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THE POST-MODERN TRANSITION:

LAW AND POLITICS

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Introduction

The historians of the future will probably describe the twentieth century as an unhappy century. Reared by its androgynous parent, the nineteenth century, to become a wonder child, it soon revealed itself as a fragile and sickly child. When it was fourteen years old it fell seriously ill, of a disease which, like the tuberculosis or the syphilis of the period, took a long time to be treated and indeed was never completely cured. So much so that when it was thirty-nine years of age it relapsed into an even more serious illness that was to prevent it from enjoying life with the full energy which usually comes with the middle age. Though considered clinically cured six years later it has since then been always in poor health, and many fear a third serious relapse, which this time will most probably be fatal.

Much more patiently than Saint-Simon, (1977:212), who already in 1819 thought that it was getting too late for the nineteenth century to throw away the eighteenth century heritage and assume its own character, we have been waiting for the meaning of the twentieth century. In a book precisely titled The Meaning of the Twentieth Century, Kenneth Boulding was content to characterize our century rather vaguely as the middle period of the second great transition in the history of humankind (Boulding, 1964:1). More recently Ernest Gellner has regretted that the twentieth century version of history "has not yet been properly formulated philosophically", (1986: 93). And I myself wrote that the twentieth century ran the risk of not beginning at all, that is, of not beginning

before ending (Santos, 1987a:6). Similar concerns have been hovering over the various conferences on the appraisal of the century organized everywhere in recent years, with the result that many of such appraisals have in fact been appraisals of the nineteenth century and not of the twentieth century as they purport to be.

However, in more recent years, there have been signs that this biography of the century may be incomplete and accordingly that the assessments and obituaries have been premature. It seems indeed that our century is now prepared to enjoy a full active life in its senior years. But what is the real meaning of such signs? Do they indicate realistic purposes and a sensible assessing of the strengths and weaknesses to accomplish them in such a short period of time, or are they rather an outburst of senile infantilism? Do they express a timely sense of urgency, or rather the self-defeating feeling of "belatedness" that, according to Harold Bloom (1973;1988), plagues our culture and particularly contemporary poetry? Finally, even assuming that its projects and purposes are realistic and worth pursuing, will our century have time to pursue and fulfil them? Or, to ask a more honest and straightforward question: will we have time to become the children of the twentieth century?

Though one of the most ambiguous feats of our century is to have transformed the sense of time into the sense of lack of time, I am inclined to give an affirmative answer and predict that the years ahead will fully confirm my positive interpretation of our current predicament. That is what I will try to demonstrate in the following with a certain dose of tragic optimism taken from Heidegger.

This paper will consist of three main parts: in the first

part I will present an interpretative analysis of the historical trajectory (or trajectories) of the paradigm of modernity and show the conditions that have contributed to its exhaustion and that point to the emergence of a new paradigm. In the second part I will present the profile of the emergent paradigm in broad lines by contrasting modern and postmodern critical theory. In the third part I will suggest some specific applications of the new paradigm in the field of law and politics. Each part starts with the enunciation of a main thesis followed by a justification.

I

THE RISE AND DECLINE OF THE PARADIGM OF MODERNITY IN ADVANCED CAPITALIST SOCIETIES

The main thesis of this part runs as follows: the socio-cultural paradigm of modernity emerged before the capitalist mode of production became dominant and will disappear before the latter ceases to be dominant. This disappearance is complex because it is in part a process of supercession and in part 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 name is authentic in its inadequacy.

In the following I will offer the justification for this thesis. The paradigm of modernity is very rich and complex, as capable of immense variability as prone to contradictory developments. It is based on two pillars, the pillar of regulation and the pillar of emancipation, each one of them constituted by 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 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, and 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 constitutive elements make the over-fulfillment of some promises and the under-fulfillment of some others hardly avoidable. Such excess and such deficit are both inscribed in the matrix of the paradigm. The paradigm of modernity aims at an 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 everyday 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, of justice and autonomy, of solidarity and identity, of 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 potentials, be it the maximization of regulation or the maximization of emancipation, thereby making problematic the success of any strategy of pragmatic compromises between them. Moreover, each pillar consists of independent and functionally differentiated principles, each of which tends also 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; and, on the side of emancipation, aestheticization, scientificization or juridification of social praxis.

The paradigm of modernity emerged as a socio-cultural project between the sixteenth and the end of the eighteenth century. Only at the end of the eighteenth century does the test of its implementation truly begin, and that moment coincides with the emergence of capitalism as the dominant mode of production in today's advanced capitalist societies. From then on, the paradigm of modernity is tied up to the development of capitalism. Following the German tradition originating in Hilferding (1981), developed by Offe (1985) and others (Winckler, 1974), and now also accepted by

English social scientists (Lash and Urry, 1987), I distinguish three periods in this development.[1] The first period, the period of liberal capitalism, covers the whole nineteenth century, though the last three decades have a transitional character; the second period, the period of organized capitalism, begins at the end of the century and reaches full development in the interwar period and in the two decades after the war; finally, the third period, the period of disorganized capitalism, begins at the end of the sixties and is still with us.

It is not my purpose here to give a full description of each period, but rather to mention those characteristics that will enable me to trace the trajectory of the paradigm of modernity throughout the three periods. My argument is that the first period already showed that the socio-cultural project of modernity was too ambitious and internally contradictory. The second period fulfilled some of the promises of modernity (sometimes even in excess) but failed to fulfil others, while trying, by a politics of hegemony, to minimize the extent of its failures and to make them socially and symbolically invisible. The third period represents the consciousness of a threefold predicament: firstly, whatever modernity has accomplished is not irreversible and, to the extent that it is not excessive, it must be defended, but it can only be successfully defended in postmodern terms; secondly, the as yet unfulfilled promises will remain so as long as the paradigm of modernity dominates; finally, this deficit, besides being irreversible, is much greater than the second period was ready to admit.

I will, thus, try to show that, as we move from the first to the second and third period, the paradigm of modernity, as if

animated by a laser beam effect, narrows down the scope of its accomplishments at the same time that it intensifies them. Such a process of concentration/exclusion is adequately symbolized in the historical and semantic sequence of three concepts, all of them rooted in the modern: modernity, modernism, modernization.[2]

The first period

What is fascinating about the nineteenth century is that in it the internal contradictions of the project of modernity explode with great violence. I mean, the contradictions between solidarity and identity, between justice and autonomy, between equality and freedom. Since these contradictions explode without mediations, both the tendencies towards the narrowing down of the project's scope and the underlying aspiration of globality - that is to say, the ambition to transform social reality radically - are there clearly to be seen in each one of the principles or logics of both the pillar of regulation and the pillar of emancipation. As to the pillar of regulation, the idea of a balanced and combined development of the principles of the State, of the market and of the community - which contrary to commonly held views was central to the political philosophy of the eighteenth century of Adam Smith and the Scottish Enlightenment (Viner, 1927; Billet, 1975; Santos 1985; 302 ff) - breaks down, and in the ideological vacuum thereby produced three phenomena occur. Firstly, the unprecedented development of the principle of the market as shown in the first wave of industrialization, in the expansion of commercial cities, and in the rise of new industrial cities. Secondly, the almost total atrophy of the principle of the community. The community, which for Rousseau was a concrete community of people in as much as

popular sovereignty belonged in real terms to the people, is reduced to a dualist structure composed of two equally abstract elements: civil society, conceived as a competitive aggregation of particular interests, and the individual, conceived as a formally equal and free citizen. The third phenomenon is the ambiguous development of the principle of the State under the impact of the first two phenomena, as well as in the face of the contradictory claims of the laissez-faire, which, as Dicey well noted, involved both the idea of the minimal State and the idea of the maximal State (Dicey, 1948: 306).

The pillar of emancipation mirrors with even greater clarity the convulsive tensions boiling inside the paradigm of modernity. The narrowing down tendency, that is, the tendency towards exclusion and concentration, occurs in the pillar of emancipation through the process of functional differentiation so well analysed by Weber. As this process unfolds the articulation among the three logics becomes more complex and their interpenetration in the Lebenswelt less probable. This may be observed, at the level of the aesthetic-expressive rationality, in the increasing elitism of the romantic movement; at the level of the cognitive-instrumental rationality, in the spectacular progress of the sciences and in their gradual conversion into a force of production among others; and, finally, at the level of the moral-practical rationality, in the liberal micro-ethics (that is, moral responsibility referred exclusively to the individual), in the legal formalism of German pandectistic boosted by the codification movement of which the Napoleonic Code of 1804 remains the outmost landmark.

