Soft Power

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EDITORIAL

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The group of scholars that has decided to work on this *Euro-American Journal of Historical and Theoretical Studies of Politics*, linking together two continents by this project, aims at giving voice and making greater room for a debate about the urgency of explaining the radical changes that have taken place in political practices and in social government in the last ten years. It wishes to do so from a perspective that fully recognizes the theoretical burden of the anthropological and cultural revolution that those changes have brought about. To engage with this view does not necessarily mean to assume its positive content. Our scientific discourse can only be critical and reflexive, designed, as it is, to question the existent. Our project stems from the taking on charge of what exists, since it is by examining the aporias within society, the gap between its current representation and the dynamics that flow through it, that we can pave the way for different political, legal and economic practices, and, by so doing, start thinking and acting *otherwise*. Of course, taking charge of something is harder than just deploring, regretting, or condemning it. It is the basic assumption of those engaged in this project that politics is not only an acting of people concerning the world that keeps them together or sets them apart, as Arendt argues. Today it also, and above all else, needs to be the governing of processes of subjectivation, of the production of forms of life shaping the social space. We may not agree with such a fact; but this is the way it is.

From this second perspective which may be defined as the governmental fold of the present, co-habiting with the first one but often in conflict with it – it evidently follows that political actors are not only institutions and traditional political subjects: the state and individuals as citizens. In and by themselves, these magnificent categories cannot explain political power in contemporary age. The Neo-liberal turn, dating back to thirty years ago and that today appears willing to overcome the terrible, global, ongoing economic crisis by strengthening its junctions rather than significantly modifying them, has drastically increased the number of subjects of politics to include different forms

of social powers, without depriving the old ones of their authority. The main feature of this new kind of political rationality, that finds in the market its legitimacy criterion, is, in fact, as we all are well aware, a co-existence and co-presence of the old with the new and, therefore, an overlapping of languages and rationalities. The world of modern institutions, with its legal-political logics steering towards the coherence of the sovereign legal system, persists and co-exists with the new, pragmatic, and inclusive logics of governance and governmentality inspired by economics – though incessantly evaluating and selecting. Yet the latter seem to prevail and wholly transform the first. Different logics and languages that in the previous form of the welfare state were politically and ideologically synthesized, and that today co-habit within an incoherent co-existence, paradoxically fuelled by contradiction.

Already in this presentation of our project, the central role of economics becomes clear. We cannot just observe how the market, as it is often said, determines and shapes our lives. It is precisely because of the governmental and bio-political turn of power that the logic of economics has becomes the "way of thinking", a method of approaching issues about life that had too long been considered unrelated to life itself and which would naturally seem to belong to the sphere of identity, feelings, and existence, well beyond the strictly economic domain. This way of thinking is strategic and modal. Its lexicon and interferences personify the medium that interconnects all aspects of life. Its competitive principle, aiming at the optimization of the cost/benefit relationship, does not only define the area of market exchanges; it also characterizes the problems of communication, information, security, and shapes everybody's plans about life.

It should be by now clear why we wish to title *Soft Power* our journal. The expression that seems more appropriate to summarize this mysterious and ambivalent ontology of actuality indicates a diffused soft power capable of producing consensus and informing the subject's forms of life. Soft power, therefore, might help us offer an explanation of the radical change in the study of the concept of power, a necessary premise to fully understand how it currently governs our lives. Only by considering power in its complexity, rationality, and productivity, we will be able to grasp the meaning of ongoing political transformations. It is no longer possible to adopt the traditional biased concept of power that reduces it to an institutional place whilst the others, those who are dominated, are simply left to put up with, delegate, or legitimize it. It is generally recognized that soft power is a syntagm that Joseph Nye adopted for the first time in the nineties to envisage, in the field of International Relations, some sort of soft power as opposed to the hard military interventionism of American geo-political influence. A power that

should have benefited from the cultural attractiveness of the American model, and that would have reacted by avoiding frontal conflicts, partaking to the shaping of collaborative, involved, and educated speakers willing to cooperate. If we go beyond this specific meaning, the most simple and captivating formulation of the syntagm relates to a new way of managing power relations: i.e. a typically neoliberal way of current times. Therefore, it refers to a form of rationality that is political in nature, although there is, underlying and operating, an economic strategic logic and a pluralistic pragmatism of forms of approach. It is a form of rationality that makes of the mechanism of interdependencies, of the co-existence of heterogeneous techniques and styles the vehicle for government processes that do not operate through the mechanism of coercion (although we will never grow tired of arguing that they co-exist with it), but rather aim to produce subjectivations appropriate for an unstable world, and power relations referred to individuals or free associations that remain active even when they find themselves in the weakest and subordinate position in an asymmetric power relationship. Soft power therefore has got a lot to do with that neoliberal form of governmentality of which Foucault has offered the initial definition and an outline of genealogy referring back to the pastoral and disciplinary model that becomes hybrid and is transformed when, through capitalism, individuals and social groups actively come into play in government relationships.

Governmental power is not a unilateral, totalitarian leadership over individuals, but a strategic relationship. It draws a scenario of different, intermittent, influenced, widespread powers – in the political socialization and in modern and late post-modern economics – in all forces operating within society, where they create multiple, varied and different relations of reciprocal influence from the bottom upwards. What we define power, here, is thus some form of integration, a coordination and finalization of relations among a wide range of forces. Besides the pyramidal structures of sovereignty, stand out *plurality* and *difference*.

Subjection is to be understood as a process of oriented subjectivation, though never completely saturated, that responds by bending its influence. The theme of soft power is the government theme, understood as a technology and the art of guiding behaviors, to act upon actions, to orientate men and populations that are at least partially free of choosing, while their regime of truth and the structure of their self are influenced. It is a bio-political practice not because it bases itself on the power of life or death, as Agamben argues, but because it overcomes the threshold of the *externum forum*, where modern power is exerted, and penetrates the secret scene of the subject, operating in his

processes of individualization and desires. Soft power, of course. Where violence is not direct, and if it is so – due to the synthesis of technologies – it is functional to security dispositifs, legitimized by the prevention of risks and by the safeguarding of one's own welfare. A power that operates over nations and men that are free is a power that cannot underestimate the importance of collective imagination, the self-representation of identity, the centrality of forms of persuasion, and therefore communication, that are necessary to any adequate subjectivation. Soft power might be used to underline that the political struggles at stake represent the complex government of souls, the ability of structuring the field of action of the other, of interfering in the sphere of its possible actions. In order to think about the exertion of power, we have to assume that all forces engaged in this relation, whether they are states, populations, or groups identified through homogeneous statistical features, are virtually free, as the people of democracies around the world declare they are today. Governmental power is a way of acting over subject-actors, free subjects, in so far as they are free, as Foucault argues. Power practices can in fact become fixed into institutionalized asymmetric relations (states of dominance) or in fluid, reversible, horizontal relations that escape the government asymmetry.

In-between these two poles lies the field of soft power government techniques, where the ethical-political conflict takes on its full meaning: to minimize domination, giving by itself the legal rules, techniques for managing relationships with others with oneself. There it becomes possible to increase freedom, the mobilization and reversibility of power games that are the conditions for resistance and creation. The organizational forms of this soft power are in fact loose, always adjusting, and show high reactivity to and adaptability with each other. The strength of weak ties spreads out, the unstable equilibrium adapts to change. Cooperation takes place through a constant transfer of experiences from the periphery to the centers, through the contamination of different languages: historical and anthropological studies in postcolonial areas show this hybridization.

Case and exception become compatible with the legal organization and we rediscover, within the impasse of universalizations, the singularity that generates new singularity. It is certainly a power that for legal philosophy is hard to account for, as it is beyond the pyramidal constructions of legal science and focuses its influence not on the general prohibitions of the law but on the differential processes, addressing and boosting the potential of each individual or group, or population, offering itself as an instrument of choice of the social powers in the form of contract, in the arbitration or voluntary

and cross negotiation, subordinate to fragmented or private objectives. Upon this social fragmentation and ontological uncertainty that is the tone of the whole, operate populist rhetorics offering empty signifiers that aggregate, by contagion and by imitation, fronts of antagonistic equivalence.

Populism is the other side of the neoliberal de-politicization and it is rooted in the same imaginary. Such a political rationality, though unstable and open, does not reduce the binding force to which the various actors are submitted, the inhibition and strong influence of many potentialities: the pressure upon self-made responsible and precarious lives increases. Yet at the same time, the power relation has generated a *plus* that is something more than a simple sum of utilized lives. The emergent qualities of those who cooperate are not logically deductible but only ascertainable in an empirical, historical and factual manner. It is therefore a power characterized by a very high degree of ambivalence that tends to empty politics, in so far as it weakens the identity antagonism on which politics traditionally hinges, as well as it declines the public representation of the law, to make room for self-managing and self-government forms, which in America have given rise to interesting developments. Ambivalent forms, non-traditional political subjectivations – which our journal will try to explain – but which risk, by weakening the political-juridical egalitarian defenses and by unleashing the agency of individuals, groups, or lobbies, to multiply the situations of inequality, and engender undesirable consequences of danger, insecurity, mistrust and existential uncertainty.

And the South of the world – of which both the Italian south and a Latin-American country as Colombia are part of, if in different ways – is aware of the mocking ambivalence of the emphasis on self-government, the explosion of social powers, and power softness.

The myriad of problems that receives a different light through this ambivalent and seductive concept of power evidently includes very different issues. The group engaged in launching this journal is constituted by philosophers and political scientists, historians of contemporary political thought, sociologists of communication, legal theorists; but we wish to make also room for contributions that are heterogeneous both in terms of disciplinary approaches and in terms of adopted standpoints, so as the journal might be a flexible and porous tool capable of growing beyond the initial project. In order to organize our work we have articulated two methodological poles: a historical one, that for us is essential in order to offer the genealogy of the factual and conceptual articulations that characterize the ongoing transformation and account for the concrete power effects that discourses of truth and practices of government *dispositifs* have generated.

The other pole is the theoretical one, assuming that the purpose of thought is the problematization of society and the effort to construct new conceptual tools suitable for it. More suitable than those we have at our disposal. As Deleuze argues: "Concepts originate from their conflict with things". Therefore, they spring from the outside, from opacities and rigidities that force us to think everything all over again, to mistrust categories that prevent us from grasping the meaning. What cannot find a place in our journal is therefore those discourses of philosophy or of political history about themselves; that strictly academic self-referential activity. And yet, this is not because we consider it irrelevant, but simply because the challenge that drives us is another one. A challenge linked with an ontology of the present, of topical questions, that needs to decipher the facts and the genealogy that it reveals. The neoliberal turn to which this form of power refers to inevitably has been studied extensively. The crisis that imbues it and that is represented within its imaginary in a way that does not affect its coherence, is in turn an opportunity for studies of great interest. All this, according to us, must be thought and analyzed by penetrating the modes and logics that structure it, so that we might speak of a thought that meets the contemporary challenges. Starting now with a journal of historical and theoretical studies on politics that Foucault would call governmental, may be a chance to improve the tools of interpretation, to highlight the aporias and the faults that are not taken into consideration yet.

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DEMOCRACIA SIN POLÍTICA

¿Por qué la democracia puede perjudicar seriamente a la democracia?

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Resumen

El artículo examina los efectos apolíticos de la democracia directa y del nuevo activismo. Según el autor, no vivimos en una era posdemocrática, sino en una era pospolítica, de democracia sin política: lo que falta en esta configuración política es la representación, mediación institucional que articula las demandas sociales en programas públicos. El artículo concluye con una defensa de la democracia indirecta y de sus autoridades reguladoras y judiciales, que equilibran la deriva plebiscitaria del populismo actual y activan la dimensión de la delegación necesaria en política.

Palabras clave

Despolitización, soberano negativo, democracia indirecta, política

Abstract

The article explores the apolitical effects of direct democracy and new activism. According to the author, we do not live in a post-democratic era, but in a post-political one, an era of democracy without politics: what is missing from this political configuration is representation, the institutional mediation through which social demands are turned into public programmes. The article concludes with a defence of indirect

democracy and its regulative and judicial authorities which balance the plebiscitary drift of current populism, thus activating the dimension of delegation which is necessary in politics.

Keywords

De-politicization, negative sovereign, indirect democracy, policy

La narrativa dominante asegura que vivimos en una época postdemocrática.[1] Esta denuncia se declina de diversas maneras: como primacía de los ejecutivos frente a los parlamentos,[2] como distanciamiento de las élites respecto de los gobernados, como desplazamiento de los partidos hacia un centro que hace imposible las alternativas,[3] como desconsideración de lo que realmente quiere la sociedad… Yo no lo veo así, ya lo siento. Una prevención que se aprende cuando uno apenas vale para otra cosa que para ejercer la sospecha filosófica me invita a mirar las cosas de otra manera. ¿No será que tenemos, más bien, una democracia abierta y una política endeble? La democracia es un espacio abierto donde, en principio, cualquiera puede hacer valer su opinión, que posibilita mil formas de presión e incluso tenemos la posibilidad de echar a los gobiernos. Esto funciona relativamente bien. En nuestras sociedades democráticas no faltan espacios abiertos de influencia y movilización, redes sociales, movimientos de protesta, manifestaciones, posibilidades de intervención y bloqueo. Lo que no va tan bien es la política, es decir, la posibilidad de convertir esa amalgama plural de fuerzas en proyectos y transformaciones políticas, dar cauce y coherencia política a esas expresiones populares y configurar el espacio público de calidad donde todo ello se discuta, pondere y sintetice. Algo tiene que ver con esto el hecho de que para quienes actúan políticamente cada vez sea más difícil formular agendas alternativas. Estamos en una era postpolítica, de democracia sin política. Tenemos una sociedad irritada y un sistema político agitado, cuya interacción apenas produce nada nuevo, como tendríamos derecho a esperar dada la naturaleza de los problemas con los que tenemos que enfrentarnos.

1. C. Crouch, *Post-democracy*, Polity, Cambridge, 2004.
2. J. Habermas, *Im Sog der Technokratie,* Suhrkamp, Berlin, 2013.
3. C. Mouffe, *Agonistic: Thinking The World Politically*, Verso, London-New York, 2013.

Voy a examinar brevemente como funciona ese "soberano negativo" que se ha convertido en una fuerza tan poderosa como ambivalente. Trataré de reconstruir las premisas ideológicas de quienes han celebrado en este fenómeno como una superación de la política en su forma tradicional (pero que yo interpreto más bien como un intento de superación de la política en tanto que tal). Uno de los efectos más ingratos de esta vitalidad democrática es que despolitiza el espacio público, fenómeno que puede verse en ciertos conceptos que han hecho furor en los últimos tiempos al hilo de la crisis de la democracia representativa, que reivindican la democracia directa o plebiscitaria, que esperan de la participación ciudadana lo que no cabe obtener de la delegación representativa o lo confían todo el establecimiento de la transparencia como principio universal. Desde tales premisas, el avance del populismo no es la solución, pero tampoco meramente un problema; es más bien un síntoma de que no hemos acertado a pensar bien el lugar de las sociedades democráticas en una sociedad política. Solo podremos superar algunas de estas disfuncionalidades si llevamos a cabo una crítica de la democracia despolitizada o, formulado positivamente, una defensa de la política contra la democracia despolitizada. La democracia puede perjudicar seriamente a la democracia no solo porque a través de los procedimientos democráticos pueda acceder al poder quien está interesado en destruirla, sino en un sentido menos evidente: que ciertos procedimientos intachablemente democráticos, si no están articulados correctamente, pueden dañar la calidad democrática. Dado que se defienden en nombre de la democracia y como la intuición parece dejarnos indemnes ante su reivindicación – ¿qué hay de malo en promover más participación, en llevar la transparencia hasta el extremo, en gobernar a golpe de sondeo, en multiplicar las consultas, en hacer siempre lo que quiere el pueblo, en suponer que lo más próximo es necesariamente lo más democrático? – la política es especialmente vulnerable ante este tipo de demandas. Solo podremos combatir lo aparentemente democrático si llamamos la atención sobre sus posibles efectos antipolíticos cuando no está integrado en una manera equilibrada de entender la política. Por eso concluyo con una defensa de lo que podríamos llamar la democracia indirecta, un territorio que merece explorarse, aun cuando no haga superfluas las formas directas de intervención democrática.

Una ciudadanía intermitente

Dicen los expertos que el retroceso de la participación electoral no viene acompañado por una falta de desinterés hacia el espacio público.[4] La ciudadanía huye de las formas clásicas de organización, lo que es compatible con crecientes modalidades de compromiso individual, un activismo que no está ideológicamente articulado en un marco ideológico que le proporcione coherencia y totalidad, como podía ser el caso de las tradicionales ideologías omnicomprensivas. El nuevo activismo es individualista, puntual, orientado hacia cuestiones que se refieren a los estilos de vida y crecientemente apolítico.[5]

Están cambiando las formas del activismo político. Las posibilidades de ejercer eso que Pierre Rosanvallon ha denominado "contrademocracia"[6] han aumentado gracias a la autoconciencia ciudadana y los avances tecnológicos. Es significativo que la mayor parte de las nuevas cuestiones políticas suscitadas en los últimos treinta años hayan sido promovidas por manifestaciones y por la acción directa, más que por las actividades políticas convencionales a través de los partidos y los parlamentos.[7] Durante la primera mitad del siglo pasado las actividades de la sociedad civil tenían lugar en el ámbito en torno a las instituciones políticas, mientras que actualmente se distancia de los lugares del poder. Vivimos en una sociedad que ya no tiene como objetivo constituir un poder para configurar los procesos sociales sino impedir el abuso de poder, que prefiere la transparencia presente a la responsabilidad futura, que ejerce la desconfianza del soberano negativo. No hemos conseguido el "nivel óptimo de desconfianza"[8] y su exceso la ha convertido en un constructor de distancia antipolítica.

Lo que tienen en común tanto las movilizaciones de la red como las protestas más clásicas de movilización en espacios físicos es su carácter puntual y negativo (no en el sentido moral, sino, principalmente, orientadas a impedir algo). Se trata, por tanto, de actos apolíticos, en cuanto que no están inscritos en construcciones ideológicas completas ni en ninguna estructura duradera de intervención. Lo político comparece hoy generalmente bajo la forma de una movilización que apenas produce experiencias constructivas, se limita a ritualizar ciertas contradiciones contra los que gobiernan, quienes a su vez reaccionan simulando diálogo y no haciendo nada.

4. R. Dalton, *Democratic Challenges – Democratic Choices. The Erosion of Political Support in Advanced Industrial Democracies*, Oxford University Press, Oxford, 2004, p. 191.
5. P. Norris, *Democratic Phoenix. Reinventing Political Activism*, Cambridge University Press, Cambridge, 2002, p. 188.
6. P. Rosanvallon, *La contre-démocratie: la politique à l'âge de la défiance*, Seuil, Paris, 2006.
7. I. Budge, *The New Challenge of Direct Democracy*, Blackwell, Cambridge, 1996, p. 192.
8. P. Dahlgreen, *The Political Web. Media, Participation and Alternative Democracy*, Palgrave Macmillan, New York, 2013, p. 17.

El espacio digital ha abierto nuevas posibilidades de activismo político. Plataformas de movilización en torno a causas concretas – como Change o Avaaz – permiten ejercer un "clicktivism" concreto a favor de buenas causas que contrasta con las adscripciones ideológicas abstractas, objeto de una general incredulidad. Para amplios sectores de la población la realidad representada por los partidos jerárquicos ya no resulta atractiva, mientras que la cultura virtual de la red les permite articular cómodamente sus disposiciones políticas fluidas e intermitentes, e incluso situarse *of line* en cualquier momento.

No faltan tampoco ejemplos de activismo y "soberanía negativa" en el espacio físico, ahora también vinculados a la movilización digital: manifestaciones y *performances* que obtuvieron una cierta celebridad, como los foros alternativos con motivo de las cumbres mundiales, Occupy Wall Street, todo el movimiento en torno al 15 M, las plataformas contra los deshaucios, la paralización de la privatización de la sanidad en Madrid, la intervención de las acusaciones particulares en los procesos judiciales, la resistencia exitosa contra ciertas obras públicas e infraestructuras: desde Burgos hasta Stuttgart pasando por Nantes… No pongo en cuestión la bondad de estas actuaciones de resistencia cívica o campañas *on line*; me limito a señalar que al no inscribirse en ningún marco político que les de coherencia, pueden dar a entender que la buena política es una mera adición de conquistas sociales. No funciona la articulación de las demandas sociales en programas coherentes que compitan en una esfera pública de calidad; en definitiva, falla la construcción política e institucional de la democracia más allá de la emoción del momento, de la presión inmediata y la atención mediática.

A quien reivindica algo que le parece justo no tenemos por qué exigirle que lo acompañe de un programa político completo y una memoria económica, por supuesto. Pero el espacio público no se reduce a la mera agregación apolítica de preferencias incoherentes, agrupadas como si no hubiera ninguna prioridad entre ellas e incluso ciertas incompatibilidades. Alguien se debería ocupar de ordenar esas reivindicaciones con criterios políticos y gestionar democráticamente su posible incompatibilidad. Pero, ¿hay alguien ahí? Si la política (y los tan de costados partidos) sirve para algo es precisamente para integrar con una cierta coherencia y autorización democrática las múltiples demandas que surgen continuamente en el espacio de una sociedad abierta. Se bloquea la construcción de infraestructuras, que seguramente no deberían hacerse, o no de ese modo, pero seguimos sin saber qué debería hacerse en materia de infraestructuras; detenemos los desahucios – porque podíamos y debíamos hacerlo – pero eso no sirve para nada más que incentivar el crédito y hacer una política de vivienda más justa; podemos parar la privatización de los hospitales públicos, pero eso no determina qué

tipo de política sanitaria debe hacerse. La política cuya presencia echo en falta es la que comienza cuando se terminan las buenas razones de la sociedad, donde se acaba la tarea del soberano negativo y comienza la responsabilidad del soberano positivo. Al hecho de que las demandas sociales estén desarticuladas se añade la circunstancia de que tales reivindicaciones son plurales, lógicamente, y en ocasiones incompatibles o contradictorias: unos quieren más impuestos y otros menos, unos *software* libres y otros protección de la intimidad y la propiedad, a unos les preocupa que haya menos libertades y a otros que haya demasiados emigrantes… Sin una valoración política es difícil saber cuándo se trata del bloqueo de reformas necesarias o de una protesta frente al abuso de los representantes. La protesta contra ciertas infraestructuras puede estar motivada por razones ecológicas, pero también por otras menos confesables como el célebre "Not In My Back Yard" (no en mi patio trasero) o por sentimientos xenófobos si lo que se va a construir es una mezquita. En cualquier caso, a quienes tienden a celebrar la espontaneidad social conviene recordarles que la sociedad no es el reino de las buenas intenciones. La legitimidad de la sociedad para criticar a sus representantes no quiere decir que quienes critican o protestan tengan necesariamente razón. El estatus de indignado, crítico o víctima no le convierte a uno en políticamente infalible. Existe, además, otro fenómeno de resistencia social antipolítica que merecería una especial atención. Me refiero al hecho de que alrededor o en los extremos de los partidos se han configurado "tea parties" que se erigen como protectores de los valores, representantes de las víctimas, portavoces de la multitud o de alguna revolución pendiente. Desde estas trincheras apolíticas parecen dominarse las cosas con una claridad de la que no disponen quienes tratan habitualmente con el principio de realidad. La ira de esos grupos no se dirige tanto a los adversarios como a los propios cuando amagan con rebajar el nivel de lo políticamente innegociable. Extienden una mentalidad antipolítica porque no han entendido que la política comporta siempre ciertos compromisos y concesiones. Los sectores duros de los partidos marcan el paso de una manera que probablemente no les corresponde con criterios de representatividad o sin disponer de la correspondiente autorización democrática y que dificultan ciertas reformas para las que se requiere el acuerdo político con los adversarios.

La ideología del soberano negativo

En los extremos ideológicos hay un desprecio de la política que no es en absoluto una crítica hacia un modo concreto de hacer la política sino una impugnación total de

la política, el deseo profundo de que no haya política, o como mucho, que sea irrelevante. El espacio político de las democracias está asediado, a derecha e izquierda, por formas extremas de resistencia contra la política, que unos ejercen desde el mercado y otros desde la sociedad, entendidos ambos – mercado y sociedad – como realidades ajenas al proceso político, desde la autonomía de los mercados autorregulados, en el primer caso, o desde la soberanía de una sociedad constituida al margen de los procedimientos de representación institucional. El neoliberalismo financiero y el "wikicomunismo" comparten una similar desconfianza hacia la política, a la par que celebran "la sabiduría de las masas", como agentes del mercado o como miembros de la multitud. En el fondo, la ilusión de una sociedad autogobernada sin mediaciones institucionales y jurídicas se distingue muy poco del mito liberal de la autorregulación de los mercados. Ya sabíamos que el neoliberalismo es una ideología antipolítica, pero no deberíamos perder de vista que en el otro extremo del arco ideológico hay actitudes que tienen efectos similares. Por eso me fijaré más en la izquierda no socialdemócrata, porque resulta más obvio el desinterés de la derecha liberal por la política. La teoría política hoy dominante en este ámbito concibe la soberanía popular como algo exterior al sistema político institucional, muy similar a las formas de resistencia premoderna contra la autoridad, pero no como implicación activa en los procedimientos de la política representativa. El poder constituyente tiene inevitablemente una dimensión antiinstitucional. De ahí la importancia que conceden a conferencias, ocupaciones, protestas y movimientos en los que se aparenta ejercer un verdadero contrapoder y se escenifican foros de una "verdadera democracia". Buscan así una eficacia inmediata de la voluntad popular, lo que políticamente solo puede ser en términos negativos y antipolíticos. La sociedad no es estructurada por el derecho y por la política, sino por los sentimientos y las convicciones. Interpretadas de esta manera, con ese desdén antiinstitucional, las protestas se limitan a escenificar un momento de soberanía democrática sin repercusiones prácticas estructurales. Hay en ello una cierta mitología del "povoir constituant" como multitud, resistencia, conflicto, expresión del antagonismo democrático, una izquierda que no tiene una idea de intervención política sino un gesto radical, que ha estetificado la política. Una de las cosas más curiosas del pensamiento de la izquierda no socialdemócrata actual es la adopción de ciertos elementos de la teoría política de Carl Schmitt y su resignación frente a las estructuras sociales dominantes. La ciudadanía es considerada como soberana en la resistencia y la excepción, no en la normalidad democrática (con lo que parece ondenada a entregar la gestión de esa normalidad a la derecha).

La otra curiosidad de buena parte de las teorías políticas actuales de la izquierda alternativa es que ofrecen una justificación ideológica involuntaria de la desregulación. La concepción radical democrática colabora a consagrar la escisión entre una política entendida como la administración de la objetividad y una sociedad movilizada negativamente, entre la normalidad del poder constituido y la excepcionalidad del poder constituyente. Cuanto más se enfatiza el valor ético de la resistencia frente a la política, menos obstáculos encuentra la política dominante para constituirse como la única objetividad posible. Se instaura, así, una división del trabajo entre la política burocrática y la politización puntual. Pese a lo pretendido por quienes reivindican una visión agonal de la política,[9] este esquema no posibilita la construcción de alternativas transformadoras sino que convierte a la protesta en algo políticamente irrelevante, para satisfacción de quienes desean que la política siga como hasta ahora. Ha tenido lugar una curiosa "división del trabajo" en lo que se refiere a despolitizar la política entre los que, por un lado, definen una tecnocratización de la política y, por otro, quienes celebran las formas de protesta social como algo exterior al sistema político. En sus versiones más extremas, derecha e izquierda colaboran así a despolitizar la política cuando coinciden en despreciar su lógica. Unos parecen desconocer que no es una cuestión técnica, ni el manejo aséptico de una objetividad incontestable; otros parecen haber olvidado su dimensión pragmática e institucional. Hay un reparto tácito del territorio favorecido por la arrogancia de los primeros y la resignación de los segundos.

La boda entre neoliberalismo y democracia radical tiene otros episodios. Muchos de los que se movilizan contra, por ejemplo, ciertas grandes infraestructuras creen en las objetividades no ideológicas y esgrimen argumentos a los que tratan de prestigiar presentándolos, al igual que han hecho siempre los tecnócratas, como si estuvieran por encima de la política. Hechos, sentido común e indignación popular apuntan en una dirección incontestable. Tienen una escasa comprensión de cómo funciona la lógica del sistema político, en el que no se ventilan tanto cuestiones que tengan que ver únicamente con la verdad y la objetividad, sino que están en juego también relaciones de poder, irracionalidades, apuestas arriesgadas, incertidumbre cognitiva y propuestas ideológicas. Es curioso cómo a uno y otro lado del espectro ideológico hay una similar concepción de lo político (mejor, de la sociedad sin política) según la cual todo se resumiría en conferir la capacidad de decisión a los detentadores de la objetividad.

9. E. Laclau, C. Mouffe, *Hegemonie und radikale Demokratie. Zur Dekonstruktion des Marxismus*, Passagen, Wien, 1991.

Entonces, ¿quién acaba con el capitalismo? Pues lo cierto es que, pese a la retórica dominante, no hay verdaderos enemigos del capitalismo, que puedan ser tomados en serio, precisamente en un momento en el que serían más necesarios que nunca. El despliegue reciente del capitalismo ha causado muchas víctimas, pero el estatuto de víctima no convierte a nadie sin más en un actor político. Las injusticias sociales no engendran por sí mismas la transmutación del sufrimiento en una fuerza transformadora. Los grupos desfavorecidos son muchos, pero fragmentados y una de las cosas que está fallando es una narrativa de la izquierda que los articule políticamente.

Reconozcámoslo: la crisis del capitalismo financiero y la erosión de su legitimidad no son consecuencia de los duros ataques de los movimientos sociales o la izquierda política, sino el resultado de una implosión como consecuencia de sus propias contradicciones, de la que saldrá probablemente victorioso, aunque herido en su legitimidad, mientras no comparezca una fuerza política que le obligue a transformarse.

La despolitization involuntaria

El gran desafío de las actuales sociedades democráticas es no dejar tranquilos a sus representantes – a los que debe vigilar, criticar y, en su caso, sustituir – sin destruir el espacio público ni despolitizarlo. Está claro que no hemos conseguido este equilibrio y o bien nos abandonamos ciegamente en la competencia de quienes nos representan (como quieren, por diversos motivos, los tecnócratas y los populistas), o bien reducimos hasta tal punto la confianza y el margen de delegación que sometemos a la política al registro de la inmediatez (lo cual también tiene una versión tecnocrática, de eficacia inmediata y populista, como gobierno de los sondeos, la política sometida a la demoscopia). En ambos casos, el activismo social puede tener efectos despolitizadores a los que hay que prestar una especial atención porque no son evidentes. Lo evidente, lo políticamente correcto, es entender la representación como una falsificación, dar por sentado que quien protesta tiene razón o suponer que cuanta más participación y transparencia, mejor.

Hay una democracia que se reivindica como combate contra la política institucionalizada o representativa, pero que al mismo tiempo destruye los espacios que son necesarios para que podamos hablar de vida política. Esta despolitización indirecta puede comprobarse en la actual crisis de la representación, de lo que son buenos ejemplos ciertas reivindicaciones de democracia directa y plebiscitaria, o las exigencias de participación

y transparencia cuando dejan de ser procedimientos de corrección de la democracia representativa y se presentan como candidatos para superarla.

Comencemos por la crisis de la representación, tan invocada últimamente, pero que forma parte, por cierto, de la normalidad política. Siempre ha habido un debate en las sociedades democráticas acerca de la naturaleza de la representación. Una sociedad democrática no puede zanjar definitivamente los procedimientos de su representación, siempre discutibles y mejorables, pero se desliza hacia el espacio de la antipolítica cuando lo que impugna es el hecho mismo de la representación. La representación permite garantizar la pluralidad de lo político, lo que no ocurre con la democracia directa. En una sociedad compleja y diferenciada solo la representación consigue que una pluralidad de sujetos sea capaz de actuar sin anular esa pluralidad. En este sentido la representación no es un inconveniente sino una capacitación para que la sociedad actúe políticamente y, al mismo tiempo, garantiza el mantenimiento de su diversidad. Si hay representación política es porque hay que mantener, al mismo tiempo, el pluralismo de la sociedad y su capacidad de actuar, el demos y el cratos de la democracia.

No hay fórmula alternativa frente a la democracia representativa que garantice mejor la eficacia, el pluralismo y la equidad (lo cual no quiere decir que esto se consiga siempre o no sea manifiestamente mejorable). Todas las otras formas de intervención democrática lo suelen hacer mucho peor. Hace tiempo que nos hemos curado en salud de las formas de democracia asamblearia, cuya representatividad es mucho más discutible que nuestros sistemas electorales e incomparablemente menor su eficacia a la hora de tomar decisiones. Tampoco los llamamientos a la participación suscitan el asentimiento general, como si hubiéramos aprendido que son procedimientos tan necesarios como limitados. Pese al entusiasmo digital, los foros *on line*, por ejemplo, se caracterizan por una gran homogeneidad y una mayor presencia de posiciones extremistas. En general, la democracia directa es atractiva para el ciudadano pasivo, es decir, para quienes están poco interesados en exponer sus opiniones e intereses frente a otros en el espacio público y prefieren formas plebiscitarias de decisión, es decir, hacer valer su voluntad, sin filtros ni modulaciones deliberativas, en el sistema político. La democracia directa y las formas plebiscitarias de decisión son instrumentos de carácter apolítico y si gozan de mayor prestigio del que se merecen es porque forman parte de ese tono general de democracia sin política que caracteriza a nuestras sociedades.

Los plebiscitos son tan importantes en una democracia como incapaces de remplazar a los debates profundos y abiertos. Los plebiscitos reflejan peor la pluralidad de opiniones e intereses de una sociedad que las relaciones de representación. Esta

imprecisión se debe a que reducen los procedimientos de decisión a posibilidades binarias, dentro de cuyo campo hay muchas posiciones heterogéneas que solo coinciden en el sí o el no. La democracia directa actúa así de un modo menos representativo que los procedimientos representativos de formación de la opinión. Paradójicamente los partidarios de la democracia directa y los tecnócratas argumentan que la reducción a un código binario hace que la solución de un problema sea más transparente y menos ideológica, pero ambos simplifican el espacio de juego político, reducen las posibilidades de creatividad política e impiden ejercer la libertad de los matices. Pensemos por un momento en la carrera meteórica del concepto de transparencia, en el que podemos encontrar, además de valores indiscutibles, algún efecto antipolítico. Dejemos que de sus virtudes se encargue la aclamación general; quisiera llamar la atención, sin embargo, sobre el transfondo antipolítico que hay tras algunas formas en las que es exigida, que dan a entender que todo el problema de la política consiste en que los políticos esconden algo cuya desocultación resolvería nuestros problemas. Ojalá fueran así las cosas. El sistema político es más banal que ocultador de secretos y aunque nos desvelara sus intimidades no habríamos disipado completamente las incertidumbres en las que nos desenvolvemos. El efecto indirecto de esta manera de pensar es dar a entender que la política es algo que tiene que ver con objetividades y evidencias, donde en última instancia no hay nada que discutir. Así entendida, la transparencia es un concepto que recuerda a la exigencia prepolítica de hechos objetivos. Este prejuicio objetivista está muy extendido a ambos extremos del arco ideológico, lo comparten los tecnócratas con los libertarios, los defensores de la autoridad de los expertos y los que sostienen que el pueblo no se equivoca, quienes lo confían todo a la autorregulación de los mercados o a la sabiduría de la multitud. Un espacio completamente transparente sería un espacio completamente despolitizado.

El populismo como síntoma

La tragedia de la política contemporánea es que quien tiene alguna responsabilidad – es decir, tanto los electores como los elegidos – continuamente estamos obligados a elegir entre racionalidad y populismo. Para los representantes, lo primero no es comprendido e imposibilita la reelección, mientras que lo segundo pone en peligro la estabilidad política pero es aplaudido socialmente. Los gobernantes se enfrentan con frecuencia al dilema de hacer lo que los ciudadanos esperan de sus gobiernos o lo que están

obligados a hacer. También se puede explicar esta situación como la coincidencia entre la incapacidad de los gobiernos de explicar sus decisiones y la incapacidad de los ciudadanos de entenderlas. Cuántas decisiones políticas se han adoptado en medio de un dilema de esta naturaleza. De ahí el drama al que suelen referirse los políticos: saben qué es lo que deben hacer pero no saben cómo ser reelegidos si hacen lo que deben hacer.

Esta situación ha alterado el clásico esquema de identificación ideológica y su correspondiente antagonismo. Al eje derecha-izquierda se le está superponiendo otro que enfrenta, en sentido amplio, populistas y tecnócratas; en ambas categorías hay versiones de derecha y de izquierda. El nuevo espectro ideológico puede explicarse en función de las diversas combinaciones de estas cuatro sensibilidades. Lo que tenemos es básicamente tecnócratas de derechas y de izquierdas, populistas de derechas y de izquierdas, dando lugar a alianzas y antagonismos que no son inteligibles desde la clásica polarización ideológica.

