EDITORIAL: THE GEOLOGY OF GOVERNING SOCIETY

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It is a privilege to write an Editorial for such a thought-provoking collection but before I get to the thoughts it provoked, the reader will forgive me for expressing my gratitude to the various individuals responsible for its genesis. I write here on behalf of the Editorial Board of the *European Journal of Legal Studies*, which is very happy to host these papers.

Our particular thanks go to Christian Joerges, who, two years ago, during the launch party of the *Journal* suggested to me that it might be a suitable medium for the conference on *Governance, Civil Society and Social Movements*. At the time, I heartily agreed, but it is the incumbent Editorial Board who brought this hopeful talk into reality. They deserve credit for that.

From the offset, the *Journal* was intended to promote academic excellence, and this it does by selecting only the very best work out of the many pieces submitted. However, the *Journal* was also intended to provide a forum for the Law Faculty of the European University Institute to showcase its in-house excellence and the quality it is able to attract; to give something of an insight into our academic activities here in the Florentine hillside. This *Special Issue* is exactly what we had in mind back when the *Journal* was but a sketch on a drawing board. The Editorial Board is, thus, indebted to the Editors of the conference, and in particular Jennifer Hendry, who did the lion's share of the preparatory work.

It is particularly gratifying to see that each paper has been published in two languages, offering the reader an invaluable choice and hopefully extending the discourse across those pesky language barriers so far as translation permits. In this contribution, I shall distil this plurality through the alembic of English for the sake of clarity, to the inevitable detriment of accuracy.

My personal thanks go to Michael Blecher, who, in his introduction, explains the thrust of the three sections of this issue, emancipating me from that responsibility and leaving me free to explore some of the

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tensions I consider fundamental.

As for the conference itself, there is no need for me to underline the quality of the contributors, but I would like to thank them for writing papers as diverse and challenging as they are unified and inspiring. And, though much can be learned from each contribution in isolation, all the papers can be read in a day – it goes without saying that the whole is greater than the sum of its parts.

What is clear from the collection is that, for those of us (the present author included) who shudder at the mere mention of "technocratic governance" or "comitology", it is not enough to wallow in nostalgia for the mythological (and, in retrospect, blissfully simple) tripartite separation of powers in the nation state. Nor is it satisfactory to succumb to the sense of powerlessness noted by Negri, that sense of impotence created by mass society, the dizzying, contemporaneous growth and shrinkage of our world. In Europe, at least, though I hardly think we are on a runaway train of postmodernity, we might well have bought a ticket for a mystery destination via these queer new locations of power.

This Editorial is not so bold as to draw conclusions but makes a simple request of the reader; and that is to keep three distinctions in mind when contemplating these papers; namely, between (i) *public and private spheres;* (ii) *moral and prudential actions;* and (iii) *law and politics*. I shall refrain from defining these distinctions because, apart from pre-empting my tentative suggestions, they are unstable, and like tectonic plates, they seem to lock together underneath this debate. Even more interesting than the internal instability of these distinctions, is the precarious interface between them. That is to say, when one theoretical fault line shifts, the others shift in compensation, in a seismic reaction. The reader is asked to keep these tectonic dynamics in mind so as to further our understanding of what might be called *the geology of governing society*.

PUBLIC AND PRIVATE

Joerges sets off at a brisk pace, making the counter-intuitive assertion that rather than European-made law suffering from a democratic deficit, it can cure the undemocratic structural malaise of the Member states. How are we to take this? Europe, of course, to some extent, entails an admixture of democracy with liberality, in that the confluence of cultures dilutes majoritarian politics. Europe makes liberal (and not so liberal) democracies act in a manner *truer* to the constitutional promises they have made to themselves, by promulgating laws (however ambiguous or general they may be) applicable to all. Further, the inclusion of plural societies of different

colours and stripes, which inexorably accompanies European expansion and unification, necessarily introduces more points of view: That cannot be bad for democracy, which can only really flourish where different voices can talk and reason it out, reaching conclusions superior to those they would have reached, given their own 'dull natural abilities' (Spinoza), selfish predelictions, and parochial viewpoints. So, yes, in this very pure sense, Europe may well make us all more liberal, and, paradoxically, more democratic.

What is the purview of the political in this liberal democratic utopia? Ciccarelli notes that liberal governments are keen to delimit the ambit of the political, relying on other forms of authority to govern behaviour, such as religion, civil society, and reformers. But to what extent is the private *private* if it is elevated to the status of public good? And how are the activities cited by Ciccarelli non-governmental if they influence and in some cases exert authority?

Frankenberg pinpoints an important issue for contemporary Europe, asking whether organisations of civil society relinquish their civil eminence where they are integrated into state decision-making. Does this question require a "yes or no" answer or does it merely trace a fault line? Can we analytically fence off the public from the private in discussions of civil society or are such distinctions misleading oversimplifications?

Frankenberg tells us that associations of civil society have always besieged public institutions, but can we say that this collective, and, thanks to the media, frequently high profile, activity is not public without involving ourselves in a contradiction? Is pressure not a form of participation? Democracy is much more than the casting of votes.

In the context of new social movements, Allegri develops this point, endorsing Curtin's observation that it is difficult to differentiate between the representation of private interests and the characteristically more public deliberations of civil society. So is the tag 'private' just a fig leaf?

Well, social systems such as the internet, worldwide broadcasting media, and transnational trade constitute what Teubner calls an "accelerated differentiation of society" into "autonomous social systems" that escape from "territorial confines". These changes should cause us to question the utility of naïve notions of public and private that correspond to state and non-state or official and civil.

Dine also locates the superficiality of the neat demarcation of public and private, but this time using the compass of corruption. She questions the

World Bank's definition, "the abuse of public office for private gain" and observes that, subsequent to the Enron fiasco, Transparency International began to understand corruption as the abuse of "entrusted power" for private gain. In a complex society where *de facto* power is exercised by a multiplicity of actors, this definition would seem, at the risk of ambiguity, more likely to capture a serviceable, modern understanding of malfeasance. The lesson might well be that a crude categorisation of public and private can, oddly enough, corrupt our sense of corruption.

Sticking with the corporate theme for a moment, Teubner can provide us with a link to the next unstable distinction between morality and prudence; that is between actions undertaken for the benefit of others and actions undertaken for the benefit of the actor. He argues that a business does not exist simply to enrich its shareholders and workers, but to fulfil a broader role in society, for the common good. Bronzini homes in on this fissure between the public and the private, the moral and the prudential. He observes that, due to the spread of capitalism through multinational companies and networks, the welfare state's political institutions are no longer connected to economic decision-making centres. The public and the private, the moral and the prudent have sourly parted company. How are they to be reconciled? I shall return to this in the conclusion.

MORALITY AND PRUDENCE

So entrenched is the contemporary partition between morality and prudence, that casting any doubt on it might attract the criticism of wishful thinking or quackery. Arguments to the effect that elevating one's soul by helping another is preferable to enriching one's bank account are often given short shrift outside of religious and (sometimes) academic circles: Dine explains the corporate mindset according to which considerations other than profit are seen as excess baggage or ballast to be jettisoned. Nevertheless, since Cicero, an above-average statesman and lawyer, considered the then-fashionable philosophical separation of the moral and the prudent to be the root of all pernicious behaviour in society, the matter might be worth a few lines of consideration.

Here, we can ask whether this corporate mindset is based on a depraved understanding of self-interest, perverted by materialism. That is, the attribution of a money value to all things has the effect of stripping all things of value that cannot be expressed in pecuniary terms: To put it another way, modern capitalism has misappropriated the liberty to allocate value according to non-monetary indices. For present purposes, this might be called the *devalorisation of value*. It is the collapse of the imaginative capacity required to estimate value external to the artifice of a share price.

This logic tells us that if money can't buy friendship, friendship must be worthless. When this devalorisation of value is coupled with a belief in the invisible hand, the doctrine according to which pursuit of private gain redounds to the common benefit, the unstable distinction between morality and prudence becomes entrenched.

At this juncture, I would like to distinguish between the belief that self-interested action can benefit others and the belief that moral actions (actions favourable to others) are prudent actions (actions conducive to our own wellbeing). The two are not the same and it is the sleight of the invisible hand that hoodwinks so many depressed capitalists, for whom, after the alleged End of History, purchase has replaced politics, and stock has substituted suffrage. Dine draws our attention to the fact that seemingly pure moral actions may turn out to be prudent too, and that corporate governance based on pandering to shareholders is not only misguided but imprudent, as it might entail heaping intolerable pressures on the company, and, eventually a loss of faith in the markets as companies fiddle and fudge to produce ever buoyant share prices.

Returning to the tectonic relation of the public and private to the prudent and the moral, Blecher, in his contribution appropriately entitled, "*Mind the Gap*" helpfully interprets Bronzini to suggest that we might view legal personality as a privilege that entails social responsibility. This allusion to social justice, to the possible alignment of prudence and morality through balancing public and private interests, sends us toppling into the next chasm, between law and politics.

LAW AND POLITICS

Zagato registers the increase in the number of factual entities operational in the horizontal dimension of international law. On the European plane, think of the proliferation of expert bodies, committees, unions, non-governmental associations and so forth. Clearly, these new forms of societal management can blur the line of demarcation between law and politics.

"Governance" is an ambiguous term, and, though I will not go into detail here for want of encroaching on ground already covered in this collection, I will note that it has something of both law and politics about it. Further, international law has been said by some to include a strange "soft" variety of law, which persuades rather than coerces, and is dissimilar to the steel rod wielded by the strong arm with which we are familiar. On the European plane, law has been asked not to "enforce" but to "harmonize" and, moreover, Joerges suggests that the theoretical approach to law

required by the European polity is one of "conflicts", of synthesis. He then reins in this concept and restricts the role of law to promoting the "deliberative quality" of European governance. So where, if anywhere, should we draw the line between law and politics, and is the line we draw bound to be faulty?

Correspondingly, are national and supranational courts, who Bronzini says we may regard as competing in a virtuous cycle, now taking political decisions? Are they flexing new diplomatic muscles in their mutual - albeit circumspect - regard or are they learning the political trick of deferring and abdicating from decision-making because of the availability of alternative fora? Claimants should not become victims of political judiciaries, reticent to make a decision simply because of the complexity of the multi-level regulatory context in which they have to reach that decision. Hannah Arendt was right (we can assume this wasn't attributable to the influence of Heidegger's embrace of national socialism) to note that the worst form of governance is not tyranny but bureaucracy, where power is exercised in such an obscure and diffuse manner that nobody can be held responsible for malfeasance. This wariness should colour all our evaluations of judicial behaviour in these new realms.

Much has been made of the dynamism required of law in this collection. Legal rules restrict and enable. Blecher refers to immunisation strategies and strategies against immunisation. I think that another useful way of expressing its paradoxical role, especially in a complex polity like the European Union, is to say that it must both *paralyze* (in the sense of restricting the ambit of permissible behaviour to guide human interaction) and *mobilize* (promote decision-making processes, facilitate the making of new laws, guarantee democracy).

Returning to finance for an example of what I am driving at here, Teubner's advocation of the incorporation of non-shareholder groups into decision-making is geared towards the paralysis of the self-destructive tendencies of businesses and the mobilization of their powers of internal control, to awaken the corporate conscience to non-economic interests, which, as I have gently speculated here, may well turn out to be prudent business too. Private companies, can without damage to their shareholders, act in the public interest, considering themselves limited by contemporary political morality and, where (like today) that political morality is itself somewhat deficient, contribute to it. Surely European businesses (let alone Japanese rice producers) can do more about the global food crisis, for instance.

It would seem that we have to be careful in this realm of novel political

modalities, not to pollute our conception of law. The aim of politics is justice, and its tool is the law. Law is not a substitute for, or supplement to, diplomacy, or political disputations and, though the discovery of law might require an adversarial procedure and judicial wranglings, eventually, law is that which is enforced (or can be enforced).

Moreover, this need not restrict law's afore-mentioned dynamism. Both enabling and restricting rules are enforced. A steel rod wielded by a strong arm can paralyze and mobilize.

Conclusion

A word on justice and society before I leave you to enjoy the collection.

Blecher tells us that we must resign ourselves to a continuous and enduringly insufficient process of conflict and cooperation, deconstruction and reconstruction, in our struggle to achieve justice. And, where social power is exerted by an ever-changing cast, I would imagine that the law must be ready to rely on its intrinsic dynamism, to change the scene. We should take care that our law-making organs are not so cumbersome that the law is slow to react to *de facto* shifts in power concentration.

On a positive note, it is worth acknowledging the unique opportunity presented by the Europe of new societies and new forms of governance and identity for recasting the relations of the private and public, refining the relationship between the moral and the prudent, and doing so through new forms of law and politics. Della Porta has much of value to say about the elaboration of attitudes in European Social Fora, which though they might run contrary to the received wisdom in Brussels, are a clear manifestation of the development of not an alternative but a richer European identity. Allegri is not wrong to note the richness of new public spaces of a post-statal variety, but we should mind that these new spaces do not become occupied with the same, pre-existing and unsatisfactory social inequalities sporting a different guise.

Briefly recalling what I said above about the unstable distinction between the public and the private, we should also recognise that we are constitutive of society, that in choosing our actions, we create our worlds and we govern ourselves. In this narrow sense, there is no such thing as a private interest. Our choice of private interests, our delineation of a sphere as private, is a quintessentially public act.

Returning to Bronzini's insight about the disjointedness of financial and social Europe, it would seem that Europe's passage to social justice

requires the marriage of its two bodies, stylized (however unfairly) in the popular imagination as trouserless gay rights marchers in Berlin and well-tailored paper-stackers in London. Teubner usefully highlights that human rights function as interpretive tools in the discursive conflicts between the competing value claims of the potentially totalizing influences of various social systems. "With these rights I do thee wed," said the marcher to the paper-stacker...

In the coda, Hendry tells us that much turns on the coincidence of singularity and commonality. How right she is. Society is nothing but the idea it has of itself. It is sheer self-perception. And civil society, pursuant to Frankenberg, is a *project*; it is the project of justice, and governance, and the generation of a European identity.

So as you survey these papers, please keep in mind the tectonic plates underlying the debate - *the geology of governing society*, because, notwithstanding the quality of this collection, we should always endeavour to build our theories, and our societies, on solid foundations.

GOVERNANCE, CIVIL SOCIETY AND SOCIAL MOVEMENTS
INTRODUCTION TO THE SPECIAL ISSUE

Michael Blecher*

When this Introduction was written, Italian Prime Minister Romano Prodi had, for many citizens, just failed to apply at the national level those new criteria of "Governance" he had introduced years ago as President of the EU Commission. In 2000, while the European Union was still suffering from the effects of the BSE crisis and its negative impact on the reputation of the European "regulatory state", Prodi had announced far-reaching and ambitious reforms that showed that the Commission had finally recognised the need for better embedding the European regulatory and decision-making system into the European society, including *a novel form of governing that would involve a reorganization of the relations between political actors and civil society, and a more democratic form of partnership between "the layers of governance"*. This created a legally undefined "space" and located the Commission's plans for "governance" somewhere between administrative and constitutional reform.

This approach was, however, not evident at the national level when, in winter 2007, the local population of the Italian city of Vicenza was denied any say on US, local and – in the end – national Government plans to install a new US Airbase and Special Combat Troops in the town. Despite the fact that Prodi had announced his resignation in the aftermath of a huge demonstration against the air base, his subsequent acceptance of the offer of creating another Government merely a week later suggested that this was more a political move designed to win back some former allies who had dared to share the Vicentinians' concerns instead of being a reaction to the public's opposition to the plans. As it was, the "voice" of the Vicenza population went unheard – treatment that disappointed many and challenged any "loyalty" to "the system", as well as bringing into harsh focus the lack of any political alternative. Rather, to many involved, few options seemed likely to put an end to this opportunistic style of political manoeuvring, other than the radical one of "exit" or the establishment of new forms of legitimate social self-organisation. This discourse was not confined to Vicenza, however – the political "manoeuvring" itself shows that classical forms of state sovereignty and political representation lose their structural grip when new forms of "governance" are in development, not least in order to reintegrate large parts of the "exit-community".

A recent German study tells us that, while there is no general legitimacy

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crisis, either on the national or international level, new multi-level global forms of sovereignty and normative societal structuring are in the making and, moreover, that different political, economic, legal, etc. positions are presently competing to produce an adequate description of this "transition" that we find ourselves in. It seems that the "governance" concept has been widely accepted as the location for this competition, but it may even represent the end of the road for that very "transition". Indeed, momentum is certainly lost if, like this study, future research takes a Hobbesian description of state sovereignty as its launching pad, and interprets the national and global fragmentation of power and law as a painful exit from such a model while all the time praising the post-second-world-war period and its "values" as its last "golden age". How golden was this age for the world's poor? What ingenious mechanisms had King Midas put in place to avoid the poor being affected by his golden touch? We can neither hide nor remove the contingency of our approaches and "values" and, if we take into account the effects of the same "model" in other parts of the world, we cannot even claim that they would at least deserve acceptance in our own context.

Foucault told us that, if we want to know how "truth" is produced in a historic context, we should switch from the question "Who is governing?", namely the question of sovereignty, to the question 'How is power exercised?', which is the question of the "art of governing".[1] Up to now it seems that any analysis of the "Erosion of State Government" concentrates either on the difficulty of intervening in globalised markets, which certainly require regulation, or on the difficulty of avoiding those frictions and negative externalities produced by autonomous national and global "discourses, institutions or systems", like law, the economy, multinational enterprises, politics, states, religion(s), communication media, science, medicine, and so on and so forth. As lawyers we are, above all, concerned with those new legal forms that are supposed to cope with "regime collisions" and with the shift of competences to supra- and transnational or self-organising regulatory regimes. But are we in the end just talking about the effects of and speculating as to possible cures for what Luhmann called "the globalisation of functional differentiation",[2] or is there more? In order to understand this, Foucault would probably have invited us to launch a series of genealogic research inquiries into the architecture of the present (post-neoliberal? post-post-modern?) societal *gouvernementalité* (or

[1] M. Foucault, "Governmentality" *I & C* 6 (1979), revised translation by C. Gordon published in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect* (Chicago: UCP, 1991)

[2] N. Luhmann, "Globalization or World Society: How to Conceive of Modern Society?" *International Review of Sociology* 7/1 (1997) 67-79.

governance?) to discover how it is working in terms of the (risky) reproduction of the rationalities of those autonomous spheres; how "conflicts" or "collisions" between them are (politically, legally, economically, etc.) managed; and which legitimisation, control and immunisation devices are being installed to defend this "network" against decay and resistance while at the same time maintaining an openness sufficient to facilitate necessary (reproductive) criticism and change.

Do the inevitable asymmetries of this "new spirit of capitalism" better respond to the needs of the multitude of the world's people, however? Who are the winners and losers or, rather, the included and excluded? We know that any societal re-organization (re-)produces asymmetries and, together with them, (re-)opens the normative question of how *should* things work (better), all of which gives rise to claims for different realisations of "the common", of "wealth", "justice", "truth", and "freedom". The battle for the difference always refers to open or latent contemporary preferences and restrictions. "Liberating the possible" by unveiling the contingency, the radically temporary structure of the present, against any universalism and fundamentalism - this was Foucault's adoption of the Enlightenment's "ethos" (with and against Kant) as "critical ontology". Now the governance concept will also be forced to stand up to such scrutiny.

The governance concept has attracted the attention of politicians and administrators, company managers and trade unionists, international development organisations, sociological, political, legal and economic scientists, and it can also be found in the debate on social movements regarding cooperation, protest and exit. Indeed, the ubiquity of the phenomenon indicates an authentic shift in the way we look at forms of societal organisation, political legitimacy, political economy, and the role and rule of law. Governance appears as the generalised new logic and style of governing through countless decision-making constellations and between various "knots" of the organised global network, i.e. between national, regional, inter- and supranational entities and institutions and other self-organised social organisms and rationalities. Governance constellations basically operate heterarchically, although this does not preclude the emergence of new hierarchies that condition decision-making when and if a solution is "deserving of acceptance". Similarly, while governance certainly endeavours to cope with conflicts arising from society's functional differentiations and to compensate for the inadequacies of politico-administrative performances by the modern (nation) state, governance models can neither avoid the residual inadequacy of any "form", nor the battle for their continuous transformation.

In order to shed additional, and hopefully new, light on the various aspects of the Governance phenomenon, a conference took place on June 30, 2007 at the European University Institute in Florence, contributions to which are published in this volume. They loosely follow the structure of the conference and its division into three interconnected parts, namely "Governance, Civil Society and Social Movements".

The first contribution provides a legal-technical, legal-political and political-economic analysis of the phenomenon. Governance will be looked at as a response to three interdependent phenomena: the erosion of state government, the emergence of post-national constellations (C. Joerges) and the deficits of traditional interventionist law (L. Zagato). At international level, the term Governance has denoted "policy arrangements" that emerge outside the administrative system of individual nation states, but which, nevertheless, have a significant impact on selected national, regional or global recipients. Examples of this are the BSE crisis, SARS and the bird-flu case. In this context, "Governance" remains rather "government" in so far as it stands for a 'classical' form of intervention into economic and social relations. This aspect, it should be noted, is distinct from those European, international, transnational or global activities that are not exclusively public and involve experts, knowledge pools and civil society representatives.

In some national environments, particularly in Germany, the involvement of non-state actors in law-making and their engagement in political programmes designed by governments to tackle social problems appear to be classical elements of "organised capitalism". Corporate governance and workers' co-determination were key sectors here, but these constellations have changed as a result of the shift in relations between "capital and labour" to post-Fordist or post-industrialist models and with the loss of previous "balances"; with the neo-liberal trend to align government, the public sector and society as a whole with enterprise management and economic efficiency criteria; with the consequent privatisation and deregulation initiatives; with the societal self-understanding as "risk society"; and, finally, with the Europeanisation and globalisation of these processes. In the course of these events, *the application context and the design of governance "modes" have changed*. In all issue areas and on all levels, new practices of governance collide with traditional concepts of the private and the public. This leads us to the question: if law will have to change its self-understanding and regulatory styles, what social and legal costs are involved in such a turn to governance, and what politico-societal potential does it have to offer?

The second set of contributions analyses the conditions for the possibility of Governance deriving from the network character of society. Boltanski and Chiapello's study on the "New Spirit of Capitalism"[3] shows that the "net" metaphor, above all, has freed humankind from the burden of "two-level-metaphysics", which located single individuals on the first level while the second level consisted of conventions relating the individuals to each other in order to subject them to moral and legal judgements. For a long time these metaphysics determined the meaning of the 'common good' of the respective polis concepts. The net metaphor does away with this kind of transcendental conditioning of social structures, eventually allowing these structures to reveal their "pure immanence"[4]; their regulatory constraints are self-created and contingent, and thus require legitimate standards, procedures, and fora (mediation and decision making bodies). The question is, then, if the net as such can be subjected to justice requirements, or if we can address (self-) regulations only to specific sectors or structured constellations of the net-matrix, like discourses, institutions, and systems, what then would be required to develop a "contextual common good"? Boltanski and Chiapello refer to the "polis" concept of embracing the regulatory requirements of the present capitalist network society as the "project-based polis",[5] a term that they use in order to combine the basic conditions of the net - its total interconnectedness, poly-centricity, basic heterarchy, "event character" and the permanent fluctuation of countless encounters and contacts – with the necessity of inserting legitimate social organisation and regulation. In the net's seamless web, "projects" would describe countless value-producing "accumulation spaces", the structures of which require legitimisation. From this point of view, the basic form of governance constellations could also be characterised as "project", which would, then, describe single "horizontal" negotiation and deliberation processes whereby "public" and "private", political and non-political actors can resolve specific economic, political, etc. controversies by establishing mutually acceptable standards. This form is precisely what the Vicentinians were asking for.

Even if we can recognize the "project character"' of our present existence, however, the "project constellation" seems to be only a single variant of today's societal network organisation. This latter form seems rather to re-coagulate into a more stable (albeit contingent) and well-structured forms, which go beyond state hierarchy and have specific Governance requisites.

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[3] L. Boltanski & E. Chiapello, *The New Spirit of Capitalism*, (London, New York: Verso, 2006)

[4] Deleuze, *Pure Immanence: Essays on a Life* (Cambridge: MIT Press, 2001)

[5] Boltanski & Chiapello, *supra* note 3

Such forms have been described as "societal constitutionalisations"[6]. The constitution of world society does not come about simply through international institutional relations, nor as an unitary global constitution overlying all areas of society – it seems instead to emerge incrementally through the constitutionalisation of a multiplicity of autonomous subsystems or 'regimes' of world society, which are required to "re-spect" each other and their natural and human "capital". Examples of such forms include the "global economic constitution" (*lex mercatoria*), the global constitution of the science and education system, the "digital constitution" of the Internet, as well as a multi-level global political constitution. All the typical constitutional "juridification" devices can be found here: rules on organisation and procedures, the regulation of each sector's reflexive "boundary-relations" by the establishment of individual liberties and guarantees for other autonomous societal sectors (fundamental rights) – even relevant environmental protection rules must be provided for each specific sector.

Two of our contributions discuss the plausibility, normativity and legitimacy of such "civil constitutions" and the role they allow the so-called "civil society" to play in their Governance constellations (D. della Porta, G. Frankenberg), while the other contributions exemplify the conditions for the creation of such civil constitutions in specific fields. One paper elaborates the problems of corporate governance and respective concepts, which try to fight forms of intrinsic institutional corruption with rules of corporate social responsibility (J. Dine), while another application is in the context of "the social dilemma of European integration" and, in particular, a new concept of labour – labour that "the new capitalist spirit" would prefer to keep fragmented and freely floating in accordance with its needs. This paper asks: how can Governance formations be used (by social movements) on the European level to develop "flexicurity" standards? (G. Bronzini). Finally, how does the formation of a sectorised network society and of its Governance constellations effect classical theories of constitution and democracy and where can the new global movements be located here? (G. Allegri).

The last set of contributions focuses on the possibilities of Social Movements to re-claim "the common" in different, "alternative" forms. In terms of law, we are now moving on from "justice as adequate complexity" – with social movements as an unspectacular part of a complex societal design – to "justice as continuous becoming". This is the understanding

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[6] G. Teubner, "Societal Constitutionalism: Alternatives to State-Centred Theory", in C. Joerges, I-J. Sand & G. Teubner, eds., *Transnational Governance & Constitutionalism*, (Oxford: Hart, 2004)

that the achievement of (more) justice always requires, challenging the selective and restrictive results of the government or governance of "life", along with their mechanisms of discipline and control. The first contribution to this section (M. Blecher) shows how the governance phenomenon brings law back to its "original form" of norm-production: firstly, law is no longer anchored to a specific "polis" or "state" and is thus able to carry the traces of different legitimate definitions of the common good as long as its own normative requirements for creating (ever more) justice under conditions of uncertainty and ever exceeding possibilities are achieved. Secondly, law reveals itself to be constituted by a paradox self-reproductive movement: law organises a continuous battle on normative standards by deconstructing the restrictions of the global social system on democracy, common welfare and justice, and this change of legal standards for political, economic, etc. organisation and operation implies a change in law's own procedural and substantive parameters, which were supposed to immunise the social system against uncontrolled transformations. In other words, law runs both immunisation strategies and strategies against immunisation. This paradox has been managed by introducing different actors, levels, locations and procedures of law-making, but also by being mobilised by social movements and their claims for freedom, autonomous self-construction and new social rights. Law acts *politically* here, and in affinity to those movements that struggle against social immunisation and control beyond systemic borders and are exist in continuous self-transformation. The recognition of this affinity and the reconstruction of Jhering's "struggle for law" as the "struggle of the movements"[7] appear to be necessary prerequisites for the continuation of critical legal thought. The second contribution (R. Ciccarelli) analyses the conditions and consequences of this approach for the organisation of governance projects and constitutions, and for the political-legal necessity to open governance procedures up to the "differences" introduced by social movements beyond those purely strategic conservation interests. One can say that social movements move "in parallel" to the paradox of Law in Movement: they may well be part of the balancing process that aims for adequate societal complexity and thus produces the justification for necessary changes. However, they basically reject the notion of being just another "stakeholder" or "participant" in the governance game; they are not concerned with those "rationalities" and "interests" requiring compatibilisation among each other.

The third contribution by A. Negri argues that social movements are aiming for *a permanent acte constituant* or *positive excess*, which not only

[7] R. von Jhering, "The Struggle for Law" or "Der Kampf ums Recht" (Wien: G. J. Manz, 1873)

improves the existing parameters of the common but also re-invents the whole organisational and decisional set-up, including those new common institutions and respective governance procedures. As a result of the unavoidable contingency of these parameters and institutions, both disobedience of and exodus from movements are taken for granted. Can law provide governance formations where this constructive "squaring of the circle" of "positive justice" takes place, while preserving the openness of the process against any false uni- or multilateral "pacifications" or "synthesis"?

G. Teubner's contribution is rather sceptical in this respect, as, for him, the problem lies with the insurmountable effects of advanced functional differentiation: law can experience the problem of the integrity of body and mind only through the inadequate sensors of irritation, reconstruction and re-entry. The deep dimension of conflicts between (specialized) communication, on the one hand, and (the needs of) bodies and minds on the other, can at best be surmised by law, whereas *justice* aims (negatively) at removing unjust situations, not at creating (positively) just ones. Legal prohibition seems the only – inadequate - way to apply restraints to the forms and effects of (functional) communication. However, *positive excess and justice* both claim to create forms of resistance and consequentially impose a (different) politico-institutional asset without following systems, discourses and corresponding strategies. They move "tactically" along the (communicative) structures of territories and contexts and exploit their "fractures" or "gaps of control". Nothing can be generalised here, nor any theory built on it; such exceeding tactics are composed of singular events. Their descriptions of non-functioning and changing functions always remain single narrations. They can tell us, however, that the "battle for law" must be continuously re-started.

By way of conclusion, J. Hendry's contribution ("Coda: Governance, Civil Society & Social Movements. Re-Claiming 'the Common'") will summarise the debate on governance, civil society and social movements, and give her views on the various positions adopted in the preceding section.

INTEGRATION DURCH ENTRECHTLICHUNG? EIN ZWISCHENRUF

Christian Joerges*

Zusammenfassung und Gliederung: Der Beitrag konzentriert sich auf das Verhältnis von Recht und Governance in Europa. Er entwickelt den von Jürgen Neyer und mir vor 10 Jahren unter dem Titel „Deliberativer Supranationalismus" eingeführten Ansatz fort. Die rechtstheoretische Grundlage dieses Ansatzes ist die Habermasche Diskurstheorie des Rechts und deren Prozeduralisierung der Rechtskategorie. Auf dieser Grundlage ist es möglich, die Wende zum Regieren[1] in rechtsstaatlichen Bahnen zu halten. Dies gilt grundsätzlich für alle Ebenen des Regierens, erfordert aber Differenzierungen. Die rechtlich vermittelte Legitimation, die das prozeduralisierte Recht im Verfassungsstaat gewährleisten kann, erfordert in postnationalen Konstellationen eine „kollisionsrechtliche" Wende. Auf der Grundlage eines kollisionsrechtlichen Verständnisses des Europarechts sind nicht nur dessen Einwirkungen auf das nationale Recht demokratie-verträglich legitimierbar; auch die neuen (und nicht so neuen) Formen europäischen Regierens lassen sich auf dieser Grundlage eingrenzen und konstitutionalisieren. Diesen Thesen entspricht die Gliederung des Beitrags. Er beginnt mit knappen Hinweisen zur rechtstheoretischen Grundlage. Es folgt ein Rückblick auf die Kritik an interventionistischen Rechtskonzeptionen, die schon in den 80er Jahren Grundlagen für einen Umgang des Rechts mit Governance-Praktiken geschaffen hat (1). Die europäische Wende zum Regieren ist das Thema des Hauptteils, der mit einer Chronologie der europäischer Governance-Praktiken beginnt (2.1), um dann zu zeigen, wie sie kollisionsrechtlich erfasst werden können (2.2). Vor allem die sog. neuen Formen des Regierens, so wird abschließend gezeigt, suchen sich freilich rechtlicher Bindungen zu entledigen, und es ist fraglich, ob das Recht gegenüber diesen Tendenz bestehen wird (3.).

I. EINFÜHRUNG

In einem interdisziplinären Projekt ist ohne Reflexionen über damit verbundene Verständigungsschwierigkeiten nicht auszukommen. Sie sind – in meinem Verständnis – wesentlich darauf zurückzuführen, dass sich unsere Disziplinen einer je eigenen Logik verschrieben haben: die

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[1] Governance mit „Regieren" zu übersetzen, entspricht dem seinerzeit (1996) im DFG-Schwerpunkt „Regieren in Europa" eingeführten Sprachgebrauch, soll aber nicht etwa programmatisch i.S. einer (Kehrt)Wende zur Regierung verstanden werden.

Politikwissenschaft befasst sich mit Erklärungen, die Rechtswissenschaft mit der Interpretation von autorisierten Texten und der Ausarbeitung von Dogmatiken.[2] In seinem rechtstheoretischen *magnum opus*, hat Habermas[3] behauptet, das moderne Recht verschränke Faktizität und Geltung. Deshalb müsse die Rechtswissenschaft, deshalb müssten aber auch sozialwissenschaftliche Analysen die real existierenden Phänomene der Rechtsdurchsetzung mit den normativen Geltungsansprüchen in Verbindung bringen, die sich auf seine Generierung in demokratischen Prozessen gründen. In einer trivialeren Fassung: Die Normativität des Rechts bleibt ein Faktum, auch wenn diese Faktizität einem szientifischen sozialwissenschaftlichen Selbstverständnis schwer zugänglich ist, und unabhängig davon, dass es für so viele Fragen sinnvoll oder gar notwendig ist, die Faktizität des Normativen auf sich beruhen zu lassen. Es macht nun allerdings keinen Sinn, all dies weiter auszubreiten, nicht bloß, weil wir hier nicht in einem rechtstheoretische Kolloquium befinden, sondern vor allem, weil sich aus der Diskurstheorie des Rechts keine Anleitungen zur Beurteilung der hier interessierenden Phänomene, jedenfalls nicht der transnationalen, deduzieren lassen.

II. Governance im Nationalstaat: Bringing the 80's back in

Was mit Governance bezeichnet werden soll, ist nicht so einfach festzustellen. In der Connex-Bibliographie, die das einschlägige Schrifttum sammelt, fanden sich im Oktober 2006 um die 2900 Einträge.[4] Seither ist vieles dazu gekommen, z.B. aktualisierte Übersichten zur Karriere des Governance-Begriffs und zum gegenwärtigen Diskussionsstand in den politikwissenschaftlichen Disziplinen.[5] Soviel bleibt bei all dem immerhin gewiss: Governance ist kein Rechtsbegriff. Die Praktiken, die der Begriff bezeichnet, unterscheiden sich von den Formen administrativen und auch gubernativen Handelns, die in den Rechtsbegriffen des Verwaltungs-, Staats- und Verfassungsrechts tradiert werden. Die hieraus resultierenden

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[2] J. Habermas, „Über den inneren Zusammenhang von Rechtssaat und Demokratie" in: U.K. Preuß, Hrsg., *Zum Begriff der Verfassung* (Frankfurt/M: Fischer, 1994) 83-94; siehe auch: "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" in *Political Theory* 29:6 (2001) 766-781.

[3] J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt/M, Suhrkamp, 1992); siehe auch, auf Englisch, *Between Facts and Norms - Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1998,].

[4] http://www.connex-network.org/govlit.

[5] B. Kohler-Koch & B. Rittberger, „The 'Governance Turn' in European Studies", *Journal of Common Market Studies* 44:1 (2006) 27-49.

Übersetzungs-Schwierigkeiten kann man sich systemtheoretisch klar machen.[6] Für die Diskurstheorie des Rechts stellen sich fundamentale Fragen: Kann das Recht, wenn es jene Praktiken adaptiert und absegnet, die Geltungsansprüche aufrechterhalten, die ihm im demokratischen Verfassungsstaat zuerkannt werden dürfen? Kann es, wenn es die Wende zum Regieren nicht aufzuhalten vermag, immerhin Maßstäbe entwickeln und durchsetzen, die diese Praktiken so formen, dass sie, um noch eine Habermas-Formel aufzugreifen, Anerkennung „*verdienen*“,[7] d.h., um einem noch zu erläuternden Sprachgebrauch einzuführen, sie „konstitutionalisieren“.

Die Rechtswissenschaft in Deutschland hat auf die Wende zum Regieren, die von der Prodi-Kommission seinerzeit geradezu emphatisch verkündet wurde,[8] mit erfreulicher Zögerlichkeit reagiert.[9] Die inzwischen sehr intensiven Rezeptionsansätze scheinen mir dem *proprium* des Rechts verpflichtet zu bleiben. Kennzeichnend ist für die Beiträge insbesondere von Trute u.a.,[10] Schuppert[11] oder Franzius,[12] dass sie Governance-Praktiken in einen normativ (verfassungsrechtlich) beglaubigten Kontext stellen wollen und sie analytisch als Kompensatoren für das Versagen von Steuerungsversuchen der regulativen Politiken begreifen.[13] Dieses

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[6] G. Teubner *Netzwerk als Vertragsverbund. Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht* (Baden-Baden: Nomos, 2004) 17 ff.

[7] J. Habermas „Zur Legitimation durch Menschenrechte”, in: *idem*, *Die Postnationale Konstellation* (Frankfurt/M: Suhrkamp, 1998) 170-192: 171; siehe auch Habermas, *oben Fn.* 2.

[8] Europäische Kommission, „Die Demokratie der Europäischen Union vertiefen“, Arbeitsprogramm, SEK (2000) 1547, 7 endg. vom 11.10.2000, in: http://europa.eu.int/comm/governance/work/de.pdf; Europäische Kommission, „Regieren in Europa – Ein Weißbuch“, KOM (2001) 428 endg. vom 25.07.2001, ABl. C 287/2001, 5, in: http://europa.eu.int/comm/governance/index_de.htm.

[9] C. Möllers, „Policy, Politics oder Politische Theorie?”, in C. Joerges, Y. Mény & J.H.H. Weiler, Hrsg., *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, European University Institute-Robert Schumann Centre / NYU School of Law-Jean Monnet Centre (2002): http://www.jeanmonnetprogram.org/papers/01/010601.html.

[10] H-H. Trute, W. Denkhaus & D. Kühlers, „Governance in der Verwaltungsrechtswissenschaft“, in *Die Verwaltung* 37 (2004) 451-473.

[11] G. F. Schuppert, „Governance im Spiegel der Wissenschaftsdisziplin“, in G.F. Schuppert, Hrsg., *Governance Forschung. Vergewisserung über Stand und Entwicklungslinien* (Baden-Baden: Nomos, 2005) 371-469.

[12] C. Franzius, „Governance und Regelungsstrukturen“, in *Verwaltungsarchiv* 97:2 (2006) 186-219.

[13] R. Mayntz, „Governance Theory als fortentwickelte Steuerungstheorie“, in G.F. Schuppert, oben Fn. 11, 11-20.

Umdenken setzt sich in methodologischen Konzepten fort, die eine Umsetzung des neuen Steuerungs-Modus Governance ermöglichen und anleiten sollen. [14]

All dies wird auf dieser Tagung kompetent erörtert und liegt außerhalb des mir zugewiesenen Themenbereichs. Es ist für meine Stellungnahmen zur Europäisierung des Regierens allerdings wichtig, dass die rechtstheoretischen, insbesondere die methodologischen Thesen, die ich aufgreifen möchte, allgemeine, nicht bloß Europa-spezifische Grundlagen haben.

Für diese Grundlagen möchte ich an die in den 1980er Jahren formulierte rechtstheoretische Kritik am politischen und rechtlichen Interventionismus erinnern – und an die sich hieran anschließende Suche nach Konzepten eines „post-interventionistischen" Rechts. Die Enttäuschung über die Wirkungslosigkeit rechtlicher „Zweckprogramme"[15] und die Besorgnisse über eine „Kolonialisierung der Lebenswelt" durch sozialpolitische Programme und deren administrativ-rechtliche Umsetzung[16] standen seinerzeit neben- und gegeneinander. Gemeinsam war ihnen die Einsicht, dass wirtschaftliche und soziale Prozesse in modernen Gesellschaften sehr viel komplexer eingebettet sind, als dies in jenen Dichotomien vorgesehen war, die Markt und Staat, Wirtschaft und Intervention, Recht und Politik gegeneinander stellten. Gesucht wurde nach einer neuen Rechtsrationalität, die den sozialstaatlichen Interventionismus und seine „materiale" Rechtsrationalität ablösen sollten, ohne dabei in den klassischen rechtlichen Formalismus zurückzufallen und die ihm anhaftende Schwäche gegenüber Formen wirtschaftlicher und sozialer Macht in Kauf zu nehmen. Die neue Rechtsrationalität sollte zudem den Mythos entlarven, das Recht könne die soziale Wirklichkeit durch die „Anwendung" von Gesellschaftstheorien in den Griff bekommen. Die

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[14] „Governance durch Regelungsstrukturen", die von Schuppert (oben Fn. 11, S. 382) geprägte und inzwischen einflussreiche Formel (oben Fn. 12, m. Nachw.), postuliert einen Zusammenhang zwischen Problemstruktur und Methodologie des Rechts rekonstruktiv in einer Form, die der oben I angesprochenen Wende zur Prozeduralisierung des Rechts entsprechen dürfte. Im folgenden soll es indessen um Spezifika Europas gehen, die dort „seit jeher" Governance-Praktiken erzwungen haben, und für deren rechtliche Bewältigung die im nationalstaatlichen Kontext entwickelten Muster umgestaltet werden müssen.

[15] Zur Kategorie N. Luhmann *Rechtssoziologie, Band 2* (Reinbek bei Hamburg: Rowohlt Taschenbuch, 1972) 227ff.

[16] J. Habermas, *Theorie des kommunikativen Handelns. Band 2. Zur Kritik der funktionalistischen Vernunft*, Frankfurt/M, Suhrkamp, 1981) 522 ff.

„Prozeduralisierung" der Rechtskategorie [17] und das Konzept eines „reflexiven" Rechts [18] waren die neuen einander mehr oder weniger unfreundlich gesonnenen Hoffnungsträger. Beide Strömungen haben sich mit sehr vielen Dimensionen der Praxis des Rechts befasst: mit Implementationsdefiziten, Alternativen zu hierarchischen „command and control"-Regulierungen. [19] Alternativen zur strengen (gerichtlichen) Streitbeilegung, Alternativen zum „hard law" usf. – sowie der Einsicht, dass ein Recht, das sowohl die Effektivität wirtschaftlicher und sozialer Regulierung fördern als auch ihre soziale Legitimität gewährleisten will, zur Re-Konzeptualisierung der konstitutionellen, administrativen und privaten Rechtssphären gezwungen wird und sich gleichzeitig auf eine kognitive Öffnung derjenigen normativen Erwartungsstrukturen einlassen muss, auf die es sich einstmals voll konzentrieren konnte.

Déjà vu? Genauer wohl: *The 80s revisited*! Alle eben genannten Fragen sind nach der „Wendung zum Regieren" erneut oder immer noch auf der Tagesordnung. Löst also bloß eine Irritation die nächste ab, wird eine ungemein facettenreiche Mode von einer Neuen Strömung abgelöst? Dies mögen Rechtshistoriker mit begriffsgeschichtlichen Neigungen klären. Ich möchte mich damit begnügen, drei Kontinuitäten hervorzuheben, die mir für den Übergang nach Europa wichtig erscheinen.
Ein allenthalben virulentes Merkmal von Governace-Arrangements ist die Berücksichtigung von Expertenwissen, nicht etwa bloß von naturwissenschaftlichem Wissen, wie es für die Risikopolitik benötigt wird, sondern aller möglichen Arten von Sachverstand, der sich für

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[17] R. Wiethölter, „Entwicklung des Rechtsbegriffs (am Beispiel des BVG-Urteils zum Mitbestimmungsgesetz und – allgemeiner – an Beispielen des sog. Sonderprivatrechts)", in V. Gessner & G. Winter, Hrsg., Rechtsformen der Verflechtung von Staat und Wirtschaft, *Jahrbuch für Rechtstheorie und Rechtssoziologie* 8 (Opladen, 1982) 38-59; R. Wiethölter, „Materialisierungen und Prozeduralisierungen von Recht, in: G. Brüggemeier & C. Joeges, Hrsg ., *Workshop zu Konzepten des postinterventionistischen Rechts, Zentrum für Europäische Rechtspolitik*, Materialien 4 (Bremen, 1984), 25-64.; J. Habermas (1992), *supra* note 3, 516 ff.; J. Habermas, „Replik auf Beiträge zu einem Symposium der Cardozo Law School" in *idem*, *Die Einbeziehung des Anderen. Studien zur politischen Theorie* (Frankfurt/M.: Suhrkamp, 1996) 309-398; 337 ff., 378 ff.

[18] G. Teubner, „Reflexives Recht. Entwicklungsmodelle des Rechts in vergleichender Perspektive", *Archiv für Rechts- und Sozialphilosophie* 69 (1982) 13-59 [= 1983, "Substantive and Reflexive Elements in Modern Law", *Law and Society Review* 17/2, 239-285].

[19] G. Teubner, *ibid*, und „Verrechtlichung – Begriffe, Merkmale, Grenzen, Auswege", in F. Kübler, Hrsg., *Verrechtlichung von Wirtschaft, Arbeit und sozialer Soldidarität. Vergleichende Analysen* (Baden-Baden: Nomos, 1984) 289-344 [= 'Juridification – Concepts, Aspects, Limits, Solutions', in *id.*, Hrsg., *Juridification of Social Spheres* (Berlin-New York: de Gruyter, 1987) 3-48].

Problemlösungen und Problem-Management anbietet. Dies ist ein sehr altes, auch schon im Nationalstaat verbreitetes Phänomen. Wolfgang Schluchter[20] hat es im Blick auf die Webersche Verwaltung durch das Dual von „Amtsautorität" und „Sachautorität" gekennzeichnet.
Wenn die Verwaltung bei ihrer Aufgabenerfüllung sich nicht mit der Exekution von Normprogrammen begnügen kann, dann dringt mit dem Sachverstand, über den sie nicht selbst verfügt, die Gesellschaft in die Verwaltung ein, und es liegt dann auch nahe, gesellschaftliche Akteure in die „Erfüllung öffentlicher Aufgaben" einzubeziehen, nicht nur wegen ihres Sachwissens, sondern auch, um ihre Management-Kapazitäten zu nutzen.

Am wichtigsten für die folgende Argumentation ist ein Phänomen, dass in der Tradition der amerikanischen *Critical Legal Studies* als „Unbestimmtheit" des Rechts [21] und seiner Fragmentierung [22] gekennzeichnet wird. In einer systemtheoretischen Perspektive hat Helmut Willke seinerzeit [23] den Begriff der komplexen Konfliktlagen geprägt, auf den der „Supervisionsstaat" mit „Relationierungsprogrammen" reagieren müsse.[24] Man kann seine Befunde auch konventioneller beschreiben. Es gibt Probleme, für deren Behandlung verschiedene Zuständigkeiten koordiniert werden müssen, und es kann zwischen in Geltung gesetzten politischen Programmen Zielkonflikte geben, deren Lösung nirgendwo vorprogrammiert ist.

Dieser dritte Aspekt verweist auf die Unvermeidbarkeit und die Schwierigkeit einer Prozeduralisierung des Rechts.

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[20] W. Schluchter, *Aspekte bürokratischer Herrschaft: Studien zur Interpretation der fortschreitenden Industriegesellschaft*, zitiert nach der Neuausgabe (Frankfurt/M: Suhrkamp, 1985/1972) 145-176.

[21] D. Kennedy, "Freedom & Constraint in Adjudication: A Critical Phenomenology", *Journal of Legal Education* 36 (1986) 518-567; M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki, 1989; Cambridge: CUP, 2007).

[22] M. Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization", *Theoretical Inquiries in Law* 8 (2006) 9-36.

[23] H. Willke, *Entzauberung des Staates. Überlegungen zu einer gesellschaftlichen Steuerungstheorie*, (Königstein/Ts: Atheneum, 1983)177 ff; *idem, Ironie des Staates: Grundlinien einer Staatstheorie polyzentrischer Gesellschaft*, (Frankfurt/M: Suhrkamp, 1992).

[24] Die Nähe zur Offenen Koordinierungsmethode (unten 2.1.5) und die Begrifflichkeit frappieren gleichermaßen. Relationierungsprogramme sollen Inhalte nicht programmieren und ihre Supervision muss dementsprechend zurückhaltend ausfallen. Immerhin bezog Willke sich damals noch auf nationalstaatlich organisierte Gesellschaften.

Koordinationsleistungen der eben bezeichneten Art werden faktisch in den „Entdeckungsverfahren der Praxis" erbracht. Welche normativen Qualitäten haben solche Abstimmungen? Unter welchen Voraussetzungen verdienen sie Anerkennung? Es soll in diesem Beitrag um Europa gehen, und es muss daher genügen, die Problemstruktur und deren Verwandtschaft mit der europäischen Konstellation zu kennzeichnen: Auch im Innern der nationalstaatlichen Rechtssysteme gibt es die Notwendigkeit, inkompatible Rechtssätze oder kollidierende Zielsetzungen zu koordinieren. Diese Koordinationsleistung lässt sich nicht zentral inhaltlich vorprogrammieren. Es handelt sich um eine Recht-Fertigung, die aus den Abstimmungsverfahren, in denen sie geschieht, ihre Legitimität gewinnen muss. Dies alles bringt die Diskurstheorie des Rechts in einige Verlegenheiten. Bei „politische(n) Entscheidungen von gesamtgesellschaftlicher Relevanz muss der Staat nach wie vor öffentliche Interessen wahrnehmen und gegebenenfalls durchsetzen können. Auch wenn er in der Rolle eines intelligenten Beraters oder Supervisors auftritt, der prozedurales Recht zur Verfügung stellt, muss diese Rechtssetzung mit Programmen des Gesetzgebers auf transparente, nachvollziehbare und kontrollierbare Weise rückgekoppelt bleiben", hat Habermas[25] postuliert. Er hat damit die Notwendigkeit und die Schwierigkeit einer „Konstitutionalisierung" dezentraler Rechtsproduktionen getroffen. Die Schwierigkeit ist eine doppelte: Problemlösungen sind auf *produktive* Leistungen *gesellschaftlicher* Akteure angewiesen, können also nicht inhaltlich vorprogrammiert werden. Die allein in Betracht kommenden prozeduralen Vorgaben müssen sich auf die Konzertierung gouvernmentaler und nicht-gouvernementaler Akteure erstrecken. [26] Hierauf wird im europäischen Kontext zurückzukommen sein (untern 2.2).

III. EUROPEAN GOVERNANCE

Offiziell, unübersehbar und mit weit reichenden praktisch-politischen Ambitionen hat sich die Wende zum Regieren in Europe unter der Ägide der Prodi-Kommission vollzogen. [27] Nun lassen sich Recht und Rechtswissenschaft durch eine wohlklingende und hoch autorisierte politische Agenda nicht ohne weiteres beeindrucken. Im Weißbuch zum

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[25] J. Habermas, oben Fn. 3,532.

[26] Verschlüsselt und genial, R. Wiethölter „Recht-Fertigungen eines Gesellschafts-Rechts", in C. Joerges & G. Teubner, Hrsg.., *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (Baden-Baden: Nomos, 2003) 13-21 [= "Just-ifications of a Law of Society", in O. Perez & G. Teubner, eds., *Paradoxes and Inconsistencies in the Law*, (Oxford: Hart, 2005) 65-77, available at http://www.jura.uni-frankfurt.de/ifawz1/teubner/RW.html].

[27] B. Kohler-Koch & B. Rittberger (2006) oben Fn. 5.

Regieren[28] selbst finden sich sehr deutliche Spuren eines fachjuristischen, der traditionellen Gemeinschaftsmethode verpflichten Widerstandes gegen deren politik- und verwaltungswissenschaftlich inspirierte „Modernisierung". [29] Sehr deutlich spiegeln diese Kommunikationsschwierigkeiten die oben (vor 1.) angesprochenen Differenzen der beteiligten Disziplinen. Dem fügt sich die Strukturierung der folgenden Abschnitte. Sie setzt nicht bei einer der inzwischen erarbeiteten Governance-Definitionen ein,[30] sondern folgt chronologisch der Entwicklung der europäischen Praxis (2.1), um dann zu fragen, ob diese unsere „Anerkennung verdient" (2.2).

1. *Neue und nicht so neue Formen europäischen Regierens: Eine Chronologie*

Das Recht hat sich zur „Wende zum Regieren" ausgesprochen pragmatisch verhalten. Die frühen Wegbereiter dieser Wende waren nicht wirtschafts- oder sozialwissenschaftliche think tanks, sondern Praktiker, Beamte und Richter, die sich gezwungen sahen, im Schatten und im Rücken der Verträge zu operieren. Sie taten früh, was die Praxis des Rechts stets kennzeichnet: Diese hilft sich in aller Regel wenig spektakulär, bleibt immer darauf bedacht, selbst tief reichende Neuerungen in die begrifflichen Gewänder der „bewährten" Gemeinschaftsmethode zu kleiden oder doch als Umsetzung von Vorgaben der Rechtsprechung auszugeben. Erst im Zuge der Umsetzung des Binnenmarkt-Weißbuchs von 1985 [31] wurde diese

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[28] Oben Fn. 8.

[29] C. Joerges "'Economic order' – 'technical realization' – 'the hour of the executive': some legal historical observations on the Commission White Paper on European governance"; in C. Joerges, Y. Mény & J.H.H. Weiler, oben Fn. 9; C. Joerges, "The Commission's White Paper on Governance in the EU: A Symptom of Crisis?", Guest Editorial, *Common Market Law Review* 39/3 (2002), 441-445.

