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BEYOND EMPIRE?¹

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Abstract

The article considers the pertinence of the concept of empire for the continued intelligibility of the configuration of the contemporary international order. The pertinence is examined by tracing its presence in the recent work of Cacciari (*The Withholding Power*) and the more extended thematization in the work of Hart and Negri. The examination commences from the question of the entwinement of the concept of empire with the framework of political theology and the consequences of the particular inflection that Cacciari confers upon this in *The Withholding Power*. The difficulties of the Cacciarian approach are then the basis for the turn from political theology to the examination of Hart and Negri's appropriation of the Polybian *politeia* as the interconnection between the concept of empire and the elements of a mixed constitution. The character of the appropriation is then indicated to be the preparatory delineation of the contemporary international order whose transformation – that which is beyond empire – arises from a globalization from below comprised of the interconnection of the multitude and the common. It concludes with a reflection upon the notion of the common.

Keywords

Empire, International Order, Juridical Form.

Resumen

El artículo considera la pertinencia del concepto de imperio para la continua inteligibilidad de la configuración del orden internacional contemporáneo. La pertinencia se examina rastreando su presencia en la obra reciente de Cacciari (*The Withholding*

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Power) y la tematización más extendida en la obra de Hart y Negri. El examen parte de la cuestión del entrelazamiento del concepto de imperio con el marco de la teología política y las consecuencias de la particular inflexión que Cacciari le confiere en *The Withholding Power*. Las dificultades del enfoque cacciariano son entonces la base para pasar de la teología política al examen de la apropiación por parte de Hart y Negri de la *politeia* como interconexión entre el concepto de imperio y los elementos de una constitución mixta. A continuación, se indica que el carácter de la apropiación es la delineación preparatoria del orden internacional contemporáneo cuya transformación —la que está más allá del imperio— surge de una globalización desde abajo compuesta por la interconexión de la multitud y lo común. Concluye con una reflexión sobre la noción de lo común.

Palabras clave

Imperio, Orden Internacional, Forma Jurídica.

Introduction

The attribution of a juridical form to the present configuration of the international order confronts the immediate difficulty that the position from which that juridical form is attributed, and the range of forms from amongst which it is selected, is open to question. The absence of a stable theoretical or methodological background in relation to which a position can be delineated and developed arises from the effect of the dominance, and subsequent failure of, the juridico-political framework of globalization.² The apparent effect of this initial dominance and subsequent failure is to have sought to create a dynamic unity of international trade, technology, human rights and democracy which has left each of the elements to pursue its own path guided by their different developmental logics.³ In order for juridical thought to remain capable of an intervention other than that of thematization within the limits of the purported parameters of the failure of the juridico-political framework of globalization, a position of explicit, reflective distance is adopted. The possibility of this position rests upon an initial divergence from the simple assumption that these parameters and their limits impose themselves upon juridical thought as an objective necessity – the primacy of a purported reality over the conceptual content and sources of juridical thought. The divergence is itself the expression of a reflective process which, in detaching juridical thought from hypostatization, extricates juridical thought from a silent acceptance of an adaptation to the continued dominance of the conceptual orientation of neo-liberalism over the failure of the juridico-political framework of globalization.⁴ The initial, reflective divergence creates a space for reconsideration and rearticulation of juridical thought⁵ and, within this space, the occasion for a deliberation upon the pertinence of the attribution of the juridical form of empire to the present configuration of the international order.

2. The failure can be attributed, primarily, to the combination of the military invasion and war in Afghanistan (2001-), the military invasion and Iraq War (2003-2011), the further war in Iraq and its intersection with the civil war (later internationalized) in Syria (2013-), the first and second Libyan civil wars (2011-20) and associated direct and indirect international military assistance, the absence of agreement in, and subsequent permanent suspension of, the Doha round of global trade negotiations at the World Trade Organisation (2001-2008) and the global financial crisis (2007-8) originating in the subprime mortgage crisis in the USA.

3. The appearance finds an exemplary theoretical reflection in the transformation evident in the following works of Francis Fukuyama *The End of History and the Last Man* (1992), *After The Neocons: America at the Crossroads* (2006), 'What Crisis' in N. Birdsall, & F. Fukuyama F (2011, pp. 312-327), *Political Order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy* (2014).

