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POSTMODERN GLOBAL GOVERNANCE AND THE CRITICAL LEGAL PROJECT

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

"…In late modernity, democratic constitutions were grounded on New Deal projects of labour emancipation, ensuing trade union negotiation, the constitutional centrality of Welfare, and the antagonism with the utopia and reality of 'real socialism'. This era is now over: **the shift to a *postmodern* global governance has been fully achieved**. This shift, moreover, has been of such intensity as to dissolve not only the 'modern' but also its memory, and to destroy (with the subject) every legal and political dispositive of 20th century 'social democracy'." (pp. 27-28)

"…In other words, by means of the constitutional and juridical revolution established **from the 1930s onwards**, both in the West and in the East, **constitutional (or tout court juridical) bodies developed such a capacity of arranging and constituting the**

social (one needs to think here only of the juridical configuration of the Welfarist society), that, from then on, life cannot be either described or, probably, understood even, outside the categories of state initiatives, constitutional law, and the biopolitical articulation of the constitution. From now on, therefore, we must keep in mind that **contemporary capitalist society is not only traversed by juridical dispositives but also that they have a 'biopolitical' reach** [estensione]. This means that, **with respect to life, law's effect must be considered as immediate**, and also, conversely, that the reproduction of life directly implies and also includes within itself the juridical.

As a result, we are confronted with the following paradox. **At the very moment in which the Fordist constitutions, under pressure from neoliberalism, are collapsing, the importance and weight of law's investment of/in the social becomes heightened. Subjects are literally formed [disposti] by public law, the relations and the objects of production and reproduction are no longer imaginable outside a fully effective legal order, while these dispositives seem to lose (at first sight at least) their conflictual character (whether latent or pronounced) as well as any sense of being the products of conflict.** To take this point further, given its centrality to the argument put forward here, let us pose the question anew. What is happening? Why is it – for this is precisely the paradox – that the efficacy of the constitution grows weaker and weaker to the point of extinction at the very moment in which the constitutional production of 'juridicity' [giuridicita`] extends its cover into life evermore increasingly, directly arranging [disponendo] subjects and objects therein?" (p. 29)

"Moreover, why is it that the intensity of the constitutional dispositive diminishes at the very moment in which it maximises its reach?" (pp. 29-30)

"… The working class and its organisations (be they national or international) no longer exist in the form they existed when the democratic system of the 20th century was established. As a consequence, the social dialectic, which rendered transparent, and, at the same time, fuelled constitutional relations in that form, is no longer valid.

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

…[**T]he capitalist initiative intent on destroying the 'dispositives' that used to regulate the relationship between social forces in the previous constitution**, emerges to some extent as 'revolutionary'. Let me explain what I mean by this by taking up again the notion of 'revolution from above', as defined in the 1930s (with regard to the seizing of

power by the fascist side) and then often reiterated in historical, political and constitutional debate." (p. 30)

"'Revolution from above' refers to a movement of radical restructuring of power relations that first and foremost imposes from above an upheaval in the social relations of production and reproduction. A movement, therefore, which deploys new social relations in order to re-assert both old power structures and old interest networks, and which does so, and achieves this, in hegemonic terms. Now, **what took place in the latter decades of the 20th century is precisely that**: namely, an initiative from above, which, while destroying the already existing structures of 'social democracy' and blocking the development of the dispositives shaped therein, at the same time, revolutionised the basic conditions of life, society, production, and reproduction." (pp. 30-31)

"A top–down revolution, which destroyed the working class as one of the parties to the relationship established by the New Deal constitutions in Italy – the effect of **a generalised shock-wave running through the constitutional structure of the countries of the liberal West, not to mention those of the socialist East**.

