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CONSTITUTIONAL RESILIENCE BETWEEN RUPTURE OF HISTORY AND CONTINUITY OF RESISTANCE

Key words: Constitutional continuum, Resistance, Revolution, Constitutional Transition, Revolutionary State, Resistancial Transition

Abstract

The *overture* of the paper provides a brief survey of the philosophical positions (from Aristotle to the contemporary debate) focusing the conjecture of the legal and constitutional *continuum* as a problematic presupposition of theories of constituent power. The positions of the authors that we can call as *continuist* authors (up to Kelsen and the neo-normativism, including Soviet jurists and theorists of the constitutional cycles) constitutes the dominant part of the theoretical evolution. We discuss it (respectfully) even if we openly criticize it, with a peculiar debate involving that other position called as *discontinuist* (whose authors are especially Marxists philosophers, anti-fascist intellectuals like Piero Gobetti, and their references in philosophy such as Leibniz and Vico).

In the *first* movement of the paper, we reconstruct the equivocal at the basis of the conjecture of the *continuum*. It corresponds to a «three-time» scheme of constitutional dynamics: (revolutionary) rupture – transition – constitution. This structure makes useless (conceptually unusable, and perhaps sources of logical contradictions) both rupture and transition.

The *second* and final movement underlines the theoretical demand to consider the transition and the constitution as *coextensive* domains. Transition is, in other words, *already* Constitution, and the constitution is *always* a transition. To the latter ones, we introduce and add another phenomenon characterizing the historical phase of the transition, namely the Resistance.

The *fact of resistance* escapes the constitutionalisation, and imposes upon the latter a *necessary* character of transition.

The conjecture of the constitutional continuum

Une obligation ne serait-elle reconnue par personne, elle ne perd rien de la plénitude de son être. Un droit qui n'est reconnu par personne n'est pas grand-chose.

Un homme qui serait seul dans l'univers n'aurait aucun droit, mais il y aurait des obligations¹.

Weil, *L'enracinement* [1943, 1999: 1027].

Since the beginning of the Thirteenth century, when the so-called continental law got to expand to other regions of Eastern and Southern Europe and more, until the cross-over leading to the Trans-Atlantic affirmation, after three centuries, the conjecture of the *Constitutional continuum* has been retaining the attention, the acquaintance and the familiarity of jurists, philosophers and politicians, while consolidating over the epochs. On the logical, ontological and methodological levels, the conjecture of the *Constitutional continuum* is clearly preceding and foregoing to any vision of the *Legal* or *State continuum* itself. One with its corollaries – namely, the *exceptional character of the Revolution*, the affirmation of the *historical tendency towards the form of the Republic* (instead of despotism), as well as the general nature of sovereignty (that is substantially *decisional*) – such conjecture is often presented with a maturity that allows us to draw an easy direct line connecting legal traditions and revolutions.

Along this line we can meet (among others):

- Aristotle²;
- Polybius³ and the Roman doctrine of the *interregnum*⁴, and the philosophers and “Scholastic

- lawyers”,
- Machiavelli⁵;
- de Groot⁶;
- Cusanus (Krieffs de Kues)⁷, Pufendorf, Locke⁸,

istatutes – is a well-known concept among the historians and jurists. See, among others Humbert, *Institutions politiques et sociales de l'antiquité* [1998: 298]. What is interesting here is its relationship with the Roman Institute of the *Imperium*, which offers an irreducible semantic richness and presents major issues in political science and constitutional law that have been discussed and analyzed by one of the most controversial authors of the past decade, Giorgio Agamben. Agamben built a coherent theory of power, sovereignty, exception, decision, policy (bio-policy). See, largely focused on the discussion of the *Imperium*, the seminal Agamben, *Stato d'eccezione. Homo sacer II* [2003]. Expressly contrary to this vision, also based on the dichotomy between *bios* and *zoē*, “political life” and “bare life”, Derrida, *Séminaire. La bête et le souverain. Volume I* [2008]. Agamben had exposed the *zoē/bios* dichotomy, as propaedeutic to the introduction of the concept of “form-of-life”, in a kind of antithesis with the *Imperium*, based instead on the right of life and death of the *pater*, in the collection Agamben, *Mezzi senza fine. Note sulla politica* [1996: 13, 15]. It is worth noting that Agamben had often used in his famous pamphlet of 2003 the equally famous text (but not translated into Italian at that time) by Derrida, *Force de loi. Le «fondement mystique de l'autorité»* [1994].

⁵ We refer ourselves to Machiavel as interpreted by Hegel. On this relation, see, among the first and most interesting, Pöggeler, *Hegel et Machiavel* [1978]. Fichte had taken from Machiavelli (even in the title of the work of 1808: *Reden*, i.e. speeches) a sort of negative anthropology, in relation to the dualism State/Society, which seems to us however little adherent to the most sincere vision of Italian philosopher.

⁶ Ernst Cassirer has drawn an interesting line connecting the scientific program by Huig de Groot, and the innovations offered by Galileo's methodology: Cassirer, *Die Philosophie der Aufklärung* [1935, 1967: 161, 344]. It is precisely the *querelle* upon continuity/discontinuity between de Groot and the Second Spanish Scholastic (namely that proposed by Suarez and Vázquez) that suggests to us to include the Holland master among the founders of the modern vision of the «continuity» of the legal order, especially the vision of law as a legal order that will lead to overlapping law/institutional organization, and therefore law/organization/State.

⁷ The idea of “continuity” seems to mark the whole literary and scientific *opera* by Krieffs de Kues as a sort of “supreme gift”: e.g. Vignali, *Il dono supremo. La visione di unità di tutto di Nicolò Cusano* [2014]. A vision of the continuity in Cusanus is always put at the very center of the political views of the cardinal, e.g. by Enrico Peroli in his recent *foreword* to Cusano's *Works*: Peroli, *Tra i tempi* [2018]. We can find a dynamic interpretation of the cycles in Cusano's thought in Bocken, *Conflict and reconciliation. Perspectives on Nicholas de Cusa* [ed. 2004].

Analysing the rich legacy of the author, we can easily admit that there is a tight connection between the conjecture of the *continuum* and the Catholic inheritance, at least on a European scale.

⁸ After the Glorious Revolution of England (1688), Locke refers to it by emphasizing the aspect of *restoration*, a return to

¹ «The notion of obligations comes before that of rights, which is subordinate and relative to the former. A right is not effectual by itself, but only in relation to the obligation to which it corresponds, the effective exercise of a right springing not from the individual who possesses it, but from other men who consider themselves as being under a certain obligation towards him».

² On the Aristotelian concepts of *stasis*, revolt, revolution and Revolution, see the “classic” Bien, *Die Grundlegung der politischen Philosophie bei Aristoteles* [1969, 1985].

³ On the notion of “anakyklosis”, the cyclical political changes in Polybius' thought, coinciding with the political meaning of the word “revolution”, see Pocock, *The Machiavelian moment* [1975, 2009].

⁴ The concept of *interregnum* – that is the management of the situation of vacancy of power between two justices or mag-

- Wolff⁹;
- Sieyès¹⁰, Ehrard: the “German jacobin”¹¹, and Achenwall, the “rousseauien”;
- Kant¹²;
- Fichte¹³;
- Hegel in Berlin¹⁴, as well as the inventor of the

- “terrible” character of the constituent power, Donoso Cortés¹⁵;
- Von Humboldt;
- Von Savigny¹⁶;
- the forerunner of the legal sociology, Maine¹⁷;
- Thon¹⁸;
- Lévy-Bruhl, the anthropologist¹⁹;
- Romano²⁰;

the feudal freedoms usurped by absolutism. In France, circles of Protestants, namely, who sympathize with the new English regime used the word “revolution” to accentuate the restorative moment. Thus, gradually, the French adversaries of these events accepted this practice and attacked the “revolution” and not a “sedition” or “revolt”. See the entry *Révolution* in Ozouf, *Dictionnaire critique de la Révolution française* [1992: 416].

It is with the French Revolution that the word “revolution” becomes the unique historical event, seen as an irresistible “force” of “things” (Saint-Just in his *Rapport sur les suspects incarcérés*), a “torrent” (Robespierre in his last speech at the meeting of 8 Thermidor, year II), while remaining a moral imperative as a fruit of free human action. In Michelet’s conclusions, the revolution became the secular analogue of the Resurrection of Christ, the profane reproduction of a sacred event. See Michelet, *Histoire de la Révolution française* [1979: 51–94].

⁹ In the full title of his work on *Institutions* the term «continuum» is expressly inserted (*Institutiones juris naturae et gentium in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur*, de 1750).

¹⁰ For a rich analysis about Abbé Sieyès’ proto-Marxism, one with a corresponding Marxist view on the couple Revolution/Constitution, see Guilhamou, *Marx, Sieyès et le moment constituant (1789)* [1999]. As for the «gouvernement des modernes», Pasquino, *Sieyès, Constant e il «governo dei moderni»*. *Contributo alla storia del concetto di rappresentanza politica* [1987]. As for a specific discussion leading to different views of the citizen (as active and passive) way to Revolution and the Constitution, see Bredin, *Sieyès. La clé de la Révolution française* [1988: 158].

¹¹ Ehrard, *Ueber das Recht des Volks zu einer Revolution* [1795, 1970]. Voir Merker, *Alle origini dell’ideologia tedesca* [1977].

