

# *Law and Community: The Changing Nature of State Power in Late Capitalism\**

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The administration of justice in the advanced capitalist countries enters the '80s with a growing concern for the development of alternatives to the traditional, official court system and formal judicial procedures. Such concern is being translated into reforms and reform proposals which have been variously called informal justice, community justice, de-legalization, informalization, conflict resolution, and dispute processing (Abel, 1970; Blankenburg & Reifner, 1978; Felstiner, 1975; Felstiner & Williams, 1978; Felstiner, Abel & Sarat, 1980; Galanter, 1976; Galanter, 1979; Garth, 1978; Harrington 1979; Hofrichter, 1978; Merry, 1979; Nader, 1979; Nader & Singer, 1976; Reifner, 1978; Sarat, 1976; Singer, 1980).

In this paper I offer a theoretical analysis of these trends and reform developments in the administration of justice. I will start by presenting in brief outline a theoretical model of legal domination in the capitalist state which will provide the background for the analysis. At the end of the paper I will try to establish the impact of current reforms and reform proposals on the nature of state power and legal domination.

## **The Law of the Capitalist State**

In historical terms the capitalist state and its legality owe much to the pre-capitalist state forms, if for no other reason because the establishment of capitalist social relations often took place under the rule of non-capitalist states and non-capitalist legality. This, however, does not preclude the possibility of establishing structural relations and homologies between the capitalist state (the

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“political” realm) and the capitalist non-state (the “social” and “economic” realms) which together constitute bourgeois society. Furthermore, these structural relations, which on the “surface of bourgeois society”, the realm of “freedom, equality, property and Bentham” (Marx, 1974), will appear as disparities and contradictions, find their theoretical coherence in a logical derivation of the state form from capitalist social relations [1]. Thus the capitalist state form reveals itself in specific structural relations which develop and change in concrete historical situations and processes.

As a particularized entity of bourgeois society, the capitalist state is the political form of capitalist social relations. Its basic characteristic is its *externality* to these relations, which on the surface are defined as “economic” [2]. However, the externality of the political is the condition of its *immanence* to capitalist social relations. This occurs due to a double contradiction in the process of capital accumulation and capital valorization: on the one hand, the *real presence* of non-capitalist elements in the reproduction of capitalist relations, that is, of aspects of social reproduction within bourgeois society which are not subjected to the law of value; on the other hand, the *fictive absence* on the surface of bourgeois society of the logic of capital (exploitation as extraction of surplus value through the use of labour power appropriated in the market by means of a contract between free proprietors).

This double contradiction develops historically in the context of two struggles, both inherent to the capitalist mode of production: the struggle between capital and labour and struggle among individual capitals. These contradictions and struggles reproduce themselves inside the state. The major function of the capitalist state is precisely to “disperse” such contradictions and struggles into an apparently chaotic sequence of administrative failures and successes, of honoured and violated political compromises, and of enforced and non-enforced repression and facilitation, a function which the state performs through the conglomeration of its apparatuses and quasi-apparatuses, of its measures and non-measures, and of its positive and negative selections.

The dispersal of contradictions is a complex phenomenon and in general it operates through a set of mechanisms involving integration, trivialization, neutralization, and exclusion, according to the historical conditions and specific forms of class struggle. Since state performance is subordinated to the logic of capital, a subordination which, however, is never homogeneous, stable, or without tension, it results both that the contradictions can never be solved, but rather at the most kept latent, and that such latency is neither general nor permanent. On the contrary, at each moment the state has to concentrate itself in the areas of social life where the intensification of class struggles has become disruptive and where, accordingly, a more intense activation of dispersal mechanisms has become an urgent political task. This sectorial concentration implies that other areas of social life will in the meantime be covered by a more diffuse state “intervention”. Depending on the specific historical conditions this fact may in itself contribute to the intensification of class struggles in any of the

latter areas, and as a result, sooner or later, the state will be forced to concentrate its dispersal mechanisms here. The capitalist state is thus forced to constant shifts without ever achieving global pacification. This process, though chaotic on the surface of social life, develops according to an internal logic which I will call *the negative dialectics of the state* (Santos, 1973, 1974).

The external form of the capitalist state is the logical condition for the performance of its contradiction dispersal function. This form is, however, no fixed entity, because it manifests itself only through the functions and structures it pre-conditions; besides, these functions and structures are performed and developed in history. The capitalist state form is thus an open form which allows for structural and historical specification and which as such is an object of struggle. At the structural level, the historicity of the state form means that the capitalist state is not a monolithic structure. It is rather a fragmented and asymmetric structure or set of structures. Such structural fragmentation and asymmetry reproduces itself in all state apparatuses and also in the relations among them.

