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Pirates and Privateers

An Introduction in Three Acts

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PIRATES AND PRIVATEERS
AN INTRODUCTION IN THREE ACTS

1.

Never low on speculative long-term predictions, in §472 of his *Menschliches, Alzumenschliches* Nietzsche prophesies that democratic distrust of government will ultimately 'impel men to do away with the concept of the state, to the abolition of the distinction between private and public' so that 'private companies will step by step absorb the business of the state' (1996: 172). The certain decay of the state is due, he explains, to the erosion of 'The belief in a divine order in the realm of politics, in a sacred mystery in the existence of the state' so that 'the state will unavoidably lose its ancient Isis veil and cease to excite reverence.' Of this idea one finds echoes in Walter Benjamin and Carl Schmitt's reflections on the connection between theology and politics: the claim, which to a certain extent they share, that structural failure by the governed to perceive the link between law-making and law-preserving violence marks the beginning of the end of an institution's legitimacy and existence (Benjamin 1978: 288; de Wilde 2008: 36). It also occupies Jacques Derrida (1992) in a lecture on 'the mystical foundation of authority' as described by Montaigne and Pascal.

Anno 2015 the hypothesis that the modern nation state and/or parliamentary democracy has run its course is a truism for some, almost to the point that its contestation becomes a cliché (Harman 2007, Sassen, 1996), although debates do occasionally flare up before receding into the depths of the academic underground. Generally, that which challenges the welfare state is subsumed under the broad rubric of 'neoliberal governance'. In this narrative, corporate powers are gradually eroding what the emancipatory social movements of the 19th and 20th centuries had gained in terms of state-recognized civil rights, social security, and so on. Yet in the cracks opened up by neoliberal globalisation various radical alternatives that defy categorization within this Manichean narrative may also prosper: local and crypto currencies (Bristol Pound, Litecoin), counter-banking (Occupy-Bank, Timebank), micronations (Principality of Sealand), eco-communities and hacker colonies (Calafou) and alternative internets (TOR, GNUnet). These are today's pirates and privateers, operative in the widening gap that separates current societal norms from their institutionally embedded precursors and the laws designed to control the technologies through which these norms are implemented. Especially in the case of the internet the legal and political apparatuses are perceived as running behind and fighting a lost battle (although, as Snowden's revelations show, agencies such as the NSA that are furthest from democratic control still seem to function relatively well).

As in most Western countries the parliamentary Left continues to defend the welfare system as a place of last resort against neoliberalism, it loses new generations of the open-minded and tech-savvy by reifying politics as a professional, institutionalized sphere instead of a dirty battle played out on the grounds of 'civil' society. Already cynical, these generations might increasingly recognize themselves in St. Augustine's pirate when he answers Alexander the Great's question of what he means by keeping hostile possession of the sea: 'What thou meanest by seizing the whole earth; but because l do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled Emperor' (in Heller-Roazen 2009: 56).

Will the conflict between neoliberal and alternative solutions to the present spiral of crises take place in ever more deterritorialised technocratic networks beyond state control? Perhaps we will witness the proliferation of

large self-regulative parallel systems, of password-protected enclaves, and of local communication ecologies and gated communities that resemble cyberpunk author Bruce Sterling's SF novel Islands in the Net, where 'the decay of political systems will lead to a decentralized proliferation of experiments in living: giant worker-owned corporations, independent enclaves devoted to "data piracy," Green-Social-Democrat enclaves, Zerowork enclaves, anarchist liberated zones, etc.?' (Bey 2001). It is around these and related questions that the articles in this *Krisis* dossier revolve, taking the pirate/privateer distinction as a starting point from which other dualisms are interrogated.

