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On Modes of Production of Law and Social Power*

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Introduction

For many years law was identified with the law of the state, the law produced by the legislature or the higher courts and distributed by the lower courts, the police, the prison system and a myriad of state regulatory agencies to be consumed by all ordinary citizens. Legal philosophy first, and Anglo-American social anthropology and sociology later, led to the conclusion that there were in society many more legal orders than those recognised as such by the state. During my field work in the squatter settlements of Rio de Janeiro (Brazil) in 1970, I came to the conclusion that the *favela* in which I lived had its own internal legal system, distinct from the Brazilian official legal system (Santos, 1977). It was a situation of legal pluralism, a concept coined by legal philosophers and historians of the end of the nineteenth century and beginning of the twentieth century and, later, elaborated upon by legal anthropology and sociology (Abel, 1979; Bohannan, 1967; Bobbio, 1942; Carbonnier, 1979; Del Vecchio, 1957; Ehrlich, 1936; Fitzpatrick, 1983; Galanter, 1981; Hooker, 1975; Macaulay, 1983; Moore, 1978; Nader, 1969). In this my work as in the work of other researchers along the same lines, I soon identified two major problems: firstly, the conception of a plurality of legal systems within the same political space could lead to a relative neglect of the state law as a central form of law in our societies [1]; secondly, once the concept of law was disengaged from the concept of the state, the identification of a plurality of laws would know no limit with the result that, if law is everywhere, it is nowhere [2].

As far as social power or power in society is concerned, the dominant view for many years was that the social power that really mattered was identical with political power and that political power was identical with state power.

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Conservative political philosophy, the sociology of organisations and, more recently, Foucault (1976; 1977; 1980) have shown that there are in society other important sources of social power besides the state. But again two problems are posed: firstly, if there is a multitude of forms of power operating in society, how to establish the specificity and the centrality of state power? Secondly, are all forms of power equivalent? And, if power is everywhere, it is anywhere? [3]

In this paper I will try to answer some of these questions. My main thesis is that

capitalist societies are *political* formations or configurations which are constituted by four basic modes of production of political power articulated in specific ways. These modes of production generate four basic forms of power which, though interrelated, are structurally autonomous. Concomitantly, capitalist societies are *legal* formations or configurations which are constituted by four basic modes of production of law articulated in specific ways. These modes of production generate four basic forms of law which, though interrelated, are structurally autonomous.

As we approach the end of the twentieth century, our conceptions about the nature of capitalism, the state or the law are increasingly confusing and self-contradictory. In my view, this is due to three main factors. Firstly, we continue to analyse the complex processes of social transformation of our time in terms of the concepts originated or consolidated in the nineteenth century—such as the conceptual distinctions state/civil society, politics/economy, public/private—whose adequacy is reaching a breaking point. Secondly, the nation-state has predominated as both the unit of analysis and the research logic, which has prevented us from grasping both the autonomy of structures and processes in smaller social units (the infra-state logic) and the autonomy of global movements at the level of the world system (the supra-state logic). Thirdly, because it is based on the social experiences of core societies (that is, the advanced capitalist countries) our social theory is bound to produce spurious generalisations. As a consequence, our conceptual frameworks tend to be less than adequate for comparative analysis. The more general the social theory, the more likely it will be based on the social experiences of the advanced capitalist countries and biased in their favour (the bias of centrecentrism).

In recent times two conflicting arguments have been presented about the nature of capitalist development. One basically argues “that capitalism has never historically operated in the mode its ideology dictates because it cannot and that, as a consequence, the final triumph of capitalist values will be the sign of the final crisis of capitalism as a system” (Wallerstein 1980, p.374). The other argument, presented by Hirschman (1977) is that capitalism cannot be criticised for being repressive, alienating, or one-dimensional in contrast with its basic values, because capitalism has indeed accomplished what it was expected to accomplish, namely “to repress certain human drives and

proclivities and to fashion a less multifaceted, less unpredictable and more ‘one-dimensional’ human personality” (1977, p.132). In other words, “capitalism was supposed to accomplish exactly what was soon to be denounced as its worst feature” (1977, p.132). Thus, the survival of capitalism is premised upon the denial of its ideology, in one case, and upon the tireless fulfillment of it, in the other.

Similar conflicting arguments can be found in the recent work on the nature of the capitalist state. While some authors have shown the tendency for the state to intervene and to penetrate more and more in the civil society and to do so in an increasingly authoritarian way—what has been described as the “regulatory state”, “authoritarian statism”, “surveilled democracy”, “liberal corporatism”, “friendly fascism”, or “fascism with human face”—other authors (and even the same authors) have converged in the idea, seemingly inconsistent with the previous one, that the state is increasingly inept to perform the variety of tasks—facilitative and repressive, legitimisation oriented and accumulation oriented—expected from it by an economic and social structure dominated by monopoly capital. According to this idea, the state lacks either the financial resources (the argument of the fiscal crisis), or the institutional capacity (the argument of the inadequacy of state bureaucracy to adapt to a fast-changing economic environment) or still it lacks the mechanisms that in civil society steer the action and account for efficiency (the argument of the lack of market signals). The state emerges in these analyses as both an all-engulfing leviathan and as a failing structure (to the point that a theory of the failure of the state is already being called for: Jänicke, 1980).

Finally, in the field of law, there have also been put forward in recent times conflicting arguments as to the nature of the role of law and particularly of the rule of law in our fast-changing societies. While some authors have described (and also prescribed: Hunt, 1981) the increasing centrality of law in our societies as a civilizational asset, the unqualified human good attributed to the rule of law by E. P. Thompson (1975), other authors have, on the contrary, described (and sometimes prescribed: Bankowski & Mungham, 1976) the fast decline of law in late capitalist societies either because it has been encircled and even emptied by other forms of social control (Foucault’s argument of the rise of disciplinary power-knowledge) or because its formal rationality is unfit for a social engineering based on particularistic, flexible regulation (Poulantzas’ (1978b) and Offe’s argument (1984, p. 252)) or still because it has been over-used and over-extended to the point of risking degeneration (Habermas’ (1982) and most recent Teubner’s argument (1983)).

One striking thing about these arguments is that all of them seem to have a grain of truth; all sound true in that they uncover a specific aspect of social transformation in our time. But they also sound unconvincing or even utterly wrong in their claim of generality. It is not my intention to offer here a thorough critique of all these positions. I will concentrate on the arguments

dealing specifically with state power and law and even here I will remain, so to say, at an archeological level as I will simply try to show that the difficulties with these arguments lie deeply in the conceptual framework within which they operate.

I will start by criticising some of the concepts which in my view have become epistemological obstacles to the advancement of social knowledge. They are, above all, the conceptual distinction between state and civil society and also some of its corollaries, such as the separation of the economic realm from the political realm; the reduction of political power to state power; the identification of law with state law; and finally, the separation of law from politics. I designate all these conceptions as a 'conceptual orthodoxy' to signal that their predominance in social thought is compatible with their theoretical bankruptcy. [4]. I will then present the outline of an alternative conceptual framework, which, I hope, will open up a new scientific agenda. I also suggest that my alternative will enable us to direct our research strategies towards solving some old questions which are being asked again today with increasing political drama, for example, by decreasing order of generality: the question of the pathology of modernity as recently reformulated by Habermas (1982); the question of the decline of law and particularly, of the rule of law; and finally the question of deregulation or delegalisation, the so-called regulatory crisis.

State and civil society

It has been said that the dualism state/civil society is the greatest of all dualisms in modern western thought (Gamble, 1982, p.45). In this conception the state is a contrived reality, an artificial, modern creation, when compared with civil society. In our century no one has expressed this idea better than Hayek: "Societies form, but states are made" (1979, p.140). The modernity of the nineteenth century constitutional state was featured in its formal organisation, its internal unity, its absolute sovereignty in a system of states and above all in its unified and centralised legal system, conceived as the universal language through which the state communicated with civil society. In contrast with the state, civil society was viewed as the realm of economic life, of spontaneous social relations guided by private, particularistic interests.

However, the dualism state/civil society was never unequivocal and, indeed, it was from the start pregnant with contradictions and bound to be in permanent crisis. To begin with, the principle of the separation state/civil society encompassed both the idea of a minimum state and of a maximum state, as state action was simultaneously conceived as a potential enemy of individual freedom and as the condition of its exercise. The state as a contrived reality was the necessary condition of the spontaneous reality of civil society. Eighteenth century thought is saturated with this contradiction since its proclamation to free economic activity from the corporatist regulations of

the ancient régime by no means involves the conclusion that modern economy will dispense with enlightened state action [5].

This is particularly evident in the work of Adam Smith (1937) for whom the idea that commerce generates freedom and civilisation goes hand in hand with the defence of political institutions that secure a free and civilized commerce. The state is assigned a very active and indeed a crucial role in creating the institutional and legal conditions for the expansion of the market [6]. As Billet has justly said from the first to the last chapter of *An Inquiry Into the Nature and Causes of the Wealth of Nations* "one is struck by the idea, crucial to Adam Smith's thought, that the character of a nation's political institutions and practices decisively affects its capacity for sustained economic development" (1975, p.430). Comparing Portugal and Spain with Britain, Adam Smith considers the despotic nature of the former states, their "violent and arbitrary government" as responsible for their stagnant economies and relative poverty:

Industry is there neither free nor secure and the civil and ecclesiastical governments of both Spain and Portugal are such as would be alone sufficient to perpetuate their present state of poverty (Smith, 1937; p.509).

Still more striking is that for Smith despotism may be either the result of an arbitrary government, ruling by force and unrestrained by institutional or legal constraints, or the result of a weak government, an unstable authority incapable of maintaining law and order and of performing the regulative functions required by the economy (Billet, 1975, p.439; Viner, 1927, p.218).

The idea of the separation of the economic from the political, based on the state/civil society distinction and expressed in the *laissez faire* principle, seems to be fraught with two insoluble contradictions. The first contradiction is that, given the particularistic nature of interests in civil society, the principle of *laissez faire* cannot be equally valid for all possible interests. Its internal coherence is premised upon an accepted hierarchy of interests, candidly implied in John Stuart Mill's dictum that "every departure from *laissez faire*, unless required by some great good, is a certain evil" (1921, p.950). The discussion of the principle always takes place in the shadow of the discussion of the interests to which the principle is to be applied. Thus, the same legal measure may be object of opposing but equally consistent interpretations. To give an illustration, the joint stock legislation of 1825-65 was viewed by some as a good example of *laissez faire* in that it removed restrictions on the mobility of capital, and by others as a clear violation of *laissez faire* in that it accorded privileges to corporate enterprises which were denied to the individual entrepreneurs (Taylor, 1972, p.12). This explains why Victorian England has been portrayed by some as the age of *laissez faire* and by others as the embryo of the welfare state [7].

The second contradiction concerns the mechanisms by which the principle of *laissez faire* is socially activated. Nineteenth-century England witnessed not

only the growth of legislation on social and economic policy but also the rise of an amalgam of new state institutions such as the Factory Inspectorate, the Poor Law Board, the General Board of Health, etc. Interestingly enough, some of the laws and institutions were intended to carry out *laissez faire* policies. As Dicey noticed "sincere believers in *laissez faire* found that for the attainment of their ends the improvement and the strengthening of governmental machinery was an absolute necessity" (1905, p.306). This means that to a great extent *laissez faire* policies were carried out through active state intervention. In other words, the state had to intervene in order not to intervene.

