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This article is an attempt to highlight the passage from the rather “embedded” role “conceded” to social movements by major concepts of social organisation to a different understanding of social movements as “re-claiming the common” throughout and beyond colliding social spheres. With respect to law, we are now moving from what Luhmann called “justice as adequate complexity”¹ to what I call, with loose reference to Deleuze², “Justice as Continuous Becoming” and “Law in Movement”. The following steps of the governance debate have brought us to this point:

Neither the normative hierarchies nor revised dualisms of international public law can easily cope with the regulatory problems of post-modern and post-national societies, which are organised “in multi-layers” and “networks”. Leftist legal positivism,³ which has been struggling against politico-legal decisional authoritarianism since the time of the Weimer Republic and can be characterised as attributing to law the leading role in (international) problem solving, also finds itself undermined by the “escape mechanisms” of non-application or non-enforcement, of new forms of political aggregation like “the coalitions of the willing”,

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¹ See N. Luhmann, *Das Recht der Gesellschaft*, (Suhrkamp: Frankfurt/M, 1993).

² See G. Deleuze, *Was ist Philosophie?* (Suhrkamp: Frankfurt/M., 1996)

³ See, for example, L. Zagato, “Governance: a challenge for international law?”, in M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., “Governance, Civil Society and Social Movements”, in *European Journal of Legal Studies* 3 (2008) (forthcoming).

and of totalising security strategies. Agamben's state of emergency⁴ seems similarly trapped by a concept of legal hierarchies (rule/exception) and has, therefore, difficulties in grasping both the novelty of structures flexibly coordinated by governance structures and the new "gaps" they are producing.

The deliberation approach⁵ faces up to these governance structures by maintaining a leading ('hard') role for the law: namely, the management of collisions between different rationalities and interests within the social *unitas multiplex*. At stake is the constitution of procedural set-ups of law-making which claim both to cope with the deficiencies of traditional interventionist law and to compensate the erosion of state government in the post-national constellation. This approach shares the "rational prejudices" of Habermas' theory of deliberative democracy, above all with its reference to an "ideal" or 'transcendental' model of procedural communicative rationality, which, as Habermas usually puts it,⁶ must(!) be claimed by anybody (*potentially*) participating in the discourse among competent actors. No doubt, this ideal model "works" and so Habermas "creates facts". However, the question remaining is whether its "accountability" is enough to meet legitimisation requirements and to

⁴ See G. Agamben, *Homo Sacer. Die souveräne Macht und das nackte Leben*, (Frankfurt/Main: Suhrkamp, 2002) 28 et seq.

⁵ See, for example, C. Joerges, "A New Alliance of De-legalisation and Legal Formalism? Reflections on Responses to the Social Deficit of the European Integration Project", in this volume.

⁶ See J. Habermas, "Kommunikative Rationalität und grenzüberschreitende Politik: eine Republik", in: P. Niesen, B. Herborth, eds., *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die internationale Politik*, (Suhrkamp: Frankfurt /M, 2007) 406-460 at 425.

avoid the result, as suggested by Günter Frankenberg, that these circles of deliberation, enriched by civil society representation, create a new “status structure”.⁷

In terms of network systems theory,⁸ law definitely loses its role as the prominent manager of collisions. Here, the market and discovery context of autonomously regulated discourses, institutions, and systems introduces compatibility problems and difficulties in the normative establishment of what is necessary for these discourses to survive and evolve “together”; namely, an asymmetric reciprocity which “transcends” their binary definitions (legal/illegal, having/not having, powerful/not-powerful, true/false, etc). On the one hand, the development of social self-organisation and collision management appears to be the latest stage of law’s secularisation process, while on the other hand, any limitation on (normative or cognitive) collision management falls short of law’s “old European promise” to eventually eradicate any kind of injustice from social organisation and develop a “positive” concept of justice. This is where “Law in Movement” or “justice as continuous becoming” comes to the fore.

