

A Just People, or Just the People? Althusser, Foucault and Juridical Ideology

Alberto Toscano

Abstract: The return of the figure of the people to the forefront of radical theorising in France can be contextualised and complicated by contrasting it with the relative hostility or indifference to it in the ambit of *la pensée soixante-huit*. For a spell, the people was largely displaced by collective formations that sought to escape the nation-state cage of political modernity, not just antagonistic conceptions of class, but all kinds of groups, movements, multiplicities, minorities, etc. This essay probes two theoretical episodes that can contribute to a critical archaeology of the people, namely Louis Althusser's reading of Rousseau in the mid-1960s and Michel Foucault's problematisation of popular justice in the early 1970s. In both we see how a critique of the modern (and Republican) figure of the people is accompanied by a militant anatomy of juridical ideology, and an effort to think forms of group formation and conflict irreducible to the dominant paradigms of political modernity.

Keywords: Louis Althusser; Michel Foucault; Juridical Ideology; People; Popular Justice.

In the secular work of the constitution and thus unification of the dominant bourgeois ideology, it is juridical ideology that was determinant, and philosophy which was dominant.
- Louis Althusser, *Être marxiste en philosophie*

[E] each time that the bourgeoisie has wished to subject a popular uprising to the constraint of a state apparatus a court has been set up.
- Michel Foucault, *On Popular Justice*

This is not a just image, it is just an image.
- Jean-Luc Godard, *Vent d'Est*

So much of the contemporary discussion on the political valences of the people, including but not solely in terms of the vexed question of popu-

* Goldsmiths University of London (a.toscano@gold.ac.uk)

lism, has centred on the rhetorical and performative potentials harboured by this founding category of political modernity¹. Naming, more precisely *the name of the people*, returns ceaselessly as a guiding concern when it is a question of thinking through the kinds of hegemony, antagonism or subjectivation that this figure of collectivity affords. This widespread theoretical preoccupation is also accompanied by the recognition, in varying registers, of the manner in which the political lemma *people* is plagued by an ambivalence as foundational as it is ungrounding – between the legitimised, sovereign, normative *populus* or *peuple-nation*, on the one hand, and that accursed share or base stratum, the *plebs*, the *populace*, the insurgent mob². It is of course precisely this ambivalence, the transmutation of base into high, remnant into ruler, nothing into all, that radical recoveries of the people have so often leveraged.

Yet efforts to capture or de-sediment the insurrectionary virtualities of the people often neglect a forthright reflection on the historical conditions of possibility of this *return of the people* to the foreground of the radical imagination. The so-called *pensée soixante-huit*, but also the various seams of insurrectionary and liberatory theorising that traversed *les années rouges*, had a fraught relation to invocations of the people. Claims laid to the continuity of a revolutionary republican tradition, as well as to the heroism of Resistance, meant that far from being subsumed by class – as some contemporary accounts seem to intimate – reference to the people was paramount in the political rhetoric of post-war French Communism (as it was, albeit for distinct reasons, in the Italian case). There is thus a considerable irony, even a kind of *contresens*, in a recovery of the people nominally grounded in the impasses of Communist class politics and its attendant Marxist theoretical arsenal, as these often operated by giving primacy, in both rhetorical-electoral and practical-organising registers, to the people *over* the class. The considerable affinity between post-Marxist theorising of the *populist hypothesis* and the politics of post-war Western European Communism – which never entirely practiced the workerism or economism targeted by post-Marxism – bears testimony to this. Rather than a horizon of proletarian self-abolition, or what these days may be discussed as *communisation*, the dominant ideological practice of Western European communism was also that of the convergence of the people-nation with the populace, *populus* with *plebs*, generally in the form of the subsumption

¹ See Badiou *et al.* (2013).

² See Bras (2018), as well as the entries *People* (by Sandra Laugier) and *People/Race/Nation* (by Marc Crépon, Barbara Cassin, Claudia Moatti), in Cassin (2014, 750-763).

or integration of the latter under the former, under the aegis of the *party of all the people*.

The left dissent from the Communist articulation of class, people and nation under the symbolic aegis of a resistant Republic can be seen to have taken, through the 1960, 70s and beyond, three distinct, if sometimes intersecting, trajectories. The first, perhaps best crystallised in the kind of libertarian-populist Maoism of the Gauche prolétarienne (GP), involved the raising of a plebeian mass over a nationalised, gentrified *people*. Inasmuch as it wished to retain a mobilising reference to the Resistance (in the guise of calls for a *nouvelle résistance*) and a horizon of the Party (or even, in deference to the Chinese Maoist model, the People's Army), this strand could end up re-territorialising the plebeian moment – we will see below that Foucault intimated as much in his discussions of *popular justice*. Some of the current return of the people to the forefront of radical theorising, namely in the writings of Jacques Rancière, can be traced back to its moment, now shorn of any symbolic or rhetorical nostalgia for revolutionary or resistant state-forms, be they Chinese or French. A second strand of criticisms of Communist national-populism, echoing earlier efforts of left-communists and syndicalists in the face of the *statisation* of Marxism, emphasised the irreducibility of class antagonism to popular sovereignty. Mario Tronti formulated this position with trenchant lucidity in *Il piano del capitale* (1963):

Workerism [*operaismo*] can also be a real danger when waged industrial workers [*operai salariati*] are a stark minority among the labouring classes. But what of a process that tends to reduce every labourer to a worker? True, in the name of not disavowing the old strategy, new *allies* are invented for the working class: the place left empty by the once-boundless masses of poor peasants is now filled by the refined elites of the new middle classes. Thus, the workers simultaneously free themselves both from any *sectarian* temptation and from any socialist *perspective*. The capitalists are well aware of this: the real generalisation of the condition of the working class can reassert the appearance of its formal withering away. This is the basis on which the *specificity* of workers power is immediately absorbed into the *generic* concept of popular sovereignty: the political mediation here serves to allow the explosive content of the workers' productive force to function *peacefully* within the fine forms of the modern capitalist relation of production. So, at this level, when the *working class* politically refuses to become *the people*, it does not block but rather opens up the most direct path to socialist revolution³.

