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Alberto Rinaldi

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**The American University in Cairo**  
**School of Global Affairs and Public Policy**

**THE OCCUPY WALL STREET MOVEMENT  
AS A 'SPACE OF PROFANATION'**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Alberto Rinaldi**

**May 2012**

The American University in Cairo  
School of Global Affairs and Public Policy

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Master of Arts in International Human Rights Law  
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The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

THE OCCUPY WALL STREET MOVEMENT  
AS A 'SPACE OF PROFANATION'

Alberto Rinaldi

Supervised by Professor Thomas Skouteris

**ABSTRACT**

Born in a crucial historical moment - the decennial of 9/11, and more than ten years after the anti-globalization movement of Seattle - the Occupy Wall Street movement (OWS) has awoken again protest and dissent, for the first time at the heart of the largest financial centre of world. More 'mature' than its predecessor and also increasingly more encompassing, this movement is presently working as a sort of 'sounding board' of protest and dissent, finding its inspiration in the Arab Spring, the Spanish indignados, and in all other forms of systemic protests that have flared around the world since the 2008 global financial crisis. In the present paper, I will argue that the Occupy Wall Street movement has opened a new space for resistance and, drawing on Giorgio Agamben's concept of profanation, I will call the Occupy movement a 'space of profanation.' I will therefore argue that this kind of profanation represents one of the best possible acts of resistance for the present time, as we live in a hyper-legalized age, where the narratives of neoliberal economics, security, crisis and human rights tend to monopolize the legal-political debate almost worldwide, and thus tend to close other potential spaces for resistance and rights-demand. As a matter of fact, the tremendous shift to no-demand, the diversity of the movement, its being characterized by decentralization and its anti-elitarian nature, with a focus on sharing, community and a clear tendency to 'inefficiency,' all these may represent the reason why the OWS movement works as a profanation of current narratives, which tend to preach precisely the opposite. The more spaces for protest, dissent and resistance – indeed the more spaces of profanation – are nowadays created, the more the 'sacredness' of current institutions, their narratives and their vocabulary will be engaged and put in question, thus possibly overcome.

## TABLE OF CONTENTS

1. Introduction.....	1
1.2 Agamben, Profanity and the OWS movement .....	4
2. The Neoliberal-Rights Moment: Closing the Space for Resistance .....	10
2.1 Neoliberalism and its Narrative .....	10
2.2 Neoliberalism as Way of Life.....	13
2.3 The a-political Project of Rights-consumption.....	15
3. Finding the Space for Resistance: Empire, Twail and the Subaltern .....	24
3.1 Of Empire and Multitude.....	24
3.2 TWAIL and the Critique of the Current Global Order .....	29
3.3 The Question of the Subaltern .....	33
4. Occupy Wall Street as a 'Space of Profanation'.....	38
4.1 The (Re)-appropriation of Space .....	38
4.2 OWS as a 'Space of Profanation' .....	41
4.3 Conclusion .....	46

## 1. INTRODUCTION

What cannot be used is, as such, given over to consumption or to spectacle exhibition. This means that it has become impossible to profane. If to profane means to return to common use that which has been removed to the sphere of the sacred, the capitalist religion in its extreme phase aims at creating something absolutely unprofanable [...]. The profanation of the unprofanable is the political task of the coming generation.

Giorgio Agamben, *In Praise of Profanation*

Almost a week after the tenth anniversary of September 11, the Event that has so dramatically marked the beginning and the early course of the new millennium, another, very different event took place near the blank area of Ground Zero. While the world was still remembering and mourning the streets of New York City covered with dust and death, very few have in fact expected to see those same streets 'invaded' with tents, chants and protest against corporate greed, global financial crisis, together with a strong call for a new and more direct form of democracy.

The Occupy Wall Street movement (OWS), born in the morning of September the 17<sup>th</sup> 2011, soon took over Zuccotti Park in the City's financial district, bringing about new and imaginative slogans, and spread in a couple of months into a worldwide movement from Spain to Hong Kong, from Amsterdam to London and from Nigeria to Canada.

In its inner diversity, the OWS movement has indeed brought to light some of the key issues of contemporary society: the strong role that banks as well as big corporations play over the political and social arenas, the dismantling of the welfare system, the loss of meaning of representative democracy, and an awareness of the increasing division between the rich class around the globe, namely the 1% and the poor, or the so called 99%.

That similar problems have been addressed also in the past is certainly a fact;<sup>1</sup> however, this time the matter at stake seems to be radically different, both in the form and in the content of the movement's struggle.<sup>2</sup>

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<sup>1</sup> The anti-globalization movement born out of the World Trade Organization (WTO) protest in Seattle in 1999, as well as the anti-war movement against the Iraq War of 2003 are just two of the most recent examples.

<sup>2</sup> If we take indeed the Seattle movement as the first act of awareness of a whole range of issues that affect the citizen of the world on a global scale, conversely the anti-war movement seemed more focused

From its very birth, the Occupy movement addressed in fact the most significant nodes of our current socio-political order: financial capital and its accountability, social responsibility and decision-making processes, loss of power of representative democracies, and thus of the party-system, the rule of law underneath, the legitimacy of the current political institutions and of the current legal order.

In this sense, the OWS movement seems not only more ‘mature’ than its predecessors, but also increasingly more encompassing, as it finds its inspiration in the Arab Spring, the Spanish indignados, and in all other forms of systemic protests that have flared around the world since the 2008 global financial crisis. To put it differently, it seems that this movement works as a ‘sounding board’ of protest and dissent that brings together completely different countries, from Spain to Tunisia, and from Chile to Israel. Indeed, the movement is born in an extremely interesting historical moment which, ten years after the fatal Event of 9/11, is witnessing today a new strong awakening of global protest, or, to put it differently, a new revival of global resistance.

In the present paper, I will argue that the Occupy Wall Street movement has opened a new space for resistance and, drawing on Agamben’s concept of profanity, I will call the Occupy movement as a ‘space of profanation.’ I will therefore argue that this kind of profanation represents one of the best possible acts of resistance for the present time, as we live in a hyper-legalized age, where the narratives of neoliberal economics, security, crisis and human rights tend to monopolize the legal-political debate almost worldwide, and thus tend to close other potential spaces for resistance and rights-demand.

The first logical step will be indeed to show how these narratives work to erase other stories and other possible voices, indeed the inner possibilities of resistance. In explaining what I mean by that, I will first assess what I call here the ‘neoliberal-right moment.’ By conjunctly presenting the role that neoliberalism and human rights today play in *occupying* the physical and imaginary spaces of the power-resistance binomial, I would like to better clarify the essential nodes that the Occupy Wall Street movement is presently addressing, i.e. provide the framework within which this movement is born and that is trying to challenge.

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on a particular ‘moment’ or initiative, hardly extensible on a larger scale. The same can be generally said also of Third World social movements; however this point will be discussed later on in the paper.



Moreover, in evaluating the role played by the human rights discourse, I would like to address a very brief but nonetheless important reflection on a standard right-based approach, which is clearly evident in the struggles of Third World social movements. Presenting the cases such as the one of the Narmada Valley in India, the Ogoni in the Niger delta, and other cases and examples from Latin America, is intended to serve two particular purposes: on the one side I will briefly show how and why it is problematic to rely on a purely rights-demand approach for all these kind of movements; secondly, this analysis will provide a further point of reflection on how to go beyond a standard approach to rights-demand, which is precisely evident today in the struggle of the OWS movement.

Furthermore, the theme of resistance needs to be taken seriously into consideration here, given that the OWS movement is understood to function precisely in that direction. Resistance, as addressed in TWAIL and in Subaltern studies critiques of international law (for example in scholars like Chimni, Rajagopal and Mutua, among others) is an essential step in the present analysis. Speaking about resistance from the TWAIL and Subaltern points of view may help to better frame and understand some of the core issues that are today at stake worldwide, such as corporate greed, neo-colonial policies, lack of accountability of international financial institutions etc., which are presently addressed by the OWS movement.

In addition to that, a reflection on the theme of resistance might help to better capture the core dilemma that any people based movement sooner or later has to face, namely with what voice the movement speak, and, most importantly, whether in fact the movement is 'permitted' to speak by its counterpart and to what extent.

Finally I will point out why the OWS movement can be said to be a 'space of profanation,' profanity being here understood as the act of 'opening-up' diverse spaces-possibilities for dissent and resistance. As a matter of fact, the tremendous shift to no-demand, the diversity of the movement, its being characterized by decentralization and its anti-elitarian nature, with a focus on sharing, community and a clear tendency to 'inefficiency', all these may represent the reason why the OWS movement works as a profanation of current narratives, which tend to preach precisely the opposite. The more spaces for protest, dissent and resistance – indeed the more spaces of profanation – are nowadays created, the more the 'sacredness' of current institutions, their narratives and their vocabulary will be engaged and put in question, thus possibly overcome.

## 1.2 Agamben, Profanity and the OWS movement

Although the issue of creating space for resistance has been long addressed throughout different currents of thoughts and by a very diverse range of scholars,<sup>3</sup> this is a theme that has becoming increasingly more pressing today,<sup>4</sup> and that the Occupy Wall Street movement is significantly contributing to bring back to the fore of discussion, as further discussed.

Deciding to do it so through the lens of Agamben is first of all a practical and not an ideological choice, nor I would like here to align myself with the successful explosion that Agamben's consideration on the State, the role of law and of the sovereign power has witnessed in contemporary critical thought. Nonetheless, and for the sake of this paper, I think that Agamben's reflection could be used indeed very strategically, since it contributes, at least in part, to strongly bring back the core issues of biopolitics and biopower,<sup>5</sup> connecting them with a critical reflection of law and of rights-creation, thus providing an interesting frame for the discussion as it is presented and developed here.

As a matter of fact, Agamben recognizes that in our increasingly over-legalized world everything tends to fall under the control of a new form of biopolitical order,<sup>6</sup> or what he calls the 'state of exception.'<sup>7</sup> Physical spaces such as Guantanamo Bay, Abu Ghraib and Gaza are said to be the most evident examples<sup>8</sup> of a system that he

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<sup>3</sup> Without inconveniencing anyone, and knowing that it is impossible to bring them all here, we might want to recognize that, since the birth of post-structuralism, critical legal studies, subaltern studies, critical geography etc. this is a theme that has become increasingly obvious and discussed in a whole set of disciplines and by a diverse range of scholars.

<sup>4</sup> A critical explanation of this statement is furnished both in Part 2 and 3 of this paper.

<sup>5</sup> If it is true that a similar kind of reflection is being proposed also in *Empire* by Hardt&Negri, as well as in the latest work by Douzinas, this should be read in fact as a proof that those coordinates are today very significant for an understanding of the present socio-political struggle. Indeed, both Hardt&Negri and Douzinas are further taken into consideration in the paper.

<sup>6</sup> Please refer to Part 2 of this paper on the notions of biopower and biopolitics.

<sup>7</sup> In its very essence, the state of exception resembles very closely the 'state of emergency', through which the sovereign power may implement policies, guarantee or deprive of rights its citizens etc. under the banner of 'public good'. See GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* (2005).

<sup>8</sup> Giorgio Agamben's limbo state between zoe and bios is exemplified by camps and prisons, such as Guantanamo Bay, Abu Ghraib, Belmarsh, the secret prisons and dark sites of CIA. In these camps, the legal exception becomes the rule. They symbolise the spatial arrangement of the new world order, Schmitt's *nomos* of empire. In the camp, power confronts life without the mediation of law or rights and directly takes over its management. Guantanamo Bay, the most notorious camp, appears both as a topographical location and as a non-space. Situated in Cuba, it is outside Cuban sovereignty. But according to the American government, it is extra-territorial for the purposes of American Law too, at least as far as the prisoners held there are concerned. Its location places it inside (Cuba, American jurisdiction) and at the same time outside, symbolising the topographical principle of empire. [...] Every person, event and situation is inside the global dispensation of empire but everything can be equally

describes able to create and destroy, absorb and reproduce, break and categorize, exclude and dis-empower.<sup>9</sup> Through the creation of detailed classes and groups, professions, rights-granting or rights-privation, Agamben asserts that the very formation of our contemporary socio-political order is based on a renovated strength exercised by the sovereign power, which, working upon the *unprofanability* of certain concepts or assumptions (i.e. growth, progress, terrorism, security, public good etc), basically decides to whom grant rights, who to deprive of those rights, or which fiscal policies to implement in time of financial crisis.<sup>10</sup> In this scenario however, the citizens tend to be completely removed from the picture, dismissing the ‘social base’ of decision making and utilizing representative democracy both as a shield and as a justification to produce and implement such policies.<sup>11</sup>

In this sense, the constant *removal* of things-concepts-rights from the common use of men-citizens is also reproduced. We live, as Agamben puts, in a sort of world-Museum, where the latest regimes of international law, namely UNESCO sites and the World Heritages cities, attest the impossibility to touch, to experience, to commonly make use of things, or, what he calls, to ‘profane’ them.<sup>12</sup> He makes the point clear in one of his most illuminating pieces:

The Roman jurists knew perfectly well what it meant to “profane”. Sacred or religious were the things that in some way belonged to the gods. As such, they were removed from the free use of men [...] if “to consecrate” (*sacrare*) was the term that indicated the removal of the things from the sphere of human law, “to profane” meant, conversely, to return them to the free use of men [...] The thing that is returned to the common use of men is pure, profane, free of sacred names.<sup>13</sup>

When disciplines such as law, economics and politics strongly develop into professions for example, they immediately tend to become part of a sacred sphere, thus they lose their willingness to work for the free use of men.<sup>14</sup> When, in time of crisis, countries opt for technical governments, radicalize the use of the law against civilian protests, or implement austerity plans to make up for the insatiable demands of the financial system,

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abandoned to the state of total exteriority, of non-humanity. The camp is a threshold zone; ‘humanity’, the threshold concept around which the imperial project is organized”. COSTAS DOUZINAS, HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF THE COSMOPOLITANISM 117-118 (2007).

<sup>9</sup> AGAMBEN, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> GIORGIO AGAMBEN, PROFANATIONS (2007).

<sup>13</sup> *Id.* at 83-84.

