ABSTRACT. The crisis of the New Deal constitutions and the shift to ‘biopolitical’ forms of global governance in the late 20th century have dramatically disturbed the epistemological groundings and the political locations of contemporary critical legal movements. In epistemological terms, the emergence of the ‘biopolitical’ has rendered transparent the impossibility of the binaries that have thus far sustained critical legal theories. With the divide between ‘inside’ and ‘outside’, ‘base’ and ‘superstructure’, ‘state’ and ‘society’, ‘society’ and ‘law’, no longer operative, critical legal movements have to outgrow their legal realist ‘roots’. Could deconstruction provide here a viable option? Confronted by an order of governance that is now both ‘global’ and ‘imperial’, critical legal movements cannot recover a politics through such ephemeral theories. Rather, the future of critical legal movements must be located in an affirmation and promulgation of radically new constitutional principles which would confront the realities, but also harness the emancipatory potential, of the ‘biopolitical’ horizon [eds.].

KEY WORDS: biopolitical, global, governance, imperial, multitude, postmodern, resistance

I

In late modernity, democratic constitutions were grounded on New Deal projects of labour emancipation, ensuing trade union negotiation, the constitutional centrality of Welfare, and the antagonism with the utopia and reality of ‘real socialism’. This era is now over: the shift to a postmodern global governance has been fully achieved. This shift, moreover, has been of such intensity as to dissolve not only the ‘modern’ but also its memory, and to destroy (with the subject)
every legal and political dispositive of 20th century ‘social democracy’.

It is often said that the 20th century has been a short one. I do not wish to discuss this statement here. One thing is certain: the last fifty years have been extremely short for the New Deal constitutions. Established with work as a founding value, they were all labour-centred constitutions. No doubt, some were more liberal than others and some more democratic. Nonetheless, they were all rooted in a ‘material constitution’ defined not only by a firm location in capitalism (for what was socialism after all, if not the latter’s fulfilment?) but also by a combination of Taylorist industrialism, Fordist wage-arrangements, and Keynesian macro-economics. In addition, their operation was fuelled by labour struggles between owners and trade unions, in other words, by a conflict framed\(^2\) by that very constitutional system (whatever the ‘blocks’ in the constitutional history of each country actually were).

This labour-based conflictual model has dominated most of the 20th century; or, rather, 20th century democracy (whether liberal or socialist). Conceived as a suitable constitutional dispositive for the regulation of class struggle – not only in public law but also often in political economy, and always in the theories and practices of biopower – it was used to stabilise the development (or the reconstruction) of productive society in the face of economic crises, revolutions, wars, and/or other recurring catastrophes. In fact, it is not a coincidence that this model emerged and took form, in the US, during the 1929 economic and social crisis (a crisis which had completely internalised the ‘Red scare’), and, in Europe, had its use generalised after the end of World War II. Moreover, it is not by chance that this model places at its base, as an essential element, the political organisation of the working class (both at the international level and within individual capitalist countries) as the opposing party [controparte] in its project for the reproduction of society: capitalist and bourgeois, on the one hand; socialist and increasingly intent on

\(^2\) In the original, I use the verb, disporre [to frame, set up, arrange], and, from this point onwards, the substantive, dispositivo [dispositive, arrangement, device, apparatus, frame, mechanism], in order to illustrate the forms, and stress the intensity of, the constitutional dynamic in so far as this is seen as the product of a constitutive dis/agreement of active social subjects and is able to absorb continuously the tensions so established. Even before Foucault, it was Machiavelli who had described this mechanism in such terms.
the redistribution of income on the other. It is thus that social peace in the course of development is organised, indeed arranged [disposta]. It is the Welfare state.

At this point, there is a further element to consider when talking about the notion of dispositive in this context. It is its reach [estensione] rather than its intensity. It is clear that, in regulating class struggle, these constitutional (and/or public law) dispositives affected, besides production, also the space of reproduction (namely the city, or that which lies outside (and beyond) the walls of the Fordist factory, society, and life more generally) and became a constitutive part thereof: these dispositives framed [disponero] the social horizon, which henceforth we will call ‘biopolitical’. In other words, by means of the constitutional and juridical revolution established from the 1930s onwards, both in the West and in the East, constitutional (or tout court juridical) bodies developed such a capacity of arranging and constituting the social (one needs to think here only of the juridical configuration of the Welfarist society), that, from then on, life cannot be either described or, probably, understood even, outside the categories of state initiatives, constitutional law, and the biopolitical articulation of the constitution. From now on, therefore, we must keep in mind that contemporary capitalist society is not only traversed by juridical dispositives but also that they have a ‘biopolitical’ reach [estensione]. This means that, with respect to life, law’s effect must be considered as immediate, and also, conversely, that the reproduction of life directly implies and also includes within itself the juridical.

