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THE NEO-LIBERAL TWIST OF LAW

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The law between old languages and new concepts

There is no doubt that the term law today is subject to transfigurations of its central constructs, originating from the processes of juridical globalisation that tend to falsify the self-referential and reassuring image of the Kesenian pyramid, revealing an extravagant contradictory pressure on the concept of law itself, which tends to correspond to a lexicon that is increasingly in trouble (Catania, 2008).

Old languages and new concepts come out on a scenario populated by multiple and diverse actors in a fragmented and uneven set of normative production, increasingly detached from a legislative matrix, given the judicial and private vocation of global governance.

The progressive encroachment of law, which goes hand in hand with the proliferation of places where the law is produced outside of traditional geometries, shows a tendency towards the proceduralisation of rights and at the same time an unprecedented flexibility in the forms of soft law and lex mercatoria, resulting in a loss of the sovereign structuring of the legal system.

Indeed, as highlighted in Alessandra Facchi and Orsetta Giolo's (2020) essay, which densely articulates the problematic relationship between neoliberalism and law, the emergence of new governance flows points out, many contradictions blurring the distinction between public and private on which modern logic is modelled.; This undermines the process of systemic differentiation of power thought as unitary, forcing us to question the adequacy of some traditional categories developed by legal science and their adequacy to the so-called neoliberal turn.

The author highlights the headless dimension of liberal ideology, its acting within the social context as an institution, without, however, a direction or a summit that determines its affirmation (Giolo and Facchi, 2020, p. 6).

This dimension align with the furrow of Foucauldian discourse on the birth of biopolitics which, by analysing the political implications of government techniques and the power dispositifs underlying them, destructures modern statuses and prerogatives without cancelling them, leaving singularities to continuous readaptation and repositioning. However, this government excludes a static and rigid status of domination, for it shows all the temporality of the influence, its reversible relationship with the governed seen as the object of care in this power relationship: the target of protection for his own good, recognised as a subject of free action (Bazzicalupo, 2010, p. 48).

If, in fact, neo-governmental rationality can be described as the new reason of the world, since it places economic competition as the universal reason and the enterprise as the criterion of subjectivation (Dardot-Laval, 2013), the discourse on law can no longer fail to consider the different criteria of intelligibility of the proliferation of global powers and the effects that the global order produces on subjects, institutions and social practice.

It is therefore necessary to reproblematise the categories located within the discourse of legal science, re-considering the definition of norm, as a dispositif, understood, at the same time, in terms of a functional regularity, linked to the correspondence of a rule to a deontic modality of a prescriptive type, —"transcendent" in the Foucauldian lexicon—, and as a principle of opposition to the pathological, with respect to which it performs a "normalizing" function, being an instrument of coercion.

This dispositf structures ever-changing relations, marked by the strategies of power and by the implications between these and the different regimes of knowledge, combining in itself the tension between the levels of normativity and normalisation, produced from the functional and "excluding" differentiation instituted by the rule itself.

The opportunity for such a problematisation moves from the unprecedented pervasiveness of biopolitical dispositifs that testify how neoliberalism has become a glocalised model of functioning that knows no waste of any biological material and that blurs the production-reproduction distinction (Cooper and Waldby, 2014; Giordano, 2018), reshaping it within the complex public/private dichotomy.

The public/private dialectic in Kelsen's rationality

As we know, This dialectic constitutes one of the cornerstones of modern rationality, since it expresses the dualism, the tension, between state and society, the former considered artificial, as a machine, external to the social tissue and built with bureaucratic apparatuses and adequate for the various political ends to be achieved, the latter, 'natural', anchored in tradition, understood and felt as a "body".

A great dichotomy, as Norberto Bobbio (1985) writes in an important entry on this theme, which despite the ambiguity and confusion traditionally revolving around it, seems to be centred on the character of asymmetry and horizontality of the relations and on the nature of the protected interests: aspects that will be decisive for its resilience before the anti-ideological unravelling carried out by Kelsen's science.

As is well known, in open opposition to German public law, Kelsen highlighted the difficulty of unambiguously determining specific criteria for such a conceptualisation, conceiving it as a difference between two methods of production and bringing dualism back within the will of the state formation process itself, which structures the unity of the legal system, revealing its ideological bearing in the recognition of the 'political' character of every subjective right (Kelsen, 1960).

This conceptual opposition is particularly relevant in the legal philosophical debate, because it mirrors the dichotomy between subjective right and objective law, reflecting the need for an ethical justification of subjective rights, which are assumed to exist even before their legal recognition by the state and are therefore removed from the arbitrary nature of objective law, for the dissolution of which the anti-ideological tendency of Kelsen's pure theory appears particularly incisive.

The division between the public and private spheres is particularly focused today on the expansion of the proprietary lexicon, which takes on a problematic connotation in relation to questions concerning the body, particularly the female body, in respect of which the contours of the lawfulness of the practices that can be performed are progressively blurred in the name of the market's metaphysical claim of self-regulation.

Therefore, in the wake of Foucauldian discourse, we maybe can re-elaborate a discourse that is partially heterogeneous with respect to the one traditionally conducted by legal science because the neo-liberal trend assumed by law involves precisely in the spread of a regulatory instance tending to regulate every detail of individual existence, a multiplication of the juridification of social life, which produces new subjectivities, radically transforming bodies (Bazzicalupo, 2004, pp. 273 ff).

Moreover, It is precisely through bodies and their relationship with knowledge that it would be possible, to respond to the traditional philosophical-legal representation and its process of dissolution of power within the paradigm of sovereignty, recording through the recodification and unveiling of those reticular dynamics of power, today more widespread and complex than ever, which go beyond the State and its institutions, to reach the processes of construction of discourses and regimes of truth corresponding to them.