In view of all this the question emerges: if the state/civil society distinction was so pregnant with contradictions why was it so widely accepted, so self-evident and even commonsensical?

Before trying to answer this question I would like to illustrate briefly the weight of this conceptual orthodoxy within Marxism itself as this will be linked to the further development of my argument. Leaving aside the English and French liberal political theory of the eighteenth century and focusing solely on the nearest background of Marx's thought, the German context, it should be emphasised that, according to Hegel (1981), civil society is a transitional stage in the development of the idea, the final stage being the state. The family is the thesis, civil society is the antithesis and the state is the synthesis. Civil society is the "system of needs", the destruction of the unity of the family and the atomization of its members; in sum, the realm of particularistic interests and of egotism, a stage to be superseded by the state as the ultimate unifier of interests, the universal idea, the most final completion of moral consciousness (1981, p.140). There are thus two threads in Hegel's thought about the state and civil society. One, very much subsidiary of the English and French liberal thought, is the conceptual distinction between state and civil society in terms of contradictory entities. The other, distinctively Hegelian, is the idea that the concept of civil society is not on an equal foot (on the same speculative level) with the concept of the state. It corresponds to a lesser developed stage of consciousness actually to be subsumed by the state and as such the dichotomy state/civil society as two autonomous self-identical concepts, is thus theoretically untenable. Though this latter thread, in spite of its mystifactory content, is in my view still today most crucial to understanding of the historical social processes of capitalist societies, it was abandoned in the philosophical and historical controversies that followed Hegel's work. The reification of the dichotomy state/civil society was soon accomplished, mainly through the writings of Lorenz von Stein II (e.g. 1888).

In spite of the brilliant rescue attempt undertaken by Max Adler (1922), I think that Marx accepted the reified version of the state/civil society distinction. He inverted it but didn't supersede it. He discovered that the allegedly 'natural' laws of classical economy hid social relations of exploitation which the state, only apparently neutral, had the function to guarantee.

Rather than the universal social interest, the state represented the interest of capital in reproducing itself. However, interested as he was in meeting the classical economy on its own ground, Marx ended up trapped in the separation between economy and politics, and tended to reduce politics and law to state action. He could not see the real (and not merely metaphorical) sense in which the 'economic relations' were not only social relations but also distinctively political and legal in their structural constitution. The metaphor of the economic base grounding the political and legal superstructure is thus not a complete distortion of Marx's thought as can be demonstrated by its remarkable resilience in light of the subsequent attempts to reconstruct the question it meant to address. I will mention very briefly one of such attempts, by far the most influential within the western Marxism of the last 20 years. I am referring to the French structuralist Marxism of Althusser and his group—with its theory of relatively autonomous instances (the economic, the political, the ideological), the concept of over-determination and the principle of economic determination in the last instance. The bias of economism is still present in this school and it is rather visible in the work of Poulantzas (1978a), without any doubt the most brilliant analyst of law and politics in this school. In his analysis of the relation of property as one of the elements of the economic instance he emphasises that "it should be noted that it belongs strictly to the region of the economic and that it should be clearly distinguished from the juridical forms with which it is invested i.e. from juridical property" (1978a, p.26). And he criticises Maurice Godelier for ignoring that "the relations of production and the productive forces belong to the same combination/structure of the economic whereas private (juridical) ownership of the means of production belongs to the superstructure" (1978a, p.67) [8].

How to explain the self-evidence of the conception of the economic as a separate and autonomous realm and of the correspondent conception of the political and legal as an exclusive attribute of the state? How to explain the persistence of the state/civil society dichotomy in spite of its internal contradictions and permanent crises?

As with any other social doctrine this conceptual orthodoxy has a shred of truth. In feudalism, necessary labour (that is, the labour required for the subsistence of the serfs) and surplus labour (that is, the labour performed by the serfs to guarantee the subsistence and accumulation of the feudal lords) were separate both in time and in space. Because the feudal lords did not own the means of production they had to rely on the political and legal institutions of the state to extract from the serfs the surplus labour. In a way, since the feudal lords had no private ownership of the means of production, their social power was most directly linked to their private ownership of the state. In capitalism, on the contrary, necessary and surplus labour take place within the same labour process given the control over the latter by capitalists as an attribute of their ownership of the means of production. Once the state guarantees the enforcement of the law of property, class relations occur and reproduce by

themselves in the private realm of the factory. It seems, therefore, that the externality of the state *vis à vis* the relations of production is the correlate of the conceptualisation of production relations as an economic, private affair between private individuals within the civil society.

On further reflection, this derivation is not logically necessary. Without questioning the externality of the political and legal institutions of the state *vis à vis* the production relations, it should be equally logical to conceive these relations inside the factory as a set of political and legal social processes taking place outside the state, under the direct control of capital. And indeed it would not be difficult to detect, inside the factory, legislative bodies, power blocks, coalitions, legal regulations, dispute settlement mechanisms, positive and negative sanctions, police surveillance, etc. Why was this alternative conceptualisation of factory reality not adopted? Why was this extreme variety of social processes lumped together in the amorphous concept of "economic relations?"

In my view the separation of the economic from the political made possible both the naturalisation of capitalist economic exploitation and the neutralisation of the revolutionary potential of liberal politics—two processes that converged to consolidate the capitalist model of social relations.

If by an exercise of imagination we compare social relations across time, it is in the field of political relations, the relations in the public place, that capitalist societies represent most unequivocally a civilisational progress. For the first time in history, the state has become truly public, that is, not the private possession of any specific group [9]. The universalisation of citizenship through equal civil and political rights, made the state, in all its theoretical attributes, the ultimate consubstantiation of the democratic ideal of equal participation in social affairs.

If, on the contrary, we take production relations in capitalist societies, the picture is almost the negative of the previous one. We may still grant to capitalism a tremendous progress in terms of technology of production but concerning the social relations in production we are led to conclude with Meiksins Wood that "in no other system of production is work so thoroughly disciplined and organised, and no other organisation of production is so directly responsive to the demands of appropriation" (1981, p.91). This unprecedented control over production is what Marx called the despotism of the workshop (1970) and Braverman the degradation of the labour process (1974).

It is my view that the dichotomy economy/politics made these two pictures incomparable or incommensurable. It kept them separate in such a way that the political form of social relations could not become the model for the economic form of social relations. Confined to the public place, the democratic ideal was neutralised or strongly limited in its emancipatory potential. On the other hand, the conversion of the public place into the exclusive site of law and politics performed a crucial legitimisation function in that it convincingly

obscured the fact that the law and the politics of the capitalist state could only operate as part of a broader political and legal configuration in which other contrasting forms of law and politics were included.

In the periphery of the world economy, that is, in the colonies first and in the less developed, peripheral countries later, the shred of truth of the dichotomy state/civil society was even thinner. There civil society was from the start a product of the state in the most direct sense. More so than in the metropolitan countries, the creation of the labour force was an administrative issue for the colonial state or for the quasi-state colonial companies. Moreover, the persistence of pre-capitalist modes of production, submitted to capital through market mechanisms but autonomous in terms of the organisation of production, called for the direct political control of surplus appropriation and thus for a certain privatisation of state power and state functions as illustrated in *coronelismo* (in Brazil) and *caudilhismo* (in Spanish speaking Latin America).

Thus, both in the core and in the periphery of the world economy, the conceptual orthodoxy I have been criticizing has become today an epistemological obstacle calling for a theoretical alternative.

A structural map of capitalist societies

When we compare capitalist societies with feudal societies, one of the most striking features of capitalist societies is the extent to which power relations are institutionalised and juridified and particularly the extreme diversity of institutional and legal forms in which social life is moulded. The political nature of power is not the exclusive attribute of any given form of power, it is rather the global effect of the combination of the different forms of power and of the modes of production thereof. Similarly, the legal regulation of social relations is not the exclusive attribute of any form of normative order, it is rather the end result of the combination of the different forms of law and the modes of production thereof.

I distinguish in society four structures upon which four primary clusters of social relations are grounded. These structures I call *the householdplace*, the *workplace*, the *citizenplace*, and the *worldplace*. For clarification purposes I will resort to systems language and say that these places are the organising matrix of four systems, the domestic system, the production system, the sovereignty system, and the world system.

The social relations clustered around the householdplace are constitutive of the mutual obligations imposed on family members and consist mainly of the relations between husband and wife and between either and the children and more generally of kinship relations [10]. The social relations clustered around the workplace are constitutive of the labour process and consist of both the relations of production at the level of the enterprise (between direct producers and appropriators of surplus value) and the relations in production (between workers and management and among workers) [11]. The social relations

clustered around the citizenplace are constitutive of the so-called public sphere and consist of the relations between citizens and the state. The social relations clustered around the workplace are the relations among the nation-states as they integrate the world economy.

To see the workplace as an internal (national) structure of social relations needs a brief explanation. For a long time social theory treated the nation-state, conceived as an insulated, self-contained social structure, as the privileged unit of analysis. In the last two decades, due mainly to dependency theory and the link it established between development and underdevelopment, the impact of international conditions was added to the scientific agenda. However, in the most important work produced so far in this area, that of Wallerstein (1980), the emphasis on world dynamics has been so dominant that the specificity of national conditions becomes almost irrelevant. This is particularly true of those social conditions that are traditionally most identified with territorial boundaries, such as law and politics. In my view, a proper balance must be found between the old and the new perspective not for the sake of eclecticism, but rather because capitalist development, being as worldwide as it is uneven, depends on the existence of sovereign national-states to reproduce such international unevenness. The balance is achieved in my scheme by conceptualizing the workplace as an internal structure, that is, as the organising matrix of the pertinent effects of world conditions upon the internal workplace and citizenplace and, through these, upon the householdplace. Such pertinent effects are determined by the position a given society occupies in the world system, a position which is, in turn, determined by the extent to which such society is able to manipulate in its favour the fluctuations of the world economy.

The four structural places identified are complex in their internal constitution. Each consists of five structural elements, namely, a unit of social practice, an institutional form, a mechanism of social power, a form of law, and a mode of rationality (as shown in Fig. 1). As to the unit of social practice, it is the family in the householdplace, the class in the workplace, the individual in the citizenplace and the nation in the workplace. The institutional form is marriage/kinship in the householdplace, the factory in the workplace, the state in the citizenplace and international agencies and bilateral/multilateral agreements in the workplace. The mechanism of social power is patriarchy in the householdplace, exploitation in the workplace, domination in the citizenplace and unequal exchange in the workplace. The form of law is domestic law in the householdplace [12], production law in the workplace, territorial law in the citizenplace and systemic law in the workplace. Finally, the mode of rationality is affection-maximising in the householdplace, profit-maximising in the workplace, loyalty-maximising in the citizenplace and effectivity-maximising in the workplace [13].

