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EDITORIAL

POWER(S) AND SOVEREIGNTY IN (AND/OR VIA) DIGITAL INFORMATION

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Giorgio Giannone Codiglione
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The last decade of the new millennium has provided us with the confirmation that the Internet is no longer a simple mass medium but a connective tissue that permeates all aspects of our lives. This epochal passage of entry into the era of *hyperhistory* (Floridi, 2014) is characterized by the definitive osmosis between real and virtual: the human person, understood as a complex informational entity (Rodotà, 2006; Solove, 2004), carries out most of its activities within a space governed by a constant flow of data.

In this context, social sciences find themselves at a crossroads: to stick with tradition, describing the disruptive effect of technologies and information in negative and positive terms (Ellul, 1954), or to move beyond the dichotomy between *apocalyptic* and *integrated* (Eco, 1977), in the attempt to understand the essence of these phenomena without limiting themselves to a mere reclassification exercise or the adaptation of an analogical interpretation (Frosini, 1968).

Data today represents the most innovative form of social subject ever created by humans (Ferraris, 2009; Morton, 2018). From an eminently technical point of view, the so-called Web 2.0 places the human being at the center of this flow of information in their new role as prosumers of data, for the purpose of further circulation and use. This

means that when contextualized into the taxonomy of human rights, the Internet not only represents the modern incarnation of the freedom of expression, "a unique and wholly new medium of worldwide human communication," as stated in 1997 by the American Supreme Court in Reno v. Aclu (Balkin, 2004; Posner, 2008; Sunstein, 1995).

By the mid-1980s, scholars had already understood the unique nature of the phenomenon and the impossibility of assimilating the regulation of electronic communication solely under the traditional framework of the positive freedoms safeguarded by the late 17th-century Charter of Rights. Hence, the concept of "digital rights" was born; an extension of the right to inform and be informed, and thus the "right to have access to information, to preserve one's own digital identity, meaning to allow, check and correct digital information relating to one's own person" (Frosini, 1984). This "embryonic" notion, closely related to the *Recht auf informationelle Selbstbestimmung* found in German Constitutional case law, has received a more extensive description with the advent of the Internet, in the sense of the freedom to use information tools to provide and obtain information of any kind.

When exercising their positive digital rights, today's internet users are called upon to guarantee a constant, lateral, and collaborative data contribution by adapting, sharing, and exploiting the quality and quantity of the common IT heritage, giving rise to a general principle of digital solidarity. Following this reasoning, we could also add a different definition of the cooperative approach to this inclusive sense of digital solidarity, stemming from the right to access and communicate online. In other words, to the concept of "computer freedom" identified first by Vittorio Frosini, we can add the notion of "online" or "digital" solidarity, by which the transit of legal information from one area of the Internet to another leads to an increase in the overall value of the system and therefore of it is functioning and the beneficial effects that it can have on society (Rodotà, 2014).

One of the emerging phenomena in contemporary societies is the blurring of boundaries between the 'public' and 'private' dimensions (D'Antonio & Giannone Codiglione, 2019; Sica & Stanzione, 2002). The digital transformation is among the drivers of this process, alongside the evolution of economic and social relationships, in a context characterized by growing exchanges and cultural contaminations, as well as environmental and social emergencies (Cascione et al., 2025).

For example, it is now a fact that European Union law, together with the Member States, has finally opened up to a more realistic and effective approach to the enforcement of the right to personal data protection (Zeno-Zencovich, 2018). The affirmation

of the principle of the free movement of personal data as the main scope of the General Data Protection Regulation (GDPR) profoundly changes the perspective from a solely personalistic logic of protection. Moreover, GDPR's neutral approach read in conjunction with the adoption of a normative model based on accountability principle and risk-based approach (we could say, in terms of liability: from a dangerous to a risky activity), in no way clash with the nature of data protection as a higher level fundamental right, hierarchically superordinate to the exercise of other fundamental rights and freedoms, such as the freedom to conduct business—as for instance affirmed by the European Court of Justice in the Google Spain case (D'Antonio & Pollicino, 2020).

The enforcement of fundamental right to data protection, moreover, must not focus exclusively on the protection of the data subject as an human person whose data are processed, but must remain open to checking the impact that these legitimate economic activities have on the consumers well-being in the ICT's society and, as a consequence, on the competitive structure of the related markets (Stanzione, 2021; Zeno-Zencovich & Giannone Codiglione, 2016).

The privatization of aspects traditionally attributed to the government, along with the increasingly public characterization of relationships previously regarded as pertaining to the private sphere, raises questions in many fields of knowledge, including the law (Sica & Giannone Codiglione, 2014). The once reassuring traditional legal categories are deeply affected. In particular, the long-contested divide between public law and private law is increasingly under stress and reveals its limited adequacy in interpreting the legal implications of new social phenomena: data as law or law as data? Data as an essential facility? The contractual relationship in the digital dimension and the protection of fundamental rights? Antitrust enforcement as a public regulatory tool for "data markets"? The public dimension of digital platforms: towards a new feudalism? What role is it for the traditional States? Net *vs*. Nets: towards the overcoming of the Internet monopoly?

This special issue of *Soft Power* takes us on a fascinating journey, thanks to the contributions of authoritative scholars from diverse academic backgrounds and perspectives, in search of answers and interpretive solutions that can guide us in an increasingly *infocentric* future.

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FACTORES QUE EN LA GLOBALIZACIÓN AFECTAN LA SOBERANÍA DEL ESTADO-NACIÓN*

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Universidad Católica de Colombia

FACTORS WITHIN GLOBALIZATION THAT AFFECT NATION-STATE SOVEREIGNTY

Resumen

Se analizan algunos de los efectos diferenciados de la interferencia de las empresas transnacionales en la globalización, a través de los factores económicos, políticos y legales que afectan la soberanía del Estado-nación, y en particular, en el contexto de la actual asfixia informativa digital. Se valoran los argumentos de los investigadores que se refieren a la afectación o no de la soberanía del Estado-nación en esta era de globalización. Se concluye que, independientemente de estos efectos evidentes sobre su soberanía, el capitalismo se ve obligado a mantener el Estado-nación con el fin de salvaguardar los intereses de las empresas transnacionales y de los gobiernos de los países desarrollados.

Palabras clave:

globalización, soberanía, Estado-nación, empresas transnacionales.

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Abstract

Some of the differentiated effects of the interference of transnational corporations in globalization are analyzed, through the economic, political and legal factors that affect the sovereignty of the nation-state and in particular in the face of the current digital information asphyxiation. The arguments of researchers referring to the affectation or not of the sovereignty of the nation-state in this era of globalization are valued. It is concluded that regardless of these obvious effects on its sovereignty, capitalism is obliged to maintain the nation-state with the aim of safeguarding the interests of transnational corporations and the governments of developed countries.

Keywords

globalization, sovereignty, nation-state, transnational corporations

Introducción

Tanto en la naturaleza como en la sociedad y en el intelecto, ningún fenómeno se produce debido a una sola causa; regularmente son el resultado de múltiples factores concomitantes. Por supuesto, no todos desempeñan el mismo papel: unos son condicionantes y otros determinantes, del mismo modo que unos resultan necesarios y otros contingentes. En lo que respecta a las afectaciones a la soberanía del Estado-nación en tiempos de globalización, este hecho también se confirma. En este fenómeno se conjugan múltiples factores económicos, políticos, científicos, tecnológicos y culturales, entre los cuales se incluyen los informativos y comunicativos.

Valorar algunos argumentos que analizan este tema constituye el objeto del presente análisis, que no debe ser reducido a una disciplina científica en particular. Para lograr un criterio lo más objetivo posible sobre el asunto en cuestión, resulta imprescindible un enfoque holístico y complejo que tome en consideración los resultados de investigaciones de las ciencias políticas, económicas, sociológicas, jurídicas, antropológicas, etc. Estos resultados, asumidos de manera aislada e inconexa, no permiten elaborar una conclusión verdaderamente fundamentada al respecto. Un estudio de esta problemática exige un enfoque transdisciplinar o una especie de "metapolitología" (Pérez, 2008, p. XV).

Desde su gestación, el capitalismo se caracterizó por desarrollar un proceso expansivo no solo territorial, financiero y comercial, sino también político e ideológico. Además de controlar las fuentes de materias primas y los mercados, aspiraba a algo más trascendental: las mentalidades de los pueblos esclavizados o colonizados. Era necesario demostrar la eficacia de la sociedad burguesa, que enfrentaba la autárquica economía feudal, y, a la vez, propagar el criterio de la supuesta superioridad étnica de los europeos, así como de sus instituciones políticas y jurídicas, respecto a los demás pueblos del orbe que debían someterse a ellos. Numerosos filósofos y funcionarios dedicaron especial atención a justificar aquellas ideas eurocéntricas, las cuales aún sobreviven en determinados ámbitos académicos.

Algunos investigadores consideran, inadecuadamente, que desde los tiempos de la conquista y colonización de la mayor parte de los pueblos de América, África y Asia comenzó la globalización. Se desconoce así la especificidad de esta nueva etapa del capitalismo, que no debe confundirse ni con los procesos de universalización de las culturas,

que han existido desde los primeros estadios civilizatorios de la humanidad, ni con el despegue del mercado mundial y la internacionalización de las relaciones entre los países, propugnada desde sus inicios por la modernidad y articulada con el surgimiento del Estado-nación. Si bien este último constituyó una necesidad para asegurar las relaciones capitalistas de producción y las instituciones jurídicas y políticas de la sociedad burguesa, actualmente parece que la globalización ha afectado su soberanía (Picarella y Scocozza, 2019, p. 111). Esta, al igual que el Estado-nación, aunque se consolidó en la modernidad, no apareció por vez primera en ella.

Analizar en qué medida los diversos factores desplegados en la actual época de la globalización afectan, de diferentes maneras, la soberanía del Estado-nación constituye el objeto del presente trabajo. Entre estos factores se incluyen los informativos y comunicativos, con el objetivo de ofrecer algunas posibles respuestas a la pregunta: ¿Qué papel deben desempeñar los Estados tradicionales ante esta problemática?

Efectos diferenciados de globalización en la soberanía del Estado-nación

Sería ingenuo considerar que la soberanía del Estado-nación en la actual época de la globalización se ve afectada de manera similar en los países desarrollados que en los periféricos del sistema-mundo capitalista. Aunque es un hecho innegable, no es objeto del presente análisis precisar en qué medida estos últimos fueron las víctimas que propiciaron el desarrollo de aquellos.

En la época naciente del capitalismo, la soberanía de numerosos pueblos "descubiertos" se vería afectada por las políticas de conquista y colonización desplegadas por voraces monarquías imperiales, las cuales llevaban a cabo su insaciable fagocitosis de tierras y recursos naturales utilizando ejércitos de ocupación.

Como consecuencia de esas políticas, mantenidas hasta la actualidad, se ha visto afectada directamente la soberanía de la mayoría de los países neocoloniales. Esto también ocurre en aquellos que, debido a los mecanismos de poder imperial, presentan una independencia ficticia.

Algo novedoso que presenta la globalización es que ya no son solo los poderosos gobiernos y ejércitos los que afectan la soberanía de determinados Estados-nación, sino que, en mayor grado, lo hacen las empresas privadas transnacionales que escapan a controles gubernamentales. En ocasiones, estas llegan a afectar la soberanía incluso de los países desarrollados donde radican sus casas matrices.

Son realmente pocos los investigadores que consideran que la globalización no ha implicado una afectación significativa de la soberanía del Estado-nación, al homologarla

con épocas anteriores del capitalismo. Incluso, algunos plantean un actual surgimiento de "estados fortalezas"," considerando que "[...]" los Estados-nación son los principales agentes de la globalización, así como los garantes de las condiciones políticas y materiales necesarias para la acumulación de capital global" (Barrow, 2022, p. 91). El hecho de que las empresas transnacionales necesiten que el Estado-nación subsista para salvaguardar jurídicamente sus intereses no significa que se subestimen las afectaciones a su soberanía debido a la globalización.

En verdad, la globalización constituye una etapa sustancialmente diferente del desarrollo del capitalismo, aunque guarde algunas similitudes con las anteriores (Guadarrama, 2006, p. 55). No debe ser reducida a un simple producto de la ideología neoliberal.

Algunos la identifican como una etapa imperial del capitalismo en la que "la soberanía declinante de las naciones-estado y su progresiva incapacidad para regular los intercambios económicos y culturales es, de hecho, uno de los síntomas principales de la llegada del imperio" (Negri y Hardt, 2005, p. 44). Independientemente de la carga ideológica de tales planteamientos, lo cierto es que no resulta difícil demostrar que la soberanía del Estado-nación, en algunos países más que en otros, ha sido afectada.

La mayoría de los analistas del tema opinan que la soberanía del Estado-nación se ha debilitado, en lugar de fortalecerse, aunque establecen lógicas diferencias sobre la misma en los diferentes países, en correspondencia con su nivel de desarrollo socioeconómico, político, cultural, tecnológico, etc. Precisamente, este último factor ha sido determinante, aunque condicionado por otros, pues

> [...] luego de haberse consolidado como la forma de organización política de la modernidad, funcional al capitalismo, el Estado nación entra en crisis justamente porque el fin de la bipolaridad permitió la expansión de un único modo de producción a escala planetaria, sustentado en el poder de la técnica, cuyo carácter incondicionado e irrestricto ha favorecido la formación de superpotencias que amenazan la existencia de los Estados nacionales, poniendo en jaque su soberanía. (Restrepo, 2019, p. 43)

Es indudable que durante la existencia del llamado campo socialista, la injerencia de las empresas transnacionales se vio algo limitada, al menos en los países que lo conformaban.

Tal criterio, aunque muy compartido, no le otorga la condición de absoluta veracidad. Sin embargo, sugiere valorar qué razonamientos lo fundamentan, especialmente cuando lo sostiene un Premio Nobel de Economía, que se encuentra muy distante de la izquierda, pero que, con honestidad académica, reconoce que "Estamos presenciando

una nueva forma de sociedad entre la inversión privada y el Estado, en la cual el público soporta sobre sus espaldas todo el riesgo y el sector privado se lleva toda la ganancia" (Stiglitz, 2009, p. 53). De esto se puede inferir en qué medida lo privado afecta la soberanía del Estado-nación, aunque de manera diferenciada, de acuerdo con el nivel de desarrollo de los diversos países.

La cuestión resulta de mayor gravedad cuando se reconoce que la incidencia de las empresas transnacionales no se limita a afectar la soberanía del sector público, sino también la autodeterminación del sector privado, en especial a través de los medios de comunicación masiva y la cooptación de los consumidores. "El Estado y sus instituciones aseguran la privatización de lo público, pero también la penetración en los ámbitos más privados, como parte de un proceso general de reorganización de lo público y lo privado, en el que por ahora se desdibujan las fronteras entre uno y otro ámbito" (Calveiro, 2012, p. 57). Si algunos gobiernos se pliegan ante las asfixiantes exigencias de tales empresas, bajo la excusa de invertir para su desarrollo, es fácil valorar las sensibles afectaciones a su soberanía. Este hecho se analiza no solo desde las ciencias económicas, sino también desde las ciencias jurídicas (Echeverri, 2014, p. 207).

Los países menos desarrollados no cuentan con suficientes recursos económicos ni humanos calificados para potenciar la investigación científica y tecnológica. Sus gobernantes son presionados a plegarse ante productos y tecnologías importados, cuyas patentes son bien resguardadas por las empresas transnacionales. Esto explica que, en sus universidades, prevalezca la formación de profesionales que limitan sus conocimientos a capacitarse en "*know how*", en lugar de generar nuevas tecnologías. Cuando descubren estudiantes aventajados, les facilitan becas en los países desarrollados, lo que propicia el fenómeno conocido como "robo de cerebros".

El Estado-nación nunca abandona del todo sus responsabilidades sociales con los sectores populares, pero las disminuye paulatinamente, al punto de convertir sus derechos en servicios que se ofrecen al trasladar al sector privado transnacional tierras, minas, industrias, empresas, instituciones de salud, educativas y de pensión laboral, entre otros (Engel, 2010, p. 267). Las políticas neoliberales impuestas por las transnacionales afectan a los sectores populares de todos los países, incluidos los desarrollados, aunque estos no sean los más perjudicados (Stolowics, 2016, p. 1121).

El magnate George Soros es quien, sin hipocresía alguna, argumenta mejor cómo las políticas neoliberales deben afectar la soberanía:

> Para estabilizar y regular una economía verdaderamente global, es necesario algún sistema global de toma de decisiones políticas. En una palabra, necesitamos

> una sociedad global que respalde nuestra economía global. Una sociedad global no significa un Estado global. Abolir la existencia de los mercados no es viable ni deseable; pero en la medida en que hay intereses colectivos que trascienden las fronteras estatales, la soberanía de los Estados debe subordinarse al derecho internacional y a las instituciones internacionales. (Soros, 1998, p. 31)

Cualquier política pública que salvaguarde los intereses nacionales de un país será considerada contraproducente e incluso premoderna por parte de las empresas transnacionales. Asimismo, para los gobiernos de los países desarrollados, dicha política representaría un obstáculo para el desempeño del "libre" mercado. Este, en realidad, solo existe en el imaginario de algunos ilusos que, conscientemente, ignoran las políticas de *dumping* y otras manipulaciones mercantiles llevadas a cabo por las empresas transnacionales.

Existen innumerables factores que, en el contexto de la globalización, afectan de forma diferenciada la soberanía del Estado-nación en diversos países; de ahí que resulte difícil analizarlos en un breve artículo. No obstante, se debe prestar atención especial a cuáles políticas pueden contribuir a minimizar —ya que no es posible impedir totalmente— el posible efecto devastador de la globalización en este aspecto.

Una de ellas consiste en promover procesos de integración económica entre determinados países. La máxima romana de "divide y vencerás" es tan vigente hoy como hace dos milenios. Todo lo que contribuya a fomentar la cultura integracionista (Guadarrama, 2021) debe propiciar que los gobiernos asuman un mayor protagonismo para lograr procesos integracionistas que, de algún modo, favorezcan la soberanía de los países que participen en ellos frente a la voracidad de las empresas transnacionales.

Sin embargo, hay quienes consideran que "[...] los protocolos de la integración contemporánea son mecanismos de imposición de la liberalización, de las condiciones de funcionamiento de la economía mundial y restringen los intentos por el ejercicio de la soberanía nacional y regional que formulan algunos proyectos políticos" (Gambina, 2015, p. 67). Tal aseveración es controvertible. Todo dependerá del tipo de integración de que se trate, ya que estas pueden resultar formas de enfrentar a los monopolios transnacionales.

Cuando George Bush (hijo) propuso implantar la Alianza de Libre Comercio para las Américas (ALCA), la mayoría de los presidentes latinoamericanos no la aceptaron, ya que se percataron a tiempo de que esta afectaría sus respectivas soberanías. De manera similar, José Martí se opuso al panamericanismo, en consonancia con la Doctrina Monroe, durante la Conferencia Panamericana de Washington en 1889, en la que se pretendía imponer el dólar como moneda única para todos los países americanos.

Como reacción a tales propuestas, los países latinoamericanos generaron nuevas instituciones integracionistas, como el ALBA, la UNASUR y la CELAC. Sin embargo, los gobernantes estadounidenses se las ingeniaron para boicotear estas políticas y promovieron tratados unilaterales de libre comercio con algunos países.

Las consecuencias del proceso desnacionalizador y neocolonial que dichos tratados han traído se observan en el caso de México (Morales, 2017, p. 136). Ante tales políticas unilaterales y divisionistas de promover estos tratados de libre comercio —que también la Unión Europea ha acordado con algunos países—, los gobernantes no tienen otra alternativa que mantener y promover instituciones integracionistas en sus respectivas regiones geográficas, como ha sabido hacer la Unión Africana. A las afectaciones de la soberanía del Estado-nación tampoco ha escapado la propia Unión Europea (Zuleta, 2012, p. 21).

Este hecho se ha evidenciado en los últimos tiempos en la subordinación de esta unión no solo a las transnacionales estadounidenses, sino también a las políticas gubernamentales de ese poderoso país, que cuenta con otro potente instrumento de manipulación de la soberanía de otros Estados: el predominio mundial del dólar. Aunque asoman síntomas de su debilitamiento ante acuerdos de algunos países para comerciar con sus respectivas monedas, su hegemonía se mantiene, pues

> [...] el Sistema Monetario Internacional ha creado una contradicción que tiene como escenario el mercado mundial de divisas —y no tiene solución dentro de su actual estructura— en tanto su actividad es por una parte fuente inagotable de lucro para una poderosa élite financiera y por la otra genera inestabilidad e inseguridad a los estados; y constituye un serio obstáculo para que estos puedan ejecutar políticas de desarrollo económico de manera estable y coherente. (Soberón, 2012, p. 21)

Es indudable que los efectos de la globalización en la soberanía del Estado-nación son muy diferentes en los países hegemónicos y en aquellos que aún mantienen relaciones de subdesarrollo y dependencia. Esto no significa que estos últimos estén condenados fatalmente a sufrir siempre atentados contra su soberanía. En la medida en que sus gobiernos establezcan políticas públicas que impongan límites precisos a las empresas transnacionales y a la intervención en sus respectivas economías, y que tomen acuerdos recíprocamente beneficiosos a través de instituciones integracionistas, podrán enfrentar esta amenaza, que, en lugar de disminuir, tiende a aumentar en estos tiempos de globalización.

Factores políticos y jurídicos que en la globalización inciden en la soberanía del Estado-nación

Los factores económicos inciden esencialmente en la soberanía del Estado-nación, junto a los factores políticos y jurídicos que resultan concomitantes. Desde su surgimiento hasta el presente, se supone que este ha pretendido garantizar una serie de derechos fundamentales de los ciudadanos, sobre la base de presupuestos democráticos (Guadarrama, 2016); sin embargo, una cuestión muy diferente es su cumplimiento. Según Hannah Arendt:

> Desde el surgimiento del Estado nacional la opinión corriente es que el deber del gobierno es tutelar la libertad de la sociedad hacia dentro y hacia fuera, si es necesario usando la violencia. La participación de los ciudadanos en el gobierno, en cualquiera de sus formas, es necesaria para la libertad solo porque el gobierno, puesto que necesariamente es quien dispone de medios para ejercer la violencia, debe ser controlado en dicho ejercicio por los gobernados. (Arendt, 2008, pp. 174-175)

> En realidad, esto ha resultado ser una utopía abstracta muy distante de cualquier utopía concreta, pues, independientemente de que la mayoría de los Estados democráticos cuenten formalmente con parlamentos y otras entidades que se consideran representantes de los intereses de los gobernados, en verdad no es así, y mucho menos en tiempos de globalización, cuando prevalecen en el poder político aquellos que manejan el poder económico. Chomsky plantea que el nuevo orden mundial construido desde las ruinas de la segunda guerra mundial se atuvo estricta¬mente a las directrices churchillianas [...]. El mundo debe ser gobernado por las naciones ricas, que a su vez están gobernadas por los hombres ricos que viven en ellas, de acuerdo con la máxi¬ma de los padres fundadores de la democracia estadounidense: "la gente que posee el país debe gobernarlo (John Jay)". [...] En la medida en que el proceso seguía su curso natural, tendió hacia la globalización de la economía, con las consecuencias derivadas de ello: la globalización del modelo de sociedad de los dos ter¬cios propios del tercer mundo, alcanzando incluso el núcleo de las economías industriales, y un gobierno mundial de facto que representa los intereses de las transnacionales y las instituciones financieras que gestionan la economía internacional. (Chomsky, 1996, p. 243)

Una de las diferencias sustanciales del Estado-nación respecto a formas anteriores de Estado es que pretende garantizar a sus ciudadanos una serie de derechos y garantías

jurídicas y políticas que los protejan de las posibles arbitrariedades de las que los súbditos eran víctimas. Así, estos derechos y garantías quedarían plasmados en numerosas constituciones, las cuales continúan perfeccionándose.

> Uno de los efectos que la globalización ha logrado impactar en la gran mayoría de países adheridos a su sistema de gobierno interplanetario, es la paulatina desaparición o transformación de los antiguos estados nacionales. La soberanía, la democracia y los derechos humanos, como elementos esenciales de las constituciones políticas de los países menos desarrollados, tendrán que adaptar su contexto a estas nuevas condiciones que inevitablemente se vienen imponiendo. (Rubio, 2011, p. 391)

Con la globalización, se ha evidenciado la vulnerabilidad de la soberanía y sus consecuentes afectaciones a la mayoría de la población, aunque un sector minoritario, dada su articulación con las empresas transnacionales, se beneficia. "Podemos coincidir con Michel Foucault en considerar que el problema de la soberanía es secundario respecto del problema del poder tal y como este último se expresa a través de multitud de dispositivos surgidos de manera más o menos fortuita" (Brown, 2014, p. 143). En definitiva, lo determinante es quiénes sustentan el poder económico y no la respetabilidad política o jurídica, aun cuando esta última pueda tener un determinado reconocimiento internacional.

No obstante, algunos otorgan mayor peso al aspecto político que al económico, como Jörg Huffschmid, para quien "el núcleo de la globalización en el contexto actual es algo más que una simple internacionalización. Es la disolución de un proyecto de reformas interno de la sociedad e internacional a través de un proyecto de contrarreforma nacional e internacional. Esto no es, en primera línea, un proceso económico sino un proceso político" (Huffschmid, 2001, p. 38). Por supuesto, la implicación política y jurídica de las afectaciones a la soberanía del Estado-nación por parte de las transnacionales es reconocida; sin embargo, el factor que, en última instancia, subyace en ellas es eminentemente económico.

> El Estado constitucional señala que para el cumplimiento de los derechos individuales y sociales se debe establecer una serie de garantías, las cuales se reflejan en principios y procedimientos que tienen como fin la aplicación de la ley, el reconocimiento explícito de la supremacía de la libertad y el control político para evitar el surgimiento de sistemas arbitrarios. [...] Este modelo se encuentra íntimamente vinculado con el sistema jurídico y político del Estado moderno y, de una u otra manera, ha evolucionado con él, de tal forma que las crisis o

> las transformaciones del Estado nación han ocasionado cambios del modelo garantista. (Carvajal, 2017, p. 7)

Estos cambios se sintetizan en que el Estado-nación no siempre es capaz de defender los intereses de su propia población frente al poder de las transnacionales, especialmente cuando la deuda externa, como espada de Damocles, lo obliga a cumplir compromisos financieros en detrimento de asegurar las conquistas sociales de sus respectivos pueblos. Entre las causas de tal situación está su estructura. "La incapacidad del Estado para responder a los nuevos desafíos del escenario global radica en la incapacidad de transformación de su propia estructura, la cual, sin embargo, se ve obligada a responder a los retos del nuevo escenario en el que se desenvuelve" (Castells et al., 2001).

Para algunos, las consecuencias políticas y jurídicas de este proceso son catastróficas en relación con la ciudadanía, como considera Arístides Obando:

> La crisis del Estado-nación ha sido agudizada por la globalización, en tanto fuente generadora de un nuevo orden mundial, en el que lógicamente deviene una nueva noción de ciudadanía; en correspondencia con la existencia de los capitales sin patria como expresión de las nuevas lógicas del mercado global, asistimos a la configuración del Estado sin nación, y con ello a la ciudadanía igualmente sin patria, sin nación; en cuyo caso, los Derechos Humanos por su carácter y pretensión de universalidad, constituyen el nuevo parámetro de definición de esta categoría. (Obando, 2013, p. 25)

En verdad, no parece que el asunto llegue a tales efectos, aunque no deja de llamar la atención que se consideren las afectaciones en estas magnitudes. Otra cuestión realmente preocupante es el impacto de la globalización en los derechos laborales y sociales, de manera desigual en los diferentes países, pues

> El neoliberalismo, como forma de organización del capitalismo a partir de sus módulos y redes más poderosas, logra la hegemonía ideológica con una democracia en que lo social es adjetivo. Esa hegemonía es tanto más fuerte cuanto más débil es el Estado-Nación y más débiles las redes y módulos que a su amparo controlan un territorio o un espacio socioeconómico del ex mercado nacional, o del ex mercado protegido del trabajo y la seguridad social. (González Casanova, 2003, p. 14)

Si algunos países pretenden mantener un papel en el mercado mundial y cierto reconocimiento en la comunidad política internacional, indudablemente estarán obligados a ceder parte de su soberanía a mecanismos financieros que, como buitres, permanecen

al acecho de cualquier presa en desgracia. "Los Estados que quieran mantenerse dentro de los circuitos globalizados se ven entonces abocados a aumentar su dependencia de las normas internacionales. Aquellos que no acceden a este requerimiento quedan reducidos al papel de Estados excluidos del concierto global, y en el peor de los casos, a Estados inviables o colapsados" (Luttwak, 2000, pp. 49-81).

Existen múltiples factores políticos y jurídicos que, en el contexto de la globalización, inciden en la soberanía del Estado-nación. Estos factores deben ser analizados con enfoques holísticos y complejos. Sin embargo, en los últimos tiempos, el impacto cibernético sobre la información y la comunicación constituye uno de los grandes desafíos que enfrenta dicha soberanía.

El papel del Estado-nación ante la asfixia informativa digital

En sus momentos germinales, el Estado-nación podía controlar mucho mejor los medios de información y comunicación, dada su precariedad tecnológica, que se limitaba básicamente a la prensa. La invención de la radio y la televisión complicó significativamente su poder al respecto. Con la aparición de internet, tal control se volvió muy difícil, aunque no imposible, ya que los avances tecnológicos también posibilitaron interferir en estos ámbitos. La soberanía de los países sobre los mismos dependería cada vez más de su capacidad tecnológica; aun así, se convertiría en un serio problema evadir todo tipo de incursiones, especialmente en su ciberespacio.

La actual asfixia informativa digital afecta no solo al Estado-nación, sino a todos los ciudadanos en diverso grado. Aunque no todos están conectados, esto no impide que se vean afectados de alguna manera por los mensajes que circulan de diversas procedencias, algunas de las cuales son peligrosas. El hecho de que no todos interactúen de la misma forma con las redes sociales y los espacios informatizados de gobiernos, instituciones de la sociedad civil, empresas transnacionales, comercios, bancos, etc., no significa que puedan evadir fácilmente las leyes, disposiciones y reglamentaciones emanadas por diferentes vías informatizadas.

Cuando alguna disposición de carácter internacional afecta la soberanía de cualquier país, ello implica que, en última instancia, la población es la que más sufre las consecuencias de estos nuevos tipos de totalitarismo. "El papel del Estado en una economía globalizada no es cómodo. No controla ya los cambios, ni los flujos monetarios, de información o mercancías. El Estado ha dejado de ser totalitario, pero la economía, en la era de la globalización neoliberal, tiende a convertirse cada vez más en totalitaria" (Ramonet, 2008, p. 53).

No solo la economía se impone de modo totalitario, sino también el dominio del ciberespacio.

> Los Estados ya no pueden hacer valer sus opiniones solo prevalidos del principio de soberanía, pues existen nuevas problemáticas mundiales, nuevos acuerdos y actores internacionales con los que deben compartir responsabilidades en un sistema *pluricéntrico* de organizaciones internacionales, organizaciones no gubernamentales, empresas transnacionales, regiones y la misma sociedad civil interdependiente e interconectada por la revolución en la comunicación. (Vieira, 2016, p. 135)

Tal situación hace que el Estado-nación, de forma casi obligatoria, se vea precisado a ceder parte de su soberanía si pretende incorporarse o mantenerse interconectado a redes informáticas y comunicativas internacionales, cuyos datos son almacenados por supercomputadoras. Estas pueden convertirse en un poderoso bumerán en las sutiles guerras mediáticas que, sin necesidad de ser declaradas, ya lo afectan.

El ancestral conflicto que ha existido en la historia entre el humanismo y la alienación (Guadarrama, 2012, pp. 21-69) ha adquirido dimensiones insospechadas recientemente, debido al fuerte impacto de los medios masivos de comunicación en la mentalidad de millones de personas, especialmente en niños y jóvenes. Lo más peligroso de esta incursión en la vida intelectual de estas nuevas generaciones es que sus resultados no se constatan a corto plazo; sin embargo, en un futuro próximo, pueden resultar nefastos.

Esto plantea no solo serios problemas generacionales, al observar que a los adultos mayores les resulta difícil manejar dispositivos electrónicos para acceder a información que se presupone está elaborada para toda la población de un país, sino que la cuestión se vuelve más enajenante al corroborar que, si bien el número de personas que poseen celulares y otros equipos comunicativos es cada vez mayor, existen millones en todo el mundo que no disponen ni siquiera de acceso telefónico. Otro problema de mayor envergadura es el de los países con altos índices de analfabetismo, lo cual también posibilita la manipulación mediática tanto en el plano económico como en el político, especialmente en los procesos electorales.

> Algunos coinciden en que
>
> El institucionalismo neoliberal mantiene que los cambios tecnológicos, que han reducido los costes de transporte y de comunicación, han conducido a una pérdida de soberanía interdependiente, que a su vez, ha impulsado a los Estados a firmar acuerdos (un ejercicio de soberanía legal internacional) con el fin de crear instituciones

> internacionales, algunas de las cuales han comprometido su propia soberanía westfaliana al establecer estructuras de autoridad externas. (Krasner, 2001, p. 28)

A esto se suma el surgimiento de estudios superiores virtuales que, en ocasiones, se presentan con la fachada de prestigiosas universidades de reconocimiento internacional, pero que, en realidad, son gestionados por empresas transnacionales que, operando bajo las leyes del mercado, ofrecen títulos de pregrado y posgrado a precios significativamente inferiores.

No hay duda de que, ante la asfixia informativa digital, los gobernantes deben buscar asesoría permanente en los profesionales del campo cibernético si aspiran, de algún modo, a evadir agresiones a la soberanía de sus países. "Los políticos tendrán que tomar decisiones asesorados de centros de prospectiva o consejos de sabios que valoren los cambios que las nuevas tecnologías y descubrimientos científicos van a significar en la sociedad, la economía, el trabajo y el pensamiento humano" (Blaschke, 2012, p. 192).

Desde su surgimiento, el capitalismo ha tenido que superar múltiples crisis de diferente carácter. En la actualidad, se le presentan nuevos desafíos por el impacto disruptivo de la información digitalizada, lo que le ha llevado a buscar alternativas, como las que proporciona la inteligencia artificial, con la incertidumbre que esta genera. "Hoy en día, la principal contradicción presente en el capitalismo moderno es aquella que se da entre la posibilidad de unos bienes abundantes y gratuitos producidos socialmente y un sistema de monopolios, bancos y gobiernos que se esfuerzan por mantener el control sobre el poder y la información" (Mason, 2016, p. 198). Tal contradicción puede que no tenga una dialéctica de superación y se agudice cada día más. Sin embargo, lo que resulta inminente es plantear una respuesta factible a las siguientes preguntas: ¿Puede el capitalismo actual prescindir del Estado-nación? Por mucho que las transnacionales afecten la soberanía del Estado-nación, no pueden destruirlo totalmente. ¿Qué entidad podría sustituirlo para suplir ese apadrinamiento que, incluso, les permite declararse en quiebra y que el "papá Estado" los indemnice?

Existe consenso en que, "A pesar de la globalización, o incluso a causa de ella, la soberanía nacional sigue siendo esencial como principio para organizar las sociedades, y esto se aplica tanto a países pequeños como a grandes" (Venne, 2003, p. 49). Esto significa que "[...] el Estado-nación, a pesar de su crisis, sigue siendo la institución más importante del control global" (Pastrana, 2005, p. 267).

> No cabe duda de que durante mucho tiempo todavía la puesta en práctica de las consecuencias de la globalización no podrá desvincularse el Estado. Puede parecer,

> perfectamente, que este último está amenazado, incluso debilitado por el proceso de globalización; a pesar de todo, le corresponderá en esta coyuntura de globalización, asegurar en un contexto difícil e in situ, localmente con respecto al proceso global, la mejor regulación posible de la esfera social. (Arnaud, 2000, p. 40)

Está demostrado que "Los teóricos neoliberales han cuestionado el papel positivo del Estado en el desarrollo de la propiedad capitalista, cuando sabemos que es solo retórica, pues en los hechos, argumentan a favor de la regulación económica estatal".[1] Esto les ha sido necesario para reproducir permanentemente el ciclo de la dependencia tecnológica de aquellos países invadidos, tanto materialmente como en su ciberespacio.

Conclusiones

La soberanía de que disponía el Estado-nación durante la época del capitalismo pre-monopolista se debilitaría posteriormente con el advenimiento de los monopolios transnacionales y se intensificaría con la llegada de la globalización. La afectación de la soberanía de los países depende de su nivel de desarrollo socioeconómico y cultural, en un grado inversamente proporcional a dicho nivel.

Aunque la globalización, en cierta medida, ha puesto en crisis al Estado-nación, tampoco puede asfixiarlo totalmente, ya que las empresas transnacionales requieren su protección jurídica, especialmente en casos de quiebra financiera u otros acontecimientos que las afecten.

Los gobernantes deben garantizar políticas públicas proteccionistas para sus respectivas economías y propiciar instituciones integracionistas con aquellos países con los cuales los intercambios económicos y culturales resulten recíprocamente beneficiosos. Esto es fundamental, ya que no solo está en peligro el Estado-nación, sino también la identidad cultural de los pueblos, la cual es tan importante como la institucionalidad económica, política y jurídica.

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[1] "E. Molina, "Estado, violencia y socialismo: una aproximación", en *Marx Ahora. Revista Internacional*, La Habana, n.o 33, 2012, p. 75.

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SOBERANÍA DIGITAL Y METAMORFOSIS RETICULAR. ¿QUÉ DESTINO PARA QUÉ ESTADO?*

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DIGITAL SOVEREIGNTY AND RETICULAR METAMORPHOSIS. WHAT DESTINY FOR WHICH STATE?

Resumen

El impacto disruptivo de las tecnologías digitales y algorítmicas en el ordenamiento jurídico contemporáneo ha transformado las condiciones de la acción pública, cuestionado los modelos democráticos establecidos y puesto a prueba la soberanía de los Estados. Asimismo, estas tecnologías han redistribuido poderes entre las esferas públicas y privadas, renovando el juego de confrontación entre intereses individuales y colectivos, y puesto en riesgo el equilibrio del ecosistema constitucional. La identificación de los nudos problemáticos que configuran el espacio jurídico contemporáneo, asediado por las tecnologías emergentes, constituye el leitmotiv de esta contribución. Su objetivo es

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doble: explorar las transformaciones que se están produciendo en el derecho constitucional y poner a prueba la configuración de la soberanía digital, todo ello a la luz de la respuesta necesaria que el Estado debe preparar para hacer frente a los retos que plantea la emergencia de la sociedad digitalizada.

Palabras clave
constitucionalismo digital; Estado; soberanía digital; ciberespacio

Abstract
The disruptive impact of digital and algorithmic technologies on contemporary legal order has transformed the conditions of public action, refuted established democratic models, tested the sovereignty of states, redistributed powers between the public and private spheres, renewed the game of confrontation between individual and collective interests, and also put the balance of the constitutional ecosystem at risk. The identification of the problematic nodes that constellate the contemporary legal space besieged by emerging technologies is the leitmotif of this contribution, whose objective is twofold: to explore the transformations taking place in constitutional law and to test the configuration of digital sovereignty, in the light of the necessary response that the State must prepare to face the challenges posed by the emergence of the digitized society.

Keywords
digital constitutionalism; State; digital sovereignty; cyberspace

Introducción

En el perímetro ilimitado de un mundo digitalizado y de un futuro desencantado, la tecnología se inscribe como una promesa autocumplida. En este contexto surgen dos registros antagónicos: por un lado, el potencial tecnológico abre horizontes ilimitados de crecimiento y desarrollo, mientras que, por otro, alimenta la ansiedad y la incertidumbre. Así, se genera una doble narrativa: la eficacia y la catástrofe. Estas posiciones, aunque opuestas, constatan el salto cognitivo desencadenado por la revolución digital, que ha trastocado las referencias espaciotemporales habituales. Esto revela horizontes inesperados.

Si unos se alegran al pensar en el mundo digital como terreno de conquista para un ejercicio más amplio de los derechos y libertades fundamentales, otros se inquietan, temiendo peligros, amenazas y riesgos. Dicho de otro modo, los dispositivos tecnológicos sofisticados pueden ampliar las libertades fundamentales del individuo o, por el mismo poder práctico, causar daños, lesiones y restricciones. Esto plantea nuevos desafíos para el ámbito constitucional.

La expansión de las herramientas digitales tiene un impacto directo en los ordenamientos constitucionales y en los derechos. Obliga a la doctrina constitucionalista a reflexionar de manera más sistemática sobre las dinámicas inervadas por las tecnologías emergentes. La infosfera permite un flujo de información antaño impensable, desafía al poder público y registra el auge de los poderes privados. Surgen múltiples tensiones, como el "capitalismo de plataforma, de información o de vigilancia" y el "poder de los datos y la zoonosis jurídica". Expresiones como "silicolonización del espacio (no solo) digital" evidencian el potencial amenazador que mina la resiliencia de los derechos fundamentales.

El impacto disruptivo de las tecnologías digitales y algorítmicas en los marcos jurídicos contemporáneos transforma las condiciones de la acción pública. Confunde los modelos democráticos establecidos, pone a prueba la soberanía de los Estados, redistribuye los roles entre lo público y lo privado. Redibuja la confrontación entre intereses individuales y colectivos y pone en riesgo el equilibrio del ecosistema constitucional.

Las principales amenazas a las democracias constitucionales provienen de actores privados. Aunque estos gobiernan espacios formalmente privados, ejercen funciones sustantivas tradicionalmente atribuidas a los poderes públicos, a veces sin garantizar ninguna protección. El auge de la sociedad algorítmica ha generado un cambio de paradigma sin precedentes. Difumina los límites entre las dimensiones públicas y privadas. La esfera digital y la gobernanza de los poderes económicos privados, que derivan su fuerza y sus códigos comunicativos de lo digital, amenazan con revertir una regresión de las garantías encarnadas y tuteladas por la figura del Estado constitucional (Venanzoni, 2020a).

Esto desvela no pocos nudos problemáticos y ofrece una perspectiva estimulante que persuade al intérprete. Su tarea es descifrar las transformaciones que se están produciendo en la sociedad a partir del desarrollo de la tecnología y el impacto que estas tienen en el derecho y en los derechos (Frosini, 2020). En consecuencia, debe perimetrar y razonar sobre la fragmentación de los derechos fundamentales y de los valores democráticos, los límites constitucionales de la soberanía digital y la prevalencia de poderes híbridos en el entorno digital. Es un entorno que representa una extraordinaria oportunidad para garantizar y ofrecer servicios transfronterizos y ejercer las libertades individuales.

Sin embargo, plantea una serie de retos al derecho constitucional nada desdeñables. No sólo porque pone en cuestión la protección de determinados derechos fundamentales, sino también porque invade el espacio tradicional de actuación reservado a los poderes públicos. Permite que actores no estatales —grandes multinacionales y organizaciones transnacionales propietarias, comercializadoras o gestoras de tecnologías digitales— amplíen progresivamente sus funciones, afirmando así una especie de supremacía del poder privado (digital) en el ámbito regulatorio. Todo esto ocurre casi indiferente a los frenos impuestos por ese poder limitador, lo que corrobora la misión congénita del constitucionalismo moderno (Iacovino, 2022).

Ahora bien, si los derechos fundamentales y los valores democráticos son objeto de injerencias públicas y privadas, en un contexto de cambio progresivo de la geometría del poder y de una gobernanza digital que ha creado nuevas dinámicas híbridas, surge entonces con fuerza la necesidad de redefinir los límites constitucionales. Estas dinámicas pueden invadir las categorías tradicionales del derecho público, limitando y degradando su alcance.

Con el fin de someter las plataformas digitales al derecho constitucional o de revisar la relación entre el derecho público y el privado, con clara referencia a los deberes del Estado de regular el complejo cibernético, dentro y fuera de sus límites jurisdiccionales. Desde una perspectiva que combina innovación y riesgo, resulta plausible debatir el papel de la regulación. Así, pretende asegurar garantías y el control democrático del desarrollo de las tecnologías algorítmicas, evitando la deriva tecno-determinista y la marginación de los actores públicos. De esta forma, se garantiza la capacidad del Estado para proteger los derechos fundamentales y los valores democráticos. "La tecnología no debe ordenar la sociedad, sino ser un medio para promover la evolución de la humanidad. De lo contrario, si la primera ordena el impulso de la segunda en los próximos años, podríamos ser testigos de la desaparición gradual de los valores constitucionales democráticos en nombre de la innovación» (Pollicino & De Gregorio, 2022, p. 5).

A partir de este marco surgen preguntas obligadas. ¿Cómo cambia la relación entre los poderes en la sociedad algorítmica? ¿Cuál es el espacio reservado al Estado? El Estado no puede ni debe renunciar por completo a su papel. ¿Cómo cambia el concepto de soberanía? ¿Qué distorsiones sufre en la infosfera digitalizada? ¿Cómo se combina con la utilidad política y la deseabilidad normativa? A partir de estas preguntas, exploraremos analíticamente las transformaciones que se están produciendo en el derecho constitucional. Analizaremos la configuración de la soberanía digital a la luz de la respuesta necesaria que el Estado debe preparar para hacer frente a los retos que plantea la transición hacia una sociedad digitalizada.

Constitucionalismo digital: impulsos innovadores y necesidades normativas

Las libertades y las tecnologías están conectadas y su interrelación constante genera una correspondencia amorosa, al menos en los Estados constitucionales liberales. En estos contextos, el desarrollo tecnológico alimenta la ampliación de las libertades, expandiéndolas a nuevos ámbitos de la acción humana; sin embargo, este desarrollo también las pone en peligro.

Lograr conjugar armónicamente las libertades del individuo con la tecnología es, sin duda, un reto para el constitucionalismo. De hecho, los escenarios construidos por el constante auge de los gigantes de silicio son lugares donde se ejercen derechos y pueden restringirse, lo que incide en ámbitos enteros de convivencia y exige la adopción de normas específicas en numerosas áreas de la legalización.

Por consiguiente, la omnipresencia de las nuevas tecnologías hace estragos en el equilibrio entre derechos y libertades, en la ponderación de intereses e incluso en la relación entre poderes. Esto obliga al Derecho a vestirse con nuevos ropajes y a ponerse al día: debe hacerlo no sólo para regular la tecnología, sino también para hacer frente a las amenazas derivadas del incremento de los poderes privados transnacionales, y para reconocer 'nuevos derechos' que, aun sin una referencia normativa explícita, muestran un tono constitucional relevante, aunque implícito, que merece ser extrapolado.

Así pues, lejos de encontrarnos ante una subversión que altere principios fundamentales o ante una transición de la democracia a la tecnocracia, más bien vivimos en un nuevo momento constitucional, en el que la tecnología digital propicia la aparición de nuevas facetas de los derechos existentes y promueve el reconocimiento de otros nuevos.

> Desde el punto de vista del derecho constitucional, ¿las tecnologías determinan nuevas formas de derechos de libertad o pueden integrarse y, por lo tanto, reconocerse en el ámbito de las libertades constitucionales tradicionales? Es decir,

> ¿es necesario reescribir nuevas normas constitucionales para definir las libertades que se han determinado como consecuencia de la llegada de la tecnología, o se pueden interpretar las normas constitucionales vigentes para extraer de ellas las nuevas figuras jurídicas de los nuevos derechos de libertad? (Frosini, 2020, p. 2)

La emergencia de la sociedad digital y algorítmica corrobora un escenario inédito, reticular y global. Sus características parecen radicalmente distintas de aquellas en torno a las cuales se modeló la ciencia constitucionalista liberal-democrática. Es necesario, por tanto, identificar nuevos objetivos que permitan a la Constitución preservar la distinción entre poderes y garantizar las libertades y derechos fundamentales en el equilibrio democrático. Debemos preguntarnos qué está llamada a hacer una Constitución en la experiencia jurídica concreta, verificando si los elementos configuradores de su estructura deben permanecer inalterados o adaptarse a los cambios hasta el punto de convertirse en nuevos. En este sentido, el nuevo marco, lejos de conducir a la disolución de las razones del constitucionalismo. Por el contrario, las refuerza (Azzariti, 2014). Como señala la doctrina autorizada:

> El reto para el derecho constitucional consiste hoy en día en la capacidad de gobernar los procesos sociales liberados por la digitalización. Dejados a su libre albedrío, estos procesos son capaces de socavar los cimientos mismos sobre los que se sustenta el constitucionalismo, entendido como disciplina y limitación del poder y garantía de las esferas individuales y sociales (Bifulco, 2023, p. 48).

El auge de los poderes digitales privados desafía las características tradicionales del derecho constitucional. Esto promueve su posible evolución ante la necesidad de garantizar la protección de los derechos individuales a la libertad en un contexto radicalmente cambiado[1]. El equilibrio de poderes en el ecosistema constitucional también sufre una sacudida. Junto a los Estados-nación, aparecen las empresas privadas como nuevos actores dominantes. Estos actúan como 'porteros online' y ejercen el poder de regular el acceso y el uso de las herramientas tecnológicas.

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[1] No en vano, ha surgido un nuevo constitucionalismo que pone en primer plano la materialidad de las situaciones y las necesidades, que identifica nuevas formas de vínculos entre las personas y las proyecta a una escala distinta de las que conocíamos hasta ahora (Rodotà, 2012, p. 7). A modo de ejemplo: el advenimiento de la tecnología digital amplifica las posibilidades de los individuos de transmitir información; circunstancia que, desde el punto de vista constitucional, implica que se fortalezcan todos los derechos basados en el intercambio de información, como la libertad de expresión, la libertad religiosa, la libertad de reunión. Por otro lado, la tecnología digital amplifica el riesgo de amenazas a los derechos fundamentales: difamación, incitación al odio, ciberacoso, pornografía infantil son algunos de los ejemplos de posibles abusos de una libertad de expresión ejercida a través de medios digitales.

En este sentido, las grandes plataformas digitales se han convertido en verdaderos actores privados que compiten con los poderes públicos. Esto representa un desafío para el constitucionalismo, que debe renovarse para perpetuar su misión original de limitar el poder. Al hacerlo, necesita interceptar nuevas geometrías de acción. El cambio más relevante parece ser la adición de una dimensión vertical exclusiva a la clásica relación entre autoridad y libertad, y la incorporación de una nueva dimensión horizontal.

El objetivo es identificar las palancas e instrumentos más adecuados para limitar y contener el poder privado que detentan las grandes plataformas informáticas (Pollicino, 2024). Junto a la limitación del poder, surge otra cuestión: la distribución y el equilibrio de los poderes. La tecnología digital *de facto* tiene un fuerte impacto en las dinámicas de la separación de poderes. Esto amplifica el fenómeno de la globalización judicial (Pollicino, 2021), revisa el aparato administrativo estatal (Torchia, 2023) y aumenta el solipsismo de un legislador "desconcertado" e inerte ante la aceleración tecnológica.

Sin embargo, el ejercicio hermenéutico de aplicar las libertades constitucionales estatales a los fenómenos de la informática aún no parece del todo superado. Esto hace, entre otras cosas, para evitar el riesgo de caer en una especie de *'constitution-free zone'* (Frosini, 2023). Así, en este contexto incierto, se asoma el constitucionalismo digital. Este es un concepto especialmente atractivo para explicar la reciente aparición de contramedidas constitucionales funcionales para hacer frente a los retos que plantea la tecnología digital.

Cómo limitar el poder en la era digital y garantizar la protección de los derechos fundamentales son las cuestiones que animan el constitucionalismo digital. Esta corriente, como primera aproximación, pretende trasladar los valores y principios del constitucionalismo contemporáneo al contexto de la sociedad digital. Encarnando la idea de adaptación al escenario cambiante. En términos más específicos, la nueva vertiente teórica promueve la traducción de los valores centrales del constitucionalismo al contexto de la algocracia. Impone la necesidad de generar contrapartidas normativas frente a las alteraciones del equilibrio constitucional derivadas del advenimiento de la tecnología digital. Al mismo tiempo, proporciona los ideales, valores y principios que orientan dichas contrapartidas (Celeste, 2019).

La idea no resulta semánticamente unívoca, sino que aparece como sintomática de diferentes aproximaciones constitucionales a las tecnologías digitales, vinculadas a las dinámicas político-institucionales. En efecto, el sedicente concepto ha sido utilizado en distintos contextos y con significados diversos, a menudo contrapuestos. Esto ha dificultado llegar a un acuerdo sobre los fines y los instrumentos normativos que deberían encarnar sus valores. Algunos (Gill, Redeker y Gasser, 2015) utilizan este descriptor como término genérico para

referirse a una constelación de iniciativas que han tratado de articular un conjunto de derechos políticos, normas de gobernanza y limitaciones de poder en Internet[2].

Otros (en particular, De Gregorio, 2022), al registrar la creciente atención de las instituciones europeas hacia las plataformas digitales, la consideran una nueva fase del constitucionalismo europeo. Aquí, la adjetivación 'digital' implicaría situar el constitucionalismo en una dimensión temporal y material. Otros, en particular Celeste (2022), destacan la función de adaptación de los valores del constitucionalismo a la sociedad digital. Esto libera al constitucionalismo de la dimensión estatal y permite la transición hacia nuevos valores e ideales, como ocurrió cuando se democratizó.

La connotación sigue siendo vaga, heterogénea y muy evocadora. No obstante, es posible unificar la divergencia doctrinal. Se pueden trazar brevemente las posiciones surgidas desde principios de los años 2000 e identificar los principales desarrollos que han marcado su evolución. A partir de la toma de conciencia del carácter transnacional, inmaterial, no territorial y descentralizado de la sociedad de la información, surgieron varias perspectivas. Algunas se han centrado en la posibilidad de estructurar una gobernanza mixta. Esta implicaría la interacción entre la autorregulación del sector privado y el control de las instituciones públicas estatales ("constitucionalismo de la información"). Así, se atribuye al derecho privado un papel constitucionalizador. Otras posiciones debatieron la conveniencia de una gobernanza capaz de someter el poder de los actores privados al derecho constitucional. Esto se consideró una solución alternativa al derecho estatal, ya que el derecho constitucional es más proclive a establecer principios generales y permite a los jueces utilizar la Constitución como punto de referencia funcional para la resolución de cuestiones políticamente desafiantes ("constitucionalismo constituyente").

Tras la progresiva valorización del reconocimiento del papel y del poder de los actores no estatales en el proceso de regulación del mundo virtual, se formuló otra teoría: el "constitucionalismo apátrida". Esto reconoce el poder autorregulador de los actores privados y considera relevantes los procesos de constitucionalización autónomamente orquestados por los sectores sociales, a partir de la constatación de que la política estatal ya no es capaz de regular plenamente la complejidad de una sociedad fragmentada y plural.

Por último, la vertiente reciente del "constitucionalismo digital" se refiere a procesos de constitucionalización autopoyética en el contexto transnacional. Estos son impulsados

[2] A partir de esta definición operativa, numerosos estudios, principalmente de carácter político y jurídico, se han centrado en el análisis de declaraciones, cartas, declaraciones de derechos, actas y textos legislativos, intentando delimitar el conjunto de derechos digitales que las distintas iniciativas iban configurando, esclarecer las controvertidas relaciones entre discurso político y procesos de constitucionalización de la red, definir las especificidades del lenguaje utilizado en los documentos por los distintos actores5 , e indagar en las motivaciones de los actores implicados en la producción de textos proto-constitucionales (Santaniello, 2022, p. 48)

por organizaciones no gubernamentales y comunidades epistémicas. Según la teoría de las "constituciones sociales" (Teubner, 2005), las normas constitucionales también pueden surgir de procesos ascendentes. Así se exaltan los subsistemas autónomos de la sociedad mundial, identificados en la economía global, la ciencia, la tecnología y los medios de comunicación. Estos subsistemas han demostrado ser más eficaces en la elaboración de normas que posteriormente se institucionalizarán a nivel jurídico, gracias a la influencia recíproca entre los Estados, las instituciones y el contexto social. De este modo, surge una especie de "constitucionalidad informal" jalonada por estructuras jerárquicas de varios niveles.