A third strand of opposition to the rhetoric and strategy of the national-popular came from an exaltation of groups, movements, masses,

³ Tronti (2019, 57) translation modified; Tronti (2006, 76-7).

multiplicities acting beyond the nexus of party, class and people, in what would retrospectively be captured in the impoverished languages of *identity politics*, *social movements*, and so on. *Plebeian*, *workerist* or *movementist* challenges to national-popular Communism – to summarise the three practical critiques all too hastily sketched out here – all struck against the *continuity*, dear to much mainstream 20th century communism, between the modern state and its foundations in bourgeois revolutions, on the one hand, and contemporary emancipatory insurgencies, on the other. The absence or critique of a popular referent in the Left political theory and practice of the *long 68* can be at least in part chalked up to this desire for rupture. For this reason, I also think that the philosophical critique of the party-form elaborated over this period, inasmuch as its concrete target was the national-popular horizon of European communism, is also, if implicitly, a critique of the category of the people understood as a category immanent to the state. The break with the national-popular continuum that a dominant strain of Communist thought drew between the bourgeois revolutions and a future communist transition took the form of an emphasis on the political centrality of collectives or groups that could not be subsumed under the aegis of party, people or state.

One interesting symptom within the philosophical field of this effort to theorise communist collectivity beyond the national-popular can be found in the peculiar convergence – given their philosophical differend – that can be registered in the critiques of the party-form elaborated by Jean-Paul Sartre (in 1969) and (in 1978) in response to an interpellation by Rossana Rossanda and *il manifesto*. Sartre – whose own theory of the overcoming of seriality into the *group in fusion* and ossification of the latter into institutional forms of party and state crucially transited through a critique of the history of the French Revolution and of its images of the people – stressed the contradictory externality of mass (or group) and party, with the latter developing “as an ensemble of institutions, and therefore as a closed, static system, which has a tendency to sclerosis. This is why the party is always behind in relation to the fused mass, even when it tries to guide that mass: this is so because it tries to weaken it, to subordinate it, and may even reject it and deny any solidarity with it”⁴. And *the people*, we could add, while it can serve to inflame and *fuse* the mass, as a kind of affective condenser, can also be a powerful operator of that delayed weakening or subordination. Where Sartre, at Rossanda’s prompting, moves towards a thinking of a dynamic externality of party and mass in the guise of *dual power*, Althusser’s

⁴ Sartre (2008, 120-1).

reflections on *finite Marxism*, add to the externality of mass and party a claim about the necessary *externality* of the party to the state, while also stressing the way in which the state has expanded itself in a capillary, even molecular way, into dimensions neglected by a restricted conception of the political, which can only recognise the latter in the domains of state, party and representation. Expanding Althusser's argument into the problematic terrain of the people, it is evident that the latter, especially as it is handled in the discourse of the Communist parties, would fall foursquare into the domain of the *juridical ideology of politics* that subtends the *ideological state apparatus*, namely in the manner in which the latter is capable of *integrating-transforming* elements that have not arisen from within the ambit of the state itself. As Althusser details, "for bourgeois hegemony, it is *juridical ideology* which carries out this function of aggregation and synthesis, This is a process that must not be understood as completed but as contradictory, since the dominant ideology does not exist without the dominated ideology, which is in its turn marked by this domination"⁵. To which we can add that, within this juridical ideology, *the people*, is, in its structuring ambivalence, a key operator of the integration-transformation of the dominated ideology by the dominant one.

In what follows, I want to explore two philosophical episodes from this left critique of the national-popular imaginary of revolutionary politics. My aim is to try and displace somewhat the contemporary preoccupation with the radical potentialities of the *name* of the people, to think instead the twisted, halting dialectic of people and group, the better to explore what is at stake in the return of the people to the field of radical political theory after its seeming abandonment in the long '68 (with the qualified exception of what I've called above the *plebeian* strand). In particular, I want to consider the relation between the people, the group, and the law through a contrastive reading of two indicative moments in the philosophical inquiry into the people that took place in France around May '68. My first exhibit, critical for its exploration of the occlusion of the group by the people, is Louis Althusser's symptomal reading of Rousseau in the mid-1960s. My second is Michel Foucault's encounter with the *gauchiste* practice of *popular justice* in the early 1970s. As I hope to show, though the

⁵ Althusser (1978, 12); Althusser (1998, 288) *Le marxisme comme théorie "finie"*. The version of this text recently translated into English Althusser (2017), was based on the version of Althusser's text published in French in the journal *Dialectiques*, which does not include the passage quoted here. On the Althusserian thesis whereby the dominant ideology is "a specific universalization of the imaginary of the dominated", see Balibar (1993, 13). On juridical ideology in Althusser, see also Toscano (2015).

two texts problematise in distinct and divergent ways the nexus of people, group and law, jointly considered they can open up lines of interrogation that remain pertinent to current debates, which often evade the question of the relation of the people to other collective formations and occlude its entanglement with the juridical.

1. The Contract Against the Group

The thwarted dialectic of people and group is among the themes that emerge from Althusser's dense and sinuous symptomatic analysis of the *Social Contract*, drawn from his École Normale lectures of the mid-sixties on Rousseau and his precursors, and published as an essay in the *Cahiers pour l'analyse*. For Althusser, the theoretical object *social contract*, functions through a series of *décalages* which are in turn masked, meaning disavowed and repressed. What we're interested here is not so much the forensic dialectic of Althusser's reading, but his anatomising of Rousseau's own presentation of that act whereby a people is a people, that *first convention* of popular *unanimity* which provides the true foundation of society⁶. Among the foremost conditions for posing the problem of the social contract in terms of this founding act, in Althusser's reading, is the emergence of the category of *interest*, a category that can only arise in a generalised state of war which is in its turn the precondition for the socialisation of human beings after the *end of the forest* – that space without places which in Althusser's bravura reading proves central to Rousseau's political anthropology⁷. The rise of the *interested* individual, of the one who harbours *goods* as one of his *forces* shows that for Rousseau, when it comes to the *dialectic of forced socialisation*, *opposition comes first*. As Althusser comments:

the objective content of particular interest links it directly with the nature of the state of war. The category of particular interest immediately betrays its universal basis. One particular interest can only exist as a function of the other particular interests in rivalry, in universal competition [...] particular interest is constituted by

⁶ “Sur le «Contrat social»” (1967), Althusser (1998, 63); Althusser (1972, 117). For a reading, at once incisive and comprehensive, that periodises and contextualises Althusser's Rousseau-readings, see Sotiris (2020), Ch. 6: “From the Critique of Natural Law to the Void of the Forest and the Inexistence of the Origin: Althusser on Rousseau”.