[30] Diese Form einer deskriptiven Annäherung kann analytischen Ansprüchen, wie sie Renate Mayntz (oben Fn. 13) formuliert, nicht genügen. Nun ist aber die Art, in der die Rechtspraxis Neuerungen einführt, und die Rechtswissenschaft sie reflektiert, ein Stolperstein interdisziplinärer Verständigungen, den man so leicht nicht aus dem Wege räumen kann und soll. Die Abwendung von der "Gemeinschaftsmethode" und die Entwicklung alternativer Formen des Regierens weisen eine geradezu exemplarische Verlaufstypik auf: (1) Die Praxis „entdeckt" ein unabweisbare Bedürfnis und „handelt". (2) Die interessierte und die akademische Fachwelt wird auf diese Irregularitäten aufmerksam und bemüht sich um ihre Rückbindung an gesicherte Rechtsbestände. (3) Je hoffnungsloser solche Bemühungen erscheinen, desto aussichtsreicher sind theoretische und methodische Innovationen und sogar interdisziplinäre Ansätze. Freilich kann das Rechtsystem mit seinen Alt-Bestände nicht so achtlos umgehen wie dies in der Politikwissenschaft in theoretischen Debatten um einen neuen Ansatz usus ist.

[31] Kommission der EG, Weißbuch der Kommission an den Europäischen Rat zur Vollendung des Binnenmarktes, KOM (85) 310 endg. vom 14.06.1985

Zurückhaltung allmählich aufgegeben. Aus Optionen, die sich „ergeben" hatten, wurden Ansätze und Regelungsmodelle, die sich als Institutionalisierungen spezifischer Handlungsrationalitäten auslegen lassen.

Das Formenspektrum des europäischen Regierens, das sich jenseits der überkommenen Gemeinschaftsmethode etabliert hat, ist ungemein reichhaltig geworden. Juristen pflegen sich, um eine Übersicht zu schaffen, an den institutionalisierten Handlungsformen zu orientieren und können so – subtile und raffinierte Differenzierungen vernachlässigend – fünf *modes of governance* unterscheiden.

2. *Das Ausschusswesen (Komitologie)*

Das europäische Ausschusswesen ist die älteste Form „neuen" Regierens. Es ist dort entstanden, wo zuerst ein komplexes, europäische und nationale Akteure einbeziehendes Regieren unabweisbar war, nämlich in der Agrarpolitik. [32] Im Zuge der Ausweitung und Vertiefung des Europäisierungsprozesses war der Aufstieg des Ausschusswesens unaufhaltsam. „Komitologie" ist der rechtstechnische Begriff für die mit der „Implementation" gemeinschaftsrechtlicher Rahmenvorschriften betrauten Ausschüsse. Über diese Ausschüsse, die von der den Verwaltungen der Mitgliedstaaten und den von diesen benannten Experten bestückt werden, organisiert die Kommission die „gemeinschaftliche" (ebenenübergreifend-kooperative) „Verwaltung" des Binnenmarktes in Politikfeldern wie der Lebensmittelsicherheit, der Sicherheit technischer Produkte und der Arbeitssicherheit. Das Ausschusswesen muss den Mangel an genuinen administrativen Befugnissen der Gemeinschaft ausgleichen und gewährleistet – allen Klagen des Europäischen Parlaments zum Trotz – eine Kontrolle der Kommission durch die Mitgliedstaaten. Indem es nationale Organe einbezieht, fördert es aber auch die Akzeptanz europäischer Vorgaben in den Mitgliedstaaten. In den Ausschüssen werden die funktionalen und strukturellen Spannungen des Binnenmarktprojekts kleingearbeitet. Die Komitologie befasst sich nicht bloß mit „technischen", sondern oft genug mit politisch sensiblen Themen; sie vermittelt zwischen funktionalen Erfordernissen und normativen Belangen. Die wechselhafte Zusammensetzung der Ausschüsse ergibt sich aus der Aufgabe, die unterschiedlichen Bestände an Fachwissen und regulativen Anliegen gegeneinander abzuwägen und zu einer Symbiose zu bringen. Sie spiegelt

[32] Vgl. J. Falke, „Komitologie – Entwicklung, Rechtsgrundlagen und erste empirische Annäherung" in C. Joerges & J. Falke, Hrsg., *Das Ausschußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung* (Baden-Baden: Nomos, 2000) 43-159.

aber auch die Interessenvielfalt und politischen Differenzen, die im Implementationsprozess ausgetragen werden müssen. Die Ausschüsse agieren häufig wie „Mini-Räte": sie dienen als Foren der Vermittlung zwischen Marktintegration und mitgliedstaatlichen Belangen, wobei tragfähige Indizien darauf hinweisen, dass ihre Beratungen sachhaltig-deliberativ verlaufen.[33]

3. *Das Prinzip der gegenseitige Anerkennung als Governance-Praxis*

Im Anschluss an die legendäre *Cassis*-Entscheidung des EuGH in 1979[34] hat die Kommission in einer Mitteilung, die dieses Urteil zu erläutern versprach, die Auffassung vertreten, aus dem vom EuGH entwickelten Prinzip der gegenseitigen Anerkennung sei zu folgern, dass Europa das „bessere Recht" von nun an in einem Wettbewerb der Rechtordnungen finden könne und die Rechtsetzung eine entsprechende Zurückhaltung zu üben habe. Diese These haben viele aufgegriffen.

Es handelte sich indessen in jener Mitteilung um ein *wishful thinking*, dem sich die Praxis der Binnenmarktpolitik nicht fügen konnte und wollte. Sie konnte es nicht, weil die Annahme, dass Prozesse, die sich aus einer wechselseitigen Beobachtung von Rechtssystemen und der Wahrnehmung von Freiheitsrechten europäischer Marktbürger ergeben, als ein wettbewerbliches Entdeckungsverfahren begriffen werden könnten, auf allzu heroischen Prämissen beruhte. Der Schritt, den die Rechtsprechung getan hat, war normativ anspruchsvoller und so etwas wie ein „constitutional moment": Die Mitgliedstaaten wurden nicht etwa mit Diskriminierungsvorwürfen konfrontiert oder mit freihändlerischen Geboten überzogen, sondern ihnen wurde abverlangt, die Berechtigung

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[33] See C. Joerges & J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology" in *European Law Journal* 3 (1998) 273-299 [= "Von intergouvernementalem Bargaining zur deliberativen Politik: Gründe und Chancen für eine Konstitutionalisierung der europäischen Komitologie", in B. Kohler-Koch (Hrsg.), *Regieren in entgrenzten Räumen*, in *Politische Vierteljahresschrift* 1998, Sonderheft 28, 207-233.]. Um die Virulenz eines weiteren, hier nicht zu vertiefenden Problems wenigstens anzudeuten: Die Komitologie muss zu politischen Problemen Stellung nehmen, verfügt aber keineswegs über die Kompetenzen, die für eine umfassende, insbesondere auf wirtschaftliche Asymmetrien kompensatorisch reagierende Problembehandlung nötig wäre (vgl. bereits C. Joerges & J. Neyer (1997), 278 f., 293 f.). Man darf eben die Emergenz deliberativer Politikmodi nicht als transnationale Demokratie verstehen und ebenso wenig von der Etablierung von wechselseitiger Bebachtungs-, Evaluations- und Beratungsmechanismen die Bewahrung wohlfahrtsstaatlicher Politiken erhoffen.

[34] Rs. 120/78, Rewe Zentrale ./. Bundesmonopolverwaltung für Branntwein, Slg. 1979, 649..

ihrer regulativen Belange darzulegen.[35] Seit dies offenbart wurde, ist die Diskussion um die wechselseitige Anerkennung intensiver und interessanter geworden.[36] Sie durfte es nicht, weil gerade im Bereich der Binnenmarktpolitik immer wieder Fragen von politischer Sensibilität anstehen, die politische Systeme nicht einfach sich selbst überlassen sollten.

Was die Rechtsprechung des EuGH im Bereich der Grundfreiheiten stattdessen bewirkt hat, ist die Öffnung der nationalen Rechtssysteme für eine interne Kritik, die ihre Argumente allerdings auf Gesichtspunkte anderer Jurisdiktionen stützen darf. Nationale Gesetzgeber müssen die Sinnhaftigkeit ihrer Gesetze vor den Foren ihrer eigenen Gerichte und vor dem EuGH rechtfertigen. Das Europarecht liefert hierfür Maßstäbe – wie den der Angemessenheit und Verhältnismäßigkeit – und verpflichtet die Mitgliedstaaten zur Rücksichtnahme auf die Belange ihrer Nachbarn. Diese Prozeduralisierung des Rechts bedeutet nicht, dass den Bürgern Europas das Recht zugestanden worden wäre, das für sie jeweils günstigste Recht zu wählen, um so an die Stelle politisch-rechtlicher Auseinandersetzungen um das richtige Recht einen Wettbewerb der Rechtsordnungen zu setzen.[37]

4. *Die „Neue Konzeption" zur technischen Harmonisierung und Normung:„Private Transnationalism"*

Die (Erfolgs-)Geschichte der „ Neuen Konzeption" ist oft genug rekonstruiert worden.[38] Hier sei lediglich folgendes in Erinnerung gerufen: Die Bemühungen um die Beseitigung von nicht-tarifären Handelshemmnissen hatte die EWG in Dilemmata verstrickt, weil sie, gefangen im Paradigma der „Integration durch Recht", den Binnenmarkt über die Harmonisierung der einschlägigen Normen der Mitgliedstaaten herstellen wollte. Diese erforderte „positive" legislative Kraftakte in einem

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[35] M. Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution,* (Oxford: Hart) 150 ff.

[36] V. Schönberger & A. Somek, "Governing Regulatory Interaction: The Normative Question" in *European Law Journal* 12/4 (2006) 431-439; K. Nikolaïdes & S.K. Schmidt "Mutual Recognition on Trial: The Long road to Services Liberalisation" in *Journal of European Public Policy* 18 (2007).

[37] Exemplarisch am Beispiel des Gesellschaftsrechts, C. Joerges, oben Fn. 29, 161 ff; siehe auch, *idem*, „Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin", in A. Furrer, Hrsg., *Europäisches Privatrecht im wissenschaftlichen Diskurs,* (Bern: Stämpfli, 2006) 133-188, auch erhältlich von http://www.zerp.uni-bremen.de/english/publikationen/diskussionspapiere.php3.

[38] Siehe H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets* (Oxford: Hart, 2005) 37 ff.

Umfang, der Sisyphus hätte erbleichen lassen. Daran änderte die Ablösung der alten Einstimmigkeitsregel des Art. 100 EWGV durch qualifizierte Mehrheitsentscheidungen im Jahr 1987 (Art. 100a EGV) allein nicht viel. Auch die Umsetzung der Pflicht zur wechselseitigen Anerkennung, die durch die *Cassis-de-Dijon*-Entscheidung (EuGH 1979)[39] eingeführt worden war, erwies sich als im Einzelfall praktisch dornenreich und taugte grundsätzlich nicht zu großflächigeren Änderungen. Bezeichnenderweise waren die „privaten" Normenwerke, die namentlich in Deutschland Anforderungen an die Produktsicherheit konkretisierten, keineswegs integrationsfreundlicher. Gegen diese sub-legalen Produktstandards, konnte die Gemeinschaft, weil es sich definitionsgemäß um bloß „private" Handelshemmnisse handelte, durch Harmonisierungsmaßnahmen nichts ausrichten. Die List der „Neuen Konzeption" verbarg sich in einem Bündel aufeinander abgestimmter Maßnahmen: Die Europäische Rechtssetzung entlastete sich dadurch wesentlich, dass sie sich von nun an damit begnügte, „wesentliche Sicherheitsanforderungen" festzulegen. Deren „Konkretisierung" wurde an gut aufeinander eingespielte Experten der europäischen und nationalen Standardisierungsorganisationen delegiert. Die Einbeziehung nichtstaatlicher Akteure bedeutete *de facto* eine „Delegation" gesetzgeberischer Kompetenzen, die freilich nicht offen eingestanden werden konnte. Dies mussten die Protagonisten der Neuen Konzeption durch die Fiktion überspielen, jene „wesentlichen Sicherheitsanforderungen" programmierten die Arbeit der Normungsorganisationen zur Genüge.

5. *Agenturen: Politisierung administrativen Handelns*

Unabhängige Agenturen bildeten das institutionelle Kernstück der Vorstellungen Giandomenico Majones[40] zur Entwicklung der EU i.S. eines „regulativen Staates". Majones Anregungen fanden große Beachtung, wurden aber nie eins-zu-eins umgesetzt. Europa hat zwar die von ihm aus den USA mitgebrachte Begrifflichkeit übernommen und auch eine eindrucksvolle Anzahl von Einrichtungen geschaffen, die als Agenturen firmieren. Was diese neuen Entitäten „sind" oder sein werden, ist noch nicht ausgemacht. So viel aber ist unumstritten: Die neuen europäischen Agenturen haben mit ihren amerikanischen Namensvettern, den Independent Regulatory Agencies, nur einen Namensbestandteil gemein. Sie sind keine sich selbst genügenden Verwaltungseinheiten und haben keine Rechtsetzungs-Befugnisse. Befasst sind sie mit Zulassungsverfahren,

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[39] *Cassis de Dijon*, oben Fn. 34.

[40] G. Majone, "The Rise of the Regulatory State in Europe" in *West European Politics* 17 (1994) 77-101.

z.B. von Arzneimitteln, oder mit allgemeinen, informellen, die „eigentliche" Politik bloß anleitenden oder begleitenden Aufgaben der Informationsbeschaffung und -verbreitung. Die neuen europäischen Agenturen antworten also auf den Bedarf an marktkorrigierenden und sektorspezifischen Regulierungen gleichsam indirekt oder – den konzeptionellen Vorstellungen der Europäischen Kommission entsprechend – bloß als Exekutivorgane, die der Kommission zuarbeiten.

Dementsprechend wird in vielen offiziösen Verlautbarungen unterstellt, dass die Agenturen ihre Aufgaben „technokratisch" erledigen könnten. Diese Vorstellung entspricht in der Tat ihrem semi-autonomen Status. Sie ist auch durchaus verträglich mit ihrer Funktion, den „Stakeholdern" der Binnenmarktpolitik bei der Artikulation ihrer Interessen behilflich zu sein. Ebenso ist sie vereinbar mit der These, dass die „Verwaltung" des Binnenmarktes mehr mit der „neutralen" Unterstützung von Unternehmensaktivitäten als mit der Vorgabe und der Umsetzung politisch-sozialer Programmatiken zu tun hat. Aber die rechtliche Einordnung der Agenturen als bloße Hilfsorgane der Kommission ist dennoch unvollständig, wenn nicht gar irreführend. Trotz ihrer förmlichen Unterordnung und trotz der Mitgliedschaft von Vertretern nationaler Behörden in ihren Management-Gremien scheinen die Agenturen dank ihrer Gründungsstatuten (Richtlinien und Verordnungen des Rates), ihrer organisatorischen Stabilität, der relativen (und im Einzelnen unterschiedlich ausgestalteten) Autonomie ihrer Haushalte und infolge ihrer Vernetzung mit nationalen Verwaltungen von direkten, explizit politischen Einflussnahmen recht gut abgeschirmt zu sein.[41] Freilich bedeuten all diese Einbindungen auch, dass die Agenturen ihre Programmatiken nicht autonom entwickeln können, sondern sich als eine reorganisierte Komitologie darstellen, deren Befugnisse sich *de jure* auf die Form der Beratenden Ausschüsse beschränken.

6. *Die Offene Methode der Koordinierung (OMK): „Abschied vom Recht?"*[42]

Die sog. Offene Methode der Koordinierung kann sich, was ihre Erfolgsbilanz angeht, mit den bislang skizzierten Formen des Regierens nicht messen. Dennoch hat sie seit der Einführung des neuen Titels VIII zur Beschäftigung im Vertrag von Amsterdam und nach der Empfehlung des Europäischen Rats in Lissabon im Jahr 2000, die „Offenen Methode

[41] M. Everson, "Control of Executive Acts: The Procedural Solution. Proportionality, State of the Art Decision-Making and Relevant Interests" in D. Curtin, A.E. Kellermann & S. Blockmans, Hrsg., *EU Constitution: the Best Way Forward* (Den Haag: Asser Press, 2005) 181-200.

[42] Die Anführungszeichen stehen für eine weitere Reminiszenz: R. Voigt, ed., *Abschied vom Recht?* (Frankfurt/M: Suhrkamp, 1983).

der Koordinierung" (OMK) in Bereichen der Sozialpolitik zur Anwendung zu bringen, große Aufmerksamkeit erlangt und ist zur „new mode of governance" schlechthin avanciert.[43] Die OMK bezieht ihre Popularität aus der Erwartung, Abhilfe in Bereichen zu schaffen, in denen politische Akteure einen erheblicher Handlungsdruck verspüren, in denen aber der Vertrag ihnen keine legislativen Kompetenzen einräumt und in denen mit der traditionellen Gemeinschaftsmethode ohnehin wenig auszurichten wäre. Was Juristen begriffliche und methodische Kopfschmerzen bereitet, ist vor allem der Handlungsmodus: An die Stelle rechtlicher Verbindlichkeit und Sanktionierbarkeit legislativen und administrativen Handelns tritt im Prozess der Koordinierung ein Verfahren der multilateralen Supervision, in welchem anhand der vom Europäischen Rat, dem Rat und der Kommission festzulegenden Leitlinien oder Indikatoren (*benchmarks*) eine wechselseitige, systematische Überprüfung (*multilateral surveillance*) und Bewertung der Leistungen der einzelnen Regierungen im Rat (*peer review*) erfolgt. Die öffentliche Wahrnehmung dieser Politikkoordinierung und der Vergleich der bewährten Praktiken (*best practices*) sollen den notwendigen Erfolgs- und Leistungsdruck für eine Anpassung und Änderung der nationalen Politiken auf Mitgliedstaatenebene auslösen.[44] Gerichtsschutz gegen solche politische Herrschaft, geschweige denn deren verfassungsgerichtliche Prüfung, ist nicht vorgesehen. Derartige Vorkehrungen müssen ja auch geradezu disfunktional erscheinen, wenn politisches Handeln außerhalb verfassungs- und europarechtlich vorgesehener Kompetenzen organisiert werden soll – sei es in der Sozialpolitik, der Bildungspolitik, der Harmonisierung des Zivilrechts in Europa.

IV. Ein supranationales Kollisionsrecht neuen Typs als Form der Verfassung Europas

Die Gründer, die für die Entwicklung der para-legalen Praxis europäischen Regierens ins Feld geführt werden, sind aus der Kritik am interventionistischen Recht zu einem guten Teil bekannt: Es geht um komplexe Konfliktlagen, die sich nicht zentralistisch-hierarchisch bewältigen lassen; das positive Recht stellt nur noch einen Rahmen zur Verfügung, in dem eine Problemlösung erarbeitet werden muss. Zwei Eigenheiten des europäischen Systems bereiten zusätzliche

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[43] Statt vieler O. Gerstenberg & C. Sabel, "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?" in C. Joerges & R. Dehousse, Hrsg., *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002) 289-341; G. De Búrca & J. Scott, Hrsg., *New Governance, Law and Constitutionalism* (Oxford: OUP, 2006).

[44] Skeptisch z.B. A. Schäfer, *Die neue Unverbindlichkeit. Wrtschaftspolitishe Koordinierung in Europa*, Frankfurt/M, New York: Campus Verlag, 2005) 190 ff.

Schwierigkeiten.

Auch wenn der Nationalstaat nicht in der Lage ist Problemlösungen zu programmieren und von einer Verwaltungshierarchie exekutieren zu lassen, so ist doch seine Integrationskraft, die für kohärente Problemlösungen erforderlich ist, stärker als die des europäischen Mehrebenensystems: In Europa muss Recht lernen, zwischen verschiedenen Kompetenzebenen zu vermitteln, deren rechtliche Bindungen schwächer sind als die eines föderalen Systems. Diese Schwierigkeit lässt sich, so soll im Folgenden gezeigt werden, durch eine kollisionsrechtliche Deutung des Europarechts bewältigen. Wenn das Recht darüber hinaus das Verhältnis zwischen politisch verantwortlichen (öffentlicher) Institutionen und der Eigenleistungen und einer sich selbst regulierenden privaten Sphäre organisieren muss, um deren Wissen und Managementkapazitäten nutzen zu können, so muss es seine Koordinationsleistungen entsprechend ausweiten. Schon in der bloßen Deskription der Praktiken europäischen Regierens ist dabei eine Tendenz sichtbar geworden, die Politikwissenschaftler augenscheinlich weniger irritierend finden als Juristen: Die Formen des Regierens, deren Europa sich bedient, waren in den Verträgen nicht oder doch „so nicht" vorgesehen. Dieses Ausweichen in extra-legale Handlungsformen wird zunehmend durch eine Entformalisierung verstärkt, die im Falle der OMK bis zum Regieren jenseits der Kompetenzordnung des Vertrages reicht und dann konsequenterweise auch ganz ohne Recht auszukommen versucht. Auf all diese Schwierigkeiten soll sein europäisches „Kollisionsrecht zweiter Ordnung" reagieren.

V. Unitas in Pluralitate: Das europäische Kollisionsrecht Erster Ordnung (Deliberativer Supranationalismus I)

Die Antwort auf die erste Schwierigkeit hält sich an den Rahmen eines Vorschlags, den Jürgen Neyer und ich[45] vor 10 Jahren entwickelt haben, als wir forderten, einen "deliberativen" an die Stelle des traditionellen oder orthodoxen Supranationalismus im Europarecht zu setzen – ein Ansatz, den wir weiterhin verfolgen.[46] Der Deliberative Suprantionalismus wurde am Beispiel einer seinerzeit theoretisch kaum beachteten, aber praktisch längst bedeutsamen Form europäischen Regierens, nämlich der Komitologie, entwickelt und zwar in legitimatorischer Absicht. Die Komitologie, so fanden wir nämlich, funktioniere weit besser, als dies ihr

[45] Joerges & Neyer, oben Fn. 33.

[46] C. Joerges, oben Fn. 29; J. Neyer, "The Deliberative Turn in Integration Theory" in *Journal of European Public Policy* 13/5 (2006) 779-791.

opakes Erscheinungsbild vermuten lasse. Freilich haben wir weder behauptet, dass deliberative Prozesse in transnationalen Gremien ein Demokratie-Ersatz seien; noch weniger wollten wir eine transnationale Funktionsbürokratie als Herrschaftsmodus für Europa empfehlen. Wir wollten stattdessen die übliche Auseinandersetzung mit dem Demokratiedefizit Europas unterlaufen. Der Kern des Arguments war und ist: Statt immer wieder darüber zu klagen, dass Europa nicht den Standards demokratischer Verfassungsstaaten entspricht, komme es darauf an, sich den strukturellen Demokratiedefiziten der Nationalstaaten zu stellen und zu fragen, was das Europarecht zu deren Beseitigung beitragen kann.

Die Begründung für diese Wendung ist schlicht: Europäisierungs- und Globalisierungsprozesse verstärken – um einen kollisionsrechtlichen Terminus zu verwenden – die „extraterritorialen" Effekte politischer und wirtschaftlicher Entscheidungen und untergraben gleichzeitig die Wirkungsmacht nationalstaatlicher – kollisionsrechtlich gesprochen: „einseitiger" – Politiken. Es ist zunehmend undenkbar, dass ein Mitgliedstaat der EU signifikante politische Entscheidungen trifft, die sich nur innerhalb seines eigenen Territoriums auswirken würden. Dies hat demokratie-theoretische Implikationen: National organisierte Verfassungsstaaten sind strukturell außerstande, demokratisch zu agieren, weil sie nicht all diejenigen, die von nationalstaatlichen Entscheidungen betroffen sind, in die Wahlverfahren, in denen sie über ihre politischen Programme befinden, einbeziehen können. Und umgekehrt: Die Bürger der Mitgliedstaaten Europas können eine Vielzahl „fremder" politischer Akteure nicht zur Verantwortung ziehen, die über ihre Belange entscheiden.

So ist die supranationale Geltung europäischen Rechts nicht begründet worden. Die List der Vernunft aber will es, dass sich so das methodisch-theoretisch ungemein kühne und praktisch so erfolgreiche Votum des EuGH für eine europäische Rechtsverfassung[47] rationalisieren lässt. Der europäische „Bund" hat zu einer Rechtsverfassung gefunden, die nicht auf eine Staatswerdung Europas abzielen muss, sondern ihre Legitimität daraus gewinnen kann, dass sie Demokratiedefizite der Nationalstaaten ausgleicht. Eben darum geht es beim „Deliberativen Supranationalismus". Das real existierende Europarecht habe, dies war unser Argument, Prinzipien und Regeln in Geltung gesetzt, die deshalb supranationale Anerkennung finden und verdienen, weil sie ein sinnfälliges Gemeinschaftsprojekt darstellen. Man muss nur hinschauen: Die Mitgliedstaaten der Gemeinschaft dürfen ihre Interessen und/oder

[47] EuGH, Rs. 26/62, Van Gend en Loos ./. Nederlandse Administratie der Belastingen, Slg. 1963, 1..

Gesetze nicht rücksichtslos-souverän durchsetzen; sie sind verpflichtet, die Europäischen Freiheitsrechte zu respektieren; sie dürfen nicht diskriminieren; sie können nur "legitime" Regulierungsanliegen, die von der Gemeinschaft abgesegnet wurden, verfolgen; sie müssen sich in Bezug auf die Ziele, die sie mit ihrer Regulierung verfolgen wollen, untereinander abstimmen, und sie müssen nationalstaatliche Regelungen gemeinschafts-freundlich gestalten: das Recht, das all dieses gebiete, sei nicht undemokratisch, sondern kompensiere Demokratiedefizite der Nationalstaaten.

Die rechtliche Form, in der das Europarechts diesen Beruf realisieren kann, steht in der Methodik des Kollisionsrecht zur Verfügung. Das Kollisionsrecht ist eine alte Disziplin, die in ihrer "modernen" Entwicklung in Deutschland (seit 1848), darauf abzielt, in internationalen Sachverhalten diejenige Rechtsordnung zu identifizieren, mit der jener Sachverhalt am engsten verbunden ist („in der das Rechtsverhältnis seinen Sitz hat"). Dabei gibt es eine wesentliche Einschränkung: Traditionelles Kollisionsrecht (Internationales Privatrecht; internationales öffentliches Recht) verweigert fremdem „öffentlichen" Recht die Anwendung und bestimmt den Geltungsbereich öffentlichen Rechts immer bloß „einseitig". Es ist das Paradebeispiel eines „methodologischen Nationalismus". [48] Aber kollisionsrechtliches Denken hat ein weiter weisendes Potential: Es kann überall da genutzt werde, wo in ihrem Inhalt und ihren Zielsetzungen divergierende Rechtssätze aufeinander treffen und koordiniert werden müssen, im Innern oder im Außenverhältnis einer Rechtsordnung.[49] Diese Autoren kann ich zwar für mein Verständnis des Europarechts nicht in Anspruch nehmen, wohl aber für die Einsicht, dass das Recht, wenn es mit kollidierenden legitimen Geltungsansprüchen demokratisch legitimierter Rechtsordnungen befasst ist, kollisionsrechtlich denken und prozedurale Methoden der

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[48] M. Zürn, „Politik in der postnationalen Konstellation: Über das Elend des methodologischen
Nationalismus'" in C. Landfried, ed., *Politik in der entgrenzten Welt* (Köln: Verlag Wissenschaft & Politik, 2001) 181-204. [= *idem.* "The State in the Post-national Constellation – Societal Denationalization and Multi-Level Governance", *ARENA Working Paper*, 35 (1999)].

[49] R. Wiethölter, *Begriffs- oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm*, (Frankfurt/M: Festschrift Kegel, 1977) 213-263; G. Teubner, „Der Umgang mit den Rechtsparadoxien: Derrida, Luhmann, Wiethölter", in C. Joerges & G. Teubner, Hrsg., *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Baden-Baden: Nomos, 2003) 22-45; A. Fischer-Lescano & G. Teubner, „Prozedurale Rechtstheorie: Wiethölter" in S. Buckel, R. Christensen & A. Fischer-Lescano, Hrsg., 2006), (Stuttgart: UTB, 2006) 79-96.

Konfliktbehandlung finden muss. Dieses europäische Kollisionsrecht muss als ein "law of law-making",[50] ein „Recht-Fertigungs-Recht"[51] verstanden werden.

Diese kollisionsrechtliche Sichtweise behält die Suprantionalitat des Europarechts bei, gibt ihr aber eine andere Bedeutung. Sie entlastet das Europarecht von unerfüllbaren praktischen und legitimatorischen Zumutungen. Sie öffnet zugleich den Blick für die vielfältigen vertikalen, horizontalen und diagonalen [52] Konfliktlagen im europäischen Mehrebenensystem. Es fördert die Einsicht, dass der Prozess der Europäisierung auf flexible und vielfältige Konfliktlösungen setzen sollte statt sich der Perfektionierung eines immer umfassenderen europäischen Rechtscorpus zu verschreiben.[53]

Dies alles ist nicht bloß *wishful thinking*. Europa verfügt längst über ein Recht, das die Gemeinschaft zu einem die politische Autonomie der Mitgliedstaaten schonendem und die Mitgliedstaaten zu einer gemeinschaftsverträglichen Rechtspolitik anhält.[54] Die Mitgliedstaaten dürfen nicht diskriminieren und müssen Belange ihrer Nachbarn berücksichtigen. Die Bürger Europas können Verfahren in Gang bringen, in denen ihr Heimatstaat zur Rechtfertigung seiner Gesetzgebung gezwungen wird. In der vertrauteren Sprache des *acquis communautaire*: Die Staaten der Union können ihre Interessen und Gesetze nicht nach eigenem Gutdünken konzipieren und durchsetzen; sie sind verpflichtet, die europäischen Freiheiten zu achten; sie dürfen nicht diskriminieren; sie

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[50] F.I. Michelman, Brennan and Democracy (Princeton, NJ: PUP, 1999) 34.

[51] R. Wiethölter, oben Fn. 26.

[52] Diese Konflikte entstehen durch die Zuweisung von Kompetenzen, die zur Problemlösung benötigt werden und deshalb sachlich zusammenhängen, an unterschiedliche Regierungsebenen – siehe C. Schmid „Selective harmonisation: Vertical, horizontal, and diagonal conflicts: Diagonal competence conflicts between European competition law and national regulation: A conflict of laws reconstruction of the dispute on book price fixing." *European Review of Private Law* 8 (2000) 155-172.). Aus dem Prinzip der beschränkten Einzelermächtigung folgt, dass die Vorrangsregel hier keine Anwendung finden darf.

[53] Diese Aussage ist mit der Existenz europäischen Sekundärrechts sehr wohl vereinbar und stellt nicht etwa dessen Legitimität grundsätzlich in Frage. Es gibt wichtige Problembereiche, in denen der „Bund" ein supranationales Sachrecht entwickeln muss. Systematisch kann diese Frage hier nicht behandelt werden.

[54] F.W. Scharpf, „Autonomieschonend und gemeinschaftsverträglich. Zur Logik einer europäischen Mehrebenen-Politik" in W. Weidenfeld, ed., *Reform der Europäischen Union. Materialien zur Revision des Maastrichter Vertrages,* (Gütersloh: Bertelsmann,1993) 75-96 ·[= "Community and Autonomy, Multi-Level Policy-Making in the European Union", *Journal of European Public Policy* 1 (1994) 219–42].

dürfen ausschließlich gemeinschaftsrechtlich anerkannte Regelungsziele verfolgen; bei der Verfolgung solcher Ziele müssen sie das Verhältnismäßigkeitsprinzip beachten.

VI. Die Verrechtlichung europäischer Governance-Praktiken durch ein Kollisionsrecht Zweiter Ordnung (Deliberativer Supranationalismus II)

Die Plausibilität einer kollisionsrechtlichen Deutung europäischer Governance-Praktiken ist bei der wechselseitigen Anerkennung augenfällig, und die prozedurale Form dieses Prinzips ist sozialwissenschaftlich rekonstruierbar (als „managed mutual recognotion“). [55] Aber die kollisionsrechtliche Interpretation des Europarechts braucht sich nicht auf dieses Exempel zu beschränken. Sie ist auch bei weiteren Formen des Regierens, namentlich für die Komitologie einleuchtend. Die Komitologie-Verfahren wurden im Zuge der „Vollendung“ des Binnenmarktes genutzt, um das Binnenmarktprojekt mit Anliegen der „Sozialregulierung“ (des Arbeits-, Verbraucher-, Umweltschutzes) verträglich zu halten. Die Rahmenregelungen, die hierbei „durchgeführt“ werden, verwenden typischerweise generalklauselartige Formeln, die diese Koordination nicht inhaltlich programmieren wollen, sondern darauf setzen, dass sich für alle Mitgliedstaaten akzeptable Konkretisierungen finden werden. Vielfach geht es um Problemlagen, für deren Bearbeitung die Berücksichtigung von Expertenwissen unerlässlich ist und die deshalb eine kognitive Öffnung des Rechts erfordern. Es ist die Beteiligung der Mitgliedstaaten durch ihre Vertreter in den Regelungsausschüssen i.V.m. der Beratung durch eine plurale *expert community*, die beides sichern soll: die politische Legitimität und die Sachhaltigkeit der erarbeiteten Regelungen. Schutzklauselverfahren, die in Gang gebracht werden, wenn neue Erkenntnisse gewonnen werden oder eine Regelung sich als unzulänglich erweist, stärken deren normativ-prozedurale Qualität. Eine kollisionsrechtliche Interpretation dieser Form des Regierens ist angemessen, weil es um Koordinationsleistungen für einen Verbund relativ autonomer Staaten geht, die ohne eine hierarchisch geordneten oder wenigstens einheitlich strukturierten Verwaltungsapparat auskommen muss. Freilich, eine die Anerkennungswürdigkeit der Komitologie sichernde „Konstitutionalisierung“ muss sich einer ganzen Reihe weiterer Fragen zuwenden: der Bestellung und Funktion der Expertenzirkel, die in Problemlösungs- und Entscheidungsprozesse

[55] K. Nikolaïdes, “Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals” in F. Kostoris & P. Schioppa, Hrsg., *The Principle of Mutual Recognition in the European Integration Process* (New York: Palgrave, 2005) 190-223.

einbezogen werden sollen; der Verbindungen zu parlamentarischen Gremien einerseits, zur Zivilgesellschaft andererseits; der Besonderheiten ethischer Fragen; der Berücksichtigung distributiver Implikationen regulativer Politiken; der Revidierbarkeit getroffener Festlegungen im Hinblick auf neue Erkenntnisse oder Wandlungen gesellschaftlicher Präferenzen. Wegen der Komplexität dieser Anforderungen sind die häufig vernehmbaren Hoffnungen auf einen europäischen *Administrative Procedures Act* nach US-amerikanischem Muster unbegründet.[56]

1. *Zwischenergebnis*

Wir fassen zusammen und halten fest: Das europäische Mehrebenensystem ist auf ein Recht angewiesen, das seine Funktionsfähigkeit sichert, ohne auf eine Staatswerdung oder auch nur ein umfassendes oder vereinheitlichtes Recht zu zielen. Dies kann sich und dies soll sich, um die glückliche Formulierung des verunglückten Verfassungsvertrags aufzugreifen, auch nicht ändern: „In Vielfalt geeint" – dies soll „der Leitspruch der Union" werden, heißt es dort.[57] Man darf übersetzen: Es ist nicht die Beseitigung der Vielfalt, sondern vielmehr deren Achtung, durch die Europa sich auszeichnen soll – und es sollte, was die Vielfalt seiner Rechtstraditionen angeht, der Umgang mit Rechtsdifferenzen sein, der das *proprium* des post-nationalen EU-Rechts ausmacht. Das kollisionsrechtliche Verständnis des Europarechts ist ein Interpretationsangebot, das eben diesem Spezifikum Rechnung tragen will. Kollisionsrecht, auch das prozeduralisierte, ist supranationales „hard law". Es soll Europa wirklich verfassen und steht insofern in der Tradition der „Integration durch Recht".

Die Komplexität dieses Rechts hängt damit zusammen, dass die europäische Governance-Arrangements immer komplexer geworden sind, dass Entscheidungen weder an suprantionale Expertengremien delegiert noch der Europäischen Kommission anvertraut, aber auch nicht an nationale parlamentarische Gremien zurückverwiesen oder in die Letztverantwortung des Europäischen Parlaments gestellt werden können. Die Diffusität der neuen Formen des Regierens hat ihr *fundamentum in re* darin, dass es tatsächlich vernünftig erscheint, keine irreversiblen Festlegungen zu treffen, nationale und transnationale Dauerdiskurse zu organisieren, an denen sich politische Akteure und Expertengremien beteiligen und die Zivilgesellschaft sowie die allgemeine Öffentlichkeit

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[56] J. Corkin "A Manifesto for the European Court: Democracy, Decentred Governance and the Process-Perfecting Judicial Shadow", Kap. V. G, (2007) PhD Thesis, EUI Florence.

57 Art. I-8 des Vertrages über eine Verfassung für Europa, ABl. C 310/1 vom 16.12.2004.

Gehör finden.

Wie praktikabel sind solche Vorstellungen? Dazu kann man immerhin ihr Design prüfen: Die kollisionsrechtliche Deutung Europas nimmt seine Vielfalt ernst. Sie sieht keine unsichtbare Hand vor, die dafür sorgen würde, dass „autonomieschonende und gemeinschaftsverträgliche" Konfliktlösungen nicht bloß erdacht, sondern auch umgesetzt würden. Sie kann nur geltend machen, dass es in der EU Voraussetzungen gebe, die eine deliberative, durch Regeln und Prinzipien gebundene Form der politische Kommunikation begünstigen, in der Argumente nur akzeptiert werden, wenn sie den Betroffenen einleuchten, weil sie nicht einfach nur partikulare Interessen strategisch umformulieren – und sie ist insofern realistisch, als sie die Fragilität des EU-Systems eingesteht.[58]

Dies gilt auch für die alten und neuen Governance-Praktiken Europas. Ob eine Konstitutionalisierung dieser Praktiken gelingt, ist eine offene Frage. Die einzig denkbaren Reaktionsformen, mit denen das Recht auf ihre Anerkennungswürdigkeit hinwirken kann, sind prozeduraler Natur: Transparenz, Pluralismus, Öffnungen von Beratungs- und Entscheidungsprozessen, inkrementalistische Verrechtlichungsstrategien und Reversibiltätsgarantien, Rücksichtnahmen auf ethische Vorbehalte, Evaluationen durch nationale und supranationale parlamentarische Gremien: Das Recht kann die deliberative Qualität europäischen Regieren fördern, sie aber nicht aus eigener Kraft garantieren.

2. *Aussichten*

M. Rainer Lepsius [59] hat die „Wandelverfassung" [60] des Europäisierungsprozesses als eine Geschichte der Institutionalisierung unterschiedlicher Rationalitätskriterien rekonstruiert. Der Terminus ist für eine Qualifikation der verschiedenen dem Recht in der wechselvollen

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[58] Auch darin bleibt der kollisionsrechtliche Ansatz der Tradition der „Integration durch Recht" verpflichtet, jedenfalls jener Version, die J.H.H. Weiler "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law* 1 (1981) 257-306.) mit seinem Dualismus von rechtlicher Suprantionalität und politischer Intergouvernementalität entwickelt hat. Nichts in dieser Konstruktion garantierte die Stabilität des Gleichgewichts beider Integrationsmodi, die Weiler in der formativen Phase des Integrationsprozesses diagnostiziert hat.

[59] R.M. Lepsius, „Die Europäische Union als rechtlich konstituierte Verhaltensstrukturierung", in H. Dreier, ed., *Rechtssoziologie am Ende des 20. Jahrhunderts. Gedächtnissymposion für Edgar Michael Wenz*, (Tübingen: Mohr, 2000) 289-305.

[60] H-P. Ipsen, „Europäische Verfassung – Nationale Verfassung", *Europarecht* (1987) 195-213.

Integrationsgeschichte zugewiesenen Funktionen verwendbar, in der im Anschluss an Weiler[61] gemeinhin drei Perioden unterschieden werden.

> (1) Die „Integration durch Recht", in der es dem EuGH gelang, im beschaulichen Luxemburg unauffällig und erfolgreich eine „constitutional charter" zu schreiben, die politische Krisen überdauern sollte; dieser Modus verdankte seine Integrationskraft wohl dem Umstand, dass Europas Rechts-Charter sich mit Regeln und Prinzipen begnügte, die dem Integrationsprojekt keine inhaltliche Programmatik oktroyierte, weder eine Wirtschaftsverfassung ordo-liberalen Zuschnitts, noch einen technokratischen Managerialism, wie ihn Ipsen in seiner Zweckverbandsthese konzipiert hat.[62]
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> (2) Eine entschieden ökonomische Orientierung vollzog sich später, nämlich im Zusammenhang mit dem Binnenmarktprojekt der Delors-Kommission, als die Wettbewerbsfähigkeit Europas und seine ökonomische Effizienz das zu behäbig wirkende Recht verdrängen sollten – um dennoch eine unerwartet intensive Re-Regulierung des Binnenmarktes zu initiieren.
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> (3) Der von der Prodi-Kommission ausgerufene „turn to governance" ist als Versuch begreifbar, auf die im Schatten der Binnenmarktpolitik entwickelten Praktiken zu reagieren, ihre pragmatischen und legitimatorischen Schwächen auszugleichen und neue Perspektiven für ein demokratisch reformiertes „gutes europäisches Regieren" zu entwickeln.

Wie in den vorausgegangenen Perioden muss man freilich zwischen der Ankündigung einer Programmatik und ihrer Umsetzung unterscheiden. Die Frage, was sich „wirklich" vollzieht, ist Gegenstand dieser Tagung und der 3.500 Schriften, auf die in Fn. 4 verwiesen wurde. Man kann dies nicht alles überblicken, geschweige denn besserwisserisch evaluieren. Kassandra-Rufe sind nicht angebracht. Wem an der Idee einer rechtlich vermittelten Legitimation des Regierens gelegen ist, kann aber besorgte Anfragen nicht unterdrücken.

Die Komitologie funktioniere vernünftig, so haben Jürgen Neyer und ich

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[61] J.H.H. Weiler, (1981) oben Fn. 58.

[62] H-P. Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen: Mohr, 1972) 197 ff; dazu M. Kaufmann *Europäische Integration und Demokratieprinzip* (Baden-Baden: Nomos, 1997) 174 ff.

vor einem Jahrzehnt[63] in unseren Studien zum Lebensmittelsektor (nicht zum Agrarsektor, schon gar seiner veterinärrechtlichen Sektion!) überrascht festgestellt. Wir hatten miteinander konkurrierende wissenschaftliche Denkschulen beobachtet, sachhaltige Diskussionen um öffentliche Interessen und Strategien des Risikomanagements registriert – und gefolgert, es komme darauf an, eine Rechtsrahmen zu entwickeln, der diese Praxis stabilisieren und die kafkaeske Züge der Komitologie korrigieren würde. Seither ist mancherlei geschehen. Die Kommission hatte im Jahr 2002 eine Neuregelung der Komitologie vorgeschlagen,[64] die dem Europäischen Parlament missfiel, aber in dem Verfassungs-Vertrag Berücksichtigung fand.[65] Schließlich kam es durch eine Ratsentscheidung vom Juli 2006[66] zu einer Reform. Sie stärkt die Mitwirkungsrechte des Parlaments – freilich nur da, wo eine Regelungsmaterie dem Verfahren (Art 251 EGV) unterliegt;[67] sie beseitigt insoweit – und nur insoweit – ein Skandalon des Regelungsausschussverfahrens, nämlich die Entscheidungsmacht der Kommission in Fällen des sog. *contre-filet*-Verfahrens, in denen ein Kommissionsvorschlag im zuständigen regulativen Ausschuss keine qualifizierte Mehrheit findet, daher an den Rat überwiesen wird, der sich aber nicht zu einer Abweisung des Vorschlags durchringt. Eine wirklich umfassende Reform ist nicht erreicht worden.[68] Sie hätte vorausgesetzt, dass Kommission, Rat und Parlament ihre jeweiligen institutionellen Interessen und Perspektiven zur Disposition stellen.

Ist die neue Welt der Agenturen besser?[69] Das interessanteste Beispiel ist

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[63] C. Joerges & J. Neyer (1997/1998) oben Fn. 33.

[64] KOM (2002) 719 endg. v. 11. Dezember 2002.

[65] Vgl. Art. 36-37 sowie die Empfehlungen der Arbeitsgruppe IX des Konvents (i.V.m. dem Amato-Bericht CONV 424/02; http://european-convention.eu.int/). Siehe auch K.S. Bradley, "Halfway House: the 2006 Comitology Reforms", Contribution to the CONNEX Thematic Conference "Creating a European Administrative Space, London, 16.-18. November 2006 (manuscript on file with author).

[66] Ratsbeschluß 2006/512/EG v. 17.7.2006, ABl. L 200/2006, 11; konsolidierte Fassung in ABl. C 255/2006, 4.

[67] Article 5a („Regelungsauschussverfahren mit Kontrolle").

[68] Typ IIIa des Regelungsausschussverfahrens nach Komitologiebeschluss 87/1967/EWG, ABl. L 197/1997, 33 (dazu Falke 2000: 60 ff. oben Fn. 32); Art. 5 VI UAbs. 3 nach dem Komitologiebeschluss 1999/468/EG, ABl. L 184/2999, 23 (dazu Falke 2000: 101 ff. oben Fn. 32).

[69] Die in Berlin vorgelegte Fassung hatte die Agenturen zu pauschal und voreilig als eine weitere Variante der Entformalisierung europäischen Regierens dargestellt. Dagegen haben in Berlin Hans-Heinrich Trute und in Florenz Maria Weimer Verwahrung eingelegt. Dem trägt der Abschnitt Rechnung, ohne die Rechtsbindungen der Agenturen abschließend zu beurteilen.

die im Jahre 2002 eingerichtete Behörde für Lebensmittelsicherheit.[70] Dass diese Agentur zu Rechtsentscheidungen (die dann direkt gerichtlich überprüfbar wären) nicht befugt ist, wurde schon angemerkt. Ihr Mandat und ihre Macht ist von einer anderen Art. Sie soll, wie es im 22. Erwägungsgrund im Kommissions-Übersetzungsdeutsch heißt, „das Vertrauen der Verbraucher und der Handelspartner" stärken. Wie soll dies geschehen? Instruktiv ist die Ausgestaltung des Zulassungsverfahrens für gentechnisch modifizierter Lebensmittel.[71] Die Agentur hat hier die bestmögliche wissenschaftliche Begutachtung von Zulassungsanträgen zu gewährleisten. Sie organisiert Wissensbestände, an denen kein Entscheidungsträger vorbeigehen kann. Wird sie so die Irritationen der europäischen Konsumenten abbauen? Der Verordnungstext selbst vertraut hierauf nicht. Artikel 37 Abs. 2 gewährleistet die Unabhängigkeit der wissenschaftlichen Beratung von jeglichen externen Einflussnahmen. Nach Artikel 37 Abs.1 sind auch die Mitglieder des Verwaltungsrats, des Beirats und der Geschäftsführende Direktor unabhängig. Deren Unabhängigkeit soll sie aber nicht so wie die Wissenschaft abschirmen; sie soll sie zum Handeln „im öffentlichen Interesse" verpflichten. Dies ist ein Begriff, der sich den politischen Dimensionen der Lebensmittelmärkte öffnet. Es kommt nicht von ungefähr, dass sich in der Zusammensetzung des Verwaltungsrats (Art. 25), des Beirats (Art. 27) und der Vorschriften zur Wissenschaftlichen Beratung (Art. 28) die aus der Komitologie-Verfahren bekannte Trias wiederfindet.

In der Institutionalisierung der Unabhängigkeit, der Gemeinwohlverpflichtung und den Rahmenbedingungen des Agenturhandelns findet Everson[72] attraktive Perspektiven einer „politischen Verwaltung" des Binnenmarktes, in der das Recht sich behaupten könne: „Within a context of 'arguing' rather than 'bargaining', a political administration might thus identify the appropriate basis for regulatory self-restraint; the context specific primacy of competing public interests. In short, 'effective problem-solving' is a criterion that matches the Commission's desire to ensure the factual legitimacy of European regulatory bodies ... whilst deliberation augments the normative legitimacy functions of 'accountability', especially as regards the adequate representation of all civil society interests",[73] "European law that both reflect legal-internal values (giving them legitimacy beyond any lacking constitutional settlement) and seem to support on-going processes of

[70] VO 187/2002, ABl. L 31/2002,1.

[71] P. Dabrowska, "Hybrid solution for Hybrid Products? EU Governance of GMOs", PhD Thesis (2006), EUI Florence, Kap. 4.

[72] Everson (2005) *oben Fn.* 41.

[73] *Ibid.* (196).

adjustment between equally valid public interests through political deliberation".[74] Nicht das Ausschusswesen, sondern die neuen Agenturen wären dann Institutionalisierungen einer transnationalen Form der Demokratie: „However, where, and to the degree that, the law of review is tailored to ensure that all relevant interests might participate in decision-making, either through a widened basis for *locus standi* or through the 'deliberative' stipulation that all relevant interests are reviewed during decision-making, lack of representation within the plural polity presents a lesser problem".[75]

Die offene Koordinierungsmethode ist radikaler. Hier sind die Entformalisierung und Ablösung der Komitologie-Strukturen gleichsam Programm. Die Legitimität dieses Regierens außerhalb des Rechts wird oft in einem Output gesucht, den man für möglich erklärt, den aber niemand prognostizieren kann. Theoretisch anspruchsvoller ist das Konzept des demokratischen Experimentalismus. [76] Danach sind das iterative *benchmarking*, der autonome Umgang der Nationalstaaten mit den vereinbarten Leitlinien und das dabei angeregte wechselseitige Lernen als genuin demokratische Prozesse zu verstehen, in denen sich ein problembezogener Demos artikuliert. Die hier nur angedeuteten Annahmen sind voraussetzungsvoll und Gegenstand intensiver Recherchen. Sie müssen viele Fragen klären: Wie finden sich die transnationalen Kriterien, die ein *benchmarking* nationaler Erfahrungen, nationaler Geschichte und nationaler Erwartungen ermöglichen und legitimieren sollen? Warum können wir darauf vertrauen, dass die Konfrontation mit den Erfahrungen Anderer in koordinierte Politiken münden und dann gegen skeptische Opponenten durchsetzbar sein wird? Wie soll die Umsetzung dieser Vorstellungen in den sachlich überaus komplexen und von Interessengegensätzen geprägten Feldern der Sozialpolitik gelingen? Gewiss ist nichts dagegen einzuwenden, dass Bürokratien und Sachverständige Erfahrungen austauschen und ihnen neue Perspektiven nahe gebracht werden. Wie aber lässt sich gewährleisten, dass sich bei all dem nicht Netzwerke etablieren, die dann, ohne sich dem regulären politischen Prozess auszusetzen, umsetzen, was sie vereinbart

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[74] *Ibid.* (197).

[75] *Ibid.* 198.

[76] O. Gerstenberg & C. Sabel, oben Fn. 43; C. Sabel & J. Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the European Union" (2006), zugänglich unter http://www2.law.columbia.edu/sabel/papers.htm. Die theoretische Sekundärliteratur ist noch immer spärlich; eine Ausnahme bildet W.E. Scheuerman, "Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy", *Canadian Journal of Law and Jurisprudence* 17 (2004) 101-127.

haben? Ein solches Regieren wäre „weich" insofern, als es nicht mehr auf zwingendes Recht angewiesen ist. Es wäre aber „stark", weil es seiner Informalität wegen die Risiken rechtsstaatlicher Bindungen und Kontrollen unterlaufen kann.

Der in der Sache – der Koordination von Marktintegration und sozialer Regulierung – erfolgreichste Modus europäischen Regierens, nämlich die „Neue Konzeption für technische Harmonisierung und Normung" ist, wenn man nationalstaatliche Vorbilder berücksichtigt, die weitaus älteste und zudem die „seit jeher" am stärksten „privat" verfasste. Dabei mag geradezu paradox erscheinen, was sich plausibel erklären lässt: dass die „Verrechtlichung" dieses „privaten Transnationalismus" [77] weitaus intensiver ausgefallen ist, als die der traditionell öffentlich-rechtlich, jetzt von den neuen Formen des Regierens dominierten Felder. Dies gilt, wie Schepel[78] gezeigt hat, nicht nur für die europäische, sondern auch für die internationale Normung. Es haben sich allgemein anerkannte und stabile Prozeduren herausgebildet, die Rechtsprinzipien, professionelle Standards, Partizipationschancen synthetisieren und immer wieder zu konsentierten Problemlösungen führen.

Bezeichnenderweise hat die europäische Normung viele Merkmale der Komitologie übernommen. Ihre nichtunitarische Netzwerkstruktur stellt sicher, dass nationale Delegationen ihre jeweiligen Perspektiven einbringen und dadurch tatsächlich Lernprozesse auslösen. Verwaltungen und auch Gerichte sind in den Normungsfragen zuweilen aktuell und stets latent präsent. Er operiert nicht nach deren Weisungen, wird wohl aber von ihnen beschattet. Dieser „private Transnationalismus" hat sich vom staatlichen Recht gelöst, ist aber nicht entrechtlicht. Er versorgt sich mit Expertenwissen, liefert sich diesem aber nicht aus. Worauf beruht seine Akzeptanz?

> „The paradox is, of course, that the mechanism through which to achieve this is, well, politics. Due process, transparency, openness, and balanced interest representation are norms for structuring meaningful social deliberation. They are not obviously the appropriate vehicles for revealing scientific 'truth' or for allowing room for the invisible hand ".[79]

Recht wie Politik bleiben präsent. Freilich, jene politischen Prozesse, die das Recht des privaten Transnationalismus ordnen, werden von der

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[77] H. Schepel, *supra*, note 38.