The four places are structurally autonomous though articulated and interpenetrated in different ways. Given the internal complexity of the four

Elementary components Structural places	Unit of social practice	Institutional form	Mechanism of power	Form of law	Mode of rationality
Householdplace	Family	Marriage/kinship	Patriarchy	Domestic law	Affection maximising
Workplace	Class	Factory	Exploitation	Production law	Profit maximising
Citizenplace	Individual	State	Domination	Territorial law	Loyalty maximising
Worldplace	Nation	International agencies, bilateral/multilateral agreements	Unequal exchange	Systemic law	Effectivity maximising

Figure 1. A structural map of capitalist societies.

structural places, most of the relations among them can only be established at the empirical level and tend to be different in core and in peripheral societies. At the theoretical level, using Erik Wright's model of determination (1979), the most that can be said is that: the workplace tends to establish the structural limits of the transformation of the householdplace and the citizenplace; the householdplace tends to determine ranges of outcomes in both the workplace and the citizenplace within a structurally limited range of possibilities, and it also mediates the relations between these two structural places; the citizenplace tends to reproduce social relations inside the workplace and the householdplace; the worldplace mediates the relations between the workplace and the citizenplace; the structural relations between the worldplace and the householdplace occur through the workplace and the citizenplace [14].

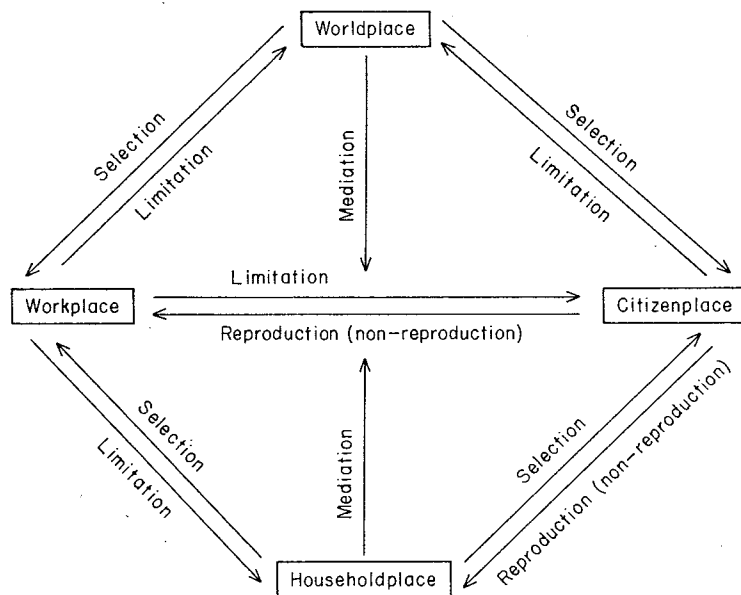


Figure 2. Structural relations (core countries).

Beyond this the structural relations among the four clusters of social relations tend to differ in core and in peripheral societies. In core societies the workplace and the citizenplace tend to establish the limits of the transformation of the worldplace while the latter selects among possible developments within the former (Fig. 2). In peripheral societies, on the contrary, the worldplace tends to establish the limits of transformation of both the workplace and the citizenplace, while these select among possible developments of the worldplace

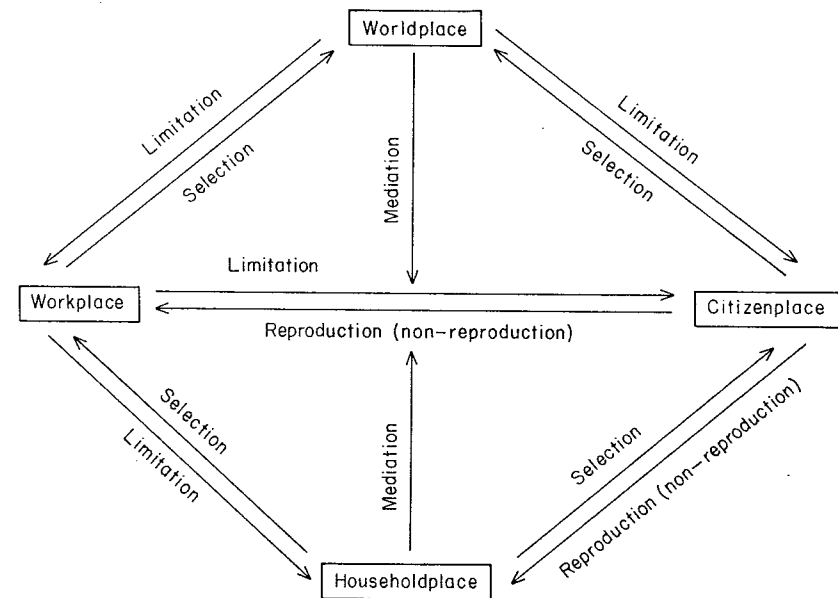


Figure 3. Structural relations (peripheral countries).

(Fig. 3). Thus, the weaker the worldplace position of a given society the greater the probability that its workplace and citizenplace and, through them, its householdplace will be affected by the workplace and the citizenplace of a core society [15].

To call these places structural means to see them not only as the most basic clusters of social relations, but also as being structurally autonomous. There are other clusters of social relations, but they occupy intermediate positions among the householdplace, the workplace, the citizenplace, and the worldplace and as such they lack structural autonomy. They are heterogeneous in their internal texture, for they combine elements of all or some of the structural places. For instance, the health, or the education system are clusters of social relations located between the householdplace, the workplace, and the citizenplace. Similarly, multinational corporations are heterogeneous clusters of social relations in our societies as they integrate elements from three structural places. For instance, multinational corporations, as an institutional form, combine elements of the factory, of the state, and of international agencies. As modes of rationality they combine profit maximising with loyalty maximising and effectivity maximising (Fig. 4) [16].

I will now provide this model with some historical concreteness, concerning

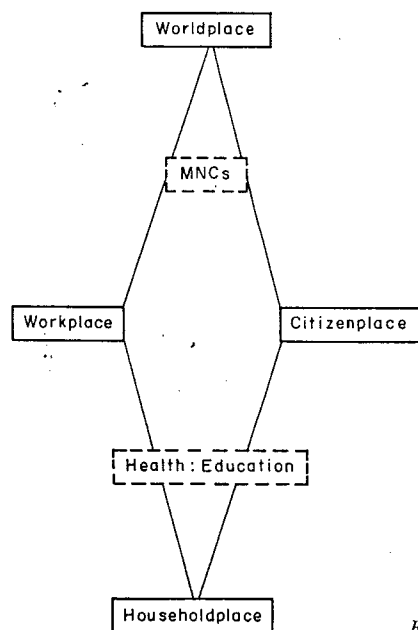


Figure 4. Heterogeneous clusters of social relations.

in particular the institutional forms, the forms of law and the mechanisms of social power.

I will argue that the hidden basis of capitalist development lies, firstly, in a complex articulation between different modes of production of political power and centred around four political institutions: marriage/kinship, the factory, the state, and international agencies/bilateral and multilateral agreements; and secondly, in a socially constructed suppression of the political and legal character of the social relations inside all institutions except the state: social relations inside marriage/kinship are transformed into effective necessities, natural predispositions, mutual protection and management of emotions, social relations inside the factory are transformed into technical necessities, organisational innovations, industrial relations, and scientific management; and social relations inside international agencies and agreements are transformed into relations among sovereign countries, new international economic order, external debt, or, at the most, into a 'rudimentary', non-coercive form of law (international law).

Starting with a historical example and restricting myself for now to the workplace and the citizenplace, I will review Marx's analysis of the emergence of the factory acts in nineteenth-century England in the first volume of *Capital* (Chapter 10) and offer a partial re-interpretation.

The crucial role of the state and state legislation in the creation of the labour force required by the emerging capitalist mode of production is today well documented. This is a long historical process that in England lasted from the fifteenth to the eighteenth century. As Marx puts it in the *Grundrisse* "the annals of English legislation contain the bloody handwriting of coercive measures employed to transform the mass of the population, after they had become propertyless and free, into free wage labourers" (1973, p.769). Marx analyses then in *Capital* the "bloody legislation against vagabondage" at the end of the fifteenth century and during the whole sixteenth century throughout Europe (1970, p.734).

These were laws that created the labour force and were an essential factor of so-called primitive accumulation. Once this stage was concluded and the labour force was created one would think that capitalist relations of production would develop by themselves. In capitalism, as I already mentioned, "surplus labour and necessary labour glide one into the other" (Marx 1970, p.236) and as a result "the dull compulsion of economic relations" (Marx 1970, p.737) operates by itself making superfluous any direct intervention of the state in the appropriation of the surplus labour by capitalists. Indeed, this is only part of the picture. Firstly, because the "dull compulsion of economic relations" was in fact constituted by the state law of property and the law of contract. Secondly, because whenever the economic compulsion failed (as in the case of destruction of machinery or of strikes) its operation could only be restored by state coercive intervention. And, thirdly, because the state intervention in the reproduction of the labour force went much beyond coercive measures against workers in exceptional situations. The factory acts on the working day are a good illustration of such an intervention [17].

Marx emphasises that given "the passion of capital for an unlimited and reckless extension of the working day" (1970, p.298) "the factory legislation was the first conscious and methodical reaction of society against the spontaneously developed form of the process of production" (1970, p.480). Were these laws against the interests of capital? "No", Marx replies, because the "unrestricted waste of human life" (1970, p.475) resulting from the "unnatural extension of the working day" (1970, p.266) would in the end paralyse the mechanism of exploitation. But the truth of the matter is that capitalists fought as much as they could against the promulgation of the factory acts and they used the most diverse devices to evade their enforcement once they were passed [18]. On the contrary, workers fought for those laws and Marx concluded that "the establishment of a normal working day is the result of centuries of struggle between capitalist and labourer" (1970, p.270), the product of a "protracted civil war" (1970, p.299).

Marx's analysis of the factory acts suffers from a certain ambiguity. If the factory acts furthered the interests of capital, why did capitalists fight against them? Why did the workers fight for them? If they were in favour of the interests of capital, were they necessarily detrimental to the interests of the

workers?

These questions were not adequately answered by Marx. Neither were they answered in most analyses of the New Deal legislation, and they are still not being answered in the current discussions of the rise and demise of the welfare state or of the regulatory state.

In my view, the factory acts symbolise *an historical turning point in the articulation of citizenplace and workplace*, a process that laid out the structural foundations for class compromises in core societies and for their non-viability or instability in peripheral or semi-peripheral societies. The factory acts were an absolute gain for the workers at the level of the citizenplace. The corresponding absolute loss for capital at that level was, however, compensated for by the gains it did obtain at the level of the workplace within the new parameters established by the laws. Marx and social historians of the period emphasise that the factory acts contributed decisively to the restructuring of capital: they accelerated the transition from the manufacture system to the factory system and they changed the conditions of competition in favour of the most productive and technically advanced factories and industries. The gains for capital were thus an increase in the control over the social relations in the workplace through the intensification of the labour process (speed-ups, introduction of piece-wages, mechanisation, etc.). These gains could not be generalised to all capitals and capitalists. They were allocated to those that could convert the losses in the citizenplace into gains in the workplace. All others would disappear or be proletarianised. For those capitalists that succeeded, the loss in the citizenplace was compensated for or neutralised by the gain in the workplace. For the workers the inverse was true.