The key concept here is the “contingency” of social and legal development, by which I mean the fact that decisions taken are neither “necessary” nor determined by “destiny”, but are always possible in a different form and thus never lose their intrinsic inadequacy. This raises the (normative) question as to how social organisation and its political, economic, legal, scientific, etc. functions *should* work differently to avoid negative effects and improve the common good in terms of wealth, justice, truth, etc. I share Foucault’s view that “liberating the possible” by unveiling contingency against any universalism and fundamentalism is the

⁷ Cf. G. Frankenberg, “National, Supranational, Global, Ambivalences of Civil Society’s Practice”, in this volume.

⁸ See, for example, G. Teubner, ‘Justice Under Global Capitalism?’, in this volume.

real breakthrough of the Enlightenment – it reveals “the Other” in Kant, a critical ontology as against an idealist apology for any condition of reason.⁹ Along with this “(onto)logical” aspect, this “criticism of criticism” reveals the permanent, transversal and “normative” pressure on the inevitable asymmetries of social organisation as they interact with mechanisms of inclusion and exclusion, discipline and control, representations and majorities, ownerships and scarcities, etc, which in turn clash with the unlimited development *potentia* of individual and social actors. “Liberating the possible” means reconstructing Spinoza’s “*potentia*” as “contingency”, meaning literally “everything possible is indeed possible”, and reconstructing “justice” as the continuous pursuit of the maximum possible mutual development in a specific historical social context. This is the distinguishing feature of law and its emancipatory mandate.¹⁰

The paradox of law’s role is that it must recognise and develop normative standards for the creation of social structures while also waging a continuous battle against any restrictions on democracy, common wealth, and justice connected to these structures. Law runs both immunisation strategies and strategies against immunisation. This paradox has been managed both by introducing different actors, levels, locations and procedures into law-making

⁹ See M. Foucault, “Was ist Aufklärung?”, in: E. Erdmann, R. Forst, A. Honneth (eds.), *Ethos der Moderne. Foucaults Kritik der Aufklärung* (Suhrkamp: Frankfurt/M, 1990).

¹⁰ I prefer the concept of “contingency” to the one of “difference” used by R. Ciccarelli in his paper “Governance & Governmentality: Same Problem, Different Answers”, in this volume. This is to underline that also the difference made by a new or different distinction is “always possible in a different form” or is *contingent*. This avoids the attribution of any “hegemonic sense” to the new distinction, which appears to be created by a process of conflict and cooperation (“governance”). The creation of the difference or of a new (“more just”) distinction results, then, in contingency *in terms of* resistance to the previous difference. It is in this way that contingency becomes self-reflexive.

(legislative institutions, contracts, courts), and by being mobilised by social movements and their claims for freedom, autonomous self-construction and new social rights. In other words: when the crowd was running against the Bastille, a symbol of the destructive forces of the ancient regime, it exercised Law in Movement. When demonstrators ran against the G8-cages, they exercised Law in Movement against the usurpation of common global space by self-declared global decision-makers lacking any adequate legitimisation through – and this is the vital point – adequate global governance structures.

Indeed, it is the governance phenomenon that brings law back to its very “origin” of law-making (“Recht-Fertigung”) by revealing that the law is not anchored to a specific “polis” or to a Hobbesian statehood, but is able to pursue different forms of the common *as long as* its own normative requirement of creating ever more transversal justice from ever exceeding possibilities is achieved. From this point of view, our complex juridical systems appear as nothing other than highly specialised (and hierarchical) forms of “governance.” In court, the possibilities exceeding the parties’ positions are represented by the professional role of a judge (or arbitrator), who is legitimated by their “impartial” access to those “third values” and is thus allowed to create the standards for the (“partial”) attribution of “rights” (legitimate claims) to one or other party. Governance, then, is not the extension of the “emergency state”, but rather the opposite: a *reaction* to the failures of markets, states and laws and to the consequential fragmentation, hybridisation and multi-level character of autonomous global norm production. These phenomena have led to the reappearance and management of other possible values for normative (re-)construction, which the “classical” forms of legal collision management, through national, international and supranational law, have not been able to cover adequately. This lack or loss of legal impact creates a *de facto* “de-legalisation” while

the governance concept tries to cope with the mentioned failures by installing another form of “legalisation” or law-making under conditions of uncertainty and exceeding possibilities.¹¹

