

## Chapter 35: Critical Legal Studies: Europe

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### I

#### *Critical theory: European trajectories*

In this chapter we trace the tradition of Critical Theory in Europe in the way it has informed and framed legal thought. A key, and distinctive, element of this legal tradition is that it characteristically connects to the *State* as constitutive reference; in other words it understands the institution of law as that which organises and mediates the relation of the state to civil society. The other constitutive reference is *political economy*, a reference that typically grounds this tradition of thinking about the law in the materiality of the practices of social production and reproduction. It is in these connections, of the institution of law to the domains of the state and of the political economy, that critical legal theory locates the function of law, and the emancipatory potentially it affords on the one hand, and the obstacles to emancipation it imposes, on the other.

Given the centrality of the State, as form of political organisation and integration, in the next section (II) we take **Hegel** – as pioneering theorist of the dialectic relation between state and civil society – as the historical point of departure of the tradition of critical theory in general and of critical legal theory in particular. It is to Hegel that one may usefully trace back the variety of trajectories of European critical legal thought, and relate to him the wide range of its instantiations, with special emphasis on their reciprocal influences, overlaps and differences.

The approach we take in this chapter is thematic, and it is against the background of the Hegelian/Marxist legacy that we visit and relate a number of theorists who have contributed most decisively to the European tradition of critical theory. While not all were centrally concerned with the institution of law, important insights can be drawn from them in the direction of critical legal theory. We will look at the work of the important Hegelian Marxist Georg **Lukács**. We will visit the tradition of critical theory of the **Frankfurt School**, first as it emerges from the legal theory of the Weimar Republic when the Institute for Social research was set up in Frankfurt and brought within its ambit important thinkers like Erich Fromm, Herbert Marcuse, Walter Benjamin, Otto Kirschheimer, Franz Neumann, and others, under the directorship of Theodor Adorno and Max Horkheimer. Amongst the legal scholars here what became distinctive is the way

that they conceptualised the integration of State and civil society; notable here was **Neumann**'s distinctive take on state theory, as well as Hugo Sinzheimer's Left-wing economic constitutionalism. After the war, some of the protagonists returned from exile to the Institute, and their thinking took a 'negative' turn away from the notion that the dialectic might deliver emancipation. **Adorno**, would - after Auschwitz - largely surrender political critique to the 'aesthetic turn', while for **Horkheimer** the collaboration of men in society will be left contradiction-laden 'with all its waste of work-power and human life, and with its wars and its senseless wretchedness'<sup>1</sup>, unless social actors act on the deficit that is experienced by them *as alienation*, a prospect increasingly remote in the face of the instrumental logic of bourgeois constitutionalism. The 'communicative turn' of the later generation of the Frankfurt school, around the key figure of Jürgen **Habermas** will redirect critical theory to politics in the form of communicative reason though, in the process, giving up the tradition's Marxist legacy and arguably divesting it of much of its radicalism to reconcile it, eventually, to law in the form of the 'co-originality' of democracy and rights, and public and private autonomy.

Running alongside the trajectory of critical theory in Germany, there emerges out of the École Normale Supérieure in Paris, and around the leading figure of Louis **Althusser**, a Marxist (and Marxian) current of critical thought. Of particular importance here is the largely forgotten work of Nicos **Poulantzas**, the writings of Étienne Balibar and Alain **Badiou**, and the recently much celebrated work of Jacques Rancière. The work of Foucault at the ENS develops largely in dialogue with that tradition.

A parallel strand of critical legal theory, drawing in part from Gramsci's theory of hegemony, finds expression in the theorists of the 'material Constitution' of the Italian Left. The emphasis here is on the production of *political unity* as the latter proceeds through processes of 'condensation' and 'distension' of social forces and the mobilisation of *collective subjects* which provide the 'efficient cause' of the development of the material constitution, as developed in the work of the leftists of the *Operaismo* and *Autonomia* movements that emerged out of the syndicalist movement, key amongst whom was Antonio **Negri**. Negri's materialist understanding of the constitution drove him to focus on movement, rather than origins, constitutional development, for Negri, the result of continuous formation and re-formation of the composition of social forces, as dictated, in other words, by class struggles which are to be understood first and foremost as occurring over and around processes of forging the collective subjectivity of the revolutionary class.

A comprehensive picture of the spectrum of the strands of critical legal theory must include also the somewhat *sui generis* strand of its development in **Britain**. Key to understanding its particular trajectory is an emphasis on both its Marxist beginnings, its decisive break with Marxist thinking in the 1980s, and its subsequent 'turns' – 'ethical', 'aesthetic' and 'political' – of the last few decades, its alignments (and misalignments) with feminism and critical race theory, all traceable to the 'peripatetic' Critical Legal Conference that since the 80s has formed its main vehicle and institutional expression.

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<sup>1</sup>Max Horkheimer, 'Traditional and critical theory', in The Continuum Publishing Company (eds.), *Critical theory: Selected essays* (1976), 204 ff.

Like its continental-European counterpart, the ‘Britcrits’<sup>2</sup> emerge as a distinct radicalised academic tradition in the mid-seventies, initially by drawing selectively on Louis Althusser and Eugeny Pashukanis, and with a passing interest in Nicos Poulantzas (especially his exchange with Ralph Miliband)<sup>3</sup> and Bernard Edelman.<sup>4</sup> Althusser’s theory of the interpellation of the subject (of law) has had a lasting influence beyond that early phase, and his theory of the ‘relative autonomy of law’ allowed the early critical theorists to distance themselves from the more reductive (‘economistic’) analyses and to focus more decisively on legal *ideology*.<sup>5</sup> An important difference with the US movement was the clear emphasis of the British CLC on *collective* frames of explanation of identity and action, against the more individualist US, attributable to the proximity of the former to the traditions of political trade unionism in Britain. This period sees also a productive alignment with feminist theory.<sup>6</sup> Another important affinity (given also the Lacanian turn in Althusser’s thought) was with Freudian and Lacanian themes and *problématiques*, an orientation that has run alongside the critical project in Britain ever since.

It might be argued that the distinctive voice of the Critical Legal Conference only emerges with their postmodern turn<sup>7</sup>, which coincides with their break from Marxism, and the translation into English of certain key works of Foucault and Derrida, in particular the latter’s essay ‘Force of Law’.<sup>8</sup> ‘The reception of Derrida,’ says Tim Murphy, ‘encouraged critique as etymology, as word-play and as symptomatology’;<sup>9</sup> and while in the US CLS strand the deconstructive turn primarily takes the form of ‘trashing’ or ‘deviationist doctrine’, in the British variant, with its reluctant engagement with substantive law, it is largely played out as a critique of legal form, and as ‘fractious hostility to legal rules.’<sup>10</sup>

Out of these distinct histories and trajectories, come diverse critical understandings of the role of law. What they have in common is an understanding of law as emerging from, or overlaying, a contradiction between Capitalism and Democracy that is operative in Western democracies under the aegis of constitutionalism. That constitutionalism is fraught by paradox (between constituent and constituted power)<sup>11</sup> is a clear indication of

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<sup>2</sup>Tim Murphy, ‘BritCrits: Subversion and submission, past, present and future’, (1999) 10.3 *Law and Critique*, 237 ff.

<sup>3</sup> See the useful Elizabeth Nash and William Rich, ‘The specificity of the political: the Poulantzas-Miliband debate’, (1975) 4.1 *Economy and Society*, 87 ff.; and Nicos Poulantzas, *State, Power, Socialism* (1978), transl. Patrick Camiller, 110 ff.

<sup>4</sup> Bernard Edelman, *Ownership of the Image: Elements of a marxist theory of law* (1980).