El avance de los populismos es Europa es un problema que debería ser considerado como un síntoma. El populismo resulta creíble porque algo no va bien y el sismógrafo populista nos sirve para identificarlo. Para que el populismo sea algo más que sectarismo de unos exaltados marginales tienen que coincidir en el tiempo un problema irresuelto y unas instituciones débiles. El éxito de los intrusos carismáticos solo se explica por un déficit en las élites dirigentes, como una derrota de sus discursos, que no resultan inteligibles o creíbles, sin olvidar que los populismos no tendrían éxito si no hubiera sociedades dispuestas a darles crédito.

Por eso el combate contra el populismo no se libra tanto en la apelación a valores intangibles como en la movilización de recursos emocionales, desde el miedo hasta la esperanza. La política es una manera de dar cauce a las emociones sociales de manera que resulten constructivas y no destructivas. El populismo es precisamente una reacción a la falta de política, que en su formato actual no permite una articulación política de las pasiones. El éxito del populismo se explica por que la política no ha conseguido traducir institucionalmente unos sentimientos ampliamente extendidos en ciertos sectores de la población, que ya solo confían en quien promete lo que no puede proporcionar.

Si expulsamos de la política los excesos emocionales y los momentos incalculables nos estamos cargando la política misma, de la que forma parte la pasión. El espacio público no es una conversación de salón entre intelectuales; las emociones forman parte de la sociedad de masas, así como una cierta dramatización. Si los políticos moderados ignoran estas condiciones emocionales, están invitando a los rompedores de tabúes, que encuentran el escenario a su disposición.

Entre esas pasiones ocupa un lugar fundamental el miedo y sus retóricas. Vivimos en un mundo de espacios abiertos, lo que significa también una cierta desprotección. Los ciudadanos más favorecidos han celebrado esta intemperie como una ganancia de libertad (como mercados menos regulados o una mayor movilidad), pero los más vulnerables se sienten inseguros, abandonados y son pasto de las promesas populistas. Muchos de los arrebatos emocionales de la sociedad tienen que ver con el hecho de que la gente siente miedo, un miedo más relacionado con la desprotección económica en la izquierda y más con la pérdida de identidad a la derecha, aunque todo esto se mezcla dando lugar a sentimientos de difícil interpretación y gestión. En este mundo ya no son eficaces las seguridades que solo funcionan en espacios cerrados, pero la gente tiene derecho a un resguardo semejante en las nuevas condiciones. Mientras la política no sea capaz de proporcionar una seguridad equivalente, las sociedades tendrán motivos para confiar en las promesas incumplibles del populismo.

Una defensa de la democracia indirecta

Las democracias representativas tienen hoy dos enemigos: el mundo acelerado, la predominancia de los mercados globalizados, por un lado, y la *hybris* de la ciudadanía, por otro, es decir, la ambivalencia de una sociedad a la que la política debe obedecer, por supuesto, pero cuyas exigencias, por estar poco articuladas políticamente, son con frecuencia contradictorias, incoherentes y disfuncionales. Mencionar este segundo peligro es romper un tabú porque buena parte de nuestra clase política y quienes escriben de política suelen practicar una adulación del pueblo, al que no sitúan en ningún horizonte de responsabilidad. Pocos hablan de las amenazas "democráticas" a la democracia, las que proceden de la demoscopia, la participación, las expectativas exageradas o la transparencia. Al señalar esta carencia no pretendo invalidar el principio de que en una democracia el único soberano es el pueblo; me limito a subrayar que la democracia representativa es el mejor invento de que hemos sido capaces para compatibilizar, no sin tensiones, este principio con la complejidad de los asuntos políticos. Aunque suene paradójico, no hay otro sistema que la democracia indirecta y representativa a la hora de proteger a la democracia frente a la ciudadanía, contra su inmadurez, incertidumbre e impaciencia.

El contra-poder del "soberano negativo" no está en condiciones de sustituir al poder constructivo. Puede politizar de manera puntual el espacio público expresando una

indignación y mantenerse al margen de cualquier construcción de responsabilidad. En el fondo, nuestra democracia sin política ha entronizado al ciudadano como evaluador independiente que se concibe fuera de toda esfera política, como consumidor. Las sociedades abiertas han desatado hasta tal punto las libertades de los consumidores que también la política es considerada desde el punto de vista del cliente, caprichoso, impaciente, exigente… El ideal de soberanía popular se ha transformado en "soberanía del consumidor". "El número creciente de boicots, expresiones de malestar y otras formas de activismo parece estar conducido actualmente por un sentimiento de consumidor y existe el peligro de que el activismo adopte más bien la forma de un *lifestyle-statement* que de un compromiso serio (…). El activismo no parece ser otra cosa que una forma refinada de consumismo para bienintencionados, a los que permite acceder a recursos públicos y procesos de decisión."[10] Ahora bien, ¿se agota en esta figura toda la potencialidad crítica y de responsabilidad democrática inscrita en el concepto de ciudadanía?

Cuando nos quejamos de que los mercados condicionan excesivamente a la política, no deberíamos perder de vista que ese condicionamiento no está limitado a los mercados financieros globales sino que se verifica también en las relaciones entre representantes y representados. A todos los niveles, en el plano global y el doméstico, el poder de los consumidores es mayor que el de los electores.

Cuando la lógica del consumidor soberano se instaura en la política, esta tiende a disolverse en la inmediatez del corto plazo. La política es especialmente vulnerable a ello debido a la permanente contienda electoral y al peso de la opinión pública, de registro cada vez más breve a causa del peso creciente de las encuestas y los sondeos, que permiten atender las exigencias del momento presente. La política se debilita enormemente si no es capaz de introducir otros criterios que equilibren esa posible tiranía del presente. Si para algo sirven las instituciones de la democracia representativa es para establecer procedimientos que garanticen al menos el debate, la consideración de alternativas y las garantías constitucionales. Una democracia no puede funcionar bien si no hay instituciones de democracia indirecta que funcionen, como las autoridades reguladoras, arbitrales o judiciales (que suelen deteriorarse cuando quedan en manos de los partidos), si se suprimiera completamente la dimensión de delegación que debe tener todo gobierno (compatible, por supuesto, con que esa delegación esté limitada en el tiempo y tenga que dar cuentas), si la opinión pública de cada momento se impone sobre otras expresiones de la voluntad popular menos instantáneas y más extendidas en el tiempo…

10. G. Stoker, *Why Politics Matter. Making Democracy Work*, Palgrave Macmillan, Basingstoke, 2006, p. 88.

Probablemente este sea uno de los problemas que están en el origen de que la política sea tan disfuncional y de lugar a tantas situaciones irracionales.[11] La política tiene que librarse del "miedo demoscópico",[12] sin ceder a la arrogancia elitista y tecnocrática. Es necesario reconocer que cualquier liderazgo tiene costes inevitables en términos de autorización democrática directa, que hay ciertos distanciamientos exigidos por la adopción de esas decisiones que solemos llamar "impopulares". Si no existiera una cierta distancia frente a los electores los gobiernos no podrían en ocasiones decir la verdad y la política no conseguiría desvincularse del poder del instante. O justificamos democráticamente esa "distancia" o no tendremos argumentos para oponernos al populismo plebiscitario, que cuenta, a derecha e izquierda, con impecables defensores.

Dicen las encuestas que la política se ha convertido en uno de nuestros principales problemas y yo me pregunto, para terminar, si en esta opinión se expresa una nostalgia por la política desaparecida, una crítica ante su mediocridad o más bien un desprecio antipolítico hacia algo cuya lógica no se acaba de entender. En cualquier caso, los ciudadanos tendríamos más autoridad con nuestras críticas si pusiéramos el mismo empeño en formarnos y comprometernos. Y tal vez entonces caigamos en la cuenta de que nos encontramos en la paradoja de que nadie confía a la política lo que solo la política podría resolver.

11. D. Innerarity, *El futuro y sus enemigos. Una defensa de la esperanza política*, Paidós, Barcelona, 2009.
12. J. Habermas, *Zur Verfassung Europas. Ein Essay*, Suhrkamp, Berlin, 2012.

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GOVERNANCE:

A Soft Revolution with Hard Political and Legal Effects

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Abstract

The basic assumption of this article is that governance marks a departure from the two pillars of the project of modernity: representative democracy and legislative institutions. Governance, as a complex institutional phenomenon that goes far beyond participation, has significantly deconstructed the two main points of reference of modern democracy, that is, people and territory. Furthermore, its inclusive and open nature has not prevented the emergence of a dark side, made of exclusive modes: a theater without publicity. From the perspective of transformations, this article highlights the emergence of a changing and fluid normativity, one capable of adapting to the specificity and the variability of situations and processes, inevitably eclipsing the primacy of the legislation itself.

Keywords

Governance, representative democracy, legal globalization, inclusiveness

Resumen

El supuesto básico de este artículo es que la gobernanza señala un alejamiento de los dos pilares del proyecto moderno: la democracia representativa y las instituciones legislativas. La gobernanza, como fenómeno institucional complejo, que va mucho mas

allá de la participación, ha desestructurado sensiblemente los dos principales puntos de referencia de la democracia moderna: pueblo y territorio. Su trato inclusivo y abierto no ha impedido el surgimiento de un lado oscuro, hecho de modos exclusivos: un teatro sin publicidad. Desde la perspectiva de las transformaciones este artículo pone en evidencia la emergencia de una normatividad cambiante y fluida, capaz de adaptarse a las especificidad y a la variabilidad de situaciones y procesos, ofuscando inevitablemente la misma primacía de la legislación.

Palabras clave

Gobernanza, democracia representativa, globalización juridica, inclusividad

Governance as a Soft Revolution

When we think of governance we usually tend to think of devices shared between the public and the private. We also think of less codified and more flexible modes of producing rules of conduct on the local, national, international and global planes. The vast literature on this topic has brought into focus the main characteristics of governance, usually comparing and contrasting it to the notion of 'government'.[1] Moreover, it has brought attention to the different issues relating to it, above all that of the 'democratic deficit'. Yet by focusing on 'governance', understood through its ideal-typical characteristics as well as its actual phenomenology, the impact of its emergence on the nature of the modern institutional scene is generally overlooked. In the following pages a specific angle will be adopted in order to seek a path towards reform, a reform that is actually intrinsic to and implied by governance itself. As it will be argued, the latter notion does not adhere to a carefully and rationally designed model; this notwithstanding, it does contain a great potential for reform.

Viewed from such a perspective, governance itself can be considered a 'soft revolution' because, all in modifying in depth the pre-existing political and institutional context, it has not openly attacked the supporting structures – i.e. the parliamentary

1. J. N. Rosenau, E.-O. Czempiel, *Governance without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge, 1992. Also see O. Treib, H. Baehr, G. Falkner, "Modes of Governance: Towards a Conceptual Clarification", in *Journal of European Public Policy*, 14, 2007, pp. 1-20.

and government institutions – and the rituals of electoral democracy on which the representative system is built. So, while the idea of the complete survival of such structures endures, in point of fact the elements defining the phase in which they developed have considerably changed. Soft revolution, implied by 'governance', has transformed legal and political as well as national and international scenarios essentially through a fragmentation of the state, the materialization of which had once signalled the advent of a coherent conception of power. Thus a new era characterized by the "incompleteness of power" has seen the day.[2] In it governance processes are crucial and, as in the Middle Ages analysed by Paolo Grossi, new "intermediate bodies" seem to flourish.[3]

The Many Defies Faced by the Modern Political and Legal Project

The basic coordinates of the modern political project are to be found in the eminently representative nature of democracy, while the juridical coordinates are exemplified, especially in Europe, by the primacy of statute law over the executive and judicial activities. The combination of representative democracy and legislation was particularly especially tight in continental Europe, where the "written law shaped by the sovereign proved to be co-essential to the very existence of [its] body politic."[4] The state used legislation as its main legal currency, in the shadow of the *jus publicum europeum*.[5] As Hobbes remarked, "[T]he common-wealth is the Legislator. But the Common-wealth is no Person, nor has capacity to do anything, but by the Representative, (that is, the Sovereign) and therefore the Sovereign is the sole Legislator."[6]

Of course the emergence of governance practices did not abruptly unsettle such a scheme. Some of the changes were gradual and were related to that unrestrainable process of challenges to representative democracy that a vast literature has analysed from different angles.[7] Similarly, the downsizing of legislative institutions gradually

2. P. Grossi, *L'ordine giuridico medievale*, Laterza, Roma-Bari, 1997, and Id., *Europa del diritto*, Laterza, Roma-Bari, 2007.
3. Grossi makes the case that the incompleteness of power generates the "proliferation of intermediate societies"; see P. Grossi, *Europa del diritto*, p. 17.
4. P. G. Monateri, *Geopolitica del diritto. Genesi, governo e dissoluzione dei corpi politici*, Laterza, Roma-Bari, 2013, p. 111.
5. C. Schmitt, *Der Nomos der Erde. im Völkerrecht des Ius Publicum Europaeum*, Greven, Köln, 1950, and P.P. Portinaro, *La crisi dello Jus publicum europaeum. Saggio su Carl Schmitt*, Edizioni di Comunità, Milano, 1982.
6. T. Hobbes, *Leviathan*, Cambridge University Press, Cambridge, 1996, p. 184 (chap. 26).
7. It suffice to refer, here, to B. Manin, *Principes du gouvernement représentatif*, Calmann-Lévy, Paris, 1995. Also see: N. Urbinati, *Representative Democracy: Principles and Genealogy*, The University of Chicago Press, Chicago, 2006; *Lo scettro senza il re. Partecipazione e rappresentanza nelle democrazie moderne*, Donzelli, Roma, 2009, and see also *Democrazia rappresentativa. Sovranità e controllo dei poteri*, Donzelli, Roma, 2010; *Democrazia in diretta. Le nuove sfide alla rappresentanza*, Feltrinelli, Milano, 2013.

took place throughout the twentieth century, when the weight of the executives grew at the expense of the legislative power. That weight has further increased in connection with globalization processes.[8] But governance produces one more double distancing: of democracy from its capacity to represent the people, and of law from the legislative process itself. This stems from the profound incompatibility of governance practices with the two pillars of the modern political project.

The representative idea of democracy was consistent with the emergence of mass politics and with a political culture that did not distinguish between the 'I' and the 'us'. Moreover, it was incompatible with the notion of 'intermediate societies'. In the main, it was used to offer to a political majority a strong decision-making capacity, necessary to adequately tackle the issues pertaining to the collective social and economic life. In Europe, the idea of representative democracy, pivoting around the opposition between majority and minority, showed at the beginning a sharp penchant towards the majority, which was considered decisive and even, in cases, was assimilated to unanimity itself.[9] But Kelsen already renames the majority principle in terms of a 'majority-minority' dichotomy, since that the entire parliamentary procedure is based on the idea of a 'compromise' between majority and minority.[10] Now, over time, the relationship between majorities and minorities has undergone several transformations,[11] to the point of establishing the paradox that democracies that rely on are undemocratic. In other words, in the too vast majorities political sphere, at a time when the interest towards 'majoritarian democracy' was increasing, the importance to be assigned to minorities groups and individuals as a mark of good democratic practices has increased. From a different perspective, representative democracy definitely had an elitist penchant, since it entrusted the mandate largely to the 'conscience' of the representatives themselves.[12] These could dispose of it freely and without constraints – a fact that, in turn, reflected the existence of a gap, theoretical if not actual, between voters and elected.

8. For example, Saskia Sassen makes the case that "[I]n the United States the state tightened its power function, even as other parts of the government lost power": S. Sassen, *Territory, Authority, Rights*, Princeton University Press, Princeton (N.J.), 2006, p. 162.

9. On this point, see P. Rosanvallon, *La légitimité démocratique. Impartialité, réflexivité, proximité*, Seuil, Paris, 2009. See especially chap. 1.

10. H. Kelsen, *Vom Wesen unt Wert der Demokratie*[2], J.B.C. Mohr, Tübingen, 1929, p. 53

11. On this issue, besides Rosanvallon's book referred to in note 28, see also E. Ruffini, *Il principio maggioritario*, Adelphi, Milano, 1976, and A. Pizzorusso, *Minoranze e maggioranze*, Einaudi, Torino, 1993. Also see F. Galgano, *La forza del numero e la legge della ragione. Storia del principio di maggioranza*, Il Mulino, Bologna, 2007.

12. See, for example, A. Pizzorno, 'Introduzione', in A. Pizzorno, (ed.), *La democrazia di fronte allo stato. Una discussione sulle difficoltà della politica moderna*, Feltrinelli, Milano, 2010.

The specificity of the European scenario forces us to come to terms with the different Anglo-Saxon and especially American context.[13] There, the consistency itself of the 'body politic' is different and incomparable to what Hobbes represented through the mythical Leviathan and that was encapsulated by Schmitt in the notion of "the autonomy of the political", that is, of "its absolute intensity and its qualitatively uniqueness."[14] On this point, suffice it to consider on the one hand how in the United States the majoritarian culture has grown weaker and, on the other, how the legal physiognomy of American democracy has been entrusted mainly to the judge-made law, rather than to the legislation.[15] The United States has always been inclined to challenge the idea of representative democracy, and has shown a clear penchant towards the principle and practices of the binding mandate.[16] Yet even in Europe, already before the advent of modern governance, that model had been affected in various ways by different social and political movements and impulses. First and foremost, there was the tendency towards Caesarism, a phenomenon already identified by Weber as a germ lingering within the modern body politic and impinging its rationality.[17] The proliferation of populist[18] and personalistic drives[19] represents a hidden risk for the representative capacity of democracy in our own time. But even the different elitist conceptions of democracy, which have brought the focus onto the competition between elites, as in Schumpeter's reading,[20] or on 'poliarchy' as Dahl has understood it,[21] contributed to minimize the actual representative value. No less significant challenges to the notion and the process of representation stemmed from the increasing social complexity and from the underlying network of interests characterizing the postmodern society.[22] The increasing

13. On this, see P. Monateri, *Geopolitica del diritto*, Laterza, Roma-Bari, 2013. Also see M. R. Ferrarese, *La governance tra politica e diritto*, Il Mulino, Bologna, 2010.
14. See C. Galli, *Genealogia della politica. Carl Schmitt e la crisi del pensiero politico moderno*, Il Mulino, Bologna, 2010, p. 737.
15. U. Mattei, *Il modello di common law*, Giappichelli, Torino, 1996.
16. So, referring to America, Tocqueville noted that "very frequently the electors, having elected their delegate, will lay down a plan of behaviors and will impose upon him a certain number of positive commitments in could in no way avoid", A. de Tocqueville, *Democracy in America*, Penguin, London, 2003, p. 288.
17. The famous Weberian distinction between traditional, legal-rational and charismatic power in M. Weber, *Economy and Society. An Outline of Interpretive Sociology*, University of California Press, Berkeley–Los Angeles–London, 1978, pp. 212-301, carries within the idea of an implicit combination of these three forms, especially between the charismatic and the legal-rational power. See G. Rebuffa, *Nel crepuscolo della democrazia*, Il Mulino, Bologna, 1991.
18. Y. Meny and Y. Surel, *Par le peuple, pour le peuple. Le populisme et les démocraties*, Fayard, Paris, 2000. Also see the latest analysis by N. Urbinati, *Democrazia sfigurata. Il popolo tra opinione e verità*, Università Bocconi Editore, Milano, 2014, especially pp. 177 and ff.
19. M. Calise, *Il partito personale. I due corpi del leader*, Laterza, Roma-Bari, 2010.
20. J. A. Schumpeter, *Capitalism, Socialism and Democracy,* Allen and Unwin, London, 1943.
21. R. A. Dahl, *Polyarchy. Participation and Opposition*, Yale University Press, New Haven and London, 1971.
22. Yet Santi Romano, already in 1909, noted that the "progressive organization on the basis of the particular interests of society, which ever more loses its atomistic nature", S. Romano, *Lo stato moderno e la sua crisi. Discorso per l'inaugurazione*

articulation of interests tended to be reflected in the sphere of political representation, transforming the representative into amere performer of increasingly more specific and partial mandates. This has led to the emergence, as for example in Italy, of the phenomenon of 'decoding' and the swelling in number of laws made for favouring specific groups or individuals.[23]

Not surprisingly, in the 1980s neo-corporatism theories saw an increasing capacity of interests groups to undermine the fullness of the representative mandate, dividing it into a congeries of particularistic mandates.[24] Even the 'deliberative' conception of democracy can be considered a precedent on the road leading to the crisis of representation.[25] In fact, following Habermassian assumptions and focusing on public discussion as crucial to the democratic process, it contributed to shift the focus from top to bottom. Moreover, the many sub-varieties of deliberative democracy, which called attention to a plurality of deliberative forums and focus groups, essentially sought to counter representative bodies. Finally, the hypothesis of an 'electronic democracy', already analysed by the existing literature,[26] and examined and arrived at the Italian Parliament in 2013, is perhaps the most explicit challenge to the classical representative rationale.[27]

Each one of these perspectives has produced effects within modern democracies, so that, it might be said, today different perspectives and components coexist. Elements of traditional representation, now almost residual, coexist with elements of corporate and lobbies representation, along with expressions of 'deliberative' democracy, but also with many other forms of 'direct' democracy. Correspondingly, law is pluralized into different 'images'[28] and various 'truths'.[29]

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dell'anno accademico dell'Università di Pisa, Vannucchi, Pisa, 1909, p. 28.

23. N. Irti, *L'età della decodificazione*, Giuffrè, Milano, 1978, and *L'età della decodificazione vent'anni dopo*, Giuffrè, Milano, 1999.

24. On this issue, see P.C. Schmitter, *Neo-corporatism and the State*, European University Institute, Florence, 1984; E. Gualmini, *Le rendite del neocorporativismo. Politiche pubbliche e contrattazione privata nel mercato tedesco e italiano*, Rubbettino, Roma, 1997 and W. Streeck, *The Study of Interest Groups: Before 'the Century' and After*, in C. Crouck, W. Streeck (eds.), *The Diversity of Democracy: Corporatism, Social Order and Political Conflict*, Edward Elgar, London, 2006.

25. On the point, J. Elster (ed.), *Deliberative Democracy*, Cambridge University Press, Cambridge, 1998. Also see J. Bohman, W. Rehg, *Deliberative Democracy*, The MIT Press, Cambridge (Mass.), 1997, and L. Bobbio, "Democrazia dei cittadini e democrazia deliberativa", in *Cosmopolis*, 8, 2013. Also see A. Floridia, *La democrazia deliberativa. Teorie, processi e sistemi*, Carocci, Roma, 2012.

26. Besides S. Rodotà, *Tecnopolitica. La democrazia e le nuove tecnologie della comunicazione*, Laterza, Roma-Bari, 2004, also see D. Pittèri, *Democrazia elettronica*, Laterza, Roma-Bari, 2007, and G. Tocci, *Governance urbana e democrazia elettronica*, Rubettino, Roma, 2006.

27. See R. Biorcio, P. Natale, *Politica a 5 stelle. Idee, storia e strategie del movimento di Grillo,* Feltrinelli, Milano, 2013, and S. Rodotà, *Il mondo nella rete. Quali i diritti, quali i vicoli*, Laterza, Roma-Bari, 2014.

28. A. Tucci, *Immagini del diritto. Tra fattualità istituzionalistica e agency*, Giappichelli, Torino, 2012.

29. F. Mancuso, *Le 'verità' del diritto. Pluralismo dei valori e legittimità*, Giappichelli, Torino, 2013.

Democracy and Governance: Coinciding or Diverging Scenarios?

The impact of governance on the representative nature of democracy has been particularly incisive in at least two ways. First, governance has substantially deconstructed the two main references of modern democracy, that is, 'people' and 'territory'. Consequently, the scenarios of governance and democracy no longer coincide with one another as regards the territory or the people. Second, the highlighting of the 'inclusive' character governance,[30] which characterizes it as a mode of government open and reassuring, has helped hide a darker side of governance, made of 'exclusive' rather than 'inclusive' modes. I will consider this second cause of divergence between democracy and governance in the following section. Now, let us concentrate on the first reason of dissociation.

The dissociation of governance from people and territory has not adequately been examined by the existing literature. If democracy might be defined as "a government of all and for all adult individuals with no other distinction; individuals who live closely together or co-exist in a given space and give themselves specific laws as if they were strangers to one other",[31] one can see that in the notion itself of state there was an "aspect of unrelatedness and artificiality" [32] that paralleled the general and abstract character of the laws. Although territory and people may appear as concrete entities, it was precisely the modern state that disembodied them by neutralizing corporate orders – as noted by Grossi.[33]

The detachment from people and territory produced by governance entails getting closer to less artificial entities. In this sense, it is part of a broader movement towards more 'natural' actions, motives, and laws.[34] Foucault brilliantly understood the factors that could deconstruct the two entities. In passing, it is worth noting that until the sixteenth century populations and individuals were merely "variables par rapport au

30. Inclusiveness, understood as the participation of private individuals to public decisions, is analysed as a distinctive trait of governance (together with 'effectiveness' and 'interactivity') in M. R. Ferrarese, *La governance tra politica e diritto*, pp. 51 and ff.

31. This is the definition offered by N. Urbinati, *Democrazia in diretta,* p. 22.

32. Ibid., p. 23.

33. Grossi stresses the importance of the annihilation of corporative bodies brought about in 1789 by Le Chapelier's decree, and the subversion that the abstract notion of equality produced on "the notion of political representation": P. Grossi, *L'Europa del diritto*, p. 131.

34. On this, N. Irti, *L'uso giuridico della natura*, Laterza, Roma-Bari, 2013. On the complex relationship and entangle between nature and art, see A. Catania, F. Mancuso (eds.), *Natura e artificio. Norme, corpi e soggetti tra politica e diritto*, Mimesis, Milano, 2011, and especially L. Bazzicalupo, "Dalla natura all'artificio e ritorno. Un breve circuito a proposito di norma", pp. 11-24. Laura Bazzicalupo, furthermore, discusses the notion of 'naturalized capitalism' in her 'L'immaginario della crisi e lo spettro del cambiamento: Falso movimento', in L. Bazzicalupo, A. Tucci (eds.), *Il grande crollo. È possibile un governo della crisi economica?*, Mimesis, Milano, 2010, pp. 15-34. Also see D. Carusi, *L'ordine naturale delle cose*, Giappichelli, Torino, 2011.

territoire."[35] It was in a 1555 work[36] that Foucault sought the traces of a different conception of government, one that was inspired by the Christian pastorate and which he called "gouvernamentalité". Far from being based on the principle of common good, it was a notion construed around the idea of "fin convenable", implying a "plurality of specific ends."[37] It is no coincidence that this conception has often been juxtaposed with that of governance.

In the literature concerning globalization, much attention has been devoted to the restructuring of spaces, even in the legal sense,[38] rather than the restructuring of 'territory' and 'people' as such.[39] Among exception is the work by Saskia Sassen, who addresses the issue of territory by deconstructing its meaning. After a long historical excursion, Sassen reaches the conclusion that "key dynamics of the current transformation tend toward disaggregation, in a reversal of the earlier period that saw the formation of the nation-state."[40] According to Giddens, 'disassembling' is a key word in the modernization process,[41] but it gains a new significance in the global political and institutional dynamic: "Disassembling the national" becomes the guideline of a spatial restructuring that rejects the classic divide between national and international as well as that between public and private.[42] Through the creation of so-called "transnational networks",[43] and "multiple for a for scientific, cultural and business communities and the formation of international private organizations,"[44] the new world of governance comes into being. Its political rationality rejects measurable and intangible quantities – as were people and territory – and inaugurates an "unprecedented compatibility of heterogeneous elements – so different from the coherence sought after by modern legal systems."[45] Through governance, in short, a new mode of flexible and decentralized government is asserted, one that does not explicitly deal with problems in general and abstract terms, but

35. M. Foucault, *Sécurité, territoire, population. Cours au Collège de France 1977-1978*, Gallimard-Seuil, Paris, 2004, p. 99.
36. Reference is to de La Perrière's *Miroir politique*, one of the works that animated the debate ensuing the publication of Machiavelli's *Principe*. The work is referred to and examined by Foucault in his *Sécurité, territoire, population*, pp. 94 and ff.
37. M. Foucault, *Sécurité, territoire, population*, p. 102.
38. See, for example, S. Cassese, *Lo spazio giuridico globale*, Laterza, Roma-Bari, 2002, and M.R. Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Laterza, Roma-Bari, 2006.
39. On the issue of territory, see A. Di Martino, *Il territorio: dallo stato-nazione alla globalizzazione. Sfide e prospettive dello stato costituzionale aperto*, Giuffrè, Milano, 2010.
40. S. Sassen, *Territory, Authority, Rights*, p. 7.
41. A. Giddens, *The Consequences of Modernity*, Polity, Cambridge, 1990.
42. S. Sassen, *Territory, Authority, Rights*, pp. 143 and ff.
43. On this, see A.M. Slaughter, *The Real New World Order*, Princeton University Press, Princeton, 2004. On the importance of networking and joining-up processes for democratic governance, see M. Bevir, *Democratic Governance*, Princeton University Press, Princeton, 2010, pp. 183 and ff.
44. S. Sassen, *Territory, Authority, Rights*, p. 151.
45. A. Tucci '(Dis)aggregazioni', in A. Tucci (ed.), *Disaggregazioni. Forme e spazi di governance*, Mimesis, Milano-Udine, 2013, p. 11.

faces them with interventions pursuing specific targets and addressing specific recipients. This also means that "numerous actors construct governance differently as they operate against the background of diverse traditions."[46] People and territory, because of their unitary and indivisible character, are no longer functional, and, without being openly questioned, become the object of a reworking and partial deactivation. Every specific governance process builds different parts of 'people' and 'territory' to meet the needs of different recipients. Furthermore, this does not necessarily deploy itself within the boundaries of the state. Indeed, as it is well known, governance processes that take place under the banner of international organizations are increasingly crucial in shaping the political face of our world.[47] In this sense, governance is linked to the process of re-invention and multiplication of spaces through a network-like legal organization typical of globalization,[48] taking on a horizontal rather than a vertical dimension,[49] and presenting a sort of 'marbled' aspect, with lines and colours intersecting in complex ways.[50]

The undoing of people and territory implemented by governance processes shows a clear deviation from the arithmetic approach to democracy which was based on the opposition between majority and minority. It is a significant challenge to it. Since it becomes necessary to offer articulated legal answers to the complex network of needs of individuals and groups, then it is the concept of 'sociological minorities' that comes into play, rather than that of 'political minorities'.[51] The dichotomy majority/minority is irrelevant to governance. As a matter of, governance actually contributes to concealing it, all in working effectively to further the rights of minority groups. In doing so, it encourages the emergence of new types of 'intermediate bodies', favouring anti-majoritarian tendencies. Moreover, in this direction, governance is paralleled by constitutionalism, which assigns a prominent position to the guarantee of fundamental rights of individual, groups and minorities,[52] and makes of these an insurmountable limit to politics, to the point of establishing a sphere of 'undecidability'.[53]

46. M. Bevir, *Democratic governance*, p. 86.
47. On global governance, see J.L. Dunoff and J.P. Trachtman (eds.), *Constitutionalism, international Law and Global Governance*, Cambridge University Press, Cambridge, 2009.
48. See F. Ost, M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Publications des Facultés Universitaires Saint-Louis, Bruxelles, 2002.
49. M. R. Ferrarese, "Il diritto orizzontale. L'ordinamento giuridico globale secondo Sabino Cassese", in *Politica del diritto*, 2, 2007, pp. 639-652.
50. Cassese uses this image in his book *The Global Polity: Global Dimensions of Democracy and the Rule of Law*, Global Law Press, Sevilla, 2012.
51. On the point, A. Pizzorusso, *Minoranze e maggioranze*.
52. See M. R. Ferrarese, *La governance tra politica e diritto*, Il Mulino, Bologna, 2010, pp. 103 and ff.
53. On this, see L. Ferrajoli, *La democrazia attraverso i diritti*, Roma-Bari, Laterza, 2013.

Governance: A Theatre Without Publicity

On a national and international level, the detachment of people and territory implemented by the processes of governance manifests itself through the incessant production of ever new decision-making scenarios concerning various topics and involving different actors who maintain varying relationships with the *government*. Speaking of 'scenarios' helps emphasize the existence of a contradictory relationship between governance and a specific theatrical genre of which it represents, at once, an elation and a rejection. In fact, on the one hand governance might be understood as a sort of travelling theatre, which assembles its scenes each time in a different way, in different places, using different pieces and even different actors for each performance. On the other hand, it largely relinquishes the 'public' character so typical of theatre performances, especially of travelling theatres. In the past, classic state institutions, and especially the parliament, considered a theatricality that coincided with publicity to be their hallmark. When Bagehot evoked the theatrical nature of the British Parliament, assigning to it a crucial role in educating the citizens, he was referring to the public character of that institution.[54] With governance, we find ourselves facing a theatricality that is disassociated from full publicity. The latter is variable, and in any case is smaller than that of government, that is, of classics state institutions. Theatricality, understood as an act performed 'publicly' and endowed with meaningful symbolic character, is simply absent. So, beyond the democratic deficit produced by governance so often pointed at by the existing literature, a decrease of the symbolic capacity of the fora engaged in strictly functional decision-making processes should also be noted.

A vast European literature, starting from Hobbes, has accustomed us to considering the state as an entity endowed with symbolic and mystical meanings,[55] mysterious,[56] and full of theological connotations.[57] The strong functionalist impression of governance breaks this narrative of the state and its institutions. The symbolic elements become less evident. It might be argued that repeated calls for 'transparency' coming from

54. "The distinguishing quality of Parliamentary Government is, that in each stage of a public transaction there is a discussion; that the public assist at this discussion; that it can, through Parliament, turn out an administration which is not doing as it likes, and can put in an administration which will do as it likes" W. Bagehot, *The English Constitution*, Oxford University Press, London, 1873, p. 34.
55. The issue has been examined from a Durkheimian viewpoint by P. Bourdieu, *Sur l'État. Cours au Collège de France (1989-1992)*, Seuil, Paris, 2012.
56. E. H. Kantorovicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*, Princeton University Press, Princeton, 1995.
57. C. Schmitt, *The Concept of the Political*, Rutgers University Press, New Brunswick, 1996.

international governance play a surrogate role, and represent a legitimizing mechanism, to the traditional symbolic role of the state. The 'eye of the law' is no longer watching.[58] On the contrary, it requires that both subjects and practices become visible by asking them, for example, to fight corruption through internal mechanisms,[59] always ready to meet with a searching eye. In this sense, governance is a further step on the road to secularization and the loss of the theological and mystical character of public institutions.

Governance is shaped around an economic rationale. It is no coincidence that Agamben speaks of an "economic theology" that has taken the place of the "political theology". If the latter expressed itself through the "legislative omnipotence", the "economic theology" mirrors the rationale of the *oikonomia* understood as "the running of the household" which calls for "decisions and arrangements for facing each time specific problems that concern the functional order (*taxis*) of the various parts of the *oikos*."[60] It is this essentially domestic and managerial nature of global governance, no longer responding to any episteme, that renders it seemingly effective and, by such a token, ends hiding its political nature and its explicitly ideological approach to the interpretation and solution of problems.

Governance Between Inclusions...

Governance is often seen as the hallmark of a new form of democracy 'from below' called 'participative' democracy.[61] Its tight relationship with participation has contributed to understanding governance primarily as a means of strengthening democracy and as a specific decision-making mode with unprecedented 'inclusive' capacities. Governance practices have multiplied in number, while the ensuing processes of participation have allowed a variety of public and private stakeholders to partake to public decisions. Individuals might represent the different needs of citizens, groups, professional associations, business enterprises, NGOs and social movements of various kinds. Public subjects include states, regions, different types of judicial bodies, and especially international networks and organizations. Such an enlarged participation has

58. M. Stolleis, *Das Auge des Gesetzes: Geschichte einer Metapher*, C.H. Beck Verlag, München, 2004.
59. See the interesting work by A. Garapon, P. Servan-Schreiber (eds.), *Deals de justice. Le marché américain de l'obéissance mondialisée*, PUF, Paris, 2013.
60. G. Agamben, *Il regno e la gloria. Per una genealogia teologica dell'economia e del governo*, Neri Pozza, Firenze, 2007, p. 31.
61. See D. Held, *Models of Democracy*, Polity, Cambridge, 1987, and M. Paci, *Welfare locale e democrazia partecipativa*, Il Mulino, Bologna, 2008; also see U. Allegretti, *La democrazia partecipativa. Esperienze e prospettive in Italia e in Europa*, Firenze University Press, Firenze, 2010.

played an essential role in presenting governance as an inclusive and welcoming mode of rule, one admitting a greater number and a wider variety of actors than those that representative democracy allowed for. This, it meets the expectations of a new form of democracy capable of giving a voice to actors who, in the past, where at the margins of society. International governance also allows and encourages the introduction of new levels of participation, marking the entry of civil society in public decision-making processes not only in societies that have scarce familiarity with democratic practices, but also in countries with longer democratic traditions.