Las diferentes declinaciones del constitucionalismo digital no son incompatibles entre sí. Aunque no hay consenso sobre dos cuestiones centrales (¿limita el poder privado o también el público? ¿Qué instrumento normativo debe implementar los valores del constitucionalismo?), todas se enfrentan a la limitación del poder de los actores dominantes. También reconocen la necesidad de una pluralidad de instrumentos normativos y de traductores de los valores constitucionales en la sociedad digital. Además, todas abogan por la perpetuación de las piedras angulares del constitucionalismo: la separación de poderes, la protección de los derechos humanos y la democracia. Por último, todos tienden a promover y sedimentar un sistema de valores destinado a estructurar un marco normativo. Este marco debe servir para proteger los derechos fundamentales y equilibrar los poderes en el entorno digital.

La noción de constitucionalismo digital encarna el conjunto de principios y valores que orientan y determinan las respuestas normativas ante los retos planteados por la sociedad algorítmica. No se identifica con la noción de 'constitucionalización' del entorno digital. Allí donde, de hecho, el constitucionalismo digital proporciona un mapa orientativo. En cambio, la constitucionalización denota la producción concreta de normas que garantizan el equilibrio del ecosistema constitucional.

Así, la constitucionalización es, en este sentido, el constitucionalismo en acción[3], con algunas modificaciones relevantes. El proceso de constitucionalización de la sociedad digital desatiende la regulación a nivel central. En el ciberespacio, los mecanismos regu-

[3] Aunque las primeras formas de constitucionalismo digital tienen el carácter de textos no vinculantes sin marco sancionador, han generado sin embargo argumentos políticos que se han institucionalizado recientemente a través de una formalización jurídica de derechos y principios, como en el caso de las iniciativas legislativas de la Unión Europea: la Digital Service Act (DSA), la Digital Markets Act (DMA) y la Artificiala Intelligence Act (AIA). "In questi atti il processo di ibridazione del costituzionalismo digitale è evidente. Da un lato, infatti, essi muovono dalla premessa comune della necessità di proteggere i diritti fondamentali dei cittadini dell'UE e i principi di governance delle istituzioni europee. Dall'altro, elaborano una complessa architettura di poteri di controllo e sanzione che rende effettive e azionabili le garanzie poste a difesa dei diritti e le limitazioni all'esercizio del potere digitale da parte di organismi statali e di corporation private. È lungo questa direttrice che si realizza un processo di maturazione del costituzionalismo digitale, che non si limita più a una mera elencazione di diritti e principi, ma si spinge fino a costruire, e a organizzare, un nuovo insieme di poteri pubblici, il cui esercizio è posto in capo a vecchie e nuove istituzioni" (Santaniello, 2022, p. 49).

ladores toman cuerpo no sólo en el perímetro institucional de los Estados-nación, sino también en el supranacional, en los feudos privados de las multinacionales tecnológicas y en el seno de la propia sociedad civil. Esto da lugar a un mosaico de respuestas normativas multinivel, que puede descifrarse fácilmente sólo si los fragmentos emergentes se interpretan como piezas complementarias de un mosaico único.

De ahí la necesidad de un Derecho situado fuera de las fronteras, capaz de trascender las barreras de la soberanía nacional. Esto se debe a que la torsión normativa osifica y condena a la decadencia a los Estados nacionales, cuya adhesión a las demandas de la sociedad se ve progresivamente comprometida. Por otra parte, si el derecho, que ha vivido durante siglos más allá de las fronteras de los Estados, se encuentra asombrado y perdido (Irti, 2007) ante una tecnoeconomía inesperada y sin precedentes, entonces debe mudar de piel: reconocer las mutaciones y gestionarlas para garantizar la protección universal de los derechos fundamentales. Todo esto es necesario incluso cuando la idea de Estado se tambalea y su pivote esencial, la soberanía, se ve comprometido porque se ve obligado a enfrentarse al movimiento centrípeto producido por la digitalización.

Mientras algunos han intentado enterrar el concepto de una vez por todas (Herzog, 2020), otros, en respuesta, afirman: "¡La soberanía siempre resurge, como un zombi, para volver a la carga!" (Cristakis, 2020, p. 1). En definitiva, la soberanía reacciona, cambia de vestido, se viste con ropajes digitalizados y conecta con el constitucionalismo digital, dotándola, además, de una serie de herramientas y poderes que permiten la tutela efectiva de los derechos (Celeste, 2021).

La soberanía digital entre el sentido y el consenso. Perfiles conceptuales y derivas hermenéuticas

La soberanía y el poder están inextricablemente unidos. La soberanía expresa una relación entre poderes y es una forma de poder que consiste en un poder de control que legitima otras formas de poder y que, a su vez, debe ser legitimado. La cuestión de la soberanía es, pues, una cuestión de poder (Grimm, 2023). Tradicionalmente, la soberanía nacional se define como el poder del Estado para controlar su territorio, los recursos que allí se encuentran y las personas que en él residen[4]. Dicho de otro modo, la soberanía significa la independencia de un Estado respecto de los demás Estados

[4] Negativamente, significa la ausencia de toda dependencia externa e impedimento interno. Positivamente, designa el carácter supremo del poder del Estado, y de este poder en sí, es decir, los poderes reales incluidos en el poder del Estado. Así pues, la soberanía implica tanto la independencia en el orden internacional (soberanía del Estado), el poder exclusivo e ilimitado, salvo el que se asigna el Estado de derecho, en el orden interno (soberanía en el Estado), como el contenido de este poder. Es una prerrogativa del Estado, a diferencia de una organización internacional (Unión Europea) que sólo puede beneficiarse de transferencias de competencias acordadas por los Estados miembros.

(soberanía externa), pero también el poder supremo de mandar sobre todos los poderes dentro de su territorio (soberanía interna). Cuando se entiende por soberanía democrática, se alude a la soberanía popular y al derecho de los ciudadanos a ejercer su autodeterminación y hacer valer sus derechos inalienables (Pohle & Thiel, 2020). Esta es la idea moderna de soberanía. Sin embargo, como se ha señalado: "Pero la era moderna ha terminado, incluso en su versión XL. Y nuestra era contemporánea no es solo posmoderna" (Floridi, 2020, p. 372). Así, la nuestra es la era digital.

> Y en la era digital, la infosfera no es un territorio, los datos no son un recurso finito, escaso, rival, natural e irrecuperable como el petróleo (por mucho que empeore la pobre analogía), los activos digitales son en gran medida privados y están sujetos a las fuerzas del mercado, y nuestros perfiles son creados, poseídos y explotados no solo por los Estados, sino también por las multinacionales, que, como indica la palabra, están globalizadas (Floridi, 2020, p. 372).

Por ello, surge la necesidad de razonar sobre la naturaleza de la soberanía. Es importante decir unas palabras sobre el poder o, mejor dicho, sobre los poderes. Sus tipologías pueden cambiar y ampliarse a lo largo del tiempo. Pueden desplazarse a nuevas residencias, tanto en sedes internacionales como, sobre todo, en sedes privadas. Así, se despojan de sus habituales ropajes institucionales bajo la égida del derecho público (Ferrarese, 2022, p. 9). Esto transforma su modo de ser y genera no pocos problemas en cuanto a su disciplina y su regulación (Cassese, 1988). La metamorfosis que se ha concretado se debe a la penetración de la tecnología en las esferas de convivencia. Esta ha producido cambios en la estructura democrática del Estado, ha ampliado el abanico de competencias y los límites de las libertades individuales, y también ha socavado las coordenadas que fundamentaban el ejercicio tradicional del poder público. Esto apunta en particular al principio de territorialidad y a la noción de soberanía. A primera vista, el principio de soberanía parece incompatible con el ciberespacio. La soberanía es un concepto intrínsecamente territorial, mientras que el ciberespacio conecta a los Estados de un modo que parece diluir la territorialidad. Sin embargo, ambos fenómenos han seguido existiendo en paralelo incluso después de la aparición de las capacidades cibernéticas. Claro está, la soberanía sigue siendo un concepto clave para entender el Estado y el orden internacional. De la misma manera, la soberanía analógica continúa apareciendo como necesaria. Pero ningún Estado es hoy tan soberano como antes. De hecho, existen desviaciones del modelo 'moderno' que afectan las características típicas de la soberanía: pueblo, territorio, plena autodeterminación política en el interior, independencia en las relaciones internacionales, poder de

último recurso, monopolio del uso legítimo de la fuerza, indivisibilidad (Ferrarese, 2024). Estas desviaciones no borran la soberanía de los Estados, sino que la transforman. Así, la soberanía sigue siendo necesaria y se convierte en soberanía digital: "La soberanía digital contemporánea también es necesaria para proporcionar formas de control eficaces y democráticas, mediante una regulación adecuada" (Floridi, 2020, 372).

Sin embargo, debe aclararse quién debe ejercerla de *facto* y de *iure*. Se trata, pues:

> de definir los contornos de la soberanía digital y los instrumentos jurídicos para limitarla. Porque, si observamos más detenidamente las características de este nuevo soberano tecnológico, yendo más allá de la imagen de la innovación como factor de crecimiento, desarrollo y liberación de la persona, descubrimos una dinámica interna de crecimiento exponencial y una difusión intolerante tanto con la idea de las limitaciones como con las formas conocidas de regulación jurídica (Califano, 2021, pp. 2-3).

Es importante aclarar el alcance semántico de la nueva declinación. ¿Qué significa el término 'soberanía digital'? La fórmula parece muy problemática e intrínsecamente polisémica. Ambos términos son complejos y densos en su significado (Venanzoni & Proietti, 2023). A menudo confundida con la noción de poder digital. Sin embargo, la soberanía exige legitimidad, que se vincula a su reconocimiento.

Surgen entonces algunas preguntas: ¿cómo se moviliza la noción de soberanía para abarcar los datos, los contenidos e infraestructuras digitales? ¿ Cómo se relaciona con nociones más tradicionales de soberanía del Estado-nación o con las interpretaciones implícitas en conceptos normativos de justicia social, autonomía y gobernanza colectiva? El análisis de la relación entre la soberanía y la soberanía digital requiere un triple enfoque: contextual, conceptual y funcional.

La primera perspectiva busca aclarar si ambas categorías son equivalentes, complementarias, diferentes o autónomas en el ámbito digital. Desde el punto de vista conceptual, conviene determinar si existen similitudes o diferencias entre ambas categorías. Por último, es necesario aclarar si existen diferencias o similitudes en sus funciones. En concreto, hay que preguntarse por qué se necesita la soberanía digital cuando existe soberanía o porqué se utiliza cuando no la hay. Es decir, qué función desempeña la soberanía digital cuando existe y qué función se le atribuye cuando no existe.

En primer lugar, la soberanía digital no es una versión en línea de la soberanía tradicional. No sustituye a la categoría jurídico-política clásica ni constituye una consecuencia ni una extensión del principio de soberanía. Robles-Carrillo (2023, p. 676) lo expresa así:

"En realidad, la soberanía digital es el núcleo de un discurso jurídico, político y científico específico que no siempre está vinculado, ni necesariamente, a su embrión físico. De hecho, no siempre hay argumentos conectados entre ambos conceptos".

También:

> la soberanía digital, en comparación con la noción tradicional de soberanía, presenta un carácter nuevo, ya que se invoca tanto para garantizar la defensa contra interferencias externas y, por lo tanto, el control sobre el territorio (natural y digital) nacional, como, de manera innovadora, para ampliar las normas de cada ordenamiento jurídico, que siguen, por así decirlo, a los ciudadanos de ese ordenamiento (Torchia, 2024, p. 28).

El intento de interceptar las distintas formas en que se ha expresado el principio de soberanía en el ciberespacio ha permitido identificar cinco categorías. Estas son: soberanía del ciberespacio; soberanía digital, gobiernos y estados; soberanía digital indígena; soberanía digital y movimientos colectivos; soberanía digital personal. Estas categorías muestran diferentes perspectivas y ponen de manifiesto algunos de los actores clave implicados.

La primera de las cinco categorías discursivas se remonta a la década de 1990. Esta categoría tiende a considerar el ciberespacio (Internet) como un nuevo horizonte de libertad frente al control estatal. Internet, surgido sin regulación, se percibe como libre e independiente de la soberanía y de la intervención gubernamental. En este contexto, la soberanía se articula en términos de oposición a la soberanía estatal[5]. Esta postura, que cuestiona la soberanía estatal sobre Internet, sigue vigente. Identifica la participación de múltiples partes interesadas, como se practica activamente en los *Internet Governance Forums* (IGM) y en organizaciones como la *Internet Corporation for Assigned Names and Numbers* (ICANN), como la base de la soberanía popular sobre Internet.

Las instituciones de múltiples partes interesadas sustituyen a los gobiernos nacionales. Así, desafían, en ciertos aspectos, la autoridad suprema del Estado sobre las políticas públicas de comunicación e información (Mueller, 2017). En esta perspectiva, el ciberespacio

[5] Esta categoría queda emblemáticamente ejemplificada por el conocido manifiesto titulado A Declaration of the Independence of Cyberspace, escrito en 1996 por John Perry Barlow, cuyas primeras frases son sintomáticas de la postura adoptada: "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather" (Barlow, 1996). El manifiesto se formuló como respuesta a los esfuerzos de los gobiernos por afirmar su poder y autoridad sobre los reinos digitales, y más concretamente a la Ley de Decencia en las Comunicaciones de 1996 en Estados Unidos, que pretendía regular la pornografía y la obscenidad en Internet.

sería inmune a cualquier regulación estatal o supranacional; las autoridades serían los otros, incapaces de ejercer su soberanía y de extender la aplicación de las normas jurídicas en un espacio idealizado como un territorio separado.

Con el tiempo, la historia cambiará el telón de fondo del ciberexcepcionalismo y el ciberlibertarianismo para dar paso al resurgimiento de la soberanía estatal como principio normativo digital. Los Estados-nación han demostrado que pueden regular e hiperregular el ciberespacio. Este espacio ideal, libre de condicionamientos y de poderes fuertes, ha terminado en manos de poderes privados. Estos actores han condicionado el proceso de autodeterminación de los usuarios, considerado la piedra angular por los pioneros de la web (Pollicino, 2024).

No es casualidad que en la segunda categoría, "soberanía digital, gobiernos y estados", la perspectiva cambie tras la aparición de las nubes. Esta etapa marca la reaparición del poder soberano de los datos (Hu, 2015). El control del flujo de datos pasa a ser central para los Estados y comienza a emerger la necesidad de que Europa cree un entorno económico y jurídico que fomente la innovación tecnológica en su territorio.

Promover la soberanía digital es, en este sentido, una forma de contrarrestar la fuerte exportación de la privacidad de los ciudadanos europeos. Así, este objetivo se logra mediante el desarrollo de nubes nacionales. Además, esta línea argumental coincide con muchas reivindicaciones contemporáneas. Muchos sostienen que los Estados deben afirmar su control sobre sus datos y sus redes de telecomunicaciones frente a países extranjeros, en particular, Estados Unidos[6]. Por último, la soberanía de los datos parece significativa y se define como el intento estatal de someter los flujos de datos a la jurisdicción nacional.

La noción de soberanía de los datos también forma parte de una perspectiva indígena. Se sitúa en la lucha más amplia de los pueblos indígenas por reclamar la soberanía sobre sus tierras, cuerpos y culturas. Esto se alinea con las prácticas y aspiraciones arraigadas en la autodeterminación en el ámbito de los datos digitales (Kukutai & Taylor, 2016). La categoría definida como "Movimientos Sociales y Soberanía Tecnológica" contrasta fuertemente

[6] Muchos gobiernos han intentado proteger al Estado y a sus ciudadanos promulgando leyes y desarrollando tecnologías "nacionales" o domésticas. En Brasil, la entonces Presidenta Rousseff propuso un plan para sustraer Internet de la influencia de Estados Unidos y sus gigantes tecnológicos, lo que algunos consideran una forma de afirmar la soberanía digital. Similar es el esfuerzo de Alemania por contrarrestar la vigilancia estadounidense de conversaciones telefónicas y correos electrónicos mediante la creación de un correo electrónico nacional, nuevos cables submarinos y almacenamiento de datos localizado. Francia también invirtió fondos en el desarrollo de un chat cifrado gubernamental de código abierto tras el pirateo de sus datos durante las elecciones de 2017, que algunos autores han caracterizado como un deseo de afirmar su soberanía tecnológica (Couture & Toupin, 2019, p. 2312). En Canadá, pidieron una reafirmación de la soberanía de la red canadiense mediante la mejora de la infraestructura para reducir el enrutamiento de datos a través de Estados Unidos: la soberanía nacional está amenazada "when an otherwise internationally independent state has its rights and powers of internal regulation and control violated by the encroachment of a foreign body" (Obar e Clement, 2013, p. 1).

con las reivindicaciones de los Estados de soberanía sobre lo digital. Afirma la autonomía de los movimientos sociales a través del control colectivo y, a veces, individual de las tecnologías e infraestructuras digitales. Hace hincapié en su capacidad para desarrollar y utilizar herramientas diseñadas por ellos mismos. Se trata de una noción de "soberanía tecnológica" que implica el uso de software y servicios libres y de código abierto.

La soberanía tecnológica se refiere, en este caso, a las tecnologías desarrolladas por y para la sociedad civil (Haché, 2014), así como a la difusión de redes comunitarias descentralizadas, software criptográfico, hackerespacio. Al igual que el concepto de soberanía alimentaria, la soberanía tecnológica también tiene una orientación política: valora las economías locales, las tecnologías sostenibles y el derecho de las personas a controlar sus propios sistemas tecnológicos. En las posiciones más extremas, se convierte en una práctica de emancipación alternativa que llama a promover como práctica anti-establishment en el campo de las TI, para integrarla en otras luchas antiimperialistas.

Por último, con la categoría "soberanía digital personal" se produce un desplazamiento de la esfera colectiva a la individual: cuando es estatal, la soberanía es colectiva; si se refiere a una estructura colectiva, si colectiva se refiere a un 'nosotros' abstracto de la sociedad civil; también puede referirse al individuo como aquel que utiliza software libre y de código abierto o tecnologías de cifrado para protegerse, la protección personal. Así, la soberanía tecnológica personal se refiere al control que un individuo ejerce sobre sus propios datos, dispositivos, software, hardware y otras tecnologías. Por supuesto, hay puntos en común y divergencias que surgen de los usos y las interpretaciones de la soberanía digital. Estas diferencias surgen principalmente al abordar el control y la autonomía sobre la tecnología. Implica la capacidad de las colectividades —Estado, organizaciones de la sociedad civil, los pueblos indígenas e incluso los individuos— para innovar y participar en el desarrollo, el control y la autonomía tecnológica. Esto estimula la innovación nacional en formas económicas de nacionalismo, en el caso del Estado, o para desarrollar software libre o infraestructuras autónomas, en el caso de las organizaciones civiles.

Más aún, el uso de la noción de soberanía es poderoso porque se presenta como una herramienta para marcar la oposición a las hegemonías. Destaca la dominación estadounidense en Internet o el poder de las grandes empresas tecnológicas privadas como Google, Amazon, Facebook, Apple y Microsoft (GAFAM), denominadas los "barones digitales". En este sentido, se utiliza para conceptualizar perspectivas contrahegemónicas o alternativas (Couture & Toupin, 2019).

Atando cabos, y haciendo balance de la connotación definitoria, el lema en cuestión se refiere al ejercicio del poder, sobre todo lo que cae dentro del territorio digital y el

control y la gestión de infraestructuras y datos digitales. Esto puede provenir de un gobierno, tanto nacional como local, que promueve la autosuficiencia tecnológica garantizando la seguridad y la privacidad frente a poderes externos. De alguna manera, el término "soberanía" se interpreta en su acepción tradicional: el poder de controlar, *de jure* y *de facto*, un determinado espacio, incluyendo las actividades que en él se desarrollan, quiénes entran en él, cómo se organiza ese espacio y cómo se ejercen los poderes policiales, judiciales y de seguridad en él (Zeno-Zencovich, 2015). Además, la soberanía digital se define como la reafirmación del poder público sobre los datos, el software, los servicios y las infraestructuras del ecosistema digital. Se trata de un prisma en el que el territorio y el espacio son evanescentes e interconectados (Pollicino, 2023). Por tanto, hay un significado diferente de soberanía digital que, declinado en clave de valor, alude:

> a esa disciplina de la relación entre derecho, persona y tecnología que cada vez más acaba definiendo el perfil identitario de un ordenamiento, desde el punto de vista social, cultural, jurídico e incluso político. En este sentido, la soberanía digital significa el gobierno de la tecnología según la jerarquía axiológica de cada ordenamiento, de conformidad con su identidad y tradición constitucional (Stanzione, 2020).

En este sentido, la soberanía digital tiene un amplio alcance. Abarca el nivel axiológico de los principios constitucionales, la dinámica democrático-representativa y sus formantes, el pleno funcionamiento de los servicios digitales, la seguridad digital y la ciberseguridad. Opera según dinámicas conectadas entre los niveles nacional, europeo y transnacional: seguridad europea, seguridad nacional, protección de datos y protección de la competencia. También incluye la ética del comportamiento y vinculación institucional, que constituyen su porte sustantivo. Todo pasa en clave instrumental, por un enfoque multidisciplinar cada vez más conocido como ciber-resiliencia (Venanzoni, 2024).

De hecho, en el ciberespacio, notoriamente declarado libre de soberanía en sus inicios, el tema ha vuelto al debate abierto por parte de Estados como Rusia y China, que reclaman derechos soberanos sobre su infoesfera nacional. En años más recientes, los Estados europeos y la Unión Europea también han recurrido a los términos "soberanía digital", "soberanía de los datos" y "soberanía tecnológica". Lo utilizan para referirse a la competitividad económica de la UE en el contexto de la economía mundial de los datos y a la necesidad de adoptar una autonomía estratégica en tecnologías digitales.

Muchos Estados nacionales están lidiando con la necesidad de garantizar el desarrollo nacional de las capacidades digitales, las tecnologías de la información, la inteligencia artificial, la computación cuántica y el Internet de las cosas. El fin de garantizar la

autonomía tecnológica. Las reivindicaciones de soberanía digital incluyen la idea de que una nación o región debería poder tomar medidas y decisiones autónomas en relación con su infraestructura digital y su implantación tecnológica.

La estrategia de la Unión para construir la soberanía digital europea es sintomática del deseo de Europa de reafirmar su identidad de valor normativo en el ámbito geopolítico. Lo hace en línea con sus raíces éticas y constitucionales, incluso en lo que se define como el ecosistema digital. Esta es una metáfora bio-natural omnipresente que combina, en un par conceptual casi oximorónico, la naturalidad y la artificialidad, las dos figuras de la comunicación actual y de la ideología de la modernidad (Torino & Zorzetto, 2023).

La frase, incorporada al vocabulario de los documentos europeos[7], redefine la soberanía digital. Se la identifica con la centralización progresiva del poder legislativo en materia digital. Así se busca reforzar la autonomía estratégica, proteger el mercado interior y garantizar la ciberdefensa de la Unión Europea.

> En particular, la posición dominante de los Estados Unidos en el sector del control de infraestructuras con sistemas masivos y, por lo tanto, su capacidad para reunir gran cantidad de datos sensibles de diferentes países del mundo, junto con la crisis pandémica, han puesto de relieve la dependencia de los Estados miembros tanto en el suministro de productos esenciales como en la vulnerabilidad en materia de protección de datos y, por lo tanto, de desarrollo económico. De ahí la necesidad de que la Unión Europea adquiera autonomía tecnológica y digital (Alpini, 2022, p. 145).

De hecho, la progresiva relevancia atribuida al tema se debe a razones vinculadas a la ciberseguridad, un ámbito de seguridad nacional que es responsabilidad de los Estados miembros. Además, influye en la delicada relación entre la circulación y la protección de datos (Perlingieri, 2020). La Comisión Europea ha expresado claramente su visión sobre la soberanía digital y los retos que pretende afrontar.

Para garantizar la soberanía tecnológica, Europa debe asegurar la integridad y la resistencia de su infraestructura de datos, redes y comunicaciones. Para ello, debe crear las

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[7] "L'espressione sovranità digitale si è diffusa in una lunga serie di recenti documenti ufficiali dell'UE, alcuni di carattere strategico, come la "Nuova strategia industriale per l'Europa" della Commissione (10 marzo 2020), le conclusioni del Consiglio "Plasmare il futuro digitale dell'Europa" (9 giugno 2020), le raccomandazioni della Commissione per un approccio comune al 5G (18 settembre 2020), le conclusioni del Consiglio sulla sicurezza cibernetica dei dispositivi interconnessi (10 dicembre 2020), le "Priorità legislative dell'UE per il 2021" (18 gennaio 2021), la "Bussola per il digitale 2030: il modello europeo per il decennio digitale" (9 marzo 2021), e nei documenti connessi alle nuove *regulation* come il DSA, il DMA e l'AIA" (Alpini, 2022, pp. 144-145) .

condiciones adecuadas para desarrollar y desplegar sus capacidades básicas, reduciendo así nuestra dependencia de otras regiones del mundo en las tecnologías más críticas. Estas capacidades permitirían a Europa definir sus propias reglas y valores en la era digital.

La soberanía tecnológica europea se basa en las necesidades de sus ciudadanos y en su modelo social; no se define en oposición a otros. La Unión Europea seguirá mostrándose abierta a todos aquellos que respeten su legislación y cumplan las normas europeas, independientemente de dónde tengan su sede (Comisión Europea, 2020).

La UE, principalmente a través de la Comisión, ha elaborado planes a corto y largo plazo para reforzar la soberanía digital. Estos planes incluyen medidas que fijan objetivos concretos para las inversiones en tecnologías clave, y promueven la creación de instituciones y marcos reguladores. Se busca fomentar un intercambio de datos más eficaz, una mejor interoperabilidad entre los sistemas, así como la transparencia y la responsabilidad en diversos sectores económicos.

Por otro lado, también pretenden proteger el mercado interior del poder económico y político de las grandes empresas tecnológicas (Barrios, 2023)[8]. En cierto modo, Europa reivindica la necesidad de definir sus propias reglas de forma independiente, minimizando su dependencia de soluciones extranjeras.

Así, aspira a exportar su modelo y promover el papel de liderazgo de Europa en el mundo. Una aspiración legitimada por el Reglamento europeo de 2016, GDPR que se ha convertido en una especie de *gold standard* mundial de la protección de la privacidad (Smorto, 2023).

Salvaguardar la autodeterminación de las sociedades europeas en la era digital, lograr que las industrias digitales sean competitivas a nivel global y proteger a los ciudadanos de los delincuentes, la vigilancia y el uso no autorizado de sus datos, son argumentos a favor de la soberanía digital europea. Europa busca articular una tercera vía de gestión del ciberespacio frente al modelo estadounidense, que evita cualquier referencia a la soberanía, y las propuestas chinas y rusas de tender a la soberanía de Internet. En este sentido, la estrategia digital europea representa una alternativa tanto al modelo liberal basado en la autorregulación como a los modelos soberanistas de los regímenes autoritarios. Se opone a las instancias aislacionistas y propone un enfoque polifónico, abierto a la sociedad civil (Santaniello, 2022), lo que la sitúa en el marco del constitucionalismo digital.

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[8] El modelo europeo de soberanía digital se caracteriza por tres elementos clave un apoyo significativo en términos de recursos y políticas para el desarrollo de capacidades autóctonas en tecnologías emergentes y para la digitalización más amplia de la economía europea, mediante el apoyo a la investigación y a la industria con el objetivo de convertirse en líder en áreas como la nube, la computación cuántica y la inteligencia artificial; la ambición explícita de crear normas mundiales y estándares de oro en la regulación y normalización de las tecnologías digitales; la creación de normas tanto a nivel europeo como de los Estados miembros destinadas a reducir la exposición a los responsables externos, limitando el acceso de los agentes extracomunitarios al mercado de la UE y restringiendo su ámbito de actividades en el mismo.

En resumen, la soberanía digital es un concepto intrínsecamente ambiguo que distintos actores utilizan de diversas maneras, pero que converge en la necesidad de un control digital sobre la capa física (recursos, infraestructura, dispositivos), la capa de código (normas, reglas, diseño) y la capa de información (contenidos, datos).

Un control que implica la capacidad de influir en y limitar la producción (incluida la extracción y el procesamiento de las materias primas necesarias), así como el diseño, el uso y el rendimiento de las tecnologías digitales. Pues bien, los Estados persiguen la soberanía digital para evitar injerencias extranjeras que socaven la estabilidad y la seguridad de los países. Algunos buscan reducir la dependencia de las tecnologías y las arquitecturas digitales extranjeras, ya que se cree que dicha dependencia perpetúa una distribución desigual de los beneficios económicos entre empresas y países. Otros objetivos comunes entre los Estados son aumentar la autonomía y la competitividad de sus industrias nacionales y recuperar la soberanía sobre los datos, es decir, tener el control sobre cómo se almacenan y procesan, y sobre quién tiene acceso a ellos[9].

Si las estrategias de ciberseguridad, los requisitos de localización de datos y la legislación sobre protección de datos y privacidad son objetivos comunes, la soberanía digital se desarrollará en cuatro ámbitos: ciberseguridad, economía digital, flujos de datos transfronterizos y protección de datos y privacidad[10].

A pesar de las breves observaciones realizadas, la soberanía digital emana de la conciencia de la limitación de las normas nacionales en la gobernanza de la tecnología digital. Refleja la necesidad de una regulación supranacional que normalice y garantice una plataforma común y homogénea, asegurando la máxima circulación de la información y la protección de las personas (Califano, 2021).

El Estado ante lo digital: hibridación y reacción. Observaciones finales

El constitucionalismo del siglo XXI se enfrenta a un nuevo poder soberano. Ya no se trata únicamente de limitar el poder privado del soberano ni el poder público del Estado. Ahora el poder es de naturaleza es mixta, pública y privada (Simoncini, 2017); un poder en proceso de *restyling*,

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[9] La soberanía europea de los datos se promueve mediante la iniciativa en la nube GAIA-X, cuyo objetivo es crear una infraestructura, servicios y oferta de datos en la nube propios de Europa y que se basa explícitamente en los principios de la soberanía por diseño, en la que el cliente tiene pleno control sobre el almacenamiento y el tratamiento de los datos, así como sobre el acceso a ellos; y la reciente *European Cloud Federation Initiative*, en la que se establecen normas de interoperabilidad entre proveedores y portabilidad de datos, y en la que se espera que los proveedores de la nube ofrezcan la posibilidad de elegir dónde se almacenan y procesan los datos (personales), sin exigir por ello que se almacenen en Europa.

[10] Cabe recordar que en Europa la circulación de datos está condicionada por la protección de la intimidad y la protección de los datos personales, considerados rasgos esenciales de la persona humana, y que el derecho a la intimidad ya está afirmado por la Directiva de Protección de Datos de 1995 y ha sido consagrado definitivamente en el Reglamento Europeo de 2016 (GDPR).

> cada vez más móvil, no residencial, que traspasa las fronteras territoriales nacionales y es capaz de representarse a sí mismo, de expresarse de forma suave bajo la ambigua apariencia de la gobernanza —término que alude a una mayor participación en la toma de decisiones que, en realidad, se adoptan lejos de las sedes democráticas, al margen del sistema representativo—, lo que sirve para marcar (y legitimar) la implicación (Ruotolo, 2024, p. 48).

La transición de la sociedad analógica a la digital conlleva crisis y tensiones en el perímetro específico del Estado tradicionalmente entendido. De hecho, el modelo de Estado autorreferencial, cerrado a cualquier injerencia exterior, ya había sido blanco y derrocado por el acuciante fenómeno de la globalización[11]. La globalización ha transferido determinadas competencias de los órganos internos a los comunitarios. Además, ha provocado una progresiva erosión de la soberanía nacional en el plano internacional. Esto ha deshecho el vínculo biunívoco y exclusivo entre derecho y soberanía, y pone tensión en la noción de territorio concebido jurídicamente como proyección espacial de la soberanía[12].

Gracias a las nuevas tecnologías, una espacialidad más amplia toma forma. Estas tecnologías permiten espacios de usabilidad ajenos a la lógica de las fronteras. Las reglas que condicionan la realidad estatal ahora son producidas por poderes elusivos y distantes, surgidos de redes transnacionales de gobernanza desterritorializada. Estas redes disuelven la coincidencia entre los lugares del derecho y los de la política (Scaccia, 2017). Presiones difusas y dimensiones metapolíticas abigarradas impregnan los sistemas jurídicos en un torbellino irregular:

> como sí se tratara de un asalto telúrico que hierve bajo la superficie, listo para reclamar el nacimiento de un nuevo orden constituido, de un orden fluido, adaptable y móvil. El espacio de coagulación de este orden es la Frontera. Ya no es un territorio, una nación o un Estado, sino un espacio translúcido sin centro y en constante aceleración, sacudido en su interior por fuerzas latentes que se agitan como una fuerza constituyente lista para reclamar su propio orden (Venanzoni, 2020b, p. 6).

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[11] La relación entre el Estado y la globalización reconfigura la estructura de poderes en una nueva perspectiva y fomenta la formación de modelos y organizaciones internacionales encargados de la nueva tarea de proteger y garantizar los derechos universales, lo que conlleva una pérdida sustancial del control de la soberanía por parte del Estado en sectores tradicionalmente vinculados a la dimensión transnacional, como la economía, la comunicación y la defensa de las fronteras (Casini, 2020).

[12] Las causas de esta crisis se observan en tres factores: el distanciamiento entre los lugares de la política y aquellos en los que se forma el derecho, la tensión entre el principio de "mundanidad" del mercado y el de territorialidad vinculada al Estado, y el efecto perturbador del advenimiento de la Red determinado por su alcance global (Caramaschi, 2020, p. 15).

Las hibridaciones entre las esferas pública y privada tampoco son nada nuevas[13]. Lo inédito es la ausencia de paridad simétrica entre las esferas. Esta paridad ha sido barrida por la colonización de los poderes privados y la externalización consecuente de la función reguladora. Los grandes temas que nutren la esencia íntima de un Estado, tras siglos de permanencia, salen del recinto de la soberanía jurisdiccional confinada. Ahora entran en el terreno de los sujetos privados, los "nuevos soberanos globales" (Azzariti, 2013, p. 50). En otras palabras, las plataformas informáticas y los proyectos de inteligencia artificial socavan la soberanía estatal y debilitan sus funciones. También abren espacios de contestabilidad en el ámbito de los poderes públicos (Ferrarese, 2024).

A modo de ejemplo: la erosión del control sobre la moneda es una de las manifestaciones más evidentes del desmoronamiento de la soberanía en el espacio global (Luciani, 1996). Incluso el equilibrio entre los derechos constitucionales se desliza ahora en manos de las plataformas digitales. Estas moderan los contenidos según las condiciones de uso privadas y afectan la libertad de pensamiento y el pluralismo político (Monti, 2019). Pasando por alto las funciones, observamos la alteración de los propios elementos constitutivos del Estado: las personas y el territorio. El concepto de pueblo sufre una metamorfosis. Pasa de pueblo de la Red a pueblo en la Red. Así se reivindica el reconocimiento y la presencia en la Red (Castells, 2013). Del mismo modo, el territorio deja de ser la base del dominio y cede espacio al ciberespacio, un ámbito espacial desterritorializado.

Podríamos seguir en esta línea ilustrativa. Sin embargo, lo que nos llama la atención *prima facie* es la progresiva ampliación de los espacios que escapan a la pretensión reguladora de los Estados. Esto lleva a que los sistemas compitan en el contexto de la desterritorialización y la desinstitucionalización. En definitiva, para abreviar, el mundo digital, al erosionar el monopolio estatal, impone un replanteamiento del poder nacional y del derecho mismo. El derecho digital marca de manera irreversible la crisis de la soberanía estatal. El derecho estatal es rígido y ya no es capaz de regular las nuevas modalidades de las acciones humanas. La desactualización produce un derecho flexible, adaptado al modelo reticular del mundo digital (Maestri, 2017). La soberanía se ve amenazada por poderes privados que producen normas capaces de afectar la vida de los individuos con la misma contundencia que las normas vinculantes emitidas por los Estados. Las empresas digitales, nuevos actores denominados *gatekeepers*, lejos de

[13] En nombre de la teoría de la pluralidad de órdenes, de hecho "lo Stato non esaurisce il diritto, potendo la produzione normativa riconducibile all'autonomia privata creare effetti giuridicamente vincolanti anche *ultra partes*, come si argomentava rispetto ai contratti collettivi di lavoro di diritto pubblico" (Ruotolo, 2024, p. 50).

querer simplemente participar en el mercado, aspiran ahora a sustituir a los gobiernos, reemplazando la lógica de la soberanía estatal por la de la soberanía funcional. De esta manera, someten a los usuarios a una forma de autoridad privada, resultado de una mezcla de derecho privado y automatización.

Los nuevos actores híbridos o parapúblicos limitan las prerrogativas típicamente estatales. A través de su estructura, cada vez más similar a la del Estado y a la de otros poderes públicos, construyen un nuevo tipo de soberanía privada funcional. Gracias a la gestión autónoma de la infraestructura digital, estos actores deciden por sí mismos cómo se relacionan los usuarios y cómo pueden hacer valer sus derechos. En otras palabras, mediante la aplicación de condiciones de servicio, las plataformas digitales determinan unilateralmente las normas que deben seguirse para acceder a los servicios, así como el tratamiento de los datos, asumiendo funciones tradicionalmente atribuidas a los poderes públicos. En efecto, la irrupción de tales poderes privados en el entorno digital pone en peligro la forma misma del Estado constitucional (o democrático-pluralista), que, como es bien sabido:

> Se construye en torno a dos ejes, bien sintetizados en el segundo párrafo del artículo 1 de la Constitución italiana. Por un lado, la soberanía popular, es decir, la remisión de las decisiones políticas al pueblo, por mayoría, mediante el principio del gobierno representativo, lo que implica la libre formación del consenso en una dialéctica democrática. Por otro lado, el estado de derecho constitucional es, es decir, la limitación del poder, incluso el de las mayorías políticas «democráticas», mediante el derecho, en nombre de la garantía del pluralismo, que encuentra su expresión en los derechos fundamentales de las personas (Groppi, 2020, p. 678).

La realidad global, interconectada, fragmentada y policéntrica, corre el riesgo de convertirse en un poderoso factor de erosión de las democracias constitucionales ante la potencial regresión de las garantías encarnadas y tuteladas por el Estado constitucional. En este contexto, la supremacía de la función reguladora y normativa confiada al aparato estatal es incierta:

> Hay una víctima designada por estos nuevos y sorprendentes mecanismos: digan lo que digan, no son nuestras libertades individuales, que, desde cierto punto de vista y en determinadas condiciones, pueden incluso encontrar nuevos espacios de expansión y potenciación, sino la capacidad reguladora de las instituciones públicas tradicionales. La estrechez de miras de los Estados nacionales tradicionales se ha revelado totalmente inadecuada y nuestra cultura occidental, democrática y social,

> parece no disponer ya de instrumentos. De ello se deriva (también) una sensación generalizada de anomia, que se vuelve omnipresente y deja a nuestras sociedades atónitas (Caravita, 2020, pp. 457-458).

El temor a un neoinstitucionalismo medieval se impone ante la difícil regulación pública de las dinámicas esquivas generadas por las tecnologías innovadoras. Esto genera reacciones espontáneas de orden social que, además, convergen en fórmulas autorreguladoras (Bifulco, 2018). Además, la torsión ordinal y la consiguiente externalización de la regulación constitucional en manos de actores privados, que operan al ritmo de la globalización económica y de la sociedad digital, condenan a los Estados 'osificados' a la decadencia.

> Y lentos, anticuados como relojes victorianos, los Estados pierden adherencia con respecto a las instancias que emanan de la sociedad, los individuos prefieren la aceleración decisoria de las plataformas, y poco importa si los procesos decisorios resultan opacos, poco garantistas, ya que las grandes plataformas digitales demuestran conocer a cada individuo, apreciar sus demandas y necesidades, desligándolo de su intrínseca politicidad, convirtiéndolo así de ciudadano en mero usuario individual (Venanzoni, 2020b, p. 9).

Sin embargo, desde un punto de vista jurídico-formal, los Estados siguen siendo todos igualmente "soberanos", incluso en el sentido clásico y altivo de los poderes "superiorem non recognoscentes" (Ferrarese, 2024, p. 9). Conservan su papel como lugares estratégicos para la estructuración de lo global. Por lo tanto, en lugar de hablar de extinción, sería más correcto hablar de una redefinición de la soberanía estatal frente a la tecnología global y digital. Esta tecnología parece ignorar el formante territorial y se estructura en un mundo basado en redes, dominios y hosts.

Esta redefinición abandona la noción dura de soberanía a favor de una noción blanda que concibe al Estado como instrumento de protección de los derechos, en línea con el constitucionalismo. La reformulación de la localización de los Estados parece requerir una redefinición de la propia soberanía. El carácter monolítico se ha visto afectado por un fenómeno de desagregación que multiplica los niveles en los que operan legítimamente las interrelaciones con el exterior (Costanzo, 2012). El Estado, a pesar de sufrir los efectos de lo digital, aspira a gobernarlo. Se trata, pues, de interceptar el papel que debe desempeñar en la revolución tecnológica desencadenada por el advenimiento de lo digital. Sobre todo, de encontrar la manera de combinar la protección de los derechos fundamentales con la producción privada del derecho.

Para cumplir tales tareas, resulta necesario reiterar que a esta creciente complejidad no responde solícitamente un orden, sino varios órdenes espontáneos (Frosini, 2014; Bifulco, 2018), a menudo autorreferenciales y renuentes a "una subordinación efectiva a la legalidad" (Cremona, 2021, p. 1262).

Así, las opciones disponibles van desde la desregulación o la autorregulación, pasando por la regulación tradicional, hasta la corregulación. La primera opción, que implica una amplia desregulación y una indiferencia jurídica radical, no es viable, dada la variedad y el alcance de los derechos implicados en la economía digital. Incluso la segunda, que prevé una regulación exclusivamente pública del entorno digital, resulta igualmente inviable ante la crisis del Derecho como instrumento exclusivo de regulación y la presencia de normas privadas cuya validez deriva precisamente de su observancia y aplicación; además, la voracidad del fenómeno digital se adapta mal a las formas clásicas de producción normativa pública, de protagonismo parlamentario, gubernamental y administrativo (Mobilio, 2020). Por consiguiente, sólo queda aceptar la tercera hipótesis y emprender el camino de una corregulación que integre las fuentes públicas con las privadas de los actores de la Red, según lógicas de subsidiariedad.

Las políticas gubernamentales pueden desempeñar un papel relevante en el equilibrio entre, por un lado, la seguridad y la protección de los datos y, por otro, la transparencia. Para lograr esto, se pueden adoptar soluciones de código abierto, la cooperación entre aplicaciones, la reutilización y los estándares de interoperabilidad y seguridad. Así se fomenta la innovación digital inclusiva.

Desde la perspectiva del Estado, se reconocen dos dimensiones de la soberanía. Por un lado, la soberanía interna, entendida como la preservación del orden constitucional ante los desafíos de lo digital y los ataques de la lógica disruptiva de lo digital y los asaltos a la seguridad operados por actores privados. Por otro lado, la dimensión externa, relativa al mantenimiento de la propia soberanía frente a las relaciones y los conflictos que se producen en el ciberespacio. En ambas, la soberanía digital puede facilitar una especie de venganza ordenada del Estado mediante la reafirmación del poder público sobre los datos, el software, los servicios y las infraestructuras del ecosistema digital. Así, la soberanía digital también podría considerarse una garantía de la resistencia de los principios, derechos y libertades constitucionales:

> mediante la reafirmación estatal frente a intrusiones, ataques y sabotajes llevados a cabo por medios digitales por actores estatales o privados, gracias al control de datos y software, inteligencia artificial, estándares y protocolos, 5G, nombres de dominio, procesos, como en el caso de los sistemas de computación en la nube,

> hardware, servidores, computadoras, teléfonos celulares, tabletas, servicios, como las redes sociales o los sitios de comercio electrónico, e infraestructuras como cables, satélites e incluso ciudades enteras, en el caso de las ciudades inteligentes, y, por otro lado, reafirmar un sistema de normas jurídicas destinadas a garantizar los derechos y libertades, desde los datos personales hasta la libertad de expresión, pasando por las libertades políticas y la protección de los consumidores y del mercado (Venanzoni, 2024, pp. 43-44).

Lograr una armonización nada fácil. Se requiere una armonización multinivel que contemple la interconexión entre los Estados nacionales de la UE y las políticas prevalentes, las normas reguladoras y los principios éticos. Estas normas a menudo van más allá del ámbito comunitario europeo.

Así, para el Estado, sigue existiendo no solo un amplio y complejo espacio de intervención, sino también una exigencia funcional de carácter decisorio. En este sentido, lejos de amoldarse a la tecnología, el ordenamiento jurídico no puede asumirla acríticamente, convirtiéndose en su rehén; más bien es preferible una mediación, *rectius* una reorganización global de lo que hace complementaria su intersección. Se necesita, por tanto, una regulación renovada.

La conclusión de estas reflexiones se resume en una recomendación y una esperanza: es imprescindible establecer reglas para limitar el poder. Cuando el poder se deja actuar libremente y sin limitaciones, se convierte en opresión y coacción, sobre todo cuando actúa desvinculado de los lazos sociales que lo vinculan a los derechos.

Las reglas también se necesitan una vez constatadas las divergencias en el tiempo. Los tiempos del derecho difieren de los tiempos de la técnica; por eso, el legislador actúa por ensayo y error, dándose cuenta de los resultados problemáticos cuando estos ya están más allá del umbral de la regulación.

El nuevo poder privado es tan fuerte y, a veces, opera de manera similar. Sin embargo, el derecho constitucional y los poderes públicos no deben ceder. Tienen la difícil tarea de regular un fenómeno que puede asestar graves golpes a la democracia e incluso poner en peligro los cimientos del Estado de Derecho.

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INSTITUTIONALISING ONLINE PLATFORMS UNDER THE EU DIGITAL SERVICES ACT: A PANACEA OR A RISK TO INNOVATION?*

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INSTITUCIONALIZAR LAS PLATAFORMAS EN LÍNEA BAJO LA LEY DE SERVICIOS DIGITALES DE LA UE: ¿UNA PANACEA O UN RIESGO PARA LA INNOVACIÓN?

Abstract

Online purchasing has been blooming in recent years, with 12 % of EU enterprises offering their goods for sale online. However, recent reports and a line of case law indicate an increasing number of trademark infringements within their networks. From a legislative perspective, at the European level, the regulatory framework governing online platforms' activities is based on the E-Commerce Directive, which has been updated by the Digital Services Act. This new framework came into force in 2022 and marks a shift from private ordering to the institutionalisation of online platforms' roles through a set of legal rules,

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similar to those imposed on financial institutions. This article argues that the new legal framework envisaged in the Digital Services Act poses a serious risk to innovation within the EU Digital Single Market; hence, it puts forward a set of guiding principles based on a sector-specific legislative framework for the regulation of the liability of online platforms for trademark infringements that accrue within their networks.

Keywords
Digital Services Act; online platforms; innovation.

Resumen
Las compras en línea han experimentado un auge en los últimos años, con un 12 % de las empresas de la Unión Europea que ofrecen sus bienes en línea. Sin embargo, informes recientes y una línea jurisprudencial evidencian un aumento de infracciones de marcas dentro de sus redes. Desde una perspectiva legislativa, a nivel europeo, el marco regulatorio que rige las actividades de las plataformas en línea se basa en la Directiva sobre comercio electrónico, la cual ha sido actualizada por la Ley de Servicios Digitales. Este nuevo marco entró en vigencia en 2022 y marca un tránsito desde la autorregulación privada hacia la institucionalización del papel de las plataformas en línea mediante un conjunto de normas jurídicas, similares a las impuestas a las instituciones financieras. Este artículo sostiene que el nuevo marco jurídico previsto en la Ley de Servicios Digitales plantea un riesgo significativo para la innovación dentro del Mercado Único Digital de la UE. En consecuencia, propone una serie de principios orientadores basados en un marco legislativo sectorial para la regulación de la responsabilidad de las plataformas en línea por infracciones de marcas que se produzcan dentro de sus redes.

Palabras clave
Ley de Servicios Digitales; plataformas en línea; innovación.

Introduction

The growth of online purchasing has been rapid in recent years. In particular, it is estimated that during the COVID-19 pandemic, 12 % of EU enterprises began or increased their efforts to offer goods for sale via online marketplaces, apps, and websites (EUIPO, 2021, p. 1; Eurostat, 2022) Moreover, it is estimated that revenues for Amazon, Etsy, and eBay have reached more than one billion dollars in 2023 (Statista Research Department, 2024). However, recent reports indicate an increasing number of trademark infringements within their networks. For instance, a report commissioned by the European Parliament (2020) demonstrates that the internet is a facilitator for the circulation of copyright-protected content and counterfeit products online, and that Instagram has become a channel where intellectual property infringements take place (EUIPO, 2021, p. 1). Moreover, it has been reported that EU and domestic courts have become preoccupied with a number of lawsuits concerning trademark violations in the services of online platforms (Joined Cases C-148/21 and C-184/21).

At the European level, the regulatory framework governing online platforms' activities is based on the provisions of the E-Commerce Directive (2000/31/EC), which has been updated by the Digital Services Act (Regulation (EU) 2022/2065). The new framework came into force in 2022 and has been described by Turillazzi et al. (2023) as "… a trade-off between the protection of users' Fundamental Rights and the ability to innovate and compete on online platforms" (p. 85). However, the new framework reveals a shift away from private ordering toward the institutionalisation of online platforms' roles. In particular, the new framework categorises online platforms differently and imposes new obligations on them, depending on their size, similar to those imposed by financial institutions. Crucially, while the shift from private ordering to the institutionalisation of online platforms may enhance brand owners' rights, it may also fail to accommodate online platforms' interests. Therefore, a risk may arise that jeopardises innovation within the Digital Single Market.

Against this background, this article argues that the new due diligence obligations in the Digital Services Act might subordinate the rights of online platforms, including the very large ones. To do so, the article first discusses the liability rules for online platforms under the E-Commerce Directive (ECD) and the EU Digital Services Act (DSA). In the second part, the article examines the shift from private ordering to the institutionalisation of online platforms and delves into a critical analysis of the relevant provisions from the DSA, drawing parallels with financial regulations. Following that, the discussion moves to the implications of imposing due diligence obligations on online platforms' interests and business models. Having discussed the relevant legal provisions

and their impact on online platforms' interests, the article offers a set of sector-specific recommendations to safeguard online platforms' rights and innovation across the Digital Single Market.

Liability of Online Platforms: From the E-Commerce Directive to the Digital Services Act

In 2001, the ECD came into force to regulate the activities of online platforms and their potential liability for trademark infringement. More specifically, Article 14(1) of the ECD offered the conditions under which online platforms were not liable for trademark infringements that took place within their networks and noted that online platforms were exonerated from liability if they did not have knowledge of the infringing material or illicit activity that took place within their networks, or when they expeditiously removed the infringing material upon receiving notification from the rights holders. Given that e-commerce was still in its infancy at the time, those immunity liability provisions were justified as a means of boosting innovation at the European level.

However, Article 14(1) of the ECD appears to be outdated. This was mainly because the article in question refrained from defining the liability of online platforms. Rather, it offered several defences to exonerate online platforms from liability. What is more, the national transposition of the provision across EU member states failed to provide a clear answer regarding the liability of online platforms. For instance, a report from the European Commission revealed that member states followed Article 14(1) of the ECD verbatim. They endorsed defences for ISPs that could be invoked to defend themselves against allegations of liability; meanwhile, there were variations in the interpretations of the terms amongst the member states. Finally, many courts turned to their national secondary tort liability rules to attribute liability to online platforms. Given the lack of harmonisation of secondary liability rules at the European level, each jurisdiction would apply its own national tort law to determine the appropriate tortious liability doctrines and thus define online platforms' liability (Krokida, 2022, p. 40).

Against this background, the EU policymakers introduced the DSA in 2022, described by scholars as "a major milestone in the history of platform regulation" (Keller, 2022, p. 299), while EU politicians applauded the new legislative instrument, with the Commissioner for the Internal Market Thierry Breton stating that

> With the DSA, the time of big online platforms behaving like they are "too big to care" is coming to an end. The DSA is setting clear, harmonised obligations for

> platforms—proportionate to size, impact, and risk. It entrusts the Commission with supervising very large platforms, including the possibility to impose effective and dissuasive sanctions of up to 6 % of global turnover or even a ban on operating in the EU single market in case of repeated serious breaches. EU institutions have worked hand in hand in record time, with determination and ambition to protect our citizens online. (European Commission, 2022)

Crucially, it seems that the DSA retains the key liability elements of the ECD by reinforcing the online platforms' liability regime, as set forth in Article 14(1) of the ECD. This means that, under Article 6 of the DSA, online platforms are not liable if they are unaware of the illegal activity or remove the illegal content expeditiously upon being notified. Indeed, Recital 16 notes that the liability framework set forth in the ECD is preserved in the DSA, while Recital 17 clearly states that the DSA does not provide a positive basis for liability of online platforms. Therefore, the flaws entailed in Article 14(1) of the ECD constitute a substantive part of the DSA.

However, apart from reinforcing the key liability features of the ECD, the DSA also provides clarifications regarding the active role of online platforms and their liability for illegal activities within their services. Indeed, unlike the ECD, the DSA introduces a quasi-Good Samaritan provision in Article 7, stating that online platforms are not deemed ineligible for immunity from liability if they undertake voluntary measures to detect illegal content online. This means that immunity liability defences will apply even if online platforms deploy measures to terminate or prevent the dissemination of content online. Furthermore, Recital 18 of the DSA describes the provision of services by online platforms as merely a technical, automatic processing of information and refrains from addressing the concept of the passive nature of online platforms as set forth in Recital 42 of the ECD.

Overall, one might conclude that the DSA provisions reinforce the ECD's liability rules and make a positive attempt to address the flaws identified in the ECD's immunity liability rules. Interestingly, apart from the liability provisions, the DSA envisions an additional set of procedural obligations for online platforms, adopting a tier-based approach. As Geese (2023) points out, "The DSA opens our eyes to the bigger picture in this respect. Whilst honouring the hosting liability exemption privilege of the E-Commerce Directive, it places the focus much more on the platforms' conduct through the regime of due diligence obligations" (Geese, 2023, p.68). The following section provides a critical examination of the obligations to online platforms.

Obligations and Institutionalisation of Online Platforms

The legal framework envisaged in the DSA appears to signal a paradigm shift from private ordering to the institutionalisation of online platforms. This is because the DSA establishes, depending on their size, a foundation of obligations for online platforms by imposing procedural and compliance requirements. Crucially, as discussed below, such obligations seem to accentuate legal uncertainties and are subject to criticism.

Firstly, the DSA requires online platforms that attract less than 45 million users to adhere to a set of obligations. These obligations primarily focus on content moderation. More specifically, under Article 15, online platforms are required to publish transparency reports in a machine-readable format, in an easily accessible manner, and at least once a year on content moderation within their services. Moreover, as per Article 16, online platforms are also required to deploy a notice-and-takedown mechanism to prevent the dissemination of unlawful content within their services. The removal of content shall be followed by a statement of reasons that justify such removal. Finally, as per Article 20, online platforms are required to establish an internal complaints system and provide users with access to submit appeals against online platform decisions within a timeframe of at least six months following the decision.

However, it is worth noting that content moderation might not always be a panacea for consumer rights. There are several reasons for this. Firstly, there is a risk associated with issuing strategically structured transparency reports. More specifically, a recent BEUC report highlighted that transparency reports focusing on intellectual property infringements often provide limited information on product safety and consumer violations (BEUC, 2021). In addition, a scheme for internal handling of complaints might be subject to language or expertise barriers. For instance, decisions to remove content related to trademark infringement may require human staff with expertise in IP law or specific linguistic skills (Genç-Gelgeç, 2022, p. 48).

Secondly, the DSA imposes an overall risk management framework for very large online platforms, i.e., those platforms that attract more than 45 million users, subject to the European Commission's evaluation every six months. Interestingly, while the risk-based approach is a novelty in digital platform regulation, it is common in the regulation of financial markets (Efroni, 2021).

