3

Law

I. Law and Terror

The third example on which I shall dwell concerns the role of law. This interests us for several reasons: above all, it allows us to pose with precision the problem of repression in the exercise of power. For in this respect, too, the capitalist State represents a veritable break with pre-capitalist forms.

In fact, it was only at a very late historical stage, when the capitalist State was already being constituted, that law first appeared as a limitation upon state arbitrariness, and as a barrier to a certain form of violence. This 'State based on law', conceived as the contrary of unlimited power, gave birth to the illusory opposition Law/Terror. I say illusory, because law and certain rules have always been present in the constitution of power: the Asiatic or despotic State was, for example, based on Babylonian or Assyrian law, the slave State on Greek or Roman law, and the feudal State on the juridical forms of the Middle Ages. Even the most bloody state form has set itself up as a juridical organization, giving itself an expression in law and functioning in accordance with a juridical form: as we know only too well, this was the case with Stalin and the 1936 Constitution, reputedly 'the most democratic in the world'. Nothing could be more mistaken than to counterpose the rule of law to arbitrariness, abuse of power, and the prince's act of will. Such a vision corresponds to the juridical-legalist conception of the State – to that political philosophy of the established bourgeois State which was opposed by both Marx and Max Weber, and which never made any impression on the theorists of bloody state management, Machiavelli and Hobbes. The split between law and violence is false even, or above all, with regard to the modern State. For unlike its pre-capitalist counterparts, this supremely juridical

State holds a monopoly of violence and ultimate terror, *a monopoly of war*.

Thus, in every State, law is an integral part of the repressive order and of the organization of violence. By issuing rules and passing laws, the State establishes an initial field of injunctions, prohibitions and censorship, and thus institutes the practical terrain and object of violence. Furthermore, law organizes the conditions for physical repression, designating its modalities and structuring the devices by means of which it is exercised. In this sense, law is *the code of organized public violence*. Those who neglect the role of law in organizing power are always the ones who neglect the role of physical repression in the functioning of the State. A clear example of this is provided by Foucault, whost latest work *La volonté de savoir* is a logical sequel to the aberrations of his earlier *Surveiller et punir*.

The chain of Foucault's reasoning may be somewhat schematically represented as follows: (a) the opposition legality-terror is false, because law has always gone together with the exercise of violence and physical repression; (b) in modern societies, the exercise of power is based much less on overt violence and repression than on subtler mechanisms that are supposedly 'incongruous' with violence: namely, the mechanisms employed by various 'disciplines'. 'And although the juridical could serve to represent, in a no doubt incomplete manner, a power that was essentially based on blood-letting and death, it is utterly incongruous with the new methods of power, which rest not on right but on technique, not on law but on normalization, not on punishment but on control – and which are exercised at specific levels and in particular forms that go beyond the State and its apparatuses.'[17] As Castel puts it, following Foucault, the exercise of power involves a passage from authority-coercion to manipulation-persuasion:[18] in other words, the famous 'internalization' of repression by the dominated masses. Inevitably, Foucault is led to underestimate at the very least the role of law in the exercise of power within modern societies; but he also underestimates the role of the State itself, and fails to understand the function of the repressive apparatuses (army, police, judicial system, etc.) as means of exercising physical violence that are located at the heart of the modern State. They are treated instead as mere parts of the disciplinary machine which patterns the internalization of repression by means of normalization.

[17] *La volonté de savoir*, op. cit., pp. 117–18.
[18] R. Castel, *Le psychanalysme*, Paris 1976, pp. 288ff.

