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## The Tension between Regulation and Emancipation in Western Modernity and Its Demise

### 1. Modern Regulation and Emancipation

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

It is my contention that we are living in a period of paradigmatic transition and, consequently, that the sociocultural paradigm of modernity, which was formulated before capitalism became dominant as a mode of production, will eventually disappear before capitalism ceases to be dominant. Such disappearance is complex because it stems partly from a process of supersession and partly from a process of obsolescence. It entails supersession to the extent that modernity has fulfilled some of its promises, in some cases even in excess. It results from obsolescence to the extent that modernity is no longer capable of fulfilling some of its other promises. Both

<sup>1</sup> The modernity I am concerned with in this book is Western modernity. Therefore, I do not delve into the existence and characteristics of other, non-Western modernities. The relationship between Western modernity and capitalism is itself a historical process that is far from linear, and in which it is possible to distinguish different moments, temporalities or "phases." Elsewhere I have tried to trace this historical process along three periods: liberal capitalism, organized capitalism, and disorganized capitalism. Santos, 1995, pp. 79–118. See also Chapter Two of this book.

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the excess and the deficit in the fulfillment of historical promises account for our present predicament – which appears to be on the surface a period of crisis but which at a deeper level is a period of paradigmatic transition. Since all transitions are both half invisible and half blind, it is impossible to name our current situation accurately. This is probably why the inadequate designation “postmodern” has become so popular. But for the same reason, this term is authentic in its inadequacy. This paradigmatic transformation will be of consequence for the development of capitalism, but its specific impact cannot be predetermined. The efficacy of the postmodern transition consists in constructing a new broad horizon of alternative possible futures, an horizon at least as new and as broad as the one that modernity once constructed and then destroyed, or allowed to be destroyed.

The paradigm of modernity is very rich and complex, as capable of immense variability as it is prone to contradictory developments. This capacity for variation and contradiction is grounded on the discrepancy between social experience and social expectation. In modernity, for the first time in Western history the current social experience of vast social groups – and not just of the elites as before – no longer coincides with their expectations concerning their future experience. She who is born poor may end up dying rich. She who is born illiterate may end up dying educated or the parent of an educated child. Expectations exceed experiences, an excess that is measured by the dimension of the promises of modernity rendered credible by the idea of progress.

The discrepancy between experiences and expectations is thus part and parcel of Western modernity. This potentially destabilizing discrepancy rests on the two pillars underlying the paradigm of modernity: the pillar of regulation and the pillar of emancipation. Modern regulation is the set of norms, institutions, and practices that guarantees the stability of expectations. It does so by establishing a politically tolerable relation between present experiences, on the one hand, and expectations about the future, on the other. Modern emancipation is the set of oppositional aspirations and practices that aims to increase the discrepancy between experiences and expectations, by calling into question the status quo, i.e., the institutions that constitute the extant political nexus between experiences and expectations. It does so by confronting and delegitimizing the norms, institutions, and practices that guarantee the stability of expectations – i.e., by confronting modern regulation. Modernity is thus grounded on a dynamic tension between the pillar of regulation and the pillar of emancipation. This tension is well expressed in the dialectics of order and good order, or of society and good society. While regulation guarantees order in society as it exists in

a given moment and place, emancipation is the aspiration for a good order in a good society in the future. The success of emancipatory struggles is measured by their capacity to constitute a new political relationship between experiences and expectations, a relationship capable of stabilizing the expectations on a new and more demanding and inclusive level. Put differently, the success of emancipatory struggles resides in their capacity to transform themselves into a new form of regulation, whereby good order becomes order. It is, however, typical of the paradigm of modernity that such success should be always fleeting: once the new form of regulation becomes stable, new aspirations and oppositional practices will try to destabilize it on behalf of more demanding and inclusive expectations. Thus, order ceases to coincide with good order. The tension between regulation and emancipation is therefore unsolvable; there is no possible final reconciliation between the two of them.

The pillar of regulation and the pillar of emancipation are each constituted by three principles or logics, that is to say, by three criteria that provide meaning and direction to social action, be it regulatory or emancipatory. The pillar of regulation is constituted by the principle of the state, formulated most prominently by Hobbes, the principle of the market, developed by Locke and Adam Smith in particular, and the principle of the community, which presides over Rousseau's social and political theory. The principle of the state embodies the vertical political obligation between citizens and the state, an obligation that is variously insured, according to time and space, by coercion and legitimacy. The principle of the state stabilizes expectations by establishing the horizon of possible (and hence of the only legitimate) expectations. The principle of the market consists of the horizontal, mutually self-interested obligation among the agents of the market. It stabilizes expectations by guaranteeing that, within the politically established horizon of expectations, the fulfillment of expectations is obtained with a minimum of imposition, through universal promotion of self-interest in the market place. Finally, the principle of community entails the horizontal obligation that connects individuals according to criteria of nonstate and non-market belongingness. It stabilizes expectations by defining what a particular group collectively may expect or attain within the political boundaries set by the state and outside or beyond any market obligation.