[78] *Ibid,* 241.

[79] *Ibid,* 223.

öffentlichen Politik und dem öffentlichen Recht nicht direkt erreicht. Mit anderen Worten: Ihre Verrechtlichung geschieht augenscheinlich „von unten". Diese Recht-Fertigung trägt dem Umstand Rechnung, dass die moderne Wirtschaft und ihre Märkte eben nicht wie Maschinen funktionieren, sondern politisch wichtige Festlegungen treffen müssen. Können wir darauf setzen, dass in der Wirtschaft und Gesellschaft politische Prozesse sich selbst so verfassen, dass ihre Ergebnisse „Anerkennung verdienen"? Eine Parallele zur Komitologie, aber auch zu dem emergierenden Recht der neuen Agenturen, drängt sich auf: Wenn die Komitologie aus den epistemischen und politischen Potentialen deliberativer Prozesse sachhaltige Problemlösungen entwickeln und faire Kompromisse zustande bringen kann, so geschieht dies dank der Prinzipen und Regeln, an denen sie sich orientiert, und im Schatten demokratisch legitimierter Institutionen und ihres Rechts. Ebenso beruht die Legitimität, die Schepel der Normung beimisst, auf der Kompatibilität ihrer Institutionalisierung mit den sie umgebenden rechtlichen Institutionen, die einsehen können, dass sie nicht selbst leisten können, was der Prozess der Normung zu leisten vermag. Ist all dies noch kollisionsrechtlichen Denkmustern zugänglich? Um Kollisionsrecht geht es auch, wenn, wie im Fall der Normung, ein nicht-staatliches Recht Anerkennung finden will.[80] Und ebenso bleibt die Frage zu stellen, ob jene Prinzipen und Prozeduren, nach denen transnationale governance arrangements sich verfassen, Anerkennung verdienen – eine Klärung dieser Frage ist noch nicht in Sichtweite.[81]

[80] E. Schanze "International Standards - Functions and Links to Law", in P. Nobel, ed., *International Standards and the Law*, Bern: Stämpfli, 2005) 84-103, 90 f.

[81] J.P. McCormick, "Habermas, Supranational Democracy and the European Constitution", in *European Constitutional Law Review* 2/3 (2006) 398-429: 415 ff.

GOVERNANCE: A CHALLENGE FOR INTERNATIONAL LAW?

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This contribution proposes – once it has brought the incommensurability of governance and international law into focus – to reconstruct a different interpretation of the very real phenomena that lie at the roots of this false question. First of all, it is necessary to focus briefly on the nature of international law, although without any pretense of resolving the theoretical battles resurfacing between legal monism and dualism within the internationalist doctrine. Such a boast would, in any case and in this author's opinion, be futile since the vitality of the roots of dualism[1] is evident in the present climate at the beginning of the millennium.

Unlike the State of the internal legal order, which exists solely as a legal personality moulded by the constitutional order, the State of international law is a *de facto* entity; at its beginnings there lies a concrete historical fact of which subjectivity in the international order is a specific consequence. Therefore, "unlike the State of national law, whose establishment coincides with the formation of the community's legal system, States as international persons come into being *de facto*, continue to exist *de facto* and are eventually modified or dissolved *de facto* from the standpoint of international law"[2]. This renders the State of international law (the State as international person) subject to obligations and rights in its relations with other entities endowed with similar qualities – effectiveness and independence – where the movements and relations of these persons become entwined within the same horizontal dimension. We are, of course, speaking of a flat social universe, barren and limited (at least in its first approximation) – a sort of two-dimensional universe if you will. Before moving on, two observations stem from this standpoint.

Sovereignty is, first and foremost, an inherent attribute of the State as a

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[1] See G. Arangio-Ruiz, "Dualism Revisited: International Law and Inter-individual Law" in *Rivista di Diritto Internazionale*, (2003) 910-999; this text should be consulted for an ample discussion including the positions of the principle "monist" authors (in particular Kelsen) and the fathers of the dualist doctrine (Triepel, Anzilotti and their successors); for the evolution of this author's theory, see L. Picchio Forlati and G. Palmisano, "La lezione di una vita: cos'è e com'è il Diritto internazionale" in *Studi di Diritto Internazionale in onore di Gaetano Arangio-Ruiz*, (Naples: Editrice Scientifica, 2004) I, XVII-LVIII. Finally, see F. Salerno, "Il neo-dualismo della Corte Costituzionale nei rapporti tra diritto internazionale e diritto interno" in *Rivista di diritto internazionale* (2006) 340-383

[2] G. Arangio-Ruiz, *ibid.*, 950

legal entity of national law, in the same manner as all the features to which sovereignty refers belong to that order and only that order: with no offence to the hardy "constitutionalising" constructions seen as of paramount importance in the current debate amongst social scientists, and to some extent also among scholars of law[3]. In such a context, indeed, the expression "external sovereignty" is used instead of independence – despite its being theoretically correct and long employed by scholars of international law, it ends up as dangerous and involuntarily ambiguous. At a time when multilevel governance is a commodity dispensed of without parsimony on the market of ideas, we risk that the State as a factual entity (of international law) can no longer be evoked as the owner of "external sovereignty", so much as the articulation of the State as legal entity (of internal law) is constitutionally appointed to entertain relations with other legal persons (of internal law).

Secondly, the international subject is characterised, not so much by being a territorial State, as by being an independent entity capable of exercising, to a limited but decisive extent, the power of *imperium*. In other words, in a globalised world international subjectivity is being steadily separated from the territorial dimension. This means that – again, in a globalised world – and in the light of the developments that followed 11 September 2001, the much-talked about weakening of the territorial State only affects the domestic sphere of the legal person; in the international order the corresponding phenomenon has more to do with the concrete possibility of factual non-territorial entities acquiring the status of subjects, that is acquiring effectiveness and independence.[4] The consequences of these phenomena appear to be capable of affecting the subjectivity of IGOs (at least the principal ones): these entities, traditionally considered *sui generis* international subjects insofar as they lack the exclusive control over a territory that characterises the national State, see their *status* as being reinforced in light of the diminishing importance of this particular limiting feature.

The result of contemporary events is thus the virtual increase in the number of players participating in international law, in the sense that the

[3] Constructions which often differ deeply from one another in various aspects (beginning with the fact that they often relate to opposite political points of view, or even projects), but all having in common the unacceptable theoretical assumption indicated.

[4] See, for example, L. Picchio Forlati, "The Legal Core of International Economic Sanctions" in L. Picchio Forlati & L. Sicilianos (eds.) *Economic Sanctions in International Law* (Leiden/Boston: Hague Academy of International Law, 2004) 202-207; see also L. Zagato, *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo 1999* (Turin: Giappichelli, 2007) 201-202.

number of factual entities apparently capable of operating in the horizontal dimension of international law without any sort of (vertical) controls has increased.
In other words, there is nothing particularly nice about international law. Its passing will not be mourned. It remains, however, that none of the "vertical" constructions, neither the federalist or constitutionalist approaches (it would, incidentally, be preferable to define these approaches as organic in order to contrast the necessarily *unorganic* character of international law) recently offered by the doctrine is convincing[5]. This is because they confuse the plane of inter-individual relations (the plane on which structures of vertical control operate) with the purely horizontal plane of international law.

As government functions do not exist in international law, the phenomenon of the multiplication of relations and inter-individual networks between the organs of inter-governmental organisations, the organs of territorial States, and physical and legal persons (whether transnational or not) – a phenomenon to which we may refer in extremely general terms as governance[6] - must find an explanation as a response to current developments in internal legal orders. That is, the phenomenon, it is useful to repeat, is related to the plane of internal legal relations (vertical / inter-individual), and not to international law.

Before continuing, we may give some space to the most "virtuous" of the organic theories, given ample credit over the last decade: namely, that a real vertical international community, albeit a 'soft' one, exists. The statute of the UN is said to form the constitutional Charter of this order, a Charter so special that (inevitably in this logic) the attribution of

[5] The reference, it goes without saying, is above all relative to the theory of M. Hardt and A. Negri, presented in *Impero* (Milan: Rizzoli,2002) 1-451, and in *Moltitudine. Guerra e democrazia nel nuovo ordine imperiale*, (Milan: Rizzoli, 2004) 1-487. I permit myself to recall the "systemic" disagreement expressed in this regard in L. Zagato, *La guerra iugoslava, ovvero: il sistema westfaliano è davvero morto in Kosovo?*, in *Altreragioni* (2000) 63ff.

[6] Given the open-endedness of the term, and its employment in relation to highly diverse phenomena, it is impossible to reach a shared notion of governance that would move beyond the "art of steering societies and organizations." Governance refers in particular, according to the definition of the *Institute on Goverance*, to the strategic aspects "of steering, making the larger decisions about both direction and roles". See "What is governance? Getting a definition", available on line at www.iog.ca/boardgovernance/html/gov_wha.html. See also the observations of C. Joerges in *Integrazione attraverso la de-giuridicizzazione? Un intervento interlocutorio* (presented in the workshop seminar held at the EUI, Florence, in June 2007, and included in this volume), in particular part 1. The notion of European governance, on the other hand, is more precise and exacting: see below, paras. 6-7.

international subjectivity to INGOs would require no other evaluation criterion apart from coherence with the objectives of the Charter.[7] The fact that the strongest States, despite their own continual indulgence in terrorist practices, stigmatise governments who are not friends, or who at any rate cause them trouble every now and again, and only those, as rogue states, would not constitute a *diktat* based on nothing more than hard hegemony, but indeed the opposite, a legitimate decision by the world 'governing' organ. And so on and so forth. We can only say that *les onusiens* (and their variations), despite being motivated by the best of intentions, would deliver up – if only they had the strength – a nightmarish world.

The inter-state element should be held as distinct from the inter-individual element, even when referring to international organisations. The international agreements that institute these entities do not represent the elements of "constitutionalisation" of a hypothetical public law of humanity. On the contrary, as long as the organisation carries out – or within the limits in which it carries out – activities related to international subjects (member States or third States and other IGOs), it will continue to operate in a relational dimension of coordination with, rather than the subordination / overruling of, other subjects of the international order.

When, on the other hand, the organisation carries out internal state activities[8] as a direct function of its founding treaty or through the *de facto* growth of its competences as uncontested by member States, the organs of the international organisation develop government activities "in State territories, with regard to the population and local activities". In an immediate sense, this is the case for peace-keeping activities, or for the reconstruction of States following armed conflicts. We shall not focus on these aspects here. More interesting for the present analysis are the situations in which the (vertical) government activities of an IGO move away from a dimension encumbered by the presence of State organs (as assumed in the former hypothesis of the post-collapse management and reconstruction of a determined State institutional mechanism), and find themselves cohabiting with the continuing activities of State organs on the territory and/or field of action in question.

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[7] See P. Alston, "L'era della globalizzazione e la sfida di espandere la responsabilità per i diritti umani" in P. Alston and A. Cassese, *Ripensare i diritti umani nel XXI secolo* (Turin: EGA-Ed. Gruppo Abele, 2003) 55-56. The author calls for an end to the use of "dated" criteria (!) for attributing international subjectivity, considering "the capacity to contribute ... to the promotion of effectiveness in a certain sector of the international legal order" as more decisive, with particular regard to the contribution made to the accomplishment of the goals and objectives of the UN charter.

[8] The doctrine traditionally spoke of operational activities. On this subject see L. Picchio Forlati and G. Palmisano, *op.cit.,* XXXIV-XXXVI.

In order not to go too far, this is the case for the organs provided for in the UNESCO conventions for the protection of cultural heritage: their activities produce increasingly complex networks of control and management in which we can see phenomena of governance in action. This is the case for the activities of the inter-governmental committees that manage the lists[9]: the ever-closer involvement, on the one hand, of the larger INGOs in roles central to the international activities of the organs in question[10] and, on the other hand, of sub-State entities, both public and private, as well as of single experts operating on the territories of the States concerned, have not been without consequence. The inter-governmental committees in question have, so to say, outgrown the role assigned to the first of them (and to the Director-general of UNESCO) in the 1972 Convention, which may be broadly defined as the notaries of the will of the strongest States. The functioning of the sector thus constitutes a clear example of governance. However, this does not contradict but rather confirms the observations made thus far on the non-commensurability of international law and governance. In fact, the phenomenon described belongs exclusively to inter-individual law: the internal legal order of the organisation, woven in with the internal law of the States that are Parties to the Conventions and, in particular, the State affected.

Turning to the plane of international law then, there should be nothing

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[9] These came about in the following order: *Inter-Governmental Committee on Cultural and Natural Heritage*, constituted on the basis of articles 8 ss. of the *Convention Concerning the Protection of Cultural and Natural Heritag*e (Paris, 16 November 1972, in UNTS, v. 1037, 151 ss.); *Inter-Governmental Committee for the Protection of Cultural Property in the Event of Armed Conflict,* provided for by articles 23 ss. of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (The Hague, 26 March 1999, in ILM, 1999, 769 ss.); *Inter-Governmental Committee for the Safeguarding of Intangible Cultural Heritage,* provided for by articles 5 ss. of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, Paris, 17 October 2003.

[10] This is the case for participation in the International Committee of the Blue Shield (ICBS) in the activities of the *Inter-Governmental Committee for the Protection of Cultural Property in the Event of Armed Conflict*; if in material terms the ICBS is part of the groove made by the *International Council of Monuments and Sites* (ICOMOS) and the IUCN so far as the activities of the *intergovernmental committee on cultural and natural heritage* are concerned, it differentiates itself by the fact that its role is directly foreseen in the text of the treaty (in this case the Second Protocol of the 1954 Convention). For a thorough examination of the role of non-governmental organizations in the administration of the UNESCO instruments, see L. Zagato, *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo 1999* (Turin: Giappichelli, 2007) in particular, 112-118 and 228 ff.

left but to note the successful effort for autonomy by the IGO in question (UNESCO) in respect of its constraints as posited by the founding Treaty. The conditional tense is, however, necessary. The biggest victory secured by UNESCO in the last few years on the basis of the two Conventions dedicated to the protection of intangible heritage, a victory represented by a much stronger involvement in its affairs than previously seen by the emerging Asian powers (China, Japan, India, Vietnam), has meant a drastic re-organisation of the process described. The Asian powers in question do not seem disposed to attribute committees charged with administrating the functioning of the new Conventions with competences comparable to those conquered over time from sister organs. Above all, these powers are unwilling to concede, either to UNESCO or any other inter-governmental organisation, any more than they have already obtained in terms of carrying out government roles in the sector. On the contrary, they are working to defuse the governance mechanisms created over the years by the organisation, and bring the directorate under control. A return – temporary, one hopes – to a situation more responsive to classical international law, with the partial dismantling of the governance mechanism operating in the sector, is thus anything but improbable. Indeed, nothing can ever be taken as given on this ground.

Sectoral networks of transnational cooperation in which vertical elements are present operate in other sectors also covered by international law, sectors that range from human rights to transnational economic cooperation. These are sectors in which, by no coincidence, the presence of INGOs is most evident in terms of both numbers and incidence[11]. We shall avoid the specific field of human rights here in order to leave space for the baffling but widely diffused image of economic relations dominated by a network of private transnational subjects completely removed from State control, a network in which vertical elements are at work. It appears licit to doubt the relevance of such an image; in reality this recalls the theoretical, as well as the political, climate of the 1990s, following the arrangement created at the international level with the end of the Cold War and the imposition of a single superpower.[12] This arrangement was

[11] This is not, however, a decisive criterion. If this were the case, international environmental law would also take the centre stage in our discussion: but it is still difficult, in light of the jealously of States on this subject, to include the environment as one of the areas in which we see a fully formed governance mechanism.

[12] Without recalling theoretical constructs that today only make us smile – the famous end of history predicted by F. Fukuyama in *The End of History and the Last Man* (New York: The Free Press, 1992) 1-418 – many theories, erring on the presence at the end of the millennium of a single economic and military superpower, preferred to follow the monist utopia, when it would have been better to reflect more modestly on the more solid theoretical foundations of the notion of hegemony.

toppled by the rude awakening in international relations and balances, including economic one, that are identified in the imaginary with the aftermath of 11 September.[13] Some features in the interpretative scheme under discussion seem to indicate the presence of a similar error. Without claiming completeness, some of these may be listed.

In some strategic economic sectors (aerospace, logistics, satellites, related industries), globalisation and liberalisation saw a drastic turnaround starting from the middle of the second Clinton presidency – around 1997 or 1998, in any case well before 2001 – in relation to the first reemergence of asymmetrical armed conflict[14] at the international level. From this sprang an impetuous process towards the militarisation of space, in defiance of the international Treaties in force on the subject, and of the project for a space frontier to be the "common heritage of humanity":[15] a notion elaborated in the era of the new world economic order in the 1970s, of which it represents the extreme legacy.[16] Not that examples of mix-ups between articulations of the State and private businesses in these sectors are lacking: on the contrary.[17] Moreover, control remains firmly with the internal dimensions of the State-institution.

Of more pertinence are the parallels with the saga of the pharmaceutical (and biopharmaceutical) sector concomitant with the HIV pandemic that

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[13] Resistance to the possibility of new scenarios is still (too) strong not only among scholars of law, but also among political scientists. One must welcome the recent provocations of L. Canfora, *Esportare la libertà*, (Milan: Mondadori, 2007), where the author, having noted that with the growing international role of China new premises are created for unprecedented [scenarios] that will arise over the next decades, exhort us to concentrate on the emergence of new and unprecedented forms of "antagonism" following the collapse of the Soviet Union.

[14] L. Zagato, "L'innovazione militare nella competizione economica fra sistemi" in L. Picchio Forlati (ed.), *Controllo degli armamenti e lotta al terrorismo tra Nazioni Unite, NATO e Unione europea* (Padua: CEDAM, 2007) 115-149.

[15] See *Trattato sui principi che regolano le attività degli Stati nell'esplorazione e nell'uso dello spazio extraatmosferico, ivi compresi la Luna e gli altri corpi celesti*, adopted in London, Moscow and Washington on 27 January 1967 (UNTS vol. 610, pp. 205 ss.), entered into force at the international level on 10 October 1967 and in Italy on 4 May 1972 .

[16] The Declaration concerning the inauguration of a new economic order is contained in the Res. GA 3201 (S-VI) of May 1, 1974.

[17] Behind the American success is the strong articulation created between the Department of Defense and its articulations, other Ministries and Federal Agencies, Congress and its committees, States and the Agencies of single States, Universities, public and private research laboratories, suppliers privileged by the DOD, private businesses operating traditionally on the national and transnational markets. This is the model currently propagated, with varying results, in the EU, China, and Russia. See L. Zagato, *op.ult.cit.*, *passim*.

culminated, but was not concluded, with the Doha Declaration.[18] But the interest here is better highlighted by the Anthrax crisis and the post-Doha fallout. To begin with the former, States that had always been resolutely opposed, even at the height of the HIV emergency, to every hypothetical concession to obligatory licences for undeveloped countries, resorted when necessary to a wider and looser use of the exceptions contained in Art. 31 of TRIPS,[19] without disagreement from any one of the supposedly omnipotent multinationals. As for the post-Doha fallout, this refers not only to the difficulties encountered in the course of implementing the results but, even more so, to the reactions of the US and, sadly, the EU. These powers, once they had overcome the crisis that immediately followed 11 September (including Anthrax), and thanks to the skilled re-launching of the technique of bilateral agreements,[20] managed to call into question the few effective results obtained in Doha at the multilateral level concerning health rights. In any case, these events showed us how the sector's major multinationals were reminded swiftly and rather brutally of their role as mere pressure groups, the far-reaching hand of one national Government or another on the global chess board, rather than the forerunners of a new order.

Finally, and most importantly, the revival of a logic of confrontation between state blocs in international trade negotiations should be noted with the emergence of an alliance between India, Brazil, China and others. Should this tendency be confirmed in the immediate future, a decisive blow would be dealt to the theory foreseeing a group of private transnational subjects, emancipated or in the process of being emancipated from State control, dominating the stage of international economic and trade relations.

We have so far reasoned on the basis of sectoral phenomena. There is no

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[18] For a reconstruction of the first part of this tale, characterised in particular by the attempted appeal against the South African government before the High Court in Pretoria by the principal global pharmaceutical companies, led by the Pharmaceutical Manifacturers' Association of South Africa (MPA), see P. Acconci, "L'accesso ai farmaci essenziali. Dall'Accordo TRIPS alla Dichiarazione della quarta Conferenza ministeriale OMC di Doha", in *CI,* (2001) 637-664. On the features linked to the discussion developed here, see L. Zagato, *Nuovo ruolo di alcune clausole di salvaguardia dopo l'11 settembre*, in Piccio Forlati & Palmisano, *Studi.. Arangio-Ruiz*, *supra* note 1, 2323-2340.

[19] See L. Zagato, *op.ult.cit.*, *passim*. for a more exhaustive bibliography.

[20] On the use of techniques borrowed from bilateralism in intellectual property rights see L. Zagato, "Sul trattamento dei PVS in materia di diritto d'autore" in L. Picchio Forlati and L. Zagato (eds.), *Cultura e innovazione nel rapporto tra ordinamenti,* (Milan: Giuffré, 2000) 29-100.

doubt that the phenomenon of European governance, in comparison, presents specific and marked features. Community law, it is useful to recall, lies at the crossroads between three different legal orders. These present themselves, so to say, in pairs: the first is the relationship between *international law* and *internal law*. International law still plays a decisive role in the key passages of the European Union's life, as demonstrated all too well by the vicissitudes of the European Constitutional Treaty. But which internal law? Here too there is a bifurcation: on one side the internal legal order of the Community/Union (EU-institution), on the other side the internal legal orders of the member States (in turn articulated in something like twenty seven sub-types). Of course, in elementary terms an analogous discourse can be made for every inter-governmental organisation: the provisions of the Treaties that give life to each single IGO establish their competences and discipline their activities, they represent the *constitution* of the international subject in question. But in this case the scale is simply too large. It is difficult to find other cases in international relations in which the institutional body,[21] constituted according to its founding Treaties, has managed over time and operating in the shadow of these Treaties and in the spaces left vacant by its member States, to conquer[22] such a dimension as allows it to stand alongside the latter as an equal. It could be said that the EU-institution has successfully followed, sometimes using the instruments offered by the situation, but above all by availing itself of the creative contribution of the Court of Justice, the road that every inter-governmental entity tries, almost always in vain, to take: to wrest the control – and, in sectors of direct competence, even the management – of economic and social life from States.

European governance, therefore, operates in a space touching on the relationship between the internal law of member States and the internal law of the Community/Union, not unlike other IGOs, but on a larger scale and with a very different level of impact. The starting point appeared simpler. It was only in the (very few) areas of exclusive competence that

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[21] With the expression "EU (or EC)-institution" we refer to the inter-individual structures composed not only of the members of the Organization's organs and their staff, but also of "any other persons involved in the organs' activity". See G. Arangio-Ruiz, *supra* note 1, 988

[22] For a reflection on Community law as a collection of heterogeneous norms, simultaneously participating in the dimensions of international, state, and community legal orders see, in particular, L. Picchio Forlati, "Il diritto dell'Unione europea fra dimensione internazionale e transnazionalità" in *Jus* (1999) 461-473. For a thorough discussion following the European Constitutional Treaty, see "Il fondamento giuridico dell'Unione europea: Trattato o Costituzione?", in *Scritti di diritto internazionale in onore di Gaetano Arangio-Ruiz*, vol. II (Naples: Morelli, 2004) 1377-1386.

the EC-institution enjoyed supranational power, in the sense that it was capable of directly addressing individuals, physical and legal persons, living in the member States, as a real social base, thereby bypassing the State organs. For the rest, the EC-institution had to content itself with the modest role typical for IGOs when operating in a relational dimension for coordination between international subjects (member States, third States or other IGOs).[23]

But things went differently: not only have the competences of the EC increased over time,[24] whether exclusive or shared with member States; moreover it cannot be denied that the relations between the two (internal) legal orders have become more complex, entailing a closer cooperation than originally intended between EC and State organs[25]. This cooperation also involves, amongst private citizens, *in primis* those already operating on a transnational basis, then multinational companies based in Community territory;[26] lastly it has come to include, with the Maastricht Treaty, the issue of the relations between the EU-institutions and sub-State public organs. This brings us to the Prodi Commission, pushing in their White Paper[27] with a determination bordering on recklessness for the inclusion of direct relations with the sub-state organs of the member States and with the Committee of the Regions, in an explicit attempt to avoid (some would say to destroy) the filter of national authorities.[28] From this, however, followed a tough play-off with the national Governments of the

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[23] See above, paragraph 4

[24] In virtue of the closure mechanism guaranteed by art. 308 (ex 235) of the ECT. On this, in terms of the Italian doctrine, see: L. Ferrari Bravo and A. Giardina, "Commento all'art. 235", in R. Quadri, R. Monaco and A. Trabucchi, eds., *Commentario Cee* (Milan: Giuffrè, 1965) II; A. Giardina, *The Rule of Law and Implied Powers in the European Communities*, in *Irish Yearbook of International Law* (1975) 99-111; G. Olmi, "La place de l'article 235 Cee dans le système des attributionsde compétence à la Communité" in *Mél. F.Dehousse*, Paris (1979) 279-295; L. Rossi, *Il "buon" funzionamento del mercato comune* (Milan: Giuffrè, 1990) 65-71; A. Tizzano, "Lo sviluppo delle competenze materiali delle Comunità europee" in *RDE* (1981) 139-210; L. Zagato, *La politica di ricerca delle Comunità europee* (Padua: CEDAM, 1993) 24-27.

[25] This dates back to 1963 - CJ 5 February 1963, case 26/62, *Van Gend en Loos*, in *Racc*., pp. 1 ss. - with the pre-judicial sentence passed down by the Court in the *Van Gend en Loos* case, the first theorisation of the "Community of law", with the consequent verticalisation of the relationship between Community and national judges.

[26] See below, paragraph 7.

[27] *European governance – A White Paper*, COM (2001) 428, in OJ n. C 287 of October 12, 2001.

[28] B. Nascimbene, "Governance, Enti locali e tutela giurisdizionale" in A. Lang and C. Sanna (eds.), *Federalismo e regionalismo* (Milan: Giuffrè, 2005) 143-161 in particular,144ff

member States subsequently partially called off, but which influenced at least to some extent the fall of the European Constitutional Treaty.

One of the relapses of the strategy in question was the presence, in the Commission document, of a definition of governance more precise than usually found. By governance, the Commission intended to denote the set of norms, processes and behaviours that "affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence".[29] In other words, European governance should be characterised, passing over the links between the law of the EU-institution and the member State's legislation, by the participation in the decision-making process of regional and local authorities, and of local authorities' organisational networks, including transnational or trans-border, to which should also be added the networks of exponential entities, in turn often transnational in nature.

The notion of EU governance at which we have arrived nevertheless still needs some clarifications, above all in light of the parallel line of development currently unfolding. Beginning with the clarifications, it is necessary to shed light on the myths surrounding the EU governance*:* often this term denotes the advantages that a more agile system based on soft law would present with respect to the functioning of the rusty institutional mechanism laid out in the Treaties. We are obliged to hope for a certain level of caution: first of all, and remaining in the field of inter-governmental relations, international law is the very realm of "more agile" practices, considering the freedom with which agreements between international subjects may be expressed. When it is said that diverse forms of governance avoid "legal constraints", the spheres of inter-individual relations and international law must once again be kept separate. Only in the first of these two spheres does this discourse make sense; as for the second, the affirmation is erroneous in that international subjects dispose of far more agile instruments than those offered by governance for avoiding rigid constraints.

This affirmation is of value when applied to the internal legal dimension; in this case, to the internal law of the EU in the double sense described above. At this point, however, the discourse must shift to the European Constitutional Treaty. The project expounded by the Commission's White Paper finds itself acknowledged in some of the provisions of this text, particularly in articles 7[30] and 8[31] of the second Protocol on the

[29] For a deeper discussion, B. Nascimbene, *ibid.* 135 ff.

[30] Establishing the obligation for Community organs to take note of the opinions sent by national parliaments or by the houses of those Parliaments in relation to

application of the subsidiarity and proportionality principles. It thus seems credible to read into the European Constitutional Treaty an attempt to block the process of continual revision that characterises the system of the EU Treaties, in the effort to formalise and clarify, and thereby render more rigid, relations between subjects – in the final analysis between the internal law of the member States and the (internal) legal order of the EU-institution. The fact that actors nostalgic for the once unquestionable primacy of the State-institution (so-called "euroscepticism") played an important role in the failure of the Treaty should not lead us to forget how, in the situation of uncertainty that had characterised the previous two years, the (vertical, inter-individual) network of cooperation between the EU-institution and the member State institutions developed hugely, and in terms much less transparent than would have occurred had the Treaty been adopted. "Greater agility", in the final analysis, could mean nothing more than the reinforcement of the dark side of European governance.

With these clarifications in place, we may agree with the prevalent doctrine, which sees in the mechanism of governance built for the functioning of the internal market one of the major successes of the EU-institution. However, this vision is partial – in fact, a phenomenon of governance with markedly divergent characteristics has for a long time been developing in the EU. The reference is the European judicial area (title IV TEC); here too, a significant increase in competences and power on the part of the EU-Institution has recently been seen. In this case, however, the types of relations with the organs of the member States are different to those valid for the internal market and theorised in the White Paper. In the European judicial area the EU-institution functions instead, to recall an old distinction,[32] as a common organ of the Community-group of the member States. The vertiginous growth of European organs and sub-organs, with their most mysterious and elusive acronyms as compared to the structures of the organs of national executive power, supplies an example of fully developed governance, but with frankly worrying aspects.

Above all, between the two experiences of governance there is by now *contaminatio*. The first – that is, the governance built for the functioning of the internal market – also includes the whole of the Europe of research and

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draft legislative acts. After a fixed threshold (calculated on the basis of the criterion established in paragraph. 2) the draft must be reexamined.

[31] Paragraph. 2 of this article also foresees the possibility for the Committee of the Regions to appeal to the Court of Justice against acts for which its consultation is foreseen.

[32] A. Giardina, *Comunità europee e Stati terzi*, (Naples: Jovene,1964) *passim*.

innovation.[33] The most recent Framework Programs (FP) in particular saw the development of a capillary network: in addition to the central organs of the EU-institution and the central and peripheral organs of the member States there operates a vast network of committees, which is more-or-less sub-dividable into three groups. The first group is constituted by the so-called comitology committees, highly politicised bodies in that they are composed of political representatives from the member States, usually civil servants responsible for scientific fields.[34] The second group is constituted by committees (or of specialized sections of committees)[35] foreseen in the founding Treaties of the European Communities, to which are added the expert groups that assist COREPER in the preparation of Council decisions and the STOA (*Scientific and Technological Options Assessment*), which in turn assists the EP. As for the last group of organs operating in the community R&D network, this is formed by a panoply of 'horizontal' committees, almost all created by the Commission with the *ex* art. 211 of the Treaty, and composed of member State experts chosen by the

[33] The author would have chosen, had he been charged with the deepening of the development of European governance in the internal market, to depart from the facts following the second oil crisis of 1980-81, when the perception of the technological gap accrued by the Community industries with regard to the US and Japanese poles, had matured amongst European big businesses, especially those operating in technologically advanced fields. The two poles are the US and Japan; the businesses operating in such sectors (the definition of the big twelve roundtable created in Brussels by the major European computer companies is famous) then intervened alongside the community authorities to plead for the support of the member states for the then nascent community R&D activities. See L. Zagato, *Il contratto comunitario di licenza di know-ho*w, (Padua: CEDAM,1997) 71-72; *idem*., *La politica di ricerca*.., *supra* note 24, 206 ff.

[34] These committees were originally set up on the basis of the notable Coucil Decision 87/373/Cee of 13 July 1987 which fixed the conditions for the exercise of execution comptences entrusted to the Commission (in OJ n. L 197 18 July 1987), then substituted by Council Decision 99/468/CE of 28 June 1999 bringing in conditions for the exercise of execution competences entrusted to the Commission (in OJ n. L 184 of July 17, 1999). The legal base is art. 202 par. 3 of the Treaty; in particular the final part of the provision which establishes that the "the above modalities must respond to the preliminary principles and norms that the Council, deliberating unanimously on the proposal of the Commission prior to the opinion of the European Parliament, will establish". The modalities in question must conform to either the *consultation committee* formula – or to those, more pervasive, for *management committees* or *regulatory committees.*

[35] Among these are: the Committee for Science and technology (art. 134 EAEC Treaty); the energy and research section of the Economic and Social Committee (ECOSOC) – which, following the extinction of the ECSC Treaty, also assumed the functions of the consultative Committee for coal and steel (sub-committee for research projects: art. 18 ECSC Treaty) – disciplined by articles 257-262 of the EC Treaty.

Commission itself for their personal capacities[36]; to these we must also add the groups created, and being created, to handle the comparative evaluations of national research policies, and the results arrived at in carrying out FP.

I have focused on this complex articulation of coordination/subordination in order to dramatise the importance of the fact that community R&D has been charged, with the VII FP, with "research in the field of security", which brings with it (as has been hinted) its own organisational / administrative plot. In the administration and execution of the next FPs, different types of governance that began in different fields are destined to live alongside one another. Fatally, between these two phenomena new levels of complexity are destined to be reproduced.

The principle of security[37] is progressively permeating all community policies. In light of this, we are required to review our overall evaluations of the direction and operation of European governance. European governance built for the functioning of the internal market grasps, it has been affirmed, the internal / inter-individual dimension of community law but not its international dimension. This latter dimension, we must however note in conclusion, presents itself with surprising tenacity; it is almost as if international law – with its manifestations of horizontality/coordination among subjects, which are set against one another and leave no free space for vertical manifestations of hierarchy – was amusing itself by "shuffling cards", and thus sending the internal market, perhaps too hastily considered as definitively integrated into a vertical/inter-individual dimension, into crisis.

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[36] Only the first, CREST (Committee for scientific and technical research) was set up by a Council Resolution in 1974; it is composed of member state civil servants and members of the Commission.

[37] From the jumble of instruments offered by title IV of the Treaty, the EC Council extrapolated at Tampere (European Council of 15 and 16 October 1999) and confirmed with the Hague Programme (European Council of Brussels of November 5, 2004) "an autonomous principle of the collective right to security of the citizens of the European Union, built around a specific policy applicable to all others". See F. Pastore, *Visa, Borders, Immigration: Formation, Structure and Current Evolution of the EU Entry Control System,* in N. Walker, ed., *Europe's Area of Freedom, Security and Justice* (Oxford: OUP, 2004) 97-98; L. Zagato, "Le competenze della UE in material di asilo dopo i Trattati di Amsterdam e di Nizza, e nella prospettiva del Trattato su una Costituzione per l'Europa" in *idem.,* ed., *Verso una disciplina comune europea del diritto d'asilo* (Padua: CEDAM, 2006) 198.

THE EMERGENCE OF EUROPEAN MOVEMENTS? CIVIL SOCIETY AND THE EU

Donatella della Porta*

I. EU COUNTERSUMMITS AND EUROPEAN SOCIAL FORUMS: AN INTRODUCTION

On June 16 and 17 1997, in Amsterdam, notwithstanding the approval of a new Treaty, the summit of the European Councils failed to deliberate on the large institutional reforms the European Commission was hoping for. On the first day of the summit, a coalition of NGOs, unions and squatted centers staged a demonstration. The coalition European March for Unemployment mobilized 50,000 people that arrived from all over Europe to ask for policy measures against poverty, social exclusion and unemployment. In symbolic protest, about 500 young people reached Amsterdam on foot, having left from different European countries on Labour Day. During the days of the summits, groups of young activists distributed joints asking for free drogues in all Europe and gay associations marched in the red light district demanding equal rights. The headquarters of the Central Bank, where Heads of State, Ministries and dignitaries met, were protected by 5,000 policemen.

Three years later, another important step in European integration was met by protest. On December 6 2000, the day before the opening of the European Summit, 80,000 people gathered in Nice, calling for more attention to social issues. The event was called for by an alliance of 30 organizations from all over the Europe. Together with the European Trade Union Confederation (ETUC), there were associations of unemployed, immigrants and environmentalists, "alterglobalist" ones as ATTAC, progressive and left-wing parties, communists and anarchists, Kurdish and Turkish militants, women's collectives, Basque and Corsican autonomists. In various French cities, activists built travellers' collectives, asking for free transportation to the summit. The Global Action Train, transporting about 1500 activists from squatted youth centers, Ya Basta, White Overalls, and the youth association of the Italian Communist Refoundation party, was blocked at the border, in Ventimiglia, where sit-ins were staged. The mayor of Ventimiglia declared, "Which Europe is this, that closes its borders when there is a summit?" In the following days, the press contrasted the "street party" of the peaceful demonstrators with the "street battles" staged by a minority of radical "no global". On December 7, attempts by a few thousands activists to block the avenue of the summit ended up in police baton-charges, with use of tear-gas. According to the chronicles, notwithstanding the deployment of anti-riot

special police, armed with flash balls and rubber bullet pistol, the works of the summit were disturbed by the protest—among others, the tear-gas entered in the summit avenue, making Mr Chirac sneeze. On the same day, an assembly of the Cross Roads for Civil Society met to develop a "true constitution", while a sit-in of European federalist was charged by the anti riots police.

The following year, protest escalated in Gothenburg, where the Swedish Old Left and Euro-sceptics met with new and "newest" movement activists. On June 14, 2001, a "mass mooning" (with activists showing their naked bottoms) greeted the visit of U.S. President Bush. Some of the protesters clashed with the police, who had surrounded their sleeping and meeting spaces. On June 15, thousands marched on the headquarter of the summit, with some members of the non-violent network climbing the fences around the congress centre contesting what they defined as the exclusion of the people from a meeting that had to discuss policies that would reconcile environmental protection and economic growth. Notwithstanding the arrests of bus-travellers at the borders and the strict controls on the 2025 protestors singled out as dangerous by the Swedish police, on the evening a Reclaim the City party escalated in street battles that ended up with 3 demonstrators heavily wounded by police bullets. The dinner of the European Council was cancelled due to protest. On June 16 2001, in what was defined as the largest protest staged by the radical Left in Sweden, 25,000 marched "For another Europe", "Against Fortress Europe", defined as a "police superstate", and "Against a Europe of the Market", with the opening banner proclaiming that "The World is not for Sale". Sit-ins followed in front of the Swedish embassies in Britain, Germany, Spain, The Netherlands and other European countries protesting among others against the deployment of masked police, carrying semiautomatic rifles with laser sights in what was defined as a "police riot".

On the following year, three EU summits are to be met by protest. On March 14-16 2002, a three days of protest targeted the EU summit in Barcelona, whose main focus was market liberalization and labour flexibility, later to be presented in the media as "an exit to the Right" from the Lisbon strategy (notwithstanding the Head of the EC, Romano Prodi, talked of reconciling solidarity and free market competition). The protesters planned not only to contest the EU policies in the street but also to discuss alternatives during a countersummit. On Saturday 16, 300,000 people marched on the slogan "Against a Europe of capital, another Europe is possible", from Placa de Catalunya to the Mediterranean harbour front in the largest demonstration against EU policies. Initially called by the Confederation of European Trade Unions,

with representatives from the 15 EU countries, the event was joined by new unions, "soft" and "hard" environmentalists, anarchists and independentists (no dictionary recognizes this word), anti-capitalists and different civil society organisations. Following an opening banner proclaiming that "Another World is Possible", protesters called for full employment and social rights against free-market globalization. While the long march (exceeding by far the organizers' expectations) proceeded peacefully, at its end some more militant groups clashed with the police, deployed "en masse" (8500 policemen) to protect the summit. Once again, demonstrators were rejected at the borders, after passport controls had been re-established between France and Spain. While the Italian Premier Silvio Berlusconi stigmatized the "professional globetrotters in search for a reason to party", the Minister of Interiors of Spanish centre-right government so justified the rejection of peaceful marchers at the borders: "Some people think that they can do things that do not meet the approval of the vast majority of the population".

A few months later, on the occasion of the EU summit held in Seville on June 20–22 June, the Seville Social Forum organised two days of conferences, seminars, and grassroots discussions on issues relating to immigration, social exclusion, and the casualisation of labour. While the opening day was marked by a general strike organised by the Spanish trade unions, with reports of up to 85 per cent participation, the counter-summit conference ended with a demonstration of about 200,000 marching "Against the Europe of Capital and War". At the same time, 300 international activists and immigrants locked themselves into the Salvador University to protest against the "anti-immigrant initiatives of the EU".

Six months later, on December 13-15, a countersummit was organized by an Initiative for a different Europe. Against a Europe that "does not like democracy", the coalition of grassroots movements, social and students' organizations, trade unions and left wing political parties asked for a Europe without privatization, social exclusion, unemployment, racism and environmental destruction. While the summit discussed civil rights, the protesters called for a right to free movement and dissent. The countersummit (organised by 59 NGOs from all over Europe) included lectures, discussions, and demonstrations against attacks on the welfare state throughout Europe, the economic and social consequences of EU plans for eastward expansion, and the process of growing militarism, as well as EU policies on migration. On December 13, about 2000 marched on the summit denouncing racism; on the next day, 10,000 marched behind the opening banner "Our World is Not for Sale".

This brief chronicle of recent EU summits and countersummits shades

doubts on the image of a broad "permissive consensus" around the EU. If truly European protest events might be few, they seem however to be prominent events in the history of an emerging movement, protesting for global justice. At the same time, the protests show that it is not the European level of governance which is contested, but first of all the content of the decisions made by the European institutions. The ideas emerged during the countersummits are developed within a different form of protest that started in the year when our story ended: the European Social Forums.

Countersummits against the official summits of International Governmental Organizations (especially the G8, World Bank and IMF, WTO, and the EU) represent quite disruptive forms of protest at the transnational level. Differently from a countersummit, that is mainly oriented to public protest, the Social Forum is set up as a space of debate among activists. Although originally indirectly oriented to "counter" another summit—the World Social Forum (WSF) was organized on the same date and in alternative to the World Economic Forum (WEF) held in Davos (Switzerland)--the WSF presented itself as an independent space for encounters among civil society organizations and citizens. The first WSF in Porto Alegre in January 2001 was attended by about 20,000 participants from over 100 countries, among them thousands of delegates of NGOs and social movement organizations. Its main aim was the discussion of "Another possible globalization". Since then the number of organizers and participants as well as the organizational efforts of the following WSFs (in Porto Alegre in 2002 and 2003, than in Mumbay in 2004, and again in Porto Alegre in 2005) increased exponentially. The WSF also gained a large media attention. According to the organizers, the WSF in 2002 attracted 3,000 journalists (from 467 newspapers and 304 radio or TV-stations), a figure which doubled to more than 6,800 in 2005. Notwithstanding some tensions about the decision making process as well as the financing of the initiatives, the idea of open arenas for discussion, not immediately oriented to action and decisions, has spread with the global justice movement.

Since 2001, social forums were organized also at macro-regional, national and local level. Panamazzonean Social Forums were held in Brasil and Venezuela in 2004; African Social Forums in Mali and Ethiopia, Asiatic Social Forums in India. Among them, the European Social Forum (ESF) played the most important role in the elaboration of activists' attitudes towards the European Union, as well as the formation of a European identity.

The first ESF took place in Florence on November 6-9, 2002.

Notwithstanding the tensions before the meeting, the ESF in Florence was a success. Not only was there not a single act of violence, but participation went beyond the most optimistic expectations. Sixty thousand participants – more than three times the expected number – attended the 30 plenary conferences, 160 seminars, and 180 workshops organized at the Fortezza da Basso; even more attended the 75 cultural events in various parts of the city. About one million participated in the march that closed the forum. More than 20,000 delegates of 426 associations arrived from 105 countries – among others, 24 buses from Barcelona; a special train from France and another one from Austria; a special ship from Greece. Up to four hundred interpreters worked without charge in order to ensure simultaneous translations. A year later, as many as a thousand Florentines (300 went to London in 2004) and 3000 Italians went to Paris for the second ESF.

Since 2002, activists have met yearly in European Social Forums to debate Europeanisation and its limits. The second ESF has been held in Paris in 2003, involving up to 60,000 individual participants, 1,800 groups, 270 seminars, 260 working groups and 55 plenary sessions (with about 1500 participants in each), and 300 organizations, among which 70 unions, signing the call, 3000 volunteers, 1000 interpreters. According to the organizers, 150,000 participated in the final march. The third ESF, in London in 2004, involved about 25,000 participants and 2,500 speakers in 150 seminars, 220 working groups and 30 plenary sessions, as well as up to 100 000 participants at the final march). The third one in Athens in 2006 included 278 betweens seminars and workshops, and 104 cultural activities listed in the official program, 35,000 registered participants and up to 80,000 at the final march.

The impressive success of the first ESF in Florence, in 2002—with 60,000 activists from all over Europe participating in three days of debate and between half and a million activists in the closing march--was the result of networking between groups and individuals with, at least, partly different identities. The multiform composition of the movement is reflected in a differentiated attention paid to how 'globalisation' affects human rights, gender issues, immigrant conditions, peace and ecology. But the different streams converged on their demands for social justice and "democracy from below" as the dominant interpretative scheme, able to recompose the fragments of distinct cultures. A multilevel public intervention able to reduce inequalities produced by the market and the search for a new democracy are in fact the central themes of the emerging European movement. The first ESF presented itself as an important moment in the construction of a critical public sphere for the discussion of the European Convention and its limits. Together with the democratisation of the European institutions, the activists demanded a charter of social rights

that goes beyond the commitments written in the Treaty of Nice.

As we are going to see in this chapter, more and more, Europeanised protest addresses the lack of concerns at the EU level for social equality. Since its origins the EU has been in fact a reaction to the weakening of the European nation state in certain key areas: from the military defence of the frontiers to the expansion of markets. As Bartolini put it, the process of territorial de-differentiation that is at the base of European integration was pushed by the evidences of the intolerable consequences of historical rivalry between the European states as well as the growing risks of an economic marginalisation of Europe in the world economy. The deepening of this process demands, however, the creation of cultural identity and citizenship that can sustain the social sharing of risks and legitimate political decisions. The EU's launch of campaigns on general ethical issues (such as gender equality, anti-racism, human rights) are evidence of the search for a moral basis for collective identity: such a moral basis would be an equivalent to what the nation had represented in the construction of the state. One of the main instruments in the construction of the nation-state—citizens' rights—are however still weak at the EU level. The process of European integration advocated at the European level the tools of economic policies, necessary for the implementing of social policies, without however investing in the latter.

In fact, it is precisely against European economic and social policies that protests are focusing the supranational level, with some early mobilizations that though rare, represent nevertheless an important signal of change (for instance, in the European Marches against unemployment in 1997 and 1999). The search for 'another Europe' is most in evidence in the movement for globalisation 'from below' that called for the mentioned countersummits, but also organized the first European Social Forum (ESF) in Florence in November 2002.

In what follows, we are going to look at the European Social Forums as emerging structures of a European social movement which is made of loosely coupled networks of activists endowed with multiple associational memberships and experiences with various forms of political participation (part 2). Looking at the frames and discourses of these activists, as well as their organizations, we shall discuss the development of a form of "critical Europeanism" which is fundamentally different for the populist Euro-scepticism on which research focused in the past (part 3). As we shall discuss in the conclusions, protestors expressed strong criticism of the forms of European integration, but no hostility to the building of supranational, European identities and institution. They can therefore be seen as a critical social capital for the emerging of a European polity.

II. The European Social Forums: the organizational dimension

The common basic feature of the social forum is the conception of an open and inclusive public space. Participation is open to all civil society groups, with the exception of those advocating racist ideas and those using terrorist means, as well as political parties as such. The charter of the WSF defines it as an "open meeting place". Its functioning, with hundreds of workshops and dozens of conferences (with invited experts), testifies for the importance given, at least in principle, to knowledge. In fact, the WSF has been defined as "a market place for (sometime competing) causes and an 'ideas fair' for exchanging information, ideas and experiences horizontally". In the words of one of its organizers, the WSFs promote exchanges in order "to think more broadly and to construct together a more ample perspective".

The ESF is however also a space of networking and mobilization. The spoke-person of the Genoa Social Forum (that organized the anti-G8 protest in 2001), Vittorio Agnoletto, writes of the ESF as a "non-place": "it is not an academic conference, even though there are professors. It is not a party international, even though there are party militants and party leaders among the delegates. It is not a federation of NGOs and unions, although they have been the main material organizers of the meetings. The utopian dimension of the forum is in the active and pragmatic testimony that another globalization is possible". References to "academic seminars" are also present in the activists' comments to single meetings published online. Writing on the ESF in Paris, the sociologists Agrikoliansky and Cardon stressed its plural nature:

"[E]ven if it re-articulates traditional formats of mobilizations, the form of the 'forum' has properties that are innovative enough to consider it as a new entry in the repertoire of collective action. ... An event like the ESF in Paris does not indeed resemble anything already clearly identified. It is not really a conference, even if we find a program, debates and paper-givers. It is not a congress, even if there are tribunes, militants and mots d'ordre. It is not just a demonstration, even if there are marches, occupations and actions in the street. It is neither a political festival, even if we find stands, leaflets and recreational activities. The social forums concentrate in a unit of time and space such a large diversity of forms of commitment that exhaustive participation to all of them is impossible."

What unifies these different activities is the aim of providing a meeting space for the loosely coupled, huge number of groups that form the

archipelagos of the GJM. Its aims include enlarging the number of individuals and groups involved but also providing a ground for a broader mutual understanding. Far from aiming at eliminating differences, the open debates should help increasing awareness of each other concerns and beliefs. The purpose of networking (through debating) was in fact openly stated already in the first ESF in Florence, where the Declaration of the European social movements read:

"We have come together to strengthen and enlarge our alliances because the construction of another Europe and another world is now urgent. We seek to create a world of equality, social rights and respect for diversity, a world in which education, fair jobs, healthcare and housing are rights for all, with the right to consume safe food products produced by farmers and peasants, a world without poverty, without sexism and oppression of women, without racism, and without homophobia. A world that puts people before profits. A world without war. We have come together to discuss alternatives but we must continue to enlarge our networks and to plan the campaigns and struggles that together can make this different future possible. Great movements and struggles have begun across Europe: the European social movements are representing a new and concrete possibility to build up another Europe for another world."

Democracy in the forum is an important issue of discussion, with tensions between different models (horizontal versus vertical, but also as oriented to action or discussion) testified for by the different structures present within the fora. Social fora belong, in fact, to emerging forms of action that stress, by their very nature, plurality and inclusion. Similar forms of protest that favours networking and successively "contamination" (or cross-fertilization) are the "solidarity assemblies", a series of assemblies where multiple and heterogeneous organizations active on similar issues are called to participate with their particular experiences or the "fairs on concrete alternatives" whose aim is to link together various groups presenting alternatives to market economy ranging from fair trade to environmental protection. Degrees of structuration, inclusivity and representation are always at the center of the discussion.

The networking capacity of countersummits and social forums is reflected in the overlapping membership of its participants. According to a survey at the first ESF, participants are deep-rooted in dense organizational networks. The activists were well grounded in a web of associations that ranged from Catholic to Green, from voluntary social workers to labour unions, from human-rights to women's organisations: 41.5% are or have been members of NGOs, 31.8% of unions, 34.6% of parties, 52.7% of other movements, 57.5% of student groups, 32.1% of squats for the young, 19.3%

of religious groups, 43.1% of environmental associations, 51.3% of charities, 50.9% of sport and recreational associations (table 1).

Table 1. Partecipation (present and past) in associations by nationality

	IT	FR	DE	ES	UK	Other non-italian	Total non-italian	Total ESF
Unions	26,3	48,9	29,1	27,1	79,7	38,5	44,6	31,8
Parties	30,3	33,1	27,8	28,1	78,0	45,7	44,5	34,6
Student groups	55,6	44,9	45,6	54,7	85,4	66,0	61,8	57,5
Youth social centers	36,9	26,5	22,7	22,1	13,8	20,6	21,0	32,1
Religious groups	20,2	12,4	19,0	13,5	16,3	19,9	17,1	19,3
Enviromental associations	42,9	12,9	48,8	45,3	53,7	51,1	43,5	43,1
Movements (in general)	46,5	56,9	69,6	40,0	88,6	70,1	66,9	52,7
Voluntary groups (charities)	49,3	52,2	40,0	58,3	55,4	60,8	55,9	51,3
Recreational associations	51,7	48,6	56,3	47,4	53,3	46,6	49,1	50,9
NGOs	32,1	48,2	65,4	58,3	61,8	71,0	63,2	41,5

While respecting existing differences, the activists share a *common set of values*. If doubts about liberalization of markets and cultural homogenization are also expressed in religious fundamentalism or conservative protectionism, these expressions of anti-globalization are not, however, present in the movement, which has a clearly left-wing profile. Significantly, activists interviewed at the European Social Forum mainly defined themselves as "left" (Table 2), with a significant component saying "extreme left", and limited acceptance of the category "centre-left". With the exception of British activists, the great majority of whom were extreme left (67.2%, followed at a distance by the French at 37.1%), placement on the left ranges from 44.3% of Germans to 53.4% of Spaniards, confirmed at around 50% of Italians. From this viewpoint, in the various countries the movement emerges from a critique of national governments' policy choices – including left-wing governments – as well as of intergovernmental organizations.