Concerning law and the legal "system", structural analysis must start from the fact that the capitalist legal form is external *both* to capitalist social relations, as the economic realm, *and* to the state, as the political realm, even though the externality *vis-à-vis* the political mediates the externality *vis-à-vis* the economic. In either case the externality is the condition of immanence and as such does not collide with the state monopoly of the production of legality. This monopoly is both fragmented and asymmetric, as is the legality it produces [3]. This characteristic reveals itself in the specific articulations among the basic structural components of capitalist legality. Those components are rhetoric, bureaucracy, and violence. *Rhetoric* is a communication form and a decision making strategy based on the production of persuasion and voluntary adherence through the mobilization of the argumentative potential of socially accepted verbal and non verbal sequences and artifacts. *Bureaucracy* is a communication form and a decision making strategy based on the production of authoritative impositions through the mobilization of the demonstrative potential of professional knowledge, general formal rules, and hierarchically organized procedures. *Violence* is a communication form and a decision making strategy based on the use or threat of physical force.

Taken separately none of these elements is specific to capitalist state legality since all of them existed in one form or another in the pre-capitalist state. What is specific is the complex structural articulation among them. Each one of these founding elements has its own structure and its own discourse. Each one of these structures and each one of these discourses has its own internal logic and organizational principle. But they are interrelated in multiple forms. Indeed what we call law and legal system in capitalist societies is a terminal concept which both expresses and hides the complex articulations among the different partial structures and their discourses. These articulations are both fragmented and asymmetric as well as complex and dynamic, and these characteristics

account for what is frequently referred to, without adequate specification, as the "ambiguity" of law in capitalist societies. I will distinguish three major types of structural articulation: quantitative co-variation, geo-political combination, and qualitative interpenetration.

*Quantitative co-variation*

Based on the rich tradition of legal anthropological and legal historical research and on a systematic comparison between the totality of informal and unofficial juridical and judicial processes inside a squatter settlement in Rio de Janeiro on one side and the official legal system of the capitalist state on the other (Santos, 1974, 1977), I have been able to postulate the following relationships: the higher the level of bureaucratic institutionalization of juridical production the smaller the rhetorical space of the legal structure and discourse and vice versa; and the more powerful the instruments of violence in the service of juridical production the smaller the rhetorical space of legal structure and discourse and vice versa (Santos 1980, p. 59) [4]. If we look at the development of capitalist legality in the light of this correlation it appears clear that legal development has involved a gradual retraction of the rhetorical element of the law and a gradual expansion of its bureaucratic and violent elements (Santos 1980) [5].

*Geo-political combination* [6]

The fragmentation and asymmetry of the state structure and the constraints under which the contradiction dispersal function is performed account for the fact that political domination is not equally distributed across the universe of social relations. Political domination can be seen as stratified along a concentration/diffusion scale according to the forms and degrees of class struggles and to the specific dispersal mechanisms to be activated in concrete historical conditions. The high concentration areas of political domination are those in which the state invests, in a given historical moment or period, most of its institutional resources. These are the concentrated core areas of domination where the dispersal mechanisms of neutralization and exclusion tend to dominate and where the state appears as quite distinct from the non-state. The low concentration areas of political domination are those in which there is little institutional investment on the part of the state. These are diffuse/peripheral areas of domination where the dispersal mechanisms of trivialization and integration tend to dominate and where the state and the non-state may, at times, be hardly distinguishable [1, 8].

The stratification of political domination reproduces itself in the legal "system" which is also unequally distributed across the universe of social relations. My contention is that up until now, rhetoric has tended to dominate in the legal fields corresponding to the diffuse/peripheral areas of political domination, while bureaucracy and violence have tended to dominate in the concentrated core areas of political domination.



*Structural interpenetration*

In its broadest definition, this consists of the presence of a given dominant structure inside another (dominated) structure, while in the preceding types of structural articulations the three components of the legal system are conceived of as being reciprocally autonomous, in the case of structural interpenetration, autonomy becomes a factor susceptible of variation. It is established as a possibility that a given structure or discourse reproduces itself in (and in the terms of) another structure or discourse. In relation to other types of structural articulation this is a much richer and a much less studied phenomenon, not only because it refers to a structural movement to be detected only in a long historical period, but also because it involves the analysis of complex qualitative processes. The relations between oral and written culture provide an illustration. It has been established that these two forms of cultural production have different structural characteristics (Ong, 1971; Ong, 1977; Santos, 1980). For instance, oral culture is centred on the conservation (stocking) of knowledge while written culture is centred on innovation. Oral culture is fully collectivized while written culture allows for individualization. Oral culture has its basic unit in the formula while written culture has its basic unit in the word. If we look at modern cultural history in the light of these distinctions it becomes clear that until the fifteenth century, European culture and hence European legal culture was predominantly an oral culture. From then on written culture gradually expanded and oral culture retracted. But from the fifteenth century to the eighteenth century it is apparent that the structure of written culture had still to be consolidated and that in its operation it was permeated by the internal logic of oral culture. In other words we then wrote as we talked and I think this can be detected in the legal writing of the time. In the second phase, from the eighteenth century until the first decades of the present century, the written word dominated our culture. But then the radio and the audio-visual mass media rediscovered the word's sound and we entered a third period which has been called one of secondary orality. However, as has been noted, this re-oralization of culture is different from the previous period of oral culture in that the structures of the written culture permeate, penetrate, and contaminate the new oral culture. In other words, we talk as we write.

Based on my research on the sociology of legal rhetoric, I have come to the conclusion that in the development of capitalist legality, up until now at least, the structure of rhetoric, itself already quantitatively reduced and located in the diffuse peripheral areas of political domination has also been internally and qualitatively "contaminated" by the dominant structures of bureaucracy and violence (Santos 1980, p. 101) [9].