<sup>14</sup> This point is drawn from WENDY BROWN, EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS (2005).

immediately they confine the art of government in a supra-humane zone, scientifically-objective, untouchable and....divine.<sup>15</sup>

Other clear symptoms of this tremendous shift to a purely 'technical' or 'sacred' view of contemporary institutions and of policy-making can be said to be the twelve-months Master degrees, MBA programmes, vocational schools and PhDs etc. where what it is most requested from the job market are, in fact, professional figures able to deal with the increasing complexity of reality.<sup>16</sup> At least, that is the mainstream story we are generally told. As a matter of fact, I think the practice of the internship or unpaid 'work experience' has become today a trend for a whole spectrum of disciplines, which asks - I shall say *obliges* - often young and idealist students in engaging in harakiri practices for gaining a place with this or that company or with one or another international organization for three months or more, without any expectation of being hired afterwards, but especially by affording all the costs. Aren't precisely contemporary formations such as student loans, debts for education and the debt of the State part of a general move towards the confinement of what was once public sphere into the area of financial capital sacredness?

Not surprisingly, one of the cornerstones of the Occupy Wall Street movement in the United States (as well as in other countries such as UK, Spain, Greece, Italy and Chile) is precisely the costs of this supposedly necessary education/professionalization. There is something ironic, nevertheless gloomy, in hearing how governments, particularly in these times of crisis, require on the one hand more and more specialization from workers, and on the other warn of the necessity to reinvent one's career.

Moreover, when the grammars of *progress, development, growth* but also of *human rights* are taken as absolute, so that it is not possible to question them, we are faced with a sacredness which turns to be the only Truth available, but from which a whole series of decisions, policies, rules and arguments descends, which moreover present themselves - and are presented - as eternal and immutable, creating and converting socio-historical concepts in proclamations of faith, turning them into

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<sup>15</sup> "Just as fear of the Hobbesian state of nature has always served to justify the power of the state and its laws, today, the rhetoric of crisis brings into being a relentless desire for law [...] Today there is a danger that critical reflection on law will be supplanted by the desire for law to mitigate crises". Victoria Sentas and Jessica Whyte, *Law, Crisis, Revolution*, 31 *Austl. Fem. L. J.* 3, 7-9 (2004).

<sup>16</sup> BROWN, *supra* note 14.

religion, and thus deprive us, free men, of their common use.<sup>17</sup> Things which are today constantly been displayed behind a glass, an envelope or a code (internet, law, economic indexes, financial instruments, methods of election of political candidates etc.) also fall in a blank vacuum, lost any significance, become flat and soulless and tend inevitably towards the nullification of any inner value, emotion, or use. In such a world we suddenly become tourists of our own lives:

If, today, consumers in mass society are unhappy, it is not only because they consume objects that have incorporated within themselves their own inability to be used. It is also, and above all, because they believe they are exercising their right to property on these objects, because they have become incapable of profaning them.<sup>18</sup>

Conversely, what Agamben is asking us is to think *whether* and *how* it is today possible to bring back such things-concepts on a common, profaned arena; the passage he is trying to elucidate does not aim to simply abolish or destroy certain structures and formations of the so called capitalistic system, but rather to imagine how to overcome that famous *fetishism*<sup>19</sup> that goes hand in hand with a whole series of concepts, policies or narratives as are today presented in the socio-political and legal spheres. A clear example of why consumers in mass society are unhappy then, it is given by the fact that in capitalistic society people do not generally use things throughout their own, real properties, instead they use them in terms of rights.<sup>20</sup>

This point will be better elucidated later on in the paper, however, what I want to emphasize here is that profanation for Agamben signifies *to learn how* to put things to *a new use*. A use of and for men, thus de-sacralised, profane, humane. However not in the sense of human-rights, but rather a use that resembles the play of the magical world of children, a space that is not yet aware of incorporation into inert and dissociative

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<sup>17</sup> See for example BALAKRISHNAN RAJAGOPAL, DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESSITANCE (2003), GILBERT RIST, THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGIN TO GLOBAL FAITH (2009), THOMAS MCCHARTY, RACE, EMPIRE, AND THE IDEA OF HUMAN DEVELOPMENT 192-205 (2009), ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1994), THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN THE INTERNATIONAL LAW DISCOURSE (2010) and COSTAS DOUZINAS, THE END OF HUMAN RIGHTS (2000), among others.

<sup>18</sup> AGAMBEN, *supra* note 12, at 83.

<sup>19</sup> The reference of course is to Marx.

<sup>20</sup> AGAMBEN, *supra* note 12.

categories, specifically built up to dismember and sanctify, to protect interests and to grant/deprive of rights.<sup>21</sup>

When a thing is de-secrated or de-activated, a whole world of possibilities immediately rise up: “to profane means to open the possibility [...] just as the *religio* that is played with but no longer observed opens the gate to use, so the powers of economics, law and politics, deactivated in play, can become the gateways to a new happiness”.<sup>22</sup>

I believe that Agamben is touching here one of the nodes of contemporary society, and it is precisely here the Occupy Wall Street movement, as further argued in this paper, also stands. To profane the unprofanability of politics, law and economics seems in fact the most pressuring task of a movement that is strongly pushing for new forms of direct representation, for accountability and transparency of the decision making process and of the banking system; but also, for conferring a renovate meaning to the process of rights creation, out of a purely technical rights-based approach which, especially in the West, is nowadays perceived as ‘empty’ and ‘meaningless,’ particularly if confronted with the untouchable power of financial capital or with the unaffordable prices of education.

In this sense, banking and political institutions are sacred, together with the very policies they emanate, the practices of internships and masters are sacred, when presented as necessary and inevitable for one’s career; finally, the disintegration and the immateriality of labor and life have become indeed sacred, under the constant impetus of neoliberal capitalism.

It is thus possible I think to establish a clear link between what Agamben calls the act of ‘profanation,’ understood as to ‘open-up’ present law, economics and politics for a new use, by returning them to a common-space, and the Occupy Wall Street movement, which is trying to challenge the very essence of present biopolitical order. In this sense, I will go as far as to argue that the instances the movement has brought to the fore in September 2011 makes of the OWS movement what I call here a ‘space of profanation.’

In the last part of the paper I will address more in details the issue of the Occupy movement as such a space, but, for now, it is important to have established the connection between Agamben’s profanation and the OWS movement. If one could in

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<sup>21</sup> AGAMBEN, *supra* note 12. at 83.

<sup>22</sup> *Id.* at 75-76.

fact argue that almost all people based movements open-up a ‘space,’ however the imaginative and physical territory they contributed to disclose and reveal is different every time, being only for the fact that movements do so in diverse ways, where much depends on the historical moment and on the socio-economic context from which that particular movement emerges. What needs to be explained then is *what* exactly has to be profaned, and especially *how*. Therefore, in order to understand the socio-political and legal framework within which the Occupy Wall Street movement is born and that is presently tempting to profane, the analysis must necessarily start in outlining what in this paper I call the ‘neoliberal-rights moment.’

As we will see in the next part, the dynamics of neoliberal capitalism and rights-consumption tend to function today precisely in the manner described above by Agamben. Presented as the ultimate truths, thus de-historicized and naturalized, they work to encompass every aspect of human life, they operate as to incorporate every spatiality and, placed in the remotest parts of the globe through the international institutions and free markets policies, little by little eradicate every different cultural formation, indeed any tentative of resistance. It is indeed the ‘sacredness’ of this narrative that operates today to reduce the space for dissent and to curtail different and imaginative space-possibilities of resistance. It is this sacredness that the Occupy Wall Street movement, as I am arguing here, wants to profane.

## 2. THE NEOLIBERAL-RIGHTS MOMENT: CLOSING THE SPACE FOR RESISTANCE

There are times in life when the question of knowing if one can think differently than one thinks, and perceive differently than one sees, is absolutely necessary if one is to go on looking and reflecting at all.

Micheal Foucault, *History of Sexuality*

### 2.1 Neoliberalism and its Narrative

Without doubt, the neoliberal moment is one of most powerful ideologies that run the social and economical interactions of the world today and, by its very nature, all it has to do is to constantly remind us that there is no real way out of it.<sup>23</sup> Even based on our common sense, we can see how entire nations are in the hands of specific financial institutions that govern the lives of millions of people, deciding, on the base of credit-rating agencies, which countries will declare bankruptcy, which ones are on their way to doing so, and which ones have to be saved and at what costs.<sup>24</sup>

In the best of all possible worlds, neoliberalism presents itself as the ultimate truth, as the end of history, where the principles of *rationality*, *homo oeconomicus*, *scarcity of resources* and the focus on the *individualization of life* dominate the current debate of policymakers.<sup>25</sup> The trend to naturalize and de-historicize its own, as well as other histories, is partially due to the fact that neoliberalism, as it is presented in the politico-legal sphere, cannot really be questioned. All we have are in fact perfect economies regulated by a system (i.e. OECD, IMF, WTO, etc.) through which the framework is set and enforced, and all citizens need to do in this ‘perfect’ world is nothing but be loyal consumers.<sup>26</sup> Times of crisis are seen especially useful because they allow to re-enforce the terms within which the neoliberal discussion is conducted, justifying the implementation of austerity plans and restrictive policies by purely technical governments (i.e. based on an objectiveness which is scientifically-mathematical, not

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<sup>23</sup> Pierre Bourdieu, *The Essence of Neoliberalism*, Le Monde Diplomatique, (Dec.8, 1998), available at <http://mondediplo.com/1998/12/08bourdieu>

<sup>24</sup> Alain Badiou, *Rescue The Greek People from their Rescuers*, Criticallegalthinking, (Feb.24, 2012), available at <http://www.criticallegalthinking.com/2012/02/24/rescue-the-greek-people-from-their-rescuers/>

<sup>25</sup> Bourdieu, *supra* note 23.

<sup>26</sup> *Id.*



merely 'political' and thus partial or biased), in a process that resembles very closely the one described by Marx in the Communist Manifesto.<sup>27</sup>

It is nonetheless possible to capture very well the nature of neoliberalism, revealing, with David Harvey, that to conceive it just as an economic theory is wrong, as the neoliberal model it is first and foremost *the* model that has been predominating the agenda of a wide variety of countries - thus not just the US or Europe - during the last four decades.<sup>28</sup> It is also possible to trace the roots of such a model drawing back from thinkers like Robert Malthus and Jeremy Bentham or looking at the *laissez-faire* system theorized by Adam Smith. However, it is especially after the end of the Gold Standard era, and in particular with the rise of the economists of the Chicago School<sup>29</sup> that this new form of economics began to erase the previous authority of Keynesian conception of welfare State.<sup>30</sup> Neoliberalism was later on reinforced through the deregulations policies of Reagan and Thatcher in the eighties, applied to Third World states with the adjustments programs (or with coup d'état backed by the US like in the case of Chile under Pinochet), and finally accustomed as the real unique model of growth and development with the Washington consensus, the advent of democracy on a global scale and Globalization.<sup>31</sup>

The vocabulary of neoliberalism is nonetheless constructed upon some cardinal points which are worth recalling: free market agreements, expansion of property rights, free trade and individual liberty, where the role of the State is confined in a marginal position, because the market regulates itself and no interference of sovereign nature are tolerated, except when it is the State that has the primary function of intervene in opening new market-spaces (when this is requested).<sup>32</sup> What is important to underline is the strict connection existing by this particular political-economic model and its enforcement at various level of political and social life, from the media, to national polices and international financial institutions. International trade agreements like the ones proposed by WTO, for example, perform neoliberal free market principles, as

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<sup>27</sup> KARL MARX & FREDERICH ENGELS, THE COMMUNIST MANIFESTO 9 (2008).

<sup>28</sup> Countries like Japan, Sweden, China, New Zealand and South Africa - just to cite few - have also applied in part or in toto the principles of neoliberalism. See David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS of the American Academy of Political and Social Science (2007).

<sup>29</sup> The Chicago School largely promoted economic liberalism and free market, rejecting the 'old' Keynesian model of welfare state in light of rational expectations theory and the hypothesis of having to deal with efficient markets which would find the proper way to regulate themselves. Major economists of this School include Ronald Coase, George Stigler and Milton Friedman.

<sup>30</sup> Harvey, *supra* note 28.

<sup>31</sup> This is nonetheless a very condensed and summarized story.

<sup>32</sup> Harvey, *supra* note 28, at 23.

well as the IMF does over those states which abide to its rules, over the threat of been sanctioned or expelled by supranational unions.<sup>33</sup> Moreover, what Harvey calls *accumulation by dispossession*<sup>34</sup> is nonetheless an inner characteristic of the neoliberal model, which includes privatization of lands, hyper-expansion of property rights, suppression of indigenous or alternatives ways of production and consumption, intense use of intellectual property rights imposed to Third World countries through TRIPS,<sup>35</sup> but also the seek to undermine the “old” schemes of pension and health care, i.e. the welfare system typical of the countries of the global North.<sup>36</sup>

Brand new categories are invented out of the blue to undercut and destabilize the workers and their unions in many part of the globe, to establish what Deleuze and Guattari called *micro-policies of insecurity*.<sup>37</sup> “The unemployed,” “the adjunct faculty,” “the temporary contract worker,” are just few examples of the inner logic of competition brought about by the neoliberal model, where insecurity, inequality and individuality are stressed over the social sphere and over the implementation of truly social policies.<sup>38</sup> This move from *proletariat* to *precariat* is attested in terms of a constant push to insecurity, which at present times is especially affecting the middle class of the first world, that now find itself living in a condition of perpetual uncertainty. The equation that sees on one side competition, precariat, entrepreneur spirit, on the other signifies the total absence of a social meeting point and the re-emergence of neo-

<sup>33</sup> The recent case of Greece may suggest a clear example. See also Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 Harv. Int'l L.J. 443, 10-11 and 12-13 (1997).

<sup>34</sup> DAVID HARVEY, *THE NEW IMPERIALISM* (2003) and Couz Venn, *Neoliberal Political Economy, Biopolitics and Colonialism: A Transcolonial Genealogy of Inequality*, 26 Theory, Culture & Society 206 (2009). The accumulation by dispossession resembles very closely the system of European domination perpetuated through colonialism for at least three centuries, where enormous quantities of raw materials coming from the colonies helped to ensure the newly industrial revolution of 19<sup>o</sup> century. In light of the transition from feudal Europe to the modern Europe born with Westphalia, and which marked the beginning of a new history no more based on rivalry but on competition, the Europe of sovereign-competitors states carried the germ on the one side of inter-national law, which helped in normalizing dispossession, and the other, the willingness to move the spaces of accumulation towards the-so-called *terra nullius*. In sum, in the zero-sum game of the newly sovereign Europe, colonialism, economic domination and the normalizing activity of law all share a determinant role.

