

Criticism. From the Outskirts of a World Without a Centre

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Abstract

On February 1433 at the university of Pavia the humanist Lorenzo Valla attacked the eminent jurist Bartolo da Sassoferrato, arguing that contemporary legal thinking was intellectual garbage. Jurists, all bartolians, forced him to leave the university. Symbol of a division that has never really been resolved, this story provides two dialectical images for an exercise in counter-narcissism for legal scholars. Valla and Bartolo show us the salvific upheaval of legal thought: to be ashamed of the established power.

In the transnational context, the Italian difference is the political primacy of conflict: without a centre, the world still maintains many outskirts. Refreshing its reflection in the corners of the world, legal science frees itself from the mortal danger of paranoid relationships with reality. Criticism is the method to build transnational legal scholar networks: only the weapons of criticism can release self-subversive energy in law.

The margin in question is the one produced early in modern Western culture between cultural patrimony and its transmission, between truth and its modes of transmission, between writing and authority

G. AGAMBEN, *Project for a Review*¹

I. February 1433: Valla, Bartolo and the anti-moral of history

In February 1433 the humanist Lorenzo Valla heavily criticized legal scholars in what has become the harshest attack of Early

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¹ G. Agamben, 'Project for a Review', in G. Agamben, *Infancy and History. Essays on the Destruction of Experience*, translated by L. Heron (London-New York: Verso, 1993), 143.

Modern Age.² ‘Squawking geese’, ‘beasts’ to be kicked out of the way, jurists – as Valla went on – are uncouth, they do not understand the purity of Latin; they understand nothing at all of classical Roman law, and it is not worth dealing with their works.³ He specifically criticized Bartolo da Sassoferrato, who had died in 1357. Valla called Bartolo a drunkard, a dunce, a crazy man, a beast. His real target, though, were the Bartolists: all the legal scholar class who at the beginning of the XV century had built their own academic hegemony⁴ around Bartolo’s myth (*nullus bonus iurista, nisi sit bartolista*); so, jurists were omnipresent in the position of power. They had switched from being ‘*iurisconsulti*’ to ‘*legulei*’.⁵

Jurists reacted so strongly that Valla was forced to leave the University of Pavia, perhaps even risking his own safety.⁶ Bartolo has had his defenders⁷ and it is not necessary to add our testimony here. The humanist and the jurist share the religion of text, but their tools of interpretation are opposite: the humanist’s text is a repertoire of ancient wisdom, lost purity, on which the critical spirit can be

² L. Valla, *Epistola contra Bartolum* (1433), critical text in M. Regoliosi, ‘L’ “Epistola contra Bartolum” del Valla’, in V. Fera and G. Ferráú eds, *Filologia umanistica per Gianvito Resta*, II (Padova: Antenore, 1997), 1501-1571 (text at 1532-1570); M. Speroni, ‘Lorenzo Valla a Pavia: il libellus contro Bartolo’ *Quellen und Forschungen aus italienischen Archiven und Bibliotheken*, 453-467 (1979). The *Epistola contra Bartolum* is published in O. Cavallar, S. Degenring and J. Kirshner eds, *A Grammar of Signs. Bartolo da Sassoferrato’s Tract on Insignia and Coats of Arms* (University of Berkeley, California: Robbins Collection Publications, 1994), 179-200.

³ ‘*Bestie enim sunt*’: L. Valla, *Epistola contra Bartolum* n 2 above, 1533; G. Rossi, ‘Valla e il diritto: L’Epistola contra Bartolum e le Elegantiae. Percorsi di ricerca e proposte interpretative’, in M. Regoliosi ed, *Pubblicare il Valla. Proposte di ricerca e ipotesi interpretative* (Firenze: Polistampa, 2008), I, 507-599; B. Clavero, ‘Blasón de Bártolo y Baldón de Valla (a propósito de una gramática de signos)’ *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 573-616 (1996).

⁴ M. Regoliosi, ‘L’Epistola contra Bartolum’ n 2 above, 1503-1510; M. Ascheri, *The Laws of Late Medieval Italy (1000-1500): Foundations for a European Legal System* (Leiden-Boston: Brill, 2013), 348.