But why would one want to revive the pirate and privateer, remnants of the romanticized clichés of a bygone era? From the perspective of the nation-state, it might help compare the conditions that triggered its formation with the conditions that currently undermine it. Of course, there can be no return of the same strictly speaking. The globalized present is, besides still being firmly in the grip of the combined efforts of nation-states, qualitatively different from the era of piracy at its height. But this doesn't prevent the grasping of structural analogies between the two situations as a way of elucidating the present and anticipating the future. The category of piracy has seen a revival in the context of both online file-sharing and protecting economic infrastructure, from global trade routes along the coasts of Africa to transatlantic internet cables. As such it is once again an important trope in our contemporary imaginary, which increasingly pictures the world in terms of vast multi-layered but under-governed networks, not only in the mainstream media and popular culture, where those who participate in illicit file-sharing identify with the pirate legacy, but in academic research as well. The figure of the pirate has become a site of fierce contestation, used simultaneously to legitimize and delegitimize the kind of practices to which it is made to refer. The edited volume *Piracy: Leakages from Modernity* (2014), reviewed here by Liesbeth Schoonheim, provides an overview of current research on contemporary piracy.

In contrast, the figure of the privateer receives far less attention: undeservedly so, if only because in its inevitable relation to sovereignty it offers a unique opportunity to better understand the different status of piracy in *its* relation to sovereignty. The privateer – essentially a private warrior – forms

but a small part of the totality of private actors whose powers are constituted through state contracts and privileges, and in contrast with which piracy is defined: 'The phenomenon of piracy is indissociable from the role of the State in processes of territorialization and the normalization of trade' (Arnould 2011, my translation). The privateer also points to the increasing difficulty of distinguishing between war and peace: control over the economy by its own means partly replaces territorial political wars (albeit guided by a deterritorialized war against insurgencies that is permanent). A terrorist attack may cost ten lives, but a 0.1% increase in import tax might cost thousands, while passing unnoticed.

It is the triadic relationship between sovereign, pirate and privateer that Sonja Schillings addresses in her thought-provoking essay on Giorgio Agamben's reflections on piracy in relation to his theory on sovereignty and bare life in the *Homo Sacer* trilogy. It provides an answer to the question, 'what distinguishes a pirate from a privateer?' by a critical engagement with Agamben's elaboration of the ban-structure of sovereignty through what is argued to be a problematic – because selective – reading of Marie de France's lay *Bisclavret*.

Does the distinction between pirate and privateer presuppose a sovereign decision that introduces the privateers as a state of exception? Does sovereignty survive the end of the nation-state by entering into ever-new formations? If so, where are these to be discerned, if no longer exclusively in state apparatuses? How is the ban that sanctions the actions of some private actors while illegalizing others re-iterated in the present in ways that profoundly challenge our political vocabulary?

Oscar Coppieter's contribution also centers on the distinction between pirate and privateer, through an interrogation of the potentials and pitfalls of the Corporate Social Responsibility (CSR) movement in a transglocal institutional arena. Although critical of its claims, he argues that it can also provide a powerful tactic in fueling counter-hegemonic resistances by politicized pirate consumers and producers. What is now a tactic that moves within the boundaries set by the given institutions might evolve into a strategy with revolutionary effects.

2.

'In civilizations without boats, dreams dry up, espionage takes the place of adventure, and the police take the place of pirates.' This remark by Foucault (1984) in a 1967 lecture on the notion of heterotopia provides a good entry point because it captures the juncture at which we have arrived, the so-called network society (arguably a misnomer that provides the illusion of unity, of an elusive 'we'). For whatever reasons, the pirates that roam the information seas (surrendering for the moment to this rather tacky metaphor) continue to crack their ways into the continuous stream of commercially released albums, games and movies, and to hack into proprietary IC systems. On the other side are the intelligence services and the police, whose gaze extends to every nook and cranny of the social by means of infrastructural states of exception tuned to emergency by design: backdoors build into the ICT we use, even at the level of hardware. Yet the produce of the general intellect is increasingly encrypted using broadly available open-source frameworks and applications. The hacker scene is a game of seduction: black and white but mostly grey hat, the hack that might land you in jail for the next ten years may also get you a well-paid contract with a security firm, or with the government itself for that matter. A story of the rise and fall of Anonymous, from black to white and back again, Maxigas reviews Gabriella Coleman's recent contribution to the emerging field of netnography, *Hacker, Hoaxer, Whistleblower, Spy: The Story of Anonymous.*