4. On the central position of adaptation within neo-liberalism, see Stiegler, (2019).

5. For instances of broader, foundational reconsideration and rearticulation, see Bazzicalupo, (2019); Bazzicalupo, (2016a); Bazzicalupo, (2016b); Galli, (2016); Marramao, (2020); (Preterossi, (2019); Preterossi, (2017).

The return to political theology?

A preliminary question which arises from the consideration of the pertinence of the juridical form empire is of its intertwinement with a theologico-political conceptual horizon. Thus, that to initiate this consideration is to engage in a return to, or reanimation of, a theological-political horizon and its associated limits.⁶ This, in turn, relates to the enduring influence of the thought of Carl Schmitt, in particular, *Political Theology* (1922) and *Political Theology II* (1970), on the interpretative stance towards the juridical form of empire. The difficult and intricate character of this continued influence is evident in Massimo Cacciari's most recent work on political theology, *The Withholding Power* (Cacciari, 2018).⁷ The attempt to rigorously conceive and delineate the relationship between politics and theology, within a renewed thematization of the Pauline notion of the *katechon*, in the *Second Letter to the Thessalonians* (2: 1-1), is the tracing of an internal, conflictual dynamic of the *katechon* in which its 'restraint' or 'containment' of chaos (*anomie*) exceeds itself in the necessity to impose a form on chaos: the conflictual dynamic of empire and *katechon* (pp. 11-26). The tendency of this internal dynamic is towards the obsolescence of empire as the corollary of the 'form' revealed to exist within that which the *katechon* seeks to restrain, and can only understand as chaos. The limits of the *katechon* – its incomprehension of the immanence of form within the chaos which it seeks to contain – becomes, with the unfolding of this internal dynamic, the revelation of "its own im-potence" (p. 76). The form which emerges immanently is neither the foundation for the advent of new possibilities nor "the mere absence of measure" (p. 76). It is "the reproduction of the ever-same, of which this every moment of crisis is an essential element" (p. 77).

The form which arises from within this internal dynamic is that of an implacable process orientated to "desubstantialize' all political power" (Cacciari, 2018, p. 70). It commences from

[...] the critique of the idea of empire, proceeds to that of every 'mortal God' and finally corrodes – logically and philosophically – the *reality* of the State, de-substantializing it, divesting it of all *auctoritas*, denouncing its ideological fictions and

6. The question differs from that posed by Lefort (2006) —the permanence of the theologico-political— with regard to the relationship between the political and the religious arising from the emergence of modern democracy.

7. The turn to the question of political theology, in *The Withholding Power*, arises from the preceding reflections on the possibility and failure of an 'idea of Europe' as a rethinking of the notion of empire on the basis of certain categories of Roman law (Cacciari, 2016).

showing the impossibility of overcoming the absolute horizontal plane of the net of conflicts and interests. (p. 110)

In this process, form ceases to be derived from “any instance of transcendence” (Cacciari, 2018, p. 76) and the effect of this displacement is expressed at the level of the individual and at the level of the net of increasingly autonomous “spheres of power and their internal conflict” (p. 116). The immanence of form originates in an energetics and its internal regulation which, as an individual, is “the quest to develop its own power *as far as it can*” (p. 113). The drive to maximization —“constant competition” (p. 116)— is tempered —regulated— by “the ‘natural’ functional needs of the system, of the obvious respect owed to the rules by means of which the apparatus labours away” (p. 111). At the level of the net composed by the autonomous spheres of power, there is a drive to maximization within these spheres and to competition between these spheres which is without a common internal regulation analogous to that at the level of the individual. Each sphere is directed by “norms internal to their own function”, resulting in a drive to maximization that “*does not know* the global effects of its own *impetus*”; and a “complexity of the relations to which they give rise, traversing various institutional levels, rights and procedures, is literally uncontainable” (p. 113).