From this triple structural articulation, it seems adequate to conclude that the capitalist state legal system in the last 200 years has been characterized by the recession or retraction of its rhetorical structural *vis-à-vis* the bureaucratic

and the violent structures in each one of the three types of structural articulation which I have identified [10].

*Law, informality and community*

Using the preceding theoretical model I will not try to analyze the current legal and judicial reforms in the direction of informalization and community justice.

These reforms, though diversified, tend, in general to focus on dispute processing and conflict resolution and to share the following characteristics:

(a) emphasis on satisfying mutually agreed outcomes rather than on strict normative observation;

(b) preference for a decision model based on mediation or conciliation rather than on adjudication;

(c) competence of the parties to take care of their defence in the setting which is both de-professionalized and run in ordinary language;

(d) the third party will be a non-jurist though with some legal training, elected or not by the community or by the group to be served by the conflict resolution setting or institution;

(e) the institution has none or very few coercive powers which it can mobilize in its own name.

Once in operation these reforms may involve a more or less extensive change in the legal structure and thus I will try to evaluate them in light of the triple structural articulation I've mentioned before.

I start with the first type of articulation, quantitative co-variation. In view of the characteristics of the reforms proposed and under way it is not difficult to conclude that they point to a mode of juridical production dominated by rhetoric. Indeed, based on widespread legal knowledge and language competence, the dispute processing setting uses an argumentative, persuasive discourse, leading to the acceptance of mutually satisfying outcomes. Conversely, within the range of such reforms both bureaucracy and violence appear as recessive or retracted structures, i.e. as structures that are withdrawing from the foreground of legal domination which they have been occupying for the last 200 years, and so much so that their withdrawal may be mistakenly conceived as de-legalization, thus forgetting that rhetoric is as inherent in legal domination as bureaucracy or violence.

Reading these reforms in the light of the first structural articulation one is led to the conclusion that legal rhetoric is re-emerging from a two centuries' long lethargy. And the importance of such re-emergence depends upon the range of such reforms and upon their being carried out without major distortions. It is still very early to answer the question of range and the question of distortions in implementation but potentially at least this phenomenon may have an impact on the mode of juridical production and thus on the nature of capitalist state power.

As is implied in the preceding argument this impact whatever it will be cannot be determined exclusively at the level of the first type of structural articulation, that is, quantitative co-variation. It is thus necessary to locate the reforms under analysis inside each one of the remaining types of structural articulation. As to the second type, geo-political combination, the first question to be asked is the following: even assuming that the rhetorical space of the legal structure is widening, in which legal fields, from the point of view of their correspondence to the areas of political domination, is such widening taking place? In legal fields corresponding to concentrated core areas or to diffuse peripheral areas? And, secondly, what is happening in the legal fields and areas of political domination in which legal rhetoric is not widening?

The answer to these questions involves complex comparisons across the legal fields and corresponding areas of political domination. At this point I will restrict my analysis to a comparison between current developments in the field covered by the reforms in the direction of informalization, community involvement, and de-legalization on the one hand and the field of criminal justice and penal policy on the other. The first striking observation which, amazingly enough, has scarcely been noticed, is that these two fields are undergoing opposite or contradictory transformations. The informalization or community field is, as I have mentioned, dominated by a therapeutic model and a treatment ethic with its emphasis on consensus and persuasion, on integration rather than on exclusion, on regulating and normalizing behaviour instead of punishing it, on mutually satisfying outcomes rather than on strict observation of legal rules and legal rights. On the contrary, in the field of criminal justice and penal policy we are witnessing the re-emergence of what has been called the justice model, or the neo-classical model (Clarke, 1978; Mathiesen, 1980; Christie, *forthcoming*) [11] which basically involves radical opposition to the treatment ethic. The latter is seen as "a logical result of the individual responsibility ethic in an age of scientism, the welfare state, consensus politics and reformism". In opposition to all this the justice model calls for: "a return of power to the judiciary; an end to treatment and its substitution by punishment as desert; increased concern for certainty and for legal rights; greater emphasis on the criminal act rather than on the actor" (Clarke 1978, p. 28).

This makes clear the opposition of the current developments in the two fields. But even more striking is that in both fields these developments are ideologically heterogeneous, that is, are sponsored by groups with opposite ideologies and socio-political objectives. In the informalization field Abel has shown how conservatives, liberals, and even radicals may be united (Abel 1978, p. 5). In the criminal justice field, and notwithstanding important differences, we have together the *Struggle for Justice* and the Schwendingers on one side and Von Hirsch, Fogel, and Hood on the other (Clarke, 1978, p. 28).

For the analytic purposes of this paper, however, it is not enough to acknowledge the opposition between current developments in the



informalization of dispute processing field and in the penal policy field. It is also necessary to recognize that these opposite developments are structurally combined. Indeed my hypothesis is that bureaucracy and violence are being concentrated in legal fields, corresponding to the concentrated core areas of political domination, to areas whose major function is to define the enemy (not necessarily a class enemy) as an enemy and to disperse him/her through mechanisms of neutralization and exclusion, while rhetoric is being expanded in legal fields corresponding to diffuse peripheral areas of political domination, to areas whose major function is to define the enemy as non-enemy and to disperse him/her through mechanisms of trivialization and integration [12].