Now, while the first point concerning the constitutive relationship between law and the exercise of violence is indeed correct, the second one is by and large false. Adopted by a current of thought that is much broader than, and often very distinct from, Foucault, this second line of reasoning has taken root in the couplet violence-consent or repression-ideology that has long been a characteristic of analyses of power. The central theme is quite straightforward: modern power is grounded not on organized physical violence, but on ideological-symbolic *manipulation*, the organization of consent, and the internalization of repression ('the inner cop'). This conception originated in the early analyses of bourgeois politico-juridical philosophy – that philosophy which, by counterposing violence and law, saw in the law-based State and the rule of law realities that impose an inherent limitation on violence. In its various modern continuations – ranging from the celebrated Frankfurt School analyses of the replacement of the police by the family as the authoritarian instance, through those of Marcuse to Bourdieu's analysis of so-called symbolic violence – the theme of internalized repression or, more generally, what we might call the 'softening' of physical violence in the exercise of power has become an almost commonplace idea.

For our present purposes, then, this current may be said to have two essential features: on the one hand, underestimation of the role of physical repression, in the strong sense of deadly, armed constraint of the body, and on the other, a conception of power in which the terms of the couplet repression-ideology constitute zero-sum components or quantities. According to this perspective, any diminution or contraction of physical violence in the functioning and maintenance of power cannot but correspond to an accentuation or increase of ideological inculcation (seen as symbolic violence or internalized repression).

There is little fundamental difference between the above conception and the one dominant in a number of currently fashionable analyses that ground consent on the wish of the masses (for fascism or whatever) or on love of the Master.[19] For these also neglect the role of organized physical violence, at the same time reducing power to repression-prohibition. The resulting subjectivization of the exercise of power takes the form of seeking 'the reasons for obedience' in the desire for or love of power – factors which here replace the role imputed to ideology in the internalization of repression. If law enters into the picture, it does so not as the

[19] There is a long list of such works: from Fr. Lyotard *(L'économie libidinale)* through R. Scherer to P. Legendre *(L'amour du censeur)*.

coding of physical repression, but as a form of the Master, who induces the desire and love of his subjects simply through his presence, self-expression and discourse. The couplet repression-ideology gives way to the couplet law-love or prohibition-desire. But the role of violence in grounding power is still underestimated, and *all that is ever mentioned are the reasons for consent.*

Of course, the fact that these analyses raise the question of consent to power is not at all objectionable – quite the contrary. What is disturbing is both their neglect of the role of organized physical violence in exercising repression, and their reduction of power to prohibition and symbolic or internalized repression. By grounding consent on love-desire of repression, they become unable to grasp the positive *material reasons* for this phenomenon – reasons such as the concessions made to the masses by the existing power, which play a decisive role over and above that of the dominant ideology. At the same time, insistence on the positivity of power should not be allowed to obscure either the question of repression or the role of ideology itself in relation to consent. Yet this is precisely what happens in Foucault's writings. Unlike the above currents, he does have the merit of bringing out one aspect of the power techniques that materially organize the submission of dominated layers – namely, the aspect of the normalization disciplines. But his analyses, too, constantly play down the role of overt physical violence. (A mere symptom of this is his underestimation of the role of law in giving coded form to such violence.)

In the omnifunctional position assigned to them by Foucault, the techniques of power absorb not only the question of physical violence but also that of consent. The latter thereby becomes a non-problem which is either given no theoretical elucidation at all or else is collapsed into the 'internalized repression' type of analysis. But over and above the disciplines of normalization, there must be other 'reasons' that explain consent. For if those disciplines were enough to account for submission, *how could they admit the existence of struggles*? Here we come to the central impasse of Foucault's analyses: his failure to provide a basis for that celebrated 'resistance' to power of which he is so enamoured. In point of fact, there has to be organized physical violence for the very reason that there has to be consent – that is to say, because of the universality and primacy of struggles based on exploitation. It is this primary, inescapable reality which accounts for the fact that *struggles are always at the foundation of power*. If power (the Law, the Master) is instead made the basis of struggle, or if 'power' and 'resistance' are considered as entirely

equivalent terms of a relation, then one is led to derive consent from love or the wish for power, or else to obscure the problematic character of consent itself. In either case, the role of violence is completely passed over.