Participation in governance processes can be of various kinds. They may encompass various procedures and different levels and types of government (local, national, international and global). They might involve law-making, regulatory, judicial, or disputes-settlement processes by 'quasi-judicial' bodies. It might even be possible to conceive of a form of 'participation rights' that are, however, particularly varied, protean and in most instances not invokable before a judge. As suggested by Cassese, these are scattered in a sort of 'labyrinth' in which it is particularly difficult to extricate oneself. Furthermore, "the divide between participation and consultation, participation and negotiation, participation and co-operation are far from clear"; emerging, here, is the continuity, if not the identification, of participation and negotiation.[62]

In particular, participation has been promoted by major international organizations. The World Bank has made participation a key requirement for countries receiving its economic aid, with the aim of involving communities and citizens and rendering them, to some extent, co-deciders of the measures adopted. Participation in decision-making encourages the introduction of new levels of democratic participation, especially in countries unfamiliar with democratic practices. At the same time, participation allows stakeholders to play a decisive role in public decision-making processes. This has been the most significant institutional outcome attained by a long cultural campaign conducted in the last decades of the twentieth century, a campaign demanding a new role for citizens and their full involvement in decision-making processes as signs of a truer democracy. All this lay in continuity with an American tradition. In the United States, voice was given to 'public interest' already in the 1970s thanks to the so-called *public interest movements*.[63] These, rather than speaking of 'general and abstract' notions, represented a form of *lobbying for the people*. In other words, in the United States issues concerning

62. S. Cassese, *The Global Polity*, p. 160.
63. See E. S. Clemens, *The People's Lobby. Organizational Innovation and the Rise of Interest Group Politics*, The University of Chicago Press, Chicago, 1997.

the public interest have emerged through lobby-like organizations and mobilizations. Indeed, the actions of lobbies themselves have often been interpreted as an 'act of representation'.[64]

...and Exclusions

Governance implies, therefore, a kind of political and legal organization that requires a high capacity of mobilization mainly based on interest. However, neither all parties nor all societies possess such an aptitude in equal measure, since this is derived from cognitive, informational and entrepreneurial abilities that are unequally distributed. It is not difficult to realize that, in this type of organization, large organized interests with great resources and with strong pressure capabilities are particularly favoured. It is no coincidence that Europe has chosen to pursue the path of subsidiarity in order to create a positive integration between the ability of subjects to mobilize and the ability of public institutions to make up for their deficiency.[65]

There is, therefore, somesort of ambivalence with regards to governance processes and their relationship with democracy. This is clearly shown by the fact that the literature on the topic is divided between the celebration of the participation surplus that it promotes and the legitimacy deficit it suffers. Following von Hayeck,[66] neoliberal thinkers have discredited all great political projects and economic planning as a sign of authoritarian politics taking away from individuals and civil society efficiency, initiative, vitality and freedom. Governance coincides with the crisis of politics and political parties,[67] that is, the collectors of political demands. It mirrors a version of politics that renounces to pursue grand projects, limiting itself to facilitate the implementation of several small projects born within civil society. The transition from politics as a general and all-encompassing project for society, based on an ideal type, to a policy essentially construed as a managerial activity pursuing specific targets and operated by subjects driven by interests, is a crucial point in understanding the modes of inclusion and exclusion of governance processes.

64. See J. M. Berry, *Lobbying for the People*, Princeton University Press, Princeton, 1977, p. 5.
65. See M. Cartabia, N. Lupo, A. Simoncini (eds.), *Democracy and Subsidiarity in the EU National Parliaments: Regions and Societies in the Decision-making Process*, Il Mulino, Bologna, 2013, and especially A. Simoncini, "Beyond Representative Democracy: The Challenge of Participatory Democracy and the Boundless Galaxy of Civil Society", pp. 45-73.
66. F. A. von Hayeck, *The Road to Serfdom*, Routledge, London, 2001.
67. G. Preterossi, *La politica negata*, Laterza, Roma-Bari, 2011, and Id., "Crisi economica globale e spoliticizzazione", in L. Bazzicalupo, A. Tucci (eds.), *Il grande crollo*, pp. 85-92.

The participatory dimension of governance is not so generalized and salvific as it may seem prima facie. The entrance of civil society–or rather of some of its components–in the realm of government implies a (more or less pronounced) privatization of public decision-making. Governance is not easily reconciled with representative democracy and with its own promise of a 'general and abstract' inclusion. In a way, inclusion through participation is always 'particular and concrete'. Indeed, this form of participation in the decision-making clearly implies an exclusion since the decision itself is no longer tied to a mandate relating to major political issues affecting the entire community or significant parts of it. On the contrary, it pertains to problems of specific groups or of local communities or even single persons. Thus it follows specific inputs. Moreover, the call for participation in governance processes, along with the values proper to the notion of democracy 'from below', promotes a transformation of citizens into stakeholders with regards to specific issues. Therefore it promotes a version of the public decision as an 'arena' in which participants are allowed to enter because of their particular and egoistic interests.[68]

Governance is a complex institutional phenomenon that transcends participation. First, it implies, beyond the privatization of the decision-making process, significant outsourcing of several public functions.[69] When considering 'governance', it is therefore necessary to consider not only decision modes that are open to the participation of private entities, but also the actual outcomes of the delegation to private subjects of functions that in the past were carried out by the state. In other words, private subjects manage many tasks that were once considered to be public. Here we find ourselves in a particularly sensitive area, where governance may have significant consequences on a people's fundamental rights and might deeply affect the distribution of resources within society. Let us consider, for example, the consequences of privatization in at least three sensitive areas: the entrepreneurial conduct of transnational corporations operating in countries without regulations protecting labourers nor the environment;[70] the privatization of prisons that, particularly in the United States, has led to a significant reduction of the protection of inmate rights; the governance of financial markets, where phenomena of 'moral hazard' have had devastating effects.[71]

68. See S. Cassese, *La crisi dello stato*, especially pp. 20 and ff. and pp. 74 and ff., where the notion of 'public arena' is examined in some detail. The image of the public arena is also used in D. Cefai, "Qu'est ce qu'une arène publique? Quelques pistes pour une perspective pragmatiste", in D. Cefai, I. Joseph (eds.), *L'héritage du pragmatism. Conflits d'urbanité et épreuves de civisme*, Editions de l'Aube, Paris, 2002, pp. 51-83.

69. A. C. Aman Jr., "Politics, Policy and Outsourcing in the United States: The Role of Administrative Law", in L. Pearson, C. Harlow, M. Taggart (eds.), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson,* Hart Publishing, Oxford, 2008, pp. 205-221.

70. See P. Zumbansen, "Lochner Disembedded: The Anxieties of Law in a Global Context", in *Indiana Journal of Global Legal Studies*, 20, 2013, pp. 1-28.

71. R. A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression*, Harvard University Press, Cambridge

In other words, governance might be considered an opportunity for new forms of democratic commitment for citizens, groups, and various subjects; however it might also represent a new form of democratic disengagement inasmuch as the privatization of decisions implies a rejection of the social responsibility criteria, endangering the fundamental rights of individuals. Furthermore, the reference to single issues, mostly of a local and particularistic nature, contributes to a general de-politicization of society, hidingbroader political issues from the public eye. Governance management tasks, which are difficult to trace back to a coherent project, inevitably devour the idealistic and ideological charge of European politics.

With the collapse of grand projects and the end of ideological politics, governance marks the end of political conflict as well. Governance, in other words, is inherently pacifying, as Czempiel has noted.[72] It might even be argued that governance constitutes a kind of insurance against conflict itself. First, this is the result of the involvement in decision-making of stakeholders, who thus become, to some extent, co-decision makers. Furthermore, major conflicts are expunged from the scenario of governance, or made less noticeable, through its division or localization. As Zumbansen has remarked, "governance conflicts are regularly disembedded by confining them to a particular context, governed by rules of competence and authority."[73] Obviously, every specific governance context has its own greater or smaller share of conflict which, however, is related to the specificities of the various contexts rather than to great political and ideological issues.

Governance might be considered a way of managing power based on 'economic' modes and aiming at 'effectiveness',[74] that is, doing "things, without resorting to legal force."[75] It does not only seek solutions to problems through specific arrangements without engaging on the theoretical and ideological plane; it also sets up its responses to problems with the least possible expenditure of political resources. In this sense, "success or failure, rather than legitimacy or illegitimacy, now become the criteria of governmental action."[76] There is, therefore, an economy inherent to governance that consists

(Mass.), 2009. On the relationship between financial crisis and governance processes, see M. R. Ferrarese, "La crisi finanziaria tra stati e mercati e il "mondo 3" dell'economia globale", *Democrazia e diritto*, 3-4, 2012, pp. 15-40.

72. E.-O. Czempiel, "Governance and Democratization", in J. N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government*, pp. 250-271.

73. P. Zumbansen, "Lochner Disembedded: The Anxieties of Law in a Global Context", p. 5.

74. On the notion of 'effectiveness' see, A. Catania (ed.), *Dimensioni dell'effettività. Tra teoria generale e politica del diritto*, Giuffrè, Milano, 2005, and Id., *Diritto positivo ed effettività*, Editoriale Scientifica, Napoli, 2010 and *Effettività e modelli normativi. Studi di filosofia del diritto*, (published by Valeria Giordano). Also see A. Catania, *Metamorfosi del diritto. Decisione e norma nell'età globale*, Laterza, Roma-Bari, 2008.

75. E.-O. Czempiel, "Governance and Democratization", p. 250. Also see O. R. Young, "The Effectiveness of International Institutions", in J. N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government*, pp. 160-194.

76. M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France. 1978-79*, Palgrave Macmillan, Basingstoke, 2008,

in saving power and resources. On the one hand, 'decision', which in the past was a sign of political sovereignty entailing an expenditure of power up to the ultimate test of the Schmittian 'state of exception', with governance seems to become a co-decision. On the other hand, a large part of the costs of enforcement is reduced through the (greater or lesser) convenience that the co-deciders find in implementing the rules.

Considerably purified of the coercive disposition of power, governance appears to be part of a framework in which "sanctioning instruments and regulatory potentials typical of the states take place through a variable geometry, with very different degrees of effectiveness."[77] Governance might be identified with 'governmentality' as defined by Foucault, a soft mode of governance that relies on 'regimes of truth' that are, as much as possible, 'natural', that is, close to or coinciding with self-regulation. All behaviors, even those of governments, need to maintain flexibility and adaptability. In this way, they turn into a kind of "exercise of possibilities", even if they maintain a normative character–as noted by Bazzicalupo.[78] The rules, therefore, are not given a priori, but are the result of negotiations and of adaptive behaviors that take into account the needs of the governed, following the model of the Christian pastorate.[79] The results of the struggle are the results of the specific decisions and ways of being of the actors involved and of the different competitive environments. They enshrine the idea that "the living, as such, is in its immanence unrepresentable", and that, however, "*it never represents* a power of the laws that is creative, generative, undetermined that inhabits the living itself; a power of the singularity differentiating itself from the *forms* it takes on."[80] Here lies the true change that governance has imposed – especially in Europe – in the legal field, thoroughly disrupting the institutional structure of 'the modern'.

What Juridical Strategy for Governance?

In the institutional changes taking place in recent decades, states have been protagonists as much as victims. On the one hand, they have contributed to the increasing liberalization

p. 16. Also see L. Bazzicalupo, *Il governo delle vite. Biopolitica ed economia*, Laterza, Roma-Bari, 2006 and *Politica Rappresentazioni e tecniche di governo*, Roma, Carocci, 2013.
77. F. Mancuso, *Le 'verità' del diritto*, p. 81.
78. L. Bazzicalupo, 'Le linee mobili di confine nella normatività sociale e la indeterminatezza delle procedure', in A. Tucci (ed.), Disaggregazioni, pp. 29-46.
79. M. Foucault, *Sécurité, territoire, population*.
80. L. Bazzicalupo, "Le linee mobili di confine nella normatività sociale e la indeterminatezza delle procedure", p. 43. Italics in the text.

of legal and economic life through a series of reforms, laying the foundations of a system of laws *à la carte* that encourages increasingly widespread processes of forum shopping, shopping law and competition between different jurisdictions.[81] Sassen has spoken of 'denationalization' precisely to indicate the tendency of states to "reorient their particular policy work or broader state agendas toward the requirements of the global economy even as they continue to be coded as national."[82] On the other hand, while states were gradually being de-nationalized, the concept of *rule of law* was being internationalized. Its new use turned it into an institutional brand expendable on the global plane for the protection of rights and even for the protection of the market,[83] sometimes leading, rather paradoxically, to situations of lawlessness.[84] So, some of the elements of the rule of law are either imposed by international organizations on to the weak states, or become the object of a 'transplant' made in exchange of economic benefits.[85]

The juridical strategy of governance requires the combination of a large number of legal codes in order to provide legal instruments that adapt to specific and increasingly different situations. The obfuscation of the primacy of law, with the view of entrusting many of its tasks to other legal instruments more capable of meeting the needs of a changing and fluid normativity, was inevitable. Such a change was mainly due to functional reasons. The demands coming from an internationalized market and from complex societies could not be met by rigid, predefined and centralized legal instruments – as those produced by the European states. There was, moreover, a discrepancy between the now 'global' extent of problems and dynamics and the 'territorial' scope of legislation. Finally, there was a temporal need, since long legislation processes were incompatible with the speed of the market.[86] But even political reasons required the use of legal instruments detached from the state and its legislation – tools that were lacking the strong symbolic meanings and the public resonances weighing down and slowing the legislation. More generally, variegated and agile legal instruments, made up of parts each capable of satisfying the specific needs of the different social groups, were required.

81. See: A. Zoppini (ed.), *Concorrenza tra ordinamenti giuridici*, Laterza, Roma-Bari, 2003, A. Plaia (ed.), *La competizione tra ordinamenti giuridici*, Giuffrè, Milano, 2007, and F. Viola, *La concorrenza tra gli ordinamenti e il diritto come scelta*, Editoriale Scientifica, Napoli, 2008. Also M. Gnes, *La scelta del diritto. Concorrenza tra ordinamenti, arbitraggi, diritto comune europeo*, Giuffrè, Milano, 2004.
82. S. Sassen, *Territory, Authority, Rights*, p. 223, and pp. 230 and ff.
83. G. Palombella, È possibile una legalità globale? Il rule of law e la governance del mondo, Il Mulino, Bologna, 2010.
84. U. Mattei, L. Nader, *Plunder: When the rule of law is illegal*, Blackwell, Oxford, 2008.
85. See, on this, G. Ajani, "Navigatori e giuristi. A proposito del trapianto di nozioni vaghe", in V. Bertorello (ed.), *Io comparo, tu compari, egli compara. Che cosa, come, perché?*, Giuffré, Milano, 2013, pp. 3-20.
86. See F. Ost, *Le temps du droit*, Odile Jacob, Paris, 1999. Also M. R. Ferrarese, *Il diritto al presente*, Il Mulino, Bologna, 2002. On the new spatial-temporal order, see S. Sassen, *Territory, Authority, Rights*, pp. 378 and ff.

The need was felt for a re-orientation, through institutional mechanisms of 'disaggregation', which rendered possible for the legal relationships to no longer be construed around 'territories' or people'. It was necessary, in other words, to seek dynamic legal solutions capable of moving in-between different legal spaces and orders, influencing each other, taking on different forms and even overcoming the boundary between public and private.

If the framework of contemporary global legality offers the viewer a remarkable variety of ways of being of the law,[87] governance processes contribute not only to enrich the picture, but also to connote its meaning by producing its own legal models. For example, besides the mode of 'government', other traditional juridical modes based on 'factuality' seem to remerge,[88] such as "hidden hands, habits, patterned behavior, and cultural mores."[89] In a context that abandons the rigor of clear conceptual distinctions and general and abstract characteristics, even Europeans return to legal mores and other forms of *ius non scriptum*[90] to respond to "complex conflict situations that cannot be managed hierarchically and in a centralistic way."[91] Supiot refers to neo-feudal characteristics as specific elements of the current legal context and of governance phenomena characterizing it.[92] Even the soft law widely adopted in Europe,[93] by directly contradicting the notion of "law command" evoked by Austin as well as Kelsen's idea of "sanction" – two concepts that belonged to the European 'punitive' language[94] – represents an epochal transition.

Here, we wish to draw attention upon two other important modes used by governance: contract law and judge-made law. These two less visible modes, belonging to the

87. On this, M. R. Ferrarese, *Prima lezione di diritto globale,* Laterza, Roma-Bari 2012.
88. On factual law, see P. Grossi, *L'ordine giuridico medievale*, and Id., "Diritto, globalizzazione, scienza giuridica", in *Foro italiano*, 5, 2002. Also see, M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Il Mulino, Bologna, 2000; M. Vogliotti, *Tra fatto e diritto. Oltre la modernità giuridica*, Giappichelli, Torino, 2007; R. Marra, "Per una scienza di realtà del diritto (contro il feticismo giuridico)", in *Materiali per una storia della cultura giuridica*, n. 2, 2008.
89. On the question of polycentrism and polyarchy, see K. J. Holsti, "Governance without Government: Poliarchy in Nineteenth-Century European International Politics", in J.N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government*, p. 32.
90. S. Mader, *Ius non scriptum*, Editoriale scientifica, Napoli, 2011. Also see S. M. Carbone, *Il diritto non scritto nel commercio internazionale. Due modelli di codificazione*, Editoriale scientifica, Napoli, 2012.
91. C. Joerges, "Integrazione attraverso la de-giuridicizzazione? Un intervento interlocutorio", in M. Blecher et al. (eds.), *Governance, società civile e movimenti sociali*, Ediesse, Roma, 2009, p. 45.
92. A. Supiot, *Homo juridicus: Essai sur la fonction anthropologique du Droit*, Seuil, Paris, 2005.
93. L. Selden, *Soft Law in European Community Law*, Hart, Oxford, 2004. Also, D.M. Trubek-L. G. Trubek, "Hard and Soft Law in the Construction of Europe: The Role of the Open Method of Coordination", in *European Law Journal*, 11, 2005, pp. 343-364; G. Bronzini, "The Social Dilemma of European Integration", and S. Sacchi, 'Governance e coordinamento aperto delle politiche sociali', both in M. Ferrera, M. Giuliani (eds.), *Governance e politiche dell'Unione europea*, Il Mulino, Bologna, 2008.
94. M. Foucault, *La société punitive. Cours au Collège de France. 1972-1973*, Seuil-Gallimard, Paris, 2013.

legal vocabulary of modernity, significantly contribute to give governance a legal physiognomy. They respond perfectly well to the idea of 'soft revolution', a scheme that operates through implied, indirect and partial rather than explicit, direct and all-encompassing reforms. It is no coincidence that their importance and the number and significance of their tasks have significantly increased in today's globalized world. The strong presence of different types of contracts and of judge-made law also responds to the need for legal forms that bear little political connotation, variable and capable of different combinations between the public and private parts. Jurisdiction and contract may allow for less restrictive and less defined rules than statutes. Moreover, they are legal methods of composition capable of reconciling and balancing different interests. They also allow for a greater feasibility in temporal terms. Whereas the law was projected into the future, a future it tended to shape rigidly, governance enjoys a greater feasibility over time. It might correspond to the short-termism of economic life, and at the same time might rapidly correct those legal responses that fail to work properly. Contract and judiciary law both have the necessary elements to become real forms of 'contract governance' and 'judicial governance' that is to work as responding to public issues.[95] In order to meet the various demands of governance, contract and judicial law, while continuing to survive in their typical form, have nonetheless undergone profound changes that make them more difficult to relate to the original model developed in the European states. Beyond the 'typical' form, contract and judiciary law have also been variously reproduced, even giving rise to apocryphal versions of the original model. This has taken place in order to respond to the changing needs of different kinds of subjects, and to adapt to the global dimension of the issues at stake. Two references will suffice to give an idea of these changes. With regard to contracts, we range from the importance of the *lex mercatoria* in the globalized world[96] – which is nothing more than a modeling of contract usages for international trade purposes – to the many outsourcing contracts – through which states and other public institutions bestow on private subjects various tasks and responsibilities which in the past were considered to be public.[97] With regard to judicial

95. On governance "by contract" there is a vast literature. See the special issued of the *Indiana Journal of Global Legal Studies*, 14, 2007, on 'Governing Contracts. Public and Private Perspective', and the special issue of the *Law and Contemporary Problems*, 2, 2013 on 'The Public Dimension of Contract: Contractual Pluralism Beyond Privity'. On these two forms of governance, see my book *La governance tra politica e diritto.*

96. See F. Galgano, *La globalizzazione nello specchio del diritto*, Il Mulino, Bologna, 2003; F. Galgano, F. Marrella, *Diritto del commercio internazionale*, Cedam, Padova, 2011; F. Marrella, *La nuova lex mercatoria. Principi Unidroit e usi nei contratti del commercio internazionale*, Cedam, Padova, 2004. Also see M.R. Ferrarese, *Diritto sconfinato*, pp. 76 and ff.

97. See, for example, S. Chesterman, A. Fisher (eds.), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits*, Oxford University Press, Oxford, 2009; Martha Minow, Jody Freeman (eds.), *Government by Contract: Outsourcing and American Democracy*, Harvard University Press, Cambridge (Mass.), 2009.

governance, we might refer not only to the expansion of different types of international courts,[98] but also to the tasks they perform, including law-making functions.[99] It is also worth mentioning that the judicial formula has also had an impact on a number of private dispute resolutions, such as arbitration, mediation by 'quasi-judicial' agencies that perform crucial tasks in today's world.[100]

To sum up, the requirements of governance promote the combination of a large number of legal regulations, so that instruments capable of adapting to the specificity and to the variability of concrete situations may become available. The variability of regulations may refer to the degree of formality of the law (encompassing the social, the private, the public/private, the public, etc…), or might be of spatial kind (ranging to the local, regional, national, international, supra- and trans-national level).

Governance and 'Strategic' Legal Forms

Contract law and judge-made law might be thought of as two heirs sharing the legacy of legislation, dispersing the abstractness and generality of rules as well as the theological nature of law itself. Inspired by the 'here and now' principle, they are far removed from any 'political theology' and from any other form of transcendence.[101] In fact, the law of governance consists of rules that have no dogmatic character; they no longer come from 'elsewhere'. They are, on the contrary, a product of the actions of competing individuals and groups motivated by specific goals and interests. Above all, judicial and contract law have become crucial in today's world for their ability to adapt in a twofold way to the ongoing tendency towards privatization. On the one hand, they provide an important role to private subjects, albeit each in different ways. On the other, both are capable of promoting and satisfying the 'legal entrepreneurship' of subjects, something typical of American history and that corresponds to the economic nature that global capitalism has forced onto institutions.[102]

98. Cassese remarks that in the last few decades international jurisdictional organisms have grown from six to more than twenty, while there ten 'almost jurisdictional' organisms. See S. Cassese, *Global Polity*.
99. On the point, M. Shapiro, A. Stone Sweet, *On Law, Politics, and Judicialization*, Oxford University Press, Oxford, 2002, and S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Donzelli, Roma, 2009.
100. See M. Shapiro, *Courts: A Comparative and Political Analysis*, The University of Chicago Press, Chicago, 1981; B. Caplan-E.P. Stringham, "Privatizing the Adjudication of Disputes", in *Theoretical Inquiries in Law*, vol. 9, 2008, consulted on line on 1 February 2014 at http://www.bepress.com/til/default/vol9/iss2/art8. Also see H. Muir-Watt, "Economie de la justice et arbitrage international", in *Revue de l'Arbitrage*, 3, 2008, pp. 389-418.
101. A. Supiot, *Homo juridicus*, pp. 92 and ff.
102. On the economic penchant of global law, see my entry "Globalizzazione", in *Enciclopedia delle scienze sociali*, Istituto

The transposition of the 'language of interest' in the legal field takes place thanks to the growing importance of contract and judicial law, which assign a direct role to subjects and reward their dynamism and interactive abilities.[103] In other words, and referring back to Elster, it might be said that judge-made law and contractual dynamics both make use of the language of 'negotiation',[104] and contemplate 'strategic' forms of action. This regards actors acting in situations of mutual dependence, each one trying to read the moves of the others in response to their own. In fact, every actor is pursuing his own selfish purposes through a competitive interaction with the other parts, a process that has been analyzed by game theory.[105] As it is known, such 'games' even contemplate the possibility that individuals resort to 'threats', misrepresentations, false statements and other strategies that belong to the repertoire of war in order to challenge the counterpart and eventually win. In a way, in the forms of strategic action the subjects no longer obey a 'command'. On the contrary, they are encouraged to act so as to produce legal results (sentences, contracts, etc...) in line with their own aims, that is, the maximization of utility and affirmation of their own interests. With reference to the game theory framework, it might be said that the rules of governance are no longer supported by a 'parametric rationality' but by a 'strategic rationality'.[106]

While legislative law pretended to offer a single, coherent solution, a unique and generalized response to a specific problem or a given social demand, the rules emerging from contracts and court decisions are strongly influenced by the competitive environment that generates them and by the skill and strategic capabilities of the parties partaking to the competition. They represent contingent and particular responses that cannot be immediately generalized and may not be immediately applied to other situations. Strategic rationality also affects public law, which is also drawn towards forms of strategic action and is subject to economic analysis.[107] These strategic modes have

dell'Enciclopedia Italiana Treccani, Roma, 2001, pp. 156a-166a. Alos see my works "Il diritto americano e l'imprenditorialità dei privati", in *Politica del diritto*, 1, 1995, pp. 97 and ff., and "An Entrepreneurial Conception of the Law? The American Model through Italian Eyes", in D. Nelken (ed.), *Comparing Legal Cultures*, Aldershot, Dartmouth, 1996.

103. See my *Le istituzioni della globalizzazione*, pp. 32 and ff.

104. J. Elster, *Argomentare e negoziare*, Anabasi, Milano, 1993. See A. Zoppini (ed.), *Concorrenza tra ordinamenti giuridici*, Laterza, Roma-Bari, 2003, A. Plaia (ed.), *La competizione tra ordinamenti giuridici*, Giuffrè, Milano, 2007, and F. Viola, *La concorrenza tra gli ordinamenti e il diritto come scelta*, Editoriale Scientifica, Napoli, 2008. Also see M. Gnes, *La scelta del diritto. Concorrenza tra ordinamenti, arbitraggi, diritto comune europeo*, Giuffrè, Milano, 2004.

105. D. M. Kreps, *Game Theory and Economic Modelling*, Oxford University Press, Oxford, 1990. For a useful introduction, offered from the perspective of political theory, see G. Rusconi, *Scambio, minaccia, decisione. Elementi di sociologia politica*, Il Mulino, Bologna, 1984.

106. A more philosophical perspective is offered by T. Magri, *Contratto e convenzione. Razionalità, obbligo, imparzialità in Hobbes e Hume*, Feltrinelli, Milano, 1994.

107. See R.C. Cooter, *The Strategic Constitution*, Princeton University Press, Princeton, 2000. Also G. Napolitano, M. Abbrescia, *Analisi economica del diritto pubblico*, Il Mulino, Bologna, 2009.

gradually gained importance, while sectors of 'public' law have been to judicial devices – often identifiable as so many forms of governance.

The emphasis on the strategic nature of the subjects' actions, especially in the context of judicial and contractual governance, reflects a strong depletion of the regulatory horizon of law itself. The notion of legality,[108] largely deprived of the guiding light of legislation, is today more than ever a 'myth'.[109] It sometimes takes refuge under the 'light constitutional cloak',[110] which refers to a 'network'[111] or to a 'fabric' made of various *auctoritates* and *rationes*.[112] This is especially true with reference to the international scenario, where states and other various international structures are engaged, within a contractual framework, in collaborating and competing with one another. Consequently, the notion of legality is subject to challenges and forms of exploitation while performing functions that limit power in the name of rights.[113] In legal relations, the crucial weight of interests and the turn towards strategic rationality may seem to contradict the constitutional turn that characterizes our own time. Yet rights and interests are the great combination buttressing the political and institutional organization based on governance.[114] The imbalance between these two components also represents the imbalance between normative and strategic attitude in current legal relations.

All this leads us to reconsider Weber's prediction that capitalism would always rely on the "complete calculability of the functioning of public administration and law",[115] as a condition to ensure "the highest degree of formal calculability."[116] On the contrary, it is in a spectrum of extremely differentiated choices, methods, practices and legal rules, in accordance with different criteria and rationalities, that today's capitalism reserves the right to make its own decisions depending on the circumstances. Governance, in this great indeterminacy, represents a vast reservoir for this extreme juridical differentiation.

108. The literature on the issue of legality is constantly growing. See, for example, M. Vogliotti, "Legalità", in *Enciclopedia del diritto*, Giuffrè, Milano, 2013.
109. P. Grossi, *Mitologie giuridiche della modernità*, Giuffrè, Milano, 2001.
110. B. Sordi, "Il principio di legalità nel diritto amministrativo che cambia", in *Diritto Amministrativo*, 1, 2008, pp. 1-28.
111. B. Pastore, "Le fonti e la rete: il principio di legalità rivisitato", in G. Brunelli, A. Pugiotto, P. Veronesi (eds.), *Scritti in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere,* Jovene, Napoli, 2009, pp. 257-280.
112. M. Vogliotti, "Legalità", p. 420.
113. G. Palombella, È possibile una legalità globale?
114. This combination indicates the juxtaposition of 'the rights of possibilities', i.e. the legal instruments that follow the language of interests, and the 'the law of necessity', i.e. those parts of the law that still sets strict limits to human action, such as the preservation of the environment.
115. M. Weber, *Economy and Society*, p. 162.
116. M. Weber, *Economy and Society*, p. 85, where computability is linked to the formalistic culture of the legal class rather than to the needs of the economic life, and where the auxiliary role played by it in capitalist development is appreciated.

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CROSSING THE BORDERS OF GOVERNANCE

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Abstract

Governance is presented by undefined and confused areas that tend to expand in a more or less arbitrary way in the absence of stable and reliable normative standards. All this calls into question concepts and recompositive monolithic categories of modern political-legal rationality and in the first place sovereignty. At the same time the current neo-governmental structure does not stand as a technology of power, exclusionary or alternative to other rationalities, but rather it tends to bring out all the contradictions and ambiguities of the present time.

Keywords

Governmentality, sovereignty, political-legal subjectivations, borders

Resumen

La gobernanza es presentada por áreas confusas e indefinidas que tienden a expandirse de una manera más o menos arbitraria en ausencia de estándares normativos estables y confiables. Todo esto pone en cuestión conceptos y categorías monolíticas recompositivas de moderna racionalidad política-legal y en primer lugar de la soberanía. Al mismo tiempo, la estructura neogubernamental actual no se sostiene como una tecnología de poder excluyente o alternativa a otras racionalidades, sino que tiende a llevar a cabo todas las contradicciones y ambigüedades del tiempo presente.

Palabras clave
Gubernamentalidad, soberanía, subjetivación de políticas legales, fronteras

Government and governance, sovereignty and governmentality

"Government is no longer an appropriate definition of the way in which populations and territories are organised and administered. In a world where the participation of business and civil society is increasingly the norm, the term *governance* better defines the process by which we collectively solve our problems and meet our society's needs, while government is rather the instrument we use"; the definition of governance provided by the OECD in 2001, echoes what we can read in the report drawn up in 1995 by the Commission on Global Governance. "Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests."[1]

Both terms, of course, refer to the transformation of government through new unprecedented ways of organization and administration of territories and populations; they place particular emphasis on the procedural and dynamic phenomenon to emphasize the distance from the traditional category of government, its forms, its fields and places which it however affects, and its institutions. The latter are, in any case, often reproduced assuming different modes of action, and–far from a definitive obsolescence–they effectively influence concrete power relations, so that "Governance is always effective in performing the function necessary to systematic persistence, else it is not conceived to exist" whilst "Government … can be quite ineffective without being regarded as non-existent."[2]

1. *Our Global Neighborhood: The Report of the Commission on Global Governance*, 1995, http://www.gdrc.org/u-gov/global-neighbourhood/chap1.htm.
2. J. N. Rosenau, "Governance, Order, and Change in World Politics", in J.N. Rosenau, E.O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge, 1992, pp. 4-5.

Therefore, process, cooperative action, collective solution of conflicts and mediation seem to be the criteria for defining a logic of government that represents itself through practices (official documents talk about best practices and good governance[3]) inspired by freedom, equality, democracy, and ultimately a supposed (normative, and counter -factual) horizontality of powers in the field.[4] This is a scenario that is more and more evoked in terms of lightness, softness and flexibility:[5] it is true indeed that governance is presented by undefined and confused areas that tend to expand in a more or less arbitrary way in the absence of stable and reliable normative standards; it is, thus, true that it calls into question concepts and ricompositive monolithic categories of modern rationality, and in the first place sovereignty; but it is also and especially undeniable that the current neo-governmental structure (that appears to be well suited for governance practices[6]), does not stand as a rational, exclusionary or alternative power to other rationalities, but rather it tends to bring out all the contradictions and ambiguities of the present time. More specifically, new prospects are developing and, although they highlight the absence of some rigid institutional frameworks, they underline now the centrality (often residual) of the State, or the imbalanced political-legal decision in favour of institutions and bodies lying beyond the public state sphere.

The tension between local and global leads us to rethink the centrality of the State: by re-reading Foucault, the history of the State and the long process of 'governmentalization' to which it has been subjected,[7] we can assert that against the claim of unity of the sovereign power in the long history of the State, there have established widespread and ramified instances as opposed to the centre that undermine the supposed unity of the political and legal decision towards a process of *pluralization of the legal system*. A plurality of social issues that shows the theoretical inadequacy, rather than the concept

3. See the OECD Seminar proceedings on "Regulatory Management and Reform", Moscow, 19-20 November 2001, http://www.oecd.org/gov/publicationsdocuments.

4. Cfr. S. Vaccaro, "Il dispositivo della Governance", in A. Palumbo, S. Vaccaro (eds.), *Governance. Teorie, principi, modelli, pratiche nell'era globale*, Mimesis, Milano-Udine, 2006.

5 M. R. Ferrarese, *La governance tra politica e diritto*, il Mulino, Bologna, 2010; J. S. Nye, *Soft Power. The Means of Success in World Politics*, PublicAffairs, New York, 2004, he talks about Soft Power as a criterion to exert power in international law as opposed to the coercive and repressive dominant views of Hard Power: «Hard and soft power are related because they are both aspects of ability to achieve one's purpose by affecting the behavior of others. The distinction between them is one of degree, both in the nature of the behavior and in tangibility of the resources. Command … can rest on coercion or inducement. Co-optive power … can rest on the attractiveness of one's culture and values or the ability to manipulate the agenda of political choices in a manner that makes others fail to express some preferences because they seem to be too unrealistic. … Soft-power resources tend to be associated with the co-optive end of the spectrum of behaviour, whereas hard-power resources are usually associated with command behaviour», p. 7.

6. Cfr. L. Bazzicalupo, "Governamentalità: pratiche e concetti", in *Materiali per una storia della cultura giuridica*, 2, 2013, pp. 371-394 and *Editorial*, in this volume.

7. M. Foucault, *Sécurité, territoire, population. Cours au Collège de France. 1977-1978*, Gallimard-Seuil, Paris, 2004.

State-institution, of its identification with the paradigm of sovereignty that still serves as a criterion of significance in the discursive field of political and legal philosophy.

Undoubtedly, this is a particularly effective category when describing and rationalizing concrete moments of power: in fact, the State can define itself as sovereign whether it acts as the sole specific holder of prerogatives related to sovereignty, instrument of decisional legitimization as well as of coercive power that it exerts in a more or less exclusive way as a hierarchically superior political entity. However, if not exceptional, sovereignty is increasingly becoming a minority, especially under the current accomplished transformation of an interdependent and globalized world, and the hypertrophy of neoliberal capitalism. In this context, the complex and plural articulation of actors, of political and legal institutions which are ever more oriented towards widespread pluralistic forms of power can be read in the light of the governmental power technique. And it is exactly the opening to organizational and neo-governmental instances that may be useful to highlight indeed a continuous dialectic between the reductive moment, aimed to unity and concentration (sovereign logics) and centrifugal pluralistic moment, encompassing all pluralistic and multileveled forms of power in running (governmental rationality).

Governmentality is in fact an ambivalent and sometimes opaque instrument, but it allows us to rethink the theory and practice of the law, and the institution of the State as well as the supranational and inter-state institutions. It is necessary to bear in mind that the two paradigms (sovereignist and governmental) are not incompatible, although logically in contradiction and mutually exclusive: *compatibility with different logics* is, in fact, an essential and entirely *new feature of the law* that coexists with other logics. There is often a polarity between sovereign decisions and governmental negotiations that creates a messy, incoherent field, though not less real and concrete, of tensions and overlaps.[8] It is about acquiring a critical–deconstructive approach to understand dynamics and processes that would otherwise escape any attempt for an appropriate representation of some traditionally effective categories which nowadays are no longer exhaustive. But with a warning in our opinion necessary: the attitude towards the sovereignist model cannot be that of those who take it as an inadequate and outdated model, but it does represent a specific device among all power devices, albeit the two logics are sharply opposed; one, sovereignty, is based upon the identification and legitimacy of the sovereign, and therefore it is completely internal to the political and legal discourse.

