

## **PART ONE**

---

# **TOWARD A PARADIGMATIC TRANSITION IN SCIENCE AND LAW**

### **INTRODUCTION**

Modernity and capitalism are two different and autonomous historical processes. The sociocultural paradigm of modernity emerged between the sixteenth and the end of the eighteenth century, before industrial capitalism became dominant in today's core countries. From then on, the two historical processes converged and interpenetrated each other, but in spite of that, the conditions and the dynamics of their development remained separate and relatively autonomous.<sup>1</sup> Modernity did not presuppose capitalism as its own mode of production. Indeed, conceived as a mode of production, Marxist socialism is as much a part of modernity as capitalism. Conversely, the latter, far from presupposing the sociocultural premises of modernity for its development, has coexisted with, and indeed thrived in conditions that, viewed from the perspective of the paradigm of modernity, would definitely be considered premodern or even antimodern.

It is my contention that we are living in a period of paradigmatic transition and, consequently, that the sociocultural paradigm of modernity, which was formulated before capitalism became dominant as an industrial mode of production, will disappear before capitalism ceases to be dominant. This disappearance is complex because it is partly a process of supersession and partly a process of obsolescence. It is supersession to the extent that modernity has fulfilled some of its promises, in some cases even in excess. It is obsolescence to the extent that modernity is no longer capable of fulfilling some of its other promises. Both the excess and the deficit in the fulfillment of historical promises account for our present predicament, which appears, on the surface, as a period of crisis but which, at a deeper level, is a period of paradigmatic transition. Since all transitions are both half invisible and half blind, it is impossible to name our current situation accurately. This is probably why the inadequate designation "postmodern" has become so popular. But for the same reason, this term is authentic in its inadequacy. This paradigmatic transformation will be of consequence for the devel-

opment of capitalism, but its specific impact cannot be predetermined. The efficacy of the postmodern transition consists in constructing a new broad horizon of alternative possible futures, an horizon at least as new and as broad as the one that modernity once constructed and then destroyed or allowed to be destroyed.

The paradigm of modernity is very rich and complex, as capable of immense variability as it is prone to contradictory developments. It is based on two pillars, the pillar of regulation and the pillar of emancipation, each one of them constituted of three principles or logics. The pillar of regulation is constituted by the principle of the state, formulated most prominently by Hobbes, the principle of the market, developed by Locke and Adam Smith in particular, and the principle of the community, which presides over Rousseau's social and political theory. The principle of the state consists in the vertical political obligation between citizens and the state. The principle of the market consists in the horizontal self-interested or antagonistic political obligation among market partners. The principle of the community consists in the horizontal, solidary, political obligation among community members and associations. The pillar of emancipation is constituted by three logics of rationality as identified by Weber: the aesthetic-expressive rationality of the arts and literature, the cognitive-instrumental rationality of science and technology, the moral-practical rationality of ethics and the rule of law.

The paradigm of modernity is an ambitious and revolutionary project, but it is also internally contradictory. On the one hand, the breadth of its claims opens up a wide horizon for social and cultural innovation; on the other, the complexity of its constituent elements make the overfulfillment of some promises and the underfulfillment of some others hardly avoidable. Such excesses and deficits are both inscribed in the matrix of the paradigm. The paradigm of modernity aims at a harmonious and reciprocal development of both the pillar of regulation and the pillar of emancipation, as well as at the undistorted translation of such development into the full rationalization of collective and personal life. This double binding—of one pillar to the other and of both to social praxis—will ensure the harmonization of potentially incompatible social values, such as justice and autonomy, solidarity and identity, equality and freedom.

With the privilege of hindsight, it is easy to predict that the hubris of such an overreaching aim carries in itself the seeds of frustration: unfulfilled promises and irredeemable deficits. Each pillar, based as it is on abstract principles, tends to maximize its potential, be it the maximization of regulation or the maximization of emancipation, thereby making problematic the success of any strategy of pragmatic compromises between them. Similarly, each pillar consists of independent and functionally differentiated principles, each of which tends to develop a maximalist vocation, be it, on the side of regulation, the maximization of the state, the maximization of the market, or the maximization of the community; or, on the side of emancipation, aestheticization, scientificization, or juridification of the social praxis.

The occurrence of excesses and deficits was perceived as possible and likely from the beginning, but both the excesses and the deficits were conceived of in a reconstructive manner. The excesses were viewed as contingent deviations, the deficits as temporary shortcomings, and both as problems to be solved through a better and broader use of the ever-expanding material, intellectual, and institu-

tional resources of modernity. This reconstructive management of excesses and deficits was gradually entrusted to science and, in a subordinate but equally central position, to law. Boosted by the fast conversion of science into a force of production, the scientific criteria of efficacy and efficiency soon became hegemonic, and gradually colonized the rational criteria of the other emancipatory logics.