In particular, financial institutions are required to undertake enhanced due diligence measures in transactions exceeding €1,000 with high-net-worth individuals. For instance, the Anti-Money Laundering legislation requires financial institutions to verify the identity of their customers and the legitimacy of their transactions through client monitoring practices (AMLA). At the same time, electronic payment services are already covered by that

legislation and therefore are subject to due diligence obligations (Ullrich, 2017, p. 125). Amazon Payments Europe has been registered as an electronic money institution, while Google Payment Ltd has obtained an e-Money issuer license in Lithuania (Bloomberg, 2018). In the context of very large online platforms, as per Article 30 of the DSA, they are required to obtain identification information from traders who wish to use their services. More specifically, very large online platforms need to verify traders' contact details, identification documents, payment account details, and the trade register indicating where they are registered. This understanding has already been exemplified in Amazon's Brand Registry, which enables brand owners to register their trademarks (Amazon, 2024). Should a counterfeit product be displayed for purchase on the Amazon platform, the brand owner will be notified.

Furthermore, financial institutions are required to conduct a risk assessment as part of their business operations. For instance, the World Bank Group (2019) published a set of guidelines on credit scoring approaches and highlighted their use by banks to evaluate customer risks associated with individual business relationships. In this light, banks take into consideration a set of risk factors, such as the customer's reputation and/or known adverse information about the customer, the source, structure, and adequacy of information about the customer's wealth, the source of the customer's funds, expected activity on the account (types of transaction, volumes, amounts, the use of cash), the customer's profession/industry sector, and involvement in public contracts. For instance, the Financial Action Task Force sets out guidelines with regard to a risk-based approach in the banking sector and requires financial institutions to conduct risk assessments in order to assess how, and to what extent, the bank is vulnerable to money laundering cases, and to enable the banks to categorise the risk and determine the level of measures required to mitigate any risks of money laundering (FATF, 2014, p. 17).

In a similar fashion, in the context of online platforms, Article 34 requires them to analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services. To do so, they need to consider a number of factors, such as the design of their recommender systems and content moderation systems, the applicable terms and conditions and their enforcement, the systems used for the selection and presentation of advertisements, and the data-related practices of the providers. Finally, Article 35 of the DSA envisages a set of measures in order to mitigate risks. For instance, very large platforms are required to undertake measures such as adapting the design features of their services or modifying their content moderation processes, as well as testing both algorithmic and recommender systems.

In addition, in the context of financial markets' regulation, supervisors are required to report any suspicious cases to the Financial Units. For example, as per Article 43 of the Anti-Money Laundering Directive ((EU) 2024/1640), supervisors must share information with the Financial Units on:

> (a) the list of establishments operating in that Member State and of infrastructure under their supervision pursuant to Article 29a (1) of this Directive, and of any changes to those lists;
>
> (b) any relevant findings indicating serious weaknesses of the reporting systems of obliged entities;
>
> (c) the results of the risk assessments performed pursuant to Article 31, in aggregated form.

Similarly, in the DSA, Digital Services Coordinators have investigative powers. As per Article 51(1), such coordinators have:

> (a) the power to require those providers, as well as any other persons acting for purposes related to their trade, business, craft or profession that may reasonably be aware of information relating to a suspected infringement of this Regulation, including organisations performing the audits referred to in Article 37 and Article 75(2), to provide such information without undue delay;
>
> (b) the power to carry out, or to request a judicial authority in their Member State to order, inspections of any premises that those providers or those persons use for purposes related to their trade, business, craft or profession, or to request other public authorities to do so, in order to examine, seize, take or obtain copies of information relating to a suspected infringement in any form, irrespective of the storage medium;
>
> (c) the power to ask any member of staff or representative of those providers or those persons to give explanations in respect of any information relating to a suspected infringement and to record the answers with their consent by any technical means.

Finally, the enforcement of obligations on financial institutions has been attributed to specific administrative bodies. In particular, under Article 50 of the Anti-Money Laundering Regulation, Financial Intelligence Units are required to have immediate

and direct access to financial and tax information, as well as to information on funds and other assets subject to financial sanctions. In a similar vein, Article 49 of the DSA states that Digital Services Coordinators are assigned to supervise and enforce the DSA, while Article 51 lists the tasks they will carry out.

Overall, one might conclude that different obligations are imposed on online platforms based on their size. From content moderation to risk assessment obligations, a new institutional framework for online platforms emerges. Such a framework appears to raise legal uncertainties, yet shares commonalities with the regulatory framework of financial markets. In this vein, the following section examines the impact of the new framework on online platforms' rights and innovation within the Digital Single Market.

Implications

The set of due diligence obligations to online platforms, similar to financial institutions, might have a detrimental effect on their operation, the online platforms, violating their fundamental right to conduct business as per Article 16 of the EU Charter of Fundamental Rights, while at the same time posing risks for the prosperity of the Digital Single Market's environment.

Firstly, crafting a legal framework similar to that applied to financial institutions might conflict with the very nature of online platforms and the main rationale underpinning their business models. This is because online platforms are considered to be public squares where users can exchange information and views. Indeed, as Tourkochoriti (2023) points out, "Today, online platforms largely define the public sphere and the opportunities for citizens both to express themselves and access the views of others" (p. 133). Consider, for instance, the level of online engagement among users, which reveals that, as of June 2022, more than 500 hours of video were uploaded to YouTube every minute (Ceci, 2024). As a result, imposing a regulatory framework similar to that of financial markets might jeopardise their main aims.

In light of that, some users might migrate to other platforms or identify alternative avenues for exchanging information and views. This understanding has been illustrated in a number of media studies, where bans on specific political beliefs have led many internet users to move to other platforms that offer anonymity and confidentiality (Tourkochoriti, 2023, p. 144). For instance, a study of user migration across platforms reveals that the main reasons for migration may be poor service quality, negative interaction experiences, or attractive new features of newer platforms. Telling examples can be found on Reddit, where user migration from the platform resulted from amendments to its content moderation policy, and from X to Mastodon due to Twitter's change of ownership (Jeong et al., 2024).

Secondly, it appears that the DSA's provisions presuppose that all online platforms' business models, including those of very large platforms, operate like those of the Big Tech Players. This is because several online platforms do not collect the information that the DSA assumes they collect. Indeed, Tushnet (2023) provides an example by citing the Organisation for Transformative Work, where they also work (p. 924). The scholar explains that the organisation is a volunteer-operated website for transformative, non-commercial works, and that, as of 2023, it has 4.7 million registered users who do not collect data or use practices through their recommender and advertising systems. As a result, the one-size-fits-all approach may create obstacles for businesses operating in the Digital Single Market and for new players seeking to enter it.

Thirdly, the imposition of procedural obligations might change the landscape of online platforms' business models. This is because very large online platforms already have the resources and know-how to develop measures to mitigate risks posed by the circulation of counterfeit goods online. Consider, for instance, that in the third quarter of 2023, YouTube's revenues reached $7.952 billion, while Meta's reached $32 billion (Statista Research Department, 2024). In addition, it appears that very large online platforms already have the resources to develop practices and demonstrate compliance with their obligations under the DSA. More specifically, Meta has already established an Ad Library where all advertisements targeting people in the EU are centralised and free to access by anyone (Facebook Ad Library). At the same time, Meta has developed two additional tools for researchers: the Meta Content Library and API. These tools include publicly available content from Pages, Posts, Groups, and Events on Facebook, as well as content made publicly available on Instagram. In this way, researchers can access the tools and therefore search and examine publicly available content through a graphical User Interface (UI) or a programmatic API. On the other hand, new players may not have the necessary assets to comply with their obligations and may be hesitant to enter the market. For instance, in the United States, after the attempted 2018 FOSTA-SESTA Law, which aimed to amend the intermediary liability framework under Section 230, investment in social media business models declined (Masnick, 2023). Therefore, the additional obligations might create a monopolistic market composed of Big Tech players that excludes SMEs.

What is more, it seems that the additional obligations imposed on very large online platforms might prove tricky to comply with. In particular, very large online platforms might be struggling to implement measures in order to comply with their obligations. This understanding is exemplified by the number of procedural investigations initiated by the European Commission. Consider, for instance, that the Commission has already opened formal proceedings to assess whether TikTok and X may have breached the provisions of the Digital Services Act concerning the protection of minors, advertising

transparency, data access for researchers, dark patterns, as well as the risk management of addictive design and harmful content (European Commission, 2023).

Fourthly, online platforms may be unsure how to incorporate the DSA's legal obligations into their policies and practices, and how to comply with them. This understanding has been exemplified in the Threads app developed by Meta. The app is a Twitter competitor and attracted over 100 million users across 100 countries within one week of its launch. However, Meta announced that users from EU member states cannot yet access the app due to 'regulatory uncertainty' stemming from the DSA's provisions (Kelly, 2023).

Finally, the new legal framework under the DSA might have a global effect. This could be achieved either through the digital platforms or the EU policymakers themselves. As for online platforms, tech companies are modifying their global policy practices to comply with new legal obligations. Indeed, Bradford (2019) argues that online platforms align their global practices with Brussels' legal mandates to enhance compliance efficiency (p. 232). On the other hand, EU policymakers can export parts of the DSA in other jurisdictions through free trade agreements (Chander, 2023, p. 5). This understanding has been exemplified in the General Data Protection Regulation, which came into force in 2018. The GDPR has been imitated in various jurisdictions, including Brazil, India, and Japan, as well as in US states such as California, thereby placing EU policymaking in the role of a global leader in regulating digital markets (FEPS, 2022). In the context of DSA, this might have negative implications for other legal systems. This is because problematic provisions of the DSA might also be exported to foreign jurisdictions, thereby triggering similar legal uncertainties and risks for global digital innovation.

Overall, one might conclude that the procedural obligations imposed on online platforms, particularly very large ones, may have a detrimental effect on innovation at the European level. Online platforms may struggle to comply with these obligations, while new players may be hesitant to enter the market. Furthermore, the legal provisions of the DSA may alter the business models of online platforms, particularly very large ones, transforming them from online spaces of free speech into profit-driven, capitalist infrastructures. In this context, the following section presents a set of novel recommendations to provide a balanced approach to regulating digital markets.

Towards a Sectoral-based Legal Framework?

Regulatory Framework

The sector-based approach might offer an alternative to regulating digital platforms for trademark infringement and reduce innovation-related risks to some extent. This is because

vertical legislation might offer flexibility in the law. For instance, the proposal for an AI Liability Directive envisaged a new liability regime to provide remedies to users who claim damages from AI-enabled products and services. Indeed, with reference to sector-specific legislation, Kerber (2020) rightfully pointed out that,

> The most important advantage might be that with rules that are tailored to the specific economic and technological conditions of a sector, a much better balancing of the many trade-offs with regard to an optimal governance of data is possible. (p. 5)

This means that sectoral legislation can be adjusted to meet the industry's needs.

In light of that, a sectoral approach would enable policymakers to better decide which requirements need to be fulfilled and how they could be implemented in the specific sector. This is because a sector-specific approach often comes with ex-ante requirements that would enhance the efficiency of the legislation. Consider, for instance, the Copyright in the Digital Single Market Directive (DSMD). The European Commission noted that, under Article 17 of the DSMD, which regulates the liability of online content-sharing service providers, they may, where proportionate, possible, and practicable, conduct a rapid ex-ante human review of uploads that contain earmarked content identified by an automated content recognition tool. This understanding provides an ex-ante safeguard of users' fundamental rights, as an ex-ante human review can assess whether the video is lawful or unlawful. Otherwise, any removal of lawful content might jeopardise freedom of speech online.

Moreover, sector-specific legislation may offer greater legal certainty to the parties involved. This is because the legislation will be more specific on the conditions, adoption of measures, enforcement, and oversight of the legal rules. The need for legal certainty has been outlined by Intergovernmental bodies and European Institutions. Consider, for instance, the European Commission's Impact Assessment report highlights the Council of Europe, which points out a number of recommendations for Member States with the need for aim of establishing legislation between cyberspace entities and public authorities that has "… a legislative clear legal basis and respects privacy regulations" (Committee of Ministers, 2007). This is warranted because the internet and all relevant digital technologies have high public service value and must promote the respect of human rights and other fundamental rights within the online environment. At the same time, the policymakers in the EU Cyber Forum declare that "legal certainty is key for a better international cooperation against cybercrime" (Council of Europe, 2020) while

the Public Consultation on the evaluation and modernisation of the legal framework around the trustworthy use of AI and states that such a framework aims to "ensuring legal certainty to facilitate investment and innovation in AI" (European Commission, 2021). The majority of respondents supported the introduction of specific requirements that would prevent the dissemination of unlawful content, along with a uniform level of enforcement of intellectual property rights at the European level. Such requirements could promote legal certainty among rights holders.

However, one might argue that a horizontal legislative framework would also enhance legal certainty. This could be achieved through standardisation and the application of future-proofed legal rules. In particular, with standardisation, uniform criteria will be developed and adopted across sectors. As Ranchordas and van t' Schip (2019) pointed out, "The proponents of future-proofing would then argue that a forward-looking approach to legislation can favour legal certainty as it allows the legislator to avoid scenarios of deeply ineffective and obsolete laws" (p. 21).

Yet, while this argument has its own merit, it should be noted that a horizontal framework may be broad enough to ensure applicability across sectors and accommodate adjustments driven by technological advancements. In this light, sector-specific legislation may offer greater legal certainty to the parties involved.

Having reflected on the regulatory considerations for developing sector-specific legislation on the liability of online platforms for trademark infringement, the narrative turns to the characteristics and conditions that could assist in developing the suggested legal rules.

Policy Suggestions

A legislative framework governing the liability of online platforms in the trademark context is not a novelty. Indeed, in the context of Intellectual Property Law, a sector-specific legislation is envisaged in the Copyright in the Digital Single Market Directive. The aim of the Directive is to provide appropriate remuneration for rights holders when their works are used and, therefore, close the value gap between rights holders and online platforms. In this light, Article 18 addresses appropriate and proportionate remuneration, Article 15 protects press publications in online use, and Article 17 addresses the use of protected content by online content-sharing service providers. What is more, the European Parliament's (2020) report for the European added value assessment of the Digital Services Act states that, in the online platform ecosystem, specific regulation is necessary to guarantee fair competition in the digital age (EU Parliament, 2020). In this way, asymmetries generated by market power would be reduced (Lomba & Evas, 2020, p. 29).

In terms of duties, online platforms should be held to a duty of care regarding the goods displayed on their services. This understanding is already exemplified in the relevant provisions of the DSA. More specifically, Article 30 introduces the know-your-customer requirement; as a result, providers of online platforms must obtain the contact details and verify the valid status of traders, while Article 32 requires providers of online platforms to inform consumers who have purchased an illegal product that the product or service is illegal, the identity of the trader, and any relevant means of redress.

Furthermore, several online platforms have already implemented measures to safeguard the circulation of lawful products within their networks. Amazon has introduced a Brand Registry scheme, which enables brand owners to register their trademarks. In this way, the Brand Registry comprises listings of products that use trademarks in their title but are not correlated with the brand the trademark represents, as well as images that include a logo that belongs to products that are not relevant to the brand; therefore, any unlawful use of a brand can be detected. In addition, several luxury brands have developed collaborations to protect their trademarks. A telling example is the Aura Blockchain consortium, which launched the Aura SaaS, a privately based blockchain platform initiated by LVMH, the Prada Group, and the Cartier Group (Aura Luxury Blockchain). The platform enables brands to register their products on the blockchain and issue digital certificates of ownership and authenticity.

The duty to develop a brand registry tool should be assigned to online platforms, taking into account their size and growth. Attributing responsibility to host ISPs based on their size is not a novel concept at the European level. Consider, for instance, Article 17(6) of the Copyright in the Digital Single Market Directive, which states that online content sharing service providers that have been in operation for less than three years and have an annual turnover below €10 million must demonstrate that they made their best efforts to obtain authorisation for the use of the works. Along similar lines, the compromised text from the EU Parliament excludes host ISPs with an annual turnover of less than €10M and fewer than 50 employees from the adoption of a filtering mechanism (Reda, 2019).

The suggested legislative framework would benefit from robust enforcement of rights. Indeed, Turillazzi et al. (2023) argue that the enforcement of the DSA is crucial (p. 83). This understanding is supported by the European Data Protection Supervisor (EDPS). More specifically, the EDPS Opinion notes that "any form of content moderation should take place in accordance with the rule of law" and stresses the need for the successful implementation of the DSA (EDPS, 2021). In addition, the importance of enforcing legal rules has already been illustrated in the context of data protection. A

report reveals that the Data Protection Authorities are not well equipped with technical resources or staff and states that, "The Committee fears that citizens' fundamental rights are in peril" (Committee of Justice, 2021). A telling example is the Irish Data Protection Authority, which has failed to resolve 98 % of 164 significant data protection complaints about privacy abuse, thus failing to comply with EU privacy laws and safeguard users' privacy rights (Matrix Security Watchdog, 2021).

Finally, the suggested legal rules should clarify the intersection with the legal rules enshrined in the Copyright in the Digital Single Market Directive. This is because there are online marketplaces that offer tangible and non-tangible goods. Tangible goods are understood as anything tangible, while intangible goods include eBooks, audio files, and online seminars, which can be viewed on YouTube. If a rights holder brings a lawsuit against the online marketplace for copyright or trademark infringement, one might wonder which principles should apply and under what conditions. Consider, for instance, following the *L'Oreal v Ebay case*, to attribute liability to the online marketplace, the Court shall examine whether the online marketplace is "aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31." Whether the principle of a diligent economic operator applies in cases where an online marketplace offers copyrighted content should be clarified.

Conclusion

This article has hitherto critically engaged with the new regulatory framework for online platforms, particularly very large ones. In particular, the new framework envisages a shift from private ordering to the institutionalisation of the role of online platforms, providing different categories of online platforms and ascribing to them new obligations, depending on their size, similar to those deployed by financial institutions.

The ascription of obligations for online platforms varies from content moderation to transparency reports, while very large online platforms are subject to a set of crisis management measures and operate under the supervision of the Digital Services Coordinators. Crucially, the attribution of obligations might have implications for innovation at the European level. This is because the provisions of the Digital Services Act presuppose that all online platforms' business models, including those of very large online platforms, operate similarly to those of the Big Tech Players. At the same time, a monopolistic market might be created, as very large online platforms already have the resources and know-how to develop measures to mitigate risks posed by the circulation of counterfeit goods online. Moreover, crafting a legal framework similar to that

of financial institutions might undermine the very nature of online platforms and the primary rationale underpinning their business models. Finally, online platforms may be uncertain about the application of the new rules; they may even struggle to implement measures in order to comply with their obligations. Finally, the new legal framework under the Digital Services Act may have a global impact and be transposed into other jurisdictions. A lack of clear legal rules may have a detrimental effect on the regulatory frameworks of online platforms worldwide.

In that vein, a set of sector-based considerations has been put forward. More specifically, this article argues that sector-specific legislation might offer an alternative to regulating digital platforms for trademark infringement and reduce innovation-related risks to a greater extent. This is because vertical legislation might offer flexibility in the law and enhance legal certainty for the parties involved. For instance, this could be achieved by imposing a duty of care on online platforms that display goods, taking into account the size and growth rate of these platforms. At the same time, the enforcement of legal rules across EU member states should also be of paramount importance. Otherwise, the lack of correct implementation of the rules might jeopardise innovation within the Digital Single Market.

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REST AND RESISTANCE. REFLECTIONS ON THE CHRONOPOLITICS OF DISCONNECTION*

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DESCANSO Y RESISTENCIA. REFLEXIONES SOBRE LA CRONOPOLÍTICA DE LA DESCONEXIÓN

Abstract
This article explores the intricate intersections among labour, leisure, and rest, shedding light on the political stakes of the erosion of boundaries between professional and personal life in digital capitalism. It critically examines how digital technologies cultivate a culture of perpetual connectivity, framing rest as a tool for productivity rather than as a right. Drawing on insights from some feminist perspectives, the article reinterprets rest and disconnection as acts of political resistance that challenge capitalist chronop-

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olitics, while also recognising their potential to be co-opted by neoliberal narratives. In this view, rest emerges not merely as a personal pursuit but as a shared resource and a collective act of defiance against capitalist exploitation, advocating for temporal justice. This original approach situates the right to disconnect within broader political struggles, emphasising its role in reimagining time as a commons rather than a commodity. The aim is to contribute to the ongoing discourse on rest and the right to disconnect as pivotal components of political emancipation and social justice in the digital age..

Keywords
rest; disconnection; digital capitalism; temporal justice; collective resistance.

Resumen
Este artículo explora las complejas intersecciones entre trabajo, tiempo libre y descanso al destacar las implicaciones políticas de la disolución de los límites entre la vida profesional y la personal en el contexto del capitalismo digital. Se examina críticamente cómo las tecnologías digitales fomentan una cultura de conectividad perpetua y presentan el descanso como una herramienta de productividad en lugar de un derecho. A partir de algunos enfoques propuestos por una corriente del feminismo, se reinterpreta el descanso y la desconexión como actos de resistencia política que desafían la cronopolítica capitalista y, al mismo tiempo, se reconoce su susceptibilidad a ser cooptados por narrativas neoliberales. Desde esta perspectiva, el descanso no se concibe simplemente como un esfuerzo personal, sino como un recurso compartido y un acto colectivo de desafío contra la explotación capitalista, que aboga por la justicia temporal. Este enfoque original sitúa el derecho a la desconexión en luchas políticas más amplias y subraya su papel en la reimaginación del tiempo como bien común y no como mercancía. El objetivo es contribuir al discurso continuo sobre el descanso y el derecho a la desconexión como componentes clave de la emancipación política y de la justicia social en la era digital.

Palabras clave
descanso; desconexión; capitalismo digital; justicia temporal; resistencia colectiva.

To be conscious is not to be in time
But only in time can the moment in the rose-garden,
The moment in the arbour where the rain beat,
Be remembered; involved with past and future.
Only through time time is conquered.

(T.S. Eliot, Four Quartets, 1941)

Labour, Leisure, and the Struggle for Rest

The distinction between labour and leisure has long occupied a pivotal place in political and philosophical debates, revealing profound tensions in how societies "comprehend" time and define human activity. In this regard, such a binary separation is a relatively modern construct, emerging alongside the rationality of industrial capitalism, where the commodification of time transformed labour into a measurable and exchangeable unit (Gorz, 1989). Against this framework, leisure was conceived as a complementary counterpart to labour: a necessary interval for rest and recovery that enabled the maintenance of productivity (Thompson, 1967). However, as industrial capitalism evolved into its post-industrial and digital iterations, this distinction has steadily eroded. Productivity and consumption have infiltrated domains once considered private and non-economic, marking a profound shift in the relationship between time, labour, and personal life (Gorz, 1989; Horkheimer & Adorno, 2002). The advent of digital technologies has amplified this erosion, creating a culture where workers are expected to remain perpetually available. This phenomenon, often referred to as the "always-on" culture (Crary, 2013; Turkle, 2015), has transformed labour into an activity that is no longer confined to specific hours or locations. Digital tools, such as smartphones, emails, and instant messaging platforms (and digital platforms in general), have not only expanded the temporal scope of labour but have also altered its spatial dimensions, enabling labour to infiltrate homes, relationships, and even moments of rest. In this sense, the boundaries between labour and leisure have become increasingly porous, blurring the line between what constitutes labour and what constitutes time away from it. This critical perspective enhances the understanding of how digital technologies can be employed not only as tools of efficiency but also as instruments of temporal control.

The concept of porosity offers a valuable framework for understanding this transformation (Genin, 2016). Porosity describes the extent to which contemporary technologies and cultural expectations allow labour to permeate spaces, times, and relationships

traditionally reserved for rest or personal fulfilment. In the digital age, the distinction between labour and non-labour time is no longer rigid but fluid, with professional demands often intruding upon moments of leisure. This condition highlights a broader structural issue: the diminishing capacity of individuals to assert control over their own time as the intertwining of professional and personal spheres becomes increasingly normalised. The result is a heightened sense of obligation and an inability to fully disconnect, a dynamic that reinforces workers' subordination to the demands of capitalist productivity. Digital technologies have radically intensified the porosity of boundaries between labour and personal life, reshaping the temporal and spatial dimensions of labour in unprecedented ways. This porosity is evident in the rise of the process of "presence bleed," an expression coined to describe how professional obligations seep into spaces and times traditionally reserved for personal life: "Presence bleed explains the familiar experience whereby the location and time of work become secondary considerations faced with a 'to do' list that seems forever out of control" (Gregg, 2011, p. 2). Far from liberating workers through flexibility, these technologies can create an environment in which individuals are always potentially "on call," fostering a culture of pervasive surveillance and implicit control. Moreover, the erosion of boundaries between labour and leisure often occurs under the guise of productivity and efficiency. For instance, remote labour, initially celebrated as a means of achieving work-life balance, has led to an even deeper fusion of professional and personal spheres. Employees are increasingly reporting difficulties in delineating their roles, as the workplace has expanded into private spaces such as homes and bedrooms (Mazmanian et al., 2013). This spatial intrusion not only disrupts routines but also creates a constant state of partial engagement, undermining psychological well-being.

As a result, porosity and flexibility become mechanisms through which the demands of capitalist productivity assert themselves over personal self-determination. Workers not only struggle to disconnect from their professional roles but also internalise the expectation of constant availability as a norm. This dynamic reflects broader changes in the organisation of time under digital capitalism, where the boundaries between labour, rest, and play dissolve into a continuous cycle of commodified activity (Crary, 2013). In this light, the digital age does not merely blur the lines between labour and leisure but actively reconstructs these categories to serve the imperatives of market logic and technological efficiency:

> Because of the permeability, even indistinction, between the times of work and of leisure, the skills and gestures that once would have been restricted to the

> workplace are now a universal part of the 24/7 texture of one's electronic life. The ubiquity of technological interfaces inevitably leads users to strive for increasing fluency and adeptness. (Crary, 2013, p. 58)

Günther Anders's (1956) critique of modern production systems provides additional insight into this phenomenon. The German philosopher "prophesied" that the logic of industrial capitalism not only dictates the rhythms of labour but also colonises leisure, transforming it into an extension of labour. Under capitalism, leisure is often reduced to a passive recovery period designed to restore workers' capacity to produce rather than serving as a space for genuine autonomy or creative fulfilment. The commodification of time has thus rendered leisure instrumental, subordinating it to the broader goals of productivity and consumption. According to Anders, the dominance of machines and automation in modern production processes has further alienated labour from its human dimension, reducing it to a mechanical act driven by external imperatives. In this context, leisure time, far from offering a true escape from labour, becomes merely a recovery period needed to restore the individual within a system that continues to exploit their productive potential. These observations are also linked to the obsolescence of labour that goes hand in hand with the overarching obsolescence of the human being (Anders, 1980). Labour not only loses its intrinsic meaning, but leisure time, once thought of as a realm of freedom and creativity, ends up being anchored to the same capitalist system that denies individuals a genuine experience of disconnection or autonomy within the community. Rest becomes a tool for self-optimisation, further tethered to the demands of capitalist productivity. The political implications of this transformation lie in the depolitisation of time as a collective issue, with leisure and rest relegated to the realm of self-management. In this view, leisure is never truly free but is instead constrained by the same logics that limit its transformative potential.

From a theoretical and political point of view, these dynamics provoke critical inquiries into the role of time in sustaining systems of domination. Foremost among these inquiries is the question of how, under late capitalism, time itself becomes a significant mechanism of control and regulation. The concept of time-space compression highlights how neoliberalism accelerates economic processes, collapsing traditional boundaries of time and space (Harvey, 1990). After all, this temporal acceleration aligns with the theory of social acceleration, which describes the increasing pace of life under modern capitalism (Rosa, 2013, 2019). This acceleration not only restructures the pace of economic processes but also intensifies the erosion of temporal boundaries between labour and leisure. By compelling individuals to adapt to an ever-accelerating rhythm,

social acceleration undermines the capacity to exercise temporal sovereignty, a phenomenon that exacerbates the porosity of time (Rosa, 2013). This observation reinforces the argument that capitalist chronopolitics strategically manipulates time to optimise productivity while diminishing opportunities for genuine rest and disconnection. Such temporal compression refers to the way advances in technology, communication, and transportation have effectively "shrunk" the world, allowing economic processes to unfold at unprecedented speed across vast distances. While this acceleration has facilitated global trade and connectivity, it has also intensified pressures on workers, increasing the demand for immediate responses, higher productivity, and constant adaptability. The speed of technological and economic processes does not merely reshape temporal and spatial boundaries but fundamentally alters the fabric of social and political life. Speed itself becomes a form of power, privileging those who can act, respond, and adapt faster than others, whether in markets, warfare, or communication systems. Such a condition resonates with the emergence of a "tyranny of the instantaneous," in which the acceleration of communication and economic processes compresses temporal boundaries, compelling individuals to respond at the speed of digital transactions (Virilio, 1986). The convergence of these dynamics illustrates how capitalist chronopolitics manipulates time to maximise productivity, further complicating the capacity to disconnect.

Therefore, it is understandable why under neoliberalism, the individual is framed as an "entrepreneurial self," responsible for optimising their own productivity and well-being (Brown, 2015; Dardot & Laval, 2013). In this context, leisure and rest are no longer collective rights but personal responsibilities, tied to the logic of self-management and self-improvement. This neoliberal framing depoliticises the structural conditions that undermine rest, shifting the burden of disconnection onto individuals while obscuring the systemic forces that perpetuate exploitation. Thus, the blurring of boundaries between labour and leisure is not merely a technological or cultural phenomenon but a deeply political issue. It reflects a broader reorganisation of time under capitalism, where both labour and rest are increasingly commodified and regulated to serve the imperatives of productivity. The political dimension of this issue lies in the fact that control over time becomes synonymous with control over workers themselves. Time, once considered a fundamental dimension of human self-determination, is now tightly controlled and regulated by market demands and technological systems. To address these challenges, scholars argue that it is essential to reimagine time as a site of resistance and collective struggle (Hardt & Negri, 2000). The fight for time—both labour time and leisure time—becomes a crucial front in challenging the capitalist structures that define human existence and exploit human labour. However, can this struggle continue under

the demand for the right to disconnect, or must it already be framed within a broader, more complex framework?

The Ambiguity of the Right to Disconnect

The origins of the right to disconnect can be traced back to early labour movements that sought to establish boundaries between labour and personal life, such as the 19th-century campaign for the eight-hour workday (Thompson, 1967). These efforts reflect a longstanding struggle against the commodification of time, demonstrating that the tension between labour and rest has deep political and historical roots. In recent years, the debate has gained momentum, driven by a clear demand for the right to disconnect. This right has been formally recognised in various countries, ensuring that workers have legal protection against the expectation of responding to work-related communications outside their designated working hours.[1] While labour becomes increasingly disengaged from physical locations and traditional time dimensions, the concept of time itself is being redefined, as are the related rights. As seen, in a world where labour can follow individuals beyond office hours via emails, messages, and mobile devices, the accumulation of capital seems to expand to all dimensions of the human, especially time. This "chronophagy" (Galibert, 2012) reflects a broader trend in which capitalist systems seek to control not only human labour but also the rhythms of individuals' time. Thus, the contemporary vindication for the right to disconnect has emerged as a timely response to the challenges of perpetual connectivity in the digital age. Although not yet specifically legislated on a large scale, it seeks to establish boundaries between labour and personal life, offering protection from the encroachments of digital labour.

Notwithstanding, while the right to disconnect is often celebrated as a progressive labour right, it risks being co-opted again into the logic of capitalism itself. In fact, the critical question is whether the revindication to disconnect may be psychopolitically configured as a product of techno-capitalism in disguise, raising doubts about

[1] As mentioned, the right to disconnect has gained increasing political and regulatory attention in recent years (International Labour Organisation [ILO], 2020; Organisation for Economic Co-operation and Development [OECD], 2022). Internationally, while no binding legal framework exists, the ILO has emphasised, through its conventions, the importance of work-life balance and rest, even though it does not explicitly address digital disconnection. In Europe, the right to disconnect has been enacted into national policies. France led the way with the *Loi Travail* (2016), which requires firms to negotiate measures to limit digital communication outside work hours. The European Union has also promoted discussion of the issue, placing it within broader work-life balance initiatives, such as the Working Time Directive (2003/88/EC), but it has not specifically legislated on disconnection. In the Italian context, disconnection gave birth to a wide debate during the COVID-19 pandemic and showed the risks of blurred boundaries between labour and private life. Italy has not yet enacted any stand-alone legislation; however, in the framework of the so-called "smart working," Decree 104/2020 regulated digital communication outside of work time. Furthermore, the issue of the right to disconnect gained political attention with the 2022 Italian Budget Law, which introduced specific protections for telecommuters.

its transformative potential. As capitalism has historically absorbed and commodified resistance, we must interrogate whether the right to disconnect may follow a similar trajectory, aligning with rather than disrupting capitalist imperatives. One of the key critiques of the right to disconnect is, indeed, its individualised framing. By framing disconnection as an individualised solution to systemic problems, such vindication may inadvertently reinforce the very structures it seeks to challenge, as well as become another tool for maintaining capitalist productivity rather than dismantling its underlying structures. This paradox arises when disconnection is framed not as a collective right but as an individualised measure. While it ostensibly empowers workers, it also places the burden of regulating connectivity on individuals rather than addressing systemic pressures. As Fisher (2009) argued, neoliberal systems often present personal responsibility as a substitute for structural change. Workers are thus tasked with navigating the boundaries of labour and rest within a system that continues to valorise hyper-labour and productivity. For example, a worker who chooses to "disconnect" under this right might face implicit consequences, such as being viewed as less dedicated or ambitious than their peers. Such a dynamic shifts the responsibility for maintaining work-life balance onto individuals while leaving the broader culture of hyper-labour intact. Capitalism has a long history of commodifying resistance. The well-being industry is a prime example, transforming practices like mindfulness and yoga—originally forms of spiritual or political resistance—into lucrative markets (Purser, 2019).

In this sense, corporate wellness programmes or flexible working policies may appear progressive but often reinforce exploitative structures by obscuring broader demands for fair wages, reduced working hours, or job security (Fleming, 2017). Such initiatives reflect a growing tendency to commodify well-being, hollowing out its transformative potential in favour of maintaining existing power dynamics. Similarly, the right to disconnect risks becoming commodified, with employers' marketing policies of "healthy disconnection" as a feature of their brand identity. Corporations might adopt the language of disconnection not to protect workers but to enhance productivity. For instance, enforcing fixed disconnection hours could simply ensure that workers are well-rested enough to meet the demands of increasingly intense workloads during their connected hours. As Han (2015) argues, the logic of productivity infiltrates even supposed acts of resistance, turning them into tools for optimising performance. Furthermore, tech companies are already capitalising on the discourse of digital well-being. Products such as smartphone apps and online platforms that track screen time or enforce "focus modes" market themselves as tools for disconnection, monetising the very conditions of hyper-labour they help perpetuate (Wajcman, 2015).

Another significant ambiguity surrounding the right to disconnect is its potential to exacerbate workplace inequalities. Moreover, gig economy platforms, such as ride-sharing and food delivery services, actively encourage "always-on" behaviour by using algorithms that penalise workers for inactivity. This technological enforcement of connectivity highlights the need for digital labour rights that account for the specific vulnerabilities of platform workers (Wood et al., 2019).[2] While high-status, salaried professionals often have the autonomy to disconnect without facing adverse consequences, precarious workers and those in the gig economy frequently lack this privilege, leaving them more vulnerable to pressures of constant availability. As Federici (2012) outlines, the structures of capitalism disproportionately exploit low-wage workers, who are often excluded from protective labour policies. In sectors like logistics, hospitality, or the gig economy, disconnection is rarely an option, as workers rely on constant connectivity to secure shifts or jobs. The right to disconnect, if not implemented equitably, risks becoming a luxury reserved for white-collar workers, leaving others trapped in exploitative cycles of availability. The right to disconnect also risks reinforcing the neoliberal separation of "labour" and "life" as distinct domains. The capitalist separation of labour from personal life often conceals the extent to which labour shapes individual identity and permeates everyday existence (Hochschild, 1997). Policies that enforce disconnection hours may unintentionally legitimise excessive workloads during working hours, intensifying the "time bind" rather than alleviating it. Moreover, the framing of disconnection as a "solution" to work-life conflict implies that personal rest is sufficient to mitigate the harms of hyper-labour. This logic echoes what can be described as the "temporal fix" of capitalism—policies that adjust temporal rhythms without challenging the overarching structures of exploitation and inequality (Sharma, 2014). The danger of the right to disconnect becoming a product of capitalism lies in its potential to reproduce rather than resist the logics of neoliberalism.

Considering the above, by emphasising individual boundaries rather than fostering collective change, the right to disconnect risks being absorbed into the very systems it seeks to challenge, aligning with capitalist values of self-management and efficiency. As

[2] The rise of platform-based gig jobs complicates the right to disconnect, as algorithmic management and flexible scheduling perpetuate constant connectivity. In response, the EU Directive on Platform Work (Proposal COM/2021/762 final) seeks to improve working conditions for gig workers, including enhanced digital rights and protections against algorithmic control. Specifically, Article 6 proposes transparency obligations for algorithmic management, requiring platforms to inform workers about decision-making processes affecting working conditions. This legislation acknowledges the temporal inequalities faced by gig workers, who remain "always-on" to secure tasks. However, the directive's potential to address temporal justice hinges on its capacity to redefine employment status and enforce digital disconnection rights within gig economy structures.

noted, contemporary capitalism has a remarkable ability to co-opt critiques, incorporating them into its structures to perpetuate itself (Boltanski & Chiapello, 2005). For the right to disconnect to have a truly meaningful impact, it should go beyond individual approaches and align with broader labour movements that advocate for universal protections, fair treatment of precarious workers, and a broader re-evaluation of the role of labour in society. To move beyond the limitations of an individualised conception of the right to disconnect, it is necessary to explore alternative frameworks that emphasise collective resistance and shared temporal autonomy. By shifting the focus from individual responsibility to communal agency, the discourse can challenge neoliberal narratives and reclaim time as a commons. This perspective paves the way for a more radical reimagining of rest.

The Commons of Disconnection. When Rest Becomes a Radical Political Act

Given the ambiguities emerging from the theoretical and political analysis of the right to disconnect, it may be useful to explore certain strands of feminist theories that, by challenging the notion of the individual, focus on the collective temporal dimension of rest. Indeed, some feminist insights provide us with significant reflections on how leisure time can represent a collective battlefield. The exploitation of women, particularly black women, is often linked to their inability to access free time, and, consequently, rest becomes a systemic issue rooted in the exploitation of marginalised communities, linking it to broader social justice and feminist struggles (Davis, 1981; hooks, 2000; Ruiz, 1998). With this regard, "when women in the home spend all their time attending to the needs of others, home is a workplace for her, not a site of relaxation, comfort, and pleasure" (hooks, 2000, p. 50). By shifting the focus from individualised approaches to systemic and shared practices, these perspectives offer a more nuanced framework for understanding rest as a site of political struggle. This analysis aims to broaden the scope of comprehension, moving beyond neoliberal paradigms to explore rest not merely as a right but as a collective act of resistance and reimagining of time itself. As bell hooks[3] (1999, 2000) argued, rest can be interpreted as a radical form of self-care, particularly

[3] Born Gloria Jean Watkins (1952–2021) was a feminist theorist, writer, and activist of the 20th and 21st centuries. She adopted the pen name "bell hooks" in honour of her great-grandmother, choosing lowercase letters to draw attention away from her personal identity and towards her ideas. Her work explored themes such as intersectional feminism, racism, love, culture, and education, consistently emphasising the need to connect theory to lived experience. She examined the oppression of black women through the intertwined forces of racism and sexism. Through a profound reimagining of love as a political and transformative force, bell hooks was a vocal advocate for collective struggle against all forms of oppression, rejecting hierarchical systems of privilege and promoting an inclusive, intersectional approach to feminism.

in societies that commodify human effort and define individuals primarily by their productivity. Rest, in this direction, becomes an act of rebellion to the extent that "choosing 'wellness' is an act of political resistance" (hooks, 1993, p. 7). It becomes political when it actively defies the expectations of relentless productivity. Moreover, the politicisation of rest necessitates a critical reflection on how its framing risks perpetuating neoliberal ideals of self-optimisation. By promoting free time as an individual solution to burnout or overwork, there is a danger of depoliticising the systemic roots of exploitation, reducing rest to a means of restoring productivity rather than challenging the structures that demand implacable labour (Sharma, 2014). Thus, while rest is undoubtedly an act of defiance, its co-optation into capitalist narratives underscores the importance of situating it within broader struggles for temporal justice. Within the opposition between labour and leisure, rest challenges the capitalist notion that time should always be optimised for labour or consumption. By resisting the relentless demand for productivity, rest becomes not only a personal necessity but also a political act (Vescio, 2024), directly opposing systems that exploit human resources and blur the boundaries between labour and non-labour life. In this perspective, the proposal reframes free time as a collective and feminist practice, emphasising how the chronic exhaustion imposed by capitalist systems disproportionately impacts women and marginalised communities. Rest, in this sense, is not only an individual right but also a form of collective resistance, advocating for temporal justice and shared well-being.

Rest, while seemingly private, carries public significance. Hersey, founder of *The Nap Ministry*[4], conceptualises rest as a collective act of resistance, especially for communities historically subjected to systemic exploitation (Hersey, 2022). She frames it as a form of reparative justice and communal healing, disrupting cycles of exploitation and reclaiming time as a shared resource:

[4] *The Nap Ministry* is a cultural organisation and movement founded in 2016 by Tricia Hersey, a poet, performance artist and activist. The movement centres on promoting rest as a radical political act and a tool for healing, particularly for black and marginalised communities disproportionately affected by the oppressive systems of capitalism and white supremacy. *The Nap Ministry* views rest, such as napping, pausing, or slowing down, as a form of resistance against a capitalist culture that exploits bodies and minds, demanding endless productivity. Hersey argues that rest is not a luxury but a fundamental human right, offering liberation from the relentless demands of hyper-productivity, a legacy rooted in the historical exploitation of enslaved people and perpetuated in modern systems. Grounded in intersectional feminism and social justice, the movement highlights how Black women, in particular, have been systematically denied rest. *The Nap Ministry* frames rest as a collective and spiritual practice, inviting communities to reimagine rest not merely as an individual necessity but as a shared act of resistance against systemic oppression. The organisation's initiatives include hosting group events and workshops centred on collective rest, sharing educational resources on social media, and inspiring global audiences to rethink their relationship with work and rest. In her 2022 book, *Rest is Resistance: A Manifesto*, Hersey expands on these ideas, positioning rest as a transformative act that dismantles harmful systems of exploitation. At its core, *The Nap Ministry's* message, captured in its mantra "Rest is Resistance," invites us to envision a more equitable world where rest is central to our well-being and collective liberation.

> Rest isn't a luxury, but an absolute necessity if we're going to survive and thrive. Rest isn't an afterthought, but a basic part of being human. Rest is a divine right. Rest is a human right. […] Like hope, rest is disruptive; it allows space for us to envision new possibilities. We must reimagine rest within a capitalist system. (Hersey, 2022, p. 60)

When rest becomes collective—when people nap in public, refuse overtime, or advocate for systemic change—it transcends the private sphere. The collective dimension of free time also confronts the challenge of inclusivity: whose rest is protected, and whose labour enables it? As intersectional feminist critiques remind us, the ability to rest collectively often depends on the invisible labour of marginalised groups, such as domestic workers or gig economy labourers, who remain excluded from many labour protections. Therefore, to reimagine rest as a collective commons, it is crucial to integrate the demands of precarious and undervalued workers, ensuring that free time is not a privilege but a universal right (hooks, 1993; Federici, 2012). Rest can indeed be understood as a form of collective sovereignty, a reclaiming of time as a shared commons. Drawing from Arendt (1958), the time beyond labour can be seen as part of the vita activa—a public practice that fosters reflection and solidarity. Historically, public spaces like parks and libraries served as sites of communal rest, allowing individuals to temporarily escape the demands of labour and engage in shared practices of repose and reflection. However, the privatisation of these spaces and the commodification of time have eroded opportunities for collective leisure. Reimagining rest as a commons means not only creating appropriate physical spaces but also fostering societal structures that protect collective well-being. At the same time, the right to disconnect reflects the individual's capacity to assert sovereignty over their own time and space. Arendt's distinction between labour, work, and action provides a useful lens through which to view this right. Disconnecting from work-related communications is not just a passive withdrawal; it can represent an active assertion of the self's ability to reclaim and redefine personal time as distinct from commodified labour.

The search for personal sovereignty over time can also be seen as connected to Honneth's (1996) theory of recognition, which holds that recognition is fundamental to individual freedom and that its absence leads to alienation and subordination. In the context of digital capitalism, where labour infiltrates all aspects of life, the right to disconnect may be seen as a struggle for recognition—an assertion of temporal autonomy against the pressures of capitalist productivity. The right to disconnect, in this light, can be read as a demand for the recognition of workers' humanity beyond their

economic value. By asserting the right to rest, individuals reclaim their capacity to exist as subjects outside the commodification of labour, challenging a system that often denies this autonomy. However, for this act to be truly transformative, it must extend beyond individual assertion to include collective recognition and address the structural conditions that constrain autonomy. The debate between recognition and redistribution is well-known, highlighting the tendency to underestimate the role of economic and institutional structures in enabling recognition (Fraser & Honneth, 2003). In this context, what emerges is that structural economic inequalities are often overlooked in favour of an emphasis on symbolic struggles. Applied to rest and disconnection, this critique again highlights the limitations of framing them solely as individual rights. Without collective and structural reforms—such as fair wages and reduced working hours—rest risks becoming a privilege inaccessible to precarious workers. Fraser also warns against neoliberal co-optation, where rights like disconnection are individualised and depoliticised, serving capitalist productivity rather than challenging systemic exploitation. An interwoven approach of recognition and redistribution is essential to ensure rest is genuinely collective and inclusive. The argument that recognition must be coupled with redistribution provides a vital lens for examining temporal justice. In the context of digital capitalism, where productivity is prioritised over human flourishing, the right to disconnect risks being co-opted as an individualised privilege rather than a collective right. By advocating for both economic and symbolic justice, Fraser's critique challenges the neoliberal tendency to depoliticise rest. This approach calls for a radical rethinking of temporal autonomy, positioning rest as a shared resource rather than a commodified luxury. This aligns with feminist critiques that emphasise the intersection of temporal and social inequalities, urging a redefinition of time not as a commodity but as a space for collective flourishing.

These insights challenge the neoliberal tendency to frame leisure as a personalised or privatised choice, instead situating it as a site of potential emancipation and solidarity. From this perspective, the division of time into labour and free time is not neutral. It is shaped by power dynamics that reflect and perpetuate broader inequalities. The capitalist imperative to maximise efficiency and extract value from human effort prioritises economic output over human flourishing, marginalising those who cannot or will not conform to its temporal expectations. By reclaiming rest as a space for resistance, creativity, and collective well-being, critical theorists invite us to reimagine the role of time in fostering more equitable and humane social structures. The claim for recognition also offers valuable reflections on temporal justice. Recognising individuals' need for rest and autonomy within the community, rather than their time, challenges the

capitalist appropriation of temporal rhythms. It suggests that temporal justice cannot be achieved through isolated policies but requires a societal shift that values time as a shared resource, fostering conditions where rest is accessible to all. The intersection of such perspectives highlights how rest and leisure are not apolitical or neutral practices but spaces where resistance to capitalist chronophagy can unfold. Rest, when framed as an intentional disruption of exploitative labour systems, can become a form of defiance against the commodification of time and the dehumanisation of workers. Leisure, likewise, holds transformative potential when it shifts from an individualistic pursuit to a collective demand that reimagines labour rights and temporal autonomy. However, we must also be aware that the feminist theories we addressed, while offering valuable critiques of capitalist and patriarchal structures, risk reproducing certain limitations when their focus on the collective fails to fully interrogate how the intersections of race, class, and ability shape access to rest. For example, the emphasis on "care" as a collective practice must also grapple with how unpaid care labour, disproportionately carried out by women, has been historically naturalised and exploited, raising concerns about whether collective rest can ever be fully disentangled from the structures it seeks to resist (Federici, 2012). For this reason, the debate can only continue.

The Politics of Rest. Conclusive Remarks

The linear and accelerated temporality that dominates neoliberal societies is deeply intertwined with the logic of productivity and relentless progress. Rest introduces alternative temporalities—such as cyclical, idle, or reflective time—that disrupt these paradigms and challenge the political economy of time (Baraitser, 2017). The right to disconnect holds significant potential within this framework, but risks being subsumed within neoliberal logic if it remains individualistic. Without addressing the structural conditions that perpetuate inequalities—such as precarious labour, digital surveillance, and economic exploitation—the right may remain inaccessible to those in precarious employment or marginalised communities, deepening temporal inequalities. For instance, the structural conditions required to exercise the right to disconnect (like economic security or workplace autonomy) are unevenly distributed, often favouring higher-status professionals over gig economy workers. This disparity highlights the need to embed the right to disconnect within broader struggles for economic justice, labour protections, and equitable access to temporal sovereignty. Gig workers and low-wage employees, for example, often lack the flexibility and resources to assert their right to disconnection, as their work schedules are dictated by algorithms and customer demands rather than their own needs. The rise of surveillance technologies, such as

AI-based performance-tracking tools, further compounds these challenges, creating a scenario in which disconnection may be actively discouraged or even penalised.

Against this background, we have seen how rest and disconnection can be framed not merely as individual rights. By creating spaces to pause, reflect, and reimagine, rest resists the commodification of time and reclaims temporality as a shared and humanised dimension of life. Similarly, the systemic undervaluation of care labour within capitalist systems reveals how rest transcends the individual to become a collective act of care and resistance when conceived as a communal and relational practice. It acknowledges the shared labour required to sustain society and emphasises the interdependence that underpins human well-being. Framing rest as a commons may offer a way to reorient society around values of solidarity and mutual support, challenging the isolating individualism of neoliberal ideologies. They can be aspired to as deeply political acts that challenge the commodification of life and labour. Reclaiming rest as a collective good resists systems that prioritise profit over human flourishing, opening the possibility for alternative societal values to emerge. Rest, when understood as a shared commons, invites us to reimagine temporal justice and prioritise societal renewal over productivity. International labour standards have long recognised rest as essential to workers' well-being. To address this vision, policymakers, unions, and activists could ensure that the right to disconnect does not merely reinforce existing inequalities but actively challenges them. This requires connecting disconnection to broader frameworks of digital and labour rights, such as regulating workplace surveillance, addressing algorithmic management, and creating protections for all workers. A regulatory framework that limits workplace surveillance and guarantees time away from labour communications could ensure that workers, regardless of their employment type, are not subject to digital overreach. Cultural shifts are equally necessary: rest should be reframed not as an individual luxury or productivity tool but as a fundamental collective right tied to human dignity and systemic change. Ultimately, rest and the right to disconnect offer a radical reimagining of the relationship between labour, time, and human well-being. By disrupting the continuous acceleration of digital capitalism, they challenge the neoliberal logic of productivity and open pathways to a more humane society. The creation of new legal frameworks and the integration of these principles into everyday practices can ensure that rest is accessible to all, making it a shared tool for social transformation rather than a privilege for the few. As society moves further into the digital age, the act of reclaiming rest takes on an ever-greater urgency, providing an opportunity to rethink the role of time in human life and labour.

Notwithstanding, further clarifications are necessary at this point. While the feminist frameworks employed in this article offer reflections on the intersection of labour, rest, and systemic inequality, they are not without their risks. A part of feminist perspectives often foregrounds the experiences of women and marginalised groups, which is essential, but it also risks overgeneralising these experiences without fully accounting for intersections of race, class, and ability. As bell hooks (1999) herself argues, feminist analysis must avoid universalising the experiences of women, recognising that systems of oppression operate differently across diverse contexts. Similarly, the critique of unpaid care labour, while central to understanding the exploitation of reproductive labour, can inadvertently reinforce a dichotomy between productive and unproductive labour, failing to fully reimagine the value of care outside capitalist frameworks. Furthermore, the emphasis on collective rest as resistance may unintentionally romanticise "care" as a solution without addressing its co-optation by neoliberal logic, as critics like Fraser (2013) caution. In this sense, she argues that these feminist strategies must integrate both recognition and redistribution to ensure systemic transformation rather than reinforcing existing inequalities. It would be valuable to explore more deeply how certain feminist approaches to rest and disconnection might unintentionally reinforce hierarchies or overlook certain perspectives.

To draw a conclusion, the line of investigation presented in these pages tried to underscore the profound political implications of rest and the right to disconnect within the broader context of digital capitalism. While the right to disconnect is often celebrated as a progressive step toward reclaiming autonomy, its framing as an individualised solution risks perpetuating the very systems of exploitation it seeks to challenge. By examining the intersections of labour, leisure, and temporal justice through feminist and critical theoretical lenses, this article seeks to highlight the opportunity for a collective reimagining of time as a shared resource. For this reason, it is a discourse that must be addressed at a superstructural level before it is normative. At the same time, this analysis acknowledges its inherent limitations. While the outlined perspectives illuminate the common dimensions of labour and rest, further exploration of how these dynamics intersect with race, class, and other axes of inequality is crucial (also beyond the Western understanding). The comprehension of rest as a political commons also confronts the entrenched structures of neoliberalism that resist systemic change. Despite these challenges, the urgency of addressing the commodification of time cannot be overstated. Rest and the right to disconnect should be reimagined as collective and inclusive practices, embedded in broader struggles for temporal justice and labour rights. The transformative potential of rest lies in its capacity to disrupt the relentless demands

of capitalist productivity, providing a foundation for alternative, more humane temporalities. Thus, these reflections are offered not as answers but as a contribution to an ongoing and necessary conversation. By reframing disconnection as a collective act of resistance embedded in broader struggles for temporal justice, this article aims to challenge neoliberal narratives and advocate for a radical reimagining of time as a commons. This perspective not only contributes to the discourse on digital labour but also broadens the political significance of temporal sovereignty, envisioning futures where rest is recognised as a shared human right rather than a privilege.

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IT'S NOT JUST A VIDEO GAME. *FORTNITE* AND THE CASE OF DARK PATTERNS: THE ROLE OF DESIGN STANDARDS IN PROTECTING CHILDREN ONLINE*

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NO ES SOLO UN VIDEOJUEGO. *FORTNITE* Y EL CASO DE LOS PATRONES OSCUROS: EL PAPEL DE LAS NORMAS DE DISEÑO EN LA PROTECCIÓN DE MENORES EN INTERNET

Abstract
The US Federal Trade Commission (FTC) secured one of the highest agreements in its history against Epic Games Inc., the creator of the popular hit video game *Fortnite*, for violating the Children's Online Privacy Protection Act (COPPA) and the FTC Act. Part

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of the complaint regarded deploying "deceptive" design techniques—namely dark patterns—to manipulate users, mostly of them minors. This paper examines the complex topic of dark patterns in relation to children through an analysis of this case and the taxonomy proposed by international institutions. It advances the idea that protecting children in the digital environment can be achieved only through their empowerment, as exemplified by the UK Age-Appropriate Design Code. The article shows that the empowerment of the individual goes hand in hand with the empowerment of the collectivity, calling for a robust response to preserve what dark patterns specifically aim at destroying: the autonomy and identity of the person.

Keywords
Dark patterns; Convention on the Rights of the Child (CRC); UK Age-Appropriate Design Code; vulnerability; autonomy

Resumen
La Comisión Federal de Comercio de los Estados Unidos (FTC) logró uno de los acuerdos más elevados de su historia contra Epic Games Inc., la creadora del popular videojuego *Fortnite*, por violar la Ley de Protección de la Privacidad Infantil en Línea (COPPA) y la Ley de la FTC. Parte de la denuncia se refería al despliegue de técnicas de diseño "engañosas" —en concreto, patrones oscuros— para manipular a los usuarios, en su mayoría menores de edad. Este artículo explora el complejo tema de los patrones oscuros en relación con los niños mediante el análisis de este caso y de la taxonomía propuesta por las instituciones internacionales. También promueve la idea de que la protección de los niños en el entorno digital solo puede lograrse mediante su empoderamiento, como en el caso del Código de Diseño Adecuado a la Edad del Reino Unido. El artículo demuestra que el empoderamiento del individuo va de la mano del empoderamiento de la colectividad, lo que exige una respuesta contundente para preservar lo que los patrones oscuros pretenden destruir específicamente: la autonomía y la identidad de la persona.

Palabras clave
patrones oscuros; Convención sobre los Derechos del Niño (CDN); Código de Diseño Adecuado a la Edad del Reino Unido; vulnerabilidad; autonomía

Introduction

On December 19, 2022, the US Federal Trade Commission (FTC) obtained from Epic Games Inc., the creator of the popular video game *Fortnite*, a total of $520 million in response to the allegations that the company had violated the Children's Online Privacy Protection Act (COPPA) and the FTC Act.