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

…**The top–down revolution of the constitutional systems** we have witnessed, and **which has led to the defaulting of every social dispositive of conflictual law-making, is firmly set in a horizon, which now-a-days is being increasingly referred to as 'global'**. Yet, given that the law is not merely an all-embracing horizon of social events (and, therefore, in this context, definable as global), but also, always, a hierarchical order, **what is the hierarchy that is being formed in the globality of the system?** What is the guarantee of contracts on the world market? That is to say, **what is the authority, the source of legitimacy of the law of the world market?**" (p. 31)

"Further, **how does the global order spill over into domestic law?** And what came first in this radical mutation, the crisis of the domestic legal orders or the revolution of the global markets?" (pp. 31-32)

"…Critical legal movements will be able to cross this crisis, and recognize themselves beyond it, only by undertaking a radical transformation of their genetic paradigm, their political location, and consequently, their epistemological statute. Why? Let us consider for a moment this genetic paradigm. There is no doubt that, **from the 1960s onwards, the critical movements in legal studies were born out of the confluence of open, anti-authoritarian Marxist (particularly Gramscian) trends, and alternative, critical currents, which had their roots in legal realism. Their approach to law bore two distinctive marks: it had a strong reformist agenda, and advocated 'doing law otherwise'.** Finally, **their critical intervention was centred on the 'historical compromise' that the New Deal regimes managed**. Faced with the current, postmodern and imperial, socio-political situation, however, critical theory will have to leave behind both these origins and these methods." (p. 32)

"…Let us go back to **the root of the question of legal realism**. Central here is an argument, which, by **simplifying the relationship between society and ideology and retrieving it in the all too familiar figure in which modern social science has placed it ever since the Enlightenment, sees two sets of structures at work in the regulation of society: one at the bottom, the so-called 'base', and one on top, the so-called, 'superstructure'. The bottom one, the 'base', is alive and *progressive*, and as such it always needs to destroy what is dead (and thus left behind) and to produce, in the whole of its discourses and its public institutions, that special superstructure called 'law' in a way that is adequate to the changes of the social**. Now, it is evident that he, who rules over society, lays down his hegemony by means of the superstructure, in this case, by means of the law. And yet, **for legal realism, the law in this situation changes continually, opens itself to conflict, and is reformed in accordance with life's permutations**…" (p. 34)

"We have said that, probably, in question, or rather, in doubt, is **the logical structure itself of legal realism**, that is to say, insofar as this involves the claim that **law is a living and progressive superstructure of an economic, social, or, at any rate, collective, structure** (of little interest here is its concrete character). For today, in our shared phenomenological experience of the law, **this being 'inside and outside', this continuous exchange, this dynamic of the law with respect to the social, is no longer there**. …**Postmodernists are**

perfectly right in declaring the implosion of the dialectic of Enlightenment. Indeed, as we have seen, **the (postmodern?) state of neo-liberalism has put normativity firmly back into the social in order to invest it with a legitimacy, which is violently disconnected from any progressive call to conflict or dialectics** – and certainly, in order to withdraw from it the hope of community and the memory of revolution.4.

… Modernity has continually relied on the illusion that there was a high and a low, a before and an after. Now, the illusion is gone. The logical form of the binary is unusable. **In postmodernity** (i.e. in this situation described earlier, where the dispositives of dis/agreement, or more generally, of binaries, do not work) **there is no longer an outside: there is only inside."** (p. 35)

"[**I]f there is no possibility of reconstructing a strong realist alternative starting from the margins of the legal system, is it still possible to consider these very margins**, that is to say, the interstices of a world compacted by command (by society's material subsumption by capital)…?