What then is the truth of the matter? Unlike its pre-capitalist counterparts, the capitalist State holds *a monopoly of legitimate physical violence*. Max Weber must be given the credit for establishing this point and for demonstrating that the legitimacy of its concentration of organized force is a 'rational-legal' legitimacy based on law. Indeed, the capitalist State's prodigious accumulation of the means of bodily constraint goes hand in hand with the development of its character as a State based on law. Now, this circumstance gives rise to some quite remarkable effects. The degree of overt physical violence exercised in the various contexts of 'private', extra-state power – from the factory to the famous micro-power situations – declines as an exact function of the State's monopoly of legitimate physical force. The European capitalist States, in particular, were constituted through pacification of territories torn by feudal wars. And once political power was institutionalized, these States had less recourse to such violence in normal contexts of domination – even though they now enjoyed a monopoly of its legitimate use – than did the various pre-capitalist States. Of course we should not forget: (a) the exceptional forms of capitalist State (fascism, military dictatorship, etc.) which infest to-day's world but which are lost from sight in the short memories and Eurocentric light-mindedness of so many theorists (although when they come to the regimes in the East, they suddenly become aware of violence); (b) the supreme terror of *war* (the First and Second World Wars, others . . . and now the threat of nuclear war: whoever had the idea that modern power is no longer exercised 'up to the point of death'?); and (c) the conjunctures of accentuated class struggle. But despite all this, overt violence is employed less frequently than in the past: it is exactly as if the State had to apply less force *to the very degree that* it holds a monopoly of its legitimate use.

However, contrary to a now widespread illusion, it does not follow that modern power and domination are no longer grounded on physical violence. Even if violence is not concretized in the daily exercise of power as it used to be, it still, and indeed more than ever, occupies a *determining* position. For its very monopolization by the State induces forms of domination in which the numerous methods of establishing consent play the key role. In order to grasp this point, we must go beyond the notion of a simple complementarity of violence and consent, modelled on Machiavelli's image of a Centaur that is half-human, half-beast.

Physical violence and consent do not exist side by side like two calculable homogeneous magnitudes, related in such a way that more consent corresponds to less violence. Violence-terror always occupies a determining place – and not merely because it remains in reserve, coming into the open only in critical situations. *State-monopolized physical violence permanently underlies the techniques of power and mechanisms of consent: it is inscribed in the web of disciplinary and ideological devices; and even when not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear.*

There can be no question, then, of replacing the couplet law-terror by a trinomial repression-disciplinary normalization-ideology, in which, despite the presence of a third term, the component parts stand in an unchanged relationship to one another as heterogeneous and distinct magnitudes of a quantifiable power, or as modalities of the exercise of a power-essence. We need rather to grasp the material organization of labour as a class relation whose condition of existence and guarantee of reproduction is organized physical violence. The establishment of techniques of capitalist power, the constitution of disciplinary devices (the great 'enclosure'), the emergence of ideological-cultural institutions from parliament through universal suffrage to the school – all these presuppose state monopolization of violence concealed by the displacement of legitimacy towards legality and by the rule of law. They presuppose this not only in the sense of historical genealogy, but in their very existence and reproduction. To take just one example, the national army is consubstantial with parliament and the capitalist school. But this consubstantiality does not rest only on a common institutional materiality stemming from the social division of labour embodied by these apparatuses; it also rests on the fact that the national army, as an explicit part of the state monopoly of legitimate physical violence, gives rise to the forms of existence and operation of institutions – parliament, school – in which violence does not have to be materialized as such. The regular existence and even the constitution of a law-enacting parliament is unthinkable without the modern national army.

Finally, I should like to say something more about *death itself*. For how is it possible not to see that the changing modes of prosaically dying in one's bed, the veritable taboo on death in modern societies, and the loss of control by 'private' citizens over their own death[20] actually converge with the state monopoly of legitimate public terror? Does the

[20] Ph. Aries, *Histoire de la mort en Occident*, and the works of L. V. Thomas.

State no longer have any function with regard to death? Even when it does not execute people, kill them or threaten to do so, and even when it prevents them from dying, the modern State manages death in a number of different ways; and medical power is inscribed in present-day law.

