The Law of the Common: Globalization, Property and New Horizons of Liberation

Introductory Note[1]

> On 10 March 2011, the International University College of Turin (IUC), in conjunction with UniNomade 2.0, hosted a debate between Professors Antonio Negri and Gunther Teubner titled 'The Law of the Common: Globalization, property and new horizons of liberation.' The central question the debate - as well as the workshop that followed - sought to answer was whether we can:
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> Start contriving real legal institutions that extend the Law of the Common, while hinting at a new programmatic perspective, at a radical alternative to capitalism from within the global crisis?

The debate was an intimate event, the audience primarily students from the IUC and a small gathering of scholars and practitioners. The debate commenced with introductory presentations from Ugo Mattei and Sandro Mezzadra, followed by two rounds of debate between the two key speakers, as well as discussant remarks from Peppe Allegri, Adalgiso Amendola, Alessandro Arienzo, Sandro Chignola, Pasquale Femia, Costanza Margiotta, Paola Napoli, Riccardo Prandini, Marco Silvestri, and Leo Spech.[2]

What are reproduced in the following pages are the edited transcripts of the exchange between the two key speakers; Professor Gunther Teubner on *Societal Constitutionalism and the Politics of the Common*, and Professor Antonio Negri on the *Law of the Common* (translation by Pietro Antonio Messina). The Finnish Yearbook of International Law is honoured to be able to publish this timely

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1. By Mr. John D. Haskell Assistant Director, Institute for the study of Political Economy and Law (IPEL), Fulbright Fellow, Eric Castrén Institute of International Law and Human Rights & Mr. Paavo Kotiaho, Executive Editor, Finnish Yearbook of International Law & Research Fellow, The Erik Castrén Institute of International Law and Human Rights, University of Helsinki.
2. Video recordings of the debate may be found at the Institute for the Study of Political Economy and Law (IPEL) Seminar Series webpage <www.iuctorino.it//content/poltical-economy-and-law-seminar-series> (visited 12 September 2011).

debate exploring issues critical to and of our discipline, continuing its own effort in promoting novel, theoretically minded scholarship of the highest standard.

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Societal Constitutionalism and the Politics of the Common

Gunther Teubner
IUC Torino and Frankfurt University

In the introductory paper to this event, Sandro Mezzadra poses precise questions, which make it possible to identify convergences and divergences of the two readings of global law presented by Antonio Negri and myself. I will address each question and formulate tentative answers.

1. Question One: What is the Future for the Public-Private Divide?

Both approaches (that of A. Negri and my own) insist on a fundamental critique of the private/public distinction. For A. Negri, the crisis of modern society is due to the divide of private property and public property in capitalism. My starting point is the inadequacy of the distinction between a private and a public sector and between private and public law. The problem is, however, how to displace the distinction and how to replace it. Social theorists have again and again analysed the breakdown of the boundary between state and society, but what they offer instead is a total politicisation of the entire society. Similarly, the distinction between public law and private law has been attacked by numerous legal scholars, but has been substituted by the vague assertion that private law is pervasively political. Negri takes a different road. He criticizes private property as well as public property, insofar as the latter is understood as the property of the state, and replaces the distinction by one concept: the common.

My argument starts with the obvious observation that the current distinction between the public and the private sector is an oversimplified account of contemporary society. More controversially, my argument continues that any idea of a fusion of the public and private spheres, which is argued by many criti-

cal scholars, among them A. Negri, is equally inadequate. I propose to take the opposite direction of a fusion: the public/private divide should be replaced by *polycontexturality*. The claim is this: contemporary social discourses and practices can no longer be analysed by a single binary distinction; the fragmentation of society into a multitude of social worlds of meaning requires a multitude of perspectives of self-description. Consequently, the simple distinction state/society, which translates into law as public law vs. private law, needs to be substituted by a multiplicity of social perspectives, which are simultaneously reflected in the law.

The distinction between private law and public law needs neither its destruction nor its fusion, rather its *Aufhebung*. In the first step, it needs to be dissolved and to be replaced by law's elective affinity to a plurality of discourses, or contexts, such as intimacy, health, education, science, religion, art, and media. This would lead to a thoroughgoing reflection within law of the distinctive 'eigenlogics' of these various realms of discourse.

The point is to liberate the law from the simplistic public/private divide, which means simultaneously not only to de-economize it, but also to de-politicize it; to distance it not only from the private sector, but also from the public sector. In the last century, legal doctrine had to adapt to the double Great Transformation, the victorious imperialism of both the economic and the political system, which had divided the social world into two great spheres of influence. On the one side, economic action developed totalising tendencies in its society-wide expansion, and transformed non-commercial social relations (e.g. the relationships of the classical professions to their clients) into profit-oriented economic relations. Law followed this ongoing commodification of the social world, sometimes reluctantly, always obediently. On the other side, there was the apparently unstoppable growth of the welfare state, transforming many social activities into public sector services. Accordingly, law abdicated its responsibilities for the legal regulation of these social activities in favour of state policies. And this erroneous dualism has been the common starting point for the great influential ideologies, liberalism and Marxism, in their countless variations and combinations, including social democracy and New Labour. Accordingly, the debate is then only about whether law should reflect either economic efficiency or governmental policies, either principles of economic autonomy or of political intervention. And even after the financial crisis, we are faced with another round in this oscillation, after neo-liberal de-regulation now back to a renewed state interventionism. *Tertium non datur*? Both political ideologies have assisted in creating legal institutions which stress, albeit in different forms, the conflicts between the political and the economic sector, but at the same time – and this is my central point – they have neglected or instrumentalised the wide array of other spheres of civil society.

In this sense, the public/private divide will be discarded, but it takes on a new meaning. Now, it is radically separated from the state/society distinction as well

as from the public law/private law distinction. Indeed, it stands orthogonal to them. The traditional private/public duality is dissolved into a plurality of social segments (*polycontexturality*). The so-called "public" politics and the so-called "private" economy are only two of a whole variety of social segments. However, the second step is crucial: the private/public divide then reappears within each formerly "private" social sphere. The "public" now takes on a different meaning—no longer state policies in so-called policy fields of regulatory politics, now the public is that sphere's expression of its intrinsic normativity in its relation to the whole society, which law legitimately takes into account.