As a result, we are confronted with the following paradox. At the very moment in which the Fordist constitutions, under pressure from neoliberalism, are collapsing, the importance and weight of law’s investment of/in the social becomes heightened. Subjects are literally formed [disposti] by public law, the relations and the objects of production and reproduction are no longer imaginable outside a fully effective legal order, while these dispositives seem to lose (at first sight at least) their conflictual character (whether latent or pronounced) as well as any sense of being the products of conflict. To take this point further, given its centrality to the argument put forward here, let us pose the question anew. What is happening? Why is it – for this is precisely the paradox – that the efficacy of the constitution grows weaker and weaker to the point of extinction at the very moment in which the constitutional production of ‘juridicity’ [giuridicità] extends its cover into life evermore increasingly, directly arranging [disponendo] subjects and objects therein? Moreover, why is it that the intensity of the constitutional
dispositive diminishes at the very moment in which it maximises its reach? And, finally, why is it that class conflicts, after having ‘built’ the intensity and reach of the ‘biopolitical dispositive’, no longer function either as causes of constitutional development or as the substance of social development?

Proceeding from the general to the particular, we can start moving towards an answer to these questions, drawing on some basic propositions, which can be summarised as follows. The working class and its organisations (be they national or international) no longer exist in the form they existed when the democratic system of the 20th century was established. As a consequence, the social dialectic, which rendered transparent, and, at the same time, fuelled constitutional relations in that form, is no longer valid. Therefore, those dispositions, on which we briefly dwelt earlier, no longer work and cannot be re-activated either. In addition, these negative propositions can be confirmed and corroborated by other, positive ones, which, in a historical vein, recognise, in each one of the constitutional systems of the West, moments of ‘neoliberal conversion’, that is, of ‘democratic devolution’, or, at any rate, involving a unitary (i.e. no longer conflictual) re-constitution of power within the liberal hegemony.

It is in this light that we need to look at a succession of initiatives which, from the mid-70s onwards, render necessary, under the banner of ‘the limits of democracy’ (following a well-known document of the Trilateral from the 1970s), the re-centring of powers outside any dispositive which is ‘strongly’ (or, perhaps, even ‘weakly’) democratic.

That said, we are still lacking an answer to our earlier question, in that we still need to address specifically the paradox involved in it. This consists of the fact that, with the crisis of the ‘Fordist’ (New Deal, social state, or Welfarist) democratic constitution, the conditions determining the continued existence of the ‘material constitution’ disappear, while, at the same time, there is an embedding of ‘biopolitical’ conditions, which, in bringing about the integration of the economic and the juridical, the social and the political, radically transform this constitutional frame of reference. Now, if this is true, the capitalist initiative intent on destroying the ‘dispositives’ that used to regulate the relationship between social forces in the previous constitution, emerges to some extent as ‘revolutionary’. Let me explain what I mean by this by taking up again the notion of ‘revolution from above’, as defined in the 1930s (with regard to the seizing of power by the fascist side) and then often reiterated in historical, political and constitutional debate. ‘Revolution from above’ refers to
a movement of radical restructuring of power relations that first and foremost imposes from above an upheaval in the social relations of production and reproduction. A movement, therefore, which deploys new social relations in order to re-assert both old power structures and old interest networks, and which does so, and achieves this, in hegemonic terms. Now, what took place in the latter decades of the 20th century is precisely that: namely, an initiative from above, which, while destroying the already existing structures of ‘social democracy’ and blocking the development of the dispositives shaped therein, at the same time, revolutionised the basic conditions of life, society, production, and reproduction. A top–down revolution, which destroyed the working class as one of the parties to the relationship established by the New Deal constitutions in Italy – the effect of a generalised shock-wave running through the constitutional structure of the countries of the liberal West, not to mention those of the socialist East.

It is thus clear that, if we are finding ourselves today facing the effects of a ‘revolution from above’ in society and in the constitution, and that if this juridical transformation has been possible by a revolution in the way of producing wealth and in the way of reproducing life, then all this has paradoxically rendered law and society even more intimate (or, to be more precise, integrated and forced to do so) than they were in the previous constitutional regime. Paradoxically, for, while the intention of this top–down revolution was to pull society away from the State, its result was (and it could not have been otherwise) to pull even closer together society and State, economy and law, thereby plunging us into the ‘biopolitical’. In other words, its result was to integrate the ‘disciplinary’ dispositives in a horizon of ‘control’.