<sup>5</sup> See in particular Paul H. Hirst, *On law and ideology* (1979); Barry Hindess and Paul Q. Hirst, *Pre-capitalist modes of production*, Vol. 2 (1975); John Holloway & Sol Picciotto, *State and capital: a Marxist debate* (1979).

<sup>6</sup> See in particular Annette Kuhn and AnnMarie Wolpe. *Feminism and materialism: Women and modes of production*, Vol. 7 (2012).

<sup>7</sup> See Ronnie Warrington, Costas Douzinas with Shaun McVeigh, *Postmodern jurisprudence: the law of text in texts of law* (1991).

<sup>8</sup> Jacques Derrida, *Force of law: The ‘mystical foundation of authority’* (2002).

<sup>9</sup> Murphy (n. 2) 255 ff.

<sup>10</sup> Peter Goodrich, ‘The critic’s love of the law: Intimate observations on an insular jurisdiction’, (1999) 10.3 *Law and Critique*, 345 ff. Goodrich characterises it as a ‘critique of law that is to all appearances steadfastly indifferent to substantive law and does not engage with doctrine.’ 349 ff.

<sup>11</sup> See Martin Loughlin and Neil Walker, *The paradox of constitutionalism: constituent power and constitutional form* (2007).

the depth of the contradiction, which also finds expression, *inter alia*, in the difficulty of navigating the boundary between public and private law, in other words of reconciling the notion of a collective *common* good and the pursuit of *private* interests and fortunes under capitalist conditions. The tensions are recurrent and ineradicable, and it is here that questions that *animate* critical legal theory take shape. The tensions relate to the contradictory elements of modern Western and/or Westernised societies, be this in the form of the constitutional state as *both* organiser of oppression (the Capitalist State) *and* of solidarity (the Social State), those that abound between capitalist proprietary interests, on the one hand, and social rights, on the other, as well as those that arise from different modes of government, notably technocracy (with its emphasis on economic expertise and “output” legitimacy) on the one hand, and popular sovereignty (with its emphasis on democratic self-government and “input” legitimacy), on the other.

The responses of critical legal theory to these tensions range widely: i) from radical Marxian strategies of ‘immanent critique’ and the critique of liberal rights and bourgeois parliamentarism from the point of view of industrial democracy; ii) to the various forms of accommodation articulated in the ‘communicative turn’ of the current phase of the Frankfurt School (Habermas, Wellmer, Honneth, etc); iii) to the development of a post-modern form of critical thinking initially connected to the work of Lyotard, then Derrida, and then taken up by the US ‘Crits’; iv) to the articulation of forms of post-State critical thought in the forms of ‘constitutionalism from below’ associated with the global South; iv) to the forms of critical thinking associated and articulating on a global scale in the struggles against ‘Empire’ (as per the influential work of Hardt and Negri); etc. The above inventory of *current* manifestations is only indicative and in any case incidental to a volume committed to exploring the interrelation between legal history and jurisprudence with its emphasis on historical inquiry. We will contend that it is towards the junctures between these different critical theoretical responses that critical historical inquiry will elucidate with new insights that may come to inform and revitalise the tradition of critical legal thought and theory, attentive to its self-understanding as *intervention*, and conscious of the ineradicably political dimension of its undertaking.

## II

### *The State and the Critique of Domination: Hegel’s legacy*

History is the dissimulating journey of the Absolute through time, and this journey arrives at its destination with the consolidation of modern statehood, contended Hegel.<sup>12</sup> The journey is “dissimulating” because of the way it presents the Absolute as a series of finitudes and partial truths. However, throughout this journey, the Absolute *remains* the Absolute, and finitude is not to be considered its facade, but its reality, for the word

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<sup>12</sup> Georg Wilhelm Friedrich Hegel, *Philosophie der Geschichte*, in Hegel, *Werke in zwanzig Bänden* 12 (1970), 57 ff.: “Der Staat ist die göttliche Idee, wie sie auf Erden vorhanden ist”; *Philosophie des Rechts*, in Hegel, *Werke* 7 (1970), 398 ff. (par 257): “Der Staat ist die Wirklichkeit der sittlichen Idee.”

“façade” does not belong to the vocabulary of the Absolute.<sup>13</sup> The task of philosophy, Hegel thought, is to comprehend the relation between the eternal reality of the Absolute and its dissimulation in time as a series of finitudes.

The history of critique – be it philosophical or social – is a history of refusals to give up this Hegelian ‘mythologeme’. This is true also of Marxian critiques (critiques that insist on ‘turning it on its head.’) For if critique forever tracks a distorted relation between the Absolute and its finite appearance, no critique would be possible if its language would not sustain a relation – however strained – between what is and what ought to be. Critique that would sever *what ought to be* completely from *what is* would not command the comprehension it requires to figure *as* critique. The incomprehensibility or incomprehension is the flaw, Hegel insisted, that renders Kant’s conception of critique pointless. For him Kant’s categorical severance of *what is* (*Sein*) from *what ought to be* (*Sollen*), terminates meaningful assessment. The incurable hermeneutic deficit – the incorrigible incomprehension – that looms large here is evident. What can duty (*Pflicht/Sollen*) mean for us if it bears no plausible link with any response to finite circumstances? It should be evident that the notion of critique simply evaporates when no instance of concrete existence can meaningfully bear the burden of an imperative. The Marxian notion of immanent critique pivots on this key insight that emerged from Hegel’s critique of Kant.

Our concern with the history of critique keeps the Hegelian mythologeme in place, and retains the emphasis on its centrepiece, the modern state. It traces a number of its key mutations in the course of the twentieth century and it reflects on what it might mean for critique to give up on Hegel’s magnificent ruse.

### *The Significance of the State in the History of Critique*

Critique, as we know it, always occurs in the context of, and takes its opportunity from, a long history of theological, ontological and sociological divisions. Engagement with this history begins with the faltering of the ‘Eusebian myth’ that considered the Roman Emperor as the incarnation of divine providence. This myth was written all over the simultaneous *association* (*quod principi placuit legis vigorem habet*) and *dissociation* (*princeps legibus solutus est*) of law and the will of the Emperor in Roman law,<sup>14</sup> a division of power repeated in the separation of power into the elements of *potestas* and *auctoritas* during the time of the Roman Republic.<sup>15</sup> These two maxims – both authored by the Ulpian – reflect an early attempt to sustain some kind of division between the finite and infinite within the organization of power and law. One might go further and

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<sup>13</sup> Hegel rejected Platonist and Kantian conceptions of the phenomenal world as “mere appearance,” that is, as a mere façade behind which the essence of things remained hidden. Appearance - *Erscheinung* – is for him the manifestation of essence. See the whole “second section” on *Erscheinung*, *Wissenschaft der Logik II*, in Hegel, *Werke 6* (1969), which is encapsulated in the phrase “essence must appear” - “[das] Wesen muss erscheinen” 124 ff.

<sup>14</sup> Joseph Canning, *A History of Medieval Political Thought* (2014) I, 300–1450 ff.

<sup>15</sup> For an instructive discussion, see Giorgio Agamben, *State of Exception*, transl. Kevin Attell, (2005).

conceive the Eusebian myth as emerging in the Roman legal imagination in order to host a series of new myths regarding the division of finite and infinite power, the first of which was the doctrine of the Two Swords through which the medieval Christian imagination sought to settle a long history of battles between Emperor and Clergy (or later, King and Clergy) for a single overarching title that would comprise both finite power and infinite authority.<sup>16</sup>

Not many centuries passed before a critical imagination wedged into the body of the King so as to split it into two, thereby producing the symbolism of the King's two bodies, his terrestrial body, on the one hand, and his celestial body, on the other.<sup>17</sup> But splitting or doubling the King's body was as good as knifing him. The myth of divine royalty was evidently approaching total exhaustion by the time half of the King – the crucial half representing the infinite continuation of his reign (“the King is dead, long live the King”) – was all too evidently nothing but an effigy. The modern state was on its way and it soon either just got rid of the King, or reduced him to a cultural relic (a living effigy) that all too evidently no longer commanded any force that was remotely worthy of a dialectic between the finite and the infinite. The time of the myth of transcendence was over. The modern state had no option but to internalize this dialectic and this internalization became the birth scene of the social critiques associated with the Modernity, and with Hegel and Marx in particular.