As for the "private", there is a contrast to A. Negri's ideas, which tend to reduce the problem of the "private" to the concept of private property and ignore other dimensions of the "private". In my view, the category of "private" should neither be given up nor be dissolved in an overarching concept, be it the public or be it the common. Historically, the distinction public/private has undergone so many changes of meaning (oikos/polis, internal morality/external law, state/society etc.) that it is inadequate to identify it exclusively with individual/collective property. Rather, the "private" would be re-instated and developed to further individual and collective actors' autonomous self-realization. The radical critique of private property has clearly its merits. But should this critique imply the destruction of the many other significations of the private: personal privacy against intrusion by others, space for intimacy in personal relations without society's interference, autonomous pursuit of strictly individual projects against their collectivization, human rights protection for individuals and groups not only against majority politics but also against capillary power relations in different social disciplines, the *Innerlichkeit* of the human mind against communicative intrusion, the spirituality of individual conscience against the domination by public religion and politics? In my view, these are all legitimate expressions of the "private" which speak not against but clearly for a reconstruction of the public/private divide, to be sure, not as a division of society into a private and a public sector, but as a variety of distinctions within different worlds of meaning.

"Public" in this new sense would not refer to the one body politic of collective deliberation and decision (A. Negri's collective subject), but to a multiplicity of public spaces, which make possible communicative reflection processes within each of the formerly "private" spheres of society. In each of these public sites, conflicts, struggles, deliberation and decisions are directed to finding a balance between the site's relation to the whole society and their contributions to individual and collective actors. Of course, law does not and cannot dictate these reflection processes within these spheres of civil society. Instead, it needs to be responsive to it and simultaneously participate in it through judgments in individual litigation, which are in their turn exposed to the continuing reflection process.

To schematize my argument, the public/private divide needs to undergo a dialectical *Aufhebung* in the double sense of negation and preservation.

(1) The simple duality which dominates still today should neither be destructed not should there be a fusion of both poles. Rather, it needs to be replaced by the multiplicity of social perspectives, which then are reconstructed within the law.

(2) In a rather limited sense, the old public/private divide will be preserved insofar as this divide is understood as the difference between political and economic rationality, which, however, is relativized, because they represent only two among many other social rationalities.

(3) In the more important (and different) sense, the public/private divide will reappear in each contexture of polycontexturality as the precarious difference between societal responsibility and the pursuit of actors' self-realisation, and law needs to be responsive to both sides of this divide.

The famous and controversial general clauses of *bona fide* and *boni mores* in contract and tort law, to give an example from my own field in private law, do not, as many lawyers see it, subjugate private contracts to the policies of the democratic state and to public law. Rather they are an expression of what I call the internal public element in so-called private institutions, in other words the *idées directrices* of multiple civil society institutions, which connects them to the idea of the common good. Constitutional rights in the "private" sphere, as a further example, are not transfers of state constitutional rights from the vertical relation of state-citizen to the horizontal relation between citizens. Instead, they protect the integrity of individual and social autonomies against overpowering anonymous social processes within different sectors of society. What both examples have in common is that they make the law responsive not to a unified political process of a new collectivity, but to the peculiar public dimension of diverse social configurations.

2. Question Two: Where is the Potential space for social movements in its relation to global governance?

We have as a common starting point the idea that transformative strategies should not oppose modernity tout court; rather, as A. Negri puts it, transformative strategies should "subvert" it – in other words, the purpose is to change it fundamentally while simultaneously exploiting the high ambivalences of modernity, by attacking their destructive potential and strengthening their productive potential. Karl Marx had this idea of making use of the progress of productive forces in capitalism for its transformation, and contemporary attempts aim to exploit post-Fordistic industrial organization in its inherent democratizing potential. Similarly, A. Negri and I see the ambivalences of the new global governance not only as a target of critique, but also as a chance for its transformation.

Subversion not opposition is A. Negri's formula, which he directs against private property in global capitalism. My ideas on the constitutional moment use a similar model, but they identify the ambivalences of modernity in a different way. My question is if there is such a thing as 'collective addiction' in the different sectors of late modern societies? Do we recognise this addiction as a genuine social phenomenon, not just as an individual problem? The usual answer would be, binge drinking, or the herd instinct of the bankers before the crisis. In fact, these are social amplifiers of addictive behaviour: they influence obsessive behaviour in the form of peer-pressure, imitation, social norms or mob mentality. But what they are concerned with is ultimately only the addiction of individuals.

However, I look for something rather different. It is possible that social processes as such might exhibit the properties of addictive behaviour quite independently of the dependence syndromes of individual human beings. Josef Ackermann is clearly not an addict, and yet Deutsche Bank is in urgent need of detox therapy. This would amount to collective addiction in the strict sense. Independently of the addiction of individuals, communications would concatenate such that they become caught up in the compulsive engagement in an activity despite lasting self-destructive consequences.

The definition of individual addiction – compulsive engagement in an activity despite lasting negative consequences – must be rethought for social systems in general, and for collective actors in particular. Which 'addiction mechanisms', in other words, are responsible for the fact that the autopoietic self-reproduction of a social system through the recursivity of system-specific operations reverts into a communicative compulsion to repetition and growth, bringing self-destructive consequences in its wake? Such a dynamics, in turn, raises a fundamental question for autopoiesis theory: how are we to conceive of the relationship between social self-reproduction and the compulsion to growth? The disquieting question remains of whether the autopoiesis of highly specialized functional systems is not secretly dependent on the logic of growth. And, particularly relevant to our discussion, does the recursivity of autopoiesis have inherent tendencies, over and above such normal growth, towards a socially harmful compulsion to repeat and grow? And by what means is such a 'turbo-autopoiesis' triggered?

Now, the crucial point is that this societal addiction is not limited to the capitalist economy in its relentless growth dynamics, as many critics of modernity see it (among them A. Negri). Instead, many, if not all function systems exhibit similar expansionist tendencies – the famous-infamous tendencies towards a comprehensive politicisation, economisation, juridification, medialisation, sexualisation or medicalisation of the world – which indicates that compulsive growth-dynamics are inherent in many spheres of functional differentiation. This transforms the critique of the capitalist economy into the critique of functional differentiation. This is probably the main difference between A. Negri's and my

critique of modernity. In all function systems, the moment of excessive expectations, a type of high-risk 'credit' in future communications, lies hidden in the motivations to accept a communication created not only by the media of money, but also by the media of power, law, truth and love. The moment can only be 'cashed in' there with permanently higher payments, and with their reaction, in turn, on increasing 'credit'-expectations, so that a necessary increase-dynamics, a growth-spiral develops. In that case, the pathological growth-spiral could no longer be regarded as a phenomenon particular to the money-medium of the capitalist economy based on private property, but instead as a inherent characteristic of each function system.