The emergence of an entirely internal, immanent form is the corollary of its manifestation in a plurality of spheres of power competing “over claims to be the true interpreter and representative of the immanent Law of the system” (Cacciari, 2018, p. 115). The intensity of competition generated by the internal configuration of each of the spheres is “the space of *permanent crises*, of passing seamlessly from crisis to crisis with no armistice, let alone peace” (pp. 114-5). The space is one of perpetual transformation whose parameters remain “unforeseeable” (p. 113): “neither the absolute and simple absence of law and command, nor anarchy, nor the prospect of a new Age” (p. 70). The space is traversed by an entirely negative indeterminacy which confines the delineation of any stability in the relationship between the spheres to the creation of “great spaces” themselves traversed by a continuing “conflict among their various powers” (p. 117).

The culmination of the internal dynamic of theology and politics is the dissolution of the *katechon*. The dissolution is the self-dissolution of the terminological conjunction, political theology, as both the end (*telos*) of its internal conflict and the end (closure) of its continued possibility. In this dissolution is contained the definitive marginalization of the juridical notion of empire, and the concomitant reduction and accommodation

of the juridical to the space of permanent crises and its immanent reproduction without “any other reference, any ulteriority” (Cacciari, 2018, p. 76).⁸

The culmination and closure of political theology; and the attendant inoperability of the juridical notion of empire, is simultaneously, for Cacciari, the effective termination of the Schmittian project of political theology.⁹ The underlying interconnection and inseparability of these elements, articulated by *The Withholding Power*, become open to question once it is acknowledged that the Schmittian texts which form Cacciari’s initial interpretative corpus are defined by a significant absence – *Political Theology II*.

The retrieval of *Political Theology II*, in particular, through a renewed concentration upon the Postscript, enables the elements to be detached from the necessity of this interconnection and for the conception of their relationship to be reconfigured. For, it becomes evident that Cacciari’s position, rather than an overcoming of the Schmittian position, is a repetition of the Schmittian position articulated in the Postscript. The repetition arises at the conclusion of the Cacciarian process of internal conflict and dissolution of the *katechon* which has resulted in the emergence of a post-theological space which has definitively dissolved all further possibility for a political theology. It is the same space, which Schmitt, in the Postscript, explicitly confronts as that resulting from the effect of Blumenberg’s *The Legitimacy of Modernity*: the attempt “to negate *scientifically* any political theology” (Schmitt, 2010, p. 117).¹⁰

The purportedly de-theologized space of perpetual competitive conflict with which *The Withholding Power* concludes, is the space which Schmitt presents as entirely intelligible to political theology. The inherent conflictuality and permanent crisis of the Cacciarian characterization of this space is the re-presentation and repetition of the Schmittian “counter-image” to Blumenbergian modernity: “the reality of an enemy whose concrete possibility I can still see in its entirely de-theologized counter-image” (Schmitt, 2010, p. 128).

Within this detheologized space, the figure of an enemy has the perpetual capacity to arise through the inherent aggressiveness of three freedoms – “scientific neutrality, the technical and industrial freedom of production [and] the arbitrary nature of free human

8. The extent to which, for Cacciari, this affects the geo-political conception of the West is considered in Cacciari’s contribution to Cacciari & Prodi (2016).

9. Despite Cacciari’s designation of the relationship to Schmitt as one which, commencing from an explicit group of Schmittian texts, adopts ‘a radical distance between my and Schmitt’s position with regard to the analytical reconstruction of the problem of the *katechon* and to its philosophical and political interpretation’ (Cacciari, 2018, fn1, 12); it can be understood as an immanent critique of the project of Schmittian political theology articulated in that group of texts.

10. Schmitt, (2010), 117: “scientifically in the sense of an understanding of science which does not accept any validity for a continuing influence of, or transposition from, the history of salvation stemming from a religion which claims to be absolute. Such transpositions are regarded as tragic mortgages from past epochs”.

utilisation” (Schmitt, 2010, p. 130) – constituting this space. The “processive progress of three freedoms (neutrality, use and objectivity)” (p. 129) determine and produce the ‘new human being’ of this space who, in the Caccarian repetition and re-presentation, has become that of the “last man” (Cacciari, 2018, p. 71). The Caccarian ‘last man’ is, thus, traversed by the *internal* conflict which reaffirms, rather than relinquishes, the Schmittian insistence upon the continued pertinence of political theology.