<sup>35</sup> See for example Peter Drahos, *An Alternative Framework for the Global Regulation of Intellectual Property Rights*, available at <http://cgkd.anu.edu.au/menus/publications.php#drahos>

<sup>36</sup> Maurizio Lazzarato, *Neoliberalism in Action: Inequality, Insecurity and the Reconstruction of the Social*, 26 Theory, Culture & Society 109 (2009). As a matter of fact liberalism was investing in mass education, social welfare, health care etc. whereas today these categories have been either privatized or tend to simply be dismissed by the State.

<sup>37</sup> GILLES DELEUZE AND FELIX GUATTARI, *A THOUSANDS PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* (1987).

<sup>38</sup> Lazzarato, *supra* note 36.

archaisms such as the fear of the immigrant, Christian fundamentalism, racism and the recourse to war.<sup>39</sup>

## 2.2 Neoliberalism as Way of Life

If nothing escapes the process of neoliberal accumulation, both on the national and the international front, this is because this process must be constantly fed and must expand over every aspect of human life, indeed, on life itself.<sup>40</sup> The point that needs to be taken into consideration here is how *life* becomes a space for neoliberalism to assault and grow upon. In this sense, neoliberalism works not just as an economic doctrine, but as a new technology of government whose aim is optimization of every aspect of peoples' existence.<sup>41</sup>

The idea that life becomes an object of political-economical power is found in Foucault, when he marks the passage from disciplinary society to biopower.<sup>42</sup> In the former kind of society, there are external forces which conduct and control the social sphere and the social behaviour: the birth of the prison, criminology, the introduction of statistical science to report, classify and affect human choices, the role of police and security forces, all these are the main features that, since the Middle Ages have been developed to design the 'society of control' that has taken over the project of modernity.<sup>43</sup>

The advent of communication industries, multinational corporations, the expansion of capitalism on a global scale, the rate of technology and the introduction of immaterial labor, together with an internalization of the precedent features mark instead the advent of a new form of societal control: *biopower*.<sup>44</sup> Biopower is literally 'power

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<sup>39</sup> Lazzarato, *supra* note 36.

<sup>40</sup> In different fashions Marx & Engels were describing the constant transformation and creation of new forms of economic activity and economic space which is inscribed into the DNA of Capitalism. MARX & ENGELS, *supra* note 27, at 6.

<sup>41</sup> AIHWA ONG, NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY (2006).

<sup>42</sup> MICHEAL HARDT & ANTONIO NEGRI, EMPIRE (2001).

<sup>43</sup> MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (1995) and THE BIRTH OF BIOPOLITICS (2010).

<sup>44</sup> "By this I mean a number of phenomena that seem to me to be quite significant, namely, the set of mechanisms through which the basic biological features of the human species became the object of a political strategy, of a general strategy of power, or, in other words, how, starting from the 18th century, modern Western societies took on board the fundamental biological fact that human beings are a species. This is what I have called biopower". MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION I (2007).

over life,' where the living being is inscribed at the heart of new political projects and economic strategies: "The control of society over individuals is not conducted only through consciousness or ideology, but also in the body and with the body. For capitalist society biopolitics is what is most important, the biological, the somatic, the corporeal."<sup>45</sup> There is therefore a strict relation between these two concepts, namely biopower and biopolitics, where the latter can be seen as the kind of *modus operandi* that 'performs' the former. For Foucault, and this is important to be underlined in light of the Agambean state of exception discussed above, the modern nation State is indeed characterized by "an explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations,"<sup>46</sup> so different forms of rules, policies and mechanisms of control projected on modern society and its inhabitants.

How do we control a subject in a disciplinary society was the question of the past however, and the answer was in fact through all the sets of material forces and institutions developed in centuries of European history; on the contrary, the discipline of one's conduct today no longer comes from an external law or from external institutions, because those mechanisms have already been interiorized and internalized by the modern subject.<sup>47</sup> If this is true, it becomes clear how the new space that power needs to control today is no more society by enlarge but, in fact, is the *subject* itself, its body, its life.<sup>48</sup> Foucault makes this last passage by showing in fact how the disciplinary society has been finally encompassed and internalized through an extreme processes of *subjectification*. In this sense, the 'power over life' situates itself on an internal level, as the new art of governance over peoples' life.

What I would like to stress here in sum, is that the human being in contemporary society becomes inscribed in a frame which puts the optimization and the financialization of the whole human experience at its core. Almost everywhere we witness today this deaf push towards the construction of our individualities: the disciplining of oneself has entered the realm of our lives, understood as the personal ability to transform oneself in an entrepreneur, in a self-made man, and, thus, completely erasing the social sphere or new and different possibilities of political imagination. In this new type of society 'us,' the self-made men, are essentially

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<sup>45</sup> Michel Foucault, in HARDT & NEGRI, *supra* note 42, at 27.

<sup>46</sup> MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 140 (1998).

<sup>47</sup> FOUCAULT, *supra* note 44.

<sup>48</sup> GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998).

working all the time, creating our individual identity through social media outlets, namely facebook and linked-in, recurring to plastic surgery to transform or enhance part of our bodies, adjusting our lives in constant competition with others and tending to maximize experiences, relations and knowledge for our own personal good and consumption. This precise dynamic of *self-growth* provide us, self-made men, an opportunity to constantly market ourselves, to persistently empower ourselves, in sum to better fit into the arena of global capitalism. Even when we assume that we are not doing that for a wage, neoliberalism – as the present technology of government - has finally inscribed the job market inside our souls.

### 2.3 The a-political project of Rights-consumption

There is another driving concept in contemporary world which takes its moves from the individual and, building on a precise idea of empowerment of the self, goes far as to the (im)possibility of creating new political-imaginative spaces: *human rights*.<sup>49</sup> Leaving aside for a moment general critiques such as the vagueness and unenforceability of human rights, their malleability, or that the separation between civil-political rights and economic, social and cultural rights don't capture the reality of

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<sup>49</sup> At the core of human rights doctrine lies first and foremost the protection of the individual against state power, as a transnational defense of potentially all forms of sovereign abuses. With their claim to universality, human rights function as levelling cultural, geographical or economical differences and dream to bring every human being in front of the altar of global justice. Nonetheless, today it is widely recognized that human rights express first and foremost the ideology, the ethic, aesthetic sensibility and political practice of a precise moment of history, in particular they are and remain a product of western liberal ideology. This ideology traces its roots in the French Revolution, precisely in the Universal Declaration of the Rights of Man and of the Citizen or in the United States Declaration of Independence and only later, at the end of the horrors of World War II, finds its modern envelope in the Universal Declaration of Human Rights. Paradoxically, those declarations in defining natural rights as inalienable, at the same time posed them under the authority of the nation-state they were born within. So for example, when the French Declaration stated at Art. 1 that: “men are born and remain free and equal in their rights”, or at Art. 2 that: “the final end of every political institution is the preservation of the natural and imprescriptible rights of man”, at Art. 3 this association is in fact defined by stating that: “the source of all sovereignty lies essentially in the Nation. No corporation or individual may exercise any authority not expressly derived therefrom”. So it is clear that human rights and national sovereignty were born together, where the *Nation* is the actual law-maker and the *citizen* becomes the beneficiary of rights. See for example DOUZINAS, *supra* note 17. See also Makau wa Mutua, *The Ideology of Human Rights*, 36 Va. J. Int'l L. 589 (1996). More in general, the doctrine of human rights finds its roots in the philosophical thought of John Locke, Thomas Hobbes, Immanuel Kant and John Rawls among others. See also Declaration of the Rights of Man and of the Citizen (1789) [trans of: *Déclaration des droits de l'homme et du citoyen*], United States Declaration of Independence (1776) and Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

Third World countries etc.<sup>50</sup> and just focus on the human rights discourse, we will find that it is precisely this discourse which is dramatically ingrained as part of the system they work within and against.<sup>51</sup>

As explained by David Kennedy, as well as other scholars, human rights contributed in creating the current terms of the debate so much as to erase practically any other forms of emancipatory projects.<sup>52</sup> They dominate the imaginative space of creating new alternatives, thus limiting other movements, values and traditions, in sum minimizing the contribution of other, different stories. Not only is their discourse centred on a victim/perpetrator/saviour/ paradigm, a paradigm – one needs to note – very close to the Christian idea of sin and salvation,<sup>53</sup> but they propose themselves as the only viable and morally universal solution against the biases and the abuses of potentially every political sphere.<sup>54</sup> This is first and foremost because human rights present themselves as a truly ‘antipolitical’ force, just in defense of the human being as such; they take their authority as a moral discourse basing on the suffering and the pain of the *other*, pointing at the immorality of that particular political power which induces that suffering.<sup>55</sup> By doing so however, “the systemic context of abuses and vulnerabilities is largely removed from view.”<sup>56</sup>

In sum, human rights discourse is largely used to deflect attention and to lead the understanding of the problem within a specific terminology and a specific arena – in this case the one of international law – without go as far as to include the *root causes* of such a problem, i.e. without considering the systemic context of socio-economical and

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<sup>50</sup> See for example Wendy Brown, “*The Most We Can Hope For...* ”: *Human Rights and the Politics of Fatalism*, 103 S. Atl. Q. 451 (2004), Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 Cal. W. Int’l L.J. 275 (2005), J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-state Actors, and the Struggle for People’s Rights in Africa*, 18 Am. U. Int’l L. Rev. 851 (2003), Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights*, 5 Yale Hum. Rts. & Dev. L.J. 177 (2002),

<sup>51</sup> David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 Harv. Hum. Rts. J. 101 (2002) and Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 Harv. Hum. Rts. J. 301 (2002).

<sup>52</sup> *Id.*

<sup>53</sup> See for example Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 Hum. Rts. Q. 361 (2005).

<sup>54</sup> Diane Otto, *Rethinking the “Universality” of Human Rights Law*, 29 Colum. Hum. Rts. L. Rev. 1 (1997).

<sup>55</sup> Brown, *supra* note 50.

<sup>56</sup> Susan Marks, *Human Rights and Root Causes*, 74 Mod. L. Rev. 57, 75 (2011). See also Jason Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project*, available at [http://www.germanlawjournal.com/pdfs/Vol07No12/PDF\\_Vol\\_07\\_No\\_12\\_1045-1088\\_SI\\_Beckett.pdf](http://www.germanlawjournal.com/pdfs/Vol07No12/PDF_Vol_07_No_12_1045-1088_SI_Beckett.pdf)

legal violence in which those violations took place.<sup>57</sup> On the one side thus, they dominate the contemporary debate and the current terminology of civil and political struggles, while on the other they do not show the larger picture necessary to site the abuses - which they claim to eradicate - in a larger-systemic context of neoliberal financial policies, transnational corporations exploitation and neo-colonial forms of interventions.<sup>58</sup>

But that is not the whole story about human rights. As a matter of fact, contemporary forms of rule of law, especially in the West, seem to find in human rights a perfect field upon which to grow and flourish. Without doubt, our contemporary world is a world of rights, where every aspect of human life is regulated, protected and thought in terms of such an item.<sup>59</sup> The individual desire in this sense takes perpetually the right-form, because that is the only form it can conceive: copy-rights, internet rights, privacy rights, but also the inclusion of rights-protection into Constitutions, treaties, conventions etc. The fundamental aspect that I would like to underline here is precisely how human desire today seems to be better represented mainly in terms of *rights*.<sup>60</sup> As Douzinas puts:

Civil and political rights have been extended to social and economic rights, and then to rights in culture and the environment. Individual rights have been supplemented by group, national or animal rights. The right to free speech or to annual holidays can be accompanied by a right to love, to party or to have back episodes of Star Trek shown daily. If something can be put into language, it may acquire rights and can certainly become the object of rights.<sup>61</sup>

Such a desire reflects a certain aspect of mass-consumption society, namely the spasmodic necessity to use and consume 'things' for different needs and purposes. This is a common feature of contemporary society, which constantly articulates itself through the exercise-enjoyment-exploitation of objects-things.<sup>62</sup> However, the visualization of law as a commodity is highly problematic, on the one side because

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<sup>57</sup> Marks, *supra* note 56.

<sup>58</sup> Anne Orford, *The Subject of Globalization: Economics, Identity and Human Rights*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 146, 148 (2000). *See also* Costas Douzinas, *The End(s) of Human Rights*, 26 Melb. U. L. Rev. 445, 452 (2002).

<sup>59</sup> DOUZINAS, *supra* note 17.

<sup>60</sup> *Id.*

<sup>61</sup> Douzinas, *supra* note 58, at 456.

<sup>62</sup> For this particular view *See* KARL MARX, CAPITAL: VOLUME 1: A CRITIQUE OF POLITICAL ECONOMY (1993), CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL (2006) and AGAMBEN, *supra* note 12.

goes to reinforce the purely personal enjoyment of a certain commodity-right, and on the other because it precisely plays the neoliberal game of empowering ourselves while fulfilling our personal desires in spite of the ones of the community.

Contemporary men thus live lives which are community fragmented, where many rights inhibit their need of socialization and fasten the hyper-individualization process typical of neoliberalism:<sup>63</sup> “in this sense, rights carry the seed of dissolution of community [...] in an over-legalised world, rules and norms discourage people from thinking independently and discovering their own relation to themselves, others, language and history.”<sup>64</sup> The ideas of *emancipation* and *self-realisation* – coming directly from the Enlightenment and which find in human rights their natural habitat - are enriched today of a new element: *rights-consumption*.

The narrative of human rights does no more works though just in its racial-democratic element, namely the need to civilize/liberate/aid the *other*, but also to constantly ‘liberate’ *us* from the thirst of been able to use and consume at all costs, in a constant process of nullification of any real political-communitarian project.<sup>65</sup> In this sense, we recognize here what as been said at the very beginning of this paper, precisely when Agamben claims that things that cannot be really *used* are just given for consumption or spectacle exhibition, thus they are deprived of their common, free use, and are immediately casted in the sphere of the sacred.

