DRAWING TOGETHER A SOCIOLOGY OF LAW IN AUSTRALIA: LAW, CAPITALISM AND DEMOCRACY

by Pat O'Malley
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Pat O'Malley is to be congratulated on attempting the task he describes as a drawing together of a sociology of law in Australia 'from the limited and disparate fragments of available sociological and related work' (O'Malley 1983:vii). *Law, Capitalism and Democracy* fills what has been a gap in the literature; until recently there has been an almost total absence of works dealing with the sociological and socio-legal aspects of the Australian legal order. Along with the recent arrival on the scene of the *Australian Journal of Law and Society* and *Law in Context*, O'Malley's work is an indication of the potential vitality of scholarly activity in this hitherto neglected field.

The author of *Law, Capitalism and Democracy* deserves further praise for recognising that an eclectic and atheoretical survey of the extant Australian literature in this field was not sufficient. Not only is O'Malley uncompromising in his argument for the necessity of theory, but he also has the merit of arguing for a theory that recognises Australia as a unique social formation. The author posits the importance for an 'historically informed theory that takes into account the fact than any social setting will reflect not only the contemporaneous pressures and relationships, but also in various degrees embodies characteristics created by the conditions of its history' (p 13).

O'Malley analyzes law within a broad framework which encompasses both Marxist and non-Marxist approaches. He is, however, theoretically predisposed toward Marxism. Nevertheless, this is no vulgar Marxism as he rejects economic determinist accounts. Also rejected are instrumentalist accounts which conceive of law as a tool utilized by the dominant class in the maintenance of its interests. At the same time O'Malley asserts that this does not mean that 'there is a chaos of legal forms or that no regularities exist between the legal form and the dominant form of economic and political relations' (p 50). He seeks to identify a middle course between 'rigid and narrow determinancy' on the one hand, and 'sociological nihilism' on the other.

In his attempt to map out a middle course, O'Malley introduces the concepts of 'legitimation' and 'relative autonomy'. The former of these concepts is understood as the need for the law to appear to be ideologically neutral in order to facilitate the maintenance of capitalist relations of production. That is, the class nature of law must be

obscured by a process of legitimation in order to achieve the appearance of neutrality.

O'Malley argues that this neutrality is not merely formal, but that the legitimation process results in substantive non-correspondence between law and dominant class interests. The demands of non-class forces, class interests opposed to those of the dominant class, and competing factions within the dominant class are such that the class nature of law cannot be obscured without the law achieving a degree of actual independence from particular class interests. As a result, the process of legitimation is not only necessary to the maintenance of capitalist productive relations, but it is also antagonistic to maintenance of those relations, as it produces a legal order which may be contrary to the interests of the dominant class or classes.

Unfortunately, all of the potential thus created to theorize law in terms other than as a reflection of dominant class interests is lost in O'Malley's elucidation of the concept of 'relative autonomy'. He weds 'relative autonomy' to 'legitimation', and is thus committed to a position whereby the autonomy of the law remains untheorized. Autonomy of law is held to be circumscribed by a 'wide range of processes' which reflect the need to valorize capital in a capitalist society. The result is a theoretical insistence upon an 'in-general' rather than an exact correspondence between law and dominant class interests.

The position which O'Malley adopts is theoretically implausible. The problem with it is that the recognition of autonomous forces affecting the legal order is inconsistent with an insistence upon an 'in-general' correspondence between law and particular class interests. The concept of 'relative autonomy' which he employs can only produce a tautological explanation of the legal order in terms of 'constraints' within capitalist economic relations which remain mysterious to this theoretical framework. Those aspects of the legal order which correspond with dominant class interests 'prove' that there is an 'in-general' correspondence between law and the requirements of capitalist relations of production. Those aspects of the legal order which do not correspond with dominant class interests 'prove' that constraints exist which allow only an 'in-general' correspondence between law and the imperatives of capitalist relations of production.

Instead of providing us with an account of 'relative autonomy', O'Malley ends up describing a number of possible outcomes in the legal sphere, some of which directly reflect the interests of the dominant class, and some of which may be the product of 'legal logic' or reflect the interests of subordinate classes. However, he insists that all these possible outcomes must be consistent with the maintenance of capitalist relations of production.