There is no doubt that the crisis of existing structures can promote forces that result in a reduction of achieved levels of justice, wealth, social protection and participation; see, for example, the notorious neo-liberal economisation of state functions. Therefore, in order to become more rather than “less critical”, the establishment of governance procedures cannot depend either on certain formal models (“the court model”, “the comitology model,” etc.) or on single concepts that hide selective economic, political, legal, etc. models. Governance procedures must develop an adequate level of party protection and (im-)partial deliberation for each specific (“regime”) context, with the aim of creating more justice, wealth and reciprocity. To this end, therefore, the following are required:

- rules on the creation of a “competent” governance forum, which also regulate access to it (*i.e.* “to justice”);
- rules on case management and collision standard setting;
- rules regarding the review of decisions.

Governance procedures aimed at the establishment of “reciprocity” or “mutual respect and care” between diverging discourses, institutions, systems, rationalities, etc. imply the legal obligation to radically open all available approaches of social construction and standard setting to everyone, including those approaches that propose alternatives to existing standards, such as , for example: a different view on property rights in terms of “unalienable common

¹¹ See C. Joerges, *supra* note 5, on a new “recombination” of de-legalising and re-formalising aspects.

goods”¹²; proposals which link the privilege of legal personality and limited liability to social responsibility¹³; or the role of fundamental rights (of the Nice Charter) “beyond bipolar systemic functions”.¹⁴ “Opening for other possibilities” also certainly means the obligation to introduce social movements who are active in the respective social context, alongside the introduction of adequate review mechanisms and the attribution of responsibilities and/or liabilities regarding their enactment.¹⁵

However, this process of deliberation through governance procedures (norm setting, argumentation, decision) never loses its ambivalence, and it is here where the differences between governance procedures and “civil society” concepts come to the fore. Social movements move “in parallel” to the paradox of law. They may well be a component of

¹² See M. Surdi, “Code, Constitution and Compromise, a Cyberconundrum?”, in: M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., “Governance, Civil Society and Social Movements”, in *European Journal of Legal Studies* 3 (2008) (forthcoming).

¹³ See J. Dine “The Capture of Corruption: Complexity and Corporate Culture”, in: M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., “Governance, Civil Society and Social Movements”, in *European Journal of Legal Studies* 3 (2008) (forthcoming).

¹⁴ See G. Bronzini, “The Social Dilemma of European Integration”, in this volume, and also G. Allegri, ‘New Social Movements and the Deconstruction of New Governance. Fragments of Post-Modern Constitutional Theories in Europe’, in M. Blecher, G. Bronzini, J. Hendry & C. Joerges, eds., “Governance, Civil Society and Social Movements”, in *European Journal of Legal Studies* 3 (2008) (forthcoming).

¹⁵ I would like to emphasise here that this “critical” concept of Governance (organized by law) was, by and large, anticipated by Rudolf Wiethölter’s 1982 concept of the “proceduralisation of law”, which means social construction by creation of adequate “standards, decision-making bodies and procedures” that law has to take care of. Cf. R. Wiethölter, “Materialization and Proceduralization in Modern Law”, in G. Teubner (ed.), *Dilemmas of Law in the Welfare State*, (de Gruyter: Berlin, New York, 1986); and: “Proceduralisation of the Category of Law”, in C. Joerges & S. Trubek, eds., *Critical Legal Thought: An American-German Debate*, (Nomos: Baden Baden, 1989).

procedures aimed at creating adequate complexity and producing the justification for necessary changes, but they also refuse simply to be another “stakeholder” in the governance “game”, for they are not only concerned with colliding “rationalities” and “interests”. Rather, both social movements and “law in movement” take (and must take) as their aim the permanent “constitutional act” necessary to de- and re-construct the parameters of the common, of justice, wealth, truth, etc. This includes the *potentia* re-invention of the entire organisational and decisional set-up, including new common institutions and respective governance procedures, which will obviously also transform the very movement itself.