At the beginning of the nineteenth century, modern science was already converted into a supreme moral instance, itself beyond good and evil. According to Saint-Simon, the moral crisis that had plagued Europe since the Reformation, and the consequent separation between secular and religious power, could only be solved by a new religion; that religion was science. In a similar vein, politics was converted into a provisional social field of less-than-optimal solutions for problems that could only be adequately solved once transformed into scientific, technical problems: the well-known Saint-Simonian transformation of the administration of people into an administration of things. On the other hand, both liberal microethics—a principle of moral responsibility referred exclusively to the individual—and legal formalism—a broad intellectual legal constellation that extends from the German pandect to the codification movement (whose most outstanding landmark is the Napoleonic Code of 1804), and to Kelsen's pure theory of law<sup>2</sup>—are valued for their adequacy to the requirements of a scientific management of society. As to the aesthetic-expressive rationality, the avant-garde movements of the turn of the century (Futurism, Surrealism, Dadaism, Russian constructivism, proletcult, and so forth), are eloquent expressions of the colonization of art by the idea of the scientific and technological emancipation of society.<sup>3</sup>

The reconstructive management of the excesses and deficits of modernity could not, however, be achieved by science alone. It required the subordinate but central participation of modern law. Such participation was subordinate because, as I have just mentioned, the moral-practical rationality of the law, in order to be effective, had to surrender to or become isomorphic with the cognitive-instrumental rationality of science. But it was also a central participation because, in the short run at least, the scientific management of society had to be guaranteed against eventual opposition by means of normative integration and coercion provided by law. In other words, the scientific depoliticization of social life would be achieved through the juridical depoliticization of social conflict and social rebellion.

This cooperative relationship and circulation of meaning between science and law, under the aegis of science, is one of the basic features of modernity. In my view, therefore, Foucault overstates the mutual incompatibility of juridical power and disciplinary (human sciences) power and overlooks the deep interpenetrations between them. 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—what he calls the disciplinary power. The latter is the dominant form of power in our time and is generated by the scientific knowledge produced in the human sciences as it is applied by professions in institutions such as schools, hospitals, barracks, prisons, families and factories.<sup>4</sup>

Foucault characterizes the two forms of social power in the following way. 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 organized and exercised from the top down; it distinguishes between legitimate and illegitimate power exercise; it applies to autonomous preconstituted recipients or targets; it is based on a discourse of right, obedience and norm. In contrast, disciplinary power has no center; it is exercised throughout society; it is fragmented and capillary; it is exercised from the bottom up, constituting its own targets as vehicles of its exercise; it is based on a scientific discourse of normalization and standardization. Although Foucault is rather confusing about the relationship between these two forms of power, it is clear that, according to him, they are incompatible, and that the scientific, normalizing power of the disciplines has become the most pervasive form of power in our society.<sup>5</sup>

This conception has a long tradition in Western thought, and indeed can be traced back to Aristotle's distinction between law as a normative command and law as a scientific description of regularities among phenomena. But in my view this distinction undergoes qualitative changes within the paradigm of modernity, and the changes occur in an opposite direction to the one indicated by Foucault. Foucault is right in stressing the predominance of disciplinary power, which, in my analytical framework, corresponds to the centrality of science in the reconstructive management of the excesses and deficits of modernity. But he is wrong in assuming that disciplinary power and juridical power are incompatible. On the contrary, the autonomy of law and science vis-à-vis each other is obtained by the isomorphic transformation of the former into an alter ego of the latter. This explains why it becomes so easy to move from science to law and vice versa within the same institutions. The defendant, depending on the "legal-scientific" verdict on his or her mental health, can be referred by the very same institution, the court, either to the medical field or to the penitentiary-judicial field. Actually, women have often been "located" in either or both fields at once—as mad women in the attic or as prostitutes—under the same sexist and classist presuppositions of both science and law. Such isomorphism and the circulation of meaning it allows give rise to social processes that function as symbolic melting pots, configurations of meaning in which elements of both science and law are present in complex combinations. One such symbolic melting pot is the social process by which doctors have been able to decide questions of life and death of their patients. More generally, sociologists of the professions have shown how professional privileges derived from scientific knowledge legitimate decisions in which scientific judgments glide into normative judgments. For instance, in his analysis of discretionary decisions, Joel Handler has shown how the "domination arising out of the exigencies of the bureaucratic task finds a comfortable home in the ideologies of the working professions."<sup>6</sup>

In my view, both the presentation of normative claims as scientific claims and the presentation of scientific claims as normative claims are endemic in the paradigm of modernity. And indeed the idea that law as norm should also be law as science has a strong tradition in modern social thought, a tradition which goes back at least to Giambattista Vico. In 1725, Vico wrote in *Scienza Nuova*, contrasting philosophy and law: "Philosophy considers man as he should be and so can be of service to but very few, those who wish to live in the Republic of Plato and do not wish to fall back into the dregs of Romulus. Legislation considers man as he is in

order to turn him to good uses in human society."<sup>7</sup> The same ideal 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 behavior, is paramount in the eighteenth and nineteenth-century social thought, from Montesquieu to Saint-Simon, from Bentham to Comte, from Beccaria to Lombroso.

If, then, as I will maintain in the following, there is a final crisis of the reconstructive management of the excesses and deficits of modernity, such a crisis will show most clearly in modern science itself, and it will also be here that the post-modern transition will be most intelligibly identified or guessed at. Hence the need to devote more detailed attention to general epistemology. This will be done in Chapter One. The results of the epistemological inquiry will be of consequence for the conceptualization both of the crisis of modern law and of the possible paradigmatic transition in the legal field. To be sure, given the autonomy of law, the general epistemological conditions of modern science will not account exhaustively for the critical condition of modern law, and the paradigmatic transition will here be much less visible than in the field of science. In Chapter Two, some of these issues will be only glimpsed at, since it is the purpose of the book as a whole to identify some of the constitutive elements of a postmodern understanding of law.

As the discussion unfolds, it will become clear that, in the same way that the version of modernity that came to prevail was one among many possible alternatives, there are also many different ways of conceptualizing the final crisis of modernity and the postmodern transition. The conceptualization adopted here could be designated as oppositional postmodernity, a conceptualization of our current sociocultural condition which, while assuming the exhaustion of the emancipatory energies of modernity, does not celebrate this fact but rather seeks to oppose it with a new map of emancipatory practices.