But, in my view, the pillar of emancipation is also in this

period the organizational matrix of social and cultural phenomena which, though in marginal or deviant forms, bring to life the aspiration of a global and radical transformation of the social praxis inscribed in the paradigm of modernity. I select three such phenomena, one from the realm of moral-practical rationality and two from the realm of aesthetic-expressive rationality. The first one consists of the intellectual and social construction of the radical socialist projects and movements both of the so-called utopian socialism and of the so-called scientific socialism. All these projects and movements point toward a full and harmonic realization in this world (even if this world is the phalanstery) of the ideals of equality and freedom, of solidarity and subjectivity constitutive of modernity. The other two phenomena are romantic idealism and the great realist novel. I am not interested here in contrasting, as Gouldner does (1970: 115), classical and romantic thought, but simply in showing that though in an elitist and sometimes consciously regressive form, romantic idealism represents the utopian vision of the full achievement of subjectivity. In longing for the totality, for the origins and for the vernacular, against the atomism, the alienation and instrumentalism of modern life, and by placing aesthetics and poetry at the centre of social integration, romantic idealism epitomizes the denunciation of and the resistance to the tendency toward exclusion and concentration in the social implementation of the paradigm of modernity.[3] On the other hand, the great realist novel bears witness to a class - the bourgeoisie - that fails to seize the historical opportunity of becoming a universal class and bringing about a radical social transformation,[4] the same opportunity that

Hegel had envisaged for the bureaucracy and Marx for the working class.

In sum, the period of liberal capitalism sets in motion the social process of exclusion and concentration but, as the contradictions of the paradigm explode without mediation, it is still possible in this period to formulate and activate, even if in a deviant or marginal form, the radical and globalizing vocation of the paradigm, thereby refusing to accept the irreversibility of the deficit in the fulfillment of the promises.

The second period

The period of organized capitalism is truly a positive age in the Comtean sense. As a reasonable and mature adult should do according to Comte, it starts by distinguishing in the paradigm of modernity between those promises that can be fulfilled in a dynamic capitalist society and those that cannot. It then concentrates on the former and tries, through the hegemonic means of socialization and cultural inculcation, to eliminate the latter from the symbolic universe of social and cultural praxis. In other words, this period begins by acknowledging the idea that the deficit of unfulfilled promises is both inevitable and irreversible and then goes on to eliminate the idea of deficit itself. This ideological transformation is translated in the transition from the broad concept of modernity to the narrower concept of modernism.§ The process of exclusion and concentration can be traced both in the pillar of regulation and in the pillar of emancipation. As to regulation, the principle of the market continues the spectacular expansion initiated in

the first period, taking on new economic and institutional forms: the concentration and centralization of industrial, banking and commercial capital; the increasing regulation of the markets; the proliferation of cartels; and the separation of legal ownership from economic control. As to the principle of community, the capitalist development and the expansion of the working class it entails, coupled with the extension of the suffrage, produces a certain rematerialization of the community exemplified in the emergence of class practices and their translation into class politics. Trade unions and working class parties enter a political space which until then was exclusively occupied by oligarchic parties and bourgeois organizations. The principle of the State suffers the impact of these changes and at the same time becomes an autonomous and active factor in their intensification and orientation. The State increases its ties both with the market through ever growing interpenetration between the State bureaucracies and the large monopolies and with the community through the political incorporation of large sectors of the working class, increasing State intervention in the forms of collective consumption, in health and education, in space management and social legislation; in other words, through the development of the Welfare State.

These transformations amount to a profound redefinition of the paradigm of modernity whereby the degrees or types of solidarity, justice and equality are chosen in view of their compatibility with the degrees and types of autonomy, identity and freedom that are deemed necessary in a capitalist society and vice versa. The reformulations lead to the emergence of two "realistic" promises which will be fulfilled to a great extent

during this period: the promise of a fairer distribution of material resources and the promise of a greater democratization of the political system. The fulfillment of the first promise is made compatible with the continuation of a class society, while the fulfillment of the second promise is made compatible with the continuation of a bourgeois class politics. Through a politics of hegemony it is then possible to convert this particular form of compatibility, which is in fact one among many others, into the only legitimate one, even, perhaps, the only imaginable one. Such conversion surfaces both in the gradual but steady marginalization of the communist parties and in the social-democratic transformation of the socialist parties.

In this second period, the pillar of emancipation undergoes transformations that are as profound as those described for the pillar of regulation and indeed convergent with them. These transformations are reflected in the transition from the culture of modernity to cultural modernism. By cultural modernism I mean a new aesthetic-expressive rationality that extends in this period to both the moral-practical rationality and the cognitive-instrumental rationality. Modernism represents the climax of the process of concentration and exclusion which in the realm of aesthetic-expressive rationality takes the form of the radical autonomy of art (art for art's sake), the antagonistic opposition between high culture and popular culture and the militant suppression of the social context well symbolised by the architecture of the megapolis. Modernism is, thus, the social and cultural construction of "a great divide", in Andreas Huyssen's terms, and he is right in considering the "anxiety of contamination" as the most revealing characteristic

of modernism, the anxiety of contamination by politics, morality, popular and mass culture (Huyssen, 1986: VII). In my view, the same anxiety of contamination can be traced in the transformations occurring in the other two logics of rationality. As far as the moral-practical rationality goes, such anxiety of contamination is present in the theories of political representation which, by favouring vertical arrangements over horizontal arrangements, lead to the emasculation of the people.[5] The same anxiety of contamination is also present in the development of a formalist legal science opposed to any form of non-professional legal knowledge, which finds its extreme and most sophisticated expression in Kelsen's pure theory of law (Kelsen, 1967). In the realm of cognitive-instrumental rationality the anxiety of contamination is present in the emergence of different positivist epistemologies, in the Mertonian paradigm of the scientific ethos (Merton, 1968: 604) and, above all, in the Bachelardian epistemological rupture between scientific knowledge and common sense (Bachelard, 1971; 1972).

The intensity of such transformations and accomplishments are the other side of the deficit of totality in which they are based and which they successfully manage to forget or suppress through their dynamism and hubris. The triumphant, shiny representation of the knowable and of the rational goes hand in hand with the dictatorship of the demarcations, the ruthless policing of the borders and the expeditious liquidation of transgressors and transgressions. In this process, the pillar of emancipation becomes more and more similar to the pillar of regulation; indeed, the pillar of emancipation becomes the mental side of the pillar of regulation, a complex process that is rendered most eloquently in Gramsci's concept of hegemony.

My argument in the second part of this paper will perhaps be better understood if I remind us at this point that the process of concentration and exclusion which characterizes the trajectory of the paradigm of modernity in the period of organized capitalism had a very tumultuous start, rich in incidents that threatened its full development. The Russian revolution and the historical avant-gardes of the twenties are two cases in point. The Russian revolution was an attempt to give historical credibility to a new and radically different form of compatibility between degrees and types of solidarity, justice and equality on one side, and degrees and types of identity, autonomy and freedom on the other. The attempt failed, both because of the failure of the revolutions in other capitalist countries (most notably the German revolution of 1918) and because of the stalinist nightmare.

As to the avant-garde movements - futurism, surrealism, dadaism, Russian constructivism, proletcult, etc. - their most striking feature is that all of them attempt to reconcile art and life against the modernist canon in very different ways. It is well known how these movements were either liquidated by fascism or stalinism or were gradually absorbed in the modernist canon. But their cultural significance cannot be minimized, as Habermas does when he conceives surrealism as a mere moment of dissublimation of modern art and, as such, bound to fail (1973:118 ff). Peter Bürger (1984), thus, right in emphasizing the cultural meaning of the avant-garde movements as the historical moment in which, for the first time, the artists understand how the autonomy and the social status of art are engineered and function in capitalist societies.[6] In other words, their historical meaning lies in

their early denunciation of the process of concentration and exclusion, the full consequences of which we are suffering now.