Regarding the violation of COPPA, the FTC alleges that Epic collected information from players under 13 years old without notifying or obtaining their parents' consent, as required, since Fortnite is a child-directed online service.[1] Moreover, the FTC asked Epic to change its default settings concerning voice and text communication for children and teens, since it often resulted in episodes of bullying and harassment of players, exposing them to traumatizing issues and sometimes leading to extreme acts.[2]

Regarding the violation of the FTC Act, in a separate administrative complaint, the FTC alleges that Epic deployed *dark patterns* to manipulate users into making unwanted purchases, specifically allowing children to incur unauthorized charges without parental involvement. In fact, players were often confused by the inconsistent, counterintuitive game settings, which led to unwanted charges when they simply clicked a button.

Dark patterns or deceptive design typically refer to practices that manipulate users into doing something they would not have done without the deceptive design (Leiser, 2023). Despite the term being coined over a decade ago by scholar Harry Brignull (2023), interest in understanding and preventing the use of these practices has only grown in the last few years among academics, regulators, and designers (Gray et al., 2024). Indeed, the term has been codified in several pieces of legislation in Europe and overseas, as well as by international organizations.[3] Therefore, dark patterns are now an emerging concern worldwide. With regard to minors, as the *Fortnite* case shows, concerns rise since the manipulation here exploits individuals who are still at a developmental stage in their personality, character, and

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[1] See Children's Online Privacy Protection Act at https://www.ftc.gov/legal-library/browse/rules/childrens-online-privacy-protection-rule-coppa. COPPA imposes certain requirements on operators of websites or online services aimed at children under 13 years of age, as well as on operators of other websites or online services that have actual knowledge of collecting personal information online from children under 13 years of age.

[2] According to the FTC's findings, Epic's role in matching children and teens with strangers to play *Fortnite* together harmed children and teens to the point that one of them committed suicide.

[3] The EU does not have a single legislation that regulates dark patterns, but there are multiple regulations that discuss these techniques, and that may be used as a tool to protect consumers. Among these regulations, the most recent is the Digital Services Act (DSA), which entered into force on 16 November 2022 and has been in effect since 17 February 2024. It expressly bans dark patterns in art. Article 25 and Article 31. Among the other EU institutions, the European Data Protection Board (EDPB) issued guidelines in March 2022 on deceptive design, which were adopted on 14 February 2023. Also overseas, the US FTC stepped in and, following a 2021 public workshop, published a staff report in 2022. Finally, the Organization for Economic Co-operation and Development (OECD) also intervened in October 2022.

emotions, with the consequence of increasing their vulnerability (Hartzgov, 2018, p. 131; Malgieri & Niklas, 2020).

The response of institutions, on a global scale, has been primarily realized through enforcement actions related to privacy violations and, in the case of children, through consumer protection law, mainly to defend their parents' economic interests.

This article argues that the specific topic of dark patterns in services (likely to be) accessed by minors, as well as the more general matter of the protection of children in the digital environment, should be addressed primarily from the children's rights perspective. It suggests that the response should be robust in its design (Hartzgov, 2018, p. 183) and that the legal parameters to consider are principally found in the Convention on the Rights of the Child (CRC). These arguments are advanced using Fortnite as a case study and the standards set out in the 2020 UK Age-Appropriate Design Code. The core idea proposed here is that there can be no real protection on the Internet without the real promotion of users' rights (and duties), and this can only be achieved by empowering individuals in the first place. At the same time, I argue that the involvement of all actors in the digital environment is equally necessary to empower the collectivity. Protecting children's rights on the Internet is consistent with this argument.

The article is organized as follows: the first part briefly presents the FTC decision on *Fortnite* and introduces the topic of dark patterns. The second part addresses the main issues arising in relation to children's rights and analyzes the solution proposed in the UK.

The *Fortnite* case

Fortnite is a highly popular video game among kids, produced by Epic Games Inc., a US-based corporation headquartered in Maryland. Fortnite itself is free to download and play; however, Epic charges users for certain in-game items, such as costumes and utilities. The problems began when, in most cases, Epic deployed a series of "design tricks"—as defined by the FTC—known as dark patterns to charge customers for these items without first obtaining their consent. Moreover, after the charge was processed, Epic denied users access to the prepaid content when they disputed the unauthorized charges with their credit card providers. Additionally, after the first purchase, Epic recorded consumers' payment information and used it for future charges, including those made by children. It is worth noting that many customers were unaware that their card had been saved by Epic.

As previously mentioned, part of the FTC's investigation focused on the modalities through which Epic charged its customers, i.e., *the dark patterns*. As a matter of fact, unintentional purchases were the result of a precise policy of design systematically

tailored for this purpose (Bösch et al., 2016). It is therefore important to understand how this works in *Fortnite* since it represents a clear example of how dark patterns operate in general (Consumer Protection Cooperation Network, 2022).

The game's start screen is designed so that the start button is clearly highlighted in yellow, with the word "free" immediately above it. Only when the user continues by scrolling down the page will they read, in small print, a range of information, such as the game's age rating and the option to make purchases. Furthermore, once started, the game allows users to "embellish" the appearance of characters using a series of tools (outfits, dance moves, and other in-game content) that can be obtained by simply clicking a button, without any authorization or consent being requested. As a consequence, the cost is immediately charged to the payment method entered during registration, which is saved by default (FTC, 2022, pp. 3, 6).

In addition, the same arrangement of the control buttons on the game console turns out to be reversed in one of *Fortnite's* competitions in comparison to the usual disposal, so that the player thinks to click on the button corresponding to "more information," but instead clicks on the "purchase" button. Among the consumers involved, as said, the majority were minors. Parents downloaded the game for their kids to play, and once done, children could do everything they wanted, including purchasing any items at any price, with a single click, without parents being notified.

Parents began to complain, as reported in the FTC report (FTC, p. 20), and Epic's employees raised concerns about the default method for saving credit card information.

Nevertheless, despite receiving numerous complaints (according to the FTC report, more than one million), Epic had not changed any procedures except in the last period, and likewise, after learning that it was under investigation by the FTC. Moreover, Epic made the situation worse by deliberately obscuring the "cancel and refund" buttons after receiving complaints, rendering the procedure practically impossible. After the investigations, the FTC decided that these deceptive techniques were to be considered under "unfair or deceptive acts or practices in or affecting commerce," as provided by Section 5 of the FTC Act, USC § 45(a). Therefore, the Commission secured the agreements with Epic.

The "Essence" of Dark Patterns

The topic of dark patterns has, in the last few years, inspired a new focus on addressing online information asymmetry (Competition Market Authority [CMA], 2022). Moreover, this topic has become widespread in the scholarly discourse and the public policy debate. Regulators and institutions, at the national and international levels, therefore, embraced the complex task of addressing and outlining it through the definition of a

taxonomy. The difficulty lies in the fact that, as many scholars have pointed out, these patterns range from nudge techniques to coercive ones (Leiser & Santos, 2023; Luguri & Strahilevitz, 2021).

Consequently, I will present key definitions from various international institutions and organizations to highlight their common features.

The European context proves to be a rich ambit in this topic. According to the European Data Protection Board's (EDPB) guidelines issued in 2022, dark patterns are "interfaces and user experiences implemented on social media platforms that lead users into making unintended, unwilling and potentially harmful decisions in regard to their personal data with the aim of influencing users' behaviors" (EDPB, 2022). In addition, the EDPB also identifies six categories of dark patterns: 1) overloading, 2) skipping, 3) stirring, 4) obstructing, 5) fickle, and 6) left in the dark. The legal basis recalled by the EDPB is to be found in the GDPR, specifically in Articles 5, 4, and 7 regarding consent, as well as in Article 12 regarding transparency. Article 25 then plays a critical role in privacy by design and by default. In this regard, the guidelines also underline specific elements to be considered in relation to this provision when dealing with dark patterns, which are: autonomy, interaction, expectation, consumer choice, power balance, no deception, and truthful.

The Digital Services Act (DSA), whose rules have fully applied since February 2024, specifically prohibits deceptive or nudging techniques and gives the Commission the power to adopt delegated acts to define additional techniques that could be included in the notion of dark patterns. The decisive criterion here is that the user's freedom of choice is distorted or impaired (see Article 25(1) of the DSA).

While the Digital Markets Act (DMA) does not explicitly mention dark patterns, it imposes obligations on gatekeepers that can also be referred to as dark patterns. Indeed, it stipulates that online interfaces should not be designed in a manipulative manner to impair users' ability to freely consent to the service (European Union, 2022, Article 37).

Also, the Unfair Commercial Practices Directive (UCPD) is relevant since it prohibits unfair commercial practices affecting consumers' economic interests before, during, and after the conclusion of a contract. In December 2021, the European Commission published guidance on the UCPD that confirms that the directive covers dark patterns and dedicates a section (4.2.7) to explain how these provisions can be applied to consumers.

The AI Act (as in the final draft approved on December 8, 2023) addresses dark patterns in Article 5, stating that "subliminal techniques beyond a person's consciousness or purposefully manipulative or deceptive techniques, with the objective to or the effect of materially distorting a person's or a group of persons' behaviour […]" are prohibited. The

provision also emphasizes the connection to vulnerabilities that may be exploited and expressly refers to factors such as age, disability, or specific economic or social conditions.

Finally, regarding the target audience of children, it is worth noting that on June 14, 2022, the EDPB and the Consumer Protection Cooperation (CPC), together with several national data protection authorities, issued the Joint Principles for Fair Advertising to Children. This is a list of five key principles for advertising directed at children, including, among others, the prohibition on designing interfaces that prompt kids to purchase in-game content (such as in Fortnite).

More generally, it can be said that the EU is taking, and has already taken, several steps forward in regulating dark patterns, with a clear, far-reaching perspective, given the multiple legislative frameworks involved.

Other relevant initiatives include the report prepared in 2022 by the US FTC, entitled "Bringing dark patterns to light," where the federal agency, through a public workshop, investigated the phenomenon of manipulative techniques and showed many examples of dark patterns operating on the Internet, in a similar way to the EPDB classification. The report dedicated a specific section to children regarding the "Design Elements that Lead to Unauthorized Charges" (Federal Trade Commission, 2022, p. 10), citing examples of in-app charges from Google,[4] Amazon,[5] and Apple.[6]

In 2022, the Organisation for Economic Co-operation and Development (OECD) also published a paper, *Dark commercial patterns*, where it proposed a working definition and identified possible policies and enforcement responses to mitigate dark commercial patterns (OECD, 2022, p. 2). The OECD's definition indeed highlights the subversion or impairment of the consumer's autonomy, leading to detriment in various ways.[7] In accordance with this thrust, it also identifies another important element in the taxonomy of dark patterns: namely, the vulnerability referred to minors, declined, however, taking into account not only inherent factors (the age, for example) but also situational (the socioeconomic conditions, the level of education) (Mendola & Pera, 2021). In this way, the paper's findings reveal that minors from lower socio-economic strata played apps with more manipulative designs (OECD paper, 2022, p. 55).

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[4] *In the Matter of Google Inc*., Docket No. C-4499

[5] *FTC v. Amazon.com Inc*., Case No. 2:14-cv-01038 (W.D. Wash.)

[6] *In the Matter of Apple Inc.,* Docket No. C-4444

[7] According to the OECD (2022), the working definition of dark pattern is: "Dark commercial patterns are business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making, or choice. They often deceive, coerce, or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways, though it may be difficult or impossible to measure such detriment in many instances" (p. 5).

Although the taxonomies identified and briefly reported naturally display some differences between them, it is nevertheless possible to trace a common and uniform line and, above all, an element that I consider essential to the specific topic here being addressed. At the same time, this element may well relate to the relationship with the digital dimension more generally.

The element I am referring to is the effect that dark patterns have on the user's identity, specifically the complete *depersonalization* (European Commission: Directorate-General for Justice and Consumers, 2022). As the studies and reports noted above have shown, these manipulative techniques induce the subject to take actions and make decisions that the user would otherwise never have taken (Gunawan et al., 2021). Moreover, dark patterns increase vulnerability in its twofold dimensions: the inherent, which relies on the intrinsic characteristics of the human nature, connected to corporeality and dependent on others affective and social natures, and the situational, which depends on economic or environmental circumstances within which individuals or social groups live in, including oppression, domination, and injustice (Gray et al., 2018; Mackenzie et al., 2014, p. 29). In the words of Stefano Rodotà (2012), "physical integrity is respected, but the integrity of the person, and with them his or her autonomy, are diminished"[8] (p. 315).

In this respect, it is necessary to examine the children's dimension, focusing on the rights of minors from a child-centered perspective and on children's empowerment. This can be possible through the legal instruments provided for in the CRC.

The "Revolutionary" Idea of the Minor in the CRC

The CRC was approved by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990. Currently, it is the most widely recognized and ratified international document, with the sole exception of the United States of America. The principle that drives the Convention is that the child is no longer an object of others' decisions (mainly the parents), according to a patriarchal idea of family, but must be considered an individual fully entitled to a series of rights (as well as duties) that contribute to the ever-evolving formation of their identity.

This implies that all choices affecting the child, as covered by Article 3 of the CRC, must be made in accordance with the best interests, which constitute the only driving principle of every action concerning children. Moreover, it is worth noting that this provision, as well as the entire Convention, is directed at both public actors, such as states, and private actors, including business operators and other organizations.

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[8] *"L'integrità fisica è rispettata, ma l'integrità della persona, e con essa la sua autonomia, sono continuamente ridotte".*

The revolutionary impact of the Convention is embodied in the concept of protection. This term takes on an entirely different meaning than before: it is not identified in mere interdictions, in prohibitions anymore, but instead, on the basis of the new conception of the child embedded in the CRC, it implies a new interaction between the child and the context in which life and daily activities take place. In this respect, the Convention is based on the fundamental principle that the child's *evolving capacities* should be recognized in accordance with the level of maturity demonstrated (Lansdown, 2005). These capacities increase progressively toward autonomy, not only with age alone, but also with the child's awareness of the consequences of their actions and the risks involved. In fact, evolving capacities are not dependent solely on age (CRC, 2023). And this is where the real revolutionary profile lies: autonomy means being aware and assuming responsibilities—individually and collectively—and, therefore, implies duties; it is certainly not a matter of accommodating mere whims.

This process is made possible only if the child is provided with all the necessary instruments to fully exercise their rights under the CRC. This means, therefore, that first the family and then the institutions, together with all the actors involved, share a concrete and collective responsibility in this process. For example, it means creating the right circumstances in which the child can "prove" their autonomy without incurring risks inappropriate to their level of maturity.

From this perspective, then, the actions that, in the specific case of *Fortnite* and, more generally, the platforms, put in place through dark patterns are even more illegitimate. It is evident that deceptive and manipulative acts, such as the ones described in *Fortnite*, aim at diminishing the autonomy, but these acts take advantage not only just of the vulnerable condition of *any* user (and even in this case, they are to condemn)—but of users that are still discovering, maturing, getting to know and choosing their own personality. In so doing, often in an underhanded way, dark patterns violate this peculiar process in the child's development, since they affect their evolving capacities and, therefore, the construction of their autonomy, inducing the minor to make decisions that are not the result of free considerations but, rather, of real coercion.

In this respect, I think the response, as mentioned above, should be implemented at two levels. Individually, through an action of empowerment of the child, and collectively, through an action of awareness and empowerment among the collectivity of "education"—about the necessity of assuming a child's rights perspective when we talk about topics that concern children.

The commitment necessary for this response has recently increased thanks to the strong dedication shown in particular by some children's organizations, such as the En-

glish 5RightsFoundation, which leads to a bigger worldwide movement in support of the protection and promotion of children's rights in the digital environment, and literally pushes for a real and concrete change in this ambit. Indeed, at a general level, it is worth noting General Comment No. 25 by the Committee on the Rights of the Child, which underscores the international community's commitment to recognizing the same rights embedded in the CRC in the digital environment.[9] At the same time, the EU has initiated a series of measures to approve a European Children's Code, modeled after the English one.[10] As a matter of fact, on a specific level, the UK Age-Appropriate Design Code (or Children's Code), with its standard specifically aimed at dark patterns, is exactly the proof of this commitment.

The UK Age-Appropriate Design Code and the Standard on Dark Patterns

The UK Age-Appropriate Design Code entered into force in September 2020. It has been the first regulatory text on children's protection in the digital environment to establish a set of design standards aimed principally at digital platforms offering services likely to be accessed by children. These standards provide built-in protections that allow children to learn, play, and explore on the web, ensuring that their best interests are always the primary consideration in the design and development of online services. Indeed, these standards explicitly recall the core principles of the UN Convention, providing further confirmation that the Code is deeply rooted in the CRC.

Practically, this means, *inter alia*, strong privacy by default, geolocation services switched off by default, and a minimum amount of information about children collected and retained by the platforms.[11]

Regarding dark patterns, the Code allocates a specific standard to this topic. Standard 13 is entitled "Nudge techniques" and is defined as: "design features which lead or encourage users to follow the designer's preferred paths in the user's decision making." Moreover, the Code expressly mentions techniques to encourage children to provide or share unnecessary

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[9] See CRC/C/GC/25 (https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation).

[10] As early as 2012 the Commission launched the "Better Internet for kids – BIK+" initiative, which consisted of a real strategy of action on four main guidelines, concerning the quality of online content aimed at minors, the awareness and subsequent empowerment of minors themselves, the creation of a safe digital environment and, finally, the fight against sexual abuse and the dissemination of child pornography online. The 2012 BIK+ strategy was updated in 2022 in light of the imminent passage of the Digital Services Act and the commitment made in the proposed regulation on the European Digital Identity (EDi). In December 2022, in fact, a call was launched to identify the members of the group that will draft the EU Age-Appropriate Design Code by early 2024.

[11] The standards of the Code are: *best interest of the child; data protection impact assessments; age-appropriate application; transparency; detrimental use of data; policies and community standards; default settings; data minimization; data sharing; geolocation; parental controls; profiling; nudge techniques; connected toys and devices; online tools.*

personal data or turn off the default privacy protections. It is evident that the Code refers to deceptive or manipulative techniques, and therefore, to dark patterns.

In addition, the Code provides some practical examples to show how these techniques could work and appear: for example, how the screen and the choice of colors could indeed encourage or induce the child to make decisions that are detrimental to the privacy settings (as recalled in *Fortnite*), lowering their default higher protections or, simply by clicking, purchasing extra items unnecessary to the service requested.

The profile I would like to underline is that, at the same time, next to banning the use of dark patterns, the Code endorses a pro-active approach: for example, it invites providers to use pro-privacy nudges (or, patterns) according to the age and maturity of the child, starting from nudges towards high privacy options when there is a limited level of understanding, getting to more neutral interventions that require minors to think things through. The proactive side of this standard is further promoted by suggesting that nudges could support children's health and well-being or invite them to use tools or resources, such as pause and save buttons. All these recommendations are based on the premise that providers should act solely in children's best interests and take into account users' levels of maturity, providing different options accordingly.

Therefore, the UK Children's Code provides practical, concrete guidance to providers on dark patterns. Despite providing a broader definition of these techniques than those in EU legislation and the US FTC, the UK's approach appears more effective in this respect.

Indeed, it is completely in line with the rationale of the CRC and the principle of evolving capacities, and at the same time, calls for the robust response I mentioned above by the institutions, service providers, and the family. From this perspective, indeed, the Code regulates a severe system of enforcement and sanctions, in line with what Woodrow Hartzog (2018) defines as a robust decision by lawmakers and regulators: "one that directly and significantly punishes bad design or dictates design specifics" (p. 184). Moreover, the "powerful incentives" recalled by Hartzog are present in the case of the Code, suggesting that *clear patterns*, rather than dark ones, create a virtuous circuit that could, potentially, become an example and a best practice. On the other hand, the family's involvement through parental control confirms the Code's commitment to the CRC and its aim of protecting the child and promoting their rights. The Code is a clear example of how the CRC principles have been completely embedded, taking into consideration the characteristics of the digital environment. As a matter of fact, the aim of the Code is not "to protect children from the digital world, but […] protecting them within it."

Ways Forward and Conclusions

In the previous pages, I tried to explore how dark patterns represent a real and concrete harm to children's rights. The example set in the *Fortnite* case study demonstrated how easily manipulative techniques can be deployed and, therefore, how critical it is to identify and ban them from the digital domain.

Dark patterns, deceptive design, or nudge techniques are dangerous, and this is a fact. But the element that I tried to highlight in this paper is that the manipulative effect is deep and even brutal on the user since it hits the very essence of the human being: the identity and, consequently, the autonomy of the person, which is inseparable from the dignity of the person (Rodotà, 2012, p. 315). In this way, the machine, the digital instrument, is no longer a tool because it prevails over the person, *depersonalizing* the human being and eliminating autonomy of choice. Instead, in front of a screen, the user must be free to choose, change their mind, and be well-informed, with all possibilities clear and explained. Otherwise, the person is completely "absorbed by the machine, with a radical change of his prerogatives," as Rodotà (2012, p. 315) clearly points out.

In the case of the minors, the deceptive effect is amplified and more subtle. The *Fortnite* case has shown how even the choice of colors or the position of a button can create a sense of complete dependency and loss in young players.

Dark patterns exploit a user's peculiar condition, which we often refer to as vulnerability. As we all are, minors are inherently and situationally vulnerable as well. Therefore, we have to look at the response we want to give: in the case of dark patterns deployed to children, the instruments are primarily to be found in the CRC. In this way, the law re-establishes the priority of the human side (Rodotà, 2012, p. 317), the autonomy of choice that, for children, is realized through the pursuit of their best interest and the principle of the evolving capacities.

The response must be robust as well: there can be no compromises with the platforms, nor with the rest of the actors involved. There is, indeed, I believe, a collective responsibility in protecting children's rights in the digital environment that go through several and diverse actions: a general awareness about the CRC's rights through a process of "digital education"; the commitment by the institutions in assuming a child's rights perspective and, of course, a series of duties and responsibilities by the minors themselves who, according to their maturity, learn to "move" within the digital environment to take advantage of it for their best interest.

This is how the empowerment of children in the digital environment can be realized: the UK Children's Code shows that this is not only possible but practically achievable. The robust response is paired with a counterproposal: proactive patterns and clear, "good" techniques to encourage children to fully exercise their rights, thereby making them *citizens* rather than just a source for data mining (Rodotà, 2012, p. 197).

After all, as it has been noticed, the digital environment is the product of humans, and the quality of the digital product does not depend "on some casual and unpredictable event […] but on the quality of the data that is fed into it at the beginning and is continuously collected" (Zeno-Zencovich, 2024, p. 3).

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TOWARDS DATA SOVEREIGNTY IN AGRICULTURE: LEGAL CHALLENGES AND COMPARATIVE REMARKS FOR A FAIR FARM DATA GOVERNANCE*

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HACIA LA SOBERANÍA DE DATOS EN LA AGRICULTURA: RETOS JURÍDICOS Y OBSERVACIONES COMPARATIVAS PARA UNA GOBERNANZA JUSTA DE LOS DATOS AGRÍCOLAS

Abstract
The application of big data in agriculture offers a promising opportunity for the sustainable transformation of the global agricultural sector. However, it also raises legal challenges that risk exacerbating the so-called "big data divide" between farmers and agribusinesses, as well as amplifying the "lock-in" problem for the former. In the context of rethinking traditional governance tools for data protection, which are currently crystallized around the dichotomy between personal and non-personal data, they

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fail to address the unique characteristics of agricultural data. In this context, a comparative legal analysis of the EU and US frameworks proves valuable for identifying converging trends in addressing this paradigm shift.

Keywords
big data; accessibility; data sovereignty; farm data; lock-in.

Resumen
La aplicación de los macrodatos a la agricultura ofrece una oportunidad prometedora para la transformación sostenible del sector agrícola mundial. Sin embargo, también plantea retos jurídicos que corren el riesgo de exacerbar la llamada "brecha de los macrodatos" entre agricultores y empresas agrícolas, así como de amplificar el problema de "dependencia" de los primeros. Estas cuestiones exigen un replanteamiento de las herramientas tradicionales de gobernanza de datos, que, al estar cristalizadas en torno a la dicotomía entre datos personales y no personales, no logran abordar las características propias de los datos agrícolas. En este contexto, un análisis comparativo de los marcos jurídicos de la UE y de EE. UU. resulta valioso para identificar tendencias convergentes al abordar este cambio de paradigma.

Palabras clave
macrodatos; accesibilidad; soberanía de datos; datos agrícolas; dependencia.

Big Data in Agriculture: Opportunities, Challenges, and Paradoxes

The imperative need for big data analytics systems to be safely deployed in farming presents a significant opportunity for policymakers and scholars to enrich discussions on revisiting traditional data governance models that have recently shaped European and North American legal frameworks.

Potentially, the use of big data in agriculture may offer unprecedented opportunities for farmers, both individually and collectively. Under the single farmer perspective, the "datification" (Zeno-Zencovich, 2018, p. 460) of the multiple qualitative and quantitative aspects featuring the rural context can empower cultivators with data-driven agronomic predictions, solutions, and prescriptions, with a considerable positive impact in terms of lower input costs and higher profit margins (Sykuta, 2016, p. 58). On a broader scale, the widespread dissemination of data among actors in the agri-food chain could play a pivotal role in addressing gaps in reliable indicators and monitoring criteria for evaluating the environmental performance of agricultural policies (European Court of Auditors, 2022). Such advancements are particularly relevant in tackling the major challenges of the 21st century, including biodiversity and ecosystem degradation, climate change, and food security (European Commission, 2019).

The wide range of outlined benefits is made possible by the distinctive characteristics that set big data apart from traditional methods of collecting and transforming data into information (Bergé et al., 2018, pp. 144–178). These characteristics, commonly referred to in the scholarly literature as the "three Vs"—volume, velocity, and variety (Hansen Krause & Porter, 2017, pp. 31–42)—highlight the unique potential of big data systems.

While the advantages of applying big data in farming have been demonstrated, the repercussions of its unique characteristics on the vulnerabilities of the agricultural sector remain to be analyzed. The very benefits associated with smart farming devices may, at the same time, foster farmers' dependence on the providers of such technologies (Ryan, 2020, p. 63).

As agronomic, meteorological, or production facts of agricultural activities are increasingly represented as "data," access to this latter transforms it into actionable "information" (Béguin-Faynel, 2020). The aggregation and integration of information from diverse origins and natures generate "knowledge": a new type of knowledge that goes beyond mere collection and plays a proactive role in shaping future farming decisions. Yet, the transformative potential of the journey from "representation" to "knowledge" is hindered by the fact that these processes are controlled by entities with technological and economic dominance over farmers (Atik, 2022, p. 711).

As a result, at a certain stage in the processing of farm data, the data originators—farmers—lose track of its use and their ability to derive any benefit from it. In contrast,

agricultural technology providers (ATPs) expand their informational resources, engaging them in market profiling to tailor subsequent contractual offers to farmers. This dynamic exacerbates existing informational and technological asymmetries between farmers and ATPs, resulting in a market failure that displays, on the one hand, as a "lock-in" effect for agricultural producers (Atik, 2023a, pp. 380–409) and, on the other hand, as a distortion of competition among agribusinesses providing digital technologies (Atik & Martens, 2020).

Focusing on the first type of phenomenology of such "informational capitalism" (Las Casas, 2024; Sadowski, 2019), agri-food corporations implement various "fit-for-farmer" measures. The most glaring examples are practices like timing recommendations for purchasing new equipment based on the predicted lifespan of previously sold machines or restricting the portability of farm data to devices purchased from competitors (Carbonell, 2016).

These dynamics highlight the darker side of the "big ag-data" phenomenon, revealing a new facet of the digitization's "transparency paradox" (King & Richards, 2013, pp. 41–47): while data was initially heralded as a cornerstone of the digital revolution (European Commission, 2021), aimed at making the world more intelligible and predictable, its interaction with global market trends often leads to it becoming inaccessible to collective scrutiny, monopolized by a small number of dominant "data landlords"(Mantelero, 2012, p. 135).

Consequently, a general reluctance to share data has emerged within the farming community, stifling rather than fostering social and economic innovation. This reluctance has been notably identified as one of the key barriers to employing big data and advanced analytical techniques in the evaluation of the Common Agricultural Policy (CAP), as highlighted in by the European Court of Auditors in 2022, emphasizing that this hesitation, coupled with low levels of data literacy in the primary production sector, hampers progress in leveraging the potential of big data (European Court of Auditors, 2022).

Comparative Legal Approaches to Agricultural Data Governance: EU and US Traditional Frameworks

The central matter arising from the aforementioned questions concerns providing users of digital agricultural systems with adequate guarantees of access (Mezzanotte, 2017, pp. 159–187), transparency, and control over data generated by such devices.

The search for an effective legal framework requires, first and foremost, the demarcation of the object of legal protection, given the absence of any legal source explicitly providing a clear definition of the term "agricultural data" (Tomasso, 2022). Since the

defining stage itself, a sharp dissonance emerges between the reliance on the discerning criterion of the "personal" character, typical of traditional data taxonomies, and the unique characteristics of big farm data generation.

The European classification of data based on its personal nature has significantly influenced heterogeneous US sources on the subject (Barrio Andrés, 2022, pp. 186–193; Di Lella, 2023, pp. 511–551) and has historically shaped the continental legal tradition, until the recent approval of the new European data governance framework (European Parliament & EU Counsel, 2022, 2023). The rationale behind this dichotomy lies in balancing the need to provide individuals with adequate guarantees for the protection of identifiable information with the interest in ensuring the free flow of data to foster knowledge proliferation.

In this context, one can easily appreciate, on the one hand, the link between the personal nature of data and the mere "identifiability" of the concerned individual, as well as the strict regulatory framework established by the General Data Protection Regulation (GDPR; European Parliament & EU Counsel, 2016), and, on the other hand, the residual criterion and the comprehensive liberalization logic underpinning the definition and regulation of non-personal data, as introduced by the Free Flow of Non-Personal Data Regulation (European Parliament & EU Counsel, 2018).

As previously mentioned, this framework has been mirrored in the US legal context, notwithstanding the adoption of a fundamentally different approach to data protection. Specifically, the comprehensive and uniform nature of the GDPR contrasts with the fragmented, "patchwork" regulatory system in the United States (Jolly, 2016), driven by the absence of a federal standard that harmonizes data processing across the nation.

It is important to highlight, however, that federal legislation in the US has addressed data protection only within specific sectors of the economy, such as commerce (63rd United States Congress, 1914), healthcare (104th United States Congress, 1996), and finance (106th United States Congress, 1999). In these areas, federal laws aim to harmonize regulations not only to ensure data protection but also to preserve free competition across US territory.

A more holistic approach to data protection is evident in certain state-level legal frameworks, with California being a notable pioneer. The California Consumer Privacy Act (CCPA; California State Assembly, 2018), followed by the California Privacy Rights Act (CPRA; California State Assembly, 2020), has prioritized empowering consumers with the "right to know" and the "right to opt out." These provisions aim to inform consumers about the scope of personal data collected by businesses they interact with, as well as the purposes for which such data is collected, thereby enabling them to opt out of its processing if desired (Goldman, 2021).

Within this framework, ag-data represent a somewhat fuzzy concept that is challenging to classify. On the one hand, many pieces of information generated through smart farming can be linked to a farmer's identity as a natural person—for instance, GPS data from agricultural machinery or the registration details of a farm vehicle (Tomasso, 2024). The classification of this kind of data as "personal" grants its holder the specific legal guarantee that its use will rely on a legal basis, which can be explicit consent or compliance with GDPR requirements. On the other side, agricultural operators also rely heavily on substantial amounts of non-personal data in their regular business activities. For example, one of the classifications of farm data most commonly endorsed in academic scholarship (Janzen, 2019) has identified several categories of farm non-personal data: agronomic data, which pertain to plants, such as soil nutrient levels or the concentration of herbicides and pesticides; soil data, which relate to the geographical location of farmland and the type of cultivation performed; machinery data, encompassing metrics like agricultural equipment performance, hours of operation, and machinery durability; and production data, which include strategic business information such as a company's financial status, contractual relationships, and operational metrics (Kosior, 2021, p. 68). As a consequence of the consideration of this data as mainly non-personal, its processing and exploitation are justified by the conclusion of a contract between agricultural producers (who "use" farm data) and agricultural service providers (who "hold" farm data). Yet, due to informational, technological, and economic asymmetries between ag-data users and ag-service providers, applying the "deregulated" framework based on the non-personal nature of such data appears quite forced and inequitable.

The highlighted regulatory gap raises fundamental questions about the nature of the rights and prerogatives that farmers hold over the non-personal data generated by the systems they use. Specifically, it is crucial to determine whether these rights should be categorized under property rights or governed by contractual frameworks (Atik, 2023b).

Prior to the extensive doctrinal debate that ultimately dismissed the notion of "data ownership" (Zeno-Zencovich & Giannone Codiglione, 2016, pp. 29–58), a potential form of protection had been identified in Europe through the sui generis right, introduced by the 1996 Database Directive (European Parliament & EU Counsel, 1996) to safeguard the contents of a database that lacks originality from extraction or reuse—either in whole or in part. However, the protection offered by the *sui generis* right has proved unsuitable for addressing the issues at hand, both because of the inherent inconsistencies in the concept of "data ownership" and the specific contractual asymmetries between farmers and agricultural service providers (Drexl, 2018, pp. 37–39).

From the first perspective, it is sufficient to note that the protection provided by the Directive does not match with the question of farm data accessibility and portability (Sganga, 2022, pp. 651–704): the rationale behind the sui generis right lies in recognizing and rewarding the human effort involved in arranging and organizing data within an electronic archive by granting exclusivity rights. In contrast, the "creation" of non-personal data by farmers is inherently tied to the use of machinery and does not involve any creative contribution. Furthermore, the primary concern of ag-data users is not the enhancement of data related to their own enterprise but the preservation of the value that such data already has, once accessed and converted into actionable information.

From a second perspective, granting users ownership rights over ag-data does not eliminate the risk of losing access to it, as contracts often lack sufficient transparency guarantees (Atik, 2022, pp. 701–742).

Similar considerations apply to the US legal system, where a form of protection designed to meet the needs of companies, rather than individual consumers, was identified in trade secret protection regulations. In this context, the Uniform Trade Secrets Act (UTSA; Uniform Law Commission, 1985) and the Defend Trade Secrets Act (DTSA; 114th United States Congress, 2016) provide robust protection for trade secrets, defining them as information that derives its economic value from not being "generally known and not easily ascertainable by appropriate means by others who could derive economic value from its disclosure or use."

However, the inadequacy of the US framework becomes evident when considering the needs of ATP users, which, as already stated, prioritize the accessibility of information, thereby diverging from the paradigms of exclusivity and secrecy central to trade secret protection.

Therefore, both in European and North American legal systems, the heart of the discussion has shifted from property rights to contractual frameworks identifying contract law and the paradigm of "access" (Resta, 2023, II, p. 654; Van Erp, 2017) as the foundations to build up mechanisms that provide legal protections for agricultural producers.

From Ownership to Contract: The Role of Soft Law and Bottom-up Approaches in the Farm Data Governance Evolution

What becomes crucial, therefore, is selecting the most appropriate legal strategy to rebalance the contractual relationships between farmers and ATP providers. At this stage, how the involved legal systems are attempting to address this phenomenon is a question that calls for the attention of the comparatist, opening up two key areas of discussion: the choice between a bottom-up and top-down methodology and the trade-off between

voluntary and mandatory standards. Initial efforts predominantly adopted a bottom-up and voluntary approach to decision-making.

The most striking examples include the launch of the US Privacy and Security Principles for Farm Data in 2014 (American Farm Bureau, 2014) and of the EU Code of Conduct on Agricultural Data Sharing by Contractual Agreement (EUCC) in 2018 (European Commission, 2018). Following a similar model, the *Charte* Data-Agri was introduced in French law in 2018 (Fédération Nationale des Syndicats d'Exploitants Agricoles, 2018).

These initiatives established a set of strategic principles aimed at restoring farmers' trust in sharing their data, developed through a participatory process involving multiple stakeholders within the sector (Van Der Burg et al., 2021, pp. 185–198). In general, it is about soft law sources encouraging agribusinesses to provide farmers with clear information on how their ag-data is used, thereby enabling them to make informed decisions about whether to share it with technology service providers.

On the one hand, the voluntary principles provide companies that collect and analyze farm data with guidelines for structuring their contracts and technologies, focusing on 13 key areas; on the other hand, the architecture of the EUCC is organized around five macro-pillars.

Both models, thus, aim to address several concerns, such as protecting the so-called "data originators" by granting them the right "to benefit from and/or be compensated for the use of data created as part of their activity."

Nevertheless, the self-regulatory approach has proven insufficient to achieve an effective contractual balance (Sanderson et al., 2018). While these codes of conduct have the merit of highlighting the importance of farm data issues at an institutional level, they fail to address the information asymmetries that characterize relationships between vulnerable contractual parties that, according to EU law, fall under the matters of "public order," justifying public intervention to counterbalance the limitations of party autonomy. Specifically, both codes exhibit significant flaws in their regulatory approach and substantive content.

From a methodological standpoint, the self-regulatory model does not compel large agribusinesses to grant farmers access to data; instead, it relies on incentives that often conflict with the very goals being pursued (Di Porto & Zuppetta, 2023, II, p. 548). For instance, the codes adopt a hyper-protective logic regarding ag-data, when more emphasis should be placed on fostering trust among farmers to encourage the free sharing of their data with relevant stakeholders. Paradoxically, it has been observed that "the Code of Conduct provides for more restrictions to the free flow of data than would seemingly apply under the GDPR for personal data" (Graef et al., 2018, p. 12).

From a substantive perspective, the codes still remain anchored to the concept of "data ownership" as the central legal framework for designing ag-data rules, rights, and principles. As a result, they fail to effectively address the structural inequalities present within the big data industry.

From Bottom-up to Top-down Approaches: EU Initiatives for Multiple "Common Data Spaces"

Given the evident inadequacy of the traditional legal framework in addressing the challenges arising from digital farming, it becomes essential to examine the measures undertaken—and still adoptable—by the considered legal systems to align their respective farm data governance structures with the described "top-down" model. While in Europe, the focus lies on regulations, which embody the most comprehensive tools for standardization, in the United States, the evolution of federal legislation will be explored.

Notably, the Data Act, which entered into force on January 11th, 2024 (European Parliament & EU Counsel, 2023), seeks to address the multiple challenges of the "data economy" (Ryan et al., 2024). Its provisions are horizontally organized into several chapters, including a dedicated focus on "business-to-consumer and business-to-business data sharing" in Chapter II. Indeed, the Data Act marks a significant step toward overcoming the traditional distinctions between personal and non-personal data, as it attaches protections to data irrespective of its "personal" nature, solely relying on the assumption that data is "used." Specifically, Article 4 grants "data users" the right to access data generated through their use of a product held by a "data holder," prescribing that access is provided "without undue delay, free of charge, and, where applicable, continuously and in real-time." The significance of such prescriptions lies in the provision of binding data access and sharing rights for users of IoT devices, including farmers. It thus reflects a notable shift in EU legislative intervention, from the self-responsibility of weaker contractual parties toward the imposition of strict compliance standards on stronger subjects. The Data Act obliges supplier companies to respect accessibility requirements for final users since the design and manufacturing stages of digital devices production. Symmetrically, users are guaranteed not only the right to access the data generated by their use of such systems, but also full control over data sharing with third parties. The described approach underscores a clear commitment to protect farmers not as consumers but as vulnerable entrepreneurs, by ensuring that they are fully aware of how their farm data is used and are accordingly empowered to make informed and autonomous decisions within the agro-industrial market.

To finally complement the set of guarantees provided to farmers under the European initiative to "reshape the digital future," it is also essential to quote the measures

introduced by the Data Governance Act (DGA) (European Parliament & EU Counsel, 2022), which significantly contribute to promoting the secure and efficient circulation of ag-data. Among the three macro-areas addressed by the DGA—reuse of certain categories of data held by public sector bodies, data intermediary services, and data altruism (Baloup et al., 2021)—a detailed analysis of the provisions concerning intermediary services for data exchange proves particularly relevant. These provisions aim at establishing a framework for facilitating relationships between data users and digital device providers for the storage and sharing of non-personal data. The DGA codifies a comprehensive framework for brokering services, structured around *ex ante* notification requirements, substantive conditions for service provision, and *ex post* mechanisms for public supervision (Ducuing, 2024, pp. 63–90). This framework is specifically designed to ensure the neutrality of intermediary platforms, a fundamental prerequisite for fostering trust among data holders in the reliability of digital services within a European sectoral data space (Ruohonen & Mickelsson, 2023). In this regard, it is particularly noteworthy that the definition of "brokering services" explicitly excludes those based on industrial data exploitation models.

Arranging the Mosaic: Applications of US Federal Data Rules to Agriculture

With regards to the US, the development of a "farm data law" reflects the characteristic "mosaic" structure of data regulation in the United States. The prerogatives that best address farmers' needs have primarily emerged from doctrinal analyses (Ferris, 2017, pp. 309–342), often resulting in the analogical application of existing federal rules designed to protect consumers' personal data in other economic sectors. The most widely accepted argument supporting this analogy lies in the similarity of the market dynamics that threaten both consumers and the contractual autonomy of data-generating agricultural operators.

In other words, if it is true that "John Deere is the Apple of farmers" (Hackfort, 2023), it is equally true that users of ATPs deserve transparency regarding the destiny of the non-personal data they generate. Such transparency is crucial to preserving their economic freedom to choose suppliers and determine the terms of their contracts, much as consumers are able to limit their profiling for marketing purposes. In this context, there are some doctrinal remarks aimed at extending the various federal sources on consumer data protection to ag-data users.

Let us consider, first, the "*de facto* common law" value attributed to the consent decrees issued by the Federal Trade Commission (FTC) (63rd United States Congress, 1914), expected to ensure compliance in business-to-consumer negotiations and counteract mis-

leading and abusive practices by commercial enterprises concerning consumer data. While these measures primarily consist of orders to comply with subsequent decisions, the clauses incorporated within them, which have gained a status comparable to the binding precedent rule, are largely designed to grant consumers control over the handling of their data for commercial purposes through the mechanism of prior consent.

One more federal intervention that has been frequently proposed as a model for uniform regulation of farm data in the US is the Health Insurance Portability and Accountability Act (HIPAA) (104th United States Congress, 1996). HIPAA is built on two foundational pillars: the "privacy rule" and the "security rule." The former prescribes, in a strict and precise manner, when and how an individual's personal data may be disclosed, and for what purposes. Conversely, the security rule establishes a "minimum floor" of data security measures that all entities subject to the act must guarantee. Additionally, HIPAA imposes disclosure and transparency obligations on healthcare institutions, ensuring that patients are informed about how their data may be disclosed and how they can access it.

Finally, the Gramm-Leach-Bliley Act (GLBA) (106th United States Congress, 1999) deserves consideration. Enacted to address the dual goals of bridging competitive gaps in the American financial market and enhancing the security of consumer information, the GLBA delegates to federal authorities the task of establishing minimum requirements for financial institutions. Notably, it mandates notification to consumers about the types of data being collected, the extent to which third parties may access the data, and the mechanisms for exercising the right to opt out.

New Data Legal Frameworks and New Flaws: Is There Room for Agricultural Data Protection?

Despite the contributions of the above-described measures to the previously voluntary, bottom-up legal framework, significant limitations persist in the application of both the EU and US data legal frameworks within the agricultural sector (Atik, 2023a).

Regarding the Data Act, the primary concerns center on the terminology used to adapt the horizontal definition of "user" to the rural context. The term "user" is defined in the Data Act as "a natural or legal person who owns a connected product, to whom temporary rights to use that connected product have been contractually transferred, or who receives related services" (Data Act, 2023, Article 2(12)). While the given definition covers both owners and lessees of IoT devices, it does not adequately address the diversity of agricultural practices. For example, farmers may hire external companies to conduct harvesting operations using farm machinery, which they neither own nor

lease, leaving them without direct control over the equipment. Furthermore, a closer examination of Article 4 of the Data Act suggests that the user's exclusive right to access data reintroduces the exclusivity logic characteristic of proprietary frameworks (Calzolaio, 2024, p. 48). This appears to contradict the EU legislator's decision to abandon the proprietary regime in favor of the "accessibility" paradigm. It therefore remains to be explored how this access will be legally structured across EU member states and to what extent it will functionally mirror the principles of ownership (Calzolaio, 2023, pp. 287–326). To address the noted gaps, scholars have proposed a revised framework for the notion of "user," tailored to farm data and centered on a "non-waivable data portability right for farm units" (Atik, 2022, p. 730). This approach would ensure that data related to a farm unit—rather than an individual farmer or a legal entity—remains accessible to the person responsible for that farm unit. This proposal consists of three core elements: the "non-waivability" of the farm data portability right; its focus on "farm units" rather than individual farmers; and its scope of application, particularly its extension to aggregated and real-time data.

Similarly, the various US legal references discussed above can only serve as valuable examples of federal contributions to the data legal framework. However, the analogy with consumer protection merely underscores the urgency of establishing a comprehensive framework for farm data protection. Yet, legislative action in this area must be tailored to the specificities of the generation and use of ag-data.

Such interventions require not only adjustments to tackle the multiple forms of agricultural businesses but also the implementation of measures that comprehensively address the specific digital concerns of farm data users, thus supplying them with robust guarantees that preserve their economic freedom in order to safeguard the autonomy of agricultural enterprises in a data-driven economy.

Final Remarks: Forthcoming Steps to Balance Innovation and Trust in Farm Data Governance

From the advantages and limitations of the proposed solution, it appears that both legal systems, despite diverging in their initial approaches to data regulation, are converging towards an intermediate framework for farm data protection. Through the Data Act and Data Governance Act, the European Union has reaffirmed its comprehensive approach to data regulation, shifting the focus of protection from the referability of data to an individual to its function of representing real-world events or facts. These methodological premises guide European efforts to establish a single, cross-sectoral data market while also addressing specific and strategic sectors, including agriculture.

In this perspective, the framework established by the Data Act and Data Governance Act departs from the traditional dichotomy of hyper-protecting personal data and liberalizing non-personal data. Instead, it adopts a logic aimed at maximizing data sharing and proliferation, emphasizing the need for building trust among data holders. Still, it is important to note that these regulations are general and cross-sectoral in nature and were not explicitly designed to address the unique challenges posed by farm data. For instance, questions arise regarding the application of the Data Act's definition of "user" in the agricultural context, considering the organizational complexities of farming practices across Member States.

At the same time, the voluntary sector-specific guidelines within the existing EUCC are insufficient to address data lock-in due to their non-binding nature. At this stage, if a possible solution involves introducing binding sectoral regulations to address farm data access concerns (Atik, 2023b), given the lengthy process of enacting vertical regulations, a more feasible approach may be a comprehensive update to the EUCC.

Such a modernization could align the EUCC with the Data Act by giving up outdated concepts such as "data ownership" and "non-personal data," while also tailoring the definition of "user" to the agricultural reality; instead of mandatory measures, economic incentives could be introduced to foster trust in farm data sharing.

In line with this approach, the European Commission has approved the preparatory "AgriDataSpace" project, paving the way for the launch of the Common European Agricultural Data Space (CEADS) in January 2025. CEADS is envisioned as a "federation of Data Space Initiatives," meaning that it operates more as a decentralized network rather than a centralized solution (García & Gil, 2024).

To reach such an ambitious goal, several recommendations have been developed to align the EUCC with the Data Act (European Commission, 2024). For example, one recommendation calls for the appointment of a "data coordinator" at the Member State level to manage the application of the Data Act in ag-data exchange; moreover, the sixth recommendation paradigmatically advocates for updating the EUCC to facilitate the application of the Data Act in the primary sector.

Conversely, the "compartmentalized" approach adopted by US federal legislation offers certain methodological advantages, particularly in addressing the specific needs of individual economic sectors. This is highlighted by scholarly efforts to design a vertical, sector-specific federal framework for farm data, as well as the proposed Agricultural Data Act in 2018, although it never came into force. The proposed legislation, however, sought to balance trust in data sharing with transparency in data control by requiring prior consent for data processing, replacing the traditional model of subsequent opt-outs.

In other words, the motion pointed to strengthen the US Department of Agriculture's management of agricultural producers 'data without undermining their rights—a goal closely aligned with the objectives of European governance.

Hence, the comparative analysis of the evolution of ag-data governance in Europe and the United States emphasizes how both legal systems are gradually converging towards intermediate solutions to address the challenges posed by ag-data management. On the one hand, the establishment of the CEADS offers an unprecedented opportunity to operationalize the concept of "data sovereignty" within agriculture by integrating existing regulations and fostering trust in data sharing; on the other hand, the US system, despite its fragmented nature, demonstrates the advantages of a sectoral approach tailored to the specific needs of individual economic areas. In this view, the attempt to introduce an Agricultural Data Act, although unsuccessful, underscores the need to balance transparency and trust while safeguarding farmers' rights and ensuring effective data management.

Ultimately, the future of ag-data governance in both Europe and the United States will depend on striking a balance among innovation, regulation, and trust. Only by combining mandatory measures with economic incentives can the sustainability and autonomy of farmers be integrated into an increasingly data-driven economy.

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THE PEDAGOGICAL ILLUSION. FOR A GENEALOGY AND CRITIQUE OF OUR SCHOOLS

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LA ILUSIÓN PEDAGÓGICA. POR UNA GENEALOGÍA Y UNA CRÍTICA DE NUESTRAS ESCUELAS

Abstract
The text offers a critique of neoliberal pedagogy through a genealogical reconstruction of what is defined here as the "pedagogical illusion": the illusion that educating individuals to self-govern better guarantees governance. Taking the Italian case as a paradigm, the text shows that this illusion persists through the transition from the school of the Constitution to the school of human capital. However, the forms change: while the former was still pervaded by a disciplinary logic harshly contested by the social movements of the 1960s and 1970s, the latter tends to become a training ground for competition and a factory for human capital.

Keywords
Production of subjectivity; educational practices; genealogy of pedagogical discourse; neoliberal pedagogy; *Scuola della Costituzione*.

Resumen

El texto ofrece una crítica de la pedagogía neoliberal mediante una reconstrucción genealógica de lo que aquí se define como la "ilusión pedagógica": la ilusión de educar a los sujetos para el autogobierno, con el fin de garantizar una mejor gobernanza. Tomando como paradigma el caso italiano, se muestra que esta ilusión persiste en la transición de la escuela de la Constitución a la escuela del capital humano. Sin embargo, las formas cambian: mientras que la primera todavía estaba impregnada de una lógica disciplinaria, que fue duramente cuestionada por los movimientos sociales de los años sesenta y setenta, la segunda tiende a convertirse en un campo de entrenamiento para la competencia y en una fábrica de capital humano.

Palabras clave

Producción de subjetividad; prácticas educativas; genealogía del discurso pedagógico; pedagogía neoliberal; *Scuola della Costituzione*.

Introduction

This essay examines the school from a Foucaultian perspective, understanding it as an apparatus of government that produces subjectivity through educational practices. The first part genealogically examines aspects of the pedagogical discourse of modernity, arguing that, at its core, lies a persistent illusion: the desire to push subjects toward self-government in order to guarantee governance. This is a long-lasting illusion—and this is our thesis—one rooted in the early modern age and still active, *mutatis mutandis*, in more recent pedagogies, such as neoliberal pedagogy, which has acquired hegemony over a pedagogy centered on constitutional-democratic principles. This is paradigmatically shown in the Italian case, which is why it is placed at the center of the second part of the essay. Indeed, in the Italian experience, one clearly sees the transition from a *"Scuola della Costituzione"*—which while democratizing the old pedagogical illusion still retained disciplinary and classist features was later challenged by the creativity of the '68 and 1970s movements—to a factory-school of human capital, in whose laboratory such creativity increasingly comes to be subsumed under the performative and competitive logic of neoliberalism. The school can only be a place for exercising power and training subjects, but—and this is the meaning of the conclusion of the essay—under certain conditions, it can become instead a utopian laboratory for experimenting with and anticipating forms of true democracy. As anyone who has taught or teaches knows, the school is indeed structurally characterized by this constitutive ambivalence.

The Descent, Emergence, and Spread of Modern Pedagogical Discourse

Descent: The Jesuit College

In a text that is too little appreciated, Alessandro Fontana (1989) has argued that modern pedagogical discourse has never ceased to develop strategies for equipping the subject with its own "tribunal of conscience" (p. 88). He suggests these are illusory strategies which have always tried to push the subject to internalize—and thereby secularize—the "old internal ecclesiastical court, in this way installing within the soul the real external judge" (p. 88). In its main features, modern pedagogy would have drawn the subject as a spectator of himself, capable of self-governing in such a way that his conduct converges with the norms that govern the social order. The structural illusion of modern pedagogical discourse would thus be that it can produce a "well-educated" subject capable of adapting to the prevailing systemic norm—everything within himself that might question that norm. Emphasizing the persistence of such an illusion in Western pedagogical discourse, as Fontana does, certainly does not exhaust its complexity, but it can at least guide the attempt to reconstruct its genealogy.

To understand the place of descent of this pedagogical illusion, and reconstruct its first site, we must first of all strive to question the idea—perhaps the fable, as Girolamo De Michele has called it—that the modern school is merely "a 'good' Enlightenment invention" generated in order "to liberate men from ignorance and minority status" (De Michele, 2004). If we question this fable, the genealogy leads us to places that we would not expect to go. Fontana indeed argues that the place of descent of the modern pedagogical illusion—i.e., the milieu in which we find it—is the Jesuit college, which spread throughout Europe in the seventeenth century by winning a monopoly over secondary education. Of course, the Jesuit college will transmit an educational model from the background that is radically hostile to the Protestant denial of free will (both Lutheran pessimism and Calvinist predestination), aligned with the classical practices of confession and the direction of conscience: practices which transmit an entire "infinitesimal analytic of sin and circumstances" whose purpose is to enable the subject to rule his soul and correctly exercise free will (Fontana, 1989, p. 89). In line with this theological background, the Jesuit education project—designed for the formation of the gentleman of the court, an elite able to govern the masses who are divided into orders and castes—aims to construct subjects shielded from Protestant contagion and every rationalist-agnostic temptation. In other words, it aims to construct students capable of governing their own intentions, having learned from the authority of the master (who is both loved and feared) the art of what Ignatius of Loyola called "true and perfect obedience" (Fontana, 1989, p. 89). Inspired by this principle, the curriculum of Jesuit studies (the *ratio studiorum*) anticipated that instruction and education would lead the subject to self-government, making him a *homme poli,* capable of governing others and inspired by the norm of *civilité* (as Father Croiset wrote) (Zanardi, 1998). The *ratio studiorum* will be promulgated in January 1599 under the generalship of Claudio Acquaviva. Its main techniques are study, meditation, the scrupulous examination of conscience, supervision of pupils, censorship in the conduct of life, and the use of the pedagogical canon of emulation, by which the worst are always humiliated in comparison to the best.[1] According to this canon, by following these techniques, the pupil can overcome their own split by reconciling their conduct with both the divine order and the earthly order. We know that this educational method will enter a crisis around the middle of the eighteenth century.[2] This will happen not only because of the Portuguese and Chinese intrigues that will lead the Company to be expelled from teaching (in France in 1762)

[1] In the Spiritual Exercises and *The Constitutions of the Society of Jesus*, Ignatius of Loyola valorizes humility as resulting from the experience of humiliation and as an imitation of Christ: a desire to become similar to Christ. "Obeying, humbling oneself'—he writes—serves to 'gain the life eternal" (Ignatius of Loyola, 1997, p. 67).

[2] On Jesuit pedagogy, see Schimberg (1915).

and to dissolve in 1774, but also and above all because the dynamism of the new bourgeois societies would no longer be served by an education of elites for the "formation of a ruling aristocracy" (Fontana, 1989, p. 91). What the bourgeois order needed was rather "a widespread education for the constitution of consciences": an education that provided "the institution of citizens" to be endowed with a new civil morality (Fontana, 1989, p. 91).