But the most important feature of this transaction is that, due to the autonomy of the structural places, it remained invisible, it remained below the threshold of social consciousness. This game of gains and losses was socially constructed not as a positive sum game between the workplace and the citizenplace but as two separate zero sum games—one in the workplace, the other in the citizenplace—whose results could not be measured one against the other. Gains for workers and losses for capital in the citizenplace; gains for capital and losses for workers in the workplace. That is, the gains and losses were not compensated for at the same level, nor were they perceived as results of reciprocal developments and as such their structural combination remained hidden. Capital's loss of political power within the citizenplace could not be measured against its gain of political power in the workplace. Its loss of control over territorial law could not be measured against its gain of control over production law.

The incommensurability of gains and losses was crucial to consolidate and legitimate capitalist social relations because it reinforced the differences between the workplace and the citizenplace. It made clear that the distribution of social power and legal competence to the workers in the citizenplace could never expand to the workplace in the same way or by the same process, and

that this fact would not be conceived as the result of a political decision but rather as the technical consequence of the structural autonomy of the two places. In other words, under capitalist social relations, the worker would always be less a citizen of his or her factory than of his or her country; moreover, such a discrepancy would be considered to be not only inevitable but also natural.

The fact that the worker's gains were obtained in the citizenplace was important in itself. They were translated into territorial law, a form of law based on rights. Given their institutional separation from the workplace, rights are relatively stable entitlements. They are not strictly tied up to the fluctuations of the economic cycle. This lack of reciprocity with production reinforced the mode of rationality of the citizenplace, which I have called loyalty-maximising, and by the same token stabilised its mechanism of power which I have called domination (that is, coercion plus hegemony). However, this relative stability was obtained through a process which simultaneously obtained the consent of the workers to be subjected, within the workplace, to production law, a form of law based not on rights but on interests. And since interests are defined by the rationality of profit maximising and satisfied through the mechanism of exploitation, they are precarious entitlements, strictly tied up to the fluctuations of production and as unstable as production itself.

In other words, the factory acts legitimated the state before the workers-as-citizens and, by the same process, they legitimated the factory before the workers-as-a-class-of-wage-labourers. This laid out the structural foundation for the types of class compromises that were later on achieved most notably by social democracy in the core countries.

It is by now clear that in my view the ideological nature of law in capitalist societies does not lie in the discrepancy between law in books and law in action, as is commonly assumed, but rather in a well-knit social construction that converts territorial law into the exclusive form of law, suppressing thereby domestic law, production law, and systemic law, without which territorial law could not operate as it does in our society. Legal doctrine, no matter how critical, has done nothing since the nineteenth century but consolidate and legitimate this suppression of dimensions of the legal formation. Capitalism in this sense is less than democratic, not because the law of the citizenplace is less than democratic, but rather because this form of law, no matter how democratic, must coexist with the more despotic law of production, a relation increasingly mediated by (also less than democratic) domestic law and systemic law.

This explains why all the attempts to create industrial citizenship, under conditions of capitalist appropriation of the means of production are always bound to fail whenever they come into conflict with the logic of profit maximising [19].

What is characteristic of capitalist societies is that the primacy of the

political (much more prominent than in feudal societies) manifests itself in a fragmented and asymmetric way. Capitalist societies are indeed segmented societies, as anthropologists would say, organised according to the principle that the political and legal forms of the citizenplace set the boundaries for all the other clusters of social relations, somehow operating like revolving doors through which other forms of political power and law circulate in society.

Marx was acutely aware of the changes in the regulation of labour taking shape in his time and indeed he established the material base for the articulation among different political and legal forms when he distinguished between the division of labour in society at large and the division of labour in the workshop and related one to the other:

The division of labour in the workshop implies concentration of the means of production in the hands of one capitalist; the division of labour in society implies their dispersion among many independent producers of commodities... in a society with capitalist production, anarchy in the social division of labour and despotism in that of the workshop are mutual conditions the one of the other (1970, p.355-6).

But he failed to see in these changes the dynamics of the articulation among political and legal forms and institutions throughout society. When he uses the terms political and legal in the context of the workplace he does so in an analogical or metaphorical sense. The forms of cooperation set in motion by capitalist production are such that "that a capitalist should command on the field of production is now as indispensable as that a general should command on the field of the battle" (1970, p.330). However, this power of command is not merely a technical function, it is rather and at the same time a "function of the exploitation of a social labour process" (1970, p.331). The political analogy is taken to the extreme when Marx says that:

This power of Asiatic and Egyptian kings, Etruscan theocrats, etc., has in modern society been transferred to the capitalist, whether he be an isolated or, as in joint-stock companies, a collective capitalist (1970, p.334).

As to the legal analogy or metaphor, the factory code is conceived as a "caricature", a code

in which capital formulates like a private legislator and at his own good will, his autocracy over his workpeople, unaccompanied by the division of responsibility, in other matters so much approved of by the bourgeoisie, and still unaccompanied by the still more approved representative system... (1970, p.424).

The main point of my argument is that the power of command in the workshop is not political power in any metaphorical sense. It is as political as the power of the citizenplace, the power of the householdplace or the power of the worldplace. They are different in their forms as they derive from different modes of production (exploitation, domination, patriarchy and unequal

exchange) but this does not alter their political nature. On the contrary, such nature is not an attribute of any of them taken separately, it is rather the aggregate effect of the articulations among them.

Similarly, the factory code is not law in any metaphorical sense. It is law, just as the law of the state is law. Moreover, the fact that it is unhampered by the representative system of the citizenplace doesn't make it a caricature. The despotic law of production is a necessary condition of democratic territorial law.

The idea of conceiving regulation of labour in the factory as a form of law was originally hinted at by the Austrian Marxists, particularly by Max Adler in *Zuchthaus und Fabrik* (n.d.) and K. Renner's *The Institutions of Private Law and Their Social Functions* (1976). Adler is mostly concerned with the functional and structural relations between the prison and the factory, thus inaugurating a line of research that was later on pursued by the Frankfurt School through Rusche & Kirchheimer, *Punishment and Social Structure* (1968), and most recently by Foucault's *Discipline and Punish* (1977) and Melossi's & Pavarini's *The Prison and The Factory* (1981) [20]. Closer to my concerns here is K. Renner's political and legal conception of the organisation of production.

K. Renner is best known for his theory of property. According to him, the law of property, originated in the Roman law as "a person's all-embracing legal power over a tangible object" (1976, p.81), changed completely its social function in the transition from feudalism to capitalism when the means of production became an object of private appropriation. While previously, property rights granted to the proprietor a mere control over things, with the emergence of capitalism and the private appropriation of the means of production, the control over things was transformed, subreptitiously as it were, into a control over people, that is, a control over the workers operating, through the contract of labour, the means of production:

In the eyes of the law, the property-subject is related to the object only, controlling matter alone. But what is control of property in law, becomes in fact man's control of human beings, of the wage-labourers, as soon as property has developed into capital. The individual called owner sets the tasks to others, he makes them subject to commands and, at least, in the initial stages of capitalist development, supervises the execution of his commands. The owner of a *res* imposes his will upon *personae*, autonomy is converted into heteronomy of will (1976, p.106).

According to Renner, the most relevant aspect of this transformation is that the right of ownership assumes a new social function without any change in the norm itself. As the literal formulation of the norm does not change, the change in its social function remains ideologically hidden.

This social theory of property is complemented with a political and legal conception of the organisation of production, a lesser known aspect of Renner's work but particularly relevant for my argument here. In his view, the regulation of labour inside the factory, under the command of capital, is a

delegated public authority since "the institution of property leads automatically to an organisation similar to the state" (1976, p.107). Accordingly, "the factory is an establishment with its own code with all the characteristics of a legal code" (1976, p.115). Renner sharply criticises lawyers and legal doctrine for not taking in due account this legal reality:

we see further that this regulation of power and labour remains concealed to the whole of bourgeois legal doctrine which is aware of nothing but its most formal, general and extraneous limitations (1976, p.114).

But in spite of pointing in the right direction, Renner should be criticised on three accounts. Firstly, he takes too far the identification of law and power of the state with law and power of the factory. He fails to recognise the structural differences between state and factory as two institutional forms and, consequently, the structural differences between the two forms of law and social power through which they operate. In my view, such differences and their articulation is what characterises capitalist societies most specifically. Secondly, Renner conceives power and law in the factory as exclusively coercive. It is true, as I have already mentioned, that production and labour are as tightly organised and disciplined in capitalism as never before. This, however, does not mean that such organisation and discipline are only made effective through coercion. Thirdly, Renner neglects the historical specificity of capitalism as when he says that "the employment relationship is... a public obligation to service, like the serfdom of feudal times" (1976, p.115). This is obviously not true. What differentiates capitalism from feudalism is precisely the privatisation of the political power over production which separates the control over production from the performance of public functions and communal services typical of feudalism (Brenner, 1977; Wood, 1981, p.86).

In recent times, Michael Burawoy has presented the most forceful argument in favour of a broad political conception of the labour process. Resorting to the Gramscian concept of hegemony, Burawoy shows that the specificity of the capitalist organisation of production is that it must elicit, in order to be efficient, the active consent and the participation of workers in their own exploitation (1979, p.27). This conception is rendered by the idea of the factory as an 'internal state', an idea that, as we saw, goes back to Renner at the same time that it echoes explicitly Selznick's theory of industrial justice (1969). Burawoy's main thesis is that the despotic form of production relations in the phase of competitive capitalism has evolved, in the phase of large corporations and trade unionism, into an hegemonic form, resting "on a limited participation by representatives of labour in the government of industry" (1979, p.110). This evolution is captured by the concept of the 'internal state' by which he means:

the set of institutions that organise, transform or repress struggles over relations in production and relations of production at the level of the enterprise (1979, p.110).

The most important among such institutions are the collective bargaining and grievance procedures.

I would like to qualify this stimulating analysis of the labour process with two critical observations. Firstly, though Burawoy, in contrast with Selznick, emphasises that the politics of production are subjected to the logic of securing and obscuring the extraction of surplus value, he takes too far, in a direction opposite to Renner, the identification of the politics of production with global politics or, in my conception, the politics of the workplace with the politics of the citizenplace. The structural difference between the two lies precisely in the presence in one of them of the logic of securing and obscuring the extraction of surplus. Such is the difference, which in my view, accounts for the despotic nature of the political and legal forms of the workplace [21]. This by no means contradicts the presence of hegemonic or consent components, which, as we well know after E.P. Thompson (1975) and Douglas Hay (1975), were also present in the despotic laws of the *ancien régime*. Coercion and consent, though present in both the workplace and the citizenplace, are different in their form and in their mode of production and combine according to different logics in the two structural places [22]. There are different hegemonies in society (family hegemony, state hegemony, factory hegemony, world hegemony) and they are not necessarily congruent.

The second critical observation is that, due to the relative collapsing of the different power forms, Burawoy neglects the central question of the articulation among them. Moreover, neither he nor Meiksins Wood, who has also in recent times argued in favour of the political character of production relations (1981), conceptualises in adequate terms the specificity of state law. Burawoy accepts implicitly the base/superstructure framework and Wood relapses into it, ending up by hesitantly locating part of state law in the base and part in the superstructure (1981, pp.79,80) [23].

