Law as inoperativity? Two possible readings regarding the relation between law and community in contemporary thought: R. Esposito and J.L. Nancy

The Twentieth Century imposed a demand on contemporary thought: how to think community in a sense that it cannot be used to justify acts of destruction as part of the realization of political projects or aspirations, as it happened with the fascisms and communisms of the last century. In these events, maintaining the respective differences, community was conceived as an entity that should produce and achieve certain essence or conception of the human being. This kind of production presupposes that human beings have something in common -such as race, blood or soil- that should be both realized and protected in the core of the community and by the community. In relation to these aspirations events like the Holocaust and the Stalinists purges were justified.

As it is well known in many of these episodes law played a central role. Either as an instrument or as later justification ("I was just following the rule") the realization of these projects in the name of the community presupposed certain relation between law and community and raised important questions: does law protect what is shared-in-common in the community? Does law set community into work? Or, on the contrary, does law interrupt the protection and the achievement of the community?

In order to sketch an answer to these questions, in the next minutes I am going to offer two different answers regarding the relation between law and community. I will trace these answers in the reflections on the subject of two contemporary thinkers: Roberto Esposito and Jean-Luc Nancy. In order to do so this talk is separated in three sections: **On the first place**, I would like to elaborate on **(a)** how the production and the protection of what human beings have-in-common, in order to set community into work, implies the realization of certain practices of violence; and **(b)** analyze, to what extent, this comprehension of what is shared-in-common truly denies, under a radical different view, both *community* and what is *common* to one another. **On the second place**, I am going to explore the tight relationship (complicity) between law and practices of violence that are proper to the production of community, according to the perspective of Roberto Esposito. And, finally, **on the third place,** I want to suggest an alternative reading of the relation between Law and community in the light of Jean-Luc Nancy´s insights on the topic. According to his perspective, law, understood as juris-*diction,* denounces any attempt to set into work the community.

I

Despite the differences and mutual accusations between each other, it is true that communisms and fascisms conceive the community in a sense that can be understood as "onto-theological". Accordingly, both of them can be understood as "communitarians" in a broader sense. This means that the community is an ideal or a project that must be set into work: the community is not given, but it must be achieved. Community must find its place beyond the individualism and privatization that represent, from this "communitarian" perspective, the dissolution of the human bonds and the subjection and domination of different political, technical and economic instances. In this sense, community is the space that allows human beings to fully realize and produce themselves: in the community, as the community, and by the community. Human beings, as agents of production of community, have been characterized using concepts like class, race, or "total humanity". All these characterizations attempt to unify the dispersed forces and directions of the individual or the people as the result of the dissolution of the human bonds.

Or, in other words, community is the Subject that sets itself into work and produces itself, seeking to realize precisely that which is shared-in-common by its members. In order to do so, community has to define, represent and reproduce the essence that is proper to its members and that defines community itself. Consequently, community has to give itself a myth of *its proper origin* and destination. And, also, it has to go through both of these extremes. Trough the myth community communicates what is common to itself; trough the myth community is transparent for itself and achieves its intimacy. Thus community presupposes the complete presence of the human being for itself.

The aspiration of community to produce itself achieving certain essence- a particular conception of the human being, for example- therefore comes along with a logic of death and sacrifice. According to thinkers like Nancy and Esposito, this can be called the logic of the *immanence*, that is, the inherence of community to itself trough the essential union of human being with itself. The immanence of community is accomplished as its full and pure presence before itself, without ruptures, contaminations or outsides, without any other reference different from its self-reference. Hence, the immanence of community implies, according to R. Esposito, the liberation of the human being, considered as a complete and pure presence, from everything that is not entirely and absolutely human (Esposito, 1996: 91). This means that community must *immunize* itself from any contagion or infection that could disturb its pure and complete presence without any residue.

Community is exposed to a danger: what was before healthy, safe, identical to itself, is exposed to a contamination that risks harassing it. And the source of that risk is, precisely, what is not fully and absolutely human; that which is imperfect, incomplete, impure, without form and achievement. So, in order to work out its proper essence, from its origin to its destiny, from one extreme to the other, community has to immunize itself by *exterminating* even the possibility of the subsistence of what is imperfect and unachieved: "I exterminate you because you infect my body and the hole humanity, because you represent it empty, bleeding in its presence" (Forbidden Representation, p. 48-49). Regarding this subject, Nancy remarks the *resonance* of "extermination": "the word is doubtless: is to go to the extreme and not allowing anything to subsist" (Forbidden Representation, p.11).

This logic of death and extermination, that goes along with all communitarian projects, and that wants to produce the essence of human being, can be explained in the following terms: in order to find a place for community these projects forget what is really *common.* Community, conceived as the Subject that has to produce itself toward the realization of what is shared-in-common by its members, revolves around the axis of the *proper*: community has to realize its *proper* origin; has to go through the *proper* myth; has to reproduce the *proper* essence and has to protect the *proper* intimacy from foreigners. But, following Esposito's suggestion, we should ask if, attending to the ordinary significance of the term *common*, commonality is precisely that which is *not* proper? Does it begin just where the proper ends? Is not *community* that which is consubstantial to each one and to all, to each one as a whole, to each one in so far as if it is all of us?

