The contribution of Nancy Fraser's critical theory to the philosophical foundations of Anti-discrimination law

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El presente trabajo es una primera versión de un capítulo que forma parte de mi tesis de doctorado. Se pide a los lectores no difundir ni citar el texto sin mi permiso. Cualquier comentario adicional pueden enviarlo al correo electrónico acoddoumc@gmail.com

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Introduction

As political philosophy is turning towards a relational conception of equality, with concepts of oppression, domination or subordination coming to the fore, theories of anti-discrimination law (hereafter, ADL) have acquired new attraction from both philosophy and legal theory.[1] Against a purely distributive paradigm, relational equality has highlighted the need to give a more accurate philosophical account of legal fields like ADL, which are explicitly addressed at redressing the evils of social relations rather than attempting to generate a fairer distribution of shares of self-respect. However, even if 'relational equality sounds very much like a description of anti-discrimination law', the aims of current anti-discrimination regimes are very much about the access to employment, services, goods or resources that are valuable for people, especially for those who are most vulnerable.[2] In other words, ADL 'also aims to rectify distributive injustices'.[3] In this way, ADL is also 'an indispensable component of a basic structure that justly distributes the benefits and burdens of social cooperation.'[4]

[1] D Helmann and S Moreau, *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013); T Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015). For the recent philosophical relevance of relational or social equality, see C Fourie et al (eds.), *Social Equality: On What It Means to Be Equals* (Oxford University Press, 2015).

[2] S Moreau, 'Equality and Discrimination', in *Cambridge Companion to the Philosophy of Law* (Cambridge University Press, 2016).

[3] Moreau, 'Equality and Discrimination'. Moreover, several authors have claimed that respect can also be understood as a good to be distributed, thus implying the redistribution of cultural value to different

In the middle of distributive and relational theories of equality, ADL may seem to provide a solution to all the problems contemporary societies are facing. Many governments have created equality laws on the assumption that they are part of progressive political projects tackling key social and economic evils: discrimination undermines the social basis for economic systems, unjustly restricts access to valuable social goods, constrains valuable options for individual freedom, generates harms for individual and social identities, and also endangers social cohesion. For conservative positions, however, ADL goes too far in attempting to intervene social relations and promote cultural and social changes according to an egalitarian ideal;[5] for some liberals, ADL should be narrowly crafted (or, worst, dispensed altogether) in order to avoid curtailing other important freedoms, like the freedom of religion or the freedom of contract;[6] for the sceptical left, ADL may be deemed as the darling of neo-liberal utopias, endorsing a politics of identity that forgoes issues of redistribution.[7] This puzzling scenario invites us to think better on the nature and purpose of ADL, not only because it touches deeper moral issues, its unavoidable expressive character, but because it promises to achieve a society free of oppression, subordination or domination and with fairer distribution of rights, duties, benefits and burdens. To be part of progressive political projects, ADL needs to be critical of its role in contemporary societies, facing processes of modernization that push towards social/political disintegration and systemic/market integration.[8] Neither a panacea nor a purely human face of neoliberal arrangements, ADL could be a truly revolutionary project that aims to transform the current state of affairs. Philosophical debates around ADL have attempted to give an account of the promises of ADL. By placing the wrongness of discrimination in certain aspects of our current practices, different theories of ADL have tried to make sense of the promises that are usually used as a justification for ADL around the world. However, as I will argue, we need more than philosophical theories attached to our legal practices to understand what is at stake.

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In this chapter, I argue that we need to think on the potential role or place of ADL within a theory of social emancipation, not only to give an account of our current anti-discrimination legal regimes, but to question how ADL can become part of progressive political projects. To do that, we should address both the power and limits of ADL as part of broader emancipatory political projects. Here, I start from the basic assumption

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forms of life or conceptions of the good. In that way, the distributive paradigm could accommodate anti-discrimination laws. See, for example, J Rawls, *A Theory of Justice* (Harvard University Press, 1971) chapter p 440-446 ?

[4] S Choudhry, 'Distribution vs. Recognition: the case of anti-discrimination laws', George Mason Law Review, p 149. He also acknowledges that the distributive paradigm has had some difficulties to distinguish between material goods and opportunities, and its different distributive principles. Although luck egalitarians have made important contributions in this respect, especially through their debate around the meaning of the moral arbitrariness of natural lottery, they have not considered the practice of anti-discrimination as an important object of reflection.

[5] E Pricker, 'Anti-Discrimination as a program of private law', German Law Journal; J Cornides, 'Three case studies on "Anti-Discrimination" law', International Journal of Constitutional Law

[6] R Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, 1995).

[7] A Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (Oxford University Press, 2011).

[8] W Streeck, 'The Crisis of Democratic Capitalism', New Left Review

that even if ADL is not a solution to every social problem, it is more revolutionary than what its critics sustain. In concrete, I argue that the current debates around different theories of ADL have not addressed the feasibility of the promises of anti-discrimination legal regimes, neither attempted to provide reasons to place ADL within emancipatory political projects. How should we give a theoretical account of ADL if we understand it as part of a broader theory of social emancipation? What are the limits of the transformative potential of ADL? If ADL is not a solution to every problem, how should we understand the role of ADL in different spheres, such as the economy, culture and politics? Should ADL incorporate poverty, class or social origin as protected grounds if it is to serve broader emancipatory goals? What kind of economic harms can ADL properly address? How can we prevent ADL from being a mere legitimation mask to processes of marketization, balkanization or social disintegration? In sum, what is the truly revolutionary aspect of ADL that triggers reaction from different constituencies? These are the questions that motivate this chapter. To attempt an answer to these questions, I will supplement debates around the philosophical foundations of ADL with insights from critical social theories, more specifically, with the theory of social justice developed by Nancy Fraser. Although she has never specifically addressed ADL, there are many arguments in her writings to rationally reconstruct the potential place of ADL in her work. Within her theory, we can read ADL as an anti-misrecognition device and display its transformative potential. Borrowing from André Gorz, and considering Fraser´s contribution, we could label ADL as a paradigmatic case of 'non-reformist reform'.[9]

This chapter is structured in the following way:

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The Philosophical Attraction of ADL

It has been already a while since theories of ADL have abandoned the idea that what is required to eliminate discrimination is a demand for consistent treatment, that is, to ensure the impartial application of the law to all the regulated subjects. Moreover, even if comparison is still important, both practically and conceptually, theories of ADL have gone way beyond the analysis of a mere requirement of anti-discrimination courts to act in a rational way.[10] If consistent treatment would be all what ADL demands, then we could have done the same with the constitutional/formal equality clauses that have been present in our legal systems for more than two centuries. The incorporation of protected grounds, usually after long struggles of social movements, demanded theoretical debates about what is the value that stands in the background of a comparative exercise.[11] Thus, the expansion of ADL required a theoretical exercise beyond formal equality. In philosophical terms, this would require an inquiry into 'the basis for people's entitlements to equal amounts of something, be it welfare or resources or political influence or, at a more fundamental level, consideration or moral

[9] A Gorz, *Strategy for Labor* (Beacon Press, 1967); N Fraser and A Honneth, *Redistribution or Recognition?: A political-philosophical exchange* (Verso, 2003), p 79.
[10] S Goldberg, 'Discrimination by Comparison', Yale Law Journal
[11] As put by Reaume, 'perhaps counter-intuitively, an equality claim does not directly appeal to equality itself as its foundation, but rather to some other value implicated in the distribution of the benefit at issue.' 'Dignity, Equality, and Comparison', in *Philosophical Foundations of Discrimination Law*, p 9.

authority or something else'.[12] For anti-discrimination scholarship, this movement towards philosophical foundations of ADL required us to focus on the wrongness of discrimination and on the reasons that ultimately justify having a whole set of legal regulations to tackle discrimination. In other words, on what is what makes, in certain spheres, discrimination on certain grounds and not others as wrongful and an object of legal regulation.

In the beginning, political philosophy understood discrimination law as an area of law that dealt with animus, prejudice or unwarranted contempt of the discriminator, therefore as having almost no interest from a philosophical perspective. Indeed, formal equality clauses, as guarantees of non-arbitrariness, were considered enough protections against contempt or irrational proxies held by the discriminator.[13] Since the emergence of philosophical theories of distributive justice, the distributive paradigm worked around the nature and value of equality as a distributive matter, and discrimination law had no space in that area of thought. Understood as dealing with mental states, discrimination was far away from discussions of distributive justice: 'it is wrong because of the attitudes or beliefs that motivate it, not because of how it distributes any particular kind of good between people.'[14] At the most, this psychologized version of ADL was of interest for social sciences, and it was expressed in the early enactment of hate crimes: discrimination is an isolated case of intentional or conscious evil that should be addressed through the means of criminal law, but it is not a broader social problem that can erode our commitments with the value of equality before the law.[15] Although this theories still have some traction, for example, when considering the availability of legal defences or in crafting proper deterrence incentives, the discussion around the wrong of discrimination has been displaced.[16] The emergence of the doctrine of implicit bias, the incorporation of indirect discrimination clauses, or the need of ADL to structurally address the stigma, stereotype or prejudice against certain social groups, has expanded our understanding of discrimination and has made it much more difficult to theorize it.[17] With the current shift towards relational equality, theories of ADL are required to deal with both distributive and relational dimensions, complicating the answer to the question of 'which of the many morally troubling features of discriminatory acts and policies render them wrongful or unfair'.[18]

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Having abandoned mental state theories of ADL, which place the wrongness of discrimination on the attitudes, intentions or feelings of the discriminator, several

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[12] I Carter, 'Respect and the Basis of Equality', pp 538-539.
[13] In contrast, rational proxies could initially pass the test of mental-based theories of ADL: for example, if employers rely on sex as a proxy for physical performance, they would be justified in hiring more men than women if that skill is relevant for job performance. If there is no intentional discrimination, mental-state theories of ADL judge the rationality of the judgement.
[14] S Moreau, 'Equality and Discrimination'
[15] A Dulitzky, 'A Region in Denial: Racial Discrimination and Racism in Latin America', in S Oboler and A Dzidzienyo (eds.), *Neither Enemies nor Friends: Latinos, Blacks, Afro-Latinos* (Palgrave, 2005).
Authors:; T Katerí Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response* (Cambridge University Press, 2014); Hate Crimes in Europe
[16] For some scholars, the operation of anti-discrimination law in the U.S. is the paradigmatic example of mental state theories of ADL that require the victim to prove intent. REFERENCE.
[17] Moreau, 'Equality and Discrimination'
[18] Moreau, 'Equality and Discrimination'

theories have proposed alternative answers (recognition-based, prioritarian, and freedom-based theories). In general, those who place the wrong of discrimination in victims' well-being, see ADL as a tool of distributive justice, because they are unjustly denied something which is valuable, either jobs, services, incomes or other goods; others, who endorse recognition-based or expressive theories, see ADL as an instantiation of relational equality.