In this section I have argued that the social reproduction of capitalist relations lies, firstly, in a complex articulation between four different modes of production of political power and law centred around four political institutions: marriage/kinship, factory, state, and international agencies/agreements; and, secondly, in a social construction that suppresses the political and legal character of social relations inside all institutions except the state.

This argument was developed with reference to the workplace and the citizenplace. With some adaptations, it could also be developed with reference to the householdplace. Since the 60s, women's studies have drawn our attention to the multiple forms of sexual discrimination. One of the most promising lines of research concentrates on the legal non-intervention in the private sphere in order to show the extent to which women are subjected to primary (as opposed to secondary) social control. According to Tove Stang Dahl and Annika Snare, "the significant factor is not so much what the law says but what it defines as outside the limits of its jurisdiction" (1978, p.17).

"Coercion of privacy" is the concept used by the two authors to illustrate the persistence of women's subordination in spite of the laws passed to eliminate some forms of sexual discrimination. In my view, coercion of privacy and primary social control is the realm of domestic law. Even if territorial law has eliminated some forms of discrimination, the social position of women remains 'unequal' because while the male worker occupies a subordinate position in production law but a superordinate position in domestic law, the female worker occupies a subordinate position in both kinds of law.

The argument presented in this section could also be extended to the social relations among nations in the worldplace, but that would be another paper.

Towards a new scientific agenda

The structural autonomy of the householdplace, the workplace, the citizenplace, and the worldplace is what distinguishes capitalist societies from all previous ones. This is, however, the product of a long historical process. As an illustration, in the early stages of capitalist development the structural elements of the citizenplace collapsed in many respects with those of the workplace [24]. This was due, in part, to the fact that the state was, particularly on the continent, an important organiser of production [25]. This complex intertwining of the coercive apparatus of the state with that of production prompted Adler's (n.d.), Rusche's & Kirchheimer's (1968) argument of the close functional relationship between the prison and the factory. From another perspective, looking at models of organisation of the citizenplace and the workplace, we should be reminded of Weber's (1948) and Hobsbawm's (1975) arguments that given the incapacity of the pre-capitalist family-based industries to establish the organisational model for the large enterprises emerging in the eighteenth century, such a model was sought in the military organisation and in the emerging state bureaucracy, a transplant particularly evident in the case of railways.

The autonomy of the structural places was accomplished differently and in different degrees in different countries. Today, looking at trends in the post-war period through the analytical windows opened up by the theoretical framework presented here, we witness a subtle but quite evident process of structural approximation or interpenetration between the workplace, the householdplace and the citizenplace. This is, however, a very different process from that observed in earlier times. It is different in at least two respects: firstly, it takes place under the increasing mediating pressure of the worldplace; secondly, it assumes different and combined forms in core and peripheral societies.

In core countries, in view of their capacity to influence global patterns of development in their own favour we have witnessed an increasing interpenetration between the householdplace, the workplace and the citizenplace, under the pulling effect of the citizenplace. Two different processes preside over this

development: *the delegation process and the proliferation process*. By *delegation* I mean the process whereby the citizenplace transfers its mechanism of social power, entrusting it to the workplace and the householdplace. This delegation of power, a kind of indirect rule, is illustrated in most social policies of advanced capitalist countries in recent times. For instance, the so-called 'deregulation' of the economy in the U.S.A. implies a transference of policies of domination from the citizenplace to the workplace. Similarly, the idea that some of the social services and social security benefits, until now provided by the state, should in the future be provided by the family implies a transference of policies of domination from the citizenplace to the householdplace. These strategies enable the citizenplace to duplicate itself in the workplace and the householdplace without any formal expansion of its institutions or laws and indeed through some institutional reductions (programme and budget cuts) What I call *proliferation*, on the other hand, is a more complex process and consists in the increasing structural homology or isomorphism between the institutional and legal forms of the citizenplace and those of the workplace and the householdplace. In this process, there is no formal delegation of power but simply the social reproduction of citizenplace forms outside the citizenplace.

When we compare the transformations in the workplace, the citizenplace, and the householdplace in recent decades we are struck by the parallel developments in production law, in territorial law, and in domestic law. The development towards a more bureaucratic and technocratic form of regulation of the labour process, as documented by Braverman (1974), Edwards (1979) and Clawson (1980) among others, runs parallel to a similar development in territorial law and in the administration of justice, as documented by Habermas (1962), Luhmann (1972), Unger (1976), Nonet & Selznick (1978) and Heydebrand (1979) and runs also parallel to a similar development in domestic law and family life as documented by Donzelot (1977), Barrett (1980, p.227) and Hartman (1981) [26]. But even more striking is the fact that in the three structural places, these developments are combined with others of an apparently contradictory nature. In the workplace, Elton Mayo's idea of work humanisation (1933) and, more recently, the ideas of workers' participation and job enrichment are structurally homologous with those in the citizenplace of the 'back to the community' movement, delegalization, and informal justice (Abel, 1982; Santos, 1980) and also with the ideas in the householdplace of the family as an informal and egalitarian community ('open families', 'free communes'), delegatised mainly through the avoidance of official marriage and the acceptance of its partial and temporary nature. Moreover these opposing developments seem to be combined in the three structural places according to a similar logic.

However, we should caution ourselves against overstressing such parallel developments. Since the structural places remain autonomous, there are always contradictory developments, the articulation of which should also be investigated. As an illustration, it should be noted that in the early 1970s the

enthusiasm for the ideas of work humanisation and workers' participation waned (Clegg & Dunkerley, 1980, p.513) while the ideas of community services and of informal justice continued to be advocated, often with additional enthusiasm. This discrepancy is not due to a time lag between the citizenplace and the workplace. Because production law is based on interests and these are defined by the rationality of profit maximising, its normative orientations are much more unstable than those of territorial law which is based on rights as defined by the rationality of loyalty maximizing [27]. Industrial sociologists have drawn our attention to the cycles of control of workers and to their close tuning to the production cycle (Ramsay, 1977). Due to the economic recession of the '70s the power relations within the workplace changed in favour of capital. The workers' challenge of the control of the labour process by management decreased as the coercive apparatus of production law increased (the dismissal coupled with the threat of prolonged unemployment and the perspective of decreasing welfare payments). The hegemony component of the production relation may have lost, in this process, some of its weight. The extent to which the relative loss in factory hegemony was compensated for by a relative increase in state hegemony (made possible by the changes in the citizenplace referred to above) should be investigated.

The analysis of the combination among these parallel and contradictory developments should alert us to the possible refractions within the citizenplace, the workplace and the householdplace resulting from the evermore complex role of the state in the new forms of work control made possible by the recent changes in the organisation of production, the new productive order which some call the third age of the factory (Gaudemar, 1980) or, in Italy, the 'diffuse factory' (Coriat *et al.*, 1980, Sabel, 1982, p.209). Such changes in the organisation of production deepen the relations between the workplace and the householdplace. Through the new forms of the "putting out system" (piece work done at home) the family becomes again a site of production—the home-factory—and domestic law is put at the service of production law.

In peripheral societies recent trends are much more diversified and it is questionable that they can be brought together under a general tendency. Nevertheless, as peripheral societies become more and more vulnerable to fluctuations of the world economy which they cannot steer in their favour, a trend is discernable toward an increasing structural approximation of the workplace, the householdplace and the citizenplace, which, in contrast with what happens in core societies, is occurring under the pulling effect of the workplace. As the citizenplace is increasingly the site of negotiation of dependance, the pertinent effects of the workplace upon the citizenplace in the peripheral societies are so pervasive that the citizenplace becomes in itself little more than a pertinent effect of the workplace. The permanent offices of the IMF in the Palácio do Planalto (government palace) in Brazil stand as a

dramatic illustration of this interpenetration of the citizenplace with the workplace. But the pressure of the workplace is also manifested in the articulation between the citizenplace and the workplace. The workplace of peripheral societies tends to distinguish itself from that of the core societies in at least two ways—firstly, the greater despotism in social relations in view of the existence of the industrial reserve army; secondly, the high degree of internal incoherence and fragmentation in view of the persistence of pre-capitalist modes of production (the peasant economy) formally subjected to the capitalist mode of production. The combined effect of these two characteristics upon the citizenplace is manifesting itself, through the mediation of the workplace, by the increasing responsiveness of the state to the coercion demands of the workplace. The wider order of labour is more and more dependent upon the combination of the criminal law of the citizenplace with the criminal law of the workplace. The external weakness of the peripheral state (due to its position in the world system) is combined with the internal repressive strength against the exploited classes. This explains why Offe's argument (1983) on the compatibility of capitalism and democracy is increasingly restricted to the core countries (and even there it seems to lose steam).

The presence of the workplace in the householdplace is equally imposing in peripheral societies. The changes in the organisation of production mentioned above are particularly drastic in such societies. The decomposition and recomposition of the labour force which is under way on a world scale takes many forms. In general, it can be described as the 'return of variable capital' since its main objective consists in undermining the already precarious stability of the wage relation (Rojas, 1984; Santos, 1985). The wage becomes an unstable and occasional source of income and the mechanisms for the institutionalisation of the capital/labour conflicts (collective bargaining, etc.), no matter how limited, are neutralised. Under such circumstances, the household is called upon to supplement the low and occasional wage income of the individual worker through other wage and non-wage incomes (peasant economy, informal sector, petty commodity production, underground economy). Thus, the householdplace assumes production functions and becomes the centre of a complex income pool that guarantees the reconstitution of the labour power spent in the workplace.

The analysis of these different movements in the core and in the periphery and of their combinations, as hypothesized in my conception, could open, I suggest, a new scientific agenda on the question of law and politics on a world scale. This conception can also provide at least the beginning of an answer to some of the old questions put forward at the outset of this paper.

The decline of law

I will start with the question of the crisis of law or of the decline of law. For

most authors, the decline of law is a direct consequence of the overuse of law for social engineering purposes, that is, the overlegalisation of social reality, or, for German authors, the rematerialisation of law (Teubner, 1983; Voigt, 1980), or, still, for Habermas, the internal colonisation of the life world (1982). This argument is usually made in conjunction with the argument of the functional inadequacy of law to regulate certain continuing (multiplex, as social anthropologists would say) relations among citizens or between citizens and the state, or with Poulantzas' argument according to which the power block holding government is increasingly unstable to rule by general legal provisions (1978b, p.218). The global effect of these conditions is a legitimisation crisis coupled, in Habermas (1962), with a motivation crisis.

In my view, all these theories have a grain of truth. Their major limitation consists in restricting their analysis to what in my conception is only one dimension, though a very important one, of the legal configuration of capitalist societies. As a result they fail to recognise the changing articulations among territorial law, domestic law, production law, and systemic law. Just as an illustration, it is not surprising that Teubner finds a good example of what he calls reflexive law in labour laws because they respect the autonomy of the subsystem of production (1983, p.276). The mystification in this conception lies in conceiving 'reflexiveness' as an exclusive attribute of state labour laws, instead of analysing the social processes by which the workplace, the householdplace, and the citizenplace combine to define the global regulation of labour according to a specific borderline between production law, domestic law and territorial law, a borderline that changes across times and societies [28].