State monopolization of legitimate violence therefore remains the determining element of power even when such violence is not exercised in a direct and open manner. This monopoly is not the origin of the new forms of struggle under capitalism; and so true is it that power and struggle summon and condition each other that the role of the mechanisms of organization and consent now correspond to these forms. State concentration of armed force and the disarming-demilitarization of private sectors (which is a precondition of established capitalist exploitation) contribute to shifting the class struggle away from permanent civil war (periodic and regular armed conflicts) towards those new forms of political and trade-union organization of the popular masses against which overt physical violence is, as we know, only conditionally effective. Confronted with a 'public' power, a 'private' people no longer lives political domination as a natural and sacrosanct fatality: it considers the state monopoly of violence to be legitimate only to the extent that legality and judicial regulation give it the hope, and in principle even the formal possibility, of gaining access to power. In short, at the very time that violence is concentrated in specialized state bodies, it becomes less than ever capable of ensuring the reproduction of domination. As I said earlier, the state concentration of force established peace instead of the private armed conflicts and constantly updated holy wars that used to constitute the *catharsis* of the fatality of power. Under the impact of the same state monopoly, these have given way to permanent disputing of political power; and the rule of capitalist law has installed in the very outposts of power the various mechanisms of organizing consent – including, insofar as it masks the state monopolization of physical force, the mechanisms of ideological inculcation.

Although law, as the organizer of repression and physical violence, thus turns out to play an essential role in the exercise of power, it does not for all that exhibit the purely negative logic of rejection, obstruction, compulsory silence, and the ban on public demonstration. Moreover, it is not only because law is also something other than law that it is never exclusively negative. Even in its repressive role, law involves an eminently positive aspect: *for repression is never identical with pure negativity*. More than a conglomeration of prohibitions and censorship, law has since Greek and Roman times also issued positive injunctions: it does not just forbid

or leave be, according to the maxim that all is permitted which is not expressly forbidden by law; it lays down things to be done, dictates positive obligations, and prescribes certain forms of discourse that may be addressed to the existing power. Law does not merely impose silence or allow people to speak, it often *compels* them to speak (to bear witness, denounce others, and so on). More generally, institutionalized law has never been so completely identified with prohibition and censorship that state organization has been divided between law-censorship-negativity and 'something else'-action-positivity. The opposition itself is partially false, since law organizes the repressive field not only as repression of acts forbidden by law, but also as repression of a failure to do what the law prescribes. Law is always present from the beginning in the social order: it does not arrive *post festum* to put order into a pre-existing state of nature. For as the codification of both prohibitions and positive injunctions, law is a constitutive element of the politico-social field.

Repression then is never pure negativity, and it is not exhausted either in the actual exercise of physical violence or in its internalization. There is something else to repression, something about which people seldom talk: namely, *the mechanisms of fear*. I have referred to these material, and by no means subjective, mechanisms as the *theatricals* of that truly Kafkaesque Castle, the modern State. They are inscribed in the labyrinths where modern law becomes a practical reality; and while such concretization is based on the monopoly of legitimate violence, we must still go into Kafka's Penal Colony in order to understand it.

Finally, although law plays an important (positive and negative) role in organizing repression, its efficacy is just as great in the devices of creating consent. It materializes the dominant ideology that enters into these devices, even though it does not exhaust the reasons for consent. Through its discursiveness and characteristic texture, law-regulation obscures the politico-economic realities, tolerating structural lacunae and transposing these realities to the political arena by means of a peculiar mechanism of concealment-inversion. It thus gives expression to the imaginary ruling-class representation of social reality and power. In this manifestation, which runs parallel to the place it occupies in the repressive machinery, law is an important factor in organizing the consent of the dominated classes – even though *legitimacy* (consent) is neither identical with nor restricted to *legality*. The dominated classes encounter law not only as an occlusive barrier, but also as the reality which assigns the place they must occupy. This place, which is the point of their insertion into the politico-social system, carries with it certain rights as well as duties-obligations,

and its investment by the imagination has a real impact on social agents.