8. L. Bazzicalupo, *Il governo delle vite. Biopolitica ed economia*, Laterza, Roma-Bari, 2006.

By contrast, the other, *governmentality,* focuses upon mechanisms of the social kind, which, through a series of persuasive, disciplinary, and bio-politics strategies, tends towards *control* and *normalization*.[9] The specific purpose, therefore, becomes to "courtcircuiter ou d'éviter ce problème, central pour le droit, de la souveraineté et de l'obéissance des individus soumis à cette souveraineté, et de faire apparaître, à la place de la souveraineté et de l'obéissance, le problème de la domination et de l'assujettissement."[10]

In this perspective, we can say that in modern self-representation *softness* alternates with *hardness* through an increasingly evident affirmation of modes of legal production characterized by *soft law* and *lex mercatoria*: law is becoming more inclusive, it tends to separate effectiveness from validity: in short, the law abandons its form, the clear distinction between *normative phase* and *law enforcement phase*. All this, however, takes place with obvious problems related in the first place to the democratic legitimacy of actors involved in the legal and political decision. These problems arise from the inability to think about new forms of production as projection on a *global* scale of the procedures and powers connected with them, which are typical of modern statehood: for instance, whether in a functioning national democracy a widespread participation and organization of interest groups flows directly into parliament and their laws implementation, a transnational and global nexus falls through inevitably.[11]

In other words, the framework proposed by the national model cannot be reproduced at the global level. The disjunction between popular involvement and multilateral cooperation, which takes decisions, involves conflicts of legitimacy and may lead to a paralysis of intergovernmental institutions: the balancing system, the impartial neutralising role played once by State institutions are missing out, and they cannot, of course, be automatically translated at a global level.[12]

This is certainly why Bevir argues that "a participatory democracy might ascribe a role in governance to a wide range of democratic groups in civil society as well as the State. Because we are dealing with fuzzy boundaries rather than sharp dichotomies, we should not be surprised that this vision finds some echoes in system governance,

9. «It is actually a perspective that draws attention to government as a heterogeneous field of thought and action–to the multiplicity of authorities, knowledges, strategies, and devices that have sought to govern conduct for specific ends", J. X. Inda, "Analytics of the Modern: An Introduction", in X. Inda (ed.), *Anthropology of Modernity. Foucault, Governmentality, and Life Politics*, Blackwell Publishing, Oxford, 2005 p. 7.
10. M. Foucault, *Il faut défendre la société. Cours au Collège de France. 1976,* Gallimard, Seuil, Paris, 2001, pp. 22-23.
11. R. O. Keohane-J. S. Nye, "Globalizzazione e Governance", in A. Palumbo, S. Vaccaro (eds.), *Governance. Teorie, principi, modelli, pratiche nell'era globale*, *pratiche nell'era globale*, Mimesis, Milano-Udine, 2006, pp. 178-179.
12. About modern legal neutralization, A. Catania, *Metamorfosi del diritto. Decisione e norma nell'età globale*, Laterza, Roma-Bari, 2008, pp. 5-20.

notably in devolution programmes and the use of partnerships between the public sector and the voluntary and private sectors",[13] but this does not avoid, and does not exclude the assertion, often reactive, of fixed forms and rigid boundaries, which mark the global scenario, by reproducing regulation, control, and risk management devices to which we are increasingly submitted in governance systems. The activity of deconstruction involving the category of sovereignty is not accompanied, in fact, by the disappearance of borders; there is indeed a proliferation of borders, both material and symbolic, that ambivalently comes into being as an institution that separates and, at the same time, becomes a place of complex structured social and political relations, thus keeping together conflicts and mediations, divisions and connections, crossings and barriers together. "Borders regulate and structure the relations between capital, labour, law, subjects and political power even in instances where they are not lined by walls or other fortifications … the regulatory functions and symbolic power of the borders test the barrier between sovereignty and more flexible forms of global governance."[14] In other words, it is about putting into question the issue of territorial boundaries in modern spatiality, re-directing it to a concrete *disaggregation* of boundaries.[15] It is no coincidence that today, upon a necessary redefinition of the concept of *boundary,* key parameter of the law and modern politics, have been focussing studies of great interest, which unhinge the traditional coincidence of the border with the images of *wall* and *exclusion* (correlative to national inclusion), to offer an image of a *possible connection and intersection* beyond the geopolitical boundaries tracked by international law and institutions to which it refers.[16]

Bordering/De-bordering

This ambivalence of boundaries – that goes beyond their interpretation as safety devices, through which we build techniques and strategies of political and geographical exclusion[17] – has been widely discussed in the *Borders studies*, which reveal how the

13. M. Bevir, "Democratic Governance: Systems and Radical Perspectives", in *Public Administration Review*, 3, 2006, p. 433.
14. S. Mezzadra, B. Neilson, *Border as Method*, Duke University Press, Durham and London, 2013, p. 8.
15. S. Sassen, *A Sociology of Globalization*, W. W. Norton & Company, New York, 2007.
16. For studies on the classic paradigm of the border, see D. Newman, "The lines that continue to separate us: Borders in our borderless world", in *Progress in Human Geography*, 2, 2006, pp. 186-207.
17. About the border as a security device, see T. Basaran, "Security, Law, Borders: Spaces of Exclusion", in *International Political Sociology*", 2, 2008 and P. Zanini, *Significati del confine. I limiti naturali, storici, mentali*, Bruno Mondadori, Milano, 1997. Amongst the classical works by M. Davis, see at least, *City of Quartz: Excavating the Future in Los Angeles*, Verso, New York and London, 1990.

contemporary world is witnessing processes of de-bordering that however, do not imply forms of erosion of the border, but its complex reorganization around different control priorities: strengthening of the borders, delimitation of spaces paradoxically overlapping with their own crisis.[18] Wendy Brown, for instance, moves right from this double track where the global phenomena extricate themselves: "What we have come to call a globalized world harbors fundamental tensions between opening and barricading, fusion and partition, erasure and reinscription. These tensions materialize as increasingly liberalized borders, on the one hand, and the devolution of unprecedented funds, energies, and technologies to border fortification, on the other."[19]

In this way *walls,* by confirming a typical logic of governance, characterize themselves as devices to guarantee, alongside with freedom and security, risk management security policies, which often result into forms of national identity protectionism thereby confirming a state sovereignty that in each case is able to resist to change. Indeed, it is precisely through the construction of *walls*, the definition of marked boundaries, which the State "may look like hypersovereignty, but is actually often compensating for its loss. Lacking sovereign supremacy and majesty, yet invoking sovereign prerogative and guile, post-sovereign States become peculiar new kinds of international actors."[20]

It is quite interesting to note that when it comes to rethinking contemporary political-legal spatiality, Saskia Sassen defines the border as a productive place of sense, a sign by which we can delineate processes of localization and delocalisation of the new global dynamics and she argues that we are witnessing the creation of specific boundaries to contain and regulate emerging, often strategic flows which violate the traditional national boundaries, as in the case of the new regimes of international agreements and organizations (NAFTA, GATT, WTO) that promote circulation of highly skilled professionals whose movements are governed by a law that goes beyond the specific migration regimes of States, or even, as in the case of the economic position of a site in a global network of "boundaries", for which reason global economy appears as consisting of a series of specialized or partial circuits, as well as economic, multiple often overlapping spaces, precisely where the demarcation lines are becoming flexible, ambivalent, but never disappear despite the pressures of governance.[21]

18. P. Andreas, "Redrawing the Line. Borders and Security in the Twenty-first Century", in *International Security*, 2, 2003, pp. 78-111.
19. W. Brown, *Walled State, Waning Sovereignty*, Zone Books, New York, 2010, pp. 9-10.
20. Ibid., p. 59.
21. S. Sassen, *A Sociology of Globalization*, pp. 217-221.

We can assert that *border* – one of the theoretical constructs of the legal and political modernity, as it sets the criteria of validity and effectiveness in a self-organizing meaningful legal system – is only apparently getting void or waning. *Reality* and *concreteness* of the national, international and transactional space draw boundaries which are crossing over the old still robust borders, yet they remain a pivotal dimension of governmentality that becomes in some way more evident in the global and seemingly unlimited range of its target.[22] The myth and ideology that had been built around the country and the border, using the concept of an exclusive and excluding sovereignty, is surely declining as it stands as an artificial political mapping, and while is still there, it obviously cannot alone explain the meaning of power relations in the new forms of "*zoning*" and the new criteria of separation and delimitation of populations.

Even Sassen looks at *territoriality* – along with authority and rights – as a constitutive feature of the definition of the political and legal system. Law and politics, of course, in the global *assemblages* assume new *configurations* in presence of an incalculable variety of spatial-temporal characteristics – and therefore irreducible to system. Central categories to legal and political tradition, rather than being *dismissed* are challenged in the full sense of their meanings and relocated into in-formal synthesis of continuity and interruptions between *national* and *global,* universal and particular, between mobility and stability. Only incidentally, the concept of "*assemblage*" adopted by Sassen refers to specific national and global components that are assembled into new types of institutionalised entities; these are neither national nor global and manifest a variety of spatial-temporal features: the spatiality/temporality dimension of globalisation contains itself dynamics of mobility and fixity.[23] In other words, those *assemblages,* in a ceaseless dialectic deprived of synthesis, presuppose and, at the same time, imply further disassembling through a series of "specific" and "complex" interactions. This oscillating movement calls into question the issue of territorial boundaries of modern spatiality in the direction of a concrete *disaggregation* of the border, which implies the need for a redefinition of the concept and of its coincidence with the image of the *wall* and *exclusion.*

The key concept of *denationalization*[24] opens up to dynamic relations between national and global level, highlighting incomplete, imperfect, provisional, reviewable

22. J. Ferguson-A. Gupta, "Spatialing States: Toward an Etnography of Neoliberal Governmentality", in J. X. Inda (ed.), *Anthropology of Modernity,* in which authors develop the idea of "an emerging system of transnational governmentality", p. 115.
23. S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, Princeton, 2006, pp. 406-414.
24. S. Sassen, "Denationalization or globalization?", in *Review of International Political Economy*, 1, 2003, pp. 1-22.

forms of confined and differentiated spaces; they do not coincide, or rarely they do, with the ancient geo-political partition. The global *assemblages* seem, therefore, to confirm the dominant rationality: territory is a legal space that is no longer organized in a pyramidal way but it has been inserted into a generally *horizontal reticular organization*, though persistently *unequal* and *asymmetrical*. As a result, these sociological-juridical investigations, while not denying the epochal even radical changes, do challenge any depictions of the State as "withering" or "retreating". For instance, the persistence of the State is evident in jurist Francesco Galgano's statements; he argues that "It is true that the political initiative of the States has given rise to the well known worldwide economy government organizations, such as the International Monetary Fund, the World Trade Organization, the World Bank Group, the World Health Organization and many others. Owing to these entities, according to a recurring formula, States shall cease to be *uti singuli* sovereign, in order to remain *uti soci* sovereign. However, it is equally true that these organizations, the so-called Governmental Organisations, are no longer able to operate as true and effective supranational organizations; rather, they have proved to perform as means for implementing policies centered by States from time to time».[25]

An adapting law

Following what it has been reasoned so far, we can argue that in the *processes of global governance* traditional universal categories place themselves in some sort of continuity/discontinuity in contrast to the previous structures. Universals become *concrete* if you will, by abandoning the status of transcendence and pure logical statement, to be defined by actual practices of power relations. They therefore must endure relevant semantics twisting since they survive, taking on new outfits, the same contexts that had produced them. *Forms* do change, or rather, they *adapt* to new contexts which with great difficulties deal with the issue of order, unity, certainty and predictability: essential features of the formalistic sovereignist tradition centered on the repressive nature of the law.

Everything dissolves into a series of representations that are generated by the multiplicity of facets through which we can understand the otherwise unintelligible network of governance, thus revealing the impossibility of representing a complex and articulated reality solely by pre-established forms. It is therefore required a change of perspective that

25. F. Galgano, *La globalizzazione nello specchio del diritto*, Il Mulino, Bologna, 2005, p. 85.

enables us to rethink the whole concept in the first place and the relation between *law/norm*, and *normativity/normalization*. The *form* that modern constructivism represented as defined and coherent, but primarily transcending the empirical reality it was supposed to order takes the form of the *mode-of-life,* and becomes flexible and adherent to the contexts from which it emerges and to which it adapts, changing and adjusting them in turn.

This complexity of forms drives the political-legal theory to question whether or not decision-making processes can become immanent; this has more and more to do with the *pluralisation* and *heterogeneity* of the power centers, and the issue about *order* and *security* increasingly experienced in an dramatized way, and consequently, the problem of the use of force: issues which can be summarized into an obvious emergency of the factual and practical moment of the law. A vision of a world governed by a network of *bordless relations* and struggle would be too easy and irenic: it is important to recognize that the ability to cross governmental boundaries and create new ones finds moments of interruption and dispute – or even concrete conflict – where an undeniable presence of sovereign powers does exist, exercising coercion on migration flows and preventing their movement, or otherwise allowing the same conflict to be resolved legally. That conceptual claim of sovereignty to consider the political unity as a condition of possibility of the law is no longer maintainable: governmentality produces through its action movable *zones* of unity and coherence which can generate rules, though through a material and concrete, as well as temporary *negotiation of the forces*. The denationalized and transnational character of the economy, culture, politics, and therefore of social powers, on the other hand shows that there still are phenomena which the sovereign scheme allows us to identify, thereby confirming the *principle of compatibility of rationalities*.

It is about an overlap – a circle of "sovereignty-discipline-government" – that leads Aihwa Ong, in a work of critical deconstruction of sovereignty, to use what in the traditional lexicon would be an oxymoron: "*graduated sovereignty*".

Due to global capitalism – following vectors originating from external bodies of the State, but compromised with them – the national space, far from any final waning is re-articulated at multiple levels that are intertwined in a way that is neither hierarchical nor pyramidal. A same *sovereign space* is divided into special *zones* (according to specific government technologies of zoning[26]) which redefine their boundaries leaving

26. A. Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*, Duke University Press, Durham-London, 2006, in particular pp. 75-120; see also A. Ong, *Flexible Citizenship: the Cultural Logic of Transnationality*, Duke University Press, Durham-London, 1999.

them porous, flexible, but still separated and regulated differently, thereby drawing an unprecedented mode of both sovereignty and citizenship. The logics reshaping different zones are numerous, from *ethnicity* and *gender* to the more often prevailing of *profit*: access to labor market, taxation systems, health and safety standards, industrial relations, environmental policy, driven by the logic of the market, do vary adapting to contexts. The coordination of policies and regulatory actions with their interests differently organized from time to time leads to a fragmentation of the national space in non-contiguous areas, promoting differentiated regulations about populations. The effect that these *assemblages* produce locally will then reverberate globally: *graduated sovereignties* in fact do not respect boundaries, but may cross them arbitrarily, and erect new or even old ones, giving rise to *transnational networks.*

This is thus a new approach to sovereignty that starts by affirming practices of "*re-territorialisation*" according to legal rules and heterogeneous, seemingly incompatible, government techniques. So, *control* and *regulation* refer to practices and government techniques, in which there are strategies of resistance and counter-conduct, thus confirming the *inclusive/selective* nature of governmental rationality. Rather than in the West, this logic of course is better highlighted in the complex articulation of political-legal constellations of the southern-eastern Asian countries where neo-liberalism presents itself in the guise of *exception* and *exemption* from full legality: a logic indeed that fits also to the more particular and partial, targeted, specific and no longer general abstract interventions in the western countries. Here, administrative controls, citizenship, territoriality – once coalesced in the sovereign state – are dismembered, bringing out real sovereignties by intersection.

In the twentieth century legal theory lexicon, this process can be translated as the legal-formal positivism crisis, the normative and legal system-based conceptions, with the consequent affirmation of institutionalist organizational government conceptions which undermine the theoretical construct that had underlined the classical institutionalist theories: a formalistic and sovereign simplification in fact – we now may argue with no hesitation – cannot be exhaustive of all the phenomena we are now facing: these come into being through an endless dialectic between a reductive moment for unity and concentration, and a centrifugal, pluralistic, aggregating participation and power management moment.

The same form of *institution,* full of positivity and practicality loses its etymological connotation that had characterized it as a regulatory device capable of steadily regulating social relationships through a set of norms, values, stable and unreflective practices.

Institutions today – while still maintaining the concrete positivity of complex devices – take on an extraordinary flexibility and elasticity, thus supporting the rhythm of an unprecedented transformation. Institutions are to give up much of their normative and coercive force, increasingly showing their factual immanent genesis, as they lose that connotation once referred to the universal and general model about associates' behavior. This normative weakness, however, refers from a strictly legal standpoint to the not simple and never definitively solved question over the *proliferation and pluralization of legal systems*. One thing is for sure: such institutions testify the impossibility to confine the analysis to the *nexus* order/legal system and so, they undermine its traditional hierarchical pyramidal connotation. *Normativity* is as technical as formal, as factual as well as immanent, and once again it calls into question that governmental biopolitical attitude of self-regulation which originally was critically compared with the sovereign and abstract government, by opposing to it the need to be "*less governed*", of the *laissez faire. Governmentality* does not refer to government *over* lives; it is about *governing lives,* and therefore it corresponds to an incremental, productive logic which coexists with the repressive/sanctioning nature of modern law.[27]

Therefore, it is about modalities of the law which work in the name of that immanent and factual (horizontal) normativity, and highlight the connotation of the same standards in terms of power and practice, rather than in terms of obligations and sanctions, according to which the distinction between *lawful a*nd *unlawful* is remarkable. Participatory, so to speak, forms of law come into being; they express forms of *agency* which jettison *normativity* in the strict sense to unleash construction and decision-making processes from below.

Coercive practices, therefore, while persisting at nodal points where the same sovereignty still operates to control space and boundaries in the name of safety and security – give way to mediation and negotiation.[28] Such a shift in accent of the general system does not put an end to those practices of *resistance* prompted by forms of self-government and self-regulation that substantiate neo-liberal freedom: on the one hand, resistances hardly ever manifest themselves in the classic and modern form of antagonism, which leads to the typically coercive and sanctioning nature of these reactions, and to a more precise identification of the contenders in the conflict. On the other, they bring about practices that interpret *resistance* in terms of *subtraction to*

27. L. Bazzicalupo, *Biopolitica. Una mappa concettuale*, Carocci, Roma, 2010.
28. From a different perspective, R. Ellickson, *Order without Law: How Neighbours Settle Disputes,* Harvard University Press, Cambridge (Mass.) and London, 1991, in which the Author puts in perspective, well beyond the arguments of this essay, the imbalanced role of the law in favor of people's attitude to mediation and private negotiation.

governance arrangements; as some sort of *power repositioning* in the gaps left unfettered by the *molar* regulation as well as an attempt to elude the law.

Government techniques, in other words, do not rule out anyone in principle; rather they do include selectively according to criteria which may vary depending on the purposes for which the government action has been programmed. Obedience and good conduct are therefore, effects of *subjectivation* processes which can generate *submission* by *subjectivising,* addressing and steering their energies towards a compliant self-government. The issue about *rights* and *identities* results into forms of *aggregation* of individuals into groups (or *populations*) that share similar governmental features, and potentially capable of self-government. Surely, these implications of forms of discipline and control together with techniques of promptness and development can generate even more resistance and therefore, they define individuals and groups through deviations and differences that they know how to practice. The persistence of *citizenship* forms but also *identity* takes up a strategic profile, as if they were consolidated instruments to achieve concrete specific purposes, devices to be used in the real negotiation and transaction. Rather than simply formally, *subjects* are thus defined in accordance with residual categories of modernity such as *identity* and *citizenship*, at the crossroad, the intersection and overlap of *subjectivising* techniques (particularly, legal-formal or, even ethnicity-identity-based ones) alongside with *subordination.* In this alternation, or rather, compatibility of forms of mediation and negotiation, resistance and counter-conduct, lie *subjectivation processes* which go beyond and exploit the categories in which the sovereign paradigm has traditionally pigeonholed the *subject* (national, autonomous rights holder, subject, etc.) to place themselves in government strategies and struggle. Within these categories, *subjects* take on an ambivalent status, either as free or autonomous subjects, or they are submitted to dominant discursive practices which are modified and adapted to them time by time, according to their own particular forms of life.

It is thereby confirmed the relational, procedural, power-generative conception so central to Foucault's reflection that marks the coming away and repositioning from a purely top-down conception of power to a horizontal exception where individuals are both subject and vehicle of the same power:[29] "the disciplinary apparatus produces subjects, but as a consequence of that production, it brings into discourse the conditions for subverting that apparatus itself."[30]

29. M. Foucault, *Histoire de la sexualité, I. La volonté de savoir,* Gallimard, Paris, 1976.
30. J. Butler, *The Psychic Life of Power: Theories in Subjection*, Stanford University Press, Stanford (California), 1997, p. 100.

All this, however may inevitably result in defining *inclusion* as *integration* and *assimilation* to a formal and abstract subject: a democratic political actor, according to the criteria and rules of the Western democratic tradition where conflict and antagonism are absorbed by cosmopolitan democratic procedures.[31]

Conversely, it can be difficult to accept that the bastions of our democratic culture are subject to legal forms of *bargaining*, but one needs to be aware of this, perhaps by signaling the emerging risks. Therefore, we must first try to understand how the *subject*, rather than *being* and *defining* itself in some pre-established way in respect of policy, it is given and identifies itself with – it connotes itself as – a political *subjectivity*, while remaining immersed in the social through forms of concrete special, contingent *agency:* thus no longer the subject and its universal rights, but the person who, involved in political and social practices – as H. Arendt suggests – does claim these rights by herself and use them in some way. One needs, therefore, to look at the practices of citizenship, in terms of the "politics of the governed."[32] In other words, one must refer to concrete forms – sub-political and intergovernmental – of resistance and mediation of those excluded or assimilated, by taking up alternative though complementary routes with respect to the dominant discourses of truth. An operation that is well evidenced, for instance, within a process aimed at "reformulating the question about colonialism",[33] by those who, in the light of the governmental technologies emphasize the constitutive heterogeneity of the global space as a temporary and unstable product of a complex process, with the obvious consequence of the emergence of stories and subjectivities *"other"* than the homogeneous and complying story of the nation state, seen that "if with sovereignty, the relation between ruler and ruled is such that power reaches out like an extension of the arm of the prince himself, announcing itself periodically with unambiguous ceremony, with government, governor and governed are thrown into a new and different relation, one that is the product not merely of the expanded capacity of the State apparatus but of the emergence of a new field for producing effects of power – the new, self-regulating field of the social":[34] an area which is affected by individuals, groups and heterogeneous populations, in no way related to the uniform homogeneous forms and limits that characterized the system of the Rule of Law, of rights and citizenship.

31. In this sense, S. Benhabib, *The Rights of Others,* Cambridge University Press, Cambridge, 2004 and see, *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations,* Oxford University Press, Oxford, 2006.
32. P. Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World*, Columbia University Press, New York, 2004.
33. D. Scott, *Colonial Governmentality*, in J. X. Inda (ed.), *Anthropology of Modernity*, p. 23.
34. Ibid., pp. 33-34.

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SOFT LAW Y LA TEORÍA DE LAS FUENTES DEL DERECHO

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Resumen

El *soft law* hace referencia a reglas de conducta que en principio no tienen fuerza jurídica vinculante, aunque produzcan efectos prácticos. El artículo investiga esta noción a la luz de la relación entre fuentes del derecho e interpretación. El *soft law* hace referencia a una serie de fenómenos relacionados a la positivización jurídica y a las prácticas interpretativas en el ámbito del derecho internacional, derecho de la UE y derecho nacional. El *soft law* desempeña distintas funciones que coexisten con el sistema de *hard law*. El *soft law* juega un papel en el ordenamiento jurídico que muestra la gradual diferenciación de su normatividad.

Palabras clave

Soft law, interpretación, fuentes del derecho, normatividad, técnicas de regulación

Abstract

Soft law concerns rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects. The article examines this notion in the light of the relationship between legal sources and interpretation. Soft law refers to a range of phenomena related to legal positivization and interpretative practices in the field of international law, EU law and national law. Soft law performs various functions, traveling in tandem with hard law. Soft law plays a role in legal order, which shows a gradual differentiation of its normativity.

Keywords
Soft law, interpretation, legal sources, normativity, techniques of regulation

Los usos de *soft law*

El sintagma *soft law* se utiliza para indicar una serie de actos no homogéneos en cuanto a su origen y naturaleza que, aunque aparentemente sin efectos jurídicos vinculantes, resultan ellos mismos jurídicamente relevantes en distintas maneras.

Se trata de una noción eminentemente doctrinal[1] de la cual se conocen muchos ejemplos en el actual panorama jurídico, caracterizado por un enorme pluralismo y un considerable nivel de complejidad.

En el ámbito internacional, en la categoría de *soft law* se recogen declaraciones de principios de las Naciones Unidas, junto con resoluciones, exhortaciones, votos y apelaciones. También se incluyen normas convencionales, *non-binding agreements*, resoluciones, recomendaciones y declaraciones de principios de organizaciones o conferencias internacionales con valor meramente exhortatorio y no obligatorio, de orientación o programáticos,[2] que encarnan nuevas exigencias de reglamentación; así como aquellas normas que, por ser parte de acuerdos aun no entrados en vigencia o finalizados, no tienen efectos jurídicos.[3] Si a continuación lo consideramos dentro de la estructura de las fuentes del derecho internacional, el *soft law* hace referencia a todos aquellos actos y procedimientos que se quedan fuera del marco indicado por el Art. 38 del Estatuto de la Corte Internacional de Justicia. La noción, por lo tanto, nos remitiría a elementos normativos sin valor de vinculación que, aunque no produzcan por sí solos algún derecho ni obligación, pueden determinar algunos efectos jurídicos y transformarse, a través del uso de los órganos competentes, en derecho inmediatamente preceptivo.[4] En este sentido, el *soft law* juega un papel en la formación de las normas generales y, de manera

1. R. R. Baxter, "International Law in 'Her Infinite Variety'", en *The International and Comparative Law Quarterly*, 29, 1980, pp. 549-566; O. Elias–C. Lim, "'General Principles of Law', 'Soft' Law and the Identification of International Law", en *Netherlands Yearbook of International Law*, 28, 1997, pp. 4-7, 45-49; A. Poggi, "*Soft Law* nell'ordinamento comunitario", en *Annuario 2005. L'integrazione dei sistemi costituzionali europeo e nazionali*, Cedam, Padova, 2007, pp. 372-380.
2. Cfr. M. Distefano, "Origini e funzioni del *soft law* in diritto internazionale", en *Lavoro e diritto*, 17, n. 1, 2003, pp. 18-26.
3. H. Hillgenberg, "A Fresh Look at Soft Law", en *European Journal of International Law*, 10, n. 3, 1999, pp. 499-515.
4. El soft law puede configurarse como elemento de reconocimiento de una costumbre o de un principio general, como instrumento preparatorio de un tratado internacional, como medio interpretativo o integrativo de normas. Véase M. Distefano, "Origini e funzioni del soft law in diritto internazionale", pp. 20, 26-29.

más general, en la elaboración de *standards* uniformes (por ejemplo, la defensa de los derechos humanos y la protección del medioambiente) que reflejan el interés general de la comunidad mundial dentro de su lenta y difícil evolución hacia una cooperación institucional activa.[5] En este escenario, el uso del *soft law* representa un modo fluido y flexible por parte de los Estados, firmes tutores de sus esferas de soberanía, para hacer frente a la defensa de sus intereses particulares junto con la imposibilidad de adoptar una regulación vinculante y universal. Tal derecho parece caracterizarse como un orden de normativa graduada,[6] apto para acoger las contribuciones de los distintos sujetos presentes en la escena global y las múltiples formas de presencia jurídica que estos manifiestan, respondiendo dinámicamente a una situación de constante desarrollo.[7]

El uso de formas de *soft law* juega un papel no secundario en la construcción de un derecho uniforme a nivel transnacional. Un ejemplo relevante consiste en el uso de los principios *Unidroit* como directrices que orientan la praxis comercial.[8] Tales principios pueden considerarse como elementos para la redacción de contratos comerciales internacionales, como normas regulatorias de estas relaciones, como criterios aplicables en la resolución de eventuales controversias por parte de los jueces estatales y árbitros, como estándares para la interpretación o la integración jurídica y como fuentes de inspiración para la codificaciones nacionales e internacionales. El hecho de que los principios *Unidroit* no estén destinados a convertirse en un instrumento vinculante, aunque sean aceptados por los operadores del derecho y la comunidad de juristas únicamente por su capacidad de persuasión, hace que se adapten muy bien a las condiciones variables del comercio internacional y que desempeñen una importante función ordinativa.

Otro ejemplo de ductilidad jurídica es el de los *Principles of European Contract Law*. En este caso se trata de criterios ordenantes utilizables por los sujetos que estipulan

5. B. Pastore, "Il diritto internazionale in un mondo in trasformazione: verso un diritto giurisprudenziale?", en *Ars Interpretandi*, 6, 2001, pp. 158-163; F. Francioni, "International 'Soft Law': A Contemporary Assesment", en V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, Cambridge University Press, Cambridge, 1996, pp. 167-178; D. Thürer, "Soft Law", en *Encyclopedia of Public International Law*, vol. 4, Elsevier, Amsterdam-London-New York-Oxford-Paris-Shannon-Tokio, 2000, pp. 452-460; J.J. Kirton, M.J. Trebilcock (eds.), *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance*, Ashgate Publishing Company, Aldershot, 2004.

6. P. Weil, "Towards Relative Normativity in International Law?", en *The American Journal of International Law*, 77, 1983, pp. 413-415; U. Fastenrath, "Relative Normativity in International Law", en *European Journal of International Law*, 4, 1993, pp. 330-332.

7. K. W. Abbott – D. Snidal, "Hard and Soft Law in International Governance", en *International Organization*, 54, n. 3, 2000, pp. 421-424, 454-455; D. Shelton, "Introduction. Law, Non-Law and the Problem of Soft Law", en D. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford-New York, 2003, pp. 1-18.

8. M. J. Bonell, "Soft Law and Party Autonomy: The Case of the Unidroit Principles", en *Loyola Law Review*, 51, 2005, pp. 229 ss.

contratos, por los jueces y árbitros en decisiones sobre las controversias contractuales y por los legisladores que preparan reglas contractuales tanto a nivel europeo como a nivel nacional. Además, no hay que subestimar el objetivo – a largo plazo – que aspira a la armonización del derecho contractual dentro del ordenamiento europeo.

El *soft law* se usa cada vez más en la Unión Europea. En este caso también nos referimos a reglas de conducta que, en principio, no tienen una fuerza jurídicamente vinculante y que, sin embargo, pueden producir efectos prácticos.[9] Un ejemplo significativo son las recomendaciones de la Comisión y del Consejo que, marcando las directrices, pueden referirse a amplias áreas de estrategia política dentro del marco de la coordinación de las relaciones entre los Estados "europeizados" y del balance entre unidad y diversidad. Además, no hay que olvidarse de los códigos de conducta, los libros verdes y libros blancos, las acciones de programa, las comunicaciones, las resoluciones, las orientaciones, las declaraciones, los consejos y las instrucciones que operan en la praxis de las instituciones comunitarias y dentro del contexto de sus interrelaciones.[10] A veces se trata de indicaciones que pueden ser transformadas en *hard law* a través de decisiones judiciales, administrativas o legislativas.[11]

En líneas generales, los actos atribuibles a tal fenómeno se pueden clasificar en tres funciones:[12] la de *pre-law*, relativa a los instrumentos preparatorios de actos jurídicos vinculantes;[13] la función de *post-law,* de la cual forman parte los instrumentos de interpretación, implementación y actuación de actos vinculantes;[14] y la función *para-law* que hace referencia a instrumentos alternativos a actos vinculantes.[15]

En cualquier caso, dentro del ordenamiento de la Unión Europea, la falta de vinculación de los actos de *soft law* no implica que estos no tengan efecto sobre la conducta de los Estados miembros, instituciones e individuos, aunque sea de un modo atenuado con respecto a los que habitualmente están relacionados con normas jurídicas vinculantes. Podemos destacar aquí una cuestión central para cualquier consideración sobre el papel que desempeña esta forma de regulación: es decir, la relación entre legalidad, legitimidad

9. F. Snyder, "«Soft law» e prassi istituzionale nella Comunità europea", en *Sociologia del diritto*, 20, n. 1, 1993, p. 80.
10. K. C Wellens – G. M. Borchardt, "Soft Law in European Community Law", en *European Law Review*, 14, 1989, pp. 289, 296-302; L. Senden, *Soft Law in European Community Law*, Hart Publishing, Oxford and Portland (Oregon), 2004, pp. 107 ss., 118 ss., 123 ss.; A. Poggi, "*Soft Law* nell'ordinamento comunitario", pp. 394-400.
11. L. Senden, *Soft Law in European Community Law*, pp. 119-120, 321 ss., 361 ss., 401 ss., 457-461; F. Snyder, "*«Soft law» e prassi istituzionale nella Comunità europea*", pp. 97-101.
12. L. Senden, *Soft Law in European Community Law*, pp. 118-120, 122 ss.
13. Se trata, típicamente, de los libros blanco y los libros verdes.
14. Nos enfrentamos, en estos casos, con directrices, códigos de conducta, comunicaciones interpretativas.
15. Un ejemplo son las recomendaciones, los consejos, las comunicaciones no interpretativas, que se ponen como actos alternativos a la legislación. De todas formas, hay que destacar que las recomendaciones desempeñan una función *pre-law* y *post-law*.

y eficacia[16] que remite a la práctica de reconocimiento y al consenso de los sujetos implicados.[17] Se perfila así una idea de derecho que no depende solo del reconocimiento formal/procedural, sino también de su capacidad de ser efectivo, es decir respetado por los ciudadanos y aplicado por los órganos institucionales.

De todos modos, en el ámbito del derecho de la UE, el uso del *soft law* adquiere un carácter principalmente funcional, coherentemente con los rasgos característicos de este ordenamiento, en el cual las herramientas jurídicas vehiculan primariamente las políticas adoptadas con objetivos específicos y en determinados sectores. El *soft law* es un instrumento de regulación entre instituciones, en ausencia de definiciones constitucionales precisas de los límites y de los ámbitos de competencia.[18] Realiza una labor de unificación, armonización, coordinación y cooperación[19] y se caracteriza como instrumento de *governance.*[20]

La técnica del *soft law* presenta algunos rasgos típicos: tendencia a regular a través de principios, con preceptos formulados con carácter persuasivo; creación de procedimientos estables para supervisar los fenómenos regulados; implicación de múltiples actores que operan en ámbitos y a niveles distintos. Otro aspecto específico del *soft law* europeo-comunitario es el hecho de que está sometido, de alguna manera, a un control de legalidad ejercido por el Tribunal de Justicia de la Unión Europea.[21]

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16. Cfr. F. Snyder, "'Soft law' e prassi istituzionale nella Comunità europea", p. 103; U. Mörth, "Conclusion", en Id. (ed.), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis*, Edward Elgar, Cheltenham (UK) – Northampton (Mass., USA), 2004, pp. 196-199.

17. L. Senden, *Soft Law in European Community Law*, pp. 477-483; H. Frykman–U. Mörth, "Soft Law and Three Notions of Democracy: The Case of the EU", in U. Mörth (ed.), *Soft Law in Governance and Regulation. An Interdiscipinary Analysis*, pp. 155-170; A. Catania, *Metamorfosi del diritto. Decisione e norma nell'età globale*, Laterza, Roma-Bari, 2008, pp. 13, 99-100, 148-149.

18. Cfr. B. Caruso, "Il diritto del lavoro tra hard e soft law: nuove funzioni e nuove tecniche normative", en M. Barbera (ed.), *Nuove forme di regolazione. Il metodo aperto di coordinamento delle politiche sociali*, Giuffré, Milano, 2006, pp. 85-86.

19. A. Poggi, "*Soft Law* nell'ordinamento comunitario", pp. 393-394, 401; G. Falkner, O. Treib, M. Hartlapp, S. Leiber, *Complying with Europe. EU Harmonisation and Soft Law in the Member States*, Cambridge University Press, Cambridge-New York, 2005.