Recognition-based theories of ADL argue that the wrongness of discrimination consists in the lack or failure of recognition of the victim. Within these theories, some scholars highlight the expressive harms of discrimination, so they focus their analysis in the messages expressed by a policy or act regardless of whether they are consciously or unconsciously avowed.[19] In that way, they expand their analysis of discrimination to factors like social conventions and public perceptions of the meanings and symbolic effects of the cases under consideration.[20] Other scholars who endorse recognition-based theories of ADL argue that the wrongness entail the failure to recognize the victim´s full standing as a person, a denial of her equal moral worth, or a violation of personal dignity.[21] In general, recognition-based theories start their analysis of the wrongness of discrimination from instances of direct discrimination, where the protected ground is explicitly used in the reasoning of the discriminator, or where the failure of recognition can be derived from a consideration of the context of the case. However, cases where a trait not explicitly included among protected grounds is considered direct discrimination because of the close connection with an included ground shows us that the difference between direct and indirect discrimination has been blurred regarding the lack or failure of recognition.[22] The way in which pregnancy was considered sex discrimination is a case in point.[23] But what about those cases of indirect discrimination where there is no lack or failure of recognition? While some scholars argue that these are derivative forms of injustice that compensate for past discrimination, others argue that there are moral reasons to prohibit indirect discrimination although it is not unjust or wrongful.[24] If direct discrimination is the paradigmatic case of wrongful discrimination for its failure of recognition, indirect discrimination involves redistributive concerns, which implies imposing duties to those private actors that control the access to valuable goods or opportunities like jobs,

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[19] E Anderson and R Pildes, 'Expressive Theories: A General Restatement', Unniversity of Penssylvania Law Review; D Hellman, *When is Discrimination Wrong?* (Harvard University Press, 2008).
[20] Allowing the claimants to present the context of the case to trigger a shift of the burden of proof has been an innovative tool to bring these factors into account. Also, the standard of evidence for civil cases has allowed bringing the social context to decide on the demeaning message of discriminatory acts. F Muñoz, 'No a "separados pero iguales": un análisis del derecho antidiscriminación chileno a partir de su primera sentencia', Estudios Constitucionales 11:2.
[21] B Eidelson, 'Treating People as Individuals', in *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013); A McColgan, Discrimination, Equality and the Law (Hart, 2014); D Reaume, 'Discrimination, Comparison and Dignity', in S Moreau, D Hellman (eds.), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013); P Shin, 'The Substantive Principle of Equal Treatment', Ratio Iuris.
[22] Moreau, 'Equality and Discrimination'
[23] Comparative Discrimination Law
[24] Hellman, *When is Discrimination Wrong?*

services, education or other resources.[25] The 'structural turn' of anti-discrimination law, then, would not be strictly about justice issues, but about engineering equality through the public and private sectors.[26]

For its part, prioritarian theories argue that there are several reasons to justify ADL as a way to redress disadvantage and alleviate the well-being of those who are worst off.[27] Indeed, these theories focus on the effects of discrimination on its victims, which are usually denied important means to support an individual´s well-being. Some of these scholars working within prioritarian theories start their reflection on the basis of a 'general moral theory according to which the right action is the action that maximizes moral value', and so they claim that ADL is a particular instantiation of the moral duty to alleviate those who are worst off, especially in circumstances where they are deserving.[28] Thus, ADL is seen as an issue of distributive justice, especially when what it is at stake in discrimination cases is the access to resources, opportunities and welfare. Direct and indirect discrimination are equally wrongful instances of disadvantage that should be redressed through ADL as an instrument of redistribution. However, the method of these scholars seems to be at odds with the way in which the operation of our anti-discrimination laws have shaped our social morality views on what is the injustice of discrimination. As put by Sophia Moreau, discrimination

> is arguably different from certain other moral wrongs, such as failing to keep promises (…). We could imagine developing a detailed and accurate conception of what a promise is and why it is morally important to keep promises even without consulting contract law (…) But it is arguable that our shared public views of what discrimination is and why it is unjust have, in large part, been shaped by domestic and international anti-discrimination laws over the past fifty years.[29]

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Hence, in contrast with prioritarian-desert theories of ADL, the legal practice of anti-discrimination laws does not seem to accommodate judgments of desert in discrimination cases: indeed, these kind of cases do not address whether the victims of discrimination usually deserve or not the treatment they received, but whether that treatment was discriminatory. At the same time, ADL has been reluctant to address socio-economic disadvantage, incorporating poverty, class or income as protected grounds, and so rejecting the idea that ADL should be always modified according to our moral prioritarian duties towards those who are worst off. If our practice should comply with what these value-maximizing theories of ADL prescribe, discrimination

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[25] M Selmi, 'Indirect Discrimination and the Anti-Discrimination Mandate', in *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013).
[26] S Bagenstos, 'The Structural Turn and the Limits of Anti-Discrimination Law', California Law Review
[27] In general, prioritarian theories move away from grounding ADL in the value or principle of equality. Indeed, as has been pointed out by Thomas Scanlon, "The idea that equality is, in itself, a fundamental moral value turns out to play a surprisingly limited role in my reasons for thinking that many of the forms of inequality which we see around us should be eliminated" (202).
[28] Moreau, 'Equality and Discrimination; K Lippert-Rasmussen, *Born free and equal: A philosophical inquiry into the nature of discrimination* (Oxford University Press, 2014); R Arneson, 'Discrimination, Disparate Impact, and Theories of Justice', in *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013).
[29] Moreau, 'Equality and Discrimination'

cases would be really judging something very different, where judgments of desert would transform ADL in an engineering tool of social policy to eliminate disadvantage.

Liberty or freedom-based theories argue that discrimination is a violation of an individual liberty, independently of what others possess.[30] For Sophia Moreau, discrimination entails a violation of our interest in 'freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender.'[31] In this way, discrimination works akin to a tort, a personal wrong committed against an individual by another, 'wrongs which consist in unfairly disadvantaging someone because of a trait whose she really should not have had to bear'.[32] Liberty-based accounts of discrimination law can also be understood as giving meaning to the basic principle to treat people with equal concern and respect, in the sense that in a liberal society we should all respect each other entitlements to decide about their lives in a way 'that is insulated from the pressures or burdens caused by certain extraneous traits.'[33] Liberty-based theories attempt to overcome the problems of recognition-based theories that do not justify the wrongness of indirect discrimination in the same way as direct discrimination: as freedoms to decide on how to pursue our lives without the burden or costs imposed by normatively extraneous traits. In other words, as costs that should not be borne by the victims of discrimination, regardless of whether they have been victims of contempt or expressively demeaning attitudes. Thus, an employer that in good faith refuses to create part-time jobs, flexible work schedules, or that emphasizes attendance at work might be unjustly imposing costs on women´s deliberative freedoms who should not bear the cost of a normatively extraneous trait such as gender.

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Recently, and against the idea of attempting to capture the wrongness of discrimination in a single value, several scholars have supported pluralist theories of ADL. They argue that the wrongness of discrimination, when considering the practice of our anti-discrimination laws, is not reduced to a single value, so it is a theory of discrimination law 'which gives some role to the absence of social subordination, some role to the protection of freedoms, and some role to the effects of discrimination on people's well-being, particularly the well-being of those who are worst off'.[34] At the beginning of his *Theory of Discrimination Law*, Tarunab Khaitan borrows from HLA Hart to distinguish two different questions that we may pose when inquiring into the nature of a discrete area of law: distributive and purposive questions.[35] Purposive enquiries address the

[30] J Raz, *The Morality of Freedom* (Oxford University Press, 1986); the right to be treated as individuals (Edelson)?; A general interpretation of anti-discrimination laws and its emergence in the employment context relates the principle of non-discrimination with the principle of merit: 'the driving force of behind anti-discrimination laws (...) is a concern for the fair treatment of individuals according to criteria of merit.' S Choudhry, 'Distribution vs. Recognition: the case of anti-discrimination laws', p 154.

[31] S Moreau, What is Discrimination?', Philosophy and Public Affairs, p 147

[32] Moreau, 'Equality and Discrimination'

[33] Moreau, 'What is Discrimination?', p 149. For Yoshino, liberty-based claims are a way in which courts can deal with what he calls 'pluralism anxiety', the idea that group-based equality claims may derive in process of balkanization. Indeed, he describes how the U.S. Supreme Court has been using individual liberty claims under the due process clause of the Fifth and Fourteenth Amendments as the new equal protection clause. K Yoshino, 'The New Equal Protection', Harvard Law Review

[34] Moreau, 'Equality and Discrimination'

[35] T Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015)

general justifying aim of ADL, what is the point of redressing some forms of discrimination through the means of law; distributive questions, for its part, emerge because we already have a regime of ADL, and are placed at an intermediate level of enquiry ('between systemic concerns and evaluation of particular disputes'), which

> seeks to understand the different tools that the law employs: the prohibition on direct and indirect discrimination and discriminatory harassment; the role of comparators; the requirement of fault; provision for reasonable accommodation and affirmative action; and the possibility of justification.[36]

Although these two questions are closely related, theorists should clarify what question they are addressing, in order to understand their relations, for example, on the way in which particular distributive tools may be tuned towards more systemic concerns. Within this distinction, Khaitan pursue his pluralist theory of ADL, which combines his prioritarian-sufficientarian view of the purpose of ADL (the elimination of systemic disadvantage that endangers the possibility of human autonomy), with a freedom-based view that also considers discrimination as a personal wrong that imposes 'costs on membership of groups whose membership is morally irrelevant.'[37] Sophia Moreau, for her part, abandoning her original claim to give an account of ADL uniquely based on the violation of an individual right to deliberative freedoms, endorses a pluralist account that promises to capture the different strands of discrimination: 'we do care very much about giving people deliberative freedoms in certain contexts; but we also care just as deeply about eliminating subordination and eliminating relative disadvantages between social groups.'[38]

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A combination of different theoretical accounts seems interesting, and these scholars have provided ways in which these moral reasons interact, in order to address the potential arbitrariness in accommodating the different reasons that justify ADL.[39] Maybe pluralists theories have achieved the best we can hope from theory: 'apparently incompatible theoretical explanations (…) all have captured some essential truth about discrimination law (although none can explain everything on its own).'[40] However, we are not entirely clear of how can we institutionally articulate these theoretical accounts to capture the different strands of current anti-discrimination laws. One possibility is to distinguish several facets or dimensions of current anti-discrimination laws within

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[36] T Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) p 10

[37] T Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 168

[38] Moreau, 'Equality and Discrimination'. Nevertheless, in 'What is Discrimination?', she already acknowledged the possible deficiencies of a purely liberty-based account of ADL: 'One area that requires further explanation is how this view of the personal wrong involved in discriminatory actions might be conjoined with an account of the harms or injustices that are suffered by each of the groups marked out by grounds of discrimination. It may be that some anti-discrimination laws-and in particular, the requirements prohibiting disparate impact- are also designed to rectify injustices suffered by these groups.' p 178.