The third period

The period of disorganized capitalism is the most difficult to analyse, if for no other reason because being the period we are living in, the owl of Minerva is not privileged to fly at dusk, the only safe flight time for knowledge, according to Hegel.

Concerning the pillar of regulation, the most decisive transformations seem to be occurring in and through the principle of the market, and so much so that this principle seems to become truly hegemonic in the sense of being able to generate a surplus of meaning that spills over to the principle of the State and the principle of the community and seeks to colonize them. The dramatic growth of the world markets coupled with the emergence of worldwide systems of production and economic agents (the multinational corporations) undermine the capacity of the State to regulate the market at the national level. The industrialization of the third world, the expansion of international subcontracting and franchising, and the ruralization of industry have together contributed to destroy the spatial configuration of production and reproduction in the central countries: the traditional industrial regions are decharacterized and deindustrialized and in their place re-emerges, as a strategic productive factor, the locality, the local endogenous dynamics often based on complex mixes of agriculture and industry, of family production and industrial production. The extensive expansion of the market runs parallel

to its intensive expansion as witnessed in the growing differentiation of products and the consequent increase of choices and particularization of tastes and also in the ever deeper commodification of the information from which result virtually infinite opportunities for the expanded reproduction of capital.

The impact of these changes on the principle of the community is wide ranging. As the wage relation becomes more flexible and precarious the corporatist mechanisms developed in the second period (labour laws, industrial courts, collective bargaining) lose steam, and the trade unions, whose membership declines, lose bargaining power. The increased internal differentiation of the industrial working class and the dramatic expansion of the service class have contributed to decharacterize class practices and to prevent their easy translation into class politics. As a result traditional working class parties smoothen the ideological content of their programs and turn into "catch all" parties.

As both a cause and an effect of these transformations the principle of the State is equally undergoing sweeping changes. In view of the transnationalization of the economy the State seems sometimes to have become an almost obsolete unit of analysis and to have lost the capacity and the political will to regulate both social production and social reproduction. As it becomes externally weaker and internally less efficient the State becomes paradoxically more authoritarian, acting through a myriad of ill integrated bureaucracies each one exerting its own micro-despotism vis-á-vis increasingly powerless politically incompetent citizens.

The trajectory of the three logics of modern emancipation in the period of disorganized capitalism is best characterized by the social and cultural construction of both a sense of irreparable deficits and a sense of uncontrollable excesses which together lead to a syndrome of exhaustion and of global blockage. This is most notably the case of the cognitive-instrumental rationality of science and technology. The involvement of science in the military-industrial complex, the ecological catastrophe, the nuclear threat, the destruction of the ozone layer, the emergence of biotechnology and genetic engineering - all these phenomena point to the idea that the promise of scientific progress inscribed in the paradigm of modernity has been fulfilled in excess and that this excessive fulfillment carries with it an unsettling deficit of meaning. As Rousseau predicted with maddening forethought we have let ourselves be enslaved by the tools devised by Bacon and Descartes for our liberation (Rousseau, 1971: 52).

In the realm of aesthetic-expressive rationality the deficit of meaning assumes the form of irrelevance and domestication. Modern art seems powerless to resist the commercialization of its uniqueness or the distraction with which it is contemplated. No matter how honourable Adorno's reasons (Adorno, 1981), to take modern art away from a levelling world into the high or into the deep, the task seems today quite implausible, if not absurd: on the one hand, the elevation to the high is impossible in an age in which the infinites proliferate, even if they are bad infinites in the hegelian sense, all of them standing on their tip-toes forcing the artistic difference to make no difference; on the other hand, digging into the deep seems equally implausible, a sysiphic task in the

midst of profound superficialities endlessly juxtaposed, rhizomatic networks of meaning in Deleuze's sense. The extremely acute awareness of this impasse and the early denunciation of exhaustion and global blockage in this realm of emancipatory logic explain why the first face of the emergent paradigm of postmodernity has been an aesthetic-expressive one, as I will show below.

Finally, in the realm of moral-practical rationality, the sense of exhaustion and of global blockage is expressed in two major and interconnected ways.[7] In the first period, revolution and social reform occupied equally strong and rival positions in the symbolic universes of those groups interested in social transformation and emancipation. As the second period unfolded in the advanced capitalist societies, the social reform gained an hegemonic position and the concept of revolution was even swept under the carpet of social and political thought. Social reform meant basically peaceful and piecemeal social transformation by means of abstract and universal laws issued by the State. In the third period the merits of this solution are being questioned. The juridification or overlegalization of social reality produced standardized social relations, that is to say, mass produced unidimensional social habituses, and the social empowerment of the popular classes it made possible was achieved by means of transforming autonomous citizens into clients or even victims of increasingly authoritarian State bureaucracies.[8]

Related to this there is a second sign of exhaustion and global blockage which presents itself as an ethical impasse. Both liberal ethics and legal reformism are based on a micro-ethics, on the attribution of moral responsibility to

individuals and for individuals' actions. This paradigm may have worked more or less adequately in the first and in part of the second period, but today, in the face of the global danger of nuclear annihilation and ecological catastrophe, a situation is created for the first time in history in which, to quote Karl-Otto Apel, "in face of a common danger, men and women are called upon to assume a common moral responsibility" (1984:250). The impasse lies in the fact that while the micro-ethics is definitely inadequate to address this new situation, it has not yet been replaced by a macro-ethics capable "of organizing the responsibility of humankind for the consequences (and side-effects) of their collective actions on a planetary scale" (Apel, 1984:250).

The exhaustion and global blockage of the logics of emancipation and the incapacity of any of the principles of regulation to secure a stable compatibility among contradictory claims and promises create a social and cultural context in which deregulation, contractualization and conventionality within each sector of social life coexist, as Offe has recently emphasized, with a high degree of rigidity and inflexibility at the global level (Offe, 1987). Everything seems possible in art and science, in religion and ethics but, on the other hand, nothing new seems to be possible at the level of the society as a whole.[9] The advanced capitalist societies seem condemned to suffer the excessive fulfillment of some of the promises of modernity and to forget or repress the deficit of unfulfilled promises.

As Max Weber showed better than anyone else the antinomies of the project of modernity in the first and second periods of

capitalism, so Habermas has shown the antinomies of the third period. As a matter of fact, we have to agree with him that the project of modernity is an incomplete project (Habermas, 1985). But while Habermas believes that this project can be completed in sub-paradigmatic terms, that is, by resorting to the cultural, social and political tools developed by modernity, I submit that whatever is there to be completed can only be completed in terms and with the tools of a new emergent paradigm.

II

TOPOI FOR THE EMERGENT PARADIGM

The main thesis of this part is as follows: the modern idea of a global rationality of social and personal life ended up disintegrating into a multitude of mini-rationalities at the service of a global, uncontrollable and unaccounted for irrationality. It is possible to re-invent the mini-rationalities in such a way that they cease to be parts of a totality and become rather totalities present in many parts. This is the task for postmodern critical theory.

In the following I will provide the justification for this thesis. The interpretive description of the third period, the period of disorganized capitalism, is only part of the picture. As I have mentioned earlier, in this period there have been accumulating the signs of the emergence of a new paradigm which, for the reasons then indicated, can be designated as the paradigm of postmodernity. As to the logics of emancipation, since the late sixties and mid-seventies, and particularly in the United

States, the aesthetic-expressive rationality of the arts and literature has undertaken a radical critique of the modernist canon, that is, the critique of modernization, standardization, and functionalism; a critique of the international style, of abstract expressionism, serial music and classic literary modernism. Such a critique, as Huyssen rightly points out, is already present in the beat generation of the mid-50's (Huyssen, 1986:186). The exhaustion of the modernist canon once perceived, the new beginning is sought, in architecture as well as in painting, theatre, film and music. The main feature of this new search is the desire to cross the borders between high culture and low culture, to mix the codes and reclaim the social context and the local vernacular, to value the Gemeinschaft over the Gesellschaft, in other words, to revive the adversarial, critical vocation of art, not by negating the world, as Adorno had maintained, but on the contrary by affirming the world and by diving deeply into reality.