20. Cfr. M. Cini, "The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime", en *Journal of European Public Policy*, 8, n. 2, 2001, pp. 192-207; K. Jacobsson, "Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy", in *Journal of European Social Policy*, 14, 2004, pp. 355-370; F. Bano, "Diritto del lavoro e nuove tecniche di regolazione: il *soft law*", in *Lavoro e diritto*, 17, n. 1, 2003, pp. 50-52, 56, 58-59, 66; R. Manfrellotti, *Sistema delle fonti e indirizzo politico nelle dinamiche dell'integrazione europea*, Giappichelli, Torino, 2004 pp. 192-199; E. Pariotti, *Normatività giuridica e* governance *delle tecnologie emergenti*, en G. Guerra, A. Muratorio, E. Pariotti, M. Piccinni, D. Ruggiu (eds.), *Forme di responsabilità, regolazione e nanotecnologie*, Il Mulino, Bologna, 2011, pp. 524-531.
La relación entre *soft law* y *governance* se analiza desde el punto de vista jurídico, sociológico y político, en relación a la Unión Europea y a nivel de las organizaciones internacionales, en U. Mörth (ed.), *Soft Law in Governance and Regulation. An Interdiscipinary Analysis*. Una fuerte crítica a la difusión del *soft law* como instrumento de *governance* en área europeo-comunitaria es propuesta por A. Somma, "*Soft law sed law*. Diritto morbido e neocorporativismo nella costruzione dell'Europa dei mercati e nella distruzione dell'Europa dei diritti", en *Rivista critica del diritto privato*, 26, n. 3, 2008, pp. 437-467.

21. F. Bano, "Diritto del lavoro e nuove tecniche di regolazione: il *soft law*", p. 53; B. Caruso, "Il diritto del lavoro tra hard e soft law: nuove funzioni e nuove tecniche normative", pp. 87- 89. Sobre el papel del soft law en la interpretación del

El *soft law* está presente también en los ordenamientos nacionales. En este ámbito, de hecho, los fenómenos que necesitan cumplir con la necesidad de flexibilidad y articulación de la intervención regulativa son varios. Se trata de experiencias relacionadas con la difusión de organismos como autoridades administrativas independientes y comisiones éticas, designadas para establecer y hacer respectar las reglas deontológicas y comportamentales de determinadas profesiones o actividades. Estos sujetos operan principalmente a través de la formulación de consejos, directivas y recomendaciones que, aunque no produzcan efectos jurídicos y prescindan de una estricta disciplina vinculante, mantienen una relevancia en el mundo jurídico.[22] Asimismo, estos fenómenos están relacionados con la definición de aquellas formas de autodeterminación normativa que necesitan de disciplinas ligeras, elásticas y flexibles como respuesta a la complejidad del orden social.[23] Las "normas ligeras" se utilizan también en algunos sectores de ordenación vigente para orientar la actividad de los destinatarios hacia un objetivo, sin necesidad de imponer un determinado comportamiento.[24]

Estos fenómenos indican un cambio en el modelo de regulación: no tan orientado hacia normas rígidas, impuestas a los ciudadanos en general y basadas en circunstancias analíticas, sino más bien enfocado a la necesidad del proceso normativo de adaptarse a las dinámicas sociales, económicas y tecnológicas en constante mutación. Estos cambios también nos llevan a un modelo más idóneo que tenga en cuenta los diferentes intereses en juego con el fin de orientar el comportamiento de los sujetos, sin obligarle a ninguno en concreto.

De este modo, la elasticidad y la versatilidad de las herramientas jurídicas, así como los mecanismos de verificación de su actuación, permiten cumplir funciones distintas: de orientación, de información y comunicación, de socialización hacia las finalidades y los valores de las reglas y del proceso de interpretación de las mismas.[25] Al mismo tiempo, estas características permiten conciliar la intervención normativa con la múltiples manifestaciones de pluralismo de las sociedades actuales, impidiendo que el derecho represente un factor de rigidez.

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derecho comunitario y sobre su reconocimiento por parte de la Corte de Justicia, véase L. Senden, *Soft Law in European Community Law*, pp. 363-373; A. Poggi, "*Soft Law* nell'ordinamento comunitario", pp. 380-393; I. Österdahl, "The ECJ and Soft Law: Who's Afraid of the EU Fundamental Rights Charter?", en U. Mörth (ed.), *Soft Law in Governance and Regulation. An Interdiscipinary Analysis*, pp. 37-60.

22. A. Predieri, *L'erompere delle autorità amministrative indipendenti*, Passigli Editori, Firenze-Antella, 1997, pp. 61, 66-67.

23. S. Rodotà, *Repertorio di fine secolo*, Laterza, Roma-Bari, 1999, pp. 170-172; S. Rodotà, "Diritto, scienza, tecnologia: modelli e scelte di regolamentazione", en *Rivista critica del diritto privato*, 22, n. 3, 2004, pp. 362, 272-373.

24. F. Bano, "Diritto del lavoro e nuove tecniche di regolazione: il *soft law*", pp. 70-72; E. Mostacci, *La* soft law *nel sistema delle fonti: uno studio comparato*, Cedam, Padova, 2008, pp. 113-125.

25. M. R. Ferrarese, "*Soft law*: funzioni e definizioni", en A. Somma (ed.), Soft law *e* hard law *nelle società postmoderne*, Giappichelli, Torino, 2009, pp. 80-82.

La disciplina jurídica, dentro de un contexto caracterizado por la convivencia y el concurso de varias fuentes y múltiples sujetos reguladores, intenta ofrecer respuestas diversificadas, adaptándose a las distintas dinámicas sociales. El derecho adquiere así fórmulas expresivas más fluidas.

En un panorama caracterizado por la relativización del principio de tipicidad de las formas y de las fuerzas normativas, así como por la creciente variedad de las reglas jurídicas, se encuentra, con sus muchos aspectos, el *soft law*, que representa uno de los factores que hoy en día permite la creación de la normativa jurídica y de su "reconceptualización".[26]

Normativa graduada

La heterogeneidad parece ser un rasgo peculiar del *soft law*, que manifiesta la complejidad de la dimensión jurídica. El derecho puede ser *soft* con respecto a su autoridad, su contenido y su eficacia, pero también puede serlo como expresión de una juridicidad en estado incoativo.

La combinación de una limitada capacidad de autoridad con un nivel variable de efectividad y relevancia jurídica ha llevado a suponer que el *soft law* se quede casi fuera de los limites de las que se consideran las "verdaderas" fuentes del derecho. La noción remitiría a "actos no-normativos de valor sub-legal", a normas de contenido impreciso y con finalidad indefinida, a un derecho débilmente obligatorio, aunque a veces con una fuerza persuasiva la cuya juridicidad resulta ambigua y subestimada.[27] Según este principio, siendo la capacidad de vincular y coercer rasgos típicos del derecho, estas reglas elásticas, que insisten en la persuasión más que en la obligatoriedad y se caracterizan por una obediencia prevalentemente voluntaria, no serían reglas jurídicas.[28] Sin embargo, semejantes reglas tienen su aplicación, convirtiéndose en eficaces, y funcionan como razones que tienen su papel en la justificación de las decisiones.[29] De distintas maneras y a través del uso y del reconocimiento, árbitros, jueces, agencias

26. E. Pariotti, "«Soft law» e ordine giuridico ultra-statuale tra «rule of law» e democrazia", en *Ragion pratica*, 32, 2009, pp. 88, 102.
27. J. Klabbers, "The Undesirability of Soft Law", en *Nordic Journal of International Law*, 67, 1998, pp. 381-391; J. d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials", en *The European Journal of International Law*, 19, 2008, pp. 1075-1093.
28. S. Ferreri, "Tipologia", en A. Pizzorusso, S. Ferreri, *Le fonti del diritto italiano.* 1. *Le fonti scritte*, con la colaboración de A. Gambaro e R. Sacco, Utet, Torino, 1998, pp. 299-301.
29. Cfr., en generale, B. Leiter, "Legal Indeterminacy", en *Legal Theory*, 1, 1995, pp. 481-485, 489 ss.; G. Itzcovich, *Teorie e ideologie del diritto comunitario*, Giappichelli, Torino, 2006, pp. 26-31, 429-430.

administrativas, legisladores y otros actores del "juego" jurídico trasforman criterios no vinculantes en normas definidas, según la exigencias prácticas y la peculiaridad del comportamiento que hay que disciplinar.[30]

Tal vez, se podría hablar de exclusividad del *soft law*. Sin embargo, el carácter evasivo de la noción, bajo esta perspectiva, no parece una razón determinante para minimizar la función que un derecho elástico, desvinculado de la rigidez de la ley y sometido a la praxis interpretativa y aplicativa, puede desempeñar.[31]

En el escenario actual, el derecho tiende a marcar sus valores interactivos y comunicativos. Eso lo convierte en un producto abierto en muchos ámbitos, según una lógica de la posibilidad y de la oportunidad, más que por una vinculación o una sanción. Esta dinámica, expresión de la crisis actual del monopolio estatal (más especificadamente legislativo) de la producción jurídica, con la consiguiente incertidumbre de la jerarquía de las fuentes, se ve agravada por los procesos de la globalización.[32] Tales procesos celebran el triunfo del mercado sobre la política, enseñando la cara de la arrogancia del poder político, y establecen relaciones multiformes y dialécticas entre los distintos productores del derecho (públicos y privados; estatales, supraestatales e infraestatales) y entre las componentes formales e informales. De esta manera, el derecho pierde sus connotaciones *hard*, propias de la tradición estatalista, que tiene como rasgos característicos el nexo exclusivo con la soberanía, la verticalidad de la estructura y una configuración de tipo normativo.[33]

La primacía del derecho legislativo está erosionada.[34] La ley se configura cada vez menos como expresión jurídica "exhaustiva". La crisis de la legislación afecta cada vez más a sus métodos de intervención en la sociedad, que parecen demasiado rígidos e incapaces de seguir caminos más articulados y complejos. Por lo tanto, es necesario extender el espectro de acción del concepto de derecho, librándole de la referencia obligada a una estructura típica que remite al modelo de autoridad. La fuente legislativa resulta contaminada por nuevas formas jurídicas, que prescinden de valores estrictamente preceptivos.[35]

30. Resulta emblemática, en relación al uso de actos sin efectos jurídicos vinculantes que operan como instrumentos interpretativos y/o integrativos de actos vinculantes, la sentencia *Salvatore Grimaldi contra Fonds de maladies professionnelles* del Tribunal de Justicia de la Comunidad Europea (proceso C-322/88) del 13 de diciembre del 1989, en *Raccolta della Giurisprudenza della Corte*, 1989, pp. 4407-4422. Véase también, en relación al derecho italiano, la sentencia del 16 de octubre del 2007 n. 21748 de la *Corte di Cassazione, sezione I civile*, en "Il Foro Italiano", CXXX, 2007, c. 3025 ss.
31. B. Pastore, "*Soft law*, gradi di normatività, teoria delle fonti", en *Lavoro e diritto*, 17, n. 1, 2003, pp. 9-11.
32. A. Catania, *Metamorfosi del diritto*, pp. 25, 34, 83, 147, 150; M. Vogliotti, *Tra fatto e diritto. Oltre la modernità giuridica*, Giappichelli, Torino, 2007, pp. 272-280; G. Zaccaria, *La comprensione del diritto*, Laterza, Roma-Bari, 2012, pp. 48-58.
33. M. R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni*, Il Mulino, Bologna, 2002, pp. 147, 193-194; A. di Robilant, "Genealogies of Soft Law", en *The American Journal of Comparative Law*, 54, 2006, pp. 499-501.
34. Cfr. G. Zaccaria, *La comprensione del diritto*, pp. 31-34, 40 ss.
35. M. R. Ferrarese, *Il diritto al presente*, pp. 72, 136-137.

El sistema de las fuentes se desestructura y se aniquila.[36] Las fuentes de multiplican y se diferencian; se difunden en un contexto abigarrado y mudable; tienden a evitar un orden rígido y jerárquico, piramidal, buscando coordinaciones de tipo reticular.[37] A la debilidad de la capacidad regulatoria de la legislación corresponde la creciente relevancia de las herramientas jurídicas *soft*, suaves, "fluidas", capaces de adaptarse a contextos diferentes y de influenciar las estructuras presentes y futuras, abiertas a aportaciones y contribuciones que llegarán *in itinere.*[38]

De esta manera, en un universo jurídico repleto y heterogéneo – que muestra las características de una estructura multipolar, de tipo horizontal y modelo "de red", más que de tipo vertical y piramidal – la "suavidad" bien expresa la imagen de una normativa que, de alguna manera, se aleja de la obligación impositiva y sancionatoria, presentándose como un tejido de malla ancha que se deja penetrar e integrar por las opciones de los distintos jurídicos.[39] Se amplía el concepto de regulación respecto a la vinculación, la determinación y la competencia normativa.[40] Eso no quiere decir que la red no tenga nudos, "núcleos duros", puntos de rigidez, elementos caracterizados por una normativa "fuerte".[41] La Constitución, junto con los derechos fundamentales, la legislación de distintos sectores de ordenamiento, las normas internacionales y supranacionales aplicadas, las reglas de procedimiento y las sentencias judiciales constituyen las partes resistentes de la estructura jurídica. Estas coexisten con las partes "elásticas", de manera que los sistemas jurídicos tienden a configurarse como conjuntos complejos que presentan, al mismo tiempo, niveles de *hard law* con fuerte vinculación y niveles de *soft law* con una flexibilidad y necesidades difíciles de encerrar en esquemas demasiados rígidos.[42] En contextos jurídicos caracterizados por pluralismo normativo, policentrismo, comunicación osmótica e hibridación entre ordenamientos, la regulación *hard* y *soft* se utilizan teniendo en cuenta la particularidad de las situaciones, reflejando una compleja articulación de las teoría de las fuentes.[43] El derecho se genera a partir de una variedad

36. F. Ost, M. van de Kerchove, *Le système juridique entre ordre et désordre*, Presses Universitaires de France, París, 1988, pp. 105-111.
37. F. Ost, M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit,* Publications des Facultés Universitaires Saint-Louis, Bruxelles, 2002, pp. 43 ss., 49 ss.
38. M. R. Ferrarese, *Il diritto al presente*, pp. 150, 176.
39. Ibíd., pp. 199-200; A. Catania, *Metamorfosi del diritto*, p. 59.
40. Cfr. C. Scott, "Regolazione gerarchica, pluralismo giuridico e *Rule of Law*", en *Ars Interpretandi*, 11, 2006, pp. 115-116.
41. Sobre la coexistencia y complementariedad entre modelo piramidal y modelo reticular, véase M.G. Losano, "Diritto turbolento. Alla ricerca di nuovi paradigmi nei rapporti fra diritti nazionali e normative sovrastatali", en *Rivista internazionale di filosofia del diritto*, 82, n. 3, 2005, pp. 425-429.
42. U. Mörth, "Conclusion", pp. 191-193; L. Senden, *Soft Law in European Community Law*, pp. 397-398.
43. Di Robilant, "Genealogies of Soft Law", pp. 504 ss., 545 ss.

de tipos de reglas, caracterizadas por diferentes grados de "dureza",[44] configurándose como un mosaico dinámico formado por múltiples piezas, a través de un continuo proceso de interacción entre los distintos elementos que lo componen.[45]

El derecho, como esfera peculiar del discurso normativo, se ha siempre remitido a varias tipologías de normas con el objetivo de influenciar el comportamiento y estas normas han sido diferenciadas según sus distintos grados de intensidad prescriptiva.[46] En el ámbito de la experiencia jurídica, por lo tanto, la presencia de normas con diferente fuerza de obligación es bastante habitual. El mundo del derecho lo ocupan mandamientos, prohibiciones, órdenes, intimaciones, preceptos, instrucciones, directivas, recomendaciones, consejos, opiniones, avisos, admoniciones, advertencias, propuestas, peticiones, intimaciones, instancias, etc. La distinción entre normas con obligaciones, que por lo tanto tienen una influencia más fuerte y normas sin obligaciones, menos condicionantes, es muy común. Se puede así afirmar que la gradación de niveles de vinculación, que se refiere a la distinción entre *soft* y *hard law*, no es un concepto nuevo.

El proceso de formulación de los actos de *soft law* no define en sí sus características distintivas y salientes. Sin embargo, es oportuno distinguir, según la estructura sintáctica, dos tipos de normas: las incondicionadas y las condicionadas (que a su vez se componen de una prótasis, la parte del enunciado que determina la condición y una apódosis, la parte que determina la consecuencia). Por lo tanto, es posible clasificar las disposiciones de *soft law* como enunciados que no presentan formulación condicional. De hecho, tal estructura es común a muchas normas que pretenden orientar el comportamiento humano. Los principios, por ejemplo, son normas incondicionadas (sin casos jurídicos) y/o no remiten a ninguna estructura lógica por la cual una consecuencia jurídica se conecta a un caso condicionante (normas con caso jurídico abierto). Además, tienen un lenguaje optativo o evaluativo; indican un objetivo por conseguir;[47] afirman una razón que dirige hacia una dirección. También, no hay que olvidarse que la mayoría de las veces los actos de *soft law* enuncian declaraciones de principio. El mismo discurso vale para los *standards*, como las políticas (*policies*) que se refieren a bienes colectivos e indican un objetivo por conseguir, respecto a una mejora de algún aspecto – económico político y social – de la vida de la comunidad.[48]

44. C. Scott, "Regolazione gerarchica, pluralismo giuridico e *Rule of Law*", pp. 109 ss.,116-117, 140-141.
45. M. R. Ferrarese, "Mercati e globalizzazione. Gli incerti cammini del diritto", en *Politica del diritto*, 29, n. 3, 1998, p. 410.
46. N. Bobbio, *Contributi ad un dizionario giuridico*, Giappichelli, Torino, 1994, pp. 188-195, 227-230.
47. R. Guastini, *Teoria e dogmatica delle fonti*, Giuffrè, Milano, 1998, pp. 275, 279, 281-282.
48. R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge (Mass.), 1978, pp. 22-23.

También desde el punto de vista de la forma lingüística y de la estructura lógica del enunciado, el *soft law* no constituye una novedad. En cambio, eso confirma la idea de que los materiales que forman el universo jurídico, y que contribuyen de distintas maneras a determinar los procesos de positivización, son muchos más articulados y complejos con respecto al modelo simplista de la dogmática jurídica. Parece entonces más interesante, desde el punto de vista de la teoría del derecho, dirigirse hacia otras direcciones que permitan captar el valor y la peculiaridad del *soft law* y de su manera de operar en los actuales contextos jurídicos. Tales direcciones llevan al punto en el cual las fuentes del derecho se cruzan con la interpretación y demuestran como la misma individuación de las fuentes sea el fruto de una actividad interpretativa que se desarrolla dentro de la praxis jurídica.

Fuentes y prácticas interpretativas

El *soft law* refleja enteramente esta perspectiva plural que caracteriza cada vez más a los sistemas jurídicos. Está típicamente constituido por textos de distinto origen que registran una variedad de léxicos particulares, con lenguajes específicos y formas expresivas propias,[49] según los diferentes contextos de la vida social. Tales textos, generalmente producidos a través de esquemas de procedimiento, se consideran en cierto modo jurídicos porque, por su unidad de sentido, forman parte de aquella praxis que definimos como "derecho".

La elasticidad, la flexibilidad y la indeterminación de los contenidos y de los objetivos de los actos del *soft law* están relacionados tanto con las condiciones de aplicación como con el código de conducta prescrito. Sin duda, el *soft law* en sus múltiples y diferentes manifestaciones, en calidad de derecho escrito no obligatorio *prima facie*, prescribe algo aunque de forma atenuada, pero no pueden considerarse como normas que se refieren a casos jurídicos concretos. Los actos del *soft law* recomiendan un objetivo, indican una disposición que hay que adoptar, un programa al cual atenerse, un aspecto que hay que considerar y un valor que reclama atención. Establecen, en resumen, una orientación que constitutivamente presenta la forma del "más o menos" y requiere una gradualidad en el proceso de realización, influyendo en la producción normativa.

49. F. Viola, G. Zaccaria, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Laterza, Roma-Bari, 2001, pp. 278-281.

El *soft law,* por lo tanto, forma parte del *corpus* normativo y participa en el proceso de positivización. Es una fuente del derecho, puesto que de alguna forma se le considera capaz de generar reglas jurídicas.

De las "fuentes del derecho" tenemos una noción material y una formal. Según la noción "material", el sintagma se define como cada acto o hecho que produzca derecho. A la luz de esta definición, para saber si un determinado acto o hecho sea una fuente del derecho, es necesario identificar su contenido (si es un acto) o su resultado (si es un hecho). Según la noción "formal", el sintagma define cada acto o hecho no como efectivo productor de normas, sino como *autorizado* a producir normas, independientemente de su contenido (si es un acto) o resultado (si es un hecho). De esto se deduce que, para saber si un acto o hecho es fuente del derecho, hay que mirar si en el ordenamiento en cuestión existe alguna norma (en particular una norma sobre la producción jurídica) que autoriza el acto o el hecho a producir derecho.[50] Ahora bien, a la vista del panorama jurídico actual, que se puede describir como una red en la cual interactúan todas las normas (de distinta proveniencia), se puede afirmar que resulta superada la distinción entre fuente en el sentido material y fuente en el sentido formal (por otra parte útil para objetivos analíticos). Nos encontramos delante de la imposibilidad de reconducir el sistema de las fuentes a enumeraciones esquemáticas, basada por ejemplo en el *nomen juris* y/o en el procedimiento de formación, es decir en un marco preciso. Existen fuentes que no se pueden colocar exhaustivamente en cualquier nivel de la jerarquía.[51] Se trata de fuentes *extra ordinem*, no disciplinadas por disposiciones sobre la producción jurídica sino que operan en base al principio de efectividad (que a su vez ejerce como norma sobre el proceso de producción).[52] Nuevos actos normativos surgen al lado de los que ya se conocen y consideran. Los intérpretes, junto a la multitud y al constante flujo de las fuentes formales (actos o hechos sujetos a condiciones definidas de validez) e informales (actos o hechos carentes de formas jurídicas normativamente predispuestas y con algún grado de efectividad),[53] deben identificar el "dato" al cual referir la atribución de significados. Aquí el momento de la elección es relevante y el objeto del proceso hermenéutico se desarrolla en la realidad del ordenamiento con una eficacia diferenciada en cada caso. La fijación del enunciado, a partir del cual se define el criterio

50. R. Guastini, *Teoria e dogmatica delle fonti*, pp. 57-59, 64-65.
51. F. Modugno, "Fonti del diritto (gerarchia delle)", en *Enciclopedia del diritto*, Agg. I, Giuffrè, Milano, 1997, pp. 585-586.
52. A. Pizzorusso, "Delle fonti del diritto", en *Commentario del codice civile*, en A. Scialoja e G. Branca (eds.), Zanichelli, Bologna – Soc. Ed. del Foro Italiano, Roma, 1977, p. 541.
53. L. Ferrajoli, Principia iuris. *Teoria del diritto e della democrazia.* 1. *Teoria del diritto*, Laterza, Roma-Bari, 2007 pp. 418, 921-922.

efectivo de regulación, implica la necesidad de definir previamente la fuente a la cual se refiere. A la tradicional tarea de inferir la norma de su fuente, se añade la de la búsqueda de la misma fuente que hay que reconstruir. Tal proceso de determinación no siempre resulta rigurosamente unívoco y capaz de prescindir de la búsqueda del objetivo que se quiere perseguir. Eso requiere que la interpretación de la fuente sea vinculada al marco de las relaciones sociales dentro el cual la fuente puede reconocerse como tal. La configuración de las fuentes sufre un proceso de revisión hacia un ordenamiento "abierto" a las practicas sociales de determinación del derecho. Nos encontramos delante a una disociación entre el conjunto de las fuentes formales y el que viene aceptado por la comunidad jurídica (más amplio y comprensivo de la fuentes informales).[54]

"Fuente" es un término que remite al conjunto de factores que influyen en la producción de las normas. Esta influencia puede variar: hay fuentes que proporcionan al operador jurídico una norma inmediatamente válida y fuentes que ofrecen solo ideas, inspiraciones y orientaciones a partir de las cuales los operadores tienen que inferir las normas.[55] Así, las fuentes presentan diferentes grados de objetivación, pero todas se presentan como recursos oficiales para inferir las reglas para casos particulares. Al mismo tiempo, estas son fruto de la interpretación y la decisión y operan como fundamentos para las soluciones jurídicas.[56] Bajo esta perspectiva, los resultados jurídicos derivan no solo de normas obtenidas a través de procedimientos formalmente válidos, sino también de normas no obtenidas, ni obtenibles, a través de tales procedimientos.[57]

El uso de fuentes remite por lo tanto al momento interpretativo y aplicativo, es decir, que la búsqueda de las fuentes se convierte en una cuestión de interpretación y de aplicación del derecho.[58] A raíz de las normas existen diferentes materiales jurídicos, heterogéneos y con distinta fuerza vinculante, que forman un conjunto normativo en potencia que hay que actualizar. El derecho positivo se manifiesta bajo este punto de vista como una acción solidaria de sujetos, institucionales y no institucionales, que con su actividad hermenéutica identifican y articulan el discurso de las fuentes, dentro de una praxis en la cual la normativa jurídica es el resultado de factores complejos que se conectan e interactúan.

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54. P. G. Monateri, "Fonti del diritto", in *Digesto delle Discipline Privatistiche*, sez. civ., VIII, Utet, Torino, 1992, p. 392; A. Pizzorusso, "Delle fonti del diritto", p. 543.
55. A. Ross, *On Law and Justice*, Stevens & Sons Ltd., London, 1958, p. 77.
56. G. Zaccaria, *La comprensione del diritto*, p. 46.
57. F. Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press, Oxford, 1991, p. 201.
58. F. Viola, G. Zaccaria, *Diritto e interpretazione*, pp. 316-317, 326, 330; B. Pastore, "Le fonti e la rete: il principio di legalità rivisitato", en G. Brunelli, A. Pugiotto, P. Veronesi (eds.), *Scritti in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere.* I. *Delle fonti del diritto*, Jovene, Napoli, 2009, pp. 269-272.

La positivización jurídica se cumple a partir de lugares de autoridad, pero ninguno de ellos es autosuficiente o conclusivo, prescindiendo de la actividad interpretativa, y solo se manifiesta en la practica jurídica.[59] El proceso de *soft law* confirma que la interpretación representa un aspecto interior en las dinámicas de las fuentes. Al mismo tiempo, este proceso demuestra de manera paradigmática que la teoría de las fuentes no se puede concebir bajo la perspectiva de la reconstrucción estática entre los actos y las normas que proceden de ellos (como "mónadas" cerradas en sí mismas, consideradas de manera atomística y netamente distinguibles),[60] sino al contrario se puede afirmar que conecta de manera constitutiva con la teoría de la interpretación.

El derecho se manifiesta como un tejido, una red de interrelaciones, dentro de las cuales unas reglas ligeras, fluidas y elásticas, coexisten con disciplinas plenamente obligatorias, desempeñando distintos roles y respondiendo a la exigencia de flexibilidad y adaptabilidad de contextos sociales cada vez más complejos. La normativa resulta, en este marco, no monolítica sino caracterizada por un considerable nivel de gradualidad. Esta se pone en un *continuum* de distintas posibles relaciones respecto a la vigencia y validez de los materiales jurídicos, su efectividad, el rol que estos desempeñan en el proceso de positivización, su obligatoriedad, junto con su aspecto coercitivo y nivel de observancia. Los grados de normatividad son diferentes tanto en el peso como en el valor y por lo tanto eso remite al uso, aplicabilidad, aceptación y observancia de las reglas jurídicas.

Todo este proceso está conectado con una continua y extensa praxis hermenéutica, articulada en distintos niveles, tanto "técnicos" y reconocidos en el ordenamiento, como aquellos no institucionalizados dentro de los cuales actúan los sujetos que experimentan la validez del derecho y lo eligen como razón para tomar decisiones. De esta manera, los materiales jurídicos presentan distintos niveles de elaboración y determinación. La positividad se gradúa.[61] El derecho puede ser más o menos positivo y consta de factores múltiples, distribuidos en los distintos niveles de su producción, integración, reconstrucción y aplicación.

En la fase actual de profunda reestructuración del paisaje jurídico, siendo perjudicada la unidad y la rigidez del sistema de las fuentes, el ordenamiento existe en la relación que conecta múltiples actos normativos, diversamente vinculantes, con las actividades interpretativas que estos desarrollan. La efectividad, por lo tanto, se presenta, no solo

59. F. Viola, G. Zaccaria, *Diritto e interpretazione*, p. 331.
60. A. Ruggeri, "Prospettive metodiche di ricostruzione del sistema delle fonti e Carte internazionali dei diritti, tra teoria delle fonti e teoria dell'interpretazione", en *Ragion pratica*, 18, 2002, p. 73.
61. L. Gianformaggio, *Filosofia e critica del diritto*, Giappichelli, Torino, 1995, p. 31.

como respuesta de conformidad y obediencia de los destinatarios a las normas, sino también como respuesta de reconocimiento de los asociados.[62] Estos, a partir de varios elementos (infraestatales, estatales, supranacionales, internacionales) construyen *hermenéuticamente* un ordenamiento jurídico que presenta un intrínseco carácter plural, polivalente y dinámico.

Soft law y *hard law* coexisten como áreas normativas a menudo interconectadas en el proceso de articulación progresiva del material jurídico. Ambos contribuyen al proceso de orientación de los comportamientos y a la toma de decisiones, en relación a los efectivos ámbitos sociales y especificidades regulativas. Tal proceso caracteriza el derecho como una actividad[63] que presenta constitutivamente una gradualidad normativa más o menos intensa.

62. A. Catania, *Manuale di teoria generale del diritto*, Laterza, Roma-Bari, 1998, pp. 173-174.
63. F. Viola, Rule of Law. *Il governo della legge ieri ed oggi*, Giappichelli, Torino, 2011, pp. 78 ss., 99-100.

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RESISTANT LIVES: Law, Life, Singularity

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Abstract

This article examines the potential of Roberto Esposito's work for a rethinking of the relationship between norm and life: in particular, the possibility of a vitalization of normativity which subverts the normative ordering of individual lives. Esposito's intervention in biopolitical debates allows us to think of a micropolitics of life as *zoe* which contests the ordering molarpolitics of Life as *bios*. The author examines this play between normativization of life and vitalization of norm in the context of citizen resistance to the attempt to normatively order their reproductive choices in the case of the 2004 Italian law on assisted reproduction.

Keywords

Biopolitics, Law, Biotechnology

Resumen

En este artículo se examina el potencial del trabajo de Roberto Esposito en el replanteamiento de la relación entre norma y vida: en particular, la posibilidad de vitalizar la normatividad que subvierte el ordenamiento normativo de la vida individual. La intervención de Esposito en los debates biopolíticos nos permite pensar en una micropolítica de la vida como zoé que impugna el ordenamiento de políticas morales de vida como bios. Yo examino este juego entre la normativización de la vida y la vitalización de la norma en el contexto de resistencia ciudadana con el intento de ordenar

normativamente las posibilidades reproductivas en el caso de la ley italiana del 2004 sobre la reproducción asistida.

Palabras clave
Biopolítica, ley, biotecnología

Introduction

In September 2013, a Rome Court ruled in favour of a couple who had been refused access to treatment at a fertility clinic under the normative order established by the 2004 Act on Assisted Reproduction. In particular, they fell foul of the provision of the Act which prohibits couples who are healthy carriers of a genetically inherited condition access to pre-implantation genetic diagnosis and IVF. The Court held that the couple have a right to have a healthy child and a right to make autonomous healthcare decisions and as such ruled this prohibition in the Act unconstitutional. This was the 28th challenge to the Act's constitutionality in its almost 10 years in existence, the 19th successful one. This case almost completes the judicial unwriting of the act provoked by constant legal challenges by groups and individuals affected by the Act's prohibitions. The law on assisted reproduction is a clear example of a normativization of life which ordered citizens ability to make choices in relation to assisted reproduction and gave symbolic legal recognition to the embryo. Most of the Act's provisions have now been declared unconstitutional as well as being contrary to the European Convention of Human Rights and Fundamental Freedoms in a Grand Chamber decision of 2013.

The 2004 Italian Assisted Reproduction Act (Legge 19 febbraio 2004, n. 40: "*Norme in materia di procreazione medicalmente assistita*") displays an auto-immunitarian logic in which law is used to protect a particular national narrative based on Roman Catholic heteropatriarchal family values. The Act set out to create a model which protected Life in the abstract and restricting the ability of living citizens to make free decisions. It prohibited the testing of embryos for research purposes, embryo freezing, pre-implantation genetic diagnosis for the detection of genetically transmitted diseases, donor insemination, denied access to assisted reproduction services to single women and provided that no more than three ova be fertilized *in vitro,* and that these be transferred to the womb

simultaneously. Once couples agreed on the treatment they would not be allowed to withdraw their consent. Any medical professional attempting to carry out procedures prohibited by the legislation would face prison terms or fines, as well as suspension from the medical register. The law directly contradicts the provision in Article 31 (2) of the Constitution of the Italian Republic, which states that no protection independent of the mother shall be accorded to the unborn. Indeed, the Constitutional Court has held that the welfare of the embryo or foetus does not override a woman's right to health. The Act limited access to in-vitro fertilisation to those categorised as infertile or sterile couples. Couples who were not so defined but who were carriers of a hereditary genetic condition would not have access to assisted reproductive services. The Act limits access to assisted reproductive services to adult heterosexual couples who are either married or in a stable relationship, are of a potentially fertile age and are both living. As Ingrid Meltzer has observed the law led to the construction of the embryo as "a new citizen subject."[1]

The Act epitomizes a negative biopolitics which orders the lives of citizens and makes them the objects of the norm, i.e. normativizes life. The Act instantiates what Roberto Esposito would call a politics over life. Citizen contestation of the Act, on the other hand, has led to a judicial unwriting of its prohibitions. Here we have a parallel creation of law which is also a hollowing out of the law from within, a case of vitalizing an abstract norm. Citizens have inhabited the law, have taken up residence there, changing it from within. Citizen resistance to the Act demonstrates that the biopolitical imperative to control lives is not a one-way street and can be resisted by the micropolitical acts of citizens. It is in Esposito's terms an instantiation of a "politics of life" which points to the possibility of an "affirmative biopolitics."[2] In other words, it is a politics which does not valorize an abstract ideologically rigid notion of Life which restricts individual lives, but performs a politics of life which is driven by actions of individual living beings acting in relation with one another. As Esposito observes: "essa passa per la disattivazione dei dispositivi autoimmunitari e per l'allargamento dello spazio del comune."[3] In such an affirmative biopolitics we see the move from what Adalgiso Amendola has called: "the absolute normativization of life... [to]… the vitalization of the norm."[4] What can

1. I. Meltzer, "Between Church and and State: Stem Cells, Embryos, and Citizens in Italian Politics", in S. Jasanoff (ed.), *Reframing Rights: Bioconstitutionalism in the Genetic Age,* The MIT Press, Cambridge (MA.), 2011, p. 118.
2. R. Esposito, *Dall'impolitico all'impersonale. Conversazioni Filosofiche*, Mimesis, Milano-Udine, 2012, p. 185.
3. Ibid.
4. A. Amendola, "The Law of the Living: Material for Hypothesizing the Biojuridical", in *Law, Culture and the Humanities*, 8 , 2012, p. 115.

be seen in such moments of contestation is the emergence of what Amendola terms: "a law that isn't imposed on subjects or that creates them artificially... but that might be produced together with the same processes of subjectivation through which subjectivities as such are formed."[5] For Amendola: "this affirmative biojuridical moment... can open to a reading of the same juridical normativization as a process that isn't superimposed abstractly over conflicts... Therefore, a path can be opened, a bumpy one admittedly, though not impassable, from a *law of the immune* to *a law of the common.*"[6]

Law's Politics Over Life

The Italian law on assisted reproduction reveals a bio-theopolitics in which life becomes the ground of a conflict between competing models of community, one immunitarian, and based on rigid delineations of a national essence and the other plural, singular and never completed or formed. In the Italian case the Act is the manifestation of a theo-political discourse which valorizes 'Life' as an abstract value. In this politics what is sought is the emplacement of a particular religious traditionalist thinking at the heart of secular political life. The rhetoric of embryo politics endows the embryo with the characteristics of a fully-fledged citizen. In such a politics the embryo represents the promise of regeneration and perpetual life. The rhetorical linking between 'embryo' and 'Life' become part of the fantasy narrative that the pro-life movement fashions. As Condit has noted in relation to the pro-life politics of anti-abortion campaigners but which can be applied *mutatis mutandis* to the politics of embryo protection:

> the major rhetorical effort of the pro-life movement was… expended in constructing… the verbal linkages between the terms *fetus* and *Life*. The concrete term *fetus* and the abstract value of Life were woven together primarily through a frequent recitation of the claim that the authority of "science" had discovered that the fetus was a human being from the time of conception.[7]

5. Ibid.
6. Ibid., p.116.
7. C. Condit, *Decoding Abortion Rhetoric: Communicating Social Change,* University of Illinois Press, Urbana, 1990, p. 61.