To complete our discussion of the crisis of the democratic model as defined by the New Deal constitutions, there is still one final aspect of the picture we have been describing that remains to be stressed. The top–down revolution of the constitutional systems we have witnessed, and which has led to the defaulting of every social dispositive of conflictual law-making, is firmly set in a horizon, which now-a-days is being increasingly referred to as ‘global’. Yet, given that the law is not merely an all-embracing horizon of social events (and, therefore, in this context, definable as global), but also, always, a hierarchical order, what is the hierarchy that is being formed in the globality of the system? What is the guarantee of contracts on the world market? That is to say, what is the authority, the source of legitimacy of the law of the world market? Further, how does the global order spill over into domestic
law? And what came first in this radical mutation, the crisis of the domestic legal orders or the revolution of the global markets? Allow me, at this point, to propose a short cut and call our current situation, ‘imperial’. Around fifty years ago, Kelsen had already anticipated this hypothesis, when thinking that only a ‘global’ over-determination of the law would allow local and/or national figures of the juridical constitution to acquire formal legitimacy. Of course, that the global and the imperial should mean one and the same thing and overlap is not necessarily a given. However, once we imagine an effective legal system on a global level, it becomes hard not to call such a system imperial – that is to say, subsume, albeit by analogy, the horizontal globality of legal validity under the verticality of an equally global (extended) sovereign source. In any case, should we refuse to recognise that the law, in its territorial globality, has an imperial character, we would nonetheless have to recognise that globality and empire tend towards a liminal identity, and that, perhaps, there are in motion interests, functions, and ‘machinations’, that are pushing in this direction.

Critical legal movements will be able to cross this crisis, and recognise themselves beyond it, only by undertaking a radical transformation of their genetic paradigm, their political location, and consequently, their epistemological statute. Why? Let us consider for a moment this genetic paradigm. There is no doubt that, from the 1960s onwards, the critical movements in legal studies were born out of the confluence of open, anti-authoritarian Marxist (particularly Gramscian) trends, and alternative, critical currents, which had their roots in legal realism. Their approach to law bore two distinctive marks: it had a strong reformist agenda, and advocated ‘doing law otherwise’. Finally, their critical intervention was centred on the ‘historical compromise’ that the New Deal regimes managed. Faced with the current, postmodern and imperial, socio-political situation, however, critical theory will have to leave behind both these origins and these methods. Critique’s new ontological grounding in fact will no longer involve a shift within exchange but against it.

II

To begin with, therefore, the focus of our discussion is going to be the internal crisis of the New Deal orders. That is, this crisis, which is

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3 It should be noted here that the Italian word ‘scambio’, for which I have suggested ‘exchange’, can also be translated as ‘trade’.
born, at one and the same time, out of the exhaustion of the (Fordist) material constitution and the transformation of the processes through which new producing and/or hegemonic subjects are juridically ‘formed and normed’ in postmodernity. At stake here is the crisis of political and social representation. How is this crisis, though, to be signalled?

It is clear that legal theory finds it difficult to describe (and/or provide a remedy to) it. Take, for instance, the long tradition, which privileges an institutional realist reading of legal transformation. At the basis of institutional realism lies the conviction that crisis is something normal in systems, for there is always dissymmetry between life and the law that regulates it; and that law, therefore, insinuates itself in the organisation/structuration of the social through the alternative means of crisis and innovation. That is to say, law, in its institutionalising form, constitutes a function, which is always interpreting and sometimes constituent, and spreads it into a continuity. It is in this creative positioning of law in institutional development that the dignity of many figures of juridical life consists. From that of jurisprudence, which involves, on the level of the everyday, the continuity of the creation of law by and through ‘lesser’ courts; to that of contractual figures, involving the determination of new, more or less corporate, equilibria (though often legal utopia insists on the recovery, at this level of contractual agreement, of the multitude’s own voice); right through, via numerous other figures, to the reforming activity of the Constitution, which, although entrusted to the ‘grand’ Justices of the Supreme Courts, is recovered in the life of societies. Thus, however much, in a ‘realist’ reading, the function of legal construction exceeds the strictly social context of the norm, by way of reference to custom and other ‘unqualified’, more or less ‘tacit’, sources of social production, it remains bound to the recognition that there is a social activity, which constitutes the horizon of common action, and that the activity of judges, can become, in this sense, fundamental, not only with regards to administration and enforcement, but also to the interpretation of the real, and thus to the creation of law more generally.

From all this, it should be clear by now that I have no intention of reducing legal realism into ‘institutionalism’, that is, into realist theories of ‘closed’ legal systems, already known in Europe for over a century. On the contrary, and in line with many scholars aware of the enormous jurisprudential productivity of ‘open’ legal systems, it seems to me that on ‘institutionalism’ one cannot but give a definitely
negative judgement. That said, it must be also added, however, that on the side of ‘realism’ things are not going any better. For even when one takes it in its most ‘open’ (i.e. unworn by the constant and continuous reference to the historical hermeneutics of institutions) and iconoclastic instances, one must admit that legal ‘realism’ cannot easily break from the rigidity of historical continuity and appear as a product of the system’s evolution.

This strict historical ontology, thus, renders legal ‘realism’ irretrievable in the face of paradigm shifts. Moreover, incremental legal construction proves particularly resistant to the radical changes that the model of legal culture is currently undergoing. It is paradoxical, but true, that legal realism should do well with reforms and badly with revolutions. Burke said as much once and for all, and what we are experiencing at the moment is a revolution, albeit ‘from above’. In effect, it could be said that legal realism has stiffened up – appearing first perplexed and then impotent in the face of the radical social and political changes that have been taking place.

