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LAW AND ITS MASTERS. THE LEGAL TRANSFORMATIONS IN THE NEOLIBERAL ORDER

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The neoliberal project and the role of law

For neoliberalism, the law is not merely a technique to be used to maximise results: it is one of its main instruments of implementation[1]. The neoliberal ideology[2], in fact, seeks forms of protection through law[3], which, as will be better explained below, seems to take on the same dichotomous logic stigmatised by Judith Butler with reference to contemporary power dynamics (Butler, 2015). This, in order, on the one hand, to

1. "In this way, law becomes a medium for disseminating neoliberal rationality beyond the economy, including to constitutive elements of democratic life. More than simply securing the rights of capital and structuring competition, neoliberal juridical reason recasts political rights, citizenship, and the field of democracy itself in an economic register; in doing so, it disintegrates the very idea of the demos. Legal reasoning thus complements governance practices as a means by which democratic political life and imaginaries are undone […] it is important to mark the ways that dedemocratization trough neoliberalized law transpires at the more analitically familiar level, that of legal reforms that strenghten the political hand of capital and weaken associations of citizens, workers, and consumers" (Brown, 2015, p. 151-152).
2. As an ideology, neoliberalism today expresses a precise project of society, governed by different political and theoretical orientations, which recognise in the primacy of private initiative, mainly of economic nature, the formula around which to organise the best possible model of society. Because of individual (economic) freedom, therefore, everything that is a limit or a prohibition is perceived as an authoritarian brake and a barrier to the great potential of each individual. Now therefore, as an ideology neoliberalism is not exclusively a new "rationality": if, on the one hand, its qualification as a "new world reason" appears extremely effective, by virtue of the pervasiveness of this orientation and its prevalent "technical" attitude, on the other hand, this representation results even more convincing only when it comes to underlining the openly planning component that neoliberalism brings with it, together with a series of generalised policies of indoctrination, with a "hegemonic vocation" (G.G. Azzolini, 2017, p. 424; Dean, 2008; Galletti & Vida, 2018; Brown, Gordon, Pensky, 2018)
3. With regard to the illusion of a self-regulating market, the most recent critical studies often refer to what Karl Polanyi already pointed out in the 1940s regarding the inconsistency of this representation and the effects that such model of economics produces. See Polanyi, 2001.

promote all that and all those who tend to conform to neoliberal planning and, on the other hand, to repress those who do not conform and challenge it.

This means that within neoliberal practices particular attention is paid to the legal phenomenon and its articulation, with the aim of making law itself consistent with the aims of neoliberalism (Dardot & Laval, 2017).

The latter can be, briefly, recognised in the affirmation of the market as the fundamental rule that legitimises politics and law (and not vice versa, as happens in the constitutional model). The legal corollaries of this main objective coincide, consistently, with the prevalence of the private sphere over the public one and the depoliticisation of law, through: the replacement of the distributive paradigm with the retributive one as the model of contemporary justice; the imposition of the principle of differentiation over equality; the construction of a fragmented and depoliticised subjectivity replacing the legal and political one based on fundamental rights and freedom. The "neoliberal culture of the objective" has replaced the "democratic culture of the rule" to the point that "*un néo-positivisme semble en cours de réalisation: un positivisme économique retenant du positivism juridique l'idée que la validité formelle de la règle de droit dépend de sa capacité à respectes les droits économiques fondamentaux*" (Bottini, 2017, p. 33).

It is therefore an imposing overthrow of the legal (and political) architecture established from the second half of the 20th century onwards: so much so that the transition underway tends to take on the characteristics of a reversal that follows the logic of regression.[4]

The "neoliberal legal style" (Denozza, 2017, p. XV) takes form in a new conception of production and application of standards, of power and subjectivity, while it seems to go beyond the very concept of order as intended over the last two centuries (i.e. from the imposition of legal positivist theory onwards).

This legal style, on closer inspection, seems to present considerable similarities with what the network model[5] intends to represent with regard to the current functioning of the law, i.e., the progressive dissolution of the hierarchy of sources in favour of a complex and "widespread" production of law within a regulatory framework in which the separation and limitation of powers as well as the distinction between public and private progressively lose relevance. The network model also appears to be open, sharing with

4. Cfr. Geiselberger (ed.) 2017. On the impressive "trend reversal" with respect to what happened in the second half of the 20th century, see also M. De Carolis, 2017, p. 10 et seq.
5. Ost & van Kerchove, 2002; see also M.G. Losano, 2005; Barberis, 2008, p. 175 et seq.

the other spheres of politics, economics and ethics, and released from the inflexibility and formalisms that have characterised law produced by the State[6]. All the more so since, in global law, the national dimension of the legal system tends to lose more and more importance, in favour of a law configuration that is not bound by borders or territories.[7]

The neoliberal "network"

Such convergences suggest the presence of a close dependence between neoliberal ideology and the increasingly pervasive affirmation (both in theory and practice) of the network model. Indeed, it is in the light of neoliberal planning that certain changes seem to take on a precise meaning and the transition underway reveals itself in all its consistency.