In pro-life rhetoric doctors who conduct pregnancy terminations are constructed as having transgressed the 'natural' order of things and are somehow tainted or associated with death and murder. As Merton has put it:

> the movement accuses anyone who condones legal abortion of, at the very least, standing by and doing nothing while millions of innocent human beings are slaughtered. The logic goes this way: a) zygotes/embryos/fetuses are human beings in the fullest sense of the term, and therefore deserving of protection; b) abortion kills zygotes/embryos/fetuses; therefore c) abortion is murder, and d) anyone who condones abortion condones murder .[8]

Such a politics over life constructs women who exercise freedom of reproductive choice as enemies of the foetus. This discourse homologizes the foetus and the nation into a figure faced with death from a threatening force, i.e. self-determining women. As Lauren Berlant has noted in relation to the pro-life narration of national identity:

> the normativity of pro-life society dictates that once pregnant the woman loses her feminine gender, becoming primarily a mother… In protecting the fetus from the woman they divide into a nongenital 'female' part – the maternal womb, which really belongs to the fetus – and a potentially malevolent section, composed of a sexual body (un)governed by a woman's pseudosovereign consciousness .[9]

This immunitarian model of the maternal-fetal relation makes women invisible, creating a model of community in which the mother is seen as somehow a threat to the fetus. This model fails to see the contingent and relational element of the maternal-fetal dyad and exemplifies in Derrida's words: "a state power where sovereignty is itself essentially phantasmatico-theological and, like all sovereignty, is marked by the right of life and death over the citizen, by the power of deciding, laying down the law."[10]

Such an immunitarian logic sets up a conflictual relationship between the embryo seen as worthy of legal protection and the mother seen as threatening to the nation. The 2004 Act driven by the need to reclaim a conservative notion of the nation based on patriarchal family values. This is a politics which lessens the freedom of living citizens in

8. A. Merton, *Enemies of Choice. The Right to Life Movement and Its Threat to Abortion,* Beacon Press, Boston, 1981, p. 7.
9. L. Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship*, Duke University Press, Durham, 1997, p. 99.
10. J. Derrida, *The Death Penalty: Volume 1*, University of Chicago Press, Chicago, 2014, p. 5.

the interest of an abstract notion of the sanctity of life. As Esposito has put it: "il concetto... di 'sacertà' della vita e spesso usato come un dispositivo di esclusione o di soppressione di altre vite, giudicate non altrettanto rilevanti".[11] Precisely in this sense we see the use of the term sanctity of life and right to life as non-negotiable and as exclusionary dispositives. The lives and beings of individuals denied access to reproductive choice and justice are disregarded along with the constitutional rights to health and self-determination in the name of an abstract signifier of Life as normativizing and subject forming. The model incorporated in the Act sees the creation of a notion of community as immunity against intruders and ultimately against death, a social compact built on the desire to survive. As Krause and De Zordo have noted in this regard:

> The rigid politics of life operating in Italy supported by the Catholic Church and sympathetic politicians defends the 'life' and the rights of the embryo and the ideal Catholic family at all costs. As a result, women who do not have children or who postpone motherhood are stigmatized, as are infertile women and couples who confront a restrictive law on medically assisted technologies, which excluded single women and same-sex couples.[12]

By valorizing life as true abstract life, woman is relegated to the status of mere life, an intermediary figure used as a means of reproducing life.

Vitalizing the Norm: Towards a Politics of Life

In this regard what the Italian case allows us to see is the operation of a biopolitics which both governs and excludes. This exclusionary consequence of biopolitics has been well defined by Didier Fassin as "about inequalities in life which we could call bio-inequalities."[13] Such a notion of bio-inequality includes a "withholding [of] recognition from the other."[14] It is precisely this withholding of recognition from individuals denied reproductive choice that has led to a counter-politics of resistance against the legislation. This resistant biopolitics of living citizens calls for a continuous struggle to maintain and

11. R. Esposito, *Dall'impolitico all'impersonale*, p. 185.
12. E. Krause–S. De Zordo, "Introduction. Ethnography and Biopolitics: Tracing 'Rationalities' of Reproduction across the North-South Divide", in *Anthropology and Medicine,* 19, 2012, p. 143.
13. D. Fassin, "Another Politics of Life Is Possible", in *Theory, Culture & Society*, 26, 2009, p. 49.
14. Ibid., p. 57.

win rights. It allows us to move from "a rigid politics of life" to a "power of life as such."[15] It demonstrates the power of individuals acting in concert to contest draconian state action and allows us to see in Fassin's terms that "another politics of life is possible".[16] Ingrid Meltzer has described such individuals as biological citizens: "speaking in the name of their physical vulnerability and mobilizing their damaged bodies, they acted as 'biological citizens.'"[17] Such biological citizens use their bodies as a strategic means of achieving reproductive freedom and choice. The notion of the biological citizen is an interesting one in that it brings together both the reality of contemporary political regimes in which we are all the subjects of governance, with the co-existing ability to resist such governance in the mode of an affirmative biopolitics. It creates a space of resistance in which citizens take on an active role in contesting the manner in which their citizenship is constructed. Here what we witness is a vitalizing of the norm as a form of counter-conduct. What we have witnessed in the last ten years of contestation of this Act is the slow and painful process of the becoming sovereign of what the law has considered to be mere life.

In order to contest their construction by the law as citizens without reproductive rights, patients' rights groups affected by the legislation engage in, in Stephen Collier and Andrew Lakoff's term a "counter-politics of sheer life", which they define as "a claim to state resources that is articulated by individuals and collectivities in terms of their needs as living beings."[18] This praxis of active citizen resistance to claim new rights or to reclaim rights taken from one is an instance of an affirmative biopolitics which opens up the field for political resistance by those categorized as bare life or lives excluded from human rights protection. In Joao Biehl's terms we can see such patient action as enacting a form of "biocommunity."[19] This community is made up of: "a… group of… patients [which] fights the denial of rights and carves out the means to access them empirically."[20] Such a biocommunity proposes an alternative model of community, not one based on auto-immunity, but based on what Esposito would call a model of "common immunity."[21] Unlike the model of auto-immunity, the idea of "common immunity" provides a mode of imagining and experiencing

15. Ibid., p. 49.
16. Ibid., p. 44.
17. I. Meltzer, "Between Church and State", p. 111.
18. S. Collier – A. Lakoff , "On Regimes of Living", in A. Ong, S. Collier, (eds.), *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems*, Blackwell, Oxford, 2005, p. 29.
19. J. Biehl, *Will To Live: AIDS Therapies and the Politics of Survival*, Princeton University Press, Princeton (NJ.), 2007, p. 324.
20. Ibid.
21. R. Esposito, *Immunitas: The Protection and Negation of Life*, Polity, Cambridge, 2011, pp. 165-177.

political community as open and contestatory. This model of common immunity is based on an understanding of community not as bounded and based on defending the nation from enemies, but on an inclusion of one within the other, on community as difference.[22] This undoes the symbolic conservative notion of the self-sufficient nation under attack from others seen as enemies.

Esposito thinks political community in terms of difference and not in terms of a hegemonic identity. Esposito is concerned with the deactivation of dispositifs such as that of the juridical person in favour of the expansion of the space of the common. For him, the notion of the person inherited from Roman law constitutes a mode of disembodying the individual, of devaluing the material in favour of the abstract. This valorization of an abstract rational subject over the mere life of actually existing individuals leads to the denigration of the flesh in favour of abstract reason. Individual lives are devalued in favour of a politics which rules over these lives. As Esposito observes: "the person doesn't coincide with the body in which it inheres, just as the mask is never one with the actor's face."[23] As such it can be seen as a *dispositif* which allows the material lives of individuals to be subjected to power, to be constructed as objects of power. For Esposito, the idea of material singularities coming together to act in common provides an example of the power of a collective being in common of material lives. In effect it provides a means of countering the *dispositif* of the person and the biopolitical governance of lives through law. It allows us to see how an impersonal force may dissolve the enforced distinction between *bios* and *zoe*, between the homogeneous non-differentiated subject of power and the flesh of individual lives, and exposes singularity in difference. This overcoming of the separation between bare life and Life is for Esposito the task of an affirmative biopolitics which is a continuous task, a work in progress, a becoming, and a continual beginning.[24] For him: "an affirmative biopolitics always involves decisions about life, its meaning, its different demands, its preservation, and its expansion."[25] What he leaves as a question is how one thinks:

> An intrinsic relationship between humanity and rights, one that is freed from the subjective slant of the legal person and brought back to the singular, impersonal being of community, is only conceivable starting from life.[26]

22. Ibid.
23. R. Esposito, "The Dispositif of the Person", in *Law, Culture and the Humanities*, 8, 2012, p. 25.
24. See further, M. Vatter, "Biopolitics. From Surplus Value to Surplus Life", in *Theory & Event*, 12, 2009.
25. R. Esposito interviewed by: T. Campbell-F. Luisetti, "On Contemporary French and Italian Philosophy: An Interview with Roberto Esposito", in *The Minnesota Review*, 75, 2010, p. 111.
26. R. Esposito, *Third Person*, Polity, Cambridge, 2012, p. 140.

Life, Humanity, Rights

One of the most important in the long series of legal challenges by individuals affected by the 2004 Assisted Reproduction Act was the decision of the Regional Administrative Tribunal of the region of Lazio of 21 January 2008. This case was initiated by the World Association for Reproductive Medicine (WARM), a not-for-profit organisation which represents the interests of professionals working in the area of medically assisted reproduction. The action challenged, *inter alia*, the legitimacy of the Code of Practice introduced by Ministerial Decree in 2004, as being *ultra vires* the powers of the Minister of Health, as well as the constitutionality of Article 13 (which prohibited embryo experimentation), and Article 14 (which provided for the transfer of no more than three embryos to the womb simultaneously) of the 2004 Act. WARM also contested the conflation of the terms sterility and infertility in the Act and the legal status accorded to the embryo in the Act. This challenge which also had the support of a number of other reproductive rights organisations was opposed by the Italian government together with a number of conservative civil society organisations, such as the Movement for Life, who intervened *ad opponendum*. The Court in its decision overruled parts of the Code of Practice introduced pursuant to the 2004 Act in July 2004. The impugned provisions related to article 13.5 of the Act which prohibits experimentation on human embryos. The decision also raised doubts over the constitutionality of article 14.2 of the Act. In effect what the decision did was to overrule the limitation on pre-implantation genetic diagnosis of embryos for observational purposes only, on the basis that such a provision could not be enacted by delegated legislation. The Minister of Health had therefore exceeded his powers in introducing this measure by ministerial regulations. As a result of this decision, the guidelines on assisted reproduction were revised on 11 April 2008 to remove the *ultra vires* limitation on pre-implantation genetic diagnosis for observational purposes only.

In its decision, the Lazio court also referred the question of the constitutionality of Article 14 of the Act to the Constitutional Court. In its decision of 1 April 2009 the Constitutional Court reversed the prohibition contained in Article 14 of the 2004 Act on the transfer in any one cycle of a maximum of no more than three embryos. In addition to the referral from Lazio, the Court also received two referrals from the *Tribunale Ordinario* of Florence from its decisions of 12 July 2008 and 26 August 2008. In both of these decisions the Florence court questioned the constitutionality of Article 14 of the Act insofar as it prohibited the freezing of spare embryos, the imposition of a maximum

limit of three embryos which could be created in any IVF treatment cycle and the need for their simultaneous transfer to the patient's womb. In addition the court questioned the constitutionality of Article 6 (3) of the Act which decreed that once a woman had consented to the simultaneous transfer of these three embryos she could not withdraw that consent. The Constitutional Court in its decision held that article 14.2 of the Act was unconstitutional and in particular breached Article 3 of the Constitution in relation to equality and article 32 of the Constitution which upholds the right to health. As a result of this decision, article 14.2 of the 2004 Act was no longer to be interpreted as placing a limit on the number of embryos to be transferred. The Court held that the number of embryos transferred in any treatment cycle should be based on individual medical opinion based on the facts of each patient's case. The decision also overruled the ban in Article 14 (1) on the freezing of embryos. As a result of the decision, embryos which might not be used in a treatment cycle may now be frozen. The Court, in referring to Article 1 of the Act, noted that the interests of all parties (not just the embryo) should be considered citing the Constitutional Court's previous jurisprudence on abortion in which the rights of the woman to self-determination and health should be given priority.

Following the Constitutional Court ruling there have been a number of subsequent successful challenges to the Act in the lower courts. The *Tribunale Civile* of Florence in its decision of 6 October 2010 overturned the ban on IVF with donor eggs or donor sperm in Article 4 of the Act and referred this aspect of the Act to the Constitutional Court for review. On 21 October 2010 the *Tribunale Civile* of Catania made a similar ruling, questioning the constitutionality of the ban on IVF using donor gametes. In the decision of the *Tribunale Civile* of Salerno of 13 October 2010 the limitation in Article 1 of the 2004 Act on access to in-vitro fertilisation to those categorised as infertile or sterile was successfully challenged. The Court ruled in favour of access to pre-implantation genetic diagnosis in the case of a couple who were neither sterile nor infertile. The couple suffered from amyotrophy, which causes the progressive wasting of muscle tissues.

The 2004 Act was the object of a further important Constitutional Court decision in May 2012. This case concerned the question of the prohibition of IVF using donor gametes under Article 4 of the Act. The decision however turned out to be more of a non-decision in that it held that the cases should be referred back to the regional courts from which they issued for re-hearing. The case involved references from three lower courts, in Florence, Catania, and Milan in relation to Article 4, paragraph 3 of the Act (which bans IVF using donor gametes), on the grounds of potential constitutional

incompatibility. The Florence case involved, a couple, SB and FB. The male partner was infertile and the couple required access to donor sperm. The clinic which they attended could not carry this out as the Act prevented it from doing so. The court was of the opinion that the impugned section of the Act was, *prima facie*, unconstitutional but noted that it needed to refer the matter to the Constitutional Court as lower court judges do not have the power to declare a part or whole of a statute unconstitutional.

The reference from the court in Catania concerned a couple, PC and GR. PC suffered from premature menopause and attended a clinic in order to request an egg donation. However she was prevented from doing this by the prohibition contained in Article 4, paragraph 3 of the 2004 Act. The Court noted a *prima facie* breach of the Constitution and noted that such a procedure was medically necessary. Again due to the inability of lower court judges to declare statutes unconstitutional the case was referred to the Constitutional Court. In the Milan case a couple, EP and MM, required sperm donation as the male partner suffered from azoospermia. In this case the prohibition contained in Article 4, paragraph 3 of the 2004 Act prevented the couple from gaining access to such a procedure. All three courts noted that there was a *prima facie* constitutional violation. The justification given by lawyers on behalf of the Government in the argument before the Constitutional Court for such a prohibition was the right of the child to know the biological identity of their parents. This justification had more to do with a conservative mentality in relation to family relations rather than any rights of the child involved.

On hearing the references before it the Constitutional Court decided not to decide and instead referred the issue back to the lower courts. The Constitutional Court used as a justification for this the then recent decision of the Grand Chamber of the European Court of Human Rights in the case of *S.H. and others v. Austria* (Application No. 57813/00, Grand Chamber decision 3 November 2011). In that case the Grand Chamber held that there was no violation of Article 8 of the *European Convention of Human Rights and Fundamental Freedoms* in a case involving a challenge to the provision of the Austrian *Assisted Procreation Act* which prohibits the use of sperm from a donor for IVF and ova donation in general. The Austrian *Assisted Procreation Act* only allows IVF with gametes from the couples involved. Even though the Grand Chamber noted that there was a clear trend across Europe in favour of allowing gamete donation for IVF, it added that an emerging consensus was still under development and so was not as yet based on settled legal principles. The Court held by a majority of thirteen votes to four that there had been no violation of the Convention. The Grand Chamber further noted that the Austrian legislation was not disproportionate as it had not banned individuals from

going overseas for infertility treatment unavailable in Austria. This assumes, without thinking, that couples are in a position to engage in such reproductive tourism.

The decision of the Grand Chamber was entirely at odds with the First Instance ruling in the same case on 1 April 2010, *S.H. and Others v. Austria* (Chamber judgment) which held that the impugned section of the Austrian legislation breached Article 8 of the *European Convention of Human Rights and Fundamental Freedoms* as this prohibition interfered with the couple's right to access treatment which would allow them to found a family. The lower courts had noted, based on the First Instance decision of 1 April 2010 in *S.H. and Others v. Austria*, that the prohibition in the 2004 Act of IVF using donor gametes constituted a breach of Articles 8 and 14 of the *European Convention of Human Rights and Fundamental Freedoms*. The Constitutional Court observed that as the Grand Chamber had overruled this decision the referring courts should re-hear these cases based on this new development.

Since the Constitutional Court judgment in May 2012, the Court of First Instance of the European Court of Human Rights handed down a decision against Italy in relation to the prohibition of pre-implantation genetic diagnosis where a couple are carriers of a genetically inherited condition. In the case of *Costa and Pavan v. Italy* (Application No. 54270/10), a couple, Mr. Pavan and Ms. Costa, both carriers of a hereditary illness, cystic fibrosis, wished to prevent this condition being inherited by any second or subsequent child they might have together. In September 2006 they gave birth to a child with cystic fibrosis, only then becoming aware that they were both carriers of the disease. The couple have a one in four chance of having a child born with the condition and a one in two chance that any future child of theirs will be a carrier of the condition. They want to ensure that any further child they have will neither have nor be a carrier of the condition. The 2004 Act prevents access to pre-implantation genetic diagnosis to couples suffering inherited genetic conditions. It only allows access to screening for infertile couples or where the male partner has a viral disease which can be transmitted through sexual intercourse, such as HIV, or Hepatitis B and C. Since these exceptions did not apply to this couple, the only option open to them as the law stood was to have an abortion on discovery via foetal testing that the future child was either a sufferer or carrier of the condition. In fact, Ms. Costa conceived a child with cystic fibrosis so decided to undergo an abortion in February 2010.

In their application to the European Court of Human Rights in Strasbourg, the couple relied on Article 8 in conjunction with Article 14 of the European Convention on Human Rights and Fundamental Freedoms. Their complaint was that their right

to privacy and family life had been infringed in that they were not allowed access to pre-implantation genetic diagnosis to allow them to prevent the birth of a child with cystic fibrosis. They also claimed that they suffered discrimination compared to infertile couples or those couples in which the male partner has a sexually transmitted disease. In its decision of 28 August 2012, the Court of First Instance of the European Court of Human Rights held unanimously that the ban on access to pre-implantation genetic diagnosis for couples with genetically inherited diseases infringed Article 8 of the Convention. The Court found that there was no breach of Article 14. The Court held that the desire of the couple to have a child who was not affected by a genetically inherited disease of which they were healthy carriers and to undergo pre-implantation genetic diagnosis and IVF in order to do so was protected by Article 8 as it formed part of their right to private and family life (Costa and Pavan v. Italy, Application No. 54270/10, Court of First Instance decision 28 August 2012, paragraph 57). The Court unanimously declared that the 2004 legislation was incoherent in that on the one hand it prohibited the transfer of only embryos which were not affected by cystic fibrosis and on the other hand it allowed the couple to abort a foetus affected by this condition. There was a clear impact on the couple's Article 8 rights in this case as a result.

The Court distinguished the decision of the Grand Chamber in *S.H and Others v. Austria* in which the Court allowed a wide margin of appreciation to Austria in legislating in this area. The Court concluded that the interference with the applicants' right to privacy constituted by the ban in the 2004 Act on of pre-implantation genetic diagnosis to such couples was not proportional. The Italian Government entered an appeal against this decision. However, the Grand Chamber of the European Court of Human Rights rejected this appeal in February 2013, noting that the Italian Law on Assisted Reproduction was clearly incoherent and in breach of Article 8 of the *European Convention on Human Rights and Fundamental Freedoms*. The decision of the Court of First Instance of August 2012 is now the final word on the matter as far as the compatibility of the 2004 Act with the *European Convention on Human Rights and Fundamental Freedoms* is concerned. This decision strengthens the hand of those groups in Italy campaigning for the legislation to be reviewed. The decision requires the Italian Government to revise the 2004 Act to make it compatible with the *European Convention on Human Rights and Fundamental Freedoms*. However given the lack of willingness of successive Italian governments to move in this direction it is unlikely that such a review process will begin immediately. What will continue to happen will be individual court challenges to the Act which will gradually have the cumulative effect of nullifying the Act's prohibitions.

It will then be imperative even for unwilling politicians to act to introduce a law which is both coherent and compatible with the *European Convention of Human Rights and Fundamental Freedoms*.

This series of challenges is an example of the vitalization of the norm brought about by the dogged persistence of biological citizens. This active citizen politics allows us to see how the abstract control over Life exercised by the State in the name of religious ideology can be contested successfully. Such a mode of political intervention allows us to imagine a "politics of life" in the sense outlined by Esposito. Such a model stresses the need for continuous political engagement to make real the merely declaratory nature of rights. It is an active engagement with the promise contained in constitutional bills of rights to enable citizens to access rights in reality. As such, this recent episode in Italian political life has universal resonance in that it demonstrates clearly the need on the part of citizens to resist in contemporary regimes of biopower when their material lives are devalued and their full citizenship is threatened in the name of a totalizing narrative of Life. As Krause and De Zordo have put it: "the struggles around reproductive policies are articulated in juridical terms… and produce rights-bearing citizens pitted against each other… These new moral regimes generate social and political spaces for ongoing negotiation."[27]

Becoming Normative?

This example provokes us to think how the normativization of lives can be contested by the vital contestation of individual citizens. In this ongoing challenge to their normative ordering citizens engage in an active mode of using rights discourse in a subversive manner to undo accepted models of subjectivity, community, identity, law and politics. Such a micropolitics of rights opens up the field for political resistance by those categorized as excluded from full citizenship. It is in Rosi Braidotti's terms a "move towards 'Life' as a non-essentialist brand of contemporary vitalism and as a complex system."[28] As such we come to see the emergence of a creative jurisprudence in the Deleuzean sense, a disarming of the normative ordering of individual lives. Such legal and political challenges are initiated by assemblages of individuals acting in concert to use rights discourse in a manner which would empower them. Such a

27. E. Krause – S. De Zordo, "Introduction", p. 148.
28. R. Braidotti, *The Posthuman*, Polity, Cambridge, 2013, p. 158.

creative bottom up employment of rights as political weapons allows us to glimpse what Gilles Deleuze called the creative and collective praxis of jurisprudence. For Deleuze it is jurisprudence "that truly creates law/right."[29] Jurisprudence for Deleuze is not the abstract conceptualization of law or legal theory but rather an active mode of resisting established legal concepts and changing and troubling the law through the collective action of singularities. For Deleuze, it is not "established and codified rights that count, but everything that currently creates problems for the law and that threatens to call what is established into question."[30] In reflecting on Deleuze's thinking on and about law and human rights, Paul Patton observes that for Deleuze:

> jurisprudence was always a matter of politics, in the broad sense in which he understood the term... Jurisprudence involves the creation of new laws but also the creation of the rights that are expressed in these laws... in so far as jurisprudence is also a matter of politics, it involves the processes through which new ways of acting or being acted towards become established (or old ways disestablished).[31]

Esposito declares an affinity with Deleuze in his thinking which opens up a thinking of the impersonal and the anonymous, of a life rather than Life as abstract ordering. This thinking allows us to reframe the tired language of institutionalized and abstract subject-centred human rights discourse and instead force us to think a materially embodied concept of rights as the collective action of singularities, a post-human rights if you will. Such a praxis of rights is similar to what Paul Patton terms a "non-transcendent, immanent conception of rights."[32] These rights embody the claims of transversal assemblages of individuals who do not see a binary cut between thought and action, life and death, environment and humanity, or animality and humanity. Esposito's reliance on Deleuze is evident throughout his work and indeed we can see in his latest book *Due: La macchina della teologia politica e il posto del pensiero* (2013) a suggestive opening to Deleuze's thought on jurisprudence in an affirmative biopolitical key when he observes in relation to Deleuze's notion of jurisprudence:

29. G. Deleuze, *Negotiations: 1972-1990*, Columbia University Press, New York, 1995, p. 169.
30. Ibid., p. 153.
31. P. Patton, "Immanence, Transcendence, and the Creation of Rights", in L. de Sutter, K. McGee (eds.), *Deleuze and Law*, Edinburgh University Press, Edinburgh, 2012, pp. 15-31, pp. 20-21.
32. Ibid., p. 15.

> For [Deleuze]… if the subject is no longer what s/he was because subjectivity is not measurable in temporal terms given that its past is always overtaken and reconfigured by the present, then it is no longer entirely subsumable by the order of law. That which its becoming something other escapes is precisely that normative regime which makes of the law not only a dispositive of guilt and punishment within a theo-political paradigm. This doesn't mean that Deleuze is placed outside or against the sphere of law. What he performs is a linguistic movement which moves the norm from the vertical relation of sovereign command to that of the horizontal plane of the form of life. The passage from one to the other, from the regime of imposition to that of metamorphosis is linked to the creative capacity of jurisprudence. If, in the *a priori* logic of law, facts like persons are subjected to an order which judges single cases on the basis of pre-existing principles, jurisprudence in the Deleuzian sense, conceived of in its originary creative power, derives principles from single cases.[33]

This overturning of our understanding of the established ordering of the norm, allows the singular case to drive the norm, an instantiation of the vitalization of the norm, a vital resistance to the norm. Thus what is at stake here is an understanding of jurisprudence as the possibility of making the norm something other than what it was, through the vital intervention of biological citizens.

We can see in the critical responsiveness to the 2004 Act the possibility of the creative transformation of this imposition of ordering. It provides us with a glimpse of a creative jurisprudence in which rights are not achieved by a top down "molarpolitics of public officials"[34] but come instead from the mobilisation of self-styling selves, "the molecular movements of micropolitics."[35] In this example we witness the play between the *micropolitics* of movements of individuals who are attempting to self-style their reproductive choices, and the *molarpolitics* of politicians, who attempt to prevent the creation of this right. This *molarpolitics* is based on rigid moral beliefs and refuses to recognize contrary views. It blocks the dialogic political process and creates stasis. William Connolly has termed this behaviour on the part of citizens an *ethos of engagement* with existing moral and social givens which may bring about unexpected consequences or transformations in the societal default thinking on bioethical issues.

33. R. Esposito, *Due: La macchina della teologia politica e il posto del pensiero*, Einaudi, Torino, 2013, p. 217.
34. W. Connolly, *Why I Am Not A Secularist*, University of Minnesota Press, Minneapolis, 1999, p. 147.
35. Ibid., p. 149.

Similar to Esposito's notion of affirmative biopolitics this active resistance on behalf of citizens affected by prohibitive legislation on bioethical issues leads to a reactivation of rights protection for those deprived of such protection. This process Connolly terms "an ambiguous *politics of becoming* by which a new entity is propelled into being out of injury, energy and difference."[36] Micropolitical movements such as the patients' rights groups in Italy which continue to call for more liberal regulation of the assisted reproductive technology sector or those individuals who bring legal challenges to the existing law, provokes us to rethink existing modes of addressing bioethical problems. Individuals take responsibility for their selves and work on the political and legal terrains to bring about real change. The intervention of individuals in the political scene via the creative use of jurisprudence allows precisely what cannot be brought about by appeals to politicians to change legislation, the move from, in Esposito's terms, the regime of imposition to that of metamorphosis.

36. Ibid., p. 160.

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GOVERNING BY INTERNET ARCHITECTURE

A Research Agenda for Political Science

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Abstract

In the past thirty years, the exponential rise in the number of Internet users around the word and the *intensive* use of the digital networks have brought to light crucial political issues. Internet is now the *object* of regulations. Namely, it is a policy domain. Yet, its own architecture represents a new regulative structure, one deeply affecting politics and everyday life. This article considers some of the main transformations of the Internet induced by privatization and militarization processes, as well as their consequences on societies and human beings.

Keywords

Cyberpower, Internet governance, Internet regulation, network design, digital rights

Resumen

En los últimos treinta años ha crecido de manera exponencial el número de usuarios de Internet alrededor del mundo y el uso intensivo de conexiones digitales ha traído a la luz cuestiones políticas cruciales. Internet es ahora objeto de regulaciones. Es decir, es un ámbito de la política. Aún su propia arquitectura representa una nueva estructura

reguladora, que afecta profundamente la política y la vida cotidiana. Este artículo considera algunas de las principales transformaciones de Internet inducida por procesos de privatización y militarización, como también sus consecuencias en las sociedades y en los seres humanos.

Palabras clave

Ciberpoder, gobernanza de Internet, regulación de Internet, redes de diseño, derechos digitales

Introduction

According to *Internet Live Stats*, Internet users are currently 2.9 billion. Today, around 40% of the world population has Internet connection. In 1995, this was less than 1%. During the last ten years, Internet population has been growing at an average rate around 350%, though such an increase has not been even throughout the world.[1] Moreover, digital networks have been adopted for all kind of social interactions. There are no transaction areas that have not been affected. In the past thirty years, the exponential rise in the number of Internet users around the word and the *intensive* use of the digital networks have brought to light momentous political issues. Of course, some of them are not entirely new: who rules the net? Through what means? How important is the Internet in *empowering people* and assisting them in claiming their basic rights? Other questions are more recent. The latter are a consequence of technological developments: has the Internet become a point of international conflict between states? Is it favouring the emergence of new institutions outside of the nation-state system? Above all, is the Internet itself a contemporary tool used to govern political processes, social relationships and human beings? As it emerges from the growing literature, Internet, as other telecommunication infrastructures in the past, is the *object* of regulations. Namely, it is a policy domain analysed from different theoretical and methodological perspectives. But, unlike other communication infrastructures, the Internet architecture is itself a new regulative structure affecting the political and legal order. In *Law in a digital world*, Ethan Katsh has illustrated some profound implications of technological innovations for the legal practice and the nature of the law.[2]

1. http://www.internetlivestats.com/internet-users/
2. E. Katsh, *Law in a Digital World*, Oxford University Press, Oxford, 1995.

However, between the 1980s and the mid-1990s, the dominant concern was to verify the resilience of democracies in the face of the challenges posed by technological change. How, in other words, the existing constitutional order could absorb – and govern – such transformations. In the end, thanks to normative-regulatory practices developed over the past two centuries, democracy seemed capable of coping with it, all in preserving the core values of the American liberal tradition.

At the beginning, the expectations and norms created by the Internet were radically *liberal* in nature, and gave new vitality to ideals of freedom of expression in politics and society, and to concepts of freedom of exchange and open, competitive access to information and communication markets in the economic sphere.[3]

Legitimized by this ideological-cultural milieu, the notion that the state should keep at a distance from processes of technological change was, in those years, the focus of two major initiatives that also became the reference point for the political and intellectual debate, not only in United States but also elsewhere. The first, in 1994, was the establishment of the Progress and Freedom Foundation (PFF) to which we owe the *Cyberspace and the American Dream: A Magna Charta for the Knowledge Age*. Two years later, at Davos, Perry Barlow launched *A Declaration of Independence of Cyberspace*. In their most significant passages, the two documents foreshadowed a world, the cyberspace, where governments could exercise any form of sovereignty. A free world ensuring freedom for all. Blurred in the off-line world, the dream of the Founding Fathers could thus live on in the virtual world. The state does not leave the scene. But the scene it now inhabits is the one that, because of its characteristics, escapes its control.[4] To this "borderless and timeless world" is offered an extraordinary power, that of resetting history on radically new bases. A myth, however, destined to crumble in a very short time.[5]

As virtual reality increasingly comes to resemble the real world, Cyberspace simply becomes another arena for the ongoing struggle for wealth, power and political influence: "The Net has lost its political innocence."[6] Internet, therefore, increasingly seems a space perfectly regulated and controlled, a space where the sovereignty of states and the power of ICTS corporations can be exerted. In other words those institutions that are contested and/or rejected by the libertarian and egalitarian ideologies of cyberculture,

3. L. M. Mueller, *Networks and States: The Global Politics of Internet Governance*, The MIT Press, Cambridge (Mass.), 2010.
4. J. R. Davis – D.G. Post, "Law and Borders: The Rise of Law in Cyberspace", in *Stanford Law Review*, vol. 48, 1996.
5. V. Mosco, *The Digital Sublime: Myth, Power, and Cyberspac*e, The MIT Press, Cambridge (Mass.), 2004.
6. D. Resnick, "Politics on the Internet: The Normalization of Cyberspace", in Ch. Toulose, T.W. Luke (eds.), *The Politics of Cyberspace*, Routledge, New York-London, pp. 51-54.

are the real protagonists of the struggle for control over the network, a struggle that has now gained a global scope.

Already a few years before 9/11, with the increasing public and academic attention over these issues, the notion emerged that politics are not external to the technical architecture. As a site of control over technology, the decisions embedded within it contribute to shape values, reflecting socioeconomic and political interests. We can consider this trend to be a fundamental shift in strategy, from regulating the use of technology through law to regulating the design of technology in order to control its use.

Policies – and the technical choices – that act on the architecture of cyberspace (co)-determine the kind of society we build. Since they express values and principles that, shaping the architecture of the Net, govern our behavior, they represent policies and decisions of constitutional significance. A point of no return in contemporary political and legal thought: "Code is law" is the famous formula coined by Lawrence Lessig to describe the ways in which the technological architecture of the Internet functions as a regulator – in addition to state law, social norms and the market.[7] The technological architecture of the network imposes rules on access and use of information. Technological architectures may prohibit certain actions on the network. Technology may also offer policymakers a choice of information flow rules through a configuration of decisions. The technological architecture is a structure that conditions regulation over the Internet. Hence, the code does not directly regulate the Internet, but rather prestructures the form that regulations over the Internet may take on in order to be effective in conditioning social behaviour.[8] The increasing awareness that decisions made during technological architectures design – hardware and software, protocols and standards – have significant political and public policy consequences, explains the attempts to place the Internet under closer control. I t also sheds light on the complex geopolitical dynamics arising from it. If debates – and the decisions – over technological architectures are a continuation of *politics by other means*, then the efforts to control and define such technological devices are the real issues at stake. Yet even as an Internet-enabled world challenges the state as the preeminent institution for the production of communication and information policy, it also generates strenuous reassertions of national authority.[9] These issues bring us to the nation-states system and

7. L. Lessig, *Code and Other Laws of Cyberspace*, Basic Books, New York, 1999.
8. B. C. Graber, "Internet Creativity, Communicative Freedom and a Constitutional Right Theory Response to 'Code is Law'", in S.A. Pager, A. Candeub (eds.), *Transnational Culture in the Internet Age*, Edward Elgar, Cheltenham (UK) , 2012.
9. See, for example, J. Goldsmith, T. Wu, *Who Controls the Internet? Illusions of a Borderless World*, Oxford University Press, New York, 2006.

to the relationship between national sovereignties and the new institutions of global governance that try to define distinct "roles and responsibilities" for governments, businesses, and civil societies. "The question now driving discussions about Internet politics is not whether the Net can be governed, but whether there is (or should be) something new and different about the way we do so."[10] Today, the new issue at stake is the de-Americanization of the Internet. Indeed, this means, rather paradoxically, going back to the fathers of the Internet. As we can read on the home page of the *Net Mundial– Global Multistakeholder Meeting on the Future of Internet Governance* (Sao Paolo, Brazil, 23/24 April 2014): "When the fathers of the internet came up with the world wide web, they conceived a web architecture which is free and open. Therefore, as the world meets in Brazil to discuss the future of the internet it must bear in mind this facts and reflect upon the visions of the founders." Has the future an ancient heart? Rather surprisingly, to properly grasp the issues at stake, it might be useful to describe that history, its driving forces and ideas, and then, move on to analyse recent developments of the Internet.

The Origins of Network Regulation: The *ad hoc* Governance Regime

In 1969 the Advanced Research Projects Agency (ARPA) of the U.S. Department of Defense achieved the interconnection of computers deployed in distant places on US territory. ARPANET was the first computer network based on the principle of packet switching, a transmission technique through which a message is divided in multiple packets that follow different paths to reach their destination, where they are then reassembled. This principle was designed by Paul Baran in order to overcome the risk that a Soviet missile attack might destroy the US military communication infrastructure.[11] The launch of the Sputnik in 1957 and the 1962 Cuban missile crisis solicited Baran's research at the RAND Corporation, a Pentagon contractor specialized in strategic analysis and research on warfare. The core idea of Baran's network was 'decentralization'. As Manuel Castells points out, Baran's design inspired a communications architecture based on three principles: decentralized network structure; distributed computing power throughout the nodes of the network; redundancy of functions in the network to minimize the risk of disconnection.[12]

10. L. M. Mueller, *Networks and States*, p. 1.
11. P. Baran, "On Distributed Communications: Twelve Volumes", in *RAND Report Series*, 1964.
12. M. Castells, *The Internet Galaxy: Reflections on the Internet, Business, and Society*, Oxford University Press, Oxford, 2001, p. 17.