Such growth accelerations of the function systems burden themselves, society and the environment with serious 'consequences of their own differentiation, specialisation and high-achievement orientation'. Three collision fields can be identified: (1) the collision of the growth imperative of one system with the integrity of other social subsystems; (2) collision with a comprehensive rationality of world society; and (3) the collision of the growth acceleration of a system with its own self-reproduction. The evolutionary dynamics of these three collisions certainly have the potential to blur into social catastrophes. But there is nothing necessary about the collapse, as Karl Marx postulated, and nothing necessary about Max Weber's 'iron cage' of modernity. Niklas Luhmann is more plausible: the occurrence of catastrophe is contingent. It depends on whether growth-inhibiting countervailing forces emerge to prevent the positive feedback catastrophe within the growth-dynamic.

The experience of near-catastrophe, as opposed to the experience of its contingency as such, may be regarded as the 'constitutional moment' in which countervailing structures potentially emerge. It is the moment when the collapse is directly imminent. The similarity with individual addiction phenomena is again obvious - 'Hit the bottom!' It must be one minute before midnight. Only then is there a chance that the understanding will be lucid enough, the will to change strong enough, to allow a fundamental change of course. And that applies not only to the economy, where warnings about the next crisis are regularly ignored, but also to politics and science.

This is the message of societal constitutionalism. A global constitutional project faces the task: *how can external pressures be exerted on the function systems in advanced societies of such force that self-limitations of their options for action will take effect in their internal processes?* It is "subversive" as it attacks the excesses of the autonomised rationalities; but it exploits at the same time their productive dynamics. A 'hybrid constitutionalization' is required in the sense that external societal forces - which are not only state instruments of power, but also decisions in the legal process and 'civil society' countervailing powers from other contexts, media, public discussion, spontaneous protest, intellectuals, social movements,

NGOs or trade unions - apply such massive pressure on the function system that internal self-limitations are configured and become truly effective.

It is only possible to invent, elaborate, and enforce these limitations from within the system-specific logic, and not from the outside. The difficult task of mutually aligning the function of a social system and its contribution to the environment at a sufficiently high level can only be attempted by a system-internal reflection, which may be initiated or mandated externally, but cannot be substituted. There is no alternative but to experiment with constitutionalization.

To take the constitution of the economy as the exemplary case, in order to inhibit pathological growth compulsions, stimuli for change need to generate permanent counter-structures that will take effect in the payment cycle down to its finest capillaries. Just as in political constitutions power has been successfully used to limit power, so the system-specific medium must turn against itself. Fight fire by fire; fight power by power; fight law by law; fight money by money. Such a medial self-limitation would be the real criterion distinguishing the transformation of the 'inner constitution' of the economy from external political regulation.

Candidates for a capillary constitutionalization would create at least three possible spheres of the "commons" understood in this wider sense.

(1) Politicisation of the consumer: Instead of being taken as given, individual and collective preferences are openly politicised through consumer activism, boycotts, product-criticism, eco-labelling, public interest litigation and other expressions of ecological sustainability. Such politicisation of economic action represents a transformation of the inner constitution, touching the most sensitive area of the circulation of money, namely, the willingness of consumers and investors to pay. And this becomes a question of constitutional importance, or more precisely, a question of horizontal effects of constitutional rights in the economy: how to protect the formation of social preferences against their restrictions through corporate interests.

(2) Ecologisation of corporate governance: What is meant, here, is not a new managerial ethics, but rather a transformation of the internal company structure, compelled by external pressures; a transformation which limits the tendencies to speculation and compulsions to grow necessarily associated with the emergence of the modern corporate structure. The traditional forms of worker's participation in the firm would have to be reconsidered under conditions of globalization into new forms of social and ecological responsibility of economic production.

(3) Public control of the monetary system would penetrate the *arcanum* of the global financial constitution, as is proposed to combat growth-excesses. The addictive drug is the creation of non-cash money by the commercial banks. Today, the relation of paper money created by the central banks and non-cash money created by the commercial banks is 20 : 80. Commercial banks should be prohibited from creating new money through current account credit and limited,

instead, to offering loans that are based on existing credit reserves. Indeed, U.S. President Jefferson demanded as early as 1813, "that the right to issue money should be taken from the banks and restored to the people". But who are 'the people' when it comes to money? How can the creation of money be restored to the people? After all that has been said, the answer can only be that money creation belongs in the public sphere, in the sphere of the commons, though not in the domain of the state. The creation of non-cash money should be "given back to the people"; it should become the sole prerogative of public institutions, which are not state institutions, the national and international central banks under democratic control.

These three strategies – politicisation of economic citizenship, ecologisation of economic production, and return of money creation to the public - participate in two antinomic thrusts to constitutionalise global markets. Analogous to Karl Polanyi's analysis of the transformation of modernity, there is a 'double movement' of transnational constitutionalism: first the expansion of sub-systems is supported by constitutive norms, and second, turbulent social conflicts force its inhibition by limitative norms that create a sphere of the commons in the centre of the economy.

3. Question Three: Would a New Global Law Be Articulated by a Different Subjectivity?

I support A. Negri's critique of private property insofar as private property is the major obstacle for forming a collective subject, which could articulate a common politics. The difficult question however is how to imagine the new contours of such a collective subject. Indeed, the proletariat and political party as the avant-garde of the working class, not to speak of the nation or even race, have turned out to be grave historical errors in forming the collective subject. But liberal philosophy and the philosophy of the subject who insist on the human individual as the only legitimate subjectivity in historical processes are also unacceptable, since both misunderstand fundamentally the transformation of society after the demise of feudalism as the rise of individualism. A. Negri's multitude in its relation to the common challenges this reduction profoundly, and revitalizes the collective subject against the dominant methodological individualism.

However, I have two objections against A. Negri's collective subject. Is the "multitude in its entirety" as the new collective actor not still bound to a traditional understanding of the collective (as if a number of separated human beings were united in a new community)? In my view, the idea of the collective cannot be revitalized as the antonym of the individual. Collective actors do not consist of individuals in concert. These are historically discredited formulations. A community is created neither in the corporeality of real people, nor in a consensus of

their consciousness, but only in their communication. Communities are living and dynamic language games, not mysterious unities of peoples' consciousness and bodies – which organicist thinkers like Gierke suggested, and which return today under the new labels of bio-politics and corporeality. As a consequence, one should follow A. Negri's starting point (but not his subsequent 'collectivist' arguments), his recourse to Wittgenstein's language games and life-practices, and expand it so that collective actors can be identified exclusively as chains of communications that thematise themselves and gain capacity for action and reflection in their own right as compared to the action and reflection of individual human beings. Collectives are social communicative configurations that cannot be identified with an ensemble of real people. No doubt, the material basis of collectives are human minds and bodies, but this should not lead us to A. Negri's holistic mystifications of the collective subject as a new unity of corporeality, consciousness and communication.

