. As well, they may, in the matters brought before them, even on their own initiative, issue injunctions or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to deal with cases for which no specific remedy is provided by law.[58]

Traditionally, the judge is called to find the common denominator between apparently irreconcilable values, such as somebody's violated freedom and its value in money (monetary compensation). If, as Kant suggests it, things have either a price or a dignity[59], this task seems close to impossible. However, in a postmodern legal climate, a judge is better suit to accomplish the task since the judge is (also) a mediator. As such he is only the carrier, communicator of the law that parties identify themselves:

"Under conditions of postmodernity... the social analyst will abandon his legislative role in favour of a **mediator** role between social worlds..., **interpreter** of alien cultures.[60]"(...)

If law is, essentially, a process of reasonable (public or, nowadays, private) discussion, then it is not altogether surprising to think that conflicts within the society require communication skills to solve them. And perhaps even more so in a global legal climate where trans-governmental fragments of society are creating their own legal regimes and, outside the social compartments, any consensus on the content of the substantive norms is beyond reach. At the global level a hierarchy of general, universal substantive norms is unthinkable. A single domestic legal system is not sufficient to regulate, for instance, the export credit transactions, to allocate rights and responsibilities among participants in an international sale transaction, to coordinate transnational banking transactions, etc.

And while agreement on substantive norms is unreachable in this much diversified landscape, people "may at least acquiesce in procedural mechanisms, institutions or practices that take hybridity seriously"[61].

…the unity of global law is no longer structure-based, as in the case of the Nation-State, within institutionally secured normative consistency; but is rather process-based, deriving simply from the modes of connection between legal operations…[62]

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[58] Art 46 of Quebec Code of Civil Procedure

[59] Immanuel Kant "Groundwork of the Metaphysics of Morals" translated and edited by Mary Gregor [NY: Cambridge, 1998], pp. 42-43. Quoted also by François Ost in « Dire le droit, faire justice », Bruylant, Bruxelles, 2007, Obiter Dicta, XX

[60] "The Postmodern Turn", edited by Steven Seidman, page 14 (Introduction)

[61] Paul Schiff Berman, *Global Legal Pluralism*, Southern California Law Review, [Vol. 80: 1155], at page 1164

[62] Gunther Teubner & Andreas Fischer-Lescano: *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25:4 Mich. J. Int'l. L. 999-1046 (2004), page 1007

When focus is shifted from unity to difference, from structure to process[63] "opportunities for plural voices"[64] open up. Procedural mechanisms, institutions, and practices "are more likely to expand the range of voices heard or considered". Once agreed upon, procedures "can potentially help to channel (or even tame) normative conflict by bringing multiple actors together into a shared social space"[65] **Within this common space, "normative gaps among communities are negotiated"[66], mediated**, discussed. The social dialog is then possible because communication happens according to generally acknowledged procedural norms. On the same time, a shared social space (where normative gaps are negotiated) offers the best environment for the co-ordination of societal fragments[67].

Judges ought to be the mediators of the normative gaps between competing societal fragments. They must also be the guardians of fair communication process and procedural norms linking separate, conflicting worlds.

Facing a plurality of substantive norms emanating from highly particularized trade practices, extremely detailed and technical, it is unthinkable to expect from a third party, a judge, to comprehend all the legal, economic or social aspects involved by large international transactions. However, they can still warrant the integrity of the communication process and its procedural norms. This is why we see the institution of *amici curiae* growing in popularity. In a plural society governed by technocrats, judges show more and more deference to the knowledge of experts. Judges do not set the law anymore. Their role is somehow reduced to ensuring the fairness of the communication process and its procedures. Judges have to communicate the legal signs and messages exchanged between participants to the legal discourse.

The meaning of a message is greatly dependent on the culture in which it is transmitted. Every object of use became encoded with its social function so that the object himself is a sign function, a layering of meanings that have to be unrevealed (Roland Barthes). Between the sender and receiver "noise" (culture, taboos, values) gets in the way and complicates the process distorting the meaning. The game of Chinese Whisper is a good example: a person starts off with a particular message which may get distorted by the time it comes to the final player – and from there conflicts spring. Then, the judge's role is to translate the law, to decode it, to say it without distorting it too much. Any labels that might carry an implied meaning must be avoided. The message that a judge transmits between conflicting players

[63] Ghunter Teubner, *Global Bukovina:Legal Pluralism in the World Society*, in "Global Law Without a State", Dartmouth, Aldershot, 1997, page 13. See also Paul Schiff Berman, Supra note 61, at pages 1164, 1166, 1168.