Table 2. Self-location on the left-right axis by nationality

	Extreme left	*left*	*Center-left*	*center*	*Center-right and Right*	*Refuse to locate*	
Italy	25,0	49,0	10,2	0,4	0,4	15,0	1683
France	37,1	44,7	4,5	0,8	0,0	12,9	132
Germany	25,3	44,3	12,7	0,0	0,0	17,7	79
Spain	19,3	53,4	5,7	1,1	1,1	19,3	88
Great Britain	67,2	27,7	2,5	0,0	0,8	1,7	119
Other non-italian	41,6	33,2	9,7	3,9	0,6	11,0	310
Total non-italian	40,5	38,0	7,4	1,9	0,5	11,5	728
Total ESF	29,7	45,7	9,3	0,9	0,4	14,0	2411

III. Critical Europeanists?

The Declaration of the Assembly of the Movements of the 4th European Social Forum, held in Athens on May 7th 2006 so addresses the European Union:

"Although the EU is one of the richest areas of the world, tens of millions of people are living in poverty, either because of mass unemployment or the casualization of labour. The policies of the EU based on the unending extension of competition within and outside Europe constitute an attack on employment, workers and welfare rights, public services, education, the health system and so on. The EU is planning the reduction of workers' wages and employment benefits as well as the generalization of casualisation. We reject this neo-liberal Europe and any efforts to re-launch the rejected Constitutional Treaty; we are fighting for another Europe, a feminist, ecological, open Europe, a Europe of peace, social justice, sustainable life, food sovereignty and solidarity, respecting minorities' right and the self-determination of peoples."

Here as well, the statement does not reject the need for a European level of governance, nor the development of a European identity (that goes beyond the borders of the EU), but criticizes the EU policies asking for "another Europe". To the contrary, it links different specific concerns within a common image of a feminist, ecological, open, solidaristic, just

Europe. Many issues are indeed bridged in the process of the European social forums that we shall address here as an illustration of the development of a European social movements. The document approved by the Assembly of the Movements, held at the third ESF, stated:

"We are fighting for another Europe. Our mobilisations bring hope of a Europe where job insecurity and unemployment are not part of the agenda. We are fighting for a viable agriculture controlled by the farmers themselves, an agriculture that preserves jobs, and defends the quality of environment and food products as public assets. We want to open Europe to the world, with the right to asylum, free movement of people and citizenship for everyone in the country they live in. We demand real social equality between men and women, and equal pay. Our Europe will respect and promote cultural and linguistic diversity and respect the right of peoples to self-determination and allow all the different peoples of Europe to decide upon their futures democratically. We are struggling for another Europe, which is respectful of workers' rights and guarantees a decent salary and a high level of social protection. We are struggling against any laws that establish insecurity through new ways of subcontracting work."

Similar attitudes are widespread among activists. Previous surveys have indicated that activists internalized the criticism of representative democracy. Among the participants in protest against the G8 in Genoa, trust in representative institutions tended to be low with however significant differences regarding the single institutions. In general, some international organizations (especially the EU and the United Nations) were seen by activists as more worthy of respect than their national government but less so than local bodies. Research on the first ESF confirmed that diffidence in the institutions of representative democracy is cross-nationally spread, although particularly pronounced where national governments were either right-wing (Italy and Spain at the time), or perceived as hostile to the GJM's claims (as in the UK). Not even national parliaments, supposedly the main instrument of representative democracy, were trusted while there was markedly greater trust in local bodies (especially in Italy and France), and, albeit somewhat lower, in the United Nations. The EU scores a trust level among activists barely higher than national governments (except, in this case, for the more trustful Italians). Similar data on the second and the fourth ESF confirm the general mistrust in representative democratic institutions, although with some specification. Among other actors and institutions, we might notice a strongly declining trust in the church and mass media, as well as in the unions in general and a stable (low) trust in the judiciary and (even lower) in political parties. Activists continue to trust instead social movements (and less, NGOs) as actors of a democracy from below.

In seeking "another Europe", one central feature is mistrust of the parties and the representative institutions. The common location on the left is blended with high interest in politics, defined as politics "from below", but mistrust in the actors of institutional politics. Above all, there is great, spatially fairly homogeneous trust in the social movements and the voluntary associations as actors of a "different" politics (ranging from some 85% among the Germans and British to 95% among the French). By contrast there is little trust in political parties (Table 3), in which a bare 20.4% of interviewees from the European Social Forum have fair or great trust (even less than in the Genoa survey),

Table 3. Trust in actors of political participation and representative institutions by nationality (in italics data referring to entire population)

Trust much or enough	IT	FR	DE	ES	UK	Other non-italians	Total non-italians	Total ESF
Parties	21,4	22,7	6,1	17,3	23,0	17,9	18,1	20,4
Unions	-	67,2	38,1	43,8	71,1	56,3	57,3	-
Cisl/Uil	*13,7*	-	-	-	-	-	-	-
Cgil	*64,8*	-	-	-	-	-	-	-
Sindacati di base	*58,9*	-	-	-	-	-	-	-
Moviments	89,8	95,4	85,1	92,4	84,4	86,8	88,5	89,4
Local governments	50,6	46,8	28,0	34,7	15,4	41,3	35,7	46,2
National Government	5,6	9,5	8,6	2,2	2,4	12,1	7,2	6,1
National Parliament	14,9	20,5	14,8	16,3	1,6	17,7	15,1	14,9
European Union	33,9	12,6	10,1	9,9	4,1	12,3	10,5	26,9
United Nations	32,0	27,3	37,6	18,4	9,0	26,8	24,0	29,6

Also confirmed is activists' mistrust of the institutions of representative democracy – not just national governments, which even if left-wing obtain the trust of not more than 10% of activists (with barely 2.2% of activists

expressing at least fair trust in Britain, but even among Germans a very low 8.6%); not even parliaments are trusted. There is decisively greater trust in local bodies (especially in Italy, France or Spain), and even though lower, for the UN (especially in Germany). A declining trust in the EU reflects the growing criticism of EU policy and institutions, with a politicization and polarization of positions during and after the French referendum on the European constitutional treaty. Similarly, the decline of trust in the UN between Florence (similar in Paris) and Athens confirms the growing dismay also among more moderate NGOs that had once trusted that institution.

The activists mistrust the EU accused of using competences on market competition and free trade to impose neoliberal economic policy while the restrictive budgetary policies set by the Maastricht parameters are stigmatized as jeopardizing welfare policies; privatisation of public services and flexibility of labour are criticized as worsening citizens' wellbeing and job security. Under the slogan 'another Europe is possible' various proposals were tabled at the first ESF, including 'taxation of capital' and, again, the Tobin Tax. Demands were also made for cuts in indirect taxation and assistance for weaker social groups, as well as for strengthening of public services such as education and health care. At the second ESF, the European Social Consult stated "we have learnt to recognize the strength of coordinated action and the vulnerability of the 'untouchable' organizations of capitalism. We need to deepen our contact and communication with society, decentralizing our struggle and working in local and regional context in a coordinated way with common objectives... the European Union is being shaped under the neoliberal politics. The European constitution comes to reinforce it and next year it will be our main goal to fight it".

The constitutional treaty is feared as "constitutionalization of neoliberalism". A participant at the seminar "Pour une Europe démocratique, des droits et de la citoyenneté", referring to the constitutional treaty, claims that:

"The first part of the text is similar to a constitution. But the third one, which focuses on the implementation of concrete policies, goes beyond the normal frame of a constitution. It constitutionalizes competition rights. Making rigid the policies to be followed, it takes away from the citizens all possibilities to change the rules. It is an unacceptable practice because it is anti-democratic. Anyway, all changes are made impossible by the need to obtain an unanimous vote by 25 states".

In the third part, "everything is subordinated to competition, including

public services, the relations with the DOM-TOM, and the capital flow (something that, by the way, make any Tobin Tax impossible)".

In particular, the lack of democratic accountability is criticized: "at the local level we have very low influence in the decision making process, but our influence becomes null in questions as the European constitution or the directives of the WTO or the IMF. We are even criminalized when we attempt it...". The WIDE-European NGO Network together with the Rosa Luxemburg foundations ask for basic services and goods, such as education, health and water, subordinated to democratic decisions, involving the local community, stating that public service as bases of fundamental rights, and stressing also the need to democratize the provision of public services.

Criticism of conceptions of democracy at EU level is also addressed towards security policies, with a call for a Europe of freedoms and justice against a Europe "sécuritaire et policière". In the first ESF, EU stances in foreign policies are considered as subordinated to the US, or environmental issues as dominated by the environmental-unfriendly demands of corporations, in migration policy as oriented to build a xenophobic "Fortress Europe". In the Paris ESF, the construction of a European judicial space is considered as a way to control police power. In particular, EU legislation on terrorism is criticized as criminalizing such categories as young, refugees, Muslims. EU immigration policies are defined as obsessed with issues of security and demographic needs (with a semantic shift from Muslim to young to potential terrorist). The official lists of "terrorist organizations" are considered as arbitrary (including groups that had already been funded by European institutions). Repressive measures are also criticized as ineffective, and the need for political solutions stressed. While terrorism is stigmatized, there is a call to "take a clear stand for international law, including the right of people's to fight occupation", but also to "defend national sovereignty". As for the EU foreign policy, there is criticism of the subordination of humanitarian politics and developmental help to commercial and security aims, recognizing the important role of the local population. Solidarity groups denounce the role or European states and corporations in Haiti, Latin America, Africa, aggressive EU trade policies, asymmetric negotiations of commercial treaty. In terms of defense policies, proposal ranges from "a Europe without NATO, EU-army and US bases" to the multilateralism and refusal of a nuclear Europe, more resources to the UN and the introduction of an Art. 1: "Europe refuses war as an instrument of conflict resolution".

Activists present at the various ESFs share these criticisms of EU politics

and policies. Interviewees from different countries stated in fact that the European Union strengthens neoliberal globalisation and a shared mistrust in the capacity of the EU to mitigate the negative effects of globalisation and safeguard a different social model of welfare (table 4). The data from the survey at the demonstration in Rome in 2005 called for protesting against the Bolkenstein directive confirm this image (with even stronger disagreement on the capacity of the EU to mitigate the negative consequences of economic globalisation). A later survey in Athens, showed a widespread belief in the need of building (alternative) institutions of world governance (93% of the respondents).

Table 4. How much do you agree with the following statements? (equilibrated sample)

	IT	FR	DE	ES	UK	ESF Total (%)	Rome 2005
a) The European Union attempts to safeguard a social model that is different from the neo-liberal one							
not at all	46.7	50.7	47.4	51.4	68.3	53.7	42.4
a little	43.7	35.8	43.6	38.5	26.1	36.8	37.7
Some	8.9	8.2	7.7	6.4	4.2	7.0	11.7
very much	0.7	5.2	1.3	3.7	1.4	2.5	4.0
Total	135	134	78	109	142	598	410
b) The European Union mitigates the most negative effects of neo-liberal globalization							
not at all	31.7	50.0	29.7	44.0	59.4	44.4	41.8
a little	51.1	27.9	48.6	40.4	21.7	36.6	40.5
Some	15.1	13.2	14.9	10.1	5.6	11.5	11.7
very much	2.2	8.8	6.8	5.5	13.3	7.5	1.5
Total	139	136	74	109	143	601	410
c) The European Union strengthens neo-liberal globalization							
not at all	3.6	3.0	2.4	1.5	6.1	3.6	4.6
a little	18.7	6.0	4.9	6.3	5.4	8.6	11.8
Some	43.2	32.8	35.4	38.7	15.0	32.3	31.7
very much	34.5	58.2	57.3	53.2	73.5	55.5	48.2

Total	139	134	82	111	147	613	410

Respondents at the first ESF in Florence were convinced that the EU favors neoliberal globalization, and that it is unable of mitigating the negative effects of globalization and safeguarding a different social model of welfare. While Italians expressed greater trust in the EU, and British activists were more euro-skeptic (followed by French and Spanish activists), the differences were however altogether small. Respondents in Athens confirmed a widely shared skepticism that strengthening the national governments would help achieving the goals of the movement (only about one fifth of the activists responded positively). Confirming the trends already observed on the battery of questions on trust in institutions, between the first and the fourth ESF there is a decline in those who support a strengthening of the EU (from 43% to 35%) and/or the UN (from 57% to 48%).

In general, the movement seems however aware of the need for supranational (macroregional and/or global) institutions of governance. At one of the plenary assemblies of the second edition of the ESF, Italian activist Franco Russo stated: "There is a real desire of Europe... but not of any Europe. The European citizens ask for a Europe of rights: social, environmental, of peace. But does this Constitution responds to our desire for Europe?". And the representative of the French union federation G10 Solidaires, Pierre Khalfa, declared that the Constitutional treaty "is a document to be rejected... [but] the discussion of the project is the occasion for a Europe-wide mobilization".

The image of "another Europe" (instead than "no Europe") is often stressed in the debates. During the second ESF, the Assembly of the unemployed and precarious workers in struggle states "For the European union, Europe is only a "large free-exchange area". We want a Europe based upon democracy, citizenship, equality, peace, a job and revenue to live. Another Europe for another World". And also, "To build another Europe imposes to put the democratic transformation of institutions at the center of elaboration and mobilization. We can, we should have great political ambition for Europe... Cessons de subir l'Europe: prenons la en mains". Unions and other groups active on public services proclaim "the European level as the pertinent level of resistance", among others against national decisions. The "No to the Constitutional draft" is combined with demands for a legitimate European constitution, produced through a public consultation, "a European constitution constructed from below". And many agree that "the Europe we have to build is a Europe of rights, and participatory democracy is its engine". In this vision, "the European

Social Forum constitutes the peoples as constitutional power, the only legitimate power". In a report on the seminar "Our vision for the future of Europe", we read "Lacking a clear and far reaching vision the EU-governments are stumbling from conference to conference. In this manner the EU will not survive the challenges of the upcoming decades! Too many basic problems have been avoided for lack of a profound strategic position. In our vision we outlined an alternative model for the future of Europe. It contains a clear long range positioning for Europe making a clear choice for the improvement of the quality of life for all and for responsible and peaceful development".

When moving from assessment of the existing institutions to the imagined ones, the activists of the first ESF expressed strong interest in the building of new institutions of world governance: 70% of the respondents are quite or very much in favor of this, including strengthening the United Nations, an option supported by about half our sample (see table 5). Furthermore, about one third of activists agree that in order to achieve the movement's goals, a stronger EU and/or other regional institutions are necessary (with higher support for the EU among Italian activists, and very low support among the British activists).

Statistic analyses (available on request) show that opinions about the strengthening of different institutions are not much influenced by gender, age or occupation (although support for the EU declines among manual workers and employees, trust in Europe and attachment to Europe among unemployed, attachment to Europe again among workers). The younger activists and the more educated are more in favor of the building of alternative institutions of world governance. Activists who locate themselves at the radical Left are more skeptical about the utility of strengthening the EU as a way to each the movement's aims (the same applies to the strengthening of the national governments), and are more convinced that the EU strengthen neoliberal globalization, trust less the EU and feel less attached to Europe. Significantly, according to the data on the anti-Bolkestein protest, the belief that the EU strengthens neoliberism and does not defend the social model is especially widespread among those who work in education and third sector.

Table 5. In your opinion, to achieve the goals of the movement would it be necessary: (ESF, equilibrated sample)

a) to strengthen national governments?

	Italy	France	Germany	Spain	Great Britain	Total

not at all	57.3	49.6	56.3	48.5	87.9	(61.4) 362
A little	26.6	18.7	27.5	25.2	4.3	(19.5) 115
enough	14.0	20.3	11.3	15.5	5.7	(13.2) 78
very much	2.1	11.4	5.0	10.7	2.1	(5.9) 35
Total	143	123	80	103	141	590

Cramer's V= 0.21 significant at 0.001 level

b) to strengthen the EU and /or other regional institutions (Mercosur, Arab League, etc.)?

	Italy	France	Germany	Spain	Great Britain	Total
not at all	33.8	32.8	44.4	34.6	85.2	(47.5) 281
A little	28.1	18.0	22.2	28.0	5.6	(19.8) 117
enough	27.3	25.4	14.8	25.2	4.9	(19.5) 115
very much	10.8	23.8	18.5	12.1	4.2	(13.2) 78
Total	140	123	81	107	142	591

Cramer's V= 0.27 significant at 0.001 level

c) to strengthen the United Nations (giving them power to make binding decisions)?

	Italy	France	Germany	Spain	Great Britain	Total
not at all	27.7	29.4	27.4	27.4	76.9	(39.1) 234
A little	18.4	12.7	14.2	14.2	7.0	(13.9) 83
enough	29.8	26.2	31.1	31.1	6.3	(23.2) 139
very much	24.1	31.7	27.4	27.4	9.8	(23.9) 123
Total	141	126	83	106	143	599

Cramer's V= 0.26 significant at 0.001 level

d) build new institutions of world governance?

	Italy	France	German	Spain	Great	Total

			y		Britain	
not at all	24.1	15.3	31.3	11.4	21.3	(20.3) 123
a little	15.6	4.4	13.4	10.5	6.4	(9.7) 59
enough	24.8	27.7	21.7	23.8	7.1	(20.8) 126
very much	35.5	52.6	33.7	54.3	65.2	(49.3) 299
Total	141	137	83	105	141	607

Cramer's V= 0.18 significant at 0.001 level

Moreover, the activists of the first European Social Forum expressed quite a high level of affective identification with Europe (see table 6): about half of the activists feel enough or strong attachment to Europe, with also in this case less support from British and Spanish activists and more from French, Germans, and Italians. The activists of the ESFs therefore do not seem to be euroskeptics, wanting to return to an almighty nation state, but "critical Europeanists" (or "critical globalist"), convinced that transnational institution of governance are necessary, but that they should be built from below.

Table 6.. To what extent do you feel attached to Europe?

	Italy	France	German y	Spain	Great Britain	Total ESF %
not at all	17.9	9.1	12.8	20.7	27.8	18.2
a little	29.3	31.8	29.5	49.5	31.9	34.2
enough	45.7	43.9	37.2	28.8	26.4	36.5
very much	7.1	15.2	20.5	0.9	13.9	11.1
Total	140	132	78	111	144	605

These positions are in line with the debates in the ESFs. Already in the first ESF in Florence, specific proposals for changes in EU policies come from networks of social movement organizations and NGOs, often already active on specific issues. So the European assembly of the unemployed and precarious workers in struggle stress the importance of developing claims at the EU level (e.g. a minimal salary of 50% of the average revenue), a

network of unions of cadres proposes a Charte de responsabilité de cadres a l'echelle europèenne; groups involved in the promotion of Esperanto as well as associations from ethnic minorities make proposals for linguistic and cultural rights, the European social consult states asks to "strengthen and widen the European social fabric in a network that should be participatory, horizontal and decentralized, as much in the taking of the decisions as in the realizations of actions". Proposals for economic reform are developed by European Union for research in economic democracy. Humanitarian NGOs debate measures against religious and ethnic discrimination, including the potentials of EU directives and national legislations.

Concrete proposals to improve the quality of democracy were also suggested during the second ESF. They went from the establishment of an annual day of action devoted to media democracy to the building of alternative media (workshop on Reclaim the channels of information: media campaigns and media protest), from the reduction of import taxes on medicines to the increase in the use of non-conventional medicine (seminar on Health in Europe: Equity and Access), from the introduction of the right to asylum in the European constitution to the regularization of all "no-papers" migrants (workshop on Right to migrate, right to asylum); from a European social charter that recognises the right to decent housing to the occupation of empty buildings (workshop on "Housing rights in Europe: towards a trans-European network of struggles and alternatives"); from the dialogue with local authorities to participation of the people in the development of international experiences of cooperation (workshop on Decentralized cooperation: a dialogue between territories as a response to global challenges); from the quality control on hard drogues to liberalization of light ones (Workshop on Perfect enemies: the penal governance of poverty and differences) all at the first ESF. Specific debates focused upon issues such as the EU policies on commercial agreements; youth rights in Europe; Christianity, Islam and Ebraism in Europe; national extremism in Europe; financiarization and workfare; the contribution of the Churches to the construction of a new Europe; European policy on employment; Europe seen by African eyes; Ecological crises in Europe; the place of Islam in Europe and islamophobia.

Europe remains similarly central at the fourth edition of the Forum where seminars (that in large majority have "Europe" in the title) discuss at the European level issues as diverse as the fight against poverty and institutional racism, the Charter of common principle of another Europe and the restriction of liberties, health systems and NATO, camps for migrants and the Ocalan case, education and relations with Southern Mediterrean countries, corporate politics and labour rights, relations with

Latin America and with the UN, the populist Right and new oppositional actors, left-wing journalisms and housing problems, the Bolkenstein directive and precarious workers, the Lisbon and Bologna strategy and constitution building, local governance and the WTO, taxation and Islamophobia, violence against women and students' mobility, linguistic equality and basic income, Roma's rights and the US military bases, agricultural policy and madhouses, human trafficking and sanctions against Israel, monotheistic religions and position towards Cuba. The Call of the European Social Movements in Florence framed all these themes under the label of a struggle against neoliberism:

"We have gathered in Florence to express our opposition to a European order based on corporate power and neoliberalism. This market model leads to constant attacks on the conditions and rights of workers, social inequalities, and oppression of ethnic minorities, and social exclusion of the unemployed and migrants. It leads to environmental degradation, privatisation and job insecurity. It drives powerful countries to try and dominate the economies of weaker countries, often to deny them real self determination. Once more it is leading to war."

The discourse on the defence of public good (such as water) is framed as oriented to overcome the culture of merchandizing, but also of a national sovereignty that refuses solidarity with the external world. At the same time, there is the attempt to enlarge the notion of Europe beyond the European Union and the fear of an exclusive European identity as representing the "civilized" culture against the non-European civilization. Criticizing "the arbitrary decision of the EU to cut funds to the National Palestinian Authority is unacceptable and exacerbates the whole situation", the Declaration of the Assembly of the Movements of the 4th European Social Forum focuses attention on the dangers of a polarization of the global citizens along a "clash of civilization", which would justify a further discrimination against the people of the South. It stated in fact that: "Conservative forces in the north and the south are encouraging a "clash of civilization" aimed at dividing oppressed people, which is in turn producing unacceptable violence, barbarism and additional attacks on the rights and dignity of migrants and minorities.

Beyond the concrete policy choices, criticism also addresses the secretive, top-down ways in which these policies are decided. The Assembly of the third ESF asked, among others, for more participation "from below" in the construction of "another Europe": "At a time when the draft for the European Constitutional treaty is about to be ratified, we must state that the peoples of Europe need to be consulted directly. The draft does not meet our aspirations. This constitutional treaty consecrates neo-liberalism

as the official doctrine of the EU; it makes competition the basis for European community law, and indeed for all human activity; it completely ignores the objectives of ecologically sustainable society. This constitutional treaty does not grant equal rights, the free movement of people and citizenship for everyone in the country they live in, whatever their nationality; it gives NATO a role in European foreign policy and defence, and pushes for the militarisation of the EU. Finally it puts the market first by marginalising the social sphere and hence accelerating the destruction of public services".

IV. A EUROPEAN SOCIAL MOVEMENT? SOME CONCLUSIONS

"One can be against a Europe that supports financial markets, and at the same time be in favor of a Europe that, through concerted policies, blocks the way to the violence of those markets... Only a social European state would be able to contrast the disaggregative effects of monetary economy: so one can be hostile to a European integration based only upon the Euro, without opposing the political integration of Europe":

> "Contestation is a crucial pre-condition for the emergence of a European public sphere rather than an indicator for its absence. The more contentious European policies and politics become the more social mobilization occurs on European issues, the more we should observe truly European public debates. If political issues are not contested, if European politics remains the business of elites, the attention level for Europe and the EU will remain low. European issues must become salient and significant in the various public debates so that a European public sphere can emerge."

Support for Europe is a polymorphic term that refers not only to different processes, but also to different 'Europes'. In our research we have discussed different indicators of support for Europe, and the different imaginations of Europe: as it currently stands, and as it ought to be (according to our interviewees). A first finding, which we think is worth stressing, is that if European integration has long been an elitist project, its evolution involves pressures "from below" – from social movement organizations, associations and NGOs. The ideology of a regulatory Europe, legitimized by good performances, appears less and less convincing: producing policies, the EU became a target of claims and protest. In this process, national actors of different types started to address the EU. If those richer in resources have been the first to open headquarters in Brussels, resource-poor actors have also started to network supranationally and framed European issues. Vertical integration created horizontal processes that while legitimizing the European institutions by

recognizing them, also politicized the European public sphere by contesting public decisions.

Our analysis on the European Social Forums have shown the emergence of European protest actors, who are innovative in term of identity, strategies and organisational structure that go beyond the boundaries of the nation states, addressing the institutions of the multilevel European Governance. They are characterized as loosely structured networks of networks of organizations and activists, with frequent overlapping membership at micro-level as well as interlocking campaigns at the organizational level. Activists are experienced with various strategies of political participation and, although critical of the European institutions, promote through their action and campaign a European identity.

Looking at the frames and discourses of these activists, as well as those of their organizations, we have observed the development of a form of "critical Europeanism" which is fundamentally different from the traditional 'nationalist' Euro-scepticism on which research on Europeanization focused so far. According to our survey activists from different countries express strong criticisms of the actual politics and policies of the EU, but they also show a high identification with Europe and a certain degree of support for the European level of Governance.

As occurred during the construction of the nation state, the focusing of protests at the national level followed the centralization of decisional power. Social and political actors also moved on multiple territorial levels: alliances with the *state-builders* targeted local governors, but there were also alliances among the periphery against the center. The construction of the nation state has however been a conflictual process: citizens' rights are the results of social struggles. Democracy emerged with the contestation of public decisions: criticism of national governments contributed to legitimizing the state as the main decisional level. Even avoiding pushing too far the parallel between nation building and the construction of peculiar and anomalous supranational institutions, such as the European Union, our research appears to confirm the development of a "Europeanization by contestation".

As observed in the two quotes reported in the *incipit*, support for the process of European integration cannot be measured in terms of (more or less permissive) consensus towards the decisions of European institutions. Even supporters of the construction of supranational institutions might stigmatize, even radically, a community treaty considered as too intergovernmentalist or too neo-liberal. Those who criticize free market Europe, could support – as Bourdieu did – a social Europe. A contested

public debate is indeed – as Thomas Risse recalled – the only path towards the creation of a supranational democracy. It is indeed not a silent consensus with the governors that signals a democratic process, but instead to submit their decisions to the "proof of the discussion". It is not the agreements upon borders, ideologies and various cleavages, but the public debate about them which indicates the existence of a European public sphere. Civil society actors appear in this frame as critical Europeanists, in favor of deeper integration but with policies very different from those that have thus far characterized the "negative integration" dominant in the EU. In line with the results of other research – departing from an analysis of party positions based on expert evaluations – our data confirms that a call for more integration on environmental, labor, and cohesion policies tend to meet with demands for more European integration. Social movement criticisms are in fact directed toward what is perceived as the survival of the prevalently economic nature of European integration, linked to the idea of Europe as part of the Western world, thus emphasizing Western values. The stability pact in particular is criticized as one of the principal examples of the neo-liberal policies privileged by already privileged groups, which reduce welfare for the poor and disadvantaged. They do not call, however, for a return to the nation state, but for a process of Europeanization from below.

NATIONAL, SUPRANATIONAL, AND GLOBAL: AMBIVALENCE IN THE PRACTICE OF CIVIL SOCIETY

Günter Frankenberg*

I. METAMORPHOSES: ON THE GEOGRAPHY OF CIVIL SOCIETY

In the national context, talk of civil society has ceased. We are left with only a distant memory of the protest movements of the tumultuous 1980s; whatever there was to analyse and criticise has been analysed and criticised. But this appearance is deceptive because elsewhere, wars are being waged. Civil protests have ascended into the supra- and transnational realms. Civil society, in the form of organisations such as Amnesty, Attac, Greenpeace, Friends of the Earth, the International Rivers Network and People's Global Action, busies itself by uncovering the secrets of the opaque world of comitology – that network of EU advisory committees – and acts as a counterbalance to the prevailing forces of the globalised world of the UN, G7, the WTO, the IMF and the World Bank.

Whosoever chooses to accompany this exodus into the higher realms must acquaint themselves with the varied usages of the term "civil society", for this nomenclature has a changing and tumultuous history and an uncertain future. If one were to attempt to pinpoint the whereabouts of civil society, one would trace, in the conceptions of political philosophy, three noticeable changes of address.[1] From the age of the Greek *polis* up until the greats of modern philosophy, Hobbes and Kant, civil society manifested itself in the twin guises of the political and public in formulas such as Kant's *civitas sive societas civilis*. Alternately, civil society can be conceived of as the natural border between the state-centric province of public transactions and the politically impoverished quarter of the private life; that is the "home".[2] Under the influence of early modern sovereignty theory and the philosophy of Montesquieu, the etymology of civil society gradually shifted towards the duality of political and civil spheres: the *Etat*

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* Johann-Wolfgang von Goethe Universität, Frankfurt am Main. Translated from the German original by Rory Stephen Brown, Doctoral candidate, Law Department, EUI. Thanks to the Centre for Commercial Law at Queen Mary's University, London, who funded this translation.

[1] For more detail on these changes, see G. Frankenberg, *Die Verfassung der Republik*, (Nomos: Baden-Baden 1996) Chapter 2

[2] In the second half of the 20th Century, Hannah Arendt, in her philosophical texts, appeared as the heir to this *polis* tradition. See H. Arendt, *Vita activa oder vom tätigen Leben* (Stuttgart: W. Kohlhammer Verlag, 1960) and *Über die Revolution* (München: Hanser, 1974)

civil no longer directly opposes the *Etat politique*. This notwithstanding, the contours of the civil landscape have not sharpened in focus. Often, theory settles on the opposition between the state on the one hand, and the society of private ownership on the other, which is stylised in the liberal paradigm as the opposition between authority and harmony. [3] The predicate, "civil" or "private" becomes synonymous with "non-state", the content and borders of which define property and market, and later, competition. Marx accordingly described civil society as the apolitical "sum of the material living conditions after the event of the English and French in the 18th Century".[4] After the exhaustion of the idea of the polis, and the waning of the liberal paradigm in an age of state interventionism, a conception is developing (often without reference to its Hegelian connections), in which civil society occupies a position between "Haus" (family and economy) and "Herrschaft" (state or authority). This followed the lead of Scottish moral philosophers and French physiocrats, who had distanced themselves from Artisotelian dogma, according to which the economy is understood as the fundament of the "Haus", entirely separate from the political-public sphere. Civil society materialised as a societal phenomenon in connection with Tocqueville's observations on democracy in America; shackled neither by political nor private fetters, civil society is constituted by the diverse intermediary organisations with their various programmes, challenges, interests and projects. The term civil society can be understood as delineating an area, but, in the context of societal phenomena, it can more pertinently be conceived of as describing a practice, namely the self-organising activity of society in the resolution of unavoidable conflicts by civil means.[5] Secondly, the notion of civil society connotes procedural and institutional public life, which entails the influential participation of the citizen in politically institutionalised will-formation.

A coda to the early history of civil society: the post-liberal paradigm of an activist theory of politics and the idea of self organisation of society through voluntary associations played a central but temporally and spatially limited role in the "progressive era" in the United States, as New York intellectuals, in their urban milieu, briefly bade farewell to *laissez-faire* capitalism in favour of a systematically interventionist state. The current career of civil society is thanks to the model of the anti-totalitarian, social-

[3] A. Smith, *Wealth of Nations*, (Edinburgh, 1776)

[4] "Gesamtheit der materiellen Lebensverhältnisse nach dem Vorgang der Engländer und Franzosen im 18. Jahrhundert". See K. Marx, *Zur Kritik der politischen Ökonomie*, 1859, MEW 13 (Berlin 1951), 12; A. Ferguson, *An Essay on the History of Civil Society*, (Basil: London, 1789).

[5] To put it bluntly and somewhat imprecisely: democratic "dispute" culture

and human rights orientated dissent movements in Middle and Eastern Europe in the late '70s and '80s. These movements, even for Western societies, catalysed the ripening of the idea of the civil society as a vision of a republican and radically democratic togetherness. [6] After the (re-)domestication of the term, the '90s heralded its notable worldwide proliferation, with an equally salient diffusion of variations of the post-liberal paradigm, for example, in China or in Islamic societies. This dissemination of the term led inexorably to considerable dilution of its meaning. The Chinese "civil society without democracy" typifies this semantic bankruptcy.

If anything, the silence enveloping civil society is localised in the national context of the West European state. With occasional exceptions, (e.g. the movement against Castor transportation) the peace, environmental, and women's movements seem to have their most active years behind them. In the theoretical discussions, all relevant arguments have been exchanged.[7] Even the Enquete-Commission of the German Parliament has put the sessions on the "future of bourgeois commitments" on ice. As was indicated at the offset, appearances deceive because the battles of (and about the concept of) civil society take place on the transnational plateau. The discovery of civil society in the EU and global(ised) context, in particular after the protests against the IMF, WTO and the politics of heads of state at G7 and G8 summits, means that it is worth questioning whether the semantic arguments have really been set aside. What role does civil society play in the transnational context? The following thoughts concentrate on a clarification of the usages of the term "civil society" (II); a discussion with the critics of those usages (III); the ambivalent approach of practice toward supranational civil society amongst an organised European civil society (IV); and on the international level with respect to a *global civil society* (V).

II. Civil Society as Utopia and Self-description

To know what one is talking about is always helpful, and this is particularly valid with respect to the politically and semantically loaded, oscillating,

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[6] From the extensive literature on this topic see, in particular: U. Rödel, G. Frankenberg & H. Dubiel, *Die demokratische Frage*, (Suhrkamp: Frankfurt/Main, 1989); E. Gellner, *Bedingungen der Freiheit. Die Zivilgesellschaft und ihre Rivalen* (Klett-Cotta: Stuttgart, 1995).

[7] For a meticulous digest of this topic, see A. Klein, "Der Diskurs der Zivilgesellschaft: Politische Hintergründe und demokratietheoretische Folgerungen" in *Politische Vierteljahresschrift* 43/4 (2002) 681-683. More comprehensively, see V. Heins, *Das Andere der Zivilgesellschaft: zur Archäologie eines Begriffs* (Transcript: Bielefeld, 2002).

and fuzzy terminology of civil society. The same is true, as will be shown, for critics of the discourse pertaining to civil society, and so three usages of the term "civil society" should be distinguished here:

First, civil society is a project: the utopia of a self-organising, democratic society, one respectful of human rights and civil liberties. Since the time of the philosophical founders of the liberal paradigm, this project has been idealistic, progressively drafting since its very founding the blueprint of a future and only partially realised civil society, in which people live together as interactive, peaceable citizens. Freely and independently, these people gather themselves into associations, in the public fora, cooperating and reaching mutual agreement on the communal transactions of society, under the rule of law and the constitution, without untoward interference from a despotic, totalitarian or paternalistic state, with measured tolerance for diversity and for the establishment of a minimal solidarity, conducive to social equality. [8] Tocqueville gave this project, the form and substance of which he (not necessarily erroneously) identified in American society, the title of "society of equality".

Second, civil society is used as a critical tool, which enumerates the elements of the project as normative, anti-authoritarian yardsticks. These yardsticks permit the disappointing reality to be compared (unfavourably) to an aspirational normative blueprint. In this context, civil society becomes a weapon which can be brandished in the face of an authoritarian regime, an officially regulated public sphere, curtailments of free expression, an entrenched system of governance or other institutional structures or phenomena which emasculate or undermine the public.

Third, civil society functions as a descriptive or analytical term,[9] which separates a specific sphere, the non-political, the associative scene, or the realm of self-organisation from the province of the state. Alternatively, the term may be used to chart the borderlines between/beyond the state, the economy and the private sphere. Clearly, the words "between" or "beyond" (state and market) indicate, on the one hand, a transition to a post-liberal paradigm and, on the other, the inadequacy of the logic of this demarcation. In what follows, the logic of demarcation is converted into

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[8] In addition, see J. Kocka, „Das Bürgertum als Träger von Zivilgesellschaft – Traditionslinien, Entwicklungen, Perspektiven" in Enquete-Commission's "Zukunft des Bürgerschaftlichen Engagements" at 16; and G. Frankenberg, *supra* note 1, Chpts 2 and 5.

[9] J. Alexander, ed., *Real Civil Societies – Dilemmas of Institutionalisation*, (Sage: London, 1998); H. Anheier, M. Glasius & M. Kaldor, eds., *Global Civil Society 2001*, (Oxford: OUP, 2001).

sheer heuristics; facilitating the analytical fencing-off of an area of action comprising the activities of clubs, social movements, and non-governmental organisations. This practice encloses a symbolic field of public discourse, with moveable boundaries, in which the public engagement of predominantly weak institutionalised groups, initiatives, societies and networks takes root. This field is adjacent, but not necessarily in opposition, to state and market.

The descriptive-analytical term usefully pertains to the practice of voluntary public associations. We can distinguish an *internal* and an *external* aspect, which are intertwined in this practice. For both, it is noteworthy that the predicate "civil" is of real import, and the players in this game, that is, the active citizenry, and the rules of the game, are distinguishable by virtue of a specific relationship to the law. The *internal* aspect describes the *integrative* significance of civil society. Here, "civility" is the watchword with respect to the modalities of civil disagreements. Civility implies on the one hand an ability and readiness of individuals to act in collectives (agency), and on the other an intimate relationship to the ethic of equality. In discussions in the realm of civil society, the actors signal their adherence to this ethic by restraining themselves to civil means of conflict-resolution and by recognising the right of their opponents to voice their private or political interests in public fora. On the basis of this condition (the ethic of equality), conflict resolution in civil society creates or represents social capital and that minimum of solidarity, required by a society of individuals for its social cohesion. Now, this description of conflict resolution in civil society, or, a democratic argumentative culture, has clear normative implications. Crucial to the suitability of this terminology for civil society as a descriptive and not a prescriptive tag, is that these implications are not attributed to the observed reality, but are demonstrable in the observable practice of associations. If that is not the case, for example in civil war or where massive and systematic transgressions of the prohibition of violence are taking place, in hierarchically structured (inegalitarian) societies, or in highly paternalistic societies, the term civil society is inapposite. Similarly, the Chinese solution, of a civil society *sans* democracy is plain nonsense, or the sheer ideology of an autocratic strategy for the cementing of power through reforms from above. This type of regime has nothing in common with the definition of civil society proposed here.

The *external* aspect constitutes the meaning of civil society for the establishment of legitimately reached official decisions. As a result of efforts to influence the public, political office holders, institutions, or economic actors and groups, public associations, particularly those dedicated to freedom of expression and association, have a public utility.

In this sense, civil society, with its specific organisational structuring of free will and its communicative rationality, mediates between the different sectors of national state society and its organisational forms (bureaucracy, market) and rationalities (power and exchange).

The difference between the internal and external aspects attaches to the everyday usages of the terminology and permits the more accurate rendering of the normative implications and the potential ambivalences of civil societal practice: civility or civil society characterises, as a democratic predicate, the manner of social intercourse in the form of spontaneous, voluntary self-organisation. It refers to the autonomy of the citizenry and the constitutional embodiment of the general rights and liberties of action and association. It is questionable whether or not the organisations and associations of civil society may lose their civil quality or be degraded where they are supported by the state or partially integrated into official decision-making processes, with its correlative demands of representative and responsible structures.

Civil society also refers to the place and mode of social intercourse in public arenas, that is, outside of the institutional or official (or economic) decision-making processes, and is, in a broad sense, geared towards the public interest. This republican-democratic component may be understood as the expression of special rights to political communication and participation in public fora. To that extent, the predicate, "civil", must be jettisoned where the activities of the citizenry lose that public quality, and/or when they are conducted in a strictly prudential manner. Finally, as a synonym for *civility*, civil society contains clear normative connotations, and prescribes a particular modality for conflict resolution and the pursuit of interests. Civility describes the self-denial of violent modalities, and, at the same time, implies tolerance and an ethic of equity: the actors in civil society come to the table as equal partners and renounce notions of preference or the natural right to violate the physical integrity of their contemporaries with force or duress. It follows that organisations no longer deserve or enjoy the tag of civil where they dispense with these notions of egalitarian, horizontal, civil confrontation, taking the law into their own hands.

If one insists, as I do, upon these components of voluntarism, public*ity*, and civility, then "civil" functions as a prescriptive term, which would presumably exclude the activities of the Mafia, the Ku-Klux-Klan, or clandestine, paramilitary, national-socialistic groups from its remit. That the understanding suggested here does not resolve all the conflicts is demonstrated by the sections on European and Global civil society. Incidentally, the various interpretations of the paradigm of civil society

create tension. From the liberal point of view, civil society animates the democratic process and guarantees that social preferences and interests are properly voiced and represented [10]: political decisions enjoy greater legitimacy as a result. From the communitarian point of view, civil society, boasting a culture of voluntarism and its various trappings, actualises "common values" of a communal society.[11] From a republican point of view, civil society revitalises the idea of public freedoms, that is a democracy of association, or simply civil virtues that facilitate the running of a representative democracy. The strengths attributed to civil society are as formidable as the dangers that imperil its existence: it is considered a nostrum by liberals, a cure for the symptoms of excessive official interventionism, while communitarians regard community groups as a cosy homestead of shared values, preferential to the cold legal-bureaucratic environment; while republicans overburden members of the societal associations by obsessively fixating on their civil roles and responsibilities. At its base the spontaneous, self-organisation of civil society is threatened, either legally formalised, banalised, co-opted or governmentalised by state administrations, that is, incorporated into state decision-making procedures and/or overburdened with the imposition of tasks by the government.

III. CRITIQUE AND RIPOSTE

Before analysing the roles and abilities of civil society on the transnational level, I wish first to engage with several criticisms, in order to prevent avoidable misunderstandings accompanying us on our journey from the national to the transnational. The first criticism concerns the theoretical inflation of the description "civil society" from a sphere or sector of society (or a specific practice of associated actors) to an elaboration of the entire community, and this complaint should be considered in unison with the foregoing observations and terminological clarifications. Thereafter, it should be clear in the following discussion that, in the national context, a logically demarcated, total conception of civil society – for example as a total demos or an association of associations – is both theoretically and empirically implausible.

A further criticism aims at conceptions of civil society which, rather than exorbitantly inflating its meaning, attribute to it, as a politicised sector, a special role: namely as a policy centre. The criticism runs like this: "the semantics of civil society [can be seen] as a utopian vanishing point against

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[10] For this, see K. A. Armstrong, "Rediscovering Civil Society: The European Union and the White Paper on Governance", in *European Law Journal* 8 (2002), 102 ff.

[11] R. Bellah, R. Madsen, S.M. Tripton, W.M. Sullivan & A. Swidler, *The Good Society*, (New York: Knopf, Random House, 1991).

the differentiated society of unity".[12] That in such besieged conceptions of the civil society it takes over the functions of which Luhmann disapproves, namely that of a normative or critical yardstick of an observatory or a policy centre,[13] would hardly be a scandalous condemnation unless, of course, the dicta of the founder of modern systems theory had the character of canonised remedies for the post-modern, disregard for which would incur social opprobrium from groups of believers. This criticism is not watertight: in reality, actors in civil society (like actors in other fields, but due to the politicisation of their practices, particularly those in civil society) perceive their activities as supplementary or complementary phenomena. Systems theory cannot evade this conclusion and still enumerates – not entirely ironically – a society of societies. To paint oneself a picture of the society of societies, or a world society, seems to be an anthropological *fait accompli*. That does not mean that in practice theoretically grounded functional differentiation should be abandoned, however in contradistinction to systems theory, the embattled action-theoretical viewpoint perceives the quotidian background assumptions – without also assuming that these are a correct description of society – and takes the political imagination of individuals seriously. It remains lodged in a pluralistic or, if you prefer, a polyarchical perspective: "Civil society no longer submits itself to an image of unity".[14]

This "criticism of unity", although slightly off-target, is not easily dodged, as it refers to a converging tendency of thinkers leading towards civil societal conceptions: politicism. This describes the overestimation and overburdening of the citizenry as "full time activists" of participatory democracy, in the realm of public freedom in a republic. Contrary to such a misunderstanding, probably arrived at due to the democratic question, it is worth noting that the members of social movements and networks do not have to make significant, enduring contributions in order to be understood as actors in civil society.

A third complaint arises apropos the normativity of the discourse about civil society, in that some conceptions read like the tenets of liberal constitutionalism. On the other hand, however, a civil society may not

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[12] On the object of the criticism, see: Rödel *et al*., *supra* note 6. For further critique, see D. Richter, "Zivilgesellschaft – Probleme einer Utopie in der Moderne", in: R. Eickelpasch &Armin Nassehi, eds., *Utopie und Moderne*, (Suhrkamp: Frankfurt/Main, 1996) 170 ff.; and, in agreement, U. R. Haltern, *Integration als Mythos*, (CUP: Cambridge, 1996) 87.

[13] U. Haltern, *ibid*

[14] "Die Zivilgesellschaft fügt sich ... nicht länger in das Bild einer Einheit". See Rödel *et al*, *supra* note 6, 101.

obtain without normative connotations and implications. Denormativised civil society would be mere society, the "civil" having been rendered otiose. As an alternative to the nomenclature of "civil", a society might be termed "civilised", "orderly", "unofficial", or "regulated" in order to describe the distinguishing normative features of its social practice. It is not contentious that "civil society" presupposes a society that refrains from certain actions; we are not, therefore, discussing the purity of the conception, but its coherence and concordance with the observed phenomena. Not every form of protest deserves the title "civil", and it does not speak for the suitability of categorisations when civil society, by dint of its ethic of equity and self-restraint, is entitled, the "community of the well-intentioned".[15]

Additionally, the complaint that the conception of civil society is normative, can be met by ascertaining whether associations trumpet civility as a model for argumentation or protestations, alternatively, it can be determined from social practice. If one presumes that a relatively robust and enduring democratic, discursive culture signals that the actors feel themselves bound by a fundamental convention, a mere empirical fact of civil reason and restraint has been evinced. Above all, the (self-)annointing as a civil society offers only a vain snapshot, it tells us nothing of either the stability or subversity of the civil societal attitude of mind, or of its resistance to corruption and an overzealous, over-intrusive state.

IV. THE "EUROPEAN CIVIL SOCIETY"

Not entirely coincidentally, the terminology of civil society featured in the debates over the democratic tweaking of governance in the EU. The White Paper on Governance,[16] distributed in July 2001 by the Commission, officially continues the discussion of the further development of community methodology and the Union's democracy. Its drafters pay attention to the growing cleft between the successes of European integration on the one hand, and, on the other, the disappointment and alienation of the "Europeans".[17] To questions such as

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[15] "Volksgemeinschaft der Gutmenschen". See V. Heins, *supra* note 7

[16] European Commission, European Governance: A White Paper, COM (2001) 428 final. In addition, see P. Craig & de Búrca, *EU Law – Text, Cases, and Materials*, 3rd edition. (Oxford: OUP, 2003), 173 ff. and for a critique on the contributions to the symposium, see: Responses to the European Commission's White Paper on Governance, www.jeanmonnetprogramm.org, in particular, G. Marks, F. Scharpf, P. Schmitter & W. Streeck, *Governance in the European Union*, (London: Sage, 1996)

[17] For more detail on this point, see J. Scott & D. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union" *European Law Journal* 8

how those who are governed from Brussels can be included in the community system, how their influence can be secured, and how the democratic deficit may be restituted, governance and civil society should be considered as being two of the possible answers.

What can still be detected in the anti-totalitarian dissident groups and civil movements in middle and Eastern Europe, can now also be identified in the context of the EU as a *top-down* project run by enlightened technocrats. The target of the reform project is, *inter alia*, the improvement of "rules, processes and behaviour that affect the way in which powers are exercised at the European level, particularly as regards accountability, clarity, coherence, efficiency and effectiveness".[18] For several years, especially with respect to subsidiarity and its traditional formulation, which informs the politics of constant consultation with "outside interest groups", the Commission has attempted to expand and formalise "open and structured dialogue" with the representatives of "organised civil society".[19] There is emphatic talk of citizens ceasing to be passive "objects" of the administrative process, and maturing into "stakeholders" who play active roles. The solution for the incorporation of civil society and corresponding direct responsibility is called, in the dry *communitese* of the Brussels administration, "regulated and systematic consultations".

The formalised and institutionalised structure of this (admittedly not new) partnership between Brussels elites and the civil society is expressed in both challenges and efforts: firstly, a full frame for the politics of consultation complete with principles and criteria; secondly, greater transparency for the consultations arrangement in the form of expert groups, advisory bodies and other fora with representatives of the civil society; and thirdly, a legal basis for the structured dialogue with the community of NGOs. This legal grounding was intended to acknowledge the role of NGOs and accredit them without, however, giving them procedural or concrete rights.

It is beyond contention that such reforms would improve the decision-making process on the supranational level, and would garner more wisdom,

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(2002), 1 ff.; O. de Schutter, "Europe in Search of its Civil Society" *European Law Journal* 8 (2002), 198 ff. and K.A. Armstrong, *supra* note 10.

[18] White Paper, Work Area no. 2.5, and subsequent. In addition see also: Economic and Social Committee. The Role and Contribution of Civil Society Organisations in the Building of Europe, CES 851/99 from 22.9.1999, Chpt. 5.2

[19] See the Brussels language regulation on the back of Art. 257 EC regarding the amalgamation of the Business and Social Committees (ECOSOC)

and certainly more legitimacy for the Commision's pronouncements. Equally obvious is the initial charm exhibited by the notion of a European civil society, that is the hope that as a fragmented and diverse *demos*, it can, a) realise a synthesis of national and supranational government and, b) institute a participatory democracy tailored to the European multilevel system. By virtue of their openness to plural membership, associations, networks and clubs are better positioned to sweep away the ashes of an ethnocentric nationalism than the notion of European citizenship. It can also be assumed that the inclusion of the "organised civil society" in *European Governance* can smooth the transition from a mindset of goal-orientation to an ideal of *process*.[20] Of course, expectations should not be set too high, and, naturally, the civil society project should be regarded as an attempt to cautiously and in an orderly manner reform the elite, technocratic *Governance* regime. In particular, a wide berth should be given to risky experiments with direct democracy.

Whoever wishes to criticise the mode of incorporation of organised civil society into *European Governance*, should avoid a potential pitfall, that is, the EU-administration should not be accused of selective accreditation of civil associations. From the point of view of Brussels, this integration strategy is neither surprising nor illegitimate, let alone open to critique. The following observations question the assumptions that a *top-down* strategy is in the interests of the EU Commission and that it would concord with the *modus operandi* of an enlightened administration. Here, however, the perspective of civil society is expressly adopted and the representatives of that *corpus* are asked to reflect on whether or not the negative ramifications of their accreditation outweigh its benefits. If one considers the logic of the White Paper, and earlier statements made by the Commission and expert groups, a not entirely unproblematic *rank structure* for civil society reveals itself. The first rank constitutes the veteran social partners of the decision-making process, e.g. employers and employees.[21] They may be identified by a high level of institutionalisation and a transnational, union-based organisation, which without any friction, can operate in a multilevel system, while the number and importance of their represented members secures them influence in the Commission. The gravitas of their interests, which they represent with real bureaucratic power, lies in the socio-economic realm. In second place, we encounter the "nobility" of the civil society: an inconspicuous albeit many-sided and diversely organised group of organisations, amongst which the NGOs stand out. (The latter are represented and accredited in Brussels, if

[20] On this decision, see F. Scharpf, *Regieren in Europa*, (Frankfurt/Main: Suhrkamp, 1999) and "Democratic Policy in Europe" *European Law Journal* 2 (1996), 136 ff.

[21] cf. Art. 138, 139 and 257 EC

predominantly on an informal basis.) Unlike the social partners, the second rank groups lack mass, and are elite organisations, *à la* Greenpeace, and part-NGO, such as the "Platform of European Social NGOs", and networks with democratic structures. They have a high profile as a result of their spectacular activities (after the fashion of Greenpeace) and imposing media presence, and they enjoy excellent organisational resources, professional expertise and close, familiar contact with the EU-administration. The interests they represent are less noticeable and more diversified than those of the social partners, while their chief concerns are environment, social, and human rights. Their rationality is demonstrated (preponderantly) in the professional advice of councils, in particular, the sub-councils of the administration: to this extent, they have recently, and prominently, and perhaps prematurely, constituted a new form of celebrated comitology. [22]

Regarding the civil associations of the third rank, a further internal differentiation can be made: in the Commission's opinion, such associations, by dint of their propagation of supra-regional issues and extra-territorial projects, are worth considering as candidates for sponsorship out of central funds. In contrast, the numerous and, for that reason conspicuous, other organisations, and equally, the "grass roots"-proletariat, are neither considered to be participants in a social dialogue nor regular consultation partners of the Commission, let alone potential recipients of subsidies. In the opinion of the EU-administration, by reason of their local or regional organisation, they are not adequately representative. Further, and by dint of their often *ad hoc* emergence and orientation, they lack requisitely stable institutionalisation. Their spontaneity, unsuitability, (single-)issue-orientation and communicative rationality qualifies them as prototypical civil organisations but, this notwithstanding, disqualifies them as desirable sounding boards of a supranational authority. Here we see the borders of a deliberative European democracy, that is, a deliberative polyarchy. [23]

The marginalisation of a significant part of civil society's associations makes the heralding of a European civil society look questionable, particularly where only transnational structures and representative organisations (and these only selectively) are supported or encouraged. The

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[22] On comitology, see: C. Joerges, "'Good Governance' through Comitology?", in C. Joerges & E. Vos, eds., *EU Committees: Social Regulation, Law and Politics*, (Oxford, Portland: OUP, 1999) and J.H.H. Weiler, *The Constitution of Europe* (Cambridge, UK: CUP, 1999)

[23] See for example: J. Cohen & C. Sabel, "Directly Deliberative Polyarchy" in *European Law Journal* 3/4, (1997) 313.

Commission's *communiqués*, in particular the suggestions of the White Paper, also portend a division of civil society: A large part of the organisations of the third rank are neglected, contrarily those of the first and second rank are accredited and, though they have no concrete rights to judicial review, can inform themselves about the agendas of the Commission or its committees and, on the grounds of soft law such as codes of conduct, minimum standards of bureaucratic practice or partnership arrangements, represent their interests. This divided, and to that extent "organised" civil society will also be included in formal constitutional arrangements and integrated into the new, flexible, and supposedly transparent practice of governance. This integration of social partners and some NGOs has its price, for the beneficiaries are also expected to maintain minimal standards of representativeness, responsibility and transparency. The relationship of those fortunate associations of civil society with the EU administration is therefore reciprocal.