¹² On the line of continuity Rousseau – Kant, Cassirer, *Kants Leben und Lehre* [1918, 1975: 398 ss.].

¹³ An interpretation of a ‘continuist’ Fichte (mainly as an ‘evolutionnist’, we would say too) is offered by Pierre Rosanvallon with reference to the context of the *souveraineté d’empêchement*, to which what comes along in Fichte’s thought is the proposition of a modern ephorat. See Rosanvallon, *La contre-démocratie* [2006: 145], as well as Renaut, *Le Système du droit. Philosophie et droit dans la pensée de Fichte* [1986].

Confront the french translation of the philosophe from Dresden, as far as this period of his thought is concerned: Fichte, *Fondement du droit naturel selon les principes de la doctrine de la science (1796–1797)* [1984] containing interesting observations and remarks by Alain Renaut.

¹⁴ There is an interesting position in the Italian doctrine, probably deriving from the opposition State/Constitution, this latter assumed (it is well known, but often without a proper basis) as arisen within the fascist context. This is the reason why we deal with elements of the Hegelian *continuum* that are both

problematic and unavoidable. Here you can read Bertrando Spaventa, about a view of the *continuum* as composed of two parts, two dispositions: «il primo elemento è richiesto dalla coscienza; non si ha coscienza senza personalità; il secondo dalla sostanzialità; sostanzialità è universalità. L’unità di questi due elementi è il vero Stato.» See Spaventa, *Opere* [2009: 733]. What, then, about (the) Constitution? It would not be an abstract form, a sort of scheme, which (the) State could lay upon, in an indifferent way. «La vera e reale costituzione è quella che è propria, intimamente propria, dello Stato; ogni Stato, in quanto è un tutto vivente [*un tout vivant*], ha la sua. Non è qualcosa di estrinseco, di artificiale, che possa adattarsi a piacere a uno Stato, come una veste, una camicia. Essa è la vita stessa, la forma della vita, dello Stato. Se la Costituzione è una camicia, lo Stato nasce, direi così, incamiciato, o s’incamicia da sé; è stoffa, disegno, sartore e camicia a se medesimo.» [*Ivi*: 734]. It was often observed that Spaventa reformulated the Hegelian dialectic; but, in our view, the author of *Rivoluzione e utopia* tends to a formulation of the *continuum*, as pointed out also by Eugenio Garin, Giuseppe Vacca, Domenico Losurdo, who all saw a proto-Gramscism in Spaventa’s works. See Vacca, *Politica e filosofia in Bertrando Spaventa* [1966], Garin, *Filosofia e politica in Bertrando Spaventa* [1983], Losurdo, *Dai fratelli Spaventa a Gramsci* [1997].

A different view of the Hegelian *continuum* was proposed by Norberto Bobbio, according with whom “nulla vi è di più estraneo al pensiero politico di Hegel del costituzionalismo, cioè dello Stato limitato dal diritto, o più brevemente dello Stato fondato sulla *rule of law* nel senso anglosassone dell’espressione”. See Bobbio, *La costituzione in Hegel* [1971, 1981: 71].

¹⁵ Donoso Cortés, *Lecciones de derecho político* (1836) dans *Obras completas. I* [1970: 390].

¹⁶ Even the opponents of the Von Savigny theory of the self-integration of positive law (we refer to the Berlin edition of the *System* of 1840) put forward arguments which confirm the continuity of the legal order, especially in favor of the impossibility of the existence of lacunae in the constitutional law (it was, moreover, the season of the big codifications and the first constitutions with strongly rationalized nature).

¹⁷ Maine, *Ancient law* [1861, 1998].

¹⁸ Thon, *Rechtsnorm und subjectives Recht* [1878, 1964].

¹⁹ Lévy-Bruhl, *L’ethnologie juridique* [1964, 2001].

²⁰ The Italian jurist Salvatore Santi Romano was among the direct references of Carl Schmitt as a theoretician of the decision, even though Romano was no doubt a normativiste, a formalist, or he self-declared himself as such. He proposed a philosophical vision often considered characterized by a “pan-juridical” vision, because any organization and any social organism, when it realizes the internal order, has legal nature. See, among the others, works by Giovanni Tarello, the founding

- contemporary jusnaturalists, Voigt and Lindsay²¹, as well as the positivist Carré de Malberg²²;
- Croce²³;

member of the Italian important liberal-socialist revue *Il Mulino*: Tarello, *Il diritto come ordinamento* [1976], *La dottrina dell'ordinamento e la figura pubblica di Santi Romano* [1977].

²¹ It is to W.M. Lindsay that we owe the Oxonyan edition (1911) of *Etymologiarum sive Originum libri XX* written by Isidore de Séville. The volume *Das jus naturale, aequum et bonum, und das jus gentium der Römer* by M. Voigt was published in Leipzig, in 1856.

²² For an analysis concerning the continuity of legal orders according to the German jurist Laband and the French Carré de Malberg, confront the reconstructions by Michel Troper: Troper, *Pour une théorie juridique de l'Etat* [1994: 16]. In fact, the continuity of the legal order is ensured by a kind of supposed identity (or co-extensivity) between State and Nation.

See the critical edition CNRS of Carré de Malberg, *Contribution à la théorie générale de l'Etat* [1985] as well as the foreword by Eric Maulin to the Dalloz edition (2004). In clear terms, regarding the continuity problem, Schönberger, *Penser l'Etat dans l'Empire et la République: critique et réception de la conception juridique de l'Etat de Laband chez Carré de Malberg* [1997].

For specific features concerning the point of coincidence Kelsen – Carré de Malberg, confront the researches carried out by Otto Pfersmann: Pfersmann, *Carré de Malberg et la «Hiérarchie des normes»* [1997]. For a different view, proposed by Troper, Carré de Malberg followed the “metaphysical tradition” derived from Bluntschli instead of the positivist line paved by Kelsen of Ross: Troper, *Pour une théorie juridique de l'Etat* [1994: 22].

The unachievement of the notions of State, Nation, Sovereignty, Legal Order... is at the core of some important researches coming shortly after those carried out by the great French constitutionalist: Duez, *Le contrôle juridictionnel de la constitutionnalité des lois* [1929], Cuche, *A propos du positivisme de Carré de Malberg* [1933], Renard, *Qu'est-ce que le droit constitutionnel? Le droit constitutionnel et la théorie de l'institution* [1933], Weyr, *La Stufentheorie de la théorie pure du droit vue par un Français* [1934], Waline, *Observations sur la gradation des normes juridiques établies par M. Carré de Malberg* [1935] et *Défense du positivisme juridique* [1939].

²³ Croce, *Filosofia della pratica* [1908, 1963]. It is worth to signal that the philosopher employs a *robinsonian* argument in order to justify the naturality of the *continuum*: «un uomo potrà non ritrovare tra una moltitudine di uomini i suoi simili e si comporterà come se essi non esistessero; e, nondimeno, anche in questo caso vivrà in società con gli esseri che si chiamano naturali o soprannaturali, col suo cane, col suo cavallo, con le piante, con la terra, coi morti e con Dio» (Croce, *La filosofia della pratica* [1963 : 320]). Focusing on this bizarre Croce's “robinconism” within the context of the Italian Hegelism, Falzea, *Introduzione alle scienze giuridiche. Vol. I* [2008: 11]. On this very same line, that of Croce's Robinsonism, we can add here Schwalm, *Leçons de philosophie sociale* [1908], Pekelis, *Il diritto come volontà costante* [1930], Darbellay, *La règle juridique* [1945], Frosini, *L'ipotesi robinsoniana* [1953] et *La struttura del diritto* [1962].

- Gurvitch²⁴;
- Schmitt²⁵;
- Max Weber²⁶;
- the founders of North American legal anthropology: Hoebel²⁷ and Llewellyn²⁸;
- Ritter²⁹;
- Eric Weil;
- Kantorowicz³⁰, Griewank³¹, Gadamer³²;
- Antonio Negri³³;
- Koselleck³⁴;
- Foucault and Habermas³⁵;

An effort in introducing Kelsen's own vision of Law and Legal order throughout a “robinsonian” interpretation is carried out by Stockhammer, *Robinsonrecht* [1937].

²⁴ Gurvitch, *Sociology of law* [1973].

²⁵ It is exemplary, in this regard, the classical schmittian conceptual dualism of the word *stasis*, as configuring both “status”, “position”, “quietude”, “calm”, and “political disorder”, “revolt”, “civil war”. See Schmitt, *Politische Theologie II* [1990].

²⁶ Constituent power would be a mediation or a form of compromise in the continuity between charismatic power and legal rationality. See, among many others, the recent research by Kulessa, *Wirtschaft, Gesellschaft, Rationalität bei Max Weber* [2015], which is didactical but clear on this issue at stake. Weber, *Économie et société* [1939, 1995].

²⁷ Hoebel, *Fundamental legal concepts as applied in the study of primitive law* [1942], *Law and anthropology* [1946], *The law of primitive man* [1963].

²⁸ Llewellyn – Hoebel, *The Cheyenne way. Conflict and case law in primitive jurisprudence* [1941].

²⁹ Ritter, *Hegel und die französischen Revolution* (1956) dans Id., *Metaphysik und Politik. Studien zu Aristoteles und Hegel* [1969]. Voir aussi Calabro, *Prefazione* à J. Ritter, *Hegel e la Rivoluzione francese* [1970].