In terms of the paradox of movements, the oscillation between participation and “exodus” can also be resolved by forms of differentiating times, actors, roles, etc. This is to say that parts of the movement will subject themselves to governance procedures and will argue and bargain, while others will react to those restrictions inevitably connected to the governance procedure, and will restart the movement elsewhere and propose alternative procedures.

Under circumstances of post-modern governance, therefore, there is no doubt that movements reach their maximum practical impact and self-reproduction by diversifying their role and by maintaining both their structural openness and networking against any Soviet-style usurpation. This also means that the movement cannot be limited to either the “siege-aspect” or to the view encapsulated by *Bartleby*’s statement: “I prefer not to”. The new spirit of capitalism will inevitably absorb parts of its ‘programme’ and its activists but – never mind – movements are progressing according to the slogan: “They want our best, but we won’t give it to them.”

The difficulty in all this is rather what Agamben¹⁶ called, in reference to Foucault, “the leading model of subjectivation”, which is to describe those puppet strings we develop from childhood on while socially interacting. This is not the totalisation of the capitalist spirit envisaged by Marx, Lukàsc, Horkheimer and Adorno.¹⁷ The point is that the governmentality described by Foucault¹⁸ (and, with special reference to the gender aspect, by Judith Butler¹⁹), brings about a generalised model of personal self-government that one cannot easily get rid of, even as “the living alternative that grows inside the Empire”. This regime of subjectivation produces today the “entrepreneurial self,” the “life-world entrepreneur”²⁰ which corresponds to the economization of post-modern societies. Independence, competition, communicative skills, vitality, personal renewal and flexibility are the well-known specs. As permanent transformation is part of this psycho-social model, it is especially difficult for movements to be “differently different”, last not least because we have a science of governance but no science of “not wanting to be governed”. This requires movements to accept their own “monstrosity” and reflect it by maintaining the openness of their forms of aggregation.

However, Agamben’s warning applies to governance circles in the first place. The economisation of the life-world system and the regime of the entrepreneurial self are creating from scratch the underlying asymmetries and biases for the deliberating global expert

¹⁶ See Agamben, *supra* note 4, at 93, and 129 et seq.

¹⁷ The climax of this tradition is certainly marked by T.W. Adorno, *Negative Dialektik* (Suhrkamp: Frankfurt/M., 1966 and 1975).

¹⁸ M. Foucault, *Geschichte der Gouvernementalität II. Die Geburt der Biopolitik. Vorlesungen am College de France 1978-1979* (Suhrkamp: Frankfurt/M., 2004).

¹⁹ See J. Butler, *Psyche der Macht. Das Subjekt der Unterwerfung*, (Suhrkamp, Frankfurt/M, 2001).

²⁰ See on this model, U. Bröckling, *Das unternehmerische Selbst – Soziologie einer Subjektivierungsform*, (Frankfurt/M: Suhrkamp, 2007).

community and the major NGOs that orbit around them, as well as for their Habermasian definition of “what deserves acceptance”. A new kind of status or class structure may appear here together with a highly selective view on social development, which reminds me of the traditional cultural homogeneity of judges that have guaranteed the coherence of the common law system of precedents. This is indeed another reason for social movements to do both: take part in governance procedures and challenge their results.

This confirms our reformulation of the concept of justice: the temporary definition of collision standards, coming as much as possible to terms with all “interests” involved, and the immediate search for better solutions as the injustice of established standards is taken for granted. Justice therefore rather lies in the acceleration of the normative transformation process and not so much in its temporary results. These results will obviously develop their “social gravity force”. However, the request to “verify” them is again part of political-legal struggles as there is no such thing like “objective verification”. *Justice is therefore the continuous struggle about the realization of more adequate reciprocal or common solutions: seditio sive jus.* Such justice as permanent de-and re-construction for the better is not still to come, as Derrida put it²¹, but in continuous becoming, and social movements are a driving force in this very process.