Furthermore, a number of the State's activities that go beyond its repressive and ideological role come to be inscribed in the text of the law and even form part of its internal structure. This is true of state economic intervention, but above all of those material concessions which are one of the decisive reasons for consent. Law does not only deceive and conceal, and nor does it merely repress people by compelling or forbidding them to act. It also organizes and sanctions certain *real rights* of the dominated classes (even though, of course, these rights are invested in the dominant ideology and are far from corresponding in practice to their juridical form); and it has inscribed within it the material concessions imposed on the dominant classes by popular struggle.

Nevertheless, it is evident that *the activity, role and place of the State stretch a very long way beyond law and judicial regulation* – a fact which cannot be grasped by a juridical-legalistic conception or by current psychoanalytic theories such as those expressed in Legendre's interesting works.[21]

(a) The activity and concrete functioning of the State by no means invariably take the form of law-rules: there is always a set of state practices and techniques that escape juridical systematization and order. This is not to say that they are 'anomic' or arbitrary in the strong sense of the term. But the logic they obey – that of the relationship of forces between classes in struggle – is somewhat distinct from the logic of the juridical order, and law invests it only at a certain distance and within a specific range.

(b) The State often transgresses law-rules of its own making by acting without reference to the law, but also by acting directly against it. In its very discursiveness, each juridical system allows the Power-State to disregard its own laws and even enters an appropriate variable in the rules of the game that it organizes. This is called *the higher interests of the State (raison d'Etat)* – which, strictly speaking, entails both that legality is always compensated by illegalities 'on the side', and that state illegality is always inscribed in the legality which it institutes. Thus, Stalinism and the totalitarian aspects of power in the East are not principally due to 'violations of socialist legality'. Every juridical system includes illegality in the additional sense that gaps, blanks or 'loopholes' form an integral part of its discourse. It is a question here not merely of oversights or blind-spots arising out of the ideological operation of concealment

[21] *Jouir du pouvoir*, Paris 1976.

underlying the legal order, but of express devices that allow the law to be breached. Lastly, of course, there are cases where the State engages in straightforward violations of its own law – violations which, while appearing as crude transgressions not covered by the law, are no less part of the structural functioning of the State. The state-institutional structure is always organized in such a way that both the State and the dominant classes operate at once in accordance with the law and against the law. Many laws would never have existed in their present form if a certain rate of ruling-class violation had not been anticipated by, and written into, the workings of the state machinery. Thus, even when illegality is distinct from legality, it is not identified with a kind of parallel organization or State separated from the *de jure* State of legality, and still less does it form a chaotic non-State counterposed to the real State of legality. Not only does illegality often enter into the law, but illegality and legality are themselves part of one and the same institutional structure.

This is essentially how we should understand Marx's argument that every State is a class 'dictatorship'. All too often it is taken to mean that the State is a power above the law – where the term law is opposed to violence and force. As we have seen, however, even the most dictatorial of States is never devoid of law; and the existence of law or legality has never forestalled any kind of barbarism or despotism. In Marx's statement, the term 'dictatorship' refers to the precise fact that every State is organized as a single functional order of legality and illegality, of legality shot through with illegality.

(c) The activity of the State always overflows the banks of law, since it can, within certain limits, modify its own law. The State is not the simple representation of some eternal law, be it a universal prohibition or a law of nature. If such were the case – and this needs to be made clear – law would have *de jure* primacy over the State. (This is indeed the cornerstone of the juridical conception of the State, whose present-day convergence with the analytical, or psychoanalytical, conception of institutions is not difficult to explain.) Now, it is true that every State is consubstantial with a system of law, and that law is not strictly speaking the utilitarian creation of a pre-existing State of naked might. But in a class-divided society, it is always the State, as the practitioner of legitimate violence and physical repression, which takes precedence over law. Although law organizes this violence, there can be no law or right in such a society without an apparatus that compels its observance and ensures its efficacy or social existence: *the efficacy of law is never that of*

pure discourse, the spoken word, and the issuing of rules. Just as there is no violence without law, so law always presupposes an organized force at the service of the legislator (the secular arm). Or, more prosaically: strength remains on the side of the law.