⁵ ‘*Quod si fecerint (ut spero et opto) non legulei, sed Iurisconsulti evadent*’ [If they do this (as I hope and prefer), they will become not pettifoggers, but jurists]: L. Valla, ‘Elegantiae’, book III, *Praefatio [Laurentii Vallae Elegantiarium Latinae Linguae Libri Sex]* (Lugduni: Apud Seb. Gryphium, 1544), 159]. Valla’s harsh criticism follows the Model of Cicero’s orations: M. Regoliosi, ‘L’ Epistola contra Bartolum’ n 2 above, 1536, 1542-1543; G. Rossi, ‘Valla e il diritto’ n 3 above, 527, note 47.

exercised without any reverence; the jurist's text is sanctified to the point of fetishism, it is intangible, though debated using any method of argumentation which is socially acceptable in order to put the fragments back together again into new unities of meaning for the solution of social conflicts. Freedom of conscience and thought, on one hand; vision of the structures of the political order, on the other. It is not a battle between bad humanists and good jurists, between intelligent educated humanists and uncouth corrupted jurists; nor is it a clash between shallow chattering intellectuals versus honest workers of order. Refereeing a match fixed in favor of your own team is unfair and, above all, silly.

The Pavia quarrel between Valla and his colleagues is the symbol of a division that has never really been resolved, and not by chance the academic institution was where that division started out: rival kinds of knowledge in a single arena.⁸ Valla's invective is just the peak of a long-standing conflict. That February 1433 created a fracture that not even the later movement of legal humanism would be able to heal: the mutual indifference, the conviction that educated men could shamelessly ignore the law and that the jurists could carry out their own arguments as if human and social sciences had nothing to say. There is nothing more stupid and hideous than a jurist willing to deal exclusively with 'formal legal issues'; and nothing is more stupid and presumptuous than a philosopher or a sociologist who boasts of ignoring the law as being a pseudoscience for corrupt

⁶ G. Rossi, 'Valla e il diritto' n 3 above, 564.

⁷ G. Kisch, *Gestalten und Probleme aus Humanismus und Jurisprudenz* (Berlin: De Gruyter, 1969), 117-124; F. Calasso, 'Bartolo da Sassoferrato' *Annali di storia del diritto*, 472-520 (1965); S. Lepsius, 'Bartolo da Sassoferrato', in I. Birocchi, et al eds, *Dizionario biografico dei giuristi italiani* (Bologna: il Mulino, 2013), I, 176-180. On Valla's side, but excessively, G. Mancini, *Vita di Lorenzo Valla* (Firenze: Sansoni, 1891), 78-83. From a philosophical point of view, M. Manzin, *Il petrarchismo giuridico. Filosofia e logica del diritto agli inizi dell'Umanesimo* (Padova: Cedam, 1994).

⁸ C. Dionisotti, 'Filologia umanistica e testi giuridici fra Quattro e Cinquecento', in B. Paradisi ed, *La critica del testo. Atti del Secondo Congresso Internazionale della Società Italiana di Storia del Diritto* (Firenze: Olschki, 1971), I, 194-195, 202: Valla as '*bestia nera*' [mortal enemy, literally 'black beast'] for all legal scholars. D. Quaglioni, 'Tra bartolisti e antibartolisti. L'Umanesimo giuridico e la tradizione italiana nella *Methodus* di Matteo Gribaldi Mofa (1541)', in F. Liotta ed, *Studi di storia del diritto medievale e moderno* (Bologna: Monduzzi, 1999), 185-212.

people. Logic and dialectic do not prevent the jurist from being criminal and false; the clear classical nature of humanist good-thinking does not prevent Valla from evoking book burnings⁹ and his philological expertise does not make him doubt that Bartolo's treatise, which he criticized, is apocryphal.¹⁰

As jurists, instead of replying, we should wonder why non-jurists do not bear us, why they believe it would be sufficient to label our discussions as savagery after a fast and superficial reading.¹¹ The critical spirit of Valla the humanist – the destroyer of the hegemonic claims which are contained in the false text of the Donation of Constantine – totally ignores the political work of Bartolo the jurist,

⁹ 'Nonne indignum est (...) et egre nobis ferendum, quod tot ineruditissimi libri et ineptissime scripti non modo non iniiciuntur flammis in publico positis (...)': L. Valla, *Epistola contra Bartolum* n 2 above, I, 1, 1532. Mariangela Regoliosi observes that this passage descends from multiple classical commonplaces: M. Regoliosi, 'L' Epistola contra Bartolum' n 2 above, 1532, note 1. The desire for book burnings is grounded in Valla's sacral conception of Latin: *Latini sermonis sacramentum est*. See E. Garin, *L'umanesimo italiano. Filosofia e vita civile nel Rinascimento* (Bari: Laterza, 1952). Valla's interest about law is only a linguistic one, according to G. Rossi, 'Valla e il diritto' n 3 above, 585. On natural law and justice see L. Nauta, *In Defense of Common Sense. Lorenzo Valla's Humanist Critique of Scholastic Philosophy* (Cambridge, Massachusetts-London: Harvard University Press, 2009), 160-163; R. Fubini, *Umanesimo e secolarizzazione da Petrarca a Valla* (Roma: Bulzoni, 1990), 386-392.