Emergence: The Reformers, the Revolution, and the Production of the Citizen

This transition, in which the jurisdiction of religion over instruction is succeeded by the nation state, often appears to us as the historical caesura between an education filled with religious superstition (flanked by the pompous ceremonials of secret court politics) and a national, public, and secular education, understood as a laboratory of a transparent and liberal civil morality. However, beyond the innovation of content (also radical) in the new educational models (with the curriculum of study that would privilege professional techniques, science, modern history, and living languages), there still remains within them, according to Fontana, the disciplinary trace of the pedagogical illusion that we have invoked: the idea, that is, that a subject must necessarily be produced who, thanks to his capacity for self-government, introjects the norm of the constituted order.[3] The difference is that now it is about the nation's norm, and the well-educated subject to be produced is the citizen. In the myriad of projects of educational reform that the genealogist encounters when studying the true place of emergence of modern pedagogical discourse—the late eighteenth century and the French revolution[4]—together with the rhetoric against the fanatical domination of religious orders over consciences, one finds that "the first bond of nations is morals; the first basis of morals is the instruction from childhood about all the duties of man in society," as Turgot wrote in his *Memoire au roi sur les municipalités.* It follows that "methods and institutions [...] are needed in order to form citizens" (Turgot, 1775, pp. 502–550, as cited in Fontana, 1989, p. 91).

Diderot, Mirabeau, Tallyrand, and Condorcet will all be equally concerned that a secular education and training can guarantee good government over all of the French nation, through the production of well-educated and well-behaved citizens capable of self-government that pushes them to internalize, through pedagogy, the norm of obedience to the order of the nation-state. The Jesuit move for the production of a docile subject is thus secularized, but, beyond new content, it is formally taken up again: the

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[3] In this sense, it seems correct to claim that "the modern school was born before the Enlightenment: it is an invention of the Jesuits" (De Michele, 2004).

[4] Fontana cites the projects of La Chalotais and Turgot, as well as the revolutionary projects of Mirabeau, Talleyrand, and Condorcet.

self-government of the well-educated subject is not for the sake of generating real autonomy, but rather for supporting the government of the state in the nation. In other words, it is a matter of "re-founding the old religious morality on a civil basis [...] with the state taking on [...] the exercise, the protection, and the teaching of the virtues," according the to adage of d'Holbach's *Système social*, for which "politics is the morality of nations" (Fontana, 1989, p. 92).[4] Everything that coincides with the new state order is rational. The rest is reduced to pernicious passion. And education rises to the role of the key science for the formation of the new citizen: for the various souls of the French Revolution, up to the Napoleonic restoration, it is the school—understood as all of the pedagogy dispersed in festivals, republican ceremonies, and public readings—which must teach the new morality. In this way, it is also outlined in the National Education Plan, drafted by Michel Lepeletier de Saint-Fargeau, presented to the Convention by Robespierre on July 3, 1793, and voted on August 13, 1793, but never implemented. This plan was socially progressive, providing free and compulsory education at the Republic's expense for boys aged 5 to 12 and for girls until 11. It was a plan in which the Jacobin Lepeletier defended the state monopoly over primary instruction, financed by all, and fiscal progressiveness, with the aim of establishing an egalitarian school that would overcome ascribed inequalities.[6] But it was also a plan in which every child is pure "raw material" that belongs to the state, which must make him into a citizen capable of avoiding the "softness of luxury [...] the pride of vanity, [and] the indiscipline of laziness" (Lepeletier, 1982, p. 350). The new national education, Lepeletier (1982) expressly writes, must, in other words, remove the new citizen from "vice or disorder," disciplining him to that "adaptation to labor" which is the true hinge of the new republican ethic and capitalist order (pp. 357–358; Le Cour Grandmaison, 1995).

Spread: The Nineteenth-Century School and the Production of the "Normal Man"

Over the course of the nineteenth century, the processes of disciplining were nationalized.[7] In this way, a new form of the Western pedagogical illusion emerges, taking

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[5] On this point, see P-H. T. d'Holbach, *Système social ou Principes naturels de la Morale & de la Politique, avec un Examen de l'Influence du Gouvernement sur les Mœurs* (1773) and *Ethocratie, ou Le Gouvernement fondé sur la Morale* (1776) in d'Holbach (2001). On the relation between d'Holbach's ideas and the French Revolution, see Boulad-Ayoub (1991).

[6] Lepeletier (1982) believed that the entire community would benefit from a national education financed through progressive taxation. For this reason, he wrote the following in the Plan: "the poor contribute very little, the rich contribute a lot; but when the deposit is formed, it is distributed equally among all; each derives the same benefit: the education of his children."

[7] On the rationality of disciplinary power in modern societies and the correlated production of "docile bodies," see Foucault (1975, pp. 147–251). On disciplinary power as a pedagogical apparatus in Foucault, see Chello (2019), Mariani (2000), and Vaccaro (2005).

shape in various ways across different countries. This new version is one for which instruction and education must produce the "normal man" through a moral orthopedics for an "administration of the multitudes" on a national scale (Foucault, 1981, p. 23). In France, after an initial phase in which disciplinary power took the form of a "repressive and authoritarian command of the military-Napoleonic type," it weakened with the establishment of the Third Republic (Fontana, 1989, p. 94). On the theoretical level, the great republican project of the public school remains consistent with the values of the Enlightenment, but the actually existing school is governed by a state that conceives of it as an instrument for guaranteeing a social order that is quite different from that which is traceable to the ideals of the ruling class. At school, according to a logic in which the state inherits the old pastoral power (secularizing it), the teacher takes the place of the priest and assumes the function of moral normalization of the population. Institutions will then aim, with unprecedented care, to produce the internalization of command in their subjects. The normal person will no longer merely have to passively obey, but will also be expected to actively participate, assuming responsibility for the functioning of the social order. In the new educational programs, conceived by authors such as Marion, Maneuvrier, Guyau, Fouillée, and Durkheim, command is increasingly problematized as an automatism to be internalized. The individual initiative that results, Fontana (1989) maintains, can only be configured as the mere result of an "orthopedics of the will," or if one wishes, as a peculiar modality of self-government that wipes out the autonomy of the individual (p. 95). The weakening of authoritarian traits in schools is grounded in the findings of both medical physiology and the new methods for treating hysteria (think only of Charcot's hypnosis), which suggested acting on the will more through persuasion and insinuation than through harsh command. A coerced will, indeed, will easily fall prey to the instinct of rebellion, while a persuaded and suggestable will can internalize the norm, naturalize it, and automate the habits inspired by it.

The Anglo-Saxon pedagogy inspired by the Spencers, Bains, and Jameses would explicitly propose itself as a discipline based on the results of psychological research into the intellect, will, perception, and attention, considered capable of providing education with a mirror of the "physical reality" that Spencer considered indispensable for the formation of disciplined character (Fontana, 1989, p. 96). On the model of sport, the formation of character can and should take place through the education of the body and the internalization of command. Spencer will write that "the purpose of education is to teach the schoolboy how to govern himself," such that he normalizes his behavior by aligning it with the good order of the social system (Spencer, 1876). The workerist version of this disciplinary thinking will later take full form within the Taylorist facto-

ry. Here, Fontana emphasizes, while punctuating industrial space with resistance and struggle throughout the arc of Fordism, that, through rigid discipline, the worker will be pushed to introject the factory command, which makes possible huge increases in productivity and profits (Spencer, 1876).

Further, if one studies the textbooks of the post-unification era in Italy—as Marcella Bacigalupi and Piero Fossati have done—one can clearly see that education was assigned the task of transforming the coarse and uneducated "plebs" into a well-educated and hard-working "people" (Bacigalupi & Fossati, 2002). The production of such a people, composed precisely of "normal men," would take place by teaching values traced to the ethical handbook of the middle class during the period: moderation, respectability, aspiration to self-improvement through labor, ability to be content even in a state of honest and dignified poverty, uncritical acceptance of the norms of coexistence in civil society and the hierarchies of class society. In short, in the schoolbooks, "educating the people" meant combating stealing, lying, violent habits, immoderate use of food, drunkenness, gambling, promiscuity, laziness, wasting time and money, anti-social and subversive intentions, concentrated and summarized with the figure of the brutish, vulgar frequenter of the tavern-goer. All of this needs to be replaced by a work ethic that promised a minimal degree of well-being proportionate to one's means and "a possibility of economic improvement, without however proposing illusory and dangerous social leaps" (Bacigalupi & Fossati, 2002, p. 59).

The idle figure of the "lazy and insolent poor," ultimately responsible for his own poverty and potentially dangerous, frequently recurs in this literature—for example, it is strongly present in the texts of Vincenzo Troya (1806–1883) and Ildebrando Becivenni (1852–1923)—and it was presented to students as the negative model par excellence. Opposed to his figure was the edifying one of the honest and hardworking laborer: the "normal man" with whom one could identify without reservation, whose work would contribute to the consolidation of the nation's industrial power, the homeland. In this way, the schoolbooks incorporated the constant complaints of business owners about ignorance, inaccuracy, and inconstancy of these former peasants and artisans who had become workers, and—as the *"Inchiesta industriale"* of 1870–1874 denounced—were now deemed unsuited to the pace of industrial labor. In short, these school texts incorporated business needs by proposing a patient work of the moral regeneration of the plebs and the construction of the people also through the basic school controlled by the state: a state that proposed to transmit those values of the homeland and labor that the Risorgimento bourgeoisie considered fundamental for achieving real unification and the industrial take-off of the country. In doing so, it would teach the members of the

popular classes to govern themselves as responsible subjects capable of interiorizing the meaning of discipline as members of a hard-working population in line with the governmental needs of the national state (including the military) and with those of capitalist accumulation.

World War I will see the pinnacle of this normalizing and disciplinary pedagogy, which will then triumph, with the corollary of racism, in the age of totalitarianism: in Italy, with the Gentilian and Fascist schools. However, wars and totalitarianisms will also call these paradigms into question. Soon, a too-linear equation between disciplined identification with order and self-realization will no longer appear to yield significant results. And, in its own way, pedagogical discourse will take note.

From the *"Scuola della Costituzione"* to the Factory of "Human Capital"

"Scuola della Costituzione" and *"Scuola Bloccata"*: The Formation of the Citizen-Producer

We remain in Italy, where, after World War II, the *Scuola della Costituzione* will be tasked with producing the democratic citizen. An advanced pedagogical discourse from thinkers such as Agazzi, Visalberghi, and Borghi exemplifies different perspectives on a Deweyan "active school." Here, the interests and aptitudes of pupils are kept at the center while the school proposes to reinforce the link between democracy and education that Calamandrei had already maintained was inseparable in a famous 1950 speech. Calamandrei (2008) argued that as an integral part of the democratic constitutional organism, the school corresponds to "those organs in the human organism which have the function of creating blood" (p. 85). Continuing with this metaphor, he added that the school was part of the "hematopoietic organs, those through which the blood flows that daily renews all the other organs, that brings renewal and life to all other organs, every day, beat by beat" (p. 85).[8] The ideal school of the new constitutional-democratic discourse, however, will still be conceived as an apparatus for the production of subjectivity. Within it, now democratized, the pedagogical illusion of forming subjects whose self-government must keep the government in shape will be renewed. The school must produce "well-educated" citizens who internalize obedience to the democratic state, while simultaneously helping to form the mental habitus of producers necessary for Fordist development.

[8] On this point, see De Michele, 2010.

The actually existing Italian school in the years of centrism, then, at least until the introduction of middle school in 1962, would be a *"scuola bloccata"* as the pedagogist Massimo Baldacci (2019, p. 166; 2022) has written. This is a school that, inheriting the authoritarianism of the liberal and fascist schools, socializes the popular masses in a moderate and socially conservative key, in this way reproducing gender and class hierarchies by carrying out a "selection by early partitioning" which continued to provide middle and high school for the dominant classes and vocational training for the subaltern ones (Baldacci, 2019, p. 167). This school functions a bit like Althusser's (2014) "ideological state apparatus," which has the function of securing "(diversified) skills of labor-power useful to capital" (p. 236). For this reason, Althusser (2014) writes, in school one does not only learn techniques such as reading, writing, and arithmetic, but also the rules of "good behavior" i.e., of the attitude that "should be observed by every agent [...] according to the job he is 'destined' for" in the division of labor (p. 236). In other words, one learns "rules of moral, civic, and professional conscience," which are "rules of respect for the social-technical division of labour and ultimately rules of the order established by class domination" (p. 236). And one also learns how to "'handle' the workers correctly," which is a necessary competence "for future capitalists and their servants" to "speak well to the workers," i.e., "to 'order them about' properly" (p. 236).

It is this kind of school and the new constitutional-democratic pedagogical illusion that the social movements in the 1960s and 70s—even after the establishment of the unified average [*scuola media unificata*]—would contest, particularly the disciplinary-classist aspect and the alienation from the life of knowledge that was learned there (De Michele, 2012). Against all of this, 1968 will give rise to experiences of non-utilitarian practice in the school. It is sufficient to refer to the journal *L'Erba voglio* (1971–1977), which was composed of many school workers, psychologists, students, and parents. It was a libertarian, not a spontaneist, experience. Against the pedagogical spontaneism, in fact, Elvio Fachinelli (one of the main drivers of the journal), would write that when the figure of the adult is eliminated, one sees "an iron-clad hierarchy arise, based on force and arrogance, which imposes itself on the relation of children among themselves"; and in this way, he continues, "it seems to be found in a violent society, between the fascist and mafioso, where the strongest and most arrogant protects those in his family" (Fachinelli, 1979, pp. 171–172). *L'Erba voglio* sees the real school as an instrument of the reproduction of "relations of exploitation, hierarchies, and roles"; as an apparatus of "containing the creative capacities of the individual"; as a machine that produces passive subjects, incapable of escaping a predetermined interpretation of reality and "removed from any verification" (Melandri, 2018, p. 91). In other words, it sees the school as an

apparatus that produces docile workers, acritical consumers, and citizens: democratic, yes, but educated by proxy and only to a formal democracy. This school, as some kindergarten teachers will summarize in one of the journal's articles, educates students to accept "the destiny that has been prepared for them: work and family, commanded distractions, and voting every five years" (Melandri, 2018, p. 91). Against this school, *L'Erba voglio* will contrast another that is conceived as a "realized utopia" but "supremely realist," which in order to bring about the exit from passivity and fear, will focus "on the presence and participation of those excluded from power, on the habit of practicing assembly, of collective decisions" (Melandri, 2018, p. 94). In other words, it will focus not so much on toppling the universe of power as on producing subjectivities capable of giving themselves common rules through which "the exercise of power [is given] among equal and always autonomous individuals," prefiguring the participatory forms of a true democracy founded on the logic of "commoning": in short, founded on putting in common experiences and desire (Melandri, 2018, p. 94).

It is also thanks to experiences like these that—as Girolamo De Michele has recalled—while in 1967, 63 % of Italians could not summarize the meaning of a newspaper article, 52 % could not apply basic mathematics to simple tasks in reality, and 1.9 % could not understand a complex text,

> in the 30 years that followed the fateful 1968, the percentage of returning illiterates fell to just over 20 % of schoolchildren, and of active citizens, equipped with indispensable tools to understand the world and be active in exercising rights, has risen above 10 %. (De Michele, 2012)

In this sense, against the varied rhetoric of evaluation in vogue today, it can be claimed that "it is this data which is the true test of evaluating schools"; and that these "capacities," contrary to the much-acclaimed competences, "sediment in society through the years," democratizing democracy and removing schools from their role as "conveyer belts and [places of] subjugation to dominant power and knowledge."[9]

In the Factory of "Human Capital"

After the defeat of the long Italian '68—and after the end of a democratic movement that acquired hegemony for a stretch of time but failed to radically transform the school

[9] *"This is the fault of the Italian school: having fought Don Milani's battle against a class school," De Michele writes. Furthermore, he notes that it is not by chance that "when the Italian school began to chip away at this apparatus, attacks on the public school began" (De Michele, 2012).*

(while influencing a season of reforms "in the spirit of the charter" but still contradictory[10])—a new scholastic spirit would assert itself that on the one hand would rethink the arrangements of the school and on the other would outline the old pedagogical illusion in new forms. After a transitional phase that prepares the ground for the turning point, the arrangements in Italian schools will shift in a neoliberal direction during the so-called Second Republic. Consistent with the 1994 Berlusconian project of the "Three Is" (Business, Information Technology, English [impresa, informatica, inglese]), and with the Berlinguer logic of regulating school autonomy in 1999—where the concept of "educational needs" was replaced with the corporatist idea of "educational demands" (in the logic of the "Educational Supply Plan")[11]—the 2003 Moratti reforms, 2010 Gelmini reforms, and 2015 Renzi-Giannini reforms will arrive. The first will revive the dual structure of high school by shaping professional instruction toward businesses, introducing individualized curricula, and upholding the primacy of family over school. Confirming the little-emphasized nexus between neoliberalism and neoconservatism, Gelmini will mark these neoconservative arrangements with the return of the "five in conduct" (*cinque in condotta*)[12] of the single-prevalent teacher in elementary school, as well as the pinafore in the classroom. At the same time, she will implement the neoliberal recipe of cuts, cooked up in synergy with the Ministry of Finance, which will result in a reduction of up to 8.5 billion from public education. The third reform—the so-called *"Buona scuola"*—will crown the not-so-long march of Italian scholastic neoliberalism, explicitly conceiving school as something that "must serve business and become a business itself": a business that, moreover, is directed by the presiding manager in such a way that it might border neo-authoritarianism (Baldacci, 2019, p. 177).

These are the main stages of the Italian translation of the European neoliberal program, which, as Christian Laval and Francis Vergne have demonstrated, informs the EU's pedagogical philosophy. For these authors, this philosophy corresponds to an "individualistic and utilitarian plan for education [that] is not an ancillary component of the program of neoliberal society," but rather "is at the center of its entire project and undergirds its implementation" (Laval & Vergne, 2011, p. 313). This philosophy conceives education

[10] From full-time in 1971 to 150 hours in 1973; from the institution of collegiate bodies with delegated decrees of 1974 to the curbing of selecting elementary schools and integration of disabled students with Law 517 of 1977. See Baldacci (2019, pp. 167–172). On this point, see also Meta (2021).

[11] Introducing the proposal for the reorder of education cycles to the Chamber of Deputies, Luigi Berlinguer claimed: "It is precisely on training that international economic competition will be focused in the near future." Later on in his presentation, "the school [...] will need to metabolize a new culture of labor by valorizing the knowledge of new organizational forms, flexibility, autonomous labor, and helping to develop the sense of responsibility, autonomy, ethical and intellectual capacities for education, planning, and implementation of projects" (Camera dei Deputati, 1997).

[12] This was an earlier form of grading that directly assessed a child's behavior while at school.

as "human capital formation" and is part of "a more global vision for human existence understood as the accumulation of private goods" (Laval & Vergne, 2011, p. 313). From this perspective, school ceases to be the vector of "a common democratic and ecological culture," and becomes an apparatus that willingly accommodates the "colonization of the totality of existence by capitalist logic" (Laval & Vergne, 2011, p. 313).

Already in *Libro verde sulla dimensione europea dell'educazione* (1993), one could read that among the main purposes of educational practice are, first of all, the formation of "human resources" and the achievement of "a greater adaptability of behavior in order to respond to the demands of the labor market." It is explicitly added that "education must hinge on the needs of the business" (Commission of the European Communities, 1993). Even early, the 1989 *Tavola rotonda europea degli Industriali* accorded "priority to the development of professional and social skills for better adaptability of workers to the changes in the labor market," based on the assumption that there is a priority to train a future worker who "is capable of recycling through the course of his own life": an assumption that must be applied both to young workers destined for international competition (and the confrontation-clash with their peers in other countries in the market for technologically advanced knowledge), and for those who would remain outside of cognitive society as they lacked the cultural resources that were suitable for its purpose (Hirtt, 2000, 2005, 2014). With *Libro bianco* (1995), the programmatic rationality of this philosophy becomes increasingly clear: in order to compete in globalization where knowledge becomes the central productive factor, and for the EU to become the most dynamic and advanced economy on the planet (in accordance with the goals that would later be declared by the Lisbon Strategy in 2000), the educational systems of the EU must increasingly transform themselves into a network of competing businesses. In each member country, many school-businesses will need to produce subjectivities equipped with the "human capital" necessary to guarantee future employability and competitiveness in the labor market, and of course, adaptability to its most dynamic and/or precarious segments. As Baldacci (2019) has argued, thus, from this perspective the school is reconceptualized as a "factory of human capital," where the subject is equipped with the "cognitive equipment necessary for business" and as an "arena of competition" where—by internalizing the spirit of competition—students are socialized into "the meritocratic mechanisms which preside over economic and social life" (p. 175). For this reason as well, individual educational institutions "must take the form of efficient businesses, capable of competing in the education market and subject to accounting for the productivity of public investment." This is according to the Blairian logic of "new public management," for which, "while school leaders become managers

of the school-business, teachers take on the role of functionaries of human capital" and/or "cashiers in the educational supermarket" (Baldacci, 2019, p. 175; 2021, p. 64).

Families meanwhile can turn into ministerial portals such as the *"Scuole in chiaro"* which provides pedigrees of the various schools, complete with learning outcomes obtained in the INVALSI Tests, or the private benchmarking sites such as Eduscopio—which has the following inscribed on its homepage: "find out which schools in your area give you a leg-up for university and the world of work, and choose which one is right for you" (Borrelli, 2022, p. 244). In other words, as Gary Becker suggested a long time ago in *Human Capital* (1964),[13] choose the best provider of human capital and skills for your children—citizenship, social entrepreneurial, civil, and STEM skills that play a central role in the new neoliberal pedagogical spirit, which will be permanently assessed by commissar-type bodies such as Invalso (in schools) or Anvur (in universities). These are skills that aim to "construct a worker adaptable to every situation" (Donat Cattin, 2019, p. 104).[14] Hence, the insistence on "teaching to learn," on lifelong learning and all those skills (such as the so-called soft skills and basic skills) which permit adaptability, resistance to stress, capacity to plan and organize, and self-confidence, in this way proving to be "applicable to every job field" (Donat Cattin, 2019, p. 102).[15]

In this context, the old pedagogical illusion takes on its new neoliberal clothes. And it promises to produce subjectivities capable of self-governing in synergy with the neoliberal government of society, which in turn promises modernization and freedom for all. Put otherwise, with a passive revolution in the critical, creative, and libertarian spirit of 1968—which as Luc Boltanski and Eve Chiapello (1999) have argued, has been put to work and subsumed in the new spirit of capitalism in order to renovate corporate management and relaunch accumulation—the school of skills and human capital invites students to construct themselves as free and creative entrepreneurs of themselves: well-educated subjects who are competent, competitive, and performing, virtually capable of excelling at work and in society. The neoliberal school thus accustoms students to self-govern in compliance with neoliberal axioms, so as to favor flexible adaptation to the precarious work many of them will soon encounter.[16] And if they fail to develop adequate human capital or

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[13] See Becker (2008), Foucault (2005, pp. 185–190), and Maltese (2015).

[14] See also Allegra (2016). For the French case, with reference to the 2005 Filon law that established "a common core of fundamental knowledge," see Laval and Vergne (2011, pp. 211–252).

[15] Already, *A Recommendation of the European Parliament and the Council of 2006*, updated in 2018, argued that these skills "become more important for ensuring resilience and the capacity to adapt to change" (Gazetta ufficiale dell'Unione europea, 2018).

[16] Roberto Ciccarelli (2018) has correctly argued that this school aims to produce people who are employable in any job, i.e., to "create the new moral subject who self-governs the precarity of labor and income" (p. 140).

to profitably employ their skills in scholastic and market competition, it means that they did not deserve it: this is the meritocratic complement of a pedagogical discourse such as the neoliberal one—constructed more by economists and technocrats—whose obscene and constitutive side is its failure (Cingari, 2020; De Michele, 2023).

Conclusion

"*Missione 4: Istruzione e ricerca*" of the 2021 Italian National Resilience Recovery Plan, which was approved to revive the Italian economy after the COVID-19 pandemic, has recently been described as a "missed opportunity" (Buondonno, 2023). This is not only because it surreptitiously attributes the crisis of public schools to their alleged backwardness, rather than to the neoliberal policies that have cut funding, but also because it revives the neoliberal pedagogical illusion, along with a performance idea of student subjectivity. When page 176 of the plan, for example, denounces the "skills mismatch," i.e., the gap in skills that exists "between education and labor demand," its programmatic rationale clearly emerges: the school—with the urging of Invalsi and Pisa who hierarchize educational institutions and students—should produce employable subjects and not train cultured, responsible, and critical citizens. In the text of the plan—which revives the logic of the neoliberal school—the phrase "competence and" appears 208 times; "substantial equality" appears only once, in order to argue that the effects of competition in the pharmaceutical market would "lead to more substantial equality and stronger social cohesion" (Italia domani, 2021). The emancipatory tasks assigned to the school by the constitution are never mentioned. There is no reference to the conscious and critical subjects that a school, which is quite different from the factory of human capital and skills, must instead programmatically produce.

In thinking of another kind of school—one that is utopian and necessary, a school "of knowing and re-knowing"—Roberto Finelli (2022) has suggested that for students, "knowing" should mean "doing continuous study and research work in common," coordinated by teachers into paths that consolidate "identification, reinforcement, and emotional defense"; and that, in the centrality of a class-group with necessarily restricted numbers, allows children to "compose [their vertical and horizontal axes] in common" (p. 111). In this way, they recognize themselves and the other from themselves, accompanied in this by "recognition from others": recognition that is the true emotional and passionate spring of learning (p. 118).

In a manner that seems to me to be complementary, Laval and Vergne have referred to a "school of the commons": a school—or better put, a federation of schools—where

children are no longer guided by adults to *self-govern for governing*, according to the persistent pedagogical illusion that has been examined in this essay. Instead, this school is where they can learn—by engaging with adults on their pedagogical journey—to *self-govern for self-governing*. In this school, with teachers capable of contesting their own role as normalizing figures, students can learn in a horizontal socialization that is neither conciliatory nor spontaneous, which also involves the shared construction of common rules: a socialization during which they could experiment with the logics of a democracy beyond delegation, understood precisely as self-government. In other words, the school—which as we have seen is always an apparatus of the exercise of power and production of subjectivity—can also be a laboratory for democracy which, following Cornelius Castoriadis (1990), presupposes "the permanent activity of all members of society, their capacity to reflect on institutions and act together in order to change them," which never renders them into sclerotized places of "a permanent instituting praxis" (pp. 113–139).

Understood as one such institution, the school can still become the place where a necessary task of our time is carried out, namely that of practicing the "collective co-construction of knowledge" necessary to confront the dramatic ecological, militaristic, economic, migratory, health, political, and social "polycrisis" that we are experiencing (Laval & Vergne, 2022, p. 78).[17] However, schools will only be able to become this "concrete utopia" if the adults who work within them are able to counter the "capitalist realism" that Mark Fisher (2017) has noted produces in our students, resulting in "depressed hedonia" and "reflective impotence" (p. 58). The impression is that, against the sad passions spread by that realism, it is necessary to reprise a long political-cultural "war of position" that is capable of innervating so many processes of emancipatory subjectivation, not only our schools—their teachers' boards, class councils, individual classrooms—but also the whole of society.[18]

[17] For the concept of polycrisis, coined in Morin and Brigitte Kern (1994), see Tooze (2022).

[18] For the concept of "war of position," the reference is, of course, Gramsci (1975, pp. 801, Quaderno 6, §138, and 865, Quaderno 7, §16).

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LIBERAL INTERNATIONALISM RECKONING WITH HISTORY: SOVEREIGN DEMOCRACY VERSUS LIBERAL DEMOCRACY *

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EL INTERNACIONALISMO LIBERAL TENIENDO EN CUENTA LA HISTORIA: DEMOCRACIA SOBERANA VERSUS DEMOCRACIA LIBERAL

Abstract
This paper examines the main characteristics of the suverennaja demokracija (sovereign democracy) as theorized by Vladislav Jur'evič Surkov and by Alexander Geľevič Dugin. Through textual analysis, the prerogatives of this model, which places itself in antithesis to liberalism, communism, and fascism, will be highlighted as a fourth political theory. The *suverennaja demokracija* assumes the character of a *praxeology* that elaborates maxims for human action and formulates predictions on the basis of experience, becoming an "ideology for the future" that does not allow any external ideological loans or contamination, and that posits itself in opposition to globalization and to those hegemonies that have generated forms of mass surveillance. As such, it is founded on deglobalization and on re-sovereignization, configuring itself as a *democratura* that destabilizes the rule of law.

Keywords
Sovereign democracy; Putinian ideology; Surkov; Dugin

Resumen
Este artículo examina las principales características de la soberanía democrática, tal como las teorizan Vladislav Jur'evič Surkov y Alexander Gel'evič Dugin. A través del análisis textual se resaltarán las prerrogativas de este modelo, que se sitúa en la antítesis del liberalismo, el comunismo y el fascismo como cuarta teoría política. La soberanía democrática asume el carácter de una praxeología que elabora máximas para la acción humana y formula predicciones con base en la experiencia, para convertirse en una "ideología para el futuro" que no permite préstamos ni contaminación ideológica externa, y que se opone a la globalización y a aquellas hegemonías que han generado formas de vigilancia masiva. Como tal, se fundamenta en la desglobalización y la resoberanización y se configura como una democracia que desestabiliza el Estado de derecho.

Palabras clave
Democracia soberana; ideología putiniana; Surkov; Dugin

Introduction

Is it perhaps the case to recover the analytical categories of the Great Game,[1] as elaborated by Peter Hopkirk (1992), in order to begin to discuss the identification strategies that undergird the Putinian project of the "special operation" launched against Ukraine on February 24, 2022, so that we can understand the ideological foundations of the theoretical paradigm of "sovereign democracy"? Or is it the case that the reflective and interpretative centrality assumed by scholars and analysts in the last year is a better fit to help us understand the new modalities of action of Russian politics in the Putin era? Certainly, the latest work by Yuri Colombo, *La Russia dopo Putin*, published in 2022, brings forth interesting clues in this regard. In fact, the content of the book, as well as the discursive plot of the arguments, does not stray from Hopkirk's analytic framework nor from the extensive literature that has flourished since the invasion of Ukraine on February 24, 2022. The distinctive trait of this work is the diagnosis that the author conducts on three levels: the traits of Russian political history; the ascent of Putin, from a former KGB agent in Eastern Germany until his rise to the presidency of the Russian Federation in 1999; and Putin's ideology and its development through the years. From these first elements, it seems that Colombo's (2022) study is in line with the works of A. Graziosi, *L'Ucraina e Putin tra Storia e ideologia* (2022), A. Borrelli, *Nella Russia di Putin. La costruzione di una identità post-sovietica* (2023), and E. Kostioukovitch, *Nella mente di Vladimir Putin* (2022). Yet Colombo's book has something more to offer. As Toni Negri writes in the Foreword, "even if it does not offer solutions, it does propose paths to follow concerning those problems that the Ukraine war has brought to our attention" (Colombo, 2022)—paths that widen in relation to the topic discussed by Colombo in the interview published in *Opinio Juris* on March 14, 2023, titled "Ukraine one year later."

From an analysis of the topics covered by Colombo, important clues emerge regarding the debate on the polarization of the global world, divided between models that embody the spirit of liberal democracies and models that, undermining the meaning of liberal democracy itself, are best understood as illiberal democracies, defined by analysts and political scientists as *pseudodemocracies* or *democratures*[2] that have the character of

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[1] The expression "Great Game" was used for the first time in 1827 by a British officer, Captain Arthur Conolly, to define a long series of diplomatic and military skirmishes that took place during the 19th century between the British and Russian Empires. These clashes aimed to secure control of new strategic territories traversed by major mountain ranges, such as the Kunlun, the Pamir, and the Hindu Kush, which, in the nineteenth century, divided the borders between the British Empire to the south and the Russian Empire to the north. Some scholars consider the Great Game a Victorian precursor to the Cold War. See e.g., Mayer and Brysac (1999, p. XVIII).

[2] The term is translated from the neologism *democratura*.. The origin of the neologism can be attributed to the Uruguayan writer and political analyst Eduardo Germán Maria Hughes Galeano, who coined the term to describe the coexistence between democratic and authoritarian elements within a model of "restricted democracy" or "constitutional dictatorship"(Burato, 2010, p. 123). Political science uses the term democracy to indicate formally constitutional but de facto oligarchic regimes.

illiberality. The adjective *illiberal* thus takes on a political meaning, as Fareed Zakaria defined it in his 1997 article, "The Rise of Illiberal Democracy." With the term *"illiberal",* the author designates those countries that, despite having initiated a transition from an authoritarian regime by adopting free elections, have failed to consolidate liberal institutions (Zakaria, 1997). The *illiberal* lexeme thus carries a negative connotation that has intensified over the last twenty years due to the erosion of the liberal consensus, driven by generalized discontent that has become accentuated, especially following the 2008 economic crisis (Delfino, 2019, pp. 46–60).

In this scenario, the neologism *"democratura"* stands as a contrast to the ideological universe of liberal democracy and is reflected in the mythologized concept of sovereign democracy promoted by Vladimir Putin in Russia. This model, although it proclaims itself to be democratic, on balance, ignores the accredited teleological conception of the socio-political development of the democratic-liberal categories and dynamics; indeed, it highlights the critical issues and weaknesses of these. On this theoretical basis, the following pages aim to analyze the main characteristics of Russian sovereign democracy, highlighting that this model has led to the progressive erosion of the rule of law and the emptying of democratic institutions of any guarantee, protection, or defense of human rights in Russia.

The Programmatic Objective of Sovereign Democracy: Surkov and Dugin

Although the Western lexicon of politics, as Pier Paolo Portinaro (2021) writes, "is notoriously indebted to Greek culture for the definition of its object" (p. 27), the semantic configuration of the construct *suverennaja demokracija* is indebted to Anglo-Saxon political science. But if in the English political lexicon, sovereign democracy is an example of democracy that outlines the traits and descriptive-prescriptive nature of the principle of organization and legitimation of power, known as the Westminster model (Carboni, 2022), the meaning assumed by *suverennaja demokracija* indicates a centralization of power that can be interpreted as an exercise in *democratura.* Seen from this angle, the sovereign democracy established in Russia is based on two pillars. The first is of a philosophical-political nature, which can be deduced from the thought of the philosophers Ivan Aleksandrovich Il'in, Vladimir Solov'ev, and Nikolai Berdjaev (Graziani, 2022). They inspired the speeches of President Putin, especially in relation to the theoretical construction of power, strengthened by his frequent use of the neologisms *narodnost'*[3]

[3] The neologism *narodnost'* was introduced into the Russian political language at the beginning of the 19th century. The Minister of Education, Uvanov Sergei Semyonovich, used it to strengthen the triad of orthodoxy, autocracy, and nationality. This style proved useful for controlling the press, education, and literary activities, counteracting liberal tendencies. On the notion of *narodnost',* cf. Knight (2000, pp. 41-65).

and *emigrkul't*.[4] These reinforce the triad autocracy-orthodoxy-nationality, the basis and foundation of Putin's ideology. The second is of a theoretical-constitutional nature, which marked those stages that, since 1993, following the military attack on the Russian Parliament by President Yeltsin and the subsequent suspension of the Constitutional Court's powers, have rendered the process of building a Russian liberal state increasingly difficult. In this way, the Russian Federation transformed itself, over the course of twenty years, into a "facade democracy" (Volpi, 2010).

It is in this framework of political variability that the model of *suverennaja demokracija* referred to by Vladislav Surkov in the speech of February 7, 2006, held at the training center of the political party Edinaja Rossija, fits (Roccucci, 2007). The incipit of the speech, as well as its title, "Sovereignty is a Political Synonym for Competitiveness,"[5] clarifies the programmatic objective: sovereign democracy presents itself as a competitive model vis-à-vis the liberal model of democracy. The speech is divided into two parts. In the first part, Surkov underlines the specificity of the general ideological attitudes of the "United Russia" party through an analysis of recent history, the recent past, and the present, with the aim of making predictions for the future. At the center of his argument, he places the "democratic society" defined as "super-ideological, much more ideological than totalitarian, a place in which fear replaces the idea." This expression condenses the nature of power and its conferral on the leadership that keeps the Russian people united. And it is precisely the election of President Putin that has generated, according to Surkov, a form of normalization of the country's complex situation through "the dictatorship of the law," resulting in: 1) the stabilization of policy; 2) the democratization of policy and a series of democratic actions that aim at: a) the opening of a democratic society; b) the integration of the global economy; c) the globalization of systems; d) the closure of access to modern Western technologies.

In the second part of the speech, Surkov theorizes sovereignty, supported by a poem by Joseph Aleksandrovich Brodsky that exalts Russian national sentiment. Sovereignty, says Surkov, "is not a fortress of Russia, it's not that we have lost it, sovereignty is participation, it is an open struggle, sovereignty is a political synonym of competitiveness". What exactly is meant by *sovereign democracy* Surkov does not say explicitly. He assumes this concept is a pillar of Russian common sense that invigorates the emotional

[4] In Russian literary texts, the neologism *emigrkul't* appears alongside the neologism *zarubežnaja Rossija* (Russia beyond the border) introduced by the economist philosopher Pëtr Berngardovič Struve in 1925. The concept of *emigrkul't* is based on the desire to preserve national-patriotic sentiment and on the refusal of any integration. On the topic, see Raeff (1990).
[5] The text of the original speech is in Russian. An English translation was reproduced for this study. For the full speech, see Edinaya Rossiya (2006).

orientation of party supporters and provides reassurance to the people. In articulating his speech, he overturns the two democracy-sovereignty paradigms, separating them from the meanings that liberal culture has traditionally given them. In a certain sense, it immunizes them. Sovereign democracy thus becomes the engine of politics, an instrument of public participation, and presents itself as a self-regulatory and non-profit organization. *Sovereign democracy* is the natural affirmation of the principle of nationality; it is the future, the continuity, and the instrument for protecting traditional values and recovering the past. The United Russia party, therefore, has the task of intensifying activities aimed at these ends through the implementation of national projects. The party positions itself as President Putin's support.

To adequately understand this construct, however, it is necessary to examine its origins. The ideological basis is linked to a phenomenological approach that the philosopher Alexandr Gel'evič Dugin presents as a necessary element in the search for a vision of Russian unity, grounded in a paradigm of ideas aimed at reconstructing an Eurasian Empire dominated by Russia. This idea appears in several of his books: *Foundations of Geopolitics* (Dugin, 1997) and *The Fourth Political Theory* (Dugin, 2012). The latter work places sovereign democracy, understood by Dugin as the fourth political theory of *Eurasianism*, in open antithesis to the theories of liberalism, communism, and fascism that preceded it. In the introduction, Dugin underlines that for the realization of Eurasianism it is necessary to: 1) reconsider the political history of the last centuries from new positions beyond the structures and clichés of the old ideologies; 2) realize and become aware of the profound structure of global society that emerges before our eyes; 3) correctly decipher the paradigm of post-modernity; 4) learn not to oppose the political idea, program or strategy, but consider the objective *status quo*, the most social aspect of an apolitical and fractured post-society; 5) build an autonomous political model that offers a path and a project in the world of stalemates and dead ends, the world of the endless recycling of the same old things (post-history according to J. Baudrillard; Bertens, 2003, p. 155).

In this analytical configuration, the fourth political theory is placed as an ideology built on the gap opened by an eschatological vision of Russia, anchored in biblical and philosophical references that have ramifications within the thought of Ilyin, Solov'ev, and Berdjaev (Graziani, 2022; Valle, 2021). The fourth theory is not a dogma, it is not a complete system nor a finished project, writes Dugin; it is instead "an invitation to political creativity, a declaration of intuitions and conjectures, an analysis of new conditions and an attempt to rethink the past" (Dugin, 2012, p. 7). This theory is the basis of *suverennaja demokracija* and, as an ideology, has the characteristics of constitutionality

that preserve the nationalist and conservative matrix of the Russian people. According to Surkov, this matrix is implicitly contemplated in Article 3 of the 1993 Constitution, which states, "The holder of sovereignty and the sole source of power in the Russian Federation is its multi-ethnic people." The people factor thus takes on a theoretical as well as a legal relevance and is categorized in the meaning of the two adjectives that occur most frequently when talking about sovereign democracy: *rossijskaja*, which indicates the identity affiliation of citizens to mother Russia (it is no coincidence that the adjective also gives its name to the newspaper *Rossijskaja Gazeta* which is the official organ of the Government of the Russian Federation), and *russkij-russkie*, which defines ethnic character traits (Biscaretti Di Ruffia & Ganino, 1996; Delfino, 2019, p. 50).

Prerogatives of Sovereign Democracy

If Dugin is a supporter of the fourth political theory, called *Eurasianism*, Surkov is the ideologist who, through *sovereign democracy*, renews the idea of Russian politics based on power, strength, and struggle. However, the ideologist does not limit himself to de*scribing suverennaja demokracija*, but also prescribes its task. In his 2009 article, titled "Nationalization of the Future: Paragraphs pro *sovereign democracy*," in addition to providing a definition, he outlined its features as a specific projectual dynamic. He argues that sovereign democracy is not just the description of a model, it is above all a form of protection for the multi-ethnic Russian people who "aspire to live within communities organized on just foundations, in which the dignity of free people requires that the nation to which they belong is free in a justly organized world" (Surkov, 2009, p. 8). This statement presents a vision that considers politics not only from the formal point of view, which concerns its normative character, but also from the structural and anthropological perspectives. Surkov argues that it is within the context of political practice that the supreme power embodied by the sovereignty of the people is affirmed: sovereignty is a constitutive element of democracy responsible for satisfying the needs of the people at all levels of civil, individual, and national activity. "The idea of sovereign democracy in Russia," writes Surkov (2009), "is consistent with the provisions of the Constitution according to which the holder of sovereignty, and the only source of power in the Russian Federation, will be its multi-ethnic people; no one can usurp power in the Russian Federation" (p. 8). In the context of this statement, Surkov (2009) gives a definition of sovereign democracy:

> Sovereign democracy is a mode of the political life of society in which state authorities, their bodies, and actions are elected, formed, and directed exclusively

> by the Russian nation in all its unities and diversities for the sake of the material achievement of well-being, freedom, and justice, for all citizens, social groups and peoples that constitute it. (p. 9)

Unlike the philosophical conceptions that are the basis of other models (liberalism, communism, fascism) which move from theory to support praxis, sovereign democracy, even if contrary to American political realism, can take on the traits of a "praxeology" that is, as Pier Paolo Portinaro (2023) writes, "a doctrine that interprets situations, elaborates maxims for action and formulates predictions on the basis of experience" (p. 50). The recipients of the model are clear: citizens, social groups, and different peoples who, although animated by divergent interests, become part of Russia's geopolitical chessboard. To understand the complexity of the model, which is subject to ambiguity among Western interpreters, Surkov adopts an analytical method grounded in *praxis*. That is, he elaborates a conception of Russian politics structured around who actually practices politics.

For this reason, he underlines: 1) overcoming the literal translation of the old term autocracy (*samoderzhvie*) in modern Russian, giving it the meaning of "government of free people living in free communities": this presupposes liberalization, internationalization, and de-monopolization of the global economy; 2) the fact that sovereign democracy is not "a homegrown enterprise" but a widespread concept recognized by practicing politicians. This is confirmed by what is happening in central Europe where the concept of pluralist democracy is distinguished from majoritarian democracy; 3) the establishment of a new form of democracy based on a bond of political and cultural influence; 4) that sovereignty, being the fullness and independence of power, is not abolished but its content changes together with the way of exercising power; 5) sovereign democracy is distinguished from other forms of democracy by its intellectual leadership, its united elite, its nationally oriented open economy and its ability to defend itself. Its priorities are a) civic solidarity; b) the synergy of the civic, creative, entrepreneurial, scientific, cultural-technological and political group; c) culture as an organism of meaning formation and intellectual influence; d) education and science as a source of competitiveness; e) intellectual mobilization for the development and promotion of each sector; 6) the ethnic factor characterized by the distinction of the Russian civic nation (*rossiiskaia*), understood as a non-linear equation of different interests, customs, language, religion, from the Russian ethnic groups (*russkie*) closely intertwined with the Russian Nation (Krastev, 2006, pp. 113–117; Surkov, 2009, pp. 15–18). In essence, sovereign democracy arises from the meeting point between the perspective of praxis and the deciphering of historical reality.

Putin's Ideology

Precisely to make the reality of sovereign democracy known empirically, Surkov published an article entitled "Dolgoe Gosudarstvo Putina" (Putin's State and the Deep People)[6] in the newspaper *Nezavisimaya Gazeta* in February 2019. This article, unlike the one published in 2009 in the journal *Russian Studies in Philosophy*, is structured around pro-sovereign democracy sequences and paragraphs and is a clear act of loyalty and celebration of sovereign democracy as a technique of government. Sovereign democracy is defined in terms of theory and practice, in contrast to a vision of politics as an illusion. Illusion thus becomes the lexeme of conflict, of struggle against the "supreme character or trick of the Western lifestyle, in particular of Western democracy, which has long been more obedient to the ideas of Barnum than to those of Cleisthenes" (Surkov, 2019, p. 25). This statement highlights the rejection of "fatalist realism" and its historical dimension, which has led to both a lack of interest in what democracy should be and in its very existence. Faced with this drift, Russia reacted by slowing down the process of decomposition through the creation of the Russian Federation, "starting from the state of nature."

In this way, Surkov ignores the Western philosophical tradition of natural law, which, as Cassese says, constitutes the basis and foundation of the doctrine of human rights (Cassese, 2015). It cannot be surprising, therefore, that the genesis of the Russian State, as a new orientation of Russian consciousness, of individual knowledge and conduct, and of the people, is built on the organic vision of the State and society, a vision, among other things, deduced from the political philosophy of Nikolai Berdjaev (Graziani, 2022, pp. 95–97). Putin's State, the creation of the Russian Federation of the 21st century, is, Surkov (2019) writes, the fourth organic model of State after "the State of Ivan III (Grand Duchy/Kingdom of Muscovy and All the Russias, 15th–18th centuries); the State of Peter the Great (Russian Empire, XVIII–XIX); Lenin's State (Soviet Union, 20th century)" (p. 150). The genesis of the State is intrinsically linked to the genesis of the government, which is based on ideas and planning dimensions defined as "ideologies of the future." Putin's ideology is the enucleable completeness of the State; it is the basis and constitutive foundation of the government. It is not founded on the style of old propaganda: it is founded on a language built on discourse and has the potential for expansion and export. According to this vision, Putin's ideology: 1) rejects any ideological borrowing from the outside; 2) rejects globalization and a horizontal world without borders; 3) protects sovereignty and national interests; 4) protects old values even in the

[6] Translated into Italian from the French edition by M. Eltchaninoff for the Fondation pour l'innovation politique with the title "La longue governance de Putin."

21st century; 5) is founded on de-globalization, re-sovereignization, and nationalism; 6) is against US hegemony which has generated forms of pervasive mass surveillance. Putin's ideology not only inaugurates a new scientific genre of ideas but also investigates the causes of past and present events, looking to the future and to a new dimension of Russian political life distant from that of the United States.

The speech in Munich on 10 February 2007, held by Putin on the occasion of the Security Conference, reopened the strategy of tension and competition between the two countries. On that occasion, Putin distanced himself from the "ideological stereotypes and double standards" of a bygone era characterized by a unipolar world. Well, the principles of political action aimed at destabilizing the West and weakening the rule of law still creep into these ideas today. To a Deep State logic, which is nothing other than the image of an "opaque political establishment", Surkov contrasts Putin's ideology, founded on: a) the idea of an honest state; b) an integrated system; c) the absence of a Deep State; d) an idea of the people, who preserve their opinions, escape polls, propaganda, the threats of other models while safeguarding their dignity.

The Russian people, although, as Surkov writes, "has been identified in the peasants, in the proletarians, in the partyless, in the hipsters", today is an anthropological constant; it is the profound people that "creates an irresistible force of cultural gravitation that unites the nation." The deep bond established between the people, society, and its leader is a distinctive feature of the new contemporary model of the Russian state, which begins "with trust and is maintained with trust" (Surkov, 2019, p. 153). This, Surkov argues, is the fundamental difference with the Western model, which cultivates an increasingly evident distrust of institutions and politics in general. The West and the political realism that distinguishes it are affected by illusions; to contain the risks of an incurable fracture, the West must undertake detailed diagnoses and propose wide-ranging strategies to avoid falling into unrealistic illusions.

Conclusions

Thanks to the analytical-reconstructive excavation work carried out immediately after the start of the "special operation" of February 24, 2022, by political scientists, analysts, and observers, today we are aware of the numerous assumptions and relevant theoretical, religious, legal, and political means which the Russian leader makes use of to propagandize his ideology inside and outside Russia with obvious lashes against the West. These are guidelines supported by a theorization that makes use of analogies that outline a new form of discrimination against the enemy: the West is to be viewed with suspicion, as Russia seeks external consensus, with the aim of generating a new form of

absolute enmity that ignores liberal paradigms by presupposing new ones, taken from the cultural and intellectual arsenal of all non-Western imperial powers. Think, for example, of the renewed friendship with China, the fascination with North Korea, and lastly, the form of hybrid friendship with Kāmeneī's Iran. Therefore, if Putin's ideology, like Iranian theocratic ideology, can be defined as a real historical force, as a product of the rebirth and recovery of unity and lost order, there would still be much to say about the difficult reconciliation between the theoretical-practical assumptions which, as Luca Scuccimarra (2023) writes, "mark the evolution of Western political and legal discourse" and the theocratic and autocratic styles that govern Iran and Russia, enemies of the West with whom it is difficult to negotiate and with which, according to Cicero's famous phrase, the Treatises remain a dead letter.

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LEGAL PLURALISM AS AN INSTRUMENT OF ADEQUACY FOR THE ANALYSIS OF TRANSPLANTS AND LATIN AMERICAN LEGAL IDENTITY

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EL PLURALISMO JURÍDICO COMO INSTRUMENTO DE ADECUACIÓN PARA EL ANÁLISIS DE LOS TRASPLANTES Y LA IDENTIDAD JURÍDICA LATINOAMERICANA

Abstract

This article examines the impact of the attempt to adapt Latin American legal identity to the standards of the European legal tradition, questioning whether this pursuit hinders the region's legal and economic development. The hypothesis to be defended is that such a pursuit is indeed detrimental, as the homogeneous legal identity, as often conceived, constitutes a

legal fiction that disregards local cultural and socioeconomic particularities and overlooks the historical process of legal transplants across different systems. The theoretical framework is based on Alan Watson's theory of legal transplants, Jorge Esquirol's critiques of legal identity, and the foundations of legal pluralism as a more contextualized and adaptable alternative. Using a bibliographic review methodology, the study concludes that legal pluralism represents a viable alternative more aligned with Latin American realities, fostering legal and economic development that is more consistent with the region's diversity and complexity.

Keywords
Legal identity; legal fiction; legal transplants; legal pluralism.

Resumen
Este artículo examina el impacto de la adaptación de la identidad jurídica latinoamericana a los estándares de la tradición jurídica europea y se pregunta si dicha adaptación obstaculiza el desarrollo jurídico y económico de la región. La hipótesis defendida es que dicha búsqueda es, en efecto, perjudicial, ya que la identidad jurídica homogénea, como suele concebirse, constituye una ficción jurídica que no tiene en cuenta las particularidades culturales y socioeconómicas locales y pasa por alto el proceso histórico de trasplantes jurídicos entre sistemas diferentes. El marco teórico se basa en la teoría de los trasplantes jurídicos de Alan Watson, en las críticas de Jorge Esquirol a la identidad jurídica y en los fundamentos del pluralismo jurídico como alternativa más contextualizada y adaptable. Mediante una metodología de revisión bibliográfica, el estudio concluye que el pluralismo jurídico representa una alternativa viable, más alineada con las realidades latinoamericanas, que promueve un desarrollo jurídico y económico más acorde con la diversidad y complejidad de la región.

Palabras clave
Identidad jurídica; ficción jurídica, trasplantes jurídicos; pluralismo jurídico.

Introduction

Latin American legal systems have an identity problem. This identity problem often stems from the inability of Latin American countries to develop their legal models independently of European models or those of developed countries, remaining in a perpetual zone of incomplete development, and even if they were able to follow the foreign example, internally, these models would never be considered authentically Latin American.

This need to fit in and fail, remaining in a perpetual transition zone, unable to develop their own model and forced to follow a foreign one, is very well explored by Jorge L. Esquirol (2008, pp. 79–80) in his investigations into "legal fictions". The European legal identity of Latin American countries is so exploited by local and foreign legal discourses that it has reached the level of a fiction, serving only as a rhetorical instrument for constructing the notion that legal systems fail because they are not following the development commands of public policies drawn up by foreign entities or agencies. Although they may be somewhat right, given the clear failures in several legal systems, they are not intended to serve local interests but only to classify Latin American countries into large, foreign-based legal families.

This is the starting point for this article. Is the concept of legal identity detrimental to the legal development of Latin America? And, if so, is there an alternative?

Based on Esquirol's (2008) conceptual construction, discussed in "The Failed Law of Latin America," both the concept of legal identity and the discourse of legal failure in Latin America are illusory (p. 77). Both have a strong ideological charge, often based on erroneous analytical data and generalizations about the region, as if it could be seen as a single large country, or even that they are merely extensions of former colonies and that, due to this historical connection, the basis for comparison would always be the European country from which much of the region's customs originated.

Much of this perception is linked to an excessive focus on legal transplants from Western countries which, by becoming the rule in the construction of local legal systems in Latin American countries, would end up reducing the agency of local actors in the recombination and transformation of legal systems to meet the specific needs of each Latin American country (Esquirol, 2008, p. 77).

The idea of legal transplants, however, clarifies what may lie at the heart of the problem of legal identity and the failure of Latin American legal systems. The concept of legal transplants was developed by Alan Watson (1993, p. 21), in *Legal Transplants: An Approach to Comparative Law*, to explain a paradox that becomes evident to researchers working with comparative law: law is the result of the identity of a people, possessing a special and authentic characteristic of a specific group of human beings or of a country,

even in the legal systems of nearby countries, but at the same time there is a clear borrowing of legal institutes or even entire legal systems from one people to another, a fact that dates back to the first centuries of written history.

Therefore, in order to try to answer the question posed in this article, we will first address the concept of legal transplantation and its implications for the concept of legal identity, especially the notion that there is a European legal identity against which Latin American legal models can be judged, since even within different European countries, there are similarities between legal institutes and a large part of the European legal models are adaptations of older legal models. Perhaps, we cannot even speak of a European legal identity.

This approach will serve as a basis for analyzing legal identity as a legal fiction and will allow us to identify the impacts of this understanding on the legal development of Latin American countries.

If we understand legal identity as a fiction or rhetorical instrument to impose or suggest reforms in the different Latin American legal systems, we will also be able to understand how this fiction hinders the fulfillment of local needs, which is reflected, to a certain extent, in the difficulty encountered by Latin American countries in developing their own institutes, even if derived or borrowed from European countries.

As a proposal to address the problem and avoid the possible harm caused by the search for a European identity in Latin American countries, legal pluralism will be presented as a political instrument capable of adapting the impacts of legal transplants to local legal and political realities.

The Historical Question of Legal Identity in Latin America

Historically, the influence of colonization on Latin American countries seems unquestionable. Spain and Portugal dominated and colonized Latin America for 300 years, and even after independence, a single and original legal system did not prevail among the jurists of the first republics.

During the colonial period, when Spain and Portugal dominated much of the territories of the new American continent, the European identity spread due to this domination, and much of the origin of law in the Spanish and Portuguese colonies is linked to the traditions of Roman law and canon law (Merryman & Pérez-Perdomo, 2019, p. 4).

Since independence, Latin American countries have built their legal systems based on the presumption of a European legal origin. Even where political independence entailed a formal break with former colonizers, legal development largely continued through the adoption of institutional models drawn from other European legal traditions.

For example, French civil law has influenced many post-colonial countries, which adopted the codification model or a civil code in opposition to the legal systems of their former metropolises, and much of the revolutionary spirit of the independence movement is rooted in the legacy of the French Revolution.

The Napoleonic code, which originated in France in the 1800s, enjoyed great prestige among the liberators and among the American caudillos who, after assuming the role of legislators in the newly independent countries, quickly adopted the Napoleonic code in their new legal system, replacing the old concepts of the colony with legislation derived from the French model. This was the case of Chile, Colombia, and Argentina, which expressly adopted the Napoleonic code in their first laws and in the speeches of their new authorities (Brito, 2004, p. 36).

Part of the French influence on the civil codes of Latin American countries stems from changes in legal structures after independence. Although many independent countries needed to draft and establish new legal institutes and sources of local law, and many of these institutes and sources, especially those of public and constitutional law, were structured in an improvised manner to meet immediate local needs, private law took longer. Many Latin American countries continued to use the sources of private law that existed during the colonial period and gradually adopted new models (Mirow, 2001, p. 294).