### *Hegel and the Internalisation of Critique in the Context of the Modern State*

The key feature of the modern state remains its concern with a constitutive division or split. Niklas Luhmann writes:

The necessity to provide foundations – of which the profound rootedness in the division between thought and existence cannot be discussed here – splits social reality with cleaving force into a sphere of the state and a sphere of society. The state has to justify itself to and in society. (Hegel's conception, which takes over this principle of division but inverts the foundational relation, never received a real following).<sup>18</sup>

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<sup>16</sup> The doctrine of the Two Swords gave way in turn to a late Medieval restatement of the Eusebian conviction of the unity of divine and secular power. This restatement of the Eusebian myth emerged with the doctrine of the Divine Right of Kings, which once again endowed the King with both secular power and religious authority. Once more the finite and the infinite appeared reconciled in the corridors of earthly government, but this reconciliation was also not to last long. See John Neville Figgis, *The Theory of the Divine Right of Kings* (1922).

<sup>17</sup> Ernst Kantorowicz, *The king's two bodies: A study in medieval political theology* (1957).

<sup>18</sup> Niklas Luhmann, *Grundrechte als Institution* (1965), 27 ff.

“[Es ist] die Notwendigkeit der Begründung, deren tiefe Wurzeln in der Scheidung von Sein und Denken hier nicht freigelegt werden können, die mit bohrender Kraft die soziale Wirklichkeit aufspaltet in eine Sphäre des Staates und eine Sphäre der Gesellschaft. Der Staat hat sich in der Gesellschaft und and der Gesellschaft zu rechtfertigen. (Die Auffassung Hegels, die das Trennschema übernimmt, aber das Begründungsverhältnis umkehrt, blieb ohne reale Folgen.)”

Our concern with this key passage from Luhmann's early work does not only pertain to his acute reservation regarding "the cleaving force" (bohrende Kraft) through which the modern state founds itself by means of a division between civil society and the state (proper), but also and especially to the throwaway parenthesized sentence with which it ends: "Hegel's conception, which takes over this principle of division but inverts the foundational relation, never received a real following." To be sure, Luhmann is not suggesting here, at odds with overwhelming evidence, that Hegel received no following. He is only referring to the fact that Hegel's invocation of the state as the author and civil society as the object of justification never received a following. The history of nineteenth century law and politics in Germany (but surely also in the United States and France) was certainly one in which the conservative patrimonial interests of a bourgeois civil society gained the upper hand in the organization of the state, thereby entrenching the power of civil society to demand justification from the state instead of having to justify itself to the state.

Hegel's philosophy of law and the state indeed pivoted on the observation that an unleashed civil society will eventually destroy the conditions for individual autonomy on which itself was based. Three passages from the *Grundlinien der Philosophie des Rechts* describe civil society dramatically as the monstrous power that ultimately consumes all of human existence, impoverishes and excludes the working class from whatever benefits it promises, and heaps disproportionate wealth on a small number of individuals:

Civil society is rather the monstrous power which draws men into itself and claims from them that they work for it, owe everything to it, and do everything by its means.<sup>19</sup>

When civil society is in a state of unimpeded activity, it is engaged in expanding internally in population and industry. The amassing of wealth is intensified by generalising (a) the linkage of men by their needs, and (b) the methods of preparing and distributing the means to satisfy these needs, because it is from this double process of generalisation that the largest profits are derived. That is one side of the picture. The other side is the subdivision and restriction of particular jobs. This results in the dependence and distress of the class tied to work of that sort, and these again entail inability to feel and enjoy the broader freedoms and especially the intellectual benefits of civil society.<sup>20</sup>

When the standard of living of a large mass of people falls below a certain subsistence level – a level regulated automatically as the one necessary for a member of the society – and when there is a consequent loss of the sense of right and wrong, of honesty and the self-respect which makes a man insist on maintaining himself by his own work and effort, the result is the creation of a rabble of paupers. At the same time this brings with it, at the other end of the social

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<sup>19</sup> Hegel, *Grundlinien der Philosophie des Rechts*, in Hegel, *Werke* 7 (1970), 386 ff. (par 238) in English translation of Knox (1821) quoted in the text above is slightly amended.

<sup>20</sup> Hegel (n.19) 389 ff. (par 243).

scale, conditions which greatly facilitate the concentration of disproportionate wealth in a few hands.<sup>21</sup>

The proximity of Hegel's to Marx's critique of bourgeois society speaks for itself from these passages. The difference between them only commences with the opposite paths of critique on which they embarked. Marx viewed the state as fundamentally implicated in the class struggle and, at least in Engels' account of it, ultimately little more than an instrument with which the bourgeoisie protected its interests, hence also Engels' normative prediction that the state will disappear when the class struggle comes to an end. The observation that the 19<sup>th</sup> century state ultimately became little more than a placeholder for bourgeois interests was sociologically correct. Hegel, however, still held on to the belief that the state was the only plausible guarantor for the universal moral autonomy that Kant's practical philosophy articulated and which the French Revolution sought to make a concrete reality. His thinking still contemplated an early revolutionary generation that consider the state as the source of liberty and not a threat to it.<sup>22</sup>

Nineteenth century private law jurisprudence was a conspicuous pillar among those from which Hegel "never received a following," as Luhmann puts it. One of the most celebrated twentieth century historians of private law, Franz Wieacker, would observe with regard to nineteenth century private law jurisprudence that the potential of Hegel's philosophy to reconcile concept and history made no impression on German private law theory.<sup>23</sup> However, it did make an impression on German public law theory. One of the most eminent and influential examples in this regard would be the work of Rudolf Smend. Smend expressly relied on a Hegelian conception of the dialectic between the finite and infinite to articulate a theory of the state as an integrating force that constantly articulates or rearticulates itself in history, thereby reconciling its eternal normative core with whatever vicissitudes of historical contingency may come to befall it.<sup>24</sup>

Of course the side of Hegel that was at work in Smend's thinking, was not the revolutionary Hegel who consistently toasted Bastille day as long as he lived<sup>25</sup> – the one whom Wieacker evidently considered as a critical alternative to the private law jurisprudence of the Historical School that ended up serving the Restoration movement – but, a Hegel who could be employed in a conservative cultural restoration movement not unlike and quite likely historically related to both the Historical School and the

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<sup>21</sup> Hegel (n.19) 389 ff. (par 244). For an instructive discussion, see Joachim Ritter, 'Hegel und die französische Revolution' in *Metaphysik und Politik*, (2003), 183–255; 'Hegel and the French Revolution' (1984).

<sup>22</sup> See Walter Leisner, *Grundrechte und Privatrecht* (1960), 22 ff.

<sup>23</sup> Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (1967), Göttingen: Vandenhoeck & Ruprecht, 415 ff.

<sup>24</sup> As he put it in a key passage: "The constitution is the legal order of the state, more specifically, of the life in which the state has its living reality, that is, its process of integration. The meaning of this process is the perennial renewal of the living totality of the state and the constitution is the statutory articulation of norms with which some aspects of this integration must comply." Transl. from Rudolf Smend, 'Verfassung und Verfassungsrecht', *Staatsrechtliche Abhandlungen und andere Aufsätze* (1994), 189 ff.