Needless to say, boats play an important role in contemporary pirate imaginaries. An offspring of Anonymous, Lulzsec sailed the seven seas of the internet in their Lulzboat. In the logo of *The Pirate Bay* the boat also occupies a prominent place, with a cassette tape – the symbol of bootlegging culture – replacing the skull in the pirate flag we are all familiar with. The boat is also, lest we forget, a technology of expansion and conquest, and as such is responsible for producing the sea as a legal and political problem. In the Western imagination the sea on which boats fare and in which they disappear is simultaneously a space of freedom and necessity. For both freedom and fate are beyond the human as the measure of things and the rules of the land. The sea occupies a unique position in relation to what Carl

Schmitt claimed is the essence of law (*nomos*): an originary *Nahme* (appropriation) that proceeds to give the land a *Name* (name). So the idea of naming is also understood as part of an act of appropriation, a taking (*nehmen*).

Schmitt goes on to state that the older word *nemein* refers in its meaning to both *teilen* (to divide), *verteilen* (to distribute), and *weiden* (to pasture, or produce) in a way that supports his argument about the fundamentally appropriative nature of Law, i.e. that 'initially, there was no basic norm, but a basic appropriation' and, subsequently, that 'no man can give, divide, and distribute without [first] taking' (345). He attacks the idea that societies might someday pass (or already have passed) beyond the proprietary positing of the Law, considering it a very dangerous and decadent idea. Liberal, anarchist and Marxist world-views are all found guilty of entertaining precisely this idea, that the present world reaches a stage where all power over men will cease and, as he sarcastically remarks, 'things govern themselves' much like bees in a beehive, where 'man can give without taking' as he 'has at last found its formula' (341, 347). The same criticism may be applied to a romanticized or overly utopian idea of the commons. But the Schmittian critique itself is not without its questionable assumptions: a combination of Christian anti-eschatological thought and a Hobbesian view of human nature presses it to embrace the *katechon* as the highest hope, to restrain evil.

These two aspects of law that merge into an 'appropriative naming' point to a theme that comes back again and again in the present issue: the idea of the common(s) as the object of an appropriation, but also as the subject of various resistances against it, and using anonymity as a subversive tactic against existing intellectual property regimes. Besides the iconic Guy Fawkes mask, the hacktivist pseudo-collective Anonymous' very name indeed contains a reference to namelessness as part of an *an-archic* ideal of sorts, creating an *a-nomic* or at least *anti-nomic* state of affairs, which mustn't be mistaken for chaos, as Schmitt very well knew, but rather as the collapse of law into the unfolding of life itself, i.e. what Deleuze refers to as an immanent life.

The idea of a lawless space where things so govern themselves of course lies at the root of what may be called the American fantasy: the (lines of) flight

from the old and the corresponding drive forward towards the final frontier. The Internet was envisioned as such an extra-juridical space beyond the nation-state: 'you have no sovereignty where we gather' John Perry Barlow proudly proclaimed in *A Declaration of the Independence of Cyberspace* (2001). But what was to be a final victory cry was taken as a challenge by the representatives of the old: in the aftermath of 9/11, new money and young brains met to conquer these anomalous dwellings, although cyberspace was never quite as innocent and virginal to begin with, like the America that first needed to be purged from its native inhabitants, which only shows that there is no appropriation that is not at the same time also a disappropriation, just as there is no pure commons preceding a *Nahme*.

In this entangled web the figure of the pirate is similarly ambiguous and strung through with contradiction. Pirates of the early modern period both undermined and played a positive role in establishing a realm of capitalist free trade established through, but relatively autonomous from, the state. Today this ambiguity is repeated in online piracy's relation to the advance of informational capitalism through the creative destruction of its earlier incarnations, those 'weary giants of flesh and steel' Barlow mentions (ironically, the headquarters of Apple originally crowned a black and white pirate flag). Media piracy undermines existing proprietary regimes, but by deterritorializing the vestiges of the old media industries they prepare new grounds for ever faster and more mobile valorizations of capital, inaugurating new divisions and distributions of property and power, perhaps even a new *nomos*.