If this hypothesis holds true, the different developments in the legal system are both unequal and combined irrespective of the ideologies justifying them and even of the policy orientations guiding them. The geo-political distribution of the three founding components of the legal structure, rhetoric, bureaucracy, and violence, across the legal fields will enable us to develop a cognitive map where these different part-structures are being distributed according to their adequacy for the different areas of political domination – a zoning system as it were.

The geo-political distribution of legal structures will also enable us to see the question of access to law in a different light. This question cannot be dealt with in monolithic terms because as the combinations among the three structures vary so does access to law. For instance, an increase of access in a legal field in whose structural combination rhetoric dominates, may be accompanied (or compensated) by a decrease in or restriction of access in a legal field in whose structural combination bureaucracy or violence dominates. If the latter legal field corresponds to a concentrated core area of political domination, in which the state has invested most of its institutional resources, the example will show how an expansion of access may indeed be on the whole a restriction of access: an access which does not give access but rather forecloses.

The geo-political distribution of legal structures is still of importance in determining the diversified nature of, and the varied accessibility to, legal discourse because as the structural combinations vary so does the legal discourse. Thus, in a combination in which rhetoric dominates, legal discourse tends to be based on commonsense knowledge and to be expressed in ordinary language while in a combination in which bureaucracy and violence dominate legal discourse tends to be based on legal scientific knowledge and expressed in technical language. There are then areas of legal discourse which are more accessible or penetrable than others. There are areas dominated by secret knowledge and others dominated by shared knowledge.

The analysis of current reforms to informal community justice in the light of the two types of articulation already mentioned leads to the following hypotheses: *firstly*, that such reforms involve an expansion of legal rhetoric and that the greater the correspondence of the legal field to a diffuse peripheral area of political domination the greater the tendency for the expansion of rhetoric to



concentrate there; *secondly*, that this expansion of legal rhetoric is combined with the expansion of bureaucracy and violence and that the greater the correspondence of the legal field to a concentrated core area of political domination the greater the tendency for the expansion of bureaucracy and violence to concentrate there.

But these hypotheses still don't catch the whole nature of current developments. For that it is necessary to take into consideration the third type of structural articulation, that is, interpenetration. As I mentioned earlier this is the richest type of structural articulation and probably because of that the most difficult to observe. The question to be asked is the following: once the space of a given structure is defined is it possible to detect the presence of other (dominant) structures inside that space? In other words is it possible to detect structural "infiltration" or "contamination"? This is important because a given "contaminated" structure may be used to secure the expansion of another "contaminating" structure. And through this process the contaminating structure may be expanding while seeming on the surface to be retracting. More concretely: is it possible to detect in current informalization reforms that bureaucracy and violence are expanding within the form of legal rhetoric? Concerning bureaucracy this type of structural articulation would lead us to analyze the types of arguments that tend to be persuasive in the informal settings in order to see if, for instance, arguments and reasonings which depend on bureaucratic logic and discourse are being advanced in the non-bureaucratic setting. And this may indeed happen, as an hypothesis at least. For instance, we customarily include among the characteristics of informal dispute processing the fact that the third party, judge, mediator, or arbitrator is not a jurist, or legal professional and because of that we call him/her a "layman/woman," that is, not a member of the legal bureaucracy. But indeed he/she may be a professional and employed in some other state bureaucracy, such as the education or health bureaucracy. And since all state bureaucracies are structurally homologous and have the same operational logic, the latter logic may be filtered down to the argumentative discourse in the informal setting.

As concerns violence, some informalization reformers have claimed that disputes arising out of "ongoing relationships" are more suitable for processing through the informal setting, the rationale being that since this setting lacks coercive power it may resort to the sanctioning power which is intrinsic or inherent to those types of relationships (Harrington 1979, p. 4). One way of evaluating this is that the state while organizing this informalization in community justice programmes is mobilizing that "native" coercive power, integrating it in the overall structure of state political and legal domination. Once integrated this native power loses autonomy and is put to service in a diffuse peripheral area of political domination. In this capacity it penetrates, as a kind of state-produced non-state power, the argumentative discourse and the mutually agreed decisions in the informal setting.

Another empirical symptom of violence infiltrating or contaminating legal rhetoric may be derived from the analysis of the relations between the types of referral of cases to community justice settings, the degree of participation by the parties, and the rates of successful mediation in the informal setting. Harrington, in an empirical study of the Kansas City Neighbourhood Justice Center, came to the following conclusion:

Findings, regarding the existence and form of sanctions and incentives to participate in NJC suggest that where there are stronger ties with the official remedy system, in cases referred from criminal justice agents with or without charges pending, the disputants are more likely to participate in mediation (Harrington, 1979, p. 35).

If this is true, it can be interpreted as another piece of evidence that bureaucracy and violence infiltrate the structure of rhetoric even if they are explicitly absent from the latter's operation. In such a case my general conclusion would be that legal rhetoric tends to expand only in the diffuse peripheral areas of political domination and that even there it reveals itself as a recessive structure to the extent that it gets infiltrated by the logics of bureaucracy and violence.