The other objection has to do with the omnipotence fantasies of politics. The collective energies of societies cannot be bundled in the one great political process, in A. Negri's words, "in the active and autonomous self-regulation of the multitude in its entirety". Here I feel a second holistic mystification in his rhetoric of the common. The collective potential of society's communication does not exist as a unified political entity in its entirety; it develops its specific force only as a multiplicity of highly specialized social potentials, energies and forces. This is the historical achievement of the specialization of communicative media – power, knowledge, money, and love. And only there is the place of the new collective subjectivity, where diverse collective subjectivities constitute themselves within the different worlds of meaning.

The self-identification of such collective subjectivities aims at the reflection of their social identity. How do the various collective subjects define autonomously their relation to society as a whole, to the other collective and individual subjects and to themselves? This triadic structure of social identity makes visible its hidden connection to the tradition of subjective rights of the autonomous individual. The autonomy of the individual was not understood as pure pursuit of individual interest nor as the will to self-realization. It stood in a constitutive relation with the individual's responsibility toward the whole community and toward the others, which could not be externally imposed but only formulated via the singular internalization of the world in individual self-reflection. Thus, it is the duplication of subjectivity, the individual human being and the communicative chains that will not and cannot be fused into a new entity. This duplication creates two independent, different and parallel contexts of autonomy and responsibility. I would suggest identifying the *"commonwealth" in this duality of individual and social reflection and in the multiplicity of communicative centres of reflection.* Modern society has no apex and no centre, and the commons should never attempt to

take this place. Such a multiplicity of public spaces would be my counter-vision to the commonwealth of the "multitude in its entirety".

4. Question Four: How Could Institutional Imagination Develop?

Again, we have a common starting point; the promise of the future lies not in institutionalized politics of the state or in the institutions of global governance, but in a constitutionalization of spontaneous processes in civil society. Here, the concepts of empire, of multitude and of the common have indeed a liberating effect against the state-centred conceptions of the tradition. But, as I said, the bifurcation begins when I understand A. Negri arguing for a comprehensive and unifying politicization of society via the concept of the commons, while I argue for a strictly pluralist constitutionalization, which explicitly requires the extensive autonomy of different social rationality spheres. This, however, raises the critical counter-questions to my argument. Does this not imply that society is de-politicized in these partial pluralities? Does giving account of multiple global legal orders really require moving beyond politics-centred constitutional thinking? And what is the value of constitutionalization without political democratization?

My tentative answer is that societal constitutions are paradoxical phenomena. They are not part of the constitution of the political system in society, yet, at the same time, they are highly political concerns. The paradox can be solved with the help of a *double conception of the political*. This is a widespread idea and the difference between *le politique* and *la politique*, is understood in a variety of ways (e.g. by Lefort, Badiou, Agamben), but I would interpret the double meaning of the political as follows. First, by 'the political' is meant institutionalised politics - the political system of the world of states. In relation to this world, social sub-constitutions 'go the distance'; they require extensive autonomy against the constitution of international politics. And with regard to the participation of the political system in the process of the social sub-constitutions, particular 'political restraint' is required. Second, the concept indicates the political in society outside institutionalised politics. It indicates, in other words, the politicisation of the economy itself and of other social spheres; the politics of reflection on the social identity of the social system involved. In this respect, the particular social constitutions are highly political, but beyond the state.

When I read A. Negri's ultimate chapter and the three platforms in which he formulates demands on a new "government", I do not find any trace of this double concept of politics; rather, a totalizing concept of the political in which what he calls "government" is supposed to constitutionalize and regulate pervasively every sector of society. Why am I sceptical about A. Negri's idea that a new political government, even if it is fundamentally democratic, needs to regulate pervasively

the fundamental structures of social sub-spheres? If it is ultimately the greatest privilege of the multitude to create a constitution for society, why do I favour the auto-constitutionalization of social sectors and not collective decisions by the "multitude in its entirety" for the whole of society? Again, the answer has to do with the basic social structures of modernity. They make it necessary to re-define the traditional relationship between representation, participation and reflection. In the functionally differentiated society, the government, even a fully democratic government in A. Negri's sense, cannot fulfil the role of defining the fundamental principles of other social spheres without causing a problematic de-differentiation – as occurred in practice in the totalitarian regimes of the twentieth century. In modernity, society can be constitutionalised only in such a way that each sphere of rationality acts reflexively in developing its own constitutional principle for itself, and the results cannot be prescribed by "government", old or new. Modern society regards participation and representation as identical and, at the same time, abolishes them. We must resist the seductive idea that a unified political collective represents society and that other social spheres participate therein. No social sub-system, not even democratized politics, can represent the whole of society.

To be sure, there is an important role for the general political process. While it cannot prescribe the constitution of the economy and other social subsystems, it can produce constitutional impulses for them. If democratic politics, together with other actors, particularly civil-societal actors, exert massive external pressure in order to compel changes in fundamental social structures - for example, in the capillaries of the payment cycle of the economy - that would be the appropriate division of labour. Social systems have the best constitutional chances where they can develop their own constitutions in the shadow of institutionalized politics.

However, what is the value of constitutionalization without democratization? Very little. Constitutionalization of social institutions makes sense only if it is realized by their internal democratization. The democratic legitimation of different social spheres must come up in relation to society as a whole – but it need not proceed through the channels of a totalizing political process which seems to be A. Negri's vision. While societal constitutionalism keeps its relative distance from institutionalised politics and sees no great democratizing potential in a stronger legitimation by a general political process, the politicisation and democratization of the economy and other social sectors themselves is high on its agenda. Politicising a social sector means to unleash intense and conflictual processes of collective reflection that deal with the social consequences of the extension and the limitation of its medium. Politicisation is realized by 'collegial institutions' in the general public, citizen groups, NGOs, labour unions, professional associations, universities and corporations. A strengthened politics of reflection is required within the economy and other social spheres that, at the same time, needs to be supported by constitutional norms. Historically, collective bargaining,

workers' participation, and the right to strike had enabled new forms of societal dissensus. In today's transnational regimes, institutions of social responsibility of formal organizations will have to be developed that fulfil a similar role. Societal constitutionalism sees its point of application wherever it turns the existence of a variety of 'reflection-centres' within society, and in particular within economic institutions, into the criterion of a democratic society. In these reflection centres, it is controversially discussed and finally decided whether, in a concrete situation, the growth compulsions of the social sector are excessive or not.

If it is true that '... psychic and social systems must develop their own reflexive processes of structure selection – processes of thinking about thinking, or of loving love, of researching into research, regulating regulation, financing the use of money or overpowering the powerful' (Niklas Luhmann) then societal constitutionalism cannot be limited to the rule of law and human rights. Its overriding concern must be to democratize not only institutionalized politics but to democratize all sectors and all institutions of society. The democratic character of a society does not only depend on democracy in political institutions (general elections, referenda, participatory politics etc.), but on the democracy of all societal institutions.