To keep complexity management at the end point of the network meant subverting the concept of the 'terminal' itself, breaking the dichotomy master/servant, fragmenting the mainframe in a computing-power-sharing galaxy. It was an idea influenced by J. C. R. Licklider,[13] head of the Information Processing Techniques Office (IPTO) at ARPA, the same office that was financing, at that time, Baran's research at RAND. The idea of an open decentralized network was also influenced by another contemporary computer scientist, Leonard Kleinrock,[14] who was then a professor at UCLA, working on packet networks and influencing key personalities like Vint Cerf, Steve Crocker and Jon Postel. On 22 November 1977, taking advantages of the decentralized structure of ARPANET, these scholars were able to interconnect different networks with a common open protocol. Decentralization of the key functions of networks was a principle that oriented other designs of the early Net. For example, the end-to-end argument set forth in 1981 by H. Saltzer, David P. Reed and David D. Clark contended that in a communication network it is important to keep as many operations as possible at the extremities, avoiding locating protocol functions within the transmission infrastructure.[15] Decentralization also inspired David Eisenberg's glorification of "the stupid network", that is, a network that, like the Internet, locates all the intelligence at the network's periphery, keeping the middle infrastructure 'stupid'.[16] A network that differs from telephones networks that have computers in the centre of the infrastructure in order to address calls, to check credit and permissions, to apply fees. There was a common belief that Internet infrastructure should be just moving bits from point A to point B. All operations should be done by the user device. Another principle, based on this idea of decentralization, is network neutrality. In a nutshell, this principle prescribes handling all data as if it were of equal importance. According to such notion, the infrastructure should not consider the nature of packets, should not manage or even gather data, and should not discriminate between connections and content.[17] Wherever a message goes to and comes from and whatever it means, it should always be delivered as others, on a first-come first-served principle.

13. J. C. R. Licklider, "Man-computer Symbiosis", in *IRE Transactions on Human Factors in Electronics*, vol. 11, 1960, pp. 4-11. See also J. C. R. Licklider-W.E. Clark, "On-line Man-computer Communication", in *Proceeding AIEE-IRE '62 Spring Joint Computer Conference*, ACM, New York, 1962, pp. 113-128.
14. L. Kleinrock, "Information Flow in Large Communication Nets", in *RLE Quarterly Progress Report*, 1961.
15. H. Saltzer – D.P. Reed – D. D. Clark "End-to-End Arguments in System Design", in *ACM Transactions on Computer Systems*, vol. 2, no. 4, November 1984, pp. 2772-2788. Online at: http://web.mit.edu/saltzer/www/publications/endtoend/endtoend.pdf. An earlier version appeared in the Second International Conference on Distributed Computing Systems, April, 1981, pp. 509-512.
16. D. S. Isenberg, "The Rise of the Stupid Network", in *Computer Telephony*, August 1997, pp. 16-26.
17. T. Wu, "Network Neutrality, Broadband Discrimination", in *Journal of Telecommunications and High Technology Law*, vol. 2, 2003, p. 141.

Decentralization of computing power, openness of protocols, redundancy of connections, all of these principles formed a set of common beliefs about networks, their scope and their architectural structure. All this implied the autonomy of each node of the Net, a principle that turned a warfare technique into a wider political philosophy. These principles, later formalized by David D. Clarke in 1988,[18] and by Brian Carpenter in 1996,[19] had already been shaping informal guidelines for every decision and action for decades. They were shared believes; a widely accepted set of design values so commonly felt that there was no need for enforcement. They were observed not in force of a declaration – which, in some cases, were published when the principles were no longer in use – but in observance of a common vision of the Internet as a decentralized and open network. An important aspect that influenced this 'open' philosophy was the fact that, for the first fifteen years, ARPANET was developed and used only by a limited circle of American researchers. As Malte Ziewitz and Ian Brown point out:

> given the rather small and close-knit group of engineers and academics who were involved in the early Internet, coordination and control took largely place on an interpersonal basis wherever a problem was identified. Problems were conceptualized as mostly 'technical' ones, which just needed to be 'engineered' with the tools and approaches people used in their day-to-day professional work.[20]

The common framework of values, visions and beliefs, the cultural homogeneity of a small circle of Anglo-Saxon engineers and the technical nature of the problems they were facing at the time, produced a horizontal problem-solving approach to network regulation. It was a regime that Castells has called "ad hoc governance."[21] In this social, technical and cultural contest, the issue of network regulation was not perceived as a problem. Decisions on technical issues were made on the basis of what was later called "rough consensus and running code",[22] an informal decision-making process based on the dominant view of a working group interested in finding practical solutions that could be swiftly implemented.[23] The process typically started with a *Request for*

18. D. Clark, "The Design Philosophy of the DARPA Internet Protocols", in *Computer Communication Review*, vol. 18, n. 4, August 1988, pp. 106–114.
19. B. Carpenter, "Architectural Principles of the Internet", in *Request for Comments*, 1958, IAB, June 1996.
20. M. Ziewitz–I. Brown, "A Prehistory of Internet Governance", in I. Brown (ed.), *Research Handbook on Governance of the Internet*, Edward Elgar, Cheltenham, 2013.
21. M. Castells, *The Internet Galaxy*, p. 31.
22. D. Clark, "A Cloudy Crystal Ball – Visions of the Future", in *Proceedings of the Twenty-Fourth Internet Engineering Task Force*, Massachussets Institute of Technology, NEARnet, Cambridge, July 13-17, p. 543.
23. S. Bradner, "IETF Working Group Guidelines and Procedures", in *Request for Comments,* 2418, September, 1998.

Comments (RFC), a document describing ideas and innovations submitted to the research community for peer review.[24] During the first stage of the network's history, Internet developers and users were living in academic communities, and were used to reach decisions through written, argued and rational discussions. It was a situation that changed with the popularization of computer networks.

Popularization has its origins in some of the great innovations occurred in the 1980s: the Internet and the personal computer. Internet was born through the transformation of ARPANET from a network developed and used by US military, academic and industry researchers into an open international network for civil and commercial purposes. This transformation was strongly affected by two main decisions taken by ARPA in 1983: the split of ARPANET into two separate networks – Internet for civil use and Milnet for military communications – and the release of the Internet Protocol Suite (IPS), an open set of standards for networks interconnections. The giving up of the Net by the army bestowed on a few researchers working on projects funded by the US government the task of managing the Internet. They soon organized themselves and gradually gave life to the so-called native institutions of the Internet. Examples of these institutions are the Internet Engineering Task Force (IETF), an open organization based on a free participation of whoever was interested in expressing an opinion on technical issues, and the Internet Assigned Numbers Authority (IANA), working under the moral authority of Jon Postel at the Information Sciences Institute of the University of Southern California. Postel played a fundamental role in the managing of those few centralized resources that the growing net required during the 1980s. He administered the so-called root zone, a set of servers where the correspondences between names, such as *ucla.edu*, and numbers, like *128.97.27.37*, were stored. His addressing system worked according to the Domain Name System (DNS), an open network protocol designed to manage this critical resource.

Even the IPS protocols–the Internet Protocol (IP) and the Transmission Control Protocol (TCP) – were open. Every network could use them without requiring permission. They were focused on simply exchanging data in a network, addressing messages (IP's function) on the cheapest available route (TCP's job). ARPA's decisions fostered the adoption of the IPS by a growing number of other networks that were being set up by research centres across the world. The focus on civil purposes and the openness of

24. RFC was invented by Steve Crocker very early in the history of the Net – indeed, in the same year of the first connection – and later became the official working procedure of the Internet Engineering Task Force (IETF) and the Internet Society (ISOC).

basic protocols led to the creation of an international network integrating more and more local networks.[25]

The second innovation that contributed to creating the conditions for an Internet for the masses was the launch of the first personal computer by Apple, the Macintosh. By introducing *Graphic User Interfaces* (GUIs) and ergonomic interfaces such as the *mouse*, Apple opened the computer world to the wider public. Macintosh PCs were cheap, small and easy to use compared to the standards of the time, when computing was a deal of the so called mainframes: expensive and big computers requiring well-trained users. Apple launched its first personal computer in 1984, announcing it during the Superbowl with a video commercial directed by Ridley Scott. The payoff of this TV commercial was: "On January 24th, Apple Computer will introduce Macintosh. And you'll see why 1984 won't be like '1984'". Reference was to George Orwell's masterpiece and to his dystopian vision of a Big Brother watching everything and manipulating people's consciences. Giving the masses the opportunity to process information with a computer in the same way that big organizations did, Apple promised to avoid the insurgence of 'all-knowing' centres. Interfacing represented another mile-stone innovation of the Net. In the early 1990s Tim Berners-Lee, a researcher at the Conseil Européen pour la Recherche Nucléaire (CERN), invented the World Wide Web (www), a set of standards capable of graphically representing information available in the Internet. Interfaces, after having put in to communication man and machine, linked the man to the Internet. Later, in the 2000s, interfaces were also deployed on servers' administration functions. The so-called Web 2.0 allowed people with a low technical expertise to publish content on the net and to administer complex functions on a hosting server.

Interfacing is a process based on delegation. Instead of commanding the machine through its own language, users interact with it through a set of pre-packaged actions, already conceptually gathered, graphically represented and translated into instructions for computers. These instructions are in the source code of the program. When the program is running, its source code produces a representation of available actions to the user, gathers human feedback, and sends commands to the machine. The source code instructs a computer on what to do, and when and how to do it. As Lawrence Lessig pointed out, "code is law in cyberspace."[26] With interfaces users delegate to programs, and to those who have written them, the control over their own computer, their browsers

25. P. Weiser, "Standards and the Internet", excerpt in P. Weiser, *Internet Governance, Standard Setting and Self-Regulation*, 28 N. Ky. L. Rev. 822, 2001.
26. L. Lessig, *Code and Other Laws of Cyberspace*.

and their web space. Initially, the source code was 'open', instructions were known, and it was possible to read and manipulate the rules. Code creation and the modification of codes produced by others were not limited in any form. Things, however, soon changed.

Even if inspired by notions of openness and decentralization, the birth of the Internet and the launch of personal computers provided the conditions for important transformations that in the 1990s radically changed the political characteristics of digital networks. And they did it in a way that hindered the decentralized structure of the early Net.

The Privatization of the Net Regulation: The Rise of Internet Governance

During the 1990s, networks and computers underwent important changes. IETF flowed into the more organized and institutionalized Internet Society (ISOC), and IANA into the Internet Corporation for Assigned Names and Numbers (ICANN). Jon Postel was ousted by DNS management and lost his battle against the privatization of the DNS root zone. The National Telecommunications and Information Administration (NTIA), an agency of the United States Department of Commerce, took on the authority over the DNS root zone, while its ordinary management was assigned to a private company. The High Performance Computing Act of 1991 (HPCA), in order "to ensure continued United States leadership in high-performance computing", deployed huge public investments in supporting software and hardware innovations, as well as for the creation of high-speed fibre optic networks.[27] The Act strengthened the alliance between the government, the industry and the university in the United States, and accelerated deregulation and privatization processes in the telecommunications sector. In 1996 President Bill Clinton signed the Telecommunications Act, which finally deregulated the media market in the USA and gave the opportunity to companies operating in a given sector (such as broadcasting) to enter other ones (for example the telecommunications or software sector). Presented as an impulse to the improvement of market competition, the Act was to be a strong force in fostering inter-sectorial acquisitions and merging between information giants. On 1 January 1998 the World Trade Organization's (WTO) Agreement on Basic Telecommunications Services was implemented, compelling OECD nations to liberalize

27. L. Kleinrock, "The Internet Rules of Engagement: Then and Now", in *Technology in Society*, 26 (2–3), April–August 2004, pp. 193–207.

their telecommunication market and to open it to international market competition.[28] The USA and the UK had been read for this, as AT&T monopoly was dismantled on 1 January 1984 and in that same year British Telecom was privatized.[29] A private managed infrastructure eroded the openness of the protocols as it produced an unequal network. There were in fact zones interconnected by broadband connections, typically in the United States, and zones depending on marginal nodes with narrow bandwidths. Upon this unequal infrastructure, a technically neutral protocol such as the TCP, one that enabled messages to be directed towards the less overcrowded paths, had a deep political impact. Since the USA had the greatest worldwide bandwidth capacity, thanks to its cable high-speed networks it began attracting the worldwide Internet traffic towards its own territory, to its own infrastructure. It was easier that packets sent from Europe to Russia or from Africa to China passed through American servers then taking the route a plane would have. Moreover, thanks to deregulation policies a hierarchy emerged between networks. Some Internet Service Providers (ISP), precisely nine organizations, joined by means of redundant cable connections with a very high speed, forming the Tier 1 Network, the backbone of the Internet. Other ISPs were directly connected only to some nodes of the backbone (T2) and in turn provided connection to many others ISPs on a local level (T3).

Privatization occurred also as regards Internet content. In order to enforce copyright, violent dramatic battles were fought by the industry backed by the state powers: legislators, governments and courts. Industry-led architectural changes and a vast number of laws, policies, and verdicts showed that the Internet was no longer the free encyclopaedia of the human culture. Content was a property, and property, in the capitalist world-system, had to be protected. The cornerstone of the global legal system set to defend intellectual property rights lay in a couple of treaties signed in 1996 at the World Intellectual Property Organization (WIPO): The World Copyright Treaty (WCT) and the Performances and Phonograms Treaty (WPPT). These treaties introduced the concept of "electronic rights management information", that is, "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work."[30] Conditions of use were thus enforced by this information encoded in the digital work itself. Digital products or devices were officially delegated to apply limitations to users. If a movie was sold, for example, for just a single vision or for multiple visions but only on the same device, this

28. P. Cowhey – M. Klimenko, "The WTO Agreement and Telecommunications Policy Reform", in *Policy*, Research working paper, no. WPS 2601, 2001.
29. A. Mattelart, *Histoire de la société de l'information*, Editions La Découverte, Paris, 2001.
30. Art. 12 of WCT.

private agreement could be directly enforced through this information management. WIPO treaties legitimized the principle that the source codes of digital products could also encode political instructions that do not concern only functional operations, but that also pertain to users' behaviours. The treaties committed signatory nations to protect these regulating codes providing "adequate and effective legal remedies against any person acting to remove or alter electronic rights management information without authority." WCT and WPPT were adopted by many nations, and in the USA they gave birth to the 1998 Digital Millennium Copyright Act. Even the source code of software was privatized. As we have seen before, interfaces are produced by the instructions of the source code. These instructions act as intermediaries in the man-network interplay, stating what computers must do and when and how they should do it. We have seen that the source codes of the early net were generally 'open', in the sense that it was possible to read and write over them. But during the 1990s a particular political kind of code on mass computers started being used. It was called proprietary source code. It is offered on the basis of a right to use license, within a private commercial relationship, typically between an American corporation and a user. It is protected by copyright laws and by technical barriers, so that it is not possible to read what it instructs a 'personal' computer to do. Under the private laws of Intel, Microsoft, Adobe, Google and other software companies, mass codes became secret laws, private regulators, *arcana imperii*. In this private environment, corporations became coding authorities,[31] creating a blurry private regime of public powers.[32] Simple interfaces produced, on the one hand, the growth of Internet users and of content; and on the other hand, a growing power within a new circle of intermediaries such as software houses, service providers and hardware manufacturers. Given this condition, even if the computing capacity came to be decentralized in a myriad of small computers diffused in every house, office and school, the power to determine what the computing capacity is used for – let us say computing power – was once again concentrated in a few centres on the East Coast.[33] Due to the privatization of the source code, the introduction of interfaces between man and machine, welcomed as a liberating technology, at the end bestowed an enormous power onto a few subjects able to encode within mass software whatever instruction they willed. Apple's promise to horizontally distribute power among the people turned out

31. L. Lessig, *Code and Other Laws of Cyberspace*.
32. G. Teubner, *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili*, Armando Editore, Roma, 2005.
33. M. Santaniello, "Diritti umani nel ciberspazio. Patrimonio, persona e lex digitalis", in *Politica del Diritto, (Diritti e sfera pubblica nell'era digitale)*, XLI, 3, 2010, pp. 419-440.

to be a lie. Paradoxically, Steve Jobs' company became one of most tenacious producers of proprietary source codes, and a pioneer of so-called Internet Appliances, that is, devices architecturally closed, remotely controlled and less generative than computers.[34] With its iPod and iPhone, and later with the iPad, Apple repudiated the decentralizing philosophy of its origins, and heavily reduced the computing autonomy of its users.

Privatization of Internet infrastructure, content and code reduced the scope of the first architectural principles of the net, namely, its decentralized structure, its openness, the redundancy of functions, the distribution of computing power throughout the nodes. Some nodes became more important and powerful than others. But, notwithstanding these transformations and in spite of their political consequences, throughout the 1990s and 2000s the mainstream debate on Internet regulation continued to be framed within a non-conflicting framework. More precisely, within the framework of Internet Governance (IG). The main object of regulation, in this framework, was the user's own behaviour. The actions of states, corporations and government, on the contrary, were almost ignored. As demonstrated by Ian Brown, Western institutions acted more promptly in proposing new measures against deviant users' behaviour – like file sharing, pedo-pornography and terrorist propaganda – than in ensuring the protection of fundamental rights in the information age.[35] In a map created for the Working Group on Internet Governance (WGIG) by two of the most influential research centres of legal knowledge on networks, the policy field of IG is limited to issues such as digital copyright, domain names, cybercrime, e-contracting, dispute resolution, foreign commercial relations, relations between private parties, taxation, e-banking, e-finance, jurisdiction.[36] These are all issues concerning property rights and their defence against Internet users. The only issue concerning human rights that was addressed was privacy. But in the liberal perspective adopted by the IG, privacy had been treated more as a property right (the personal property of one's own data) than as a non-fungible personal right (such as dignity, reputation and honour). The WGIG itself gave a controversial report for the World Summit on the Information Society (WSIS) that took place in 2005 in Tunis.[37] Essentially, the report proposed a working definition of Internet governance; it assigned roles and responsibilities to governments, the private sector, and civil society; and delineated a multi-stakeholder approach to decision making processes. Moreover,

34. J. Zittrain, *The Future of the Internet And How to Stop It,* Yale University Press, New Haven & London, 2008.
35. I. Brown, "Internet Self-regulation and Fundamental Rights", in *Index on Censorship*, 39 (1), 2010, pp. 98-106.
36. NetDialogue, "Clearing the House on International Internet Governance", Harvard Law School's Berkman Center for Internet and Society, 2005. At: https://web.archive.org/web/20091001015044/http://www.netdialogue.org
37. WGIG, *Report of the Working Group on Internet Governance,* 2005, http://www.wgig.org/docs/WGIGREPORT.pdf, p. 6.

it established four key public policy areas of Internet governance, mirroring the map of Harvard's Berkman Center and Stanford's CIS.

This part of the report, which focused on users' regulation, network security, and on some intergovernmental disputes over critical centralized resources, was recognized in the official Tunis Agenda for the Information Society.[38] Instead, another part of the report, more critical on some important political issues, left no trace in the final document. In this part WGIG had addressed controversial issues such as the "unilateral control by the United States Government" on the root zone files and system, the "uneven distribution of interconnection costs" from which ensued that "countries remote from Internet backbones must pay the full cost of the international circuits"; the "barriers to multi-stakeholder participation in governance mechanisms". The last issue is particularly important. The WGIG explained that:

> a) there is often a lack of transparency, openness and participatory processes; b) participation in some intergovernmental organizations and other international organizations is often limited and expensive, especially for developing countries, indigenous peoples, civil society organizations, and small and medium-sized enterprises (SMEs); c) the content produced by some intergovernmental organizations and other international organizations is often restricted to members only or is available at a prohibitive cost; d) frequency and location of venues for global policy meetings causes some stakeholders from more remote areas to limit their participation; e) there is a lack of a global mechanism for participation by Governments, especially from developing countries, in addressing multisectoral issues related to global Internet policy development. [39]

All of these matters were not properly addressed by the Tunis Agenda and the final document also avoided addressing the requests from emerging countries to move the control over DNS and other critical resources from ICANN to a UN agency. On the contrary, it called for another summit ten years from then. This demonstrated that the multi-stakeholder governance model, which postulates a free participation of different actors in defining the way digital networks were governed, turned to be serving, essentially, as a discourse platform between the American government and private stakeholders. A number of other world forums, international workgroups and

38. WSIS, *WSIS-05/TUNIS/DOC/6(Rev. 1)-E*, 18 November 2005, http://www.itu.int/wsis/docs2/tunis/off/6rev1.html
39. See note 38, p. 6.

organizations were conceived to give all stakeholders the opportunity to express their visions about Internet regulation. But no political representation was assured to the interconnected masses and, under the flag of self-regulation, no normative power was given to any really democratic organization. The multi-stakeholder governance model legitimized the privatization of the Internet regulation, hiding it under the cloak of an open form of participation. The discourse about political power was kept at the margins of the IG debate, and the idea that a technical and administrative governance of the Internet was sufficient to regulate digital networks became dominant. The de-politicization of Internet regulation fostered by the IG paradigm was often supported by argumentations reflecting the libertarian design principles of the early Net. Even if, as we have seen, those principles had been gradually narrowed down by the privatization of the Internet, Internet was still assumed to be a decentralized system of equivalent nodes,[40] managed by a transnational multi-stakeholder partnership, drawing together a plethora of technical authorities with shared responsibilities.[41] The discourse about openness and decentralization became, from a normative informal belief, a mystifying formal representation hiding a completely altered empirical reality. A reality made of an architecture oriented more to security and property defence than to the freedom and autonomy of each node.

The Re-militarization of Networks: Cyber-power and the Internet of the Bodies

The great mystification ended in 2013. On 6 June *The Guardian* published the first of a long series of revelations about how the US government in using the Internet for its mass surveillance programs, collecting, storing and processing billions of human interactions, in America as well as everywhere else in the world. Together with their British colleagues working at the Government Communications Headquarters (GCHQ), the National Security Agency (NSA) was caught using the re-centralized, opaque and secured architecture of the Internet, built during the 1990s by corporations, in order to know everything about everyone. Documents leaked out by the whistle-blower Edward Snowden showed that Anglo-Saxon governments were downloading, on daily basis,

40. S. E. Gillet–M. Kapor, "The Self-governing Internet: Coordination by Design" in B. Kahin, J. Keller (eds.), *Coordination of Internet*, The MIT Press, Cambridge (Mass.), 1996.
41. N. Desai, "Foreward", in W. Keinwachter (ed.), *The Power of Ideas: Internet Governance in a Global Multi-Stakeholder Environment*, Marketing fur Deutschland GmBH, Berlin, 2007.

billions of emails, social network activities, phone and VoIP calls, video conferencing, streaming transmissions, web click stream, bank account operations, file transfers and stored data. They were doing this throughout PRISM, a secret program collecting information from databases of American information corporations like Microsoft, Google, Yahoo!, Facebook, YouTube, Skype, Aol, Dropbox and Apple. Moreover, they were taking advantage of the TCP effect – which, as we have shown, consists in attracting the world Internet traffic on to the American information superhighways – in order to store, process and analyse a great amount of global traffic. They were also taping into submarine international fibre-optic cables to access global communications; they were targeting foreign countries leaders and persons of interest through spying activities and intercepting webcams with the Optic Nerve program. Documents published by *The Guardian* revealed that NSA was infiltrating thousands of computer systems of citizens, organizations, companies and enemy countries. They were even paying tech companies to insert weaknesses into products and they were able to undermine Internet security by planting vulnerabilities in encryption standards like the one adopted in 2006 by the National Institute of Standards and Technology (NIST) and later by the International Organization for Standardization (ISO), which counts 163 countries as members.

Electronic espionage was not a novelty in international relations, nor was government surveillance of electronic communications unknown. Concerns about American agencies surveillance programs had already been expressed by several organizations at all levels. In 1999, for example, the European Parliament addressed the issue of the American electronic espionage system codenamed Echelon.[42] In 2003 the DARPA's Total Information Awareness, a project gathering an enormous amount of data, was defunded by Congress after public criticism–though it simply changed name into Terrorism Information Awareness. But the 9/11 attack limited disapproval and criticism towards US security policies and, abroad, the War on Terror prepared Western countries to be more tolerant towards US secret activities. One month and a half after the attack, President George W. Bush signed the Patriot Act. It drastically curtailed civil rights of Internet users inside and outside American jurisdiction, while expanding technical and legal possibilities for secret actions. Some provisions of the Act were lately declared unconstitutional, but the main body of the law was reauthorized by three bills until 2010. On 26 May 2011 President Barack Obama signed a further four-year extension of some of the Act's key provisions, extending surveillance permissions on devices and data.

42. STOA, *Development of Surveillance Technology and Risk of Abuse of Economic Information*, PE 168.184/Vol 5/5, 1999.

As the mix of architectural and legal changes allowed the privatization of the Internet in the 1990s, by 2001 the same mix worked to get the Pentagon back in control of the networks. As for users' behaviour, at the end of the first decade of the twenty-first century Internet was almost completely secured.

Power relations between states instead became more and more conflicting, above all those between the USA and China.[43] A geopolitics of the Internet begun to be drawn on maps. Low-density conflicts started to be fought through electronic armies, and silent battles were conducted mostly to steal data, infect systems and test enemies infrastructures and devices. Even if no open war was declared, governments started to face cyberwarfare, and Internet was starting to be militarized.

Between 2006 and 2013 the frequent leaks about government programs threatening civil rights and the increasing conflicting interstate relationships made critical approaches to Internet Governance less marginal than in the past–at least within the research community. The IG agenda was opened up to some thorny issues ignored for almost two decades. This opening is well testified by a 2010 paper by Laura De Nardis who, taking into account contributions by scholars focusing on power relationships in the cyberspace, expanded "the emerging field of Internet Governance" to some critical areas such as communications rights, private backbones, deep data inspection and "private industry use of trade secrecy laws to control the flow of information online."[44] But the 2013 Datagate shattered the Internet Governance. All IG's assumptions such as openness, power decentralization, rough consensus, multi-stakeholder partnership, the limitation of states power, and even the concept of governance itself went questioned. Every discourse based on trust and delegation seemed out-of-date. The empirical reality of the Internet suddenly revealed itself as an unprecedented system of always-on control erected by US governments, with a working team play between Democrats and Republicans. It was no longer surveillance. It was an automated mass surveillance. Absorbing almost entirely the "free flow of information", storing and processing it through data mining software is not just a search. It allows scanning human interactions and predicting aggregate behaviour. It allows a limited circle of people to know more than they should about other people. Moreover, surveillance is not the only goal of this system. Throughout the secured Internet, government agencies can also punish. Infiltrating a computer, damaging a communications system, hacking a protocol,

43. J. Goldsmith – T. Wu, *Who Controls the Internet?*
44. L. DeNardis, "The Emerging Field of Internet Governance", in *Yale Information Society Project Working Paper Series*, September 2010.

destroying content, software or hardware are all actions that go far beyond watching. NSA, GCHQ and other similar agencies have gained the power to take untraceable and unauthorized actions against their targets. They can control–and also command. The re-militarization of the Internet has been achieved at a critical moment of the historical process of interfacing between the man and the Net. Thanks to biometric interfaces, to mobile devices, to always-on connections, to home automation, to geo-localization facilities, to smart watches, Google Glass and other wearable technologies, the human body is getting increasingly closer to the Net. The Internet of Things is producing the Internet of Bodies, and the dream of a man-computer symbiosis expressed in a visionary 1960 article by Licklider, just before being appointed head of IPTO by the Pentagon, has almost became a reality.[45] In this scenario, with a secured network in direct touch with the human body, the issue of networked power becomes a crucial issue that urgently needs to be addressed. Ruling the Net increasingly means ruling the people, their social interactions and their own bodies. The capillary innervation of the network in the everyday material life raises serious questions about the governing systems of our time. Humanity is threatened by emerging technologies of "biopoliticized security", a security "taking the human body and its movements as the focal points."[46] These are questions that cannot be addressed with the conceptual instruments of technical governance, and that require, on the contrary, an analysis of the political government of the Net. An analysis, that is, of power itself.

Conclusions

Much research still needs to be made. Current trajectories – such as privatization, militarization processes and the escalation of conflicts – need to be investigated. They are deeply transforming the Internet and affecting human interactions in the cyberspace. What kind of cyberspace should we expect for the future? An open and decentralized 'augmented reality', or an inextricable web of snares fettering human behaviour? A shared resource for humanity, or a battlefield for cyber-powers?[47] And, furthermore, will

45. J. C. R. Licklider, "Man-computer Symbiosis", in *IRE Transactions on Human Factors in Electronics*, vol. 1, 1960, pp. 4-11.
46. A. Ceyhan, "Surveillance as Biopower", in K. Ball, K. Haggerty, D. Lyon (eds.), *Routledge Handbook of Surveillance Studies,* Routledge, London and New York, 2012, pp. 38-45.
47. M. Santaniello–F. Amoretti, "Electronic Regimes: Democracy and Geopolitical Strategies in Digital Networks", in *Policy & Internet*, 5, 2013, pp. 370-386.

power relations in the cyberspace lead to a balkanization of the Internet?[48] Are we facing a de-Americanization of global networks? What are the strategies of the most powerful actors? How do they affect human rights? Is there still a possibility of re-democratizing the Internet? Or, on the contrary, the only choice left to those who seek freedom is between diving into the Darknet, where contestation ghettoize among deviancy, and a total or a partial disconnection, an exit strategy following the example of the Russian Army that uses typewriters to keep top secret documents out of the Internet? Will the call for an *Internet Bill of Rights* be able to merge principles throughout normative standards for any actor – states, international organizations, ICT corporations and individuals? Is it still possible to *constitutionalize* the Net?[49] If the Internet does not naturally empower people, how might it do so? In order to answer these and other important questions – all of which will have a deep impact on the political nature of human societies in the ensuing years – it is necessary to begin a wider and deeper reflection about cyber regulation. A holistic reflection that keeps constantly focused on its own research object, one that avoids ideological approached and mystifications by continuously scrutinizing its own material and technical basis.

48. K. Saunders, "Balkanizing the Internet", in S.A. Pager, A. Candeub (eds.), *Transnational Culture in the Internet Age*, Edward Elgar, Cheltenham, 2012.
49. H.L. Tribe, *The Constitution in Cyberspace. Law and Liberty Beyond the Electronic Frontier,* Harvard University Press, Cambridge, 1991.

NOTAS Y DISCUSIONES

Sobre el libro

Wolfgang Streeck

Gekaufte Zeit: Die vertagte Krise des demokratischen Kapitalismus
(Shurkamp Verlag, Berlin, 2013)

English translation: *Buying Time: The Delayed Crisis of Democratic Capitalism*
(Verso, London, 2014)

¿POR QUÉ GANAR MÁS TIEMPO?

Una lectura bioeconómica de la crisis

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La actual crisis económica viene acompañada por un debate, siempre más amplio y heterogéneo, del cual emerge una cuestión antigua, que hoy asume una inédita especificidad teórica: ¿cuál es la relación entre democracia y mercado? ¿En qué términos puede declinarse todavía esta relación?

El recién y riguroso análisis de Streeck muestra cómo esta crisis es el resultado de un largo camino, empezado en los años setenta, que ha conducido a una hegemonía sin antecedentes de la ideología capitalista neoliberal. Los instrumentos utilizados para hacer frente a los periódicos momentos de crisis han funcionado como un fármaco provisional, que ha mantenido unido el inestable binomio democracia-capitalismo. Una alianza disuelta por la actual financiación del capital, frente a la cual la política, tradicionalmente entendida como *government*, se ha desmoronado, llegando a ser completamente sumisa a la ideología neoliberal.[1] Se trata de un diagnóstico ampliamente compartible;[2] sin embargo, la compleja relación entre capital y democracia puede ser reinscrito en el ámbito de un marco conceptual capaz de ofrecer una perspectiva que ilumine la profundidad y la irreversibilidad de las transformaciones de las últimas décadas, que han erosionado la consistencia teórica original de numerosas categorías, a partir de la categoría misma de la política. Esta torsión, léxica y teórica, permite replantearse la relación mercado-democracia dentro de una governabilidad de tipo bioeconómico, caracterizada por la intensa socialización de los poderes, que gobiernan la vida a través de relaciones de tipo económico. Estas, en sintonía con la representación neutralizadora del mercado, configuran las conexiones interpersonales mediante transacciones basadas en criterios de conveniencia, por tanto con rasgos despersonalizadores y no afectivos, que eluden

1. W. Streeck, *Gekaufte Zeit: Die vertagte Krise des demokratischen Kapitalismus*, Shurkamp Verlag, Berlin, 2013.
2. No faltan las convergencias con otros estudios sobre este tema, cfr. D. Harvey, *A Brief History of Neoliberalism,* Oxford University Press, Oxford, 2005; L. Gallino, *Finanzcapitalismo. La civiltà del denaro in crisi,* Einaudi, Torino, 2011.

los instrumentos jurídico-políticos aún vinculados a un pacto de solidaridad y a un soberano que los hace efectivos.

El proceso de economización de todas las facetas de la vida ha hecho que el imaginario en el que se fundan las sociedades sea inseparable de los mecanismos de estructuración de sujetos dominados por la mentalidad mercantil, con su retórica de la autoafirmación, del ser hacedor de sí mismo, basada en la exaltación de las capacidades relacionales y creativas. La cuestión de la política no puede prescindir de estas nuevas subjetividades-sometidas y de la exigencia de profundizar la concreta articulación de estos procesos en el contexto histórico y en las modalidades de producción económica en las que se realizan. Hay subjetivaciones políticas que no nacen necesariamente de un gesto antagonista dictado por una contingente identidad política en conflicto con el orden establecido y tampoco de una acción desvinculada del contexto que lo precede y lo alimenta, sino que aparecen a partir de aquellas fuerzas que se resisten a la captura de la ideología capitalista, capaces de manifestar el desacuerdo y poner nuevamente en juego, polémicamente, nuevos espacios de identificación y de acción política.

La lógica económica de la *Governance*

El proceso de hegemonización del discurso neoliberal ha coincidido con la afirmación de lo que generalmente es definido *governance* global. El uso siempre más difundido de esta categoría procede, antes de todo, de una exigencia de tipo descriptivo, que aspira a explicar la actual forma gubernamental como el resultado de una transformación de las categorías clásicas de la modernidad, la primera de entre ellas la de soberanía. La lógica vertical y jerárquica típica del *government*, vinculado a unos espacios bien delimitado por confines, se ha transformado en una lógica de tipo horizontal destinada a favorecer procesos de cooperación e interacción entre sujetos de diferente naturaleza (ciudadanos, empresas, asociaciones y el mismo Estado), que utilizan variados instrumentos para la elaboración de políticas, que deberían de ser caracterizadas por una mayor transparencia de los procesos de toma de decisiones mediante la participación en ellos de sujetos no institucionales. Este sistema de intermediación de intereses entre diferentes actores halla plena justificación en la adaptabilidad a los procesos de toma de decisiones en sistemas complejos, que no hacen referencia a un territorio específico.[3]

3. Sobre los mecanismos de ensamblaje de componentes nacionales y globales en nuevos tipos de entidades institucionales, cfr. S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, Princeton,

Se trata de una descripción que si bien adherente a lo que se sucede en el mundo a día de hoy, parece inadecuada para iluminar el opaco orden discursivo que la sostiene, para sondear el cual puede resultar conveniente acudir a la caja de herramientas que nos ha puesto a disposición Foucault. Él nos ha mostrado cómo las dinámicas del poder nunca se puede resumir en un único "lugar", mucho menos si ese lugar se halla en la cúspide el sistema político, y tampoco se explicitan mediante funciones prevalentemente represivas, más bien se entrelazan en tupidas tramas de tipo horizontal que se entretejen en el ámbito social, produciendo acciones y subjetividades subordinadas a los saberes que se afirman como verdaderos. En particular los estudios sobre la *gouvernamentalité*,[4] es decir la específica racionalidad que caracteriza, en un determinado período, el gobiernos de los vivos, se concentran en las condiciones de posibilidad e inteligibilidad de los modos en los que el gobierno actúa sobre las acciones suyas y de los demás, ofreciendo una perspectiva de una profundidad a menudo ausente en aquellos análisis que se preocupan de investigar sobre todo las lógicas autopoiéticas de la *governance*.

Moviéndonos en esta perspectiva, la alianza entre capital y democracia se presenta del todo interna al paradigma biopolítico, en el que el cuidado y el fortalecimiento de la vida, es decir el discurso dominante subyacente a ese paradigma, han encontrado su plasmación práctica en la afirmación de una serie de derechos (sanidad, instrucción, salarios más altos, etc.), realizando por tanto una función productiva y afirmativa de las expectativas, de las necesidades y de los deseos de los sujetos. El doble registro, discursivo y práctico, que ha sido puesto sobre la mesa por los dispositivos biopolíticos welfaristas, ha garantizado de esta manera el crecimiento social mediante una serie de medidas dirigidas al bienestar de los sujetos según una modalidad que vuelve a proponer canones pastorales.[5] Este paradigma he llevado a cabo un significativo *deplacemént*, puesto que el discurso que se afirma como verdad ya no es el del soberano, sino el del *bios* y el de las normas a él subyacentes. El primero se basa en la relación mandato-obediencia: se da el reconocimiento voluntario de un poder jerárquicamente supraordenado al que se nos somete por razones que pueden ser diferentes, pero que de todas maneras legitiman ese poder; sin embargo, la perspectiva abierta por la figura del pastor introduce una diferente relación en la que la autoridad de quien gobierna se funda en su disponibilidad

2006; sobre las diferentes "graduaciones" de soberanía, cfr. A. Ong, *Neoliberalism as exception. Mutations in Citizenship and Sovereignty*, Duke University Press, Durham, 2006. Un análisis específico sobre estos temas se encuentra en A. Tucci (ed.), *Disaggregazioni. Forme e spazi di Governance*, Mimesis, Milano-Udine, 2013.