I recognise a hysterical tone to these last questions. However, just to clarify, what exactly is involved in this shared feeling that the ‘realist’ view of law is in crisis? Is it perhaps the fact that the logical structure itself of legal realism (to say nothing of continental institutionalism) has been radically put into question by the paradigm shift we have witnessed?

Let us go back to the root of the question of legal realism. Central here is an argument, which, by simplifying the relationship between society and ideology and retrieving it in the all too familiar figure in which modern social science has placed it ever since the Enlightenment, sees two sets of structures at work in the regulation of society: one at the bottom, the so-called ‘base’, and one on top, the so-called, ‘superstructure’. The bottom one, the ‘base’, is alive and progressive, and as such it always needs to destroy what is dead (and thus left behind) and to produce, in the whole of its discourses and its public institutions, that special superstructure called ‘law’ in a way that is adequate to the changes of the social. Now, it is evident that he, who rules over society, lays down his hegemony by means of the superstructure, in this case, by means of the law. And yet, for legal realism, the law in this situation changes continually, opens itself to conflict, and is reformed in accordance with life’s permutations...

At this point, let us consider our options. Merely saying that there is nothing new in these claims and that they are almost banal, or ascertaining how widespread the (so to speak) ‘realist’ legitimation of
the law is, does not change the situation we find ourselves in, but makes it worse. So let us recap. We have said that, probably, in question, or rather, in doubt, is the logical structure itself of legal realism, that is to say, insofar as this involves the claim that law is a living and progressive superstructure of an economic, social, or, at any rate, collective, structure (of little interest here is its concrete character). For today, in our shared phenomenological experience of the law, this being ‘inside and outside’, this continuous exchange, this dynamic of the law with respect to the social, is no longer there. Postmodernists are perfectly right in declaring the implosion of the dialectic of Enlightenment. Indeed, as we have seen, the (postmodern?) state of neo-liberalism has put normativity firmly back into the social in order to invest it with a legitimacy, which is violently disconnected from any progressive call to conflict or dialectics – and certainly, in order to withdraw from it the hope of community and the memory of revolution.4

Let us finally recognise that this old, 20th century dualism is no longer tenable. The logical figure of legal realism is in crisis because, when the state speaks through the social and the social disguises itself in the legal – in other words, when the paradox of the ‘biopolitical’ structuration of the real is affirmed – then legal realism becomes, at best, a paralogism of reason. Its talk of the ‘other’, its recourse to social dialectics to explain the superstructure, is make-believe; it does not understand that the other is the same; it continually confuses the real bear of the forest with the Ursa up in the sky; and the effectiveness of norms of control with a now impossible production of dispositives. How convenient legal realism was! With a little imagination and generosity it was always possible to find the base that would guarantee or transform a structure. And the law, it had then to become social, had to be taken away from God and returned to Adam…

Modernity has continually relied on the illusion that there was a high and a low, a before and an after. Now, the illusion is gone. The logical form of the binary is unusable. In postmodernity (i.e. in this situation described earlier, where the dispositives of dis/agreement, or more generally, of binaries, do not work) there is no longer an outside; there is only inside. What to do then? How to recover the criteria for a logic of regulation? And if this is not possible (as everything said so far seems to

4 Thanks to Andreas Philippopoulos-Mihalopoulos for his help with this sentence [J.H.C].
show), do we still have a chance of inventing a legal science that would not be suffocated from the weight of ‘realism’s’ failure, reclaiming thus the passion for transformation?

III

It is well known how, from the perspective of the logic of norms and within the continuity of transcendentalism, the last attempt to recover an autonomous and productive figure, which could, among other things, support a realist approach in law, is to be found in a ‘deconstructionist’ discourse. Therein, the end of the powerful tautology of the postmodern (i.e. there is no longer an outside to discourse but only circularity), that is, the overcoming of the difficulty of naming the ‘other’ place where the power of critique and/or transformation of a given order can be situated, are set as the objectives of critical discourse. However, such a place cannot be defined by deconstructionists, except in entirely liminal situations, while its productivity involves a sort of prodigy, which only an extreme necessity presents. A new horizon for juridical action? It is truly difficult to try and build it on Derrida’s ‘margin’ or by contemplating Benjamin’s ‘angel’, though many do. If what is going to rack and ruin is all too clear, what makes things hard, in terms of reconstruction, is pretending to have a basis that is so ephemeral.