[39] As put by Moreau, the different theories 'do not give us quite the same kinds of reasons, and so they do not work in quite the same way, from a moral standpoint: freedom and equal standing seem to ground a personal duty from the discriminator to particular victims, whereas the general goal of raising the level of those groups who are worst off seems to give us a more general moral reason to perform certain actions, without necessarily generating a claim to any particular goods on the part of particular individuals.' Moreau, 'Equality and Discrimination',

[40] T Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 10

pluralist theories, and provide a compartimentalized explanation of the operation of sophisticated institutional programs of regulation. For example, we may explain direct and indirect discrimination as addressing the same personal wrong, because we understand that we are unjustly imposing costs on group membership for the victims; however, at the same time, we can distinguish between the different defences that may be available for defendants in both cases, as direct discrimination usually involves an explicit lack of recognition or egregious expressive harms, while indirect discrimination may be understood as the legislative imposition of duties on the hands of those who control valuable goods that determine our socio-economic position. Also, we may distinguish between the judgement of the wrong of discrimination, that answers the legal question of who should be held responsible for a discrimination claim, and the desirability of using ADL to eliminate systemic disadvantage against certain social groups, which is expressed in the remedial parts of adjudication that frequently attempt to extend the impact of the case beyond the involved parties.

The abovementioned theories have been looking for 'a coherent normative foundation upon which discrimination law can securely rest.'[41] They have been criticized because there are several aspects of the surface structure of anti-discrimination laws that are not explained by the preferred normative foundation, even when we have considered those aspects as morally desirable. How can we explain the fact that we consider indirect discrimination as something to be redressed even when the discriminatory act shows no demeaning expressive message? How can we explain the fact that ADL also protects individuals who are not among disadvantaged groups if the discriminatory act cannot be considered as a serious threat against their individual freedoms? In a way, the whole theoretical enterprise is about dealing with aspects of our current anti-discrimination laws that we consider important. The look for the right balance between what the practice shows us and what we think ADL should be doing is a plausible theoretical enterprise. An acknowledgment that the relationship between law (as it is) and morality is mutually constitutive has been one of the main contributions of the current philosophical debate: it is not only that our practice should match our previous moral agreements, but that our practice can inform, both practically and theoretically, our moral reasoning. It is precisely by exploiting this relationship that pluralist theories have been developing the most interesting accounts of ADL, reaching closely to what I am trying to do in this chapter by reconnecting ADL not only with issues of morality, but with broader issues of critical social theory. For example, when Moreau addresses the critiques against recognition-based theories of ADL that ground the wrongness of discrimination in a failure of recognition of the victim's full standing in society, or in acts that express demeaning messages that effectively lowers one's social status, she interprets that wrongness as 'fundamentally about the absence of subordination'. She then reckons,

> We need a theory of social subordination, of what it is for individuals and groups to have a certain status in society, of how exactly this status can be lowered, and of when such lowering counts as unfair domination or subordination. And providing this will, I think, require these theorists to think more about the role of groups in discrimination. You

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[41] T Khaitan, *A Theory of Discrimination Law*, 6

> cannot subordinate an individual, qua individual: you can only subordinate qua member of some group or some presumed group. And in fact the law recognizes this, and this is in part why the protected traits are not idiosyncratic personal traits, but traits that tend to mark out broader social groups. Recognition theorists owe us a more distinct account of what these groups are and of how they are subordinated.[42]

By looking into the practice with pluralist lens, we may acknowledge that the purposive question around ADL requires elements that go beyond a relationship between law and morality. Maybe a whole picture of the practice tells us that social movements see ADL as a truly encompassing project that addresses several problems faced by disadvantaged groups and reserve a place for it within a broader movement towards social emancipation. And maybe that is what people expect or what governments promise when a particular ADL is enacted.

Debates around philosophical foundations of ADL have not addressed the conditions for ADL to be an emancipatory project of social change. Initially, this question may fall towards the purposive inquiry, which 'engages with overall systemic concerns: why do we have a system of discrimination law at all? What, indeed, is the point of this area of law?'[43] The practice of ADL in several jurisdictions has proved quite challenging for the status quo and has been dubbed as a 'dangerous' instrument in the hands of social movements. Several equality laws have included clauses that prevent anti-discrimination claims to become the first step in a sliding edge toward broader legal reforms.[44] The fear of LGBTI movements using ADL as a way to strengthen their ability to push for egalitarian or same-sex marriage has warned various conservative decision-makers globally.[45] As was highlighted at the beginning of the chapter, although ADL is not a solution to every social problem, either in relation to social or material inequality, it could prove quite emancipatory in the hands of those who have been disadvantaged and considered as second-class citizens for quite a while.

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In order to make a purposive inquiry of the emancipatory character of ADL, we need to go beyond philosophical discussions, and draw from insights of critical social theory. For critical theory, theoretical works should not be decoupled with engaging with the practice and, moreover, with the commitment to transform the reality one is trying to understand. Nancy Fraser's theory of social justice offers us a way to link the philosophical foundations of ADL with a theory of social emancipation. Within this relationship, ADL can be viewed as an anti-misrecognition device that acknowledging its limits, can act as a non-reformist reform, which acknowledges its strengths.

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[42] Moreau, 'Equality and Discrimination'

[43] T Khaitan, *A Theory of Discrimination Law*, p 10

[44] Chile (2011); Paraguay (bill); Mexico (2001); Equality Law UK (2010); Swedish Law?

[45] J Diez, *The Politics of Gay Marriage in Latin America Argentina, Chile, and Mexico* (Cambridge University Press, 2015), p XXXX; W Eskridge Jr., 'Backlash Politics: How Constitutional Litigation has advanced Marriage Equality in the United States', Boston University Law Review, p XXXX

The critical social theory of Nancy Fraser

Introduction: non-reformist reforms

What do critical social theories contribute to the analysis of current forms of discrimination and the potential role of ADL in addressing/redressing it? This is the question that will guide us towards the analysis of the work of Nancy Fraser. In general, critical social theories work around the idea that what distinguishes itself from traditional theories is a practical aim towards human emancipation, that is, challenging domination or oppression and improving human freedom in all its forms. In order to do that, every critical theory combines philosophy and social sciences, and 'must explain what is wrong with current social reality, identify the actors to change it, and provide both clear norms for criticism and achievable practical goals for social transformation.'[46] In the first part of this section, I will introduce the work of Nancy Fraser and then explain how she conceives the purpose of human emancipation in the current conditions of complex societies facing modernization processes. Then, I will reconstruct her views or thoughts on law. Finally, I will conclude by providing reasons, drawn from Nancy Fraser's theory of social justice, to consider ADL as an anti-misrecognition device.

Nancy Fraser is a critical theory scholar that has developed, in many different books and articles, a 'comprehensive critical theory of justice'.[47] Through a thoroughgoing debate with her critics, she has developed several premises of this influential theory of justice, in the midst of current post-socialist conditions.[48] In contrast with the Rawlsian approach, that bypasses an analysis of the concrete and different injustices that afflict contemporary societies, she starts from an empirically grounded social theory to develop her normative standard of participatory parity.[49] Moreover, and in contrast with other critical social theories, she advances a clear normative framework that orients attitudes towards the 'right struggles'.[50] Her critical theory is influenced by different intellectual sources, and the aim is to provide a comprehensive framework to understand and clarify the different struggles of our times. In several works, she uses the famous statement of Karl Marx on what should be the object of philosophy, which counts as a general definition of Critical Theory: 'the work of our time to clarify to itself (critical philosophy) the meaning of its own struggles and its own desires.'[51] She explicitly starts her analyses from what she calls 'folks paradigms of social justice', which are paradigms used by individual and collective actors in order to assess social

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[46] J Bonham, 'Critical Theory', Stanford Encyclopaedia of Philosophy

[47] Rainer Forst, 'First things First', *Adding Insult to Injury* (Verso, 2008), p 310

[48] The influence of Nancy Fraser's theory is widespread...examples (Philosophical Foundations of Discrimination Law, Julie Suk). EXPLAIN POST-SOCIALIST CONDITIONS.

[49] Although Rawls, unlike Kant, did 'not seek to abstract moral theory from general facts about human nature and circumstances.' C Fried, 'Liberalism, Community, and the Objectivity of Values', Harvard Law Review, p 962.

[50] THE CRITIQUE AGAINST CRITICAL SOCIAL THEORIES FOR THEIR LACK OF NORMATIVE ORIENTATIONS. REFRENCE.

[51] K Marx, 'For a Ruthless Criticism of Everything Existing', in R. Tucker (ed), *The Marx-Engels Reader* (Morton, 1978), 15. Quoted In 'What's Critical About Critical Theory'; also later in *Fortunes of Feminism*.

and institutional arrangements.[52] In contrast to Axl Honneth, who claims that critical theory should avoid deriving its concepts from the activity and struggles of social movements, Fraser supports the general idea that social theory should start from concrete political experiences, as everything happens in discursively mediated contexts.[53] In her own words, '[a] critical social theory frames its research program and its conceptual framework with an eye to the aims and activities of those oppositional social movements with which it has a partisan –though not uncritical- identification.'[54] Indeed, her theory draws mostly from the struggles of feminist social movements, assessing to what extent do our critical theories 'serve the self-clarification of the struggles and wishes of contemporary woman'.[55] In this context, 'the folk paradigms of justice that constitute a society's hegemonic grammars of contestation and deliberation', are the starting point for Nancy Fraser's theory, although 'they do not enjoy any absolute privilege.'[56] In her famous debate with Axl Honneth, who endorses a subject-centered philosophy, in which moral psychology grounds, and constrains, social theory and moral philosophy, the method of the critical theorist becomes clearer, because it should assess the adequacy of 'folk paradigms of justice' from two independent perspectives: 'She or he must determine, first, from, the perspective of social theory, whether a society's hegemonic grammars of contestation are adequate to its social structure, and, second, from the perspective of moral philosophy, whether the norms to which they appeal are morally valid.'[57]

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Within the first perspective, Fraser advocates for a social theory capable of analyzing the mutual imbrication of economy, culture and politics in contemporary societies, and avoid approaches such as substantive trialism (dissociation between each dimension), or economism/culturalism/politicsm (where the different dimensions are reduced to one). Instead, she adopts a 'perspectival trialism', that assumes that redistribution, recognition and representation are three analytical perspectives applied to social phenomena, 'which cut across institutional divisions'.[58] It is important to highlight that these are analytical distinctions within a theory that has been elaborated with a single

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[52] For Fraser, these paradigms 'are transpersonal normative discourses that are widely diffused throughout democratic societies, permeating not only political public spheres, but also workplaces, households, and civil society associations. Thus, they constitute a moral grammar that social actors can (and do) draw on in *any* sphere to evaluate social arrangements.' N Fraser and A Honneth, RR, p. 207-208. Today, the principal 'folk' paradigms of justice are recognition, redistribution and representation.