If this makes sense, then the crucial point is this: it would be a categorical mistake to transfer democratic institutions and procedures that have been developed in the political system directly to other social sectors. This was one of the main errors of 1968. Every world of meaning must find its own way of democratization. Power-politics democracy with its compulsive division of the world into the binary distinction progressive/conservative would impair the proper rationality of other social spheres. Democratizing the accumulation of power for collective decisions cannot and should not be the model, neither for the inner constitution of scientific inquiry and the universities, nor for the judicial process, nor for the health sector, nor for the media of information, nor for economic production. What is needed, instead, is to generalize a concept of democracy from the experiences of politics, and then to re-specify it for the other spheres of rationality. This would be my view of the politics of the commons: not in the entirety of the multitude, but in the fragments of polycontexturality.

In the case of law, electoral politics for judges or the *referé legislatif* would be the categorical mistake. Instead, the appropriate move is to radically broaden access to justice and transform the private litigation process into a site of public deliberation where not only the parties but concerned third parties and the general interest are heard, points to the right direction because it respects the inner triadic structure of the judicial process. In the case of the economy, this would mean transforming post-Fordist tendencies of decentralization and functional democratization into genuine processes of participation of the productive coalition, which create the monetary surplus necessary for securing future needs of society.

5. Question Five: Where are the main differences and convergences between societal constitutionalism and the politics of the common?

I will try to summarize here the main differences and convergences between our approaches in three points. First, my counter-category to the excesses of the 'private'" is not the 'common' but the 'public'. To be sure, this is not the 'public' of the state, of public law and of institutionalized politics. Rather, it is the 'public outside the state', within society, within the many so-called 'private' fields. While the 'common' seeks to overcome the alienation of the private via collective activities and collective modes of attribution, the 'public' tends to strengthen the space of open and democratic deliberation, which finds its different forms in each social field. Undoubtedly, common property has a powerful potential, which has been suppressed under the domination of neo-liberal policies of private property. But the choice between different attributions of property rights cannot be decided a priori on theoretical grounds in favour of the commons, but needs to be governed by public reflection processes within each sphere of life. Democratic reflection processes will draw diverse boundaries in each sphere of life of what should be legitimately kept private (e.g., part of intimate life, exclusionary to others, etc.) and what should become a common enterprise shared by all.

Second, what I call *polycontexturality* has certain similarities to the fragmentation of *Empire* and *Multitud*e, but as a result of *longue durée* historical processes, it is much less fluid and cannot and should not simply be overcome by political fiat. Rather, any subversive transformation of modernity that wants to overcome it but simultaneously to draw on its productive potentialities will have as one of its priorities to cultivate polycontexturality. If A. Negri wants as he says to build not only on natural science and technical knowledge (but also on existing sociological knowledge), he would have to take centrally into account what I see as sociology's most important diagnoses of modernity - those traditions that include, Emile Durkheim's division of labour, Max Weber's new polytheism, Talcott Parsons' and Niklas Luhmann's functional differentiation, Bourdieu's *champs sociaux* ending in its most radical formulations in Gotthard Günther's polycontexturality and Francois Lyotard's *différend*. I should stress that polycontexturality cannot be identified exclusively with the functional differentiation that dominates today. It is more abstract and opens the space for new social differentiations that we are partially witnessing today, including the multiplicity of discourses, identified by postmodern thinkers, and the variety of hybrid cultural distinctions, modes of A. Negri's 'altermodernity', as a result of the double fragmentation of world society. Polycontexturality, in my view, does not only result from fragmenting power structures of the Empire, as A. Negri tends to argue. We have to take the high ambivalence of polycontexturality more seriously. Unleashing the relent-

less and reckless dynamics of specialized rationalities - not only in the capitalist economy, but in many function systems - it is responsible for the catastrophes of modernity, for the alienation of individuals, for devastating social conflicts and for ecological disaster. And at the same time, this very polycontexturality embodies the conditions of possibility for the promises of *siècle des Lumières* and modernity: the liberation of reason from religious and political repression, the autonomy of the rule of law against political and economic power, the democratization of the political process and its protection against economic corruption, and last not least, the concentration and limitation of the social surplus production in the field of economic action.

Third, and finally, while these two points drive our projects in different directions, there are linkages, open connections and hidden convergences in many other respects that would be worthwhile to be worked out in detail. Societal constitutionalism and the politics of the commons argue both against the political quietism of many strands of post-structuralism, against the *Gelassenheit* and against the passive waiting for a new subjectivity. They both identify the Janus face of capitalist modernity - its self-destructive as well as its productive potential - and see in its high ambivalence the chances for its "subversion". Both criticize the sterile alternative of state-centeredness versus private property of the private/public divide and change the focus of attention to wider processes in society. They dismiss both the old collective subjectivities (class, avant-garde, nation, race) and formulate ideas of a new subjectivity in the tradition of Wittgenstein's language games and life practices. Subjectivity appears no longer exclusively as the identity of the self-reflecting individual, but as a dense web of social events in its ruptures and repetitions – autopoiesis of the collective. In their critique of the excesses of private property and its underlying growth compulsion, both argue for a thoroughgoing politicization of the so-called private sectors of society. In contrast to contractual theories of society, they see massive social conflicts as the driving force, but stress at the same time an urgent need for institutionalizing and constitutionalizing new political dynamics within all sectors of society. And perhaps most importantly, they judge the democratic character of a society not in terms of formal democratic procedures in institutionalized politics, but in democratizing processes within different domains of society.

The Law of the Common

Antonio Negri
(translation by Pietro Antonio Messina)

1. Introduction: The Fades of Law

Legal scientists have highlighted key features of global governance: the tendency of processes and practices of governance to exceed the rigidity of legal systems and regulatory structures; the fragmentation of legal systems under the pressure of conflicts of the global system; and the clash between different sorts and kinds of norms. Governance thwarts any attempt to unify global legal systems due to the need to operate a modular logic to manage conflicts and ensure legal compatibility among the fragments of the global world. In this sense, governance is indeed a "government of the state of exception" (obviously in the opposite sense to that theorized by Schmitt to define sovereignty).

It seems that this conclusion is correct and that in the globalized world the deconstruction of traditional forms of law and sovereignty is inevitable. Indeed, we must accept global governance to be "post-democratic", in the sense that it no longer relies on three traditional traits: the representative system framework which supported and ensured the legitimacy of the state; the organs, techniques and practices of governance to have the flexibility and the fluidity needed to constantly adapt to changing situations; and its enforceability to be dependent on a variety of forms of regulation controlled, often indirectly, by oligarchies, particularly economic ones.