Jonathan Paul Marshall and Francesca da Rimini's contribution mobilizes both play theory, the history of capitalism and classical anarchist theory about the relations between theft and property to evaluate these structural transformations, based upon the extensive body of ethnographic research on pirate practices they have accumulated, including interviews with the main actors involved. They take two recent events – the legal attacks on the peer-to-peer torrent tracker Demonoid and the court cases around the Sony PlayStation 3 – as case studies to better grasp what they believe is an emerging 'pirarchy' whose basic model of operation and tactic is that of a spontaneous and disruptive swarm.

3.

The non-political character of piracy supposedly derives from its being geared towards a private, rather than a public, interest. But this line of reasoning obviously has a tautological character, for what makes something of public interest at least partly derives from the political nature of the act. But who decides what is of public significance and what merely constitutes a criminal act? Can the categorical distinction between the public-political and the private-criminal itself be subjected to political contestation? This presents a problem, for it becomes impossible to decide if this contestation itself is of a public or private nature, as it precedes the establishment of the criterion as such - that is to say, that the injunction that posits the distinction between legitimate and illegitimate in terms of the public and the private can itself not be legitimized on that basis. It also signals the dialectical – because mutually constitutive – relation between law and property, and between political and economic power.

In a short article, Felix Cohen points out the vicious circle inherent to legal reasoning about intellectual property rights, i.e. the idea that 'courts are not creating property, but are merely recognizing a preexistent Something'. He does so using the example of the trademark 'Palmolive', which if it 'is not restricted to a single firm […] will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. Not being of economic value to any particular firm, the word would be regarded by courts as "not property," and no injunction would be issued […] Ridiculous as this vicious circle seems, it is logically as conclusive or inconclusive as the opposite vicious circle, which accepts the fact that courts do protect private exploitation of a given word as a reason why private exploitation of the word should be protected' (2006: 1). Conversely, the Marxist legal scholar Evgeny Pashukanis (2003: 93-94) shows how public law can never on its own create, but rather presupposes and is determined by, privately accumulated property.

Issues of ownership and its relation to law have a long history in political philosophy and critical theory. They are also at the heart of the theme of

digital piracy and the intellectual property wars pirates engage in. 'Information must be free' irrespective of ends (emancipation, but also just entertainment) and by any means necessary: from torrents, viruses and DDoS attacks to professional hacks into proprietary platforms and whistle-blowers leaking classified data. Are the categories of critical political theory equipped to deal with this novel constellation? How to think about individual and collective agency in the presence of algorithmic enclosures and autonomous botnets? What about the conventional distinctions between public and private, the political and the economic? What delimits political acts from mere illicit behavior? How do digitalization and globalization structurally transform the means and ends of political activism and social movements? In global networks of capture where 'visibility and transparency are no longer signs of democratic openness but rather of administrative availability' (Bueti 2011), are struggles for inclusion and recognition still liberatory? Is anonymity, instead of identity, in the process of becoming a new and global site of struggle, rather than a dire condition in need of an emancipatory uplifting? Or are we in for a return of the same after all? It is in the following interview with Ned Rossiter and Soenke Zehle that some of these questions will be interrogated.

Combined, the contributions to this *Krisis* dossier hopefully shed some light on the mind-boggling complexities that animate the networked present. Coming from different disciplinary directions, each article – in the specific delimitation of its own theme – provides an implicit comment on the others. It is not often that Demonoid is allowed to encounter the dark causality of ancient sovereignty, or Corporate Social Responsibility the political theology of a scholar denounced for his relation to Nazi Germany. Far from an inconsequential cacophony, however, the following articles carve out the structural ambiguities of globalization, which, far from providing an easy excuse for remaining in a state of political apathy, and without wanting to quote Hölderlin, finds potentialities opening up in the very dangers that threaten to overrun them.

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
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