[53] Fraser and Honneth, RR, pp 204-205.

[54] Fraser, 'What's Critical about critical theory?', in *Fortunes of Feminism*, p 19.

[55] *Fortunes of Feminism, pp. 19-20*; any of her works included in a *Feminist Reader*?

[56] Fraser and Honneth, RR, pp 207, 208.

[57] Fraser and Honneth, RR, p 208.

[58] Fraser & Honneth, RR, p 217; for the incorporation of politics as a third separate sphere of justice, see Nancy Fraser, 'Reframing Justice in a Globalized World'. The incorporation of 'politics' as a third domain of justice, or the analysis of misrepresentation as a separate form of injustice, has been celebrated as an innovation in Fraser's theory of social of social justice. This innovation stemmed from the analysis on how the grammar of contestation and deliberation has been altered with globalization (what she calls a '*Post-Westphalian* frame'): above and beyond first order questions of substance, like those addressed by redistribution and recognition, 'arguments about justice today also concern second-order, meta-level questions. What is the proper frame within which to consider first-order questions of justice? Who are the relevant subjects entitled to a just distribution or reciprocal recognition in the given case? Thus, it is not only the substance of justice, but also the frame, which is in dispute' (ibid., p. 72).

purpose: to provide an evaluative framework to the struggles of our time.[59] In other words, these are not distinctions that pretend to mirror social dynamics or describe states of facts; instead, it is an approach for the social theorist who is working to offer guidance to the struggles of social movements.[60]

In the realm of moral philosophy, she offers a normative standard to distinguish between worthwhile desires and aims for the struggles of our age. Fraser's theory of social justice has been praised for offering a 'clear articulation of a normative framework', one of the best contributions to contemporary critical social theory.[61] In concrete, she proposes a standard of 'participatory parity', grounded in the idea that 'justice requires social arrangements that permit all members of society to interact with one another *as peers*.'[62]

In the current context of complex societies facing modernization processes that pull towards systemic integration, which in its turn endangers communicative practices of social integration, the question that emerges is how a theory of social justice like the one of Nancy Fraser can foster human emancipation.[63] A first remark is that, along with other critical theories, Nancy Fraser has been gradually developing scepticism towards grand theories, because of the pressure to say something on the demands and desires for human emancipation of concrete communities and social movements that are placed in particular points in history. The approach that unifies different critical social theories is to start 'with agents' own pretheoretical knowledge and self-understandings' and to

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[59] Several authors have wrongly interpreted Nancy Fraser's approach without considering that recognition and redistribution are different analytical perspectives. For example, Choudry criticized Fraser for adopting a group-based status recognition that 'sets to one side the notions of recognition that underlie egalitarian politics of redistribution, even if only as a simplifying device'. He does not take into account how she conceives the relations of intertwinement between the two, how in real life we usually experience both harms and, finally, how we can start thinking on a strategy to redress those harms towards emancipation. 'Redistribtuion vs. Recognition: the case of anti-discrimination laws', p 159.

[60] Fraser and Honneth, RR, p. XXXXX

[61] C Zurn, 'Arguing over Participatory Parity', in *Adding Insult to Injury*, p. 148. This is a legacy of what is called the 'normative turn' that Habermas attempted to give to critical theory.

[62] Fraser, 'Why Overcoming Prejudice is Not Enough', in *Adding Insult to Injury*, p. 84. The clear commitment of Fraser with liberal principles is explicit in the derivation of the principle of participatory parity from the universal principle of equal moral worth: 'the universalist norm of the equal moral worth of human beings requires ensuring all members of society the possibility of participating on a par with others. This in turn requires removing obstacles to participatory parity in whatever form they arise, including failure to recognize group difference' (p 87). Indeed, her principle of parity of participation is a 'radical democratic interpretation of the principle of equal moral worth'. N Fraser, 'Reframing Justice in a Globalized World', p 73. Apparently, her standard of participatory parity endorses a thick (substantive) conception of justice, making her close to a deontological conception of liberalism. Although different from procedural liberalism, which centres on the institutional arrangements that grant democratic procedures, Fraser's approach acknowledges that participatory parity results from the accumulation of substantive standards that have been incorporated to the realization of equality. Fraser and Honneth, RR, chapter 3, p 230. Deontological liberalism (M Sandel, Rawls TJ chapter 9, C Fried, O O'Neill); is it committed to a distinction between the right and the good? How does she deals with the problems of conceiving rights as trumps? However, in contrast with Kantian deontological liberalism, the linguistic turn, endorsed by Fraser, commits herself to substantive standards that are unavoidably imperfect, fallible. For a more detailed analysis of Fraser´s liberal commitments, see the sections on the Principle of State Intervention and the Political Axis of ADL in the next chapter.

[63] Highlight her Habermasian influence.

employ different approaches according to differing circumstances.'[64] Moreover, contemporary critical theories need to say something relevant to our current struggles, something which some scholars have labelled as perspicacity: 'if, at the end of the day (…) critical social theory doesn´t tell us something insightful and practically useful about the actual struggles and wishes of our age, then it has missed the target.'[65]

Within this scepticism to grand theories, Nancy Fraser borrowed from André Gorz the term 'non-reformist reform', in order to assess whether a policy or action could be framed as emancipatory in the current post-socialist conditions.[66] In the words of Fraser, these are reforms (or, better, struggles) that

> set in motion a trajectory of change in which more radical reforms become practicable over time. When successful, nonreformist reforms change more than the specific institutional features they explicitly target. In addition, they alter the terrain upon which later struggles will be waged. By changing incentive structures and political opportunity structures, they expand the set of feasible options for future reform. Over time their cumulative effect could be to transform the underlying structures that generate injustice.[67]

In this way, Nancy Fraser is on the look for a '*via media* between an affirmative strategy that is politically feasible but substantively flawed, and a transformative one that is programmatically sound but politically impracticable.'[68] Moreover, and in connection with Fraser´s understanding of Foucauldian genealogies of power, we could understand that emancipation, in her theory, 'refers specifically to transforming a state of domination into a mobile, reversible, and unstable field of power relations within which freedom may be practiced.'[69] In other words, emancipation does not mean a freedom free from power relations (with Foucault, we would say, there is no way out of power relations, we are subjectively constituted by them), the traditional utopian image of freedom for the Enlightenment tradition; however, as put by Fraser, 'what Foucault needs, and needs desperately, are normative criteria for distinguishing acceptable from unacceptable forms of power.'[70] The standard of participatory parity, in connection with her political critique of the force of law, which will be explained later, will allow us to frame ADL as a non-reformist reform,

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[64] J Bonham, 'Critical Theory'.

[65] C Zurn, 'Arguing over Participatory Parity', p 143.

[66] André Gorz, *A Strategy for Labor* (Beacon Press, 1967). It was not originally in the Tanner Lectures, but later included by Fraser, by a suggestion from Erik Olin Wright, in the book with Axl Honneth, *Recognition and Redistribution*.

[67] Fraser & Honneth, RR, pp 79-80.

[68] Fraser & Honneth, RR, p 79

[69] A Allen, 'Emancipation Without Utopia', Hypathia 30:3, p. 517. Analysing feminist struggles, Amy Allen claims that the late Foucault distinguishes between power and domination, allowing us to theorize 'emancipation from states of gender domination, where this means transforming a field in which power relations are frozen or blocked, asymmetrical and irreversible, into a mobile, unstable, and reversible field in which 'power is exercised only over free subjects, and only insofar as they are free', p. 518.

[70] N Fraser, 'Foucault on Modern Power: Empirical Insights and Normative Confusions', Praxis 3, 1981, p 286. However, her endorsement of Foucault's usefulness for a social theory that works to distinguish different articulations of power relations does not commit her to the Foucaldian idea that "the analysis of power is better done without mention of law". For a critique of the Foucaltian aproach to Law-Power, See G Wickhan, 'Foucault, Law and Power: A Reassesment', Journal of Law and Society 33:4, p 601.

> that opens up lines of fragility and fracture within the present that are also spaces of anticipatory illumination, spaces that enable us to transform states of domination into mobile and reversible fields of power relations, and to practice freedom within those fields.[71]

In a way, nonreformist reforms are 'policies with a double face': they call upon people's identities and articulate their claims within existing frameworks of recognition, redistribution and representation, while they also 'set in motion a trajectory of change in which more radical reforms become practicable over time.'[72] Thus, for example, feminist movements are challenging hard-wired norms that rank 'masculine' qualities above 'feminine', but they must also gain concrete advances in order to broaden their support. In other words, and contrary to former social movements that have sacrificed immediate achievements for a hoped-for ultimate aim, Nancy Fraser calls for reforms that could reinforce current social struggles. The strategy, then, lies in

> conceiving and pursuing reforms that deliver real, present-day results while also opening paths for more radical struggles for deeper, more structural change in the future. Feminists can embrace this approach in an agnostic spirit. We don't need to decide now whether the end result must be a postcapitalist society (…) So I say, let's pursue nonreformist reforms and see where they lead.[73]

Although this brief introduction to Nancy Fraser's theory of social justice does not make justice to her longstanding influential trajectory, the following sections will highlight how useful are her current ideas for analysing ADL, a concrete struggle that is specially endorsed by social movements deploying legal strategies. As I will explain in the following section, I will consider ADL as one example of a recognition struggle that has become mainstream, accommodating its internal practical tensions, and its mutual imbrication with political and redistributive struggles.

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Does she have a particular theory of law?