¹⁰ G. Rossi, 'Valla e il diritto' n 3 above, 550-551. The *Epistola contra Bartolum*, however, is still worth attention for the critique of scholastic medieval syllogism, according to the logic of common sense: M. Regoliosi, 'Valla, Lorenzo', *Dizionario biografico dei giuristi italiani* n 7 above, II. On Valla and legal Humanism see D. Maffei, *Gli inizi dell'Umanesimo giuridico* (Milano: Giuffrè, 1956), 37; R. Orestano, *Introduzione allo studio del diritto romano* (Bologna: Il Mulino, 1987), 607, note 47. The relationship between Humanist and Jurist has, naturally, many sides: M.P. Gilmore, *Humanists and Jurists. Six Studies in the Renaissance* (Cambridge, Massachusetts: Harvard University Press, 1963); D.R. Kelley, 'Civil Science in the Renaissance: Jurisprudence Italian Style' 22 *The Historical Journal*, 777-794 (1979); D.R. Kelley, 'Jurisconsultus Perfectus: The Lawyer as Renaissance Man' 51 *Journal of the Warburg and Courtauld Institutes*, 84-102 (1988); F. Calasso, 'Umanesimo giuridico', in F. Calasso ed, *Introduzione al diritto comune* (Milano: Giuffrè, 1951), 181-205.

¹¹ Valla narrates having read Bartolo's Treatise *De insigniis et armis* suddenly overnight; immediately afterwards writes his *Epistola contra Bartolum*. He focuses, however, on the non-legal section of the Treatise; a section which is probably apocryphal. Valla's knowledge of juridical medieval culture appears casual and cursory: G. Rossi, 'Valla e il diritto' n 3 above, 590.

who deals with the harshest conflicts of his times, writing about interdictions, reprisals, city factions, forms of government and, above all, tyranny.¹²

Perhaps humanists hate the idea that the person is reduced to a function of order, the constant claim that actions should repeat themselves according to a pre-fixed normative model in order to be legal: the exhibited seriality of law opposes itself to the hidden seriality of humanistic culture, which lives by infinite narrative structures and variations, as *ars est celare artem*. Certainly, humanists criticize our (supposed, increasingly weaker) direct and privileged relationship with power; theirs, in contrast, is a conflictual one: sometimes as servants in a close relationship, and more often (from the Romantic fracture onwards) as prophetic outsiders in a constitutively marginal or subversive relationship.

Is this the war between the discursive universe of the '*It has always been*' (The Order) and the discursive universe of the '*Always new*' (The Marvellous)?

There is no answer, not even a moral of the story in the dispute between Valla and Bartolo. For us it is just a chance to unveil the inner subversion beneath 'The Order' and the constant structure within 'The Marvellous',¹³ trying to realize that the organizing

¹² Usually, Valla's polemics look like a one man show. See, eg: '*Qui non tantum adversus mortuos scribo, sed adversus etiam vivos, nec in unum alterum ve, sed in plurimos, nec contra privatus modo, verum etiam contra magistratos* (public officials)': L. Valla, *De falso credita et ementita Constantini Donatione* (1440), I, 1. Among Bartolo's most celebrated Treatises: *De bannitis* (1354), *De repraesaliis* (1354), *De guelphis et ghibellinis* (1355), *De regimine civitatis* (1356), *De tyranno* (1356). The Treatise *De insigniis et armis* was written in 1357, year of his death: G. Rossi, 'Bartolo da Sassoferrato alle origini della moderna trattatistica giuridica: note di lettura sul «Liber Minoricarum»' *Studi umanistici piceni* (additional issue), 19 (2012). See, above all, the critical edition of the Treatise *On Tyranny*: Diego Quaglioni, *Politica e diritto nel Trecento italiano. Il 'De tyranno' di Bartolo da Sassoferrato (1314-1357). Con l'edizione critica dei trattati 'De Guelphis et Gebellinis', 'De regimine civitatis' e 'De tyranno'* (Firenze: Olschki, 1983); and the following debate: O. Cavallar, 'Il tiranno, i *dubia* del giudice ed i *consilia* dei giuristi' *Archivio Storico Italiano*, 265-345 (1997); O. Cavallar, 'Geografia della tirannide. Una proposta di lettura per alcuni degli ultimi trattati bartoliani', in J. Barthas ed, *Della tirannia: Machiavelli con Bartolo. Atti della giornata di studi – Firenze, 19 ottobre 2002* (Firenze: Olschky, 2007), 3-46; D. Quaglioni, *Machiavelli e la lingua della giurisprudenza. Una letteratura della crisi* (Bologna: il Mulino, 2011), 57-75.