⁷ On the forest as *the truth of the state of nature*, *a space without places* and *without topos*, and ultimately *the society of non-society*, see the fascinating discussion in Althusser (2015a, 115-16), as well as Althusser (2006, 116, 311). See also Sotiris (2020, 99-101, 105-6, 113-122).

the universal opposition which is the essence of the state of war. There are not first individuals each with his own particular interest: opposition intervening subsequently as an accident. The opposition is primary: it is the opposition that constitutes the individual as a particular individual⁸.

And the fruit of this opposition is *alienation*.

When the *end of the forest* came and the whole earth came under cultivation and was seized by its first occupiers or the strong men who supplanted them, then there was no longer any refuge for human liberty. Men were forced into the state of war, i.e. into alienation. That is how they were trapped in the very relations that their activity had produced: they became the *men of those relations, alienated like them*, dominated by their particular interests, powerless against those relations and their effects, exposed at every moment to the fatal contradiction of the state of war⁹.

This then generates the position of a problem, whose solution – the *contractual* act whereby a people becomes a people¹⁰ – constitutes the first *décalage* in Rousseau's social contract. Yet how can a juridical device founded on individualised exchange, on the form of the legal person, render possible the emergence, indeed the self-founding of a sovereign collective? For Althusser, Rousseau engages in a *sui generis détournement* of the way in which the philosophers of natural law had earlier adopted *the juridical structure of the contract (an exchange between two parties)*. For the people to be inscribed in the contract, that contract must be exceptional, its structure *paradoxical*.

The paradox stems from the fact, stressed by Rousseau himself, that all the contract's clauses are reduced to the *total alienation* of each associate member and his rights to the entire community. As Althusser underscores, Rousseau identifies a bifurcation in the very meaning of alienation, between *giving* and *selling* oneself, between, on the one hand, a gratuitous act devoid of exchange and, on the other, a non-gratuitous if in its own regard paradoxical exchange, whose upshot is that *one cannot sell one's freedom* (a contract of enslavement in exchange for subsistence cannot serve as the

⁸ Althusser (1998, 66); Althusser (1972, 120-1).

⁹ Althusser (1998, 67); Althusser (1972, 122).

¹⁰ In his 1965-6 ENS course, from which the 1967 essay is drawn, Althusser refers to the social contract as “the contract that is constitutive of the being people of the people”. He continues, in a manner that complements the “fear of the group” which we will explore below: “It can be explicit or tacit, but it is always unanimous: opponents exclude themselves from the city; and if they remain, they admit to having contradicted their own vote. [The contract] constitutes the internal essence of all the acts of the city. ... It constitutes a political body among the contracting parties. It has an objective as well as a moral reality”. Althusser (2006, 349-50).

model for a contract of political submission). And yet the birth of a free people seems to depend precisely on total alienation, that sole clause of the social contract. Having framed the state of war – in language that is not Rousseau’s own – as a state of universal alienation, Althusser formulates the paradox as follows:

the total alienation of the Social Contract is the solution to the problem posed by the state of universal alienation that defines the state of war, culminating in the crisis resolved by the Social Contract. *Total alienation is the solution to the state of total alienation*¹¹.

Beneath the paradox is a shift from the unconscious and involuntary alienation that governs the *slavery* of the state of war, in which one gives one’s freedom for nothing, on the one hand, and a conscious and voluntary (contractual) alienation, on the other. If the solution to alienation must be immanent to it, it involves a different *use*, a different *experience* of alienation; it must involve a change in its *modality*. Alienation has, it could be argued, the structure of a *pharmakon*: “This is what Rousseau very consciously states elsewhere when he says that the remedy of the evil must be sought in its very excess. In a word, a forced total alienation must be turned into a free total alienation”¹².

But can a *free alienation* be? For this solution not to stand as a *mere* paradox, according to Althusser a *décalage* must obtain. To elucidate this, he asks us to look at the form of this most peculiar contract. We have two *recipient parties* (RP)¹³, RP1 (the individual) and RP2 (the community). If RP1 gives everything (including his *freedom*), what is exchanged by RP2? To answer this, we must ask: what is the community? Well, it is the association of individuals and their *forces* (including their goods, their interests). *But this association is meant to be the product of the contract itself*. The temporality of all other contracts, according to Althusser’s Rousseau, is that its parties are pre-existing, pre-formed, individuated, while here the existence of one of the parties is conditional on the completion of the contract.

In a word, here is the difficulty: in every contract the two Recipient Parties exist prior to and externally to the act of the contract. In Rousseau’s Social Contract, only the RP1 conforms to these conditions. The RP2 on the contrary, escapes them. It does not exist before the contract for a very good reason: it is itself the product of the contract. Hence the paradox of the Social Contract is to bring together two RPs, one

¹¹ Althusser (1998, 71); Althusser (1972, 127).

¹² Althusser (1998, 71); Althusser (1972, 128).

¹³ *Partie pré-nante* can also be translated as *stakeholders*.

of which exists both prior to and externally to the contract, while the other does not, since it is the product of the contract itself, or better: its object, its end. It is in this difference in theoretical status between the two Recipient Parties to the contract that we inscribe: *Discrepancy [Décalage]* ¹⁴.