At this point, I would like to add a particular note to the criticism raised by Gunther Teubner in one of his recent publications.²² The reflexive opening or exceeding effect which Derrida describes is obviously transversal. The deconstruction of all distinctions applied – including

²¹ See J. Derrida, *Gesetzeskraft: Der mystische Grund der Autorität*, (Suhrkamp: Frankfurt, 1991) at 105 et seq.

²² See G. Teubner, “Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?”, manuscript on file with author, (Frankfurt, July 2007).

those between (functional) systems and their environments, between conscious and social systems, between immanence and transcendence – leads to the “undetermined formula against the current practice”²³, i.e. to “friendship” or a “common good” in the fields of politics, to the “gift” or “common wealth” in the field of economics, to “justice” in the field of law, to “forgiving” in the field of morality, etc. These “normative promises” always require to be “realised” and defined through a new form (systemic or else) of individual and social construction which, with respect to the exceeding possibilities, will in any case again be asymmetric, limited and controversial and recreate the critical, deconstructive force in the light of the same “promises”.

The experience of this strange procedure of the production of reality brings about a radical (and paradoxical) sense of contingency towards “both sides” involved – towards the inevitable exceeding promises and the inevitable constructions of the network of reality. The maximum we can gain from this sense of contingency is a *new attitude* towards the same production of reality, a paradoxical attitude of struggling without clinging too much, above all struggling without wanting to kill the opponent being well aware of our own “monstrosity”, of our own limitation and imperfection. This is the only way to avoid that those undetermined “normative promises” or “symmetry formula” will become the hub for a new transcendental(!) judgement the representation(!) of which somebody will claim with *force majeure* and a new guillotine. This is also true for the field of religion as Spinoza showed us very well: there is no final sacrifice to be committed in order to reach the promised land. The fact that the same real world is always a realisation of that exceeding *potentia*, of those “promises”, means that the distinctions applied are carriers of the “the divine”. This means in the first place: you cannot

²³ *Ibid.* See also C. Menke “Selbstreflexion des Rechts: Die Figur subjektiver Rechte und die Politik: Luhmann – Derrida”, manuscript on file with author, (Berlin, July 2007).

be wrong! This is an uncomfortable message which subverts all hierarchies and doctrines, not only religious ones. However, the sense of contingency also brings about a radical democratic “mandate” to all of us to realise continuously the *potentia* and its promises against established forms and their mechanisms of exclusion, subordination and privileges not legitimised by the same democratic construction; means we are responsible for creating, deconstructing and improving reality in all sectors through conflict and cooperation in order to maintain a maximum of (“divine”) development *potentiae* for all individuals, social aggregations and the world as a whole. In this sense, justice, friendship, gift, common good, forgiving, truth, freedom, etc. are in “continuous becoming”.²⁴

It is obviously here where social movements come to the fore. The constraints produced by the functional and asymmetric structures of reality make certain actors prominently develop the role of reflection and of (self-)criticism. The battles of social movements play a major role for the productive de- and re-construction of reality. If they want to develop diversity with respect to this ever badly constructed world, they must keep in mind and confront themselves with their inevitable involvement with actual structures, with their own corruption and monstrosity, they must accept their permanent self-transformation and keep their forms of aggregation open.

There is no way out of this restless process of negotiation of standards and their transformation, of this eternally insufficient mix of conflict and cooperation which keeps itself alive because it must realize the exceeding promises without being able to ever reach the complete achievement of this goal. It does not matter if this phenomenon takes today the form of “proceduralisation” or “governance”. The announced redemption lies in any case in this

²⁴ See Deleuze, *supra* note 2

construction of reality, in this opposition of reflection against the form which reproduces reflection which reproduces the form and brings about *a transversal action which is genuinely and irreducibly political*,²⁵ in any case: “*poietic-non-systemic*.”²⁶

²⁵ See Menke, *ibidem*, at 38.

²⁶ See R. Wiethölter, “Recht-Fertigungen eines Gesellschafts-Rechts”, in C. Joerges, G. Teubner (ed.), *Rechtsverfassungsrecht*, (Nomos: Baden Baden, 2003), at 13 et seq.