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. These three logics – each

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in its own way – destabilize the horizon of possible expectations by expanding the possibilities of social transformation beyond a given regulatory boundary. In other words, they create possible futures that do not fit the political relationship in force between experiences and expectations. They have therefore a utopian dimension. They explore through the power of imagination new modes of human possibility and new forms of deployment of human will, and contest the necessity of whatever exists – just because it exists – on behalf of something radically better that is worth fighting for, and to which humanity is fully entitled. For instance, the aesthetic-expressive rationality creates possible futures through what, towards the end of the eighteenth century, the German poet Friedrich Schiller designated as aesthetic appearance (*das aesthetische Schein*). Here are Schiller's words:

In the midst of the fearful kingdom of forces, and in the midst of the sacred kingdom of laws, the aesthetic impulse to form is at work, unnoticed, on the building of a third joyous kingdom of play and of semblance, in which man is relieved of the shackles of circumstance, and released from all that might be called constraint, alike in the physical and in the moral sense.<sup>2</sup>

Just as the aesthetic-expressive rationality, the cognitive-instrumental rationality creates possible futures by freeing human beings from the chains of circumstance and established limits, but it does so through the potentially infinite succession of technological revolutions. Finally, the moral-practical rationality creates possible futures by transforming new ethical demands of liberty, equality, and fraternity into political imperatives and juridical demands.

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

<sup>2</sup> Schiller, 1967, p. 215.

With the privilege of hindsight, it is easy to predict that the hubris of such an overreaching aim carries in itself the seeds of frustration: unfulfilled promises and irredeemable deficits. Each pillar, based as it is on abstract principles, tends to maximize its potential – be it the maximization of regulation or the maximization of emancipation – thereby blocking the potentially infinite unfolding of the tension between them. Similarly, each pillar consists of independent and functionally differentiated principles, each of which tends to develop a maximalist vocation. On the side of regulation, it tends either to the maximization of the state, or to the maximization of the market, or still to the maximization of the community. On the side of emancipation, it tends to the aestheticization, the scientification, or the juridification of social practice.

## **2. The Role of Science and Law in the Management of Excesses and Deficits of Modernity**

Given the inner tensions and the breadth of the paradigm, excesses and deficits were to be expected. What is crucial, however, is that both excesses and deficits were conceived of in a reconstructive manner. The excesses were viewed as contingent deviations, the deficits as temporary shortcomings, and both as problems to be solved through a better and broader use of the ever-expanding material, intellectual, and institutional resources of modernity. This reconstructive management of excesses and deficits was gradually entrusted to science and, in a subordinate but equally central position, to law. Boosted by the fast conversion of science into a force of production, the scientific criteria of efficacy and efficiency soon became hegemonic, and gradually colonized the rational criteria of the other emancipatory logics.

At the beginning of the nineteenth century, modern science had already been converted into a supreme moral instance, itself beyond good and evil. According to Saint-Simon, the moral crisis that had plagued Europe since the Reformation, and the consequent separation between secular and religious power, could only be solved by a new religion; that religion was science. In a similar vein, politics was converted into a provisional social field of less-than-optimal solutions for problems that could only be adequately solved once transformed into scientific, technical problems: the well-known Saint-Simonian transformation of the administration of people into an administration of things. On the other hand, both liberal microethics – a principle of moral responsibility concerning exclusively the individual – and legal formalism – a broad intellectual legal constellation that extends from the German pandect to

the codification movement (whose most outstanding landmark is the Napoleonic Code of 1804), and to Kelsen's pure theory of law<sup>3</sup> – were valued for usefulness to a scientific management of society. As to the aesthetic-expressive rationality, the avant-garde movements of the turn of the century – Futurism, Surrealism, Dadaism, Russian constructivism, proletpcult, and so forth are eloquent expressions of the colonization of art by the idea of the scientific and technological emancipation of society.