[64] Paul Schiff Berman, Supra note 61, at page 1166

[65] Idem, at page 1167

[66] Idem, at page 1168

[67] Gunther Teubner & Andreas Fischer-Lescano, Supra note 62, at page 1017

must be a "Degree Zero" legal message. Minds have to meet[68].

Like legendary **Hermes**[69] charged with the communication between incompatible worlds, the postmodern judge has to be in charge of passing the messages between conflicting worlds. If the mountain or the Pyramid agreed to the majesty of Jupiter, and the funnel to the pragmatism of Hercules, Hermes Law takes the form of a network. The messenger of the gods, always in motion, Hermes is in heaven, on earth and in hell. God of merchants, trade chairs, he connects the living and the dead. He is the god of sailors, travellers, always crossings the unknown. Hermes is the universal mediator, the great communicator. No other law before knew such a circulation of legal discourses as it is done by the judge-Hermes[70].

But, if Hermes, messenger of gods and god of merchants, is also the god of thieves, how then defend the morality of Hermes, correlate (associate) it to some (even ephemeral, passing) righteousness (established, recognized) authority, without distorting his role? This is, maybe, the Achilles' heel, of the postmodern law: its incompatibility with any discourse of authority. Here it comes into play the dignity and high ethics inextricably associated to the institution of a judge. Judicial ethics is the solid promise that the procedural fairness would be maintained throughout the mutual communications of expectations, substantive norms and settlement proposals between the parties. This is one more reason why judges are the most suitable to assume the role of mediators, communicators.

CONCLUSION:

We saw that in the legal postmodernism the deconstruction and dejudiciarisation of the legal system means that, in a way, the State and its officials (judges) do not intervene to impose norms and apply sanctions there where they use to do it. It does not mean that along with the postmodernism the State abandons its role. All that means is that the State does not dictate anymore what the rules are, but, to a certain extent, allows the participants to make their own rules. In this respect, the postmodern judge is called to assume great responsibility: in performing the role of a mediator, communicator, she/he becomes the designer of the postmodern legal world:

Adjudication of legal conflict is the site of law's most potent capacity to either close down or expand the possibilities of juridic identity.[71]

Postmodern terms need to be used in order to address judicial mediation. Because judicial mediation operates within a postmodern culture, it is important to comprehend its terms if we do not wish to, some day, find judicial

[68] "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law - I say nothing about the laws of other countries - to make a contract." in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, Bowen LJ

[69] See François Ost, « Dire le droit, faire justice », Bruylant, Bruxelles, 2007, Chapter Two : *Jupiter, Hercule, Hermès : trois modelès du juge* , pages 33-61

[70] Idem

[71] Idem, at page 17

mediation alienated because of lack of understanding of its language or concepts:

"The suggestion that postmodernism is appropriate for legal analysis is still a contested claim within conventional jurisprudence. Not all legal academics, and certainly very few lawyers, have a deep (or even passing) understanding of the postmodern critique. Many have found postmodernism too confronting to the foundational assumptions that underwrite their own role within the legal system… [T]o make matters harder, the language of postmodernism is so unlike traditional legal language that it is inaccessible to … lawyers, judges, law reformers and legal academics who are the key proponents of legal change."[72]

It should be noted that the traditional approach to solving conflicts remains for now a full option. Most of the time judges still are public officers of the Court and guardians of the positive law and its proper enforcement. But it also needs to be said that the alternative dispute resolution mode is a full option as well, for instance in Canada, in particular in the jurisdiction of the province of Quebec[73].

Participants in the administration of justice system can, of course, continue to play games with and within the new legal landscape, ignore the cultural changes, and seek to deny that their role, obligations, responsibilities have in any way changed. "But the fact that one can continue to play the game says nothing about the value or nature of the game being played."[74]

[72] Helen M. Stacy, "Postmodernism and Law", at page 14

[73] In Quebec (Canada) Justice Louise Otis is opening pioneer procedural avenues for the litigants. See http://www.louiseotis.com

[74] Pierre Schlag *The dedifferentiation problem,* Cont Philos Rev (2009) 42:35–62, at page 59