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*Coda: Governance, Civil Society &
Social Movements. Re-Claiming ‘the
Common’*

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Coda: Governance, Civil Society & Social Movements.

Re-Claiming ‘the Common’

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The aim of this short conclusion is to discuss the final section of this journal issue, specifically the contributions of Michael Blecher, Antonio Negri and Gunther Teubner, in light of the overall theme of both the conference workshop and this special issue. To this end, I am aware that Blecher’s introduction has already raised a number of relevant points and it is not my intention to repeat them; rather, my aim is to identify and draw attention to the loci of agreement and disagreement across the three papers, some of which are obscured by the different perspectives on the topic.

The title of this section – *Re-Claiming ‘the Common’: The Transformation of Governance-Projects by Social Movements’* – was established well before any of these articles were written, and the different approaches taken and arguments furthered by these three papers serves to demonstrate the very fertility of this topic. In this paper I will, first of all, discuss some of the main concepts introduced by the three papers, and then seek to draw together some of the specific threads running through all of the contributions. However, I would first like to take a moment to focus on the title and, specifically, to give a definition of the ‘common’ that we are so intent on ‘reclaiming’.

On “The Common”

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Perhaps the best or, at least the most straightforward, conception of the common is the one laid out in the introduction of Michael Hardt & Negri's book *Multitude* as being that which allows the "multitude" "to communicate and act together",¹ and is "at once an artificial result and a constitutive basis"² of the multitude. The common, therefore, is the basis for the existence of the multitude, which can itself be defined as "an irreducible multiplicity" or, in other words, a collection of "singularities that act in common".³ Indeed, much turns on this co-incident of singularity and commonality, as this is the means by which Hardt & Negri avoid the either/or binaries of both unity/diversity and Them/Us. By attributing subjectivity to the multitude, accomplished by recognising the dissolution of the previously dominant institutionally-delimited spaces that formerly gave rise to distinct and individual subjectivities, they attempt to preclude the descent of the multitude into either postmodern fragmentation (diversity) or a single, lumpen mass of global proletariat (unity). In essence, the existence of the multitude depends upon the *becoming-common* of multiplicity, a state that must be achieved while maintaining the internal distinctions of the forms that comprise it.

The success or failure of Hardt & Negri's philosophical project is neither the focus nor the concern of this paper; however, the indivisibility of their concepts of the common and the multitude – in effect, their mutual co-constitution – makes it impossible to discuss one without the other, let alone to attempt to find definitions. Indeed, one of the difficulties in providing a definition of the common, as we have seen above, is the way in which it more often than not tends to be characterised in terms of either what it is not or what it gives rise to – for example, according to Hardt & Negri: "the common does not refer to traditional notions

¹ M. Hardt & A. Negri, *Multitude*, (2004) Penguin Press: New York, at xv

² *Ibid*, at 349

³ *Ibid*, at 105

of either the community or the public”⁴; “the common ... is what configures the mobile and flexible substance of the multitude”⁵; and “social life depends on the common”.⁶ This approach must necessarily be regarded as a natural consequence of the abstractness of the concept, as well as resulting from of a lack of adequate language and categories in terms of which to describe it.

A quick aside here –the term “the common” should be distinguished from the term “the commons” – the blurring of the lines between the two undeniably contributes to increased confusion in what is an already complex area of thought. While evidently similar, the latter term brings with it connotations of “pre-capitalist-shared spaces [...] destroyed by the advent of private property”⁷, while the former seeks to break with tradition, lose its historical baggage and set out for philosophical pastures new. In their seminal text *Empire*,⁸ Hardt & Negri reconceptualise the notion of the *commons*, presenting it as being “the incarnation, the production and the liberation of the multitude”⁹ instead of simply the property-tied and -embedded “basis of the concept of the public”. The common, on the other hand, can be conceptualised as being both the product of labour and the basis for future production. This labour is not confined to material labour; rather, it is in the realm of immaterial (or

⁴ Hardt & Negri, *Multitude*, *supra* note 1, at 204

⁵ *Ibid*, at 349

⁶ *Ibid*, at 188

⁷ *Ibid*, at xv

⁸ M. Hardt & A. Negri, *Empire* (2000) Harvard U.P: Cambridge, Mass.; London, at 300ff

⁹ *Ibid*, at 303

biopolitical) labour¹⁰ that the greatest potential lies, with communication as the most pertinent example.

That being said, there is also a number of applied and gradated conceptions of the common, most of these less abstract than the one furthered by Hardt & Negri. In an earlier paper, Blecher talks about, for example, a democratic “common good” in the realm of politics, a “common welfare” in that of economics, and a conception of liberty that is dependent upon a singular autonomy intended to act as a counterpoint to the “common”¹¹ – in effect, a *functionally differentiated* conception of the common. So, in light of this, what does reclaiming the common mean and involve? And what is the relation of the common to legal questions, and specifically those of governance, civil society and social movements, considering they are our focus?