Okay. But this analysis of the crisis of law and sovereignty in a globalized world, with the strong deconstructionist contents that characterize it, does not attain to deal with another term that (contemporaneously, if not synchronically) is placed in the context of globalization: the theme of the common.

We observe, first of all, that global and common are not coextensive terms. When they are considered as such, they are vulgarized (e.g., Nancy, Esposito, etcetera). On the contrary: whatever are the political and legal overlaps, global is a spatial term, common is a productive term (with a strong and significant incidence on the ground of ontology). Why, then, draw them near? Is globalization the cause of this shift? Of course, it is a very important one, but that does not make it a device of definition and let alone of constitution of the common. Rather, globalization is an engine of chaotic fragmentations and / or of unpredictable links, often still determined by residual (not therefore less effective) streams of sovereign action.

If we do not rely on an ideological approach, one can perhaps assume that the term "common" enters into the debate as a central theme when, in globalization

and the legal practices that accompany it, we begin to see missing, as defining marks, the transcendentals of private and public law and the subsequent legal practices. It seems there are aspects, dimensions, profiles of the 'common' that – if they do not give answers to that crisis – at least redefine its terrain. We will return later to this issue. For now, let us ask ourselves: while we allow 'fading' categories of the old law (both conceptual and jurisprudential in nature), how may we lay out the theme of the "common"?

A hypothesis shared by the majority believes the old law to be defined essentially around the concept of private property. Cannot we go beyond this horizon? Faced with the 'fades' in the terrain of a global governance of law, how can we configure the permanence of law? From whatever point of view a historical analysis of this topic may be developed, it seems we can confirm that behind the fades that globalization has determined, there are stories that show, by their current crisis, the impossible evolution of private and public law to another kind of law, to a *tertium genus*. Least of all, clearly, to a "law of the common". It should be added immediately that the word "law" here is as equally ambiguous and uncertain a term as the "common."

This is confirmed, first of all, if we consider continental law. In the West, the legal dimension became important as soon as it was articulated around the formalized (and individuated) figure of the property-owner. The institutional (and conceptual) framework of Western law is rooted in the needs of the individual, modelled inside the conflictual (zero-sum) relations that she has with her judicial counterpart. The establishment of Justinian's Corpus Juris marks the end of a legal evolution in the Roman world that paved the way for two thousand years of legal history. Later on, Roman law is taken again and is adapted according to the needs of early capitalism, so that it can properly interpret and organize the primitive accumulation of capital. Characteristic of this story is the fact that legal, procedural and case law practices consolidate the rights of the property owner and produce a mechanism of uniform validation of property (the market) and sovereignty (the State). Both these systems concentrate the power on the individual and exclude all other decision-making subjects in the sphere of the given jurisdiction. *Hic Rhodus, hic salta*. In this context, looking for something beyond the strictly private conception of law and of its procedures of application and verification would be vain. Consequently, looking for a definition of the common in this ambit is entirely inappropriate. Continental law does not allow the common to be recognized, no matter how it is interpreted. The boundaries (of the zero-sum conflict) in the public and in the private do not leave, for the time being, space for a definition of a third way.

The same conceptual void occurs when you follow the tradition of old English law, which is called right of common. This archaic right is closely related to the communal structures of medieval towns. When Pollock and Maitland analyze this

"right of common", they recognize that far from being a right "of the common", it is an individual right, a right which is not in a relationship of rupture with legal individualism, that is with property ownership interests. On the contrary, it is a right that the individual can oppose against a collective management of the common, a right that cannot in any way align the perspective of the common to that "of equality in the co-production of non-state legal norms" (as the "law of the common" has been recently formally defined). It is no coincidence that these ancient communal definitions have been referred to in the fifties by Hayek, for example, and we know perfectly well how.

It seems, therefore, very difficult to acknowledge a law of the common that originates within the old legal theories and then emancipates itself from them. Especially if (as it is often theorized by socialist legal thought) it is expected that the evolution of public law, opposing private law, will provide a foundation for the transition to the law of the common. On this point, the reference to Soviet experience is interesting. Pashukanis - the greatest jurist at the time - immediately noticed it with great clarity. There is no - he says - proletarian law: "by getting to the stage of developed socialism, the disappearance of the categories of bourgeois law will mean the extinction of law in general, namely the gradual disappearance of the legal moment in the relationship between men". As for the Soviet state, it is defined as a proletarian State capitalism, in which two realities of trade and law exist, according to Pashukanis. The first is an economic life that takes place in a "public" manner (general programs, production and distribution plans and so on); the second, instead, consists in the connection between economic units that carry out their activities "in the form of value of circulating commodities and, therefore, in the legal form of contract". Now it is clear that the first trend (that of public law and planning) has no progressive perspective and opens only to a gradual extinction of the legal form in general, translating it into the economic management of society. The second trend is the one that, resuming the autonomy of economic forms and considering them in their cooperation, can instead develop towards the common.

It is interesting to note that in the Soviet discourse of someone like Pashukanis (a minority position, but Marxistically correct) it is emphasized that it is impossible to extract the "law of the common" from public law and it is considered, instead, the possibility of relying on the cooperation of collective work, not only as an exit from the property-based law, but as well for the construction of new forms of life and of non-capitalist social organization (the "Market - common Chinese peasant – without capitalism" in Arrighi is a model with the same resonances).

Does current history, in which the procedures of governance are emerging, give us some positive indications about the road to the "common"? Is it possible to catch in the procedures of governance a glimpse of a "trend towards decentralization" against the strong trend of concentrated capitalist power in

the world? Towards the fragmentation of powers against their tough economic unit? Towards the possibility of widespread control by an active public opinion? Towards the bottom-up experimentation of mechanisms of participation in the division of social labour and in the redistribution of the product? With plenty of optimism we could perhaps conjecture it, but realistically it is difficult for us to conceive of currently establishing governance, as an exercise of power and production of legal norms, that might meaningfully allow for open, flexible, dynamic institutional arrangements, nor can we easily imagine a legal program devoid of any centre that might rely on mechanisms of conflict between norms and competition among systems. This model sounds very much like a utopia, especially as current history seems rather to demonstrate the impossibility of a linear development of the existing legal systems towards the common.