(In parenthesis, at this point, we could ask ourselves: if there is no possibility of reconstructing a strong realist alternative starting from the margins of the legal system, is it still possible to consider these very margins, that is to say, the interstices of a world compacted by command (by society’s material subsumption by capital), as points of resistance, or simply as irresoluble ontological ‘folds’, or even as cues for escape strategies? Such an illusion has for long been maintained by intellectuals and law practitioners during the years in which reformism was in deep crisis, i.e. from Thatcher to Blair, Reagan to Clinton. In the years of the ‘pensiero debole’, some, having almost gone ‘underground’, hoped (like hackers infiltrating the net) that individual instances of resistance could still produce general effects of sabotage in the system and that the gestures and the tactics of refusal could open up into alternative strategies. None of this was realised, at least not in any visible way. Even where the normative logics of the destruction of Welfarism and privatisation do not extend their reach, even where the restorative decisions of the courts do not openly
triumph, a mechanism was set in motion whereby democratic legal proceedings were neutralised and the constituent powers of freedom suffocated – a mechanism which seemed and proved unstoppable. And yet...

And yet something did happen. It happened not because of the ‘resistants’ but because the phoenix-like return of the flame from the furnace of the new totalitarian fusion has been unstoppable. The fact of the matter is that the more the postmodern process of law’s absorption into the privatistic command of capital got underway, and the new technologies of governance became effective in managing the particular and in leading it back into the system of command, the more one witnessed the onset, or at least the appearance, of a multiplicity of violent shifts, a plurality of interruptions, more or less capable of being clearly articulated and of producing subjectivity, yet always proliferating... For the proliferation of the interstice was ontological, not a matter of will. What we witnessed was a somewhat spontaneous overturning of the systemic interdependence of legal production points, so that, with respect to the central problematics of legal thought for instance, the theory of interpretation became increasingly undecided (and therefore potentially open to unforeseen and radically other possibilities), and, on the constitutional plane, the definition of subjects became increasingly fragmented, diffuse, and wide, bending the system’s unity into some sort of spontaneous federalism.

We cannot overestimate these phenomena. Taken in themselves, they are of utmost importance. They often make possible both the opening up of the discussion and, exceptionally, the bringing together of the critical process. Substantive interests and subjective rights – such as those of women, gays and lesbians, and other groups – would not have had the space to develop and mature outside these interstitial dispositives. Still though, none of this is enough. The insistence of legal strategy on the interstice, no matter how open this be to proliferating tensions, cannot establish a new juridical horizon. Small, albeit important, innovatory moments are drawn into the abyss of the structures of command. At which point, there is once more the void).

In the empty space that the crisis of legal realism has left us, we have nonetheless to continue to ask ourselves: in what way and in what direction are we to proceed in order to regain a theoretical perspective? In what manner could a material basis for law be brought within our grasp again?

To be sure, we could settle our queries by reminding ourselves: has not Luhmann’s systems theory already proclaimed the absence of an
‘outside’? What is this great novelty that is now being proclaimed about the jamming of normative logic, when systems theory had already identified the way out and located it in the system’s ability to reproduce itself, i.e. in its ability of being ‘autopoietic’ of equilibria? Certainly, we could describe systems theory as a paradoxical machine that does not move; but it is a living thing nonetheless!

Alternatively, we could recall that Rawls’ procedural contractarianism, although coming from a diametrically opposed position from that of Luhmann, in a sense, responds to the same concerns; that is, to the imperative to give new life to a system completely closed in on itself. Now, Rawls proceeds as follows. First, in reaction to the neoliberal revolution, he sets up a constituent process founded on the pluralism of contracts (already before Kant, Pufendorf had tried this method – in the dissolution of the Holy Roman Empire). Then, through the convergence of constituent impulses and the machinery of (administrative) norm overlapping, he establishes an inexhaustible source of juridical renewal. At this point, it is the inherent constructivism of contract (which the tradition of Kantian formalism articulated) that is assumed as the way of breaking out of and leaving behind the postmodern tautology.

I do not believe, however, that this crepuscular experimentation can save us from mourning for legal realism. For in both of these theoretical ventures, in Luhmann and Rawls (once they are not taken to be conflicting, a singular resemblance and connection between the two becomes discernible) there is a destructive double helix, the very one we have emphasised from the beginning of this article. A double helix, which reflects, in reverse, that paradox (of the crisis of the Welfare state, i.e. of law in a conflictual set up [ovvero del diritto nel conflitto], and of the subsequent neoliberal invasion of the state, ‘revolutionised from above’) from which we started off and that signals the contradictory implosion of the old order. Now, this helix, and here lies its first meaning, leads us to consider every legal development as an exclusion of ‘living labour’, that is to say, of every conflictual, constituent, at any rate antagonistic, social dispositive. In these theories, the development of the constitutional systems and orders, whether this is of the open, American, type or of the hermeneutic, continental, one, involves either a very narrowly constructed genealogy or a forced superimposing. If there is one branch of knowledge, where complaints about the ‘end of history’ have been absorbed (or better, prefigured), it is legal theory. Here, in fact, knowingly, whether that be a postmodern, luhmannian, or rawlsian awareness, the creative sense of the ‘dispositive’ between
reality and normativity, history and orientation, is entirely cancelled
and legal realism is not only diluted but destroyed. Ehrlich and
Gurvitch are turning in their graves … as well as the entire tradition of
modern reformism, for that matter.