Justice as Law’s “Common”

In light of Blecher’s apparent functional differentiation of the common into a political common good, an economic common welfare, and a scientific common truth, the equivalent for law is a common *justice*. Each of these unconditioned *potentiae*¹² is a facet of the

¹⁰ Hardt & Negri, *Multitude*, *supra* note 1, at 109: “The labour involved in all immaterial production... remains material – it involves our bodies and brains as all labour does. What is immaterial is *its product*. We recognise that *immaterial labour* is a very ambiguous term in this regard. It might be better to understand the new hegemonic form as ‘biopolitical labour’, that is, labour that creates not only material goods but also relationships and ultimately social life itself.” (emphasis in original)

¹¹ M. Blecher, “Law in Movement: Paradoxontology, Law & Social Movements”, in J. Dine & A. Fagan, eds., *Human Rights & Capitalism: A Multidisciplinary Perspective on Globalisation*, (2006) Cheltenham; Northampton, MA: Edward Elgar, chpt 4, at 83

¹² M. Blecher, *ibid*, at 83-84. “*Potentia*” refers to the very possibility of *everything* possible.

overarching common, which is produced by (biopolitical) immaterial labour (understood here as social order communication), and refers to the endpoint of the social role that each social function system aims to attain.

This differentiation or segmentation begs the question, however, as to the interrelation and interaction of the social function systems.¹³ Firstly, if the common is divided into parts, how interdependent are these parts? Similarly, should a communication that furthers the political common *good*, for example, be considered as *just* simply as a result? Perhaps the notions of the three *potentiae* of common good, welfare and justice are too conceptually similar or close-together for clarity at this point, as the temptation is to see them as corollaries of each other – for example, it does not seem to be a huge jump to consider anything that gives rise to a common good as also being *just* (despite the normative strictures imposed by the law itself and the question of whether it is legal or not). However, the scientific *potentia* of truth seems to be the fly in the ointment here, as it is evident that no reciprocal relationship can exist between unconditioned truth and unconditioned good, welfare or justice – the axes on which they would have to be measured simply do not overlap. Therefore, despite each being a facet of the overarching common, there is no direct relationship among the *potentiae*.

Similarly, there is no naturally progressive relationship between the social function system and its aspect of the common, or *potentia*. For example, there is no direct link between what is legal and what is just; the philosophically abstract concept of justice is far removed from legal discourse, for law cannot proscribe what is just, only that which is legal or illegal.¹⁴ As

¹³ I should say here that I am not (yet) discussing Luhmanian functional differentiation or systems theory.

¹⁴ See G. Teubner, “The Anonymous Matrix: Human Rights Violations By ‘Private’ Transnational Actors”

(2006) 69(3) *Modern Law Review* 327-346

Blecher says regarding the application of binary logic, “one can easily understand that, in a complex world, the same event can...be defined as being ‘legal’ in one context and ‘illegal’ in another”.¹⁵ Justice, on the other hand, necessarily has to be universal and unconditioned,¹⁶ as must all the other *potentiae*, for they are necessarily always *a venir*.

Unconditioned justice, therefore, must always be striven for by the law, and yet can never be attained. Whatsoever is considered to be *universally just* can never be achieved but, rather, remains a potential value – something that is necessarily out of reach, or that leaps further away whenever an attempt is made to grasp it. Blecher here explains the law’s thankless task in terms of both its inevitable failure and essentially relentless endeavour, while also pre-empting the naturally ensuing question of: why does it not just give up?

“On the one hand, the complete emergence of this ‘justice’ (*all* possibilities for *all* participants) is out of reach because any concrete social entity can only be realised through ‘asymmetric’ selective creations from that space of unlimited possibilities. On the other hand, the permanent attempt to realise ‘justice’ is necessary because any restriction or exclusion produced by a social entity is only legitimate as far as it tries to realise the maximum of possibilities for the maximum of single and collective entities involved.”¹⁷

¹⁵ M. Blecher, *Law in Movement*, *supra* note 11, at 81

¹⁶ *Ibid*, at 84

¹⁷ *Ibid*, at 84

Despite recognising (to an extent) the law's "failure of itself"¹⁸, namely its inherent incapability of achieving its *potentia* of unconditioned justice, Blecher posits this "intrinsic inadequacy" as a source of potential strength for the law,¹⁹ while also arguing for recognition of a degree of "blurring" at social system boundaries (more on this in a moment).²⁰ Key to the former claim is the concept of *contingency* in social development – that is to say, any decision taken is only ever a selection from a number of possible decisions *that could potentially have been taken*. Instead, therefore, of being a mere potentiality, under this construction justice becomes the constant quest for the common good across the entire social order – in order to be just, *each* social decision should be that which achieves the optimum common good for society at that temporal point, hence Blecher's term: 'justice as continuous becoming'.²¹ And the very field in which these selections are recognised, conditioned and decided upon is that of *governance*.