Proceeding step by step, I would first like to focus on the compatibility and reciprocal functionality that the network metaphor and neoliberalism present with reference to a fundamental question. The deep assonance between the network and neoliberalism is not about the simple, sometimes even accidental, confluence of interests, but rather the *rationale* that animates both: a *rationale* that apparently contains a contradiction, but which instead reproduces the binary logic of all neoliberal policies.

In all its ramifications, neoliberalism promotes a variety of techniques that can nevertheless be traced back to a dichotomy, i.e. a binary representation of social, political, economic and even legal reality. The *neoliberal binarism* is made up, on one side, of devices aimed at promoting individual freedom, optimising competition and enhancing merit, making obligations more flexible, limiting State interference in both the private and economic spheres, and, on the other side, of mechanisms aimed, on the contrary, at the annihilation of political agency, the repression of dissent, and the exclusion of those who do not intend to/cannot conform to neoliberal standards in terms of performance and productivity, through the strengthening and extension of the penal paradigm. It is no coincidence that the exaltation of individual freedom is flanked, with an apparent contradiction, by the different forms of so-called criminal neoliberalism[8].

6. On the openness of the network system Barberis, 2008, p. 161.
7. See, by way of example, what is described by Cassese 2002 and 2003. On the crisis of the relationship between territory, state and law see also Irti, 2006.
8. On criminal neoliberalism see Campesi, 2007; Wacquant, 2002 and 2013.

Therefore, within this dichotomous framework, two souls of the contemporary legal phenomenon also end up coexisting. Two legal worlds, inhabited by different subjects, which are arranged within the two levels in hierarchical order.

The network metaphor, with its associated representation of the flexibility and complexity of law, in the light of the dichotomous logic of neoliberalism, seems to represent only one side of contemporary law, yet not the only one. In fact, the legal phenomenon also shows another side: that of authoritarian law, the application of which is delegated to bodies and powers distributed on the territory.

Today the transformations underway should be interpreted considering this only apparently contradictory binary logic. As it is in this perspective that the changes in law (that have already led – partially, not definitively – to the reworking of the purposes of law) become visible and show their strategic importance. All this by promoting, on the one hand, the overthrow of the equality paradigm in favour of the imposition of the criterion of inequality and, on the other hand, the overcoming of the compulsory and uniform nature of the law in favour of greater fragmentation and differentiation.

These issues are notoriously interconnected: during the century of reforms, the debates on the law had led to the belief that the adoption of a few clear and mandatory rules for all was functional to the affirmation of equality since law uniformity was understood as a premise for its correct and equal application among people[9].

On the other hand, the neoliberal network metaphor, because of the complexity of contemporary societies, fully overcomes the representation that has accompanied reflection on law from the 18th century to the present, weakening the connection that had been increasingly strengthening between the articulation of law itself and the principle of equality until the advent of the constitutional State (Ferrajoli, 2007, p. 55 et seq.).

Contemporary complex law therefore no longer has any apparent relationship with the principle of equality, because it is not aimed at its realisation, but rather seems to be increasingly oriented towards the new "principle of differentiation"[10], in the light of which the two legal *levels* mentioned above become possible.

I use the expression "legal levels" or "legal environments" (Denozza, 2017, p. XVIII), and not legal orders, because the characters of order and unity can hardly be found in contemporary legal experience, despite the fact that the distinction among levels is clearly reminiscent of the fragmentation of the pre-modern law order.[11]

9. For a reconstruction of said debate on the so-called "good legislation" during the 18th century reform, see, for all, Fassò, 2018.

10. Inequality is understood as necessary in order to guarantee the market dynamism. See Valentin, 2002, page 249.

11. For example, Paolo Grossi writes, with reference to medieval law, of the "personality of law": "ogni persona, all'interno

The replacement of equality with the principle of differentiation[12], as a change of course, resembles a real reversal. A reversal of paradigm in line with the needs expressed by neoliberalism, which in turn is interested in reinforcing differences and at the same time the precariousness of *statuses*, much more useful to the logic of the market: the "legal environment" is in fact characterised by variability, the omnipresence of risk and the absence of stable points of reference (Denozza, 2016, p. 441).