In the field of the cognitive-instrumental rationality of the sciences and technology, the epistemological crisis of modern science dates back to the beginning of the century and has been deepening and widening ever since. The most important moments in this process are: Einstein's theory of relativity (Reichenbach, 1970), the uncertainty principle of Heisenberg, the complementarity principle of Bohr (Heisenberg, 1971), the non-completion theorem of Gödel (Ladrière, 1967:312; Jones, 1982:158; Parain-Vial, 1983:52; Briggs and Peat, 1985:22), the catastrophe theory of Thom (1985); and, more recently, the theory of dissipative structures of Prigogine (1979; 1980; 1981), the synergetics of Haken (1977; 1985), the hypercycle of Eigen (1979), the autopoiesis of Maturana and Varela (1973;1975), the implicate order of David Bohm (1984) and the bootstrap philosophy underlying the s-matrix of Geoffrey Chew (1968; 1970; Capra, 1979). All these trends point

to a new science. Its various names - Prigogine's new alliance (1979), Fritjof Capra's new physics or Tao of physics (1976, 1983), Jantsch's paradigm of self-organization (1980, 1981), Bateson's immanent mind (1985), Bohm's implicate order (1984) - are the possible names of a postmodern science.

Finally, concerning the moral-practical rationality of ethics and law the limits of the liberal micro-ethics and the legal form connected with it have been further exposed. This ethical and legal form is totally inadequate to address some of the serious problems of our age, from Chernobyl to Aids. The point of the matter is that a new jus-naturalism is emerging, not as an abstract construct, but as the interstitial symbolic configuration of the new social struggles which I shall be discussing below.

At the level of the principles of regulation the identification of postmodern signs is particularly difficult. What from a certain angle seems to be new and discontinuous with the past, when seen from another angle, is really an uninterrupted progress into the present. The principle of the market is the most ambiguous. On one side, the extensive and intensive expansion of the market makes it ever more difficult for any adversarial, alternative, socially useful and not profit oriented social or cultural initiative to succeed, so imminent is the danger of its being coopted, absorbed, domesticated and converted into another sphere of capitalist production. On the other side, in the age of televisual and informational reality, the opportunities for a more democratic consumption and even production of knowledge are immense. The increased social and cultural competence to be expected from here may indeed materialize if the dramatic increases in productivity of the

recent years continue. The reduction of the working week, increasingly central in labour disputes, will expand leisure time and production will be displaced by consumption; in this case the priority of production basic to the paradigm of modernity and present as much in social theory as in modernist architecture will collapse (Jencks, 1987: 11 ff; Huyssen, 1986: 187).

As to the principle of the community, the relative weakening of class practices and politics has been compensated for by the emergence of new agonistic spaces which propose new social (postmaterialist) and political agendas (peace, ecology, sexual and racial equality) to be acted out by new insurgent groups and social movements. In this respect one might say that the twentieth century only begins in the third period of capitalist development. Indeed, the discovery that capitalism produces classes and that classes are the organizing matrix of social transformation was a nineteenth century discovery. The twentieth century enters the historical scene only when it discovers that capitalism also produces racial and sexual differences and that these can also be nodal points for social struggles.

Finally the principle of the State, which in the period of organized capitalism functioned very much as the structuring ground for the operation of both the principle of the market and the principle of the community, seems now on the retreat as if only fit for a secondary role vis-a-vis these two principles. The retreat of statism is combined with changes in the world system of States and particularly with the decline of the American empire and the reemergence of the Soviet Union as a large field of social experimentation in which the principle of the market and the principle of the community are given new

prominence. These trends don't necessarily point to the end of statism or to a final crisis of the Welfare State; but they do change the political debate in such a way as to make room for a more intelligent and particularized Welfare State, or rather, for a renewed articulation between the Welfare State and what we may call the welfare society, that is to say, a new and more polyphonic community consciousness.

Are these signs enough to make for the emergence of a new paradigm? The claims of truth of both a negative and a positive answer to this question are probably equivalent. We live in a period of paradigmatic transition, and as Koyré has taught us in his study of the scientific revolution of the sixteenth century, in such periods this question cannot be answered in terms of truth claims, precisely because the criteria that ground such claims are under question themselves (Koyré, 1986; Kuhn, 1970). What is at stake is not a decision over the validity of new findings but rather the emergence or not of a new perception of reality. Thus the question will ultimately be decided in terms of the relative strength - a pragmatic and rhetorical strength - of the groups that will favour one or another global perception.

This fact has a double implication for the argument I will present in the following. Firstly, it accounts for the critique of modernist epistemologies, which Rorty calls foundationalist epistemologies (1980), and of the truth concept in which they are based, a critique diversely present in the work of Rorty himself, Gadamer (1965, 1983), Feyerabend (1978;1981;1985) and Morin (1982). Secondly, it accounts for the reemergence of James' and Dewey's version of pragmatism, and for the renewed interest in Greek and medieval rhetoric, which can be dated back to 1967, the date of publication of Perelman's New

Rhetoric (1971). Finally, the fact that in a period of paradigmatic transition the question of truth can only be solved in pragmatic and rhetorical terms, explains why all the attempts to define postmodernism in abstract categories have failed. In a sense, such attempts represent a modern way of capturing the postmodern, they are nets that don't hold the fish. This is even true of the most sophisticated catalogues of the postmodern characteristics, such as the one proposed by Ihab Hassan, which includes: indeterminacy, fragmentation, decanonization, selflessness, depthlessness, the unpresentable unrepresentable, irony, hybridization, carnivalization, performance, participation, constructionism and immanence (Hassan, 1987: 167).

In my view, this and similar other lists are still presented in modernist terms, in that they leave out the hermeneutic and the existential context that should underly the combination and concretization of these categories; furthermore, the pragmatic and rhetorical strength that they carry to build a new intellectual mood and a new common sense is also left out. For my part, I would prefer to tell three short stories, or rather scripts for stories that could be told and performed in educational communities. Each story is a partial story very much in the sense that according to William James "the world is full of partial stories that run parallel to one another, beginning and ending at odd times" (1969:98). From each story a rhetorical topos can be drawn but the persuasive or argumentative power of each one of them derives above all from the rhetorical chain or sequence in which it is integrated.

The Known and the Unknown

The first story tells us that modern knowledge is a strange bird with wings that don't match. One of the wings, called complicity, flies low touching the roofs of government offices and business headquarters; the other, called critique, flies high half hidden by the clouds. It is not surprising that such a misshapen bird should collide in the mountains of our reflexivity. As we inspect the ruins we get persuaded that we are still alive by collecting the following topoi in the rubble.

The first topos goes like this: "Don't touch. This is human." Our present epistemological situation is a dilemmatic one: ignorance is still unpardonable but knowledge is sometimes unbearable. Let's take the example of the research on the genetic chart and genetic engineering. We must reasonably suspect that as we know more in this field it becomes more likely that human beings will be the next and the ultimate commodity. If so, then perhaps we need a guard to shout in favour of the human, much in the same way that the guard of the exhibition of postmodern art in Kassel shouted in favour of the autonomy of art when Huyssen's child ran his fingers over the surfaces of one of the works in the exhibition: "Nicht berühren. Das ist kunst." (Don't touch. This is art) (Huyssen, 1986:179).

Second topos: it doesn't matter if it is not real, provided that it is near. Modern knowledge in general (modern science as well as modern art and modern ethics and law) is based on representation, that is, on the creation and isolation of the other, called object, which the self, called subject, then describes as being what it is independently of any creative intervention by the self. Representation creates thus a distance, the greater the distance the more objective the

knowledge. In a recent analysis of seventeenth century Dutch painting Susan Sontag emphasizes the way the artist combines "the atmospherics of remoteness with accuracy of depiction, depiction of a real church from a real viewpoint, though never from a near one" (Sontag, 1987:125). Indeed the real and the near have always been antagonistic in modern knowledge. Postmodern knowledge, in its turn, favours the near in detriment of the real. To be pragmatic is to approach reality from James' "last things", that is, from consequences, and the shorter the distance between acts and consequences the greater the accuracy of the judgment on validity. On the other hand, because it is rhetorical, postmodern knowledge longs for oral, face-to-face communication, which, as Walter Ong has shown, is situational, close to the human lifeworld, empathetic and participatory rather than objectively distanced (Ong, 1982:36). Postmodern knowledge is thus local, but being local it is also total. The localism involved is the localism of context, not the localism of static spaces and immemorial traditions. It is an internationalist localism, without a solid genius loci, very much like the localism of the new generation of American (or rather New Yorker) "objectistic" artists (the "new objectistics"), according to Bonito Oliva's interpretation of their work (Oliva, 1988: 62).