¹³ S. Greenblatt, 'Invisible Bullets: Renaissance Authority and His Subversion' 8

principle of the discourse is only the astonishing criticism of perception. With these fragmented perceptions we will finally reach the salvific upheaval of legal thought: to be ashamed of the established power (on the way of self-subversion).

II. Valla and Bartolo together: dialectical images instead of programs

We do not expect to heal the fracture between humanists and jurists with our work. Neither do we want to announce a program: programs are wishes, it would be better not to talk about them. Instead, we want to restart from the images, from the two apparently irreconcilable figures of Valla and Bartolo. We would like to look at them to protect ourselves from the mortal danger of a narcissistic projection into the past. Jurists love to represent themselves in an old fashioned way: this is a bad habit which started when classicism and conservatism mingled, shown in the distorted identification with the colleagues from the past centuries. Modern jurists envy their authority, crave it, look for legitimacy in their formulas (eg *lex mercatoria*). These are symptoms of scientific weakness, consoling practices, strategies to hide cultural crises: though legality cannot be found in pretense, it is a constructive engagement.¹⁴

May the effigy of this Journal be a therapy: let's mirror ourselves in a dual image, a disturbing – not comforting, not narcissistic – image of conflict, of division, of contempt; something that calls for the everlasting need of a clash between discursive closeness and communicative openness. We are not a phalanx of legal doctrine, we do not want to convert anyone, nor drag anyone into our battles. We would just like to invite everyone, readers and authors (interchangeable roles), to practise daily the exercise of counter-mirroring in the dialectical image of Valla

Glyph, 40-61 (1981); F. Moretti, 'La grande eclissi. Forma tragica e sconsecrazione della sovranità' (1979), in Id, *Segni e stili del moderno* (Torino: Einaudi, 1987), 50-103. Stephen Greenblatt has brilliantly studied the ambiguous balance between authority and subversion in Lorenzo Valla's Treatise *On pleasure (De voluptate)*: S. Greenblatt, *The Swerve. How the World Became Modern* (New York-London: Norton, 2011), 222-224.

¹⁴ P. Perlingieri, 'Il principio di legalità nel diritto civile' *Rassegna di diritto civile*, 164-201 (2010).

and Bartolo, the ones we have chosen, our protective gods against their will, inseparable friends/foes.¹⁵

III. The Italian difference

What can Italy offer in this trend common to all Western legal systems? Italy, as most countries are, is an outskirts of the Empire without place,¹⁶ where the political primacy of conflict has appeared.¹⁷ Power grows, rules, legitimates itself by running along transnational communicative channels.¹⁸ There is no centre, there is no place; however, non-places have their outskirts too – they are

¹⁵ W. Benjamin, 'Das Passagen-Werk', in R. Tiedemann and H. Schweppenhäuser eds, *Gesammelte Schriften* (Frankfurt am Main: Suhrkamp, 1991), II, 591-592. M. Regoliosi, 'Ritratti di Lorenzo Valla', in G. Lazzi and P. Viti eds, *Immaginare l'autore. Il ritratto del letterato nella cultura umanistica. Convegno di Studi, Firenze, 26-27 marzo 1998* (Firenze: Polistampa, 2000), 207-213. This sort of unlikely friendship between Valla and Bartolo has a chance in our future. François Rabelais kept both in mind in the tenth chapter (Book One, 1532) 'Of that which is signified by the colours white and blue' of *Gargantua and Pantagruel*: 'Is not the night mournful, sad, and melancholic? It is black and dark by the privation of light. Doth not the light comfort all the world? And it is more white than anything else. Which to prove, *I could direct you to the book of Laurentius Valla against Bartolus*' (italics added, translated by T. Urquhart of Cromarty and P.A. Motteux) available at <http://ebooks.adelaide.edu.au/r/rabelais/francois/r11g/book1.10.html> (last visited 23 March 2014). See L. Valla, *Epistola contra Bartolum* n 2 above, VI, 30-39, 1562. We would imagine the two enemies in this darkness walking (and questioning, quarrelling...but, for the first time, in this purely fictional time, listening to each other) and together searching the light. Is this the moral of the story? Absolutely not: they should have in mind, obviously, different, incommensurable, images of light. And the quarrel goes on...