<sup>25</sup> See Ritter (n. 21) 196.



Restoration.<sup>26</sup> For the conservative Smend<sup>27</sup> the task of cultural historical interpretation, that could integrate Germany and the German people, was to be conferred to a judiciary that was widely perceived from the side of the socialist and workers movements as partial to the old status quo of the German Empire; hence the insistence of these movements that courts should have no revisionary powers vis-à-vis the legislation of the new Republic.

This is precisely the message of the progressive constitutional theorists of the time, notable among whom were Franz Neumann and Hermann Heller. Both Neumann and Heller would place their faith in the parliament, in positive legislation, and positive law. They were legal positivists and their positivism was motivated by a concern with social-democracy that for them evidently outweighed all concerns with German cultural identity. (Later, post-Radbruch, generations of “progressive” legal theorists for whom legal positivism would become a swearword, conveniently remained ignorant of this progressive political motivation of the Weimar positivists.) The Weimar Left knew that a conservative judiciary with interpretive powers could easily undo the social-democratic revolution in Germany by reading their own cultural values into the general principles of the Weimar Constitution. It should be noted that another major constitutional theorist of the time, Hans Kelsen, whom later generations – and especially one famous contemporary – would deride for his lifeless positivism and normativism, also disqualified the judiciary from interpreting the broad principles of the Constitution.<sup>28</sup> His famous contemporary was Carl Schmitt, the constitutionalist theorist who completely unleashed the interpretive powers of judges by turning every clause of law into an open clause of law.<sup>29</sup>

Schmitt’s unleashing of judicial powers of interpretation in 1933 – for purposes of making sure that the fundamental tenets of the National Socialist movement permeated every aspect of German society – stands in clear contrast to Neumann’s critical assessment of the transformation of private law that was taking place at the hands of the Weimar judges. The open principles of private law such as “good faith” and “good morals” (gute Sitten/boni mores) became general principles private law jurisprudence with regard to which even clearly applicable statutory rules of law could be re-assessed and re-interpreted by the courts. The liberal application of the general principles of law thus became an effective instrument with which democratic legislation could be circumvented. In 1933, Julius Hedemann published a small book in which he cautioned

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<sup>26</sup> Smend was an exponent of the *cultural-historical integration movement* during Weimar Germany that considered General Von Hindenburg the personal embodiment of German cultural-historical identity and therefore the only political force that could integrate Germany and the German people. Moreover, Smend also conferred the task of cultural historical interpretation, through which the state was to perform to its task of integrated German society, to a judiciary that was widely perceived from the side of the social and workers’ movements as partial to the old status quo of the German Empire; hence the insistence of these movements that courts should have no revisionary powers vis-à-vis the legislation of the new Republic.

<sup>27</sup> See Smend (n.24) 145 ff. See also Peter C. Caldwell, ‘Is a ‘Social Rechtsstaat’ Possible? The Weimar Roots of a Bonn Controversy’ in Caldwell and Scheuermann (eds.), *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic* (2000), 143 ff.

<sup>28</sup> Hans Kelsen, ‘Wesen und Entwicklung der Staatsgerichtbarkeit’, in Robert Christian Van Ooyen (ed.), *Wer soll der Hüter der Verfassung sein?* (2008), 39 ff.

<sup>29</sup> Carl Schmitt, *Staat, Bewegung, Volk* (1933).

against the general flight into the general clauses of law (*Flucht in die Generalklauseln*).<sup>30</sup> And it is to Hedemann that Schmitt responded by arguing that every rule of law had become a general clause of Nationalist Socialist rule that judges had to employ programmatically to promote the dynamic ideals of the movement.<sup>31</sup> Neumann described this development in detail in his 1937 essay “*Die Funktionwandel des Gesetzes im Recht der bürgerlichen Gesellschaft*.”<sup>32</sup> It began, he shows, with the Weimar judiciary’s remarkable appropriation of the power to review parliamentary legislation – something that was unheard of in the jurisprudence of the *Reichskammergericht* and other supreme or high courts of Europe since the French Revolution – in view of the demands of reasonableness and good faith. The main aim of these newly adopted review powers was to counteract the social security and anti-trust legislation of the new social democratic republic. And their cumulative effect was to establish an institutional concept of law that ultimately reduced the relations between autonomous legal subjects to the demands of an imperative communal fidelity (*Gemeinschaftstreue*) that shielded the naked social reality of an authoritarian state serving the concerns of a handful of private monopolies.

The Hegelian idea of the state safeguarding its citizens against the monstrous consumption of moral autonomy by civil society had evidently collapsed into an antithesis from which dialectic escape was no longer a realistic prospect. Far from a powerful state with the sovereign power to protect its citizens, the National Socialist state was ultimately a weak societal construction that fell prey to the demands of powerful private social actors.<sup>33</sup> The National Socialist movement itself attached no more than expedient importance to the state. It was an incidental form with which the dynamism of the movement was prepared to compromise as long as it served its purposes.<sup>34</sup> However, the lasting legacy of the movement was to cast a lasting shadow over the idea of the state as the source of liberty. Later generations that increasingly failed to distinguish between the National Socialist movement and state, would accordingly also commence to view the state as a threat instead of a source of liberty. This would indeed then also become one of the main features of the most significant post-war political developments in Europe, namely, the series of treaties that would lead to the formation of the European Union. It is not an exaggeration to suggest that distrust of national states was a driving force of this development. Neither is it an exaggeration to suggest that this development itself contributed much to the further demise of the idea of the state as an emancipatory force. And this is how one of the key normative ideals of Modernity unravelled in the course of the second half of the twentieth century to the extent that percipient observers of this development would invoke in this regard the return of feudalism.<sup>35</sup>

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<sup>30</sup> Justus Wilhelm Hedemann, *Die flucht in die generalklauseln: Eine Gefahr für Recht und Staat* (1933).

<sup>31</sup> Schmitt (n. 29) 43-44 ff.

<sup>32</sup> Franz Neumann, ‘Die Funktionwandel des Gesetzes im Recht der bürgerlichen Gesellschaft’, *Zeitschrift für Sozialforschung* (1937), 542-596 ff.

<sup>33</sup> See Chris Thornhill, *A sociology of constitutions: constitutions and state legitimacy in historical-sociological perspective* (2011).

<sup>34</sup> Neumann (n.32) 591 ff.

<sup>35</sup> Alain Supiot, *The Grandeur and Misery of the Social State: Inaugural Lecture Delivered on Thursday 29 November 2012* (2013), Collège de France.

A crucial ambivalence remains in critical theory when it comes to its attitude toward the state. As was mentioned already, for the Marxist Left the state remained harnessed to the interests of the capitalist class though the precise nature of that alignment was hotly debated. Amongst the most insightful approaches and certainly one of the most complex was that of Nicos Poulantzas who argued that the state was the ‘material condensation’ of the relations of social power as these find contradictory expression within the ambit itself of the state, which thus ceases to be a monolithic bloc, as in Engels, but instead harbours antagonisms that lend themselves to the strategic action of political actors.<sup>36</sup> At the other, *post-Marxist* end of critical theory, Habermas will argue for the continuity between the legislative and executive political functions whereby popular sovereignty as exercised through the legislative channels of will-formation is transferred to the state for implementation so long as the processes are not overly distorted by the logics of money and excessive bureaucracy, what Habermas calls ‘the colonisation of the lifeworld’.