The concept of 'relative autonomy' can be seen to contribute nothing to O'Malley's theorization of law. Insistence upon a conception of the law as necessarily acting in the long term interests of the dominant class prevents any theorization of the nature and extent of legal autonomy. Once a preconceived notion of the 'capturing' of law by particular class forces is adopted, then analysis of law can only proceed with reference to notions of class, class interests and alignments of class forces. These notions are external to the framework employed and thus remain untheorized. At one point O'Malley reluctantly concedes that he has adopted an economic determinist position, in which law is seen as a reflection of class forces determined in the economic sphere (p 30).

O'Malley's analysis of the contemporary Australian legal order relies heavily upon his conclusion that there has occurred, albeit incompletely, a process of economic transition from a system of competitive capitalism to monopoly capitalism characterised by the prevalence of corporatist practices. The economic determinist thrust of his theoretical framework leads O'Malley to insist that this economic transition could not have failed to transform the legal order. Inevitably, one of the central themes of his analysis is to show how this transition and the continuing struggles between competitive and corporatist practices and ideologies are among the primary influences on the nature of Australian legal order today.

In developing this central theme O'Malley advances a restricted definition of corporatism which conflicts with his central thesis of a generalized corporatist transformation:

> A tripartite political and economic order emerges, necessarily geared to the requirements of a capitalist economy, but increasingly taking the form of a co-ordinating and stabilising national alliance . . . between the state, capital and the labour unions (p 14).

This definition does not describe a total political system, but rather a partial and specific mechanism within a capitalist society. In his critique of Winkler, Leo Panitch points to the fact that realisation of the limited articulation of corporatist structures raises significant matters which are glossed over by expansive definitions of corporatism: first, the question of needing to see parliamentary institutions as the linchpin of hegemonic domination and, second, the question of the different consequences of corporatist integration for trade unions versus business organisations (1981:121-143).

These points could equally be seen to apply to the relationship of the law to corporatist evolution. Which specific aspects of the law are affected by corporatism? Also, in what way do corporatist legal mechanisms supplement traditional legal techniques? (For instance, is business law differently affected in the encroachment of corporatism than labour law?)

It becomes clear when one examines O'Malley's examples of the emergence of a corporatist legal order that he has been extremely selective. The general emergence of a corporatist legal order is read off from the bureaucratisation of the criminal process, and to a lesser extent the emergence of special tribunals to deal with the specific problems experienced by sectional groups within society. What is also striking in O'Malley's account of 'corporatism' is that despite his definition which places the relationship of labour, capital and the state at the centre of the emergent system, he provides almost no examples which pertain to that relationship. O'Malley insists on using criminal law as an exemplar of a corporatist system without demonstrating that it is more than peripheral to the capital/labour/state relationship.

O'Malley glosses over those laws which are most directly related to the main actors in the corporatist scenario. Those laws which regulate business are scarcely mentioned at all, labour law is similarly passed over, as are also those laws which regulate the state itself.

In addition to his failure to recognise the specificity and partial nature of corporatist structures, O'Malley fails to locate historically the tendency towards state intervention that he identifies as integral to the emergence of a corporatist legal order:

> Corporatism emphasises unity, harmony and technical rationality and invokes

> generalised state intervention in order to secure the organic cohesion of the social formation (pp 124-125).

The competitive capitalism which O'Malley contrasts with corporatism has never existed anywhere except in textbooks. While O'Malley acknowledges that Australia was never a pure laissez-faire economy, he glosses over the extent of state intervention in the nineteenth century. The utilization of the Master and Servant Acts and the Merchant Seaman's Acts to regulate the workforce in the nineteenth century does not even rate a mention. Even O'Malley's appropriation of the criminal law as a site of increased state intervention is dubious. O'Malley's argument would only make sense if he could illustrate the relative unimportance of state intervention to the criminal process in the nineteenth century. Whilst demonstrating that guilt is often determined before a case comes before the judiciary in the contemporary environment, O'Malley provides no empirical evidence to the effect that this was not also the case in the nineteenth or early twentieth century. Recent debates in *Past and Present* (Langbein 1983) around Douglas Hay's essay on Property, Authority and the Criminal Law tend to reveal that in the nineteenth century and earlier the courts quite often processed cases in which guilt was pre-established. It could plausibly be argued that this phenomenon is related to the emergence of modern police forces.