Paradoxes & Transcendence

Justice, as law's *potentia* in the overarching common, or as "continuous becoming" is, as Blecher points out, a progression from the Luhmanian conceptualisation of justice as

¹⁸ See R. Wiethöltner, 'Recht-Fertigungen eines Gesellschafts-Rechts', in (2003) C. Joerges & G. Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (2003) Baden-Baden, at 6

¹⁹ M. Blecher, "Mind the Gap" (contribution to this volume), at 3

²⁰ Blecher also identifies similar "failures" across the other social function systems but argues, contrary to the tenets of social systems theory, that the *potentia* of these systems, as discussed above, are also furthered by *other* systems: "on the one hand, these core functions produce social structures while, on the other hand, their distinctions are continuously liquefied and appear to be treated 'elsewhere' and 'differently' in order to come to terms with their 'potentia'." For more on this, see M. Blecher, 'Law in Movement', *supra* note 11, at 85-86

²¹ See M. Blecher, *supra* note 19.

(socially) adequate complexity.²² Teubner, however, questions the ease of this transition, citing the problem here as being a misunderstanding of Derrida's argument on justice as the transcendence of law.

It should be noted that Teubner's contribution to this volume sits slightly separate from the other two in this section on "Reclaiming the Common", mainly as a result of his reliance on both a systems-theoretical approach and the perspective of societal constitutionalism²³ rather than that of normative fragmentation,²⁴ but also because of his focus on justice in relation to human rights. Human rights, he argues, are not merely "judicially protected rights of individuals against state power" but rather are "much broader social counter-institutions that [...] are emerging inside expansive social sub-systems, and restrict[ing] their expansion from within".²⁵ This reformulation of the concept has altered human rights discourse from being between two private actors (violator and victim) to being between the "anonymous matrix of an autonomised communicative medium" and – instead of a single individual – a tripartite grouping of rights: institutional, personal, and human, each of which in turn pertain to and protect the autonomy of social discourses, the autonomy of communications, and act as negative limits on societal communication.

²² "A system has adequate complexity as a legal order in the degree to which it adapts its other variables to the extent of making it possible for consistent decisions to be taken". (my translation)

See N. Luhmann, "Gerechtigkeit in den Rechtssystem der modernen Gesellschaft" in *Rechtstheorie* 4 (1973) at 153

²³ Societal constitutionalism can be said to describe "a series of social counter-movements directed against the destructive aspects of functional differentiation". See G. Teubner, "Justice Under Global Capitalism" (contribution to this volume), at 2. See also footnote 7 of this article for many further references to this concept.

²⁴ This latter difference is not especially important, as the two are just different perspectives of the same processes or event, one being bottom-up and the other being top-down.

²⁵ G. Teubner, *supra* note 23, at 3

The problem for this rearticulation of human rights discourse *qua* justice for Teubner here is that, in a systems-theoretical approach, the individual does not occupy a position as such; rather, humans are considered to be mere semantic artefacts (“persons”)²⁶ by the anonymous institutions in society. Here, Teubner frames the problem in the form of a question:

“How can society ever ‘do justice’ to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely irritate or destroy them?”²⁷

Considering this paradox,²⁸ he answers his own question with a negative, concluding that the “programme” of positive justice is doomed to fail because it is *inherently impossible*. While recognising Blecher’s Derridean argument of “justice as continuous becoming” and its status as the counter-principle of the deconstruction of law against the corrupt practices of modern law,²⁹ Teubner argues that law does not possess a transcendence formula and that it must

²⁶ G. Teubner, *ibid*, at 4

²⁷ *Ibid*, at 4

²⁸ “The paradoxical circular relationship between society and individual (society constitutes the individual person, who in turn constitutes society) is, as it were, the *a priori* that underlies all historically variable human-rights concepts. Flesh-and-blood people, communicatively constituted as persons, make themselves disruptively noticeable, despite all their socialisation, as non-communicatively constituted individuals/bodies, and hammer for their “rights.” See G. Teubner, “Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter”, (2003/04) Storrs Lectures, Yale Law School, at 6

²⁹ G. Teubner, in discussion at the conference workshop held at EUI, June 30, 2007. See also, G. Teubner, “Dealing with Paradoxes”, *ibid* at 5; and J. Derrida, “Force of Law: The Mystical Foundation of Authority” *Cardozo Law Review* (1990) 919-1046, 959ff.

continue to deal *only* with contingency.³⁰ It is at this point that governance, the “uncertain government of contingency”³¹, now enters the picture.