¹⁶ A. Negri and M. Hardt, *Empire* (Cambridge, Massachusetts: Harvard University Press, 2000), XII, 335 (It 'is no longer possible to demarcate large geographical zones as center and periphery'). But the delocalization of power makes us all a peripheral multitude; 'the space of non-place creates neither singular identity nor relations; only solitude, and similitude': M. Augé, *Non-Places. Introduction to Anthropology of Supermodernity*, translated by J. Howe (London-New York: Verso, 1995), 103.

¹⁷ D. Gentili, *Italian Theory. Dall'operismo alla biopolitica* (Bologna: il Mulino, 2012); A. Negri, *La differenza italiana* (Roma: Nottetempo, 2005), 22.

¹⁸ A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006).

mainly receptive territories,¹⁹ corners of the world imitating global noise. We can look at the centre of the non-place only from the outskirts.²⁰ Something escapes, something dark remains for the bare lives living in the thousand centres of a world without a centre; something cannot be perceived by those who grow up producing themselves within a stream of discourses which receives and consumes everything, as long as everything runs according to the meaning which is built in the shapes of an indisputable domain;²¹ something is never understood in the global universe, a world interpreted and never shaken by itself:

...daß wir nicht sehr verläßlich zu Haus sind
in der gedeuteten Welt
(R. M. Rilke, *Duineser Elegien*, I, 12-13)²²

¹⁹ U. Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' 10 *Indiana Journal of Global Legal Studies*, 383-448 (2003).

²⁰ M. Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne: Eine theoretische Betrachtung und eine Interpretation des Falls Brasilien* (Berlin: Duncker & Humblot, 1992); H. Brunkhorst and S. Costa eds, *Jenseits von Zentrum und Peripherie. Zur Verfassung der fragmentierten Weltgesellschaft* (München und Mering: Rainer Hampp Verlag, 2005).

²¹ U. Mattei and L. Nader, *Plunder: When the Rule of Law is Illegal* (Malden, Massachusetts-Oxford-Carlton: Blackwell, 2008), 196-210.

²² '...that we are not really at home in / our interpreted world', translated by Stephen Mitchell [R.M. Rilke, *Duino Elegies and the Sonnets an Orpheus* (New York: Vintage, 2009), 3]. 'Interpreted world' seems the best translation for '*Die gedeutete Welt*' of the first Duino Elegy. Other choices: '*elucidated world*' [R.M. Rilke, *Duino Elegies and Other Selected Poems*, translated by L.P. Gartner (Bloomington: AuthorHouse, 2008) 1]; '*translated world*' [R.M. Rilke, *Duino Elegies and The Sonnets to Orpheus*, translated by A. Poulin jr. (New York: Mariner Books, 2005), 5]; '*signposted world*' [R.M. Rilke, *Duino Elegies*, translated by Peter Cohn (Evanston: Northwestern University Press, 1998) 21]; among Italian translations: '*mondo interpretato*' [R.M. Rilke, *Elegie duinesi*, translated by M. Ranchetti and J. Leskien (Milano: Feltrinelli, 2006) 3]; '*mondo già interpretato*' [R.M. Rilke, *Elegie duinesi*, translated by F. Rella (Milano: Rizzoli, 2004) 43]. Perhaps the finest translation is Furio Jesi's '*mondo significato*' (signified world): F. Jesi, *Esoterismo e linguaggio mitologico. Studi su Rainer Maria Rilke* (Messina: D'Anna, 1976) 65. See G. Agamben, 'Vocation and Voice' 10 *Qui parle* 93 (1997); F. Rella, *Negli occhi di Vincent. L'io nello specchio del mondo* (Milano: Feltrinelli, 1998) 37; R. Walisch, „daß wir nicht sehr verläßlich zu Haus sind in der gedeuteten Welt“: *Untersuchung zur Thematik der gedeuteten Welt in Rilkes „Die Aufzeichnungen des Malte Laurids Brigge“*, „Duineser Elegien“ und spätester Lyrik (Würzburg: Königshausen & Neumann, 2012) 226-240. Rilke's *gedeutete Welt* is a world astonished under the

This *something* is the poison of the present day, the hidden foulness of order, its violence, its oppression, its hypocrisy.²³ Herds of jurists living by the law to cause pain by calling it justice; networks of coherent, calculating, reasonable discourses, and always guardians of the scandal of human misery and its hardest inability of transcendence.

Jurists shamelessly have their hands dirty with power. Will the legal science be able to return them their decency, or will it just be one of the many masks of power itself?