Precisely at this point then, I would like to drive the attention for a moment over some of the most famous people based movements of the last two decades, in order for me to better elucidate what in the neoliberal-rights moment I mean by ‘use.’ If we look at how a neoliberal-right approach works in reality around the globe, although one can recognize its usefulness (for instance in order to frame a particular political request, to articulate a demand, to ask for recognition and incorporation), the same can also be said to be highly problematic, at least for two reasons: first, a rights-based approach tend to ‘formalize’ the social and political demand passing via established channels, such as lawyers, Commissions, conventions, treaties, Constitutions etc. at the risk of prolonging, denaturalizing and ‘taking away’ the original demand from the hands of the people; secondly, the other threat is represented when the neoliberal-rights vocabulary as

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<sup>63</sup> Lazzarato, *supra* note 36.

<sup>64</sup> Douzinas, *supra* note 58, at 459.

<sup>65</sup> AGAMBEN, *supra* note 7 and Costas Douzinas, *Human Rights And Postmodern Utopia*, 11 *Law & Critique* 219 (2000).



exposed above is so deeply entrenched in institutional meshes that it is constantly used by the institutional bodies either to respond, repress, or channel the requests of such movements. Let's briefly look at three examples to further explain my points.

The ruling of the Supreme Court of India in the Narmada Valley case of October 2000, as illustrated by Rajagopal,<sup>66</sup> precisely shows how the grammar of *progress*, *development* and *nationalism* were protected over the movement's struggle, when the Court allowed the construction of a dam.<sup>67</sup> First of all, the Court buys into an *evolutionary ideology* (which is aimed at progress) when it asserts that: "the displacement of the tribals and other persons would not *per se* result in the violations of their fundamental or other rights [...] The gradual assimilation in the mainstream of the society will lead to betterment and progress."<sup>68</sup> Secondly, a *nationalistic interest* is protected, against the possible threat posed by neighbouring countries: "apart from bringing drinking water within easy reach, the supply of water to Rajasthan will also help in checking the advancement of the Thar desert. Human habitation will increase there which, in turn, will help in protecting the so far porous border with Pakistan."<sup>69</sup> Thirdly, the opinion of the court is imbued with a certain idea of development, not dissimilar to the one that Rist describes, when he says that western countries tend to see development as an inevitable step towards the well-being of a society (thus naturalizing and de-historicizing a story to render it eternal, to make hegemony out of it).<sup>70</sup> The Court saw the construction of the dam as a necessary step for the improvement of the local population: "It is not fair that tribals and people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of lifestyle [...] displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for the larger good."<sup>71</sup>

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<sup>66</sup> For an insightful view on this case See Balakrishnan Rajagopal, *Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle*, in BOAVENTURA DE SOUSA SANTOS & CÉSAR A. RODRIGUEZ-GARAVITO, *LAW AND GLOBALIZATION FROM BELOW* (2005)

<sup>67</sup> On the facts of the case please See also <http://www.narmada.org/sardar-sarovar/sc.ruling/>

<sup>68</sup> Rajagopal, *supra* note 66, at 204.

<sup>69</sup> *Id.*

<sup>70</sup> RIST, *supra* note 17.

<sup>71</sup> Rajagopal, *supra* note 66, at 205-206.

In similar fashion, the Ogoni case in the Niger Delta<sup>72</sup> is showing on the one side a flexible approach adopted by the African Commission (which also undertook a fact-finding mission to Nigeria in March 1997) in interpreting the African Charter,<sup>73</sup> however highlighted also its major weakness. Apart from the fact that the Commission had no enforcement mechanisms and that the timing of the procedures were certainly prolonged (the Commission reached its decision in October 2001, after almost a ten years struggle), additionally, the decision of the Commission targeted only the Nigerian government, not taking into account other third subjects, in this case the Shell Corporation.<sup>74</sup> If the Ogoni case represents a positive example of how the MOSOP movement has been taken seriously into consideration, however the final decision definitely failed in *not questioning* the basic assumptions of the international legal framework upon which that particular violation was sustained and perpetuated.<sup>75</sup>

Latin America also provides us with many and diverse examples of movements struggles as well as mechanisms of resistance and creation of alternative space out of

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<sup>72</sup> For an insightful view on this case See for example <http://www.mosop.org/> and <http://www.unhcr.org/refworld/docid/3ae6a7d8c.html>. See also J.Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for the Peoples Rights in Africa*, 18 Am. U. Int'l L. Review 851 (2003).

<sup>73</sup> The judgment recognizes in fact that "the enforcement of collective, group, or peoples' rights is an important obligation on the international community and on states in and of itself"; it addresses the important right to an satisfactory environment favourable to development (Art.24), together with Article 21 (free disposal of natural resources) which is a vital achievement for African countries, as they are still enormously affected by the presence of foreign companies that contribute to damage their land and exploit their natural resources; finally, the "cross generational approach" adopted by the Commission in addressing the violation of human dignity and the right to food "is essential to the objective of demarginalizing second and third generations rights, and in fortifying the interrelatedness and interconnection between the various categories of rights". See Richard N. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L L. 80, 100 (1988) and Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter of Human and Peoples' Rights*, 23 Hum. Rts. Q. 327 (2001). See also Onyango, *supra* note 65, at 883. See also African Charter on Human and Peoples' Rights, available at [http://www.achpr.org/english/info/charter\\_en.html](http://www.achpr.org/english/info/charter_en.html)

<sup>74</sup> *Id.*

<sup>75</sup> Indeed we can read this case in a manner that shows how a regional human rights body was able to interpret the law favourably to the struggle of this social movement. This case differs from the NBA case mentioned above because it involves a non-state actor (Shell), and a project that is also aimed at exporting natural resources, not harnessing them for local use (as with the dam). For the Ogoni people, the unregulated actions taken by Shell, with the approval of the governments, resulted in a loss of livelihood, food sources, and homes, as well as numerous health issues from the oil spills. Basing on the Merits of the Decision, the Ogoni case shows certainly an advancement in the protection of human rights when these violations target the environment, and the human and materials resources of oppressed peoples. However the decision did not go as far as to touch the real fundamental issues at stake, such as for example the right to self-determination of the Ogoni, a clear definition of 'people', and it completely misses to address the liability of the Shell Oil Company which, through a series of unregulated actions under the approval of the Nigerian government, resulted in a loss of livelihood, food sources and homes, as well as causing numerous health issues for the Ogoni people due the oil spills.

the neoliberal-rights narrative: from the time of the Zapatismo<sup>76</sup> to the most recent case of Bolivia,<sup>77</sup> the South American continent has witnessed over the last two decades a flourishing of different practices of resistance and the creation of a number of ‘spaces of profanation.’ Indigenous and other political movements in Brazil, El Salvador, Argentina, Ecuador, Peru and Chile have contributed to challenge neoliberal policies imposed both by the State or by the international institutions,<sup>78</sup> as well as to propose and realize (at least in part) instances of autonomy, political representation and redistribution of wealth.<sup>79</sup>

Since the end of the eighties, the Movement of the Landless (MST) in Brazil for example, contributed to the process of constitutionalizing the law of the country and to redefine the access to land in a more equitable way, by shaping the concepts of property rights;<sup>80</sup> the struggle of the U’wa people in northern Colombia against oil drilling in their land has brought to the fore the question of indigenous rights recognition in the country, contributing to the turn towards a multicultural approach of Colombian Constitution;<sup>81</sup> the same can be said of similar indigenous and social movements in Uruguay, Paraguay and Bolivia.<sup>82</sup>

However, what needs to be pointed out here is that, although all these movements contributed to create new or more space for resistance, thus profaning - at least in part - the precedent institutional and legal constraints, what Latin America has witnessed in most cases after such struggles, was first and foremost the return of the State as the

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<sup>76</sup> For an account of the Zapatista movement See for example Richard Stahler-Sholk, *Globalization and Social Movement Resistance: The Zapatista Rebellion in Chiapas, Mexico*, 23 *New Political Review* 493 (2001).

<sup>77</sup> RAÚL ZIBECHI, *DISPERSING POWER: SOCIAL MOVEMENTS AS ANTI-STATE FORCES* (2009).

<sup>78</sup> See Mario A. Murillo, *The 2008 Indigenous and Popular Minga in Colombia: Civil Resistance and Alternative Communication Practices*, 23 *Socialism and Democracy* 137 (2009), Kenneth P. Jameson, *The Indigenous Movement in Ecuador: The Struggle for a Plurinational State*, 38 *Latin America Perspective* 63 (2011), David Carruthers & Patricia Rodriguez, *Mapuche Protest, Environmental Conflict and Social Movement Linkage in Chile*, 30 *Third World Quarterly* 743 (2009), Paul D. Almeida, *Social Movements, Political Parties, and Electoral Triumph in El Salvador*, 42 *NACLA report on the Americas* 16 (2009) and Raúl Zibechi, *New Challenges for Radical Social Movements*, 38 *NACLA report on the Americas* 14 (2005).

<sup>79</sup> *Id.*

<sup>80</sup> Peter P. Houtzager, *The Movement of the Landless (MST), Juridical Field, And Legal Change in Brazil*, in DE SOUSA SANTOS & RODRIGUEZ-GARAVITO, *supra* note 66.

<sup>81</sup> César A. Rodriguez-Garavito and Luis Carols Arena, *Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U’wa People in Colombia*, in DE SOUSA SANTOS & RODRIGUEZ-GARAVITO, *supra* note 66.

<sup>82</sup> Zibechi, *supra* note 77.

central pillar of social control and social change.<sup>83</sup> Secondly, and more important, many doubts remain that a real form of representation could be given through predefined legal forms (such as ‘multicultural Constitutions’, or through general extensions of right-granting), which do not pertain in the first place to indigenous populations or indigenous knowledge and practice.<sup>84</sup> It seems indeed that what has been put in place here is a sort of ‘culturalization of indigenous rights,’ with the precise intent to domesticate the political demands of those struggles.

To conclude, most of the movements which significantly shaped Latin American politics and institutions through the 1990s and the 2000s, not only find today marginalized by the newly elected governments,<sup>85</sup> but have also witnessed the appropriation by current political powers of their own language and codes used during their struggles, together with the implementation of the latest forms of biopolitical control, the so called ‘*planes sociales*’.<sup>86</sup> Thanks to those planes, the State is now able to classify people according to their material needs, thus putting in practice the policy of ‘capacity building’ designed and fostered for instance by the World Bank, but also to go straight at the core of those territories that were once space-incubators of resistance, neutralizing, de-politicizing and dismantling the whole set of networks, forms of solidarity, reciprocity and communal assistance that people have created to engage and resist neoliberal practices in the first place.<sup>87</sup>

In sum, what I wanted to show here is that the neoliberal-rights moment tends today not only to be proposed and used as the current vocabulary through which to grant rights, constitutional recognitions, protections or forms of autonomy, as one could see in the Narmada case for example. But, by doing so, this discourse tend to erase a whole other set of notions and stories, either coming from an indigenous perspective or from the dissent of the 99%, as the examples taken from Latin America further explain. Moreover, passing through established channels such as lawyers, Constitutional recognition, Commissions etc. mostly works to cast the true nature of the struggle in a zone supra-humane, purely legal in this regard. This zone then becomes impossible to be profaned because impossible to be *used*, if not through those same institutional

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<sup>83</sup> Raul Zibechi, *Governments and Movements: Autonomy or New Forms of Domination?*, 24 Socialism and Democracy 1 (2010).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

channels, as the Ogoni case has showed. Finally, being projected as the only viable solution and the only practicable way for rights-demand and recognition, the neoliberal moment closes dissimilar spaces for resistance, tending to reducing present socio-legal issues into a flat and technocratic landscape, which, from Latin America to Europe and from Africa to the U.S., increasingly works at the complete disposal of the present neo-imperial State.<sup>88</sup>

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<sup>88</sup> AGAMBEN, *supra* note 7 and DOUZINAS, *supra* note 8.

### 3. FINDING THE SPACE FOR RESISTANCE: EMPIRE, TWAIL AND THE SUBALTERN

Is impossible to *think* of anywhere in the world without invoking certain categories and concepts, the genealogies of which go deep into the intellectual and even theological tradition of Europe. Concepts such as citizenship, the state, civil society, public sphere, human rights, equality before the law, the individual, distinction between the public and the private, the idea of the subject, democracy, popular sovereignty, social justice, scientific rationality, and so on all bear the burden of European thought and history.

Dipesh Chakrabarty, *Provincializing Europe*

#### 3.1 Of Empire and Multitude

The analysis undertaken so far shows not only that on the one side political discourse – at the national as well as the international level - is still carried out today by some juridical-legal axioms, namely sovereignty, development, progress, growth, etc. but that these axioms are also implemented, reinforced and protected through the neoliberal form of governmentality around the globe, its biopolitical intrusion and ramifications into the realm of life, the use of crisis as the new disciplinary mean of subjugation and the de-politicization process undertaken by the expansion of (human) rights on a planetary scale.<sup>89</sup> The intensity of the lawmaking process seems today to encounter no obstacles on its way, but in the case impediments still remain, the game is won by playing the card of the eternal conflict between tradition and modernity, civilization and barbarism, development and poverty, democracy and authoritarianism, thus providing that old image of the endless clash between good and evil, so well accustomed in Western mentality and that has been revitalized with the events of September 11.<sup>90</sup>

Today we see everywhere the new means of this contemporary biopolitical world order: planes sociales, millennium development goals, Special Economic Zones, R2P, civil society, NGOs, Export Product Zones, immigration detention centres, microcredit etc.<sup>91</sup> all of these mark the establishment of an entire *apparatus* whose function is to

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<sup>89</sup> HARDT & NEGRI, *supra* note 42.

<sup>90</sup> Gayatri Chakravorty Spivak, *Globalities: Terror and Its Consequences*, 4 *The New Centennial Review* 73 (2004).