What is in decline is not law but rather the law of separation between state and civil society. But this cannot be conceived as a pathological phenomenon, as when Habermas speaks of the pathology of modernity, because, as I have argued, it is inscribed in the organising matrix of capitalist societies. To be fully coherent, Habermas should speak of modernity as pathology rather than of the pathology of modernity. Indeed, one must agree with Hirschman that capitalism cannot be blamed for accomplishing what it was always supposed to accomplish (1977, p.132).

There is no legitimisation crisis, therefore, as far as the legal formation in its totality is concerned. Both production law and systemic law have never been so hegemonic, particularly in core countries. It is also mystifying to speak of deregulation. What is at stake is what I have described as processes of delegation and proliferation, that is to say, different forms of substitution of territorial law for production law, domestic law, or systemic law. Deregulations are reregulations.

The decline of Foucault

A much broader question—though it also touches upon the issue of the decline

of law—is raised by Foucault in his theory of the dominant forms of social power in contemporary societies (1976, 1977, 1980). Foucault's major thesis is that, since the eighteenth century, the power of the state, what he calls the juridical or legal power has been confronted with and gradually displaced by another form of power which he calls disciplinary power. The latter is the dominant form of power in our time and is generated by the scientific knowledge produced by human sciences as it is applied by professions in institutions, private or public: in schools, hospitals, barracks, prisons, families, factories.

I will briefly summarise Foucault's characterisation of his two forms of social power: juridical (or state) power is based on the theory of sovereignty; it is power as a right possessed or exchanged; it is a zero-sum power; it is centrally organised and exercised from top down; it distinguishes between legitimate and illegitimate power exercise; it applies to autonomous pre-constituted recipients or targets; it is based on a discourse of right, obedience, and norm. In contrast, disciplinary power has no centre; it is exercised throughout society; it is fragmented and capillary; it is exercised from bottom up constituting its own targets as vehicles of its exercise; it is based on a scientific discourse of normalisation and standardisation produced by the human sciences.

Though Foucault is rather confusing about the relation between these two forms of power [29], it is clear that according to him they are incompatible and that the scientific, normalising power of the disciplines has become the most pervasive form of power in our society.

From the standpoint of the theory of social power and law which I have been presenting here, Foucault's view must be criticised on two accounts.

On the one hand, although Foucault is correct in positing the existence of power forms operating outside the state, he goes too far in stressing their dispersion and fragmentation. He is left with no theory of the hierarchy of power forms and consequently with no theory of social transformation. He obscures the central role of the power forms of the citizenplace and the workplace in our societies, domination and exploitation, respectively.

On the other hand, it must be noted that, in other respects, Foucault does not go far enough. He takes the conventional critical wisdom about the state for granted, in that he conceives state power and law as a monolithic entity and reduces it to the exercise of coercion [30]. This leads him to overstate the mutual incompatibility of juridical power and disciplinary power and to overlook the subtle interpenetrations between them.

I will illustrate this circulation of meaning between the two forms of power by looking at the distinction between law as a normative command and law as a scientific description of regularities among phenomena. This distinction has been so reified in our cultural paradigms, since Aristotle at least, that it has obscured the fact that, very often, social processes, acting as symbolic melting pots, create configurations of meaning in which elements of both conceptions

of law are present in complex combinations.

Indeed, the idea that law as normative is also somehow law as scientific, has a certain tradition in modern social thought which goes back at least to Giambattista Vico. In 1725, Vico wrote in *Scienza Nuova* contrasting philosophy with law:

Philosophy considers man as he ought to be and is therefore useful only to the very few who want to live in Plato's Republic and do not throw themselves into the dregs of Romulus. Legislation considers man as he is and attempts to put him to good use in human society (1953, pars. 131-2).

The idea of creating a social order based on science, that is, a social order in which the commands of law are emanations of scientific findings on social behaviour, is paramount in the eighteenth and nineteenth centuries from Montesquieu and Saint-Simon to Bentham, Comte and Durkheim. The same is true of certain currents of legal theory. As David Trubek has recently written, "During the classical age jurists presumed to transcend the uncertainty of philosophical speculation for the hard and sure world of science" (1983, p.67). In all these trends scientific law is contained, in a recessive form, in the normative law.

But this interpenetration has also occurred in the opposite direction. Within the workplace and concerning production law, many models of organisation of production have been offered, most prominently the model of scientific management, whose normative claims are presented in the form of scientific claims. This is well illustrated in a quotation of Taylor, the father of Taylorism: "best management is a true science, resting upon clearly defined laws, rules and principles" (1911, p.1, in Clegg & Dunkerley 1980, p.87). More generally, the sociologists of the professions have shown how professional privileges derived from scientific knowledge legitimate decisions in which scientific judgements glide into normative judgements, a process very well documented in the medical professions [31].

All these interpenetrations show that the distinctions are increasingly blurred, that the normative and the normalising are less far apart than Foucault assumes. I suggest that this is in part the result of the processes of delegation and proliferation I mentioned above.

Conclusion

In this paper I have presented the outline of an alternative to the conceptual orthodoxy centred around the state/civil society dichotomy. The scientific process developed here is best described as having originated in the following exercise. Let us suppose that we forget all the old concepts we have been using for classifying society. How will we then make sense of reality? This is not an easy task since orthodoxy has multiple ways of vindicating its influence on the common sense of social scientists, no matter how self-conscious. One keeps

falling back into the old conceptual bric-a-brac.

The main scientific purpose of this alternative conception consists in demonstrating that the recognition of the centrality of state power and law is compatible with the recognition of the multiplicity of forms of power and forms of law in capitalist societies. This was done by subjecting such a multiplicity to a principle of structuration, and by relativising the state in two different directions: toward the inside, through the structural autonomy of social relations in smaller political and legal spaces (the householdplace and the workplace); toward the outside, through the structural autonomy of social relations in bigger political and legal spaces (the worldplace).

So far I have only developed the structural side of this theoretical framework. But, as I said, structures are nothing more than sedimented clusters of social relations. This means that structure and action are not just intimately related; they are the two sides of any form of social practice. In view of the structural analysis presented here, there are at least two ways in which the relation between structure and action can be explored.

Firstly, to demonstrate the theoretical bankruptcy of the orthodoxy crystallised in the state/civil society dichotomy should be conceived as a first analytical step to be followed by a second and equally important one which will account for the presence of such dichotomy in our common sense, and, thus, for the ways in which such dichotomy constitutes our cognitive everyday practice, the social perceptions and the social experiences of lawyers, politicians, social scientists and the people in general. The epistemological break with common sense does not eliminate it as a social phenomenon; it simply creates the conditions to convert it into a theoretical object of its own. Throughout this paper I emphasised the crucial ideological function of the commonsensical reduction of law and politics to the realm of the state. The analysis of the structure of a given legal configuration should be complemented by the analysis of the social configuration of the legal *habitus* in which such structure circulates [32]. These two analytical steps call for different methodological and even epistemological concerns but they should be viewed as different moments of a global scientific strategy. Taken together, they are the meeting ground of structuralism and phenomenology.

The second and broader path through which the relation between structure and action can be explored consists in the analysis of the articulation among the units of social interaction and of the cultural constellations condensing their life experiences. As will be remembered (see Fig. 1), according to my structural map, people are human configurations of families, classes, individuals, and nations combined in different ways in view of their specific locations in each one of the structural places. Moreover, people may also be, permanently or transitorily, heterogeneous units of social practice (intermediate between the structural places) as when they are students, clients, or patients. Indeed some people stay so long (or so deep) in such intermediate social relations that these become the dominant place of their life experiences.

The internal diversification and heterogeneity of our cultural and ideological constellations is the mirror image of the human configurations that activate and transform them. Class ideologies coexist with individual ideologies, family ideologies and with national ideologies as much as class struggles coexist with individual struggles, family struggles and national struggles. The global profile emerging from the combination among different ideologies and struggles is historically contingent and differs in core and peripheral societies.

The empirical investigation of all these working hypotheses constitutes another and equally important scientific agenda. The elaboration of a map of structural places would be of no interest if there were no travellers to use it.

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Notes

- 1 In "The Law of the Oppressed" I described the structural differences between the law of the *favela* (Pasargada law, as I called it) and the Brazilian official law and conceived the articulation between the two as an "interclass legal pluralism ... structured by an unequal relationship of exchange in which Pasargada law is the dominated part" (1977, p.89). However, this articulation was not grounded on a broader social theory that would account for the different modes of production of law from which they derived. Though his analysis is restricted to the so-called Third World, Fitzpatrick (1983, 1984) has presented so far the most stimulating and successful attempt to develop a social theory of legal pluralism.
- 2 This problem raises another one, the problem of the concept of law. After a long and inconclusive debate over the analytical status of the concept of law (known as the Gluckman-Bohannon debate) legal anthropologists reconstructed their *empirical object* in terms of 'disputes' and 'dispute settlement mechanisms'. This reconstruction had a strong impact on legal sociology, though it didn't solve the basic problem of defining the adequate support of a sociological theory of law, that is, the problem of the *theoretical object* (Santos, 1977, p.10; Cain & Kulcsar, 1982). Although the vast majority of legal sociologists avoids confronting this problem, the solutions, whenever made explicit, oscillate between a broad (Santos, 1977, p.10) and a narrow (most recently, Macaulay, 1983, pp.57-8) concept of law. In the latter case, legal pluralism is conceived in functionalist rather than in structuralist terms: "A social theory cannot assume that public government has a monopoly on those functions the theory assigns to the legal system" (Macaulay, 1983, p.57). Such a conception, however, calls for a 'structural equivalent' to law broad enough

to fill the gap between law-as-structure and law-as-function. In Macaulay's case this is provided by the concept of 'private government.'