2. Factual considerations

It remains to be asked why the global recalls the common. It recalls the common because globalization has put us immediately in front of a common, though one that we might describe as a 'bad' one: the common of capital. When the time measurement of work is replaced by the power of cooperation, and devices for the circulation of commodities, productive services and communications stand as agents of capitalist valorisation; when the process of real subsumption, which is the transition from the industrial production of commodities to the control of social life put at work, with automation and computerization of production – in such a context, the transformations in the law of value present capital as global bio-power. The new basis, on which exploitation is established, consists in a progressive movement of capitalist command from the factory (the Fordist industrial organization and the Taylorised discipline of the working mass) to the whole of society (through productive hegemony on immaterial labour, valorisation by cognitive work, financial control, and so on). That is to say, the new basis on which capital works is the exploitation of cooperation, languages and common social relationships. It resides, in general, in the so-called "social externalities", internalized into the capitalist production on a global scale.

Let us start, by way of an example, from the current global economic crisis. Many interpretations have been offered. In any case, were they from the right or the left, the reasons for the crisis were brought back to the gap between finance and "real production". If you take the new assumptions which we have discussed so far, which refer to the emergence of a new "common" quality of living labour and its exploitation as such, it should be stressed here that the financialization of the global economy is not an unproductive or parasitic deviation of increasing amounts of surplus value and collective savings, but a new form of capital accumulation, symmetrical to the new social and cognitive processes of produc-

tion of value. To overcome this crisis, it is useless to pretend that the answer can avoid the creation of new social ownership rights of the common - and these rights, clearly, clash with private property and require a break with the public law that represents the legal force of private property. Repeating what we have elaborated in the UniNomade seminars: 'If until now access to a common good has taken the form of 'private debt' (and the crisis actually exploded around the accumulation of this debt), from now on it is legitimate to claim the same right in the form of "social return". To have these common rights recognized is both the right and the only way out of the crisis.'

2.1 Approximations 1

Traditional law cannot, therefore, define (or even turn towards) the common. It is always compelled, in the current crisis, to perform a kind of restrictive governance action and is sentenced to a substantial ambiguity. Governance can only make smooth social exchange and optimize the flow of streams. This means rewriting sovereignty in contractual terms, de-hierarchizing structures of decision making, introducing a perspective of relationship which is fragmented and polycentric, weakening the traditional separation between public and private - but importantly, it cannot do anything more than that. Chignola reminds us in the path of John Fortescue and Justice Coke, 'the term governance is referred, from the very outset, both to government as personally referred to the right to command of the prince and to the hierarchy of the administrative offices that depend on him, and to the thick collection of norms, practices, statutes and libertates, which defines the web of rights and powers of political and civil organization.' In the sunset of the rule of law, the lights of dawn repeat themselves.

Alleviating the suspicion with which we have so far dealt with governance let us, however, admit that it may open up, in constituent terms, beyond the current conditions in which it acts. Let us assume that the terrain of the common appears closer to us, as a terrain of transition from the public to the common, and that governance fits along the plot of this transition. The question to ask at this point could be: if traditional law fails to define (to control, to transcribe, to establish) the common, in which manner can governance approximate it? Which is like saying, will the governance be (ambiguously, producing a sort of conatus) the one that builds the new law?

2.2 Approximations 2

From a thoughtful point of view – namely, that of jurisprudence - we can here try to raise the issue of how to define the common. I suggest a few examples that represent extreme cases (between which there are infinite combinations) but that may perhaps help us to proceed. On the one hand, then, in terms of socio-political Darwinism, the common has been defined as the effect of economic and political

relations of co-production. In this regard, everyone knows the famous formula by Saint Simon, taken over by Marx and Engels, according to which the "administration of things" will replace the "government of men". The common, here, is revealed as the economic administration of society by itself. Socialism responds to the self-equilibrium of interests proposed by the liberal market with the conscious economic self-organization of men. This formula constantly recurs in socialism, at least up to Lenin. This clearly is a teleology of the common, innervated by industrial technological rationality. The common is something made (participle of the verb "to make"), "a real movement that realizes the state of present things."

An opposite pattern of definition of the common is the sociological-institutional one. The development, from civil society to forms of public organization, to a common conceived as a societal outcome or as the result of the tendency to form associations, is seen just as a product of an ongoing activity. A procedural and social activism substitutes here the economic and technological need of the first model. Considered in its most recent figures, the "institutional" common is defined (for example, in Luc Boltanski's scholarship) by the abandonment of sociologies that focus on vertical dimensions and on the opacity of the alienated consciousness of the actors, for the benefit of a sociology that insists on horizontal relationships (and, of course, on networks) and on "contextualized" actions of actors led by strategic reasons or moral imperatives. The focus is on elements of "performativity" of the social and even when the public (the state) is called back and it is assumed to be a balancing element of processes, this pragmatic sociological institutionalism recognizes both the contradictions within which the process is closed, and the power of its open devices. In short, "a real movement that acts the state of things"

A third interesting model (which is, however, the median between the extremes), still from the point of view of a definition of the common, is the philosophical revival of a dialectical (soft) theory of relationship. It was the path that the formalism of Habermas had advanced on and the realism from which Honneth proceeds. The common is here seen as an Aufhebung (soft), without needs. The difficulty of its realization is to determine – in the indefinite context of the conditions - the compossibility of the differences. So here are experienced, among other things, the difficulties that have become evident in the development of Foucault's project, when one considers it as an epistemological model rather than a political device.

These approximations remain as such. All attack the idea that the common can in some way be presupposed and all claim that we can only think about social practices of production of the common. How will governance be able to interpret, and possibly go beyond, these premises on a path that leads towards the common?

To avoid further obstacles, we may ask here whether the common determination of acting in common should necessarily take the form of the "institution"

when we proceed on this field. Answering in the negative to this question, one could rather insist that the production of rules that are not derived from the law may take the form of negotiated customs, of practices of the common that cannot but originate through concrete determinations and power relations. In this framework, we might ask a further set of questions. How, for instance, to articulate the terrain of property with that of customs? What are the conditions of compossibility of the individuals/singularities? How to prevent the strength of identities to close any possibility of compresence of singularities? What are the processes of subjectification that cross these constitutive processes? Can the constitution of a common, that is not "additive" nor "integrative", that is not "sum" nor "organism", be out of a dialectic progression (or regression, hard or soft) of Hegelian kind?

To answer this question let us introduce some additional questions, or what we might call experiments.