Across the varieties of critical theory, then, an undeniable contradiction would continue to complicate this increasing marginalisation of the idea of the state as the main emancipatory force in modern societal organisation. The state has remained the only power with real capacity to coerce. Military and police capabilities have not been transferred to other social actors, despite the pervasive trans-nationalisation and globalisation of economic, societal, cultural and even governmental arrangements. This has led one prominent observer to contend that state sovereignty still underpins the whole movement towards transnational “social constitutions” that marks the world order of the late twentieth/early twenty first century.<sup>37</sup> The question that beckons in this regard concerns the way this contradiction will be resolved or processed in the course of the twenty first century. Will sovereign statehood reassert itself as an emancipatory form of social organisation, or will it all too evidently become reduced to a useful obfuscation of social forces that have no concern with the emancipatory ideals of Modernity?

### III

#### *Critical theory as Ideology-critique*

If the return to Hegel, and the Left-Hegelian philosophical tradition, allowed us to recover the critical vein of Marxism from the standpoint of its own philosophical foundation, and to focus it on the critique of domination (*Herrschaftskritik*), another takes the cue from Hegel in terms of the *dialectical method* and deploys it in the direction of the critique of ideology (*Ideologiekritik*).

#### *Immanent critique*

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<sup>36</sup> Crucial in this regard is the recognition of the material rootedness of ideology in the social processes through which social relations are reproduced. See Poulantzas (n.3).

<sup>37</sup> Dieter Grimm, *Die Zukunft der Verfassung II* (2012), 312 ff.

For this we turn, with Marx, to the processes of production and social reproduction to identify the *locus* of critique. Basic categories of the operation of the economy and the material reproduction of society are expressions of capitalist relations. They are constitutively mediated through the basic categories of private law that give them expression as acts of freedom and autonomous agency. There are key features of material organisation of society that are thereby distorted, misrepresented, eclipsed or elided in the process of giving them expression. By tracking, fastening onto, and ‘exploiting’ the contradictions that the imaginary constitution of society therefore inevitably incurs, the critical method is able to engage actors normatively in forms of contestation of the reality of their situation. The critical element appears both at the level of the experience of meaning (or sense) and of structure/agency. The first, semiotic, route takes us to the processes of meaning construction; the second route leads us to questions of structure and agency and the way in which speaking positions – rather than what is spoken *about* – are formed.

There is much to develop at this juncture of meaning-construction and agency, and we can begin with the notion of *immanent critique* to capture the idea of theory as practical, engaged activity. A useful instantiation here is Max Horkheimer’s famous essay ‘Traditional and Critical theory’ and the way he describes the lived experience of meaning-creation, and of its deprivation. The primary transcendental move of critical thought, says Horkheimer referring to Kant, refers to the transcendental condition of knowledge, must presuppose the existence of its object, and reflects on the *a priori* that conditions its possibility. For the Hegelian that he is, ‘the tension between the concept and being is inevitable and ceaseless.’ Critical theory installs itself in the instituting gap between the two and articulates them in dialectical terms. What drives the dialectic is not some speculative commitment to coherence but, for Horkheimer (who here repeats Marx’s insight) to a deficit that is experienced by social actors *as alienation*. ‘The critical theorist,’ he says, ‘finds himself *confronted* with the real experience of disharmony or alienation.’ Much of Horkheimer’s critical enterprise is directed to tracking the ‘productive’ tension between processes he deems ‘objective’ and the ‘subjective’ experience they generate in those who find themselves subjected to them. There arises a discrepancy between what law promises – freedom, equality, self-determination – and what it delivers. Note how crucial for ‘immanent critique’ is the embeddedness in actual experience: it means that the representation of that discrepancy, and contradiction, is not merely an *expression* of historical reality but a force of *change* within it because it attaches to the experience of social actors who are striving to make sense of their experience. ‘Immanence’, in other words, always-already implicates the historically poised, necessarily unfinished nature of human engagement, which suggests that the engagement is not something subjects can stand back from, but one that comes upon them with the ‘force of present distress’ which they need to ‘make rational’.<sup>38</sup> For critical theory the awareness of its own partiality, the rational falling short of the categories of thought, is what drives them to transcend current forms of their finitude. A certain incomprehensibility of suffering as such calls forth a response by the subject, whether it takes the form of de-mystifying the capitalist surface forms of equality, or the critique of

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<sup>38</sup> Horkheimer (n. 1) 215 ff.

domination through culture, or ideology critique. The inaugural gesture of critical thought is reflexivity over its own partiality.

### *The Dialectic of Subjectivity*

The history and theory of the subject, of agency as engaged in the social world, is central to the conceptual development of critique and critical theory that would come to the fore in the dialectic thought of Hegel and Marx. We take here a brief look at two key moments of what might be called the Hegelian-Marxian narrative of the dialectic of subjectivity, namely, the revitalisation of the dialectic of subjectivity in the thought of Georg Lukács and its undoing in the work of Theodor Adorno. They represent key moments in the trajectory of European critical thought.

The central concern of Lukács' epochal revision of Marxist thinking was the rehabilitation of the dialectic between subject and object and the reinstating of the revolutionary subject. Lukács considered both these elements – the dialectic between subject and object and the agency of the revolutionary subject – to have disappeared from the late phase of Marx's work (largely as a result of the influence of the thought of Engels). Central to Lukács' revision of Marxist thinking was the endeavour to replace what had become the objective dialectic of categories (later also associated with scientific historical materialism) with a revolutionary dialectic in which the proletariat would again assume the role of revolutionary subject.<sup>39</sup> The revolutionary agency of the proletariat that Lukács sought to rehabilitate in Marxist critique consisted, according to him, in destroying the false objectivity that resulted from capitalist commodity fetishism and the resulting *reification of social relations*.<sup>40</sup> For purpose of this rehabilitation he considered it necessary to return to the key concern of subjective agency in Hegel's dialectic, stressing in this regard the important influence of Fichte's emphasis on the primacy of action and praxis on Hegel's conception of the dialectic.<sup>41</sup>

The discovery of the revolutionary subject or agent of history in German Idealism nevertheless gave way to – as Lukács put it – the mystification of Spirit in Hegel's thought, a mystification that Marx duly demystified by turning the history of Spirit into the history of matter and historical Idealism into historical materialism, before historical materialism, too, lost its concern with material historical agency in the conceptualism of the late Marx. It is this conceptualism that Lukács sought to replace with real historical and subjective agency and for purposes of which he turned to the agency of the proletariat, only to discover that the proletariat itself is already so implicated in the reification of social relations – concerned with its own immediate class interests instead of the emancipatory ideal of the classless society – that it no longer offers the promise of historical agency without being guided towards its true historical interests. It is for this guidance that Lukács turned to the leadership of the Communist Party.<sup>42</sup>

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<sup>39</sup> See Georg Lukács, *History of Class Consciousness* (1971), 1-5 ff.

<sup>40</sup> Ibid. 83 ff.

<sup>41</sup> Ibid. 121-131 ff.

<sup>42</sup> Ibid. 314-339 ff.