Moreover, there is a second helix, which, on this powerless sur-
face, assumes an important function: an extensive machinery, which
allows the new regulation to spread out in a way that is efficient but
flat, omnivorous, and always in control. What I mean by this is that
the programmatic exclusion of ‘living labour’ from the constitutional
processes (whether ordering or constitutive) goes hand in hand with
the affirmation of the omnipotence of the legal system, and of the
authorities that hegemonise it, and this is something that invades
everything. A politico-juridical ‘naming’, and a (moral?) autopoietic
legitimation, that would follow their own needs…. It is not by chance
that in globalisation this independent naming of legal values is so
similar to the registering of value in monetary and financial terms…

Were we to continue along this line of inquiry, we would do no more
than strengthen our sense of being caught up in a non-space of signifi-
cation, that is, of being swept away in a world without any meaningful
relation between names and the real. The double helix appears here in
its full destructive force: firstly, it prevents living labour from intro-
ducing contradictions in the order; secondly, it restores order to us as
‘eternal return’ of the same, as the static place of power.

IV

Now, when considering the political positioning of the critical move-
ment, one finds that the change demanded of theory is equally pro-
found and far-reaching. In the new social situation in which theory is
immersed and to which it reacts, critical legal theory cannot but set out
to look for a new subject. This subject no longer involves only the figure
of the working masses but also a social figure of labourer, that is to say,
white-collar workers and intellectuals, the part-time, female, immi-
grant, etc. work-force. Productive socialism, although once an element
of political identification in the movement, no longer has any meaning
today. The terrain on which critical theory should intervene is no longer
that of direct production but above all that of diffuse production:
services, reproduction, work in the home. The new subject is no longer
merely political but biopolitical: it redraws on the entire scene of life the
antagonism with capitalist biopower.
An elementary phenomenology reveals, confirming our theoretical inductions, that some of the fundamental conditions of the common, civil conception of law have been exhausted in recent decades. These changes, which bolster the image, at once stuck and aleatory, of postmodern law, touch upon the more specific dispositives that the constitutions of the Fordist years had put in place. To demonstrate this we have at our disposal an embarrassment of choice with a phenomenology, which risks becoming a catalogue.

Here, however, there is the advantage that all roads lead to Rome; that is, in my view, to the crisis of political representation. Indeed, political representation, in the actual figures that the social conflicts of the Fordist era had fixed it, became the real dispositive of the democratic constitutions, that is, the (party and/or institutional) subject established for the purposes of mediation. It is in the Foucaultian idea of the ‘disciplinary dispositive’ that we find in its entirety this democratic idea of conflict and of its constitutive (re)solution.

Now, democratic political representation no longer works. If there is something that has been burnt out by this brief century, it is democratic representation. An infinite number of specific, historical, elements come together to define this crisis in its bare materiality. From the ever more overpowering significance of the government over the legislative power (representative by antonomasia) to the distortions and the blocking (or twisting) of representative mechanisms caused by corporate intrusion and by the banalisation of administrative corruption. From the increasingly evident abandonment of the ‘official’ sites of representation (parliament/government) to the unbounded expansion of new public spaces defined by the ‘media’. From the consequent judicial (an ‘independent’ power?) overdetermination of social conflicts to the imbalance in constitutional power play... And this is not all. From these arise further elements of crisis: firstly, the drifting away of sovereign powers towards other loci of power (in Europe, for instance: on the one hand, towards a federal form, and on the other, towards local forms) with ensuing often unpredictable transformations; and above all (through a radical crisis in representation in addition to the crisis in sovereign competences) the imperial devolution of the nation state. In this final case, political representation becomes a rarity, and so the list goes on ad infinitum...

How, then, could a representative function, in the sense of a mechanism of mediation, i.e. a constitutive dispositive, possibly emerge here? When Foucault (anticipating this crisis by a long way) confronts this problem, he assumes the impossibility of restoring the
democratic dispositive at the moment in which the modern figure of
the political and of government, of the ‘discipline’ of class conflict,
was fading, or rather, collapsing, leaving space for another paradigm.
When, as a consequence, he theorises the new dynamics, truly beyond
the representation of ‘governability’ (of ‘governance’ or of ‘governmental-
ity’), and locates the efficacy of these new forms of government
in the structures (internal, continuous, intense) of ‘biopolitical con-
trol’, here he has in mind the epochal shift that we are living and into
which he plunges us: leaving us, however, without the possibility of
addressing the need for freedom.

V

Third problem: the epistemological protocols of critique. When
politics and law no longer begin (in a modern, Hobbesian sense) with
the unification of the multitude but manifest themselves in the mul-
titude’s manifold practices, then politics and law will follow trajec-
tories that, though ambiguous, are nonetheless intelligible. For the
fields that we have before us are marked by plurality and charac-
terised at once by both the division and the hierarchy of capitalism, as
well as (and for us, especially) by lines of escape, by movements of
struggle against new forms of exploitation, and by new forms of
cooperation of the multitude. Further, if the ‘mise en forme’ of pol-
itics and law takes place necessarily in the context of globalisation
and of its effects, this means that it is also an immanent and reiterated
construct made up of a multiplicity of spaces of thought and action,
of life and freedom. In this situation, critical legal theory has to
follow the existence and resistance of new, poor and proletarian,
subjects soliciting, theorising, and defending a process, which, from
below, will be constitutive of new categories of every day life.
Deconstruction is over: we must now exercise constituent power.