These very tentative ideas on the triple structural articulation have the merit of leading us: *firstly*, to analyze partial or sectoral developments and reforms in the light of the global legal structure; *secondly*, to conceive this global structure as highly contradictory and unstable and as internally asymmetric in its correspondence to the different areas of political domination; *thirdly*, to recognize that resistance to such domination has also to be highly diversified, the more so if it is to be a global resistance.

Since, in this conception, any reform, however partial, always involves changes in the overall structures of domination in one way or another, the next question is this: provided that informalization and community reforms go forward, what is their impact on legal and political domination and thus on the nature of capitalist state power?

### **The Changing Nature of State Power**

It has been argued that the reforms under analysis serve a triple objective: they help reduce the fiscal crisis; they absorb the impact of a possible loss in the legitimacy of the capitalist state resulting from cuts in state expenditure; they stabilize power relations in society.

The fiscal crisis argument is well known. The advanced capitalist countries witnessed in the '60s the emergence of new and more advanced forms of class-struggle. Highly mobilized grassroots movements brought new pressures upon the state which invariably responded with an expansion of social rights and, consequently, with an increase in state expenditures. Though obtained through struggle, the state expansion was made possible (and probably necessitated) by

the conditions of capital valorization in the period (calling for an increase in unproductive spending). As a result of this state expansion, the repression/legitimation relation between the capitalist state and the working classes changed significantly. In the early '70s the conditions of capital valorization started changing with the so called oil crisis and since state intervention is subordinated to the logic of capital the state expansion carried over from the previous decade was soon redefined as over-expansion and its reduction to a "functional" level was insistently requested by the bourgeoisie. In the realm of law and justice, legalization became over-legalization and accessibility, over-accessibility. The court system is said to be a costly bureaucratic apparatus and the informalization/de-legalization reforms will make spending cuts possible in this area by taking away from the court system certain types of conflicts and issues to be processed and settled in informal settings at a lower cost (Hofrichter, 1978).

Two objections can be raised to the fiscal crisis argument. *Firstly*, it assumes that informal justice is less costly than formal justice, which is probably debatable. *Secondly*, it explains adopted solutions by their external necessity and not by their internal logic; in other words, it does not explain why a specific spending cut is chosen instead of any other.

However, the fiscal crisis argument becomes much more persuasive when coupled with the second argument, the argument that the reforms under analysis absorb the impact of a possible loss in the legitimacy of the capitalist state resulting from cuts in state expenditure. Since the state expansion predominantly took the form of new legal rights, any spending cuts will produce changes in the repression/legitimation relation between the capitalist state and the working classes. Faced with a legitimacy crisis the state resorts to informalization reforms (and to the cuts in spending they make possible) because by appealing to popular participation, self-government, renaissance of real communities, consensual social life, and struggle against bureaucracy, such reforms have a legitimacy potential which is likely to compensate for the eventual legitimacy loss connected with spending cuts.

However, this argument proves too much if the legitimacy resources of these reforms are not checked by the logic of the reproduction of political domination in the capitalist state. This leads to the third argument, the argument that these reforms stabilize power relations in society. Abel has reminded us that in the liberal state powerful institutions have to be formal institutions (Abel, 1978, p. 28). Indeed, the so called absolute state ceased to be absolute (and became liberal) when formal law became absolute. In my formulation, since then bureaucracy and violence have been developing hand in hand. Informalization thus means powerlessness and as a result social relations will be stabilized since no dramatic changes can be expected from institutions or settings which, due to the limits of their coercive powers, will be oriented to consensus and harmony.

Many types of disputes or issues to be processed by the new informal settings share the two following characteristics: *firstly*, they show structural differences



in social power between the parties; *secondly*, they occur recurrently. This is, for instance, the case of landlord/tenant disputes and consumer complaints. In such cases the mediation or arbitration assumes a repressive nature because the setting has no coercive power to neutralize, even if at the individual level, the power difference between the parties. Repressive mediation leads to repressive consensus which, I submit, will more and more characterize the exercise of capitalist state power.

In this sense informalization means disarming and neutralizing. Poulantzas has emphasized that a major function of the capitalist state is to disorganize the working classes through the legal form (Poulantzas, 1973). What is new in current informalization and community programmes is that while up until now the oppressed classes had been disorganized at the individual level, that is, as citizens, voters, welfare recipients, in the future they will be disorganized at the community level. I suggest that state sponsored community organization will be the specific form of disorganization in late capitalism.

Community production of services, be they justice, legality, social control, regulation, is a non-autonomous production. At the most it has merely a negative autonomy, that is, the autonomy not to ask from the state the performance of certain services which up until now were, potentially at least, performed by it. It won't have a positive autonomy, that is, the autonomy to struggle for measures and services which though structurally possible are functionally incompatible with the corporate interests of the dominant class.