- 3 In the Weberian tradition the sociology of organisations must be credited with the most sustained effort to develop typologies of forms of power. However, lacking in general a social theory of power relations it has failed to "distribute" such typologies in society. Its most serious limitation is thus its claim to generality, the attempt to develop models equally valid for all clusters of social relations. It misses in its descriptive flatness the rich processes of segmentation and structuration which contradictorily separate and combine different forms of power or different types of organisations. A good overview is given by Clegg & Dunkerley (1980).
- 4 In my view the crisis of western thought opened up by the collapsing of religious orthodoxy in the sixteenth century remained unresolved until the nineteenth century when a new symbolic matrix, centred around the ideas of the state and of the rule of law, finally emerged. At the beginning of the nineteenth century Saint-Simon could still speak of a spiritual crisis as the deep cause of the social turmoil in the European societies of the time. In his and in Comte's view, modern science should become the nucleus of the new orthodoxy. It seems, however, that science was only able to perform such a role as part of an overarching orthodoxy based on the idea of the state and of the law. As evidence of this new orthodoxy stands the fact that the state and the law were by far the social phenomena that offered greatest resistance to their conversion into objects of social scientific inquiry. For a long time and without resorting to any form of censorship, the state and the law managed to suppress any form of knowledge other than the closed-circuit, intimate knowledge they were able to produce through consecration institutions (such as law schools) and organic intellectuals (such as lawyers), a kind of self-knowledge known as normative political science or legal science. In these studies, rather than objects, state and law were indeed subjects of knowledge personified in lawyer's writings.
- 5 This is very clearly the case of the Scottish enlightenment thinkers whom the nineteenth century thought converted into doctrinaires of *laissez faire*—which they were not, or were only retrospectively, that is, *vis à vis* the corporatist regulations of the feudal state. They were indeed keenly aware that modern economy would lead to the emergence of a state with an incommensurably higher potential to influence the lives of people than that of the feudal state. This explains why they were so concerned with developing political arrangements that would prevent the abuse of power "les grands coups d'autorité" in Montesquieu's words.
- 6 There has been some debate about the role of political and legal institutions in A. Smith's thought. Against what is becoming a widely accepted view (Viner, 1927; Billet, 1975; Samuels, 1979), Hirschman tends to minimise such a role. But he also recognises that "it appears that Smith advocated less a state with minimal functions than one whose capacity for folly would have some ceiling" (1977, p.104).
- 7 In this light it would not be surprising if the crisis of the welfare state or the crisis of regulation, as currently discussed, were conceived by some as the return to the age of the *laissez faire* and by others as the embryo of a new more authoritarian state form.
- 8 These formulations, which first appeared in 1968, were by far the most influential. The evolution of Poulantzas' thought on this issue can be traced in his last book (1978b).
- 9 Until the eighteenth century the privatisation of state power was achieved by

- multiple means. One of the most pervasive was the sale of offices (Swart, 1949).
- 10 I am aware of the difference between 'household' and 'family'. They do not necessarily coincide. The structural place is defined in terms of the household in order to stress the sharing relationship (above all, the income-pooling practices). But since the institutional and ideological reproduction of the household occurs mainly through the concept of family (the social unit based on kinship or biological ties), I use the latter to define the elementary components of the householdplace. With similar purposes, Michele Barrett speaks of 'households' and of 'familial ideology' "as terms that avoid some of the naturalism and mystification engendered by the 'family'" (1980, p.199). (See also Donzelot, 1977.)
 - 11 For the distinction between relations of production and relations in production, see Burawoy (1979).
 - 12 Domestic law is here restricted to the household. Y. Dezalay, in an important paper on disciplinary councils in enterprises, uses the term 'domestic order' in a broader sense, as "the complex and durable interactions inside a restricted group that shuns judicial interventions" (1985, p.4). Thus conceived, domestic order includes both domestic law and production law as used in this paper.
 - 13 All the structural elements are internally complex and allow for internal fragmentation, assymetry and contradiction. This is obviously the case of the state as an institutional form but it is equally true of territorial law (Santos, 1980, p.381).
 - 14 The modes of determination used here are derived from Wright (1979, p.15). Erik O. Wright distinguishes among different modes of determination. *Structural limitation* "constitutes a pattern of determination in which some social structure establishes the limits within which some other structure or process can vary, and establishes probabilities for the specific structures or processes that are possible within those limits". *Selection* "constitutes those social mechanisms that concretely determine ranges of outcomes, or in the extreme case specific outcomes, within a structurally limited range of possibilities". *Reproduction/non-reproduction* "implies that the reproducing structure prevents the reproduced structure from changing in certain fundamental ways". *Mediation* "defines a mode of determination in which a given social process shapes the consequences of other social processes" (1979, pp.15-29). Given the topic of this paper, I am not concerned here with the dynamic aspect of this model of determination and that is why I do not consider two other modes of determination mentioned by E.O. Wright: *transformation* and *limits of functional compatibility*.
 - 15 Though the structural relations between the householdplace and the other structural places remain the same in the core and in the periphery of the world system the concrete roles played by the household and the nature of its elementary components are quite different in these two types of societies. This has to do with the articulation in peripheral societies of the capitalist mode of production with pre-capitalist work relations and with the fact that women are above all involved in activities which are not typically capitalist (Meillassoux, 1975; Saffioti, 1977: 33; Women and National Development, 1977; Rogers, 1981). More on this later.
 - 16 The heterogeneous clusters are particularly unstable forms since they reflect the effects of contradictory developments in the four structural places. Moreover, their specific locations in the *continua* among the structural places also change over time. For instance, multinational corporations originated as heterogeneous clusters belonging both to the workplace (they organised production relations) and to the

worldplace (their specific presence in any given country was both the cause and the effect of the country's location in the world economy). However, due to their expanded capacity to manipulate in their favour the whole political 'environment' and to assume quasi-sovereignty functions MNCs have gradually incorporated citizenplace features in their structure, a form of heterogeneity particularly evident in the peripheral societies.

The European Economic Community is another instance of structural changes in a given cluster of social relations over time. The EEC originated as an institutional and legal form of the workplace of each one of the countries integrating it. In recent times, however, it has gradually evolved into an heterogeneous form occupying an intermediate location between the citizenplace and the workplace. On the one hand, certain EEC regulatory agencies have become, through the preemption clause, quasi-state apparatus of each one of the community members, particularly with reference to the common agricultural policy. On the other hand, through the supremacy clause established by the community court, the EEC legislation is also, within certain limits, the constitutional law of each one of the country members. Within the reach of this clause the EEC legislation has ceased to be systemic law to become territorial law. The internal diversity of this legislation and of its articulations with the different territorial laws is so great that it probably constitutes a new form of legal pluralism of its own.

- 17 As late as 1949 Kahn-Freund could say that:

the regulation of hours of work by legislation or collective agreements was the earliest and remains the most notable restriction of the command power which is the concomitant of the ownership of means of production (in Renner, 1976, p.161).

- 18 Marx describes in great detail the different forms of resistance against the laws: frontal violation; the relay system making it difficult for factory inspectors to detect violations; restriction of the inspectors' access to the factories; wage cuts; changes in the legal concept of 'child' (what Marx calls "capitalist anthropology": 1970, p.280); the use of the 'economic crisis' as a justification for not enforcing the laws; the denial of responsibility; the negotiation over the range and degree of violation. See also Carson (1979).
- 19 The history of this failure is well documented at least since Gramsci's workers' councils in 1919 Turin. See, for an overview, Clegg & Dunkerly (1980, p.512).
- 20 Though M. Adler is one of the most innovative Marxist thinkers, nobody, to my knowledge, has acknowledged his original contribution to the analysis of the articulation between economic production and punishment. The most influential analysis has remained Rusche & Kirchheimer's. It has been critically assessed and expanded in different directions (Foucault, 1977; Jankovic, 1977; Melossi, 1978; Ignatieff, 1978; Melossi & Pavarini, 1981). In general, the functionalist and economist biases in Rusche's analysis have been transcended by an emphasis on structural correspondences or homologies, which is particularly the case of Foucault and of Melossi & Pavarini. But, in my view these authors exaggerate such an emphasis by collapsing the mechanisms of social power of the workplace with those of the citizenplace. I will come back to Foucault later on in the text. As to Melossi & Pavarini, they try to combine Rusche & Kirchheimer with Pashukanis (1978) and derive the structural isomorphism between prisoners and workers from the logic of capital:

- If the punishment as deprivation of liberty is structured, then, on the model of 'exchange' (in terms of retribution by equivalent), its execution (read: penitentiary) is modelled on the hypothesis of manufacture, of the 'factory' (in terms of discipline and subordination (1981, p.186).
- 21 P.K. Edwards & H. Scullion have criticised Burawoy for focusing mainly on the creation of consent (1982:9). Based on broader empirical data they try to analyse how the control in the workplace relates both to consent and resistance.
 - 22 High wages and 'work humanisation' have been the two most important factors of factory hegemony. Their strict dependence on the production cycle distinguishes them from the factors of the other forms of hegemony (family hegemony, state hegemony and world hegemony).
 - 23 One of the most stimulating aspects of Burawoy's research is his concern with the comparative analysis of the labour process (U.S.A., Zambia, Hungary). His empirical research is particularly relevant to determine the impact of the workplace upon the workplace in any given country.
 - 24 As a matter of fact the same was true at the time of the householdplace and the workplace. The autonomy of these two structural places occurred with the capitalist development through the separation of production and consumption and the concomitant distinction between the public sphere and the private sphere (Dahl & Snare, 1978; Gamarnikow *et al.*, 1983).
 - 25 In the sixteenth century textile workers in Milan worked under oath, sanctioned by the state, that they would not abandon the city. In 1682 Colbert sentenced to death the workers that abandoned France to work abroad (Adler, n.d., pp.72-3).
 - 26 According to the functionalist sociology of the family, modernisation and industrialisation would bring more democracy to family relations (a more rational complementarity of male and female roles inside the family) (Parsons, 1959). This model was later to be challenged by women's studies: the participation of women in the labour force far from being an egalitarian trend has often contributed to the further subordination of women. However, with the expansion of the welfare state this subordination assumed a new form. It became more bureaucratic as a result of the increasing legalisation of family relations (state regulation of husband/wife and of parents/children relations; social security regulations; increasing resort to courts to solve family disputes) (e.g. Wilson, 1977; Barrett, 1980, p.226).
 - 27 In this respect domestic law holds an intermediate position between production law and territorial law. It is both based on rights and interests. The rights in the domestic law are thus more unstable than rights in territorial law. Given the multiplex nature of relations inside the household, the exercise of rights is interwoven with (and limited by) the interests in the survival of the family as defined by the logic of affection maximising. This explains why the economic recession of the '70s and the changes it produced in the income pool of the family forced some newly acquired rights of the woman and the children to yield before the interests of 'mutual protection' and 'psychological equilibrium' inside the family.
 - 28 A critique of Teubner can also be found in Macaulay (1983, p.104).
 - 29 The following are some of the relations between juridical power and disciplinary power most commonly found in Foucault's work: juridical power is the wrong conception of power while disciplinary power is the right one; juridical power is the agent of disciplinary power; disciplinary power goes beyond juridical power; disciplinary power is less legal or exists where juridical power itself is less legal ("at

the extremities"); disciplinary power is colonised by juridical power; juridical power and disciplinary power are the two sides of the same general mechanism of power; they co-exist though they are incompatible; juridical power conceals and legitimates the domination generated by disciplinary power.

- 30 Foucault also criticises Marxists for defending a conception of zero-sum power (power in society is a fixed quantity; if one group has it the other does not) but in 1968 such an influential Marxist thinker as Poulantzas was already presenting a forceful critique of the zero-sum power conception (1978a, p.117) and in terms strikingly similar to those used by Foucault much later.
- 31 In a recent paper Handler justly emphasises that "domination arising out of the exigencies of the bureaucratic task finds a comfortable home in the ideologies of the working professions" (1983, p.62).
- 32 I use here the concept of *habitus* as elaborated by Bourdieu (1980, p.87).