One of the major codes influenced by French law was the Chilean Civil Code of 1855, written by Andrés Bello. When it was written, the Napoleonic Code was already widely available for consultation and was undoubtedly the most famous and influential among local jurists, and a good part of the provisions of the Napoleonic Code were transplanted into the Chilean Civil Code of 1855, although at the time of writing the code, the translation of the provisions was not literal, but adapted to harmonize with the local language and ideas (Mirow, 2001, p. 306).

The Chilean Code of 1855 was adopted by El Salvador, Ecuador, Venezuela, Nicaragua, and Honduras. It was a major influence on the civil codes of Uruguay, Mexico, Guatemala, Costa Rica, and Paraguay (Mirow, 2001, p. 291).

In subsequent centuries, the influence of European identity persisted in Latin American countries. The civil law model based on the Napoleonic code was consolidated and, in criminal matters, criminal codes were often complete copies of the Spanish code, such as the penal code of Peru, Venezuela, Mexico, Chile, and Costa Rica (Olmo, 1999, p. 23) and, during the 19th century, the influence of the Italian positivist school spread throughout Latin America (Olmo, 1999, p. 20).

The interest of Latin American countries in the European identity of their criminal law is explained, in part, by the participation of Latin American jurists in the International

Union of Penal Law, which, founded in 1888, had six Latin American countries in 1891: Argentina, Brazil, Costa Rica, Chile, Guatemala, and Venezuela (Olmo, 1999, p. 23). Many of these jurists were representatives of their countries, whose role was to reform criminal codes in accordance with international precepts, incorporating European legal science with North American techniques of criminal procedure (Olmo, 1999, p. 24).

This European mix, with certain North American institutes, is also perceived in Latin American constitutionalism. The constitutional models adopted by the newly independent republics, and later reaffirmed through domestic constitutional reforms, were largely inspired by the English mixed constitution, which sought to organize a society divided into estates through a system balancing the monarch, the few, and the many. This structure took the form of monarchical or presidential systems with bicameral legislatures, incorporating North American institutions such as checks and balances (Gargarella, 2020, pp. 17, 18). However, these constitutional designs rarely materialized in practice due to the region's recurrent constitutional ruptures, including military coups.

In Argentina, even during the Peronist regime, the country adopted North American legal institutes, such as the principle of stare decisis, which obliged lower courts to follow the precedents of the Supreme Court (Miller, 2003, p. 871). Currently, the code of ethics of Argentina's public administration is inspired by and influenced by the ethical standards of the United States executive branch (Miller, 2003, p. 850).

What can be said about this formation of the Latin American legal identity is that, although a single model or a new model did not emerge in the new Latin American republics, the desire to construct a particular identity meant that the first jurists and politicians of the new nations did not look only to Spain or Portugal as the original source of their legal systems, and many turned to Italian and French sources. The codification of the French model was prominent in the region from the mid-19th century onward, and Italian criminology exerted significant influence (Esquirol, 2020, p. 31).

Despite this sui generis characteristic of the post-colonization Latin American legal model, most of the classification of local legal systems keeps them within a European classification, whether within comprehensive categories of Western law or more specific categories as part of the Roman-Germanic family of law (Romano-Germanic Family) or the European legal family (European legal Family). The notion that Latin American law is a beginner in the great family of European law has become established (Esquirol, 2020, p. 32).

However, to say that Latin American private law is based solely on French civil law is a hasty simplification; it would be the same as saying that the law of the United States or England is based on William Blackstone's commentaries or that the law of continental

Europe is based on Justinian's Digest. Although there is some truth in these statements, these simplifications do more harm than good in understanding the law of each of these locations.

What seems to emerge from this construction of Latin American legal identity linked to European identity is a desire within the legal cultures of Latin American countries to identify with European legal systems. In fact, the analysis of national legislatures reveals numerous legal transplants from continental Europe that are little more than copies with minimal adaptations and fail to consider local needs (Esquirol, 2020, p. 33).

Furthermore, this search for identification with European legal culture, exemplified by the recurring citation of European jurists by Latin American jurists (Esquirol, 2020, p. 34) has strong implications for the acceptance of reform projects for local systems by international organizations, opening the door to hasty adherence to reform projects that make it more difficult than easier for the judiciary to meet local needs.

And, at this point, the Latin American legal identity seems to be much more of a legal fiction, an ideological search for identification with a culture supposedly superior to the local one. As a fiction, it ignores local realities and the needs arising from them, as seen in the perception of academic research in law that Latin American law is failing, although a good part of the problems arising from this failure are linked to ideological projections about Latin American law.

Alan Watson's Theory of Legal Transplants

The understanding of legal identity as a fiction, including the perception that Latin American countries fail to conform to the legal models of their large European legal family, can be better understood based on the concept of legal transplants, which explores the notion that many of the legal institutions we know do not originate solely from the will of a specific group of people or the spirit or will of a country, but are evolutionary and historical constructions.

This perception undermines the hasty notion that there is a model to follow and that, for Latin America, this model would be the one originating in Europe. The concept of legal transplants can be defined as follows: legal transplants are the transfer of a rule or a system of laws from one country or people to another (Watson, 1993, p. 21).

For Watson (1993, p. 21), the creator of legal transplants, law reveals several paradoxes; the most interesting is that law is part of a people's identity, yet legal transplants have been so common throughout recent history. To use Savigny's expression, positive law as it exists lives the consciousness of a people and we can call it the law of the people (*Volkrecht*), which cannot be understood only as the arbitrary will of its individual

members, but as part of the spirit of the people (*Volksgeist*), of the individuals who live and work together and create positive law not accidentally, but as part of the consciousness of each of these individuals. On the other hand, it is widely accepted that the private law of all modern legal systems in the Western world is, to a greater or lesser extent, derived directly from Roman Civil Law and the English common law model.

The phenomenon of transplantation is not restricted to the modern world. It dates back to the earliest legal writings and, as Watson (1993, p. 22) notes, appears in the legal provisions of Mesopotamia. This does not mean that any and every connection is an example of legal transplantation. Watson (1993, p. 25) warns that the expression "seek and you will find" (from Matthew 7:7) applies to legal transplantations and he uses as an example the connection formulated by part of the historical and anthropological research of Law: the Law of the 12 Tables originated in a Roman delegation that traveled to Greece and examined the Laws of Solon, giving rise to the 12 tables that ignore the controversy regarding the existence of this delegation.

Although most researchers still maintain that there was a strong Greek influence on the code, Watson (1993, p. 27) argues that these arguments are not compelling, warning against treating any similarity or connection as evidence of legal transplantation. There is one further point to consider regarding legal transplants as a metaphor for the movement of rules, norms, and legal institutions from one country to another.

A successful legal transplant—like the transplantation of human organs—will grow into its new body and become part of that body as if the rules or the institution itself had continued to develop its original system. Watson (1993, p. 28) cites the financial compensation for disfigurement caused by others to free men as an example of such a case, which would be a development of the Lex Aquilia Romana when adopted by Western European states.

The Roman Lex Aquilia required monetary compensation for property damage caused by others (e.g., theft or vandalism), including slaves. When adopted by Western European states, it was extended to include damages to free men. Although the application of the analogy in Roman law provided for the possibility of this extension to free men, Roman law prevented the monetary assessment of damages such as scars and deformities, because it was understood, as is stated in Justinian's Digest, that "scars and deformities could not be assessed because the body of a free man does not admit of assessment." However, Dutch jurists of the seventeenth century, who had adopted the Lex Aquilia into their law, recognized an action for damages for disfigurement, although they acknowledged that it was contrary to Roman law (Watson, 1993, p. 28).

For Watson (1993, p. 28), this is the result of a slow development that would have begun in the 14th century and passed by the Spanish jurist Antonio Gomez in the 16th

century, who is the oldest jurist cited by Roman-Dutch writers, who declared it is not possible to financially evaluate the scar of a free man, but it would be possible to do so in the case of women, as long as they were not married, because they would find it difficult to get married due to the scar. The measure of compensation would be, in Gomez's sense, the value of the increase in the dowry necessary to obtain a husband.

The changes continued, and even though it is not possible to trace all the elements of these changes historically, it is possible to find shifts in understanding the possibility of applying the Lex Aquilia in Hugo Grotius. A century before the Dutch jurists, he had already predicted that "pain and disfigurement of the body, although not compensable, can be measured in money, if so demanded" (Watson, 1993, p. 28).

Watson's historical approach is centered on Roman Law and, as informed by Ewald (1995, p. 490), investigated in great depth what can be called the "gradual expansion" of the legal transplants of Roman Law throughout continental Europe. He made clear, through a reading demarcated by different legal institutes, the persistence of these rules—drawn up by a class of Italian aristocrats, many of whom practiced law only as a pastime and who have been dead for more than two thousand years—in the modern structure of today's law.

A theory that has strong radical implications, after all, suggests that law is modified by the internal needs of a system that has been gradually transforming, from the society of Julius Caesar, to that of the medieval popes, passing through the ancient regime of Louis XIV and Bismarck's Germany, until arriving at the welfare states of the 20th century, instead of being modified by external pressures. A vision that transforms all legal theories based on grand fata morgana narratives, a lost dream of legal scholars who do not perceive how law, as a matter of historical study, currently develops (Ewald, 1995, p. 490).

Paradoxically, this does not mean that the study of legal transplants precludes examining law from the perspective of power relations, since the very notion of legal transplant suggests that legal changes or the establishment of an entire legal order result from factors external to the will of the people.

This perspective differs from approaches that treat law merely as a product of the economic and social interests of a particular group, thereby rejecting broader interpretations of law as a simple reflection or "mirror" of society (Ewald, 1995, p. 493). At the same time, it allows law to be understood through the lens of colonization processes (Graziadei, 2009, p. 724), which is particularly relevant in Latin American countries.

The reception of foreign laws, whether through voluntary borrowing or through imposition by colonization or conquest, has long generated reflection on the tensions between local and foreign elements of law. Much of the literature on legal transplants

begins from the accumulation of evidence showing how law is borrowed or transplanted, rather than created through local innovations arising from specific social needs or conditions. This approach can be understood, at least in part, as a reaction to functionalist or positivist conceptions of law, which describe it as a mere "constellation of norms" produced by governing forces in response to social demands and enforced through the application of coercive power (Graziadei, 2009, p. 726).

The literature on legal transplants has also attracted widespread attention from comparative legal theorists because it accommodates pluralistic views of law by allowing a single system to comprise multiple, already established legal models. Although it can be argued, as legal doctrine does, that some models fit into large legal families, such as the well-known distinction between models with a Roman-Germanic foundation or common law legal models centered on precedents, many modern legal systems, even those that do not fit into descriptions as "mixed" systems, have characteristics that suggest that borrowing or transplantation is recurrent, even across barriers that are not so easily permeable (Graziadei, 2009, p. 727).

This pluralist approach to legal transplants not only challenges the functionalist logic of traditional legal theory (Graziadei, 2009, p. 728) but also opens space for anthropological and sociological analyses of law. These perspectives emphasize the complexity of culture, which, as Graziadei observes, is far from a homogeneous whole and instead reflects ongoing tensions and compromises among different cultural constellations (Graziadei, 2009, p. 729). In this context, the various elements of a legal system may be shaped in distinct ways, making it necessary to distinguish which components are relevant in any given analysis of legal transplants.

Legal systems, in this sense, would be much more the result of evolutionary and cumulative processes of legal transplants than an original production, and when dealing with Latin American legal systems, one could not speak of a European legal identity because the European legal identity itself would be composed of a multiplicity of legal transplants that date back to the first Roman legal codes.

This perception also reinforces the idea of legal identity as fiction. If the internal processes of systematization and transformation of a country's law are evolutionary, unfolding through successive legal transplants drawn from diverse legal systems, then legal identity cannot be understood as singular or pure. This is evident, for example, in the codification of private law in the Chilean Civil Code of 1855, which incorporated provisions from the Napoleonic Code while harmonizing them with local language and legal ideas (Mirow, 2001, p. 306). The result was a mixed French–Chilean code rather than a faithful reproduction of a European model. Accordingly, it is not possible to

speak of a purely Chilean, French, European, or even Latin American legal identity. Instead, legal identity emerges as plural, shaped by successive mixtures and borrowings of legal institutions throughout legal history.

Jorge L. Esquirol's Criticism of Legal Identity

The concept of legal fiction, developed by Esquirol (1997, p. 426) more than twenty years after its publication, remains present in North American legal discourse. Political and social movements, whether from the right, concerned with the growth of the private sector, or from the left, concerned with economic redistribution and cultural pluralism, use legal reform as a central point of their proposals for the development of Latin America. However, within their North American political narratives, they ignore Latin American social realities.

A large part of this problem is also attributable to a deficiency in comparative law research, which presents the Latin American model as having a European foundation or European identity (Esquirol, 1997, p. 427). Despite criticizing various legal systems for flaws in their functioning, the research ultimately supports Latin American legalism.

At the same time, the traditional program of liberal democracy for Latin America casts a shadow of "illiberality" over Latin American societies that ignores the reality that Latin American societies are not European, despite local jurists pretending that they are, hence the idea of European identity as a legal fiction (Esquirol, 1997, p. 470).

This legal fiction of European identity is central to the construction of a background, both political and legal, that positions Latin American law as a "failed law" (Esquirol, 2008, p. 76). A related fiction serves to facilitate legal reform by projecting an image of pervasive deficiencies in Latin American legal systems, suggesting that they are incapable of addressing local problems without adopting models grounded in European or North American liberal democracy (Esquirol, 2008, p. 76).

This failure, however, is not necessarily false; there are other studies that point out the failures of Latin American law, but the meaning of this failure differs from that projected by the fictional narrative of "failed law". The fiction is not centered on the operational breakdown of each of the distinct problems of Latin American countries, but points out a generalized failure that could not be overcome by localized reforms, but only by the general reform of the entire model, serving as a narrative to facilitate reform projects (Esquirol, 2008, p. 76).

This approach creates a problem for the reading of legal transplants, especially if the focus is on the functionality of foreign legal institutes applied to Latin American

regional models, whose focus may end up overshadowing the agency of local actors in the change, recombination, and transformation of the transplanted rules, norms, and legal institutes (Esquirol, 2020, p. 3).

On the other hand, it can serve as a legitimizing instrument by validating what Esquirol (2020, p. 13) calls "legal consciousness," which distinguishes law from mere politics, suggesting a connection not only among Latin American countries but also between these countries and an internationally organized legal structure.

From the perspective of Latin American legal identity, this dynamic produces a clear paradox. On the one hand, the transplantation of legal instruments and institutions from the North American model, often without regard to local legal realities, reinforces the fiction of a European identity or, alternatively, the narrative of a "bankrupt" legal system in need of reform. This process sustains the idea that Latin American law lacks autonomous foundations and must be corrected through external models.

On the other hand, the same process simultaneously legitimizes existing Latin American law. By transforming domestic legal frameworks or presenting them as aligned with universally accepted models, these transplants confer an appearance of conformity with legal standards traditionally regarded as valid by both foreign and Latin American jurists. A paradox that requires further explanation.

As Esquirol (2020, p. 1) informs us, Latin American countries have many laws and legal institutions similar to those found in Continental Europe and the United States, and, especially after the independence movements of the 19th century, many Latin American leaders looked to European models and the American Constitution to build new models.

The rules of private transactions, criminal justice, court procedures, and administrative actions all draw on European sources, and legal borrowings from Europe continue to this day. Latin American national constitutions were heavily influenced by the 1787 American Charter, and constitutional rationality has become increasingly shaped by Anglo-American legal thought, with many Latin American jurists deliberately emphasizing these connections (Esquirol, 2020, p. 1).

On the other hand, the law in Latin America does not work in the same way as in Europe and the North Atlantic. The legal systems here seem to be incapable of providing political stability and economic development and are known for their ineffectiveness, corruption, high crime rates, human rights abuses, and impunity, which seems to be beyond state control.

Esquirol (2020, p. 1) calls this an inversion of the Rule of Law into an Unrule of Law, based on two premises that are the focus of his diagnosis of legal fictions: a) national law in Latin America is European in a fundamental way; and b) this same legal system fails to operate as contemporary law should.

The problem with these two considerations is not their obvious paradox. It is not as simple as assuming that successful Western legal models fail when transplanted to Latin America. Beyond the possible conventional explanations of this paradox, the most important point is that this paradox stubbornly persists, and this persistence is linked, to a certain extent, to a flawed description of the problem, because they suffer from a combination of ideological rationalization, unconscious projection, and political bias according to the interests they serve (Esquirol, 2020, p. 3).

We can take as an example of this problem the paradox identified by Esquirol (2003, p. 66), which prevents the approximation of the horizons of Latin American and European legal identity, that a large part of Latin American law and conventional discourse (mainstream) ignores the "social" character of law, although most of the Latin American law is organized at the national level.

In this sense, the search for fit within the European legal identity and the insistence on the postulates of individual rights, which underpin European law when transplanted to Latin American law, ignore the enriching possibility of drawing on country-specific ideas and community practices in the consolidation of law in Latin America.

Although Europe's connection to Latin America is indeed strong, the prevalence of this identity in the region leaves much to be desired. It is rooted in a select plurality of narratives: a) the Spanish and Portuguese history of colonialism; b) the textual comparison of European legal transplants; c) the histories of the intellectual influence of European doctrine; d) legal and sociological findings of the region's legal culture, among others (Esquirol, 2020, p. 101).

These narratives ignore the equivalence of importance of modifications to European models, and their interactions with local norms in Latin America are equally important.

An example of these enriching local interactions is the Bolivian Constitution of 2009, which established a progressive fusion of European law with local and Indigenous worldviews and required a reclassification of the legal system. However, maintaining an identity-based criterion may continue to ignore the already neglected dimensions of Latin American legal systems, and even if the old European classification were to be erased, it would be the same as exchanging one identity classification for another identity, which would not challenge the instrumental function of the identity classification in the first place (Esquirol, 2020, p. 27).

Legal Pluralism as an Alternative

Once the problem of legal fictions has been outlined and the peculiarities of their implementation, stemming from inefficient legal transplants in Latin American countries,

have been explained, it is necessary to present a possible alternative: legal pluralism. A long time ago, it ceased to be merely an analytical and descriptive concept of normative orders and legal institutions within a political organization and became a true political concept (Kyed, 2011, p. 1).

In this context, the political concept of legal pluralism is understood as the recognition of non-state, informal or even customary practices and norms capable of achieving justice and security for developed countries or those in recent processes of redemocratization (Kyed, 2011, p. 2), but also as a critique of legalistic and state-centric models of intervention and reform (Kyed, 2011, p. 3).

An approach that seems to fit perfectly with the problem presented in this article is the instrumental use of European and foreign legal identity in Latin America, especially when we consider the ideologically justified reform projects or interventions by foreign organizations in Latin American legal systems.

The response of pluralist models is currently centered on accepting governance and justice mechanisms that operate within the formal scope of the State or within the boundaries between the State and society, in what could be called non-state justice systems, which are reform mechanisms focused on improving the legal performance of different legal institutions (Faudez, 2011, p. 19).

The improvement of institutions, however, is not centered on the application of foreign legal mechanisms or on conforming the legal structure of Latin American countries to European models. By contrast, pluralist models aim to account for a deep understanding of local state structures, political processes, and local communities (Faudez, 2011, p. 18).

This in-depth understanding of local interests and particularities has already served to diagnose the shortcomings of different Latin American countries, such as Bolivia, in reconciling non-state legal systems with the constitutional models in force, which, although recognizing Indigenous rights, manipulate them to fit into the traditional legal and state paradigm (Faudez, 2011, p. 24).

This problem, in part, stems from the Bolivian Constitution of 2009. Despite recognizing the rights of Indigenous and peasant communities and establishing as a foundation of the Bolivian people the respect for legal pluralism and cultural diversity, it did not have direct reflections in the legislative production of the Bolivian people, having not consolidated in the legislation in force mechanisms for resolving jurisdictional conflicts between Indigenous institutions and state legal institutions (Faudez, 2011, pp. 28-29).

In Bolivia, in more recent times, the context of egalitarian legal pluralism was used to seek equality in the hierarchies of the Original Peasant Indigenous Jurisdiction (*Juris-*

diccíon Indígena Originaria Campesina – JIOC) against Bolivian legislation that subordinated it to the Ordinary Jurisdiction (*Jurisdicción Ordinaria* – JO) in criminal matters, and there was a strong contradiction between the understanding of the subject matter of both jurisdictions, with the Ordinary Jurisdiction defending its jurisdiction to judge criminal matters (Paz, 2021, p. 202).

Despite the difficulties in accepting non-state jurisdiction models by classical legal institutions, the emergence and recognition of these non-state jurisdiction modalities is in line with the classical project of legal pluralism, centered on the existence of one or more realities and multiple forms of action within a context of social and cultural diversity, each involving particularities and varieties in the perception of phenomena, whether legal or social (Wolkmer, 2018, p. 104).

Legal pluralism in the Latin American context shows that national states recognize that traditional ways of resolving conflicts are not the only or exclusive ways to understand the legal phenomenon. In this sense, it is a gateway to understanding law beyond the static and pure concept of a European legal identity, which does not minimize, exclude or deny the monopoly of the rule of law produced by the State, but recognizes the existence of other forms of regulation, generated by political bodies and social organizations that have a certain degree of autonomy and their own identity (Wolkmer, 2018, p. 104).

The rise of these new ways of understanding law, centered on legal pluralism, also provided tools for perceiving the "social" or the "common good," a problem that has long plagued Latin America. As pointed out by Esquirol (2003, p. 66), Latin American legal discourse has never managed to make the "social" part of the practical routine of conventional legal discourse, although, paradoxically, a good part of Latin American legal norms are produced and regulated at the national level (Esquirol, 2003, p. 67).

Latin American legal pluralism, in its various meanings, has filled this gap, presenting localized visions and regionalities that consider local needs and peculiarities to shape the "common good" or the "social" dimension of the national legal discourse. One such example is the concept of good living (*buen vivir*), present in the Constitutions of Ecuador, in 2008, and Bolivia, in 2009, which emerges as a structuring concept that creates a cultural and political connection between local communities and traditional legal institutions (Wolkmer & Wolkmer, 2022, p. 74).

One of the central points of the pluralist approach, when compared with the traditional legal vision, is the possibility of challenging the paradigm through legal reform to identify possible alternatives for understanding the law from local community views, since, often, by being understood as the only possible alternative, it weakens legal and political development according to local needs.

Legal pluralism, from a political point of view, provides an alternative to competing with established legal authority, creates the need to articulate distinct discourses, contributes to the progress and overlapping of distinct jurisdictions, challenges conventional meanings of justice and law, reflects on power relations and local socioeconomic situations and, above all, allows changes that come from the inside out (Kyed, 2011, pp. 16-17).

Here is the central point of connection between legal pluralism and the legal fiction of identity. If we understand that many legal institutions are transplanted from other legal systems, as is the case of European legal systems brought to Latin America, and that many of the problems found in local systems are caused by inefficient transplants that ignore local peculiarities and particularities, legal pluralism is the possibility of changes that start from within, serving as a perfect instrument of reform to adapt these transplants to the circumstances of the transplanted country, nourishing traditional legal institutions with local particularities.

Conclusions

The concept of legal identity has been an obstacle for Latin America. The need to fit into a broad, traditional European legal family, whether the well-known civil-law models or the Roman-Germanic legal families, has impeded the development of Latin American legal systems that account for local needs and particularities.

Within legal discourse and practices, the quest to fit into these large global families, in addition to harming local political and legal development, has also conditioned Latin American countries to a subordinate status, as neophytes or beginners who are learning how to behave in a large scheme of the global world-system and, consequently, subject Latin American countries to economic and legal development policies from the outside in.

This eternal search for European legal identity has been so exploited that it has become a true legal fiction, used instrumentally only to justify legal reforms in Latin American countries that have only fueled the false perception that Latin American legal systems are doomed to fail.

This fiction is further revealed by comparative law and legal transplants, which indicate that there is no possibility of a pure legal identity or even a classification within a single, large legal family in traditional legal systems or their Latin American implementations. Every legal system is in continuous evolution, modifying its internal structure by borrowing or transplanting legal institutes from other systems, which has happened and continues to happen in both Europe and Latin America.

The concept of legal transplants, fueled by the political and legal vision of critical legal pluralism, can also provide elements for understanding an alternative that allows

legal institutes transplanted from traditional European models to be modified and adapted, from the inside out, to meet local and regional needs, including with legal discourses that fit into Latin American political and social contexts.

This perception opens a new approach to understanding law in Latin America. No longer focused on ideological and instrumentalized discourses about the flaws of legal systems but oriented towards the search for possible alternatives within plural and local community contexts, which view Latin America from its own interests.

In this context, it is possible to state that Latin America can only gain if it embraces the flexibility of a pluralistic legal identity that enables adaptation and economic, political, legal, and social growth.

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ARTÍCULOS

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CREATING THE STATE OF EXCEPTION? CARL SCHMITT'S POLITICAL THEOLOGY AND POST-WORLD WAR II ITALY

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¿CREAR EL ESTADO DE EXCEPCIÓN? LA TEOLOGÍA POLÍTICA DE CARL SCHMITT Y LA ITALIA POSTERIOR A LA SEGUNDA GUERRA MUNDIAL

Abstract

This article analyzes the development of the state of exception within the Italian context. The standpoints of the state of exception, that is, the prevalence of government over parliament, the limitation of civil liberties, the creation of a friend/enemy dichotomy, and the widespread use of governmental decrees. The analysis demonstrates how, in Italy, the state of exception operates peculiarly, as some parallel, extralegal powers, including organized crime, former neo-fascists, and NATO officers, co-operate with state apparatuses either to repress or create "enemies". This is therefore a paradoxical aspect of the friend/enemy dichotomy, as State sovereignty is abrogated in relation to foreign powers. The article concludes that it is necessary to update, if not overcome, the friend/enemy dichotomy by promoting and implementing an inclusive dichotomy that excludes those who oppose such a wide-ranging definition of sovereignty.

Keywords
Italy; state; exception; conflicts; legality

Resumen
Este artículo analiza el desarrollo del estado de excepción en el contexto italiano. Los puntos de vista sobre el estado de excepción: la prevalencia del gobierno sobre el parlamento, la limitación de las libertades civiles, la creación de una dicotomía amigo/enemigo y el uso generalizado de decretos gubernamentales. Se demuestra cómo en Italia el estado de excepción opera de manera peculiar, ya que algunos poderes paralelos y extralegales, como el crimen organizado, los ex neofascistas y los oficiales de la OTAN, co-operan con los aparatos estatales ya sea para reprimir a los "enemigos" o para crearlos. Por lo tanto, este es un aspecto paradójico en relación con la dicotomía aliado/enemigo, ya que la soberanía del Estado disminuye ante las potencias extranjeras. La conclusión muestra que es necesario actualizar, si no superar, la dicotomía aliado/enemigo, promoviendo e implementando una dicotomía inclusiva que excluya a quienes se oponen a una definición tan amplia de soberanía.

Palabras clave
Italia; estado; excepción; conflictos: legalidad

Introduction

This article analyzes the development of the "state of exception" within the Italian context. The standpoints of the state of exception, that is, the prevalence of government over the parliament, the limitation of civil liberties, the creation of a friend/enemy dichotomy, and the widespread use of governmental decrees. Following Giorgio Agamben's specification (2017), we will see how enemies are included in the juridical space through their exclusion from the social space. They function as scapegoats (Girard, 2006) through which a society fraught with conflicts lives on the threshold of anomie (Durkheim, 2000). This mechanism allows society to avoid dissolution.

It will be evidenced how, in Italy, the state of exception operates peculiarly. Some parallel, extralegal powers (Bobbio, 1993), such as organized crime, former neo-fascists, and NATO officers, cooperate with state apparatuses. They do this either to repress the "enemies" or to create them. This is a paradoxical aspect of the friend/enemy dichotomy, as State sovereignty is diminished vis-à-vis foreign powers, such as the USA and NATO. So, it is not a matter of State sovereignty, but rather of bloc sovereignty, and in the Italian case, this dynamic will hold from 1945 to 1989. Schmitt (1994) gave a juridical definition of sovereignty and the state of exception, but did not address how the *construction* of the enemy is the product of a circular dialectic.

Modern states, as Thomas Hobbes (1997) argues, emerge from civil wars to bring peace and order and to boost economic development. Hobbes argues that the creation of the State is the consequence of a free choice, made by actors who have equal wills and resources. Modern capitalism, as noted by Lefebvre (1978), embitters social conflicts, thereby confuting the condition of equality imagined by Hobbes. As a result, the State will be forced to legitimize itself by choosing between the two opponents. The way this choice is made is influenced by forced relations and conflicts between different social groups.

Sovereignty is therefore not monolithic, and the state, as Agamben points out in *Stasis* (2013), faces a constant risk of dissolution. This makes it necessary to create enemies—that is, individuals or groups who are, on the one hand, considered a threat to the State's existence and, on the other hand, essential to its survival. Therefore, it can be argued that the State does not create the enemy; rather, it creates the enemy to ensure its survival. The tense relationship between political power and social groups results in a vicious cycle that perpetuates ongoing conflicts and the State's need for them. There is also a shift in the enemy's political nature.

Until 1989, when the Berlin Wall fell, one could argue that the enemy was an external threat, as the communists were associated with a foreign State, that is, the USSR. The collapse of the socialist regime catalyzes the emergence of a new kind of enemy: an

inner, unknown enemy, even more dangerous, threatening society from within rather than from outside, and requiring a more articulated State intervention in everyday life.

The conclusion is that it is necessary to update, or even overcome, the friend/enemy dichotomy by promoting and implementing a more inclusive approach that excludes those who are against such a wide-ranging definition of sovereignty.

1. Post-War Italy: A (Limited) Sovereignty?

Post-World War II Italy is a peculiar country, fraught with deep political and social cleavages that also threatened the Italian State's existence. The post-resistance divisions, as described by Pavone (1993), reveal how the liberation war overlapped with civil war and class war, coupled with divisions between north and south. Sicily provided the scenario for the State of Exception.

On Mayday 1947, in Portella della Ginestra, near Palermo (Casarrubea, 2002), gunmen killed 11 people during a demonstration to celebrate the victory of the left coalition in Sicilian regional elections. Other homicides and intimidation episodes followed across Sicily (Santino, 2017) and were not enforced either by the Italian police forces or by the Carabinieri.

The Italian governments of the time contrasted the "illegal" occupations of lands by the workers. At the same time, they widely tolerated the assassination of union activists and the intimidation of those engaged in political struggles. These individuals were portrayed as enemies of private property laws, which were central to the foundations of the Italian state (Spriano, 1989; Mineo, 1953). The massacre of Portella della Ginestra marked the peak of the peasant movement repression. After this event, many Sicilians decided to emigrate either to Italy or abroad.

Besides the peasants' movement in Southern Italy, the growth of the left-wing parties, such as the PCI (Partito Comunista Italiano) and the PSI (Partito Socialista Italiano), raised, among the most conservative political and social forces, as well as among the Western Allies, the concern of an imminent Bolshevik rising to turn Italy into a socialist country. While hopes of revolution grew rapidly among the left, the anti-fascist resistance was considered the first step toward socialist revolution (Pavone, 1993). The occupation of factories and the execution of former Fascist activists by Communist squads such as the *Volante Rossa* (Bermani, 1993) reflected the contradictory post-war atmosphere.

This period combined the hope for a better future with the resentment against the cruelties suffered under the fascist dictatorship and the war, and desperation because of economic hardships. Such political and social polarization triggered a sharp conflict, in which the friend/enemy dichotomy was epitomized day by day, reaching its peak

during the 1946 referendum, when Italian voters, by 2 million votes, decided to repeal the Monarchy. The victory of Christian Democracy (DC) in the general elections of 1948 will mark a watershed, as it inaugurates Italy's entry into the Cold War context.

The threat of Communism provided the DC-led governments with a reason to justify not repealing the authoritarian law passed by the fascist regime. They also joined clandestine military structures such as Gladio, and to prevent a Communist rise to power, they made it legitimate to recruit former ex-fascist officers, neo-fascist activists (De Lutiis, 1994). They conducted illegal activities of surveillance, espionage, infiltrations, and terrorist attacks. The consequences of such *de facto* legitimization of illegal actors soon became clear.

In July 1964 (Franzinelli, 2013), an attempted coup tried to overthrow the first centre-left government led by Aldo Moro. News of this attempt became public only three years later, thanks to leaks from the weekly magazine *L'Espresso.* Two other attempted coups followed: the "Borghese" occurred in 1970 and the "Rosa dei Venti" in 1973 (Ferraresi, 1993).

The most heinous fact, though, concerns the bomb that exploded in Piazza Fontana, in the centre of Milan, on 12 December 1969, killing 17 people and wounding 84 in a terrorist attack that took place in the Banca dell'Agricoltura, right in the centre of Italy's economic capital (Ligini, Di Giovanni & Pellegrini, 1971; Boatti, 1999; Bettin & Dianese, 1999; Maltini & Fuga, 2017). At the beginning, both the police and the mainstream public opinion held the anarchists responsible for the bomb. Authorities arrested some of them, and also killed an anarchist activist, Giuseppe Pinelli, who fell out of the window of the Milan police headquarters.

However, later investigations by magistrates unearthed the existence of a sophisticated plot involving members of the secret services, ex-fascists, neo-fascists, high-ranking officers, and ministers who co-operated with NATO members.

The post-war context shows the peculiarity of the Italian State of Exception. On one hand, firstly, the alleged communist threat created a climate of emergency; on the other, no new special laws were passed during this period. This was likely because the recent Fascist legacy had left enough repressive laws that only needed to be enforced and not repealed. Moreover, the return to democracy discouraged attempts to use power in an authoritarian manner.

For this reason, one could argue that an implicit State of Exception characterizes post-war Italy. This consists of keeping the old fascist laws and apparatus intact while delaying the enforcement of the democratic Constitution. For example, regional autonomy was not enforced until 1970, thereby maintaining a centralized State structure that allowed the central government to operate more efficiently by circumventing local

powers. Besides this, administrative decisions, such as those undertaken by the *prefetti* (local chiefs of police) under the direction of the Ministry of Interior against the demonstrations and strikes by workers and peasants (Bernardi, 1994), increased executive power as outlined in the Schmittian scheme.

Secondly, the exception provided by the Communist threat manifests in the tolerance and involvement of illegal actors in the alleged "defense of democracy". Mafioso, ex-fascists, and neo-fascists provided a fruitful cooperation to serve the purposes of the Western Bloc. This cooperation contradicted the official formulas of legality and respect for fundamental liberties.

This dynamic would characterize Italian politics throughout the Cold War. Ex Fascists and Mafioso played a role that, in Giorgio Agamben's scheme (2017, p. 187), has the force of law but is neither legislated nor legitimate. Still, it is effective in wielding power and influencing Italy's political balance.

These two actors often enjoy support from American forces operating in Italy (www.cameradeideputati.it/commissionestragi) and have worked as effective lawmakers within the Italian context. Although they actively operated by committing crimes and by thwarting the implementation of any legislative decision that works against their interests. Their ambiguity in the Italian political scenario is notable. On one hand, their anti-communist stance and significant share of economic power and paramilitary force, especially the Mafioso's control in Sicily, Calabria, and Campania (Santino, 2000, cit.; Sciarrone, 2001). On the other hand, criminal organizations and neo-fascist groups are sometimes used instrumentally to feed the rhetoric around new emergencies, which justify the enforcement of special laws.

It usually works within a top-bottom dynamic, where lower ranks of the *poteri occulti* (hidden powers) are caught and criminalized (Ruggiero, 1996). Meanwhile, the connections between legal and illegal high ranks remain hidden or are overshadowed. The prosecution focuses on scapegoats, labeled as the most heinous criminals, whereas their connections with politics are neglected.

This aspect fits into the idea of emergency as a circular process. First, States create enemies, which justifies their power. A superficial interpretation of this scheme could lead to determinism, as it may seem that States are endowed with a synoptic rationality that allows them both to predict and to manipulate conflicts. In reality, State power consists of a dominating cluster of fluid and temporary alliances. These alliances attempt to produce and reproduce their prerogatives, and this process becomes understandable. Neo-fascists and the criminal organizations, no matter their strength, do not have a monopoly on violence. They cannot control magistrates, government, or parliament,

except through a long-term alliance. If organized crime and fascism raise moral panic, authorities can make them scapegoats, even if they were tolerated before.

We will analyze this mechanism more in depth in the next session. What is important to stress here is that the Italian peculiarity of the State of Exception constantly reshuffles the actors of the exception, who can change sides over time. In any case, what happens is an increase in executive power under decrees and special laws, as well as under the creation of a new enemy.

Thirdly, in Italy, the concept of sovereignty develops in a very paradoxical way. Although Italy was defeated and remains under military occupation, the continued presence of NATO (especially American officers) within its borders sharply contradicts the statement Schmitt (1994) makes: formally, it is the Italian government that decides about the State of Exception, but the substantial decision maker is in Washington, as a matter of fact. This is a limiting aspect of Italian sovereignty that will embitter social conflicts, as discussed in the following session.

Finally, there is no such thing as a monolithic sovereign. Behind it, a cluster of actors shares the concern for a Communist rise to power and aims to resolve this problem. The State, according to Poulantzas (1977), is crossed by a plurality of conflicts. Sovereignty is defined by plurality: a coalition of actors takes power and eventually defines the space for exception. This describes the case of the Italian state of exception, which is also subject to change. In the 1970s, as we will see, the era of National Solidarity will bring the PCI into the government. It will inaugurate a new exception under the alleged threats of terrorism and economic recession.

2. 1973-1990s: The Paradox of *Democratic Exceptionalism* From Terrorism to Corruption

The 1970s mark a watershed in Italian history. On the one hand, social and economic modernization gave rise to new social movements: women, students, and mass workers (Panzieri, 1963; Moroni & Balestrini, 1998, cit.; Crainz, 2005, cit.; Ginsborg, 1992). Their radical changes spread across society. On the other hand, the economic crisis of the early 1970s (O'Connor, 1976) increased the unemployment rate, particularly among young people, and led to price increases, spreading unrest across the country. Demonstrations, clashes, collective occupation of abandoned flats, and boycotts of bill payments became common, often organized by the extra-parliamentary left (Scalzone, 1989; Negri, 1983).

There is a gap between the traditional working class, satisfied with its full-time job and its family-based welfare, and the new generation of workers. This caused a social rift and prompted change within Italian society and politics. The PCI chose to consider

widespread social unrest as a matter of public order. The episode in Rome on 17 February 1977 marked the start of an open confrontation between the PCI and the social movement of the age. On that day, the leader of the Communist trade union, Luciano Lama, was forced to interrupt his speech at the university and hurriedly leave the premises to escape students' protests.

The Communist secretary, Enrico Berlinguer, had allowed his party to join a coalition of National Solidarity with the Christian Democrats. He supported an austerity-oriented economic policy to face the crisis. Berlinguer called the movement "a bunch of ciphers" (Valentini, 1989) and endorsed the law-and-order approach against the demonstrators. His cousin, Christian Democrat Ministry of Interior Francesco Cossiga, had decided to adopt this approach.

In 1975, the Italian Parliament had passed the *Reale Act*. This law allowed police forces to shoot point-blank and also limited the freedom of speech and demonstration under the necessity of maintaining public order. Some tragic episodes followed, such as the death of the student Francesco Lo Russo on March 11, 1977, and the death of the young feminist Giorgiana Masi on May 12, 1977, both victims of point-blank shootings by the police forces. These events spread among movement activists, who came to believe that armed struggle was the only answer. The Red Brigades engaged in an escalation reaching a peak in 1978 with the kidnapping and killing of Aldo Moro, the Christian Democrat leader.

This historical reconstruction shows that the Italian State of Exception underwent big changes. Unlike in previous years, the PCI had crossed the threshold of legitimacy and had become one of the main actors in exceptionalism. It even inspired a hard-line approach against the movement, which one could call democratic exceptionalism, as all the parties represented in parliament, except the Radicals and PDUP (Partito D'Unità Proletaria), endorsed it.

Special laws, government decrees, suspension of civil liberties, and an increase in police powers were directed against a part of the country that expressed its discontent with both the deterioration of living conditions and the parties' measures, including those on the left. Younger generations were regarded as a new enemy, against whom all advocates of democratic values should unite.

The friend/enemy dialectic takes place *inside* the state, starting a pattern that will characterize Italy in the future. Despite the Berlin Wall still standing, the PCI became part of the friendly side by promoting the repression of social movements. Unlike earlier decades, this time the state of exception is *explicit*. In the 1950s and 1960s, the persistence of fascist laws and cadres, the failure to enforce the Constitution, and the delay of de-militarization

of police (which would not occur until 1981), worked as a deterrent for social movements. In the 1970s, special laws, enacted with almost unanimous parliamentary consent, became necessary to maintain public order. This removed not only the conflicts themselves but also their social and political roots. The consequence of this repressive stance was the escalation of conflict, with the Red Brigades escalating to a higher degree of violence and other armed groups, such as Prima Linea (Segio, 2005), forming and operating in the late 1970s.

One can argue that it is a context of circular dialectic, with the State cloning its own enemy (Ruggiero, 2006). The enforcement of special laws to reject the demands of the 1977 social movements created the conditions for embittered confrontation. This is not a deterministic matter. Instead, it is a *deviance-amplification dynamic, as Stanley Cohen (1971) suggested in his work on* deviance and moral panic. The more some social groups are labeled negatively, the more they will live up to their negative identity. This alienation from mainstream society and politics, under specific critical events, can push the boundaries to the point of no-return: armed struggle. It is the State, or, as we have stated before, the coalition of groups that hold power, that draws the line. This creates space for folk-devils, marauders, and subversives, and deepens the gap within society.

Democratic exceptionalism will also influence the neo-fascist groups. On the one hand, right-wing militants connected with state apparatuses will continue their terrorist attacks. The Italicus train bombing of 1974, the Brescia massacre of the same year, and the Bologna station attack of 1980 (Ferraresi, 1997) follow the same trail inaugurated in 1960. These bombs explode in public places and cause mass deaths.

On the other hand, new neo-fascist groups, such as the *Nuclei Armati Rivoluzionari* (NAR; Armed Revolutionary Nuclei), theorize and practice a guerrilla-style action. These actions emulate those of extreme-left organizations (Bianconi, 1995; Rao, 2006; Colombo, 2007) and distinguish themselves from an older generation of neo-fascists, seen as too compromised by state power.

The kidnapping and killing of Aldo Moro by the Red Brigades in 1978, as well as the discovery of the illegal masonic lodge P2 by the Milanese magistrates Giuliano Turone and Gherardo Colombo (Galli, 2003; Beccaria, 2007), set the context for a re-interpretation of recent Italian history. P2 was involved in many corruption scandals and terrorist attacks. These events were used to justify the enforcement of special laws. Conspiracy theory approaches, mostly by PCI members and intellectuals (Flamigni, 1993), claim the existence of an anti-PCI plot. They argue that this plot was woven by Gladio and the P2 lodge to impede a DC-PCI government.

To fulfill this purpose, the plot has bred and fed terrorism, both on the left and on the right. The existence of such an articulated plot implies a serious threat to Italian

democracy. This threat must be addressed through the approval and enforcement of special laws. Within this cultural and political context, new special laws will be passed.

For example, Francesco Cossiga, who served as prime minister between 1979 and 1980, promoted measures such as extending incommunicado detention to 4 days and establishing special detention for political prisoners (De Vito, 2009). Furthermore, Cossiga supports legislation granting *pentiti* (turncoats) significant reductions in punishment in exchange for their revelations.

At the same time, police officers, in particular those from a special squad trained by the so-called *Dr De Tormentis*, that is Doctor Tormentor, (Gonnella 2013, cit.; Prette, 1994), practice torture. No martial law was ever declared, nor was there any suspension of liberties. Despite this, special laws and government decrees dissent and let workers work in the direction of criminalizing dissent and enacting repressive policies that ended up killing demonstrators or producing political detention.

On April 7, 1979, magistrates in Padua, Milan, and Rome issued 62,000 *comunicazioni giudiziarie* (warrants of investigation) against alleged militants of extra-parliamentary left. These individuals were accused of being involved in a subversive plot to overthrow the government. Charges included *insurrezione armata contro i poteri dello Stato* (armed uprising against the State) or *concorso morale* (moral support). These charges were drawn from the Fascist penal law, which remained in force (Bocca, 1982).

By the early 1980s, Italy had 5,000 political prisoners, making up one-fifth of the total number of inmates (Amnesty International, 1983). The authorities indiscriminately used pre-trial detention and enforced an inhuman imprisonment regime. These actions fell far short of the presumption of innocence expected in a liberal regime. Officials justified their repressive measures by citing an alleged "terrorist threat", to enforce such repressive measures that, indeed, 1970s Italy was living under a State of Exception.

While the state repressed political dissent, it allowed organized crime to operate and thrive due to the state's indifference. Cigarette smugglers in Naples employed 15,000 people (Barbagallo, 1990). The *Corleonesi* faction of Cosa Nostra eliminated their opponents to gain control of the criminal organization (Deaglio, 1993; Santino & Chinnici, 1990) and killed police officers and magistrates who tried to investigate the Sicilian mafia activity.

3. The exception of honesty. Italy since the 1980s

The abduction of US general James Lee Dozier and his liberation in early 1982 (Galli, 2003) meant the end of the Red Brigades and of left-wing political violence. Moreover, the defeat of Fiat workers in November 1980 (Revelli, 1993; Polo-Sabattini, 2003)

marked the end of sharp social conflict and initiated a period of economic restructuring. In this new phase, small, family-based, and country-based factories replaced the old large urban industrial complexes, providing the backbone of the Northern League (Bonomi, 1998).

However, this apparently peaceful scenario was short-lived. A new emergency soon emerged, requiring exceptional laws in the Italian political landscape. On 3 September 1982, the *prefetto* of Palermo, Carlo Alberto Dalla Chiesa, former head of the Anti-Terrorism Unit, was killed by a Mafioso commando along with his wife, Emanuela Setti Carraro.

The event drew the Italian public's attention to Sicily, as the battle between the Corleonesi and their rivals raged. Local politicians, as well as journalists, magistrates, and police officers, were being killed because of their anti-mafia activism. Although the mafia, along with the camorra in Campania and the 'ndrangheta in Calabria, had been operating for centuries (Dickie, 2012), it was only after the killing of Dalla Chiesa that the issue of mafia gained consideration by politicians and opinion makers.

The Italian State of Exception is strictly related to this change. The end of terrorism and the crisis of the working class, caused by industrial restructuring, made previous emergencies obsolete and created a vacuum that needed to be filled. Meanwhile, mafia wars across Southern Italy, but especially in Sicily, resulted in a high death toll. This also concerned members of the state apparatus, such as magistrates, politicians, and police officers (the so-called excellent crimes; Pantaleone, 1969; Santino & La Fiura, 1989).

The high number of these victims, including the President of Sicily Piersanti Mattarella (1980); the provincial secretary of Christian Democracy Michele Reina (1979); the regional secretary of PCI Pio La Torre (1982); the prosecutors Cesare Terranova (1979); Gaetano Costa (1980), Rocco Chinnici (1983); police and Carabinieri officers Giuseppe Russo (1977), Emanuele Basile (1980), Calogero Zucchetto (1982) and Mario D'Aleo (1983); as well as the journalist Mario Francese in 1979, to feed the rhetoric of an attack against the State.

A mafia/anti-mafia dichotomy developed, revolving around an alleged conflict between the State, depicted as a compact, monolithic entity, and the mafia, regarded as an "octopus" (a metaphor inspired by a successful TV serial) that attempted to strangle it. Journalists and academics produced numerous investigations into the mafia. Meanwhile, new politicians and political movements produced the rhetoric of *legality*. Organized crime violated the rules of associate living. Thus, it was necessary to emphasize the value of respecting rules, including the use of special laws. According to the "anti-mafia professionals", as the Sicilian novelist Leonardo Sciascia was soon to define them (1986), Italy was at war with organized crime.

Consequently, authorities adopted as many exceptional measures as possible. They deployed the army, created special police branches, concentrated power in the hands of the government, and limited the presumption of innocence and of rights within the penal system. Authorities did not attend to their requests until the early 1990s. Thanks to revelations by the ex-prominent mafia member Tommaso Buscetta (Biagi, 1987; VV.AA., 1989) and other Mafioso, the Palermo prosecutors Giovanni Falcone and Paolo Borsellino were able to put the main mafia bosses on trial and secure their convictions. In 1992, Cosa Nostra planned two bomb attacks that killed Falcone and Borsellino. These attacks tapped into a context of a legitimization crisis, as the Tangentopoli corruption scandal (Nelken, 2001) broke out, causing the collapse of post-war political leaders and the parties that had ruled the country for almost half a century.

In pursuit of honesty, the army was deployed to patrol Sicily after Borsellino's death in July 1992. Meanwhile, the 41 bis section of the penal procedure law limited the rights of inmates who were either convicted or accused of membership in criminal organizations. Furthermore, the *ergastolo ostativo* (permanent life sentence) banned access to alternative measures for the mafia convicts who did not collaborate with magistrates. Despite violations of inmates' rights under such regimes (Indelicato, 2016) and the unfavorable 2010 judgments of the European Court of Human Rights against the enforcement of 41 bis, almost all political parties consider these measures the touchstones of legality. In contrast, on the corruption side, magistrates in Milan, where the *Tangentopoli* scandal broke out, engaged in mass arrests. They forced defendants into long pre-trial detention to compel confessions (Fele, 1996). Finally, the alleged corruptors and the corrupted were shown handcuffed to the public as scapegoats.

In this context, in 1992, the Italian Parliament passed a law that raised the number of votes required to pass an amnesty to two-thirds, thereby making it impossible. This act reversed a trend in the Italian Parliament (Pavarini, 1998, p. 29) of voting on an amnesty bill every decade that, at least temporarily, resolved the problem of prison overcrowding.

This new stage of the State of Exception has no ideological connotation, as the political parties claim to be against organized crime and corruption. The Northern League and the neo-fascists took advantage of this context and became part of the government under the leadership of tycoon Silvio Berlusconi. As electoral reforms have increased executive power, magistrates have played a more central role in mediating conflicts between two coalitions, each proposing a different version of neo-liberalism.

The so-called center-left aimed to turn Italy into a "normal country" (D'Alema, 1997), with private entrepreneurship regulated by the State and supported by the third

sector (Rifkin, 1995), a cluster of NGOs and cooperatives around the Catholic Church and the ex-PCI network, to provide a certain degree of "solidarity". The other side, that is, the center-right, proposed a more aggressive neoliberalism, a free enterprise without any limitations (Urbani, 1994). Both sides agree on the privatization of public services and the rollback of the State's role, as well as on Italy's participation in the USA–ruled NATO military alliance.

The consequences of this neo-liberal consent were seen in July 2001. Specifically, the G8 meeting in Genoa ended tragically with the death of the young activist Carlo Giuliani at the hands of the police. Additionally, there was a raid at the school Diaz, resulting in mass arrests and torture of demonstrators (De Gregorio, 2002). In the aftermath, various observers characterize the events in Genoa as a *suspension of democracy,* with both sides having endorsed this condition. On one hand, the management of public order at the G8 was assigned to the freshly elected second Berlusconi government. However, it is important to note that preparations had already been made by the previous coalition (2021), as evidenced by the repression of a no-global rally in Naples a few months earlier.

Despite their different motives, both sides appealed to demonstrators' sense of responsibility. They did so by emphasizing the alleged "violent acts" committed by the latter and by neglecting the repressive and authoritarian attitude of police forces. Furthermore, the special laws passed in the 1970s remained in place, aligning with the nearly unanimous neoliberal consent in Italian politics since 1992.

As a result, the repression of new dangerous classes, such as the no-global movement, matched the securitarian attitude hegemonizing politics and society. Those outcomes were the expansion of the penal sphere (De Giorgi, 2001). The issue of punitiveness grew increasingly relevant in Italy as immigration became a public order concern (Dal Lago, 1999). The punitive anti-drug law enforced in 1990 (Anastasia & Gonnella, 2002) resulted in a skyrocketing number of prisoners, which increased to 67,000 in 2006, compared to 25,000 in 1990 (Mosconi & Sarzotti, 2006).

A new emergency, urban security, also in post-Cold War Italy. Following trends in other Western countries like the USA (De Giorgi, 2000; Simon, 2009), a more unstable society sought cohesion in the community of accomplices (Bauman, 2006) that creates and prosecutes the scapegoat. Migrants, activists, sex workers, drug users, and LGBTQI+ people became the new dangerous classes, a tank of dysfunctional groups to be monitored, banned, and punished.

The new Italian state of exception is inward, as its enemies are internal rather than external. While foreigners may seem outside, they remain part of the national space and

share the status of a dangerous group with other members of Italian society. Relevant political conflicts might divide the political spectrum, but they are largely absent, so exceptionalism is shared by all political actors. The old exceptional laws remain, having set a precedent still followed: the government issues decrees, which Parliament eventually approves, often after a confidence vote.

The resolution of conflicts is increasingly delegated to magistrates' ruolo suppletivo (substitutive role), while police forces ensure public order is maintained. As a consequence of this, old political parties have collapsed, to be replaced by populist forces (Tarchi, 2017) such as the 5 Star Movement of the comedian Beppe Grillo and the post-fascist *Fratelli d'Italia* (Brothers of Italy), led by the current prime minister Giorgia Meloni.

As the economy deteriorated because of the pandemic, the centre-left and 5 Star Movement-led governments collapsed. This was followed by the formation of a government of national emergency, led by the former European Central Bank president Mario Draghi, who secured a majority that included all parties except Fratelli d'Italia. Under Draghi, Italy emerged from the health crisis by organizing a mass vaccination campaign supervised by an Army General. Following this, economic consequences were addressed through austerity policies that required mediation among many stakeholders.

However, as the Italian economy remained slow to recover, discontent grew, which led to the far-right leader Giorgia Meloni winning the September 2022 elections, the Italian economy is far from recovering. The September 2022 election was won by the far-right leader Giorgia Meloni, who benefited from discontent in Italian society after the pandemic.

The new government could best exploit an electoral law that penalizes plural representation, discouraging many citizens from voting; only 67%, the lowest electoral turnout since 1946, went to vote. As a result, the 25% FdI gained is effectively16%, and the whole right-wing coalition's 40% is essentially 26%. This uncertain majority, also marred by internal conflicts, has used scapegoating of groups and individuals to secure consent. Measures such as the anti-rave decree of October 2022 and the special detention regime for anarchist inmate Salvatore Cospito both create new emergencies, allowing continual increases in executive power. A government that has no wide consent, whose economic policies cannot contradict the UE blueprints, will look for another exception to create and feed. The State of exception is, as always, artificial.

Conclusions

This article has sought to shed light on what lies within the State of Exception and, therefore, the *sovereign*. Sovereignty is not an empty or monolithic category, but consists

of social and political actors with specific values and economic interests. These actors conflict, agree, or tolerate one another depending on specific historical contexts.

The Italian case shows a progressive, inclusive path and a peculiar presence of external actors, such as the Mafia and NATO. These groups are included, tolerated, or excluded at different times. Italy transitioned from a significant social and political cleavage, characterized by the exclusion and criminalization of working-class and left-wing parties, to a state of generalized unanimity, with almost all the political and social actors included. This dynamic is related to the second aspect we analyzed: the nature of the *enemy*. Post-war Italy, bound to join NATO, was ruled by a government that viewed the working class, the PCI, and, to a certain extent, the PSI as agents of the USSR, thereby identifying them as the enemy within.

As the Communists gradually cross the threshold of sovereignty, the nature of the enemy changes, becoming an internal threat defined either by the degree of its compliance with the law (legality) or by its alien nature, determined by lifestyle, ethnicity, and sexual orientation. In other words, we are facing a scapegoat, or more than one, embodying all the negative characteristics that put at risk the mere existence of society. It is a weak society that produces its own threat and must deal with it through exceptional means. The third aspect of this article has also addressed the means used to enact the State of Exception. We were able to spot implicit and explicit means, such as the maintenance of fascist laws and apparatus, and the reluctant enforcement of the Democratic Constitution.