Eventually, this aperture of the Eurocracy may prove itself to be less of a genuine democratisation and more akin to a refined technique of rule, akin to Foucault's "gouvernementalisation". [24] The EU technocracy domesticates the organisations of civil society and robs these registered partners of a considerable amount of their independence and spontaneity, particularly to the extent that they become financially indexed to the Commission. This set-up functions as an early warning system, an agenda-setter, and a pool of expert knowledge. From one point of view, it is disquieting that the social capital and moral energy of associations of civil society, which, the historical record relates, tend to political innovation and social and political progression, remains unharnessed, to the detriment of the general European well-being and to the advantage of the hackneyed Brussels technocracy, which, having thusly colonised the civil associations, need not anticipate unsettling protest movements or political unrest. [25] From another perspective, the "gouvernmentalisation" of civil society is not free from ambivalence, which could operate in the favour of the latter: in so far as civil partners are served by the administration, they may operate in independence from administrative interference. The challenges and goals of civil society are incorporated into the hierarchy of sub-committees and, as a result of influence in the Commission will enjoy more

[24] M. Foucault, *Society Must Be Defended. Lectures at the Collège des France 1975-76* (New York: Picador, 2003)

[25] See C. Offe, *Civil Society and Social Order: Demarcating and Combining Market, State and Community,* Archives Européennes de Sociologie, vol. XLI (2000), 71 ff.

weight as against the Parliament. [26] To the extent that associations of civil society are *ab initio* excluded, the administration courts the potential "besiegement"[27] of the fortress Brussels by civil groups, networks and organisations in their traditional casting as resistance to the powers-that-be.

V. MIGHT AND MYTH OF THE "GLOBAL CIVIL SOCIETY"

Appearing in the early 90s, noticeably at the World Summit at Rio in 1992, and rapidly spreading to various other world fora, the *Global Civil Society*, has remained on the scene and in the headlines with spectacular protests, and global fora attended by thousands of representatives, with militancy in Seattle, Genoa and elsewhere, featuring campaigns against landmines, child labour and poverty and for the rights of indigenous peoples, women and political prisoners. Alongside ambitious aims propagated by international NGOs such as "planetary citizenship", "cosmopolitan democracy" or "new world order", less lofty goals, familiar to the European ear, take their place, such as public participation, consultation, transparency and political accountability. [28]

Globalisation is often acknowledged, perhaps too eagerly, as a midwife of *Global Civil Society*. What such a society can constitute and what it could achieve should not, however, be considered without at least a cursory clarification of the globalisation phenomenon. The various attempts at definition throw into relief two aspects of the new globality: first, the transcendence of space, borders, areas, and distances ("supraterritoriality)[29]; and second, a quasi-contemporaneity of processes of political decisions, economic production, and social communication.[30] That globalisation can be understood as a transformation of social

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[26] An example of this is the influence of the Migration Policy Group upon the formulation of the EU's politics on migration.

[27] J. Habermas, *Faktizität und Geltung* (Frankfurt/Main: Suhrkamp, 1992).

[28] In addition see the contributions in I. Shapiro & C. Hacker-Cordón, eds., *Democracy's Edges* (Cambridge, UK: CUP, 1999); D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity, 1995) and J.N. Rosenau & E-O Czempiel, eds., *Governance without Government*, (Cambridge, New York: CUP, 1992).

[29] J. A. Scholte, "Civil Society and Democracy in Global Governance", CSGR Working Paper No. 65/01, (January 2001).

[30] From the enormous amount of literature on the topic of globalisation, see in particular: R. Münch, *Globale Dynamik, lokale Lebenswelten*, (Frankfurt/M: Suhrkamp, 1998); J. Galtung, *Die andere Globalisierung*, (Munster: Agenda Verlag, 1998); E. Altvater & B. Mahnkopf, *Grenzen der Globalisierung* (Münster: Westfaelisches Dampfboot, 1999).

geography and an amelioration of time constraints, can be observed in the development of new, complex and flexible forms of transnational political regulation and government (global governance, multilateralism) in transnational economic production (production chains), in the borderless flow of finances and communication (internet, cyberspace) and in the *a*national semantics of human rights, democracy and ecology. It goes without saying that the governance of transnational space without corresponding institutional arrangements guts any substantive conception of democratic legitimacy and transparency. [31]

On close inspection, *Global Civil Society* exhibits further characteristics: firstly, there is the weakening nation-state, facilitated by the post-cold war aperture of political possibility outside of and beyond conventional national politics, accompanied by theories of the minimalist state of the neoliberal variety; secondly, heterogeneous transnational organisations like the UN, the IMF, the World Bank and the WTO; thirdly, the internet, or more precisely, the technological revolution, the dramatic reduction in communications- and organisation costs facilitating a cyberspace-activism;[32] fourthly, a turn in the industrial states to nonmaterial values, which emphasise individual liberty and responsibility as opposed to state interventionism and control; and finally, a worldwide dissemination of the democratic idea and freedom of expression and a thickening of international principles and procedures born of the notion of the rule of law, which chaperone the activities of a *Global Civil Society*. [33] These conditions make it easier for NGOs to arrange themselves transnationally, to combat problems (intensified by globalisation) of war, poverty and authoritarianism, to thematise moral authority on the world stage and to challenge the "global players", economic and political, deploying influential speakers to galvanise public protest.

Every classification of associations that constitute the fragmented *Global Civil Society* runs the risk of underplaying the conspicuous diversity of

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[31] For a critique of this discourse on global governance, see: U. Brand, A. Brunnengräber, L. Schrader, C.Stock & P. Wahl, *Global Governance – Alternative zur Globalisierung*, (Münster: Westfälisches Dampfboot, 2000) and Michael Zürn, *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance*, Frankfurt/Main: Suhrkamp, 1998); H-P. Martin & H. Schumann., *Die Globalisierungsfalle: Der Angriff auf Demokratie und Wohlstand* (Berlin: Rowohlt Verlag Taschenbuch, 1996).

[32] L. Lessig, *Code and Other Laws of Cyberspace*, (Cambridge, MA: HUP, 1999); Y. F. Lim, *Cyberspace Law*, (Oxford, New York: OUP, 2002)

[33] For this, see H. Anheier & N. Themudo, *Organisational Forms of Global Civil Society*, 198f in M. Glasius, M. Kaldor & H. Anheier, eds, *Global Civil Society 2002* (Oxford: Oxford University Press, 2002).

worldwide and regional platforms, societies, fora and networks. Consequently, any criterion informing a categorisation must be able to distinguish between charitable organisations, transformative, democracy-orientated NGOs, political and technical NGOS or privately run BINGOs [34] and public-interest, international NGOs. Particularly prominent amongst the latter contributors to this humanitarian-universalistic picture are Attac, Friends of the Earth International, Amnesty International, Citizens' Action Against Hunger, Medico International, Greenpeace, Global Policy Forum und Public Citizen. Associations of this genus and mindset purposely distance themselves from the manifestations of international economic ideology; for example, neither the International Chamber of Commerce nor the World Economic Forum, which can count over 900 businesses amongst its members, were invited to the Earth Summit. It might well be the case that rather than the prudentially-driven BINGOs jeopardising the good name of the *Global Civil Society*, the real danger emanates from those associations which camouflage themselves in altruism and infiltrate the sundry world fora. Especially poisonous to reputation are those associations that openly propagate anti-semitic, chauvinistic, racist or fundamentalist ideologies or those whose authoritarian organisational structure does not sit comfortably with a democratic, rights-based image. These poisonous elements are best filtered out with a precise, normative conception and energetic, argumentative defence of the notion of the "civil".

As in the context of the EU, where organised civil society is expected to compensate for a democratic deficit (next to institutional reforms), in the transnational context, the *Global Civil Society* is assumed to play a similar role, namely the bridging of the chasm between supra-territoriality and geopolitical self-determination. On the transnational plane, a plethora of associations, networks, and groups are active, which boast organisational and membership structures, spanning state boundaries and aiming towards global problem-solving.[35] Naturally, one should take care not to adopt a hasty idealisation of frequently uncooperative NGOs, jealous to guard their sovereignties; they cannot be championed as flagbearers [36] of a

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[34] BINGO is the acronym for business-oriented international non-governmental organisation

[35] C. Grzybowski, "Civil Society's Responses to Globalisation", in *Corporate Watch* from 8 November 1995; The Center for the Study of Global Governance, eds., *Yearbook Global Civil Society 2002*, Part II (Issues in Global Civil Society) – http://www.lse.ac.uk/Depts/global/Yearbook/outline2002.htm

[36] D. Archibugi & D. Held, eds., *Cosmopolitan Democracy: An Agenda for a New World Order*, (Cambridge: PUB, 1995); D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, (Cambridge, 1997); and, finally, O. Höffe,

cosmopolitan democracy, and their performative capacity should not be overestimated.

Before overestimating the healing powers of the *Global Civil Society*, its ambivalent relationship to the nation state, the international political institutions and economy should be taken into account.[37] Like the state on the national level, the civil society of the transnational plane is dependent on institutional prerequisites, which it can neither produce nor guarantee. Features of the necessary growth environment for global civil activism include relatively functional democratic and rule-of-law informed institutions and procedures.[38] *Global Civil Society* can operate neither in an institutional vacuum, nor in a world of pure resistance. More realistically, this society, like its national and supranational sisters, relies on the state and international institutions, the decisions of which it can criticise and influence. *Global Civil Society* has an awkward relationship with international law: first, to organise itself, to articulate itself and find fora and followers; and second, to achieve durable results. Conventionally, therefore, civil associations put their trust in state institutions, legal process and warranties – human rights commissions, judges and a police force sensitive to civil liberties – for their own self protection and for the sanctioning of the torturers, child traffickers and environmental polluters that they uncover. Such associations ritually translate their demands into the universal language of human rights. Consequently, they function as amplifiers of sundry scandals, even where their campaigns are not directly targeted at the codification of prohibitions of various transgressions against humanity, e.g. production of landmines, child labour. [39] Paradoxically, the ambivalence of *Global Civil Society* towards state institutions and international law creates an environment in which

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Demokratie im Zeitalter der Globalisierung, (Munich: Beck, 1999), who has absolutely no place for civil society in his conceptions of cosmopolitan democracy. For a more sober assessment see the contributions in E. Altvater, ed., *Vernetzt und verstrickt – Nicht-Regierungsorganisationen als gesellschaftliche Produktivkraft* (Münster: Westfälisches Dampfboot, 2000); R.D. Lipschutz, "Reconstructing World Politics: The Emergence of Global Civil Society", *Millenium* 21 (1992), 389 ff.

[37] For this, see W. Streeck, "Einleitung: internationale Wirtschaft und nationale Demokratie", in: W. Streeck, ed., *Internationale Wirtschaft und nationale Demokratie*, (Frankfurt; Campus, 1998) 11 ff. On the disintegrating effect of the fragmented NGO scene on the system of institutions of international society, see R. D. Lipschutz, *supra* note 35, at 419.

[38] On the present institutional structure and the public international law rules, see S. Hobe, "Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht", *AVR* (1999) 152 ff.

[39] A. Fischer-Lescano, "Globalverfassung: Los desaparecidos und das Paradox der Menschenrechte", *Zeitschrift für Rechtssoziologie* (2002) 217 ff.

particularly operationalisable and media friendly goals are adopted by governments, and deployed as state human rights policies.[40]

Otherwise, the relationship between civil society and the economy is more taut than NGOs are willing to accept. This ambivalence goes both ways. Whereas *Global Civil Society* silently requires a flourishing international capital market, the market relationships must be embedded in non-economic relationships in order to function relatively ergonomically. Economic transactions, as the classic commentators on economic liberalism recognised, [41] need a disciplined, calculable, and healthy socialised relationship; families and schools are, from this point of view, unreliable instances of socialisation. Capitalism requires, as a base, significant social capital, that is, trust[42] between actors and the stabilising effect of social norms, and it is not contentious that these norms cannot be economic in nature. [43] Social capital is rather the product of integral social relationships and the engagement of the citizenry generated not exclusively but notably through multiple memberships in associations. Relatedly, civil society and the economy, on all levels, are interested in one another because they presuppose one another.

The engagement of the citizenry can also produce problematic results in the global context,. These can, nevertheless, be highlighted from the perspective of the civil society itself. We owe the theory of collective action to the insight that close-knit social organisations tend to inefficient cartel building and corruption.[44] Observable on the transnational level is the trend that uncooperative, prudentially-motivated civil organisations have precipitated a re-feudalisation, and the institutions of international society, which should be deployed against various iniquities, can have a disintegrative effect. [45] These re-feudalising tendencies are intensified through the accreditation- and consultation-practices of the international organisations, which divide the civil society into two. The cautious, albeit

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[40] On this subject, see C. Vismann, "Das Recht erklären. Zur gegenwärtigen Verfassung der Menschenrechte" *Kritische Justiz* 3 (1996) 321 ff.

[41] Fundamentally, A. Smith, *Theory of Moral Sentiments* (Edinburgh, 1759). Also, N. Chandhoke, "The Limits of Global Civil Society", in Anheier, Glasius & Kaldor, *supra* note 33, at 35 ff, 50 f

[42] F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995).

[43] R. Putnam, "Bowling Alone: America's Declining Social Capital", *Journal of Democracy* 6 (1995) 65 ff.

[44] Putnam, *ibid,* at 76 with reference to M. Olson, *The Rise and Decline of Nations*, (New Haven: Yale UP, 1982) 2

[45] Lipschutz, *supra* note 35

optimistic analyses of the *Global Policy Forum* and other observers[46] reveal that, again, the unaccredited NGOs are left out in the cold and the accredited NGOs pay dearly for their insecure and limited consultative status. From the upper executive echelons of the UN, they are regulated and served by a soft law regime, presently susceptible to the pressures of the American government.[47] The WTO-guidelines for arrangements with NGOs [48] endorse on the one hand transparency, cooperation and consultation but, nevertheless, anticipate only non-binding conferences on special themes and, since 2001, also the participation of representatives of select and registered NGOs on plenary meetings and briefings, the goal being "to increase the awareness of the public in respect of WTO activities". The guidelines can be interpreted as a strategy of legitimation through process in the Luhmanian sense, a tactic aimed both at the pre-emptive soothing of disappointment at policies and the absorption of potential protests.[49]

Despite these careful apertures and attempts at incorporation – for example, at the UN, UNESCO and also the WTO[50] - it would be highly premature to speak of their democratisation or of a noteworthy inclusion of the *Global Civil Society*.[51] This may be a sobering conclusion, but even more arid is the realisation that these central institutions of the system of intergovernmental governance – particularly the G8, the OECD, the World Bank and the IMF – exclude not only civil society but also the majority of their member states from their decision making processes.[52]

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[46] See, for example, J.A. Paul, NGO Access at the UN (July 1999) – http://www.globalpolicy.org/ngos/analysis; J. A. Scholte, "Civil Society and Democracy in Global Governance" in *Global Governance* 3 (2002)

[47] W.H. Reinicke, F. Deng, J-M. Witte & T. Benner, *Critical Choices, The United Nations, Network and the Future of Global Governance* (Ottawa: IDRC Books, 2000) xviii und 91 ff.; T. Brühl & V. Rittberger, "From International to Global Governance: Actors, Collective Decision-making and the United Nations in the World of the Twenty-first Century" in V. Rittberger, ed., *Global Governance and the United Nations System* (United Nations University, 2001) 1ff.

[48] For guidelines on arrangements on relations with Non-governmental Organizations – http://www.wto.org.

[49] N. Luhmann, Legitimation durch Verfahren, (Berlin: Neuwied, 1969).

[50] H-J Prieß & G.M. Berrisch, eds., *WTO-Handbuch*, (München: PUB? 2003) 67 ff. and M. Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation (WTO)*, (Berlin: Duncker & Humblot, 2001) 261 ff.

[51] For a critical assessment, see R. Dahl, "Can international organizations be democratic?" in Shapiro & Hacker-Cordón, *supra* note 28, 19 ff., which characterises these organisations, including the EU, as "bureaucratic bargaining systems".

[52] See J.A. Scholte, "Civil Society. Speziell zum IMF hat sich der ehemalige Vizepräsident der Weltbank, Joseph Stiglitz", where this is very clearly expressed, in

The concern is not only a divided *Global Civil Society*, but also a divided transnational institutional mechanism. At the decision-making end of this system, no thought is given to the inclusion of civil society through consultation-procedures or to making the deliberative process more transparent.

We cannot expect a divided civil society, ostracised from the dominant planetary power-bearers, to provide a workable alternative to a market-orientated international order. More probably, we can anticipate that the accredited NGOs will petition for improved conditions of cooperation and consultation in order to crystallise their status. They may succeed in enriching the agendas of international finance and trade organisations with social and environmental concerns and in increasing the transparency of decision-making processes. More cannot be expected of the global or European civil societies. In particular, we should not anticipate that normative structures that curtail the principles and interests of powerful states or more powerful companies will be institutionalised, nor should we foresee that the extreme global inequalities will be righted.

The prime "profession" of the associations of civil society is to attract media attention to iniquity, scandalising misfeasance, not to save the world. In this vein, these actors should seek recognition, not domestication. In the event that they are not successful in representing their legitimate interests in the relevant institutions, they should be mindful that the organisations of civil society have always prosecuted the good-natured besiegement of institutions, and this is the practice *par excellence* of the organised citizenry. This solace may console every level of civil society, be it national, supranational, or global.

J.A. Scholte, "Globalization and its Discontents" (New York: The New Press, 2002). In addition, L.D. Brown, S. Khangram, M.H. Moore & P. Frumkin, "Globalization, NGOs, and Multisectoral Relations" in J.S. Nye & J.D. Donahue, eds., *Governance in a Globalizing World*, (Washington D.C.: Brookings Institutional Press 2000) 271 ff.

THE CAPTURE OF CORRUPTION: COMPLEXITY AND CORPORATE CULTURE

Janet M. Dine*

I. INTRODUCTION

> "*Corruption is often discussed in the kinds of language and symbolism reserved for life-threatening diseases."*[1] *The World Bank insists that it "has identified corruption as the single greatest obstacle to economic and social development."*[2] *This is problematic, as no one seems to have found a universal definition of corruption. Nor is there absolute consensus on what types of behaviour within a loose definition are harmful. Johnson, however, argues that in some respects there is too much consensus. "The new wave of concern has been driven primarily by business and by international aid and lending institutions. While there is nothing inherently wrong with that, their vision of corruption, like any other, is partial."*[3]

Johnson points out that the major anti-corruption players ("USAID," World Bank, "OECD," "UNDP" and "TI")[4] rarely address differences in the societies whose corruption they seek to cure. Noting the way in which corruption and anti-corruption has emerged on to the international agenda, Samson notes, "In the last five or six years, anti-corruption practices have diffused transnationally and have become organized globally. We have seen the emergence of a *world of anti-corruption* with its own actors, strategies, resources and practices, with its heroes, victims and villains."[5] Samson moots two possible explanations for this powerful recent emergence of the anti-

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1 M. Johnson, "Political Corruption" (Colgate University, 2003)

2 http://www.worldbank.org

3 M. Johnson, "Comparing Corruption" in W. Heffernan & J. Kleinig, eds., *Private and Public Corruption*, *Private and Public Corruption* (Maryland: Rowman & Littlefield, 2004) 276

4 United States Agency for International Development; Organization for Economic Development and Cooperation; United Nations Development Program; Transparency International

5 S. Samson "Integrity Warriors: Global Morality and the Anti-Corruption Movement in the Balkans" in D. Haller and C. Shore, eds. *Corruption,* (Ann Arbor: Pluto Press, 2005) 106. Italics in original.

corruption movement: first, "[t]he fight against corruption is virtuous, and those who form part of the anti-corruption community' are thus 'integrity warriors;" second, the need to increase system rationality arguably "will make market economies more efficient, state administration more effective, and development resources more accessible."[6]

Pointing out that when anti-corruption norms are applied to projects "'global morality' [becomes] . . . a social process. It is a process by which virtue is transformed into a specific activity called a project--one which includes formulating a funding strategy, approaching donors, analyzing stakeholders, hiring consultants, developing NGOs, conducting project appraisals, making evaluations and so on. Anti-corruptionism . . . is a stage in which moral projects are intertwined with money and power."[7] Because of this "Anti-corruption . . . is not innocent. It can be manipulated to serve the interest of even the most unscrupulous actors."[8]

Further, the interdependence of world economies makes the condemnation of certain behaviours one-sided; that is, the behaviour of one set of actors is condemned while those on the other side of the transaction are regarded with disinterest. This paper argues that such a system operates in certain tax havens, and will spotlight the British Virgin Islands to put detail on a complex moral phenomenon.

The British Virgin Islands are a tiny group of islands composed of the remains of a volcano. As such they are mountainous and have very poor soil. With 20,000 inhabitants in such a location making a living is extremely difficult. Moreover, the islands have a troubled history:

"The English ousted the Dutch from Tortola in 1672, and from Anegada and Virgin Gorda in 1680. The new rulers introduced the two quintessential features of the colonial era in the Caribbean: sugar cane and slaves. At first, most of Tortola's 'planters' were more interested in piracy and smuggling than agriculture, but by the 18th century they were displaced by a new wave of experienced planters and a settlement of hard working Quakers. Between the mid-18th and early 19th centuries, the islands prospered, producing sugar, cotton, rum, indigo and spices. Slave unrest and ideological doubt brought an end to slave auctions in 1803. By the 1830s, slaves had been emancipated. Abolition and competing sugar production in Europe and the USA were disastrous for the islands: capital and settlers departed for more buoyant economies, and for the next 100 years the islands' economy stagnated."[9]

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[6] *Ibid,* 107

[7] *Ibid,* 109-10

[8] *Ibid,* 129.

[9] Lonely Planet on-line guide

The British Virgin Islands ("BVI") are an Overseas Territory of the United Kingdom.[10] From a desperately poor economy based primarily on agriculture, the economy has evolved to a service economy based mainly on the twin pillars of tourism and financial services. The economy is very stable and one of the most prosperous in the Caribbean. The estimated GDP per capita income in 2004 was $38,500, one of the highest in the Caribbean.[11]

The financial services industry has seen significant growth in the last few years mainly due to the government's careful development of its offshore legislative package and professional infrastructure. In the budget address in December 2005, Finance Minister, the Hon R. W. Skelton, projected that this sector will contribute approximately $130,000,000 (63.99%) of the country's revenue during 2006. There can be no doubt that the sector is vital to the continued growth of the economy.

However, the BVI was on the OECD list of corrupt economies and only removed in 2002. While one of the OECD issues was the possibility of money laundering, the very existence of tax havens is frequently condemned. While concealment of the proceeds of crime fits almost any definition of corruption, there are many who argue that the establishment of tax havens to facilitate the avoidance of tax is in itself corrupt. The condemnation, however, tends to be one-sided, with the criticism focused not on the corporate culture, which seeks to use tax havens to maximize shareholder profits, but on the countries which establish the tax havens themselves. This paper will also raise a number of issues thrown up by this partnership between the culture of companies that have established more than 400,000 "shell" companies on the BVI and the development aspirations of those living on the barren (but beautiful) rocks which make up the BVI. As we will see the public interest is often held to be significant in definitions of corruption, but the public interest is a complex phenomenon, especially where cross-border issues are at stake. Specifically the issues are:

a) what should the definition of corruption be?
b) what consequences flow from wide or narrow definitions
c) what are the advantages or disadvantages of selecting wide or narrow definitions

II. CORRUPTION: DEFINITION ISSUES

[10] Although the Territory is popularly known as the British Virgin Islands its correct name, as the Constitutional Commissioners pointed out in their 2005 report, is the Virgin Islands. For stylistic reasons, and to avoid confusion, while using the term 'Virgin Islands' in the long form, where abbreviation was necessary we have used 'BVI').

[11] www.cia.gov/publications/factbook/geos/vi.html.

One definition of corruption was put forward by Edward Banfield in 1975. He described corruption as a relationship between three parties: the public as principal, the public official as agent obligated to fulfil the wishes of the principal, and a third party seeking to have the agent work on its behalf instead.[12] This is a simple description of corruption but it raises a number of issues. Kleinig and Heffernan explain, "it is not the predominant understanding of the term in the *Oxford English Dictionary;* it leaves out much of what has historically been deemed corrupt; and it relies on the superficial clarity of a private/public distinction and an unexamined view of what counts as improper use. Corruption is not the exclusive failing of public officers; there may also be personal corruption, corrupt institutions, and corrupt cultures."[13] Heidenheimer distinguishes between black, white and gray corruption, with black corruption being perceived by both elites and ordinary people as fundamentally detrimental to society, white acts seen by both groups as of some benefit to society, and gray acts those about which the groups differed.[14] Holmes debates the definition but settles for a "core" definition for the purpose of studying corruption in post-communist states.[15]

While all these issues cannot be explored here, this paper challenges the narrow definition of corruption and examines the concept of institutional corruption. It also raises further issue of cross-border corruption. Interestingly, the Banfield definition is most apt in describing a bribe which takes place *within a single jurisdiction.* It contains an assumption that a public official is being bribed to act against the interests of his public. If we widen the description to take account of behaviour in (for simplicity) two jurisdictions we may have an instance where the definition does not do any harm; if the condemned behaviour is approved of by the public in both jurisdictions, does the corruption disappear? What if one public condemns the behaviour and the other approves?

Let us consider the BVI example. As a moral and legal issue the use of tax havens is problematic, some would say inherently corrupt, since it is clearly contrary to the beneficiaries of taxation in the home state of those companies offshoring their activities. However, it would seem to benefit one other public interest within that same jurisdiction; the shareholders will receive greater profit and the share price will go up. This is at least to their *financial* benefit. The third public interest resides in the tax haven. Especially on such

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[12] E. Banfield, "Corruption as a Feature of Governmental Organization", *Journal of Law and Economics* 18/3 (1975) 567-605.

[13] J. Kleinig & W. Heffernan, "The Corruptability of Corruption" in Heffernan & Kleinig *supra* note 3, at 3. Emphasis in original.

[14] A. Heidenhaeimer, *Political Corruption* (New York: Holt, Reinhart & Wilson, 1970)

[15] L. Holmes, *Rotten States,* (Durham & London: Duke University Press, 2006)

unpromising volcanic soil as the BVI, how else to develop? Tourism has natural limits; financial skulduggery has none? If the scheme benefits two publics and disadvantages one, do we accept majority rule? And if so, why was the BVI on the list of corrupt tax havens when it was being used by many companies in rich jurisdictions to increase their profits?

The problem with narrow definitions is that they can be selectively used by the powerful to displace blame on to others and away from their own actions. An explanation of the way in which selective narratives arise from narrow definitions has been provided by Global Witness.[16] They report that in Congo Brazzaville, Angola, and Equatorial Guinea huge sums of oil and extractive revenues have vanished; paid as bribes by the companies to the local elites. This is despite the voluntary disclosure code launched by the UK government in 2003. A UK government spokesperson explained that it was for the governments of these countries to stamp out corruption. Global Witness had suggested preventing parent companies from listing on the London Stock Exchange, Dow Jones or Bourse (or any powerful country's stock exchange), unless companies were transparent about these sums of money. The UK spokesperson explained that this was not possible since laws would have had to be passed in all the countries where the mining companies were registered.[17] This is a manifest inaccuracy, since European Union ("EU") rules and US rules would cover most of the operations. The stock exchange of Angola has, to say the least, a low profile in world affairs, but this attitude displaces the burden to act on to the corrupt governments. Manifestly, a recipe of appeasement of the companies by smoke and mirrors while apparently "tackling the problem."[18]

It is noteworthy in this context that corruption indices have always concentrated heavily on rating countries by the frequency of receipt of bribes, rather than the source of the bribes, although there are some signs of change.[19] In 2005, 159 countries were included in Transparency International's *Corruption Perception Index*.[20] Only in 2006 was a Bribe Payers Index composed

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[16] Time for Transparency: Coming Clean on Oil, Mining and Gas Revenues, www.globalwitness.org, March 24, 2004.

[17] BBC Today Programme, March 24, 2004

[18] In Angola one in four children die of preventable disease under 5 years old while $1.7 billion goes missing each year. Companies involved in the scandal in the three states include Elf, Mobil and Chevron.

[19] For a detailed examination of comparative indices see M. Johnson "Comparing Corruption" *supra* note 3, 275 et seq.

[20] Transparency International Annual Report 2005, www.transparency.org, Berlin 2005 and see Transparency International *Global Corruption Report 2004,* (London: Pluto Press, 2004)

rating companies from 30 countries.[21] Further, the UN Convention against Corruption encompasses acts such as trading in influence, abuse of functions, and embezzlement of property in the private sector.[22] It takes two to be corrupt, and, in the Global Witness instance, it is clear that the bribes were coming from the West. It is therefore necessary to consider much more carefully the definitions of corruption that we use.

As we have seen, Kleinig and Heffernan argue that corruption is by nature "essentially contestable" both as to its definition and its desirability.[23] It is suggested here that the culture which has grown up in some of our largest and most powerful multinationals is a corrupt culture which merits as much attention as public corruption, and may often be a contributory factor in the development of other corruptions, including illegal or marginally legal offshore financing. Euben argues from the basis of the *Oxford English Dictionary,* which associates corruption with a cluster of words--decay, degeneration, disintegration, and debasement.[24] This much wider definition opens up an investigation into corporate culture.

Definitions that restrict corruption to public officials run the risk of being accused of capture of the concept, that is, used selectively to condemn behaviour to achieve particular policy outcomes. This is particularly important when corruption is used to impose conditionality on the grant of aid or loans. It misses altogether the institutional corruption that is to be found in the aggressive, deregulated corporate sector. Scenarios such as that in Enron and Worldcom are informative on this point. It should be remembered that Arthur Anderson was indicted, *inter alia,* for "knowingly, intentionally and corruptly" inducing employees to shred documents relating to Enron. Shore and Haller are clear that such financial scandals "remind us that Europeans and Americans cannot assume that grand corruption is something that belongs primarily to the non-western 'Other' or to public-sector officials in defective state bureaucracies: corruption (both massive and systemic) we should not be surprised to learn, can also be found in the very heart of the regulated world capitalist system."[25] This seems to have been missed by the World Bank whose definition is "the abuse of public office for

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[21] Transparency International *Bribe Payers Index,* October 4th 2006, Transparency International, Berlin.

[22] UN Convention against Corruption, came into force December 14th 2005 when the 30th state ratified it. See D. Jayasuriya "The expanding frontiers of international law in the fight against corruption," *Amicus Curiae* 67/7 (2006).

[23] Heffernan & Kleinig, *supra* note 13, at 3

[24] J. P. Euben, "Pure Corruption", in Heffernan & Kleinig, *supra* note 13, at 54.

[25] D. Haller & C. Shore, eds., *Corruption* (London: Pluto Press , 2005)

private gain."[26]

III. DEFINITIONAL PROBLEMS: CORRUPTION AS A MORAL DEFLECTION DEVICE?

Thomas Pogge explains the ability of rational humans to shape their thinking to suit their interests; "moral norms, designed to protect the livelihood and dignity of the vulnerable, place burdens on the strong. If such norms are compelling enough, the strong make an effort to comply. But they also, consciously or unconsciously, try to get around the norms by arranging their social world so as to minimize their burdens of compliance."[27] Pogge labels such avoidance techniques "moral deflection devices."[28]

There are strong reasons for believing that narrow definitions of corruption act as a moral deflection device. It is certainly used as a "persuader" by lobby groups with a particular agenda:

"Most corruption involves agents seeking favours from public officials. The larger the realm of government, the greater the opportunity for such favours 'to be granted'. If the government regulates trade, the corruption can play a part in allocating export or import quotas. If the government does not regulate trade there are no such opportunities for preferment. ... But ... certain enduring values seem to be more important than the amount of government intervention in determining the level of corruption (most notably personal honesty). What are we to make of the fact that there are some relatively uncorrupt countries with very intrusive governments, such as in Scandinavia? ... Can we create a virtuous 'chain of events with less government leading to less corruption and then to a better functioning of the expanded domain of the market economy?"[29]

No surprise that the right-wing, free-market Institute of Economic Affairs would like to argue deregulation of companies and a smaller State, if only the inconvenient evidence of the Scandinavians did not impede the argument. Neild takes a more balanced approach. Neild examines the emergence of

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[26] World Bank (2002) The New Anticorruption Home Page www.worldbank-homepage.htm, accessed 6/10/2006

[27] T. Pogge, *World Poverty and Human Rights,* (Oxford: Polity Press in association with Blackwell, 2002) 5

[28] Pogge, *ibid*, p9

[29] P. Booth, "Foreword" in I. Senior, ed., *Corruption—The World's Big C* (London: Institute of Economic Affairs, 2006)

"clean government" in north-western Europe[30] in the 18th and 19th centuries, which by no means went hand in hand with less government, and points out the dangers of the reduction of government. "[A] policy of trying in a heavily governed country to reduce the scope of government, and hence the number of rules that have to be enforced, may be accompanied by denigration of the public service and by cuts in its pay and conditions of such severity that, in combination with an idealization of private gain, it may produce an increase rather than a decrease in the rate of corruption. Russia today is an example."[31]

However, at least corruption can be used by such lobbyists as an argument to restrict aid: "The most effective way of putting international pressure on corrupt, pauper nations is for aid to be available only to those that are demonstrably rooting out corruption. Countries with corrupt governments should be excluded from all aid programs and soft loans. Their international debts should not be cancelled."[32] As Haller and Shore note the main structural approaches to corruption have colonialist overtones; either by perceiving corruption as a social pathology of "primitive" nations or by measuring corruption against concepts of good governance.[33] "While advocates of this approach claim that the concept of 'good governance' is based on neutral, objective and a-cultural values, critics argue that it reinforces the hegemonic values of the West as universal—precisely by defining them as 'above' the realm of politics and culture."[34] A similar problem lies with the Banfield approach noted above, the concept of harm to the public interest being a notably slippery concept. In particular, Haller and Shore point to the complex nature of the public-private distinction, which is fundamental to many approaches to corruption. "In the conventional political science approach, as in neoliberal ideology and in Transparency International (TI) initiatives, it is the violation of this public/private distinction by individuals that fundamentally defines corrupt behaviour. Corruption is thus viewed as a measure of how well a society distinguishes between public and private spheres."[35] Further, the distinction between gifts and bribes is an incoherent one in some cultures.

> "Neoliberalism has set the frame for analytical models of corruption, particularly in its restrictive World Bank definition of corruption as the abuse of 'public' office. Stripped to its basics, the neoliberal thesis holds that since corruption is primarily a pathology of the

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[30] Although even these societies are subject to corruption; see M. Bull and J. Newell (eds) *Corruption in Contemporary Politics* (Basingstoke: Palgrave, 2003).

[31] R. Neild, *Public Corruption* (London: Anthem Press, 2002) 6

[32] I. Senior *Corruption,* !EA 2006, p189

[33] For example, by Transparency International.

[34] D. Haller & C. Shore, *supra* note 25*,* 4

[35] *ibid*, 5

> public sector, the solution lies in reducing public spending and rolling back the frontiers of the state. Shrinking the public sector, so the argument goes, reduces the scope for public officials to engage in malfeasance. It also subjects public officials to the regulatory disciplines of the market, to cost-consciousness, and to entrepreneurial business ethics. To focus on corporate crimes and corruption within the private sector is simply not on the current agenda of the U.S. government or the IMF."[36]

However it is on the agenda of TI, which, following the Enron scandal, expanded its operations and definition of corruption from "abuse by public officials for private gain" to abuse of "entrusted power for private gain."[37] The limitations of this latter definition restrict the discussion to the "bad apple" theory of corporate corruption, much favoured in the Barings and Enron cases, which argued that it was identifiable, corrupt individuals that caused the problem rather than an underlying corrupt culture.[38]

As Thomas Pogge points out, the belief that corruption is a "pathology of primitive nations" is common to "many citizens of the affluent countries" who hold that the global economic order is not to blame for severe poverty and increasing global inequality. Rather, "poverty is substantially caused not by global, systemic factors, but—in the countries where it occurs—by their flawed national economic regimes and by their corrupt and incompetent elites, both of which impede national economic growth and a fairer distribution of the national product."[39] This comforting belief is accompanied by demands that the poor countries must first help themselves by giving themselves respectable political regimes. Or, in other words, since (until imposition of regime change in Iraq) it is not the responsibility of rich nations to impose regimes on others, nothing can be done. Aid, if given, would only be lost to corrupt elites. However these comfortable beliefs "are nevertheless ultimately unsatisfactory, because it portrays the corrupt social institutions and corrupt elites prevalent in the poor countries as an exogenous fact: as a fact that explains, but does not itself stand in need of explanation."[40]

The prevalence of bad regimes itself requires an explanation. By way of providing an explanation, Pogge focuses on the extraordinary double standards applied to a gang of thieves overpowering the guards at a warehouse and stealing the contents as opposed to a group overpowering an elected

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[36] *ibid*, 18

[37] Transparency International, *Global Corruption Report 2004,* (London: Pluto Press, 2004)

[38] For a further discussion of this see below, especially the work of MacLennan.

[39] Pogge, *supra* nota 27, 110

[40] *Ibid,* 112

government. The latter becomes the owner of the contents able to dispose of the natural resources of the country, transferring ownership to buyers, and can borrow freely on its resources (the "international resource privilege"[41]).

> "Indifferent to how governmental power is acquired, the international resource privilege provides powerful incentives toward coup attempts and civil wars in the resource-rich countries. Consider Nigeria, for instance, where oil exports of $6-$10 billion annually constitute roughly a quarter of GDP. Whoever takes power there, by whatever means, can count on this revenue stream to enrich himself and to cement his rule. This is quite a temptation for military officers, and during 28 of the past 32 years Nigeria has indeed been ruled by military strongmen who took power and ruled by force. Able to buy means of repression abroad and support from other officers at home, such rulers were not dependant on popular support and thus made few productive investments towards stimulating poverty eradication or even economic growth."[42]

The failure to alter the prevalence of corruption under Olusegun Obasanjo has provoked surprise. But it makes sense against the background of the international resource privilege: Nigeria's military officers know well that they can capture the oil revenues by overthrowing Obasanjo.

Consequence of Adopting a Broad Definition: Companies & Corruption

As noted above, if we reject the narrow definition of corruption and associate our search for a definition with Euben, looking at decay, degeneration, disintegration, and debasement,[43] this much wider definition opens up an investigation into corporate culture. Recent scandals, including Enron, receive mention in mainstream corruption publications, but from restricted viewpoints. TI's Global Corruption Report 2004 traces the US $6 million donated by Enron to candidates for Congress or the presidency and the national political parties.[44] Although limited, it is a welcome perspective as it opens the debate to the concept of "state capture," or the excessive deference of state organs to private power. This author has argued elsewhere that the metamorphosis of modern states into "market states" has led to the "willing capture" of states since politicians consider that the money-making function of giant companies is unequivocally good for their countries.[45] Beyond that, it

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[41] *Ibid,* 110

[42] *ibid,* 113

[43] Euben, *supra* note 23, 54

[44] Transparency International, *Global Corruption Report 2004* (London: Pluto Press, 2004, 74

[45] J. Dine, *Companies, International Trade and Human Rights,* (Cambridge: Cambridge University Press, 2005)

is arguable that corporate culture has itself become corrupt by limiting the focus of companies to the production of profit for shareholders. Enron had more than 3,000 subsidiaries including 400 registered in offshore tax havens as part of its strategy to enhance shareholder value.

MacLennan traces the roots of the current waves of corporate corruption in America to early industrialization. He says there is inevitable and fundamental conflict between the emergent values of market capitalism and democratic goals to protect the public interest.[46] The author argues that this conflict was met by a network of regulations creating an American welfare state that "not only provides a social safety net for the disadvantage in the economy, but also welfare for the very rich and their corporations."[47] Examining why this system seems to have failed so spectacularly over recent years, MacLennan advances the argument in saying that, while the regulatory system is based on the idea that regulation is needed only during "*moments of business failure*,"[48] the clash of values runs deeper:

> "Market values, which have their root in a pre-industrial, liberal society based upon democratic citizenship and agrarian, small business enterprises, have morphed into a new ethic of corporate capitalism which no longer resembles the business culture of the past ... Corporate behaviour in the United States has become increasingly 'corrupt' and the behaviour of officials in the Enrons and Worldcoms is not isolated. ... it is pervasive and institutionalized. That means, it is more than criminal behaviour by a few bad actors in an otherwise clean enterprise. It is institutionalized in the everyday world-view and processes of corporate action."[49]

MacLennan's study is of the close networks that link the political and economic elites, but also notes that "[d]efinitions of morality, public interest and personal responsibility in corporate board rooms and executive offices may in fact be quite different from those of the rest of the middle, working and poor classes."[50] An interesting example of this is the belief by Enron's ex-CEO Jeffrey Skilling that he is entirely innocent of wrongdoing. This is unlikely to be mere denial and may well stem from an unholy mixture of the "Alpha male entitlement" syndrome which leads powerful people (not *always* males) to refuse to believe that the rules of ordinary life apply to them, and by

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[46] C. MacLennan, "Corruption in Corporate America: Enron-Before and After" in D. Haller & C. Shore, *supra* note 24, 156.

[47] *ibid,* 157-8

[48] Italics in the original

[49] MacLennan, *supra* note 46, 158

[50] *ibid,* 163

the fact that by constantly driving up the share price he believes that he was doing precisely the job that the company required in accordance with its aggressive market forces culture.

MacLennan insists:

> "[C]orruption implies something systematic, institutionalized and perhaps endemic to an organization or culture. It is pervasive, infused or embedded in the system ... Corrupt or criminal *behaviour* is individual. If an alleged crime occurs, individuals are held responsible and receive punishment through the courts. But *corruption* is institutional, patterned—perhaps criminal and unethical from outside, but not necessarily perceived as such by insiders. All of the attention to the individual criminal executive is a detour from figuring out how corruption works. An example is the coverage of the prosecution of Enron's executives, CEO Jeffery Skilling and Chief Financial Officer Andrew Fastow. All eyes are on the courtroom ... and on possible jail sentences—thus isolating the executive as the criminal. The corporate culture that bred corruption, and the social expectations of the elite that ruled the organization, have escaped scrutiny."[51]

Let us look at some instances of the Enron culture as translated into action by Skilling. Skilling introduced a rigorous employee performance assessment process that became known as 'rank or yank' under this system the bottom 10 percent in performance were shown the door. There was heavy pressure to meet targets, and remuneration was linked to the deals done and profits booked in the previous quarter.[52]

> "One thing the traders all loved about Enron was the sense they had of operating in the purest environment that had ever been created in corporate America. By pure, they meant that the trading floor operated strictly by the dictates of the free market. The company's credo had always been that free markets worked best, of course. But the traders grabbed on to that belief with a cult-like fierceness ... Maximizing profit was not inconsistent with doing good, they believed, but an inherent part of it."[53]

> "And always, hovering over everything and everyone at Enron, was

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[51] C. MacLennan, *supra* note 46, 164-165, italics in original.

[52] S. Hamilton & A. Micklethwait, *Greed and Corporate Failure,* (Basingstoke: Palgrave, 2006) 36

[53] B. McLean & P.Elkind, *The Smartest Guys in the Room,* (London: Viking, 2003) 219

> Wall Street ... In the Skilling era, the stock became...Enron's obsession. A stock ticker in the headquarter's lobby offered a constant update on the price of Enron shares. TV monitors broadcast CNBC in the building elevators ... for Skilling himself ... 'the stock price was his report card.' When it rose, he was exultant; when it dropped, he was glum."[54]
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> "Skilling's methods of arriving at Enron's quarterly and annual targets was downright perverse. Instead of going through a rigorous budget process and arriving at a number by analyzing all the business units and their prospects for the coming year as Kinder used to do, he would impose a number based solely on what Wall Street wanted. He would openly ask the stock analysts "What earnings do you need to keep our stock price up?"[55]
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> "And the number he arrived at was the number Wall Street was looking for, regardless of whether internally it made good sense. . . . Invariably, as the quarter drew to a close, Enron's top executives would realize that they were going to fall short of the number they'd promised Wall Street. . . . when the realization took place that the company was falling short, its executives undertook a desperate scramble to fill the holes in the company's earnings."[56]

A similar corruption was evident in the fall of Barings. The lack of supervision of Nick Leeson was attributable in a substantial degree to the feeling that he was the goose laying the golden eggs so that stringent enquiries into his activities or limitation of them should be avoided at all costs.

In a brief investigation of corporate culture, MacLennan notes the prevalence of "shared corporate values predicated on the rights of property and the rule of the market."[57] Let us look more carefully into property rights and market assumptions.

The US/UK model of companies and corporate law has shareholders as the primary focus; the company must serve the interests of shareholders who appoint and dismiss directors. However, the directors are to act in the interest of the company and usually owe no direct duties to shareholders. This structure does not necessarily equate shareholders with the company, nor

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[54] *ibid*, 125

[55] *ibid,* 125

[56] *ibid*, 127

[57] C. MacLennan, *supra* note 46, 165

does it equate shareholder interests with 'profit maximization' and impose a duty on directors to achieve such a goal. Nevertheless, recent discourse has imposed the concept of profit maximization on the assumption that this is what shareholders require and the second assumption that shareholders and the company are one and the same thing. Such an understanding of corporate aims has wide implications for their behaviour since all considerations other than profit are seen as negative externalities to be adhered to or to be bargained away if possible. There is no doubt that this philosophy was one of the underlying causes of spectacular bankruptcies such as Enron and WorldCom. In terms of moral responsibility such a construct of corporations means that they become another method of moral deflection: because the purpose of corporations is to make as much money as possible those who tolerate and profit from their existence have no responsibility for the methods they pursue. This ignores not only the fact that national laws structure companies, but also that those who profit from an activity have a responsibility to prevent that activity from harming others. However, offshore financing muddies the water since, as noted above, we have at least three different competing interest groups that may claim to represent the public interest.

Underpinning Corrupt Companies' Free Markets' and Neo-Classical Economics

The Enron vision of free markets was based on neo-classical economics. It is therefore important to examine closely the foundational concepts of this thinking to understand how norms have emerged from the analysis. A key concept is "efficiency," a term which also has emotive power. Who has ever heard of a government asking advisers to formulate an inefficient economic policy? However, notions of the measurement of efficiency vary. Pareto efficiency requires that someone gains and no one loses. However, the Kaldor-Hicks test accepts as efficient "a policy which results in sufficient benefits for those who gain such that potentially they can compensate fully all the losers and still remain better off."[58]

The neo-classical economists believe that rational actors utilizing perfect information will produce maximum allocative efficiency by making choices that exploit competition in the market. In plain English, this means that everyone is assumed to be equally rational, have equal bargaining power, and that there is no asymmetry of information. Stiglitz explains the theories in this way:

"One of the great intellectual achievements of the mid-twentieth century . . . was to establish the conditions under which Adam Smith's

[58] Explanation given by Ogus in A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994) 24, who immediately points out that there is no requirement for the gainers to compensate the losers.

'invisible hand' worked. These included a large number of unrealistic conditions, such as that information was either perfect, or at least not affected by anything going on in the economy, and that whatever information anybody had, others had the same information; that competition was perfect; and that one could buy insurance against any possible risk. Though everyone recognized that these assumptions were unrealistic, there was a hope that if the real world did not depart too much from such assumptions—if information were not too imperfect, or firms did not have too much market power—then Adam Smith's invisible hand theory would still provide a good description of the economy. This was a hope based more on faith—especially by those whom it served well—than on science. My research, and that of others, on the consequences of asymmetric information . . . has shown that one of the reasons that the invisible hand may be invisible is that it is simply not there."[59]

Since the invisible hand is not to be fettered, state regulations should be removed so that a free market is permitted to reach maximum efficiency. However, deregulation distorts the concept of freedom by removing regulation that seeks to protect the vulnerable: trade union law, employment regulation, and environmental legislation. Freedom to trade in this sense becomes someone else's lack of freedom. It is notable that the slave traders defended their practices on the basis that they must be allowed free trade.

It must be noted that any identified defect in the underlying assumptions tends to have a cumulative effect, each building block contributing to a picture which emphasizes the necessity for a market free of regulatory interference, disguising the reality of imbalances of power that might be addressed by regulation. The basis of the theories on a pseudo-scientific notion of efficiency and the claim that creating wealth is beneficial for society as a whole means that the end result is a picture where interference with the freedom of markets needs to be justified by anyone who argues for any regulation of market behaviour. It is important to note that Enron rose in the context of deregulation of the utilities industries and of the accountancy profession.

Take first the Kaldor-Hicks notion of efficiency. The concept that net gains and losses need to be calculated and any net gain to any party is equivalent to efficiency is open to "several powerful objections, at least as a conclusive criterion of social welfare."[60] Ogus points to the coercive imposition of losses on individuals, the assumption that one unit of money is of equal value whoever owns it and its hostility to the notion of distributive justice. Ogus

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[59] J. Stiglitz *The Roaring Nineties: Seeds of Destruction*, (London: Allen Lane, 2003)

[60] *ibid*, 25

gives the following example:[61]

> "Suppose that the policymaker had to choose between: (A) a policy that increased society's wealth by $1 million and benefited the poor more than the rich, and (B) a policy that increased its wealth by $2 million, the bulk of which devolved on the rich? Many would argue for (A) on the grounds of fairness,[62] but (B) would be considered to be superior in Kaldor-Hicks terms."[63]

Now, if we see this argument in the light of Karl Marx's views on equality and the concept of freedom we can see how the approach is based on the idea of "notional equality" of the Kantian and Hegelian kind and how clearly Marx saw the reality that given real inequalities which pre-date the time of the transaction, inequalities will not only persist but become more and more accentuated. The Pareto-Hicks formula does not insist that the winning individuals and the losing individuals should be different in different transaction; in practice the powerful become more powerful, the poor more poor and disadvantaged. O. Lange writes:[64]

> "[L]et us imagine two persons: one who has learned his economics only from the Austrian School, Pareto and Marshall, without having seen or even heard a sentence of Marx or his disciples; the other one who, on t he contrary, knows his economics exclusively from Marx and the Marxi sts . . . Which of the two will be able to account better for the fund amental tendencies of the evolution of Capitalism?"

Lange also makes the contrast between Marx's theory of economic "evolution" and the fact that "for modern 'bourgeois' economics the problem of economic evolution belongs not to economic theory but to economic history."[65] This static nature may be seen as flowing from the essentially moral emptiness of current economic theory; unlike Marxism it is not driven by a desire to achieve freedom and fulfillment of a spiritual nature.[66]

IV. Advantages and Disadvantages of Definitions

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[61] *ibid*, 25

[62] A. Ogus, *supra* note 58; see also, J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972).

[63] This argument has powerful resonance when the operation of transnational and global corporations is under scrutiny.

[64] D. Horowitz, *Marx and Modern Economics,* (Michigan: University of Michigan Press, 1968)

[65] *ibid*, 73

[66] A. Van Leeuwen *Critique of Heaven,* (London: James Clarke Co., 1972), especially chapter IV "Human self-consciousness as the highest divinity"

1. *Deregulation, Market Failure, Corporate Governance and Failures to Fulfil Human Rights*

It is clear, then, if we adopt a wide definition of corruption that we are obliged to take a fundamental look at some of our own institutions and to consider corruption other than traditional bribe-taking behaviour. This is consistent with the scholars who call for constant re-assessment of institutions to prevent their continuous and inherent tendency towards corruption.[67] The disadvantage of adopting a broad definition is that it defeats the move towards justiciability so popular with the "integrity warriors" as something so ephemeral as corporate culture cannot be reduced to command and control outlawing tactics. It is therefore sensible to adopt a criminalizing approach in "black" situations of corruption, provided the consensus is wider than western organizations, particularly where financial decision making is consequential on categorization as "corrupt" or not. However, the recognition of corruption in a wider sense emphasizes that it is not a hard and fast concept and exists beyond practices condemned by all as fundamentally wrong. The understanding of institutions as tending always towards capture by powerful interest groups enhances debate about regulatory structures which can be found to counterbalance this inherent trend.

2. *Counteracting Corrupt Corporate Culture*

The call for regulatory structures to rebalance the company's focus on shareholders so that it serves to deliver a more just economic outlook may be a way of counteracting corrupt corporate culture. One of these institutions is the capitalist market. Corrupt corporate culture is a market failure. Where there is market failure there is a good case for regulations to try to correct the market failure so far as possible.