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

This cooperative relationship and circulation of meaning between science and law, under the aegis of science, is one of the basic features of modernity. In my view, therefore, Foucault overstates the mutual incompatibility of juridical power and disciplinary power, and overlooks the deep interpenetrations between them. Foucault's major thesis is that since the eighteenth century the power of the state – what he calls the juridical or legal power – has been confronted with and gradually displaced by another form of power – what he calls disciplinary power. The latter is the dominant form of power in our time and is generated by the scientific knowledge produced in the human sciences as it is applied by professions in institutions such as schools, hospitals, barracks, prisons, families and factories.<sup>4</sup> Foucault characterizes the two forms of social power in the following way: Juridical (or state) power is based on the theory of sovereignty. It is power as a right possessed or exchanged, a zero-sum power that is centrally organized and exercised from the top down. Juridical power distinguishes between legitimate and illegitimate power exercise; applies to autonomous preconstituted recipients or targets; and is based on a discourse of right, obedience, and norm. In contrast, disciplinary power has no center. It is exercised throughout society. It is fragmented and capillary. It is exercised from the bottom up, constituting its own targets as vehicles of its exercise. It

<sup>3</sup> Kelsen, 1967.    <sup>4</sup> Foucault, 1976; 1977; 1980.

is based on a scientific discourse of normalization and standardization. Although Foucault is rather confusing on the relationship between these two forms of power, it is clear that, according to him, they are incompatible, and that the scientific, normalizing power of the disciplines has become the most pervasive form of power in our society.<sup>5</sup>

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

<sup>5</sup> The following are some of the relations between juridical power and disciplinary power most commonly found in Foucault's work: juridical power is the wrong conception of power, while disciplinary power is the right one; juridical power is the agent of disciplinary power; disciplinary power goes beyond juridical power; disciplinary power is less legal, or exists where juridical power itself is less legal ("at the extremities"); disciplinary power is colonized by juridical power; juridical power and disciplinary power are the two sides of the same general mechanism of power; they coexist though they are incompatible; juridical power conceals and legitimates the domination generated by disciplinary power.

the bureaucratic task finds a comfortable home in the ideologies of the working professions.”<sup>6</sup>

To my mind, both the presentation of normative claims as scientific claims and the presentation of scientific claims as normative claims are endemic in the paradigm of modernity. And indeed the idea that law as norm should also be law as science has a strong tradition in modern social thought, a tradition which goes back at least to Giambattista Vico. In 1725, Vico wrote in *Scienza Nuova*, contrasting philosophy and law: “Philosophy considers man as he should be and so can be of service to but very few, those who wish to live in the Republic of Plato and do not wish to fall back into the dregs of Romulus. Legislation considers man as he is in order to turn him to good uses in human society.”<sup>7</sup> The same ideal of creating a social order based on science, that is, a social order in which the commands of law are emanations of scientific findings on social behavior, is paramount in the eighteenth- and nineteenth-century social thought, from Montesquieu to Saint-Simon, from Bentham to Comte, from Beccaria to Lombroso. In the twentieth century, this ideal was most notably present in Roscoe Pound’s theory of law. Against legal formalism, Pound called for a type of law grounded in the social sciences. According to him, it was up to sociology to identify the social interests to be secured by law.<sup>8</sup>

### 3. A Paradigmatic Transition?

In my view, the reconstructive management of the excesses and deficits of modernity through modern science and modern law is undergoing a final crisis and not surprisingly such crisis is most evident in science and law. In my view, what most strongly characterizes the sociocultural condition at the beginning of century is the collapse of the pillar of emancipation into the pillar of regulation, as a result of the reconstructive management of the excesses and deficits of modernity which have been entrusted to modern science and, as a second best, to modern law. The gradual colonization of the different rationalities of modern emancipation by the cognitive-instrumental rationality of science led to the concentration of the emancipatory energies and capabilities of modernity in science and technology. Not surprisingly, the social and political theory that explored the emancipatory potential of modernity in the most systematic way – that is, Marxism – saw such potential in the technological development of productive forces, and used the cognitive, instrumental rationality to legitimize

<sup>6</sup> Handler, 1983, p. 62.    <sup>7</sup> Vico, 1961, p. 20.1.    <sup>8</sup> Pound, 1937, 1950, 1959.



both itself (Marxism as a science), and the model of society envisaged by it (scientific socialism). Surprisingly enough, this is equally true of Utopian socialism. Its most sweeping and consequent version, Fourierism, relied heavily on the scientific rationality and ethos, as is tellingly illustrated in Fourier's mathematical calculations of the exact size of the phalansteries and of their constitutive elements.<sup>9</sup> The hyperscientificization of the pillar of emancipation allowed for brilliant and ambitious promises. However, as time went by, it became clear not only that many such promises remained unfulfilled but also that modern science, far from eliminating the excesses and deficits, contributed to recreating them in ever-new moulds and, indeed, to aggravating at least some of them. Let's examine in turn some of the central promises of modern emancipation.