Now we need to focus on one of the most pressing questions to Nancy Fraser's theory of justice, a question that has been raised frequently in several exchanges with Jacques Derrida, Axl Honneth, Leonard Feldman, Christopher Zurn, William Scheuerman and Thomas McCarthy, among others.[74] In general, these critics have claimed that Fraser has neglected the analysis of law as a separate sphere of analysis (the *neglect critique*). Even though she locates her normative principle of participatory parity within the liberal values of equality, freedom/autonomy and dignity, for her critics 'she does not elaborate it in legal-and political-theoretical terms; thus, she largely bypasses the

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[71] Allen, 'Emancipation Without Utopia', p 524.
[72] Fraser & Honneth, RR, p 79.
[73] Interview with Gary Gutting, New York Times.
[74] J Derrida, 'Force of Law', in D Cornell, M Rosenfeld, and D Gray (eds.) *Deconstruction and the Possibility of Justice*, New York: Routledge, 1992, pp. 3-67; N Fraser, 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 1; L Feldman, 'Redistribution, Recognition and the State: The Irreducibly Political Dimension of Injustice', Political Theory 30:3; A Honneth, RR, pp 136, 151-152, 251); C Zurn, 'Arguing Over Participatory Parity', in *Adding Insult to Injury* (Verso, 2003); T McCarhty, 'Review of Redistribution or Recognition', Ethics, p 400.

complicated contestation of the meanings of equality, autonomy, and the like within the liberal tradition'.[75]

Moreover, these critics have claimed that 'Fraser tends to treat law purely instrumental, as a guarantor of redistribution and recognition claims, rather than as a mode of social ordering and a dimension of social justice in its own rights' (the *instrumentalist critique*).[76] For Axl Honneth, within Fraser's approach to law,

> state-sanctioned rights are to have only the purely instrumental function of equipping already achieved entitlements to cultural recognition or economic redistribution with certain enforcement powers after the fact. This instrumentalism does not seem at all convincing to me, however, because it forgets that rights govern relations among actors in fundamental ways, and their significance to social interaction is thus not only functional. Rather, the subjective rights we grant one another by virtue of the legitimation of the constitutional state reflect which claims we together hold to require state guarantees in order to protect the autonomy of every individual. This interactive character of rights also allows us to explain why they should be understood as independent, originary sources of social recognition in modern societies.[77]

In several works, Honneth has stressed that legal recognition or legal freedom is indispensable for personal integrity and thus a positive achievement of modernity, because law is needed to enable structures of recognition outside the legal sphere of rights.[78] This is what Fraser supposedly ignores or bypasses, the centrality of law and rights for political and social struggles in modernity. Even worst, she has been considered as endorsing a neo-marxist approach to law that is merely functional or instrumental.[79] For William Scheuerman, these problems may be explained because although Fraser expresses 'fidelity to critical theory as an interdisciplinary endeavor, law's status within that project ultimately remains unclear.'[80] Despite her self-declared neo-Kantian commitments, she does not addresses law, rule of law or rights, and does not engage with a whole legal and constitutional scholarship inspired in Frankfurt´s Critical school, specially after the publication of Jurgen Habermas *Between Facts and Norms*.[81]

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Although her general comments on law are very brief, we can say that her empirical reference points are always dealing with social struggles around legal institutions (e.g., marriage) or fought within legal discourses (e.g., domestic violence). In this regard, law becomes one of the crucial object of analysis, as social movements use legal discourse as one of the main avenues to advance their 'folk paradigms of justice', either to challenge legally sponsored subordinations or to 'redress nonjuridified status subordination'.[82]

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[75] T McCarthy, Review of Redistribution or Recognition, Ethics, p 400.

[76] T McCarthy, Review of Redistribution or Recognition, Ethics, p 400; Honneth, *Recognition or Redistribution*, pp 251-2.

[77] Honneth, RR, p XXXX

[78] Honneth, *Struggles for Recognition* (MIT Press, 1995); *Freedom´s Right* (Polity Press, 2014) ch 4

[79] W Scheuerman, 'Recent Frankfurt Critical Theory: Down on Law?', Constellations 00, 00, p 11

[80] Scheuerman, 'Recent Frankfurt Critical Theory: Down on Law?, p2.

[81] J Habermas, *Between Facts and Norms* (Polity Press, 1996).

[82] N Fraser, RR, p 221.

The question, then, could be reformulated from the point of view of the relationship between law and social change, or between law and the demands of social movements.

Even if her main works do not directly address the central place that occupies law in social and political struggles, I think her exchanges with several scholars allows us to reconstruct her legal thoughts in a more interesting way. Her theoretical thoughts on law are rooted in her comments to Jacques Derrida´s legal ideas, a brief work that has not been quoted by most of her critics, and that could help us in defending her critical theory approach to law. [83] Against Derrida, who endorsed a metaphysical idea on the force of law as constitutively and inescapably violent, she supported a political understanding of the force of law that elaborates an approach that locates 'law's force in contingent social relations and institutionalizations of power'.[84] Moreover, her political approach to the force of law specifies the object of critical theory in 'forms of masked, structural violence', because we tend to overlook 'a range of deadly systemic social processes' that generates massive harms, and 'which cannot be easily attributed to identifiable individual agents'.[85] For example, she has paid special attention to the expressive harms or symbolic injustices that are rooted in legal institutions that operate as exclusions of certain groups who then become unable to participate as peers in certain social interactions.[86]

Specifically, in her critique of Derrida's *The Force of Law*, she supports a critique of law that can highlight the structural limitations of current legal systems in addressing 'claims for harms one has suffered by virtue of belonging to a social group'.[87] Thus, she has always been aware of the limits of an individualistic justice that 'presents obstacles to anyone who seeks judicial standing to claim that a systemic injustice has occurred.'[88] Moreover, a political approach to the force of law, she argues, should not preclude the critical analysis of cultural backgrounds of legal systems, which determine the functions and outcomes of legal decision-making processes that 'work to the disadvantage of subordinated social groups'.[89] Summarizing her 'political critique of the force of law', we could say that its object consists in rendering visible 'forms of masked, structural

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[83] J Derrida, "Force of Law," in D Cornell, M Rosenfeld, and D Gray (eds.) *Deconstruction and the Possibility of Justice*, New York: Routledge, 1992, pp. 3-67; for a broader analysis of Derrida's philosophy of law, beyond his 'Force of Law', see the special issue in the German Law Journal, Special issue 2016. For Fraser's response, see her 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 1. Not even William Scheuerman, who has probably made the most informed critique of Nancy Fraser from a Frankfurt-inspired theory of law, made a reference to this work. 'Recent Frankfurt Critical Theory: Down on Law?', Constellations 00, 00.

[84] N Fraser, 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 13, p. 1328.

[85] N Fraser, 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 13, p. 1328.

[86] Fraser on same-sex marriage

[87] N Fraser, 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 13, p. 1329.

[88] N Fraser, 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 13, p. 1329.

[89] 'A good example of this is the congeries of androcentric assumptions that has led many judges and juries to reject self-defense as a legal defense in cases where women are accused of attacking or killing men who have battered them over a period of years. It has been argued that any legitimate act of 'self-defense' must occur in the heat of an assault and cannot involve use of a deadly weapon against an assailant who has used 'only' his fists.' Fraser, The Force of Law: Metaphysical or Political?, Cardozo Law Review 13, p. 1330.

violence that permeate, and infect' specific legal judgments, an 'institutionalized regime of justice reasoning situated in a specific, structured, sociocultural context.'[90]

At the end, she leaves open the door for considering law as vehicle of social emancipation, because her theory of social justice has the normative tools to distinguish and identify forms of legal violence that are not necessary.[91] We should remember that Fraser's 'perspectival trialism' conceives law as pertaining to the three abovementioned domains of justice (redistribution, recognition, representation), 'where it is liable to serve at once as a vehicle of, and a remedy for, subordination'.[92] Again, in contrast with Honneth, who reserves a special place for legal recognition in one institutionalized social sphere (among love and esteem or solidarity), Fraser highlights the pivotal role that law plays in many social spheres, giving form to what Scheuerman called the *compartmentalization* thesis against Honneth.[93]

In this sense, for Honneth, family and marriage fall under the sphere of love and care, while legal recognition deals with the respect we need in public spheres. In the words of Scheuerman, for Fraser, '[t]he law decisively shapes intimate relationships in ways that Honneth's attempt to parcel it off into a separate sphere of recognition'.[94] However, in other parts of his work, Honneth gets closer to Fraser, and stipulates a broader role for law in modern conditions, where it can serve as a 'legitimate and even necessary means to make sure that recognition in the sphere of intimacy takes a normatively acceptable form. Law does not disable but instead enables "structures of recognition" even outside the (legal) sphere of rights'.[95] This is an issue that has been present from the early works of Fraser, specially in her critique of the Habermasian view on juridification, which, for example, romanticizes the family as a sphere of communicative interaction that should be kept apart from the density of legal regulation, according to his distinction between system and lifeworld.[96] In contrast with Scheuerman, who suggests Fraser is an enemy of legalism, we can read her critical approach to juridification as part of her political approach to the force of law: we should not be afraid to use the weapons of law, or fight within legal arenas, specially against certain epistemologies that start from substantive boundaries that put the family, educational institutions or other romanticized spheres outside the scope of legal regulation. [97] By treating law perspectivally, Fraser assumes that we can call for its force whenever we grasp a parity-impending challenge.

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Although she has not spent too much energy in developing a thoughtful approach to legal issues, her political critique of the force of law acknowledges that law is not only an instrument but constitutes an important insight into the analysis of 'folk paradigms

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[90] N Fraser, 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 13, p. 1330.
[91] N Fraser, 'The Force of Law: Metaphysical or Political?', Cardozo Law Review 13, p. 1330.
[92] Fraser and Honneth, RR, p 220.
[93] W Scheuerman, 'Recent Frankfurt Critical Theory: Down on Law?', Constellations 00, 00, p3.
[94] W Scheuerman, 'Recent Frankfurt Critical Theory: Down on Law?', Constellations 00, 00, p3.
[95] W Scheuerman, 'Recent Frankfurt Critical Theory: Down on Law?', Constellations 00, 00, p3.
[96] N Fraser, 'What's Critical about Critical Theory', in *Fortunes of Feminism* (Verso, 2013).
[97] Recently, and in addition to her political critique of the force of law, Fraser showed concerns on the increasing "legalism" of current Critical Theory, a tendency that endangers "a troublesome reduction of critical social analysis to unduly legalistic theories of justice or 'constitutional theory'". W Scheuerman, William Scheuerman, "Recent Frankfurt Critical Theory: Down on Law?", Constellations 00, 00, p1.

of justice'; for example, it has allowed feminist movements to display their struggles in legal arenas, transforming the meaning of legal terms that were previously understood according to dominant positions. Legal discourses (that is, an officially recognized idiom, which includes concrete vocabularies, paradigms of argumentation, narrative conventions and modes of subjectification) are readily available means of interpretation and communication (MIC) that constitute 'the historically and culturally specific ensemble of discursive resources available to members of a given social collectivity in pressing claims against one another.'[98] However, even if 'a society´s authorized "means of interpretation and communication" are often better suited to expressing the perspectives of its advantaged strata than those of the oppressed and subordinated', social struggles deploying legal strategies or making their claim in legal avenues have made linguistic innovations to articulate injustices that previously lacked names.[99] I think this idea of law as being both constitutive and instrumental is closer to what Nancy Fraser recognizes as the proper picture of law in her theory. In some way, it puts Fraser closer to the emerging literature on law and social movements, which has abandoned a purely instrumental notion of law into a more complex picture.[100]

ADL as an anti-misrecognition device

From the work of Nancy Fraser, I think there are good reasons to understand ADL as an anti-misrecognition device. Although she has not made any detailed analysis of ADL, her theory allows us to place this field of law within broader reforms or policies for emancipatory social change. In the last part of this section, I am going to inscribe ADL within her critical social theory.