The preceding analysis does not go deep enough in identifying the basic mechanism through which the nature of state power may be changing before our eyes. Bourgeois society is based on a dual power conception: two basic modes or forms of power which though complementary have been kept separate and, indeed, as mutually exclusive. I would call them the *cosmic* power and the *chaosmic* power. The first power form is centralized power "physically" located in formal institutions and hierarchically organized. This is the traditional conception of juridical power. It is a macro-power which since the seventeenth century has found in state power its most accomplished implementation. The second power form, the chaosmic power, is the power emerging in the multitude of social relations and social interactions in society wherever there is inequality, in the family, at school, on the street, etc. It is a micro-power. It is eccentric, atomized, multiple, with no specific location, mobile, and innumerable: in sum, chaotic [13].

Liberal political theory is based on a militant refusal to recognize this dual power structure reducing it to a single power structure, that is, state power, juridical power. And here lies, as is known the distinction between state and civil society. The state is the power realm, the physical basis of power and violence, while civil society is the realm of freedom and equality.

The deep crisis of this theory in our century results in my view from the increased recognition, made possible by recent transformations in the accumulation process, *firstly*, that there are indeed two power forms



corresponding to the two basic forms of social inequality in our societies, the macro (or class) inequality and micro (or interactional) inequality, and *secondly*, that these two forms of exercising power, though very different in their structure, are indeed complementary to the extent that each one of them is made tolerable and reproduced through the other.

What informalization and community justice reforms may indicate, reforms with counterparts in many other areas of social life [14], is that the nature of state (cosmic) power is changing and with it its relation to the chaomic power inherent in social relations in civil society. To the extent that the state, as I mentioned earlier, tries in those reforms to integrate the sanctioning power inherent in the ongoing social relationships it is indeed explicitly connecting its cosmic power to the chaomic power which up until now had been outside its reach. And to the extent that, as has been recognized, the state, through such reforms, manages to control actions and social relations which cannot be directly regulated by formal law, and also to the extent that in informal justice the social environment of the dispute is integrated as a whole in the processing of the dispute, we may be able to conclude that through such reforms the state is indeed expanding. *And it is expanding through a process which on the surface appears to be a process of retraction.* What appears as *de-legalization* is indeed *re-legalization*. In other words, the state is expanding in the form of civil society and that is why the dichotomy of state/civil society is theoretically not useful anymore if ever it was [15]. And because the state expands in the form of civil society, social control may be exercised in the form of social participation, violence in the form of consensus, class domination in the form of community action. In other words, the state power expands in a kind of indirect rule [16].

"Native" processes, interactions, atmospheres, environments are over-integrated in the global strategy of capitalist political domination. On the surface such *over-integration* is negated (hidden) by the *under-codification* made possible by the extensive use of legal rhetoric (through the commonsense knowledge and ordinary language it mobilizes). This transformation of political domination is also relevant for the fiscal crisis and legitimacy crisis arguments. As already mentioned, under conditions of a tendentially stagnating accumulation the bond between the capitalist state and the working classes runs the risk of collapsing. But since the state may expand both through the material functions (delivering goods and services) and through the symbolic functions (producing symbols and ideals which make a radically different social life look either impossible or irrelevant), the bond may be restored through the latter when the fiscal crisis precludes the expansion of material functions. By their appeal to transcendental values the reforms under analysis will contribute to this shift in the legitimacy strategy. If these reforms signal a general trend, we will probably be able to witness that in the late capitalism of the '80s and '90s the state will expand more through symbols than through goods and services.

The state is reaching far beyond its formal apparatuses and in the process it may become more informal and even less organized. The state and the non-

state look more and more alike and it is not absurd to predict the development of a face-to-face state. The formal institutions which, as Foucault has shown, have always been the "physical" *locus* of state power, have been in recent times criticized and even undermined (Foucault, 1975; Illich, 1973). This movement has its material base in state participation in the mediate reproduction of labour power under conditions of increasing structural unemployment, a process which has become more prolonged and costly and which has caused an unprecedented institutional growth. Such anti-institutional movements may indeed serve the objectives of fiscal crisis therapy, provided that alternative sources of power production and reproduction develop. And indeed it may be speculated that the relations between cosmic and chaosmic power will change in the future in the direction of a relative dislocation of political domination from the form of cosmic power to the form of chaosmic power, with the consequent transformation in the relations between concentrated core areas and diffuse peripheral areas of domination. An acentric domination will have no periphery. In this case there will be a dislocation of power from formal institutions to informal networks. Social networks will then become the dominant unit of power production and reproduction, a source of power which is diffuse and interstitial and which as a consequence is as familiar as it is remote.

### **Concluding Note on Power, Knowledge and Utopia**

Quite apart from what can be speculated about long term dislocations of power in bourgeois society I have tried to show in this paper that recent reforms in the field of law and justice may be manifestations of power dislocations occurring inside the capitalist state and that these dislocations result in an increasing asymmetry of capitalist political domination: a high investment of formal institutional resources in the concentrated core areas and an expansion of informal, network-based resources in the diffuse peripheral areas of political domination. This increasing asymmetry reproduces itself inside the legal system through the dynamics of the multiple structural articulations among rhetoric, bureaucracy, and violence.