Governance & Social Movements

Before continuing with this critique, another short aside regarding the term “governance” and its usage is necessary here. The concept of governance itself is used in all three contributions here in its critical form, that is, less to suggest simply soft-law forms than to infer “proceduralisation”. Proceduralisation here means social construction by the “creation of adequate standards [...] and procedures that law has to take care of”³² – a formulation first introduced by Rudolf Wiethöltner, and expanded upon to include “just-ification” (*Rechtfertigung*, to be understood both as law-making and the reason for doing so) as being “the form of the thing proceduralisation”.³³ Governance, therefore, is a “reaction to the failures of markets, states and laws and to the consequent fragmentation, hybridisation and multi-level character of autonomous global norm production”.³⁴

Governance is seen, essentially, as the result of the “chaotic situation”³⁵ caused by normative fragmentation. This fragmentation of the normative world is, according to Negri,

³⁰ “While Luhmann asks about the law’s justice to its environment, he does not ask about its justice to the world. According to Luhmann’s system of law, the law does possess a contingency formula in the concept of justice, *but not a transcendence formula.*” (My emphasis) See G. Teubner, *supra* note 28, at 11

³¹ A. Negri, “The Philosophy of Law Against Sovereignty: New Excesses, Old Fragmentations” (contribution to this volume), at 2

³² See M. Blecher, *supra* note 19, at 6, footnote 13, on R. Wiethöltner’s concept of the ‘proceduralisation of law’.

³³ Wiethöltner, *supra* note 18, at 6

³⁴ Blecher, *supra* note 19, at 4

³⁵ *Ibid* at 2

accompanied by a “constituent excess”, while governance is the device used to mask the resultant but unavoidable uncertainty. Fragmentation and excess co-exist in an asymmetric relationship, and here Negri points to three identifiable themes or examples where this is played out.³⁶ Firstly, and in terms of political economy, excessive disproportion between fixed capital and variable capital (*i.e.* the workforce) uncovers areas of resistance. Secondly, in terms of the State, the fragmentation of judicial functions (domestic and international) has given rise to a surplus of sovereignty claims that necessitate mediation. Finally, and this time in terms of individual (legal) subjectivity, Negri argues that fragmentation within these processes of subjectivity give rise to forms of excess that are incompatible with transcendental determinations of individualism³⁷; this excess produces singularity, which in turn enters the common.³⁸ Each of these themes exemplifies processes of fragmentation and excess, which in turn constitute an *expressive biopolitical fabric*.³⁹

Reclaiming the Common?

As discussed above, governance provides the conditions under which the common good *qua* justice could potentially be realised (justice as continuous becoming), and it is in the turn from government to governance and the resultant decoupling of law from its classic state-based articulation that this dynamism is found.⁴⁰ It could be argued here that, while the scope of the law has been widened in this formulation, this expansion has occurred at the expense of its

³⁶ See *ibid* at 1-3

³⁷ *Ibid*, at 3

³⁸ Teubner furthers a similar argument, albeit from a different perspective, in terms of a singular ‘moment’ of self-observation that can give rise to a humanly-just communication (with justice read as law’s common). See G. Teubner, *supra* note 14

³⁹ A. Negri, *supra* note 31

⁴⁰ M. Blecher, *supra* note 19, at 4

legitimacy (or justification), which has been sorely reduced by the attenuation from its original (at least in the modern sense) source. This conclusion, however, would be to follow blindly down the same old statist or quasi-statist path – in other words, to “uncritical[ly] transfer nation-state circumstances to world society”,⁴¹ for both the *potentia* and irreducible diversity of the multitude transcend old-school notions of legitimacy.⁴²

Legitimacy, in effect, lies with social movements, as the active part of the multitude, whose task it is to “act out” justice. Negri identifies this potential for social change as lying *outwith* the recognised boundaries of the law, namely, a *positive excess*, a constituent act that redraws those boundaries, as well as ameliorating the existing parameters of the common.⁴³ Following from this, therefore, Negri’s gripe against Luhmann’s systems theory is that it anticipates normative fragmentation but refuses to open itself to the potential available in the asymmetric; Negri argues that, in systems theory, the “innovative elements are considered as marginal effects”, and thus remain peripheral and consequently negligible,⁴⁴ rather than centre-stage being given to (positive) excess *qua* resistance *qua* social movements.

⁴¹ G. Teubner, “Societal Constitutionalism: Alternatives to State-Centred Theory”, in C. Joerges, I-J. Sand & G. Teubner, eds., *Transnational Governance & Constitutionalism*, (Oxford: Hart, 2004) at 3

⁴² M. Blecher, *supra* note 11, at 95

⁴³ Excess, it should be noted here, can be conceptualised as either a positive or negative situation that occurs on the battlefield of governance: the positive expression is resistance, while the negative is corruption. See A. Negri, *supra* note 31 at 7

⁴⁴ *Ibid*, at 2-3