O'Malley's account of a move towards corporatism may have been more fruitful if instead of seeing it as an emergent political structure replacing democracy in the representative sphere, and replacing the rule of law in the juridical sphere, he had instead limited himself to analyzing it as a structure which was confined to the articulation of collective mass organisations with the centralized state apparatus. Panitch has offered a definition which points to the specificity and partial nature of corporatism:

> . . . corporatism is a political structure with advanced capitalism which integrates organised socio-economic producer groups through a system of representation and co-operative mutual interaction at the leadership level and mobilization and social control at the mass level (1980:173).

The heavy reliance in O'Malley's work upon empirical examples drawn from the criminal sphere also raises the question of how easily one might be able to generalise an account of 'law' from an analysis of its components concerned with the regulation of criminality. It is generally assumed in the literature that criminal and civil law are unitary. Marxist and other writers on the left have virtually all been prepared to accept a functional definition of law—'law' is what the state defines as law. Little analysis has been undertaken in an attempt to delineate the differential role of the criminal and the civil—for instance, whilst it might make sense to talk about some form of hegemony around the criminal law in order for it to function at all, does it make any sense to talk about hegemony around Company Law or the Local Government Act in the same way? Alan Hunt has pointed to the difficulties that writers have encountered in attempting to construct an unitary theory of law:

> The practical consequence of this bifurcation or rupture within the conceptual framework within which the law is located is the presence of two rather different bodies of theory; the first focuses on the regulation of the social relations of production (in particular, property and contract relations) and the second on the role of law in the preservation of class domination (in particular, embodied in criminal and constitutional law) . . . the general theoretical problem that presents itself in the development of a Marxist theory of law is the manner in which the common

> sense reality of the opposition between 'consent' and 'coercion' is to be theorized in such a way as to produce an unitary theory (1982:88).

In erecting his theoretical account of the Australian legal system O'Malley does not even recognise the difficulties inherent in adopting a position that assumes that the law is unitary. He assumes that material gleaned from an analysis of the criminal law is directly translatable to the civil sphere. Instead of accepting this, if one were to analyze the dichotomous components of 'law' separately, each having their own history and dynamic, then one might find that the manner of 'legitimation', the extent of 'relative autonomy', and the 'corporatist' tendencies of each was quite different.

In the article cited earlier, Alan Hunt points to the inadequacy of existing unitary conceptions of law. After reviewing the attempts of neo-Gramiscians, commodity form theorists and rule of law polemicists to bridge the gap between coercive and consensual aspects of the law within a unifying theoretical framework, he concludes:

> The examination of the major trends within recent sociological theories of law has revealed the enduring presence within the different theoretical perspectives of a dichotomous conception of law organised around the polar opposition between coercion and consent succeeds in embracing important characteristics of law. Yet none of the positions examined succeeds in advancing a coherent presentation of a mode of combination of the apparently opposed characteristics of law so as to produce a unitary conception not reducible to a choice between opposites or a fluctuation between them (1982:95).

If one recognises that there is a bifurcation in the 'law', then O'Malley's account must be seen not as an account of the corporatist absorption of the 'law' as functionally defined, but merely a specific account of the emergence of a corporatist criminal 'law', or perhaps more accurately a corporatization of the conflictual dimensions of 'law'. The main difficulty in so conceptualizing O'Malley's account is the inadequacy of his elucidation of corporatism. At best one can agree with O'Malley that there has been a tendency for the conflictual aspects of law to be resolved through administratively expedient forms.

O'Malley's text is weakened further by his failure to satisfactorily connect the theoretical sections of the book to the more empirical ones. The theoretical position propounded in the early chapters relies heavily on a model which sees the consensus aspects of the law as primary. However, as we have seen above, the empirical chapters rely heavily on work done in the criminal law sphere. In fact, those theories which would have been the most likely candidates to support O'Malley's implicit assumption that the conflict and consensus dimensions of law are unitary are rejected.

In conclusion, there is little doubt that *Law, Capitalism and Democracy* will, as its author hopes, serve as a catalyst for analysis of law in Australia. The strengths and weaknesses of the book must be judged in the light of the fact that it is a '. . . first, simplified and schematic attempt to draw together a sociology of law in Australia' (O'Malley 1982:vii). The analytical flaws upon which the commentary has focussed do not detract from the achievements of the book in drawing together a disparate literature and in schematically identifying issues which are central to productive debate about the nature and functions of law. O'Malley's work will form a useful basis for further contributions around the themes of the hegemonic role of law, the tendencies towards corporatism in the legal order, and the dichotomous nature of law.

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