What is urgent today, therefore, is a response of freedom. Who
can provide it though? How can one go about it, if realism has
become an impossible road to take and it is no longer possible to
identify the basis upon which to build ethically sound projects? How
can one be virtuous in this situation? If the conflicts, which made
realism necessary, have now ended, how can one, in a world of
self-referential relationships without an outside, identify a set of
principles as the basis on which to rebuild a constitution founded on
freedom and progress for all? Does there exist, within the new
anthropological frame determined by the change of paradigm, the
possibility of identifying a set of ‘intuitive principles’, which can form the basis for a new constitutional debate?

In considering this problem, I can think of nothing other than the method of that ‘new political science’, which, *mutatis mutandis*, lay at the origins of *The Federalist*. At the time, a number of American intellectuals initiated a ‘scientific’ debate, which, from the American provinces, reached the ‘world centre’ of political thought, i.e. the culture of the Enlightenment. On this basis, this debate constituted a frame of reference for a ‘new’ constitutional discussion, for the definition and allocation of rights, and for the division and balance of powers and counter-powers. It was Hume and Rousseau who (according to the most authoritative historians) inspired the thought of the American ‘founding Fathers’: their influence allowed a public discussion to open up (the one registered in *The Federalist*), which was driven by a set of intuitive principles towards a constitutive teleology.

I wonder, therefore, to begin with, whether today there are intuitive principles around which to have a meaningful discussion about the making of a new constitution of rights and freedoms, powers and counter-powers. Secondly, I wonder whether today there are politicians and lawyers who could actually set up, maintain, and develop a constitutional discussion.

Now, on the first question, I believe that it is possible to try and grasp some intuitive arrangements (*dispositivi*), i.e. an ethico-political framework, around which it is possible to discuss (without necessarily agreeing). Two intuitive principles emerge, in particular, if one bears in mind the thinking developed in recent years around the end of the Welfare State and the polemic concerning the so-called ‘pensée unique’, that is to say, around the exchange concerning the ‘paradox’ of the ‘biopolitical’ transformation of the constitution.

The first principle of the ‘new political science’, seems to me, could consist in the recognition of the ‘biopolitical field’. What does this mean? It means that every line of reasoning that starts from the enigma of ‘political representation’ (and therefore from the autonomy of the constitutional and/or the political) and subjects ‘legal realism’ to this transcendental operation ends up inevitably in crisis. On the other hand, administration and production, politics and the economy are fusing together evermore intensely, since to the extent that production became social, politics became productive. Seen from the point of view of the subject, ‘biopolitics’ means that the ‘modern’ experience of the political is exhausted. The political is no longer separate from life but participates in it. The paradoxical result of the neoliberal destruction of
the Welfare State consists in revealing that all of the social has become productive, that all of life has been put to work (as Foucault and Deleuze had clearly understood). As a result, the economic and the political, ownership and trade unions [il padronale e il sindacale], the non-governmental and the institutional set up of social production, live within each other. Thus, the field of the political is also defined in an entirely new (and intuitively obvious) way by the ‘biopolitical’, just like the productive is fully re-defined by this relationship.

The second intuitive principle of this ‘new political science’ has a lot to do with the critique of ‘la pensée unique’. It entails that the conflict for power, in this case for biopower, takes place within the field of biopolitics, and that, as a result, the latter is determined by a radical antagonism. This antagonism appears where the decision on biopower taken by the social agents of production, the producers, reveals itself in contradiction with (and as irreducible to) the one expressed by the political proponents of the social capital and the democratic institutions that should be representing it. Otherwise put, this antagonism appears where the social expression of the (‘biopolitical’) productive force [potenza produttiva] is held back, distorted, blocked, in forms which preserve the economic order and/or reproduce the existing pattern of biopower. The radical antagonism that characterises the ‘biopolitical’ wants to liberate the social forces [potenze sociali] of life, that is of production – wants to give to life (which partakes of production) charge over production.