<sup>91</sup> ONG, *supra* note 41. Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 *Eur. J. Int'l L.* 679, 695 (1999). See also David Whyte, *Naked Labour: Putting Agamben to Work*, 31 *Austl. Feminist L.J.* 57 (2009). Responsibility to Protect, available at <http://www.iciss.ca/pdf/Commission-Report.pdf>

provide the grammar, the means and channels of actions, the moral *raison d'être*, and whose aim is precisely to neutralize differences and criticism, overcome cultural diversities and the actual possibility of re-inventing new forms of social relationships and social sentiments. Far from living in a lawless world, as Agamben reminds us,<sup>92</sup> we actually live in a hyper-legalized technocratic age, where the rhetoric of *crisis*, *immigration* and *security* is used to subdue any forms of resistance and opposition, and where the grammar of international law furtively enters to smooth any exception.<sup>93</sup>

Empire is materializing before our very eyes. Over the past several decades, as colonial regimes were overthrown and then precipitously after the Soviet barriers to the capitalist world market finally collapsed, we have witnessed an irresistible and irreversible globalization of economic and cultural exchanges. Along with the global market and global circuits of production has emerged a global order, a new logic and structure of rule—in short, a new form of sovereignty. Empire is the political subject that effectively regulates these global exchanges, the sovereign power that governs the world.<sup>94</sup>

If it is true that Empire is materializing before us, probably then the hard thing is being able to *focus* it. The terms of debate appear in fact too 'right' and 'necessary' for attempting to resist. If, for example, the status of capitalism emerges today as unchallengeable, that is not just because of the left deflection or its defeat on a historical basis, but it is because capitalism presents itself now with an ethical façade, so that when we buy a pair of shoes or consume a coffee at Starbucks, at the same time we are told that we are helping a child in a remote village of the Third World or that we are respecting the environment by purchasing a certain commodity.<sup>95</sup> We do not however ask ourselves whether that form of aid (if it actually is to occur, in what manner and following what channels) might somehow destroy a whole set of pre-existing socio-cultural and economical relations. In sum, this process of total *alienation* - to use one of Marx's favourite terms - is characterised in contemporary world by a

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<sup>92</sup> AGAMBEN, *supra* note 7.

<sup>93</sup> See JEF HUYSMANS, THE POLITICS OF INSECURITY: FEAR, MIGRATION AND ASYLUM IN THE EU (2006), David Chandler, *The security-development nexus and the rise of 'anti-foreign policy'*, 10 J. Int'l Rel. & Dev. 362 (2007), Seyla Benhabib, *Citizens, Residents, and Aliens in a Changing World: Political Membership in the Global Era*, 66 Social Research 709 (1999). See also DAVID KENNEDY, OF LAW AND WAR (2006). As Douzinas also puts: "Because terror is not a nation, the war on terror appears as police action, as the war of law. It makes us imagine the world as one, through normative, legal, and moral regulation, and the enemies as outlaws. The terrorist as criminal shares the one legal order and as evil-doer repudiates our common ethics". Costas Douzinas, *Postmodern Just Wars and the New World Order*, 5 J. Hum. R. 355, 368 (2006).

<sup>94</sup> HARDT & NEGRI, *supra* note 42, at xi.

<sup>95</sup> TOMS shoes, available at <http://www.toms.com/our-movement>, Starbucks available at <http://www.starbucks.com/responsibility>

complete erosion and disappearance of socio-political responsibilities.<sup>96</sup> Human rights already provide the means of all possible rebellions, microcredit grants the individual the monetary resources to develop its own entrepreneur spirit, the World Bank's project 'voices of the poor' is the classical example of mainstream plan which aims to empower the ones excluded from economical wealth (fulfilling Amartya Sen's dream of expanding individual capabilities), and thus precluding to actually *see* (and to challenge) the bigger picture of systemic regimes of exploitation and neo-colonization which may be the cause of that poverty and of that exclusion.<sup>97</sup>

The legal-capitalistic communication machine is constantly in the act of producing ideologies and symbols that we are eager to internalize, vocabularies that immediately kill autonomy and creativity, because they respond to *our* inner common sense, the inner *topology* we are fed from birth.<sup>98</sup> We don't question the basic assumptions of the system because is upon these assumptions that our life is produced and maintained.

While global terrorism functions as the latest soundtrack of our existences,<sup>99</sup> the entire human life becomes an immaterial de-socialized process that is very easily controlled under the realm of neoliberal biopower, and thus through law, the state and the capitalist classes around the globe. The (im)possibility of imagination – already aware of being ingrained in this present and perpetual inescapable order - finds its preferred forms of evasion in a purely aesthetical representation of the self, through blogs, facebook, virtual profiles or in a brutal rush to consumption.<sup>100</sup>

Again and again what is forgotten in this immense process of production, accumulation and creation of new needs is the revelation of a reality far more obscure and atrocious than the one that the machine of ethical-capitalism proposes today: in the age of legal fetishism and rights business, land grabbing and new detention camps, hedonism and de-responsibility, *human life* is finally inscribed into the global market

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<sup>96</sup> BROWN, *supra* note 14.

<sup>97</sup> See AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000), RAPAHIL KAPLINSKY , GLOBALIZATION, POVERTY AND INEQUALITY (2007), IMMANUEL WALLERSTEIN, WORLD SYSTEM ANALYSIS: AN INTRODUCTION (2004), for the World Bank project available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:20622514~menuPK:336998~pagePK:148956~piPK:216618~theSitePK:336992,00.html>

<sup>98</sup> HARDT&NEGRI, *supra* note 42.

<sup>99</sup> See for example [http://www.cbsnews.com/8301-250\\_162-57390922/holder-u.s-can-kill-citizen-terrorists-abroad/](http://www.cbsnews.com/8301-250_162-57390922/holder-u.s-can-kill-citizen-terrorists-abroad/) or [http://www.huffingtonpost.com/2012/03/05/us-targeted-killings-eric-holder\\_n\\_1320515.html](http://www.huffingtonpost.com/2012/03/05/us-targeted-killings-eric-holder_n_1320515.html)

<sup>100</sup> Dipesh Chakrabarty, *Universalism and Belonging in the Logic of Capital*, 12 Public Culture 653 (2000).



orgy, becoming a pure accessory in the hands of the best bidder. In this sense, human life turns out to be the favoured ground of any political power, since *life* is a universal concept which by all means it does unify, standardize and *remove* political differences: “the right to life, to one’s body, to health, to happiness, to the satisfaction of needs and, beyond all the oppression or ‘alienation’, the ‘right’ to rediscover what one is and all that one can be, this ‘right’ – which the classical juridical system was utterly incapable of comprehending – was the political response to all these new procedures of power.”<sup>101</sup>

While *human* rights reinforce this view by assigning potential shields to every human life, understood in their biological uniqueness, these same rights are inseparable from being first and foremost assigned to the citizen,<sup>102</sup> therefore submitted to the government and its mechanisms of governmentality, or being completely disregarded *because* of that: refugees are not citizens, thus they have no rights, the United States can kill their citizens abroad if they become a threat to the government, subalterns populations are left out of History because they lack civilized means of governmentality like democracy, accountability, and...human rights.<sup>103</sup>

In short, it seems that the extreme game that is played today is properly to *bet on* human life, after having celebrated its festival: if one the one side in fact life becomes hyper-legalized and hyper-protected on a universal scale – and thus dismembered and stripped of its political peculiarities - on the other, new mechanisms are constantly put in place (on a national as well on the international level) that decide which life counts as such and which does not, put in other terms, who deserves to live and who deserves to die.<sup>104</sup>

In a universe in which, thanks to these neoliberal dynamics, men found themselves constantly at work, while they have no idea of what they actually produce, for whom and by what means,<sup>105</sup> if their capitals secured in banks are used to finance corporations which destroy the ecosystems of other populations (other peoples’

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<sup>101</sup> Michel Foucault in AGAMBEN, *supra* note 48, at 121.

<sup>102</sup> Please refer to note 49 and AGAMBEN, *supra* note 7.

<sup>103</sup> AGAMBEN, *supra* note 48.

<sup>104</sup> *Id.*

<sup>105</sup> Marx’s theory of *alienation* is even more relevant today. See KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 (1959). Confront also the Capital’s chapter on the Working Day, MARX, *supra* note 62, (especially at 375-376) with Neil Smith in David Hugill, *Revolutionary Ambition in an Age of Austerity: An Interview with Neil Smith*, Criticallegalthinking, (Mar. 12, 2012), available at <http://www.criticallegalthinking.com/2012/03/12/revolutionary-ambition-in-an-age-of-austerity-an-interview-with-neil-smith/>

lives),<sup>106</sup> or where the lack of social solidarity is visible in those supranational institutions which boast their being unions,<sup>107</sup> but also where “the explosive growth of slums in the last decades - especially in the Third World megalopolises from Mexico City and other Latin American capitals, through Africa (Lagos, Chad) to India, China, the Philippines, and Indonesia - is perhaps the crucial geopolitical event of our times,”<sup>108</sup> it seems that the concept of ‘multitude’<sup>109</sup> may regain strength.

Entire landscapes are in fact completely removed from the sight, presented as the ultimate humanitarian catastrophe or used to instil fear and terror among citizens, and thus employed to reinforce the state, the status quo and its global class of retainers. Introduced to encompass the “old” concept of Third World - namely the previous form of exploitation based on the North-South axes – today, while biopolitics is working on a global scale, from the U.S. to India and from Egypt to Russia, everybody needs to remember that he or she is potentially part of that multitude:

Masses can be both destructive and creative of democratic practice [...] As numbers, the *multitude* has the power to impose limits on the rulers. For Spinoza, there is a political connection that emerges not from an abstract representation of the masses but from their historical reality that consists in the capacity of the masses to turn numbers into a movement [...] Spinoza makes clear that the masses as a real political force cannot be historically eliminated from democratic theory through representational politics; they remain a mobile numerical force that can physically move against political order.<sup>110</sup>

Here we can perhaps better understand why the process of breaking those masses into individual entities is a common element of our celebrated ‘age of rights.’ on the one side in fact, rights are given to dismember and to foster the individualization process typical of capitalism, to allow the super-legalization of private property, or to grant the authority of the state (and therefore of its security forces) upon its citizens at home and abroad, but only to the point, then, to re-assemble those same masses through the usage of statistical analysis (for particular policy objectives), through mapping of groups (for

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<sup>106</sup> B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 Melb. J. Int’l L. 499, 504-505 (2007).

<sup>107</sup> William Wall, *Shame on Europe for betraying Greece*, THE GUARDIAN, (Feb. 14, 2012), available at <http://www.guardian.co.uk/commentisfree/2012/feb/14/europe-betraying-greece> and *The EU & Greece: A Capitalism that has persuaded the world that capitalism is the world*, Criticallegalthinking (Feb. 13, 2012), available at <http://www.criticallegalthinking.com/2012/02/13/eu-greece-capitalism-is-the-world/>

<sup>108</sup> Slavoj Žižek, *Multitude, Surplus, and Envy*, 19 Rethinking Marxism 46, 56 (2007).

<sup>109</sup> MICHEAL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* (2004)

<sup>110</sup> Claudia Aradau and Jef Huysmans, *Mobilising (Global) Democracy: A Political Reading of Mobility between Universal Rights and the Mob*, 37 Millenn. J. Int. Stud. 583, 598 (2009).

categorization into boxes such as “the unemployed,” “the hungry,” “the layoff” etc.) or through other means of social control. On the contrary, rights may not be given at all, in order to intentionally exclude and not provide people with a status, thus to dispose of life as it pleases to the sovereign power.<sup>111</sup>

### 3.2 TWAIL and the Critique of the Current Global Order

In outlining a transversal form of exploitation at a closer view, fractures are discovered: material and social inequality flare between the Global North and the Global South, so that we may want to ask - with Spivak - “why Kabul - behind it Gaza, Karachi, Ulan Bator and *bien d’autres encore* – cannot emerge as global cities?”<sup>112</sup> or why five countries still dominate the Security Council, while ‘civilized’ nations like the United States can pass legislation in order to kill their citizens abroad if they are considered a terrorist threat?<sup>113</sup> Moreover, those same inequalities are also dramatically increasing within the Global North and the Global South of the world, as the recent events among Spain, Italy, Greece, US and Nigeria are showing.<sup>114</sup> In this sense, capital globalization has not brought about homogenization, but rather an awareness of the material good of the rich class around the globe,<sup>115</sup> as shouted today in probably the most famous slogan of the OWS movement: “we are the 99%.”

The resistance of the multitude then makes even more sense today, as the global wave of protest is more active and able to raise consensus than ever, spreading transnationally from Bahrain to London and from Moscow to Wall Street. In a recent interview to Al-Jazeera, Slovenian philosopher Slavoj Žižek made the point clear: “The system has lost its self-evidence, its automatic legitimacy [...] the marriage between

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<sup>111</sup> AGAMBEN, *supra* note 48.

<sup>112</sup> Spivak, *supra* note 90, at 74.

<sup>113</sup> Please refer to note 99.

<sup>114</sup> See for example European Trade Union Institute, *Social inequality worsening in European Union*, available at <http://www.etui.org/News/Social-inequality-worsening-in-European-Union>, OECD, *Growing Income Inequality in OECD Countries: What Drives it and How Can Policy Tackle it ?*, available at <http://www.oecd.org/dataoecd/32/20/47723414.pdf>, See also Dean Baker, *Greece and those wild and crazy guys at the European Central Bank*, Al-Jazeera (Feb. 21 2012), available at <http://www.aljazeera.com/indepth/opinion/2012/02/20122218635894953.html>, Danny Schechter, *#Occupy Nigeria shows the movement’s global face*, Al-Jazeera (Jan.23 2012), available at <http://www.aljazeera.com/indepth/opinion/2012/01/201212114314766322.html>

<sup>115</sup> JAMES FERGUSON, *GLOBAL SHADOWS: AFRICA IN THE NEOLIBERAL WORLD ORDER* (2006).

democracy and capitalism is over, and now the field is open.”<sup>116</sup> Indian activist Vandana Shiva – even if making a broader generalization - recalls the words of Gandhi when she describes “the general assemblies in cities around the world are living examples of ever expanding, never ascending oceanic circles. When everyone has to be included in decision-making, consensus is the only way.”<sup>117</sup> All this may actually underline a process towards emancipation, a process that, worldwide, is at present trying to propose creative ways to shape the current system. Alternative forms of socio-legal and economical knowledge are therefore essential, and social movements – in fact the Occupy Wall Street movement itself - could characterize this new era of intense social-class struggle:

The antiglobalization movement – disorganized, fragmented, and multiply focused as it was – made clear to a lot of people that there was in fact an alternative. Latin American revolts – at the ballot box, but also on the streets and in the forests – were extraordinary signs that neoliberalism was not beyond contestation. During the economic crisis of the late 1990s, a lot of people who had been neoliberalism’s most avid supporters jumped ship. Joseph Stiglitz, Jeffrey Sachs, and others said “okay, this is not working.” Then, of course, there was the economic crisis after 2007.<sup>118</sup>

TWAIL critique of the international legal order is perhaps one of the most useful tools to re-open and re-engage present narratives, as well as to consider different forms of narrations and resistance. When one stops for a minute to look at how the process of decolonization has been driven by the Western powers from the beginning for example, he or she would realize that legal items and concepts such as self-determination in the form of Nation-state, *uti possidetis*, the doctrine of state responsibility and of development etc. were part of a structure which helped to confine decolonization into a box; a box that the Western powers had already prepared and which could dispose as they pleased.<sup>119</sup>

National liberation movements were, in this sense, ‘national’ and could not have taken other forms than that; the vocabulary of (international) law worked as to confine

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<sup>116</sup> Slavoj Žižek, *Capitalism with Asian values*, Al-Jazeera, (Nov. 13 2011), available at <http://www.aljazeera.com/programmes/talktojazeera/2011/10/2011102813360731764.html>

<sup>117</sup> Vandana Shiva, *The Lies of Free Market Democracy*, Al-Jazeera, (Nov. 15, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/20111112135744718390.html>

<sup>118</sup> Smith, *supra* note 105.