Finally, the third topos: from affirmation to critique through alternatives. Modern critical theory affirms itself by negating the world, by confronting it or by escaping from it but always possessed by the anxiety of contamination. This posture is premised upon two conditions: the distance effect produced by the representation view of knowledge; and the conception of social reality as a monolithic present. I have already

criticized the first condition. As to the second, its untenability becomes more evident as we enter an age of instantaneous social time, of high-speed reality, of televisual experience, of images governed by an aesthetics of disappearance, as Paul Virilio puts it (1988:57). It becomes now clear that there are generations of reality as there are generations of images. There are emergent realities as there are testimonial, transplanted or residual realities. The specific existential situation of the emergent realities is that the last layers of reality have a surplus of meaning that necessarily spills over them. Thus the emergent reality cannot help being affirmative before being critical. How is it then possible to be affirmative without being accomplice and critical without being escapist? Through the constant production of alternatives, assuming the risk of absorption by constantly renewing and recycling reality. Postmodern critical theory is positive in this sense, tirelessly looking for genuine shreds of content in manipulation and domination to put them to the alternative use of creating new spaces of emancipation. It assumes then the dive into reality in search of a new common sense. Postmodern critical theory is thus both polyphonic and agonistic: against knowledge it creates knowledges and against knowledges, counter-knowledges.

The desirable and the possible

The second script deals with the new situation of discrepancy between the desirable and the possible we are living in. When the desirable was impossible it was handed over to God; when the desirable became possible it was handed over to science. Now that part of the desirable is again impossible and part of

the possible is undesirable we cannot count on either God or science. We can only count on ourselves. And because everything is in our hands, it is not surprising that we have become increasingly interested in language (hence the second Wittgenstein), in persuasion and the power of knowledge (hence Nietzsche, Foucault and the New Rhetoric), and, finally, in human communication and interaction (hence the revival of American pragmatism).

To cultivate our new interests I imagine a new kind of school offering two classes: in the first class, where the consciousness of excess is taught, we learn not to desire everything that is possible just because it is possible; in the second class, where the consciousness of deficit is taught, we learn to desire the impossible. The students of reactionary postmodernism attend only the first class; the students of progressive postmodernism attend both classes at the same time. The aim of the communication going on in these classes is not to obtain consensus, as Habermas would have it, but rather to formulate new radical needs in agonistically toned ways, as Agnes Heller would suggest.[10]

However, this description does not suffice to distinguish postmodern critical theory from modern critical theory. After all, both Habermas and Heller subscribe to the latter. What distinguishes postmodern critical theory is that the radical needs are not to be formulated by another radical philosophy; they will rather arise out of the socio-aesthetic imagination lodged in emancipatory everyday practices. Only the embededness in the near, even if it is a new unfamiliar near, can achieve the reenchantment of the world. Some emergent social conditions seem

indeed to point in this direction. In a recent paper Ernst Gellner declares himself, even if with some misgivings, disenchanted with the disenchantment thesis. As we know, the thesis states that the modern world's "Faustian purchase" of cognitive, technological and administrative power forced us to exchange our previous, meaningful and humanly responsive world for "a more predictable, more amenable, but coldly indifferent and uncosy world" (Gellner, 1987:153). This is the well-known iron cage to which Weber has condemned us. Gellner however argues that the iron cage only applied to the emergence of industrial society. Today, as the working week shrinks and leisure expands and as the activities requiring Cartesian thought are diminishing, we are leaving the iron cage and entering a rubber cage. In my view, the rubber cage is still a cage and so it will remain if the desirable and the possible are not redefined in postmodern terms. Modern critical theory as much as the modernization theory converted the desirable and the possible into functional values; the difference between the two theories lies in the way they identify the functions and the social groups that benefit from them. For the postmodern critical theory the desirable and the possible are also aesthetic values and their functionality cannot be separated from their beauty. In this, as in many other instances, postmodern thought innovates by quotation, by recuperating and recycling degraded forms of modernity. We have been used to consider Saint-Simon as the father of the modernization theory, of the idea of converting science and technology into the great engine of progress, thereby gradually replacing politics by the administration of things. However if we look at the way he conceived the new political

system in 1819-1820, it becomes clear that for him the desirable and the possible were both inseparably useful and beautiful. In his vision, the first chamber of the House of Commons, called the Chamber of Invention, would consist of three hundred members, among whom there would be two hundred civil engineers, fifty poets and other literary inventors, twenty five painters, fifteen sculptors and architects and ten musicians. This chamber would be in charge of presenting public projects, the most important of which would be what we would call today physical infrastructures. But he adds that "the roads and canals to be built should not be conceived only as a means of facilitating transport; their construction should be planned so as to make them as pleasant as possible for travellers" (Saint-Simon, 1975:203). As if fearing that this might not be totally clear or deemed important he adds in a footnote: "Fifty thousand acres of land (more, if it is thought right) will be chosen from the most picturesque sites crossed by roads or canals. This ground will be authorized for use as resting-places for travellers and holiday resorts for the inhabitants of the neighbourhood. Each of these gardens will contain a museum of both natural and industrial products of the surrounding districts. They will also include dwellings for artists who want to stop there, and a certain number of musicians will always be maintained there to inspire the inhabitants of the canton with that passion whose development is necessary for the greatest good of the nation" (Saint-Simon, 1975:203).

Interest and capacity

According to the third script, modern men and women used to live in a frontier city whose dynamic transformation was based on

the equation interest=capacity. Whoever had an interest in the processes of transformation had also the adequate capacity to carry them on. The greater the interest, the greater the capacity. Liberal political thought was premised upon the idea that the bourgeoisie was among the different classes the most interested in the development of capitalism and, hence, the most capable of bringing it about. Similarly, marxist theory was premised upon the idea that the working class was the most interested in overcoming capitalism and as such the most capable of doing it. With unsurpassable eloquence, the Communist Manifesto of 1848, without any doubt one of the great texts of our modernity, links the privileged historical role of the working class in carrying out the social revolution to the fact that this class, contrary to all the others, had nothing to lose except its chains.

As the years went by modern men and women moved to a euro-american suburb and there the equation interest=capacity seems to have collapsed. Even assuming that the working classes still have an interest in overcoming capitalism they most patently lack the capacity to do it. And if, as a theoretical hypothesis, we defend that the capacity though dormant is still there, it then appears that they have lost interest in putting their capacity to work.

In the meantime, the last two decades have witnessed the emergence of broadly based social groups interested in the so-called postmaterialist struggles: peace, the defence of the environment, the struggle against the nuclear holocaust, the fight against sexual and racial discrimination. Such struggles are faced with three major problems. The first one can be

formulated in dilemmatic terms: the broader the interest (for instance, the interest in peace or ecology when compared with the interest in sexual and racial equality) the greater the difficulty in identifying the historical subject most capable of leading the social struggle. The second problem is that the difficulty in matching interest and capacity is further complicated by the difficulty in knowing in advance which of such interests and struggles can be fought for successfully in capitalist societies and which of them can only succeed if and when capitalism is overcome and replaced by socialism. In the latter case, many people find themselves in the inverted position of that described by the Communist Manifesto: they have a great interest in the success of the struggle but at the same time feel that they have a lot to lose with the transformations that will thereby occur. To the extent that such struggles can succeed within capitalism a third problem arises: provided that the struggles succeed and deliver the goods they are supposed to deliver, how to avoid the social devaluation of such goods. In the past, capitalism has been able to devalue such goods either by turning them into new opportunities for profitable enterprising or by circumscribing them to a separate and segregated sector of social action, called the political.