Moreover, it was found that the Italian State of Exception relies on the presence of external, as well as illegal, actors, such as organized crime groups, who patrol large parts of the territory through a paramilitary structure and a widespread network of relations. It is an unusual presence, but preserving the Italian Republic's existence will be crucial in line with NATO expectations and recommendations. It is thus possible to argue that, following Agamben's scheme, exception relates more to the force of (law) than to the force of law. Neither is it necessary to have juridical status to wild power, nor is it required that the existence of a law that either states or regulates the condition of exception. Those actors vested with power will decide *how, when*, and *to what extent to* wield their power.

For this reason, it is not necessary to decree a full state of exceptions; the government's use of ad hoc decrees to address a specific *emergency* will suffice. In more complex cases, special laws governing a specific domain of public life (the penal system, political dissent) will be issued and presented as *temporary exceptions* to normal life, but they will indeed remain in force.

Finally, the existence of illegal, informal, and external actors can feed the circle of creating (cloning). Power relations constantly change, so it becomes possible to indicate as an enemy one who was on your side shortly before, and vice versa. It was the case of neo-fascists and the mafia, who changed their status after social and political changes, but they were tolerated and incorporated before.

The creation of the enemy also relates to the mechanism of deviance amplification, as a confrontation is the consequence of a refusal to negotiate or to incorporate, at least in part, some of the demands the "other side" puts forward. Conflict is not always the natural outcome of political confrontation, but rather the consequence of a refusal to relinquish part of the power or to modify, at least partially, power relations. Power is a complex phenomenon, although a crucial aspect of social life.

To understand its mechanisms and dynamics, it is necessary to investigate its internal conflicts and transformations in depth. Carl Schmitt's (1994) concept of the state of exception is an important and seminal category for understanding sovereignty and the modern state, but it needs further investigation to be fleshed out. Only in this way it becomes possible to understand that, on the one hand, power seeks exceptions, creates them, but, on the other hand, exceptions are temporary, always due to be replaced, because of the dynamism and complexity of society, as well as because of the relational, plural nature of power itself. This achievement is necessary for us not to overcome our fear of power.

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THE RELATIONSHIPS BETWEEN GOOD GOVERNANCE AND PUBLIC POLICY EDUCATION IN A COMPARATIVE FRAMEWORK

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LAS RELACIONES ENTRE LA BUENA GOBERNANZA Y LA EDUCACIÓN EN POLÍTICAS PÚBLICAS EN UN MARCO COMPARADO

Abstract

The inherent difficulties of designing and executing good public policy are not restricted to modernity or to any given political system. Many of these difficulties were pondered and discussed even in the ancient world. Today, public policy education has become a primary need, and more than at any time in recent history, it needs to be promoted globally. In fact, public policy education would help citizens play a more effective role in good governance by clarifying how government decisions directly impact their lives. This paper addresses the origins of public policy fundamentals, arguing that they are not inherently bound to the American context. It suggests that public policy educators around the world can develop their own curricula based on similar broad outlines and comparative studies. The paper, after sketching examples

from bilateral treaties on water rights, further highlights how other real-world case studies from international organizations, such as the International Telecommunication Union (ITU) and the Food and Agriculture Organization (FAO), can help students get exposed to practical policy challenges.

Keywords
public policy education; fundamentals; good governance; students

Resumen
Las dificultades inherentes al diseño y la ejecución de buenas políticas públicas no se limitan a la modernidad ni a un sistema político determinado. Muchas de estas dificultades ya fueron objeto de reflexión y debate incluso en el mundo antiguo.
Hoy en día, la educación en políticas públicas se ha convertido en una necesidad primordial y, más que en cualquier otro momento de la historia reciente, necesita ser promovida a escala global. De hecho, la educación en políticas públicas ayudaría a los ciudadanos a desempeñar un papel más eficaz en la buena gobernanza, al aclarar cómo las decisiones gubernamentales afectan directamente sus vidas.
Este trabajo aborda los orígenes de los fundamentos de las políticas públicas, sosteniendo que no están intrínsecamente ligados al contexto estadounidense. Sugiere que los docentes de políticas públicas de todo el mundo pueden desarrollar sus propios planes de estudio basados en líneas generales similares y en estudios comparados.
El artículo, tras esbozar ejemplos de tratados bilaterales sobre derechos hídricos, destaca además cómo otros estudios de caso del mundo real procedentes de organizaciones internacionales, como la Unión Internacional de Telecomunicaciones (UIT) y la Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO), pueden ayudar a los estudiantes a familiarizarse con desafíos prácticos de las políticas públicas.

Palabras clave
educación en políticas públicas; fundamentos; buena gobernanza; estudiantes

1. Introduction

Public policy as an academic discipline is relatively new, having been founded in the United States after World War II. It is both an academic field and a training for practical professions.[1]

(1) It is unclear what fundamentals undergraduates in public policy studies should master for graduate study or professional work. My experience suggests that they need the following: Recognize recurring patterns of social life and governance that reappear across a wide historical and geographic range of societies.

(2) A grasp that *self*-government, in any form, presents difficulties that life under an oligarchy, a personal ruler, or a far-flung empire does not present.

(3) An understanding of the logical premises for governance by the people in a democracy or republic.

(4) The realization that to be responsible for policy is to deal with unexpected problems; the unexpected is not some separate category.

(5) The capacity to accept constraints in the tools or solutions that are available.

(6) Experience in making decisions on unexpected problems while working collaboratively within a small group, ensuring accurate recall of the group's consensus and process, not just one's individual contribution or preference.

(7) The ability to clearly communicate a decision to the public, consider objections to it, and answer questions fairly.

It is useful to briefly consider the relations between the recently listed qualities and skills and the framework creation of the U.S. Constitution. Items (1) through (4) were part of the intellectual equipment of the 55 founders who wrote the Constitution. These qualities were fairly widespread in the revolutionary generation. All four qualities were stimulated by the types of effort involved in fighting for, and conceiving of, a republic that would cover a large extent of territory – something then a novelty in the world. Later, with greater historical distance from the founding era, these four qualities may have declined.

On the other hand, items (5) through (7) are administrative qualities that, in its new structure of government, the revolutionary generation had to learn. In the American

[1] A short and helpful overview can be found in Potucek and Leloup, "Approaches to Public Policy in Central and Eastern Europe," pp. 1-2, https://www.martinpotucek.cz/wp-content/uploads/2019/10/approaches-pp.pdf. This is chapter 1 of Potucek, M., and Leloup, L., et al., *Public Policy in Central and Eastern Europe: Theories, Methods, Practices,* (Bratislava: Network of Institutes and Schools of Public Administration in Central and Eastern Europe, 2003), published online by Cambridge University Press, 2018.

experience, it is important to note that these latter qualities may have reached their real fruition in the 1930s and 1940s, a period when the Great Depression and World War II tested the country's capacity for survival. Furthermore, the development of congressional legislation for reform and of executive-branch agencies to address pressing problems created a structural legacy that is now the subject of controversy and dispute.

Students new to the study of public policy are likely to assume that for a given problem, material resources, a knowledge base, and the rationality to use both well are already in place. However, in a given case, at least one of these three is likely to be lacking. Also, the rule of law is not a constant in a given society; it is, at best, more fragile than it appears and is a matter of degree, tending to widen or narrow depending on which social strains are affecting it.

These general observations may seem platitudes, but I draw them from observing students and their expectations of the world. Their expectations are best addressed by presenting actual policy problems that they can, if not exactly master, tentatively solve in collaborative exercises.

2. How Students Can Work in Class with the Fundamentals

Although these seven fundamentals may initially appear overly ambitious when listed in this fashion, each can be taught in school. I have sought to do so in two required courses taught by other colleagues: "Great Thinkers and Public Policy" and "Public Leaders and Active Citizens." I will draw on my teaching in these courses to address each of the seven fundamentals I propose.

For students to (1) contact the idea of patterns that have reappeared across a wide range of societies, I introduce them to Confucius. In the West, it is no longer appreciated that Confucius is the earliest source of civil service thinking and standards of conduct. The idea that civil servants should be free of corrupt self-dealing or over-responsiveness to political influence is Confucian. However, eighteenth-century European intellectuals were very much aware of Confucius, having absorbed the writings of seventeenth-century Jesuit missionaries who were resident in China and scholars of its culture. It was only after the Chinese concept of civil service examinations had been adopted in the nineteenth century in Britain and the United States that its Chinese origins were largely forgotten. In class, I lectured on Confucius' life and work. More importantly, students read extracts I have collected from the *Analects*[2] that directly relate to the concept of civil

[2] Eno, R. (2015). *The Analects of Confucius*, at https://www.transcend.org/tms/wp-content/uploads/2022/09/Analects-of-Confucius-Eno-2015-TMS_compressed.pdf.

service. I rely on Robert Eno's (2015) edition. To facilitate their understanding, I have divided these extracts into sections with strong practical application, such as:

- On informing yourself
- On the people
- On getting employed
- On how to act
- On getting fired
- On leaving
- On young people
- On the flourishing and decline of states.

Students select a short passage and write a brief essay on why they find it meaningful personally or for policy. Many are often surprised by the accessibility and ethical familiarity of this ancient text – understandable, since its values were imported into European high culture in a previous period and are now absorbed as ideals.

For students to take in the reality that (2) self-government is a constant effort to meet difficulties – an effort that passing into oligarchy, accepting a personal ruler, or functioning inside an imperial structure will obviate (though of course each of these brings its own distinct sufferings). I introduce them to *The Politics of Aristotle* (Aristotle, 1992).[3] It is curious but true that in American universities, undergraduates are more likely to be introduced to Plato's *Republic* than they are to Aristotle's *Politics*. While Plato's work is speculative philosophy, Aristotle's has empirical grounding and is riddled with examples from real city-states (it has been estimated that Aristotle and his students may have been aware of about 500 of them). In continuing this contrast, Plato's work is not oriented toward self-government. At the same time, Aristotle attempts a taxonomy of self-governing constitutions and is explicit about their relative capacities to stabilize and endure. Given this, one would imagine that Western democratic societies, in educating their youth, would gravitate more toward *Politics*, but in the United States, this has not been the case.

I do not ask students to read all of the *Politics*, but I give them extracts from Books IV, V, and VI that focus on the following themes:

- Why are there so many different constitutions
- Social classes and different constitutions

[3] The edition I use is Aristotle: *The Politics*, Sinclair, T.A. (translator), Saunders, Trevor J. (editor), Penguin (New York, 1992). The original division into eight books should presumably be maintained by any translation into any language. The extracts I use with students are all from Books IV, V and VI.

- Definitions: types of democracy and oligarchy– as types of government
- from a property standpoint
- Polity (the inclusion of different principles)
- Types of tyrannies
- Governments' likelihood of stability or overthrow
- Best practices for democracies

I think American students find it hardest to understand that the most stable constitution is the one that integrates multiple principles.

In Aristotle's thought, deviations from the mean in the center are deviations away from a balance of principles, and these can happen either toward the rule of wealth (oligarchy) or toward the rule of the current majority (democracy). If a current majority can overrule laws and customs that support deliberation *in haste*, the constitution will become unstable. Conversely, if deference toward wealth leads to a situation in which "those in the middle," that is, those who have a sufficiency, enough to feel secure, do not outnumber the other two groups *together*, the rich plus the poor, the constitution will become unstable.

To encourage students to ponder (3) the logical premises of governance by the people in a democracy or republic, after all, why do we assume that the public is a source of good judgment? I introduce them to Machiavelli (1996). It is also interesting that American universities are more likely to teach Machiavelli to undergraduates through The Prince, a treatise on sole rulership, rather than through the Discourses on Livy, a treatise on republicanism. One would think that the oldest large republic would prefer to teach the latter. In any case, I give students a single section from the Discourses, Chapter 58: "That a People is Wiser and More Constant than a Prince" (Machiavelli, 1996).

Machiavelli begins by pointing out that he is arguing for principles "where it is not sought to impose them by violence or authority (*i.e.*, earlier writers)."[4] On these questions, reason can stand alone. He then explains that the people are neither inherently better nor worse than a prince: "both equally err when they can do so without regard to consequences […] were any to accuse both princes and peoples, the charge might be true, but […] to make exception in favor of princes is a mistake."[5] Human nature is the same among ordinary individuals, princes, or a multitude. Therefore, respect for the laws, especially a community's founding laws, is what makes the difference in governing wisely. It is only if a people respect its laws that it is "more prudent, more stable, and of better judgment than a prince."[6]

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[4] Quotations are from the Project Gutenberg source (see note 4).
[5] Mark Musa and Peter Bondanella, cit., p. 126.
[6] *Ibid.*, 131

Machiavelli's final reason is empirical. In his Renaissance world of the Italian peninsula, he argues that cities governed by the people "make marvellous progress," outpacing those governed by princes. He does not argue that this must always happen, but notes that it often does. For American students, this serves as a necessary corrective to the misconception that a republic or democracy functions like a machine. The idea of opposing social forces in a schema of checks and balances is a wonderful gift from the eighteenth-century legacy. However, Americans of that era did not believe this system would work on its own, without constant civic virtues expressed through deliberation.

To help students understand that (4) being responsible for policy means addressing unexpected problems, and that the unexpected is an inherent part of policymaking, classroom simulations can present real policy dilemmas. These dilemmas are accessible (so most readings are available online) and specific enough for students to analyze effectively. One simple example–from the course's first week – is as follows:

In the U.S. state of Virginia, the law requires that the commissioner of the Board of Health be a medical doctor. The Virginia Senate must also confirm him or her. The Senate had rejected the governor's earlier nominee. He then appointed a temporary acting commissioner while looking for a new nominee. However, contrary to the law, this person was not a medical doctor. Board of Health members became concerned about the legality of any action they or the commissioner might take.[7] The problem with the simulation was: What choices did the Board of Health have to try to change this situation? Whom should it appeal to? Should that appeal be private or public?

Each week, students were presented with a different problem that required them to identify with real policymakers. Some problems were at a local level, as in this example; others were national; still others were international (for instance, the Arctic Council, the International Telecommunication Union, or the Food and Agriculture Organization). All the problems had aspects that were not anticipated by laws, regulations, or customary procedures, so they lacked an obvious solution.

The simulations sought to build in students (5) the capacity to accept constraints on the tools or solutions that are available. This was done by offering a menu of approaches and largely restricting the students to these options. In the example just given, students had three options: (a) the Board of Health should send a private letter to the governor; (b) the Board members should discuss their concerns with members of the Virginia senate, who might well talk about them in public; or (c) the Board should issue a public

[7] For a journalistic account of this controversy, see for example the Washington Post, "Youngkin's Health Chief Was Ousted. What Happens Now?," February 10, 2023, at https://www.washingtonpost.com/dc-md-va/2023/02/10/greene-virginia-health-youngkin-abortion/.

statement to the citizens of Virginia, explaining the gravity of the situation. Students had to accept that, in this simulation, they did not have the power to fix the problem.

It is difficult for experienced policy professionals to (6) make decisions under constraints on unexpected problems, collaboratively in a small group, and to recall the details of the group's decision accurately later, rather than only one's own part in that decision. However, this is exactly what will be needed the next day.

In the classroom, having been briefed on the problem, students formed groups of four to six. These groups were not fixed throughout the course; instead, they were formed on the spot as follows.

All students posed three questions about larger issues raised by the policy problem, and their answers were tracked. Those who had answered at least two out of three in one fashion went to one side of the room; those who answered in the other fashion went to the opposite side. Then, students formed groups that included people from both sides of the room.

Once settled in groups, each group was given a six-sided die. They counted off so each student had a number, then rolled the die to see who would lead the group, which meant making sure each student got their turn to express their thoughts before the conversation became general. The groups then had twenty-five minutes to agree on how to handle the policy problem, with a warning when five minutes remained. They were also repeatedly told that they must each take clear notes on the group's decision, because these would form the basis of a later writing assignment.

This sequence is less complicated to do than it appears on paper. By the third week, the students had become quite habituated to it. Note-taking is important. Students do not naturally identify with a group decision or recall the reasoning behind it. They can only learn this through practice.

With their notes, students should practice (7) clearly communicating a policy decision as if writing for the general public. They should also consider objections and provide fair answers to possible questions. A few weeks later, each student picked one week's group decision and wrote a mock press release about it. They also created a "Frequently Asked Questions" page, addressing four or five questions or objections they came up with themselves.

During the course, students complete these exercises at least twice. They learn the fundamentals of clear communication about something they are responsible for, but responsibility in a group sense, not just as an individual. Although these papers are only two pages long, there is plenty of opportunity to get details wrong or right; to confuse or clarify.

3. An Example: Comparing Two Bilateral Treaties' Modes of Handling the Same Type of Problem–Water Rights

Various types of policy problems, especially those related to nature or the fundamentals of human welfare, exhibit similarities across cultures and can be treated comparatively in class. Climate change, modes of organizing public health, dealing with epidemics or pandemics, or improving energy efficiency are broad areas that will provide countless examples.

Here, I will work with one such area: bodies of water that cross national boundaries. One case concerns the United States and Mexico; the other concerns Iran and Afghanistan. In each case, a pre-existing treaty serves as a framework for water allocation and dispute settlement and can address new and unforeseen situations. There is also a major contrast: in the North American case, the headwaters are in the territory of the larger, more developed country, whereas in the Middle Eastern case, they are in the territory of the smaller, less developed country.

3.1. The North American Case

In North America, the water rights treaty was negotiated during a period of positive U.S.-Mexican relations. In 1944, both Mexico and the U.S. were at war against the Axis powers and were therefore allies. As Howard F. Cline (1965) notes in his classic account *The United States and Mexico*, German sinkings of Mexican cargo ships in 1942 had led Mexico to declare war on all three Axis powers.[8] During the war, Mexico and the U.S cooperated extensively on supplies and materiel. In the midst of this activity, the Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande was negotiated. It includes some features of interest worth considering for freshwater cross-border treaties in general.[9]

The treaty's formula for *who* will implement it tends to depoliticize problems and put technical aspects in the foreground. It established U.S. and Mexican Sections with parallel personnel structures. Each section is headed by an "Engineer Commissioner," who is aided by two assistant engineers, a legal advisor, and a secretary. All of these are granted diplomatic rank as a condition of the treaty, so their status is clear when they visit the other country. The Engineer Commissioners report directly to their foreign ministries.

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[8] See a classic account in Howard F. Cline, *The United States and Mexico,* New York: Atheneum 1965, pp. 265-272.

[9] The full text of the treaty in English and Spanish is available at https://www.ibwc.gov/wp-content/uploads/2022/11/1944Treaty.pdf.

The Treaty's personnel have the capacity to discuss and act on ongoing issues that are certain to demand attention, such as increases in sediment that clog waterways or higher salinity in water delivered from upstream to downstream. Their role is to negotiate an interpretation of the treaty as it applies to the matter at hand and embody that solution in a document called a "Minute".

The "Minute" is transmitted to the two foreign ministries. Either country has 30 days to object to a "Minute", which otherwise becomes part of the treaty with the same force as the treaty itself.[10]

The Treaty specifies annual water amounts to be delivered to Mexico, but given the aridity of the vast region covered, there is time flexibility in meeting the requirements. When the balance shifts toward excess or lack, U.S. deliveries that are higher or lower than the treaty amount are included in a five-year running average.

The upstream party has an incentive, in a year of high-water supply, not to retain all the water beyond the required level, because any surplus will be recorded in the five-year account. Thus, the variation in natural conditions has a greater scope to establish the required amounts over a longer term. (In the case of the Rio Grande in a high-water year, after delivering Mexico its required amount, the United States is still not entitled to more than one-third of the flow.)

In severe droughts, the time frame is extended. The treaty states: "In the case of extraordinary drought or serious accident to the hydraulic systems […] any deficiencies at the end of the aforesaid five-year cycle shall be made up in the following five-year cycle […]". [11]

Not all dams and storage works are the sole property of either country. The treaty provided for "international storage dams": the national shares of water in a given dam are agreed upon, and the dam's costs are divided in the same proportion. If the dam generates hydroelectric power, the associated costs are split evenly. Personnel from one country who are active in dam projects in the other country are free from any restrictions on their movement.

The "technocratic" style of problem-solving embodied in the U.S.-Mexico treaty has the weakness of being unresponsive to issues arising in smaller regions and districts across the vast area involved. The proof of this is that over the years, "Minutes" have

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[10] For a deeper look, see Stephen P. Mumme, "The U.S.-Mexico International Boundary and Water Commission in the Sustainable Development Era," *IBRU Boundary and Security Bulletin*, Summer 2001, pp. 117-125, at https://www.durham.ac.uk/media/durham-university/research-/research-centres/ibru-centre-for-borders-research/maps-and-databases/publications-database/boundary-amp-security-bulletins/bsb9-2_mumme.pdf.

[11] Treaty relating to the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, or the 1944 Water Treaty, signed at Washington, November 14, 1944, at https://www.ibwc.gov/wp-content/uploads/2022/11/1944Treaty.pdf.

created bi-national committees to focus on "problem and region-specific" efforts; an observer notes that "the narrowness of their focus appears to aid in their success".[12] In addition, "Citizens' Forums" are also held in various regions, to which the public is invited, and information on water activities is shared. However, it is unclear whether this is a significant channel for public input into policy.

3.2. The Middle Eastern Case

Before considering the other half of our comparison, it is important to note an underlying difference: for at least two centuries, the peoples of the Helmand Basin and its surroundings regulated water use on their own for much of the time, without outside help. In Afghanistan's Nimruz province (east of Iran's Sistan and Baluchistan province), "there is no document regarding problem solving." As Abdul Qayeum Karim (2016) notes, "*Mirabs* are accustomed to applying their experience for justification, and also [the] problem is only with one season" – that is, the season when water is more abundant (p. 18). Other scholars, referring to the late 19th century, observe that "while the question of water allocation remained unanswered, for 30 years disputes over the Helmand waters in the delta were apparently settled locally without intervention from central authority; that is, residents – Afghans and Iranians – cooperated in sharing the same water" (Nagheeby & Warner, 2022, p. 559). The same authors describe the period from 1905 to 1930 as similar. The point is not that if the local people on both sides of the border manage things, all will be well; rather, the point is that when all is well, they manage things. If customary usages are present today, even in part, then they can be viewed as a positive human resource ("a feature, not a bug") that allows the governments to focus on procedures designed to handle times of strain.

Floods, droughts, and the river's own changes, of course, require over time a level of binational planning that local people cannot provide – so there is no argument for autarky here. Even in earlier periods, such as "from 1905 to 1930, an annual joint commission made up primarily of academics appointed by the two countries cooperated in jointly measuring and allocating the Helmand water at Band-e Kamal Khan" (Nagheeby & Warner, 2022, p. 560). The impetus for the Helmand River Water Treaty of 1973 may have come in part from the severe drought of 1970-71. The treaty's ratification and exchange of instruments, however, did not come until 1977.

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[12] Sánchez, Anabel. (2006) 1944 Water Treaty Between Mexico and the United States: Present Situation and Future Potential, *Frontera norte*, 18(36), p. 136, at https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0187-73722006000200005.

The treaty leaves the question of *who* will implement its provisions largely to the two governments. Protocol Number One of the Treaty states only that "the Commissioners shall be appointed from among high-ranking officials" (Helmand River Water Treaty, 1973, Protocol No. 1, Article 3, p. 3).[13] The Commissioners, their deputies, and advisors from both countries constitute a Joint Committee which meets regularly.

Even if the Joint Commission agrees to handle a problem, its powers are unclear. Article 7 states affirm: "This Committee shall endeavor to solve expeditiously any problem which may arise in the performance of its duties under this Protocol. The decisions of the Joint Committee shall be binding within the limits of its authority."

However, Article 10 sets up another body that can overrule the Joint Committee:

Each party to the Treaty shall appoint a delegation headed by the Minister responsible for matters relating to water utilization. The delegations of the two parties shall together constitute the "Committee of Ministers […] which shall have jurisdiction to solve any problem that may arise in the application of this Protocol." (Treaty on Water Utilization, Article 10).

Article 11 further complicates the structure by stipulating that if the Committee of Ministers fails to reach an agreement, each party to the Committee shall submit a report to its respective Government so that "the two Governments seek a solution through diplomatic channels".

Notably, the Protocol specifies that "any decision made, or action taken by either Committee shall not in any manner whatsoever establish a precedent," ensuring that when a problem recurs, the problem-solving process starts from scratch (Treaty on Water Utilization, Article 11).

The level above the two Committees is covered by Protocol No. 2, which allows the parties to establish an Arbitral Tribunal of three members, one of whom need not be an Iranian or Afghan national. This last provision is the only part of the treaty with truly colonial echoes, recalling instances of British arbitration in the late 19th and early 20th Centuries.[14]

While the technical or "bottom" level of decision-making has its authority circumscribed, the time flexibility for equitable problem-solving is also somewhat narrow. In a year with low water levels, the amounts delivered by Afghanistan are to be adjusted downward; when water levels rise, the amounts delivered will also increase to specific levels set out in the treaty (Article 3).

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[13] *Ibid.*
[14] *Ibid.*

In practice, this suggests that there is only a two-year time frame in which the water deliveries can find equilibrium–a time frame in which Nature may not cooperate.

3.3. Organizing the Problem So Students Can Work on It

Students of policy need a framework for discussion that is grounded in the concrete yet includes abstract elements. Without trying to complete the task here, let me show how I would start in presenting the problem of cross-border water rights. By comparing the North American and Middle Eastern cases, we see that water rights issues are addressed in three broad domains, which we can call:

- The technical domain, which includes water engineers and agricultural and environmental experts:
- The usage domain, where regional residents carry out their activities;
- And the political domain, where water issues are a concern between governments.

We can imagine these domains hierarchically, with the political on top, the technical below it, and usage at the bottom. Alternatively, we can imagine them as overlapping, qualitatively distinct but not "stacked" or ranked. In the hierarchical view, it is always possible to take a seemingly intractable problem and "kick it upstairs" to the next level to solve. In the overlapping view, assigning responsibility for problem-solving can be difficult. However, it is possible to pool knowledge and resources across two or more domains and arrive at a solution.

What these two treaties emphasize is fairly evident. In the North American case, the treaty makes the two Engineer Commissioners and their staffs the hub of its operation. If the political domain wants to intervene in a decision that has been embodied in a minute, it must find the energy to do so and take the initiative. The communities in the usage domain would also have to struggle to get serious input into a given problem-solving process.

In the Middle Eastern case, the technical domain may be underemphasized. The treaty even stipulates that the Commissioners must be selected from high-ranking officials, not that they should be professionally qualified, though presumably members of their staff would be water engineers. There are no details in the treaty about the Committee's decision-making process or how to embody its decisions. If the Committee is deadlocked, it can always refer the matter to the Committee of Ministers, which sits above it. Hence, the political domain is always one step away when policymaking becomes difficult.

The "silent partner" in the Iran-Afghanistan treaty, however, is the domain of usage. Since Afghans and Iranians have a long history of customary usages that hold up fairly

well in years of average water levels, a breakdown in the political domain does not necessarily imply a breakdown in the water distribution–that depends on the stringency of the situation.

With these observations, I will stop. However, for a classroom, the next step would be to develop menus of specific options to improve both treatments.

4. Conclusions

I believe the seven fundamentals I proposed at the beginning of this paper are not inherently bound to the American context. Their origins are much older than those of the United States, so there is no reason to think they have unique American features. On the contrary, for these fundamentals, the United States has been an adapter of other traditions. Consequently, teachers of public policy in many other countries will likely find they can develop their own coursework with similar broad outlines.

Internationally, a readily available way to adapt these techniques is to use problems arising within international organizations, especially UN agencies dedicated to specific areas. While standpoints on a given problem may differ, the overall issue of how to determine the agency's path will remain the same.

Two cases that I have used in class are from the International Telecommunication Union (ITU) and the Food and Agriculture Organization (FAO). For the ITU, the problem was to develop recommendations for handling e-waste (typically used cell phones), with a range of options viable for low-, middle-, and high-income countries.[15] For the FAO, the problem was to develop a strategy to promote millets worldwide–grains that are hardly affected by heat, drought, high altitudes, and the effects of climate change–while avoiding their becoming a fashionable Western 'health food,' which would wreck their price structures for most countries' needs.[16]

When students imagine they are operating in an international organization, they get an initial taste of horizontal (less hierarchical) modes of organization. This is a valuable experience for later, when they are in frameworks where vertical organization is primary, which may appear to be only command structures. When a specific problem seems insoluble at first, both the vertical and horizontal dimensions of interaction should be tried out, one after the other, to see if the problem's rigidity can be loosened up.

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[15] For a recent discussion of the problem from the ITU, see "Supporting a Circular Economy for Electronics," https://www.itu.int/en/action/environment-and-climate-change/Pages/ewaste.aspx.

[16] For example, see Food and Agriculture Organization: "International Year of Millets 2023: Final Report," https://openknowledge.fao.org/items/f019d0db-768d-4428-8234-cf803968c4d9.

More broadly, students' learning experiences can be related to human issues in the practice of constitutionalism. Policy actors have to learn to operate their national constitution–that is, not to act within the constitution only in a passive sense, and certainly not to act outside it. They have to provide the right kind and degree of dynamism. Hence, students need to be taught, through practices and reflection, that there are essential human factors that those engaged in policy must infuse into existing structures.

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POST-COLONIAL HISTORY, SUBALTERN STUDIES AND THE (DEFICITS OF) NEO-HEGELIAN CRITICAL THEORIST. ON AMY ALLEN'S DECOLONIZING PROJECT

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HISTORIA POSCOLONIAL, ESTUDIOS SUBALTERNOS Y LOS (DÉFICITS DEL) TEÓRICO CRÍTICO NEOHEGELIANO: SOBRE EL PROYECTO DE DESCOLONIZACIÓN DE AMY ALLEN

Abstract
The paper takes its cue from Amy Allen's critique of contemporary German critical theory from the perspective of post- and decolonial studies. It takes up the conceptions of history and progress adopted by Jürgen Habermas and, above all, Axel Honneth in light of the neo-Hegelian strategy of "normative reconstruction." In doing so, it shows how this vision of the progressive development of "reason" in history establishes a hierarchy of eras and civilizations in favour of European modernity, a hierarchy strongly contested by subaltern studies. Against this background, the leading role played by subaltern groups, as highlighted in particular by Dipesh Chakrabarty,

is emphasized. The discussion then shifts to the neo-Hegelian model of immanent critique from the perspective of the relationship between the critical theorist and the subaltern. Here, the paternalism and detachment of the traditional critical theorist are contrasted with the listening of the organic intellectual/critic, a theme addressed by Antonio Gramsci and taken up again in subaltern (and cultural) studies.

Keywords

Critical Theory; Subaltern Groups; Antonio Gramsci; Amy Allen; Postcolonial Studies;

Resumen

Este artículo toma como punto de partida la crítica de Amy Allen a la teoría crítica alemana contemporánea desde la perspectiva de los estudios poscoloniales y decoloniales. Aborda las concepciones de historia y progreso adoptadas por Jürgen Habermas y, sobre todo, Axel Honneth, a la luz de la estrategia neohegeliana de la "reconstrucción normativa". Al hacerlo, muestra cómo esta visión del desarrollo progresivo de la "razón" en la historia establece una jerarquía de épocas y civilizaciones en favor de la modernidad europea, una jerarquía fuertemente cuestionada por los estudios subalternos. En este contexto, se enfatiza el papel protagónico desempeñado por los grupos subalternos, tal como lo ha señalado especialmente Dipesh Chakrabarty. A continuación, la discusión se centra en el modelo neohegeliano de crítica inmanente desde la perspectiva de la relación entre el teórico crítico y el subalterno. Aquí, el paternalismo y el distanciamiento del teórico crítico tradicional se contrastan con la escucha del intelectual/crítico orgánico, tema abordado por Antonio Gramsci y retomado posteriormente en los estudios subalternos (y culturales).

Palabras clave

teoría crítica; grupos subalternos; Antonio Gramsci; Amy Allen; estudios poscoloniales; estudios decoloniales

1. Introduction

German critical theory still must overcome a series of assumptions, perspectives, and methods that expose it to objections from post- and decolonial thinking. These theoretical deficits are particularly evident in the neo-Hegelian version of this research tradition, which primarily concerns adopting a conception of history rooted in a sequential model of development and progress. This view implies a clear hierarchy of historical eras, starting with the "myth of modernity," and of civilizations and their normative orders. We are faced with the classic Eurocentric thesis of the "superiority" of European modernity on several levels—cognitive, moral, ethical, and political—over other civilizations and eras, including colonized peoples. This is therefore a view fully in line with the most strongly felt polemical objectives of post- and decolonial thought, precisely because it has been a constituent part of the theoretical framework that has historically legitimized and justified colonialism. And it is still today a salient theoretical element of "colonial power."

This issue was firmly raised again by Amy Allen (2016) in *The End of Progress. Decolonizing the Normative Foundations of Critical Theory.* Allen draws on authors such as Dipesh Chakrabarty (2002, 2000), Edward Said (1978, 1989, 1993), Gayatri Spivak (1999), Homi Bhabha (1994), Enrique Dussel (1993), and Walter Mignolo (2002, 2007, 2011). She reveals the problematic nature of the notions of progress and modernity used by leading authors of contemporary German critical theory, such as Jürgen Habermas (1987) and Axel Honneth (2014). Both continue to defend a conception according to which European modernity is fundamentally an "unfinished project" to be completed, adopting a cumulative and retrospective conception of progress that Honneth (2014) openly declares teleological.

More specifically, Allen (2016) argues that, in their normative foundation strategies, both Habermas and Honneth use a distinct neo-Hegelian immanentist methodology of "normative reconstruction." They retrace the "stages" of normative progress achieved in modern history and then argue for the "developmental superiority of European Modernity" (Allen, 2016, pp. 71 ff., 114 ff.). Allen contrasted this approach with Foucault's historical genealogies and Adorno's dialectic of progress.

In light of the critiques of the neo-Hegelian conception of progress, as well as of the regressions found particularly in Axel Honneth (2007a, 2007b, 2009a, 2009b) and in various respects, in Rahel Jaeggi (2025), in this paper, I would like to point out a further deficit. This deficit relates to the specificity of the method of "immanent critique." On this level, which is more properly inherent in the forms of social criticism, critiques from post- and decolonial studies are also applicable.

These start with the paternalism of "progressive" theorists of colonization. I believe these critiques can be directed at the detached, superior stance that the traditional critical theorist assumes toward subalterns when using the neo-Hegelian strategy of immanent critique. It is therefore a matter of advancing the analysis and critical discussion of the deficits identifiable on both levels: that of a teleological philosophy of history, and that of the forms of immanent critique characteristic of the neo-Hegelian turn in contemporary German critical theory (see Solinas 2019a, 2019b, 2021, 2025; Honneth 2019; Jaeggi 2021).

To clarify this issue, we will first examine Dipesh Chakrabarty's position (Chakrabarty, 2000, 2002). Traditional Hegelian historicism often leads to the classic *paternalism* of the "European colonizer," whose actions aim to 'help' and 'educate' the colonized. The theorist who embodies this hierarchical view of historical development places himself on a plane of clear superiority over "non-Europeans," whom he considers 'immature' and at a 'lower' stage of civilization. Subaltern studies overturn this approach. They focus on listening *to* the subalterns, and theorists place themselves on an equal footing.

In a second step, we will explore this reversal of perspective in greater depth. The neo-Hegelian model of immanent critique remains tied to a hierarchical view of the relationship between critical theorists and subalterns. In contrast, the position of the theorist outlined in subaltern studies can be traced back to the figure of the organic intellectual outlined by Antonio Gramsci (1992, 2000). The traditional critical theorist adopts a top-down view, focusing their criticism on what they consider to be blocks, interruptions, pathologies, and deformations of the progressive (and teleological) path of reason in history. The organic critic, instead, moves from the demands felt and expressed by the subalterns.

2. Destroying the Waiting Room of History

Amy Allen shows that the concept of progress in contemporary German critical theory reflects a strongly hierarchical view of history that is openly exposed to criticism from post- and decolonial studies. This issue emerges clearly in Axel Honneth's *Freedom's Right* (2014). The method of 'normative reconstruction' is, in fact, directly anchored in "Hegel's teleology notion that the present always stands at the forefront of a historical process in which rational freedom is gradually realized" (Honneth, 2014, p. 59).

However, this view is certainly updated in a post-metaphysical form. This conception, as Allen (2016) points out, implies a "moral superiority" of European modernity—openly claimed on several occasions by Honneth (2014) and Habermas (1987). They present European modernity and its forms of life as superior in an evolutionary con-

ception.[1] This supposed superiority is doubly harmful: "not only has the claim of moral and cognitive superiority repeatedly been used as a justification for imperialism and colonialism […] but this claim to superiority and the developmentalist conception of history used to support it are themselves gestures of the powerful" (Allen, 2016, p. 116 f.).

As Allen (2016) recalls, Dipesh Chakrabarty (2000) clearly highlighted the link between traditional historicism and colonialism in his now-classic *Provincializing Europe*. For example, referring to John Stuart Mill, Chakrabarty writes:

> According to Mill, Indians and Africans were not yet civilized enough to rule themselves. Some historical time of development and civilization (colonial rule and education, to be precise) had to elapse before they could be considered for such a task. Mill's historicist argument thus consigned Indians, Africans, and other "rude" nations to an imaginary waiting room of history. (Chakrabarty, 2000, p. 8)

Chakrabarty (2000, p. 8) points out the morally and politically crucial point of this vision: "That was what historicist consciousness was: a recommendation to the colonized to wait." This is a wide-ranging criticism. It is certainly not directed solely at Mill's paternalism, but contemplates historicism as such. It repeatedly targets the Marxist tradition and its "ideology of progress," characterized by a structure of global historical time condensed in the motto: "first in Europe, then elsewhere." (2000, p. 8). This vision, as Chakrabarty (2000) observes, "allowed Marx to say that the 'country that is more developed industrially only shows, to the less developed, the image of its own future, and that 'in the colonies, it legitimated the idea of civilization" (2000, p. 8; see Marx 1990, p. 91). We could also include Hegel's (2001) open justification of colonialism here. He can be counted among the founders of historicism *tout court*. For example, when he argued that:

> The English have undertaken the weighty responsibility of being the missionaries of civilization to the world; for their commercial spirit urges them to traverse every sea and land, to form connections with barbarous peoples, to create wants and stimulate industry and first and foremost to establish among them the conditions necessary to commerce, viz. the relinquishment of a life of lawless violence, respect for property, and civility to strangers". (Hegel, 2001, p. 475; see also Hegel 1991)[2].

[2] Hegel (1991, §351): "The same determination *entitles* civilized nations to regard and treat as barbarians other nations which are less advanced than they are in the substantial moments of the state (as with pastoralists in relation to hunters, and agriculturalists in relation to both of these), in the consciousness that the rights of these other nations are not equal to theirs and that their independence is merely formal."

One of the main theoretical fault lines that Chakrabarty (2000) works on is crucial for overcoming *the theoretical and political deficits* of historicism. This applies to both its liberal and Hegelian-Marxian forms. The aim is to overturn this traditional approach, especially regarding the ethical and political role and stature attributed to the subaltern classes. Rather than waiting for the 'right moment' or being represented by theorists who consider themselves 'superior' to them on multiple levels, these classes must be considered first and foremost "as the makers of their own destiny" (Chakrabarty, 2000, p. 11). A dialogue must be established on a plane of full moral and political equality. This perspective embodies one of the theoretical traits that shapes this entire tradition of research:

> As is well known, an explicit aim of *Subaltern Studies* was to write the subaltern class into the history of nationalism and the nation, and to combat all elitist biases in the writing of history. To make the subaltern the sovereign subject of history, to listen to their voices, to take their experiences and thoughts (and not just their material circumstances) seriously–these were goals we had deliberately and publicly set ourselves. (Chakrabarty, 2000, p. 102).

This raises the crucial issue—also highlighted by Allen (2016)—of listening to subalterns, to their voices, and engaging in dialogue. This approach is not only distinct from but also opposed to the traditional position of a theorist. The traditional theorist considers themselves superior and speaks for, or even against, subalterns. This often means denying subalterns the right to speak or dismissing their voices as irrelevant. It is on this level that we see a clear divergence from the figure of the critical theorist who adopts the neo-Hegelian model of immanent criticism.

3. Organic Connections

One salient feature of the neo-Hegelian method of immanent critique lies in the critical theorist's detachment from the positions locally shared by specific subordinate groups and their cultural formations. As Axel Honneth has often clarified, the methodology of immanent critique, which he sees as defining German critical theory, should be understood as a clear alternative to the "models of social criticism that are constructed in the spirit of Michel Foucault's genealogical method or in the style of Michael Walzer's critical hermeneutics" (Honneth, 2009a, p. 19). In other words, it is a question of avoiding the adoption of methodologies that rely on critics closely connected to the demands of specific social groups. These critics often

'interpret' the needs and expectations of these groups from a close distance, as in the model of internal or immanent criticism proposed by Michael Walzer (1987). It is also necessary to avoid relying on those who operate 'locally', such as the specific intellectual outlined by Foucault (1977, 1980).

On the contrary, Honneth (2009a) argues that the neo-Hegelian model of immanent critique must be anchored in the ideal of the progressive and teleological development of "reason" in history. Critique, for him, takes the form of a diagnosis of the "deformations" and "pathologies" that occur when "the progress of reason is blocked or interrupted," and is therefore understood in terms of "socially deficient rationality" (Honneth, 2009a, p. 19). The sharing and adoption of criteria that are "immanent" in a given social reality develops in light of the critical theorist's ability to 'reconstruct' the forms in which "reason" is embodied over time in social and institutional life.

Conversely, the theorist must also diagnose the blocks and interruptions in this progressive development. Thus, it is not a question of sharing the demands, needs, and desires embodied in the lived experience of the popular strata and expressed by the subalterns. These demands, on the contrary, can and must be critically commensurate with this teleological path. This explains Honneth's defence of the perspective of an author such as Marcuse as well as his fierce criticism of (false) "mass" needs and desires (Honneth, 2009b, pp. 44 ff., 2009c).

Conversely, from the perspective of subaltern studies and their convergence with post- and decolonial studies, one of the turning points is represented by the breakdown and reversal of the critic's/intellectual's relationship of superiority over the subaltern. It is a question of re-establishing a relationship based on listening, continuing along the path opened by Antonio Gramsci (2021), who criticized traditional intellectuals for their paternalistic attitude. In his words:

> Of paternal and divine protection, the 'self-sufficient' feeling of one's undisputed superiority" over the subaltern, whose relationship was thus stigmatized: "like the relationship between two races, one superior and the other inferior; like the relationship between adults and children in old schooling; or worse still, like the relationship of a 'society for the protection of animals', or like that of the Anglo-Saxon Salvation Army toward the cannibals of Guinea" (Gramsci, 2021, p. 69).

The criticism was therefore directed at those traditional intellectuals who "do not feel tied" to the people and "do not know and sense their needs, aspirations, and feel-

ings. In relation to the people, they are something detached, without foundation, a caste and not an articulation with organic functions of the people themselves." (Gramsci, 2000, p. 367).

Certainly, for Gramsci (1992), the organic intellectual must not remain confined to merely recording what exists. Still, it must perform an auxiliary function of clarification and even "direction," aimed at bringing the demands of the subalterns to a high level of theoretical elaboration and advancing them on the plane of political and cultural struggle. To summarize schematically, there is a need to strike a balance between two poles:

> The popular element 'feels' but does not always know or understand; the intellectual element 'knows' but does not always understand, and in particular does not always feel. The two extremes are therefore pedantry and philistinism on the one hand and blind passion and sectarianism on the other." (Gramsci, 1992, p. 69).

Thus, the mistake of the intellectual "consists in believing that one can know without understanding, and even more so without feeling and without passion" (Gramsci, 1992, p. 418). The intellectual also errs by adopting a position "distinct and separate from the people and the nation" (Gramsci, 1992, p. 418).

Conversely, the organic intellectual establishes a strong connection with subalterns. This connection helps form, at the political-cultural level, a "historical bloc" capable of acting within the framework of power relations in the given historical situation. As Stuart Hall pointed out, "Relations of force," which "constitute the actual terrain of political and social struggle and development," are established from time to time (Hall, 1996, p. 411). These occur within a general framework in which "no necessary teleological evolution" is assumed (Hall, 1996, p. 422).

Now, by situating the figure of the organic intellectual within the discussion of two models of criticism in German critical theory and the traditions of post- and decolonial studies, it becomes clear that we face two distinct alternatives regarding the position of the social critic. On one hand, there is the neo-Hegelian model of immanent criticism. This model is anchored in an ideal of the progressive and teleological development of reason. By adopting this parameter, the critical theorist, acting *alone*, so to speak, and sometimes even against the 'local' claims of subordinates, has the primary task of identifying those blocks and deformations in the development of reason that he considers to be social pathologies.

Conversely, critics organically connected to subordinates start from their demands,

needs, and desires, interpreting and reworking them on a theoretical level and advancing them in light of the current power relations and conflicts existing at a specific moment in history. Subordinates' demands and positions are understood not in light of a normative ideal of "rationality" (or irrationality), but rather as emancipatory visions, conceptions, and ideologies. The organic critic is committed to making these positions hegemonic within the framework of the struggles that arise from time to time.

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SINGULARITY, GENEALOGY, PROBLEMATIZATION. ON FOUCAULT AND THE FRANKFURT SCHOOL*

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I will briefly examine the direct relationship Michel Foucault (1971, 1978a, 1978b, 1982a, 1982b, 1983, 1984) establishes with the Frankfurt School through key texts I consider decisive. This confrontation emerges from several interviews conducted in the late 1970s and early 1980s, as well as in a significant lecture on the meaning of critique, delivered at the *Société Française de Philosophie* on May 27, 1978. Notably, this lecture was omitted from the *Dits et écrits edition*; it is less widely known. My talk aims to reaffirm the logic of Amy Allen's (2016) approach in her book while problematizing some of her conclusions.

For Foucault (1982b), the term *rationalization* is "dangerous", just as calling reason to «trial» is «sterile». From Kant (1784) onward – a point he makes explicit – the problem of limiting power and critiquing domination becomes the hallmark of modern thought. This is significant given the persistence and relevance of his reference to Kant's text. Foucault (1982b) finds the use of the word "rationalization" both unnecessary and dangerous, specifically because it perpetuates a link between morality and socio-political structures[1]. For Foucault (1983), this involves the interplay between rational and

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[1] M. Foucault, *À propos de la généalogie de l'éthique : un aperçu du travail en cours,* (1983), now in: M. Foucault, *Dits et écrits 1954-1988*, Édition établie sous la direction de D. Defert et F. Ewald avec la collaboration de J. Lagrange, Paris, Quarto Gallimard, 2001, vol. II (1976-1988) [= DE2], pp. 1202-1230, p. 1211.

irrational, guilt and innocence, all of which are fixed by the judgment of legitimacy on which critical thought relies.

On the other hand, he is also worried about the notion of "progress" as an overarching, global, and unilinear process; or, in Allen's (2016, pp. 13-14; Foucault, 1982) terms, as a "fact". Furthermore, Reinhart Koselleck (2004)[2] shows that between the late eighteenth and the second half of the nineteenth century, historical science came to see the future as future past. The future became fully determined by the premises conditioning its development. Thus, rendering it foreseeable within the emerging centrality of the social sciences.

Regarding the dangers associated with *rationalization* and the idea of a dialectic of Enlightenment as a trial of Western reason, Foucault (1982b) distances himself from the Frankfurt School, calling for "another way" to analyze power (Chignola, 2025). However, what I find most significant is that, in other Foucauldian texts, this distance is not framed as an outright opposition. Rather, it delineates their relationship more precisely, particularly regarding the definition of critique. Foucault (1978a) himself explicitly describes this relationship as "fraternal"[3].

Once again, the Enlightenment – reconsidered through the lens of Kant – represents a crucial issue. Foucault (1978a) credits the Frankfurt School with drawing attention to the problem of the Enlightenment and to the interplay between reason and power. This is particularly important in relation to the Frankfurt School's analysis of the relationship between science and technique, between *épistème* and *techné*. This same relationship resurfaces in the analytics of structures of French historical epistemology and its potential for political radicalization. French epistemology introduces the theme of ruptures that punctuate the history of knowledge. German theory – more directly tied to the issue of modernization and shaped by its constitutional history's relationship to domination – reasserts the centrality of the Enlightenment, even within French philosophy. This "chiasm" between Germany and France, oscillating between views on knowledge and powershifting, is highlighted by Foucault as:

1. An indispensable premise for addressing the problem of an ontology of actuality.
2. An equally essential foundation for "desubjectifying" [*désubjectiver*] philosophy and rearticulating it in a historical-genealogical sense.
3. A key premise in the analytics of power, highlighting that the structures of rationality

[2] See: Chignola (2025).

[3] «ce problème qui nous rend fraternel par rapport à l'École e Francfort» (Foucault, 1978a, p. 45).

function not only as mechanisms of subjugation but also as "pure singularities" whose positivity establishes contingent and always reversible relations, since, for Foucault (1978a), power is never exercised in a unidirectional or global manner. For Foucault (1978a), the Kantian approach to the problem of Enlightenment identifies two key points.

The first one concerns the connection between thought and the historical present, which establishes the modern critical «attitude» of thought. The second point is crucial for configuring what Foucault (1978a) calls critique, which addresses the relationship between power, truth, and the subject. This relation is defined within the processes of governmentalization that Kant helps delineate, but Foucault presents them in reverse. He begins with mechanisms of de-subjectification that, on the side of the governed, challenge their relationship to power and truth at every level.

These two points allow Foucault (1978a) to deconstruct the Enlightenment as a historical figure or ideal type of rationalization: instead, he reinterprets it as a «matrix» with multiple entry points. This «matrix» processes changes in the relationship among truth, power, and the subject over time.

Foucault (1982b) also claims that these occur within strategic games that are inevitably expanded by the irreducible resistance, which keeps them in tension. The «chiasm» with Frankfurt's theory leads to a fragmentation of the relationship between rationalization and domination, between knowledge and power. The displacement of the analysis toward strategic games, where rationality or knowledge acts as a «revolving door». This offering has a certain power grip, thereby allowing the possibility of an overthrow (Foucault, 1982a).

Beginning with his reading of Kant's (1784) text, Enlightenment is the term Foucault uses to describe the connections between archaeology (the plane of knowledge and the discontinuity of the structures of rationality), genealogy (the plane where knowledge is linked to its power effects), and strategy (the analytical plane where the exercise of power emerges as an agonistic game, resistible and reversible) (Foucault, 1982b). For Foucault, this connection defines the main purpose of his work: to historicize and fully politicize philosophy. It also affirms his inherent claim to the immediate political responsibility of thought. This political responsibility does not mean normativism or the invocation of universal principles of justification. Instead, it operates within the "field of immanence of pure singularities" (Foucault, 1978a). Here, the power games are treated as Wittgenstein treats language games: within the realm of «everydayness» and surface, "eventializing" and problematizing their political conditions of emergence (Foucault, 1978b). This sets genealogical work in motion in different fields, whose relevance is defined by the conflicts that arise and run through them.

It seems to me that a problem arises here: it is certainly true that for Foucault, freedom is always possible and, therefore, it operates as a device of futurization. However, freedom, understood as an essential part of the unfolding of the power relation and as that which holds it in tension, does not pertain to the normative sphere or only to modernity's achievement, but rather to the dynamics of power relations. For Foucault (1978a), the Enlightenment is a «matrix» in the sense that the power-truth-subject schema can be used to analyze *any* configuration between freedom and power, or between subjectification and modes of subjection.

In my view, this is a decisive point for understanding the overall meaning of Foucault's work and the significant distance that separates him not only from critical theory but also from much of the contemporary philosophical-political discourse. If, as Foucault famously stated, knowledge is not meant to understand but to take a position, "pour trancher", as he writes (Foucault, 1971), then the central problem of philosophy is to accept that there is no such thing as an outside to power games. There is no position of detachment from actuality on which one can settle a critical gaze. It is impossible to call history, even that of Western rationalization, before the tribunal of reason. Nor is there a progressive direction in which to resolve the material contradictions that make history a permanent battleground.

An ontology of actuality means recognizing that every historical present is an event. Eventializing history [*événementialiser*] – that is, treating it as a series of discursive singularities and dissolving its continuity into a set of blocks that correspond to strategic, multiple-entry games – is necessary to undo the idea that the present we belong to, and not just the future, is given to us as a *fact*. On this point, I am in complete agreement with Amy Allen (2016). Foucault (1984) inherits the question of the Enlightenment from the Frankfurt tradition, but emancipates it from the history of Western rationalization. With Kant, this question of the present and its event is grasped in its singularity (Foucault, 1984). It becomes the «matrix» that allows us to repeatedly address, at every moment in history, the connection between power, truth, and subject as a strategic game in which domination and freedom confront each other.

In this context, philosophy abandons the task of justification traditionally assigned to it. Instead, it challenges the stability of the present and supports its destabilization. Building on this understanding, genealogy is an inherently and immediately political task, insofar as the relevance of the archives and problems to be studied is determined by what continually reopens and expands the relationship between freedom and power: power that is not a "thing" or an intention, but "action upon action", or more precisely, *re-action* upon action or conduct. Specifically, what Foucault refers to, drawing on

analytic philosophy, as "games of power" [*jeux de pouvoir*], are serious singular games that history can address in terms of positivity or emergence. These games must be approached within the field of immanence, where goals and strategies, truth and knowledge, power and resistance are always exposed to the randomness of praxis, which either accommodates or revokes their "government".

In my view, it is highly significant that Foucault reclaims the semantics of government. This move frees his analysis from the formalism inherent in the term "power" and from its uncritical association with the modern state's constitutional process. Government, as seen in his earliest analysis, is orienting living relations. The central concern is precisely its acceptability or resistibility. The reality of government is shaped by what makes it inherently *problematic*. The Foucauldian terms "problematization" and "eventialization," as genealogical tasks, must be understood within this framework.

Power has no outside: its process defines the field of immanence where knowledge and truth relate. However, this does not suggest that power controls all reality. Rather, it highlights that power is always exposed to the risks of its performative capacity to impose order.

"Je ne cherche pas à dire que tout est mauvais, mais que tout est dangereux," Foucault (1983) once stated. And: "Si tout est dangereux, alors nous avons toujours quelque chose à faire" (Foucault, 1983, p. 1205). In other words, there is always something to do. This is true both on the level of individual responsibility — since all of Foucault's works are driven by problems of the present and aim to trace genealogies that challenge its definitiveness — and on the level of collective responsibility, which emerges when the processes of government subjectify the position of the governed. In this regard, I would like to highlight a point that aligns closely with Amy Allen's (2016) approach. From Foucault's perspective, Adorno's (1964) statement, "progress occurs where it ends", can be understood in two ways. On the one hand, it involves breaking free from the teleological patterns of the philosophy of history. This teleology supports the process of institutionalizing the social sciences within the modern state. On the other hand, it reopens history to the event, both within and beyond each singular configuration of the "power game".

Foucault's approach is not just a political philosophy. It is a deliberate *political use of philosophy* that employs history as a terrain for revealing blocks of intelligibility and positive singularities that correspond to real battlegrounds. He refers to them as "fictions historiques": not as restitutions of meaning inherent to the objectivity of the historical process. Instead, they explore how knowledge, truth, and power emerge and relate to one another, but as inquiries into the logics of emergence that shape their connections.

These processes structure the relationship between practices of subjection and practices of liberation (Foucault, 1978a)[4].

To undertake the "genealogy of problems" is not merely to "problematize" in the conventional sense of critique. Instead, it is to approach reality as a *heterogeneous, multiple-entry system*. One where each access point corresponds to specific operations and domains, none of which can neutralize the element of randomness that destabilizes the exercise of power or, in terms of Foucault (1983), the exercise of government. The genealogist's research agenda is dictated by the present, by struggles, conflicts, and resistances that function as "chemical catalysts". These make visible power relations that would otherwise remain unnoticeable (Foucault, 1982a, p. 1044). For this reason, Foucault defines critique, in what seems to me an obvious reference to Weber, as an "attitude", as an ethos, as a «vertu». This critique demands both obstinacy and "courage". At stake, in the Kantian text, are the tasks of what Foucault (1978a) calls a "philosophie à venir" or "philosophy to come" (p.36).

The question, then, is whether this "philosophy to come" can be resolved into a renewal of critical theory. Allen's (2016) approach is highly valuable in this regard. This is particularly in light of Foucault's (1982a, p. 1097-1099, 1982b, p. 1053, 1984b, p. 1545-1546) distancing himself from Habermas. However, the issue remains: Is such a renewal sufficient? Beyond the «epistemic humility» required to decolonize its reconstructive paradigm and curb its ethical-applicative tendencies, a further step may be needed. This step would involve an act of "unlearning" (Allen, 2016). It would move beyond its own canon and assume responsibility for the present that calls upon us.