Since power structures are always connected with knowledge structures it is predictable that changes will occur in legal knowledge resulting from the power dislocations inside the capitalist state. As state power becomes more heterogeneous so does the knowledge through which it operates. Besides the scientific, professional, disciplinary knowledge – and note the connotations of the word "discipline" both as science and as social control – a new form of lay, commonsensical knowledge will emerge. As the increasing asymmetry of political domination will reproduce itself in the increasing asymmetry of knowledge domination, a tendency will develop toward a high investment of professional disciplinary knowledge in the concentrated core areas of political domination (which for that reason will become less and less accessible) and an

expansion of non-professional, "trivial" knowledge in the diffuse peripheral areas of political domination.

In the light of such tendencies there is no reason to think that capitalist domination can only be carried out through the form of professional scientific knowledge. On the contrary in the situation when power dislocates itself from institutions to networks it is predictable that there will occur a shift in social relevance from scientific to non-scientific knowledge and thus from scientific legal knowledge to non-scientific legal knowledge. On a further speculation it might be imagined that the new non-scientific, non-disciplinary knowledge will not be captured in the truth/falsity polarity which has been the founding matrix of the scientific paradigm, but rather will point, like utopia, at least toward a liberation/oppression polarity. This would be the ultimate crisis of the scientific paradigm and of the theory of knowledge upon which the bourgeois society has based the permanent technological revolution of production and the concomitant degradation of the labour process.

Speaking of utopia it would be a gross mistake to analyze current reforms as sheer manipulation and state conspiracy. In the particular case I have dealt with (informalization and community justice) the main contradiction is that the reform movement carries with it a strong symbolic feature; the idea of participation, self government, and real community. This is its utopian transcendental element. It is true that this symbolic function is captured in an overall social control strategy. But though in a distorted form, the symbol is confirmed through these reforms since state controlled community justice does require a certain amount of popular participation. There is here a liberating element which obviously can only be unleashed and made effective through an autonomous political movement of the dominated classes [17].

I could illustrate this with an example from another field. I believe that there is some kind of a structural homology between reformed informal and community justice and mass culture or popular culture. One could say of informal and community justice what Jameson says about mass culture in criticizing the Frankfurt School. He says that mass culture is not to be grasped as an "empty distraction or false consciousness but rather as a transformational work on social and political anxieties and fantasies which must then have some effective presence in the mass cultural text in order subsequently to be managed or repressed." (Jameson 1979, p. 141).

That is, we cannot do justice to informalization or community reforms "unless we are willing to concede the presence within them of a more positive function as well, that is, as an utopian or transcendental potential" (Jameson, 1979, p. 144).

Community justice cannot be ideological without at some time being implicitly utopian as well. It cannot manipulate unless it offers some "genuine shred of content as a fantasy bribe to the community members about to be manipulated" (Jameson, 1979, p. 144). Resistance to manipulation must start from that genuine shred of content.



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### Notes

- 1 The fertility of this three step analysis (historical, structural, and form-logical) depends on a careful articulation of the different partial analytical perspectives. Otherwise it will be difficult not to fall prey to one of the following systematic distortions or prejudices: empiricist historicism, a-historical structuralism or abstract theoreticism.
- 2 This analysis starts from Marx's work; particularly from *Das Kapital* and *Grundrisse*. E. B. Pashukanis (1978) developed it in his theory of capitalist legality and it has dominated the German Marxist debate on the state in recent years. For an overview of this debate see Brandes *et al.* (1977) and Holloway and Picciotto (1978).
- 3 Liberal theorists have always criticized the idea of the state monopoly of legality production. See lastly M. Galanter (1979). Both supporters and critics of the idea of the state monopoly have started from a wrong formulation of the problem. Firstly, the state monopoly of legality is not a logical question; it is a structural and an empirical or historical one. This is of crucial importance in understanding the early period of the establishment and reproduction of capitalist social relations. Secondly, as I argue in the text, the monopoly is both fragmented and asymmetric, which means that it is not equally distributed across the legal fields. The recognition of an "indigenous law" does not contradict the idea of the state monopoly if it can be demonstrated that the logic of state legality dominates the operation of the indigenous law. In this sense the existence of a state monopoly of legality does not preclude the existence of legal pluralism in capitalist societies. In my own research I have been trying to draw attention to situations of legal pluralism in capitalist societies in which the unofficial legality is the "dominated" side and thus subjected to the political and legal domination of the capitalist state (Santos 1974, 1977, 1979).
- 4 The use of methodological tools developed by positivist (structural/functionalist) social science in a Marxist analysis corresponds to an attempt to adopt a new working relationship between the two analytical traditions. Without giving up the logic of Marxist theorizing an attempt is made to open new and more rigorously mapped out analytical fields by resorting to the methodological contribution of positivist social science. The objective is to pull Marxist thinking away from a certain stagnation, which was the result of various kinds of naive theoretical purisms and of anachronic conceptions of political strategy (Wright, 1978, p. 9; Keat and Urry, 1975).
- 5 Though the relations between bureaucracy and violence in capitalist legality are still to be determined in detail it is of crucial importance to recognize that they have developed concomitantly in the same direction. This fact accounts for the illusion, often reproduced as a founding reality by liberal political theory, that the capitalist state is less violent than previous state formations.
- 6 This expression is meant as a suggestive metaphor justified by the underdevelopment (another metaphor) of theory on this topic.
- 7 This is another instance in which the historicity of the state form is revealed. Though always contradictorily anchored in the logic of capitalist social relations, it undergoes historical transformation and allows for internal differentiation in any given structural moment. Thus, in some areas of state action the state will appear as a kind of super-state while in others it appears as a kind of watered down state.
- 8 The distinction between concentrated core areas and diffuse peripheral areas does not imply that they are unequally important for global political domination; it by no means implies that,