2.2.1 Experiment 1

If we assume that the context of governance, in which the plurality of actors develops its action, is devoid of any finalistic or value determination, and if any determination is a power that wins (or loses) relative to other powers, the first legal example which we could refer to in our quest for the common, is the one traditionally represented by the international law of war. Here the common paradoxically refers back to the global economy. This is certainly a terrain free from formalisms. Indeed, the risks that we would face if we worked in this area with the liberal concepts of rule of law or with the doctrines of justice anchored to the abstract schemes of metaphysical rationalism are clear to everyone. But by so doing, legal practice is reduced to the mere recording of facts - it is the manner in which sociology and realistic empiricism proceed - we enter an area (the one defined by Carl Schmitt for international law as a non-law), whereby governance is defined in the absence of any possibility of *nomos*. We are once again deep in the fades. The experiment of international law does not change the fades other than by dislocating them. Here, a new reflection has to be made on the terrain of globalization: a reflection that recognizes the basic antagonisms between which, in all senses, the process of global reorganization moves, which eliminates any homology with the past, any reference to the old international constitutions, and which tries to build temporary and effective regulations on new spaces and themes (bio-political, media and especially financial).

A second example is that of trade union law, in relation to class struggle. In the post-Fordist transition and during the economic crisis – once the Rhine compromise and in general the more or less corporatist industrial contractualism collapsed - the problem of social labour regulation and that of the redistribution of "gross domestic product " have become issues now free from any legal conditioning,

shifting from the field of direct production to that of social production. Again, any homology with past trade union law is vain - here too, there is a constituent initiative to be opened. However, what appears today, is also in this case a terrain characterized by determinations similar to those defined by international law: a real disaster of traditional legal forms. For the moment only tactical operations of resistance appear to be possible.

2.2.2 Experiment 2

Here, our second experiment is on the line of commonwealth. It leads us to deal with the issue of an eventual law of the common from the point of view of the ontology of the common. This line starts from the recognition of the construction and the functional subjection of the common by global, financial, and military capitalism. Far from proposing processes of mere recognition or appropriation of structures and shapes of the "communism of capital" and of its State, this line suggests to think about processes of governance as a means of further destructuring of traditional law and, secondly, it undertakes the objective of urging, within this process of destructuring, the emergence of new types of productive cooperation.

The only way out, with respect to these problems seems to be:

1. The restatement of the theme of the common on a terrain that is not socially homogeneous, which does not have pre-established institutional structures or homologies, but rather, which is crossed by original antagonisms: on the one hand, there is a more and more precarious labour force, which recognizes its own autonomy from capital; on the other hand, the relation of command that capital continuously seeks to renew. The solution of these conflicts cannot be constructed according to some teleological or dialectical determination. We move in a Machiavellian context. Each determination is a power that wins (or loses) relative to other powers. The sense of the process is assimilated and produced here by the power of collective decision-making. In this framework, the common cannot be placed in continuity with the legal tradition, cannot be configured as a terrain in which you propose, from the outside, ideas of justice. Instead, it can only hold and build usages and govern them in their immanence, in their reciprocity and community. International law (precisely as a non-law) is from this point of view the model to which we may refer (but in a reversed manner, opposite to how Carl Schmitt raised the question).

2. The reversal of Schmitt's perspective - not the recovery of the 'exception' but the insistence on the 'surplus' of cognitive labour, the assumption of a suitable biopolitical context, the study of doctrines and practices destructuring Western law and the exercise (in the destructuration of law) of constituent power - constitute today the only viable way out on these issues. In this regard, writing in the 1920s, Pashukanis proposed some very interesting lines: "It is most obvious, that the logic of juridical concepts corresponds with the logic of the social relationship of

commodity production, and that the history of the system of private law should be sought in these relationships and not in the dispensation of the authorities. On the contrary, the logical relationships of domination and subordination are only partially included in the system of juridical concepts. Therefore, the juridical concept of the state may never become a theory but will always appear as an ideological distortion of the facts."

To imagine a law of the common (but why even still talk about law?) we must therefore - once the destructuring of the property-based constitution is completed – rise from the plurality, from the network of labour relations and forms of regulation that include and develop the potential of social productive relations, and which constitute, in equality and co-production, non-state legal norms to regulate the common life. Thus, for example, we must follow the phenomena of cooperation of the labour force, of self-valorisation, that introduce a surplus of productive capacity of the individual and collective labour force. We must go through all financial phenomena revealing from therein the power of symmetrical relations between social production and system of signs – and importantly, we must reinvent, probably at this level, a theory of "labour-value" (and its measurement). Only here will it be possible to establish lines that (not simply in tactical terms but finally in strategic ones), go back from Welfare to the common (that here, in this light, begins to define itself as an arena of democratic participation coupled with distributive equality).

3. A Note to Teubner's Note (Hardt and Negri)

Teubner begins by interpreting, in a sometimes confused way, concepts of Commonwealth; however, in his final characterization of the differences and similarities between his path and ours, he is very fair and generous. There are two similarities to be noted:

1. The recognition of the inadequacy of the alternative between the neo-liberal market solutions and Keynesian or socialist (state) ones. If a third way has not come yet, we must invent it.

2. The appreciation of the plurality of the social field and the insistence on a political movement based on multiplicity. Very well, so far.

The first critique of Teubner is, indeed - when he comes to the end of his speech – that we are guilty of supporting a unified and totalizing political solution that betrays our initial reliance on the multiplicity. On this point, we adhere to Teubner's insistence on the multiplicity, simply by putting in this context the need to "make multitude", or more simply, to make society (not as a unified social totality, but as a coherent context of stable social relations). We believe not to be far from Teubner's view on this regard.

Nevertheless, we believe that the discussion should be deeper on the use of the concepts of public and private. Addressing Teubner's argument, he wants to tear the 'public' from the state, and he uses the concept for many of the determinations, which we call "common". The issue, however, becomes more complicated when he wants to recover the "private". He mentions that even if he can agree with our critique of private property, there are still many other uses of the private that he wants to keep. We have never said that all the guarantees Teubner wants to keep for the private should be thrown away. On the contrary, we would like to characterize them, rather than using the concept of privacy, with the concepts of autonomy and freedom; concepts which are very different because they are not based on separating and protecting, but instead rooted on our power.

Finally - and perhaps most importantly - we think Teubner underestimates the intensity of our criticism of private property, or rather undervalues the radical social transformation required by the abolition of private property. He assumes, in fact, that all other meanings of "privacy" (outside property) are neutral with regard to the "private" of property – whereas we believe that they are closely involved in it. In short, we would like to contextualize Teubner's characterization of the 'private' with that of Pashukanis when he shows that private property rights ground bourgeois (and capitalist) law, while the other energies of the singularity (the responsibility at work, the joy of scientific research, social solidarity etc.) enable the construction of the common. We are so convinced of this that it does not seem strange to us that the common could be constructed from those private virtues rather than by the strength of the public, of the State (always aimed at the protection of property). Teubner, perhaps, does not realize how much the conditions of private property, in all contexts, endanger those language games that he wishes to preserve.