The internal conflict, which develops from “a continuing and process-progress of a widening renewal of knowledge” (Schmitt, 2010, p. 128), shapes a free human action characterized as “the creation of nothingness as the condition of the possibility of the self-creation of an ever new worldliness” (p. 129). Free action is the counterpart of “the neutrality of human science and knowledge” and “the freedom of the use of its results within the framework of free production” (p. 129). The individual “is the unplanned, arbitrary product of the process-progress of himself” (pp. 128-129), and this process-progress contains a ceaseless, restless intensity and aggressiveness.

The new human being is aggressive in terms of the ongoing progress and continuous repositioning of himself. He rejects the concept of the enemy and any secularization or transposition of old conceptions of the enemy. He leaves behind the outmoded through what is scientifically, technically and industrially new. The old is not the enemy of the new. The old resolves itself, through itself, in the scientific, technical, industrial process-progress which either consumes the old – according to the measure of new utilities – or will be ignored as unusable or annihilated as invalid (pp. 129-130).

The affinity between the Caccarian period of the ‘last man’ and the Schmittian ‘new human being’ is also the point of divergence, as the Caccarian period is a re-presentation which has relinquished the remaining Schmittian hesitation concerning “the ‘neutralization’ of the evaluative content of ‘aggressive’” (Schmitt, 2010, p. 130).¹¹ The final Caccarian gesture of resignation – “[t]here does not seem to be much more than this to know” (Cacciari, 2018, p. 117) – is effectively to have assumed the final Schmittian ‘neutralization’: “Freedom replaces Reason, and Novelty replaces Freedom” (Schmitt, 2010, p. 130).

The effect of the Caccarian intertwining of empire and *katechon* is to present their supersession as the realization of the final Schmittian depoliticization or neutralization.

11. For Schmitt, the hesitation concerns the evaluative question: “[w]hich of these freedoms is intrinsically the most intense and aggressive: scientific neutrality, the technical and industrial freedom of production or the arbitrary nature of free human utilisation?” (Schmitt, 2010, p. 130).

The realization is the retention of the remnants of a political theology which has transformed its position of enunciation into one of resigned descriptive detachment.

The relevance of the turn to Polybius: Empire as a mixed constitution

The separability of the notion of empire from the conceptual framework of political theology, and its continued pertinence has been a central aspect of the work of Hardt and Negri.¹² The interpretative horizon from which the notion of empire has been developed is that of Polybius's *Histories* and, in particular, Book VI, which presents a description of the Roman *politeia*.¹³ For Hardt and Negri, the Polybian presentation of the Roman *politeia* is a distinctive theory of a mixed constitution whose elements are capable of interpretative rearticulation and extension to encompass the juridical conceptualisation of the contemporary international order.

In this rearticulation, which is also the explicit acknowledgement of a divergent position “in the genealogy of interpretations of Polybius in the history of European political thought” (Hart & Negri, 2000, p. 315), a return to the original Polybian “*tripartite* model” (p. 315) — monarchy, aristocracy, democracy— as “the relations and materiality of force” (p. 316) is substituted for the “*trifunctional* model of constitutional construction” (p. 315) – the juridical formalization of an equilibrium between the three functions of executive, judicial and representative. The return is the reflection of “an evolution beyond the modern, liberal model of a mixed constitution” (pp. 316-317).

The evolution is orientated by “two primary axes” (Hart & Negri, 2000, p. 317) which concern the “nature of the mixture in the constitution” (p. 317) and “both a displacement of constitutional theory and a new quality of the constitutional itself” (p. 318). The nature of mixture is modified from that of an interrelationship between “separate bodies or functions” to that of merger “in hybrid forms” (p. 317): “a passage from *mixed constitution* to *hybrid constitution*” (p. 318). The modification is accompanied by the disappearance of a central, unified locus which is maintained and reproduced by the interrelationship between distinct bodies and functions. The process of hybridization

12. The turn to Polybius is begun in Hart & Negri (2000) and its centrality is reaffirmed in Hart & Negri (2019).

13. The term *politeia* is utilized here in order to indicate that, for classical scholars, the translation of the term as constitution, and to confer this term with a merely juridical meaning, is already to engage in an interpretative narrowing of the broader phenomena encompassed by the term (See, for example, Erskine, 2013; Nelsestuen, 2017).

extends beyond the absence of a central, unified locus to encompass the interpenetration of the elements which comprise the constitution.