Lukács thus articulated and published in 1923 what may be considered the last major aspirational conception of relatively orthodox Marxism to invoke the utopian potential embodied in the discontent of the proletariat and the epistemological leadership of the Communist Party, before the disaster of the Stalin-Hitler pact derailed this current of Marxist thinking for good in 1939, at least as far as Western Marxism is concerned. One of the most pertinent responses to this disaster would come from two social theorists of the Frankfurt School, Max Horkheimer and Theodor Adorno. Their legacy would be to place the very notions of historical subjectivity and the idea of an emancipatory dialectic between subject and object in question. Their co-authored essay on *The Dialectic of Enlightenment* (1944) already commenced with an equation of subject-formation and reification. The subject itself is as such a product of reification and dominance and can therefore not be invoked for purposes of contemplating a revolutionary de-reification of social relations, they argued. Adorno would articulate this thought further in a way that directly challenged Lukács view of the subject as an agent of emancipation. One can consider the following key passage from his *Negative Dialectics* (1966) one of the crucial statements of critical theory's despairing withdrawal from the philosophy of the subject and the whole legacy of German Idealism:

The human mind is both true and a mirage: it is true because nothing is exempt from the dominance which has brought it into pure form; it is untrue because, interlocked with dominance, it is anything but the mind it believes and claims to be. Enlightenment thus transcends its traditional self-understanding: It is demythologization – no longer as a *reductio ad hominem*, but the other way round, as a *reductio hominis*, an insight into the delusion of the subject that will style itself an absolute. The subject is the late form of the myth, and yet the equal of its oldest form.<sup>43</sup>

It is obvious that the subject considered as the very product and vehicle of dominance can no longer be contemplated to enter into an emancipatory dialectic with the object. The thing, the object, that figured for Lukács as the product of reification and commodification, becomes the abode of a non-identity that critical theory should shield against the domination of subjectivity, as another key passage from *Negative Dialectics* makes clear:

If a man looks upon thingness as a radical evil, if he would like to dinamize all entity into pure actuality, he tends to be hostile to otherness, ... to that nonidentity which would be the deliverance, not of consciousness alone, but of reconciled mankind. Absolute dynamics, on the other hand, would be that absolute action whose violent satisfaction lies in itself, the action in which nonidentity is abused as a mere occasion.<sup>44</sup>

The work *Negative Dialectics* itself is an attempt to resist conceptual grasping of the object (the key concern of German Idealism). It considers conceptual thinking as such as a suppression of objectivity and endeavours to transcend the concept through the concept – *über den Begriff durch den begriff hinauszugelangen*<sup>45</sup> – by developing a method of conceptual constellations that “circled” the object instead of grasping it directly.<sup>46</sup> The distrust of conceptual thought as irredeemably bound to annihilate nonidentity,

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<sup>43</sup> Theodor Adorno, *Negative Dialectics* (1973), 186 ff.

<sup>44</sup> Ibid. 191 ff.

<sup>45</sup> Ibid. 27 ff.

<sup>46</sup> Ibid. 163 ff.

nevertheless moved Adorno to shift his concern with a reconciliation between subject and object, that would be premised on the nonidentity between them, to art. (Avant-Garde) Art, he argued, concerns a mimetic approach to the object that respects nonidentity by portraying, exactly, the lack of reconciliation between subject and object.<sup>47</sup> With these thoughts Adorno took leave of the pursuit of a *dialectic* reconciliation between subject and object that was still central to Lukács' work. He pursued, instead, a *negative dialectic* that stressed the recognition of non-identity and lack of reconciliation between subject and object as the last resort for the promise of a "reconciled mankind." One might contribute the dilemma in which his thinking ended up, in the final analysis, to a failure or refusal to let go of the subject-object relation – the essential legacy of German Idealism – as the key organisational premise or his thinking, notwithstanding his attempt to think this relation negatively. A different line of critique would be opened by a thinking that duly began to take leave of this relation, or rather, commenced to contemplate a release from it by shifting its focus to the possibility of *an event* that precedes the constellation of subject and object and sets the scene for it. Adorno already mentioned – almost in passing – the *incidence* of artistic intuitions in *Negative Dialektik* that hits the work of the artist like flashes of lightning – '[a]uch in die künstlerische Arbeit schlagen sie ... als Blitze von oben ein.'<sup>48</sup> This thought, however, did not detain him. It would, however, become the arresting thought in the work of Jean-Francois Lyotard, which we will visit briefly later.

### *From the History of the Subject to the Future of the Event*

If the transformation of the critical project can be seen as a move from the dialectic of the subject to a focus on the event, it is because the unfolding of subjectivity in history could not guarantee that it would resist the reification that ran alongside it with the development of Capitalism. This is what the story of the Negative Dialectic tells, and it is also clearly expressed in the emphatically anti-Hegelian currents of Marxism associated with the rise of structuralist thought. Amongst the most important here are the theories that emanated from the Ecole Normale Superieure in Paris around the key figure of Louis Althusser, perhaps the most typical exponent of the anti-Hegelian, *structuralist* current of Marxism, with its emphasis on the structural determination of subject positions and possibilities of action *without* dialectical overcoming. Reading *Capital* closely, Althusser takes from Marx the notion that the fetish phenomenon – the commodity form – on which is based capitalist exchange arises as co-original with what may be envisaged as the possibilities of human association under capitalist conditions. It cannot be stepped back from, or put to question dialectically. In one of his most quoted essays, on the function of 'ideological state apparatuses', Althusser distinguishes between forms of capitalist state repression (police, prison service, military) and ideological forms that operate behind the backs of agents, as it were, in calling them forth ('*interpellating*' them is his term) under specific descriptions to occupy subject positions that reproduce the relations of production according to the logic and the exigencies of capitalism. The subject of these relations is not in a position to step behind the ideological forms and put them to question because

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<sup>47</sup> Ibid. 26 ff.; See also Theodor Adorno, *Ästhetische Theorie* (1980), 251 ff.

<sup>48</sup> Adorno (n. 43) 26 ff.

they inform constitutively what it means to be a 'free' subject and what it means to exercise those freedoms. The constitutional imaginary of bourgeois democracy cannot be put to question by actors who rely on its semiosis of freedom, subjecthood and self-determination to make sense of their social experience. To contest bourgeois democracy was to transcend those terms, and with them the juridical condition of the construction of sense, a condition that revolution alone could deliver.

A similar impasse relating to the subject position is posed by the tradition of revolutionary syndicalism in Italy and the post-Gramscian currents of the autonomist syndicalist movements. If 'to speak of constituent power is to speak of democracy,' as Antonio Negri puts it in the opening sentence of his early work on the concept (*Il potere costituente*) the fact that it appears as constitutional, that is, comes always-already implicated with constitutional form, means that democracy is already straitjacketed to the conditions and limitations of capitalist legality. To be valid, popular will must be imputed to the constitution that establishes the conditions under which the popular will can be expressed *as* sovereign. Law and democracy are reconciled only via the suppression of a paradox that impacts on constitution-making as never, inevitably, fully democratic, if democracy, *ex hypothesi* must remain sovereign to contest and determine the conditions of its exercise. The tradition of thinking about revolution - a tradition that also informs Negri's work - in the variety of its instantiations typically returned to the promise of *constituent power* to face up to precisely that reflexive question. 'What is constituent power from the perspective of juridical theory?' asks Negri, whose priority of course lies with constituent power as an expression of the potentiality *to break with* the logic of capitalist reproduction.

Here is Negri of the earlier work:

[The constituent] is the source of production of constitutional norms – that is, the power to make a constitution ... in other words the power to establish a new juridical arrangement ... This is an extremely paradoxical definition: ... Never as clearly as in the case of constituent power has juridical theory been caught in the game of affirming and denying, absolutising and limiting that is characteristic of its logic (as Marx continually affirms.)<sup>49</sup>

Negri tracks a sequence of reductions, inflicted by juridical reason in the context of its 'taming' and instrumentalising the constituent, and in the process inflicting 'every type of distortion'

Constituent power must itself be reduced to the norm of the production of law; it must be incorporated into the established power. Its expansiveness is only shown as an interpretative norm, as a form of control of the State's constitutionality, as an activity of constitutional revision. ... In this the juridical 'covers over and alters the nature of constituent power.' ... 'This is how the juridical theory of constituent power solves the allegedly vicious circle of the reality of constituent power. But isn't closing political power

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<sup>49</sup> Antonio Negri, *Insurgencies: Constituent power and the modern state* (1999), 2 ff.



within representation nothing but the negation of the reality of constituent power?’<sup>50</sup>