III

POLITICS AND LAW IN THE POSTMODERN TRANSITION

The central thesis of this part is as follows: A new theory of subjectivity is needed to account for the fact that we are an increasingly complex network of subjectivities. Out of the ruins

of social collectivism, the collectivism of the self is emerging. The struggle against the monopolies of interpretation must be conducted in such a way as to lead to the proliferation of political and legal interpretive communities. The controlled dispersal of the legal realm will contribute to decanonize and to trivialize law. The end of legal fetishism will mark the emergence of a new legal minimalism and of micro-revolutionary practices.

I will now try to justify this thesis by bringing my scripts to bear on a postmodern and critical understanding of law and politics. The last script (interest and capacity) shows that a discrepancy has been growing between the scale of interests in social transformation and the organization of capacities to struggle for them. As some interests become global the enemy to fight against seems to vanish, which, contrary to what might have been expected, has not facilitated the organization of those wanting to get actively involved in the struggles. This has aggravated the impasse of modern critical theory and, in particular, of orthodox marxist theory, an impasse that has crystallized in a double reification: the reification of the historical subject and the reification of the political mediation for the deployment of social capacities. The emergence of postmodern critical theory is premised upon the supercession of this double reification.

The reification of the historical subject has consisted in the a priori historical privilege granted to class and to class politics, that is, and to use Laclau's and Mouffe's words, in "the idea that the working class represents the privileged agent in which the fundamental impulse of social change resides" (Laclau, Mouffe, 1985:177). The critique of this reification has

been brilliantly made by Laclau and Mouffe. But, contrary to their view, it is neither necessary nor correct to go to the other extreme and conclude that "society has no essence", that is, that it is impossible to account in social-theoretical terms for the problem of historical determination (Mouzelis, 1988). In my view, the most important task for social theory today consists in combining global contingency with local determinisms, structure with agency. If essence is to be conceived in monolithic terms, be it the society, in all versions of holism, starting with Durkheim, or the individual, in the recent theories of methodological individualism, it is only correct to be anti-essentialist. But between the essence conceived as a monolithic ontological entity and the non-essentialism of infinite contingencies there is the middle ground of a pluralist view of essences, of a controlled dispersal of social structures.[11]

As far as the question of the historical subject goes, I think that instead of fixing the a priori priority of an historical subject as orthodox marxism did, or instead of sweeping the question of the subject under the carpet of social knowledge, as both structuralists and poststructuralists have done, the task ahead consists in analysing in concrete terms our historical trajectories as subjects both at the macro and at the biographical level. Modern men and women are configurations or networks of different subjectivities and even though the internal differentiation of the self is an historical variable, as A. Heller has rightly pointed out,[12] I submit that the differentiation is neither infinite nor chaotic. As I have proposed elsewhere, contemporary capitalist societies consist of four structural

places to which four structural subjectivities correspond: to the householdplace corresponds the subjectivity of the family; to the workplace corresponds the subjectivity of the class; to the citizenplace corresponds the subjectivity of the individual; and to the worldplace corresponds the subjectivity of the nation (Santos, 1985).

This is not the occasion to provide a full explanation of this analytical framework. It should merely be retained that modern men and women are configurations of four basic subjectivities. Of course, they are also many other subjectivities (for instance, male/female, black/white) but all of them are grounded on the four basic ones. On the other hand, the specific configuration of subjectivities varies according to different historical conditions, according to different periods of our lives or even according to daily routines or circumstances. We attend the meetings of our children's schools as members of a family, work during the day as members of a class or class fraction, go shopping or read the newspaper as individuals, attend the match of our national team as nationals. In all these occasions or situations we are all four, and perhaps even other subjectivities, at the same time, but as the occasions or situations vary, one different basic subjectivity gets the privilege of organizing the specific configuration of subjectivities that accounts for our behaviour and attitudes. In this respect, the social and scientific construction of a postmodern critical theory is based on the idea that out of the ruins of social collectivism the collectivism of the self is emerging.

The second reification of critical modern theory, the reification of the political mediation for the deployment of

social capacities, consists in the reification of the State. This reification is indeed central to liberal political theory, from which critical theory borrows, and consists in reducing the political to a segregated sector of social action and in conceiving the latter as action of and/or through the State. This reification gained great prominence in the period of organized capitalism and found its most accomplished expression in the political form of the Welfare State.

The crisis of this conception is now apparent. Postmodern critical theory is based on two ideas. Firstly, the hyperpoliticization of the State is the other side of the depoliticization of civil society. Confined to a specific sector of social action, the public sphere, the democratic ideal of modern politics has been neutralized or strongly limited in its emancipatory potential (Santos, 1985:306). Secondly, freedom is not a natural human good which has to be preserved against politics as liberal political theory claims.[13] On the contrary, the broader the political realm the greater the freedom. The end of politics will always mean, in one way or the other, the end of freedom.

Based on these two ideas and following Foucault I suggest that there is politics wherever there are power relations. But again I think, and now contrary to Foucault, that we cannot go to the extreme of giving up the task of structuring and grading power forms and power relations. If power is everywhere it is nowhere. In my view, the four structural places I mentioned before are the locus of four major power forms circulating in our society (Santos, 1985:309). These power forms are: patriarchy, corresponding to the householdplace, exploitation, corresponding to the workplace, domination, corresponding to the citizenplace, and unequal

exchange, corresponding to the worldplace. There are other forms of power but these are the basic ones. None of these forms of power is political in itself. It is the combinations among them that make them political, each one then political in its own way. Of all these four forms of power only one, domination, is democratic, and even so in a limited degree and in a small group of countries in which the advanced capitalist societies are included. The political aim of postmodern critical theory is to extend the democratic ideal to all other forms of power. Socialism is but the tireless continuing expansion and intensification of democratic practices. This aim, because it has no limit itself, will inevitably show the limit of capitalism, the point at which capitalist social relations will have to block the further expansion of democratic emancipation.

The global but not indiscriminate politicization of social relations will mark the end of the monopolies of political interpretation at the same time that it will ensure that renunciation to interpretation, typical of mass consumption societies, will not follow. While for modern critical theory radical democratization of social and personal life had only one enemy, the monopolies of interpretation (be they religion, the state, the family or the party), for postmodern critical theory it has two enemies, both equally fierce: the monopolies of interpretation and the renunciation to interpretation. To fight against both of them there is only one alternative: the proliferation of political interpretive communities. Softly structured by the specific combinations of subjectivities and of forms of social power, such communities are the social basis of a new political common sense, a new political commitment based on old and new civic virtues in Dewey's sense, that is, virtues that

are not poured on us as the metaphysical overflows of any deus ex machina, but which rather emerge from the familiar and the near. In this sense, Charles Jencks is right when he includes among postmodernist values the idea that "the human presence is back even if it's on the edge" (Jencks, 1987:11). The human presence is back but not as an unreflexive identity dissolved in deeprooted traditions. Our roots are on permanent display; they are the rhizome that proliferates on the deep surface and on the momentary eternity of our meaningful encounters. Traditional communities in advanced capitalist societies would be of as little use for us as the medieval guilds were for Durkheim when he proposed the reconstruction of the corps intermediaires (between the State and the individual), the lack of which accounted in his view for the rampant anomie in French society at the turn of the century (Durkheim, 1964: preface to the 2 nd edition).

The proliferation of political interpretive communities represents the postmodern way and indeed the only reasonable way of defending the accomplishments of modernity. I mentioned earlier, among such accomplishments, a fairer distribution of economic resources and a significative democratization of the political system in the conventional sense. As with all processes of transition, the postmodern transition also has a dark side and a bright side. The dark side is that as the reification of class and of State are further exposed, the modern tools used until now to fulfill and consolidate those promises, that is, class politics and the Welfare State, become less reliable and less efficient. The proliferation of political interpretive communities will broaden the political agenda in two convergent directions. On the one hand, it will emphasize the

social value of extra-economic or postmaterialist goods such as ecology and peace; on the other hand, it will expand the concept and the practice of democracy in order to incorporate direct participatory or base democracy. The success of the struggle for extra-economic goods will be conditioned by the success of the struggle for economic goods and for a fairer distribution of economic resources. The struggle for participatory democracy will prevent the emasculation of representative democracy. It is in this sense that the promises of modernity can only be defended, from now on, in postmodern terms.