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At a first glance, Fraser's theory of social justice could favour a reading of ADL as a device against every form of injustice. [101] Indeed, ADL has been used in every social sphere, from tackling everyday discrimination in the media (culture), highlighting the absence of woman from political places of power (politics), or addressing poverty in countries that do not have a welfare state (economy). In general, then, ADL cuts across the three domains of justice. However, according to Fraser's theory, I will argue that ADL could be considered as an anti-misrecognition device. The reasons I will explore here are threefold: first, we need a theoretical account of ADL that acknowledges its limits, because it is not a solution to every form of injustice; second, it needs an articulation with the remedies against forms of injustice that are mainly rooted in the economy or in the political drawing of membership in different communities; and third, instead of drawing upon an ontological distinction between what pertains to the state

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[98] N Fraser, 'Struggle Over Needs', *Fortunes of Feminism* (Verso, 2013), p 57.

[99] N Fraser 'Prioritizing Justice as Participatory Parity', in *Adding Insult to Injury* (Verso, 2008), p334; see the analysis of 'the politics of needs surrounding wife-battering', which saw feminist activists that 'renamed the practice with a term drawn from criminal law and created a new kind of public discourse', highlighting the political character of the issue under discussion, N Fraser, 'Struggle over Needs', in Fortunes of Feminism, 72; 'Toward a Discourse Ethic of Solidarity', Praxis International 5:4, 1986.

[100] M McCann, 'Law and Social Movements', *The Blackwell Companion to Law*; see also M McCann (ed.), *Law and Social Movements* (Ashgate,) p xii.

[101] For Nancy Fraser, theories of distributive justice have been unable to incorporate issues of recognition. For her, we need to transcend this issue, and look for a bivalent or trivalent theory of justice. See I Robeyns, 'Fraser's critique of Theories of Distributive Justice'; and K Olson, 'Distributive Justice and the Politics of Difference' (arguing that Fraser has unjustifiably neglected the ability of some theories of distributive justice to deal with misrecognition, like the capabilities approach of Amartya Sen).

and what to culture, it combats the different formal/cultural institutionalization of value patterns that impedes participation as peers in social life.

Fraser's analysis of contemporary recognition struggles starts from the need to develop a comprehensive theory of justice that could articulate different struggles addressing different harms. In her early works, she started from the fact of our current postsocialist conditions in order to analyse two different paradigms of social justice, redistribution and recognition, and integrate them into a single framework (a 'bivalent conception of justice').[102] Her initial worries were rooted in the dilemmas between recognition and redistribution struggles, specifically, in the problem of 'displacement' in the age of identity politics:

> The demise of communism, the surge of free-market ideology, the rise of 'identity politics' in both its fundamentalist and progressive forms – all these developments have conspired to decenter, if not to extinguish, claims for egalitarian redistribution.[103]

Rather than disparaging recognition struggles, her overarching aim was to give an account of two different conceptions of injustice, maldistribution and misrecognition, which could be addressed in every societal domain.[104] She used the idea of 'perspectival dualism' in order to apply these two analytical perspectives to the analysis of contemporary struggles and proposed a socio-theoretical framework where 'neither of these injustices is an indirect effect of the other', but where both could be understood as 'primary and co-original.'[105] However, as was said before, she later recognized the need to incorporate politics as a separate domain, where a distinct form of injustice (misrepresentation) takes place. In this sphere, the struggles are about participation itself, that is, questions about who has a voice, about the membership in a participatory community. Thus, the need to adopt 'perspectival trialism'.[106]

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Fraser's status model of recognition is influenced by a Weberian approach to Marx.[107] Indeed, within this folk paradigm of justice, victims 'are more like Weberian status groups than Marxian classes.'[108] In other words, 'they are defined not by the relations of

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102 N Fraser, 'Social Justice in the Ag of Identity Politics', Tanner Lectures, 1996, Stanford University.
103 N Fraser, 'Social Justice in the Age of Identity Politics', Tanner Lectures, 1996, Stanford University, p. 4.
104 RR 63.
105 N Fraser, 'Social Justice in the Age of Identity Politics', Tanner Lectures, 1996, Stanford University, p.
106 T Burns and S Thompson, *Global Justice and the Politics of Recognition* (Springer 2013), p XXXX. Leonard Feldman speaks of a 'trivalent theory of justice'. Leonard Feldman,
107 In contrast, her approach to the politics of redistribution is influenced by the Marxist paradigm of the exploited working class. Overall, her comprehensive social theory could be labelled as a Neo-Marxist approach, an example of 'the articulation of Weberian concepts in the recent development of Marxist theory (…) a Neo-Marxist theory of class.' V Burris, 'The Neo-Marxist Synthesis of Marx and Weber on Class', in N Willey (ed.), *The Marx-Weber Debate* (Sage Publications 1971), 68. Although Fraser has been labelled as a committed Marxist, due to her somehow implicit defence of the primacy of class relations in her analysis (J Butler, 'Merely Cultural', New Left Review), 'the thrust of contemporary Marxism has been decidedly in the direction of a more multidimensional viewpoint' (ibid., p. 75). Indeed, Neo-Marxists like Fraser grant 'considerable autonomy to nonclass form of oppression. Disagreements remain as to the most appropriate way of conceptualizing these forms of oppression, their degree of autonomy, and the precise manner in which they are articulated with capitalist class relations.' (ibid.) As I will address later, the precise manner in which nonclass forms of oppression are articulated with class in contemporary capitalism is one of the most important contributions of Nancy Fraser to critical social theory.
108 Fraser and Honneth, *Redistribution or Recognition*, p. 14. She quotes the influential essay of Max Weber, called "Class, Status and Party".

production, but rather by the relations of recognition, they are distinguished by the lesser respect, esteem, and prestige they enjoy relative to other groups in society.'[109] When evaluated from the standard of participatory parity, misrecognition is a specific form of injustice where 'institutionalized patterns of cultural value constitute some actors as inferior, excluded, wholly other, or simply invisible, hence as less than full partners in social interaction.'[110]

In contrast with 'identity models of recognition', such as those of Axl Honneth and Charles Taylor, which 'start from psychological premises about the intersubjective conditions for the development of a sense of personal identity', the status model of recognition endorses a sociological approach that, according to Christopher Zurn, 'treats recognition from the external perspective of a sociological observer rather than the internal perspective of individuals engaged in intersubjective relations of recognition and identity-formation.' [111] Hence, misrecognition should not be understood mainly as a cognitive/psychological issue, but as 'an institutionalized social relation'.[112] Although Fraser does not ignore the possibility that misrecognition may have profound effects on individual identities, she considers that from a critical theory of justice, we should not start the analysis of our current struggles from subjective, unmediated, pre-political experiences of injustice. In other words, 'the status model does not so much exclude other meanings of recognition as set constraints on how they may be legitimately achieved.'[113] Her account, then, is broader than identity models, which start their analysis of misrecognition from a phenomenological account of subjective experiences of injustice:

> 'critical theory must prioritize the critique of institutionalized injustice in order to open a space for legitimate forms of self-realization. Treating justice as the first virtue, it must seek to equalize the conditions under which various interpretations of human flourishing are formulated, debated and pursued.'[114]

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Furthermore, the need to look into status rather than identities does not imply endorsing a fixed ontological lens that assume that groups are an unavoidable fact of modernity. Thus, although Fraser

> does not deny the multiplicity of kinds of social affinity groups, collectivities, associations, coalitions, and so on found in complex societies, it focuses only on those groups that owe their existence as a group to being placed in a subordinate social

[109] Fraser and Honneth, *Redistribution or Recognition* (Verso, 2003), p 14.
[110] Fraser and Honneth, *Redistribution or Recognition* (Verso, 2003), p 29.
[111] C Zurn, 'Arguing Over Participatory Parity', in *Adding Insult to Injury* (Verso, 2003) 147-148. In a different article, Zurn argues against this 'status model of recognition', in order to rescue the contributions we could draw from identity models, specially for creating different recognition remedies (transformative or affirmative), that is, whether groups may want to create the social conditions for differentiation or dedifferentiation: 'Only when we treat recognition politics as centrally tied up with identity - and not just status differentials - can we see that individuals seek not only differentiating status recognition, but also non-differentiating universalist respect recognition. Because a healthy sense of self-identity requires different kinds of recognition, it should be no surprise that misrecognized groups will seek various kinds of social conditions required for undistorted individual identity development, social conditions that may tend to differentiate or dedifferentiate that group.' 'Balkanization or Homogenization: Is There a Dilemma between Recognition and Distribution Struggles', Public Affairs Quarterly 18:2, p167.
[112] N Fraser, 'Capitalism, Heterosexim and Misrecognition', p280.
[113] N Fraser, 'Prioritizing Justice as Participatory Parity', p 333.
[114] N Fraser, 'Prioritizing Justice as Participatory Parity', p 334.

> position because of entrenched patterns of cultural value. According to the status model, then, misrecognition arises not merely from cultural and symbolic slights, but only from those that are anchored in social institutions and that systematically deny the members of denigrated groups equal opportunities for participation in social life.[115]

From her early works, Fraser acknowledged the tensions between ascertaining the existence of group-based misrecognition and the reifying potential of group identities, which in turn excludes dissenters and breeds separatism.[116] Her liberal commitment with the principle of equal moral worth and the standard of participatory parity made her approach radically aware of potential oppressive roles of group identities for individual autonomy.[117] Moreover, her critical stance towards social struggles and social movements does not commit her to a full partisan endorsement of those causes: 'once we couch misrecognition in terms of status subordination, it becomes clear that misrecognition can occur not only across groups, but within groups as well.'[118] Thus, for example, her polemical critical stance on how the achievements of second-wave socialist feminists -which, she supports- have been co-opted by mainstream neoliberal thought, reproducing the social conditions for gender subordination.[119]

To overcome misrecognition, she initially advocated a deconstructive recognition politics (as she advocated socialism for redistribution struggles), aimed at the deconstruction of binary oppositions that reproduce practices of cultural misrecognition.[120] Indeed, the initial versions of her account of recognition politics 'appeared predominantly critical of an affirmative politics of recognition, as interfering with transformative economic justice and generating perverse feedback loops of resentment when combined with liberal welfare state programs targeting disadvantaged groups.'[121] However, already in the *Tanner Lectures* (1996), she elaborated a more diversified account of recognition remedies and strategies, arguing that 'judgments about the appropriateness of a deconstructive approach to cultural injustice or a multiculturalist approach cannot be made theoretically, and a priori.'[122]

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[115] C Zurn, 'Arguing Over Participatory Parity', in *Adding Insult to Injury* (Verso, 2003) 148.