> "But for the market economy to function well there is a need for laws and regulations—to ensure fair competition, to protect the environment, to make sure that consumers and investors are not cheated."[68] Stiglitz examines the ways in which deregulation in the United States in the 1990s was instrumental in assisting the economic "bubble" to grow and then burst and the spectacular bankruptcies and revelation of fraud that followed.
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> "Regulations help restrain conflicts of interest and abusive practices,

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[67] See M. Blecher, Law in Movement: Paradoxontology, Law and Social Movements in J. Dine & A. Fagan, eds, *Human Rights and Capitalism,* (Cheltenham: E. Elgar, 2006); O. Perez & G. Teubner, eds., On Paradoxes and Self-reference in Law (London: Hart, 2004)

[68] J. Stiglitz, *supra* note 59, 91

> so that investors can be confident that the market provides a level playing field and that those who were supposed to be acting in their interests actually do so. But the flip side of this is that regulation restrains profits and so deregulation means more profits. And in the nineties, those who saw the larger profits that deregulation would bring were willing to invest to get it—willing to spend megabucks in campaign contributions and lobbyists." [69]

So far as corporate governance is concerned, market failure occurred by failure to regulate competition adequately, by permitting banks and accountancy firms to merge and take on tasks that inevitably involved conflicts of interest, and by using perverse incentives as part of the rewards packages for CEOs.[70] Competition regulation failure came partly from the argument that the "New Economy" had arrived, that it provided new conditions where innovations would keep competition healthy so regulation was not necessary. Stiglitz was not convinced. Analyzing the telecommunications market he writes;

> "There were two reasons that I was suspicious of those who simply said 'Let competition reign.' The first [was] . . . everyone talked about the importance of being the first mover into a market. In doing so, they were, in effect, admitting that they did not anticipate *sustained* competition. There would be competition *for* the market, but not competition in the market. That, in fact, was why those who had a head start in the race were lobbying so hard: they thought they had the inside track, and the payoff, if they won, would be enormous. . . But secondly, why, if the local phone companies really thought that competition would break out, were they so resistant to efforts to make sure that there was strong anti-trust oversight?"[71]

The second significant failure lay in permitting accountancy and banking firms to merge into huge giants carrying out activities which were clearly in conflict of interest. Thus accountants were making huge profits by carrying on consultancies for firms whose accounts they were supposed to be auditing and banks were simultaneously lending money to firms such as Enron, while also undertaking the placing of Initial Public Offers ("IPOs") of shares with the public. The independent assessment of the lending branch of the bank as to the creditworthiness of the firm was likely to be undermined by the wish of the investment branch to do business issuing shares for the firm. This removed an important device for monitoring the solvency of the company and

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[69] *ibid*, 90

[70] *ibid*, chapter 4

[71] *ibid*, 97-98, italics in the original

gave false signals. If the bank is still lending, investors would believe that the firm was still solvent. Loans were granted to Enron until the last moment before the scandal broke and such loans only increased the size of the eventual shortfall for employee pension schemes as well as investors.

A third significant failure was "the strange corporate practice of giving corporate executives stock options—the right to buy company stock at below market prices—and then pretending that nothing of value had changed hands."[72] These transactions were not adequately disclosed. The importance of this is clear to Stiglitz:

> "As a longtime student of the role of information in a well-functioning economy, I [understood that] . . . the executives are being paid too much partly because *it isn't widely known exactly how much they are really being paid*. And if no one knows how much the CEOs are being paid, that means no one knows how much profit (or loss) the company is making. No one knows how much the firm is really worth. Without this information, prices cannot perform the roles they are supposed to in guiding investment. As economists put it somewhat technically 'resource allocations will be distorted."[73]

Further, compensation packages for CEOs ran out of control with boards accepting huge increases and shareholders unable to prevent the packages going through. "While senior executive compensation rose 36 percent in 1998 over 1997, the wages of the average blue-collar worker rose just 2.7 percent in the same period. ... Even in 2001, a disaster year for profits and stock prices, executive CEO pay increased twice as fast as the pay of the average worker."[74] And you can be sure that it was not a percentage calculated from equivalent pay at the outset. Stiglitz understands the cause of the downturn of the US economy as being significantly caused by these factors, which were all brought on by deregulation and a failure to understand the correct role of regulation in preventing or minimizing market failures. And, market failures impact most significantly on the poorest in the community and are likely to directly cause non- or under fulfilment of human rights. The imperative is to prevent perverse incentives and competition failures from so distorting the market that it fails. We must be on guard against the simplistic economic viewpoint which is analyzed above since it is still endemic in many policy think-tanks and government advisors all over the world. Deakin argues, "[w]e have acquired a framework of perverse incentives that rewards most those managers who are best at shifting risks and liabilities on to the under-represented within the corporation (mainly employees) and in society at large.

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[72] *ibid*, 115.

[73] *ibid*, 118, italics in the original

[74] *ibid*, 124

This is the result of entrenching a particular version of the "shareholder value" norm, associated with short-run share price maximization, in corporate culture and practice.[75]

3. *Combating Corruption: Companies Are Not Property*

Paddy Ireland has made it clear that companies fit with difficulty into the property rights discourse.[76] This is because the traditional idea of companies is that they are "the property of the shareholders" or "in the 'nexus of contracts' or 'agency' theory of the company, in what amounts to the same thing, that the shareholders own not 'the company' but 'the capital', the company itself having been spirited out of existence."[77] Ireland also shows that there is considerable convergence between the property rights of creditors and those of shareholders; each can be seen essentially as outsiders having contractual rights against the company rather than insiders with membership rights. The remaining insider rights of shareholders are relics of the time when joint-stock companies were run by members, and. of an even earlier time, when lending for interest was banned but partnership for profit was not. An investment as a "sleeping partner" was a convenient way to circumvent this rule.

The shareholder value norm itself rests on the myth of shareholder ownership, that this myth is rhetoric appealing to the concept of property as an important right which has distorted our understanding of companies and of directors' duties by accepting that the gap between ownership and control should be plugged by duties designed to align the interests of directors with those of shareholder-owners. Because this structure is based on the myth of ownership it is unhelpful and distorting, leaving out of account many of the real risks that companies run: risks of damage to the company by poor treatment of employees, the environment, and consumers, leading not only to loss of reputation but to the real danger of collapse from striving for a short-term goal of shareholder value maximization at the expense of sustainability and long-term goals. As we have seen, although greed motivated some of the fraud which was important in the downfall of Enron, one of the most important motivating factors was a desire to keep the share price rising. "I don't want us ever to be satisfied with a stock price; it should always be higher . . . . Indeed, we still think that over the next several months that there's a good chance that the stock price could be up as much as fifty percent, and I think there's no reason to think that over the next two years

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[75] S. Deakin, "Squaring the Circle? Shareholder Value and Corporate Social Responsibility" GEO WASH L. REV. 70 (2002) 976, at 977

[76] P. Ireland, "Company Law and the Myth of Shareholder Ownership" *Modern Law Review* 62 (1999); see also J. Hill "Visions and Revisions of the Shareholder" in *American Journal of Comparative Law* 39 (2000).

[77] *ibid*

we can't double it again"[78] There is, however, room for optimism:

> "For almost a quarter century, beginning in the early seventies, the *rational expectations* school of economic thought dominated economic thinking. This portrayed the individual not only as a rational being, making consistent choices, but as someone capable of processing complex information and absorbing all the relevant knowledge. Its advocates focused on models in which everyone had the same information—there were no asymmetries. In fact, few people know enough math to process even the range of knowledge bearing on the simplest investment decision. (the rational expectations theorists conceded as much, yet asserted that, somehow, individuals acted *as if* they had processed it all. Not content with upholding the rationality of individuals, they portrayed the economy itself as a rational mechanism—one in which, miraculously, prices reflect instantaneously everything that is known today, and prices today reflect a consistent set of expectations about what prices will be *infinitely far into the future.* The political agenda of this work often seemed barely beneath the surface: if the rational expectations school was right, markets were inherently efficient, and there would be little if any need, ever, for government intervention. The heyday of the rational expectations movement has ended, I am pleased to report."[79]

It is most notable that the most fervent believers of this creed have profited from it (at least until they have gone to prison); a clear example of Pogge's understanding that human beings prefer to take comfort from beliefs that will favour themselves.

4. *Combating Corruption: New Uses for Concession Theory*

Nowhere is there complete adherence to the theory that companies ought to be permitted to function free of all regulation: all states operate a mixed system of market freedom and regulatory control.[80] However, traditional discussions of corporate governance give little weight to the web of regulation that surrounds every corporate operation and, in particular, the impact of regulations on corporate culture has not been examined in its legal context. Is the way in which companies actually work reflected in discussions of

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[78] Kenneth Lay speaking at a n Enron meeting, December 1, 1999, cited by B. McLean & P. Elkind *supra* note 53, 242; see also B. Cruver, *Enron, Anatomy of Greed* (London: Arrow, 2003)

[79] Stiglitz, *supra* note 59, 151-2, italics in the original

[80] J. Dine, *Governance of Corporate Groups* (Cambridge/New York: Cambridge University Press, 2000)

corporate governance and an adequate legal framework?

The imposition of regulations may easily be justified by traditional concessionary approaches: in its simplest form this approach views the existence and operation of the company as a concession by the state, which grants the ability to trade using the corporate tool, particularly where it operates with limited liability. In return this concession implies the right to impose limits on a company's freedom.[81] The imposition of regulations inevitably identifies those at most risk from particular corporate decisions and seeks to protect from or minimize that risk. Thus, environmental regulation identifies whole communities as at risk, financial regulation protects shareholders and health and safety regulation principally targets employees. As Teubner rightly says:

> "Putting it quite bluntly, a corporate enterprise does not exist simply as a self serving and self-realizing institution for the unique benefits of its shareholders and workers, but rather exists, above all, to fulfil a broader role in society."[82]

Indeed, large companies have a huge on influence our social, economic and political lives. In the words of Chayes, "[T]hey are repositories of power, the biggest centres of nongovernmental power in our society."[83] In the UK, the influence of companies is just as evident as in the United States. The food we eat is dependent on how it is grown, processed, packaged, advertised and sold to us. Every one of these stages is determined or influenced by companies. Increasingly companies are involved in the provision of public services with the government having created mechanisms such as private finance initiatives, and more recently the proposals for community interest companies. Such mechanisms are recognition of the influence of companies and their role in society. In such a context it seems that the two company law assumptions that share the structure of company law and corporate governance are not only anachronistic but in fact wholly inaccurate in their representation of the character of companies today. Teubner argues for a proceduralisation of fiduciary duties that enables non-shareholder interest-groups to participate in

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[81] ibid and S. Bottomley 'Taking Corporations Seriously: Some Considerations for Corporate Regulation' [1990 19 *Federal Law Review* 203, W. Briton jnr 'The New Economic Theory of the Firm; Critical Perspectives from History' 1989 STANFORD L. REV. 1471.

[82] G. Teubner, "Corporate Fiduciary Duties and their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility" in Hopt & Teubner, eds., *Corporate Governance and Directors' Liabilities* (Berlin: de Gruyter, 1987) 149, at 157.

[83] A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass: Harvard University Press, 1995) 25

the monitoring and decision-making functions. The role of the law, in Teubner's view should be to control indirectly internal organizational structures, through external regulation. The role of the law is the external mobilization of internal control resources.[84] The organizational structures should allow for "discursive unification processes as to allow the optimal balancing of company performance and company function by taking into account the requirements of the non-economic environment." In short, Teubner advocates a constitutionalisation of the private corporation to make the corporate conscience work "if that meant to force the organization to internalise outside conflicts in the decision structure itself in order to take into account the non-economic interests of workers, consumers, and the general public."[85] Teubner highlights the role of disclosure, audit, justification, consultation and negotiation and the duty to organise. He emphasizes the need to proceduralise. Ultimately, the point is to ensure that the decision-making processes allow participation by those affected by the decisions, whether in terms of profit, consumer choice, working conditions, or environmental impact of corporate activities. If the decisions are made jointly with the directors the monitoring role ought to reduce. Teubner's proceduralisation would mean a complete change in conceptualisation of the company and directors' duties. The following tries to put some flesh on the bones' in the context of a new look at UK company law.

As we have seen, Berle and Means identified the separation of ownership and control in the 1930s,[86] showing that, with dispersed ownership of shares, control of corporations lay less with shareholders and more with the professional managers of large companies. This led to corporate governance being discussed primarily as involving antidotes to such a separation, and, in particular with implementing mechanisms to align the managers' interests with those of shareholders. Today there is a second shift in the governance of companies, this time strengthening the degree of separation between ownership and control and also shifting the focus and perhaps the power centre of decision making to a lower level in the company. This second shift calls into question the reality of the vision of a company exclusively directed by the "controlling minds" of managers, but by acknowledging that directors still have the ultimate decision making power which is in line with the reconceptualisation of a company as an owner; the directors are exercising their property rights powers on behalf of the company. Limits on their decision-making, however, appear by a way of providing them with information from throughout the organization and insisting that the focus of their decision-making should be an assessment of risks to the organization.

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[84] Teubner, *supra* note 82, 160

[85] *ibid,* 165

[86] A. Berle & G. Means, *Modern Corporation and Private Property* (New York: Macmillan, 1962)

This new understanding would reject the idea of the company being composed solely of its organs but, in some ways embrace the "organic" view of companies.[87] The organic analysis is borrowed from the analysis of states. Wolff[88] cites John Caspar Bluntschli who "found something corresponding in the life of the State not only to every part of the human body but even to every human emotion, and designated e.g., the foreign relations of a State as its sexual impulses!" In fact, the organic theory is remarkably wide in its vision, many current theories would omit the inclusion of the "hands" at all, regarding employees as negative externalities, rather than as an integral part of the company's existence.

There is a multiplicity of regulations that companies must implement and within companies, systems are set up to implement them. A simple example (and the most obvious) is the systems which must be set up to ensure financial control. In the Barings collapse, one of the problems that was clearly identified was the lack of knowledge of the derivatives operation displayed by the directors. They were eventually disqualified as directors as being unfit following their failure to put in place proper systems of financial control. However, in order to create effective systems they needed to fully familiarize themselves with the functioning of the derivatives operation. It is argued here that, because detailed knowledge of the operation of systems that make up a functioning company are to be found elsewhere than at board level, and that proper systems of control cannot be designed without this detailed knowledge, it is incumbent on the eventual decision-makers to take account of the knowledge and experience of those most intimately involved in the systems necessary to control the risks that are the subject matter of the regulations.

This is not to say that the power to make the eventual decision has moved, but that proper decisions cannot be made without wide consultation. This, in turn, gives those consulted standing to influence the decision-making process, and, in particular, change the culture of the company from focusing on shareholder profit alone.

The example of financial controls is just a single example of the regulations which impinge on decision-making within companies. The company must remain within the criminal law and must have systems that ensure this happens. This may extend to ensuring consistency between methods of working and achievable targets. For example, if time targets for repairs to electric signals on a railway cannot be achieved without electricians working excessively long hours, the inconsistency may in future be identified as a reason for holding the company (and its directors) criminally responsible for

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[87] M. Wolff, "On the Nature of Legal Persons" *Law Quarterly Review* (1938) 494

[88] *Ibid*, 499

an ensuing disaster. Similarly, proper systems for implementation of health and safety and environmental regulations must rely on detailed knowledge of the way things actually work.

In effect, the imposition of regulations which must be implemented, gives the company a greater degree of autonomy from the shareholders. As we have seen, the shareholder property rights model led to a narrow definition of what is meant by "Corporate Governance" with most commentators concerned only with the methods by which management action can be controlled in order to ensure management behaviour for the benefit of the company, meaning, in the vast majority of situations, for the financial benefit of shareholders. This tendency has been reinforced by the legal boxes that have been constructed, particularly in common law jurisdictions. Company law is seen as a separate discipline from labour law, ignoring the fact of enormous proportions that the huge majority of employees work for companies and that companies cannot work without employees. Similarly, other regulatory structures impinge on corporate decision- making so that it is no longer open to the shareholders to insist on profit at the expense of compliance with health and safety standards, environmental regulations,[89] or consultation with employees. Nor can systems to ensure compliance with criminal law be neglected.

In the recent U.S. scandals, particularly those like ENRON and WORLDCOM, which involved manipulating accounts in order to maintain inflated share prices, we see a conflict between the old fashioned view of corporate governance that sought to create mechanisms for aligning the governance of the company with shareholders' interest in profit maximization and the vision described here which seeks, by regulation, to make sure that companies have proper systems in place to ensure their compliance with the requirements of society generally. Although it is true that directors of these companies stood to gain personally from inflated share prices, the primary motive for the creative accounting was the pressure to do better than competitors so far as a continuously rising share price was concerned. The system of corporate governance that relies primarily on shareholder enforcement is shown not only to be inadequate but counterproductive, imposing pressures destructive of both the company and the wider interests of society, both in loss of faith in markets and destruction of things such as pension benefits.

V. CONCLUSION

[89] See on this point M. Blecher "Environmental Officer: Management in an Ecological Quality Organisation "in G. Teubner (ed) *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organisation* (London: John Wiley, 1994)

And so back to the BVI; even if such reforms were to lead to a more sustainable, socially responsible and less corrupt corporate culture this will not solve the conundrum of the corruption of offshore tax havens. If reformed companies decided that shareholder value was not the sole determinant of their behaviour, would they desert offshore financing? And if so, what would happen to the development potential of the ex-slave colonies that currently rely on it? Pogge would undoubtedly point to a duty to support the development of previously exploited peoples. What should replace the easy income from invisible companies?

GOVERNANCE AND THE DEVELOPMENT OF FLEX-SECURE LABOUR LAW

Giuseppe Bronzini*

I. INTRODUCTION

It is widely acknowledged that social security and labour rights protection systems are increasingly beginning to fail, even in Europe where they initially began. During the three Keynesian decades, these systems have both achieved constitutional status and proved to be extremely successful in tempering the excesses of capitalistic accumulation; however, many authors suspect that the so-called post-Fordist era holds little more for labour than an unforeseen growth in lawlessness. An impressive array of literature[1] has pointed out the disruptive effects of delocalisation in countries with a low standard of social protection[2] and a particularly flexible labour market: the more competitive multinational firms currently practise "forum shopping" across differing social legislations, which, twinned with the transparency of national borders, means that even the most virtuous countries are forced to fall in line with the "rogue states" that cynical practice social dumping in order to attract foreign investment and resources.[3] While economic interests are becoming increasingly supranational, the institutional venues are losing the capacity to manage and direct social exchanges. The European Union (which shall be the focus of my analysis) has, in the course of its gradual and at times controversial construction, not only directly encouraged this process by creating a quasi-federally organised common market and a single currency, but also indirectly given rise to this state of affairs by giving authority on social matters (to a large extent) to its member States.[4] As a result, the welfare state's political institutions are disconnected from the other economic and productive decision-making centres.

It goes without saying that a "national" response to this situation would be quite ineffective, whether on a European or a global scale. The nation-based security policies (such as Zapatero's measures against *temporalidad*)

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* Judge, Appeal Courts, Rome

[1] B. Hepple "Labour laws and global trade" (Oxford, Oxford University Press, 2005)

[2] L. Gallino " L'impresa irresponsabile" (Torino: Einaudi, 2005)

[3] See J. Stiglitz "La globalizzazione e i suoi oppositori" (Torino: Einaudi, 2002) and N. Chomsky, V. Shiva & J. Stiglitz, eds., "La debolezza del più forte. Globalizzazione e diritti umani" (Milano: Mondatori, 2004)

[4] With the exception of the partial communitarisation of labour law during the 1980s.

can only attempt to cope temporarily with the most urgent social imbalances. In the long-run, however, they can neither deal with the pressures exerted by the market nor restore – in the present-day context – the compromise between social and systemic integration known as the welfare state. Still, on closer inspection, the difficult balance between economic and social politics is not solely a result of the novelty of a supranational context, which hampers the creation of new paradigms of social legislation capable of regulating the various European singularities. We must also consider what the 1999 *Supiot* report on the prospects for European labour law termed the "crisis of subordination" within a society that is now "au delà de l'emploi".[5] This crisis did not just stem from the objective decline of the Fordist model of production, based on the employer's decision-making powers and on the strict enforcement of contractual rules regarding working hours, tasks and places; rather, and from a subjective perspective, this crisis also stemmed from the long wave of the Sixties revolts, which undermined the subordinate employment model with its hierarchical labour organisation and its lack of autonomy, and led to ever more evident claims for different work conditions, more in terms of freedom, flexibility and creativity than of job security.[6]

The new rules, therefore, will require at least a continental scope, and must be in accordance with the trends of younger generations in Europe, who now question a life-long, stable, full-time and markedly disciplined employment model. Even the Charter of Nice acknowledges – not the traditional right to work (that is earning a wage and entering the productive process) – but the wider right to engage in work, that is, the opportunity for workers to choose as far as possible their tasks, conditions and hours. From this perspective, serious consideration should be given to the rather incomplete and unsatisfactory attempts to build a European system of social guarantees capable of meeting individual expectations and current production mechanisms. This is an active process, which includes two aspects: in the first place, the creation of an arena of dialogue and debate (involving civil society in addition to national States and the European Union) focused on the construction of an "European welfare" model and on post-Fordist individual and collective labour rights; in the second place, the creation, with the increasing convergence of the various nationally based social politics, of a common ground of "multilevel" jurisdictional guarantees, founded on the Common Bill of Rights arduously achieved in Nice in 2000.

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[5] See A. Supiot, *Il futuro del lavoro* (Roma: Carocci 2003); G. Bronzini "Generalizzare i diritti o la subordinazione?" in *Democrazia e diritto* 2 (2005)

[6] See S. Giubboni "Il primo dei diritti sociali. Riflessioni sul diritto al lavoro tra Costituzione italiana e ordinamento europeo" W.P. Massimo D'Antona 46 (2006)

II. European Governance and the Open Method of Coordination (OMC)

There are many different ways to define "governance" in the European Union. To put it simply, we may say that "governance" – in contrast to government – is not tightly bound to the electoral system-based mechanisms of representative democracy. While government is "from the people, for the people" and relies mostly on competence and decision, governance, on the other hand, is result-oriented and consequently relies mainly on procedure. A nostalgic literature assumes that the decline of "government" as a hegemonic mode of regulation coincides with the beginning of the post-democratic[7] era, which is taken to mean the advent of technocracy and of a corresponding weakening of democratic control. On the contrary, and as can be seen in the approach of Christian Joerges and Karl-Heinz Ladeur (of the innovative school of "New European Constitutionalism"[8]), communication, dialogue, negotiation and exchange of experience are simply innovative resources which "differ" from the classical instruments of parliamentary politics. Although expert committees can hardly be considered exciting, this is no reason to cry for the demise of professional political representation.

There is, however, a mode of governance I would like to insist on, this being the "open method of coordination" as promoted by the Treaty of Amsterdam in 1997 and successively revived by the Lisbon Agenda in 2000. The OMC differs sharply from traditional mechanisms of regulation, which include, *mutatis mutandis*, the so-called community method carried out through directives, regulations and harmonisation of national rules.[9] As for the three main topics of the Lisbon Agenda: employment, social security and the fight against social exclusion, it should be noted that the OMC has simply been put in brackets and not abolished by the community method. Actually, we should begin by acknowledging that the various social legislations differ greatly – these differences could conceivably be overcome through authoritative decisions, but with what results and in which direction? In short, there is something of a wager on collective and open learning procedures, and on the type of competition that is the outcome of a confrontation between differing experiences and practices. These learning procedures, in the opinion of Manuel Castells,

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[7] C. Crouch, *Post-democrazia* (Bari: Laterza, 2003)

[8] See O. Eriksen, C. Joerges & F. Rödl, eds., "Law and democracy in the post-national Unione" Arena report 1 (2006) Oslo, Arena

[9] M. Barbera, ed., *Nuove forme di regolazione: il metodo aperto di coordinamento* (Milano: Giuffrè, 2006); L. Torchia, *Il governo delle differenze* (Bologna: Il Mulino, 2006)

himself an apologist of European governance, are typical of the net-society and the knowledge economy.[10]

Institutions are now involved in a process of learning, rather to one of dictating, and find themselves being more *reactive* than proactive. The European multilevel context allows them to learn not only from nations and the Brussels bureaucracies, but also from regions and from the wide net of civil society (trade unions, foundations, universities, NGOs). The instruments of "soft law" and procedures such as benchmarking, peer review, best practises and mutual learning – originally adopted by corporation strategies and rewritten in a quasi-political contest – have brought the European public sphere to gradually converge on a common view of the Lisbon Agenda goals. This is also a template for the adoption, when necessary, of more forceful measures, such as the recommendations of the European Council, or the framework directives: it is a fact, however, that discussion based on quantitative data and graduated goals has proved its validity. This articulated discussion has brought flex-security to the fore as the emerging model for a further socialisation of the welfare state, beyond the crisis provoked by the decline of the long-term employment. This promising situation was largely anticipated by the Charter of Nice, which opted for labour protection obtained both through contracts and the operation of the marketplace, and particularly through the novel rights pertaining to the concept of "industrious citizenship", such as "basic income" and the right to a lasting and continuative education, which have no basis today in many European constitutions. These outcomes should be pursued by means of the OMC, because a continental Bill of Rights must be fleshed out by an open, multilevel dialogue, involving nations, experts, European or inter-European committees, trade unions, NGOs, regions, municipalities and citizens' forums. The suggestion has been raised that this is a more advanced model of deliberative democracy. In all events, I would like to insist on the originality of this experience, which entails dialogue rather than decisions, inducements rather than orders.[11] Now that the Charter of Nice's[12] immediate validity has been widely acknowledged, the recommendations, stemming from OMC procedures for a generalisation of the best practises of Northern Europe, need not count only on the moral sanctions of naming and shaming the less cooperative

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[10] M. Castells, *Volgere di millennio* (Milano: Università Bocconi, 2004)

[11] See S. Sciarra, *The Evolution of Labour Law 1992-2003* (Luxembourg: Office for Official Publications of the European Communities: 2005) and "La costituzionalizzazione dell'Europa sociale" in *QC* 2 (2004)

[12] G. Bronzini, "La Carta di Nizza: dal *Bill of rights* europeo alla costituzionalizzazione dell'Unione?" in H. Friese, A. Negri & P. Wagner, eds., *Europa politica* (Roma: Manifestolibri, 2002)

nations (including Italy). Through the OMC, we have achieved a contamination/competition between differing social models and experiences, an initial approach to horizontal government (bottom-up rather than top-down), while alluding to a cooperative federalism based on information, dialogue and, sometimes, negotiation.

Long ago, in 1997, Ladeur wrote:

> "The European Union should take the lead in experimenting with self-organized and flexible forms of regulation, based on the creation of a public-private network. In this way, the European Union could be a sort of laboratory for the much needed modernisation of the State. In this respect, the still unfinished structure of the Community could be considered an opportunity, to the extent that it usefully sidesteps the strict benchmarks of the state-based model.[13]"

I think that this concept still shows great promise, particularly in reference to the OMC. In fact, the OMC consists of fluid, semi-legal procedures, which are open, by definition, to outside influences. Moreover, these procedures are not representation-based; consequently, they could lead to forums, which could be open to social movements, subject to the acceptance of a dialogue, which does not, however, imply their "capture" by the final decision-making processes. On the contrary, because they voice issues that are not represented through the institutional organisations, social movements would, as the European Union explicitly maintains, play an essential role in ensuring both transparency and participation. It is a fact that NGOs find themselves more at ease in dealing with the European Committees or the OMC procedures than trade unions or political parties. It is still necessary, however, to bring pressure to bear on the institutional context and on the existing power allocations. This does mean that the more radical social movements (the ones, for instance, who voted against the European Constitution)[14] must free themselves as quickly as possible from the mental constraints that have prevented them from accepting the new realities, shedding the trite rhetoric on the "peoples that count".

III. THE EUROPEAN MULTILEVEL SYSTEM OF PROTECTION OF RIGHTS

[13] K-H Ladeur, "Towards a Legal Theory of Supranationality – The Viability of the Network Concept" in *European Law Journal* 3/1 (1997) 33–54

[14] See the 2005 referenda on the European Consitution.

The slow and uncertain construction of a Europe of rights, fostered by the CGCE in the Sixties (with the invention of a judicial safeguard of fundamental rights, which was not contemplated by the Treaties), has brought about an unprecedented situation which finds no analogies elsewhere. In Europe there are no less than two supranational Courts, the various national constitutional Courts, the ordinary jurisdictions and, in a few nations even regional Courts: these all watch over the fundamental rights. Judges in ordinary Courts but can bypass national law and apply Community law directly, while also being required to be cognizant of the decisions of the CGCE and of the Court of Strasbourg.[15] In this way, national and supranational superior and ordinary Courts may be considered as competing in a virtuous cycle. The Charter of Nice provides a complete and updated list of first, second and third-generation rights. All claims, even the most peculiar ones, can be easily included in the protected area of the Nice Bill of Rights, the general and abstract formulations of which should now be considered as providing the necessary positive scope for jurisprudential adjustment. This gives rise to a juridical hybrid, which collects and integrates various juridical traditions: the common law, with its diffuse judicial review; the Spanish and German traditions, in which the superior Courts provide direct protection for fundamental rights; the unique Strasbourg tradition, with its reparative and "moral" aspects and so on. This sophisticated construction, which according to the Charter of Nice[16] must apply the most favourable norm, has led to extremely progressive and important decisions, but lacks a clearly defined supreme court of appeal – in fact, several national constitutional Courts, along with the Court of Luxembourg[17] and the Court of Strasbourg, aspire to this role. Nevertheless, the multilevel system of protection has spontaneously assigned a fundamental constitutional position to the non-discrimination principle. This principle was initially invoked only in sexual and racial matters, but its scope has since been broadened and it can now be employed as a wide-ranging argument in contrasting diverse Community or national norms, which run from labour law to political rights. However, social movements and civil society have not yet fully availed themselves of the novel opportunities provided by the multilevel system of protection, though some of the stronger NGOs – Greenpeace or Amnesty for instance – operate in the European multilevel judicial field with increasing success.

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[15] See I. Pernice e R. Kanitz "Fundamental rights and multilevel constitutionalism" in WHI paper 7 (2004)

[16] See G. Bronzini & V. Piccone, "La Carta di Nizza nella giurisprudenza delle Corti europee" in *I diritti dell'uomo* 2 (2006)

[17] See G. Bisogni, G. Bronzini & V. Piccone, *I giudici e la Carta dei diritti fondamentali dell'Unione europea* (Taranto: Chimienti, 2006); G. Bronzini, "Il rilievo della Carta di Nizza nella crisi del processo costituzionale europeo" in *Democrazia e diritto* 2 (2006)

Two questions, then, arise: Is it possible to rethink the theory of social disobedience - which has been developed in the USA - in the European context, where the federal political institutions are still incomplete, while the judicial ones are on the contrary well developed? What are the prospects for a grassroots "constitutionalisation" of the European Union, a process capable of injecting social content and claims in the courtrooms, while seeking out a new institutional project?

This perspective has been completely eclipsed in the course of the French debate on the European constitution. Clearly, "government by judges", or a return to the natural law tradition are not credible options. However, it hardly seems productive to contrast the tradition of parliamentary democracy with the wealth of safeguards that have already been implemented in Europe.

IV. CONCLUSIONS

I have just enough time to outline a further aspect of the construction of a set of guarantees capable of overcoming national boundaries in a global scope. The adoption by the ILO of the 1998 Declaration on Core Labour Rights[18] is an event which deserves careful consideration. Its three meta-rights (abolition of forced labour and child labour, the right to collective bargaining and the abolition of discrimination) have been finally recognised as universal, irrespective of social and productive contexts. While the Declaration affirms these meta-rights somewhat generically, the ILO Conventions (at the basis of the Declaration), on the contrary, clearly specify their content. The ILO's historic contribution has been the recognition of features of labour law, so fundamental and so related to human dignity, that they must be held as universally valid.[19] As a result, the ILO bypassed all questions related to the legitimacy of these fundamental rights, linking them firmly to the abolition of inhuman and demeaning treatment (such as child labour) sanctioned by the United Nations Charter. These rights, consequently, according to a vast literature, constitute an actual international *ius cogens*, enforceable by any Forum or national and international Court.

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[18] A. Perulli , *Diritto del lavoro e globalizzazione* (Padova: Cedam, 1999); S. Sanna , *Diritti dei lavoratori e disciplina del commercio nel diritto internazionale* (Milano: Giuffrè, 2004); B. Hepple *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005); P. Alston, ed., *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005)

[19] See G. Bronzini, "La dichiarazione del 1998 sui core labour rights e la rinascita dell'OIL" in *Democrazia e diritto* 1 (2006)

Let me ask, now, to what extent have social movements furthered the onset of a new "Pinochet case" in labour law? Why not promote a grassroots Court for labour rights, based on the Russell Tribunal, which was the model for the Rome Statute and of the International Criminal Court? Could it be that it is more comforting to repeat the misdeeds of globalisation and neo-liberalism than to employ method and conviction in using the tools already available in the European legal systems in order to assist the construction of a new social order?

In my opinion, the rather embryonic and unexplored options that I have outlined[20] will prove their validity only when they are travelled by social movements, particularly the so-called alter-globalist ones, on condition that they cease from pining inconclusively for the restoration of the traditional, merely protective, social state, and commit themselves decisively to a European dimension of conflict. Nevertheless, a debate, however significant, that merely involves jurists or political institutions will never achieve the power and the ideal energy required to force a novel compromise on the elements of profit and accumulation, now free from their classic constitutional constraints.

[20] See J. Dine & A. Fagan, eds., *Human rights and Capitalism* (Cheltenham: Edward Elgar Publishing, 2006)

NEW SOCIAL MOVEMENTS AND THE DECONSTRUCTION OF NEW GOVERNANCE: FRAGMENTS OF POST-MODERN CONSTITUTIONAL THEORIES IN EUROPUZZLE

Giuseppe Allegri*

I. THE NEW SOCIAL MOVEMENTS ACTIVISM: THE "SLOW LEARNING"[1] OF EMERGING EUROPEAN CIVIL SOCIETY

"There's no certainty - only opportunity."
Alan Moore, V for Vendetta

Global movements that have challenged globalisation since the 1990s may be viewed as the last generation of those "new social movements" (NSMs) to play a major role after 1968 and the crisis of the workers and socialist movement.[2] The NSMs have arisen separate from and beyond the crisis of the traditional workers movement and trade unions: descending from the political and socio-cultural innovations of the 1960s and 70s, they have developed a continuous dialogue with the political activism of the NewLeft. The "global insurrection" of 1968 and the "transnational political" vision[3] opened the doors to a cycle of protests and public criticism against the traditional forms of political and workers organisations: collective action outside the statist framework and the tradition of mass movements (the Social Democratic and/or communist parties and the trade unions). The student movements that, in the middle the 1960s, crossed the "situationists avant-garde"; the feminist movement, that in those years disputed collectively the patriarchal family and the

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1 The title used here is taken from the first collection of stories by Thomas Pynchon, *Slow Learner. Early Stories* (Little, Brown & Company, 1984) to underscore the youthful path to the NSMs in the crisis of modernity and European public space.

2 C. Offe, "New Social Movements: Challenging the Boundaries of Institutional Politics" in *Social Research*, 52/4 (1985); N. Luhmann, *Sociologia del rischio*, transl. G. Corsi, (Bruno Mondadori, 1996); see *Soziologie des Risikos* (Berlin: de Gruyter, 1991); I. Wallerstein, "New Revolts Against the System" in *New Left Review*, (Nov-Dec, 2002); M. Castells, *The Power of Identity, The Information Age: Economy, Society and Culture*, Vol. II (London: Blackwell, 2004)

3 M. Watts, "1968 and all that..." in *Progress in Human Geography* 25 (2001) 157-188

male-dominated society; the "*Bürgerinitiativen*" of the German local/civic movements, already investigated by Jürgen Habermas and Niklas Luhmann; the collective mobilisation for peace; [4] the ecologist and environmentalist movements; the consumers' movements; the human rights and post-colonial movements; the collective actions seeking for social justice for outsiders left behind by European Welfare. These NSMs are both "Anti-systemic Movements" and new political and social organisations.

Those NSMs, along with their innovations, cross the economic and institutional changes of late modernity in the old continent; they act on imaginary and symbolic fields and are able to transform the public space (*Öffentlichkeit*) of post-industrial society.[5] The NSMs are aware that the relations between "time, space and society" are in a phase of radical change: the age of information and knowledge – where production is language – has generated a fragmentation of authority and powers. The social and technological innovation has conveyed the pursuit of decision-making promptness through refined governance procedures and has fragmented in a multitude people claiming freedom and autonomy by powers. The relationship between society and institutions is an unresolved friction between permanent global war, control society, autonomy or subordination of social conflict, anti-political populism.

The legal modernity trajectory, a century after the announced crisis of Modern State, has now led us to the crisis the post-modern State, facing a network society based on information economy. On one hand, we are passing from von Jhering's "struggle for law" and from the theories of institutional pluralism and the *droit social* of the beginning of the last century to the perspective of the "conflict of laws";[6] on the other hand, we are posing the singularity of the mobile and disorganised multitude before the deconstruction of the institutions and the consolidation of social connections, between the empire and new demands of being in common.[7]

In these 30 years of historical changes, the NSMs had a imaginative

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[4] A. Melucci, "The Symbolic Challenge of Contemporary Movements" in *Social Research* 52/4 (1985)

[5] A. Touraine, "An Introduction to Study of Social Movements" in *Social Research* 52/4 (1985)

[6] C. Joerges, "Rethinking European Law's Supremacy" in *EUI Working Paper Law* 12 (2005)

[7] H. Rheingold, *Smart Mobs: The Next Social Revolution*, (Cambridge, Mass.: Perseus, 2002) [trad. it. G. Rossi & R. Cortina, 2003]; M. Hardt & A. Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2000).

capacity of thinking and putting into practice a space between (state and supranational) institutions and "civil society": an "intermediate public space", where the autonomy of the movements prevented their institutionalisation but allowed for a conflict-dialogue-exchange between the NSMs' claims and the time of political decision-making.[8] NSMs assert a new political space: avoiding the close alternative between private/civil society/market and statal/institutional and affirming the richness of new post-statal public spaces. The NSMs' activism has contributed to articulate processes of subsidiary redistribution of powers and functions between the multiple levels of government/administration in Europe; they have protected their reticular, non-hierarchical, horizontal self-organisation and the survival of autonomous communicative spaces of local-continental collective action. They have also taken advantage of their natural talent toward autonomy to create counter-institutions or, rather, independent institutions in the post-Fordist society, the "society of spectacle"; as Herbert Marcuse already said regarding 1968, they can be seen as "working against the established institutions while working within them".[9] As a matter of fact, during the 1980s and 1990s the innovative attitude of social movements, compared to the "changing structure of political opportunities in the European Union"[10] has been evident, especially in terms of the environmentalists, NSMs and the regionalists-autonomous movements, and for the anti-nuclear and pacifist movements that have assumed the continental dimension of conflicts and claims. In those years, mechanisms of comparison and collaboration of the so-called EU "old governance" have been developed by the inclusion of the institutionalised part of the European civil society acting on single issues – for which the possibility to influence and transform specific institutional policies is crucial. On these issues the 80s NSMs have become lobbyists (as stakeholders) or players (as in the case of Green Parties) of the European political-institutional space in transition, only partially reducing their public activism. As for the peace movements and environmentalists on a global scale (from Amnesty International, Greenpeace, *Médicines Sans Frontières* and other NGOs), they try to keep radicalism in public actions, the capacity of communicating and raising the awareness of public opinion, forms of self-organisation and of direct action in the areas of crisis, together with mechanisms of influence and participation to institutional choices. We could re-affirm here what was said about the global context: this is the "quiet revolution"

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[8] Melucci, *supra* note 4

[9] Watts, *supra* note 3

[10] G. Marks & D. McAdam, "Social Movements and the Changing Structure of Political Opportunity in the European Union", in G. Marks, F.W. Scharpf, P.C. Schmitter & W. Streeck, eds. *Governance in the European Union* (London, Thousand Oaks, Calif.: Sage, 1996)

of the NGOs – understood as "motors of change" – but here it is often impossible to distinguish the boundary between the "private interest representation [and] civil society deliberation".[11] Moreover, in Europe, there exists the hope that NGOs may act as "agents of political socialisation" in the process of "Europeanising civil society", although the internal organisation of NGOs has to become truly democratic in order to give real instruments of intervention in the decision process of the EU.[12] The awareness and the richness of these new movements, in both the actions and the tactics aiming to institutional influence, survives in periods of deterioration of the spaces of political action and the ebbs of mobilisation, when only single-issue claims can establish an embryonic European public sphere. However, a continental public space, as a definite and permanent arena of public debate for European citizenships and of control of EU institutions, cannot be realised.

Actually, the grassroots statement of 15 February 2003 made by the "mass demonstrations in London and Rome, Madrid and Barcelona, Berlin and Paris" against the war in Iraq could be interpreted as a "sign of the birth of a European public sphere":[13] an evocative constituent date in the process of definition of political Europe, not only as a bureaucracy for EU policies, but as an area of activism, mobilisation and conflict practised by NSMs; in particular, those led by the "anti-war" ones, who met the action of post-Seattle global movements. The mass-media spoke of a "new power in the streets", the "second superpower" of the "global peace movement".14 In those days, the streets of global cities were crossed by multitudes that, at the turn of the century, had questioned, challenged and transformed the global order – "the End of History", as Francis Fukuyama pretended. The "three roads" arising from the global protests of 1968 – Berlin in 1989, Chiapas in 1994 and Seattle in 1999,[15] and after the Genoa G8 of 2001 and

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[11] D. Curtin, "Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance" in *Social Legal Studies* 12 (2003); C. Beyer, "NGOs as Motors of Change" in *Government and Opposition* 42/4 (2007)

[12] A. Warleigh, "Europeanizing" Civil Society: NGOs as Agents of Political Socialization" in *Journal of Common Market Studies*, 39/4 (2001)

[13] J. Habermas & J. Derrida, "February 15, Or What Binds European Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe" in *Constellations* 10/3 (2003) 291-297

14 "[T]he huge anti-war demonstrations around the world this weekend are reminders that there may still be two superpowers on the planet: the United States and world public opinion." See P.E. Tyler's famous article published in *The New York Times*, February 17 (2003), "Threats and responses: new analysis. A New Power in the streets"; also, J. Schell, "The Other Superpower" in *The Nation*, April 14 (2003)

[15] Watts, *supra* note 3

9/11 – met to contrast Bush Jr.'s unilateralism and stand as a global critical public opinion.

This could have been a further advance in the definition of a "European public sphere": such continental public dimension already existing in the artistic, cultural and scientific had known peaks of assertion even at the level of the public protest against the legitimacy of political institutions in the 1990s: the "negative advertising" brought by scandals such the Bangemann affair, "mad cow disease" (BSE) or the resignation of the Santer Commission, had played a role in the same direction, as well as the approval of 'public' procedure by the Prodi Commission.

This "slow learning" of a European plural and critical public opinion achieved a partial result as the "Convention on the Future of Europe" gave rise to the European Constitutional Treaty, sanctioned afterwards by the French and the Dutch referenda of 2005. The claims rising from the movements of that European public opinion remained unanswered, therefore, as well as lacking any real institutional counterpart. The question nevertheless still stands open: how to act in the reticular meshes of European governance while both avoiding the institutionalisation that could reduce the movement to simple stakeholders and maintaining an autonomous capacity to control, protest, challenge and influence the decision-making process?

> "*Dans les "institutions", il y a tout un mouvement qui si destingue à la fois des lois e des contrats*."
>
> Gilles Deleuze, Contrôle et devenir[16]

II. THE "NEW EUROPEAN GOVERNANCE" DILEMMA

Already with the White Paper on European governance,[17] the EU Commission felt the need "to strengthen the participation and interaction (consultation) of civil society,[18] as well as "reinforc[ing a] culture of consultation and dialogue",[19] "involv[ing] civil society", and rediscovering civil society, especially as a tool to reduce the gap between the structures

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[16] G. Deleuze, "Contrôle et devenir" in *Pourparlers* (Paris: Editions de Minuit, 1990)

[17] COM (2001) 428 Final/2

[18] O. De Schutter, "Europe in Search of its Civil Society" in *European Law Journal* 8/2 (2002) at 30

[19] *Ibid,* 16

of transnational governance companies governed by these structures.[20] However, the White Paper seemed to have been more the "symptom of the crisis" of the EU institutions rather than its remedy[21] – the question of the legitimacy of the EU institutions remains and, as Olivier de Schutter observes, Europe is still "in search of its civil society"[22] as much as it is "in search of legitimacy".[23] After the refusal of the "Constitutional Treaty" and pending the ratification of the Lisbon Treaty, the EU still maintains experimental modes of partial openness and participation in the regulatory process such as, for example, the "New Modes of Governance" (NMG) and the Open Method of Coordination (OMC) – in areas such as: employment policies (European Employment Strategy, EES), social protection and inclusion, youth policies, education and training – the committees system ("comitology"), the EU agencies, procedures of European social dialogue, and so on and so forth.

Cases of employment and social inclusion[24] show how the civil society organisations have been able to use the Open Method of Coordination (OMC) "to strengthen their agendas and positions *vis-à-vis* governments", and define the OMC as a "perfect laboratory for them to defend and develop their existing agendas and to develop stronger means to influence Social Ministries". On the other hand, some observe that the current evolution of the OMC, a tool for the intergovernmental cooperation, is harmful to the EU system due to the centrality of the governments and the marginal role which is confined the EU Commission, and thus are hopeful that what they see as a necessary "communitarisation" of the OMC will take place.[25]

However, a major question remains open: do these "new modes of governance" suffice to establish good governance and include real openness and participation for the new social players, excluded from the institutional system? This is the new governance dilemma behind the

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[20] K.A. Armstrong, "Rediscovering Civil Society: The European Union and the White Paper on Governance" in *European Law Journal* 8/1 (2002)

[21] C. Joerges, K-H Ladeur & J. Ziller, with assistance from L. Dragomir, eds., "Governance in the European Union and the Commission White Paper", in *EUI Working Paper Law* 8 (2002)

[22] Schutter, *supra* note 18

[23] E.O. Eriksen & J.E. Fossum, "Europe in Search of Legitimacy: Strategies of Legitimation Assessed" in *International Political Science Review* 25/4 (2004)

[24] C. de la Porte, "Good Governance via the OMC? The Cases of Employment and Social Inclusion" in *European Journal of Legal Studies* 1 (2007)

[25] V. Hatzopoulos, "Why the Open Method of Coordination Is Bad For You: A Letter to the EU" in *European Law Journal* 13/3 (2007)

"participatory myth"[26] and the somewhat instrumental use of the terms "participatory democracy".[27] Is it possible to go beyond the merely functionalist orientation of European governance? There exists instead a mechanism of mutual influence between "the power of institutions" and the hundreds of groups of civil society, which is nevertheless often crucial for the interference of bureaucracies from national governments, as government institutions have a significant and often dark and non-transparent "ability to influence the dynamics of the interest group system".[28]

We should undertake the criticism of the participative rhetoric inscribed in the meshes of the new European governance, which is ever-oscillating between self-reference and openness. The co-existence of a "dark" and a "golden" side in the governance ideology and procedures should be interpreted as an opportunity to rethink the forms of democratic participation, starting from some positive experience of a possible meeting between the "democratic aspirations and the political reality" as happened for environmental and regional policies, and the debate about food safety and genetically modified organisms (GMOs). The participation of civil society in these areas could become a principle of "cure for the democratic deficit"?[29]

One should reduce the most elitist aspects of procedure complexity in the ways of access to the European governance system and enhance the instruments of transparency, administrative simplification, proximity to the citizenships and thus of openness and inclusion, preventing the danger of normalising the public sphere and neutralising the institutionalised civil society, as would happen if the praxis was restricted to the top-down approach of functionalist governance. One may valorise the "golden side" of new modes of European governance to release the decision-making procedures from the statal dimension, to reconsider the forms of inclusion beyond the institutions of the representative mediation and to imagine and practice new forms of legal (self-) regulation, beyond the crisis of parliamentary democracy and law. One should conceive a dimension that puts the "new social movements" of the last generation before the "new modes of governance". Indeed, NMGs and NSMs invest in the gap

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[26] S. Smisman, "New Modes of Governance and the Participatory Myth" in *European Governance Papers* 06/01 (2006)

[27] J.N. Pieterse, "Participatory Democratization Reconceived" in *Futures* 33 (2001)

[28] C. Mahoney, "The Power of Institutions: State and Interest Groups Activity in European Union" in *European Union Politics* 5/4 (2004)

[29] J. Steffek, C. Kissling & P. Nanz, *Civil Society Participation in European and Global Governance. A Cure for the Democratic Deficit?* (Basingstoke: Palgrave, 2007)

between institutions and society, exceeding the worn-out forms of political and labour representation. Here, therefore, I propose a comparison between NMGs and NSMs under the triple profile of the crisis of state-centric, democratic and normative paradigms, or – if we proceed by slogans – NMGs and NSMs between non-state public space, post-democracy and self-government/regulation. An impossible squaring of the circle, this recombines new criticisms of the institutions and a deconstruction of the governance with the new social movements' imaginative practice.

An End (h)as a Start: NSMs and Post-Modern Constitutional Theories: Preliminary Notes on Fragments of Possible Experiments

In these last considerations I assume the horizons of the procedures of new governance and the NSMs exist in a relationship of ongoing tension with the changing law production and the redefinition of political relationship, in order not to fall into the trap of the statal legitimacy. This new context made of often irreducible pluralism, systemic complexity, procedural fragmentation and reticular relationships gives birth to a plurality of new actors: those who are not rooted in state sovereignty, nor recognise themselves in the traditional forms of social mediation.

In this multilevel space, the governance procedures face the intermittent emergency of the active portion of NSMs. The political autonomy of conflicts, considered as "pillars of democratic societies"[30] lies between the places and times of the decision and the need for public control and protest; but such players act against the idea of state sovereignty and the mediation exerted by parties and unions, which is based on the parliament centrality and on the hierarchy of the sources of law.

The Europeans NSMs of the last generation, who have learned from autonomy of the feminist movement, from the "information guerrilla" of the Zapatistas and self-organisation of social spaces in the European metropolis, turns to be active minorities into the disorganised public opinion. They are autonomous, informal, anti-conformist movements, who perform their collective public actions to deconstruct and de-structure the language and the practice of powers, and even claim a constituent attitude. They represent the other side of organised civil society, which has been admitted to institutional levels: they want to involve it in the mobilisation and lead campaigns on single issues to influence decision-making; but the NSMs remain outside institutional mechanisms. In fact, the NSMs seem to be immediately "constituent" from the communicative point of view and, while protesting, claim the possibility of a "law in movement", from

[30] A. O. Hirschmann, "I conflitti come pilastri della società democratica a economia di mercato" in *Stato e Mercato* 4 (1994)

where it is possible to keep autonomy and ongoing "institutional deconstruction" together, based also on the "flexible alliances between autonomous social spheres and various levels of global governance".[31]

NSMs practice autonomy as a tool of self-government and constituent imagination of heterogeneous institutions with respect to established powers. This trend displays a "constitutional irresolution"[32] and, at the same time, the hypothesis of transforming the "post-modern Global Governance" before the "critical legal Project".[33] Thus the thoughtful reading, which proposes to recover the tradition of civil society in the "re-imagination of European Constitutionalism",[34] while appearing extremely interesting although probably biased, still sets itself apart from "European constitutionalism beyond the state".[35] Here one would like to remove the question mark from John Erik Fossum's "*Adieu to constitutional élitism?*"[36] in order to question what the constituent processes will become in Europe after modernity. One could also opt for proposing "constitutional insurgency"[37] by simply accepting a non-formalistic interpretation of the Constitution and considering it to be an unsettled project, open to a network writing by social outsiders of the hierarchy of powers.[38]

In this sense, NSMs are the richest fragment of critical public opinion, fighting for new welfare systems, common goods, commons, environmental issues, new rights of the digital age, autonomy and metropolis self-government. How can these new players and their instances question, meet, change what we call the post-modern constitutional critical theories? On one hand, one could follow the paths of the reforms of new governance, no matter how radical. Particularly

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[31] M. Blecher, "Law in Movement. Paradoxontology, Law and Social Movements" in J. Dine & A. Fagan, eds., *Human Rights and Capitalism* (Cheltenham: Elgar, 2006)

[32] E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society" in *European Law Journal* 9/4 (2003)

[33] A. Negri, "Postmodern Global Governance and Critical Legal Project" in *Law and Critique* 16 (2005).

[34] M.A. Wilkinson, "Civil Society and the Re-imagination of European Constitutionalism" in *European Law Journal* 9/4 (2003)

[35] J.H.H. Weiler & M. Wind, *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003)

[36] J.E. Fossum, "Adieu to Constitutional Elitism?" in *ARENA Working Papers* 10 (2006)

[37] J.G. Pope, cited by J. Brecher, "Global People's Law?" in *Znet*, May 4 (2006)

[38] F. Ost & M. van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit* (Bruxelles: Publications des Facultés universitaires Saint-Louis, 2002)

interesting approaches are those of Jonathan Zeitlin,[39] alone and with Charles F. Sabel,[40] where it is argued that the OMC is a form of Social Europe "experimentalist governance", in addition to which they situate other instruments of the "new architecture of experimentalist governance in the EU", such as the "federated regulations in privatized infrastructures" (electricity and telecommunication infrastructures) and the "networked agencies", as far as proposing these operational models of the EU as being "an exemplary architecture for global governance".

In this respect, one can debate the central role played by the "system of committees", one of the "new instruments of transnational governance in the EU", which needs a reform in the sense of greater correspondence to the criteria of openness, access, pluralism: a "constitutionalisation of comitology" without a re-stating of state-centric paradigm but, rather, for the purpose of settling "the conflicts of law".[41]

This analysis has many similarities to those that propose to investigate the "new governance" as a form of "democratic experimentalism", to reverse the top-down approach and promote action "from the bottom-up"[42] instead. This is a very inspiring framework, frankly dealing with the critical thought on powers, albeit from a pragmatic approach in the wake of John Dewey, which also provides many insights starting from the "Toyota jurisprudence" as "a kind of "post-Fordism" for legal theory".

One analysis includes the role of case law, which becomes crucial during all institutional transformations: this highlights the importance of dialogue between the courts in the Old Continent, where sometimes the protection of fundamental rights becomes a comparison, but also of conflict between multi-level courts (ordinary-national, constitutional, European),[43] civil society and Union citizens.[44] This is a level that consumer associations, some advocacy of social movements, the active minorities, etc. have been already aware of for quite a long time: namely, how to protect their rights at the highest degree and introduce new ones. This demand will become

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[39] J. Zeitlin, "Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?" in *European Governance Papers* 4 (2005)

[40] C.F. Sabel & J. Zeitlin, "Learning from Difference: The New Architecture of Experamentalist Governance in the Europan Union" in *Eurogovernance Papers* 2 (2007)

[41] Joerges, *supra* note 6

[42] Wilkinson, *supra* note 34

[43] M. Cartabia, ed., *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee* (Bologna: Il Mulino. 2007)

[44] S. Wernicke, "Au nom de qui? The European Court of Justice between Member States, Civil Society and Union Citizens" in *European Law Journal* 13/3 (2007).

even more urgent as a result of the possibility of making creative use of the EU Charter of Fundamental Rights, solemnly re-proclaimed by the European Parliament last December.