The axis upon which constitutional theory is displaced and the new quality attributed to the constitution arise from a transformation in the form of order required to be imposed. The transformation relates to the requirement for the imposition of order upon “the temporal dimensions of society” which is simultaneously its imposition upon “the dimension of subjectivity” (Hart & Negri, 2000, p. 318). It indicates the passage from order as the imposition of discipline to order as control.

This interpretative appropriation of Polybius, in *Empire*, which sought to trace the rudiments of an emerging constitutional order of globalization in order “to recognize the terrain on which contestation and alternatives might emerge” (p. 319), and to articulate its dynamics, is itself reinterpreted in the subsequent absence of an overarching global order and a process of globalization which has become “less legible” (p. 67). The lack of legibility derives from the effect of the “neoliberal counterrevolution” (p. 69) upon the initial processes of hybridization orientating the interconnection of the elements of the mixed, global constitution. The development of interconnections – hybridizations – is replaced with a central disjunction between the “sphere of governance” and the “sphere of social production and reproduction” (p. 69). The disjunction reflects an unstable subordination of the sphere of social production and reproduction (the inner sphere) to the sphere of governance (the outer sphere) in which “neoliberal imperial governance” confines itself to “rule over and capture value from the inner sphere” (p. 70).

The underlying instability and fragility are the counterpart of a mixed constitutional order which institutes “the proliferation of borders and hierarchies at every geographical scale, from the space of the single metropolis to that of great continents” (Hart & Negri, 2019, p. 73). The monarchic element remains without a permanent, unqualified personification and has as its corollary an aristocratic element — “major corporations, dominant nation-states and supranational institutions” (p. 74)— which indicates an essential continuity. The “intense competition” (p. 74) within and between its components belies an unwavering adherence to the disjunctive neoliberal framework “constructing and maintaining the capitalist global order” (p. 75). The democratic element – “the rule of the many” (p. 75) – encompasses “a vast array of forces”, at a global level, which are only nominally democratic and, beyond instances of resistance and challenge to “the monarchical and aristocratic powers”, are equally orientated “to support the imperial constitution as a whole” (p. 75). The overarching configuration of the elements of the

mixed constitutional order indicates a “globalization from above” which seeks to contain and prevent a co-ordinated and enduring “globalization from below” (p. 76).

The interpretative appropriation of Polybius presents the global mixed constitutional order within and against that which is *beyond* empire arises. In contrast to *Empire*, the later analysis indicates that its emergence is to be located in the inner sphere —the sphere of production and reproduction— as “the potential to create social relations beyond capitalist rule” (Hart & Negri, 2019, p. 83). The relocation of the processes and practices of globalization from below indicates that their development is presented as one of immanence: it is entirely *internal* to the movements of the multitude.¹⁴

Thus, the reinterpretation of the Polybian conception of *politeia* retains an affinity with the preceding history of interpretation which confines the Polybian meaning of *politeia* to that of a constitution and its associated juridico-political framework.¹⁵ The divergence relates to the identification of a locus of immanent social and political organization which is at variance with both the order of the mixed constitution and the particular juridico-political form of the elements of which it is composed. The combined effect of this affinity and divergence upon the textual structure of Polybius’s Book VI is to separate and redefine the narrower and broader sense of the Polybian conception of *politeia*. The broader, non-judicio-political sense is separated and redefined in a manner which transforms their Polybian configuration, as a constellation of customs, values and norms, into a biopolitics of the production and reproduction of social relations.¹⁶

The internal differentiation and re-presentation of the Polybian conception of *politeia* necessarily reorientates the conceptualization of empire from that of the Polybian “first globalization on a Mediterranean scale” (Hartog, 2010, p. 32)¹⁷, centred upon Rome, to the tracing of the tendencies of the contemporary situation of full globalization. From this reorientation, the hybrid juridical notion of empire is, in turn, detached, as a necessary corollary of the exclusive concentration on Book VI, from the Polybian peda-

14. This alteration can be considered as an aspect of a wider transformation in the orientation of Hart and Negri which, commencing from Negri’s initial critique of the form of the State, and the place of labour within it, proceeds, through the collaborative work of Hart and Negri, to accord less centrality to juridical categories, particularly those of public or constitutional law, and, with *Assembly* (2017), to concentrate upon a theory of political organization, predicated upon the immanence of decision-making and assembly, of the movements of the multitude.