4. M. Foucault, *Naissance de la biopolitique. Cours au Collège de France, 1978-79*, Seuil/Gallimard, Paris, 2004.

5. Sobre la estrecha conexión presente en los dispositivos entre elementos discursivos y no discursivos, cfr. L. Bazzicalupo, *Dispositivi e soggettivazioni*, Mimesis, Milano-Udine, 2013.

a actuar a favor del bienestar y la prosperidad de los gobernados-población. Se ofrece como oblación la gestión de las vidas y se espera la influencia obligatoria que esta ofrenda suscite en los gobernados. Se instauran relaciones heterónomas y en cierto modo pasivizantes, realizadas a través de técnicas en su mayoría inclusivas y disciplinarias que satisfacen el deseo, colmando la falta, que normalizan, creando subjetividades internas a los procesos de resocialización al que aspira el proyecto keynesiano en la búsqueda de un punto intermedio entre individuo y Estado moderno.[6]

El deslizamiento, evocado por Streeck, de una justicia social a una justicia del mercado se ha concretado en los últimos treinta años, en los que se ha impuesto un complejo de retóricas que ha culminado en la colonización del espacio político por parte del económico, capaz de superar el conjunto de mediaciones coordinadas por las instituciones democráticas y de gestionar autónomamente los conflictos sociales. El gobierno bioeconómico se ha presentado como capaz de remover los defectos de la democracia representativa debidos a la necesidad de mediar y, por lo menos en parte, de satisfacer las peticiones de los ciudadanos, asegurando a la vez criterios para seleccionar lo mejor que la sociedad ofrece en términos de talento y de mérito. Por tanto, las nuevas subjetivaciones se han formado en el interior de un imaginario completamente diferente al del pasado, ahora más impregnado de libertad y posibilidades autorrealizadoras, dentro de una continua competición, sometidas a los poderes que las gobiernan más como vidas deseantes que como ciudadanos titulares de derechos. La crisis de la política, entendida como lugar de la decisión legítima sobre un determinado territorio, no deriva de su sometimiento al discurso económico, considerado como externo a ella y como su principio de legitimidad, sino del hecho de que ella misma llega a ser una economía en el momento en que concentra el fuste de su propia racionalidad más sobre la lógica que guía las decisiones que sobre los fines de estas elecciones.[7]

Describir la *governance* limitadamente en términos de una mera dislocación de los poderes de un nivel nacional a otro global y hallar su fuente de legitimidad en las prácticas de negociación y asociación que permiten ampliar la esfera de toma de decisiones a los sujetos titulares de un interés, significa aceptar su retórica sin darse cuenta de la mutación ocurrida en la racionalidad del gobierno, y de cómo ello haya producido una indistinguibilidad entre *governance* y economía. Nos basta pensar en el modelo antropológico en el que se funda esta nueva racionalidad gubernamental. Los agentes están considerados iguales e independientes, cada uno en posesión de la

6. J. M. Keynes, *The End of Laissez-Faire: The Economic Consequences of the Peace* (1926), Prometheus Book, New York, 2004.
7. L. Bazzicalupo, *Il governo delle vite. Biopolitica ed economia*, Laterza, Roma-Bari, 2006.

información necesaria para orientar de forma racional sus decisiones de adquisición e inversión. Ellos dirigen su propia conducta al aprovechamiento óptimo del propio capital humano, que no deriva solo de caracteres genéticos o biológicos, sino que es la consecuencia de una inversión educativa y profesional que genera conocimiento, entendido como factor de producción que aumenta la productividad del individuo. El sujeto se construye como una especie de empresa permanente y a la vez flexible, capaz de interactuar con el ambiente en que vive y de potenciar sus capacidades, libre de reinventarse, pero también inexorablemente atrapado en el cerco de técnicas y saberes, y siempre sometido al yugo de expertos que orientan su conducta. Una mezcla entre retóricas de la autorrealización y formas de control caracteriza la lógica gubernamental neoliberal que desvela su alma bioeconómica: ella produce nuestras subjetivaciones y estructura nuestro imaginario.

Subjetivaciones

A la luz de estas consideraciones, las propuestas de Streeck – la salida del euro, con anulación de la deuda y la vuelta a la soberanía estatal – aun siendo loables por tratar de dar un nuevo impulso a la política y a sus aspiraciones solidarias, amenazan con adquirir las connotaciones de una batalla de retaguardia, cercanas, entre otras cosas, a las posturas de los nuevos populismos antieuropeos. Es esta la acusación que le hace Habermas, intransigente a la hora de sostener la necesidad de una consolidación democrática de Europa que se ha de conseguir a través de la activación y del funcionamiento de una esfera pública de ámbito europeo, que apoye políticamente la decisión de las instituciones europeas.[8] Nos encontramos ante un paradigma moderno que considera la economía, en cuanto ámbito de saber con una lógica inmanente, del todo extrínseca a la política que, al ser una esfera separada, sigue con poder para regularla y someterla a unos vínculos en nombre de principios comunes. El punto de perspectiva es el mismo, lo que se amplía es únicamente el campo visual (del nacional al supranacional), sin captar el deslizamiento que este nuevo dispositivo gubernamental ha producido en los modos y las técnicas de gestión del ser vivo.

Eso no significa renunciar a la perspectiva de una nueva justicia social adecuada a los nuevos sujetos sometidos a la *governance* y antagonista respecto de las actuales lógicas

8. J. Habermas, "Demokratie oder Kapitalismus?", en *Blätter für deutsche und internationale Politik*, 5, 2013, pp. 59-70.

de la justicia de mercado. Sin embargo, evidentemente, la racionalidad de gobierno de matriz welfarista hallaba su coherencia solo dentro de un sistema cuya lógica era específicamente política, como el de tipo nacional, y pasaba por formas de mediación encarnadas por sujetos como los partidos y los sindicatos, que hoy en día se encuentran vaciados de sentido y deslegitimados, debido a las políticas de ataque y recorte a los derechos de los trabajadores y a la creciente evanescencia de los mecanismos representativos. Así el augurio de Streeck desvela un rasgo paradójico y termina con parecerse a un desesperado intento de ganar más tiempo, mediante una vista que mira más al pasado que al presente.

No hay que olvidar cómo el neoliberalismo ha invertido a fondo en la producción de subjetividad, no sólo relacionado con lógicas autopoiéticas y de *empowement*, sino creando también subjetividades móviles y resistentes, recapturadas a través de modalidades de rejerarquización y selección que no renuncian a utilizar técnicas tradicionales de control y disciplina: nos vale pensar en los nuevos dispositivos de asignación de raza y género. Sin embargo, justo ahora que la crisis encuentra dificultad para encontrar salidas, y el crecimiento ilimitado y la regeneración del capital pasan por una fase de *impasse*, las subjetividades estructuradas alrededor de este tipo de imaginario pueden encontrar un espacio, un resquicio con respecto a él y a el imagen ideal y natural de sí con la que tienden a coincidir. Si uno de los rasgos principales de la *governance* neoliberal ha sido aquel de economizar el deseo, la fallida satisfacción de los deseos generados por el mismo discurso del capital provoca no solo desilusión, sino también resistencias. Emergen siempre más numerosas clases de excluidos que, inmersos en la lógica inmunizadora del intercambio por equivalencia del capitalismo, se encuentran en desorientada condición de pérdida. Pues justo de la capacidad de estos sujetos – precarios, desempleados, nuevos pobres – de elaborar el luto de su misma condición puede surgir la complicada, pero necesaria, obra de erosión de aquellas verdades en las que se funda el gobierno neoliberal. Se trata de una sujetividad que tiene en sí aquellas potencialidades autorganizadoras – que el mismo discurso neoliberal siempre ha sostenido – y que de forma frecuente utilizan modalidades más o menos explícitas, más o menos organizadas, de sustracción o de ruptura con respecto a los dispositivos de apropiación del capital.

Plantearse el problema de la política no significa necesariamente volver a confiar en aquellas categorías que ya funcionaron en el pasado, pero que actualmente se han reducido a ser meros engranajes de la maquinaria capitalista cuyas teorías económicas están entrelazadas con la producción de saberes, que justifican las bases de lo político. Por el contrario, la cuestión política debe enfrentarse a las nuevas sujetividades que, con

la fuerza de sus reivindicaciones y la disonancia de sus perspectivas respecto a la verdad "natural" del mercado, pueden constituir un primer paso necesario para poner en entredicho el orden gubernamental actual. Queda claro que las instancias procedentes de la sociedad serán muchas veces profundamente diferentes entre ellas, sintomáticas de la complejidad que invade los procesos de sujetivación política. Sin embargo, justo esta emergencia y la articulación de estas voces en contra-discursos constituye el presupuesto para poner en evidencia las patologías presentes en el espacio, aparentemente liso y totalizador, del discurso capitalista y para reactivar la matriz polémica y radical de la política.

THE *LONGUE DURÉE* OF A TEMPESTUOUS MARRIAGE:

The Multi-Faceted Crisis of Democratic Capitalism

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Are democracy and capitalism incompatible? In the end, this is the crucial question of *Buying Time: The Delayed Crisis of Democratic Capitalism*[1] by Wolfgang Streeck. According to the author, the present economic, financial, and public debt crisis is just the last chapter of the intricate relationship between democracy and capitalism. Starting from the end of World War II, the book reconstructs three consecutive phases of such relationship: the phase of "tax State", spanning the so-called "Golden Age" (1945-75); the phase of "debtor State", emerged over the seventies and eighties as the new institutional regime after the crisis of the tax State; and the present phase of budgetary "consolidation State", a multilevel international regime based on fiscal austerity, de-politicization of economics and de-democratization of politics.

Based on a perspective of *longue durée*, the book suggests that the present crisis can be interpreted as a further step in the neoliberalization of European states started since the seventies. The key variable in Streeck's analysis is time. Indeed, as crisis seems to be an inevitable outcome of the tempestuous marriage between democracy and capitalism,[2] crisis is just a matter of time. Hence the only thing State can do is to delay the crisis by buying time. The author shows how over the last seven decades democratic capitalistic states have been able to buy time by introducing new strategic variations, in terms of institutional devices and social and financial settlements, aimed at rebalancing the relationship between democracy and capitalism. Consistently with the critical theory of the Frankfurt School, Streeck argues that the crisis is first and foremost a legitimation crisis.[3] Yet, his analysis differentiates itself in two points.

1. W. Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism*, Verso, London, 2014.
2. R. A. Dahl, *On Democracy*, Yale University Press, New Haven and London, 1998.
3. J. Habermas, *Legitimation Crisis*, Polity Press, Cambridge, 1976.

The first relates to the inevitability of the crisis, which is not due to the existence of an abstract "iron law" linked to the inherent contradictions of capitalism, but is the consequence of human agency. The second point is that the delegitimation of the State doesn't come from its citizens, as supposed by the members of the Frankfurt School, but is the result of the withdrawal of capitalism from the commitments it entered into. Democratic capitalism is an institutional formula involving three main players: State, capital and "wage-dependent" people. Its crisis is due to the lack of confidence by profit-dependent class in State's capacity to perform actions that are beneficial to capital. In order to delay the crisis, the State has to regain such confidence by resorting to social and financial devices which are both attractive to capitalists and able to keep social peace. The only way to fulfill such conflicting aims is to resort to devices which are able to quickly create virtual wealth. As to the crisis of the first institutional regime of democratic capitalism, the tax State, inflation was the device to create a new satisfactory settlement between democracy and capitalism. Through inflation, the State – while downsizing itself – was able to address the need of the new consumer society. But this was possible only for a limited time. With stagflation and central banks' decision to rise interest rate, in the early eighties the State had to find ways alternative to taxation and inflation for funding its own policies. The new device was the resort to public debt, which turned the tax State into the new institutional regime of debtor State. As Streeck demonstrates, the rise of debtor State was not due to an alleged excess of democracy, that is an increase in public spending caused by new participants and demands on democratic government. In fact it was due to the decrease of State's revenues linked to the lowering of fiscal pressure for the wealthiest income brackets. Indeed, with neoliberal globalization and financial liberalization, State was even more compelled to run after capital by levering fiscal and regulatory systems.[4] However, the resort to public debt led to the rapid increase of sovereign debt, which made financial markets even more skeptical about State's capacity to repay its debt. For this reason, this device could be used for a limited time too. Therefore, the debtor State had to turn into an austerity or consolidation State, defined by balanced budgets and a gradual decline in public indebtedness. The new financial device of consolidation State is private debt, that is a debt regime of extreme generosity, allowing (or better compelling) individual citizens to take out loans at their own risk with which to pay for the education, housing, and social services, that the consolidation State is no more able

4. L. Gallino, *Il colpo di Stato di banche e governi. L'attacco alla democrazia in Europa,* Einaudi, Torino, 2013.

to fund. Unlike its predecessors, the consolidation State is a multilevel international regime fully embedded into the European integration process. Indeed, the institutional transformation from the Keynesian national mixed economy to the Hayekian transnational free economy sees the EU as the 'liberalization machine' for fulfilling the Hayekian utopia of an international regime based on free market. By the same token, the Economic and Monetary Union (EMU) and the introduction of the euro as a single currency constitute the supranational governance regime in which member states commit themselves to strict fiscal discipline as well as to renounce to currency devaluation as a tool of monetary and economic policy. Such an institutional transformation is coupled with the twofold process of de-democratization of politics and de-politicization of economics. In the first place, the onward disempowerment of democratic institutions, such as national and European parliaments, coupled with low turnout and growing populism, also reveals citizens' dissatisfaction for the actual operation of representative democracy. In the second place, the shared understanding, provided by the guiding principles of the EMU, that economic and monetary policies constitute a "special" and privileged domain,[5] led to an increasing role of unelected bodies, such as the European Central Bank, European Commission and International Monetary Fund, in imposing a radical change in domestic policy agendas towards the privatization of public services, de-structuring of welfare state, and cuts to public expenditure. Moreover, the recent ratification of important treaties, such as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also known as "Fiscal Compact"), tightened this process by providing both a legal basis for states' commitment to strict fiscal policies, and automatic sanctions for those deviating from stated macroeconomic objectives.

In Streeck's view, the EU and euro constitute a kind of supranational "cage" which favours the neoliberalization of European states and undermines democracy. In order to guarantee just rough social justice and democracy, he proposes to stop the EMU process and come back to national sovereignty. His proposal of an "European Bretton Woods" is based on the reintroduction of national currencies into a system of flexible exchange rate with the euro acting as a reference virtual currency. Before discussing such controversial recommendations, other points are worth considering.

The first one relates to the methods introduced by the State to delay the crisis, which share some characteristics. Firstly, each method can be used as far as it doesn't

5. K. Dyson, "Economy and Monetary Union in Europe. A Trasformation of Governance", in B. Kohler Koch, R. Eising (eds.), *The Trasformation of Governance in the European Union*, Routledge, London 1999, pp. 97-118.

endanger capital accumulation. Secondly, the creation of merely virtual wealth by the three methods explains their intimate fragility in coping the crisis in the long run. Lastly, the new social settlement following the delegitimation of the previous method is always based on deeper liberalization, further defeat of wage-dependent people and increasing inequality.

In fact, the end of inflation was linked to the defeat of unions and the end of full employment as a public macroeconomic objective. The end of public debt regime coincided with the privatization of public services and retrenchment of social rights. The crisis of private debt has been followed by mass unemployment, drop of income and further cuts to social spending. These effects are not fortuitous or mishaps. There is a rationale behind them, named neoliberalism, that, from the seventies onwards, has pushed for the "great transformation" of democratic capitalism. The encrusted welfare State turned into neoliberalized State based on a paradigm shift from "Keynesianism" to "Hayekism" that realized in a few years.

Although Streeck's account of the historical reasons of the crisis is a convincing one, his focus on the economic aspects of the process is only in part able to explain the quickness of such paradigm shift. Furthermore, his class-based analysis is rather ineffective in reasoning out the universal diffusion and success of neoliberalism as the new "hegemonic worldview".[6] As to the quickness of the paradigm shift, it can be better reasoned by giving consideration to the climate of general disrepute of welfare State, which was delegitimized both in its normative foundation and practical operation by different perspectives. On the one hand, theorists of legitimation crisis, such as Habermas (1976) and Offe (1984), emphasized the inherent contradictions of democratic capitalism based on welfare State; on the other hand, overload theorists, such as Huntington (1975) and Brittan (1975), underlined the dysfunctions of democracy caused by the delegitimation of authority and overloading of government. Both these theories claimed that State power had been eroded in the face of growing demands emerged over the sixties. These were regarded as the result of an "excess of democracy" in the case of overload theorists, or as the inevitable result of the contradictions within which the State was enmeshed, in the case of legitimation crisis theorists. Nonetheless, while the solutions proposed by the latter remained by and large the province of a few political analysts and academic circles, overload theories were influential in party political circles and much discussed in general ways in the

6. D. Harvey, *A Brief History of Neoliberalism*, Oxford University Press, Oxford, 2005.

media.[7] Their proposals of downsizing government, reducing the excess of democracy, and reconstituting authority based on expertise rather than democracy, were key points of neoliberal perspective too. In this sense, the role of overload theories in paving the way to neoliberalism has to be emphasized. Yet, neoliberal discourse distinguishes itself by some special elements. Firstly, downsizing government coincides with less interventionist State only during the early phase of "creative destruction" of neoliberalism, based on privatization, deregulation and dismantling of welfare State. From the nineties onwards, the phase of "roll-out" neoliberalism is a process of positive construction which coincides with the neoliberalization of the State based on its active role in constructing new markets or re-regulating the existing ones.[8] Hence State has to provide the legal, regulatory, and institutional framework for the implementation of market principles. The neoliberal transformation of the State is a never-ending restructuring process, that is a radical and continuous change in State's scope, objectives, norms, values, and constituency. The State becomes "neoliberal State" by a process of continuous adjustment involving economic, as well as political, juridical, cultural and social aspects. Neoliberalism's ability to become hegemonic as a mode of discourse, as well as to have pervasive effects on ways of thought and become incorporated into the common-sense way many people interpret, live in, and understand the world, can only be reasoned by taking into account all these facets. It is not just an institutional transformation, but an anthropological one. Based on the golden value of competitiveness and the rhetorical celebration of individual freedom, neoliberalism is not just an economic doctrine or the new ideology of the dominant class. It is not just false class consciousness for wage-dependent people. Neoliberalism is a rationality which uses economics as "a method to change the soul", as Margaret Thatcher clearly put it. As "the new way of the world",[9] its discourse involves the neoliberalization of economy, as well as politics, society, and individual psychology. Such an all-encompassing pervasivity makes it very difficult even to imagine an alternative way of the world. It is no coincidence that pervasivity is also the distinctive feature of technology. Based on competition and the logic of enterprise, neoliberalism can be described as the technology of government for disciplining states and individuals. On the one hand, such an interpretation of neoliberalism makes Streeck's analysis of "consolidation State" as an international governance regime even more impressive,

7. D. Held, *Models of Democracy. Third Edition*, Polity Press, Cambridge, 2006.
8. J. Peck – A. Tickell, "Neoliberalizing Space", in *Antipode*, 34, n. 3, 2002, pp. 380-404.
9. P. Dardot, C. Laval, *The New Way of the World. On Neoliberal Society*, Verso, London, 2014.

since the EU and EMU, with their regulatory system and treaties, can be conceived as the distinguishing technology of government created by member states to better realize market principles, competitiveness and liberalization, after financial and economic globalization emerged.[10] On the other hand, such an all-encompassing conception of neoliberalism calls into question Streeck's proposal to return to national sovereignty. In fact, in this process the State cannot be considered just as an empty box, filled with policies imposed by neoliberal capitalists. Nor the State is just the submissive agent of decisions taken elsewhere. The neoliberal restructuring of the State has been made through the active role of the State. The transformation of State's polity has been performed by State's policies proposed by State's politics. If a "coup" occurred, then it cannot be depicted as the result of international finance conspiracy against national government. Rather, this process sees the full and witting participation of national politics.[11]

States are at the core of EU integration. They agreed to the transfer of authority from national to European level, and most of them signed European treaties which provided for more liberalization, as well as more constraints on national macroeconomic autonomy. Therefore, the proposal to stop neoliberalization by returning to national sovereignty is at least contradictory. The State Streeck asks to come back to is the neoliberal State: hence it is rather problematic to overcome the present phase of neoliberalization by relying on states whose politics and policies most contributed to the present situation. Change needs time. And the neoliberal State is likely no more willing to buy more time for creating virtual wealth for its citizens. Actually, its new device to face the crisis appears to be stealing time from its citizens, by worsening the quality of their life, reshaping their expectations, reducing their democratic participation, as well as job opportunities, and social services. Probably, even this device can be used for a limited time. But it will not be the existing State to put an end to this situation, as Streeck seems to hope for. It will likely be up to a revised version of the third (and rather neglected) player of democratic capitalism formula, including all those people hit by the neoliberal restructuring crisis, to reverse the process. How this will take place is currently not predictable. In fact, if these people will feel to be bound by their nationality, and strive for a "national solution" to the crisis, then an easy way-out will probably be the emergence of populism, as a national response fully

10. S. Gill, "Constitutionalizing Capital: EMU and Disciplinary Neo-Liberalism", in A. Bieler, D. Morton (eds.), *Social Forces in the Making of the New Europe*, Palgrave, New York, 2001, pp. 47-69.
11. L. Gallino, *Il colpo di Stato di banche e governi. L'attacco alla democrazia in Europa.*

consistent with the neoliberal understanding of State. Otherwise, the hardest way-out consists of counteracting neoliberalization at the transnational level. It is a process with an uncertain outcome, involving an all-encompassing understanding, that is a new way of the world able to act as a counter-hegemonic alternative to the neoliberal one. It is a time-consuming way, but it is likely the only one to regain the stolen time.

DEMOCRACY AND NEOLIBERALISM

On the Crisis of Democratic Legitimacy Caused by Neoliberal Transformation

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Time has run out for democratic sovereignty in the now bygone era of neoliberal governmentality and the time "bought" in the thirty year period after the Second World War with social Welfare State policies is the price we now have to pay in terms of public debt and distributional conflict in an irreversible crisis of representative democracy. This is the assumption underlying Wolfgang Streeck's essay, *Buying Time. The Postponed Crisis of Democratic Capitalism.* By reconstructing the monumental steps that led to the financial crisis of 2008 and its current political development governed by the central banks and the European Union, Streeck focuses on neoliberal transformation and shows its expansion in light of the conflict between capital and work that developed at the end of the 1970s following a decline in growth and a rise in inflation. With the start of market deregulation and initial dismantling of the social guarantees provided by welfare, there is a change in the mechanism of governance applied during Fordism. Governance is no longer decided by the sovereign will of states for the wellbeing of the population but by market competition for trade liberalisation. By using an innovative approach to historical narrative, Streeck analyses the delaying strategy implemented by state policies, first with inflation and then with public and private debt, in response to the growing regulatory power of the markets and rating agencies, and sees the crises of the last thirty years as the result of a reorganisation of power technologies in which current neoliberal rationality takes shape.

The work is based on the theoretical plane focused on by Streeck and begins with the process of institutional transformation that has affected the sovereignty of nation states and has radically changed their ability to intervene with regard to capital. Its aim is to provide a critical reflection on the difficult relationship between democracy and neoliberalism which is currently at the centre of contemporary debate. I will therefore

analyse some critical and closely interrelated issues raised by the author: the democratic crisis inflicted by financial capitalism, the debt caused by social policies and the role of the European Union.

The idea is that neoliberalism is not only the economic rationality behind the current processes of valorisation and accumulation, but, albeit more radically, as Laura Bazzicalupo points out in the opening editorial, it is also the contemporary political rationality "that finds its legitimacy in the market",[1] that permeates the lives of individuals and governs power relations in an ambivalent way that is foreign to the sovereign paradigm and is based on legal dichotomies between public and private, state and market and rights and citizenship.[2] In my view, the sovereign dimension of the political notion that Streeck refers to in his analysis of the contemporary crisis should therefore be integrated with a knowledge of the highly innovative nature of the institutional processes activated by neoliberalism.[3] This political rationality is no longer exclusively attributed to two modern political structures, State and citizens, but a multitude of social powers that de-territorialise governance and lead to processes of subjectification and subjection based on self-government that reconfigure the classical political space, as pointed out by Michel Foucault in his studies on neoliberal governmentality.

In light of this view, clarified in Foucault's 1979 lectures, I would like to dwell on the crisis of democratic legitimacy brought on by neoliberal reform at the end of the 1970s and considered by Streeck to be the first step in a financial transformation that brought an end to the democratic obligation assumed by states in the post-war period in the form of social pacification. As already mentioned, the delegitimacy of the welfare state, that is to say, the regulatory mechanism between State and market in Fordism, is not only caused by economic factors linked to a decline in industrial profits. Along with the devastating events of the energy crisis, it is caused by social policies that are strategically inspired by a new principle of organisation based on competition as demonstrated by the fact that back in 1971, the USA had already taken a first step in this direction by inaugurating the regime of flexible exchange "with the intention of disengaging the monetary system from the wage struggles."[4]

1. L. Bazzicalupo, "Editorial", in this volume, and "Democrazia. Crisi e ricerca di altri modi di essere democratici", in L. Coccoli, M. Tabacchini, F. Zappino (eds.), *Genealogie del presente. Lessico politico per tempi interessanti*, Mimesis, Milano-Udine, 2014, pp. 51-62.
2. Cfr. W. Brown, "Neo Liberalism and the End of Liberal Democracy", in *Edgework: Critical Essays on Knowledge and Politics*, Princeton University Press, Princeton, 2005, pp. 37-59.
3. Cfr. S. Mezzadra-S. Chignola, "Fuori dalla pura politica" in "*Filosofia Politica*", 1, 2012, pp. 65-82.
4. Cfr. S. Mezzadra, "Introduzione", in A. Fumagalli, S. Mezzadra (eds.), *Crisi dell'economia globale*, Ombre Corte, Verona, p. 9.

This is what Ordo-liberalism claims regarding governance. With regard to the inability of states to maintain the governability of democracy in the long term, i.e. the delicate equilibrium between social demand and economic control, already existing between 1928 and 1930, the German school of Ordo-liberalism redefines the relationship between state and market which radically changes the terms according to their respective roles. Ordo-liberals believe that the market economy is not subject to political intervention but is the principle that controls the state so that economic logic, not social justice, acts as a legitimising factor in the exercise of power. In Foucault's interpretation, this premise legitimises the reconfiguration of government functions that began with neoliberalism in the 1970s. Where the Frankfurt crisis theories underestimate the ability of capital to act as a political player and steer institutional transformation towards growth, Streeck stresses the strategic power of global expansion.

On the basis of Foucault's lectures, we must therefore focus on the regulatory design[5] of neoliberalism that presents political strategies intended to extend the corporate competitive model within society.[6] The difference lies in this widespread economisation of politics. Indeed, in the neoliberal reform, market self-regulation is not the spontaneous effect of a return to a *laissez faire* approach as in classic liberalism, but the regulatory effect of policies that aim to introduce governance devices implying 'the unequal inequality of everyone'[7] rather than social inequality correctives as in welfare. Anti-naturalism therefore characterises neoliberal rationality. In this sense, the theoretical comparison made by Streeck between Hayek and Keynes, the two key authors on economic regulation policies at this time, is significant. The market justice supported by Hayek contrasts with the social justice that inspires the Keynesian New Deal policies and the Beveridge Plan now dismantled by neoliberalism. We are dealing with two different ways of intervention: the first requires the privatisation of investments and identification of the workforce whereas the second required public intervention in economics to guarantee full employment. Whereas market justice aims at corporate governance that guarantees enterprise, an equilibrium between the distribution of assets and profitability, in all areas, social justice requires market governance that guarantees employment and core labour rights, even to the detriment of economic growth. The fact of the matter is that neoliberalism has completely modified state spaces by increasingly deregulating governance with its constructivist

5. Cfr. L. Bazzicalupo, "Governamentalità, pratiche e concetti", in *Materiali per una storia della cultura giuridica*, 2, 2013.
6. Cfr. T. Lemke, "The birth of bio-politics: Michel Foucault's lecture at the Collège de France on neo-liberal governmentality", in *Economy and Society*, 2, 2001, pp. 190-207.
7. Cfr. M. Foucault, *Naissance de la biopolitique*, *Cours au Collège de France* (1978-1979), Gallimard/Seuil, Paris, 2004.

approach that leans towards economic justice. Therefore, by putting a process that reconverts governance into motion, it has questioned democracy as a postulate of politics and an embodiment of popular sovereignty.[8]

This framework includes Streeck's views on the desovereignisation of nation states proposed by the European Union which develops the liberal federation model proposed by Hayek in 1939.[9] Indeed, beginning with consolidation of the single currency and then following the financial crisis in 2008, the European Union acted as a catalyst to the international debt policy implemented by the central banks which benefitted investors and markets through its decisions to privatise services and liberalise financial capital.[10] European competition law is simply one of the judicial tools used in the transition that is currently underway from a national debtor state to a consolidated international state entirely de-democratised by the markets.

If States have been able to buy time in favour of democratic policies for the last thirty years, first with inflation and then with public debt, governance can no longer be postponed – to the benefit of citizens, pensioners and workers – in the face of the states of emergency created by turbo-capitalism and the ever pressing need for political decisions based on economic efficiency.[11] The issue I would like to discuss here, in light of solutions provided by Streeck regarding policies for abandoning the euro and devaluating national currency, is the issue, which is a critical one in my view, concerning contemporary time and space. The reason why today time has run out for democracy and the legitimate expression of popular sovereignty lies with a profound transformation of the categories of time and space adopted by neoliberal governmentality. If modern state leads to "a crystallisation of space and a reversal of time",[12] and power operates according to a dichotomous logic (public/private, economics/politics) that establishes social space and controls it from above, the crisis of the 1970s leads to a radical questioning of this formalisation of categories. A series of social powers and economic players burst into the political space transforming diachronic temporality and hierarchical spatiality in an immanent, horizontal sense. This gives rise to what Foucault defines as 'politics *of* the governed' with all the ambivalence that this expression entails. Unlike Streeck, who, as I have pointed out at the beginning, moves from the sovereign perspective of the

8. Cfr. P. Dardot, C. Laval, *La nouvelle raison du monde. Essai sur la société néolibérale*, La Découverte, Paris, 2009.
9. Cfr. F. von Hayek, *Individualism and Economic Order*,The University of Chicago Press, Routledge, London, 1948.
10. Cfr. M. Lazzarato, *La fabrique de l'homme endetté: Essai sur la condition néolibérale,* Éditions Amsterdam, Paris, 2011.
11. Cfr. L. Bazzicalupo, "Le mobili linee di confine nella normatività sociale e la indeterminatezza delle procedure", in A. Tucci (ed.), *Disaggregazioni. Forme e spazi di governance*, Mimesis, Milano-Udine, pp. 29-46.
12. S. Chignola, "Governabilità", in L. Coccoli, M. Tabacchini, F. Zappino (eds.), *Genealogie del presente*, pp. 95-105.

national state to conceive forms of collective resistance and mobility, we must concentrate on infra-governmental practices that interweave structural tensions with governance arrangements through mobile, concrete processes of subjectification. Based on this subjectification, which cannot be reduced to the verticality of state space or the abstraction of financial power, we should perhaps find a way out of the crisis of contemporary democracy.

SOFT POWER

Revista euro-americana de teoría e historia de la política

Soft Power es una revista que nace del trabajo conjunto de estudiosos del sur de Europa y de América Latina, con el objetivo de solicitar la investigación sobre el nuevo paradigma de poder gubernamental, que hoy organiza el mundo, con especial atención a la zona geopolítica.

En respuesta a la urgente necesidad de repensar las categorías jurídicas y políticas tradicionales de la modernidad, tiene como objetivo el análisis crítico y reflexivo, centrado en resaltar el carácter problemático de corriente.

Soft Power es publicada semestralmente. Asume un lenguaje interdisciplinario para garantizar la pluralidad de puntos de vista sobre el enfoque temático elegido, dando espacio a las contribuciones de filósofos políticos y del derecho, politólogos e historiadores del pensamiento político, pero también economistas y sociólogos.

La revista también tiene una sección, un *forum* de discusión, que le abre paso a la lectura de un libro de gran resonancia, analiza su tema desde diferentes perspectivas.

SOFT POWER

Euro-American Journal of Historical and Theoretical Studies of Politics

Soft Power is a review born from the joint work of scholars of Southern-European -Latin America, with the aim of hastening the research on the new paradigm of governmental power, which organizes the world with particular attention to that specific geopolitical area. Responding to the urgency of a rethinking of the traditional legal and political categories of modernity, it intends its analysis as critical as reflective, focused as it is onto highlighting problems of the present time.

Soft Power is published semi-annually. It adopts an interdisciplinary language to ensure the plurality of perspectives on the theme proposed from time to time, giving room to the contributions of political and law philosophers, political scientists and historians of political thought, as well as economists and sociologists.

The review also has a section, a discussion forum, that moving from the reading of a book of great resonance and importance, it goes on analyzing its topic from different perspectives.

NORMAS PARA LOS AUTORES DE LA REVISTA

Los artículos enviados deberán respetar los siguientes requisitos:

El texto no podrá tener una extensión superior a 40/50000 caracteres (tamaño DIN A4), a espacio 1,5 líneas, incluyendo resúmenes, breve *curriculum vitae* del autor y notas de pie de página.

Normas para los autores de la revista:

- El texto irá en letra Times New Roman tamaño 12, a espacio 1,5 líneas; las notas de pie de página irán en letra Times New Roman tamaño 10 a espacio sencillo.
- En la primera página debe figurar el título, centrado y en mayúsculas. Más abajo se escribirán, también centrados, el nombre y apellido del autor o autores, así como el centro o la institución a la que está(n) adscrito(s). Seguidamente debe figurar un resumen (*abstract*) de no más de cien palabras y una lista de palabras clave (*keywords*) de tres a cinco términos. Tanto el resumen como la lista de palabras clave deben tener una versión en español y otra en inglés para facilitar su inclusión en las bases de datos internacionales y en los repertorios bibliográficos.
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Para citar libros:

- Inicial del nombre del autor y apellido(s), título del libro en cursiva, [eventual indicación de trad., pról., epíl], editorial, lugar de edición, año de la edición, número de la edición [opcional], página o páginas citadas [abreviadamente p. y pp.]
- H.L.A. Hart, *The Concept of Law*, Oxford University Press, London, 1961, p./pp.

Para citar capítulos:

- R. Dworkin, "On interpretation and Obiectivity", en R. Dworkin, *A Matter of Principle,* Harvard University Press, Cambridge (Mass.), 1985, p./pp.

Para citar prólogos y epílogos:

- L. Bazzicalupo, "Prefazione", en J. Butler, E. Laclau, S. Zizek, *Dialoghi sulla sinistra. Contingenza, egemonia, universalità*, Laterza, Roma-Bari, 2010, p./pp.

Para citar ensayos de monografías colectivas:

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- J.N. Rosenau, "Governance, Order, and Chang in World Politics", en J.N. Rosenau, E.O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge, 1992, p./pp.

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- The first page should contain the article title, centered and in capital letters. It should be followed by the author(s)'s name(s), affiliation(s) and contact details, including email address(es). The first page should include an abstract of no more than 100 words, a list of 3 to 5 keywords and the word-count (including footnotes).
- Abstracts and keywords must be in English as well as in Spanish in order to facilitate the inclusion in international databases and indexing services.

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- e.g.: H.L.A. Hart, *The Concept of Law*, Oxford University Press, London, 1961, p./pp.

Chapters in edited volumes:

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- e.g.: J. N. Rosenau, "Governance, Order, and Chang in World Politics", in J.N. Rosenau, E. O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge, 1992, p./pp.

or

- e.g.: R. Dworkin, "On interpretation and Obiectivity", in R. Dworkin, *A Matter of Principle,* Harvard University Press, Cambridge (Mass.), 1985, p./pp.

Forewords or epilogues in edited volumes:

- e.g.: L. Bazzicalupo, "Prefazione", in J. Butler, E. Laclau, S. Zizek, *Dialoghi sulla sinistra. Contingenza, egemonia, universalità*, Laterza, Roma-Bari, 2010, p./pp.

Journal articles:
- Initial of the author(s)'s first name(s) and surname(s); title of the article in inverted commas; name of the journal in italics; volume number; year of publication, page number.
- e.g.: J. J. Moreso – P. Navarro, "Aplicabilidad y eficacia de las normas jurídicas", in *Isonomia: Revista de Teoría y Filosofía del Derecho*, 5, 1996, p. /pp.

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Articles that do not respect these guidelines will be rejected.

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Every contribution sent to Soft Power needs an attachment letter in which the author declares that the article has not been submitted to other reviews and it will not be presented before the council has not reached an agreement on its pubblication.