Which principles of justice? Such question, too, is constantly present in the various schools of "post-modern theories of jurisprudence", such as those analysed in the US by Gary Minda.[45] And this is certainly the search for a "postmodern concept of justice", starting from the "law in movement" in Michael Blecher's recent work,[46] which maintains that the "emancipatory concepts of law and social justice today comes from systems theory".

In particular, let us consider the work by Gunther Teubner, who has been dealing with the "critical legal thought" since the 1980s, firstly in terms of the definition of a new *lex mercatoria* and then with the global law in the sense of a "constitutionalism societal" as an alternative to State-centred constitutional theory:[47] going as far as to question forms of resistance and the self-claiming of "human rights", against the pervasiveness of communication processes of the "Anonymous Matrix", and moving the idea of justice closer to "spontaneous indignation, unrest, protest".[48] There is a *fil rouge* in the Teubner's thought, crossing from the demand for universal political access to digital communication (*qua* cyberspace), with the definition of a *lex digitalis*, but which does not exclude the acknowledgment of a "reasonable illegality"; up to the promotion "prompting regime-internal self organisation so the different regimes can establish their own grammars for their version of a global *ius non dispositivum*", in a process that the French philosophers, Deleuze and Guittari, might have characterised as being "rhizomorphic" in nature".[49]

The assertion of new rights and modes of regulation is also the domain of labour law scholars dealing with the transformations of labour and of

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[45] G. Minda, *Postmodern Legal Movements. Law and Jurisprudence at Centur's End* (NY: New York UP, 1995)

[46] M. Blecher, "The Continous Becoming: Towards a Post-Modern Concept of Justice, presented at the Conference on 'Human Rights and Capitalism', Queen Mary's College, London, (September, 2006)

[47] G. Teubner, "Societal Constitutionalism: Alternatives to State-centred Constitutional Theory" in C. Joerges, I-J Sand & G. Teubner, eds., *Transnational Governance and Constititionalism* (London: Hart, 2004)

[48] G. Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors" in *Modern Law Review* 69/3 (2006).

[49] A. Fischer-Lescano & G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" in *Michigan Journal of International Law* 25 (2004).

welfare systems over the past 30 years, especially in the context of Europe.[50] The search for social systems recognising rights and guarantees to the laborious citizen "*au delà de l' employ*",[51] the analysis of the new forms of regulation[52] and the composition of rights in Social Europe[53] are attempts to answer to the new forms of post-Fordist labour within the information society. The planning of "new welfare systems" meets the need for new protections for the independent worker of second generation,[54] proposing the hypothesis of a basic income – *allocation universelle*[55] along with the "flexicurity" policies and principles now discussed at EU level.[56]

On these issues, as the rethinking of a radical and critical federalism, from a reinterpretation of the relationship between "city and the grassroots",[57] one wishes for the eventual meeting between European NSMs' imaginative practice in the continental spaces and these innovative critical theories of powers and rights. This is a part of the toolbox, to be filled with more tools if these are still the times to conceive the self-organising society, experiencing the right of every generation to live a life of dignity.

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[50] B. Caruso, "Changes in the workplace and the dialogue of labor scholars in the 'global village'", *WP C.S.D.L.E. - Massimo D'Antona*, 50 (2007)

[51] A. Supiot, *Au-delà de l'emploi* (Paris: Flammarion, 1999)

[52] M. Barbera, ed., *Nuove Forme di Regolazione: Il Metodo Aperto di Coordinamento delle Politiche Sociali*,
(Giuffrè, 2006)

[53] S. Sciarra, "La costituzionalizzazione del'Europa sociale. Diritti fondamentali e procedure di soft law", *WP Massimo D'Antona*, 23 (2003); S. Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (Cambridge: Cambridge University Press, 2006)

[54] S. Bologna & A. Fumagalli eds., *Il lavoro autonomo di seconda generazione. Scenari del postfordismo in Italia*, (Feltrinelli, 1997)

[55] Y. Vanderborght & P. Van Parijs, *L'allocation universelle, La Decouverte* (2005) [trad. it. *Il reddito minimo universale*, di G. Tallarico (Università Bocconi Editore, 2006)]; C. Pateman, "Democratizing Citizenship: Some Advantages of a Basic Income", in *Politics and Society* 32/1 (2004); BIEN – Basic Income Earth Network)

[56] G. Bronzini, "Flexicurity for all?" in *Centro per la Riforma dello Stato*, http://www.centroriformastato.it (2006); G. Allegri, "Oltre l'Europa convenzionale: i mille piani dei movimenti sociali nell'Europa politica", in G. Bronzini, F. Heidrun, A. Negri & P. Wagner, eds., *Europa, Costituzione e movimenti sociali*, (Rome: Manifestolibri, 2003).

[57] M. Castells, *The City and the Grassroots: A Cross-cultural Theory of Urban Social Movements* (University of California Press, 1983); see also, "Re-reading Castells" in *International Journal of Urban and Regional Research* 30/1 (2006)

MIND THE GAP

Michael Blecher*

This article is an attempt to highlight the passage from the rather "embedded" role "conceded" to social movements by major concepts of social organisation to a different understanding of social movements as "re-claiming the common" throughout and beyond colliding social spheres. With respect to law, we are now moving from what Luhmann called "justice as adequate complexity"[1] to what I call, with loose reference to Deleuze[2], "Justice as Continuous Becoming" and "Law in Movement". The following steps of the governance debate have brought us to this point:

Neither the normative hierarchies nor revised dualisms of international public law can easily cope with the regulatory problems of post-modern and post-national societies, which are organised "in multi-layers" and "networks". Leftist legal positivism,[3] which has been struggling against politico-legal decisional authoritarianism since the time of the Weimer Republic and can be characterised as attributing to law the leading role in (international) problem solving, also finds itself undermined by the "escape mechanisms" of non-application or non-enforcement, of new forms of political aggregation like "the coalitions of the willing", and of totalising security strategies. Agamben's state of emergency[4] seems similarly trapped by a concept of legal hierarchies (rule/exception) and has, therefore, difficulties in grasping both the novelty of structures flexibly coordinated by governance structures and the new "gaps" they are producing.

The deliberation approach[5] faces up to these governance structures by maintaining a leading ('hard') role for the law: namely, the management of collisions between different rationalities and interests within the social *unitas multiplex*. At stake is the constitution of procedural set-ups of law-making which claim both to cope with the deficiencies of traditional

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[1] See N. Luhmann, *Das Recht der Gesellschaft*, (Suhrkamp: Frankfurt/M, 1993).

[2] See G. Deleuze, *Was ist Philosophie?* (Suhrkamp: Frankfurt/M., 1996)

[3] See, for example, L. Zagato, "Governance: a challenge for international law?", in M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., "Governance, Civil Society and Social Movements', in *European Journal of Legal Studies* 3 (2008) (forthcoming).

[4] See G. Agamben, *Homo Sacer. Die souveräne Macht und das nackte Leben*, (Frankfurt/Main: Suhrkamp, 2002) 28 et seq.

[5] See, for example, C. Joerges, "A New Alliance of De-legalisation and Legal Formalism? Reflections on Responses to the Social Deficit of the European Integration Project", in this volume.

interventionist law and to compensate the erosion of state government in the post-national constellation. This approach shares the "rational prejudices" of Habermas' theory of deliberative democracy, above all with its reference to an "ideal" or 'transcendental' model of procedural communicative rationality, which, as Habermas usually puts it,[6] must(!) be claimed by anybody (*potentia*lly) participating in the discourse among competent actors. No doubt, this ideal model "works" and so Habermas "creates facts". However, the question remaining is whether its "accountability" is enough to meet legitimisation requirements and to avoid the result, as suggested by Günter Frankenberg, that these circles of deliberation, enriched by civil society representation, create a new "status structure".[7]

In terms of network systems theory,[8] law definitely loses its role as the prominent manager of collisions. Here, the market and discovery context of autonomously regulated discourses, institutions, and systems introduces compatibility problems and difficulties in the normative establishment of what is necessary for these discourses to survive and evolve "together"; namely, an asymmetric reciprocity which "transcends" their binary definitions (legal/illegal, having/not having, powerful/not-powerful, true/false, etc). On the one hand, the development of social self-organisation and collision management appears to be the latest stage of law's secularisation process, while on the other hand, any limitation on (normative or cognitive) collision management falls short of law's "old European promise" to eventually eradicate any kind of injustice from social organisation and develop a "positive" concept of justice. This is where "Law in Movement" or "justice as continuous becoming" comes to the fore.

The key concept here is the "contingency" of social and legal development, by which I mean the fact that decisions taken are neither "necessary" nor determined by "destiny", but are always possible in a different form and thus never lose their intrinsic inadequacy. This raises the (normative) question as to how social organisation and its political, economic, legal, scientific, etc. functions *should* work differently to avoid negative effects and improve the common good in terms of wealth, justice, truth, etc. I

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[6] See J. Habermas, "Kommunikative Rationalität und grenzüberschreitende Politik: eine Republik", in: P. Niesen, B. Herborth, eds., *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die internationale Politik*, (Suhrkamp: Frankfurt /M, 2007) 406-460 at 425.

[7] Cf. G. Frankenberg, "National, Supranational, Global, Ambivalences of Civil Society's Practice", in this volume.

[8] See, for example, G. Teubner, 'Justice Under Global Capitalism?', in this volume.

share Foucault's view that "liberating the possible" by unveiling contingency against any universalism and fundamentalism is the real breakthrough of the Enlightenment – it reveals "the Other" in Kant, a critical ontology as against an idealist apology for any condition of reason.[9] Along with this "(onto)logical" aspect, this "criticism of criticism" reveals the permanent, transversal and "normative" pressure on the inevitable asymmetries of social organisation as they interact with mechanisms of inclusion and exclusion, discipline and control, representations and majorities, ownerships and scarcities, etc, which in turn clash with the unlimited development *potentia* of individual and social actors. "Liberating the possible" means reconstructing Spinoza's "*potentia*" as "contingency", meaning literally "everything possible is indeed possible", and reconstructing "justice" as the continuous pursuit of the maximum possible mutual development in a specific historical social context. This is the distinguishing feature of law and its emancipatory mandate.[10]

The paradox of law's role is that it must recognise and develop normative standards for the creation of social structures while also waging a continuous battle against any restrictions on democracy, common wealth, and justice connected to these structures. Law runs both immunisation strategies and strategies against immunisation. This paradox has been managed both by introducing different actors, levels, locations and procedures into law-making (legislative institutions, contracts, courts), and by being mobilised by social movements and their claims for freedom, autonomous self-construction and new social rights. In other words: when the crowd was running against the Bastille, a symbol of the destructive forces of the ancient regime, it exercised Law in Movement. When demonstrators ran against the G8-cages, they exercised Law in Movement against the usurpation of common global space by self-declared global decision-makers lacking any adequate legitimisation through – and this is the vital point – adequate global governance structures.

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[9] See M. Foucault, "Was ist Aufklärung?", in: E. Erdmann, R. Forst, A. Honneth (eds.), *Ethos der Moderne. Foucaults Kritik der Aufklärung* (Suhrkamp: Frankfurt/M, 1990).

[10] I prefer the concept of "contingency" to the one of "difference" used by R. Ciccarelli in his paper "Governance & Governmentality: Same Problem, Different Answers", in this volume. This is to underline that also the difference made by a new or different distinction is "always possible in a different form" or is *contingent*. This avoids the attribution of any "hegemonic sense" to the new distinction, which appears to be created by a process of conflict and cooperation ("governance"). The creation of the difference or of a new ("more just") distinction results, then, in contingency *in terms of* resistance to the previous difference. It is in this way that contingency becomes self-reflexive.

Indeed, it is the governance phenomenon that brings law back to its very "origin" of law-making ("Recht-Fertigung") by revealing that the law is not anchored to a specific "polis" or to a Hobbesian statehood, but is able to pursue different forms of the common *as long as* its own normative requirement of creating ever more transversal justice from ever exceeding possibilities is achieved. From this point of view, our complex juridical systems appear as nothing other than highly specialised (and hierarchical) forms of "governance." In court, the possibilities exceeding the parties' positions are represented by the professional role of a judge (or arbitrator), who is legitimated by their "impartial" access to those "third values" and is thus allowed to create the standards for the ("partial") attribution of "rights" (legitimate claims) to one or other party. Governance, then, is not the extension of the "emergency state", but rather the opposite: a *reaction* to the failures of markets, states and laws and to the consequential fragmentation, hybridisation and multi-level character of autonomous global norm production. These phenomena have led to the reappearance and management of other possible values for normative (re-)construction, which the "classical" forms of legal collision management, through national, international and supranational law, have not been able to cover adequately. This lack or loss of legal impact creates a *de facto* "de-legalisation" while the governance concept tries to cope with the mentioned failures by installing another form of "legalisation" or law-making under conditions of uncertainty and exceeding possibilities.[11]

There is no doubt that the crisis of existing structures can promote forces that result in a reduction of achieved levels of justice, wealth, social protection and participation; see, for example, the notorious neo-liberal economisation of state functions. Therefore, in order to become more rather than "less critical", the establishment of governance procedures cannot depend either on certain formal models ("the court model", "the comitology model," etc.) or on single concepts that hide selective economic, political, legal, etc. models. Governance procedures must develop an adequate level of party protection and (im-)partial deliberation for each specific ("regime") context, with the aim of creating more justice, wealth and reciprocity. To this end, therefore, the following are required:
rules on the creation of a "competent" governance forum, which also regulate access to it (*i.e.* "to justice");
rules on case management and collision standard setting;
rules regarding the review of decisions.

Governance procedures aimed at the establishment of "reciprocity" or

[11] See C. Joerges, *supra* note 5, on a new "recombination" of de-legalising and re-formalising aspects.

"mutual respect and care" between diverging discourses, institutions, systems, rationalities, etc. imply the legal obligation to radically open all available approaches of social construction and standard setting to everyone, including those approaches that propose alternatives to existing standards, such as , for example: a different view on property rights in terms of "unalienable common goods"[12]; proposals which link the privilege of legal personality and limited liability to social responsibility[13]; or the role of fundamental rights (of the Nice Charter) "beyond bipolar systemic functions".[14] "Opening for other possibilities" also certainly means the obligation to introduce social movements who are active in the respective social context, alongside the introduction of adequate review mechanisms and the attribution of responsibilities and/or liabilities regarding their enactment.[15]

However, this process of deliberation through governance procedures (norm setting, argumentation, decision) never loses its ambivalence, and it is here where the differences between governance procedures and "civil society" concepts come to the fore. Social movements move "in parallel" to the paradox of law. They may well be a component of procedures aimed at creating adequate complexity and producing the justification for necessary changes, but they also refuse simply to be another "stakeholder" in the governance "game", for they are not only concerned with colliding "rationalities" and "interests". Rather, both social movements and "law in movement" take (and must take) as their aim the permanent "constitutional act" necessary to de- and re-construct the parameters of the

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[12] See M. Surdi, "Code, Constitution and Compromise, a Cyberconundrum?", in: M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., "Governance, Civil Society and Social Movements', in *European Journal of Legal Studies* 3 (2008) (forthcoming).

[13] See J. Dine "The Capture of Corruption: Complexity and Corporate Culture", in: M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., "Governance, Civil Society and Social Movements', in *European Journal of Legal Studies* 3 (2008) (forthcoming).

[14] See G. Bronzini, "The Social Dilemma of European Integration", in this volume, and also G. Allegri, 'New Social Movements and the Deconstruction of New Governance. Fragments of Post-Modern Constitutional Theories in Europuzzle, in M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., "Governance, Civil Society and Social Movements', in *European Journal of Legal Studies* 3 (2008) (forthcoming).

[15] I would like to emphasise here that this "critical" concept of Governance (organized by law) was, by and large, anticipated by Rudolf Wiethölter's 1982 concept of the "proceduralisation of law", which means social construction by creation of adequate "standards, decision-making bodies and procedures" that law has to take care of. Cf. R. Wiethölter, "Materialization and Proceduralization in Modern Law", in G. Teubner (ed.), *Dilemmas of Law in the Welfare State*, (de Gruyter: Berlin, New York, 1986); and: "Proceduralisation of the Category of Law", in C. Joerges & S. Trubek, eds., *Critical Legal Thought: An American-German Debate*, (Nomos: Baden Baden, 1989).

common, of justice, wealth, truth, etc. This includes the *potentia* re-invention of the entire organisational and decisional set-up, including new common institutions and respective governance procedures, which will obviously also transform the very movement itself.

In terms of the paradox of movements, the oscillation between participation and "exodus" can also be resolved by forms of differentiating times, actors, roles, etc. This is to say that parts of the movement will subject themselves to governance procedures and will argue and bargain, while others will react to those restrictions inevitably connected to the governance procedure, and will restart the movement elsewhere and propose alternative procedures.

Under circumstances of post-modern governance, therefore, there is no doubt that movements reach their maximum practical impact and self-reproduction by diversifying their role and by maintaining both their structural openness and networking against any Soviet-style usurpation. This also means that the movement cannot be limited to either the "siege-aspect" or to the view encapsulated by Bartleby's statement: "I prefer not to". The new spirit of capitalism will inevitably absorb parts of its 'programme' and its activists but – never mind – movements are progressing according to the slogan: "They want our best, but we won't give it to them."

The difficulty in all this is rather what Agamben[16] called, in reference to Foucault, "the leading model of subjectivation", which is to describe those puppet strings we develop from childhood on while socially interacting. This is not the totalisation of the capitalist spirit envisaged by Marx, Lukàsc, Horkheimer and Adorno.[17] The point is that the governmentality described by Foucault[18] (and, with special reference to the gender aspect, by Judith Butler[19]), brings about a generalised model of personal self-government that one cannot easily get rid of, even as "the living alternative that grows inside the Empire". This regime of subjectivation produces today the "entrepreneurial self," the "life-world entrepreneur"[20] which

[16] See Agamben, *supra* note 4, at 93, and 129 et seq.

[17] The climax of this tradition is certainly marked by T.W. Adorno, *Negative Dialektik* (Suhrkamp: Frankfurt/M., 1966 and 1975).

[18] M. Foucault, *Geschichte der Gouvernementalität II. Die Geburt der Biopolitik. Vorlesungen am College de France 1978-1979* (Suhrkamp: Frankfurt/M., 2004).

[19] See J. Butler, *Psyche der Macht. Das Subjekt der Unterwerfung*, (Suhrkamp, Frankfurt/M, 2001).

[20] See on this model, U. Bröckling, *Das unternehmerische Selbst – Soziologie einer Subjektivierungsform*, (Frankfurt/M: Suhrkamp, 2007).

corresponds to the economization of post-modern societies. Independence, competition, communicative skills, vitality, personal renewal and flexibility are the well-known specs. As permanent transformation is part of this psycho-social model, it is especially difficult for movements to be "differently different", last not least because we have a science of governance but no science of "not wanting to be governed". This requires movements to accept their own "monstrosity" and reflect it by maintaining the openness of their forms of aggregation.

However, Agamben's warning applies to governance circles in the first place. The economisation of the life-world system and the regime of the entrepreneurial self are creating from scratch the underlying asymmetries and biases for the deliberating global expert community and the major NGOs that orbit around them, as well as for their Habermasian definition of "what deserves acceptance". A new kind of status or class structure may appear here together with a highly selective view on social development, which reminds me of the traditional cultural homogeneity of judges that have guaranteed the coherence of the common law system of precedents. This is indeed another reason for social movements to do both: take part in governance procedures and challenge their results.

This confirms our reformulation of the concept of justice: the temporary definition of collision standards, coming as much as possible to terms with all "interests" involved, and the immediate search for better solutions as the injustice of established standards is taken for granted. Justice therefore rather lies in the acceleration of the normative transformation process and not so much in its temporary results. These results will obviously develop their "social gravity force". However, the request to "verify" them is again part of political-legal struggles as there is no such thing like "objective verification". *Justice is therefore the continuous struggle about the realization of more adequate reciprocal or common solutions: seditio sive jus.* Such justice as permanent de-and re-construction for the better is not still to come, as Derrida put it[21], but in continuous becoming, and social movements are a driving force in this very process.

At this point, I would like to add a particular note to the criticism raised by Gunther Teubner in one of his recent publications.[22] The reflexive opening or exceeding effect which Derrida describes is obviously

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[21] See J. Derrida, *Gesetzeskraft: Der mystische Grund der Autorität*, (Suhrkamp: Frankfurt, 1991) at 105 et seq.

[22] See G. Teubner, "Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?", manuscript on file with author, (Frankfurt, July 2007).

transversal. The deconstruction of all distinctions applied – including those between (functional) systems and their environments, between conscious and social systems, between immanence and transcendence – leads to the "undetermined formula against the current practice"[23], i.e. to "friendship" or a "common good" in the fields of politics, to the "gift" or "common wealth" in the field of economics, to "justice" in the field of law, to "forgiving" in the field of morality, etc. These "normative promises"' always require to be "realised" and defined through a new form (systemic or else) of individual and social construction which, with respect to the exceeding possibilities, will in any case again be asymmetric, limited and controversial and recreate the critical, deconstructive force in the light of the same "promises".

The experience of this strange procedure of the production of reality brings about a radical (and paradoxical) sense of contingency towards "both sides" involved – towards the inevitable exceeding promises and the inevitable constructions of the network of reality. The maximum we can gain from this sense of contingency is *a new attitude* towards the same production of reality, a paradoxical attitude of struggling without clinging too much, above all struggling without wanting to kill the opponent being well aware of our own "monstrosity", of our own limitation and imperfection. This is the only way to avoid that those undetermined "normative promises" or "symmetry formula" will become the hub for a new transcendental(?!) judgement the representation(!) of which somebody will claim with *force majeure* and a new guillotine. This is also true for the field of religion as Spinoza showed us very well: there is no final sacrifice to be committed in order to reach the promised land. The fact that the same real world is always a realisation of that exceeding *potentia*, of those "promises", means that the distinctions applied are carriers of the "the divine". This means in the first place: you cannot be wrong! This is an uncomfortable message which subverts all hierarchies and doctrines, not only religious ones. However, the sense of contingency also brings about a radical democratic "mandate" to all of us to realise continuously the *potentia* and its promises against established forms and their mechanisms of exclusion, subordination and privileges not legitimised by the same democratic construction; means we are responsible for creating, deconstructing and improving reality in all sectors through conflict and cooperation in order to maintain a maximum of ("divine") development *potentiae* for all individuals, social aggregations and the world as a whole. In this sense, justice, friendship, gift, common good, forgiving, truth,

[23] *Ibid*. See also C. Menke "Selbstreflexion des Rechts: Die Figur subjektiver Rechte und die Politik: Luhmann – Derrida", manuscript on file with author, (Berlin, July 2007).

freedom, etc. are in "continuous becoming".[24]

It is obviously here where social movements come to the fore. The constraints produced by the functional and asymmetric structures of reality make certain actors prominently develop the role of reflection and of (self-)criticism. The battles of social movements play a major role for the productive de- and re-construction of reality. If they want to develop diversity with respect to this ever badly constructed world, they must keep in mind and confront themselves with their inevitable involvement with actual structures, with their own corruption and monstrosity, they must accept their permanent self-transformation and keep their forms of aggregation open.

There is no way out of this restless process of negotiation of standards and their transformation, of this eternally insufficient mix of conflict and cooperation which keeps itself alive because it must realize the exceeding promises without being able to ever reach the complete achievement of this goal. It does not matter if this phenomenon takes today the form of "proceduralisation" or "governance". The announced redemption lies in any case in this construction of reality, in this opposition of reflection against the form which reproduces reflection which reproduces the form and brings about *a transversal action which is genuinely and irreducibly political,*[25] *in any case: "poietic-non-systemic."*[26]

[24] See Deleuze, *supra* note 2

[25] See Menke, *ibidem*, at 38.

[26] See R. Wiethölter, "Recht-Fertigungen eines Gesellschafts-Rechts", in C. Joerges, G. Teubner (ed.), *Rechtsverfassungsrecht*, (Nomos: Baden Baden, 2003), at 13 et seq.

REFRAMING POLITICAL FREEDOM: AN ANALYSIS OF GOVERNMENTALITY

Roberto Ciccarelli*

I. GOVERNANCE & GOVERNMENTALITY: SAME PROBLEM, DIFFERENT ANSWERS

Over the last fifteen years, "governance" has emerged as a research agenda in international relations theory. The term "governance" has been used as a kind of catch-all term to refer to any strategy, tactic, process, procedure or programme for controlling, regulating, shaping, mastering or exercising authority over others in a nation, organization or locality. Governance tends to be judged good when political strategies seek to minimize the role of the state, to encourage non-state mechanisms of regulation, to reduce the size of the political apparatus and civil service, to introduce "the new public management", to change the role of politics in the management of social and economic affairs. Governance refers also to the outcome of all these interactions and interdependencies: the self-organizing networks that arise out of the interactions between a variety of organizations and associations. Politics is consequently seen to increasingly involve exchanges and relations amongst a range of public, private and voluntary organizations, without clear sovereign authority. Governance has allowed the state to survive within contemporary power relations and it can be understood in terms of the transformation of the regulating, controlling and de-centralising role of the state.

All things considered, governance defines the transformation of power in post-neoliberal societies in terms of flexibility of social control – in other words, the invention and assembly of a whole array of technologies that connect calculations and strategies developed in political centres to the thousands of spatially scattered points of the state, which endeavour to manage economic life, the health and habits of the population, the civility of the masses and so forth. In the framework of governmentality studies, which is the methodological starting point of this essay, governance has been defined as *government at a distance*. Political forces instrumentalise forms of authority other than those of "the state" in order to "govern at a distance" in both constitutional and spatial senses: distanced constitutionally, in that they operate through the decisions and endeavours of non-political modes of authority; distanced spatially, in that these

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technologies of government link a multitude of experts in distant sites to the calculations of those at a centre.

Governance as a form of *government at a distance* operates by opening lines of force across a territory, spanning space and time. Its activities are aimed at translating singular standards, individual judgments and conducts into normative prescriptions. To govern no longer means to negotiate a contractual mediation between the different interests of groups, corporations or classes, but to act in accord with independent, international and local, public and private agencies which promote both global and individualised expertise considered essential for the achievement of desired objectives. Studies on governance typically claim that the state has lost power to non-state actors and that political authority is increasingly institutionalised in spheres not controlled by states.

In this perspective, the role of non-state actors such as biotechnological corporations, medical and security agencies in re-shaping and carrying out global governance functions is not an instance of transfer of power from the state to non-state actors, but rather an expression of a changing logic or rationality of government by which civil society as a passive object of government to be acted upon is redefined as an entity that is both an object *and* a subject of government.

The French historian and philosopher Michel Foucault introduced the term "gouvernamentalité" ("governmentality") in the 1970s in the course of his investigations of political power. Government, as he put it in his 1977–1978 course entitled "Security, Territory and Population", was an activity that undertakes to conduct individuals throughout their lives by placing them under the authority of a guide responsible for what they do and for what happens to them. Or, as he put it a couple of years later summarizing the 1979–1980 course "On the Government of the Living": governmentality was "understood in the broad sense of techniques and procedures for directing human behaviour – government of children, government of souls and consciences, government of a household, of a state, or of oneself".

In these lectures, together with those of 1978–1979 on "The Birth of Biopolitics", he proposed a particular approach to the analysis of the successive formulations of the art of governing. Foucault's essay on governmentality argued that a certain mentality, what he termed "governmentality", had become the common ground of all modern forms of political thought and action. Governmentality is an ensemble of the institutions, procedures, analyses and reflections, calculations and tactics that allow the exercise of this very specific albeit complex form of power.

He counterposed the art of government that was taking shape in Europe in the eighteenth century to two other poles: sovereignty and the family. Thinking about power in terms of sovereignty was "too large, too abstract and too rigid," and the model of the family was "too thin, weak and insubstantial". Although the former was concerned with how a prince might best maintain his power over a territory, the model of the family was merely concerned with the enrichment of this small unit. Government, in contrast, was concerned with population which could not simply be controlled by laws or administrative fiat or be conceived as a kind of extended family. Studies on governmentality are not just studies about the actual organisation and operation of systems of power or about the relations that are created among political and other actors and organisations at local levels and their connection with actor networks and the like. Within this theoretical framework, various practices of rule are conceptualised in a different way with respect, first, to state-society relations, and, second, to the functioning of power.

Unlike political theory, which considers the autopoietic logic of governance, governmentality studies are concerned with the conditions of possibility and intelligibility of the ways in which government seeks to act upon the conduct of the self and others, to obtain certain ends in relation with governance policy and to modify individual conducts where governmental policies are at work. The sociologist Nikolas Rose has distinguished the *analytics of governmentality* from *sociologies of governance*:

> "First, analyses of governmentalities are empirical but not realist. They are not studies of the actual organization and operation of systems of rule, of the relations that obtain amongst political and other actors and organizations at local levels and their connection into actor networks and the like [...]. But what distinguishes studies of government from histories of administration, historical sociologies of state formation and sociologies of governance is their power to open a space for critical thought."[1]

In the analytics of governmentality, Rose adds,

> "Governing should be understood nominalistically: it is neither a concept nor a theory, but a perspective. For sociologists of governance [...] the object of investigation is understood as an emergent pattern or order of a social system, arising out of complex negotiations and exchanges between "intermediate" social actors,

[1] N. Rose, *The Powers of Freedom: Reframing Political Thought*, (Cambridge: Cambridge University Press, 1999) 19

> groups, forces, organizations, public and semi-public institutions in which state organizations are only one – and not necessarily the most significant – amongst many others seeking to steer or manage these relations. But the object of analytics of government is different. These studies do not seek to describe a field of institutions, of structures, of functional patterns or whatever. They try to diagnose an array of lines of thought, of will, of invention, of programmes and failures, of acts and counter-acts. Far from unifying all under a general theory of government, studies undertaken from this perspective draw attention to the heterogeneity of authorities that have sought to govern conduct, the heterogeneity of strategies, devices, ends sought, the conflicts between them, and the ways in which our present has been shaped by such conflicts"[2].

In this sociological and theoretical framework, the sciences of economics, management, and accounting could be seen once again – as they had been by Marx, Weber, Sombart, and many other theorists of capitalism – as crucial for constructing and governing economy. Today, the technologies of budgets, audits, standards, benchmarks, risk and assurance, biotechnology and personal medicine are crucial for the operationalisation of programmes of governing at a distance that characterises the new forms of public management taking shape under rationalities of advanced liberalism.

At the start of the 1980s, Foucault's work was being embraced in different ways in various national and disciplinary contexts. Although at one level his analytical framework was not tied to a specific set of problems, it should be regarded partly as a response to a particular challenge: how to make sense of the transformations in the art of government that were under way in Britain, the United States, and other Western countries. Liberal *governmentalities* stressed the limits of the political and stressed the role of a whole array of non-political actors and forms of authority – medics, religious organisations, philanthropists, and social reformers – in governing the *habitus* of the people. Strategies of social government had begun from the argument that such techniques were insufficient to ward off the twin perils of unbridled market individualism and the anomie it carried in its wake, or the social revolution with all the dangers that it entailed. Government, from this point onwards, would have to be conducted from the social point of view, and these obligations had to be accepted by the political apparatus itself: a point of view embodied in the doctrines of social rights, the ethical principles of social solidarity and social citizenship, and the technologies of social welfare and social

[2] N. Rose, *ibid*, 21.

insurance. These took the form of a critique of the welfare state, social security mechanisms, state planning, and state ownership of enterprises, indeed of the whole apparatus of the social state that had taken shape during the course of the twentieth century. It was in this context that a novel periodisation of governmentalities began to take shape.

This tripartite division of liberalism, welfarism, and advanced liberalism became formalised into a typology and chronology in which analysis sought to place each and every programme, strategy or technology under this general covering law. This mode of analysis rendered the new forms of power embodied in the advanced liberal art of government since the early 1970s both visible and intelligible, and it demonstrated the complex costs and benefits of those rationalities and technologies that sought to govern through freedom and security of the population in the 1990s.

II. The Problem of the Government of Freedom and Security

Foucault's analysis of governmentality ("the sum of institutions, procedures, analyses and reflections, calculations and tactics which enable the exercise of this specific and extremely complex form of power, for whom the population is its principal target, the political economy its privileged form of knowledge and the dispositives of security its essential technical instrument") has enabled to distinguish the analysis of power from the analysis of domination and sovereignty, to differentiate the typologies of analysis of the methods of action of the state and its effects on the lives of the subjects who depend on them and lastly to approach on of the principal problems of contemporary politics: how is it possible to govern in order to be less governed? Or rather, how should freedom, which is our fundamental political condition, be governed? At the heart of this inquiry is immersed the dilemma of government: governing freedom means producing new insecurity; producing new insecurity means destroying the freedom to govern.

In order to analyse this problematic place of contemporary politics, starting from the work of Foucault, we will confront the principal themes of *Governmentality studies*, which has been an established line of research for the last twenty years, especially in the English speaking world starting with the Foucauldian interpretation of neo-liberalism[3]. Governmentality

[3] A. Barry, T. Osborne, N. Rose, *The Foucault and Political Reason. Liberalism, Neo-liberalism and Nationalities of Government* (Chicago: The University of Chicago Press, 1996); N. Rose, *The Politics of Life itself: Biomedicine, Power, and the Subjectivity in the Twenty-First Century* (New Jersey: (In-formation) Princeton University Press, 2007);

Studies explored both the individual areas where neo-liberal governmentality developed (in particular the new management sciences, the insurance techniques, biomedicine and biotechnology), and the wider theoretical question – rich with antinomies and a plurality of possible answers – which characterises the last phase of Foucauldian production (the lessons at the *Collège de France* already cited, the "trilogy of sexuality" and lastly the "hermeneutics of the subject").

In general, the problem of governmentality can be summarized with the following aporia: how can a critique of the rationality of neoliberal politics be distinguished from the rationalization of the same politics? For Governmentality Studies the ambivalence of the problem is due to the very subject of this politics. A world populated, in an entirely theoretical way, by autonomous individuals produce an apparent paradox: is it possible to think that the freedom of a subject is the condition of his subjection to a government? And that such a subjection is the condition of the same freedom? In neoliberal governmentality the exercise of authority in fact presupposes the existence of a subject with needs, desires, rights, interests and choices. To act freely, such a subject must be first formed, guided, moulded and put in a condition to exercise his or her own freedom in a system of domination.

The problem of freedom, understood as a condition of the government and not only as its constitutive limit, emerged in the last thirty years of the 20th century during which the crisis of the welfare state exploded and neoliberal policies were fully realised, in particular in Britain and North America and later in European countries. In this context, governmental rationality depends on the development of specific forms of knowledge and on their transformation into technology of the government. Such rationality tends to "de-governmentalise" the state and to "de-statalise" the practices of government, to privatize knowledge, to separate the substantial authority of experts (doctors, managers, etc.) from state apparatuses, placing such experts and their knowledge on the market

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T. Lemke, *Eine Kritik der Politischen Vernunft. Foucault Analyse der moderne Gouvernementalität*, (Hamburg: Berlino, 1997); P. O'Malley, *Crime and Risk Society* (Aldershot: Dartmouth 1998); U. Bröckling, S. Krasmann & T. Lemke, *Gouvernementalität der Gegenwart* (Suhrkamp: Frankfurt/M, 2000); J.Z. Bratich, J. Packer & C. McCarthy, *Foucault, Cultural Studies and Governmentality* (Albany: State University of New York Press, 2003); P. O'Malley. *Risk, Uncertainty and Government* (London: Cavendish, Glasshouse, 2004); N. Rose & P. Miller, "Political Power beyond the State: Problematics of Government" in *The British Journal of Sociology*, 43/2 (1992): 172-205; N. Rose, P. O'Malley & M. Valverde, "Governmentality" in *The Annual Review of Law and Social Science* 2/5 (2006) 1-5.22

governed by competition, individual responsibility and consumer demand. Neoliberal governmentality, in contrast to classic liberalism, does not at all intend to govern "through society", but through the regulated choices of individuals aimed at obtaining social and economic self-promotion. In other words, individuals must be governed – and must govern themselves – through their freedom. They are not the isolated atoms of classic political economy, besieged by primordial instincts dictated by contingent interests but responsible subjects and members of heterogeneous communities able to self-determine themselves through moral relations that are independent of the will expressed by central government.

According to Foucault, this transformation is the result of a double discontinuity which was produced in the history of governmentality. The first is between liberal governmentality and public-juridical governmentality dating from the formation of nation states and the theory of the reason of state. Foucault argues that in liberal governmentality what is at issue is no longer the distribution of power, the foundation of the action of government upon a constitution, on a bunch of moral and legal rules, on the type of regime and the consensus that this is able to receive, in other words on the dialectic between natural or original rights of each individual and the power of the sovereign which must respect the limits of interference, an imperative in force in the "legal-deductive path" of public law from the 17th century onwards.

The ascendancy of the market and economic science, and the decline of the rule of law and its function as the external limit of the exercise of power, produced a second discontinuity between the "revolutionary" French and the "radical" English methods of governing the market. The first solution attaches a series of imprescriptible and inviolable rights of the individual which condition the exercise of state power and economic activity. The second solution considers the "independence of the governed" the object of its activity. In this case, law is not the result of a preventive determination, but the result of a utilitarian transaction.

The Foucauldian genealogy explains how the radical-utilitarian roots of neoliberal policies have prevailed over the public-juridical ones, even if not in an entirely antagonistic manner. Indeed, during the era of the Welfare State public economic interventions were already steered by the criteria of utility, but it only after the neoliberal "revolution" that administrative governmentality is finally replaced. Administrative governmentality, which until then had characterized public policies and the political dialectic, continued to pursue the growth of the power of the state, together with the general welfare of the population, while the principal goal of neo-liberal governmentality is the smooth running of the market (that is the

respect for the game of the multiple particular interests of the governed, of the market and of the pressure groups) which is of general benefit to the population.

There is another difference between the neoliberal governmentality analyzed by Foucault at the end of the 1970s and the governmentality of "advanced liberalism" studied by Governmentality Studies between the 1980s and 1990s. What distinguishes the policies of advanced liberalism from those of neo-liberalism is the normative reflexivity of social and political practices. This essential difference was analyzed in particular by N. Rose and P. O'Malley, according to whom the governmental practices of "advanced liberalism" are characterized by the use of diverse forms of freedom and action, but also by the deployment of instruments dedicated to their surveillance. In contrast to neo-liberal policies which were implicated in a *negative* idea of society, "advanced liberal" policies instead focus on the valorisation of "human capital", emphasise the levels of reciprocal trust and civil participation which ultimately transform into "communitarian" politics, which aim to reaffirm the "shared values" in the choices that are taken individually within the free market (and in life in general).

In summary, the governmental practices of advanced liberalism and neo-liberalism are distinguished in the extent to which they promote and regulate forms of "indigenous government" in individuals. From the 1990s onwards, the problem of the protection of a social framework around the activity of the market, made way to the need to reconfigure the social in a plurality of markets which operated in the service, supply and knowledge sectors and the retraining of the unemployed as citizens-consumers (*work-fare* and *work-for-done*).

III. THE GOVERNMENT OF ADVANCED LIBERALISM

The problem of government and of the "governmentalisation of the State" emerged with renewed urgency towards the middle of the 1970s, at the moment of the financial and social crisis of the Welfare State and of the absorption of social and production life in the political economy. The phase of material expansion of the world economy which had started after the Second World War was drawing to a close, the system of fixed parity between the principal national currencies (the gold-dollar exchange standard) ended in favour of a system of flexible and fluctuating exchange rates, the oil crisis was flaring up and the progressive financilisation of capital had begun as a result of the expansion of world commerce generated by growing competition, while the growing accumulation of global liquidity in deposits could no longer be controlled. This situation

led governments to intervene in exchange rates in order to attract or repel off shore capital for the benefit of domestic economies. It was the beginning of what Robert Gilpin has defined the "global financial revolution" of the twentieth century, and what we can define in terms of an "epistemic break" (Bachelard) which characterised the transition from a public-juridical governmentality to a neo-liberal governmentality.

The rise in real wages, which enabled families to afford durable goods (homes and consumer goods), and the growing cost of reproduction on the part of the Welfare State, were no longer manageable through taxation. On the left, observers began to talk about "the crisis of the legitimation of the state": social services such as health, education and the pension system were cut because of the heavy taxes that they imposed upon profits and because of the threat they constituted for "accumulation". This crisis had been provoked by the search for security and stability on the part of families which incurred debts with the state in order to finance their consumption. The fight against inflation, for real wages, against turnovers, for holidays, for housing, for the "quality of life" pushed the way to the creation of a debt economy which posed the question of the reproduction of the work-force outside the traditional form of the ideology of exchange and of wage against work. In order to prevent productivity from falling irreparably, the welfare state was forced to protect the value of the workforce through credit, raising the social demand for consumer goods, but also borrowing to the point of penalising supply.

During the same years in which some analysts declared the "fiscal crisis of the state" provoked by trade union struggles and struggles to improve social and health services, education and more in general by the search for a diffuse social wealth, the neo-liberal right began to talk about the contradiction between the growth of the "unproductive" sector of the welfare state and the expenditure of the private "productive" sector in which national wealth was produced. The state should no longer accompany the citizen from "cradle to grave". The relationship should assume a different form: the state should be limited to keeping the legal and security infrastructure running, the citizen should promote individual and collective well-being through his or her own responsibility and self-entrepreneurial capacity. The state had grown to the detriment of the private sector, while Keynesian attempts to sustain aggregate demand through deficit policies led to a rise in inflation and taxes which penalized industry. To govern better, the state had to govern less and, above all, spend less. It was a matter, as Milton Friedman argued, of encouraging individuals to govern themselves within a legal structure guaranteed by the state.

Both critiques underlined the cost of government activity. The left critique aimed at increasing these costs on the part of the private and capitalist sector in a vision of class struggle, while at the same time warning of the risk of a immeasurable extension of the state bureaucracy's power of control and repression of the lives of individuals. The neoliberal critique denounced the "totalitarian" risk of a new protagonism of the State to the detriment of "civil society" along the example of Nazism or Communism. In contrast to what was written during the 1940s by F.A. Hayek, according to whom the only principles upon which government activity can be founded are the principles of classical liberalism: the freedom to carry out a choice dictated exclusively by one's conduct; for the neoliberals of the Chicago school the market was not omnipotent, while *laissez-faire* was not the miraculous solution for the government of society. In contrast to the remedies elaborated by Hayek or by the *Ordoliberalen,* a group of German jurists and economists gather before the Second World War around the journal "Ordo", the government of society should be restructured in the name of an economic logic, while the government of the economy should create and support both business and competition. The whole of society should, in other words, be reorganized following economic lines and a calculating rationality centred on the human faculty of choice.

The convergence between these two critiques of the welfare state, and of the political and social compromise that sustained it, derived from the common observation for which public expenditure was economically supported by the subaltern classes to the advantage of the middle classes through a tendentiously universalistic politics which reinforced social inequalities and tax injustices. That said, the political differences between the two critiques came to light when the neoliberal platform was adopted by governments in the English-speaking West at the end of the 1970s. It became clear at this point the extent of the structural and anthropological revolution that was in progress. The market was considered the ideal mechanism for the coordination of the decisions of a multitude of actors in the common interest of the government. Every social and economic sector previously governed by a bureaucratic and social logic assumed the new techniques of financial administration, competition and entrepreneurship. The government in this way changed formula and content, finding a new function in the management of a myriad of para-state and semiprivate authorities and subjects which exercised their powers upon individual conduct.

Neo-liberalism established itself therefore as a dispositive of government and not only as one of the cannons of liberal political philosophy. Such a dispositive accumulated a large latent transformation for most of the 20th century which organized the powers of the state, devolving many

responsibilities in the administration of health, human reproduction and social wealth to a series of organs independent of government, and in doing so increasing the functions attributed to "governmental power" by Foucault himself. The rationality and the objectives of neoliberal governmentality have not changed with respect to the Foucauldian definition, while instead it is the dispositives of government that have been adapted to the new forms of life that have emerged "at the multiple intersections between the imperatives of the market and the drive for shareholder value".

Neoliberal governmental rationality coincides with the "logic of transfer". This definition, inspired by Bruno Latour,[4] explains how the activity of government consists in connecting the objects of authority with the projects of organizations, groups and individuals who are the subjects of the government. It is only through these transfer processes that the relation between government and governed is recovered. The object of the government is to create a flexible and contingent "assemblage" between political agencies, political bodies, economic, legal, social and technical authorities and the aspirations, the judgments and the ambitions of formally autonomous entities such as companies, pressure groups, families and individuals.

Unlike public-juridical governmentality, on which the welfare state was also modelled, advanced liberal governmentality is inextricably tied to the activities and calculations of independent philanthropic, medical, sanitary, police, entrepreneurial, bureaucratic, parental and employment authorities. Such an operational method has been defined by Nikolas Rose and Peter Miller in terms of a *government at a distance*: the government hardly ever intervenes directly in interests and relations of power, but acts indirectly by connecting the multiplicity of more or less independent organs with the aim of directing the outcomes of individual and collective conduct. Government at a distance therefore establishes flexible relations between existent subjects separated in time and space, as well as in formally distinct and autonomous spheres. Its activity consists in *translating normatively* individual standards, judgments and conduct. Governing no longer means negotiating a contractual mediation between the divergent interests of groups, corporations or classes, but acting upon the actions of these autonomous bodies indicating the results, promoting the agenda, monitoring the partial results, allocating the necessary budgets, and promoting the expertise regarded to be indispensable for the achievement of an objective.

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[4] B. Latour, *Science in Action,* (Milton Keynes: Open University Press, 1987) 219-32

The evolution from administrative governmentality to neo-liberal governmentality has revealed, on the one hand, the inadequacy of the pastoral projects of normalisation and rationalisation adopted by welfare policies and, on the other hand, has brought to light a new form of citizenship based on the techniques of self-esteem, self-empowerment, self-entrepreneurship and individual well-being. These new "technologies of citizenship" presuppose the existence of free and active citizens, of informed and responsible consumers, of community members who self-regulate themselves and agents capable of taking decisions at their own risk and danger. The citizen becomes an active agent in the regulation of professional expertise, in particular that which is dedicated to health care and the prevention of disease, and a fundamental actor for his/her own and others' security. With regard to the old image of the liberal *homo oeconomicus*, isolated and selfish atom in a free market, the new citizen is placed at the intersection between the ties and affinities created within restricted communities, in professional groups, in the individual choices of the markets useful for the consolidation his/her own and others' security. Out of this arises a new emphasis on the *ethos* of self-conduct which interprets individual freedom in terms of *autonomy*, in other words the capacity to realise one's desires in life and to determine the direction of one's existence through personal choices.

IV. THE PASTOR OF SOMA

With the concept "pastoral power", Michel Foucault alluded to the relation which, especially in oriental culture, defines the relation between the family and the economic management of its life. It is "pastoral power" which associates liberal governmentality with the reason of state, the aspiration, in other words, of directing the conscience and soul of individuals just as the "pastor watches over his sheep". Its aim is to manage in a circumspect way the resources of humans. With the birth of the modern economy, the family *oikonomia* loses its role as model to become an articulation of a wider mechanism. The family is only one of the domains of the political economy whose aim is to "improve the destiny of the populations, their health, to increase their wealth and their life expectancy". With the advent of the "biopolitical" era, in other words of the "seizure of power over man as a living thing, of a statalisation of biological existence or at least of a tendency that will lead towards what could be called a statalisation of biological existence", pastoral power leaves the family domain and focuses on the body of the whole population. Governmentality imposes the incorporation of the control of the body in the general techniques of the administration of the population. The result, according to Foucault, is an *epistemic* change which involves first of all the objective of governmental rationality: "for millennia man has remained the

same as what Aristotle saw: a living animal also capable of political existence; modern man is an animal in whose politics life as a living thing is in question".

The long duration of the process of governmentalisation of the state and of the generalisation of pastoral power in the sense of a government of the freedom of individuals, reaches maturation in the 20th century, first with the creation of insurance technologies elaborated at the height of the welfare state, in other words, those governmental formulae between socialism and liberalism in which collective security was bound to individual restraint, then with the governmentality of advanced liberalism which attributes to the individual a true pastoral role through which he or she can create a personal identity by practicing everyday his or her own autonomy. In this context, there emerges another criterion of differentiation deriving from the "epistemic break" between neo-liberal and advanced liberal governmentality beginning with health policies and, in particular, with the *pharmacogenomic* technologies and personalised medicine.

Nikolas Rose[5] has argued that, since *Birth of the Clinic* (1963), and then with the lessons at the Collège de France (1977-8) and lastly with the "trilogy on sexuality" (1978-1984), Foucault explained the interest of governmental power in the life of the governed in terms of a *politics of health* (birth and death rates, diseases and epidemics, comprehension of the biological constitution of a population and its consequences of different sub-populations – activities which compelled governmental power in the middle of twentieth century during Nazi-Fascism to adopt coercive and deadly measure in name of the future of the "race"). According to Rose, contemporary "biopower" can instead be described as a sum of *policies of life* in which the state devolves its power to near-autonomous legislative organs (bio-ethical commissions, private companies like fertility clinics, biotechnological multinationals which sell products like genetic tests direct to consumers; professional groups such as the medical associations regulated at a distance by complex mechanisms of certifications, standards, bench-marketing and balances.

Governmental policies are the result of a meticulous operation in laboratory by the new techniques of the bio-economy: genetic screening, reproductive technologies, organ transplants, the genetic modification of organisms, personalized medicine cut to the individual genotype codified in microchips, the *in vitro* manufacture and regeneration of organs or the

[5] N. Rose, *The Politics of Life itself: Biomedicine, Power, and the Subjectivity in the Twenty-First Century* (New Jersey: (In-formation) Princeton University Press, 2007)

use of genetic cells which can be differentiated according to the type of tissue. The enormous computational power of the new technologies today connects medical histories and family genealogies with genomic sequences, the power of pharmaceutical multinationals' marketing, the committees on the regulation of drug addiction and the bio-ethic commissions, the pursuit of profits and surplus value promised by this research.

The dynamics of this new model of power is to connect experts with subjects, and the empowerment sciences of human capital with the events that cut across the lives of individuals. The objective is to elaborate a common strategy to deal with, and to *prevent*, disease, exclusion, poverty, and more in general the *risk* of a life exposed to the dangerous inclination of losing one's self-control. More in general, Rose argues that the analysis of power today disregards the normative characterisation which induces by force of circumstances the presupposition of the existence of a *verticality* between its subject and its objects, between the principles to which its political rationality obeys and the technologies of government through which different political authorities implement the government's programme established *a priori* from the catalogue of principles. Instead a *horizontal* dimension prevails whereby the typical pastoral function of governmental power loses its constitutive transcendental characterisation (the Sovereign, or the Pastor, who governs the flock or the people) and acquires an immanent profile: render the individual components of the population responsible with the aim of identifying together with institutions the solutions to the problems of individual and collective life. In this way, governmentality passes from a coercive to a cooperative model.

With regard to the genealogy of power prepared by Foucault since "*Society must be defended*", in which the model of the Christian pastoral of the souls and bodies occupied a central place in the definition of the governmental paradigm, the genealogy of the new "somatic pastoral" identified by *Governmentality Studies* explains a further transformation in governmentality. With regard to the era of liberal biopolitics analysed by Foucault, in which it was state power that held the prerogative of intervention in the life of the population through the institutions of the clinic, the prison, the asylum and the army, in the era of the somatic pastoral the pharmaceutical industry, together with a multiplicity of public and private bodies, has acquired the power to intervene in the molecular composition of life itself, free to mobilise, control and recombine the bio-chemical mechanisms and the genetic variations to guarantee an optimal level of the life of the population.

Figures such as doctors, chief executives of multinationals, bankers of the

poor, genetic specialists and criminologists who advocate the genetic screening of the population to prevent criminal tendencies all invite the population to share the responsibility of managing the highest value of a community, that of life ("bio-value"). Their job is to demonstrate that state clinical power has lost its monopoly over the diagnosis and therapeutic calculation of the quality of life having surrendered it to a new multiplicity of subjects which conduct an intense activity of capitalization on health, illness and on the intellectual property of genetic technologies. Resuming this analysis, Kaushik Sunder Rajan has outlined the epistemic and economic revolution carried out by the governmentality of advanced liberalism in comparison to the previous one.[6] In the case of health policies, these have moved from *pharmacogenetics*, based essentially of the study of genetic variables, to *pharmacogenomics*, in other words, the commercial, industrialized science which has emerged with the scientific revolution of the genome. This transition means that it is not necessary to suffer from a specific pathology in order to study its genetic causes. It is possible, instead, to study the genetic variability to predict a future pathology. The therapeutic intervention increasingly shifts towards the preliminary stages of the manifestation of a disease to the point that, on the base of the analysis of genome, it is possible to hypothesise from birth the existence of certain genetic tendency and therefore modify it early on.

Compared with the era of the welfare state, the pharmaceutical industry has today become an autonomous insurance industry. This industry relies on the self-regulating capacity of individuals in the choice of diagnosis and therapeutic intervention, in other words on the government of the self stimulated by a combination of strategic actors who constitute the emergent structure of *postgenomic* medicine. The new insurance technology, no longer public and universal, but private and individual, aims at the construction of a "molecular surveillance" which on the one side intends to prevent anomalies in the genetic makeup of individuals and, on the other, directs all the capacities of the human body and soul towards a strengthening of its resistance against such anomalies. Its objective is to modify the understanding that subjects have of themselves through a renewed centrality attached to flesh, organs, tissues, cells, molecular sequences, of their regularity and irregularity, in other words, of a somatic knowledge that everyone must acquire about their own body.