[116] Which early work? Justice Interruptus? N Fraser, 'Rethinking Recognition'. In contrast, Iris Marion Young, who also acknowledged the importance of group-based oppression, was uncritical towards the possible reifying effects of group identities, and understood 'group differentiation' as 'both an inevitable and a desirable aspect of modern social processes'. *Justice and the Politics of Difference* (Oxford University Press), p 47.

[117] Choudhry wrongly includes Fraser in his account of the 'paradigm of recognition', which he claims does not address the potential oppressive effects of group identities as a way to fight group-based oppression. 'Distribution vs. Recognition: the case of anti-discrimination laws', p 163.

[118] C Zurn, 'Arguing Over Participatory Parity', in *Adding Insult to Injury* (Verso, 2003) 153.

[119] N Fraser, 'Feminism, Capitalism and the Cunning of History'; see the answers of V Schild and Joann Slang

[120] N Fraser, *Justice Interruptus*, p. XXXX. For some critics, this early account looked like 'an assimilationist project that ultimately expects all barriers and divisions to dissolve. The weight attached to transformation inevitably suggests a process of convergence between what are currently distinct values or identities, a cultural "melting pot" out of which new-but then no longer "cultural"- identities will be forged.' A Phillips, From Inequality to Difference', in K Olson and N Fraser, *Adding Insult to Injury* (Verso, 2003) 124.

[121] L Feldman, 'Status Injustice: The Role of the State'. P. 223. Along with liberal welfarism, the same critique could be made to liberal versions of multiculturalism that celebrate diversity without challenging the dominant horizons of value.

[122] L Feldman, 'Status Injustice: The Role of the State'. P. 223. Pier-Luc Dupont is also one of the few scholars who recognize the sceptical stance of Nancy Fraser on the strategic and tactical decisions regarding recognition remedies. 'Reconocimiento o Antidiscriminación: Una síntesis jurídico-política', Derechos y Libertades 32, p 244.

Later, in *Recognition Without Ethics (2000)*, Fraser acknowledged that recognition struggles should carefully choose its strategies and remedies, according to the particular kind of cultural injustice that purports to tackle, while also assuming the connection with the other two dimensions of justice.[123] Some injustices may require misrecognized groups

> to be unburdened of excessive ascribed or constructive distinctiveness. In other cases, they may need to have hitherto underacknowledged distinctiveness taken into account. In still other cases, they may need to shift the focus onto dominant or advantaged groups, outing the latters' distinctiveness, which has been falsely parading as universality. Alternatively, they may need to deconstruct the very terms in which attributed differences are currently elaborated. Finally, they may need all of the above, or several of the above, in combination with one another and in combination with redistribution.[124]

In other words, a range of different recognition remedies, whether affirmative or transformative, may be available, and across the different domains of justice. The target of these different remedies are not the culture, the economy or the political as separate entities (substantive trialism), but rather different harms whose origins lie primarily in these different spheres, and that remedies intended to tackle one phenomena, like discrimination, may end up reproducing the conditions that generate a certain harm in any domain of justice.[125] In a way, Fraser´s initial dilemma between redistribution and recognition struggles has gradually shifted from a tragic to a practical dilemma: 'There are real and persistent practical differentiation tensions between the numerous remedies and strategies that might be adopted to achieve social justice.'[126]

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The history of the dynamic interpretation of equality clauses has showed that even if certain groups are now pushing for differentiating strategies, their long-term purpose moves toward the consolidation of a formal equality clause. However, she has claimed that, '[f]or participatory parity to be possible (...), it is necessary but not sufficient to establish standard forms of formal legal equality.'[127] A more detailed analysis of the history of legal equality clauses would teach us that recognition remedies are not always pushing for consolidation of difference, and therefore potential balkanization, but for a more nuanced scenario. Here, we could build an approach to ADL that accommodates a range of different recognition remedies in its struggle against misrecognition, and considering the interimbrication with other spheres.[128]

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[123] N Fraser, 'Recognition Without Ethics',

[124] N Fraser, 'Social Justice in the Age of Identity Politics`, p. 35.

[125] I think Christopher Zurn makes this mistake.

[126] C Zurn, 'Balkanization or Homogenization: Is There a Dilemma between Recognition and Distribution Struggles', Public Affairs Quarterly 18:2, p. 179.

[127] Fraser & Honneth, p XXXX

[128] Where? A frequent example used by Fraser regarding LGBTI struggles could help us in attempting to address this issue: what should its advocates pursue through the usage of ADL? Egalitarian Marriage (tackling sexual orientation as a barrier to the right to marriage) or decouple benefits from heterosexual marriage and allocate it to individuals? Should they concentrate their struggles in achieving formal equality or in attempting to overcome cultural forms of misrecognition that are better confronted by intervening social and private spheres of action? Should their main target be the cultural domain, attempting to challenge dominant horizons of value, or the legal sphere and institutions, which grant the social basis for an egalitarian distribution of self-respect?

Rescuing the contribution of 'identity models of recognition', like the one articulated by Axl Honneth, where recognition implies securing the conditions of social interactions for individuals to develop self-confidence (love), self-respect (law), and self-esteem (achievement), may leads us towards this flexibility.[129] In the words of Zurn: 'different types of recognition struggles-contra Fraser- may or may not be fundamentally aimed at dominant cultural patterns of value, and furthermore, may or may not involve strategies for remedy that tend towards group differentiation.'[130] However, nothing in the 'status model of recognition' prevents us from incorporating this flexible approach to recognition remedies, especially if we include the later incorporation of misrepresentation as a specific form of injustice. Indeed, we could say that she endorses the idea that

> 'a theory of social justice must attend to the multiple causal axes of injustice and the different forms of political struggles appropriate to them. It must be sensitive to their distinct sets of focal issues, types of injustice, normative claims, candidate remedies, strategic choices, practical tensions between desirability and feasibility, and so on.'[131]

This practical approach towards recognition remedies should be coupled with her account of the relationships between different spheres, that in turn stems from her analytical distinctions and articulations of nonclass forms of oppression with class and citizenship in contemporary capitalism. Nancy Fraser's analytical distinction between misrecognition, maldistribution and misrepresentation is appropriate to understand the limits of an emancipatory tool like ADL, which I have labelled as an anti mis-recognition device. Indeed, when we are able to understand in which sphere certain harm is mainly rooted, we are able to tailor particular remedies, allowing us a more efficient use of our limited capacities for social struggles. In this way, ADL attempts to tackle a social phenomenon that has its origins in the institutionalization of cultural value patterns, which may have effects in different spheres or dimensions, as illustrated by the economic or political effects of discrimination. As an anti-misrecognition device that tackles harms that are mainly rooted in culture, it does not mean that it does not operate in the economy or in the political sphere.

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[129] 'From a perspective internal to recognition struggles, it becomes evident that they do not all aim at the recognition of group specificity, promote the same type of remedy for achieving justice (i.e., cultural-interpretive change), nor have the same differentiation tendencies.' C Zurn, 'Balkanization or Homogenization: Is There a Dilemma between Recognition and Distribution Struggles', Public Affairs Quarterly 18:2, p. 180.

[130] C Zurn, 'Balkanization or Homogenization: Is There a Dilemma between Recognition and Distribution Struggles', Public Affairs Quarterly 18:2, p. 171. For Zurn, Nancy Fraser's status model of recognition does not fit with basic struggles for political and legal equality that are not primarily directed at institutionalized patterns of representation, interpretation and communication: 'Struggles to secure the social conditions of self-confidence and of self-respect will tend to put the disrespected group out of business as a group, precisely because they aim to have individuals recognized in their fundamentally vulnerable humanity, and their equal moral and political autonomy, respectively. Furthermore, such recognition struggles for the social bases required for self-confidence and self-respect are not primarily aimed at cultural-symbolic representations of misrecognized groups, but are first and foremost directed at familial and intimate interaction patterns and at legal-political structures (even if cultural representations play a role in perpetuating the misrecognition). It is telling here that Fraser mentions only in passing that any recognition struggles that fail to respect basic human rights are unacceptable, but then does not pursue how such basic struggles for political and legal equality might be analysed.' p. 173.

[131] C Zurn, 'Balkanization or Homogenization: Is There a Dilemma between Recognition and Distribution Struggles', Public Affairs Quarterly 18:2, p 180.

The idea that harms are rooted primarily in the cultural sphere, at the same time, does not mean that ADL tackles merely symbolic harms. Contrary to the idea of coupling symbolic harms with culture and material harms with the economy, Fraser has explained that 'injustices of misrecognition are just as material as injustices of maldistribution'[132] Thus, 'norms, significations, and constructions of personhood that impede women, racialized peoples, and for gays and lesbians from parity of participation in social life are materially instantiated.'[133] Her theoretical framework, then, 'eschews orthodox distinctions' and endorses a socio-theoretical distinction between different spheres in order to propose a theory of social emancipation that could deal with the gaps, with those instances where misrecognition is not the superstructure of an economic base, or with those economic complexities that move fluidly across different cultural spheres in order to achieve its self-declared aims of enhancing competitiveness or maximize profits.[134]

Futhermore, labelling ADL as anti-misrecognition devices does not preclude the mutual influence of the different spheres, the mutual imbrication between the economy, culture and politics. To the contrary, these 'three dimensions stand in relations of mutual entwinement and reciprocal influence', as Fraser said in *Reframing Justice in a Globalizing World*.[135] Here, it is crucial to understand how ADL fits within this status model recognition, in relation with the other two dimensions: the economy and the political. Although the different articulations of the political dimension of justice have never been fully explained by Fraser, a footnote of the abovementioned essay is the clearest articulation of this mutual 'interimbrication':

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> the capacity to influence public debate and authoritative decision-making depends not only on formal decision rules but also on power relations rooted in the economic structure and the status order, a fact that is insufficiently stressed in most theories of deliberative democracy. Thus, maldistribution and misrecognition conspire to subvert the principle of equal political voice for every citizen, even in polities that claim to be democratic. But of course the converse is also true. Those who suffer from misrepresentation are vulnerable to injustices of status and class. Lacking political voice, they are unable to articulate and defend their interests with respect to distribution and recognition, which in turn exacerbates their misrepresentation. In such cases, the result is a vicious circle in which the three orders of injustice reinforce one another, denying some people the chance to participate on a par with others in social life. As these three dimensions are intertwined, efforts to overcome injustice cannot, except in rare cases, address themselves to just one of them. Rather, struggles against maldistribution and misrecognition cannot succeed unless they are joined with struggles against misrepresentation—and vice versa. Where one puts the emphasis, of course, is both a tactical and a strategic decision.[136]

The interimbrication of the different spheres does not mean that ADL could address every possible injustice, wherever it relies; rather, it starts from the idea that the complexity of political and economical systems tend to work according to its own logics, which could be better understood by other socio-theoretical devices. Within a broader theory of social emancipation, we should conjoin these different struggles against maldistribution, misrecognition and misrepresentation. However, at a more concrete

[132] N Fraser, 'Capitalism, Heterosexism and Misrecognition', p 286.
[133] N Fraser, 'Capitalism, Heterosexism and Misrecognition', p 286.
[134] Fraser, 'Feminism, Capitalism and the Cunning of History'; W Brown, *Undoing the Demos* (Verso, 2015).
[135] Fraser, 'Reframing Justice in a Globalized World', p. 79.
[136] Fraser, 'Reframing Justice in a Globalized World', p. 79, fn 11.

level, we should tailor particular remedies addressed at different kind of harms after 'a tactical and a strategic decision.' It is within this pragmatic ethos that I use the label of anti-misrecognition device for ADL.