Like morality and theology, law has a paranoid relationship with reality.²⁴ It comes from it and interacts with it; though their relationship is sick. Dissent is immorality, is sin, is illegality. Facts oppose the discourse which envelops and founds norms; and even before the opposition could open to criticism, these paranoidly oriented systems reject them, labelling them in a negative way. Facts, sooner or later, make the law – they make it and, above all, they destroy it. However, their work does not appear on the outside: discourses pretend to change by themselves, not under external pressure. Therefore, the constitutive form of the relationship between world and paranoid system is hypocrisy. This way the legal

pressure of too many meanings, which offer themselves as real things: ‘Under these influences a totally different conception of things has formed in me, certain differences have appeared that separate me from people more than anything that has gone before. *A transformed world. A new life full of new meanings. At the moment it is rather hard for me, because everything is too new. I am a beginner in my own relationships*’: R.M. Rilke, *The Notebooks of Malte Laurids Brigge*, translated by B. Pike (University of Illinois: Dalkey Archive Press, 2008) 53 (italics added). The last passage in German: ‘*Eine veränderte Welt. Ein neues Leben voll neuer Bedeutungen. Ich es augenblicklich etwas schwer, weil es alles zu neu ist. Ich bin ein Anfänger in meinem eigenen Verhältnissen*’: R.M. Rilke, *Die Aufzeichnungen des Malte Laurids Brigge*, I (Leipzig: Im Insel Verlag, 1910) 105; Id, *Werke. Kommentierte Ausgabe in vier Bänden* (M. Engel, U. Fülleborn, H. Nalewski and A. Stahl eds.), III (Frankfurt am Main - Leipzig: Im Insel Verlag, 1996) 505.

²³ S. Chignola, ‘*Etwas Morsches im Recht. Su violenza e diritto*’, available at www.uninomade (last visited 9 January 2012); W. Benjamin, ‘The Critique of Violence’, in P. Demetz ed, *Reflections. Essays, Aphorisms, Autobiographical Writings*, translated by E. Jephcott (New York: Schocken, 1986), 286: ‘in the exercise of violence over life and death more than in any other legal act, law reaffirms itself. But in this very violence something rotten in law [*etwas Morsches im Recht*] is revealed’.

²⁴ P. Femia, ‘Against the “Pestilential Gods”’. Teubner on Human Rights’ 40 *Rechtsphilosophie & Rechtstheorie*, 260-274 (2011).

system – perhaps not the most powerful among paranoid systems, but certainly the most difficult to escape from – assures the paradoxical condition of a change that occurs uniquely because the legal system is allowed to act under the mask of continuity.²⁵

For a very long time law has worked as an enunciating machine (*dictio*). It has enunciated juridical qualifications (*iurisdictio*) according to the code legal/illegal. It has assured stability of the images of the world, it has given a huge power to jurists, legal priests of order. Though nowadays power speaks other languages, all related to economics: production, finance, investments, incomes, growth, employment, wealth and poverty have become the lexical architecture of happiness and tragedy. The mortal god of the market, convinced by the discursive autopoiesis of its own immortality, appears as the premise of any order, as the measure of the value of any public policy.²⁶ What is the point of ‘fulminating with voidness’ (some still write like this) a contract under national law, if the global financial system still lives thanks to that contract? How many minutes would a constitutionally founded legal system resist if contracts (legal contracts – who knows why no one uses the word ‘blessed with validity’), which private citizens use to finance public debt, were fulminated with scepticism by financial speculation? A contract declared illegal under the national legal system can still be concluded and enforced; a State declared unreliable by the transnational economic system can only dissolve into disorder (or recover, *in extremis* – as a system, not as a State – from its own compulsive autopoiesis).²⁷

Every day the State, this magnificent paper god of each positivist jurist, holds out its hand in order that some private citizen finance it, by buying its bonds. The private sector finances the public one and so the private sector has bought the public one; every day financial markets give an example of a magnificent public beggar living on trust. Every day a solitary and well organized crowd of individuals

²⁵ G. Teubner, *Law as an Autopoietic System* (Oxford-Cambridge: Blackwell, 1993).

²⁶ About the institutional framework of the conservative legal school, see S.M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008).

²⁷ G. Teubner, ‘A Constitutional Moment? The Logics of ‘Hitting the Bottom’’, in P.F. Kjaer, G. Teubner et al eds, *Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011), 9-51.

reduced to rapacious functions of their wish – as infinite as the fear of becoming poor – gives the State money in order to make profits (ie taking collective resources away and expropriating public wealth to the benefit of private wealth).

