

NEOLIBERALISM AT A CROSSROADS

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One, None and One Hundred Thousand Neoliberalisms

Not so many years ago, Flew argued that, in a relatively short period of time, the term “neoliberalism” had become “a kind of conceptual trash-can, into which anything and everything can be dumped, as long as it is done so with suitable moral vehemence” (Flew, 2014, p. 67). Although scholars cautioned early on against “reify[ing] neoliberalism and treat[ing] it as a phenomenon which manifests itself everywhere and in everything” (Gamble, 2001, p. 134), Flew asserts that “this is in fact what has happened to neoliberalism over the last decade” (Flew, 2014, p. 51). She offers an astounding number of —sometimes amusing— examples that illustrate how the term has been used in this very way, in contexts ranging from the space dedicated to books in Australian public libraries to the popularity of Bollywood-style weddings (p. 51).

Despite warnings to avoid “conspiracy theories” about neoliberalism, as well as a rough instrumentalism of the nexus between the juridical-political and economic spheres —an instrumentalism that keeps on being credited to poor Marx— Flew’s (2014) invitation to consider neoliberalism “as a historical institutional form” (p. 64) may be reduced to little more than a tautology: that is, neoliberal political practices and legal changes vary according to the different “varieties of capitalism”. Beyond that, she invites “the neo-Marxist critique of neoliberalism” not to “remain within binary opposition of public and private, collective and individual, and state and market” (p. 64); at the same time, however, her paper dwells heavily on binary oppositions, such as those that pit Harvey against Foucault or, ultimately, Marx against Weber.

Flew's arguments allow me to clearly state my starting point: I agree with her in that neither conspiracies nor instrumentalism should find space in such debates —but I do wonder if these theoretical positions are actually occupied by anyone in this field (and, in the interests of clarity, I doubt that such a criticism can be directed at Harvey). And, while I do not think it is helpful to keep pitting *scholars* against each other (not to mention founding fathers of social science such as Marx and Weber), I do think —as I will argue— that pitting *concepts* against each other is not only productive but also, in a sense, necessary. In particular, I see the “binary opposition” between public and private as the conceptual key to understanding the role of law in the neoliberal project.

As almost any paper on neoliberalism sooner or later acknowledges, such an “umbrella term” can be used to refer to a lot of different things, such as “a political ideology, an historical moment, an economic programme, an institutional model, and a totalising political project” (Brabazon, 2017, p. 1). My point here is that these different theoretical concepts are not mutually exclusive. As is often the case —not only in the social sciences— what is found depends on the starting questions and hypotheses, so there should be no surprise in discovering that neoliberalism as *a political ideology* is different from neoliberalism as *an economic programme*, or as *an institutional model*. Moreover, as both Flew and Giolo have noted, these ideologies, programmes, and models will take a different shape within the context of different legal or political cultures, not least because of the unpredictability of the so-called “transplant effect” (Palacios, 2017, p. 73).

To give just one example: if we look at the development of legal techniques in the field of foreign investment law, we may find clear evidence of the erosion of state sovereignty, partly due to the return of the contract and of an abstract concept of property (Perrone, 2017; Papolizio, 2015); in other legal fields, such as the management of urban marginality, we may, on the contrary, observe traces of a “punitive turn” that involves a shift “from welfare state to penal state” (Wacquant, 2009). These developments are not contradictory at all since, as Giolo (2020, pp. 32ff.) argued, neoliberal legality rests on the differentiation of (at least) two juridical layers, that produce a sharp hierarchization of juridical subjects. However, to avoid the above-mentioned danger of seeing neoliberalism “everywhere and in everything”, scholars should clearly state their basic theoretical assumptions and the specific model of neoliberalism they will investigate.

In this paper, neoliberalism will be treated as *a historical moment* in the development of capitalism. As such, it will be described from the standpoint of historical sociology, and in particular in terms of the theory of “systemic cycles of accumulation” proposed by Arrighi in two landmark books (1994, 2007), which build on the works of giants such

as Marx, Braudel, and (to a lesser extent) Polanyi. This powerful theoretical framework will allow the time boundaries of the neoliberal era to be defined, and will also help in differentiating between what is “neo” and what is “liberal” in that period of time. My only addendum to Arrighi’s position is that, in my view, it implicitly reveals an ineludible tension between two legal ideal types, and thus neoliberalism can be interpreted as a historical victory of the private over the public.