Regarding the promise of equality – that is, the promise of a more just and freer society made possible by the plenty resulting from the conversion of science into a productive force: according to the latest available figures available from the UN Food and Agriculture Organization (FAO), in 1997–1999 there were 815 million undernourished people in the world: 777 million in developing countries, 27 million in countries transitioning to market economies and 11 million in industrialized countries.<sup>10</sup> In the twentieth century, more people died of hunger than in any of the preceding centuries, and even in the developed countries the percentage of the socially excluded, those living below the poverty line (the “interior Third World”), continues to rise. Based on UNDP data, the Global Policy Forum has estimated that “three decades ago, the people in rich countries were 30 times better off than those in countries where the poorest 20 percent of the world's people live. By 1998, this gap had widened to 82 times (up from 61 times since 1996).”<sup>11</sup> A World Bank economist concluded in a “wide ranging study covering 85% of the world's population from 91 countries” that “the richest 1% of the world have income equivalent to the poorest 57%. Four fifths of the world's population live below what countries in North America and Europe consider the poverty line. The poorest 10% of Americans are still better off than two-thirds of the world population.”<sup>12</sup>

Concerning the promise of liberty: violations of human rights in countries living formally in peace and democracy reach overwhelming proportions. According to a conservative estimate by Human Rights Watch, out of the 60 million to 115 million working children in India, at least 15 million

<sup>9</sup> Fourier, 1967, p. 162.    <sup>10</sup> FAO, 2001.

<sup>11</sup> <http://www.globalpolicy.org/soecon/inequal/gates99.htm>. Accessed 06–17–02.

<sup>12</sup> Figures estimated by Branko Milanovic, World Bank economist, as reported by *The Guardian* (<http://www.guardian.co.uk>) on January 18, 2002.

are working as virtual slaves (as bonded child laborers).<sup>13</sup> The prison population continues to rise around the world—reaching 2 million in the U.S. alone in 2000 – while police and prison violence are inordinate in such countries as Brazil and Venezuela. Racial conflicts in the UK increased almost threefold between 1989 and 1996. Sexual violence against women, child prostitution, street kids, thousand victims of anti-personal land mines, discrimination against drug addicts, HIV positives and homosexuals, trials of citizens by faceless judges in Colombia and Peru, ethnic cleansing and religious chauvinism – such are some of the manifestations of the diaspora of liberty.

With respect to the promise of perpetual peace that Kant formulated so eloquently: According to the figures quoted by Giddens, in the eighteenth century, 4.4 million people died in 68 wars; in the nineteenth century, 8.3 million people died in 205 wars; in the twentieth century 98.8 million people had died by 1990 have already died in 237 wars (and the counting has not yet closed). Between the eighteenth and the twentieth centuries, the world population increased 3.6 times while the number of war casualties increased 22.4 times.<sup>14</sup>

Lastly, the promise of the domination of nature and of its use for the common benefit of humankind led to an excessive and reckless exploitation of natural resources, the ecological catastrophe, the nuclear threat, the destruction of the ozone layer, and to the emergence of biotechnology, of genetic engineering and the consequent conversion of the human body into the ultimate commodity. During the past 50 years, the world lost about a third of its forests. According to FAO estimates, more than 150,000 square kilometers of tropical forests are lost annually.<sup>15</sup> Nowadays, multinational corporations hold the right to fell trees in 12 million acres of the Amazon forest. Desertification and water scarcity are the problems that will most affect Third World countries in the next decade. A fifth of humankind no longer has access to drinking water.

In order to grasp the full impact of the unbalanced, hyperscientificized development of the pillar of emancipation conveyed by these figures, it is necessary to bear in mind the concomitant and equally unbalanced development of the pillar of regulation in the last two hundred years. Rather than a harmonious development of the three principles of regulation – the state, the market, and the community – we have, in general, witnessed the over-development of the principle of the market to the detriment of both the

<sup>13</sup> Human Rights Watch, 1996.    <sup>14</sup> Giddens, 1990, p. 34.

<sup>15</sup> <http://www.fao.org/sd/epdirect/EPre0030.htm>, accessed 06–17–02.