15. The limitation is evident once reference is made to the text of Book VI, as the discussion and presentation of the distinctive combination of the elements of the Roman form of government is situated within a broader notion of the Roman *politeia*. See Nelsestuen, (2017 p. 215), and the accompanying footnote references.

16. The reinterpretation of Hart and Negri marks a fundamental contrast with recent attempts to present the Polybian conceptual framework as a prefigurative game theory of moral motivations and political institutions, (Straumann (2020).

17. For Hartog (2010), this is inseparable from the underlying question: “By what means and under what system of polity (*politeia*) have the Romans in less than fifty-three years succeeded in subjecting nearly the whole world to their sole government?” (p. 30).

gical textual strategy of the *Histories*: an adaptation of “the Greek theme of “learning through suffering” (*pathei mathos*) and fusing this theme with the Roman traditions of instruction through *exempla*” (Balot, 2010, p. 497).¹⁸ The notion of empire is, thereby, one whose dynamics and their moderation has ceased to be the exclusive determinant of the presentation of the mixed constitution of which it is composed. The reinterpretation situates the notion of empire, and the elements of its juridico-political framework, as the preliminary level of intelligibility —legibility— of the present configuration of the international order. The dynamics of this preliminary level are inherently immoderate, and their presentation has ceased to be concerned with any attempted moderation. For, the addressees are no longer those engaged in the maintenance of empire and its constitutional elements, but those who, within this preliminary framework, seek an alternative manner of social and political existence beyond the excesses of empire.

Thus, the pertinence of empire, and the reinterpreted Polybian *politeia* upon which its rests, is conferred with an essentially preparatory purpose. The appropriation of the Polybian *politeia* is essentially heuristic through the establishment of determinate points of attribution of global juridico-political authority. The elements of the Polybian mixed constitution are appended to the contemporary international order in a manner which explicitly retains a degree of discordance between the original Polybian elements and their contemporary points of attribution. The discordance indicates an attribution which establishes a distance from, rather than an identification with, empire. In this distance is also an enduring hesitation with regard to an existence beyond empire which continues to articulate itself within the framework of the juridico-political.¹⁹

The Common

The reticence of Hart and Negri in relation to the continued adoption of the conceptual framework of the juridico-political reflects an attempt to reorientate the thematization of social and political existence beyond empire. The reorientation arises from their insistence upon the interconnection between the multitude – the plural emancipatory political subjectivity animating globalization from below – and the common – a field of production and reproduction which is irreducible to the judicial categories of private

18. See, also Guelfucci (2003) and Annequin (2018) for important complementary and supplementary analysis.

19. For consideration of the further aspects and effects of this hesitation, see Fitzpatrick (2004).

or public law.²⁰ The elaboration of the interrelationship between the multitude and the common can be understood as an intervention which defines itself against two main juridical reconfigurations of the international order.

The juridical reconfiguration of the international order, through the sociology of law of social systems theory, is explicitly acknowledged, by Hart and Negri, as the presentation of a theory of a world social system attentive, in the accompanying sociology of law, to the distinctive juridical transformations of the contemporary international order. From this theoretical position of social systems theory, it is the sociology of law of Teubner (2004a) which has been held by Hart and Negri to reflect the position of social systems theory.²¹ Teubnerian sociology of law, through recourse to Luhmannian social systems theory, describes the reconfiguration, at a global level, of the domains of private and public law. In this reconfiguration, Teubner traces, in opposition to “a drastic (polit)economic reduction of the role of law in the globalization process” (p. 71), the emergence of a distinctive global law from the operation of “other social systems” than merely that of the economic social system. (p. 72). This, in turn, shifts the level of socio-legal analysis to “the structural linkages of law with other social subsystems” and the emergence of the broader phenomenon of “private regimes” of normative creation and conflict resolution. (p. 73). These regimes are inherently fragile in which

[...] various types of social law linking up with various global sectors and typified by differing internal organization of norm production have to be distinguished, and differing requirements as to the law’s distance and adjustment have to be correspondingly clearly developed. (p. 79).