It is not that Rousseau ignores this paradox, rather that he masks and disavows it in the very recognition of its paradoxical character. Thus, when he says in *Émile*, that the people only enters into contracts with itself (as though RP2 where tautologically contracting with RP2), or, in *The Social Contract*, that *each individual is, so to speak, contracting with himself* (as though RP1 where tautologically contracting with RP1), he betrays (that is to say both avows and masks) the fact that the difference and *décalage* between RP1 and RP2, between the isolated individual *in the form of isolation* and the individual *in the form of community*, is operated through the category of *individuality* – which engineers the suture or compression of the *time-lag* between the isolated individual and the community in the *atemporal* act of the contract¹⁵. The *décalage*, the gap or lag, transpires in the very lexical moves through which Rousseau masks or annuls it, namely by referring to RP1 with the name of RP2 (the people contracts with itself) or RP2 with the name of RP1 (the individual enters into a contract with himself). As Althusser sums up: “Rousseau’s contract does not correspond to its concept. In fact, his Social Contract is not a contract but an act of constitution of the Second RP for a possible contract, which is thus no longer the primordial contract”¹⁶. From a different angle, we can also say that this is a contract without parties in which an exchange nevertheless appears.

But the key moment for our purposes in Althusser’s decryption of the *Social Contract* is to be found in his exploration of another *décalage*, the one operative between *particular* and *general* interests and wills. Althusser notes Rousseau’s *dream*, in the dedication to the second *Discourse*, his wish that People and Sovereign be *the same person*, and comments that:

This dream is realized by the Social Contract, which gives Sovereignty to the assembled people. The act of legislation is indeed never anything but the Social Contract combined, repeated, and reactivated at each ‘moment’. The primordial ‘moment’ which ‘has made a people a people’ is not a historical ‘moment’, it is the always

¹⁴ Althusser (1998, 72); Althusser (1972, 129).

¹⁵ The aporetic time of the people will require Rousseau’s *forward flight into ideology*. See Althusser (1998, 90); Althusser (1972, 155). It is also, more specifically, what requires the twin intervention of religion and the (external) legislator to ensure the institution of a people. Althusser (2006, 353).

¹⁶ Althusser (1998, 74); Althusser (1972, 131).

contemporary primordial ‘moment’ which relives in each of the acts of the Sovereign, in each of his legislative decisions, the expression of the general will. But the general will only exists because its object *exists*: the general interest¹⁷.

At the heart of Althusser’s investigation of the passage between particular and general interest, or better of the fact that the particular interest is both the foundation and the contrary of the general interest is the way in which, as in the *décalage* (or short-circuit) between RP1 and RP2, this depends on *the interdiction on any group formation*. The individual can only rise to the collective as long as he is not ensnared in the group, as long as the immanent identification of citizen and people is not inhibited or deflected by other collective formations or investments. Althusser dwells on the passage from the *Social Contract* (Book II, Section III) where Rousseau observes that if *citizens had no communication with one another*, then *small differences* would always result in the general will, and deliberation would not stray from its right path. Here lies the crux of Althusser’s critical exploration of the figure of the people in the *décalages* of the *Social Contract*. For Rousseau’s *people* to constitute itself through that founding act that is the social contract, and to reproduce itself in its deliberations as the general will, “there must be no ‘factions’ or ‘partial associations’ in the State, above all no dominant partial association, for then what is “declared” will no longer be the general will but a partial will, if not quite simply a particular will: that of the dominant group.”¹⁸. What’s more:

An *absolute condition* for Rousseau: that the general will really is interrogated in its seat, in each isolated individual, and not in some or other group of men united by interests which they have in common, but which are still *particular* with respect to the general interest. If the general will is to declare itself, *it is thus essential to silence (suppress) all groups, orders, classes, parties, etc.* Once groups form in the State, the general will begins to grow silent and eventually becomes completely mute¹⁹.

Althusser’s forensic investigation pushes further and finds in the homonym *particular interest* another symptomatic *décalage*, which shows Rousseau both recognising and masking, which is to say disavowing, the distinction between *groups* and *individuals*. As Althusser details:

We have a total contradiction: particular interest is the essence of the general interest, but it is also the obstacle to it; now, the whole secret of this contradiction lies

¹⁷ Althusser (1998, 84); Althusser (1972, 147-8).

¹⁸ Althusser (1998, 86); Althusser (1972, 150).

¹⁹ Althusser (1972, 150).

in a 'play' on words in which Rousseau calls the particular interest of each individual in isolation and the particular interest of social groups by the same name. This second interest, which is a group, class or party interest, not the interest of each individual, is only called particular with respect to the general interest. It is a 'play' on words to call it particular in the way the interest of the isolated individual is called particular. This 'play' on words is once again the index of a Discrepancy [*Décalage*]: a difference in theoretical status of the isolated individual and social groups – this difference being the object of a denegation inscribed in the ordinary use of the concept of *particular interest*. This denegation is inscribed in so many words in his declaration of impotence: human groups must not exist in the State. A declaration of impotence, for if they *must not* exist, that is because they *do* exist²⁰.

The group is thus the *point of the real*, the disavowed obstacle, of Rousseau's construction of the people. The echoing or specular *myths* of the individual and general interest, have their condition of (im)possibility in the disavowal of the existence of groups (orders, estates, classes, etc.)²¹. And they reveal the functioning of a (bourgeois) ideology that can present class interests to particulars (the dominated) as general interest²². This disavowal or denegation is for Althusser no longer simply theoretical, it is practical: "to denegate the existence of human groups (orders, classes) is to suppress their existence practically"²³.

²⁰ Althusser (1998, 87); Althusser (1972, 151-2). This *fear of the group* was also operative in the ideological battles within the French Revolution, for instance in Sieyès's identification of a formidable risk in the possibility that political agents would call upon (fractions of) the people and undermine the unity of the Nation. See Bras (2018, 71).

²¹ Conversely, in the register, at once concrete and contingent, of history, not every group of men "is destined at every moment to the vocation and destiny of becoming people, to receive laws". Althusser (2006, 352). Althusser notes how, for Rousseau, Russia is a case of premature institution of a people, while both Corsica and Poland are ripe for receiving laws, and thus *becoming peoples*.