The postmodern understanding of law starts from here. I will concentrate on the topics that from my point of view will be most crucial in constructing a new legal common sense.

The end of the monopolies of legality

The movement towards a postmodern understanding of law starts in the sixties with the studies of legal pluralism in complex societies followed by the focus on the informalization of justice. The theoretical and normative claims behind these studies could be traced back to some of the debates in the continental legal philosophy of the nineteenth century, but they were new to the extent that they were sociologically grounded, and informed by a progressive political stance. These studies were also very much part of the dominant legal-sociological paradigm, that is, the critical analysis of the discrepancy between law in books and law in action with the purpose of contributing positively to the greater efficiency of the official legal system.

The problem with these studies was that in them these two

dimensions, the critical and the positive, did not quite match. Explicitly or implicitly such studies contained a devastating critique of the official legal system, but they were content to contribute to some minor improvements in the operations of this system. With the privilege of hindsight we can say today that, to the extent that these studies addressed themselves to legislators or State bureaucracies, they were bound to fail (Sarat and Silbey, 1987). The current disenchantment with this scientific agenda, with the cooptation of its critical potential and with the perverse consequences of some of its proposals expresses that sense of failure. To my mind, such failure could have been avoided if, instead of addressing itself to the State bureaucrats, this scientific agenda had spoken to the people in general or to specific social groups (i.e. different addressees of legal discourse) and tried to generate in them a new legal common sense. The genuine shred of utopian content of these studies lies in the verification that in the same geo-political space there are not one but many different legal orders and that, accordingly, the claim of the State to the monopoly of the production and distribution of law is absurd. As much as we are networks of subjectivities and enter in social relations in which different combinations of forms of power are present we also live in different and overlapping legal orders and legal communities. Each one of them operates in a privileged social space and has a specific temporal dynamic. Since the social spaces interpenetrate and the different legal orders are non-synchronic the particular stocks of legal meanings which we activate in specific practical contexts are often complex mixtures not only of different conceptions of legality but also of different

generations of laws, some old some new, some declining some emerging, some native some imported, some testimonial some imposed.

Corresponding to the four basic subjectivities and forms of power I identify four basic forms of law circulate in society: the domestic law, that is, the native law of the family; the production law, which includes the factory codes and internal regulations of corporations; the territorial law, which is the law in the conventional and official sense; and finally, the systemic law that regulates the relations among the nation-States and which extends far beyond the domain of international law (Santos, 1985:309). There are many other legal orders in society but these are the basic ones in that they structure the ways in which all the others operate. This controlled dispersal of legal orders has two important implications for the postmodern understanding of law: firstly, of the four forms of law only one, territorial law, is democratic even if not completely so. The democratic content of this form of law can only be expanded or even merely secured if the democratization of the other forms of law becomes central to the participatory political agendas. Secondly, relativized in this way, law in general and most particularly state law is trivialized and decanonized (and, accordingly, the distinction between "high law" and "low law" tends to disappear). The emancipatory social value of a given legal order lies in its capacity to secure and expand individual and collective rights (in the last instance, rights are forms of social competence). The modern understanding of law sacralized law and trivialized rights. The postmodern understanding of law trivializes law and sacralizes rights.

From modelling to repetition: towards a new legal minimalism

Modern State law has undergone many changes in the three periods of the development of capitalism. In the first period, the major legal developments aimed at expanding and consolidating the principle of the market. In the period of organized capitalism, the State law was specifically characterized by the consolidation and expansion of the principle of the State and the principle of the community. In the current period of disorganized capitalism, the trends carried over from the previous period seem, on the surface, to go on undisturbed. At a deeper level, however, some important changes are taking place. I summarize them as the relative cancellation of the symbolic value of law occurring in the transition from maximal law to minimal law.

In the first and even more so in the second period modern State law was typically a maximal law. The political construction of legal reformism as the hegemonic mode of social transformation endowed State law with imperialistic powers which were used to declare the death of a double enemy: social revolution on the one hand, and all kinds of popular, non-State non-official law on the other. The death rituals were performed in different ways in different periods. Out of them emerged the State law as a unique, autonomous and auratic law. The aura, which as in modern art was from the start inscribed in its uniqueness, was further amplified by the prestige of legal science, particularly in Continental Europe, and by the social power of law schools both in Europe and in North America. Fixed in the solid sculptures of legal codes, high court decisions, leading articles in leading scientific

journals, modern State law was allowed to make true Comte's slogan of "order and progress" and to plan the future sometimes as a repetition of the present, sometimes as modelling of controlled social innovation. Grounded on the persistance of its building materials, modern State law, as much as modern art, adopted an aesthetics of appearance and permanence in which the dynamics of an eternal present contrasted both with the ephemeral past and the trivial future.

In recent years two complementary changes have occurred that are undermining the pedestal upon which this legal posture stands. Firstly, the growth of the regulatory State and the high speed of both legal repetition and legal modelling have led to the increasing obsolescence of State law. Its solid fixity seems to be melting away as if possessed, like the televisual images, by an aesthetics of disappearance rather than by an aesthetics of appearance. Secondly, both at the infra-State level and at the supra-State level, there have been emerging forms of law that are explicitly liquid, ephemeral, ever negotiable and renegotiable, in sum, disposable. Among many examples I cite two, one at the level of the infra-State, the other at the level of the supra-State. They are respectively the regulations of subcontracting, that is, the particularistic laws and contracts that regulate the relations of production among corporations (Marques, 1987), and the legislation of the European Economic Community (Snyder, 1987) In their very different ways

both examples bear witness to the emergence of a contextual legality, finely tuned to the momentary interests of the parties involved and to the power relations among them. For these emerging forms of law the hic et nunc becomes a categorical imperative. The hyperproductivity of the social context is not only tolerated but celebrated. Like some American postmodern art, the "new objectistics" I mentioned before, this postmodern legality "deliberately lowers the level of its own traditional atmosphere in order to reestablish for it a function suited to the times" (Oliva, 1988:66). It is an antiauratic law, an interstitial, almost colloquial law, which repeats social relations instead of modelling them, and in such a way that the distinction between professional and non-professional legal knowledge as much as the discrepancy between law in books and law in action ceases to make sense. Confronted with this new legal minimalism the sociologist of law is at pains to even identify and isolate the legal dimension of social relations, a situation that echoes that of legal anthropologists in the so-called primitive societies. The real books of the law are more and more the changing images of social relations. But this explains why the situation of the legal sociologist is indeed very different from that of the legal anthropologist. The new minimalism is only possible on the basis of a pre-existent tradition of auratic, autonomous, highly professionalized law; indeed minimal law is oftentimes developed by professionals trained in the tradition of maximal law. The hyperproductivity of the social context is a complex phenomenon because the latter is to a great extent saturated by modern legality and has been moulded by it. In other words, the contextualization of postmodern legality is a two-way process:

as law approximates social reality, social reality approximates law.

This emergent and by now still very marginal postmodern legality coexists peacefully with modern legality, but as it gains terrain it corrodes the symbolic stance of modern legality by forcing it to descend into the materiality of the hic et nunc. Slowly but steadily, modern law transits from modelling to repetition, from duration to co-presence, and concomitantly from generality to particularism, from abstraction to rematerialization.

Law, micro-revolutions and neo-luddism

The transition from modelling to repetition, from planning to ratification, does not mean that law will disappear completely in the social relations it regulates. Law will go on performing an intensification function through which social relations are rerouted from an ordinary chain of being toward a higher chain of being. The difference will lie in the ways in which such function will be performed. As law, through its many operators, reaches the understanding that its false utopia is coming to an end, the world as it is becomes more recognizable in the process of its legal intensification. As this occurs, two related phenomena will take place: on the one hand, the limits of social transformation through law will become more apparent; on the other hand, other forms of emancipatory practice will gain or regain social credibility.