By coupling the «*longue durée*», advocated many years ago by Braudel (1958), with the ambition of describing “historical capitalism as a world system”, Arrighi’s (1994) starting point is that “[o]nce we stretch the space–time horizon of our observations and theoretical conjectures in this way, tendencies that seemed novel and unpredictable begin to look familiar” (p. 4).

From my perspective, Arrighi’s theory offers two crucial advantages. Firstly, it follows a narrow path between two antithetical dangers: (i) the risk of “epochalism”, that is, of claiming “that we now live in a new kind of society which departs in fundamental ways from previous modes of social ordering” (Savage, 2009, p. 219); and (ii) the impossibility of clearly identifying any rupture of the system, or paradigm shift, so transforming the history of capitalism into “the eternal return of the same” (Hardt & Negri, 2000, p. 239¹). Secondly, Arrighi’s ambition to provide a comprehensive account of capitalism, from its origins in medieval Italy, overcomes the above-mentioned argument that neoliberalism assumes different shapes in different legal cultures. As we will see in the next section, measuring the lifespan of systemic cycles in centuries, rather than in years or decades, offers the possibility of observing “the truly surprising regularity with which the phases of economic freedom and of economic regulation have succeeded each other” (Pirenne, 1914, p. 515). In my opinion, this same regularity is the key to understanding the legal changes that have occurred in the neoliberal era.

Accumulation and crises

It is worth addressing from the outset a possible objection to using Arrighi’s theory to describe neoliberalism: Arrighi, himself, almost never uses the term “neoliberalism”, either in his 1994 masterpiece, or in his book mainly devoted to the analysis of China, in which the term is used only in the detailed analysis of Harvey’s arguments (pp. 222ff.). I

1. Negri and Hardt believe this is the main flaw of Arrighi’s theory, a critique that I do not agree with, for the reasons explained in the text.

could easily dismiss this point by referring to the teachings of legal realists who, almost a century ago, warned us against engaging in “silly word battles” (Frank, 1930, p. vi), but Arrighi’s choice in avoiding use of the term is revealing. Notably, the crucial shift that started in the last quarter of the 20th century has been defined in a variety of ways. Before “neoliberalism” occupied the stage, the most commonly used term to capture this social change was, perhaps, “globalization”, another “umbrella term” that was later largely dismissed for the same reasons now cited in criticizing “neoliberalism”: that is, its “vagueness”.

In a 2000 paper, Arrighi addressed this very issue —could “globalization” have a definite meaning or was it just a “gimmick”, as Harvey once said he believed “in his more cynical moments”— and wrote:

Gimmick or not, the idea of globalization was intertwined from the start with the idea of intense interstate competition for increasing volatile capital and a consequent tighter subordination of most states (the United States included) to the dictates of *private capitalistic agencies*. Globalization may be a misleading term with which to denote the shift from a global financial system controlled by a hierarchy of governmental agencies headed by the United States to an equally global financial system in which governments have little control over their finances and compete fiercely with one another for the favor and assistance of *privately controlled capital*. But whether or not we want to retain the term, we can hardly hope to make sense of what has been going on in the world in the last twenty years or so without paying close attention to the shift itself. (p. 119; emphasis added)

The lengthy quotation above is important as it identifies, in a nutshell, the points I will try to defend in this article. First, I will consider the argument that neoliberalism should not be regarded merely as “a political ideology” but rather as a shorthand way of describing a historical shift. The neoliberal era can be described as a *hegemonic crisis* of the state that led the previous phase of material expansion: that is, the United States. From this perspective, the theoretical and practical influence gained by the arguments disseminated by the Mont Pelerin Society or the Chicago School of Economics ceases to appear as the by-product of a conspiracy, or as the brilliant victory of individual freedom over state oppression. Those ideas gained momentum because of their convergence with the material interests of the dominant classes in the “hegemonic bloc”, but they also signalled a specific rebalancing of forces *within* that bloc.