If, therefore the welfare state, and the neoliberal states forged in its crisis, could still be represented in the terms of a distribution of wealth with a more or less egalitarian element of risk, in "post-neoliberal"

[6] K. S. Rajan, *Biocapital. The Constitution of Postgenomic Like,* (Durhamn/London: Duke University Press, 2006)

governmentality risk is strictly individual and is cut to the measure of the citizen-consumer. If before society predicted the possibility of a potential catastrophe – transforming the exception into a rule – in the societies of advanced liberalism the rule is constituted by the variability and contingency of events, the anomaly is the law upon which the ability of prediction of governmental rationality is measured. Risk is the fundamental element of capital and no longer the moment of its dissolution. If risk remains therefore the characteristic factor of insurance technologies, it is inseparable from the risk of the enterprise of the pharmaceutical multinationals which invest in therapeutic development. As such, every individual becomes the potential object of therapeutic intervention, the object of a capitalisation, as well as the consumer of insurance technologies. It is the individual in person, as a rational actor on the market, who guides the choice of the instruments to minimise the risk on life both for themselves and for others.

In this situation risk is not at all eliminated; rather, if it is possible, it is exponentially increased. The individualization of technologies of controls can minimalise it, localise it and, in part, neutralise it but never banish it. Advanced liberalism is populated with actors who have an absolute need to calculate the future, for the very reason that they not able to do it. Life as such remains the principal source that produces risk, *biocapital* depends on it completely, it is founded on it, and it remains subject to its contingency. This negative and destructive characterization of life is typical of the liberalist *episteme* which removes the *affirmative* and *relational* character of life. If it is therefore true, as Foucault has written, that "there is no liberalism without the culture of danger", in this culture it is not possible to discern the constitutive potential of life and the virtuous impossibility of subsuming it protection dialectic of security/destruction of freedom.

V. THE AMBIGUOUS *CONSTITUTIO LIBERTATIS* OF GOVERNMENT

The emergence of neoliberal governmentality, and its evolution into advanced liberal governmentality, has enabled a multiplicity of forms of life, not all contained in the rational plan established, albeit in a flexible manner and the widest possible, by the government at a distance. It is the very subjects of the government, on the basis of the freedom that it grants them, who formulate hypotheses that are not always commeasurable with governmental rationality. It is however in the nature of *government at a distance* to predict the existence of conduct that does not perfectly fit in the plan of normalisation and prefixed rationalisation, even that which is most flexible and open to every type of determination. If in fact the "will to govern" cuts across all the possible governmental assemblages, these assemblages are never the mere product of a unilateral will to govern. For

its imperfect nature, the activity of transfer realised by the government at a distance is a fragile *relais*, constantly subjected to contestations and to a constant transformation which fuels the production of risk, rather than reducing it. The high rate of uncertainty contained in governmental technologies elaborated in "advanced liberalism" is due to the assemblage of different, and often antagonistic, knowledge, powers, capacities, competences and judgments.

The uncertainty in question is not however the mere result of a lack of rationality on the part of the government, or of the unpredictability of the market, but derives directly from the freedoms enjoyed by individuals. The point at which the circularity of the production of freedom (on the part of the government for the benefit of the subjects and of the subjects in favour of the government) is interrupted is the uncertain, random and regular nature of such production. The "construction" of freedom remains the imperative of liberal life, but has as its downside the totalising control of all the spheres of individual life: movement in space, material existence, nourishment, treatment practiced upon individuals. A number of exponents of Governmentality studies seem to ignore its constitutive paradox: liberal life is subject to an incessant, solicitous prescriptive activity that is always aimed at the benevolent goal of preventing risks thus running the risk of suppressing it – liberal life – in a system of totalising prevention[7].

Liberalism constantly risks creating paternalistic and neo-conservative policies which impose a normative ethics and securitarian, if not authoritarian, political instances. As such, the problem of inequality and poverty generated by the market is blamed, in a discriminatory and racist manner, on the incapacity of certain sectors of the population to exercise their own autonomy. The ingenuity of these policies is to believe in the representation of the individual able to behave in the same way as a business acts in the market. The presumption of having erased the division between the private sphere of the market and the public-state sphere has created the illusion that the "social question" no longer exists. From this presumption derives the idea that neo-liberalism tied to economic globalization leads to the disappearance of the role of the state. The crisis of the state, like the crisis of the "social", now fully unfolded in front of our eyes, does not imply the end of the State or the end of "society"[8]. The necessity to "govern less" does not imply the State's renouncement from

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[7] J. Donzelot & C. Gordon, "Comment gouverner les sociétés libérales? L'effet Foucault dans le monde anglo-saxon" in *Esprit*, 339 (November 2005)

[8] M. Dean, *Governmentality, Governmentality. Power and Rule in Modern Society* (London: Sage, 1999) 206-7.

governing, nor does it translate in the establishment of a securitarian State, or a permanent state of exception, which irreversibly overturn the constitutional web - and the material composition – of all the existing political institutions.

The problem of government is just the opposite. Its objective is to prevent and correct the anomalies which break the consensual circularity between the government and the governed. The freedom in question is, on the one hand, the political product of a will to govern subjects, on the other the product of their opposition to such a project, in other words a *social and political construction* that is not the presumption rather the result of a power relation. The uncertainty tied to the production of freedom is due to the increasing autonomy of the corporations of experts (in particular medical corporations) and pharmaceutical multinationals from state authority, but it is above all the product of counter-conducts of the governed which constitute an instrument of permanent problematisation of governmental rationality. From this point of view, the representation of the individual as a free and autonomous citizen in the market is a pretence which re-elaborates, and neutralizes, conflict between governmental conduct and the diffuse counter conducts regarding the practices of freedom which constitute the horizon of liberalist politics.

VI. CONCLUSION: THE DILEMMA OF GOVERNMENT

There is full awareness in Governmentality Studies of the ambiguity between the production of freedom which a subject enjoys and the idea that such production is the necessary result of the rationalization of governmentality. To understand in depth this ambiguity it is useful to return to some of the assertions made by Michel Foucault. The experience of freedom is understandable in so far as one abandons the conventional distinction which opposes subject or object, in which subjectivity is considered the authentic place of moral autonomy and power as the entity which exploits, denies and destroys such autonomy. Contrary to the claims made by the old theory of power, the Frankfurt School not being the last, governmentality does not distort subjectivity, nor is it able to dominate it. Its pastoral power, on the contrary, fixes, promotes and intensifies the truth on them.

Foucault identified the genealogical origin of this experience of freedom in the Kantian text "What is the enlightenment"[9]. In this text he invites us to abandon the classic opposition between domination and liberation because

[9] M. Foucault, "Qu'est-ce que les Lumières?" in *Dits et Ecrits*, (Paris: Gallimard, 2001), 1381-1397; 1498-1507

power acts through practices which form subjects as *free persons*. Unlike domination, power presupposes the capacity of the subject to act on its own limits, to render itself the object of its own practices, to practice the faculty of critique starting from its own existence. The fundamental disposition of the modern subject is, in other words, a new *ethos* which pushes it to stay in its own present, to determine autonomously its own conduct and to establish objectives on the basis of its analysis of reality. It was Charles Baudelaire who clearly expressed this attitude towards the present in terms of the relationship that the subject has with itself. To be modern, for Baudelaire, means not accepting one's self for one is, but taking one's self as an object of complete transformation. Modern man is no longer in search of the hidden truth of his identity, but is constantly looking to invent himself in terms of a specific historic subject.

Neo-liberal and "post-neo-liberal" governmentality lead this *ethos* to the dilemma between security and freedom. The ambiguity that arises is due to the constant clash between freedom and subjection: one is the condition of the other. To act freely, the subject must first be trained in the use of such freedom. In such conditions, freedom cannot be but the product of a system of domination. There however exists a way of escaping this dilemma: the *ethos* identified by Foucault prompts one not to adhere to a specific moral model or to pre-established end. It leaves open every possibility of determination because critique always has its end itself[10]. Overturning therefore the point of view of governmentality, the production of freedom does not depend on the *systemic* logic of the balance between government and governed, but on subjects' obstinate and wild desire to live freely and on the *ethos* of those who intend to govern themselves and their like autonomously which obstructs that logic up until extreme consequences. This capacity of resistance comes from life, from the sum of its functions that are useful in resisting death and no longer from a core of subjective rights, or from the will of individuals who oppose the state or the market.

Governmentality Studies stopped on the threshold of the contestation of the ambiguity between the critique of governmental rationality and the rationalisation of the same governmentality. What is yet to be discussed is the origin of the desire to self-determination of the citizen-consumer as a free and autonomous subject, without it being fully clear what are the limits to such self-determination and in what position it finds itself regarding the freedom produced by government.

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[10] T. Osborne, *Aspects of Enlightenment. Social Theory and the Ethics of Truth* (London: UCL Press, 1998)

PHILOSOPHY OF LAW AGAINST SOVEREIGNTY: NEW EXCESSES, OLD FRAGMENTATIONS*

Antonio Negri

The only way to critically enter the world of the "normatively fragmented" – by which I mean, to step inside the legal reality of crisis and/or transformation that is dominant today – or rather, taking the reverse perspective, the world of "social constitutionalism" as discussed by Sciulli and Teubner,[1] is perhaps (but, as I will argue later, this 'perhaps' may be deleted) to stress that the fragmentation of the normative world is accompanied by a *constituent excess* – although the manner of this accompaniment cannot be considered to be an isomorphic one, but rather is chaotic and non-sanctioned.

To confirm this critical point of view would thus mean that the normative world ceases to be considered as self-consistent, and is placed instead within a historical context, immersed in its eventual crisis, and considered alongside phenomenology as an experience of the clash between (and transformation of) organised functions and innovative and/or spontaneous instances. To put it in Foucauldian terms, when we are immersed in the crisis of an *episteme* we must place ourselves in circumstances and conditions that enable us to modify, along with the systems that organise knowledge, the *episteme's* forms of production and the subjects that produce it. To deconstruct systems means, in this case, to reconstruct the forms of knowledge. The hypothesis here, therefore, is that we are witness to a crisis of the entire *episteme*, and all the events deriving from this.

The attention of this paper is focused on a few privileged themes, the first of which is political economy – a rather unfashionable priority that readers must forgive, but which nevertheless does stem from classical influences. To be brief (although the literature on the topic is enormous), the concept of capital that was once considered, without any negative inflections, to unite social ground, is the first that should be checked for the phenomena of fragmentation. In fact, variable capital (or the workforce) now no longer appears to be a part of fixed capital – that is, the latter no longer seems

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* Translated from the Italian original by Louisa Parks, Doctoral Candidate, Political Science, EUI.

[1] See D. Sciulli, *Corporate Power in Civil Society: An Application of Societal Constitutionalism*, New York, New York University Press, 2001 and G. Teubner, "Societal Constitutionalism: Alternatives to State-Centred Theory", in C. Joerges, I-J. Sand & G. Teubner, eds., *Transnational Governance & Constitutionalism* Oxford, Hart, 2004.

able to include the former in its exclusive command (and thus qualify the workforce as variable capital). In any case, the relationship between fixed capital and variable capital – between capital's command over the workforce and the latter's exodus, as a workforce cognitive of capital – is no longer measurable. Faced with this excessive disproportion – incarnate in the new figure of the workforce – cognitive capitalism responds with exceptional instruments: real estate and land gains, financial gains and the like occupy the space of profit, forming the measure of its accumulation, while monetary regulations show in an extreme form its simple command over decisions on the rules of global capitalist reproduction. In response to the issue of fragmentation, then, the answer cannot be said to lie in inertia. Excessive disproportion uncovers areas of resistance, processes of subjectification, subjects: it uncovers, or rather reveals, a reply.

Secondly, fragmentation and excess reveal themselves from the point of view of State doctrine. Others (including Gunther Teubner and Christian Joerges) have spoken of processes of "constitutionalisation without the State", seeing *governance* as an "uncertain government of contingency".[2] Indeed, the fragmented development of judicial functions (at both domestic and international levels, and at administrative as well as political levels – it is important here to bear the immanence of local/global and micro/macro relations in mind) cannot be contained in one systemic frame.[3]

Recognising this systemic 'incontinence' does not mean re-evaluating or reinventing an institutionalist line in order to start reconstructing the order from scratch, but rather means that one should recognise the rise and prospering of a chaotic situation against which instances of government (governance) duplicate and/or multiply. All of this frees excess(es) from outside the system and from the interior of its fragmentation, its interstices, between conflicts and the collision of different rationalities and genealogical architectures, and so on.[4]

At this point it is worth recognising that Luhmann's systems theory anticipated the description of the dynamics of this fragmentation to

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[2] See, for example, G. Teubner, ed., *Global Bukowina: Law Without A State*, Dartmouth, Aldershot, 1997 and "Societal Constitutionalism", *supra* note 1.

[3] G. Teubner, *La cultura del diritto nell'epoca della globalizzazione: L'emergere delle costituzioni civili*, Rome, Armando, 2005.

[4] G. Teubner, "La matrice anonima. Quando 'privati' attori transnazionali violano I diritti dell'uomo", in *Rivista critica del diritto privato* 26 (2006) 9-37.

come,[5] and also that Luhmann (with a strong gesture) somehow solicited them – beginning with the consciousness of the asymmetrical and critical presence of normative flows and instances of self-organisation. That recognised, it must be added that this theoretical operation hid a sceptical, 'libertine' attitude ("everything must change for nothing to change") – that is, a 'cynical' option in the abused Machiavellian sense of the term, rather than an opening of power to the unorganised, to the asymmetric, to autonomy. If I emphasise this aspect of Luhmanian action here, it is certainly not in order to denounce it or chastise its influence but, rather, to pose a problem that cannot be discussed here: namely that of the centrality of innovation, autonomy, and asymmetry in the production of subjectivity. I would, in any case, like to insist on the fact that, in systems theory (as is generally seen in post-structuralist positions), innovative elements are considered as marginal effects, products of deconstruction rather than reconstructive and constituent tensions that must be placed at the centre of every ontology of the present.[6]

The third stage upon which the relationship between fragmentation and excess is played out and widely noted is the ethico-political issue of defining a legal subject. In the current historical condition the concepts of conscience and responsibility are fragmented inside processes of subjectification, flattening sameness and any condition of individual determination.[7] That this is the case can be argued with reference to earlier points – that is, whenever instrumental responsibility can no longer find the measure of an ordered synthesis of interests; whenever the individual understanding of the law no longer finds the productive outlets of (or for) universal freedom. It must, then, be recognised that excess presents itself in terms irreducible to the transcendental determinations of individualism. Indeed, on the contrary, excess produces singularity and the singular enters the common: the word in language, the event in history. Cognitive processes sprawl inside complex devices that open up between the past and the yet to come. Temporality constitutes an arrow that indicates not only succession, but also innovation. This approach is closer to arriving at both a conception and practice of the law that will finally reappropriate time.

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[5] By "systems theory" I mean the theory of autopoietic systems as promulgated by Niklas Luhmann (for an introduction see *Soziale Systeme: Grundiss einer Allgemeinen Theorie*, Frankfurt Am Main, Suhrkamp, 1988 and, more recently and with particular reference to law, Gunther Teubner (for an introduction see *Autopoietic Law: A New Approach To Law & Society*, Berlin, de Gruyter, 1988).

[6] M. Hardt & A. Negri, *The Labour of Dionysos*, Minneapolis, Minnesota U.P., 1996; A. Negri, *Fabrique de porcelaine*, Paris, 2006.

[7] Hardt & Negri, *ibid*, at 114-115, 147-148.

When this process of fragmentation and excesses takes place, it is recognised as being *constituent of a biopolitical fabric*. This fabric is defined by powers that operate transversally to determine (through relations of force, epistemic relations, voluntary, technical and productive acts) behavioural and normative contexts. Consequently, it can be considered to be *an expressive biopolitical fabric*. The capacity for expression running through it serves to reveal its cognitive and corporeal fullness, and to recognise both its singular consistency and the dynamics still required; it possesses the power of current activity and of the production of subjectivity, which is not a dialectic but a constituent synthesis, labyrinthine rather than systemic.

Some interpreters of Foucault and theoreticians of biopolitics (when approaching both economic and judicial themes, but above all the ethico-political questions surrounding themes of historical methodology) have tried to close this biopolitical dimension inside the figure of biopower.[8] I, on the other hand, support the absolute conceptual separateness of the two categories or concepts: 'biopolitics' and 'biopower'. I do not deny that these concepts are capable of meeting in an interface or that they live within and constitute one another, but, rather, seek to assert that they always, even without constituting an absolute dualism, march in different and singular directions. The former (biopolitics) is singular consistency, common persistence, plural and constitutive action, the production of subjectivity, relations of difference/resistance, and ontological expression. The latter (biopower) is the extension and the effectiveness of a transcendental power through all modes of existence. This separateness of concepts is posed and insisted upon by Foucault: in his work, the *production* of subjectivity is freed progressively from each pre-constituted container, while the *power* of subjectivity shows (and, more importantly, declares) that it is not the counterpart of biopower. This is, as I stated earlier, ontologically consistent. Foucault thus frees himself of all relativism, the result of which is that there is, therefore, no possibility to stow Foucauldism in classical systems theory. For Foucault, the concept of biopolitics can be mingled with but never reduced to the concept of biopower: power is always predicated in Foucault, not in an approved or an unambiguous manner, but rather in a singular and ontological one. Power is difference, and dualism, and can be a manifold relation, a multiple device, a social relation.[9]

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[8] R. Esposito, Communitas*: Origine e destino della comunità*, Torino, Einaudi, 1998; G. Agamben, *Homo Sacer: Il potere sovrano e la nuda vita*, Torino, Einaudi, 1995.

[9] J. Ravel, *Dictionnaire Foucault*, Ellipses, 2007.

At this point, it is nevertheless very important to note that systems theory has also reached analogous conclusions in its development. In post-modern society, the law must structurally live alongside the 'paradoxes' that its development determines. And, if a related question can be posed, it may only ask what 'degree' of clash a legal society can allow itself. The conclusions by the protagonists of systems theory, even in the power of its freshly-made affirmation, do not seem to free the approach from a certain degree of pessimism: fragmentation is cultivated, which is good, but what is excess? Does this approach, once again, not just result in mere fragmentation?

Before each moment of fragmentation and each crisis of modern transcendental concepts, the emergence of escape routes becomes evident; these routes are followed, and at times marked, by attempts at *governance* – that is, by actors and powers of exception. This, from an intensive point of view, reveals and expresses itself in the prospect of *mediation*. Since mediation cannot affect either fixed measures or judicial relations (for example, 'private' and 'public'), governance intervenes to build hybrids that span networks, creating an illusion of both autonomy and centrality, while compromises abound but are almost always skewed towards the side of power.

This is also true from the extensive point of view. Here, too, mediation can no longer find fixed and measurable relations on the basis of which to practice, and recognises as much: fluid and undeterminable processes flow between national and international law. With the alternatives of unilateralism and multilateralism no longer being viable options, a possible replacement for them is an interdependence based on systems of force, soft powers and local hegemonies. In this case, too, there exists a communitarian hybrid that creates differences without gathering (or by bowing to the logic of the strongest) excesses.

Thirdly, this *dark* side of fragmentation (and consequently of *governance*) presents itself in the temporal dimension. Effectiveness and legitimacy reveal themselves here as being completely mixed and indistinguishable concepts/qualities/devices. As was already mentioned, what is most noticeable within the formative processes of effectiveness/legitimacy, is a "face of exception" - an exception that spreads over time (instead of presenting itself, as in the original theory of exception, as an event and a decision). In this case too both theory and practice resort to excuses to hide the paradox of uncertainty and the permanence of governance practices. In precise terms, 'latent powers' are assumed to be present - methodologies and/or practices of the linear recomposition of systems or of the articulation of governmental and legal interventions. In reality, here

fragmentation represents the highest point of a crisis and an excess dark side: corruption. It is, in fact, within the elusive and multilateral, chaotic and dissipated discontinuity of judicial processes that corruption takes hold, not so much as an element of moral debacle before the arrogance of power and/or money, but as a functional activity intrinsic to governance.

It is clear that here I am describing (and insisting on) processes and concepts of *governance* that seem decidedly *negative*, because they are no longer capable of building. There is a feeling of powerlessness here that some have considered typical of post-modern sensibility. For example, it is said that it is impossible to create procedures that allow, in the current chaos, for the conclusion of democratic, technological/technocratic, and legal motions in the construction of common finalities; similarly: the current situation is one in which elements of the constitution, once defined as 'formal' or 'material', are no longer able to find a common path (the complexity of relations between the formal and the material constitution has reduced us to powerlessness); and: the horizontal nature of the network seems to impose itself as tangentially hegemonic, but then what does the concept of governance, which alludes in both concept and tradition to being somewhat vertical, mean (I could continue but will refrain from doing so out of sympathy for the reader)? Once all this has been highlighted, therefore, is the only conclusion a sceptical position? We may then end up slipping into that *libertinage érudit* that has already been denounced by post-modern legal scholars. What is embarrassing in this case, however, is not so much the strong mistrust that post-modernists feel for the capacity for civil planning of power, nor is it even surprising that a strong metaphysical scepticism should, at times, emerge from the debris of the conclusions of deconstructionism. What seems strange to me is that post-modern systems theorists think that their position will stand up and not be washed away with the tide of corruption.

One last observation should be made in this section. The process of crisis with which we are faced is new, innovative from all viewpoints. The crisis unfolding here is new, in that it is not something that can be fixed on or relegated to the ground of modernity. Those who consider the contemporary as an excess of the modern, as hypermodern, have tried to limit us to this – it is not possible: here we are beyond modernity, outside its categories. When function and mediation are no longer methodological instruments of systemic corruption, Max Weber is finished. But what comes after rationality is corruption: the first instrumental, the second even more so (and even more spread over existence).

Positive excess reveals itself as resistance and the subsequent imposition of a political institutional telos on the stage, now defined as 'monstrous', of

governance. The 'fight for law' recommences here.

The contemporary era is a period of transition. Hypermodernity has been left behind and a new age has been entered, the *contemporary* (not post anymore – not post-modern, post-fordist, etc., not simply this): there has been a 'qualitative jump'. There is nothing stupider (remaining on legal ground) than thinking that the 'beautiful' legal conscience of the 19th century can reappear, be revived, reconstitute itself after the 20th century (whether short or long!). The phenomenon of globalisation alone precludes this assumption. But this is not enough – other phenomena run deeper. It is enough to think of the forms of expression of the lower classes in the 19th and 20th centuries, of the relative powerlessness and the continuous rebellion they lived through in the 19th century and of the heroic experience of the 'builders of a new State' (whatever the result) in the 20th century. This inheritance is a strong one – it has, for example, survived the defeat of social movements in the fordist age and reveals itself in the quality of the post-fordist social and political movements. What I want to say here is that social movements today unite the legal claims and political powers that movements have expressed and seen recognised at other times along new axes; they are not beginning from scratch but from an accumulation of experiences that have transformed the conditions and the anthropological structures of law. In the period of transition then, movements are fixed as political-institutional forces (often virtual – but the relation between power and action is always present to the hope and imminent danger of power). The fragmentary margins of systems can today be crossed by constitutive devices.

It is worth underlining once more the limits of the position held by those who, although they have understood the current limits of the ideological-political dimension set in biopolitical governance, propose a way out that forgets the dimensions and the quality of the phenomenon. Indeed, one cannot place biopolitics as a central object (affirmative even though problematic) within a criticism, in a *pars construens* (as these authors do), and then, in the *pars construens* of philosophical reasoning, abandon oneself to biopower, tremble and hide from it. This is, once again, *libertinage érudit*: "bene vixit qui bene latuit". It is even more important to underline the 'tragic' limit of those who see in an 'event', in 'transcendence', the determining of excess. An event, thus, without continuity, without institution, and without any constituent positivity.[10] Who knows why! The impression is that in both of these cases, in Agamben as in Badiou, the negative teleology that features in works from Spengler to Heidegger

[10] A. Badiou, *L'Être et l'événement*, Paris, Seuil, 1988.

triumphs.

One final note here by way of conclusion. This asymmetry between fragmentation and excess must be cultivated and insisted upon in a philosophical landscape that refuses every last sign of transcendentalism – in the legal paradigm every residue of those infinite forms of neo-Kantism that did so much harm to the science of law and to the philosophy of *Mitteleuropa*. It is wonderful that it is doctors of law who are seizing the spirit of the new era against cumbersome philosophical traditions.

JUSTICE UNDER GLOBAL CAPITALISM?

Gunther Teubner*

I. DOUBLE DIAGNOSIS: CLASH OF RATIONALITIES, RE-SOCIALISATION OF CONFLICTS

Globalised capitalism cannot be understood as being driven by economic processes alone. The alternative to conventional ideas of an economy-led form of globalisation is "polycentric globalisation". The primary motor is an accelerated differentiation of society into autonomous social systems, each of which expands beyond territorial boundaries and constitutes itself globally. This process is not confined to markets alone but also encompasses science, culture, technology, health, the military, transport, tourism and sport, as well as, albeit in a clearly more restricted form, politics, law and welfare.[1]

When describing the external relations between these global villages, the term "clash of cultures" is appropriate. Through their own operative closure, global functional systems are free to intensify their own rationality without regard to other social systems or, indeed, regard for their natural or human environment. Ever since the pioneering analysis of Karl Marx, repeated proof has been provided as to the destructive potential of a globalised economic rationality. Max Weber deployed the concept of modern polytheism in his efforts to identify this potential within other areas of life, and to analyse the resulting (and threatening) rationality conflicts that can arise. In the meantime, the human and ecological risks posed by other highly specialised global systems, such as science and technology, have also become readily apparent to a far broader public. Similarly, and especially where the position of countries within the

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[1] Various social theories on legal globalisation make this point: on theories of global culture see, for example, J.W. Meyer, J. Boli, G.M. Thomas and F.O. Ramirez, "World Society and the Nation-State", in *American Journal of Sociology* 103/144 (1997); on discourse analysis, see A. Schütz, "The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society", in G. Teubner, ed., *Global Law Without A State*, 257ff; on global legal pluralism, see B. de Sousa Santos, *Toward A New Legal Common Sense: Law, Globalisation & Emancipation* (London: Butterworths, LexisNexis, 2003) *passim*; on global civil society, see D. Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (Cambridge: Polity, 1995), *passim*; on world society, see the contributions in M. Albert & L. Hilkermeier, eds., *Observing International Relations. Niklas Luhmann and World Politics* (London, New York: Routledge, 2004)

southern hemisphere is considered, it is clear that real dangers are posed less by the dynamics of international politics and more by economic, scientific and technological rationality spheres that instigate a "clash of rationalities". In Niklas Luhmann's central thesis, the underlying cause for post-modern risks is to be found within the rationality maximisation that different globally active functional systems are engaged in, which hides an enormous potential for endangering people, nature and society.[2] Problems raised by global finance markets, hedge funds, financial speculation, pharmaceutical patents, drugs trade, and reproductive cloning, for example, are caused by the fragmented and operationally closed functional systems of a global society in all their expansionist fervour. A reversal, or a turn towards the de-differentiation of society and a resurrection of old myths, is also excluded if the civilising achievements of this highly ambivalent development are to be retained: '[T]he sin of differentiation can never be undone. Paradise is lost."[3]

In the eighties of the last century, Habermas diagnosed a conspicuous trend in the crisis of late capitalism: explosive social conflicts have been moved from the private markets to the welfare state institutions.[4] Today we can observe a reversal of this trend: explosive political conflicts that were formerly absorbed within the diverse regimes of the welfare state do not vanish after privatisation; rather, after the take-over by the market, these conflicting energies move back from welfare state institutions to private markets and re-emerge there in new forms. It is now the new private regimes of governance that have to cope with them, but they cannot be resolved by market mechanisms. As a result, privatised activities will be driven into a new politicisation. This re-politicisation is not necessarily limited to the establishment of public law regulatory agencies, however, but also entails the politicisation of private governance itself, its different modes of self-regulation and conflict resolution via private litigation. The sources of this conflict can be identified in those privatised activities that have to bear the clash of rationalities themselves, the structural tensions between their proper rationality and economic calculation – professionals as well as clients suffer from those tensions. Here, in the resistance of social practices to their new economic regime, is the source of all kinds of new quasi-political conflicts, which now take place within the "private" spheres.[5] A good indicator for this change is the

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[2] N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt/M: Suhrkamp, 1997), at 1088 *et seq*.

[3] N. Luhamnn, *Die Wirtschaft der Gesellschaft* (Frankfurt/M: Suhrkamp, 1994), at 344.

[4] J. Habermas, *Legitimation Crisis* (Cambridge, UK: Polity, 1975)

[5] For what these changes mean for private law, see G. Teubner, "In the Blind Spot: The Hybridization of Contracting" (2007) *Theoretical Inquiries in Law* 1/4/8, at 51-71;

growing intensity of political fights between regulatory agencies, consumer groups, regulated companies and their shareholders that we are presently witnessing, and the extent to which protest movements and other forms of civic resistance are switching their targets from political to economic institutions. There is also the strange alliance between civic protest movements and mass media speaking up in the name of ethics against a comprehensive economisation of activities which damages their integrity.

II. SOCIAL AND LEGAL COUNTER-MOVEMENTS

Societal constitutionalism is not limited to a tendency within the law; rather, it designates a series of social counter-movements directed against the destructive aspects of functional differentiation. These counter-movements coerce expansive social systems to self-restriction. [6] In particular, fundamental rights are not just judicially protected rights of individuals against state power as lawyers usually see them, but are much broader social counter-institutions that, after long-term conflicts, emerge inside expansive social sub-systems and serve to restrict this expansion from within. Historically, basic rights have emerged in reaction to the emergence of autonomous spheres of action in modern society, especially in response to the matrix of autonomised politics. As soon as expansionist tendencies that threatened the integrity of other autonomous areas of society became evident in politics, turbulent social conflicts ensued. Expansionist tendencies have manifested themselves historically in very different constellations; in the past, mainly in politics but today, mainly in economics, science, technology and other sectors of society. If the core task of political basic rights was to protect the autonomy of spheres of action from political instrumentalisation, then the central task of "social basic rights" has become to make it possible to safeguard so-called non-rational action logic against the matrix of the dominant social trends

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G. Teubner, "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?" in K-H. Ladeur, ed., *Public Governance in an Age of Globalisation* (Aldershot: Ashgate, 2004); Gunther Teubner, "Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes", *Social and Legal Studies* 9 (2000) at 399-417

[6] For details see, G. Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors" in *Modern Law Review* 69 (2006) at 327-346; see also G. Verschraegen, "Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory" *Journal of Law and Society* 29 (2002) at 258-281; K-H. Ladeur, "Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie" in *Kritische Justiz* 32 (1999) at 281-300; C. Graber and G. Teubner, "Art and Money: Constitutional Rights in the Private Sphere" *Oxford Journal of Legal Studies* 18 (1998) at 61-74

towards rationalisation.[7]

Human rights, therefore, cannot be limited to the relation between State and individual, or the area of institutionalised politics, or even solely to phenomena of power in the broadest sense. Specific endangerment of physical and mental integrity by a communicative matrix comes not just from politics but, in principle, from all social sectors that have expansive tendencies. For the matrix of the economy, Marx clarified this particularly through such concepts as alienation, autonomy of capital, commodification of the world, exploitation of man by man. Today we see – most clearly in the writings of Foucault, Agamben, and Legendre – similar threats to human integrity from the matrices of the natural science, of psychology, the social sciences, technology, medicine, the press, radio, television, and telecommunications.[8]

The human rights question in the strictest sense must today be seen as a response to the endangerment of individuals' integrity of body and mind by a multiplicity of anonymous and globalised communicative processes. It now becomes clear how a new "equation" replaces the old "equation" of the horizontal effect. The old one was based on a relation between two private actors – private perpetrator and private victim of the infringement. Now, in the new equation, one side is no longer a private actor as the fundamental rights violator, but rather the *anonymous matrix of an*

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[7] This is the core idea of societal constitutionalism developed by D. Sciulli in his *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992) at 21 ff.; see also D. Sciulli, *Corporate Power in Civil Society: An Application of Societal Constitutionalism* (New York: New York University Press, 2001) at 131 ff. For an elaboration, G. Teubner, "Societal Constitutionalism: Alternatives to State-centred Constitutional theory?" in C. Joerges, I-J. Sand and G. Teubner, eds., *Constitutionalism and Transnational Governance* (Oxford: Hart, 2004), 3-28. For the related concept of constitutional pluralism beyond the nation state, see N. Walker, "The Idea of Constitutional Pluralism", 65 Modern Law Review 65 (2002) 317-359 and N. Walker, "Taking Constitutionalism Beyond the State", RECON Online Working Papers (2007)1-18; C. Walter, "Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law", *German Yearbook of International Law* 44 (2001) 170-201; H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart, 2005), 161 ff.; For a parallel diagnosis in the "new economic constitutionalism", see J. Tully, "The Imperialism of Modern Constitutional Democracy", in N. Walker & M. Loughlin, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: OUP, 2007) 315-338

[8] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 15 et seq.; M. Foucault, *Discipline & Punish: The Birth of the Prison*, (London: Penguin Books, 1991); P. Legendre, *Leçons VIII. Le crime du caporal Lortie. Traité sur le père* (Paris: Fayard, 1989)

autonomised communicative medium. Similarly, the other side is no longer simply the compact individual – now on this side of the equation the fundamental rights have to be systematically divided into three dimensions:

> - *Institutional rights* protecting the autonomy of social discourses – the autonomy of art, of science, of religion – against their subjugation by the totalising tendencies of the communicative matrix. By protecting social discourses against the totalitarian tendencies of science, media or economy, fundamental rights take effect as "conflict of law rules" between partial rationalities in society.
> - *Personal rights* protecting the autonomy of communications, attributed not to institutions, but to the social artefacts called "persons".
> - *Human rights* as negative bounds on societal communication, where the integrity of individuals' body and mind is endangered by a communicative matrix that crosses boundaries.

However, even after such a reformulation of the human rights concept, the nagging question remains: can one discourse do justice to the other? This is a problem the dilemmas of which have been analysed by Lyotard,[9] but it is at least a problem *within* society, one Luhmann sought to respond to with the concept of justice as socially adequate complexity.[10] The situation is still more dramatic in terms of human rights in the strict sense, located as they are at the boundary between communication and the individual human being. All the groping attempts to juridify human rights cannot hide the fact that this is a strictly impossible project. How can society ever "do justice" to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them? In the light of grossly inhuman social practices, the justice of human rights is a burning issue, but one which has no prospect of resolution. This has to be said in all rigour.

If a positive concept of justice in the relation between communication and human beings is definitively impossible, then what is left, if we are not to succumb to post-structuralist quietism, is only second best. In the law, we

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[9] J-F Lyotard, *The Differend: Phrases in Dispute* (Manchester: Manchester Univ. Press, 1988), cif. 1 et seq.

[10] N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart: Kohlhammer, 1974); N. Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, (Frankfurt: Suhrkamp, 1981) 374 et seq.

have to accept that the problem of the integrity of body and mind can only be experienced through the inadequate sensors of irritation, reconstruction and re-entry. The deep dimension of conflicts between communication, on the one hand, and mind and body on the other, can at best be surmised by law. The only signpost left is legal prohibition, through which a self-limitation of communication seems possible, but even this prohibition can only describe the transcendence of the other allegorically. This programme of justice is ultimately doomed to fail, and cannot, with Derrida, just console itself that it is "to come, *à venir*",[11] but it has to face up its being, in principle, impossible. The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of humanly just communication might be.

[11] J. Derrida, "Force of Law: The Mystical Foundation of Authority", *Cardozo Law Review* 11 (1990) 919 et seq., at 969.

CODA: GOVERNANCE, CIVIL SOCIETY & SOCIAL MOVEMENTS RE-CLAIMING 'THE COMMON'

Jennifer Hendry*

The aim of this short conclusion is to discuss the final section of this journal issue, specifically the contributions of Michael Blecher, Antonio Negri and Gunther Teubner, in light of the overall theme of both the conference workshop and this special issue. To this end, I am aware that Blecher's introduction has already raised a number of relevant points and it is not my intention to repeat them; rather, my aim is to identify and draw attention to the loci of agreement and disagreement across the three papers, some of which are obscured by the different perspectives on the topic.

The title of this section – *Re-Claiming 'the Common': The Transformation of Governance-Projects by Social Movements'* – was established well before any of these articles were written, and the different approaches taken and arguments furthered by these three papers serves to demonstrate the very fertility of this topic. In this paper I will, first of all, discuss some of the main concepts introduced by the three papers, and then seek to draw together some of the specific threads running through all of the contributions. However, I would first like to take a moment to focus on the title and, specifically, to give a definition of the 'common' that we are so intent on 'reclaiming'.

I. ON "THE COMMON"

Perhaps the best or, at least the most straightforward, conception of the common is the one laid out in the introduction of Michael Hardt & Negri's book *Multitude* as being that which allows the "multitude" "to communicate and act together",[1] and is "at once an artificial result and a constitutive basis"[2] of the multitude. The common, therefore, is the basis for the existence of the multitude, which can itself be defined as "an irreducible multiplicity" or, in other words, a collection of "singularities that act in common".[3] Indeed, much turns on this co-incidence of singularity and commonality, as this is the means by which Hardt & Negri avoid the either/or binaries of both unity/diversity and Them/Us. By

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[1] M. Hardt & A. Negri, *Multitude*, (2004) Penguin Press: New York, at xv

[2] *Ibid*, at 349

[3] *Ibid*, at105

attributing subjectivity to the multitude, accomplished by recognising the dissolution of the previously dominant institutionally-delimited spaces that formerly gave rise to distinct and individual subjectivities, they attempt to preclude the descent of the multitude into either postmodern fragmentation (diversity) or a single, lumpen mass of global proletariat (unity). In essence, the existence of the multitude depends upon the *becoming-common* of multiplicity, a state that must be achieved while maintaining the internal distinctions of the forms that comprise it.

The success or failure of Hardt & Negri's philosophical project is neither the focus not the concern of this paper; however, the indivisibility of their concepts of the common and the multitude – in effect, their mutual co-constitution – makes it impossible to discuss one without the other, let alone to attempt to find definitions. Indeed, one of the difficulties in providing a definition of the common, as we have seen above, is the way in which it more often than not tends to be characterised in terms of either what it is not or what it gives rise to – for example, according to Hardt & Negri: "the common does not refer to traditional notions of either the community or the public"[4]; "the common ... is what configures the mobile and flexible substance of the multitude"[5]; and "social life depends on the common".[6] This approach must necessarily be regarded as a natural consequence of the abstractness of the concept, as well as resulting from of a lack of adequate language and categories in terms of which to describe it.

A quick aside here –the term "the common" should be distinguished from the term "the *commons*" – the blurring of the lines between the two undeniably contributes to increased confusion in what is an already complex area of thought. While evidently similar, the latter term brings with it connotations of "pre-capitalist-shared spaces [...] destroyed by the advent of private property"[7], while the former seeks to break with tradition, lose its historical baggage and set out for philosophical pastures new. In their seminal text *Empire*,[8] Hardt & Negri reconceptualise the notion of the *commons*, presenting it as being "the incarnation, the production and the liberation of the multitude"[9] instead of simply the property-tied and -embedded "basis of the concept of the public". The common, on the other hand, can be conceptualised as being both the

[4] Hardt & Negri, Multitude, *supra* note 1, at 204

[5] *Ibid,* at 349

[6] *Ibid,* at 188

[7] *Ibid,* at xv

[8] M. Hardt & A. Negri, *Empire* (2000) Harvard U.P: Cambridge, Mass.; London, at 300ff

[9] *Ibid*, at 303

product of labour and the basis for future production. This labour is not confined to material labour; rather, it is in the realm of immaterial (or biopolitical) labour[10] that the greatest potential lies, with communication as the most pertinent example.

That being said, there is also a number of applied and gradated conceptions of the common, most of these less abstract than the one furthered by Hardt & Negri. In an earlier paper, Blecher talks about, for example, a democratic "common good" in the realm of politics, a "common welfare" in that of economics, and a conception of liberty that is dependent upon a singular autonomy intended to act as a counterpoint to the "common"[11] – in effect, a *functionally differentiated* conception of the common. So, in light of this, what does re-claiming the common mean and involve? And what is the relation of the common to legal questions, and specifically those of governance, civil society and social movements, considering they are our focus?

II. JUSTICE AS LAW'S "COMMON"

In light of Blecher's apparent functional differentiation of the common into a political common good, an economic common welfare, and a scientific common truth, the equivalent for law is a common *justice*. Each of these unconditioned *potentiae*[12] is a facet of the overarching common, which is produced by (biopolitical) immaterial labour (understood here as social order communication), and refers to the endpoint of the social role that each social function system aims to attain.

This differentiation or segmentation begs the question, however, as to the interrelation and interaction of the social function systems.[13] Firstly, if the common is divided into parts, how interdependent are these parts? Similarly, should a communication that furthers the political common *good*,

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[10] Hardt & Negri, *Multitude*, *supra* note 1, at 109: "The labour involved in all immaterial production... remains material – it involves our bodies and brains as all labour does. What is immaterial is *its product*. We recognise that *immaterial labour* is a very ambiguous term in this regard. It might be better to understand the new hegemonic form as 'biopolitical labour', that is, labour that creates not only material goods but also relationships and ultimately social life itself." (emphasis in original)

[11] M. Blecher, "Law in Movement: Paradoxontology, Law & Social Movements", in J. Dine & A. Fagan, eds., *Human Rights & Capitalism: A Multidisciplinary Perspective on Globalisation*, (2006) Cheltenham; Northampton, MA: Edward Elgar, chpt 4, at 83

[12] M. Blecher, *ibid*, at 83-84. "*Potentia*" refers to the very possibility of *everything* possible.

[13] I should say here that I am not (yet) discussing Luhmanian functional differentiation or systems theory.

for example, be considered as *just* simply as a result? Perhaps the notions of the three *potentiae* of common good, welfare and justice are too conceptually similar or close-together for clarity at this point, as the temptation is to see them as corollaries of each other – for example, it does not seem to be a huge jump to consider anything that gives rise to a common good as also being *just* (despite the normative strictures imposed by the law itself and the question of whether it is legal or not). However, the scientific *potentia* of truth seems to be the fly in the ointment here, as it is evident that no reciprocal relationship can exist between unconditioned truth and unconditioned good, welfare or justice – the axes on which they would have to be measured simply do not overlap. Therefore, despite each being a facet of the overarching common, there is no direct relationship among the *potentiae*.

Similarly, there is no naturally progressive relationship between the social function system and its aspect of the common, or *potentia*. For example, there is no direct link between what is legal and what is just; the philosophically abstract concept of justice is far removed from legal discourse, for law cannot proscribe what is just, only that which is legal or illegal.[14] As Blecher says regarding the application of binary logic, "one can easily understand that, in a complex world, the same event can...be defined as being 'legal' in one context and 'illegal' in another".[15] Justice, on the other hand, necessarily has to be universal and unconditioned,[16] as must all the other *potentiae*, for they are necessarily always *a venir*.

Unconditioned justice, therefore, must always be striven for by the law, and yet can never be attained. Whatsoever is considered to be *universally just* can never be achieved but, rather, remains a potential value – something that is necessarily out of reach, or that leaps further away whenever an attempt is made to grasp it. Blecher here explains the law's thankless task in terms of both its inevitable failure and essentially relentless endeavour, while also pre-empting the naturally ensuing question of: why does it not just give up?

> "On the one hand, the complete emergence of this 'justice' (*all* possibilities for *all* participants) is out of reach because any concrete social entity can only be realised through 'asymmetric' selective creations from that space of unlimited possibilities. On the other hand, the permanent attempt to realise 'justice' is necessary because

[14] See G. Teubner, "The Anonymous Matrix: Human Rights Violations By 'Private' Transnational Actors" (2006) 69(3) *Modern Law Review* 327-346

[15] M. Blecher, Law in Movement, *supra* note 11, at 81

[16] *Ibid*, at 84

> any restriction or exclusion produced by a social entity is only legitimate as far as it tries to realise the maximum of possibilities for the maximum of single and collective entities involved."[17]

Despite recognising (to an extent) the law's "failure of itself"[18], namely its inherent incapability of achieving its *potentia* of unconditioned justice, Blecher posits this "intrinsic inadequacy" as a source of potential strength for the law,[19] while also arguing for recognition of a degree of "blurring" at social system boundaries (more on this in a moment).[20] Key to the former claim is the concept of *contingency* in social development – that is to say, any decision taken is only ever a selection from a number of possible decisions *that could potentially have been taken*. Instead, therefore, of being a mere potentiality, under this construction justice becomes the constant quest for the common good across the entire social order – in order to be just, *each* social decision should be that which achieves the optimum common good for society at that temporal point, hence Blecher's term: 'justice as continuous becoming'.[21] And the very field in which these selections are recognised, conditioned and decided upon is that of *governance*.

III. Paradoxes & Transcendence

Justice, as law's *potentia* in the overarching common, or as "continuous becoming" is, as Blecher points out, a progression from the Luhmanian conceptualisation of justice as (socially) adequate complexity.[22] Teubner, however, questions the ease of this transition, citing the problem here as

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[17] *Ibid*, at 84

[18] See R. Wiethöltner, 'Recht-Fertigungen eines Gesellschafts-Rechts', in (2003) C. Joerges &G. Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (2003) Baden-Baden, at 6

[19] M. Blecher, "Mind the Gap" (contribution to this volume), at 3

[20] Blecher also identifies similar "failures" across the other social function systems but argues, contrary to the tenets of social systems theory, that the *potentia* of these systems, as discussed above, are also furthered by *other* systems: "on the one hand, these core functions produce social structures while, on the other hand, their distinctions are continuously liquefied and appear to be treated 'elsewhere' and 'differently' in order to come to terms with their 'potentia'." For more on this, see M. Blecher, 'Law in Movement', *supra* note 11, at 85-86

[21] See M. Blecher, *supra* note 19.

[22] "A system has adequate complexity as a legal order in the degree to which it adapts its other variables to the extent of making it possible for consistent decisions to be taken". (my translation)
See N. Luhmann, "Gerechtigkeit in den Rechtssystem der modernen Gesellschaft" in *Rechtstheorie* 4 (1973) at 153

being a misunderstanding of Derrida's argument on justice as the transcendence of law.

It should be noted that Teubner's contribution to this volume sits slightly separate from the other two in this section on "Reclaiming the Common", mainly as a result of his reliance on both a systems-theoretical approach and the perspective of societal constitutionalism[23] rather than that of normative fragmentation,[24] but also because of his focus on justice in relation to human rights. Human rights, he argues, are not merely "judicially protected rights of individuals against state power" but rather are "much broader social counter-institutions that [...] are emerging inside expansive social sub-systems, and restrict[ing] their expansion from within".[25] This reformulation of the concept has altered human rights discourse from being between two private actors (violator and victim) to being between the "anonymous matrix of an autonomised communicative medium" and – instead of a single individual – a tripartite grouping of rights: institutional, personal, and human, each of which in turn pertain to and protect the autonomy of social discourses, the autonomy of communications, and act as negative limits on societal communication.

The problem for this rearticulation of human rights discourse *qua* justice for Teubner here is that, in a systems-theoretical approach, the individual does not occupy a position as such; rather, humans are considered to be mere semantic artefacts ("persons")[26] by the anonymous institutions in society. Here, Teubner frames the problem in the form of a question:

> "How can society ever 'do justice' to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely irritate or destroy them?"[27]

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[23] Societal constitutionalism can be said to describe "a series of social counter-movements directed against the destructive aspects of functional differentiation". See G. Teubner, "Justice Under Global Capitalism" (contribution to this volume), at 2. See also footnote 7 of this article for many further references to this concept.

[24] This latter difference is not especially important, as the two are just different perspectives of the same processes or event, one being bottom-up and the other being top-down.

[25] G. Teubner, *supra* note 23, at 3

[26] G. Teubner, *ibid*, at 4

[27] *Ibid,* at 4

Considering this paradox,[28] he answers his own question with a negative, concluding that the "programme" of positive justice is doomed to fail because it is *inherently impossible*. While recognising Blecher's Derridean argument of "justice as continuous becoming" and its status as the counter-principle of the deconstruction of law against the corrupt practices of modern law,[29] Teubner argues that law does not possess a transcendence formula and that it must continue to deal *only* with contingency.[30] It is at this point that governance, the "uncertain government of contingence"[31], now enters the picture.

IV. GOVERNANCE & SOCIAL MOVEMENTS

Before continuing with this critique, another short aside regarding the term "governance" and its usage is necessary here. The concept of governance itself is used in all three contributions here in its critical form, that is, less to suggest simply soft-law forms than to infer "proceduralisation". Proceduralisation here means social construction by the "creation of adequate standards [...] and procedures that law has to take care of"[32] – a formulation first introduced by Rudolf Wiethöltner, and expanded upon to include "just-ification" (*Recht-fertigung*, to be understood both as law-making and the reason for doing so) as being "the form of the thing proceduralisation".[33] Governance, therefore, is a "reaction to the failures of markets, states and laws and to the consequent fragmentation,

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[28] "The paradoxical circular relationship between society and individual (society constitutes the individual person, who in turn constitutes society) is, as it were, the *a priori* that underlies all historically variable human-rights concepts. Flesh-and-blood people, communicatively constituted as persons, make themselves disruptively noticeable, despite all their socialisation, as non-communicatively constituted individuals/bodies, and hammer for their "rights." See G. Teubner, "Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter", (2003/04) Storrs Lectures, Yale Law School, at 6

[29] G. Teubner, in discussion at the conference workshop held at EUI, June 30, 2007. See also, G. Teubner, "Dealing with Paradoxes", *ibid* at 5; and J. Derrida, "Force of Law: The Mystical Foundation of Authority" *Cardozo Law Review* (1990) 919-1046, 959ff.

[30] "While Luhmann asks about the law's justice to its environment, he does not ask about its justice to the world. According to Luhmann's system of law, the law does possess a contingency formula in the concept of justice, *but not a transcendence formula*." (My emphasis) See G. Teubner, *supra* note 28, at 11

[31] A. Negri, "The Philosophy of Law Against Sovereignty: New Excesses, Old Fragmentations" (contribution to this volume), at 2

[32] See M. Blecher, *supra* note 19, at 6, footnote 13, on R. Wiethöltner's concept of the 'proceduralisation of law'.

[33] Wiethöltner, *supra* note 18, at 6

hybridisation and multi-level character of autonomous global norm production".[34]

Governance is seen, essentially, as the result of the "chaotic situation"[35] caused by normative fragmentation. This fragmentation of the normative world is, according to Negri, accompanied by a "constituent excess", while governance is the device used to mask the resultant but unavoidable uncertainty. Fragmentation and excess co-exist in an asymmetric relationship, and here Negri points to three identifiable themes or examples where this is played out.[36] Firstly, and in terms of political economy, excessive disproportion between fixed capital and variable capital (*i.e.* the workforce) uncovers areas of resistance. Secondly, in terms of the State, the fragmentation of judicial functions (domestic and international) has given rise to a surplus of sovereignty claims that necessitate mediation. Finally, and this time in terms of individual (legal) subjectivity, Negri argues that fragmentation within these processes of subjectivity give rise to forms of excess that are incompatible with transcendental determinations of individualism[37]; this excess produces singularity, which in turn enters the common.[38] Each of these themes exemplifies processes of fragmentation and excess, which in turn constitute an *expressive biopolitical fabric*.[39]

V. RECLAIMING THE COMMON?

As discussed above, governance provides the conditions under which the common good *qua* justice could potentially be realised (justice as continuous becoming), and it is in the turn from government to governance and the resultant decoupling of law from its classic state-based articulation that this dynamism is found.[40] It could be argued here that, while the scope of the law has been widened in this formulation, this expansion has occurred at the expense of its legitimacy (or justification), which has been sorely reduced by the attenuation from its original (at least in the modern sense) source. This conclusion, however, would be to follow blindly down the same old statist or quasi-statist path – in other words, to

[34] Blecher, *supra* note 19, at 4

[35] *Ibid* at 2

[36] See *ibid* at 1-3

[37] *Ibid*, at 3

[38] Teubner furthers a similar argument, albeit from a different perspective, in terms of a singular 'moment' of self-observation that can give rise to a humanly-just communication (with justice read as law's common). See G. Teubner, *supra* note 14

[39] A. Negri, *supra* note 31

[40] M. Blecher, *supra* note 19, at 4

"uncritical[ly] transfer nation-state circumstances to world society",[41] for both the *potentia* and irreducible diversity of the multitude transcend old-school notions of legitimacy.[42]

Legitimacy, in effect, lies with social movements, as the active part of the multitude, whose task it is to "act out" justice. Negri identifies this potential for social change as lying *outwith* the recognised boundaries of the law, namely, a *positive excess*, a constituent act that redraws those boundaries, as well as ameliorating the existing parameters of the common.[43] Following from this, therefore, Negri's gripe against Luhmann's systems theory is that it anticipates normative fragmentation but refuses to open itself to the potential available in the asymmetric; Negri argues that, in systems theory, the "innovative elements are considered as marginal effects", and thus remain peripheral and consequently negligible,[44] rather than centre-stage being given to (positive) excess *qua* resistance *qua* social movements.

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[41] G. Teubner, "Societal Constitutionalism: Alternatives to State-Centred Theory", in C. Joerges, I-J. Sand & G. Teubner, eds., *Transnational Governance & Constitutionalism*, (Oxford: Hart, 2004) at 3

[42] M. Blecher, *supra* note 11, at 95

[43] Excess, it should be noted here, can be conceptualised as either a positive or negative situation that occurs on the battlefield of governance: the positive expression is resistance, while the negative is corruption. See A. Negri, *supra* note 31 at 7

[44] *Ibid*, at 2-3