… **Such an illusion has for long been maintained by intellectuals and law practitioners during the years in which reformism was in deep crisis, i.e. from Thatcher to Blair, Reagan to Clinton**. In the years of the *'pensiero debole'*, some, having almost gone 'underground', hoped (like hackers infiltrating the net) that individual instances of resistance could still produce general effects of sabotage in the system and that the gestures and the tactics of refusal could open up into alternative strategies. **None of this was realised, at least not in any visible way**." (p. 36)

"…The fact of the matter is that **the more the postmodern process of law's absorption into the privatistic command of capital got underway, and the new technologies of governance became effective in managing the particular and in leading it back into the system of command, the more one witnessed the onset, or at least the appearance, of a multiplicity of violent shifts**, a plurality of interruptions, more or less capable of being clearly articulated and of producing subjectivity, yet always proliferating… For the proliferation of the interstice was ontological, not a matter of will. **What we witnessed was a somewhat spontaneous overturning of the systemic interdependence of legal production points, so that, with respect to the central problematics of legal thought for instance, the theory of interpretation became increasingly undecided (and therefore potentially open to unforeseen and radically other possibilities), and, on the constitutional plane, the definition of**

subjects became increasingly fragmented, diffuse, and wide, bending the system's unity into some sort of spontaneous federalism." (p. 37)

"…Now, **when considering the political positioning of the critical movement**, one finds that the change demanded of theory is equally profound and far-reaching. In the new social situation in which theory is immersed and to which it reacts, **critical legal theory cannot but set out to look for a new subject. This subject no longer involves only the figure of the working masses but also a social figure of labourer, that is to say, white-collar workers and intellectuals, the part-time, female, immigrant, etc. work-force**. Productive socialism, although once an element of political identification in the movement, no longer has any meaning today. **The terrain on which critical theory should intervene is no longer that of direct production but above all that of diffuse production: services, reproduction, work in the home.** The new subject is no longer merely political but biopolitical: it redraws on the entire scene of life the antagonism with capitalist biopower." (p. 38)

"…Now, **democratic political representation no longer works**. If there is something that has been burnt out by this brief century, it is democratic representation. An infinite number of specific, historical, elements come together to define this crisis in its bare materiality. **From the ever more overpowering significance of the government over the legislative power (representative by antonomasia) to the distortions and the blocking (or twisting) of representative mechanisms caused by corporate intrusion and by the banalisation of administrative corruption**. From the increasingly evident abandonment of the 'official' sites of representation (parliament/government) to the unbounded expansion of new public spaces defined by the 'media'. From the consequent judicial (an 'independent' power?) overdetermination of social conflicts to the imbalance in constitutional power play… And this is not all. From these arise **further elements of crisis: firstly, the drifting away of sovereign powers towards other loci of power (in Europe, for instance: on the one hand, towards a federal form, and on the other, towards local forms) with ensuing often unpredictable transformations**; and above all (through a radical crisis in representation in addition to the crisis in sovereign competences) the imperial devolution of the nation state. In this final case, political representation becomes a rarity…" (p. 40)

"…**What is urgent today, therefore, is a response of freedom**. Who can provide it though? How can one go about it, if realism has become an impossible road to take and it is no longer possible to identify the basis upon which to build ethically sound projects?... **Does there exist, within the new anthropological frame determined by the change of paradigm, the possibility of identifying a set of 'intuitive principles', which can form the basis for a new constitutional debate?**" (pp. 41-42)

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

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

Now, on the first question, I believe that it is possible to try and grasp some intuitive arrangements (dispositivi), i.e. an ethico-political framework, around which it is possible to discuss (without necessarily agreeing)…

… **The first principle of the 'new political science'**, seems to me, could consist in the recognition of the 'biopolitical field'. What does this mean? It means that every line of reasoning that starts from the enigma of 'political representation' (and therefore from the autonomy of the constitutional and/or the political) and subjects 'legal realism' to this transcendental operation ends up inevitably in crisis… Seen from the point of view of the subject, 'biopolitics' means that the 'modern' experience of the political is exhausted. **The political is no longer separate from life but participates in it**." (p. 42)

"…**As a result, the economic and the political, ownership and trade unions** [il padronale e il sindacale], **the non-governmental and the institutional set up of social production, live within each other.**" (p. 43)