Second, this crisis does not involve any “blurring” of the public/private distinction, as many observers claimed. On the contrary, as the emphasis added in the Arrighi quotation above shows, we can account for this transition *only by referring to that distinction*, which encompasses not only public and private organizations, but also different “logics of power” (in Arrighi’s words) or legal ideal types (from my perspective). To understand the full picture, however, we must first summarize Arrighi’s main arguments.

According to Arrighi, the history of capitalism can be interpreted as the succession of different “cycles of accumulation”, each led by a different hegemonic power. However, a few caveats are necessary here in order to fully understand this ambitious theory. First, the beginning of each cycle is always, at the same time, the end of the previous one. In other words, cycles overlap. Second, each of these “containers of power” (or “states”, if you like) should be regarded as a bloc “of governmental and business organizations that have led the capitalist world-economy through its successive phases of material expansion” (Arrighi, 1994, p. 13). Furthermore, since that same distinction “constitutes the latest stage of a six-centuries-long process of differentiation of business enterprises from governments” (p. 86; emphasis added), it is only at the end of the process that we can clearly identify these organizations on the basis of their means (exchange and war, respectively) and ends (economic and political power) — that is, we may perceive the difference between *public and private* organizations as “natural” and “obvious”, but that has, in fact, not always been the case.

Third, and finally, each hegemonic bloc can also be identified *as a whole* on the basis of the specific strategy it adopted to lead the phase of expansion. Here again we find two opposite “modes of rule or logics of power”:

In the territorialist strategy, control over territory and population is the objective, and control over mobile capital the means, of state- and war-making. In the capitalist strategy, the relationship between ends and means is turned upside down: control over mobile capital is the objective, and control over territory and population the means. (Arrighi, 1994, p. 35)

Historically, of course, these two strategies do not operate in isolation, as states employ both of them. We can identify powers that represent “the clearest embodiment of a capitalist logic of power”, such as the Venetian republic, and typical territorialist powers, such as Spain in its conquest of the new world, but the leading capitalist states of every epoch typically combined both strategies to differing degrees. For example, the United

States were territorialist in their internal “conquest of the West”, but later reorganized the world economy following an essentially capitalist strategy.

In my opinion, the main strength of Arrighi’s theory is that it allows room for historical and even geographical contingency, since who wins the race for hegemony is *not* predetermined, while at the same time it also points to a developmental path that is “not a purely random process” (Arrighi 1997, p. 159). That (very specific) predictability is linked to the leap inherent in every systemic transition since, in the three shifts observed by Arrighi, the new hegemonic power promotes the two logics of power to a level that helps in overcoming the contradictions of the previous phase. In this way, “the sequence of leading capitalist states [...] consists of units of increasing size, resources, and world power” (Arrighi, 1994, p. 14): thus, the small city-state of Genoa, after defeating its old rival Venice (in the 16th century), is superseded at the beginning of the 17th century by the “proto-state” of the Netherlands, that midway through the 18th century gives way to the rising British maritime empire; then, at the end of 19th century, Britain began to pass the sceptre to the “continental island” of the United States². So, an obvious question arises: what is next in the race for hegemony³?

There is one last detail to note: as Braudel stated, with reference to the Dutch decline, every systemic transition is marked by a financial expansion in the extant leading state that can be read as a symptom of maturity of that cycle or, to quote Braudel’s brilliant words, as “a sign of autumn” (Braudel, 1984, p. 246). This financial expansion indicates an oversupply of capital that cannot be reproduced in the old way anymore, and the need for a change.

Recurring shifts

In Arrighi’s (1994) theory, the “financialization” of the economy acts as a “signal crisis” in a systemic cycle, as described below:

[...] it marks a ‘turning point,’ a ‘crucial time of decision,’ when the leading agency of systemic processes of capital accumulation reveals, through the switch, a negative judgement on the possibility of continuing to profit from the reinvestment of

² For the exact dates and a graphic timeline of these cycles, see Arrighi (1994, p. 220).