Among the limits of law and legal reformism the following will become most prominent. Firstly, the State law is one among many forms of law circulating in society even if it is the most

important one. Indeed, it became more and more important in the period of organized capitalism, since the objectives and strategies of reformism and democratization concentrated on State law. In this process, all the other forms of law existing in society were left out of the legal picture and were thus allowed to go on reproducing status quo and undemocratic social relations. As this historical process of reduction and occultation is further exposed, the undemocratic nature of law as a whole is unveiled and even the democratic content of State law is put into question. Since the law of the State, while regulating social relations, is forced to interact and negotiate with other forms of law its reformist and democratic claims must be contextualized and relativized, particularly in view of the hyperproductivity of the social context diagnosed above. A very recent illustration of this can be found in Kristin Bumiller's brilliant analysis of the ways in which the anti-discrimination laws may have in fact contributed to perpetuate the victimization of the people they were intended to benefit (Bumiller, 1988).

The second limit of law and legal reformism is that authentic legal reformism is hard to achieve and that, whenever achieved, it does not sustain its social meaning for very long. Assuming that the undemocratic content of a given network of legal orders is socially exposed, this exposure will by itself contribute to the empowerment of those social groups more victimized by the former occultation. The fairer the distribution of power resources among groups interested in legal reforms the harder the negotiations to produce reformist laws and the narrower the scope of the reforms. The laws will accordingly become more particularistic and complex. The idea of the

decomplexification of social reality through law which Weber and most prominenly Niklas Luhmann celebrated as the genius of modern law (Luhmann, 1969) will come to an end and this is not in itself a bad thing. But it will definitely contribute to decanonize and to trivialize law in general and the State law in particular. In an age of audio-visual speed and social acceleration these effects are likely to be intensified by the constant and ever stronger pressure to renegotiate regulatory agreements or impositions. Under these circumstances, law will be easilly trapped in the dilemma: either to remain static and be ignored, or to keep up with the social dynamics and be devalued as a normative reference.

The third limit of modern State law has to do with the scale (in cartographic terms) used by law to represent and distort social reality. I have dealt with this topic elsewhere (Santos,1987b). Here it will suffice to mention that the specific scale used in the representation of reality accounts for the type of phenomena that can or cannot be adequately regulated by law. There are phenomena that, no matter how important in social terms, cannot be adequately dealt with by law because they fall outside the regulation threshold defined by the scale at which that particular law operates. To give examples, we live in a world of Chernobyl and Aids. In spite of its seriousness, it seems that neither of these problems can be dealt with adequately by State law, one because it is too public or too collective (Chernobyl) the other because it is too private or too individual (Aids). As these types of limits become more readily identified the following question will inevitably emerge: if law cannot adequately deal with some of our most serious problems, why

should we treat it so seriously?

The principle of the recognizability of the world that presides over the postmodern understanding of law is not confined to the negative function of identifying the limits of law. It opens up to new positivities. On the one hand, the identification of limits maps, by contrast, social spaces in which non-legal (illegal or a-legal) emancipatory practices may take place. On the other hand, since the identification of the limits goes hand in hand with the expansion of the concept of law and its internal fragmentation in a plurality of legal orders, the ideological claim of legal fetishism becomes more untenable and the alternatives to it correspondingly more credible. Such alternatives can be summarized by the concepts of micro-revolutions and neo-luddism.

If we analyse closely the reform/revolution debate at the turn of the century we will conclude that the debate was about different strategies to achieve basically the same goal, that is, socialism. As reformism got the upper hand the social transformation to be brought about under its name was gradually scaled down and the State law was the instrument used to achieve that objective. It can even be argued in favour of the relative autonomy of the law, that law reconstructed the scale of social transformation to a level that would maximize the efficacy of legal regulation. From then on a discrepancy was created between the scale of legal reformism and the much larger scale of revolution, a discrepancy that furthered the discredit of the revolution.[14] This created no serious problem in the advanced capitalist societies as long as legal reformism kept intact its ideological hegemony. In recent years, however, the situation

has been changing, as I argued earlier. The gradual cancellation of the symbolic aura of law will open a gap in our social imagination. After a century of small scale legal reformism it is, however, impossible to fill such a gap with the old concept of a large scale social revolution. A postreformist social revolution can only be a network of micro-revolutions to be carried out locally inside the political communities whenever and wherever they are created. To conceptualize such micro-revolutions is not an easy task. It may help to proceed by quotation - indeed a very postmodern way - and try to recuperate, recycle and reinvent degraded forms of social resistance against oppression. Hence the concept of neo-luddism. It evokes the destruction of mechanical looms in the first decades of the nineteenth century by English weavers confronted with the introduction of new technologies that would eliminate their autonomy in the work process and worsen further their already wretched life conditions. For many decades, such outbreaks of protest were dismissed as foolish, romantic, and reactionary resistance against the inevitability of progress. In recent times, however, and not altogether by coincidence, the luddist movement has been reevaluated. The pioneer work of Eric Hobsbawm (1964), followed by others (Wasserstrom, 1987), has contributed to change the luddite symbol and convert it into the only rational collective action available to workers before the age of unionization. What is coming into the new political agenda is not the specific means of resistance used by the luddites but rather the invention of forms of social innovation that like those of the luddites confirm and intensify the capacity of autonomous subjectivities to free themselves from the prejudices of legal fetishism.

In the technological age, neo-luddism will certainly be less violent and naive but it shall equally bear witness to the intensity of civil engagement and political mobilization only obtainable when the objectives of the struggle are transparent, and the results to be expected as close as possible to everyday life world. Only under these conditions will the struggles be lived as rational, of a mini-rationality that is only total in so far as it is local. The interpretive and transformative communities will generate these struggles through processes of rhetorical persuasion that get their argumentative ammunition from the topoi that can be squeezed out of the scripts of partial stories about knowledge, desire and capacity I referred to above. It does not matter if such mini-rationalities are lightweight, portable or even pocket rationalities, provided that they explode in our pockets.

NOTES

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1 - For the characterization of the three periods I follow Lash and Urry (1987) very closely.

2 - There are striking parallels between this sequence and this other: reason, racionalism, rationalization.

3 - See Brunkhorst for whom "romantic modernism edges bewilderingly close to the conservative or reactionary fundamental opposition to modern culture and its utopian rationalism" (1987: 409). Similarly, according to Gouldner, "the revolutionary potential of Romanticism derived, in part, from the fact that although basically a critique of industrialism, it *could* as well be used as a critique of capitalism and its culture" (1970: 115).

4 - According to Lukács, "the central category and criterion of realist literature is the type, a peculiar synthesis which organically binds together the

general and the particular both in characters and structures" (1972: 5). Hence, his definition of realism: "a correct dialectical conception of the relationship between being and consciousness" (1972: 119). See also Auerbach (1968:454 ff) and Swingewood (1975: ch. III).

5 - These were the theories that Hannah Arendt once considered as underlying the American Constitution and hence responsible for the latter's "fateful failure" to promote the politics of participation. See Kateb (1987) and Dallmayr (1987).

6 - On the debate between Habermas and Bürger see Schulte-Sasse (1984) and Jay (1985).

7 - A powerful analysis of the sense of exhaustion and of global blockage in the advanced capitalist societies can be read in Offe (1987).

8 - On this, a very strong statement by Moscovici: "at the beginning of the century we were certain that the masses would triumph, whereas towards the end of it we are all prisoners of leaders" (1985: 1).

9 - Cfr. Offe's assessment of our contemporary condition: "on the one hand, nearly all factors of social, economic and political life are contingent elective and gripped by change, while on the other hand the institutional and structural premises over which that contingency runs are simultaneously removed from the horizon of political, indeed of intellectual choice" (1987: 8).

10 - For a comparison between Heller's and Habermas' thought see Radnoti (1987).

11 - My papers on modes of production of law and social power (1985) is precisely an attempt to present such a pluralistic view of structures.

12 - According to A. Heller, "the internal differentiation of the Self is itself a variable ... moreover ... it is not only an historical, but also a 'personal' variable" (1987: 15).

13 - A critique of the liberal conception of freedom as a pre-political essence can be read in Arendt (1963: 149).

14 - I speak of social revolution as large scale for the sake of intelligibility. In cartographic technical terms, one should speak, in that case, of small scale: the larger the real space to be represented in the confined space of the maps, the smaller the scale. See Santos (1987b: 283).

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