IV. Transnational critical networks to train jurists on shame

All these things are disturbing, we do not like to hear about them. Jurists (and so moralists and theologians, and basically, anyone else) can turn their backs disdainfully on their fate of insignificance, clinging to the emblems of a power as shallow as the scabbard of Melville's *Benito Cereno*;²⁸ they can look for individual ways of salvation by offering the economic god the same services they offered the political god in the past. Instead they can cross the frontier of order and find a new function, make legal science the model of a new science of counter-hegemony for the protection of weak people. It is for weak people that justice was born.²⁹

Law is a language of its own. Today it is a babel of dialects, where hegemonic dialects try to establish themselves as universal languages. Under these conditions law is a local phenomenon. It seems hard to imagine a world which is built according to the Kantian utopia of cosmopolitan law:³⁰ too many differences, too much influence of local power (which is not destroyed, but only ordered by global power), too many subversive forces triggered by the global economic system which needs differences in local governments, as each difference gives an opportunity of greater exploitation.³¹ However, if statutes and, at least in part, the other sources of law are not cosmopolitan, indeed structures and cultures

²⁸ P. Femia, 'Benito Cereno in Bucovina', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* (Milano: Giuffrè, 2013), 23-115.

²⁹ A. Prospero, *Giustizia bendata. Percorsi storici di un'immagine* (Torino: Einaudi, 2008) 170-175.

³⁰ P. Kleingeld, 'Kant's Cosmopolitan Law: World Citizenship for a Global Order' 72 *Kantian Review*, 72-90 (1998); S. Benhabib, 'The Law of Peoples, Distributive Justice, and Migrations' 72 *Fordham Law Review*, 1761-1787 (2004). Above all D. Zolo, *Cosmopolis. La prospettiva del governo mondiale* (Milano: Feltrinelli, 1995).

³¹ D. Harvey, *The Enigma of Capital: And the Crises of Capitalism* (Oxford: Oxford University Press, 2010), 184-214.

will be transnational.³² Using the plural, because there is not a mainstream thought, but a single need for an infinite criticism of the present day.

Law should become a system able to overwhelm the paranoid pride of *dictio* – of the qualification and disqualification of rights and wrongs, of the wish to teach the world how to think about what occurs to the world itself – and able to open cognitively, admitting the flexibility of the sources of law, accepting a conception of legal validity as a reversible process, which is not totally formalized in immutable procedures.³³

Finding out the *ratio* of norms is not enough, but we need to understand the policy of regulation; *regula* has no sense (and even if it had, it would be useless), whereas the policy of *ius* has; not fragments of orders to obey or to disobey if they are not advantageous, but coherent (or to be made coherent through criticism) complexes of directives to be evaluated analyzing the results of their application.

Validity no longer depends on what norms say, but on what norms do; on the results they produce. A legal system based on democratic discussion accepts the idea of reviewing its own contents forever. It does not work under Nihilism:³⁴ it annihilates itself. It preserves a destructive potential on the inside, the ability to demolish current norms in order to make other norms.³⁵ This kind of system, then, does not have just one language, it cannot impose the infinite repetition of identicalness in its orders, it cannot say ‘You shall have no other law before me’. As there is no discourse that regulates, but a multitude of communicative networks able to regulate.

The law, like the world, is fragmented into many communicative

³² P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 17-19.

³³ N. Luhmann, *Law as a Social System*, in F. Kastner et al eds, translated by K.A. Zeigert (Oxford: Oxford University Press, 2004), 106 ([T]he legal system operates in a normatively closed and, at the same time, cognitively open way’); N. Luhmann, ‘Operational Closure and Structural Coupling: The Differentiation of the Legal System’ 13 *Cardozo Law Review*, 1427 (1992).

³⁴ G. Perlingieri, ‘Sul giurista che come «il vento non sa leggere»’ *Rassegna di diritto civile*, 385-413 (2010).

³⁵ P. Femia, ‘Segni di valore’, in L. Ruggeri ed, *Giurisprudenza della Corte europea dei diritti dell’uomo e influenza sul diritto interno* (Napoli: Edizioni Scientifiche Italiane, 2012), 83-156.

networks.³⁶ A supranational legal science does not exist, an overworld does not exist, nor does a superior point of view to observe law. Legal science is just one of the many communicative networks able to order; it deals with the reality of human suffering, not with the heavenly destinies of ideas; it is located in a place whose structures of power it decomposes and recomposes; it is a criterion to connect national debate on local regulatory experience with networks which have the same function in other countries.³⁷ A superscience, therefore, does not exist; what exists is a continuous contamination between all the scientific networks.