³ In his 1994 book, Arrighi believed that Japan might take the lead, with the help of the so-called “Asian tigers”; however, in his 2007 book, he subsequently revised this view and pointed to China as the next power, as we will see in the conclusion.

surplus capital in the material expansion of the world-economy, as well as a positive judgement on the possibility of prolonging in time and space its leadership/ dominance through a greater specialization in high finance. (p. 220)

So, in the case of contemporary neoliberalism, when did that “turning point” take place? The first sign came in 1971, when United States President Nixon declared the end of the so-called “gold-dollar standard”. That happened because the hegemonic power eventually realized that its spending power (impaired by President Johnson’s Great Society programme and the Vietnam war) was not infinite and was also under attack from *private capital*. As Arrighi (2007) said “[...] once that system actually collapsed, the gates were open for an ever-growing mass of privately controlled liquidity to compete with the United States and other state actors in the production of world money and credit” (p. 157).

A long struggle against “stagflation” was then about to start until, in 1980, the president of the United States Federal Reserve Paul Volcker, following monetarists’ theories, decided that the only real cure for inflation was to deepen the economic recession by raising interest rates —that is, by raising the cost of money. Not by chance is the “Volcker shock” now widely considered as the beginning of the neoliberal era (see, for example, Harvey, 2005; Sonti, 2018), since it involved a significant rebalancing of class forces in American society: it dented workers’ power —as any recession does— and at the same time rewarded capital owners, thus leading to a massive inflow of capital to the United States and a “redistribution in favour of creditor–financier interest” (Ingham, 2008, p. 87) that laid the basis for the financial explosion of the 1980s.

In my view, that shift should be regarded as symmetrical to another shift that occurred at the beginning of the 20th century, when the hegemonic role passed from the Britain to the United States. In that case too, we can see a financial explosion that overlaps with the so-called *belle époque*. This latter shift ultimately required two world wars, and a prolonged economic depression (1914–1945) to bury the liberal premises of the Victorian era, along with the dominance of Britain’s industry and navy. Nonetheless, these tragedies allowed for a new phase of material expansion (1945–1975), led by the United States and based on the very different assumption that political power must control “the power of money”: this *primacy of the public over the private* was required in order to limit and repair the dramatic consequences of entrusting the *whole* allocation of resources entirely to the market, as Keynes (1936) claimed in his groundbreaking work, and Polanyi (1944) later observed in his social history of 19th century Europe.

Towards the end of the 20th century, the turning point of the 1970s simply reversed that premise again, with a return of liberal arguments, albeit in a very different world. United States policy choices in support of a fiat currency (1971) and against inflation (1980) led capital owners to understand the real nature and basis of their power—that is, *a global economic space segmented into independent political units that were in a perpetual struggle for power*. Once again, as Weber told his students more than a century ago with reference to Europe at the beginning of modernity, “[t]his competitive struggle created the largest opportunities for modern western capitalism. The separate states had to compete for mobile capital, *which dictated to them the conditions under which it would assist them to power*” (Weber, 1961, p. 249; emphasis added).

The long-term perspective of Weber, Braudel and Arrighi thus shows us that the current situation is nothing new: if it is true, as Weber went on to say in the passage quoted from above, that modern capitalism arose from “this alliance of the state with capital, dictated by necessity”, it is also true that these two powers did not always row in the same direction. As Braudel (1979) pointedly noted:

Thus, the modern state, which did not create capitalism but only inherited it, sometimes acts in its favor and at other times acts against it; it sometimes allows capitalism to expand and at other times destroys its mainspring. Capitalism only triumphs when it becomes identified with the state, when it *is* the state. (p. 64)

Neoliberalism and law

If we accept the arguments of Braudel and Arrighi, we should conclude that the neoliberal era is not, as many observers claim, the triumph of capitalism but, on the contrary, is one of its recurring times of crisis. Does that help us in decoding the legal changes brought about by neoliberal policies? In considering this, it is worth noting a peculiar paradox in observing neoliberal legality.

Since the public/private distinction rose to be regarded as the “grand dichotomy” of Western legal thought in the 19th century (Pupolizio, 2019, cap. II; the quotation comes from Bobbio, 1970), it has been considered as one of those distinctions that, “taken together, constitute the liberal way of thinking about the social world” (Kennedy, 1982, p. 1349). At the same time, since then, the distinction has been accused of being false, ideological, simplistic, banal, imprecise, contradictory, or of being all of these things

together. The list of critics is so long and varied that it includes authors as different as Marx, Kelsen, American legal realists and, more recently, critical legal scholars.