<sup>119</sup> B.S. Chimni, *Third World Approach to International Law: A Manifesto*, 8 Int'l Comm. L. Rev. 3 (2006). See also ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2006). See also RIST and RAJAGOPAL, *supra* note 17. See also MARTTI KOSKENNIEMI, *THE GENTLE CIVILIER OF NATIONS: THE RISE AND THE FALL OF INTERNATIONAL LAW 1870-1960* (2004).

those struggles into something it could recognize, inscribing them into forms and institutions which were western in nature, and thus legible and decipherable for westerners.<sup>120</sup>

The increasingly democratic nature of today's global system seems to drive exactly towards the same point: offering the tools and the words for inclusion is the first prerogative to maintain international peace and security, no matter what the cost. In expanding treaties, declarations and charter of rights all over the world, the language of this global project kills other forms of autonomy, other authentic projects of emancipation. From the colonial time, through the saints of the civilizing mission, arriving at the altar of human rights, there is always a juncture that needs to be re-engage and re-open, and where *other* forms of history would play a fundamental role in eroding the current state of affairs. In sum, this is exactly where TWAIL critiques arrives to offer their contributions to profane the unprofanability of the current system.<sup>121</sup>

Thanks to such critique, the landscape of international law has fundamentally changed: rather than being flat and objective, and rather than responding to a systemic set of notions and disciplines, it now appears to be full of fractures, caves, ravines and made of a seething underground.<sup>122</sup> Moreover, the TWAIL project is also very useful to give voice for resistance to present institutions and current narratives; this is *how* I think the OWS movement should read the warning that B.S. Chimni launches from its Manifesto, when he writes: "three billionaires in the north today hold assets more than the combined GDP of all the least developed countries and its 600 million people [...] Armed with the powers of international financial and trade institutions to enforce a neo-liberal agenda, international law threatens to reduce the meaning of democracy to electing representatives who, irrespective of their ideological affiliations, are compelled to pursue the same social and economic policies."<sup>123</sup> As I have shown above, there is in fact an entire *apparatus* which is currently proposing itself as the only viable regulatory project, an apparatus formed by both a totalizing and encompassing vocabulary and by

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<sup>120</sup> Please refer to note 119.

<sup>121</sup> Chakrabarty, *supra* note 100. See also B.S. Chimni, *Alternative Visions of Just World Order: Six Tales from India*, 46 Harv. Int'l L.J. 389 (2005). On the project of TWAIL and its difference from postmodernism and post-colonial theory See Makau Mutua, *What is TWAIL?*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 31 (2000).

<sup>122</sup> Hilary Charlesworth, *Remarks on The Project of Reconfiguration: How Can International Law Be Reconstituted?*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) (2000).

<sup>123</sup> Chimni, *supra* note 119, at 3.

living neo-liberal formations such as the IMF, the WTO, the WB etc., or special regimes like the TRIPS and the GATTs.<sup>124</sup>

Nonetheless - and given the new territorialization of global capital discussed before -<sup>125</sup> in revealing how national and international institutions function today as the primary vehicle of global capitalism, and how they are currently being transformed both by an into the preferred space of the *lex mercatoria*, it is worthy stressing the encompassing nature of TWAIL critique, precisely in underlining a form of worldwide exploitation *also* within the Third World but not confined to it.<sup>126</sup> Following a proper Marxist approach to law, in the current global economic arena we are in fact able to locate a Transnational Capitalist Class (TCC), a Transnational Middle Class (TMC) and a Transnational Working Class (TWC).<sup>127</sup> The logic of historical materialism and of class-formation is applied, and enriched, here on the global level.<sup>128</sup> Chimni - as well as Akbar Rasulov and China Miéville - masterfully points out that every dimension of the global arena is today rooted in a process of 'material production,' where economic relations encompass all other forms of social relations. This fundamental passage is essential as it allows to capture not only the role of the present economical structure (in terms of production/exploitation and of struggle/resistance) but also unable us to *see* how the international plane becomes the new arena for a transnational class struggle,<sup>129</sup> thus give proper voice and ground a rationale for those set of questions about social inequality and global exploitation addressed by the Occupy Wall Street movement in its most famous slogan of the 99%, and that today dramatically resume their centrality in the debate both over the national and the international arenas worldwide.<sup>130</sup>

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<sup>124</sup> Chimni, *supra* note 119. See also ONG *supra* note 41 and Ugo Mattei, *A Theory of Imperial Law: A Study of U.S. Hegemony and the Latin Resistance*, 10 Ind. J. Global Legal Stud. 383 (2003).

<sup>125</sup> ONG, *supra* note 41 and HARVEY, *supra* note 34.

<sup>126</sup> Chimni, *supra* note 119.

<sup>127</sup> Chimni, *supra* note 106 and 119.

<sup>128</sup> For such approaches See MARX, *supra* note 62 and MARX & ENGELS, *supra* note 27. Please refer also to the dynamics of 'Empire' as discussed above.

<sup>129</sup> "The International legal system is a powerful site for contestation of the limits of the readability of ideas about community and democracy. Because law has the constitutive power to universalize certain knowledge and to disqualify others, the ability to speak to and influence law-making processes is a critical determinant of access to power". Diane Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 Soc. & Leg. Studies 337, 359 (1996).

<sup>130</sup> I am here referring to the questions posed by Spivak about 'globalcities', Žižek and others as discussed above. See also Akbar Rasulov, *The Nameless Rapture of the Struggle: Towards a Marxist Class Theoretic Approach to International Law*, 19 Finn. Y. Int'l L. 243 (2008). In different fashions, See MIÉVILLE, *supra* note 62 and the dynamics of the working day as explained by Marx, See MARX, *supra* note 62, at 344.

### 3.3. The Question of the Subaltern

When fractures are revealed, a whole world of possibilities comes to light. Having disclosed the Maya's veil concerning the role of European domination lying at the very heart of the international community, is probably one of the most important contribution of TWAIL, either focusing on the *event* of colonisation, or on its reiteration through the new forms of neo-imperial domination.<sup>131</sup> Too soon however, the calculative machine - to draw on Heidegger's expression -<sup>132</sup> of both national and international institutions absorbed many, if not all the ruptures, domesticating them by giving the verbal and grammar tools, the channels of action and rebellion;<sup>133</sup> in sum, "if third world peoples ever metamorphosed into subjects of international law, it was only ever to surrender sovereignty to colonial masters. The moment of empowerment was the moment of complete subjection."<sup>134</sup> This is without doubt one of the nodes for any thoughtful discussion on social movements, especially for those who propose the inscription of forms of resistance within the current legal order:<sup>135</sup> this inscription could represent in fact the latest development of the global biopolitical governmentality.<sup>136</sup> In addition, there are at least three aspects that I would like to further discuss here.

First of all, the existing dichotomy between "non-legal" (or "pre-legal") and institutionalization is a central part of the analysis, as many scholars have pointed out the strong influence that social movements had played throughout history in

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<sup>131</sup> ANGHIE, *supra* note 119, at 36. Chimni, *supra* note 106 and 119.

<sup>132</sup> On the meaning of 'calculative thinking' See MARTIN HEIDEGGER, DISCOURSE ON THINKING (1969).

<sup>133</sup> "Even when the colonies were perceived to challenge some of the fundamental assumptions of the discipline, as in the case of the doctrine of self-determination, which was used in the 1960s and 1970s to effect the transformation of colonial territories into sovereign states, such challenges were perceived, mainly in political terms, as a threat to a stable and established system of international law, which was ineluctably European and was now faced with the quandary of accommodating these outsiders". Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1, 3 (1999).

<sup>134</sup> Chimni, *supra* note 119, at 501.

<sup>135</sup> On this argument See RAJAGOPAL, *supra* note 17. See also Frédéric Mégret, *Le droit international peut-il être un droit de résistance ? Dix conditions pour un renouveau de l'ambition normative internationale*, 39 Études internationales 39 (2008).

<sup>136</sup> "The complicity of the international legal system in globally normalizing and instituting the knowledges of modern disciplinary Europe has already been canvassed. Legal claims to rationality, objectivity and neutrality are reinforced by the categories of the social sciences and law's place as a 'prominent conversation' in international relations reinscribes normativity into new elite knowledges. But simultaneously, because legal argument cannot produce the neutral outcomes it lays claim to, it emerges as site for contestation 'objective' social realities as the G77 set out to do". Otto, *supra* note 129, at 352.

constructing, for example, the doctrine of human rights.<sup>137</sup> That the struggle of social movements becomes later new raw materials for the legal sphere is a crucial element to address also for the OWS movement, as both the national and the international fronts normally acknowledge the implementation of a clear “top down” agenda of norms and policies, especially during times of crisis.<sup>138</sup>

Second, in the “natural” trend to reduce extra-legal realities into institutionalized bodies, the OWS could potentially challenge today’s dominant neoliberal conceptions of how these institutions and norms are formed and implemented, as later argued in this paper. However, one must be aware of the fact that the interaction between social movements from below and institutions is not an equal encounter; all too frequently the language of resistance and revolution can be captured and incorporated within the dominant discourse, feeding it and making it more powerful (the human rights discourse is probably the best contemporary example of this aspect).<sup>139</sup>

This is also the case with the role played by the media. Constantly trying to delegitimize, domesticate and de-politicize the August 2011 London Riots, making fun of the “bunch of hippies” who took over Zuccotti Park and trying to hide any possible connections between Western form of protests and the so called and much celebrated Arab Spring,<sup>140</sup> the New York Times was recently celebrating the ‘Year of the Protester,’<sup>141</sup> again an example of how the encounter between social movements and

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<sup>137</sup> See for example Edward Rubin, *The Conceptual Role of Social Movements*; Neil Stammers, *Social Movements, Human Rights and the Challenge to Power*; Kathryn Sikkink, *A typology of Relations Between Social Movements and International Institutions*, 97 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 295-308 (2003).

<sup>138</sup> See RIST, *supra* note 17, at 93-108 and 171-196, RAJAGOPAL, *supra* note 17, at 135-161, ANGHIE, *supra* note 119, at 245-272. See also David Kennedy, *The “Rule of Law”, Political Choices, and Development Common Sense*, in DAVID M. TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95-173 (2006). See also Sentas and Whyte, *supra* note 15.

<sup>139</sup> “A hundred and fifty years later [the Declaration of the Rights of Man and of Citizens], the human rights aspect of postcoloniality has turned out to be the breaking of the new nations, in the name of their breaking-in into the international community of nations”. Gayatri Chakravorty Spivak, *Use and Abuse of Human Rights*, 2 *Boundary* 131, 134 (2005). Moreover: “The excluded may try to claim political recognition by adopting the existing rules of the game and turning their demands into regional expressions of the established order. This is the case with reformist social movements”. DOUZINAS, *supra* note 8, at 105.

<sup>140</sup> Not surprisingly, the expression *Arab Enlightenment* also recurred in bunch of articles, as to simplify and magnify the cultural, social and political distance between European history and the history of the rest of the world, in this case of the Middle East. See for example William Pfaff, *Arab Awakening could begin to resemble European Enlightenment*, Chicago Tribune, (December 29, 2011), available at [http://www.chicagotribune.com/news/politics/sns-201112291700--tms--wpfafftr--v-a20111229dec29\\_0.6350836.column](http://www.chicagotribune.com/news/politics/sns-201112291700--tms--wpfafftr--v-a20111229dec29_0.6350836.column)

<sup>141</sup> *Time Person of the Year*, N. Y. Times, (December 14, 2011), available at <http://www.time.com/time/person-of-the-year/2011/>



institutional space is unequal, given the tendency to mock, to deride and to de-politicize resistance in all sort of ways. Thus, the OWS movement has to be strategic in its engagement with law and institutions, using their strengths to get what it wants, in a sort of ‘political jujitsu’ where the opponent’s power is manipulated against itself.<sup>142</sup>

Finally and most importantly, the larger question that needs to be considered is the one asked again by Spivak, namely *whether the subaltern can really speak?*<sup>143</sup> Not only in fact we would like to assume that someone is listening to radical political requests at all – whatever that radicalism may contextually signify - but, if the answer is yes, and we accept that social movements are always speaking, however we may want to ask what is the language that they are using to formulate their requests, thus what is the *space* within which their demands are tolerated, understood and legitimated. What Edward Said called ‘the permission to narrate’ is the crucial point around which all other issues revolve, both on the national as well as the international level.<sup>144</sup>

One can reveal fractures, discover and shed light on the remotest and roofed issues of history, but, in doing so, necessarily he or she has to *use a language* which remains legible and understandable, and that has mostly been coined in a precise manner, following certain practices and criterias.<sup>145</sup> We must in sum inevitably be clear on one crucial point: until a radical change will not occur in terms within which the spatial-temporal and economical-legal categories are currently expressed, the game will always be resolved following the dynamics which are already known both by the game itself and its players.