VI

If we accept these principles (which seem intuitive), we will be able to draw some conclusions pertinent to that constitutional teleology, which today seems important to put into place. Now, the first conclusion is that a new Constitution can only be born once a series of new constitutional principles are affirmed and acted on. These principles are: First, biopolitical belonging for every citizen – which means that ‘everything belongs to everyone’, and that, therefore and, as importantly, every citizen has the right to a basic income [reditto di cittadinanza], which is universal, unconditional, and able

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to guarantee one’s social reproduction. Second, the right singularly to reappropriate a quota of biopower,\(^6\) or exploitation as the expropriation of the common – which means that the reasons for the antagonism between rich and poor, rulers and ruled, cannot in any way be neutralised. On the contrary, the constitutional machinery must show through this difference and allow its overcoming. It must legitimise the exercise of counter-power [contropotere]. Finally, there is a third (intuitive) principle, which needs to be put forward for a well-functioning Constitution. It is that of recognising difference, and thus of federalism. Of course federalism has always been thought as a mechanism of territorial distribution and, hence, as a means of neutralising difference spatially. However, in the context of these new intuitive principles (which are traced, in this case also, to Foucault and Deleuze), federalism is being put forward as the constitutional dispositive of difference, as the site of freedom, of exodus, and of ever-possible movement for citizens, as the space in which the foreigner is welcomed as a brother and in which the melding of cultures and races creates new productive forces.

But let us ask now, if there exist legal thinkers or legal theories that can maintain, as efficiently as the Enlightenment philosophes, such a strong constitutional proposal. And let us ask also, by the way, why up until today nobody has done so. I believe that the answer is complex and, in any case, at least two-fold. In reality, it has not yet been possible to take on board (better, to assume fully) the radical transformation of position that intellectuals (legal thinkers included) have experienced in post-fordist, neoliberal, postmodern society. From this re-determination of the place of the intellectual stem various definitions of the thinker’s function in today’s society, of the relevance and efficiency of intellectual work (both generally and in law), and at least two dispositives of political and/or legal action.

Assuming the problem in broad terms, we could say therefore that in post-fordist society intellectuals have become a workforce – better, a new immaterial form of labour, working directly in intellectual, communicative, and relational production. Intellectual work is evermore identified with service work and intellectuals have thus rightly begun to be defined as service providers. Services can be high or low and intellectuals can therefore be placed in a high or a low position in society. This has always been the case. What is novel is the

\(^6\) Here, the Italian text reads ‘il diritto alla riappropriazione singolare di una quota di biopotere’ [J.H.C.].
fact that the intellectuals, whatever their social position, appear now within social production not as single individuals but as a mass. Moreover, as mass intelligentsia [intellettualità di massa], they appear in the world of social labour increasingly in the role of executives rather than in the role of planners or innovators of knowledge. What is the point of asking intellectuals to function as a ‘critical conscience’ (for this is the role assigned to the intellectual in the Enlightenment tradition), when the intellectual has become mass-work-force?

If we now wonder why intellectuals have let go of their critical function in the last twenty years or so (and even further how some of them could have shamefully succumbed to the blandishments of power), we can respond that in this period the mass intellectual [l’intellettualità di massa] has been overwhelmed by an unprecedented wave of misery and productive subordination, and that the difficulties of individually developing a counter-hegemonic conscience [coscienza antagonista] in this new context have been huge. Nonetheless, the possibility of acquiring (in full knowledge of one’s new social position) the power of a prospect of radical transformation of the existent, is now ontologically determined by the new character of intellectuals as mass. It is necessary to realise that mass intellectuality is the basic productive force of the postmodern regime of production. It is to this therefore that the intuitive principles of the new constitution of social labour refer. In fact, mass intellectuality is biopolitical: production and freedom coincide both in its existence and its operation. It is antagonistic: the means of production is not prescribed by capital but belongs to the brain, is constructed in education, and formed in the technological Bildung of the subject. It is mobile and flexible – but this fluidity and flexibility are not at the disposition of capital, they are expressions of freedom. Will these people (and the legal thinkers among them) produce a new constitution?

I will not move now onto this new territory and neither will I attempt to develop the epistemological themes that emerge here. It is enough to underline a further paradox. This, in the biopolitical context, is that relations appear increasingly in forms that seem to recall private law, that is, as Pashukanis would have it, the law of exchanges. But in this new world in which we live, these relations which seem private are merely singular – or, better put, they no longer succeed in spreading out spatially nor in arranging themselves temporally according to the rules of private law. In the moment in which exchange and contract seem all powerful (and the world has taken the shape of the universal spectre of merchandise) in that same
moment the biopolitical horizon appears as a set of relations, the majority of which cannot be fully brought under the rule of the figure of merchandise. The immaterial forces of production or the co-operative forces of production and reproduction are irreducible to a logic of exchange. In fact, productive subjectivity is singular because it is excessive [smisurata]. Thus biopolitical singularity is not private but common - and the common is not that which sovereignty and modern law have defined under the name of ‘public’ (that is, a community [comunanza], which is either biological or State ordained) but a multitude of singularities, which builds reality out of desires and differences. The common is the language spoken by the multitude, which is handed on, accumulated, and invented always anew – a process in which all of us participate. The method of legal science needs therefore to get evermore closer to linguistic community [comunità linguistica] and retrieve that materialist and creative telos, which constitutes it. In this situation, law’s grammar (which is to be rebuilt) will be able to bow before the word of liberation.

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