We hope that these processes of hyper-communication between scientific networks will grow and so create a critical power to fight the cultural hegemony of possessive individualism, which has colonized the economic discourse and therefore every corner of the world.³⁸

If power really is the shame of man – as Elsa Morante, a great Italian novelist, said³⁹ – then we want to teach jurists shame. And we would like to add that inequality is the shame of human communities. Unequal distribution is a scandal and law should not be complicit in it. It is not easy to get rid of the repetition compulsion: law helps to represent the ontology of order in this compulsion. This is why law works perfectly when everything has to stay as it is, when disputes should be resolved by ensuring that everyone stays in the same social position belonging to him or her

³⁶ G. Teubner, *Constitutional Fragments: Societal Constitutionalism in the Globalization* (Oxford: Oxford University Press, 2012); C. Crea, *Reti contrattuali e organizzazione dell'attività d'impresa* (Napoli: Edizioni Scientifiche Italiane, 2008), 189-199.

³⁷ An interesting case is brilliantly examined by A. Federico, 'Il trasporto di cose', in G. Gitti, M.R. Maugeri and M. Notari eds, *I contratti per l'impresa* (Bologna: Il Mulino, 2012), I, 325-342.

³⁸ A. Fischer Lescano, 'Postmoderne Rechtstheorie als kritische Theorie' 61 *Deutsche Zeitschrift für Philosophie*, 179-196 (2013); A. Fischer Lescano, 'Critical Systems Theory' 38 *Philosophy & Social Criticism*, 3-23 (2012); G. Alpa, 'Lo snobismo degli economisti e il rifiuto del dialogo con i giuristi (a proposito dell'introduzione alla versione italiana, 'Impresa, mercato e diritto' di R.H. Coase)' *Economia e diritto del terziario*, 745-749 (1996).

³⁹ Elsa Morante appropriately wrote that power is the 'dishonour' of man: E. Morante, *Piccolo Manifesto dei Comunisti (senza classe né partito)* (Roma: Nottetempo, 2004), 7.

before the dispute.⁴⁰ Law retributes, it does not distribute. Even when law explicitly takes on the task to achieve social justice – and therefore distributive, not retributive, justice – it cannot actually change the predetermined distribution plan; even when it distributes, it retributes; it does not really distribute, because it goes by a fixed order: therefore, it is not open to the tragic uncertainty of the becoming,⁴¹ but to the fixed order of the distributive procedures. It is embedded in the comforting repetition of a path, transforming the disordering power of equality into the entitlement to the right to a distributive procedure; ie into the retribution of distributive rights.

Only the weapons of criticism can release innovative and self-subversive energy in law⁴² Accepting the risk of uncertainty, as order is not repetition, but an infinite production of sense ever new. Kafka has taught us to hesitate before the doors of law, in the sense of Italian *legge* (law as a statute).⁴³ Il *diritto* (law as a whole), though, is an infinite network of doors watching each other, opening each other. Our doors are open, we have educated them to transience. Cross our doors, and dissipate them.

Greetings

*Da una camera accanto della vita
Quasi una voragine distante*⁴⁴

*Sfondare la parete nera.
Rompere in alba la sera.
È il sogno del morituro?
Il voto del nascituro?*⁴⁵

⁴⁰ About the balance between justice and welfare, G. Calabresi, 'About Law & Economics: A Letter to Ronald Dworkin' 8 *Hofstra Law Review*, 553, 557 (1980).

⁴¹ G. Calabresi and Ph. Bobbit, *Tragic Choices* (New York: W.W. Norton & Company, 1978), 39.

⁴² G. Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' 72 *Modern Law Review*, 1-23 (2009); P. Femia, 'Infrasystemische Subversion', in M. Amstutz and A. Fischer-Lescano eds, *Kritische Systemtheorie. Zur Evolution einer normativen Theorie* (Bielefeld: Transcript Verlag, 2013), 305-325.

⁴³ G. Teubner, 'The Law Before its Law: Franz Kafka on the (Im)possibility of Law's Self-reflection' 14 *German Law Journal*, 405-422 (2013).

⁴⁴ G. Giudici, *Da una camera accanto*, in Id, *Eresia della sera* (Milano: Garzanti, 1999), 65 (*From a next room of life / almost a chasm far*).

⁴⁵ G. Caproni, 'Sfondare la parete nera', in Id, *Res amissa* (Milano: Garzanti, 1991), 178 (*Rifting the black wall / Breaking evening in dawn / Is the dream of the dying man? / The vow of the not even born?*).