II. Modern Law

Despite the fact that all legal systems have certain characteristics in common, capitalist law is specific in that it forms an *axiomatic system*, comprising a set of *abstract, general, formal and strictly regulated norms.*

A certain variant of Marxism has sought to base this specificity of the capitalist juridical system in the sphere of circulation of capital and commodity-exchange: 'abstract' juridical subjects are thus held to correspond to free commodity-traders, and 'formally' free and equal individuals to equivalent exchange and 'abstract' exchange-value, and so on.[22] However, we can hardly grasp the reality of capitalist law by remaining within this sphere. The roots of its specific features (abstraction, universality, formalism) – which also embrace the state monopoly of legitimate violence as opposed to the diffusion of such violence among several bearers that characterizes juridical particularism – have to be sought in the social division of labour and the relations of production. It is these which assign to violence its position and role under capitalism. For by virtue of the expropriation of the means of labour from the direct producers, violence is not present directly and as such (as an 'extra-economic factor') in the production process. The axiomatic system of capitalist law constitutes the framework wherein agents who are totally dispossessed of their means of production are given *formal cohesion*; it thus also sketches out the contours of a state space relatively separate from the relations of production. The formal and abstract character of law is inextricably bound up with the real fracturing of the social body in the social division of labour – that is to say, with the individualization of agents that takes place in the capitalist labour process.

Modern law therefore embodies space-time as the material frame of reference of the labour process: a serial, cumulative, continuous and homogeneous space-time. This law institutes individuals as juridico-

[22] In my first and long since out-of-print work *Nature des choses et droit* (1966), I also took this position. However, the reader can rest assured that I have no intention of republishing this text.

political subjects-persons by representing their unity in the people-nation. It consecrates, and thus helps to establish, the differential fragmentation of agents (individualization) by elaborating the code in which these differentiations are inscribed and on the basis of which they exist without calling into question the political unity of the social formation. All subjects are free and equal before the law: that is, the discourse of law does not merely hide, but actually expresses the fact that they are different (as subjects-individuals) to the very extent that this difference may be inscribed in a framework of homogeneity. All too often it is said that capitalist law just obscures real differences behind a screen of universal formalism. But in fact, it also helps to establish and consecrate individual and class differences within its very structure, while at the same time setting itself up as a cohesive and organizing system of their *unity-homogenization.* Therein lies the source of the universal, formal and abstract character of the juridical axiomatic. For it presupposes agents who have been 'freed' from the territorial-personal bonds of pre-capitalist, and even serf, societies – bonds resting upon a law which was essentially composed of the statuses, privileges and customs of castes or Estates, and in which the political and the economic were closely intertwined. Of course, *law* does not itself *free* these agents: it rather intervenes in the process whereby they are disentangled and separated from the bonds that differentiated them according to class or Estate (those closed classes which served as the fount of signs, symbols and meanings). Law participates in this process by helping to establish and consecrate the new great Difference: *individualization.* The modern legal system works for this individualization either in a parallel, and more or less contradictory, relationship with other state techniques and practices (the normalization disciplines) or else by covering and moulding itself to them.

Now, insofar as they materialize the dominant ideology, capitalist law and the capitalist juridical system present certain further peculiarities. The centre of legitimacy shifts away from the sacred towards legality. Law itself, which is now the embodiment of the people-nation, becomes the fundamental category of state sovereignty; and juridical-political ideology supplants religious ideology as the predominant form. Although these changes coincide with the emergence of a state monopoly of legitimate force, they have much deeper roots than that. The function of legitimacy shifts towards the impersonal and abstract instance of law, at the very time that the agents 'loosen' and 'free' themselves from their territorial-personal bonds. It is exactly as if the abstract, formal and general character of law had rendered it the mechanism most suitable