But that is precisely where the Occupy Wall Street movement is today placing itself. I will give further elucidations on this point in the last section but, as shown from the very beginning of this paper, today this movement is unquestionably attacking precisely the socio-legal and political-economical narratives which stands at the base of the present world order. There is no doubt that today, as the recent events have also worldwide shown, a great need to develop a different vocabulary of resistance is felt, a vocabulary that can engage the pillars of the current system, without being co-opted by those who are currently pursuing the neoliberal ideology. Embracing the disjuncture

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<sup>142</sup> The reference is of course to Gandhi. See also HENDRY DAVID THOREAU, CIVIL DISOBEDIENCE (2000).

<sup>143</sup> Gayatri Chakravorty Spivak, *Can the Subaltern Speak?* 83, available at [http://www.mcgill.ca/files/crclaw-discourse/Can\\_the\\_subaltern\\_speak.pdf](http://www.mcgill.ca/files/crclaw-discourse/Can_the_subaltern_speak.pdf)

<sup>144</sup> *Id.* at 79.

<sup>145</sup> *Id.*

brought about by the subaltern perspective can be very useful for the OWS movement, as the subaltern is always opening a plurality of histories and temporalities, of practices and knowledges, indeed of spaces, even if speaking with its counterpart's language and voice. To continuously *open-up spaces of profanation* - from which worlds and words that were previously unknown can arise – then, is the true act of resistance that a subaltern has to commit itself to.

The democratic process wants indeed to produce 'good stories,' not subversive ones;<sup>146</sup> the media industry generally works to mock dissent, by thematizing, domesticating and de-legitimize it in various ways;<sup>147</sup> law and institutions are created to maintain order and to erase many possible threats of insurgence and resistance;<sup>148</sup> police and security forces are today repressing even more violently the protesters, using new and over-sophisticated means, including the latest pepper spray;<sup>149</sup> everywhere one can see today the reinforcement of the rule of law, by the increasingly use of criminal law or other mechanisms adopted towards the constant de-politicization of life;<sup>150</sup> the tools of the capitalist reproduction are today in the hands of classes of techno-bureaucrats that that from US to China, implement a definite grammar of growth and development, of trade and exploitation.<sup>151</sup>

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<sup>146</sup> Chakrabarty, *supra* note 100, at 22.

<sup>147</sup> Please refer to note 141.

<sup>148</sup> See for example SOUSA SANTOS & RODRIGUEZ-GARAVITO, *supra* note 66 and AGAMBEN *supra* note 7 and 48.

<sup>149</sup> Megan Gaber, *Image as Interest: Occupy & the Pepper Spray Cop*, Criticallegalthinking, (Nov. 22, 2011), available at <http://www.criticallegalthinking.com/2011/11/22/image-as-interest-pepper-spray-cop/>, See also Paul Rosenberg, *Time to occupy the Democratic Party*, Al-Jazeera, (Nov. 11, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/20111191405175653.html> and Naomi Wolf, *The streets of 2012*, Al-Jazeera, (Jan. 3, 2012), available at <http://www.aljazeera.com/indepth/opinion/2012/01/2012121194440825.html>

<sup>150</sup> On this account See FOUCAULT, *supra* note 36 and 37 and AGAMBEN, *supra* note 7.

<sup>151</sup> "Today the major economies of Western Europe, the US and China share the assumption that there are no historical future horizons other than 'growth and development' [...] Certainly China is shifting the world order in the sense that decisions concerning the economy and international relations will no longer be made solely by Western (US/EU) institutions. The struggle here is for knowledge. The promotion of Ziu Min to the IMF is one such example. Thirty years ago, this appointment was unthinkable, and if it had happened, the appointment might very well have been motivated by a 'democratic' feeling of involving people beyond the US (and at that time not even Europe), seated in the IMF offices [...] China cannot rule the world by itself, the US and the EU cannot rule the world by themselves [...] My reference [...] refers to the agents and institutions that are making the decisions on Wall Street, the European Union, the G8, the IMF and the people who congregate around Davos. The institutions that rule the world are represented at Davos, the G8, the Food Summit and the Environmental Summit". Christopher Mattison, *Neither Capitalism nor Communism, but Decolonization: An Interview with Walter Mignolo*, Criticallegalthinking (Mar. 21, 2012), available at <http://www.criticallegalthinking.com/2012/03/21/neither-capitalism-nor-communism-but-decolonization-an-interview-with-walter-mignolo/>

In looking at the Occupy Wall Street movement as a practical as well as imaginative space for the political task of profanation, as presented at the beginning of this paper through the lens of Agamben, not only this movement has to take into account the dynamics of current national and international neoliberal form of production and procreation, but it needs to start looking at the Law more as an ‘enslaving grammar,’<sup>152</sup> rather than a democratic arena for representation, indeed more as a tool in the hand of the institutional powers, and thus of police, security forces and courts, than something which will be beneficial for the movement itself. Law and institutions have traditionally interposed themselves between the voice of the subaltern and those who work to maintain the order and the status quo, certainly not in supporting the former.<sup>153</sup>

Ultimately, we would like to see *how* and *why* the Occupy Wall Street movement is acting as a ‘space of profanation’ of the present, sacred order of biopolitical control and reproduction. In order to do so, we must necessarily move to the next and last section.

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<sup>152</sup> “I am afraid we are not rid of God because we still have faith in grammar”. FRIEDRICH NIETZSCHE, THE WILL TO POWER 38 (1968).

<sup>153</sup> SOUSA SANTOS & RODRIGUEZ-GARAVITO, *supra* note 66.

## 4. OCCUPY WALL STREET AS A 'SPACE OF PROFANATION'

Language begins only at the point where communication is placed in danger.

Henry Miller, *Sexus*

### 4.1 The (Re)-appropriation of Space

When life is reduced and confined in a world-Museum, attesting the impossibility of touching, experiencing and indeed using concepts-things-rights, and while the means of the new biopolitical order extend their reach on the remotest part of the globe, the issue of profanation of current notions-narratives seems today to find its preferred envisage properly in the act of 'occupation.' What is being occupied is always, in this sense, a *space*. Physical or imaginary it does not matter, because the subject at stake transcends its material boundaries, going as far as to speak to the heart, the mind and the sensibility of the people around the globe.

The first strong message brought about by the Occupy Wall Street movement is essentially here: to re-conquer a space that citizens have been deprived of, or that they *think* and *feel* they have been deprived of. In this sense, there are undeniably times in life when the question of knowing if one can think and perceive differently resumes its centrality in the political and social sphere, thus in our-being-with others and in the world.<sup>154</sup> We definitely live in such a time.

Recent events around the globe are attesting today an increasingly awareness of the enlarging gap between the rich and the poor, the masters and exploited, no longer just between the Global North and the Global South, but also within the North and the South themselves.<sup>155</sup> The Arab World's revolutions functioned in part as a spark that flamed the West's willingness to move beyond History,<sup>156</sup> as it was narrated in the last decade since that fateful day of early September 2001. Ten years after, the Occupy Wall Street movement has welcomed the invitation of Tahrir Square to announce that resistance and revolt were once again with people.

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<sup>154</sup> JEAN-LUC NANCY, THE INOPERATIVE COMMUNITY (1991).

<sup>155</sup> Please refer to note 114.

<sup>156</sup> Jean-Luc Nancy, *What the Arab Peoples signify to us*, Criticallegalthinking, (Mar. 31, 2011), available at <http://www.criticallegalthinking.com/2011/03/31/what-the-arab-peoples-signify-to-us/>

In the present panorama, described by Agamben as a persistent creation of zones of inclusion and exclusion,<sup>157</sup> the narrative of September 11<sup>th</sup> (either with, or against us!) that has been internalized by our new neoliberal order, may be potentially challenged. However, this signifies first and foremost to make the move towards the re-conquest and the re-engagement of a whole spectrum of space-narratives, of zones of unprofanability, of areas of which the access has been persistently denied.<sup>158</sup> It is precisely here the battle of the OWS movement is played: in opening-up, disclosing and bring to light a whole set of different and diverse possibilities and vocabularies for radical change within the present socio-political and economical-legal arenas.

Working to 'alter' the terminology of the present neo-liberal rights conversation, is an almost impossible task of a movement that in couple of months has reached unthinkable results, together with a brutal use of force that has been used to evict it.<sup>159</sup> After all, as one of the most famous slogans of the movement recites, all the OWS movement is asking is to “be realistic: demand the impossible.”<sup>160</sup> It is precisely the supposed impossibility of change in fact, as fostered by current political-financial powers and their narratives, that drives the movement and functions as its engine.

The issue of *space* in this sense is fundamental, especially if engaging with a rights-based approach, which, as shown above, tends to channel, direct, and offer ready-made tools, thus to ‘close’ different social and legal practices, in a world that is increasingly becoming over-legalized and lawfully flat.<sup>161</sup> Moreover, as discussed earlier, another crucial point is represented by looking at the spaces that neoliberal capitalism is presently eroding worldwide. The creation of space is crucial in this sense, as a response of that *accumulation by dispossession*,<sup>162</sup> through which capital is persistently caught in the act of privatizing public space, financing electoral campaigns, raising the cost of education, speculating on peoples’ lives and reducing social interactions to mere market transactions between detached citizens, who are given the illusion of being equal in terms of rights, only then to distinguish them in terms of money-ownership.<sup>163</sup>

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<sup>157</sup> AGAMBEN, *supra* note 7.

<sup>158</sup> *Id.*

<sup>159</sup> A theme not covered enough by the media though, and that the videos posted continuously on Youtube contribute to show and report.

<sup>160</sup> <http://occupywallst.org/>

<sup>161</sup> DOUZINAS, *supra* note 8 and 17, AGAMBEN, *supra* note 7.

<sup>162</sup> Harvey, *supra* note 28.

<sup>163</sup> MARX, *supra* note 62.

Moreover, today, space as conceived through the old coordinates of sovereignty, nation-State and borders, is no longer representative of the present social reality.<sup>164</sup> Evidenced by Globalization, migration on a global scale, the more transversal role that international institutions and organizations play worldwide, the explosion of NGOs and of multinational corporations, in sum the emergence of Empire in the re-territorialization of capital, the migratory waves and an increasingly awareness of the inter-connections of movements around the globe on issues that affect the citizens worldwide, might reveal in fact what Arjun Apparudai once called ‘the emergence of *translocalities*.’<sup>165</sup> Even at the time of the first World Social Forum, that movement was already in fact conceived to re-open and re-engage the space of capital production, in an attempt to harshly criticize it, by collecting a whole set of different notions and practices coming from all the corners of the world.<sup>166</sup> The fundamental research of alternatives was already present at that time, the WSF being an open space of confrontation, discussion and awareness of the current world order.

I think here precisely relies the emergence of a very interesting new aspect of contemporary movements, of the OWS in particular, that is, to propose and think of themselves primarily in terms of ‘space.’ What I would like to emphasize is the fact that the very notion of space since the end of Cold War has totally changed, and that a movement such as the OWS inevitably stands as promoter of a new physical, imaginary political space, which transcends a ‘pure and simple’ rights-based approach, the political parties system and potentially the State itself. In challenging the actual distinction between public and private, in addressing the loss of faith in current political institutions, in shouting its slogans against present financial crisis, the fear of the precariat and the cost of education, indeed in the very act of occupying a space inside the financial district of the world largest stock exchange, the Occupy Wall Street movement has established a clear link between the *macro-level* of transnational capital

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<sup>164</sup> See for example Keith Aoki, *Space Invaders: Critical Geography, the “Third World” in International law and Critical Race Theory*, 45 Vill. L. Rev.913 (2000), , HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* (1992), DELEUZE AND GUATTARI, *supra* note 37, ONG, *supra* note 41, HARDT & NEGRI, *supra* note 42 and HARVEY, *supra* note 34.

<sup>165</sup> Arjun Apparudai, *Sovereignty without Territoriality: Notes for a Postnational Geography*, in *THE GEOGRAPHY OF IDENTITY* 338 (1996).

<sup>166</sup> Boaventura de Sousa Santos, *Beyond neoliberal governance: the World Social Forum as subaltern cosmopolitan politics and legality*, in DE SOUSA SANTOS & RODRIGUEZ-GARAVITO, *supra* note 66.

flows<sup>167</sup> and those *micro-policies* of insecurity which constitutes the backbone of the neoliberal model at the national level.<sup>168</sup>

In this sense, the movement has already broken the binary opposition established by September 11<sup>th</sup> and its class of supporters of exported-democracy, human rights and capital liberalization, by affirming, with its physical presence-occupation the open end of resistance and the disclosure of a diverse, imaginative way to conceive human experience on this planet. The Occupy Wall Street movement is presently establishing a sort of third space,<sup>169</sup> indefinite, open and not yet legalized, a space that resembles these words by Homi Bhabha: “these in-between spaces provide the terrain for elaborating strategies of selfhood-singular or communal-that initiate new signs of identity, and innovative sites of collaboration, and contestation, in the act of defining the idea of society itself.”<sup>170</sup>

If this may resemble the ‘normal’ practice of all social movements, conceived as creators of extra-institutional spaces between the insurrectional and the institutional moment,<sup>171</sup> however what needs to be underlined here is that, differently from indigenous or other movements that tend to raise their voice on and from the margins, the peripheries, the borders of a system which already confines them and which generally acknowledge a struggle over a specific, peculiar issue,<sup>172</sup> not only the OWS movement is emerging from the heart of twenty-first century financial capital, but it also stands up in questioning the very assumptions upon which that system is currently working and reproducing itself. But how?

#### 4.2 OWS as a ‘Space of Profanation’

Thus far, working through the lens of Agamben, profanation has been explained, as well as those elements in contemporary society that need to become profane, which I this paper has identified as the ‘neoliberal-rights moment;’ having defined the Occupy Wall Street movement as a ‘space of profanation’ I have included in the analysis the renewed role that space – either physical or imaginary – plays in contemporary global

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<sup>167</sup> Aoki, *supra* note 164.

<sup>168</sup> DELEUZE AND GUATTARI, *supra* note 37.

<sup>169</sup> LEFEBRVE, *supra* note 164.

<sup>170</sup> HOMI K. BAHBHA, THE LOCATION OF CULTURE 1-2 (1994).

<sup>171</sup> ZIBECHI, *supra* note 77.

<sup>172</sup> *Id.* By stating this it is absolutely not my intention to undermine the importance of these movements and their struggles.

order. So then why does the Occupy Wall Street movement stand as a ‘space of profanation?’