³⁰ In fact, the great historian and analyst of the symbolism of power asserts on a “minimal” position: although the identification between law and state prevents any application to societies previous the formation of states, modern anthropology has failed to identify a society, primitive and poorly organized, as deprived of the right and, consequently, divested of any legal concept. Kantorowicz, *The definition of law* [1958, 1990].

³¹ Griewank, *Der neuzeitliche Revolutionsbegriff* [1969, 1979].

³² Remarkably, Gadamer as a companion to Aristotle.

³³ Negri, *Rivoluzione* [Encyclopedia Feltrinelli – Fischer *Stato e politica*, 1970].

In his famous *Il potere costituente* (1992), Negri argues that the critical breakdown in the historical-juridical *continuum* is precisely... constituent power! The latter was, according to the author, the one and only revolutionary power of modernity, presenting itself as a *powerful singularity*. See Negri, *Il potere costituente* [1992, 2002: 9, 8].

³⁴ Koselleck, *Vergangene Zukunft* [1979, 1990]. About the continuity problem and the Revolution in Koselleck's view, see Auciello, *Vortici e forze. Riflessione e storiografia* [1991].

³⁵ Both Foucault's and Habermas' contribution in debate are now collected under the title *Illuminismo e attualità. Mod-*

– Catharine MacKinnon³⁶.

Of course, a *continuist* conception and an *evolutionist* vision have multiple points of connection and intersection. Including among others the post-weberism of Habermas³⁷ and Karl-Otto Apel³⁸.

erno come interrogazione sul presente, by Giacomo Marramao confrontable in *Il Centauro* de 1984 [voir Marramao, *Illuminismo*, 1984]. Focusing on the debate Foucault – Habermas as centered on the meaning of Revolution and ciclicity of history, Racinaro, *Rivoluzione come riforma* [1995: 9]. For a discussion of Ritter's position, as a previous 'disclosure' to Habermas, we can attentively consult Habermas, *Hegels Kritik der französisch- en Revolution* [1967].

³⁶ MacKinnon, *Towards a feminist theory of the State* [1989]. The work of the jurist of Michigan would like to be compatible with a historical view of Capitalism in the light of feminist criticism. In fact, the initial questions of her critical approach have expressly a «continuist» nature, sometimes about the law, sometimes the State. «Sexuality is to feminism what work is to Marxism» [Ivi: 3]; «I began trying to disentangle the economic from the sexual roots of women's inequality: is it sexism or capitalism?» [Ivi: X]; «Unpacking the feminist approach to consciousness revealed a relation between one means through which sex inequality is produced in the world and the world it produces: the relation between objectification, the hierarchy between self as being and other as thing, and objectivity, the hierarchy between the knowing subject and the known object» [Ivi: XI]; encore, MacKinnon speaks of *women as women, unmodified by class distinction and apart from nature* [Ivi: 9] «Women are not permitted fully to know what sex equality would look like, because they have never lived it. It is idealist, hence elitist, to hold that they do. But they not need to. They know inequalities because they have lived it, so they know what removing barriers to equality would be. Many of these barriers are legal; many of them are social; most of them exist at an interface between law and society» [Ivi: 241].

³⁷ Habermas, *Tanner lectures (1986)* [1997]. Also confront the rich survey in Meehan, *Feminists read Habermas. Gendering the subject of discourse* [ed. 1995, 2013].

³⁸ We make explicit reference to Karl-Otto Appel's adress to the 'limits of language' in the so called "second Wittgenstein". See our Magliacane, *To blue* [2017], and, for a discussion, Magliacane, *El tiempo lineal de la Constitución y la contracción revolucionaria en la teoría jurídica* [2009], as well as Magliacane – Rubino, *Forme e crisi della norma-stato* [2009, 2015].

Karl-Otto Apel introduces a "synchronic relativism" as far as philosophy of language games (*Sprachspiel*) is concerned in Wittgenstein, and a "diachronic relativism" regarding Heidegger's philosophy of history, the two both converging towards a conception of the incommensurability of paradigms in the sense of Kuhn. Read Apel, *Il problema del linguaggio in Wittgenstein e Heidegger* [1991], and the debate engaged with Enrique Dussel: Apel – Dussel, *Etica della comunicazione ed etica della liberazione* [1999], *Debate en torno a la ética del discurso di Apel* [1994]. For what brings about the debate engaged with Habermas concerning the right to the moral point of view in the transcendental practice, the named "transcendental-se-

But States also evolve in a direct relation with their territorial dimension and their place in the world-state scale, in an international, supranational or global projection. Braudel, Wallerstein, Amin³⁹, Hobsbawm, and Arrighi, all them have presented successful interpretations of this type of evolutionary continuity, as based on the Marxian «bottom» of the different types of «primitive» accumulation⁴⁰. The cyclicity of capitalist crises ensures the evolution of the system, in this framework of social-economic development, as well as the transition to a new order that is ever larger (imperialism, and beyond)⁴¹.

miotic point of view": Apel, *La relation entre morale, droit et démocratie* [2001] and *Penser avec Habermas contre Habermas* [1990].

We can also read, among many others, Kettner, *Kulturrelativismus oder Kulturrelativität* [2000] and Benhabib, *Critique, norm and utopia* [1986].

³⁹ A contemporary feedback regarding the studies on the accumulation is proposed by Samir Amin, as an interpreter of recent changes in the whole Arabian context. See Amin, *Le Monde arabe dans la longue durée* [2015].

⁴⁰ Confront, for instance, the articles concerning Eastern despotism and the Asiatic mode of production, written during the lapse 1852 to 1962 by Marx a lancer for the paper *New York Daily Tribune*, as well as the rich analyses carried out by Rosa Luxemburg and Rudolf Hilferding on Financial capital, before the post-colonial turn embodied by Baran and Sweezy (Baran – Sweezy, *Monopoly Capital* [1966]). The latter ones introduce an important distinction into the analyse of the accumulation: that between *surplus* and profit, on the one hand, and the new forms of accumulation, on the other one. I.e. the cognitive and immaterial Capital (about which, among the first who studied it, Gorz, *L'Immatériel* [2003] and Moulrier-Boutang, *Le Capitalisme cognitif: la nouvelle grande transformation* [2007]).

It is worth to signal that the analyse of the accumulation seems to be melted now, and put into perspective, because of the coming on stage of the different aspects of the crisis into trade exchanges and monetary concurrence (with the exception of Samir Amin, remarkably on the role of BRICS countries and the vicissitudes of the *printemps arabe* 2011–2013: Amin, *Sur la crise* [2008] et *La Loi de la valeur mondialisée* [2011]).

⁴¹ The theme «accumulation and cities» is masterfully developed by Mike Davis since his book *City of Quartz* [1997, 2006] to the most recent *Dead cities* [2009], through *Le pire des mondes possibles: de l'explosion urbaine au bidonville global* [2006], *Au-delà de Blade Runner* [2006] et *Paradis infernaux: les villes hallucinées du néo-capitalisme* [2008].

Focusing on the many connections between territory and the primitive accumulation, see the researches carried out by David Harvey: Harvey, *Géographie et capital* [2010] et *Géographie de la domination* [2008].

For a presentation of the «neoliberal imaginary as a metamorphosis of the violence of the regime of accumulation into a second nature and a universal of substitution», read the recent Cusset – Labica – Rauline, *Imaginaires du néolibéralisme* [eds. 2016].

More specifically, an evident legal-constitutional continuity has been explicitly considered as referred to the ideas of the Resistance as a common matrix of the European unification projects⁴². In this context, on the background of this historical and constitutional continuity, European fascisms would be an historical “parenthesis”, as well as the French state of Vichy⁴³.

More recently, Otto Pfersmann (to whom we owe an “ontological” theory of law)⁴⁴ and Michel Troper⁴⁵, revived a debate on positivism that was based on the presupposition of the legal *continuum*, both of the order

⁴² It is worth to signal the important research carried out by Veronika Heyde on the European and North-American projects for the post-war European countries as related to the constitutional ideas of the Resistance: Heyde, *De l'esprit de la Résistance jusqu'à l'idée de l'Europe* [2010].

Hannah Arendt's interpretation is brilliant, as always. The vision of a European federation, for the sake of which every movement of liberation had fought, (*to free and to federate* is the French Resistance's motto against the risk of an *étatisme envahissant*, in Louis Saillant's words), was soon opposed by the logic (of power) of the exiled governments that were about to return. These were aiming at the restauration of the *status quo*: «The governments-in-exile, being interested only in restoration as such, waver pitifully between these alternatives and are ready to accept almost anything offered by one of the Big Three – collective security, sphere of interest, or alliance». Arendt, *Approaches to the «German Problem»* [1945, 1994: 118]. Nations (against states) had then, in Arendt's consideration the urge to restore «the meaning of the war to its nineteenth-century sense of a purely national conflict, in which *countries* rather than *movements*, *peoples* rather than *governments*, suffer defeats and win victories» (Arendt, 1994: 106).

⁴³ Confront the transcription of the famous pacifist declaration pronounced by Thomas Mann to the speakers of the BBC, on November 29, 1942.

⁴⁴ Pfersmann analyzes the assumption of a general “norm-genetic link” (for the construction of the fundamental norm and the hierarchy of norms, both national and international) in Pfersmann, *La production des normes: production normative et hiérarchie des normes* [2013: 524].