References

- Abel, R. (1979) Western courts in non-western settings: patterns of court use in colonial and neo-colonial Africa. In *The Imposition of Law* (Burman, S.B. & Harrel-Bond, B.E. Eds). New York: Academic Press.
- Abel, R. (1982) The contradictions of informal justice. In *The Politics of Informal Justice* (Abel, R., Ed.) Vol 1, p.267. New York: Academic Press.
- Adler, M. (1922) *Die Staatsauffassung des Marxismus*. Vienna: Verlag der Wiener Volksbuchhandlung.
- Adler, M. (n.d.) *Zuchthaus und Fabrik*, Leipzig: Ernst Oldenburg Verlag.
- Bankowski, Z. & Mungham, G. (1976) *Images of Law*. London: Routledge and Kegan Paul.
- Barrett, M. (1980) *Women's Oppression Today*. London: Verso Editions.
- Billet, L. (1975) Political order and economic development: reflections on Adam Smith's *Wealth of Nations*. *Political Studies*, 35, 430.
- Bobbio, N. (1942) *La Consuetudine Come Fatto Normativo*. Padova, Italy.
- Bohannon, P. (1967) Introduction. In *Law and Warfare*. (Bohannon, P. Ed.). Garden City: Natural History Press.
- Bourdieu, P. (1980) *Le Sens Pratique*. Paris: Éditions de Minuit.
- Braverman, H. (1974) *Labor and Monopoly Capital*. New York: Monthly Review.
- Brenner, R. (1977) The Origins of capitalist development: a critique of neo-smithian marxism. *New Left Review*, 104, 25.
- Burawoy, M. (1979) *Manufacturing Consent*. Chicago: University of Chicago Press.
- Cain, M. & Kulcsar, K. (1982) Thinking disputes: an essay on the origins of the dispute industry. *Law and Society Review*, 16, 3.
- Carbonnier, J. (1979) *Sociologia Juridica*. Coimbra: Almedina.
- Carson, W.G. (1979) The Conventionalization of Early Factory Crime. *International Journal of the Sociology of Law*, 7, 37.
- Clawson, D. (1980) *Bureaucracy and the Labor Process*. New York: Monthly Review Press.
- Clegg, S. & Dunkerley, D. (1980) *Organization, Class and Control*. London: Routledge and Kegan Paul.
- Coriat, B. *et al.* (1980) *Usines et Ouwriers Figures du Nouvel Order Productif*. Paris: Maspéro.
- Dahl, T. S. & Snare, A. (1978) The coercion of privacy. In *Women, Sexuality and Social Control* (Carol & Barry Smart Eds). London: Routledge and Kegan Paul.

- Del Vecchio, G. (1957) *Persona, Estado y Derecho*. Madrid: Revista Occidente.
- Dezalay, Y. (1985) Du fait au droit. Les juridictions disciplinaires comme institutionnalization de l'interaction entre l'ordre domestique et l'ordre juridique. Paper presented to the *Fourth European Conference of Critical Legal Studies*, Coimbra, Portugal.
- Dicey, A.V. (1905) *Lectures in the Relation between Law and Public Opinion in England during the Nineteenth Century*. London: MacMillan.
- Donzelot, J. (1977) *La Police des Familles*. Paris: Éditions de Minuit.
- Edwards, P.K. & Scullion, H. (1982) *The Social Organization of Industrial Conflict*. Oxford: Basil Blackwell.
- Edwards, R. (1979) *Contested Terrain*. New York: Basic Books.
- Ehrlich, E. (1936) *Fundamental Principles of the Sociology of Law*. Cambridge: Harvard University Press.
- Fitzpatrick, P. (1983) Law, plurality and underdevelopment. In *Legality, Ideology and the State* (Sugarman, D. Ed.) London: Academic Press.
- Fitzpatrick, P. (1984) Law and societies. *Osgoode Hall Law Journal*, 22, 115.
- Foucault, M. (1976) *La Volonté de Savoir*. Paris: Gallimard.
- Foucault, M. (1977) *Discipline and Punish*. New York: Pantheon.
- Foucault, M. (1980) *Power and Knowledge*. New York: Pantheon.
- Galanter, M. (1981) Justice in many rooms: courts, private ordering and indigenous law. *Journal of Legal Pluralism*, 19, 1.
- Gamarnikow, E. et al. (Eds). (1983) *The Public and the Private*. London: Heinemann.
- Gamble, A. (1982) *An Introduction To Modern Social and Political Thought*. London: MacMillan.
- Gaudemar, J.-P. (1980) Le Troisième âge de l'usine? In *Usines et Ouwriers* (Coriat et al, Eds). Paris: Maspero.
- Habermas, J. (1962) *Strukturwandel der Öffentlichkeit*. Neuwied: Luchterhand.
- Habermas, J. (1982) *Theorie des Kommunikativen Handelns*, 2 vols. Frankfurt: Suhrkamp.
- Handler, J. (1983) *The discretionary decision: adversarial advocacy—reform or reconstruction?* Conference on Reflexive Law and the Regulatory Crisis, Madison.
- Hartman, H. (1981) The Family as the locus of gender, class, and political struggle: the example of housework, *Signs*, 6, 3, 366.
- Hay, D. et al. (1975) *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*. New York: Pantheon.
- Hayek, F. (1979) *Law, Legislation and Liberty*. Chicago: University of Chicago Press.
- Hegel, G. (1981) *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*. Berlin: Akademie Verlag.
- Heydebrand, W. (1979) The technocratic administration of justice. In *Research in Law and Sociology A Research Annual*. (Spitzer, S. Ed.) Vol. 2, 29ff.
- Hirschman, A. (1977) *The Passions and the Interests*. Princeton: Princeton University Press.
- Hobsbawm, E. (1975) *The Age of Capital 1848–1875*. London: Weidenfeld and Nicolson.
- Hooker, M. (1975) *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*. Oxford: Clarendon Press.
- Hunt, A. (1981) The politics of law and justice. *Politics and Power*, 4, 3.
- Ignatieff, M. (1978) *A Just Measure of Pain*. London: MacMillan.
- Jänicke, M. (1980) Zur Theorie des Staatesversagens. In *Folgen reduzierten Wachstums für Politikfelder, Politische Vierteljahresschrift* (Grottian, P. Ed.) Vol 11 (special issue), 132 ff.
- Jankovic, I. (1977) Labor market and imprisonment *Crime and Social Justice*, fall–winter, p.17.
- Luhman, N. (1972) *Reschtssoziologie*. Reinbek: Rowohlt.
- Macaulay, S. (1983) Private government. *Disputes Processing Research Program Working Paper 6*. Wisconsin.
- Marx, K. (1970) *Capital* Vol. 1. New York: International Publishers.
- Marx, K. (1973) *Grundrisse: Foundations of the Critique of Political Economy*. Harmondsworth: Penguin.
- Mayo, E. (1933) *The Human Problems of an Industrial Civilization*. New York: MacMillan.
- Meillassoux, C. (1975) *Femmes, Greniers et Capitaux*. Paris: Maspero.
- Melossi, D. (1978). George Rusche and Otto Kirchheimer: Punishment and Social Justice. *Crime and Social Justice*, spring–summer, 73.
- Melossi, D. & Pavarini, M. (1981) *The Prison and the Factory*. Totowa: Barnes and Noble.
- Mill, J. (1921) *Principles of Political Economy*. London.
- Moore, S. (1978) *Law as Process: An Anthropological Approach*. London: Routledge and Kegan Paul.
- Nader, L. (Ed.) (1969) *Law and Culture and Society*. Chicago: Aldine.
- Nonet, P. & Selznick, P. (1978) *Law and Society in Transition. Toward Responsive Law*. New York: Harper and Row.
- Offe, C. (1984) *Contradictions of the Welfare State*. London: Hutchinson.
- Parsons, T. (1959) The social structure of the family. In *The Family: Its Function and Destiny* (Anshen, R., Ed.) New York: Harper Row.
- Pashukanis, E. (1978) *Law and Marxism. A General Theory*. London: Ink Links.
- Poulantzas, N. (1978a) *Political Power and Social Classes*. London: Verso Editions.
- Poulantzas, N. (1978b) *State Power and Socialism*. London: NLB.
- Ramsay, H. (1977) Cycles of control: worker participation in sociological and historical perspective. *Sociology*, 11, 481.
- Renner, K. (1976) *The Institutions of Private Law and their Social Functions*. London: Routledge and Kegan Paul.
- Rojas, F. (1984) *Nuevos Movimientos Populares. Nuevas Estrategias Estatales*. Centro de Investigacion y Education Popular (Bogotá), *Documento Ocasional*, 18.
- Rogers, B. (1981) *The Domestication of Women. Discrimination in Developing Countries*. London: Tavistock.
- Rusche, G. & Kirchheimer, O. (1968) *Punishment and Social Structure*. New York: Russell and Russell.
- Sabel, C. (1982) *Work and Politics*. Cambridge: Cambridge University Press.
- Saffioti, H. (1977) Women, mode of production, and social formations. *Latin American Perspectives*, 12, 13, 27.
- Samuels, W. (1979) The state law and economic organization. In *Research in Law and Sociology. A Research Annual* (Spitzer, S., Ed.) Vol. 2, 65.
- Santos, B. (1977) The law of the oppressed: the construction and reproduction of legality in Pasargada. *Law and Society Review*, 12, 5.
- Santos, B. (1980) Law and community: the changing nature of state power in late capitalism. *International Journal of Sociology of Law*, 8, 379.
- Santos, B. (1985) Estado e sociedade na semiperiferia do sistema mundial: O case

- Portugues. *Analise Social*, (in press).
- Selznick, P. (1969) *Law, Society and Industrial Justice*. New York: Russell Sage Foundation.
- Smith, A. (1937) *An Inquiry Into the Nature and Causes of the Wealth of Nations*. New York: Modern Library.
- Stein, L. von (1888) *Handbuch der Verwaltungslehre*. Stuttgart: J.C. Cotta.
- Swart, K. (1949) *Sale of Offices in the Seventeenth Century*. The Hague: Nijhoff.
- Taylor, A. (1911) *Principles of Scientific Management*. New York: Harper.
- Taylor, A. (1972) *Laissez Faire and State Intervention in Nineteenth Century Britain*. London: MacMillan.
- Teubner, G. (1983) Substantive and reflexive elements in modern law. *Law and Society Review*, 17, 239.
- Thompson, E.P. (1975) *Whigs and Hunters*. New York: Pantheon.
- Trubek, D. (1983) Where the action is: critical legal studies and empiricism. *Disputes Processing Research Program Working Paper 10*, Wisconsin.
- Unger, R. (1976) *Law in Modern Society*. New York: Free Press.
- Vico, G. (1953) *Opere*. Milan: Riccardi.
- Viner, J. (1927) Adam Smith and laissez faire. *The Journal of Political Economy*, XXXV, 198.
- Voigt, R. (1980) *Verrechtlichung Analysen zu Funktion und Wirkung von Parlamentarisierung, Bürokratisierung und Justizialisierung sozialer politischer und ökonomischer Prozesse*. Königstein: Athenäum.
- Wallerstein, I. (1980) The withering away of the states. *International Journal of Sociology of Law*, 369.
- Weber, M. (1948) *From Max Weber. Essays in Sociology*. London: Routledge and Kegan Paul.
- Wilson, E. (1977) *Women and the Welfare State*. London: Tavistock.
- Women and National Development (1977). *Signs*, special issue, 3.
- Wood, E. (1981) The separation of the economic and the political in capitalism. *New Left Review*, 127, 66.
- Wright, E. (1979) *Class Crisis and the State*. London: Verso Editions.