The fragility furnishes the other aspect of the non-reductive role of law within the social systems theory of globalization: “globalization simultaneously opens the chance for law to institutionalize a dual constitution in sectors of global society” (Teubner, 2004a, p. 79).

It is at this juncture that Teubner considers the capacity of law to assist and reinforce this institutionalization is an entirely sectoral process — “[t]he realistic candidate for a dynamic civil society is pluralism of autonomous global social subsystems” (Teubner,

20. The connection is central to Hart & Negri (2004); Hart & Negri (2009) and is re-emphasized in their more recent exchange with David Harvey (Hart & Negri, 2018a; 2018b). It finds its initial encapsulation in the concluding phrase of Negri’s response to Macherey’s critical remarks on Hart and Negri’s *Multitude* (Macherey, 2004): “the multitude does not have the ambition to take power, but to manage the common” (Negri, 2005, p. 117).

21. The focus culminates in the direct, critical exchange between Teubner and Negri (2010b) and (Negri, 2010).

2004a, p. 81)— the internal distinction established within a global social subsystem between the autonomy of their activity and the autonomy of their regime. Thus, a non-reductive global law is presented as

[...] institutionalizing constitutions for global villages of social autonomous sectors, in relative distance from politics and the economy. Within the autonomous sectors there would be potentials for re-politicization, re-regionalization and re-individualization of norm-making processes. And the main attention of global law would then have to be directed towards underpinning the duality of social autonomy in the subsystems, i.e., a mutual control dynamic of spontaneous sector and organized sector, in normative terms too. (p. 83)²²

The Teubnerian approach to the reconfiguration, through a sociology of law, of the private and the public is the rejection of the conceptual pertinence and possibility of both the multitude and the common. The complexity —polycontextuality— of the social systems of which the contemporary international order is composed – is held to expose the limits of the conceptual adequacy and transformative potential of both notions.²³

The juridical reconfiguration of the international order, through the continued acceptance of the conventional extension of the juridical formalization of private property, whilst absent from explicit consideration by Hart and Negri, represents the reassertion of private property law as an integral aspect of a theory of international development. It is premised upon a conception of underdevelopment – the informal economy – as the absence of systematically formalized relations of private property (de Soto, 2001; de Soto, 2002; de Soto & Cheneval, 2006; The Commission on the Legal Empowerment of the Poor, 2009). The expansion of formalized property rights, encompassing a system of land titling, is the commodification of the informal economy – the creation of distinct units —property rights— capable of economic valuation and exchange. The informal economy is, through the extension of property rights, to be transformed into the formal sphere of production and reproduction. In this manner, it is predicated upon the misrecognition and denial of the common: that which exists outside the formalized system of property rights is as yet unutilized or underutilized value. The misrecognition and

22. This notion of constitutionalization is further developed, by Teubner, in Teubner, (2004b; 2010a; 2010b; 2012; 2013a; 2018) and Teubner & Beckers (2013b).

23. See, in particular, Teubner (2010b), for a concise exposition of these limitations.

denial of the common is the counterpart of the exclusive focus upon the expansion of the spectrum of the individual holders of private property rights.²⁴

In place of a reiteration of Hart and Negri's interrelation of the multitude and the common, as the positive content generated through opposition to the two reconfigurations of the contemporary international order, the final consideration of that which is beyond empire will adopt an indirect response. The indirectness relates to a reflection upon the common which acknowledges that its articulation exists within a broader theoretical project of which Hart and Negri represent a particular emphasis. The indication of this particularity or specificity is to initiate a possibility of reflection through supplementation, a reflection which, in its indirect approach, relinquishes the parameters of a dispute over method.

The indirect reflection would seek to supplement the common by posing the question of its capacity to be formulated juridically. In this sense, to confront simultaneously, the two juridical reconfigurations of the contemporary international order which, while recognizing their obvious differences, effectively prohibit a juridical formulation of the common, with a renewed critique of law.²⁵

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24. For the question of the relationship between de Soto's theory of property rights and a wider, Searlean theory of social construction and coordination, see Smith (2006), Smith et. al. (Eds.) (2008).

25. For, certain rudiments of a renewed critique, see Fischer-Lescano & Möller (2016); Möller (2018), Möller (2016), Möller, (2011), Spanò (2019) and Supiot (2016).

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