Undoubtedly, the Foucauldian reading aims at breaking trhough the repressive image of modern juridical rationality, typical of a particular vision of legal positivism, which coincides with the formation of the liberal bourgeois state, structured on the dichotomy of duty and sanction, showing a prismatic dimension of power, which refers to different techniques of government that range respectively from those typical of sovereignist juridical systems to disciplinary ones, up to biopolitical securitarian ones, in which different levels of regulation are carried out, producing multiple and diversified effects.

If, in fact, in the neo-governmental rationality, power is abstracted from its connection with the repressive character of the law, being directly exercised on the person's biological life, as a widespread, pervasive, microphysical power, new practices of self-regulation are arising. Those practices are detached from the trascendent foundation of disciplinary dispositifs, finding their constitutiveness in the self-ruling social tissue, in an incessant dialectic between the introjection of the rule and its continuous adaptation (Tucci, 2018, pp.9-10).

What we have here, therefore, is a rationality characterised by the complexity of its mechanisms and its continuous connections with heterogeneous power dispositifs, which, ranging from biological, cultural and genetic knowledge to discursive practices, are affecting the whole life, in a continuous intertwining and overlapping.

A technique of government that, by overcoming the traditional distinction between public/private on which modern philosophical-legal representation has been based, restructures our lives, modelling them within the logic of the *homo oeconomicus* (Foucault, 2008) entrepreneur of the self and which generates a continuous ambivalence between the empowerment of bodies and the economic dynamics of exploitation and social inequality.

Dispositifs of power and vulnerable bodies

Today, the public/private dichotomy undoubtedly shows an unprecedented fluidity in a scenario that tends to reflect a weakening of the prestige of the authority of law and in some cases the transfiguration of legal regulation into a global network of institutions, agencies and organisations. It makes particularly problematic to draw a line between the public and private spheres in the production of the legal.

In fact, the active promotion of the body, its self-valorisation, in a biological-political sense, pursued through the use of the new technologies of science, constitutes, one of the distinctive features of neoliberalism: by including and excluding different subjectivities along a line that intersects with the categories of race, gender and class, it works as a model of capital accumulation that incorporates the whole life, reproducing it, within the precarious and changing spaces designed by our global democracies.

Indeed, neo-liberalism dissolves the public-private couple in the reticular opacity of private powers, which progressively disengage from the self-referential model *more geometrico*, expanding individual freedom and reproducing, economic logics even within the most private and intimate aspects of life.

The erosion of the Fordist family and the redistribution of care functions outside the private sphere entail, in fact, the outsourcing of goods and services that were previously circumscribed within the private sphere, generating a very strong demand for "making bodies available". Undoubtedly, the image put forward by Rose (2007, p. 3), of a radical paradigm shift following the passage from disciplinary government techniques, which objectify bodies by spatially placing them and domesticating them —to government techniques that take charge of bodies, caring for them, healing them, improving them, empowering them, with a view to security and control— well expresses the growing biopolitical dimension of global power dispositifs and the pervasiveness of differentiated practices that break down bodies, fragment them, in a continuous process of transformation and redefinition.

At the heart of the new social demand for reproductive medicine is the question of the growing vulnerability of the subjects and the progressive spread of practices of subjection and domination. These practices leave little room for the self-regulating illusion of the market, since they are stratified in global arrangements, which inevitably present "objectifying" (Mackinnon, 1989) modes on women's bodies.

If, in fact, the use of biopolitical empowerment dispositifs generates a transformation of the private sphere, from a traditional space of subjection of women to a place of expansion of individual freedom, the risk is to conceal, within the rhetoric of free choice (Giolo and Facchi, 2020), a progressive functionalisation of women's bodies to a purely economic logic.

We are therefore witnessing a progressive extension of the lexicon of ownership that highlights a continuous ambivalence between practices of freedom and dynamics of exploitation, which highlight the growing dimension of mass vulnerability, determined by the weakening of the mechanisms conceived to protect individuals, which seem to leave a large room for manoeuvre to wild powers.

In this regard, denouncing how contemporary political systems are characterised by dysfunctions and distortions in access to equal opportunities, Finemann (2008) proposes a redefinition of rights in the light of the universal condition of vulnerability, intended as a more stringent paradigm compared to the equality-based approach, because it is based on a reconceptualisation of the role of the state and institutions in the distribution of privileges and opportunities within society and on the strengthening of democracy and public participation.

It is therefore a question of re-semanticising the political and legal discourse through the construction of a relational category (Pastore, 2021, p. 24) that leads the subject back to the fragility of human existence and to his own corporeity, overcoming —through the image of the vulnerable subject— a public/private division that confines the burden of care within the family, socially imposing it and at the same time making it invisible.

As Giolo effectively points out, this is a category that should be freed from its rhetorical purpose, which very often hides an involuntary adherence to neo-liberal ideology, making it possible to unveil the dissolution of the subject of law through the problematisation of its relationship with force and power, laying the foundations for a new legal paradigm that is the foundation of global law and institutions.

Moreover, precisely in the sense indicated by the author, it would be necessary to strengthen a theoretical reading that reflects the growing relevance of this paradigm, raising questions and dilemmas also on the relationship that is established between the dimension of corporeality, always seen as a place where desires and personal claims are rooted, and therefore as an exquisitely identitary dimension, and the condition of fragility, dependence and precariousness that characterizes the horizons of our contemporary lives, increasingly compressed by unstable mechanisms of redistribution of resources.

The point is to voice a vulnerability narrative able to read the growing relevance of the biopolitical dimension even in the choices that concern law, shedding light on the political and symbolic matrix of our bodies, on the relational and intersubjective bond that, exposing us, forces us to the otherness, in the confrontation and conflict that structure the fragile and precarious nature of human existence.

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