In this regard, it is sufficient to recall how the economic policies of recent decades, and with further acceleration following the economic crisis that began in 2008, have led not to the redistribution of wealth but its centralisation in the hands of a few, to the detriment of the masses of individuals who have seen, on the contrary, their well-being greatly reduced (Gallino, 2002). This process of reverse redistribution (not downwards, but upwards), already stigmatised by many scholars, is of such magnitude that reference is increasingly made to the processes of primary accumulation that in Marxian theory are at the origin of capitalism[13], and thus at the origin of the great social transformations and the establishment of new balances (or imbalances) of power, which necessarily have an impact on the legal sphere[14].

The metaphor of the network, therefore, would only represent the superordinate juridical level of contemporary law, whose access would be limited to the privileged class of people who participate – directly or not – in the neoliberal practices of (upward) redistribution of wealth (Gallino, 2015). The "partiality" of this representation therefore conceals the description of the lower juridical legal level, intended for the non-privileged classes. Thus, the network, if it manages to capture some of today's novelties, nevertheless offers an incomplete reconstruction of the current legal phenomenon, and does not highlight the coexistence of several legal dynamics, some of which are strictly reserved for subjects who do not conform with the model of neoliberal subjectivity[15].

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dello stesso regime politico, lungi dall'essere soffocata entro un diritto unitario a proiezione territoriale, è portatrice – a seconda delle particolarità del proprio ceppo etnico – di un diritto specifico e differenziato" (Grossi, 1995, page 54). In the same way, the depoliticised dimension of law is recognizable in the pre-modern order, so much so that political power, according to Grossi, showed, at the time, a "general attitude of substantial indifference towards the legal framework" (*Ibidem*), tolerating the existence of different processes of formation of law (ibidem, page 53).

12. On this point, Giolo, 2020.

13. See Marx [1867], 1992. On the reading proposed by Rosa Luxemburg, according to whom primary accumulation in reality does not only belong to the original phase of capitalism but recurs every time capitalism experiences moments of crisis from overproduction, in Rosa Luxemburg, *The Accumulation of Capital*, 1919. For a reconstruction of this debate, also in the light of Nancy Fraser's elaborations, I refer to Casalini, 2018, page 65 et seq. On the "new" regime of accumulation promoted by neoliberalism, especially in the financial sphere, see Dardot & Laval (2017), p. 18 et seq.

14. See Giordano & Tucci., 2013, page 135 et seq.

15. Interesting in this regard is this statement by Denozza: "[a]d un livello più generale, è almeno singolare che l'emanazione di norme apparentemente idonee ad accrescere la protezione di cui determinati soggetti, considerati più "deboli", godono nel traffico giuridico, abbia coinciso e coincida con un generalizzato e impressionante aumento delle diseguaglianze e quindi con un ulteriore indebolimento dei più deboli" (Denozza, 2014, p. 17).

Moreover, it does not seem to offer visibility to the great concentrations of power that are taking place (Picciotto, 2011, p. 138 et seq.). Above all, it helps to conceal the places and subjects of the legal and political choices: the decision-making moment, core of each legal and political activity[16], always seems to take place *somewhere else* that is not clearly identified, by subjects who are not fully recognisable or controllable, in the context of strategic relations that are not known to most people[17].

On the basis of these relevant convergences between the legal transformations in progress and neoliberal planning, it becomes possible to read these changes in terms of a paradigm shift from constitutional law to *neoliberal law*. The latter appears to be a new model of law compatible with the purposes of a society in which powers are not bound to rules, inequalities are acceptable, and rights and freedom are neither unavailable nor inderogable.

Considering the ability of the neoliberal ideology to propose rather than impose (at least rhetorically) new arrangements, deviously and through modes of progressive adaptation (from nudge to soft law), we need to ask ourselves what role legal culture intends to play in this transition. It is a matter of deciding which law to accept[18], and therefore which model of society and politics to promote: whether in relation to the market, going along with the imposition of neoliberal law or, hopefully, safeguarding the paradigm of constitutional law, in order to build the best guarantees of fundamental rights, on a universal scale.

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16. "Il mondo del diritto è il mondo delle decisioni" (Pastore, 2015, p. 33).
17. On the new contemporary conception of power as a "strategic relationship" I refer to L. Bazzicalupo, 2014, p. 13.
18. As H.L.A. Hart suggested, every system rests its legitimacy and validity on a standard of recognition, which is ultimately embodied in its acceptance by jurists. See Hart, 2012.

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