The ‘interpreters of law’ are at pains to maintain the ‘vitality’ of the system, while navigating that vitality away from any kind of dangerous democratic excess.<sup>51</sup> Amongst the jurists it is only Schmitt, for Negri, that posed the question of constituent power ‘with extraordinary intensity.’ (24) (the ‘constituent’ is preserved in Schmitt in the logic of the decision, that is never purely of the order of the ‘constituted’.) But in tying it to the logic of the exception, Schmitt ‘capitulates to the force of an attraction that is by now devoid of principles’. (21)

In the, much celebrated, later work *Empire* the emphasis has shifted away from the state, but the problématique remains, of how to claim a speaking position for the subject that breaks with the system of capitalist social reproduction. For Negri, the (collective) revolutionary subject, as wielder of constituent power, must remain under-determined and resist subsumption under the dominant symbolic order. To pick up the thread for this incongruent representation, we will need to go back to a certain Italian current of Marxism out of which Negri’s work grew: the ‘operaismo’ movement of the 1960s that formed the springboard for the later ‘autonomist’ current of Italian Marxism in the 1970s, in which Negri was a leading figure. What is distinctive about the autonomist movement is the centrality within it of a project of working class self-valorisation, and with this self-valorisation, crucially, a resistance to accept the hegemonic representational orders of Capitalism, a refusal to define the movement through those vocabularies. What this entailed was the rather paradoxical refusal to identify the revolutionary-subject-to-be—the working class—through work, since the system of work, they argued, provides a context within which the self-identification of the proletariat as potential revolutionary subject is always-already undercut. That is because, to put it in the terms Marx used in the Manifesto, ‘a class of labourers, live only so long as they find work, and find work only so long as their labour increases capital’. Thus, practically, political action for the *Autonomia* was undertaken in terms of refusal to work, wildcat strikes, spontaneous slow downs, acts of sabotage, bad-faith reformism (the political programme of demanding more from management than management could possibly deliver, etc.

At the conceptual level, the possibility for self-identification of the working class is cancelled in this undertaking, and Negri can only call upon this ‘project of destruction’ to undo the symbolic grip that capitalism exerts on the proletariat with its control—at the very point of the recovery of meaning—of the vocabularies and representational orders within which self-valorisation might have taken place. The injunction of *Operaismo* and then *Autonomia* to undertake political praxis ‘dal punto di vista operaio’ becomes tragically both urgent and impossible because that point of view forever slips back to existing schemata, and makes alternatives visible only in terms of dislocations it marks

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<sup>50</sup> Ibid. 3-4 ff.

<sup>51</sup> Three traditions of constitutional interpretations that undertake this ‘labor of constitutional interpretation: there are advocates of transcendental solutions, advocates of immanent solutions, and synthesisers who integrate constituent power as ‘coextensive and synchronic’ into ‘the positive constitutional system.’ See Negri (n. 49) xxx-xxx. Kelsen is typical of the first position and Schmitt of the second; and although not mentioned by Negri, Habermas, with his achievement of the synthesis or co-implication of constituent and constituted power might be the most celebrated of the ‘synthesisers’ of the third approach.

rather than any consistent programme of 'self-valorisation'. 'We find ourselves', protests Negri, 'with a revolutionary tradition that has pulled the flags of the bourgeoisie out of the mud.'<sup>52</sup> Like the Marx of *The 18th Brumaire*, his call is to 'let the dead bury the dead'. And yet, despite its tragic contradiction, for Negri it is of paramount importance to remain with the project of self-valorisation.

It is this project that takes a positive turn in *Empire*.<sup>53</sup> Transferring a distinction that Negri borrows from Spinoza between *potentia* (force) and *potestas* (authority, command), the distinction into politics allows Negri to subordinate the concept of sovereignty/*potestas* to its continuing actualisation in *potentia*. And *potentia* becomes the term for constituent power. The constituent power of the multitude remains inalienable and does not freeze into entrenched representations ('the people's autonomy lives before its formalisation', he says). In *Insurgencies* he wrote of 'an irresistible provocation to imbalance, restlessness and historical rupture'; ceaseless self renewal. In continuity with Negri's earlier work, the main thrust of *Empire* is a call to resist the familiar (by now) problem of representation: that every moment of self-constitution—and the revolutionary moment as ultimate self-constitution—must yield to a pre-constituted order. We have already discussed the problem that without this yielding, praxis would find no leverage and identity no register. The difficulty is that the yielding is at once a necessary condition, because without it there is no representational space, and yet cancels out the new in the very act of accommodating it in pre-existing schemata. In all this the idea of constitutional self-government comes with the 'self' over-determined. The collective self of this self-government is a self significantly pre-determined in the past, always already encumbered with its limitations.

If the problem is put like this: 'how can the multitude—the first-person plural—initiate an action if it is the action itself, its undertaking and acceleration, that positions the subject?' then the answer must be that the subject of constituent power is only ever the insurgent subject, the emergent property of an action, not its instigator or agent. Could it be then that in linking the two questions and answers together Negri allows 'dialectic' to do more than he initially envisaged? By producing incommunicable resistances to its practices as totalising context and target of resistance, 'Empire' allows a growing coincidence, a certain accumulation of struggles, even an 'over-determination of contradictions' as Althusser would have it, and in the process of that accumulation the emergence of the anti-capitalist movement as universal subject.

The operation of 'Empire' as a system of global capitalism depends on a totalising inclusion, whereby all conflict is replicated as crisis. Conflicts are played out as fragmentary and local, and thus not only innocuous but actually instrumental to the reproduction of Empire. But as production comes increasingly to coincide with communication (in that it is 'communication' that has displaced all other commodities) what guarantee, asks Negri, is it possible for the system to give that this condition (this internalisation) will continue? That, in other words, contingencies will not become subversive to the system but that they will forever be contained as internal to it, as opportunities to instigate responses and in the process re-entrench itself as sole and total context, effecting on an unprecedented scale the subsumption of the social to capital? There is no meta-guarantee (and ideology can no longer provide the reproduction of

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<sup>52</sup> Negri, *The savage anomaly: the power of Spinoza's metaphysics and politics* (1991).

<sup>53</sup> Antonio Negri and Michael Hardt, *Empire* (2000).

meanings at a meta-level) that social production, living labour, desire, and all that dynamism will be harnessed to reproduce the given framework of relations and will not instead erupt asymmetrically and break with the pressures of homology. And what is crucial here is that 'Empire' in a sense makes available the space of resistance, suspends it open, by the very fact that it has been so spectacularly successful in having effected the subsumption of society to capital in the first place.

### *Theorising the Event*

What remains to be thought in view of the moments of critique traced above is its transformation from a concern with subjectivity to a concern with the event; and more specifically, from a concern with subjectivity as irreducibly determined by its history, to the event as inception of an undetermined and unprecedented future. For purposes of contemplating this transformation, we situate Negri's concern, above, with an *always insurgent subjectivity* that resists the reduction of constituent to constituted power (and the *accomplishment* of subjectivity that this reduction implies) within the development of critical theory from Lukács to Adorno, on the hand, and the emergence of a concern with *the event* in a host of late twentieth century thinkers of whom the work of Alain Badiou and Jean-Francois Lyotard can be selected as representative. From the perspective offered by the thinking of the event, we shall pose the question whether the insurgent subjectivity contemplated by Negri does not, in fact, concern the sheer insurgence of the event that predates whatever (restorative) subjectivity may come to be announced in its wake. If this question is to be answered positively, one would have to ask whether this turn from a concern with the revolutionary subject that is predetermined by its own history to a concern with an unprecedented event that inaugurates an as-yet-undetermined future, does not also announce an exploration of critique that breaks with the tradition of dialectics and seeks to solicit moments of rupture that refuse dialectic incorporation.