²² In his 1965-6 ENS, Althusser presents Rousseau's account of the origins of the contract in the second *Discourse* in terms whose classed nature is rather *unmasked*: "The rich elaborated a well-pondered [*très réfléchi*] project: to demand from those who are subjected [*soumis*] and who threaten them that they transform their servitude into juridical alienation in order to preserve their liberties. The contract is thus born from an objective misunderstanding regarding the proposition of the rich, and thus from a differential reason". Althusser (2006, 325).

²³ Althusser (1998, 89); Althusser (1972, 154). For an interpretation of the figure of the people Rousseau that tries to counter Althusser's ideological reading for the sake of an emphasis the term's emancipatory rhetorical appropriations, see Bras (2018, 34ff). Transposing Althusser's critique of Rousseau to the present, we could hazard the following thesis: *populism is an individualism*.

2. The People Against the Law

Towards the end of the *red years* of French philosophy, Michel Foucault – responding to the 1978-9 Iranian revolution as a break with a European (and Marxist or *dialectical*) model of revolutionary action – would identify the vanishing of groups in the apotheosis of the general will as a kind of political epiphany that he experienced at first hand on the streets of Tehran.

Among the things that characterize this revolutionary event, there is the fact that it has brought out – and few peoples in history have had this – an absolutely collective will. The collective will is a political myth with which jurists and philosophers try to analyze or to justify institutions, etc. It's a theoretical tool: nobody has ever seen the *collective will* and, personally, I thought that the collective will was like God, like the soul, something one would never encounter. I don't know whether you agree with me, but we met, in Tehran and throughout Iran, the collective will of a people. Well, you have to salute it, it doesn't happen every day²⁴.

Pressed by his interviewer to reflect on the resonances between the mass unanimity witnessed in Iran and the vicissitudes of the Chinese Cultural Revolution, Foucault further specified the importance, for him, of the *undivided* character of the Iranian people in revolt, vis-à-vis the Maoist masses:

the Cultural Revolution was certainly presented as a struggle between certain elements of the population and certain others, certain elements in the party and certain others, or between the population and the party, etc. Now what struck me in Iran is that there is no struggle between different elements. What gives it such beauty, and at the same time such gravity, is that there is only one confrontation: between the entire people and the state threatening it with its weapons and police. One didn't have to go to extremes, one found them there at once, on the one side, the entire will of the people, on the other the machine guns²⁵.

I introduce this quote by way of articulation and contrast with the text I wish to focus on, namely Foucault's 1972 discussion with the Maoists of the Gauche prolétarienne on *popular justice*. Though their registers and occasions vary, Foucault's political interventions of the 1970s allow us to discern the figure of the people as an operator of division and indivision, but also to see how Foucault, albeit in a very different vein than Althusser, could also thematise the ambivalent nexus of the people and the law,

²⁴ Foucault (1988, 215).

²⁵ Foucault (1988, 216).

as well as the need to undermine our juridical illusions by attending to the antagonistic politics of groups and classes. The *popular* moment in Foucault also reveals the presence of what we could term an *anti-strategic* moment amid inquiries into the meshworks of power and the tactics of resistance – what Foucault would identify in the figure of the *plebs* as a kind of *limit* of the field of power²⁶.

The occasion for Foucault's debate with *les Maos*, first published in a special 1972 issue of *Les Temps modernes* on *New fascism, new democracy*, was a sequence of largely abortive or thwarted efforts to institute *people's courts* against the impunity of bosses, cops and landowners – beginning with a widely publicised tribunal in Lens, in which Jean-Paul Sartre participated, that inquired into the deaths of sixteen miners in a methane explosion²⁷. In 1971, the GP had been involved in a project to establish a people's court against the police, which is explicitly indicated as the context for the discussion in a brief note at the beginning of the text²⁸.

As has been noted²⁹, this discussion is largely a dialogue of the deaf – the *Maos* (especially the GP leader Pierre Victor, aka Benny Lévy) maintaining as their unshakable model the articulation of mass insurgency and

²⁶ “The plebs is no doubt not a real sociological entity. But there is indeed always something in the social body, in classes, groups and individuals themselves which in some sense escapes relations of power, something which is by no means a more or less docile or reactive primal matter, but rather a centrifugal movement, an inverse energy, a discharge. There is certainly no such thing as *the* plebs; rather there is, as it were, a certain plebeian quality or aspect (*de la plèbe*). There is plebs in bodies, in souls, in individuals, in the proletariat, in the bourgeoisie, but everywhere in a diversity of forms and extensions, of energies and irreducibilities. This measure of plebs is not so much what stands outside relations of power as their limit, their underside, their counter-stroke, that which responds to every advance of power by a movement of disengagement. Hence it forms the motivation for every new development of networks of power”. *Powers and Strategies* (1977). Foucault (1980, 137-8) the text is an interview with the editorial collective of *Les révoltes logiques*, including Jacques Rancière. The interviewers are in many ways pushing Foucault to distinguish himself from the use of the *plebs* by the *nouveaux philosophes*. See also Dews (1979).

²⁷ For a rich account of this sequence see Macey, (2019), Ch. 12: *The Militant Philosopher*. As Macey notes, the Lens tribunal gave inspiration to Foucault's partner Daniel Defert to establish the Groupe d'informations sur les prisons (GIP). He also sees Foucault's discussion with the *les Maos* as haunted by the shadow of a clandestine tribunal the GP instituted against one of their very few black members, Moussa Fofana.

²⁸ *On Popular Justice: A Discussion with Maoists*, in Foucault (1980, 1). It is not insignificant that in the issue of *Les Temps modernes* in which it was first published, this text was preceded by a 70-page essay of André Glucksmann on old and new fascisms, in which the police and the Interior Ministry were presented as the avant-garde of a counter-revolutionary process of *fasciation*. Glucksmann (1972).