What is particularly important for this research is his “spatial” vision of the *continuum*, which does not exclude the temporal dimension but it relativizes and subordinates it to the assumption (“at least in principle”) of the circularity and recursivity of legal sources.

⁴⁵ Consult what Michel Troper wrote in his introducing part to Kelsen's theories in Troper, *Pour une théorie juridique de l'Etat* [1994: ex. 13–15, 20–21, 23, 27], notably regarding «l'erreur de Kelsen» about legal concepts as products of the science of law [Ivi p. 27 ss.]. Also read the more recent Troper, *Le droit et la nécessité* [2011] where the author seems willing to revise his «réalisme critique» to the sake of an interpretation of the *fact* (necessity) emphasizing its dimension as essentially *normative*. By doing this, Troper draws a line between his *factualism* and a certain Schmittian view of legal substantialism.

itself and the norms⁴⁶.

Kelsen's vision of *continuum* is very interesting and original indeed. The *Grundnorm* would be an undifferentiated ancestor of any and every other norm, from which they would spring as evolutionary and historical *specifications* and *concretizations*. Its nature would be properly “prehistoric” rather than “metajuridic”, and its character would result as “original” rather than “general”, while its aspects of generality would have lost in evolution and differentiation. The *continuum* is therefore assured by the mere presupposition of this “ancestor”. The originality of Kelsen's theory lies in the fact that, despite any logical and methodological contradiction that sometimes affect it, it remains the only one to assume the “local” character of the *continuum*, via the presupposition of the *Grundnorm* for any normative order and for *each* of the historical orders⁴⁷.

⁴⁶ Along the line opened by Pfersmann through the extension of the ontological normativism to constitutional transitions, see Cartier, *La transition constitutionnelle en France (1940–1945)* [2005]. We will incidentally remark that Cartier's continuumism is *pure*, that is without a contemplation (either expressed or implicit) of a starting point which could be related to juridical – legal – constitutional nature of a legal order. It implies neither any coincidence, nor any superposition, nor any scission, among law, legal order, institutional system, and State. On the opposite side, Pfersmann's continuumism is grounded (at least in some of his works) upon an implicit point of origin of State and legal-constitutional order. A «schéma d'évolution» is offered by the author in Pfersmann, *De la justice constitutionnelle à la justice internationale. Hans Kelsen et la Seconde Guerre mondiale* [1993].

Focusing on centralisation-decentralisation problems, which are essential points in order to better understand both Kelsenian and post-Kelsenian vision of the *continuum*, see Thaler, *Die Vertragsschlusskompetenz der österreichischen Bundesländer* [1990] and, more recently, Wiederin, *Kelsens Begriffe des Bundesstaats* [2005] et Pfersmann, *La production des normes* [2013: 517].

A recent wave has clearly revived the vision of the *continuum* on the presupposition of identity (or, at least, functional coincidence) between the legal norm and the moral norm. See, for example, in Italy, Catelani, *Il diritto come struttura e come forma* [2013: 8]: «Non potrebbe esistere una società se non esiste anche un complesso di norme che promanano dai suoi organi esponenziali, e che disciplinano l'agire dei consociati nei loro reciproci rapporti».

⁴⁷ It must be pointed out that, in strictly scientific terms, the only theory that could share this “local” character is the institutionalism (either the institutionalism of Salvatore Santi Romano at the beginning of the last century, or the North American neo-institutionalism of the Chicago School or Bostonians Paul Di Maggio *et al.*). In improper terms, we can note that even theories of sovereign decision would be characterized by the assumption of a “local” normative dimension, the *found-*

Around the same years, Walter Benjamin, while “brushing the history against the grain”, discovered the “catastrophe”, “rubble and debris” that the lack of a Revolution had produced on the bottom of this metaphysics of *Dasein*, which is often called ontology. The stupidity of the Machiavellian prince, and the ridiculous form of “German tragic drama” that the struggles for the constitution took, annihilate time in a frozen and oppressive present, expanded in a “monstrously” and performing/ /deforming/conforming way out the world. The most powerful vision of Benjamin’s *continuum* is not in the Angel of History (which is sometimes a revolutionary), but in the sketch of the “pearl fisherman” consecrated and dedicated to prisoner Blanqui who had written in 1872 in his *Éternité par les astres*: «hommes du XIX^e siècle, l’heure de vos apparitions est fixée à jamais et vous ramènera toujours les mêmes ... c’est du Nouveau toujours vieux et du vieux toujours nouveau».

In Benjamin’s words:

This book completes the century’s constellation of phantasmagorias which one last, cosmic phantasmagoria, which implicitly comprehends the severest critique of all the others⁴⁸.

ing decision (sovereign, therefore) being limited to a single normative order and a single historical legal system. We emphasize that the “local” character of theories of sovereign decision is, however, inappropriate, such theories having a “unidirectional” perspective towards the future (the decision that found the law, or State, to come), and therefore losing the quality of *normative isotropy* which, on the other hand, characterizes the fundamental dimension of “locality”. The Kelsenian *Grundnorm* is the only theory of local normativity that – even in relation to institutionalism – is based on the assumptions of homogeneity and normative isotropy, the institutionalism being based only on the legal homogeneity and not on the equality of the legal norms *independently* of the observer or the interpreter (which is a matter of normative isotropy). Incidentally, we note that the quality of homogeneity is generally compatible with totalitarian political orders, i.e. fascists, socialists of the “real” type, or democratic dirigiste and representative. On the contrary, the quality of normative isotropy is incompatible with systems, regimes or totalitarian orders, the observer having the power (the habilitation, of any type whatever, and therefore of normative type too, otherwise it would not right) to qualify the system. This, in our view, also contrasts the question of the compatibility (which is in fact an absolute incompatibility) of the Kelsenian *Grundnorm* with non-liberal or dictatorial systems, the accusation of “justificationism” led against the assumption of the fundamental norm.

⁴⁸ Benjamin, *The Arcades projet* [1939, 1999: 25]. Read the french version: «Ce livre parachève la constellation des fantasmagories du siècle par une dernière fantasmagorie à caractère cosmique.» Benjamin, *Paris, capitale du XIX^e siècle* [1989: 58].

Blanqui here strives to trace an image of progress that (immemorial antiquity parading as up-to-date novelty) turns out to be the phantasmagoria of history itself⁴⁹.

Because:

The conception of the universe which Blanqui develops in this book, taking his basic premises from the mechanistic natural sciences, proves to be a vision of hell. It is, moreover, the complement of that society which Blanqui, near the end of his life, was forced to admit had defeated him⁵⁰.

Shortly after, Ernst Bloch delivers us an unusual view of the political *continuity* that touches socialism as well. Because of a “mechanistic overestimation of the objective tendencies of the existing society” that can lead to “a weakening of the will to act practically”, and thus to an “anti-utopian social-democracy”, Socialism proved himself incapable (in terms of concrete historical experience) of bringing the economic conditions of the post-revolutionary transition to a complete maturity. It did not break with the transition itself, and inhibited the revolutionary breakdown in and within the *continuum* of political forms⁵¹.

⁴⁹ Benjamin, *The Arcades projet* [1939, 1999: 25]. Read the french version: «Blanqui s’y préoccupe de tracer une image du progrès qui – antiquité immémoriale se pavanant dans un appareil de nouveauté dernière – se révèle comme étant la fantasmagorie de l’histoire elle-même.» Benjamin, *Paris, capitale du XIX^e siècle* [1989: 59].

⁵⁰ Benjamin, *The Arcades projet* [1939, 1999: 25]. Read the french version: «Si l’enfer est un objet théologique, on peut qualifier de théologique cette spéculation. La vision du monde que Blanqui esquisse là en empruntant ses données à la physique mécaniste est de fait une vision infernale, mais elle est en même temps, sous forme de vision naturelle, le complément de l’ordre social qu’au soir de sa vie Blanqui dut reconnaître qu’il était son vainqueur.» Benjamin, *Paris, capitale du XIX^e siècle* [1989: 59]. For the relation Benjamin – Blanqui, and the observations addressed by Adorno, see the second part of the good volume that Miguel Abensour devoted to utopia: Abensour, *L’utopie. De Thomas More à Walter Benjamin* [2000]. For the «passages Blanqui» in Benjamin, also see Abensour, *Walter Benjamin entre mélancolie et révolution* [1986].

⁵¹ An examination of the utopian conditions (as well as the Blochian critics towards the anti-utopian social democracy and the bureaucratic drift of Stalinism) of the first two chapters of the *Principe Esperance*, is conducted with great originality in 1979, by Hans Jonas, in the last part of his *Prinzip Verantwortung*: Jonas, *Le principe Responsabilité* [1990].

Incidentally, Jonas opens/revives a complex “continuitist” vision that could be located on Arne Naess’s “political-ecologist” line (a problematic, to be sure), while the eco-Marxism of a James O’Connor, on the other hand, had tried to unite Marx-

Here we mention some remarkable exceptions to the *continuum* conjecture. They include, as an unavoidable background to the following ones, the absolutely pioneering Vico's criticism to the rationalists (Descartes, Galileo, Hobbes)⁵² as well as, for different reasons, the so-called "utopian" visions (not only the "classics" of Jambulos, Joachim di Fiori, More and Campanella, but especially those of the "modernists" Cabet, Fourier and Saint-Simon)⁵³.