Lyotard's engagement with avant-garde art thematised the anxious concern of the artist with the irreducible uncertainty and unpredictability of the *event*, the irreducible uncertainty of whether something will come; the irreducible unpredictability of the *there is*, the *il y a*.<sup>54</sup> His endeavour in *Le Différend*, in his own words, would be nothing but addressing the question of whether something new may be taking place – [e]n écrivant ce livre, [j'ai] eu le sentiment de n'avoir pour destinaire que le *Arrive-t-il?* And the thinking of the event concerned for him, the ultimate resistance to the instrumental use of time – *l'ultime résistance que l'événement peut opposer à l'usage comptable du temps*.<sup>55</sup> It is here that contemporary critical theory finds its most forceful impetus, that is, in a radical nonidentity thinking that no longer takes the relation between subject and object as its point of departure, but simply thinks in terms of an incommensurable emergence of new possibilities of political action and the aporetic regard for ways in which this emergence may be solicited without returning to the philosophy of the subject. It is exactly this impetus that one discerns in Negri's concern with constituent power that refrains from

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<sup>54</sup> Jean François Lyotard, *L'inhumain, Causeries sur le temps* (1988), xx ff.

<sup>55</sup> Lyotard, *Le différend* (1988), 15.

subject formations that are nothing but the continuation or repetition of already available histories.

For an other, different, theorisation of the event one must turn to Alain Badiou, another of the Marxist theorists that emerged from Althusser's circle.<sup>56</sup> At one level at least, Badiou's argument contests Negri's frontally. For Badiou the 'reach' into that which Negri assumes to be an underdetermined *multiplicity* is always and can only be directed by, and thus contained within, what he calls *the situation*, 'contained' as past memory, present options and future scope. And while structures are indeed re-embedded and renewed in time, the renewal proceeds along given pathways, and it is always the situation that shapes and delimits the 'encounter' with whatever may be outside it, establishing in the process the very meaning of encounter, of *what* is situated and against what it is situated, establishing, that is, reference to self and other. Against dialectical thinking, for Badiou, for the engaged - situated - subject there is *nothing* beyond the situation.

Thus Badiou's account of the 'situation', to begin with, presents us with closure that is totalising. In terms of semiosis, for Badiou the closure of situations is *condition* of signification, of the creation of meaning, of something counting-as *x*. And that is why resistance is caught up in a double bind here because while *negation* would be crucially a presupposition of breaking *out of* the confinement of a situation, yet it plays a functional role *within* the situation. The problem for critique here is that, as a value in the dyad of exclusive alternatives, negation *confirms* the situation as much as affirmation does. Normative orders at this point exploit negation as a means of immunising themselves from challenge. Negating the situation by operating within its own semiotic universe, thus forever slips back into affirming it, not transcending it.

And yet, for all the totalising hold of the situation, Badiou attaches the possibility of critique, and therefore of resistance, to the idea of the *event*. The event cannot be inferred from the situation. 'As something that cannot be recognized as one in the situation, an event is the presentation of inconsistency in the situation.'<sup>57</sup> 'From within the situation the existence of the event cannot be proved, it can only be asserted. An event is something that can only be said to exist in so far as it somehow inspires subjects to wager on its existence.'<sup>58</sup> What does it mean to 'assert' what is denied presence?

We do not for present purposes need to follow Badiou in the critical-theorisation of how the new breaks into the 'situation' as an 'event'. Suffice it so say that for him the event remains 'unpresented and unrepresentable' and its belonging to a situation is undecidable from within the situation itself.<sup>59</sup> Instead the appearance of the event follows a certain logic of *rupture*, an emergence that could not be counted-for from within the situation, and an opportunity that arises paradoxically *in spite of* the opportunity-structure available.

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<sup>56</sup> Though in Badiou's case, the relationship with his teacher was fraught, to say the least. For a fascinating account of the tensions see Dominique Lecourt, *The mediocracy: French philosophy since the mid-1970s* (2002).

<sup>57</sup> Peter Hallward, *Badiou: A Subject to Truth* (2003), 115 ff. See also Peter Hallward, 'Order and Event', (2008) 53 *New Left Review*, 97-122 ff.

<sup>58</sup> Alain Badiou, *Being and Event* (1988); transl. Oliver Feltham (2008), 214 ff.

<sup>59</sup> Badiou (n. 58) (2008) 199 ff. et 202 ff.

#### IV

#### Conclusion

The critical concern with the event and the emergence of radical utopian possibilities of action that is at stake in the contemplation of *constituent* power (in terms of itself, and not in terms of something else) is irreconcilable with the critical concern with the normative framework of the state and the whole gamut of *constituted* power implied by this normative framework. It is nevertheless the task of critical theory not to neglect either of these possibilities of critique. The critical project on which, for instance, Neumann embarked unfolded squarely within the parameters of existing conceptions of constituted power. Its critical thrust, however, is not in the least blunted today in a time that executive judiciaries are again (or still) the secret agents of the emaciation of the state and the reduction of the normative framework of Modernity to the logic of the market. This critical project, however, must remain accompanied by the thinking of unheard possibilities of political action, were it not ultimately to collapse into a complacent endorsement of the compromised justice that known forms of political organisation offer. It is for this reason that critical theory must continue to think, with Negri, the aporetic thought of a constituent power that can only be understood in terms of itself and not at all in terms of constituted power. Caught between these two irreconcilable and opposite trajectories, critical theory faces the difficult and awkward task of constantly articulating and rearticulating its own in/coherence.

Let us finish by *reiterating* some of the fundamentals of Critical Theory as captured variously by our thinkers, and with special emphasis on the critique of juridical reason and its critical deployment.

The first thing to note is that critique begins in the context of the articulation of specific constellations of meaning, where the creation of meaning occurs in terms of specific imaginaries, with their vocabularies and rules of signification. It also occurs in the context of specific sets of social relations, institutional arrangements and processes of social reproduction. In both senses it is always *in media res*

In the second place, critique involves the acquisition of distance from the conceptual forms that determine identity and action, where by 'distance' one need not yet assume a fully fledged reflexivity but at least the introduction of contingency where there is necessity. This is both key to critical thinking and one of its steepest requirements, one that Althusser for one, as we saw, thought impossible in relation to the fundamentals of capitalist relations. Marx's analysis of the fetish phenomenon is, as we saw, a case in point: for Marx too the commodification of social relations is *ab initio* and cannot be stepped behind to recover them in a non-alienated form. Where founding assumptions carry a certain self-evidence into the imaginary constitution of society, as inscribed in language and as mobilising specific systems of signification and material support, critical theory demands the recognition of the contingency of those foundations.

The reflexive move is emphatically *not* a stepping *outside* of the context that might afford an objective (as opposed to class-inflected) view but always carries the partiality of contextually situated and historically conditioned perspectives.

And yet the critical perspective is one that fastens onto contradiction, a term under which we can here subsume also fundamental inconsistencies, silences and exclusions, discrepancies between what the system promises and what it is *capable* of delivering. Capable is an important word here; unlike 'likely' it carries a structural limitation. For example a capitalist labour market cannot deliver on the promise of full employment because a market - in order that it be able to optimise supply and demand - requires a structural element of unemployment to maintain itself *as* a market. In this respect critique distinguishes itself from criticism as simply directed to rectify inconsistencies. In contrast, the object of critique is to expose contradiction and offers neither rectification nor reconciliation.

Where contradictions have been tracked, ideology critique aims to expose them as the *systematic* expression of dominant interests – whether these are class interests or whether they pertain to gender, race or underlie other forms of oppression. Ideology critique approximates the critique of domination most clearly when these particular interests combine in hegemonic constellations.