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

---

* 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

---

[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.

---

[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]

---

[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.