Other exceptions to the supporters of the *continuum* are contained in Fichte's *Reden* (1808), which allowed the supposition of a society without a state and the idea of a kind of permanent revolution as an ancestral condition of *law* and fundamental for the origin of the systems of human rights⁵⁴.

ist and ecologist positions in a revolutionary type of synthesis (based on the underproduction of the environment).

For a survey concerning the ecological problem at the core of the revolutionary debate, see Batou, *Révolution russe et écologie* [1992], as well as Bailes, *Science and Russian culture in an age of revolutions* [1990]; also consult the excellent research carried out by Weiner, *Ecology, conservation, and cultural revolution in Soviet Russia* [1988], as well as the skeptical (but well advised) research by Zile, *Lenin's contribution to Law. The case of protection and preservation of the natural environment* [1971], and the rich volume by Joravsky, *Soviet Marxism and natural science* [1961].

⁵² See Habermas' interpretation of the contradiction between *episteme* and *phronesis* as approached by the great philosopher of Naples. Episteme as limit and phronesis as a medium. (See quotation Marx, Berlin, and Bohm)

⁵³ For a brief survey of these position as related to Marxist utopia, with some interesting observations taken from Gramsci, see Markovic, *Une société nouvelle et son organisation* [1971: surtout 24 ss.].

An extraordinary analysis of political utopia in relation to ideologies (and the Freudian imaginary matrix) is delivered from Mannheim by Paul Ricoeur: Ricoeur, *L'idéologie et l'utopie* [1975, 1997].

⁵⁴ There would be, of course, a whole discussion to be made about Fichte's idea of *freedom*, and the process of liberation that follows from it.

For a discussion, which nevertheless does not propose a 'strong' *discontinuity* throughout Fichtian thought, read Renault, *Le Système du droit. Philosophie et droit dans la pensée de Fichte* [1986]. To Renault, for example, the tendency of legal evolution towards "republican" forms is a "synthesis" of compromise [1986: ch. III] and not an impasse on the move to the social forms *without state institutions*.

For Rosanvallon, for example, the revolutionary rupture of the state's approach is a secondary problem in relation to the Fichte's vision of a human right of *resistance*, notwithstanding his *letters* on the French Revolution (which would also mean defending the thesis that Marx was not a revolutionary, but rather a resistant, because he had criticized the program of Gotha and the concrete taking of power in the Commune!). Here is the

Simmel has taken up and developed the concept of a form of social life that would be independent from law, in his *Lebensanschauung* published in 1918.

In a proudly contradictory way, Carl Schmitt offered in his *Politische Theologie* a version of the sovereign decision that is sadly famous: it literally comes from a legal *nothingness*⁵⁵ but it fits *within* or *at the top* of an

theorist of counter-democracy on this subject, starting from a discussion of the "modern ephorate".

«Le pouvoir positif est, par définition, toujours investi dans des actions particulières, menacé par des formes de corruption, et c'est cette caractéristique qui appelle justement en contrepartie le déploiement d'un pouvoir négatif qui, lui, doit être structurellement identifié à sa tâche pour justifier son existence. Fichte envisage certes que les éphores puissent à leur tour manquer à leur mission, et il maintient pour cela la possibilité d'un 'supplément d'éphorat' sous les espèces de l'insurrection populaire, comme mode de contrôle ultime du pouvoir. [«The positive power was by definition always involved in specific actions and vulnerable to various forms of corruption, and it was for this very reason that a negative power was needed, a negative power structurally identified with its mission so as to justify its existence. To be sure, Fichte foresaw that, the ephors themselves might fail in the mission, and for that reason, he envisioned the possibility of a "supplement ephorate" in the form of popular insurrection as an ultimate check on power»]. L'auteur de *Fondement de droit naturel* se rattache encore de cette façon aux théories du droit de résistance. Mais il s'inscrit bien globalement dans une perspective beaucoup plus audacieuse. S'il finit lui-même par douter de la viabilité d'un tel agencement des pouvoirs, il n'en a pas moins magistralement éclairé les termes d'un problème essentiel.» Consult Rosanvallon, *La contre-démocratie* [2006: 149], and here is the conclusion: «on ne peut dorénavant réfléchir aux formes que pourrait emprunter une souveraineté plus accomplie, parce que plus complexe, sans se référer à ces développements» [«any reflection on a more complex and therefore more mature conception of sovereignty must begin with his work»].

Confront the philosophe himself, finally: Fichte, *Lettres et témoignages sur la Révolution française* [2002].

⁵⁵ «Die Entscheidung ist, normativ betrachtet, aus einem Nichts geboren». Schmitt, *Politische Theologie* [1922, 2004: 42]. And yet the sovereign decision, engendered by and through nothingness, is directed towards associated masses, which are in fact already structured into orders, according to Schmitt of *Über die drei Arten* [1934, 1972: ex. 250, 258, 260] and of *Legalität und Legitimität* [1932, 1998], and *Verfassungslehre* [1928, 1984: ex. 24]. It is worth to be noticed that there is a clear shifting towards an institutional vision derived from Maurice Hurion, in the *foreword* that Schmitt wrote precisely for the occasion of the re-edition of *Theology* (1934), written by the author in Berlin, on November 1933. The year that followed, Schmitt paid tribute to the Italian scholar Salvatore Santi Romano, in a famous quotation at page 260 of the volume *Ueber die drei Arten des rechtswissenschaftlichen Denkens* [1934, 1972]. Romano was renowned for being the author of *L'ordinamento giuridico* [Romano, 1917, 1946, 1972] forerunner of a normativist legal vision, grounded as well upon a trichotomy, that of

already (and yet) existent order⁵⁶.

A kind of double level exceptionism/continuism is also presented by the Soviet jurist (perhaps the greatest of them) Evgueni Pachoukanis⁵⁷.

order-institution-organization, to which a certain vision of the necessity as a source of law and of the *jus involuntarium* was openly linked.

⁵⁶ Focused on this Schmittian contradiction (openly claimed by the author himself), that has been attracting the attention of several jurists and law researchers for a long time, see, notably on the supposition of the continuity Revolution – Constitution, Amirante, *Costituzionalismo e costituzione nel nuovo contesto europeo* [2003].

By meaning a convicting *nuance*, Emile Boutmy supposed in his studies of Comparative constitutional law, in 1885, that «le pouvoir constituant est un *acte impératif* de la *nation* qui surgit du *néant* et organise la hiérarchie des pouvoirs». Voir Boutmy, *Études de droit constitutionnel. France, Angleterre, États-Unis* [1885, 1990: 241].

Interesting remarks are to be made to the subject matter of the relation Schmitt – Girard about violence and the recursivity of the model of the *scapegoat* («bouc émissaire»). We can find these and other remarks (notably, on the abstract and fable value of the presume heuristic vision embodied in Schmittian factualism), made by Jean-Clément Martin, in Martin, *La Vénédée et la Révolution* [2007].

⁵⁷ Pasukanis, *La théorie générale du droit et le Marxisme* [1970]. Pasukanis (aka Pachoukanis) shows an open continuist tissue when he holds that we can reverse the thesis of the Austrian Marxist Renner, by assuming that norms and standards modify themselves along the evolution leading to the Capitalist structure of current days, as a social-production model, but their function rest unaltered. In fact, the social function of law and rules is essential and it is not directly linked to a specific historical content, being it given one with the legal (and law) form itself. This function cannot be suppressed, nor could be it repressed... either through a change of the law, or throughout a modification in the written and abstract law, or deriving from a shift in what is really in force and power within the societies. We take into account, among others, the French translation, with a foreword by J.-M. Vincent: Pasukanis, *La théorie générale du droit et le Marxisme* [1970: 117, 148, 162].

Actually, beyond the general critical observations by Karl Korsch in his préface to the French edition of the best known among the Soviet jurist's works, we can perceive that Pasukanis tries to join a typical socialist critique of law and legal orders (that is typical of classic Marxism studies and essentially derived from post-Engelsian views, focusing upon the super-structural and instrumental character both of law as a norm and law as a legal order), with the critique of ideology. From this latter point of view, not only Pasukanis aims at a substantial demystification of the fetishism (under the form of the commodity) inherent to the law/legal product; but also he tends to a reconstruction of a specific technical function for law and legal orders in a world that is in transition towards democracy (at first), socialism (at the following steps), and communism (finally and at last), and maybe beyond. On this

Later, Jacques Derrida, Jean-Luc Nancy, Giorgio Agamben, among the philosophers, have supposed, not without disputes, often very “engaged” among them⁵⁸, a kind of dualism society/State, where the second term remained (through, throughout or without Revolution) not essential for the creation of a *just* life. Mainly, we read it as written by the Derrida of *Spectres* (of Marx), in 1993.

John Rawls and Robert Nozick have proposed an abstract conception of discontinuity, assuming that it was at the origin of the State, of the legal order, of the social justice (whatever it means for both authors, who also have two different views of political liberalism).

We still record two notable exceptions, *both* as compared to the time of the authors *and* for the themes remaining highly current and problematic.

The first is Leibniz. Meaning, eclectically in relation to his time, a distinction in legal orders that are expressly devoid of any character of continuity⁵⁹. Orders

perspective, Pasukanis is among the firsts deconstructionists, anticipating Walter Benjamin too.