²⁹ Macey (2019).

the People's Army in the Cultural Revolution, Foucault evading the strictures of *Mao Tsetung thought* to trace a genealogy of popular justice back to the French Revolution and further into the Middle Ages. And yet the misunderstanding is productive, as it obliges Foucault to speculate on the practical, political possibilities of those *popular illegalisms* that so much of his work of the 1970s would explore³⁰ – from the inquiries of the Groupe d'information sur les prisons³¹ to his Collège de France course on *The Punitive Society*, from his engagement with E.P. Thompson³² to his portraits of *infamous men*. What's more, bending, or rather *breaking* the stick³³, that his GP interlocutors are pushing towards a (revolutionary) statist direction, Foucault takes the occasion to advance some of his most radical propositions about the need to have done with the entire juridical sphere, and he does so with reference to a certain figure of the *people*.

From the word go, Foucault questions the idea that one should presuppose the form of the court in thinking through the problem of popular justice. His point is indissolubly methodological and political: to frame popular justice through the court-form is to prejudice one's understanding of the phenomenon, and to channel mass acts of resistance into an institutional apparatus which, as he will sketch out, does not have a popular origin. On the contrary, his hypothesis is "not so much that the court is the natural expression of popular justice, but rather that its historical function is to ensnare it, to control it and to strangle it, by re-inscribing it within institutions which are typical of a state apparatus"³⁴. In an implicit disavowal of any linear vindication of popular sovereignty, running from Jacobinism through the Resistance all the way to French Maoism, Foucault chooses to emphasise the passage from popular violence to the Terror in the French Revolution as the site of a capture and neutralisation of popular justice by a classed juridical apparatus. With his characteristic penchant for provocation, Foucault presents a *plaidoyer* for the September Massacres of 1792

³⁰ For an excellent treatment of Foucault's thinking about illegalism in the 1970s, Feldman (2019).

³¹ Toscano (2013).

³² Bernard Harcourt, *Course Context*, in Foucault (2015).

³³ I am referring to this moment in the exchange with Victor/Lévy: "FOUCAULT: I had got the impression that you thought that only the existence of a state apparatus could change a desire for retribution into an act of popular justice. / VICTOR: At the second stage. At the first stage of the ideological revolution I'm in favour of looting, I'm in favour of 'excesses'. The stick must be bent in the other direction, and the world cannot be turned upside down without breaking eggs... / FOUCAULT: Above all it is essential that the stick be broken..." *On Popular Justice*, Foucault (1980, 32).

³⁴ Foucault (1980, 1).

as “at least an approximation to an act of popular justice; a response to oppression, strategically effective and politically necessary”³⁵. Manifesting an anti-Jacobinism that will also determine Foucault’s sympathy for the *nouveau philosophes* and his praise of François Furet, the Terror emerges by way of contrast with these preventive acts of plebeian vengeance as a usurpation of popular energies and a crystallisation of state power.

But, in a genealogical gesture familiar from Foucault’s other historical anatomies of power, this is precisely a relational emergence and not merely a vertical imposition of domination. In this case, it is men from the Paris Commune which, in response to the *wild* executions, set up courts with judges behind a *table* – that symbol and spatial technology of the *Third Party* – establishing truths, eliciting confessions, and deliberating upon what is *just*. On this stage, we see at work the three ingredients of a state judicial apparatus which *ex-appropriate*, to use a Derridean formulation, the very process of popular justice: “(i) a *third element*; (ii) reference to an idea, a form, a universal rule of justice; (iii) decisions with power of enforcement. It is these three characteristics of the courts which are represented in anecdotal fashion by the table, in our society”³⁶. Overlooking this small revolutionary stage of the law, Foucault poses a question that his Maoist interlocutors will not really answer:

Can we not see the embryonic, albeit fragile form of a state apparatus reappearing here? The possibility of class oppression? Is not the setting up of a neutral institution standing between the people and its enemies, capable of establishing the dividing line between the true and the false, the guilty and the innocent, the just and the unjust, is this not a way of resisting popular justice? A way of disarming it in the struggle it is conducting in reality in favour of an arbitration in the realm of the ideal? This is why I am wondering whether the court is not a form of popular justice but rather its first deformation³⁷.

While not primarily concerned here with a juridical illusion, rather with a juridical *dispositif*, Foucault’s debate with his friends in the *Gauche prolétarienne* has an important affinity with Althusser’s philosophical inquiry into the constitution of the people. In both cases – one organised by the form of the *contract*, the other by the form of the *court* – we see the nexus of the people and the law operate to control the risk posed by

³⁵ Foucault (1980, 1-2). The September Massacres will reappear in Foucault’s work in the context of his analysis of the genesis of the *political monster* in conjunction with the establishment of the penal system in the late eighteenth century. Foucault (2003, 99-100).

³⁶ Foucault (1980, 11).

³⁷ Foucault (1980, 2).

the actions of groups or collectives that evade or refuse entirely a juridical framing. In particular, the nexus serves both to disavow and to intervene upon class antagonisms.

Again, Foucault details this process by reference to the conflictual dynamics of the French revolution, and namely to the classed character of the emergence of the court as an instance of impartiality. As he observes, employing a language – that of ideology – which resonates with Althusser's, and which he would soon jettison:

the people's court, as it functioned during the Revolution, did tend to act as a *neutral institution* and, moreover, it had a very precise social basis: it represented a social group which stood between the bourgeoisie in power and the common people of Paris (*la plèbe*); this was a petty bourgeoisie composed of small property owners, tradesmen, artisans. This group took up a position as intermediary, and organised a court which functioned as a mediator; in doing this it drew on an ideology which was up to a certain point the ideology of the dominant class, which determined what it was *right* or *not right* to do or to be³⁸.