According to these considerations, what is the relation between legality and immanence? between legality and community? And what role does law play in the achievement and production of community?

II

Following Roberto Esposito, one of the main characteristics of the modern State, at least in the classic jurisprudence, is sovereignty. The State exerts its power over a group of individuals that are located in a certain territory that is legally defined by a set of frontiers. Within these frontiers the modern State is the supreme authority and sovereign: modern State self-organizes trough the Law that it gives to itself and by itself. Understood in these terms, the State *represents* itself "as the only and absolute titular of the sovereign exercise"

(Esposito, 1996: 75). Thus, the State is the subject of sovereignty. Or, more precisely, the State is the sovereign subject.

The sovereign has to own and exercise the supreme authority: sovereignty does not allow anything above itself. Is the extreme instance that establishes itself in a unconditional, insuperable and unsubordinated way, engaging in conflict with any other authority that threatens it, having to exterminate it. As the supreme instance, the sovereign must be autonomous, so it gives itself its own law, its own origin and purpose: it has to be the source of the principles that shape the form of its community and has to pass through them and realize them from beginning to end. Thus, the sovereign must be complete, must present itself as free from any lack or deficiency that disturbs it.

According to this, Modern State, as a sovereign State, conceives itself as a project to be realized, being itself the agent of its own realization by following the path of its own laws. As it conceives itself as its own origin and fundament, Modern state falls easily in the logic of immanence and immunization of the community. Because the State extracts and obtains everything from itself, without any reference that is not comprehended under the boundaries of its own origin, State aspires to be immanent, as a presence without deficiency and outsides. Consequently, the State would conceive everything that is exterior to it as a threat that must be confronted and subjugated. According to Esposito, the fact that an out-side of the State exists, that the jurisdiction cannot comprehend everything and that something escapes what it can reach, is what threats the sovereign State and what has to be confronted and subjugated.

But there is another way to conceive the relation between Law and community that does not reproduce the logic of immanence and immunization: one that, instead, denounces it. In order to explore this alternative it is necessary to elaborate more on a concept that defines the Roman law, that is, the juris-*diction.*

III

Law has to be understood as juris-*diction.* In order to understand this affirmation is necessary to remind us that Law gives form- figure- and shapes the facts upon which deploys itself. Law must *form*ulate them, *figur*ate them. This means that it has to translate these facts into a juridical grammar in order to exercise power over them. Facts must be *said* by the Law, they must become *cases* because otherwise, as pure facts, they would be out of its scope. Having in mind the fact that Law has to enunciate itself in a juridical grammar upon which it is going to

be exercised, what is characteristic of Law is *saying* the law. Thus Law is juris-*diction:* "the jurisdiction is the *fact* of saying the law". Moreover, its existence depends upon shaping, sculpting (*fictum*), "fictioning" the facts. In these terms Law is a discourse of the fiction: juris-*diction* is really a juris-*fiction.*

This means that every fact that is shaped by Law exceeds it. As Law *figurates* a fiction, what is figured necessarily falls out that figure, so Law does not appropriate the sense of what is figured. On the contrary, Law introduces a difference or a distance between what is figured and the figure: "Law is the act of making distance". Considering that formalization is in itself a distancing act, a juridical form can never overcome or appropriate the fact that it figures. In that sense, Law does not sculpt presences that are achieved and closed over themselves but, on the contrary, by way of formalization, it introduces a distance that dislocates the immanence of any substantial entity that is given and closed.

The Law figurates the facts and figurates itself saying the Law. More importantly this means that it also gives shape to the *fact* of saying the Law. In other words, the constituted Law says that the constituting fact that establishes the Law has the right to say the Law. In these terms, the Law says that the fact that inaugurates the Law is a fiction. And by doing so the Law deploys itself, not founds itself, as jurisdiction. This means that Law cannot exist, it cannot be deployed as jurisdiction, if it does not utters itself as a fiction. Accordingly, Law has the obligation to say that that which inaugurates it and that "founds" it is a fiction, because, on the contrary, it would not be deployed as jurisdiction and would not exist. Or, in other words, the Law "founds" itself saying its lack of fundament, unsettling the fundament, uttering its fiction.

Understood as juris-*diction*, Law inserts itself in the core of the Modern state and accompanies it since its own foundation, since the enunciation of its jurisdiction. In the precise moment when the Modern state "founds" itself and enounces its jurisdiction in order to achieve any particular "communitarian" project, Law denounces its fiction. Accordingly, in the precise moment when the modern State looks forward to set community into work, is when it begins its own *inoperativity*, its own unsettling.

> "We must not be surprised if the Modern state provokes, sometimes in an open way, always in a latent way, the protest for the *right to say* –the last exigency of the Law is *to say the right of what is by right without law*. Therefore, is in that time and place of the birth of the State where it is opened the space for the resistance of a dislocation".