For a different reading, aiming at shedding a direct light to the socialist character of Pachoukanis' conception of law and legal order (from the angle of the struggles of the classes and the theory of alienation), see Negri, *Rileggendo Pašukanis*. Note di discussione [1974].

⁵⁸ Here we make an explicit reference to Derrida's effort (that was not common of the philosophe from Alger) of literally tearing Agamben's distinction *bios/zoé* down, that between social life (biopolitics) and “vie nue”. Voir, Derrida, *Séminaire. La bête et le souverain. Volume I* [2008].

According to Giorgio Agamben, in his volumes *Homo sacer*, the legal-constitutional *continuum* is uniquely regarding the political tradition of Modernity (which is, in turn, a long way percussive proto-modern insistence on the scale of the progression of the historical affirmation of sovereignty. For the purpose of this supposition, Antonio Negri observed: «secondo Agamben, il potere costituente è attratto dal suo opposto e perciò *non può essere assunto come espressione radicale di innovazione del reale*, né come segno tematico del movimento rivoluzionario». Negri, *Il potere costituente* [1992, 2002: 8, *nous soulignons*]. Consequently, in order to encircle Agamben's conjecture, Negri contends that «il potere costituente è stato probabilmente una prassi impossibile, ma ha tuttavia rappresentato l'unica potenza rivoluzionaria nel moderno». [Ivi: 9].

⁵⁹ We could be tempted to assimilate this sort of incommunicability among legal orders (either yesterday or tomorrow), which are originating from nowhere as well as they are ending somewhere suddenly, to the famous monadology. See, for an interesting reference to Zabarella's and Corsano's influences on Leibniz, Ciurlia, *Varietas in unitate. Individualismo, scienza e politica nel pensiero di Leibniz* [2008].

In fact, even if the feedbacks are clearly testable, we opt in favour of an autonomy, both scientific and political, between

are inspired by the vision of “*conspirare in communem usum*”.

Leibnizian monadology and Leibniz as a jurist and law scholar. The contrary would unreasonably lead to the conclusion that a legal order can be «integrated» or anyhow measured by following the discoveries into the infinitesimal calculus made by Leibniz as a mathematician! We do not share the idea that Leibniz’s political philosophy is «incomplete», «partial», «contingent» or «linked to the events of the time», and therefore «not comparable to the philosophy of *Leviathan* or of the *Social Contract*». See, for this idea, Basso, *Inquietudine e politica in Leibniz* [2005]. The idea is nevertheless well rooted: we could refer to the sociological system of Gabriel Tarde which expressly takes up the monadology in Tarde, *Les lois de l’imitation* [1890, 2001], *Monadologie et sociologie* [1893, 2003], with a presentation by E. Allié conscribed to «Tarde et le problème de la constitution», *L’opposition universelle* [1897, 1999], already in *Les traits communs de la nature et de l’histoire* [1882]; On Tarde as a «leibnizien», see Leroux, *Gabriel Tarde* [2011], Debaise, *Une métaphysique des possessions. Puissance et société chez Gabriel Tarde* [2008], Lazzarato, *Puissances de l’invention. La psychologie économique de Gabriel Tarde contre l’économie politique* [2002]; apparently, contrary Citton, *Esquisse d’une économie politique des affects. Tarde et Spinoza* [2008].

Furthermore, as regarding the continuity natural sciences – social sciences and humanities, from a Leibnizian perspective, see Tosti, *Review of Gabriel Tarde’s social laws* [1900], Ruck, *Die Leibniz’sche Staatsidee* [1909], Barnes, *The philosophy of the State* [1911], Manhke, *La synthèse de la Mathématique universelle et de la métaphysique de l’individu* [1925], Roche-Agussol, *Tarde et l’économie psychologique* [1926], Vuillemin, *L’imitation dans l’interpsychologie* [1949], up to Latour [1998].

«En fait, la philosophie politique leibnizienne était, oui, asystématique, dans le sens qu’elle ne parvenait pas à une tractation systématique ou synthétique de la vision de l’auteur, mais à notre avis, tout cela dérive du caractère non didactique et non d’exposé (à peu d’exceptions près) de l’intégralité de l’œuvre de Leibniz, ainsi que de l’importance «de second degré» que la politique (et non pas la philosophie politique) avait pour un politicien qui avait rejeté (à sa manière, certes) la carrière diplomatique, et en général dans le contexte du grand système scientifique du philosophe de Leipzig»: see Rubino, *Les philosophes et la continuité du droit* [2016].

«Il faut ajouter – as added by Rubino [2016: 14] – qu’il manque aux ouvrages politiques de Leibniz une édition critique et complète des 10 volumes regroupant les 200 textes environ d’inédits, outre les 5 déjà publiés dans l’*Akademie – Ausgabe (Politischen Schriften)*. Au moment de la rédaction de ce texte, la publication des inédits retrouvés chez le *Leibniz – Archiv* de Hannover dans une édition critique n’est pas encore terminée».

The aspects of the *breakdown* in Leibniz allow us to oppose his political vision – societies evolve by leaps and equilibria and by breakdowns of equilibria – to that contemporaneity of Spinoza and Descartes (to stay in a *mainstream*). It is an approach to conceive the ruptures *inside* the continuity ever a core of that (a sort of «saltationism» spaced by a «gradualism», characterized the evolutionary jump of the civilization and culture) would constitute the modernity and the originality of Leibniz.

The second exception roots into Marxian thought itself. We will say that Rosa Luxemburg, perhaps better than Lenin⁶⁰, interpreted and revived the anti-state and

God, State, Nature, Spirit, Science... could follow their own laws, of each of them, without a mutual interference (with the exception of the knowledge of the laws of their evolution, that is to say the laws of evolution and functioning of each system, thanks to mediation of God and of Spirit, interpreting it *via* the Science). (Also confront the differences between the so called “rules of the game” and the “rules or laws of functioning”).

For a brilliant analysis about the *lliaison* Marx – Leibniz (*via* Hegel), some works by Jon Elster are seminal. We could read, namely: Elster, *Marx et Leibniz* [1974], *Leibniz et la formation de l’esprit capitaliste* [1975], as well as *Making sense of Marx* [1985, 1994].

Please read the extract here attached, the wideness of which is fully justified, as any reader will perceive at the end of the paragraph: *Making sense of Marx* [1994: 108].

«Marx was of course stepped in Hegel, but also in Leibniz. Leibniz’s philosophy of history was part of his general theodicy, his view that the actual world is the best of all possible worlds. Logically speaking, there is no reason why the best of all possible worlds should also contain the best of all possible societies; or the best of all possible temporal sequences for the universe as a whole the best of all possible histories of humanity. The general logic of theodicy is that the over-all optimum may require sub-optimality in the parts. Leibniz made a distinction between two ways in which an optimal development may require suboptimal intervals. The first was later and independently developed by Tocqueville and Schumpeter: a system that at any given moment exploits its possibilities maximally, may over time perform less well than a system that does so not at no given moment. The patent system is an instructive example: by restricting the diffusion of knowledge, it ensures that there will be more knowledge to diffuse. The second is what Leibniz referred to as “*reculer pour mieux sauter*”: it may be necessary at some point to take one step backwards in order to be able later on to take two steps forwards. An instance of this pattern is investment – consuming less now in order to be able to consume more later on. Now the crucial point is that both of these optimizing methods requires an intentional agent. The first requires the ability to say No to favourable opportunities in the present in order to be able to say Yes to even more favourable ones later on, the second an ability to say Yes to unfavourable options now in order to be able to say Yes to very favourable ones in the future. In both cases the suboptimal action only makes sense in view of the future gains that it makes possible.»

⁶⁰ Lenin was clearly compelled towards ever shifting theoretical positions by... the revolutionary agenda. The necessary articulation in phases and stadia of the dictatorship of the proletariat all way out of the socialist transition still is nowadays little comprehended and more problematic for the interpreters of Lenin’s thought and political theories. «Ce qui a vulgarisées les interprétations d’un léninisme de manière (Hill), d’un Lénine spinozien (Negri), d’un Lénine trahi (Lewin)... de plus, cette dernière vision, celle d’un Lénine (avec un Trotskij en interprète fidèle et loyale de l’esprit révolutionnaire léniniste) trahi par ses successeurs, Staline en premier, a favori paradoxalement la vision d’une révolution qui était dès ses premiers pas comme destinée

anti-socialist Marxian radical view⁶¹.

A parenthesis should be opened to evoke one of the most fruitful and flourishing experience of the 20th century: the “Frankfurt School”, exiled in Los Angeles (in the 1940–1950). The dilation of the concept of norm, especially in the *Studien* by Horkheimer and Marcuse of 1936, gets then to analyze the dispersion, in the post-industrial mass society, of the *ideology* and (more correctly, even if the term was not yet so legitimized in the '40s of the last century) of the *imaginary*, especially with Adorno⁶². The implications are breath-

tragiquement à l'involution bureaucratique et totalitaire. Une vision, donc, cette dernière, qui a malheureusement fini par relier (au-delà de toute intention, évidemment) les historiens trotskystes aux historiens jugés «révisionnistes» (de Furet à Martin Malia en Usa, à Boumandil, à Marcello Flores en Italie, parmi les historiens les mieux connus)»: see Rubino, 1917 [2019: 23].