Perhaps the first element that captured the attention of the people and of the media last September, as tents and camps were installed in Zuccotti Park, was that the OWS movement did not seem to have a clear agenda, a plan of action, or defined political requests.<sup>173</sup> This tremendous shift to *no-demand* is unusual for a people-based movement, more in general for the dynamics of political and social dissent and certainly for traditionally rights-demand.<sup>174</sup>

Not surprisingly, the first reaction of the U.S. media, commentators, politicians or even common people, was to label the movement as a ‘bunch of hippies’ who literally did not know what they wanted.<sup>175</sup> CNN was mocking them, by addressing the issue with the following words, “Seriously, protesters?”<sup>176</sup> and showing images of people dancing and partying in the street of New York City. Charles Krauthammer, a syndicated columnist addressed the movement by stating that “[it] has no objectives [...] it is a party of the unemployed [...] those people are just wandering around, instead they should go home, take a shower and get a job.”<sup>177</sup>

Those reactions captured very well indeed one of the most distinctive features of the contemporary neoliberal-rights moment, what we could call ‘the tyranny of choice,’<sup>178</sup> for the sovereign power does not really matter what or how, the point is that in the neoliberal model one has to choose or, at least, one has to articulate his own desire, even if it is expressively against the current political agenda. As I have shown above, the dynamics of self-growth, the construction of our individualities, the push towards a form of constant labor in the neoliberal model, are asking people precisely to make constantly choices, to articulate themselves, to foster and boost our own capabilities.

Moreover, in the precise moment when a clear demand is being formulated, the counterpart will be able to label it, by looking at one’s strategy, and probably easily

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<sup>173</sup> Danny Schechter, *Is it time to occupy the world?*, Al-Jazeera, (Nov. 16, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/2011111394616990196.html>

<sup>174</sup> William I. Robinson, *Global rebellion: The coming chaos?*, Al-Jazeera (Dec. 4, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/20111130121556567265.html>

<sup>175</sup> For additional facts, interviews and reports please See

<http://www.aljazeera.com/programmes/faultlines/2012/03/2012319152516497374.html> and <http://www.aljazeera.com/indepth/spotlight/aljazeeraatop102011/2011/12/20111226125438417351.html>

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Nikolas Kozloff, *Occupy's challenge: Overcoming the 'tyranny of choice'*, Al-Jazeera (Mar. 7, 2012), available at <http://www.aljazeera.com/indepth/opinion/2012/03/201235125326919665.html>



defeat it, agreeing to give a little improvement to the welfare system, for instance, to offer some jobs, to seduce through the classical weapons of constructing an individuality or rather pushing towards an increase of economical insecurity.

Conversely, when 'the system' faces the absence of a clear plan or political request, it feels disoriented, as it is not capable to incorporate the instance of its counterpart. In sum, and until this point, political powers have failed to decipher the OWS movement through the lens of biopower, for biopower – as we have previously shown – it is necessary that the subject of rights is able and willing to 'build' and 'construct' himself or, as Krauthammer puts, "to find a job," even presenting himself as a political counterpart, but ultimately, do something! In this sense, the fact that the OWS movement presented itself without any specific political requests, any plans of action or any clear agenda, has totally 'disrupted' the way of interpreting dissent and resistance.

Moreover, there is another, peculiar issue through which the OWS has already achieved something truly revolutionary: the movement claims in fact to know no leaders, no structures, no spokesman. The fact that everybody is, potentially, a leader, has completely disoriented, for example, the media and the authorities. The New York police department has encountered many difficulties in finding an interlocutor, as any attempt to political compromises and discussions have witnessed the 'refusal' to elect a spokesman for the protesters. The impossibility of a 'standard confrontation' has been one of the factors that has convinced Mayor Bloomberg of the necessity to evacuate Zuccotti Park on the night of November the 10<sup>th</sup>, a night that will also be remembered for the concerted action of police forces in various American cities, where the Occupy movement had meanwhile grown.<sup>179</sup>

The clear tendency to *inefficiency* is another of the most revolutionary and striking aspect of the OWS movement. The 'General assemblies' which were held at Zuccotti Park lacked in fact the 'efficient' mechanisms normally used in large discussion processes. Microphones and loudspeakers were banned, and instead the 'human microphone' was used, so that the words of any speaker had to be repeated by the listeners to gradually reach the furthest persons on the square.<sup>180</sup> This is a very time-consuming and costly practice, but also highly original, for the neoliberal moment

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<sup>179</sup> Please refer to note 175.

<sup>180</sup> Jodi Dean, *Consensus*, Criticallegalthinking, (Dec. 13, 2011), available at <http://www.criticallegalthinking.com/2011/12/13/consensus/>

being in the constant act of producing information, news, and events, literally bombarding people with over sophisticated and fast forms of advertisement, ready to be used and consumed at any moment.

The OWS movement in this sense chose a 'slow' conception of time, where everybody has to *wait, trust* and *rely* on its neighbours if he or she wants to hear the voice of the speaker in charge. By operating in this manner, it takes a lot of time to make decisions, people get to know each other, socialize, share ideas and put their own in question, experience what does it mean to reach consensus through solidarity and not through imposition of top down policies, thus re-invent the way decision-making is traditionally done. Competition is suddenly left out of the equation, thanks to this tendency to operate in a regime of inefficiency, as everyone is requested to listen to other peoples' ideas and opinions, while shared consensus make it possible to erode the pressure to constantly compete to prevail over the other, the *other* no more seen as a threat, but instead as a necessary part to reach the common good or even a simple decision.

In strong contrast with a system which would like to see everybody aligned and focused on their individualities or careers,<sup>181</sup> the OWS movement also promotes a *highly social environment*. Zuccotti park has witnessed the birth of kitchens and common tables, places where it is possible to cook and eat together, in communion, sitting next to each other. These sites are characterized by the intense sharing of food and other material resources, such as internet, or the creation of innovative ways to generate alternative forms of energy, such as lighting and gas.<sup>182</sup> Moreover, the practice of 'sharing' is evident in the creation of a library, where everyone can contribute with his or her books, making them available to the others, and take advantage of those texts brought there by other people. An information centre was also built, together with a stand for second-hand clothes, all places where anyone could stop to chat or bring clothes that he or she no longer uses. In sum, all these examples are given to show how the meeting of the human experience was there practiced in its entirety, by exchanging foods, resources, opinions, fears, emotions, problems and dreams. The sense of a *community* here is magically recreated, far from a model that has made of the body, thus of human life, the preferred *space* for control through the production-consumption

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<sup>181</sup> Shiva, *supra* note 117.

<sup>182</sup> Mark LeVine, *The People's Library and the future of OWS*, Al-Jazeera, (Nov. 17, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/2011111681642279467.html375>

of more and more individualizing rights. Here, human life in its entirety (and no longer legally-dissociated) regains its natural, social space.

*Diverse, de-centralized, and anti-elitist* in nature, the movement presents a clear transversal reaction to the neoliberal policies produced by the 1%, re-engages the right to protest and dissent, claims that ‘*we the people*’ are the ones who have the rights and the power of decision making, and not financial institutions, bankers or politicians.<sup>183</sup> The movement stands out from a purely technical legalistic approach, re-shaping and utilizing human rights with direct action, by asking basic recognition of the right of education and health care, but also pushing for accountability and transparency of financial and political institutions, thus using rights as a political weapon, as a tool of dissensus and resistance, and by doing so it overcomes the unprofanability of treaties and conventions that would otherwise remain on paper. In addition, by recognizing for example that ‘*now we are all illegal,*’ the movement goes at the core of the human rights doctrine, by affirming that simply being human unites us all over the world, not treaties, conventions, Commissions or Constitutions, thus realizing the human rights utopia in its very essence, separately from border politics, sovereignty, citizenship and law-making processes.

The *occupation* of a public space in this sense is essential, because it reaffirms first and foremost the *human* presence over financial regimes and regulations, re-conquering the space for human life against the space that capital is currently eroding worldwide.<sup>184</sup> The occupation brings with it a clear refusal to recognize the legitimacy of current political institutions, the legal order and its supporters, prefiguring a new imaginative way of doing politics, by starting again to tell different stories and narrations through open confrontation. What does it mean to make democracy now is one of the main question asked by this movement, as more and more citizens - especially in Europe and the U.S.- are finally aware that their much celebrated democratic systems are being co-opted by financial institutions and the capital market system.<sup>185</sup> Even if these kind of occupations may not be sustained forever, at present time they are working to show that democracy is always a mean, and not an end in itself, and that dissent and resistance are its main fuel.

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<sup>183</sup> Juan Cole, *How neoliberalism created an age of activism*, Al-Jazeera, (Nov. 15, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/20111114131340415929.html>

<sup>184</sup> Rebecca Solnit, *Ms Civil Society vs Mr Unaccountable*, Al-Jazeera, (Nov.26, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/20111125154610156977.html>

<sup>185</sup> Robinson, *supra* note 174.

If these examples seem ridiculous or vestiges of an old dream now wrecked, one wonders why such a movement has arisen in the midst of the largest financial centre of world. As we have previously seen, this movement serves also as a sort of sounding board for a number of other movements that characterize today's global outcry from Tahrir to Moscow, from Tunis to Santiago of Chile. I have already discussed the fact that the OWS movement stands in sharp contrast and dissent against the role that banks, financial institutions, and corporations are playing in dictating contemporary political life. In addition, its birth marks the reappropriation not only of a physical space – the park being a symbol of the citizens' territory - but also imaginary. Being conceived as a node, a rhizome,<sup>186</sup> or as a 'translocality,'<sup>187</sup> and not as static and fixed, the Occupy Movement is potentially able to regenerate from its own ashes, erupting at any moment if necessary, and easily avoiding the eye of 'big brother' the State. Its potential, in this sense, has been demonstrated by the sudden emergence of similar Occupy movements not only throughout the U.S. territory, but literally around the world.<sup>188</sup>

Finally, the movement comes at a crucial moment in history to clearly express the voice of dissent, protest and resistance, in an attempt to alter the terms through which the neoliberal-rights moment is conducting the socio-political conversation. A *new language* here is experienced, by seriously putting in danger the previous form of *communication*: by reaffirming the central role of civil disobedience, non-violence and protest, the OWS movement works to 'profane' all those rules, conditions and narratives explicitly created to fill the vacuum left by Ground Zero.

#### 4.3 CONCLUSION

If the neoliberal-rights moment is constructed upon some cardinal points, such as individual rationality, homo oeconomicus, scarcity of resources and an extreme individualization of life and competencies, the OWS movement has responded with a highly move towards a post-scarcity, low intensity and inefficient way of building political space for resistance. Rationality is put here at the service of the *other*, and hospitality, trust and the rely on the neighbour all become crucial aspects of a

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<sup>186</sup> See DELEUZE AND GUATTARI, *supra* note 37.

<sup>187</sup> Apparudai, *supra* note 165.

<sup>188</sup> Please refer to <http://stream.aljazeera.com/story/occupy-wall-street-movement-reaches-other-cities>, See also Immanuel Wallerstein, *The contradictions of the Arab Spring*, Al-Jazeera, (Nov. 14, 2011), available at <http://www.aljazeera.com/indepth/opinion/2011/11/2011111101711539134.html>

movement which is actually showing a more inclusive and diverse understanding of the homo oeconomicus principle. The replacement of competitiveness and accumulation with an economy of gift and sharing are experienced here in imaginative and practical terms.

In addition, in a time when the welfare system is been disrupted and dismember by a brutal privatization and by the undermining of the basic public principles of health care, education, pension fund etc. the OWS movement stood up to remember that *this* accumulation by dispossession fostered by the neo-imperial State at all levels (at the national as well as the international level), might be potentially overcome with more inclusive and equal forms of *redistribution*. In this sense, there is a strong call to move from those micro-policies of insecurity and macro-level of capital flows, to a new, more comprehensive way of fostering economic wealth and relocation of wealth and resources. A space for a new ethic is thus experienced.

On a more legal note, while the mechanisms of rights-consumption are attesting the complete impossibility of using such rights, thus to profane certain concepts and notions which stand at the core of our supposedly democratic societies, the OWS movement went at the core of the issues at stake, by re-inventing and re-shaping the way of rights-recognition and rights-creation. Not passing (at least not yet) through established channels, but directly asking for respect of basic rights, the movement went already beyond the contemporary trend of rights-consumption, reaffirming the importance of putting in question the apparatus of the neoliberal order, its moral *raison d'être* and the supposedly ethical façade of contemporary capitalism. Understood as a 'sounding board' of the struggle of a diverse range of movements all over the world, the OWS also connects itself potentially with the rest of the planet, to reveal the alienation produced by systemic regimes of exploitation, which definitely go beyond the U.S. borders.

While the future is uncertain for the movement, given also the violent response it has received from security forces in practically all the Occupy camps in the United States as well as in Europe, however, what needs not to be forgotten is that fact that, in a few months, the Occupy movement has reached unexpected results, both in political practice and in the imagination of people around the world. In a very short time this movement has expanded in all major cities of the West and beyond, probably becoming the new socio-political reality of this newly decade, with which the current institutional bodies will inevitably have to engage at same point.

Nonetheless, with the present paper I have argued that the Occupy Wall Street movement stood out as capable of putting in practice what Giorgio Agamben calls ‘profanation,’ namely ‘to put things to a new use,’ thus desecrate certain concepts and narratives which stand as ‘sacred’ and unchallengeable, and which constitute the vocabulary and the backbone of what I have referred to here as the ‘neoliberal-rights moment.’

Furthermore, I have shown what it is exactly that today can be put to a new use, given the tendency of current legal and social narratives to close spaces for dissent, resistance and rights-demand. I therefore called the Occupy movement as a ‘space of profanation,’ arguing that this kind of profanation – or the ‘opening-up’ to diverse spaces-possibilities for other stories of being told - represent one of the best possible act of resistance for the present time, as we live in a hyper-legalized age, where the narratives of neoliberal economics, security, crisis and human rights tend to monopolize the legal-political debate almost worldwide, and thus tend to close other potential spaces for resistance and rights-demand. If it is true, as Agamben puts, that ‘the profanation of the unprofanable is the political task of the coming generation,’ this paper wanted also to suggest that we may want to see the Occupy Wall Street movement as the beginning of a new political era, thus we may want to explore more and more in depth what does it mean to open-up as many spaces of profanation as possible.