However, as Giolo (2020, pp. 27ff.) points out, there seems to be no room in the “neoliberal network” for this old-fashioned distinction, which appears to have been ousted by legal developments such as the emergence of soft law, transnational legal regimes and, last but not least, the end of the identification of law with the state. Giolo argues that today this assumed “blurring” of the public/private divide takes on a meaning that is quite contrary to the one it had in classical liberalism. According to her, all of the above-mentioned critics targeted the “grand dichotomy” because it was essentially *ideological*, that is, it supported a false divide between “a heavenly and an earthly life”, to quote Marx’s famous words (Marx, 1958). In other words, both Marx and Kelsen supported the view that the public/private distinction was meant in the first place to prevent the public (i.e., the political power) from interfering with the private (i.e., the economic power).

I think that Giolo’s argument is sound, even though I also see it as *incomplete*. On the basis of what we have learnt from Arrighi, we can now add a few further points to the picture. First and foremost, just like any other “grand dichotomy”, the public/private distinction is an ideological device that can be applied *in both directions*: on the one hand, Giolo wrote that it can be used to protect the private from the public (let’s call this the “Marxian argument”); on the other hand, as Kelsen repeatedly pointed out⁴, it can be used to claim the primacy of the public over the private, that is, to prevent the government from strictly applying the rule of law (*en passant*, this “Kelsenian argument” has been used by common law jurists to claim that this distinction does not have the same importance in their legal systems as is the case in civil law countries⁵).

Second, and odd as it may appear to Kelsen, the elevation of the public/private distinction to a “grand dichotomy” was one of the cornerstones of the building of the rule of law or *Rechtsstaat* in 19th century Western legal culture: from this perspective, the protection of the private *from* the public encompasses the “sacralization” of property as well as habeas corpus or free speech, which together represent the core of so-called civil rights.

Third and finally, as we have seen, the dichotomy is not only an ideological device, as is apparent from Arrighi’s discussion of the historical developments of capitalism.

4. Kelsen’s standpoint is clearly stated for the first time in a 1924 article, written for the Italian public (Kelsen, 1924), and then reiterated in all of his major works (for details, see Pupolizio, 2019, pp. 86ff).

5. This tradition however starts with Dicey (1885). More recently, see Lucy & Williams 2013.

On the one hand, Arrighi highlights the functional differentiation between *public and private* organizations (i.e., between governments and business enterprises). On the other hand, he highlights the shift between *public and private* “logics of power” (i.e., between territorialism and capitalism) observed in leading states in the struggle for hegemony: currently, the decline of United States “global military Keynesianism” (Arrighi, 1994, p. 315) has made way for the “pure” capitalist logics of financialization (that is, finance as the main source of accumulation) and privatization (referring not only to the control of resources, but also, as Giolo points out, to the production of rules), although these will not necessarily be the logics of the new phase of expansion.

In summary, my argument is that Arrighi’s (1994) description of historical capitalism helps us understand neoliberalism as being, at the same time, (i) the terminal crisis of the United States regime of accumulation and the beginning of “a change of guard at the commanding heights of the capitalist world-economy” (p. 367); and (ii) a historical period marked by *the relative primacy of the private over the public*. No one knows when or how this changing of the guard will end, but it is apparent that, for the first time in history, (i) the leading role of capitalist accumulation is slipping away from Western hands, and will probably end up in those of the People’s Republic of China; and (ii) the new hegemonic power will have to cope with newly emerging global threats, such as pandemics or climate change, that could alter the whole context in which capitalism has thrived for five hundred years.

Be that as it may, the next leading power will once again have to find a new synthesis between “the power of the gun and the power of the money” (in Arrighi’s words), or between the public and the private (in my words), for dealing with unprecedented problems for a system that originated in Italy’s medieval city-states and went on to colonize the entire world economy. In the context of these long-term challenges, I think the following remark from Teubner will still hold true: “It has almost become a ritual these days to de-construct the private/public distinction. The problem is, nobody knows how to dis-place it, not to speak of how to re-place it” (Teubner, 1998, p. 394).

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