"…**The second intuitive principle of this 'new political science'**… **entails that the conflict for power**, in this case for biopower, takes place within the field of biopolitics, and that, as a result, the latter is determined by a radical antagonism. This antagonism appears where the decision on biopower taken by the social agents of production, the producers, reveals itself in contradiction with (and as irreducible to) the one expressed by the political proponents of the social capital and the democratic institutions that should be representing it. Otherwise put, this **antagonism appears where the social expression of the ('biopolitical') productive force [potenza produttiva] is held back, distorted, blocked, in forms which preserve the economic order and/or reproduce the existing pattern of biopower**. **The radical antagonism that characterises the 'biopolitical' wants to liberate the social forces** [potenze sociali] **of life, that is of production – wants to give to life (which partakes of production) charge over production.**" (p. 43)

"…Now, the **first** conclusion is that **a new Constitution can only be born once a series of new constitutional principles are affirmed and acted on**. These principles are: **First, *biopolitical belonging for every citizen* – which means that *'everything belongs to everyone'*, and that, therefore and, as importantly, *every citizen has the right to a basic income* [reditto di cittadinanza],5 *which is universal, unconditional, and able to guarantee one's social reproduction.***" (pp. 43-44)

Second, the right singularly to reappropriate a quota of biopower,6 or exploitation as the expropriation of the common – which means that **the reasons for the antagonism between rich and poor, rulers and ruled, cannot in any way be neutralised**. On the contrary, **the constitutional machinery** must show through this difference and allow its overcoming. It must **legitimise the exercise of counter-power** [contropotere].

Finally, there is a **third** (intuitive) principle, which needs to be put forward for a well-functioning Constitution. It is that of **recognising difference, and thus of**

federalism. Of course federalism has always been thought as a mechanism of territorial distribution and, hence, as a means of neutralising difference spatially. However, **in the context of these new intuitive principles (which are traced, in this case also, to Foucault and Deleuze), federalism is being put forward as the constitutional dispositive of difference, *as the site of freedom*, of exodus, and of ever-possible movement for citizens, as the space in which the foreigner is welcomed as a brother and in which the melding of cultures and races creates new productive forces**. (p. 44)

[NO BORDERS???] [COLLECTIVES?]

"…What is novel is the fact that **the intellectuals, whatever their social position, appear now within social production not as single individuals but as a mass**. Moreover, as mass intelligentsia [intelletualita` di massa], **they appear in the world of social labour increasingly in the role of executives rather than in the role of planners or innovators of knowledge**. What is the point of asking intellectuals to function as a 'critical conscience' (for this is the role assigned to the intellectual in the Enlightenment tradition), when the intellectual has become mass-work-force?" (pp. 44-45)

"…It is necessary to realise that ***mass intellectuality* is the basic productive force of *the postmodern regime of production*. It is to this therefore that the intuitive principles of the new constitution of social labour refer**. In fact, mass intellectuality is biopolitical: production and freedom coincide both in its existence and its operation. It is antagonistic: **the means of production is not prescribed by capital but belongs to the brain**, is constructed in education, and formed in the technological *Bildung* of the subject. **It is mobile and flexible – but this fluidity and flexibility are not at the disposition of capital, they are expressions of freedom**. Will these people (and the legal thinkers among them) produce a new constitution?" (p. 45)

"Thus **biopolitical singularity is not private but common - and the common is not that which sovereignty and modern law have defined under the name of 'public' (that is, a community [comunanza], which is either biological or State**

ordained) but a multitude of singularities, which builds reality out of desires and differences. The common is the language spoken by the multitude, which is handed on, accumulated, and invented always anew – a process in which all of us participate. The method of legal science needs therefore to get evermore closer to linguistic community [comunita` linguistitca] and retrieve that materialist and creative telos, which constitutes it. In this situation, law's grammar (which is to be rebuilt) will be able to bow before the word of liberation." (p. 46)

[THE BORG??]