See my recent Magliacane, *Rosa, Lénine et la Révolution* [2019].

⁶¹ The Irish jurist from Mexico, John Holloway, wrote a volume that rests (wrongly enough) undervalued in Western Marxism, where he aims at a re-problematization of the anti-power problem of Revolution – without misleading the complexity of Marx's own problematization on the issue – in terms that go *beyond* State and Power. Voir Holloway, *Changer le monde sans prendre le pouvoir* [2002, 2007], Holloway – Picciotto, *Marxismo, Estado y Capital* [dir. 1994] et *Towards a materialist theory of the State* [1978].

According to our own analysis, the weakest parts in Holloway's works essentially concern (beyond any remarkable intention of the author's) the misleading articulation of the dialectic mass – avant-garde as implying a political party of a communist type: a dialectic in which (and according to which, in Holloway's view) the taking of power does not go *one with* people's insurrection (i.e. on the foundations, agitated and magmatic, of the insurrection).

⁶² We can read the following efficacious report by Susan Buck-Morss. “There was a tendency in the twenties against academic sterility (as well as against modern society with its bureaucratically organized, ‘rationalized’ structure) to take the form of an affirmation of the irrational. The theological revival was one manifestation of this, but there were many others: Sorelian voluntarism in politics, a renewed interest in Kierkegaard, Jungian psychiatry, the novels of Herman Hesse, the advocacy of ‘culture’ over civilization and ‘community’ over society, and even an intellectual vogue for horoscopes and magic. A shift was occurring in intellectual alliances: the advocates of reason, since the Enlightenment identified with progressive social and political forces, had abandoned the impulses of revolution and ‘passively’ accepted the ‘given’ state of things. Rationality had become synonymous with compromise and resignation, manifested in political life by the *Vernunftrepublikaner* who, with a claim to being ‘reasonable’, accepted without enthusiasm the given reality of the Weimar Republic, which was in many respects very un-republican and undemocratic. On the other hand, revolt which grounded itself in irrationalism slipped easily into a formula for fascism. To their credit, Adorno and

taking: Adorno's analysis conditioned politics, applied ethics, sociology, psychology, psychoanalysis, aesthetics, media and communications, and they are likely to have influenced the contemporary theories of complexity, to have given biopolitics its foundations, and to have limited cybernetics epistemology⁶³.

Adorno's original view about continuity and rupture in history can be expressed in his own words, taken from the often-quoted introduction to his *Negative Dialektik* (1966):

Philosophy, which once seemed obsolete, lives on because the moment to realize it was missed.

those individuals who were intellectually closest to him did not accept the new dichotomy that was developing. Rather than align themselves with one side of this polarity, they insisted that truth lay in the tension between the two, in the rationale of what appeared as irrational and in the irrationality of what was accepted as reason”. Buck-Morss, *The Origin of Negative Dialectics* [1977, 1979: 7].

Aussi Moutot, *Essai sur Adorno* [2010: 31].

⁶³ Beyond any didactical reductionism, we can only note in this brief introduction that legal experts are not yet realizing this enormous contribution, adequately, so far. Without any fear of seeming outrageous, we could evidence that Paul Ricoeur's theories about both subjectivity as a political text and the irresolution of the thing-in-itself problem are essentially of an Adornian matrix.

According to Robert Kaufman, “the familiar idea in play, developed out of Kant by Benjamin and Adorno (and by others before them, including Nietzsche and Emerson), is that there exists a noninstrumental yet precise, coherent, nonarbitrary mode of thought – the aesthetic – that contributes formally towards and imaginatively reinvigorates conceptual knowledge while itself forgoing substantive conceptuality and the modes and the logic of argumentation and discursivity.” See Kaufman, *Adorno's social lyric, and literary criticism today* [2004: 354]. In short, “the aesthetic bridges objective-conceptual knowledge (or the objective world to which such knowledge corresponds) and the subjective human capacity for a critical agency that would be more than arbitrary in relation to objective knowledge of existing reality.” [*Ibidem*]. Following the author, “contrary to so much of the ‘anti-aestheticist’ hostility of contemporary Marxian and Marxian-inflected theory to aesthetic experience and aesthetic judgement, Marx himself intentionally marshals the aporetic but by no means paralyzing structure of Kantian reflective aesthetic judgement precisely for the ‘theory of praxis’ announced in his *Theses on Feuerbach*” [*Ibidem*].

See also Bernstein, *Negative dialectic as fate: Adorno and fate* [2004].

The transition's corollaire

Concrete utopia as object-determination presupposes concrete fragment as object-determination and involves it, even though certainly as an ultimately revocable fragment.

Bloch, *The Principle of Hope*
[1954, 1995: t. 1, 222]

Beyond constitutionalism, and in spite of derridian deconstructionist efforts (in which Language as a system retained, nevertheless, a general normative dimension) and of post-Marxist critical thought, political philosophy and ethics have constantly supported the conjecture of legal-constitutional continuity *via* the critical discussion of its corollaries.

The critique of corollaries was often led by eclectic arguments (this is the case of Fichte), or by hyper-political views (this is the case of anarchism at the end of the 19th century), or even by trans-epistemological positions (this is the case of Derrida). It ended by consolidating the vision of the exceptional character of the Revolution (and of *the Revolution as an exception*), the theory of *sovereignty as a decision*, and the hypothesis of the *republican tendency of the alternation of political forms*.

In particular, constitutionalism has often been relied, to the point of drawing autonomous constitutional theories, upon the “decisional” vision of sovereignty and the “republican tendency” of political forms⁶⁴.

The theory of constitutional cycles (for the mo-

ment do not distinguish it from the scientific theory of “waves of constitution-making” formulated by Jon Elster)⁶⁵, which is in fact a theory of constitutional cyclicity (that is to say the cycles of *the* constitution) offers us a recent synthesis of the two corollaries. Popular or revolutionary movements (not necessarily Revolutions), mass uprisings, citizens’ insurrections, Resistance organizations, even the most articulate rebellions and the most socially stratified riots, especially *demand a new constitution that is, or would be or should be formally and substantially republican*. The transition, in legal and constitutional terms, is only a path, led by the revolutionary transitional authorities, towards a republican constitution⁶⁶.

We understand now why the third corollary, dealing with the “exceptional” nature, that is to say the *exception*, of the Revolution, presents itself (to the analytical investigations) as characterized by a major complexity.

Beforehand, and notwithstanding the *confusion* that condenses the concepts of political revolution and legal revolution around the French Revolution – not to mention those of «Revolution» (as a historical and constitutional movement characterizing and determining the succession of orders and constitutions) and «revolution» (as a historical cycle which, on the Aristotelian paraturnalist line, tends to reproduce, *through* the alternation, and then to return to, the typical orders of the politics) – we should perhaps recall that the problem of constitutional continuity predominantly presents itself in the terms of the political legitimacy of the new system that succeeds to the previous constitutional order.

This corresponds, moreover, to the Kantian vision of the Revolution as a fact. Its legitimacy should be established by the «success» of the revolutionary attempt to and against the constitution, in the name of a sort of Reason (which is «republican» in the tendency)⁶⁷.

⁶⁴ It is worth to be recalled here the case with the Italian constitutionalis Antonio Negri (very well known for his *Le pouvoir constituant* [1997], *Il potere costituente* [1992, 2002]) one with the North-American philosopher Michael Hardt: along more than ten years (1999–2011) they signed together three volumes focusing on the core of the constituent decision as being essentially cosmopolite in its vocation and decisional in its nature. These volumes, which deeply marked cultures and visions of contemporary jurists and researchers, are the following ones: Hardt – Negri, *Empire* [1999, 2000], *Multitudes* [2004], *Commonwealth* [2011, 2012]. Long before, Negri had tried to conciliate a synthesis of Spinozian positions (e.g. the view of State as a limitation, as well as the concept of *multitudo*) with Schmitt’s provocations (the «theory» of the partisan, the «state of exception»), Marx’s analyses (namely from his *Grundrisse*), and Lenin’s readings of history (e.g. the connection Revolution – Constitution... from a Spinozian angle).

See Negri, *Stato e politica. Rivoluzione* [1970], *L’anomalia selvaggia. Saggio su potere e potenza in Baruch Spinoza* [1981], *Macchina-tempo. Rompicapi, liberazione, costituzione* [1982], *Spinoza sovversivo* [1992], *Spinoza* [1998], *Kairós, alma Venus, multitudo. Nove lezioni impartite a me stesso* [2001].

⁶⁵ Elster, *Forces and mechanisms in the constitution-making process* [1995].

⁶⁶ You may emphasize the possible confusion between two fields. That of the legal-constitutional concept of *Revolutionary Authority*, that is a body representing the People (what is essentially correct in and according to Kantian terms), on the one hand; and the legal concept, that is typical of the constitutional transitions, of *Liberation Committee* (alias liberation front, counsel of resistance, revolutionary committee, etc.) as a temporary government *ad interim*.

⁶⁷ We read it, we can easily remember it, in Kant’s *Was ist Aufklärung?*.