Against this backdrop, put bluntly, the issue is not the project of modernity, its possible fulfillment, or the normative claims of philosophy. Rather, it is the forms and practices of domination, racialization, exploitation, and everyday violence. These fracture the present, making it asynchronous with itself. To think the contemporary means *to set one time against another.*

This asynchronicity – continually reinforced by contradictions that cannot be dismissed as historical residuals, since they are *precisely* what enables today the reproduction and expansion of the capital's operations (Mezzadra & Neilson, 2019) – must be acknowledged to take a position. For me, this means problematizing the status quo while simultaneously choosing a side in the struggle between freedom and power.

Building on this, after all, this is what critique means for Foucault. Moreover, I am not sure to what extent this perspective can be reconciled with a critical theory that, as I believe Allen (2016) also suggests, has long taken a completely different path.

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[4] See Chignola (2018).

It is not critical theory but historical materialism that Walter Benjamin (1991) himself invokes. He does so in a sense not too far from Foucault's when he writes:

> No document of civilization is not at the same time a document of barbarism. Moreover, just as such a document is not free of barbarism, barbarism also taints the manner in which it was transmitted from one owner to another. A historical materialist, therefore, dissociates himself from it as far as possible. He regards it as his task to brush history against the grain[5].

Given this, I wonder if our task today is not similar: moving from what, in the present, threatens the very possibility of the future.

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[5] «Es ist niemals ein Dokument der Kultur, ohne zugleich ein solches der Barbarei zu sein. Und wie es selbst nicht frei ist von Barbarei, so ist es auch der Prozeß der Überlieferung nicht, in der es von dem einen an der andern gefallen ist. Der historische Materialist rückt daher nach Maßgabe des Möglichen von ihr ab. Er betrachtet es als seine Aufgabe, die Geschichte gegen den Stricht zu bürsten» (Benjamin, 1991, pp. 696-697).

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DISMISSING PROGRESS. RECONSTRUCTIVISM, CRITICISM, GENEALOGY[1]

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INTRODUCTION

This article explores different approaches to genealogy. It inquires Honneth's reconstructive criticism with a genealogical reservation and Allen's problematizing genealogy. It compares these two cases with the characteristics of genealogy as outlined by Foucault to highlight the differences among reconstructivism, criticism, and genealogy. It considers Harcourt's reflections on the plurality of genealogical paradigms and challenges the usefulness of dismissing the idea of progress.

This article also aims to explore different approaches to the genealogical method to dismiss the concept of progress. The starting point is Amy Allen's 2016 work, *The End of Progress*, namely the analysis of the link between normative foundation and progress and the goal of decolonizing Critical Theory. If post- and decolonial thought has questioned and rejected the idea of historical progress as Eurocentric and imperialist, many of the most prominent exponents of the Frankfurt School, including Jürgen Habermas, Axel Honneth, and Rainer Forst, continue to affirm the ineliminability of progress. Although they use different strategies to argue for these theses – as Allen explains at length

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– they agree that progress, development, and modernity are indispensable for formulating and sustaining normative claims. Allen refuses this view and suggests following instead Adorno and Foucault (which she calls "Adorno's Other 'Other Son'" (Allen, 2016, p. 163). In conclusion, she identifies several instruments for decolonizing Critical Theory, including the notions of unlearning, epistemic humility, and metanormative contextualism.

The latter, that is contextualism about normative justification, as a position in moral epistemology, reveals us "the contingency of our beliefs and normative commitments and showing us the ways that those beliefs and commitments have been contingently made up of complex relations of power, domination, and violence" by the "method of problematizing genealogy" (Allen, 2016, p. 209).

The term 'genealogy' is used in various ways by some authors of the Frankfurt School, by Allen, and by Foucault, who draws inspiration from Nietzsche. Therefore, in the following lines, we inquire into a case where it is used as a "corrective" and an example where it is "corrected" by certain attributes, to conclude with the most prominent features of the genealogy outlined in Foucault's *Nietzsche, Genealogy, History.*

In the first case, we focus on Honneth, who seeks to mitigate his contention that we need a robust account of historical progress to secure the normativity of critical theory by suggesting a reconstructive critique with a "genealogical reservation" (Honneth, 2001, pp. 3-12). In the second one, the genealogical method is specified by the addition of an adjective, such as in Allen's "problematizing genealogy".

Another example of this strategy is the book by Angela Davis, Gina Dent, Erica Meiners, and Beth Richie, titled Abolition. Feminism. Now. (2022). This work introduces what they call a "critical genealogy" of current social movements advocating for abolition and Black lives. Our aim is not to "impugn types of genealogy or typecast critical philosophers." Instead, the question is whether these clarifications about genealogy help us reject the idea of progress. For example, Harcourt (2024), in his essay *On Critical Genealogy,* affirms that sometimes "the genealogical work of demonstrating how a particular way of life has become dominant […] can itself become oppressive" (p. 170), meaning that it can "sometimes feel overbearing, as if there's no way out and no way forward" (p. 170).

Building on Harcourt's concern, he considers it "urgent that we now knock on those genealogies to determine which are hollow and which are robust – which discourage, and which encourage action. It is time for us to do, not just genealogical work, but *critical genealogical* work" (Harcourt,2024, p. 170). This kind of remark is punctual and useful, because it reminds us that "at its best, genealogy involves a practice of critique

and praxis that […] leads to action" (Harcourt, 2024, p. 171). And yet, we can note that expressions such as 'critical genealogy' or 'problematizing genealogy' disregard the distinction between genealogy and criticism, and in doing so, they do not allow us to grasp the specificity of genealogy, which could help us to dismiss the idea of progress.

Firstly, we consider Honneth's (2007) reconstructive criticism with a genealogical reservation. This formula implies that it is the concrete customs of our present which constitute the standards for evaluating our form of life. Thus, the risk of teleologism, still high in the idealistic model, should be corrected by the genealogical reservation, that is, a sort of precautionary principle that reminds us of the hiatus between an ideal and its realization.

The reservation, however, is a principle introjected into the Enlightenment project, within which the genealogical critique does not problematize the Enlightenment account of reason or its implications; furthermore, it does not delegitimize reason as such, which was precisely the focus of Nietzsche's use of genealogy (Nietzsche, 2017). As a result, the power of criticism to tend towards ideal goals is formally safeguarded.

Once the normative competence of reason is reaffirmed, the capability of criticism to tend towards ideal objectives can be maintained, and if combined with the reconstructive approach, a circularity arises. This circularity lies in the fact that the criteria for judging reality are found within it, but are compelled to confirm it because of the value still attributed to reason, namely, the justification of institutions and habits.

If, on the one hand, the intersection of these two models causes a theoretical short circuit at the level of justification, on the other hand, their connection reinforces them in their political consequences. We refer to the idea that the alleged superiority of the modern Western vision is rationally proven and can be universally extended, and that there is a linear progress within which everything is encompassed, from regressions to conflicts, a line on which one can move forward or backward, but that, anyway, points towards a precise direction from which there is no escape.

Indeed, Honneth (2007) outlines a conflict-ridden, discontinuous, yet unstoppable historical learning process that has nothing to do with genealogy. The fracture that characterizes the latter is the emergence of qualitative differences, a decentralization that shatters existing values and creates irreconcilable tensions between ethical systems.

Instead, in Honneth's vision, discontinuity (Honneth, 2007, p. 16) concerns domination and is considered an obstacle to the stadial process; thus, it should be excluded from history. Since the latter is seen as a development, Honneth must find an antidote to discontinuity: events which "touch on the 'interests of humanity', can no longer fall into oblivion with respect to the species' learning capacity. The result is that, like stages

or degrees, they mark a progress in the process of a future emancipation of humanity that is irreducible" (Honneth, 2007, p. 17).

We can conclude that the genealogical reservation has nothing genealogical about it. Indeed, genealogy maintains "passing events in their proper dispersion"; his method "is to identify the accident, the minute deviations […] the errors, the fails appraisals […]; it is to discover that truth or being do not lie at the root of what we know and what we are, but the exteriority of accident"(Foucault, 1977, p. 146). On the contrary, Honneth confirms and reinforces concepts such as universality, species, and humankind. Either way, these categories need the idea of progress to claim emancipatory aims. To make it clear, the reference to all humanity needs and supports a strong stadial view of history, and hence the account of progress.

Secondly, we analyze a case that helps elucidate the relation between criticism and genealogy. We refer to the definition of the term 'genealogy' by the adjective 'critical' or 'problematizing'[2]. In Allen's work, problematizing genealogy is a method that shows us "how our normative commitments are entangled with relations of power and domination" (Allen, 2016, p. 205). It is also, as she clearly states, "a way of inheriting the normative perspective of the Enlightenment in the dual sense of taking it up while simultaneously problematizing and decentring it" (Allen, 2016, p. 205).

Foucault, too, as Allen emphasizes, underlines in *What Is Enlightenment?* "the extent to which a type of philosophical interrogation – one that simultaneously problematizes man's relation to the present, man's historical mode of being, and the constitution of the self as an autonomous subject – is rooted in the Enlightenment" (Foucault, 1997, p. 312). But there is a divergence in the way genealogy's specificity is conceived in relation to the Enlightenment.

According to Allen (2016), "in order to realize the normative legacy of the Enlightenment fully, we need a different sort of relationship to our history, one that is neither subversive nor vindicatory, but rather problematizing" (Allen, 2016, p. 121). What is implied in this categorization[3] becomes evident when Allen states that "critical theory

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[2] The expressions "critical genealogy" and "problematising genealogy" – formulated by Harcourt and Allen respectively – answer to two different needs: the first is to distinguish, in a context in which the adjective genealogical has become hegemonic, those works that really "augmented and directly invigorated our activity" (Harcourt, 2024, p. 172). The second is to differentiate a certain kind of genealogy from what is called vindicatory or subversive genealogy. It seems to us that these specifications reveal a fear of renouncing certain categories that the genealogical approach necessarily breaks down, not as 'subversive' but as such, namely a method that renounces the search for the origin.

[3] Allen, 2016, p. 166: "I sketch out the distinctive alternative methodology for the philosophy of history that can be reconstructed from the work of Adorno and Foucault. This methodology weaves together vindicatory and subversive genealogies […] in service of a distinctive genealogical aim: a critical problematization of our present historical moment. This problematization […] has a normative point, namely, the fuller realization of the normative inheritance of the Enlightenment, in particular, the norms of freedom and respect for the other".

starts from the basically Hegelian metanormative contextualism is perfectly compatible with the kind of moral-political universalism that Habermas and others hold so dear" (Allen, 2016, p. 43).

Even if there is a significant difference with the position of the last exponents of the Frankfurt School, as Allen explains in *The End of Progress*, we can see how she tries to safeguard a future-oriented notion of progress. Allen writes, "the normative principles and ideals on which we rely in our judgments about what could or would count as progress in the future may rest on a contingent foundation, but they are no less powerful for that" (Allen, 2016, p. 43).

In Foucauldian thought, precisely because of the genealogical method, we cannot find the idea of a distorted or incomplete realization of the Enlightenment that needs correction. This correction, as happened in the dialectical approach, remains in Adorno. Genealogy is not aimed at saving the account of progress, nor is it a future imperative, and it is not declined in normative terms.

We do not intend to claim that genealogy *per* se requires the renunciation of certain concepts as if genealogical methods were defined in contrast to the use of specific categories. However, juxtaposing 'genealogy' with methods such as metanormative contextualism, which aim to reaffirm the validity of normativism and a forward-looking conception of progress, could blur the distinction between genealogy and criticism.

If we assume that "anyone with a critical theoretic bone in their body, who conducts historically inflected critique, refers to their work now as 'genealogical' rather than simply as 'historical'" (Harcourt, 2024, p. 168), Harcourt's focus on the type of genealogy that "leads to action" (p. 171) becomes understandable. Nevertheless, even if we consider Allen's work as capable of inspiring action and changing perspective – in short, a truly critical thinking – we aim to take a further step and examine what remains at stake in this expression (and in similar ones like "critical genealogy"[4]), of the genealogical method.

Only if we take the distinction between criticism and genealogy and keep in mind that genealogy has to do with the dismissal of origin and the renunciation of a moral criterion that clearly shows us the positive or negative value of every single genealogy, can we approach the crucial point, namely, the destitution of the idea of progress. Instead,

[4] For example, Harcourt, *On Critical Genealogy*, and Davis et al., *Abolition. Feminism. Now.*, xiii-xiv: "We frame this book as a critical genealogy rather than a manifesto, one that emphasizes how important it is to trace political lineages […] Our work proceeds genealogically to address subjugated histories of organizing that must inform and strengthen our present mobilizations […]. And we contend that genealogies should always be questioned, because there is always an unacknowledged reason for beginning at a certain moment in history as opposed to another, and it always matters which narratives of the present are marginalized or expunged".

critical thinking subjects historicized reason to a rational overthrow that illuminates the rationality deployed at the liminal edge of physiological and pathological exercise. In this process, it reaffirms the normative competence of reason even as it denounces its pathology. It seeks to straighten out reason, to find true life in a false one, and in doing so, it does not really give up the search for origin.

According to Foucault, Nietzsche "challenges the pursuit of the origin (Ursprung) at least on those occasions where he is truly a genealogist" (Foucault, 1977, p. 142). The search for the origin attempts to grasp the exact essence of the thing, to find what was already there, because it leads us to believe that at the beginning of things, we can find what is most perfect and essential. In contrast, the historical beginning is discordant and accidental. And, finally, since it is understood as the place of Truth. As Foucault (1977) writes,

> The origin […] always precedes the Fall. It comes before the body, before the world and time; it is associated with the gods, and its story is always sung as a theogony. But historical beginnings are lowly: not in the sense of modest or discreet like the steps of a dove, but derisive and ironic, capable of undoing every infatuation (Foucault, 1977, p. 43).

This ineliminable character of genealogy explains why it moves differently from criticism. Genealogy works within a space of time in which to redesign linearities, fractures, threshold points, fractal geometries, and to chase on the plane of non-original forces, but of descent and provenance. As Foucault suggests, "we can give the name 'genealogy' to this coupling together of scholarly erudition and local memories, which allows us to constitute a historical knowledge of struggles and to make use of that knowledge in contemporary tactics" (Foucault, 2003, p.8).

If, on the one hand, Harcourt (2024) affirms that "the different types of genealogy – vindicatory, debunking, problematizing, and possibilizing[5] – should be understood *not* as competing or mutually exclusive modalities" (p. 174, p. 176), then on the other hand, we must question whether a broad discussion on attributes makes us lose focus on the methodological specificity of genealogy.

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[4] Harcourt, 2024, p. 176: "In an article titled 'On Possibilising Genealogy' published in 2020, Lorenzini offers a compelling answer and way forward, one that avoids the dual pitfalls of the two dominant responses, namely that either genealogy is not normative and we must adopt a non-foundationalist approach, or that it is internally normative and advances particular values like autonomy or freedom. Lorenzini demonstrates convincingly that both conventional responses are ultimately inadequate to the challenge and proposes instead that Foucaultian genealogy is "normatively significant" and has "normative force" in a unique way: it creates a framework within which the readers form a sense of community and develop political commitment to continue the struggle".

These various genealogical approaches often seem to decide *a priori* whether they want to be debunking, critical, or vindicatory toward their object. Yet this is already a disavowal of the genealogical method. Indeed, the genealogical approach does not define its relationship with its object in advance; it does not decide *a priori* if the roots it seeks are obscure or noble. Its only fixed point is the understanding that "the world of speech and desires has known invasions, struggles, plundering, disguises, ploys" (Foucault, 1977, p. 139).

According to Harcourt (2024), "Foucault never chose his objects of study in a non-normative or value-free way" (p. 171). This sentence makes an equivalence that is not taken for granted and that we want to challenge: the overlap between non-neutrality and normativism. Certainly, Foucault is not "neutral" (who could claim to be?); indeed, he always asserts his situatedness, but why should this mean that his work follows a normative approach? The very fact of considering any thought that does not vindicate a normative label as hypothetically incapable of taking a position is precisely what distinguishes normative approaches from genealogy.

We suggest that Foucault's choice not to argue in normative terms should not be underestimated. He speaks of critique, of genealogy, of Enlightenment, of optional 'rules' (which, it is worth remembering, are different from 'norms'), but not of a normative approach, and does not use terms such as 'contextualism' or 'metanormative' since he is not concerned with justification.

Thus, the proposal is to take genealogy's core seriously, which, in our opinion, leads us beyond normativity. It implies that the rejection of the status quo passes through an ethical positioning, formed by decentralization, exceeding, and discarding. The subject and the struggle are always situated, and the 'position' has a moral connotation; in this sense, genealogy allows us to reject the teleological conception of history also because it is willing to give up universalism. As Foucault (1977) writes,

> The subject who speaks, who says 'I' or 'we' cannot, and is in fact not trying to, occupy […] the position of a universal, totalizing, or neutral subject. In the general struggle he is talking about, the person who is speaking, telling the truth, recounting the story […] is inevitably on one side or the other: he is involved in the battle, has adversaries, and is working toward a particular victory (p. 52).

Moreover, Foucault illustrates that the continuous transition between what is and what might otherwise have been does not pertain to a learning process or to an axial vector that serves as a reference but is the outcome of an uncertain and never-ending

battle: genealogy is precisely the reconstruction of this battle, which shows us how no apparatus (dispositif) can be considered as natural or necessary.

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BYUNG-CHUL HAN, LA CAÍDA DE LA DEMOCRACIA EN LA ERA DE LA PERFORMANCE

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La obra de Byung-Chul Han, *Infocracia* (2023), se configura como un agudo análisis de las transformaciones del poder en la era contemporánea. Han plantea un contraste dialéctico entre *el régimen disciplinario de Foucault* y el que él mismo denomina *el régimen de la información en formación*. Esta propuesta no es una mera descripción de los cambios sociales, sino una profunda relectura de las dinámicas de la subjetivación.

El régimen disciplinario, tal y como lo describe eficazmente Han, evoca los análisis foucaultianos sobre la sociedad disciplinaria. La función de este régimen es moldear al individuo en un cuerpo dócil y productivo, un "engranaje" funcional a la lógica del capitalismo industrial. La sanción, en este contexto, no es solo retributiva, sino eminentemente pedagógica y correctiva, destinada a restablecer el orden mediante el aislamiento y la estigmatización del *desviado*. El objetivo último es maximizar la eficiencia productiva mediante el sometimiento físico, transformando al hombre en una "bestia de trabajo". (Han, 2023, p. 1)

Con la llegada del capitalismo de la información, Han nos proyecta en una dimensión radicalmente cambiada, definida como *infocracia*. En la infocracia, el centro del poder ya no reside en el control de los medios de producción tangibles, sino en el acceso y la manipulación de los datos y la información. Esta transición implica un desplazamiento del foco: ya no es el cuerpo el objeto privilegiado de explotación, sino la psique

del individuo.

De modo similar, Donna J. Haraway sugiere que la contemporaneidad ha trascendido la concepción del poder disciplinario, entendido como el control ejercido sobre los cuerpos y las instituciones. La llegada del ciberespacio ha disuelto la materialidad de lo orgánico, reconfigurándolo en una red de flujos electrónicos. Estos flujos ejercen una forma de heterodirección sobre la existencia individual, manifestándose en ámbitos que van desde las transacciones financieras digitales hasta las biotecnologías médicas avanzadas, pasando por las intrincadas dinámicas de la comunicación. En este escenario, la noción tradicional de cuerpo sufre una deconstrucción. Lo que permanece *son momentos de experiencia biotecnológica*, es decir, huellas temporales de la experiencia que adquieren un valor procesual y fluido, en lugar de un valor sustancial y corporal. En este contexto, la identidad y la experiencia ya no se configuran a través de la fisicidad, sino a través de la temporalidad de los datos y del flujo informático (Haraway, 2018, p. 28).

La vigilancia psicopolítica, como la denomina Han, sustituye a la mera vigilancia física y penetra en los pliegues más íntimos de la interioridad. La disciplina externa da paso a una forma de autodisciplina interiorizada, estimulada y alimentada por la búsqueda constante de rendimiento, proactividad y optimismo. Lejos de ser dócil, el individuo está ahora llamado a ser proactivo y a "representar" su propia existencia en un esfuerzo constante de autooptimización.

La metamorfosis de "bestia de carga" a "bestia de datos" y "bestia de consumo" pone de manifiesto una nueva forma de alienación. Si en el régimen disciplinario la alienación estaba ligada a la cosificación del cuerpo en el proceso productivo, en la infocracia se vincula a la cosificación de la psique, transformada en un depósito inagotable de información monetizable. El imperativo de la felicidad y la belleza, como sugiere Han con la expresión "rehén de la industria de lo bello", ya no es un ideal ético, sino un dictado biopolítico destinado a generar datos y estimular el consumo. (Han, 2023, p. 2)

El análisis de Byung-Chul Han (2023), expuesto en *Infocracia*, encuentra un eco significativo y una mayor profundización en el diálogo con el pensamiento de Neil Postman. La distinción perspicaz de Postman entre las distopías de Orwell y Huxley, reelaborada y actualizada por Han, resulta crucial para comprender la naturaleza de la amenaza actual a la libertad y la razón en la sociedad de la información. Postman, al comparar *1984* de Orwell (1949) con *Un mundo feliz* de Huxley (1932), esbozaba dos paradigmas distintos en el ejercicio del poder. El modelo orwelliano se basaba en el control social mediante el castigo y la inducción del miedo. Por el contrario, el paradigma huxleyano establece la subyugación no a través de la coacción directa ni de la aversión, sino mediante la seducción, el placer y la adhesión voluntaria a lo que se ofrece. Esto se

manifiesta en la promoción de conductas deseables y en la oferta de «oportunidades» (Postman, 2021, p. 19).

La visión de Huxley se revela para Han como la prefiguración más inquietante de nuestra contemporaneidad. La clave de este análisis reside en la afirmación de Han de que, en nuestra sociedad, el dolor se ha convertido en un tabú, un elemento esencial para comprender la naturaleza del control actual. (Han, 2023, p. 13)

Han destacado una sociedad en la que la positividad exagerada y la felicidad obligatoria se han convertido en normas implícitas, casi en un imperativo biopolítico categórico. El dolor, en todas sus formas, ya sea físico o psíquico, se percibe no como una experiencia humana intrínseca, sino como una aberración que debe erradicarse. Esta tendencia se ve respaldada por una amplia gama de instrumentos: desde la farmacologización del malestar hasta las terapias destinadas a optimizar el bienestar, pasando por el consumo ininterrumpido de entretenimiento que actúa como un anestésico colectivo. El resultado es una privación de la capacidad de procesar el sufrimiento, de afrontarlo, de comprenderlo y, lo que es más importante, de trascenderlo para convertirlo en una fuente de conocimiento, crecimiento y transformación. El dolor, que durante siglos se ha entendido como un catalizador de significado, un límite existencial que define lo humano y empuja a la reflexión, se reduce ahora a un mero defecto del sistema que hay que eliminar (Han, 2021).

Destaca que el castigo se sustituye por la motivación y la optimización. El sistema no impone órdenes, sino que sugiere sutilmente, actúa a un nivel casi inconsciente, a través de estímulos positivos que orientan la voluntad. Esta dinámica es especialmente insidiosa porque induce una forma de autocontrol. El individuo, al interiorizar el imperativo del rendimiento y la felicidad, se convierte en su propio carcelero, impulsado a conformarse, no por miedo, sino por el deseo de adhesión y éxito. (Han, 2023, p. 6)

La consecuencia más grave de esta dinámica es la simulación de la autodeterminación, una libertad engañosa que Han denuncia con fuerza. Se ofrece al individuo un "falso ámbito de acción", un espacio aparentemente ilimitado de elección, pero que en realidad ya está preestructurado y orientado. Dentro de este simulacro de autonomía, el dominio se mantiene eficaz.

Han esbozado un mecanismo perverso mediante el cual el individuo es empujado incesantemente al consumo, no para satisfacer necesidades primarias, sino para calmar un sentimiento de insuficiencia intrínseco al propio sistema. La aparición de figuras mediáticas como los influencers es paradigmática de esta lógica. No representan simplemente modelos de éxito o bienestar, sino arquetipos de una existencia que se presenta como intrínsecamente deseable y, al mismo tiempo, inalcanzable. Estos simulacros de

realización personal transmiten un mensaje implícito: la autorrealización, la felicidad e incluso la propia validez existencial están indisolublemente ligadas a la adquisición y exhibición de bienes de consumo. La mercantilización, lejos de limitarse a los objetos, afecta a la esfera de la identidad misma. Esta dinámica, observa Han, compromete al individuo en un ciclo incesante de consumo que, paradójicamente, lo "consume" hasta la muerte. (Han, 2023, p. 6)

La dinámica del deseo mimético, un concepto que tiene sus raíces en pensadores como René Girard y que también es actualizado por Scarane, nos obliga a un cuestionamiento incesante y casi obsesivo: *"¿Qué quieren los demás de nosotros? ¿Qué ven en nosotros?* Y, en última instancia, *¿qué somos para los demás?"*. Esta búsqueda constante de validación externa, esta interiorización de la mirada ajena, transforman al individuo en un actor perpetuo, comprometido a interpretar un papel en función de un público invisible, pero omnipresente. (Scarane, 2015, p. 34)

Han identificado una autoexposición voluntaria de la existencia individual. No se trata de una coacción externa a la visibilidad, sino de una necesidad intrínseca de autorrevelación que impregna el consorcio social contemporáneo. Este imperativo de visibilidad no es heterodirigido en el sentido tradicional del término, sino que surge de una presión interna: de un deseo incondicional de ser visto y reconocido. El individuo se compromete activamente con la autoproducción del yo, una actividad incesante destinada a generar una forma de visibilidad que se convierte en objeto de deseo. Las proféticas palabras de Andy Warhol, "En el futuro, todo el mundo será famoso durante quince minutos" (Warhol, 1968), resuenan con fuerza en este contexto, anticipando la fama instantánea y la visibilidad efímera que caracterizan nuestros días. La libertad de expresión, que en otro tiempo fue un baluarte contra la opresión, se transforma aquí en una obligación performativa: una compulsión a revelar la propia vida, los propios pensamientos, las propias emociones y a alimentar un sistema de vigilancia que no es impuesto, sino aceptado y deseado.

Otro factor clave que nos convierte en *"bestias de datos"* es la comodidad y la inmediatez que ofrece lo digital. La integración omnipresente de la tecnología en la vida cotidiana ha hecho que cada acción resulte más fácil y, sobre todo, más rápida.

En una sociedad que exige un rendimiento constante y "inteligencia", la lentitud se erradica y se convierte en un lujo inaccesible o incluso en un signo de incompetencia.

La palabra clave de nuestra sociedad, "rendimiento", no es una simple exigencia de eficiencia, sino un profundo mecanismo de control y autoexplotación que redefine las categorías de responsabilidad, culpa y libertad.

Han argumentado que la retórica del "si quieres, puedes" se ha inculcado profundamente en nuestras mentes. Esta mentalidad, aparentemente liberadora y motivadora,

esconde, en realidad, una sutil trampa: transfiere toda la responsabilidad del éxito y del fracaso al individuo. Cuando no se alcanza un objetivo, la culpa recae íntegramente sobre nosotros mismos. Las barreras estructurales, las desigualdades sistémicas y las contingencias externas ya no existen o son sistemáticamente ignoradas. El fracaso se convierte en un defecto personal, una falta de voluntad o de compromiso.

Este mecanismo de internalización del fracaso es, según Han, eminentemente funcional para el sistema de poder contemporáneo. Es preferible, sostiene el autor, tener una población deprimida que se autoflagela que una población enfadada que podría rebelarse. La depresión, en este contexto, no es solo una patología individual, sino un síntoma social; es el resultado de un imperativo de autooptimización que, cuando se frustra, se vuelve contra el propio sujeto. La energía revolucionaria y el deseo de cambio se desvían hacia la autoacusación, transformando la ira social en cansancio y en autoagresión (Han, 2021, p. 16).

El análisis de la transición de la democracia a la infocracia, mediada por la mediocracia y precedida por la cultura libraira, ofrece una taxonomía esclarecedora de las diferentes configuraciones del poder y el conocimiento a lo largo de la historia. Lo digital, en esta progresión, representa el catalizador de una profunda transformación de la soberanía y la libertad política.

La lectura, por su propia naturaleza, requiere lentitud, concentración y una elaboración autónoma del contenido. El texto escrito permitía la relectura, la contextualización y la sedimentación del pensamiento, lo que favorecía una forma de autonomía crítica.

La mediocracia, que se valía de los medios de comunicación (radio y televisión), introdujo una importante centralización de la información. El conocimiento y la información fluían principalmente desde un centro hacia una periferia pasiva. El potencial de manipulación, aunque menos directo que las formas de control que Han identifica en la infocracia, era, sin embargo, omnipresente y actuaba a través de la selección de noticias, la construcción de la agenda pública y la creación de narrativas dominantes.

La democracia, en esta fase, comenzaba a enfrentarse al poder de los medios de comunicación de masas para moldear la opinión pública, aunque manteniendo espacios para el debate y la crítica.

La llegada de la infocracia, habilitada por lo digital, representa la culminación de este proceso. Aquí, el poder ya no reside solo en la posesión de la información, sino también en la capacidad de gestionarla, filtrarla y orientarla. El verdadero recurso ya no es la posesión de datos, sino su procesamiento algorítmico, su capacidad de perfilado y de predicción del comportamiento. La "verdad", en este entorno, no es un dato objetivo ni el resultado de un debate racional, sino una construcción dinámica y fácilmente influenciable por el flujo

incesante de datos, las burbujas de filtro y las cámaras de eco. La democracia, entendida como el ejercicio autónomo de la voluntad popular y la formación de un juicio político informado, se desnaturaliza en un sistema en el que las decisiones y las percepciones se moldean de forma sutil y casi invisible por el flujo incesante de datos, la amplificación de algunas narrativas y la marginación de otras. El consenso ya no es el resultado de un debate racional, sino de una manipulación algorítmica de las percepciones (Han, 2023, p. 13).

Es de vital importancia comprender la transformación de la democracia digital en una democracia de la presencia, en la que el smartphone se erige en "parlamento móvil" (Han, 2023, p. 19). Nos ofrece un diagnóstico penetrante del deterioro de las condiciones para una auténtica deliberación democrática, identificando en los teléfonos inteligentes y en los enjambres digitales los vectores de una despolitización que socava los cimientos mismos de la polis. Las personas están despolitizadas porque la comunicación digital, por su propia naturaleza, no es ni libre ni democrática en el sentido profundo de la palabra.

La crítica fundamental radica en que la información ya no proviene del espacio público, lugar de encuentro y de confrontación con la alteridad, sino que llega directamente a nuestros espacios privados. Este estudio sobre el espacio público es un golpe mortal para la democracia deliberativa. Elimina la presencia del otro, ese elemento crucial para la formación de una opinión genuinamente discursiva, capaz de cuestionar las propias certezas y no meramente autorreferencial, dogmática o dominante. Si el otro desaparece del horizonte de nuestra interacción informativa, la opinión se cierra sobre sí misma, se radicaliza y pierde su capacidad de confrontación crítica.

Lo digital, continúa Han, ha generado las cámaras de eco. Los algoritmos, basándose en nuestros datos y preferencias previas, solo nos muestran lo que refuerza nuestra opinión y excluyen sistemáticamente las visiones discordantes. Estos filtros de nueva generación no se limitan a seleccionar, sino que determinan activamente lo que nos gusta: cuanto más interactuamos con ciertos contenidos, más se llena nuestra "burbuja de filtros" con información de nuestro agrado, lo que consolida nuestras convicciones y aleja perspectivas diferentes. Han definido este fenómeno como la constitución de aislamientos tribales, en los que los individuos, a pesar de estar hiperconectados, viven, en realidad, en burbujas cognitivas separadas, incapaces de un verdadero diálogo. (Han, 2023, pp. 20-26).

El exceso de información actual nos impide actuar de forma racional, ya que el tiempo para reflexionar es prácticamente inexistente. La información actual tiene una validez temporal extremadamente limitada y se alimenta del puro encanto de la novedad. Esta inestabilidad temporal intrínseca genera un torbellino incesante de "actualidad" que

sobrecarga el sistema cognitivo humano. El resultado es la imposibilidad de detenerse a reflexionar sobre los contenidos, una condición en la que la mente está en constante movimiento, pero sin la capacidad de procesar en profundidad lo que absorbe.

Este fenómeno, que Han denomina infodemia, representa una difusión viral de información que compromete gravemente el proceso democrático. La experiencia y el conocimiento, tradicionalmente pilares de la sabiduría y la capacidad de juicio, se ven sometidos al imperativo de la aceleración: a una sucesión infinita de "presentes puntuales". Esta rapidez es perjudicial para la democracia, ya que la presión constante de procesar nueva información y reaccionar con rapidez nos priva de nuestra racionalidad, entendida como la capacidad de pensar de forma crítica, reflexiva y orientada al largo plazo. (p. 14)

La capacidad de pensar profundamente es un salvavidas en un mar de estímulos. Pero este pensamiento, nos advierte Rolf Dobelli (2020), no puede florecer sin concentración, y la concentración, a su vez, es una flor delicada que se marchita bajo el torrente de noticias. La exposición constante a este diluvio informativo no solo fragmenta nuestra atención, convirtiéndonos en pensadores superficiales, sino que también socava nuestra memoria.

Dobelli nos invita a reflexionar sobre la dualidad de la memoria: una memoria a largo plazo, vasta y capaz como un antiguo archivo, y otra de trabajo, efímera como un cuaderno provisional. Entre estas dos moradas del conocimiento se encuentra un "ojo de aguja" neuronal, un paso estrecho y crucial. Cada destello de comprensión auténtica debe atravesar este punto, consolidándose de lo provisional a lo eterno. Sin embargo, las noticias, con su incesante y fragmentada carrera por el "aquí y ahora", debilitan activamente esta vía maestra de la comprensión, dejándonos con una mente llena de ecos efímeros, pero desprovista de verdadera sabiduría. En una era de sobrecarga sensorial, la contemplación se convierte en un acto de resistencia (Dobelli, 2020, p. 68).

Este paso es fundamental: recurrimos a la inteligencia, pero en un sentido restringido y puramente funcional. Como sugiere Han, la inteligencia se traduce en la capacidad de orientarse rápidamente hacia soluciones y resultados concretos. Ya no hablamos de comportamientos racionales, que requieren una evaluación global y la consideración de las implicaciones éticas y sociales. Se trata más bien de *acciones inteligentes* en el sentido de *reactivas* y orientadas a la eficiencia inmediata. La "inteligencia" se ha convertido en la virtud suprema, sustituyendo a la sabiduría y a la profundidad de juicio. (Han, 2023, p. 15).

La pretensión del *dataísmo* es alcanzar una visión global de la sociedad mediante el análisis de datos, con el objetivo de optimizar todos los procesos sociales. Esta perspectiva, asimilable a una "visión de 360 grados", no es solo una ambición tecnológica, sino

una auténtica visión del mundo que relega el intelecto humano a una posición secundaria con respecto a la supuesta sabiduría "divina" del Big Data.

Desde esta perspectiva, la política, entendida en su sentido más crítico y conflictivo, parecería innecesaria. Se argumenta que el Big Data podría ofrecer una estabilidad suficiente para reducir los conflictos de intereses y el antagonismo entre clases, relegando la acción partidista a un segundo plano. Las decisiones importantes para la sociedad serían tomadas por algoritmos y sistemas de inteligencia artificial, dejando el debate político en la irrelevancia. Los políticos serían reemplazados por expertos en informática, quienes gestionarían la sociedad basándose en la aparente neutralidad y objetividad de los datos, más allá de las ideas ideológicas.

Sorprendentemente, Han encuentra un presagio de estas ideas en el pensamiento de Jean-Jacques Rousseau. Aunque lejano en el tiempo y en el contexto, su entusiasmo por el método sistemático del siglo XVIII le llevó a desarrollar una racionalidad aritmética, antitética a la racionalidad comunicativa. Rousseau concebía la voluntad general como una magnitud puramente numérico-matemática, casi un algoritmo. En *El Contrato Social*, Rousseau distingue la voluntad de todos (una suma de intereses particulares) de la voluntad general (centrada en los intereses comunes), que surge de la sustracción de las diferencias individuales que se anulan mutuamente, revelando una síntesis numérica de la voluntad auténticamente colectiva. Esta lectura de Rousseau por parte de Han es provocadora: sugiere que la idea de una voluntad colectiva extrapolable matemáticamente no es una novedad absoluta, sino que tiene sus raíces en un pensamiento que se remonta incluso al siglo XVIII. (Han, 2023, pp. 30-31)

Han (2023) destaca que el régimen de la información presenta rasgos totalitarios. Su aspiración a un conocimiento total, basado exclusivamente en datos y alcanzado mediante operaciones algorítmicas en lugar de narrativas ideológicas, pretende calcular todos los aspectos de lo existente y de lo que está por venir. La razón cede el paso a los cálculos y el elemento narrativo es sustituido por los datos numéricos. Ya no es la persuasión ni el compartir un ideal lo que guía, sino la cuantificación y la previsibilidad.

A pesar de la sofisticación de los algoritmos y su pretensión de exhaustividad, Han subraya un límite crucial: se revelan incapaces de eliminar las experiencias de contingencia con la misma eficacia que las narrativas ideológicas en el totalitarismo. Mientras que las ideologías totalitarias se presentaban como sistemas de pensamiento coherentes y totalizadores, capaces de dar sentido e incluso justificar el sufrimiento y el sacrificio —a veces entendidos como la realización de un designio divino o como la máxima expresión del amor a la patria—, la cuantificación numérica, en su intento de depurar la

realidad de toda interpretación ideológica, por su propia naturaleza, no puede ofrecer tal profundidad de sentido.

La contingencia, la imprevisibilidad, lo incontable persisten. La vida humana, con sus matices, sus contradicciones y su complejidad irreductible, no se deja encerrar por completo en la lógica algorítmica. (Han, 2023, p. 7)

La obra de Byung-Chul Han, desglosada en sus múltiples capas, se configura, para los filósofos del derecho, como un diagnóstico clínico de las patologías más insidiosas de nuestra época. Más allá de una mera descripción sociológica, Han nos obliga a enfrentarnos a una mutación radical de las categorías del poder y de la subjetividad, que obliga al derecho a replantearse sus propios fundamentos. Han nos presentado una sociedad en la que la libertad, lejos de ser una condición de emancipación, se ha convertido en el más sutil de los instrumentos de control: una libertad de autoexplotación y autoesclavitud, vehiculada por lo digital. La alegría y la positividad, como máscaras de un nuevo totalitarismo, niegan el espacio al dolor, a la tristeza, al fracaso, privándonos de aquellas experiencias que siempre han dado profundidad y sentido a la existencia humana y a la lucha por la justicia.

¿Cómo puede el derecho redefinir y proteger a los individuos frente a un poder que no se manifiesta como coacción explícita, sino como seducción, motivación y autooptimización inducida? ¿Qué nuevas categorías de "daño" y "abuso" surgen cuando el objeto del ataque no es el cuerpo o la propiedad, sino la psique y la capacidad de pensar de forma autónoma?

Resulta esencial explorar la posibilidad de codificar principios que trasciendan la mera protección de la privacidad. Pensemos en un derecho a la desconexión, un derecho a la lentitud o un derecho a la invisibilidad: estos principios pueden afirmar una resistencia al imperativo de la visibilidad total y de la aceleración incesante.

Paralelamente, el derecho debe encontrar los medios para preservar y refundar el *espacio público* democrático. Esto significa actuar en la era de las cámaras de eco y las burbujas de filtro, promoviendo un entorno en el que puedan prosperar el debate genuino y la pluralidad de ideas.

La lección de Han es clara: la libertad formal puede ocultar las formas más sofisticadas de dominación. La tarea principal del derecho, hoy en día, es investigar las raíces invisibles de este nuevo poder y forjar los instrumentos conceptuales y normativos para defender la soberanía inalienable del alma humana en una era de transparencia forzada y eficiencia coercitiva.

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RECUPERAR LA *BOÎTE À OUTILS* DE BECCARIA: RESEÑA DE "SU DIRITTO E SRAGIONE. FOLLIA E OZIO A PARTIRE DA CESARE BECCARIA"

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Su diritto e sragione. Follia e ozio a partire da Cesare Beccaria (Editoriale Scientifica, Nápoles 2023), del filósofo del derecho italiano Gianvito Brindisi, es sin duda un texto con múltiples niveles de interpretación. Se trata de un libro cuyo objetivo es profundizar en el estudio de la obra del filósofo milanés Cesare Beccaria, a partir de cuestiones hasta ahora poco exploradas. Por ejemplo, el lugar que la "locura"[1] ocupa en su reflexión, o incluso temas completamente ausentes en el panorama de los estudios beccarianos, como el problema del ocio. Al mismo tiempo, Brindisi intenta esclarecer el vínculo entre la reflexión de Beccaria y la evolución de los sistemas penales desde los comienzos del siglo XIX, tal como fueron analizados por Michel Foucault en relación con el poder de normalización. Sin embargo, su análisis va más allá: se trata de una reflexión más amplia y ambiciosa que, siguiendo la estela de Foucault, interpreta la reflexión de Beccaria como una *boîte à outils*. En este marco, el filósofo milanés se convierte en una herramienta crítica para interrogar los sistemas penales modernos y contemporáneos,

[1] Se entiende aquí perfectamente que el término "locura", al igual que sus derivados, es muy sensible. Su utilización en el presente texto es conforme a la de Gianvito Brindisi: la "locura", la "desrazón", no son una realidad a la que se hace referencia, sino una producción discursiva que produce efectos en otros discursos. El foco del libro de Brindisi son los efectos que la confrontación con la "locura", con la "desrazón", produce en el discurso penal de Beccaria y en el discurso penal que le sucedió.

imaginar alternativas y reabrir el debate filosófico sobre el sentido del castigo. Con este horizonte, procedamos, pues, a una breve presentación de la argumentación del texto para reconstruir sus ejes fundamentales.

Desde el inicio del texto, Brindisi aclara que su atención específica a los temas de la locura y el ocio en la obra de Beccaria (a los que se añade, con menor desarrollo, el tema de "los sospechosos peligrosos") se debe a su centralidad histórica a lo largo del siglo XIX. En este periodo se consolidó una connotación medicolegal de los sistemas penales, acompañada de la creciente individualización del juicio y del castigo. Esta transformación supuso una concepción y una práctica de la penalidad en fuerte antítesis con respecto al objetivismo penal beccariano, cuyo postulado fundamental sostiene que el castigo debe ser proporcional al daño social causado por el delito, y no a las características individuales del infractor.

A partir de esta tensión, Brindisi se propone comprender qué papel juegan estos temas en la obra de Beccaria, con el fin de captar la relación que esta última tendría con los sistemas penales a partir del siglo XIX; y verificar si se trata de una relación de total desacuerdo, o si algunas tensiones y contradicciones de la obra de Beccaria podrían permitir interpretarla como anticipadora de los sistemas penales modernos. En resumen, para que la reflexión de Beccaria funcione como *boîte à outils* para cuestionar los sistemas penales contemporáneos, es necesario analizar el papel que desempeñó en la prehistoria de la moralización y la antropologización de las prácticas penales.

Dado que Beccaria no dedica ningún tratamiento explícito al castigo de la locura, en el primer capítulo Brindisi explora cómo los hermanos Verri amplían las reflexiones del filósofo milanés en su respuesta a las críticas del monje vallombrosano Facchinei contra el objetivismo penal beccariano. En esta respuesta, los Verri afirman la necesidad de castigar a los locos: ya que también son sujetos de derecho, y, por lo tanto, no pueden ser sustraídos de los procedimientos ordinarios del derecho. La alternativa sería configurarlos como no-personas, como no-sujetos de derecho, lo que implicaría recurrir a mecanismos de excepción al estado de derecho, que Beccaria, sin duda, no habría avalado.

Además, como destaca Brindisi, aludiendo a otros textos de Beccaria, según el filósofo milanés, la distinción entre locos y no locos no se basa en una diferencia cualitativa entre una voluntad libre y una voluntad mecánica o instintiva, como la que establecen los sistemas medicolegales posteriores, sino en una diferencia cuantitativa en el grado de interés o de pasión. Para Beccaria, el loco se diferencia del no loco por una diferencia en su impulso, no por la naturaleza de su voluntad. Desde esta perspectiva, los Verri que siguen a Beccaria reconocen que el castigo para el loco culpable puede ser atenuado, debido al menor daño social causado por su delito, en comparación con el de un no loco.

El castigo es necesario porque "a través de la pena atenuada, el loco es instituido como persona, no se le priva de su subjetividad jurídica, de su dignidad ni de su capacidad residual"[2] (Brindisi, p. 210). En resumen, castigar al loco significa situarlo en un plano de igualdad con cualquier otro ciudadano: de hecho, la pena "implica que incluso el loco, como cualquier ciudadano, sea políticamente libre y no deba temer actos arbitrarios de ningún tipo" (p. 215).

En el segundo capítulo, Brindisi analiza el ocio a partir de diversos textos y documentos de Beccaria. Entre ellos se destacan el capítulo XXIV de *De los delitos y las penas*, dedicado al ocio político; así como los Elementos de economía política y los actos de gobierno, que el filósofo milanés redactó a lo largo de su actividad como funcionario. A partir de esta revisión, Brindisi destaca que el ocio no debe entenderse como una patología de las clases populares. Por el contrario, frente a la interpretación que se le atribuyó en el proceso de desarrollo de las técnicas disciplinares y normalizadoras, Beccaria propone una lectura distinta: el ocio debe interpretarse "en términos de disposición a la improductividad y al desorden, tanto individual como colectiva, que aparece en diferentes clases y estamentos" (p. 256).

En cada uno de los textos analizados por Brindisi, Beccaria expresa consideraciones distintas respecto del ocio y de las formas de punición que podrían aplicarse. En *De los delitos*, el gobierno de los ociosos debe ser tanto legal como policial: los ociosos que puedan representar una amenaza para el orden público deben estar sujetos a una actividad policial de control y prevención. Sin embargo, Beccaria sostiene que "debe ser la ley la que haga menos atractiva la vida de las clases de personas que no producen, establezca el ocio como punible y lo someta a un mecanismo de exclusión, es decir, enviar al destierro" (p. 391).

En cambio, en los *Elementos* y, sobre todo, en los actos de gobierno, el tratamiento del ocio legitima una vigilancia y una penalidad correctiva, marcadas por un enfoque más disciplinario y normalizador. Por esta razón, Brindisi destaca que este discurso sobre el ocio plantea algunos problemas para el liberalismo penal de Beccaria. En última instancia, es evidente su compatibilidad con tácticas penales y policiales de carácter belicoso, ya que el control se orienta a la prevención de revueltas y a las necesidades de mano de obra (p. 394).

En un apéndice al segundo capítulo, Brindisi dedica una sección al tema de los "sospechosos peligrosos", tema al que Beccaria dedica algunas consideraciones al final de

[2] Todas las traducciones al español de las citaciones del libro de G. Brindisi han sido realizadas por el autor de la reseña.

capítulo XXIV de *De los delitos* sobre los ociosos. Al igual que ocurre con el tratamiento del ocio, esta cuestión representa una posible fisura en la coherencia de la estructura liberal-garantista que caracteriza la obra de Beccaria. Para el filósofo milanés, "debe ser desterrado quien es acusado de un delito atroz sin que esté completamente probado, es decir, cuando hay una gran probabilidad, pero no la certeza moral, de que sea culpable" (p. 395). Así, el filósofo milanés considera que los motivos que justifiquen el destierro deben ser mayores en el caso de ciudadanos y de acusados por primera vez, que en el caso de extranjeros y de quienes hayan sido acusados varias veces.

En este apartado, el sospechoso deja de ser tratado como un sujeto de derecho, presunto inocente, para ser considerado un sujeto peligroso. La aplicación de la pena, en este caso, el destierro, no se basa en la condición personal del individuo, sino en la probabilidad de que haya cometido un delito. La sanción se determina según su condición. Si es extranjero o nacional, si ha sido acusado por primera vez o en múltiples ocasiones, lo que vulnera el principio de la igualdad radical entre sujetos de derecho, central en los *Delitos*.

Brindisi subraya que estas contradicciones internas, respecto de la orientación liberal-garantista beccariana, tienen como objetivo atribuir a la jurisdicción una función particular, es decir, "proteger el orden social de un peligro potencial, más que verificar los hechos" (p. 421). Como resultado, la justicia beccariana adopta "una función policial, de orden, preventiva, de exclusión, no como excepción, no como guerra, sino como una práctica normal de seguridad contra un peligro, integrada en los mecanismos de funcionamiento normal del estado de derecho" (p. 431).

El tercer capítulo del texto de Brindisi se dedica a rastrear la relación histórica entre la reflexión de Beccaria, incluyendo las tensiones y las contradicciones destacadas en los capítulos precedentes, y la evolución medicolegal posterior de los sistemas penales. Entre los elementos que han determinado esta evolución, Brindisi destaca tres factores clave: la adopción del elemento biográfico como indicio que autoriza una presunción de culpabilidad o inocencia; la pericia psiquiátrica, que trasforma al individuo jurídicamente responsable en objeto de normalización, con ello, el desplazamiento del foco de juicio del crimen al criminal; y, finalmente, lo que denomina "la doble reducción epistemológica de derecho y medicina, que implica la objetivación psiquiátrica del sujeto como individuo peligroso o perverso" (pp. 444-445).

Brindisi considera que no es posible sostener que la transformación de los sistemas penales haya derivado, de alguna manera, de las tensiones y contradicciones propias de la obra de Beccaria. Como argumenta a lo largo de todo el capítulo, si bien existe una relación entre ambas, esta está mediada por un proceso de moralización de la antropología y de la epistemología beccarianas, llevado a cabo por autores que, aunque

se inspiren en su trabajo, tienden a otorgar importancia a las características subjetivas en la asignación de la pena. Esta mediación se lleva a cabo precisamente mediante una atención específica a los temas de la locura y del ocio.

En cuanto a la locura, un protagonista fundamental de la mediación es, sin duda, el jurista Joseph Michel Antoine Servan; pero también figuras como Giovanni Carmignani y Jeremy Bentham desempeñan un papel significativo. Un elemento central en el proceso de mediación es la progresiva convicción de que la ausencia de motivos para un delito, impensable en el contexto de la antropología beccariana (según la cual toda acción responde a pasiones o intereses), se convierte en indicio de la alienación del criminal. Se introduce así una diferencia cualitativa entre quienes cometen un crimen sin motivación, y los considerados "normales", asignando a los primeros (considerados "anormales") un tratamiento penal diferenciado y privándolos, al mismo tiempo, de su estatus como sujetos de derecho.

En cuanto al problema del ocio, varios autores, inspirados por Beccaria, aunque con clara divergencia respecto de su pensamiento, comienzan a considerarlo un rasgo distintivo de las clases populares, que pronto serán identificadas como peligrosas. Esta caracterización justifica la aplicación de una penalidad especial, orientada a reeducar sus tendencias, maximizar su productividad; y, al mismo tiempo, defender a la sociedad de los daños que podrían causar.

En resumen, tanto en el caso del tratamiento de la locura, como en el del tratamiento del ocio, se consolida una penalidad correctiva, en que la individualización de la pena se concibe en función de la reeducación del individuo. La propuesta de *De los delitos* parecerá siempre más un recuerdo lejano.

Como se mencionó al comienzo de este texto, el libro de Brindisi no se limita a ofrecer una interpretación de la obra de Beccaria. De hecho, *Su diritto e sragione* puede leerse como una tentativa de interpretar el pensamiento de Beccaria como una *boîte à outils*, una caja de herramientas para interrogar críticamente los sistemas penales contemporáneos e imaginar alternativas. Conforme a una concepción foucaultiana de la práctica filosófica como "instancia crítica de la violencia epistémica inherente a los saberes que producen normalización y reproducen desigualdades" (p. 561), Brindisi pretende rescatar, ante todo, el gesto crítico del filósofo milanés, en las raíces de su filosofía del derecho: una filosofía que se posiciona como un discurso crítico frente a las verdades, las reglas y los procedimientos jurídicos de su época.

En su caso específico, el pensamiento de Beccaria se presenta como un discurso que demuestra en qué medida la jurisprudencia de *Ancien Régime* funcionaba como un instrumento al servicio de las fuerzas sociales dominantes, reforzando tanto su poder

material como simbólico. Esta jurisprudencia contribuyó de manera determinante a la constitución de subjetividades funcionales a la reproducción de este poder. Para Beccaria, el derecho debe situarse siempre en el contexto de una sociedad que no solo lo determina, sino que también es decisivamente moldeada por él. Por esta razón, el filósofo milanés quiere sustituir la penalidad arbitraria del *Ancien Régime*, que permite la reproducción de una sociedad marcada por privilegios y desigualdades, por un derecho penal ilustrado, que promueva la igualdad y la utilidad colectiva.

La necesidad de pensar el derecho en su relación con la sociedad lleva a Beccaria a subrayar también la importancia fundamental de las condiciones socioeconómicas en la determinación de las características subjetivas, y en la predisposición a ciertos tipos de delitos. Esta predisposición, lejos de ser innata, es producto de circunstancias económicas concretas, principalmente la pobreza, lo que la lleva a destacar la importancia de intervenir políticamente para mejorar las condiciones socioeconómicas. Solo así el derecho penal puede cumplir adecuadamente su función de contribuir a la construcción de una sociedad más justa y segura.

Rescatar el gesto de Beccaria, para Brindisi, significa volver a interrogar a los sistemas penales contemporáneos con la misma radicalidad con que Beccaria cuestionó la jurisprudencia del Antiguo Régimen: preguntarse quién puede beneficiarse de sus categorías, de sus procedimientos, y qué tipo de subjetividades contribuyen a construir. También significa subrayar con fuerza la interacción necesaria entre, por un lado, la constitución de un "derecho penal mínimo" (adoptando la expresión de Luigi Ferrajoli), inspirado por el objetivismo penal y por la igualdad radical de sujetos de derecho que promueve Beccaria, cuyo potencial crítico frente a las diferenciaciones de los sistemas penales modernos sigue siendo profundamente vigente; y, por otro lado, las políticas de reducción de las desigualdades socioeconómicas.

En conclusión, podemos afirmar con certeza que el texto de Brindisi es profundamente generativo por varias razones. En primer lugar, constituye un notable esfuerzo erudito que nos permite profundizar en los análisis foucaultianos sobre el poder de normalización y su genealogía. En particular, facilita la comprensión de cómo *De los delitos,* el referente más ilustre e invocado por el liberalismo penal, no han sido, en realidad, especialmente influyentes en la constitución del sistema penal normalizador moderno. Al mismo tiempo, permite comprender hasta qué punto otros autores, para quienes la inspiración beccariana coexistía con una exigencia de normalización, ejercieron una influencia importante en la constitución de la penalidad correccional y normalizadora moderna.

El intento de considerar a Beccaria en términos de una *boîte à outils*, como una caja de herramientas extremadamente rica para la crítica de la violencia de los sistemas penales

en su vínculo con las relaciones de poder, resulta extremadamente fructífero; en particular, para pensar en alternativas que transformen el derecho penal en el instrumento de una sociedad más justa e igualitaria. De hecho, mediante el uso de Beccaria como caja de herramientas, Brindisi parece proponer una reflexión renovada sobre el sentido de la pena, inspirada por el filósofo milanés: la pena debe ser un instrumento para la seguridad de las sociedades, que no tiene nada que ver con el securitarismo policial.

El delito, desde esta perspectiva, debería concebirse como un daño social, susceptible de despenalización en ciertas condiciones, y la pena debería tener la función de disuadir su repetición, dentro de un marco estrictamente legal y garantista. Sin embargo, la pena no puede lograr su sentido sin un esfuerzo político por transformar las instituciones para que estas se ocupen activamente de reducir las desigualdades socioeconómicas, que están en el origen de muchos delitos.

Frente a la lógica represiva del securitarismo policial, que contradice el marco garantista del sistema beccariano, se trata, en definitiva, de replantear la necesidad de seguridad desde una perspectiva social. Esta seguridad no se puede alcanzar sin establecer una relación necesaria entre una penalidad que castigue el daño social, y un esfuerzo político por reducir las desigualdades socioeconómicas.