The interimbrication of ADL as an anti-misrecognition device with the other spheres could be explained better. The following table shows examples of harms mainly rooted in one of the three spheres, but with effects or influences in the others, and its possible remedies:

Harms/Remedies	Culture	Economy	Politics
Culture	Status inequality (Recognition); ADL (?); redressing everyday discrimination in the media.	Gendered nature of Poverty, childcare and unpaid work, gender pay gap (sexual division of labour); ADL, formal equality, intersectionality	Underrepresentation of women in politics; ADL, Quotas
Economy	Stigmatization of poverty; include poverty as a protected ground	Economic inequality (Redistribution); Unions, collective bargaining, taxation, financial regulation.	Buying votes; campaign financing laws.
Politics	Centralization of politics and underestimation/stereotypation of the capacity of rural areas to develop themselves	Exclusion of Global South from international arrangements and underdevelopment; new UN venues (?)	Political Equality (Representation); electoral systems, federal/parliamentary

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Thus, for example, the first row shows different harms mainly rooted in the cultural sphere, but with effects in all other spheres. ADL attempts to redress everyday discrimination in the media even if its effects could be deemed as merely cultural, that is, that impede parity of participation but without a clear impact on the other spheres.[137] For example, the stigmatization of disadvantaged groups in comedy festivals could be addressed by using ADL in conjunction with media regulation in order to tackle the reproduction of the social conditions of disadvantage, even if its effects or impacts on the economic well-being or citizenship status of the victims is not clearly proved. Also, the gendered nature of poverty, the economic costs of childcare activities and unpaid work, or, more clearly, the gender pay gap, are mainstream cultural harms with profound economic effects. The remedies, here, may range from applying formal equality clauses to bridge gender pay gaps to an active use of intersectionality approaches that could tackle the gendered nature of poverty. The remedies, in general, should bring forth or highlight the sexual division of labour, either by using comparators or by challenging male-dominated horizons of value and its expressions in the job market.[138] Lastly, ADL has been used to challenge the lack of disadvantaged groups in positions of decision-making power by revealing the obstacles that a male-

[137] K Pérez Portilla, *Redressing Everyday Discrimination* (Routledge, 2016).

[138] S Fredman, 'Women and Poverty: Human Rights Approach'; M Campbel, 'CEDAW and Women's Intersecting Identities: a pioneering new approach to Intersectional Discrimination', Revista Direito GV

dominated arrangement of representative democracy places on women: from the toughness and bargaining skills which are unjustifiably attributed to men, to the timetable of party meetings that make difficult for women with 'double shifts' to attend.[139] However, even regarding harms that are rooted mainly in other spheres, ADL could be used as an ancillary device. The most obvious case has been to address the cultural effects of a structural economic harm, like the stigmatization of people living in poverty.[140]

In general, regarding harms mainly rooted in the other two spheres, Fraser's theory of social emancipation recommends tailoring remedies apart from ADL. This has to do with her account of the interimbrication of the different spheres. On the one hand, she has continually stressed the idea that late capitalism has developed into a 'social formation that differentiates specialized economic arenas and institutions, including some that are designated as cultural.'[141] What this means is that there is a 'relative uncoupling' of economic and cultural issues in the current state of late capitalist societies: 'far from claiming that cultural harms are superstructural reflections of economic harms', or that economic harms or injustices are always rooted in cultural hierarchies, like the sexual division of labor, she historicizes the current capitalist formations in order to understand the gaps that could help us in tailoring the adequate remedies.[142] Contra Judith Butler, for example, she argues that, empirically, capitalism does not need heterosexism, and so it could easily deal with some of the main claims of feminist or LGBT movements: '[w]ith its gaps between the economic order and the kinship order, and between the family and personal life, capitalist society now permits significant numbers of individuals to live through wage labour outside of heterosexual families.'[143] If there are still 'economic disabilities of homosexuals', these could be better 'understood as effects of heterosexism in the relations of recognition that as hardwired in the structure of capitalism.'[144] Conversely, several harms are rooted mainly in the structure of capitalism, and could be better addressed by transformative distributive remedies such as the traditional means of unions that target the imbalance of capital and labour.[145]

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On the other hand, and although she has not deeply developed her account of misrepresentation, she acknowledges that the political sphere can create certain harms which could be better addressed by devices targeted at the drawings of the constitutional membership, like rights of citizenship or directly political means, or by devices crafted to respect the idea that every member should have equal political voice. As she explains in *Reframing Justice*, '[m]isrepresentation occurs when political boundaries and/or decision rules function to deny some people, wrongly, the possibility of participating on a par with others in social interaction—including, but not only, in political arenas.'[146] At a first level, there is ordinary-political misrepresentation, and here we enter into the terrain of political science and its debate on the relative merits of alternative political/electoral systems, or on the drawing of different constituencies and

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[139] REFERENCE

[140] A Coddou, 'Addressing Poverty through a Transformative Approach to Latin America', in L Boratti et al (eds.), *Law and Policy in Latin America* (Palgrave, 2017).

[141] N Fraser, 'A Rejoinder to Iris Marion Young', p 127.

[142] N Fraser, 'A Rejoinder to Iris Marion Young', p 127; see also RR p 56.

[143] N Fraser, 'Capitalism, Heterosexism and Misrecognition', p 285.

[144] N Fraser, 'Capitalism, Heterosexism and Misrecognition', p 285; Pinkwashing (where?)

[145] W Streeck, *Buying Time* (Verso, 2013), p XXXX; Somek, *Engineering Equality*, p XXXX

[146] N Fraser, 'Reframing Justice in a Globalized World', p 76.

its compliance with the principle of political equality and its balancing with other principles like stability or governability. At a different level, she introduces the idea of misframing, 'which concerns the boundary-setting aspect of the political. Here the injustice arises when the community's boundaries are drawn in such a way as to wrongly exclude some people from the chance to participate at all in its authorized contests over justice.'[147] In contrast with ordinary-political misrepresentation, which could be addressed by traditional political means, misframing involves very serious injustices that have been highlighted by globalization. Frequently, we directly suffer the impact of decisions in which we could not even have the opportunity to have a say, decisions that usually lie outside the boundaries of the national state we live in.

Within the first level, the remedies, we may say, could very well consist in the articulation of political means directed at legal reforms, mainly placed in parliamentary debates or daily political debates. At most, ADL could be used to highlight issues of political misrepresentation that disproportionately affects certain protected groups. In general, however, the constitutional guarantee of political equality, in its different articulations, should suffice to tackle these problems. Within the second level of misrepresentation, however, the remedies should be crafted in order to foster the Habermasian discourse principle beyond the traditional Westphalian model.[148] Indeed, today we are affected by procedures of decision-making that work beyond the boundaries of the territorial Westphalian state and that are subject to weak accountability checks. That is why the Fraserian shift to the analysis of political injustices required an expansion towards global or international arrangements.

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In general, then, ADL is an anti-misrecognition device that operates in a highly complex interimbrication of different spheres, and that depends also on strategic and tactical decisions of social agents that raise their anti-discrimination claims. In that scenario, the relationship with law illustrates both constitutive and instrumental aspects of ADL. As I will illustrate in following chapters, individuals and groups use ADL highlighting both its expressive commitments, their sense of entitlement due to the recognition of identities in legal discourse, but also as a means for achieving recognition or access to valuable goods like pensions or other social benefits. The theoretical toolkit provided by Nancy Fraser allows us to locate ADL within a theory of social emancipation, understanding both its strengths and limits. However, at the same time, and within societies facing pressures for precarious systemic-market integration processes, ADL constitutes an interesting case of non-reformist reform. Indeed, as the first step, with the materials we have at hand, towards elaborating progressive political projects that could reinforce the current struggles for human emancipation and alter the terrain upon which later struggles will be mounted. Hence, it is not only its expressive currency, but the way in which ADL has been used, what constitutes the theoretical framework to build a transformative approach to ADL. ADL appears as a dangerous weapon in the hands of social movements that can exploit the incentive structures and political opportunity structures, at least when viewed from the perspective of those who want to defend dominant horizons of value of what is considered as the 'norm'. The next chapters will be dedicated to show the reader how Latin American ADL provides a fertile ground to test the basis of this transformative approach.

[147] N Fraser, 'Reframing Justice in a Globalized World', p 76.
[148] J Habermas, *Between Facts and Norms* (Polity Press, 1996).

Conclusion

This chapter started providing the reader with an overview of the most important debate around the philosophical foundations of ADL and concluded that pluralist theories have explained the wrongness of discrimination through several different aspects or facets of the practice of ADL. Pluralist theories of ADL point towards a purposive inquiry of the practice of ADL as committed with transformative aims. Then, the chapter continued by stating that philosophical foundations of ADL needed to be complemented by a critical social theory capable of placing ADL within a broader theory of social emancipation. Indeed, the critical theory of social justice developed by Nancy Fraser provides us with theoretical toolbox to understand the strengths and limits of ADL and place it within progressive political projects. Her general thought on law allowed us to understand both the constitutive and instrumental function that law plays in articulating the 'folk paradigms' of justice. Moreover, the analytical distinctions between the different spheres, which were crafted according to the ultimate aims of a critical theory committed to human emancipation, allowed us to place ADL as an anti-misrecognition device. Reconstructing her views on law and explaining her 'trivalent' theory of justice, the chapter concluded by considering ADL as an anti-misrecognition device that, acknowledging the interimbrication of the different domains of justice, could be labelled as a 'non-reformist reform'.

In the next chapters, I will build on the ideas developed above in order to elaborate five principles that will constitute the transformative approach to ADL. Indeed, these principles will be elaborated on the basis of Nancy Fraser's theoretical framework presented here, but that also draw upon the current practice of Latin American anti-discrimination legal regimes, the case law of both domestic and regional courts, and specially the activity of social movements deploying ADL to advance their causes.

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