For a reading on the Kantian problem of the public use of reason, and for a lecture of the republican tendency of this em-

Normativism] has produced the best results over the past century in “quantitative analysis”. Even in most of these analyses of constitutional succession, the question of *constitutional transition* remained as behind the main process, as a *necessary* background topic in order to understand the new constitution (and, of course, the limits of the one that preceded it). It was a specific tool in legal theories, in order to let us grasp the legality and the legitimacy of the old and the new constitutional orders. This sort of instrumentality is also likely to appear as *not essential* for the constitutional phenomenon. Either here transition, in fact, is an “ancillary” sub-phenomenon, or, at the same time, is it a rupture of the constitution in force and an establishment of a new Constitutional and State order.

Furthermore, in terms of a normative constitutional analysis⁶⁸, the constitutional transition presents a sort of singular inversion of Hume’s law⁶⁹. Without any further mediation, transition is a *fact* (*sein*, *dasein*, or

ployment within the context determined by the contingency of the *fact* of the Revolution, consult the astonishing *New York Lectures* by Hannah Arendt (1970), as reviewed, edited and published twelve years after by Ronald Beiner [Arendt, 2001], as well as Arendt’s *foreword* to her *Was ist Politik?* [1993].

Arendt’s lectures opened the path to a vast and eclectic debate about the perspectives and the limitations of the Kantian theory of judgement, namely the assumed ‘lacks’ of the philosopher of *the life of mind*: see Vollrath, *Dire Rekonstruktion der politischen Urteilskraft* [1977]; remarkably before the publications of the *lectures*, Riley, *Hannah Arendt on Kant. Truth and Politics* [1987], Tassin, *Sens commun et communauté. La lecture arendtienne de Kant* [1987].

More recently, the philosopher from Turin, Simona Forti, presented a more articulated view (that is not necessarily more efficacious) concerning the relation between Hannah Arendt and the Kantian theory of the decision: see Forti, *Hannah Arendt tra filosofia e politica* [2006]. We believe that the best reconstruction of an Arendtian view about Kant is still today that engaging a Habermasian critic perspective: see Seyla Benhabib in Benhabib, *Critique, norm and utopia* [1986]. The philosopher from Istanbul is at the Arendt’s “critic Kantism” again in Benhabib, *The reluctant modernism of Hannah Arendt* [2000, 2003].

For an interesting line drawn between Arendt and Adorno, see the contributions by Samira Gandesha and others in the volume edited by Auer – Rensmann – Shulze Wessel, *Arendt und Adorno* [2003].

⁶⁸ There is no doubt that this kind of analysis is the most interesting for an understanding of the reach and the limits of the historical phenomenon and the legal question as related to the transition.

⁶⁹ Pfersmann, *Le sophisme onomastique* [2005]; *Temporalité et conditionnalité des systèmes juridiques* [1994].

institutional fact) that becomes *norm* (either *sollen* or teleonomy-teleology), that is the legal and constitutional basis, the logical and ontological ground, of the new constitution.

There is no difference if the case (or cases) of transition is foreseen in or by the constitution itself, the transition characterizing *in the facts* the passage from one constitution to another. This means, above all, that the new constitution cannot be “judged” by means of an interpretation pulled or derived from, borrowed or connected to, founded or built upon, the constitution that is interested/affected in/by the phenomena of transition. In relation to the constitution, which is the historic “result” of the *fact* of the transition, legality does not originate from its conformity to the criteria of legality foreseen by the old constitution. Law, in Kantian terms, is as suspended in order to consent the birth of a new system of rights⁷⁰.

The roots of the “three-time” *continuum* construction would then present a structure that is strongly conditioned by that Kantian vision, which is articulated in the succession of three phenomena (if we can correctly characterize these phenomena as phases, or as stages or simple events, we cannot see it now) that are: *rupture* (or *ruptures*, *micro-ruptures*, or *breakdown*), *transition*, *constitution*.

The *continuum* is precisely characterized by the succession, which is always (self) reproducing, of these three phenomena.

Rupture concerns a constitution that, *via a transition* that suspends its validity, is eventually transformed into another *constitution*.

Yet a *constitution* derives from a *rupture* and leads to a *transition* that will set up (again) both legitimacy and legality.

Lastly, *transition* is the fundament of the validity and legality of a new *constitution*, provided that *rupture* could not have any character of validity and legality, of course!

⁷⁰ In order to better understand the hesitations by Kant facing both the necessity of an autocensure (the philosopher was openly accused and charged of deviation from Christian orthodoxy by the Cabinet order in 1794, according to the Wöllner edict on Religious belief), and the urge to valorise the intellectual pulsions arising from the French Revolution, confront the stimulating research that the philosopher from Bari, Domenico Losurdo, developed starting from a textual analyse of the Kantian compromises: Losurdo, *Autocensura e compromesso nel pensiero politico di Kant* [1983].

In other words, the three events, the three phases, the cited phenomena of rupture (which is always revolutionary in the legal sense, and announcing a constitutional breakdown), of constitutional transition and of re-constitutionalisation, stand and fall as a whole. No rupture without a transition, no constitution without a transition, no transition without a rupture and without a new constitution.

Conclusions: toward the revolutionary state. The «resistancial» transition between clandestinity and insurrection

This investigation is also dealing with a “classical” issue of the theory of law: the relation between *fact* and *right*, *factualism* and *normativity*. Here it stands out as renewed at the light of the great changes and contradictions of contemporaneity⁷¹.

In the “classical” terms, the founding relation of the legal order was that intercurring between a Revolution and a Constitution, in the sort that the moment of the “passage” between the revolutionary fact and its juridical “translation” was often called “the time of law-writing, the time of drafting”.

In fact, in his reconstruction of the origins and the issues of the “constituent power”, Antonio Negri⁷² has substantially demystified this primacy of the revolutionary *fact* in relation to the constitutional dynamics. That process would have subordinated the role of the social struggles and the conquests of the international workers movements in favor of the power of the *constituted* institutions (as though it were a *ruse* of the bourgeois institutions in order to renew and modernize them). What we emphasize here is that Negri also relaunched the importance of the constitutional *fact* as a power of the *constituent* people.

A more articulated and nuanced vision comes from Jacques Bidet. It is enriched by some elements of unusual political philosophy (elements such as “dignified” life), and submitted to a radical critical examination the Marxist concept of structure *via* the introduction of the meta-structure. Elsewhere, this brilliant philosophy of politics and law draws from phenomenology (such as

for the Althusserian interpellation). Finally, it characterizes the most recent work of Bidet aiming at introducing the problematic issues of a *constitutive* identity between *People* and *Class*.

The “classical” relation-tension between Revolution and Constitution brought with it the implication of a certain dynamics that is peculiar to law, to legal order, to constitution, to transition.

In constitutional law and in the domain of the theory of law, this dynamics is often presented as being articulated in three stages: first comes a *rupture* (of the constitution), that is followed by a *transition* (in fact, both action and law) which eventually leads to a new *constitution*. We saw it.

We should only add that these three-time dynamics and dialectics are based upon a doctrinal, philosophical and political construction that goes back to the conjecture (so well-known by now) of the *continuum* of the normativity and of the juridicity of the domain of social relationships (and of their “supreme” forms: the constitutions). This *continuum* implies, as we have seen, *via* the recurrent constitutional dynamics, the constant and indefectible presence of the State (in its different forms of government, obviously, the Republic being the most complex) during the whole history.

This political vision is characterized by fundamental aspects of *continuity*, both of (those) institutions and of (those) norms that structure and express them.

Because of their performative force, the conjecture of the *continuum* and the tendency to Republic, and republican forms of power, assume the function of a paradigm of analysis.

As a conclusion, we state that this paradigm is incomplete. The tension between the revolutionary *fact* and the constituent *power* dismantles the historical specificity of the Revolution (which is not a phenomenon that can be considered as “on the agenda”!) and exalts the political function of the Constitution.

This twofold theoretical approach – compression of revolutionary action, on the one hand, in favor of a broadening of the constitutional scope, on the other – had been attempted by Carl Schmitt. The constitutionalist, who was Nazi-beyond-Nazism⁷³, added two elements of problematization: a theory of supremacy (which complicated the traditional vision of sovereignty) and a legal sociology of decision (which intelligently jointed the *fact* of the sovereign human decision with

⁷¹ In other researches, we carried on, for instance, the problematic relation among the *facts* of terrorism, the *right* to resistance, and the concept of non-law/non-legal, as an intermediation among facts and norms, facts and rights.

⁷² Negri, *Le pouvoir constituant* [1992, 1997].

⁷³ Rubino, *Conferenza sulla Governance* [2015].

the gnoseological-normative *recognition* and *acknowledgement* of and by the political citizen).

Yet, if you let me abuse once again a famous metaphor, the schmittian theoretical *mountain*⁷⁴ gives birth to a political *mouse*. That is, the friend/enemy distinction-relation (as it was able to replace the master/slave dialectics)⁷⁵.

To the place of *civil war* that openly derives from it as the foundation both of democratic transitions and new constitutions⁷⁶, we must introduce, replace and substitute the complexity of the Resistance, which embodies, on the other hand, a *material discontinuity* between the forms of the Politics, and a *dialectic-oppositional contraposition* between the orders of discourse. We called it *Resistancial Transition*.

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⁷⁴ It is celebrated until today, as if the fault of the jurist of Plettenberg was just to be a naïve Nazi sympathizer, being the rest simply relevant as a matter of cultural and scientific glory and irreversible Heuristic discoveries!

⁷⁵ Badiou, *La République de Platon* [2012].

⁷⁶ See Traverso, 1914–1945. *La guerre civile européenne* [2007: 274].

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