From this revolutionary scene, Foucault will step back to present a compressed history of the state judicial apparatus, delineating the passage in the Middle Ages from archaic systems of arbitration to modern institutions of judgment generated, first, by the *fiscalisation of the judicial system*, binding the legal power of judges to property (and varieties of tax-farming), and, second, by the *increasing link between the judicial system and armed force*. In response to the commoners' uprisings of the fourteenth century, the fiscalisation and militarisation of legal processes would undergo powerful pressures towards centralisation, generating an "embryonic state judicial apparatus"³⁹. What this judicial history also allows us to perceive, as the history of the dispossession of and war against the poor *through the law*, is that popular justice is embedded in a centuries-old *anti-judicial* tradition, that perceives *in the judicial system a state apparatus, representative of public authority, and instrument of class power*, and often has recourse to rituals of retribution drawing from archaic habits of *private war* – among which Foucault pointedly mentions the thread linking the *old Germanic custom to put the head of an enemy on a stake, for public viewing* to the parading of heads on pikes around the Bastille⁴⁰.

³⁸ Foucault (1980, 3). Also, p. 22: "Penal law was not created by the common people, nor by the peasantry, nor by the proletariat, but entirely by the bourgeoisie as an important tactical weapon in this system of divisions which they wished to introduce".

³⁹ Foucault (1980, 5-6).

⁴⁰ Foucault (1980, 6).

Now, where, according to Althusser, the philosophical form of the contract served to displace and deny the reality of groups in Rousseau, the legal form (and spatial technology) of the court, in Foucault's account, serves to divide the people in the very process of presenting itself as neutral (as a *third* party acting on behalf of the People and the Law). With an eye on the politics of incarceration in the present, and his own activist experiences with the GIP, Foucault declares that: "The penal system has had the function of introducing a certain number of contradictions among the masses, and one major contradiction, namely the following: to create mutual antagonism between the proletarianised common people and the non-proletarianised common people"⁴¹. Advancing an historical hypothesis that will be fleshed out at great length in *The Punitive Society* and *Discipline and Punish* – namely in his arguments on the relation between the accumulation of capital and the "accumulation of men", on the articulation of infra-power and surplus-value⁴² – Foucault presents the penal system both as an operator of proletarianization, *fixing* the dispossessed to their workplaces, and as an apparatus to manage the remnants and the deserters of this *making of the working class*, "the most mobile, the most excitable, the 'violent' elements among the common people"⁴³. But the penal system also strives ideologically to regiment the proletarianized into a moral worldview that separates them from the rabble, the *Lumpen*, the mob, subjectivating them as different from the non-proletarianised. "For the bourgeoisie it is a matter of imposing on the proletariat, by means of penal legislation, of prisons, but also of newspapers, of "literature", certain allegedly universal moral categories which function as an ideological barrier between them and the non-proletarianised people."⁴⁴. Whether in regimenting the proletariat or in hounding the non- or de-proletarianised, the state judicial system that Foucault concisely presents in its long historical arc is above all an *anti-seditious system* that functions by fostering class antagonisms among the common people⁴⁵. Foucault, going against the grain of the romantic

⁴¹ Foucault (1980, 14).

⁴² See Toscano (2014).

⁴³ *On Popular Justice*, Foucault (1980, 15).

⁴⁴ Foucault (1980, 15). It is difficult not to hear a denunciation here of the way in which post-war European Communist parties, drawing on nineteenth-century repudiations of the *Lumpenproletariat*, repeatedly operated distinctions between the working class as the proper People and what Foucault terms *the dregs of the population*.

⁴⁵ Though Foucault, notwithstanding his involvement at the time with immigrant workers struggles in France (see Macey 2019), does not thematise this at any length, the relevance of these speculations to a study of the relation between class, race and criminalisation is evident enough. Interestingly, Foucault does touch on the nexus of race and class in settler-colonialism but only to conclude, all too hastily, that as the army

populism and workerism that haunts the rhetoric of the GP, is stark about what he calls the *ideological effects* of this system, not just in terms of its *moral* capture of the proletariat, but in what concerns its shaping impact on the *non-proletarianised plebs*, which “has been racist when it has been colonialist; it has been nationalist, chauvinist, when it has been armed; and it has been fascist when it has become the police force”⁴⁶.

Testifying to the Nietzschean inspiration that will accompany so many of his writings, it is the connubium of morality and law that stands as the ultimate adversary for Foucault, and accounts for his formulation of the struggle between the people and the courts as an ideological one. Summarising the crux of his intervention into the debate over the possibility of people’s courts, Foucault declares:

the bourgeois judicial state apparatus, of which the visible, symbolic form is the court, has the basic function of introducing and augmenting contradictions among the masses, principally between the proletariat and the nonproletarianised people, and that it follows from this that the forms of this judicial system, and the ideology which is associated with them, must become the target of our present struggle. And moral ideology – for what are our moral values but those which are over and over again associated with and re-confirmed by the decisions of the courts – this moral ideology, just like the forms of justice operated by the bourgeois apparatus, must be submitted to the scrutiny of the most rigorous criticism⁴⁷.

In later years, Foucault would not just jettison the Marxist category of ideology entirely, but would also develop an arguably far less *Manichaean* conception of the politics of law. But in the militant crucible of the early 1970s, and especially of Foucault’s prison activism, which also brought him into international contact with the revolts of Black prisoners in Attica and with the emblematic figure of George Jackson⁴⁸, a political figure of the people emerges in the midst of the conflict against the penal system and juridical ideology. As Foucault remarked to Deleuze:

and colonisation are now obsolescent as mechanisms for dividing the non-proletarianised people and the proletariat, only the prisons remain. In a passage that curiously echoes debates on the ‘wages of whiteness’, from W.E.B. Du Bois to David Roediger, Foucault observes about the ‘earlier’ phase in the management of the non/proletarian difference: “And it was certainly in order to avoid the forming of an alliance between these ‘lesser whites’ and the colonised peoples – an alliance which would have been just as dangerous out there as proletarian unity would have been in Europe—that a rigid racist ideology was foisted on them: ‘Watch out, you’ll be living among cannibals.’” Foucault (1980, 17). See also Feldman (2019, 10-12).

⁴⁶ Foucault (1980, 23).

⁴⁷ Foucault (1980, 35-36).

⁴⁸ Toscano (2013).