for instance, the concentrated core areas are more important than the diffuse peripheral areas. Most probably the over-development of the state at the core cannot be understood without its under-development at the periphery. What is important is the distinction itself because without it, it is impossible to analyse the bond between the capitalist state and the working classes, and thus it is impossible to analyse the repression/legitimation relationship in its internal and historical variation. This does not collide with the fact that from a strategic point of view the core defines the periphery and not vice-versa. Since the state invests in the concentrated core areas most of its institutional resources it finds here and in the specific dispersal mechanisms to be mobilized a kind of reserve repressive core to be activated in particular crisis situations.

- 9 The procedure to detect "contamination" or "infiltration" rests on a close analysis of the types of argument which tend to become more persuasive and thus more susceptible to calls for voluntary adherence. Such contamination will exist if it is shown that arguments subsidiary to the logic of bureaucracy or violence tend to dominate the rhetorical discourse. An earlier attempt to explain on sociological and psychological grounds the variation in persuasion potential of different rhetorical arguments is in Apostel (1963).
- 10 This development is neither linear nor equal in the different capitalist states. It represents a general trend.
- 11 The designation "neo-classicism" derives from the emphasis on the return to the classical principles of imprisonment.
- 12 This does not at all mean that the legal field of criminal justice and penal policy corresponds as a whole and exclusively to a concentrated core area of political domination. On the contrary, all legal fields as traditionally defined (labour law, contracts, torts, criminal justice, etc.) are heterogeneous in that they cut across the two polar areas of political domination and such heterogeneity is reflected in the unequal distribution of rhetoric, bureaucracy, and violence inside each one of them. In this respect the distinction among the legal fields lies in their unequal adequacy (correspondence) to the different areas of political domination so that some legal fields are, as a whole, more adequate to political domination in a concentrated core area, while others are, as a whole, more adequate to political domination in a diffuse peripheral area.

The reasons for such differences can only be obtained through detailed historical analysis, which moreover cannot be restricted to capitalist developments. Under current conditions the field of criminal justice and penal policy of the capitalist states tends to be predominantly adequate to the concentrated core areas of political domination. But this does not mean that this legal field "belongs" exclusively to this area of political domination (otherwise the reason why some of the informalization/de-legalization reforms are also taking place in this legal field would be left unexplained). Moreover the possibility that in the future concentrated core political domination may be carried out through non-criminal legal fields is not ruled out.

This analytical strategy will probably be equally revealing in a systematic comparison of the different states at a given historical moment. As a mere hypothesis, it could be found that in a given state a given legal field, labour law for instance, corresponds predominantly to a concentrated core area of political domination, while in another state the same legal field corresponds predominantly to a diffuse peripheral area of political domination.

- 13 What I call chaomic power echoes Foucault's conception of power (Foucault, 1971, 1976). But while Foucault converts this power into the general form of power and denies the existence of a centralized top-down power (what I call cosmic power), in my conception, on the contrary, the existence of these two forms of power and the dialectical relations between them is what constitutes the "deep structure" of social domination in modern societies. Foucault merely inverts the liberal political theory (which converts cosmic power into the general form of power) and as such remains inside its intellectual universe no matter how radical his formulations are.
- 14 It seems to me that in many other areas of social interaction, such as education, health, science, culture, a parallel development of structural fragmentation and asymmetry may be detected along with the emergence of concentrated core areas and diffuse peripheral areas. On the one hand there is the concentration of high investment in technological and institutional resources

- in some areas where sophistication becomes the condition of elitism and exclusion, and on the other hand the expansion of low investment areas where trivialization becomes the condition of participation and accessibility.
- 15 As Marx showed, the distinction state/civil society is the ultimate mystification of capitalist social relations. It seems to me, however, that in the early stages of capitalism this distinction corresponded, even if only marginally, to the real conditions of the establishment and reproduction of capitalist social relations at the time, and as such it had a shred of truth. The civil society *created* the state as its own *opposition*, the mystification lying not in the creation itself but in its creation *as opposition*. Today, I am arguing, the mystification is double in the sense that the capitalist state is somehow creating civil society as its opposition and in this case the mystification lies both in the *creation* and in the *opposition*. We are probably witnessing the development of a secondary civil society (as state produced non-state areas of social life).
  - 16 Even if they are used only as analogical starting points, the reasons and conditions that led the colonial state to adopt indirect rule deserve close attention as they may help to elucidate current changes in political domination.
  - 17 In order to become a collective movement the broadest political objectives have to be translatable into individual grievances. This individualization is what the legal form provides in a mystified way since in it individualization means insulation and atomization. It is up to the autonomous political movement to establish the missing link between the individual and the collective.

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