I think that it is not simply the idea of better and more equitable forms of justice that underlies the people's hatred of the judicial system, of judges, courts, and prisons, but – aside from this and before anything else – the singular perception that power is always exercised at the expense of the people. The antijudicial struggle is a struggle against power and I don't think that it is a struggle against injustice, against the injustice of the judicial system, or a struggle for improving the efficiency of its institutions⁴⁹.

Now, while Foucault casts doubt on the idea of a counter-justice⁵⁰, he does discern the possibility of a lived form of thought that would work to sap the very foundations of juridical ideology. In a 1973 preface to the writings of former convict and prison activist Serge Livrozet, Foucault provides an eloquent sketch of *illegalism* as an intellectual attitude, which I think serves as a fitting conclusion to our exploration of the philosophical nexus between the people and the law in the environs of May '68:

For a long time, there has been a thinking of lawbreaking [*infraction*] inherent to lawbreaking itself; a certain reflection on the law linked to an active refusal of the law [*loi*]; a certain analysis of power and law [*droit*] practiced among those who were waging an everyday struggle against power and the law. Strangely, this thinking seems to have been a greater menace than illegality itself, since it has been more severely censored than the facts that accompanied it, or of which it was the occasion. ... It now explodes with this book. It explodes because, in the prisons, among both those who leave and those who enter them, in revolts and struggles, it has gained the force to express itself. [This] book is the forceful and individual expression of a certain popular experience and a certain popular thinking of the law and of illegality. A philosophy of the people⁵¹.

Bibliography

- Althusser L. (1972), *Politics and History: Montesquieu, Rousseau, Hegel and Marx*, trans. B. Brewster, London: New Left Books.
- Althusser L. et al. (1978) *Discutere lo stato. Posizioni a confronto su una tesi di Louis Althusser*, Bari: De Donato.
- Althusser L. (1998), *Solitude de Machiavel*, ed. Y. Sintomer, Paris: P.U.F.
- Althusser L. (2006), *Politique et Histoire, de Machiavel à Marx. Cours à l'École normale supérieure 1955-1972*, ed. F. Matheron, Paris: Éditions du Seuil.

⁴⁹ Foucault and Deleuze (1977, 211).

⁵⁰ *On Popular Justice*, Foucault (1980, 34).

⁵¹ Foucault (2001, 266-7). See also Toscano (2013).

- Althusser L. (2015a), *Cours sur Rousseau (1972)*, ed. Y. Vargas, Montreuil: Les Temps des Cerises.
- Althusser L. (2015b), *Être marxiste en philosophie*, ed. G. M. Goshgarian. Paris: Presses Universitaires de France.
- Althusser L. (2017 [1978]), "Marxism as a Finite Theory", trans. Asad Haider, *Viewpoint Magazine*, 14 December, available at: <https://www.viewpointmag.com/2017/12/14/marxism-finite-theory-1978/>
- Badiou A. et al. (2013), *Qu'est-ce qu'un peuple?* Paris: La Fabrique.
- Balibar E. (1993) "The Non-Contemporaneity of Althusser", in *The Althusserian Legacy*, E. Ann Kaplan and Michael Sprinker (eds), New York: Verso.
- Bras G. (2018), *Les voies du peuple. Éléments d'une histoire conceptuelle*, Paris: Amsterdam.
- Cassin B. (ed.) (2014), *Dictionary of Untranslatables: A Philosophical Lexicon*, Princeton: Princeton University Press.
- Dews P. (1979), "The Nouvelle Philosophie and Foucault", *Economy and Society*, 8:2, 127-171.
- Feldman A.J. (2019), "Foucault's concept of illegalism", *European Journal of Philosophy*, 1-18.
- Foucault M., Deleuze, G. (1977 [1972]), "Intellectuals and Power: A Conversation between Michel Foucault and Gilles Deleuze", in M. Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, ed. Donald F. Bouchard. Ithaca: Cornell University Press.
- Foucault M. (1980), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. Colin Gordon, New York: Pantheon Books.
- Foucault M. (1988 [1979]), "Iran: The Spirit of a World Without Spirit", in *Politics, Philosophy, Culture: Interviews 1977-1984*, ed. Lawrence D. Kritzman, trans. Alan Sheridan et al., Londo: Routledge.
- Foucault M. (2001) "Préface" (1973), in *Dits et écrits I, 1954-1975*, Paris: Gallimard.
- Foucault M. (2003), *Abnormal: Lectures at the Collège de France 1974-1975*, ed. Valerio Marchetti and Antonella Salomoni, trans. Graham Burchell, London: Verso.
- Foucault M. (2015), *The Punitive Society: Lectures at the Collège de France 1972-1973*, eds. B. Harcourt and A. Fontana, trans. G. Burchell. New York: Palgrave Macmillan.
- Glucksmann A. (1972), "Fascismes: L'ancien et le nouveau", *Les Temps modernes*, 310: 266-334.
- Macey D. (2019), *The Lives of Michel Foucault*, London: Verso.

- Sartre J.-P. (2008 [1969]), “France: Masses, Spontaneity, Party”, in *Between Existentialism and Marxism*, trans. J. Matthews, London: Verso.
- Sotiris P. (2020), *A Philosophy for Communism: Rethinking Althusser*, Leiden: Brill.
- Toscano A. (2013), “The Intolerable-Inquiry: The Documents of the Groupe d’information sur les prisons”, *Viewpoint Magazine*, 25 September, <https://www.viewpointmag.com/2013/09/25/the-intolerable-inquiry-the-documents-of-the-groupe-dinformation-sur-les-prisons/>
- Toscano A. (2014), “What is Capitalist Power? Reflections on *Truth and Juridical Forms*”, in Martina Tazzioli, Sophie Fuggle et Yari Lanci (eds), *Foucault and the History of Our Present*, Basingstoke: Palgrave Macmillan.
- Toscano A. (2015), “The Detour of Abstraction”, *Diacritics*, special issue on Louis Althusser, 43.2: 68-90.
- Tronti M. (2006), *Operai e capitale*, Roma: DeriveApprodi.
- Tronti M. (2019), *Workers and Capital*, trans. David Broder, London: Verso.

