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Jaime Couso

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**The other violence**  
**Domestic penal power over children in Chilean Law**

**Jaime Couso\***

“The age of happiness goes by in the midst of tears, punishment, threats and slavery. We torment the poor child for his own good and we do not see that we are summoning death, which will trap him in the middle of this sad task...Fathers, do you know the day on which death awaits your son? ... make sure that, whatever hour God may call them, they will not die without having tasted life.”

Jean-Jacques Rousseau, Emile, 1762.

**I. Introduction.**

Reyno de Chile, 1792.

Fernando Ríos, minor, was arrested:

“for going around as a vagabond in bad company, given to vice, and without due subordination to his father, who has denounced to your worship the evil customs of his son, asking that he be banished to the penitentiary of Valdivia...(and the father declares that) he is one of the most disobedient of his sons when given orders by his Parents... banishment is the only means whereby I and his poor mother and the rest of the family will consider themselves free of what makes them blush ...”<sup>1</sup>

Republic of Chile, 1855.

Civil Code, Article 233:

“The father will have the faculty of correcting and moderately punishing his sons, and when this is not sufficient, he will be able to apply to them the punishment of arrest for up to a month in a reformatory establishment.

“For this the requirement of the father and the judge will be sufficient, and in virtue of this he will issue the arrest warrant.

“But if the son shall have reached the age of sixteen, the judge will only order the arrest after evaluating the motives, and he may extend it for up to six months.

“If the father sees fit, he will be able to put an end to the arrest.”

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<sup>1</sup> A case registered in the Archive of the Audiencia Real, in the National Archive, Santiago de Chile, quoted by Araya, Alejandra, “Ociosos, vagabundios y malentrenidos en Chile Colonial”, Dibam – LOM – Barros Arana research Centre, Santiago 1999, p. 94 (emphasis added by the author).

The aim of this essay is to examine the relationship between violence and the law in domestic life, and in particular violence exercised on children. The starting-point is an institution of republican family law in the 19<sup>th</sup> century, which goes back to colonial times, and which I have chosen to call “penal domestic power”<sup>2</sup> over children, which represents a form of legalized domestic violence. It consists of the faculty of the father to punish his son physically, and when that was not enough, to imprison him, for which he could count on help from the public authority.

The institution is interesting and deserves to be studied<sup>3</sup>. It contrasts with the energetic legal rhetoric of today, which condemns violence within the family peremptorily. In fact it was about a violence that not only was not condemned by the law, but which, on the contrary, was made legitimate by the law. Studying it, and examining its evolution, it seems to me, can tell us something about the relationship between law and violence, in a field in which today this would be something easy to answer: the law condemns and reduces domestic violence against children.

Indeed, Chilean law appears to have changed greatly regarding these matters. In 1928, the penal power of the father over his children was repealed. Today article 234 of the Civil Code (successor of the old article 233) lays down that:

Article 234:

“Parents will have the faculty to correct their children, taking care that that will not harm their health or their personal development.”

“If such harm should be produced, or if there are well-founded fears that it may occur, at the request of any person or written document the magistrate will dictate measures to take care of the son, without affecting the sanctions which should be applied for the infringement.”

“Whenever it should be necessary for the welfare of the son the parents will be able to ask the tribunal to take a decision about the future life of the son, for the length of time it may deem most convenient, which may not exceed the time needed for the child to reach eighteen years of age.”

“What the magistrate may resolve will not be subject to modification by the sole wish of the parents.”

The sanctions against the parents were established by the Intrafamily Violence Law in 1994, and they refer to physical or psychological violence, including those that leave no physical injuries on the children.

Thus one could conclude that the law has led the way, or marched alongside, in a process of overcoming domestic violence, showing its capacity to make living together peaceful.

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<sup>2</sup> Actually, Ferrajoli had already called “punitive domestic power” a very similar legal institution of Italian Law. Cfr. Ferrajoli, Luigi, “Derecho y razón. Teoría del Garantismo penal”, spanish translation by Perfecto Andrés Ibáñez and others, Madrid, Trotta, 1995, p. 405.

<sup>3</sup> Without this being the central theme of his study, Cillero, “Evolución histórica de la consideración jurídica de la infancia y la adolescencia en Chile”, in Pilotti, Francisco (coordinador) “Infancia en riesgo social y políticas sociales en Chile”, Motevideo, Instituto Latinoamericano del Niño, 1994, pp.83-84 and 99, has already noted the interest which this institution and its evolution present in order to understand the development of social control over childhood in Chile.

This tempting conclusion (since it is so simple) leaves some key questions unanswered:

Why did the law legalize domestic violence in the past? What ends did that serve?

Did the repeal of the father's legal violence against the children produce a net reduction of legal violence against children, or only move the same to another kind of administrator in a way that allowed the functions to stay in place? And in particular, what was happening to public legal violence as this private legal violence shrank?

The first part of this study, on the basis of these questions, analyses the function and the transformations of domestic penal power over children.

Together with these questions, or in the attempt to answer them, it is worthwhile examining what concrete contribution the law, the juridical form, in these transformations of violence, makes. It is evident that the law does not invent violence. Violence, even when the law formally legitimises it, is upheld first in social and economic forces, and is made legitimate at cultural or ideological level. And, too, the transformation of legal violence is far better explained by the changes produced on those planes, regarding which the law does not function autonomously. But then it is indeed worthwhile asking the following questions: What interaction has the law with those social forces and those ideologies that uphold violence? Is it a neutral instrument, equally useful to the forces and ideologies which uphold violence as it is to those which reduce it? Or does there exist a certain intrinsic capacity of the law, the juridical regulation of human cohabitation, to reduce or domesticate violence, at least partly? Or is it true, on the contrary, that there are reasons to think that, when the law regulates violence, it consolidates it, and institutionalises it, implanting it and perpetuating it in social life more than its social and cultural factors would have done?

All the alternatives suggested in these questions have been upheld by some tradition of thought. At the end of this work, after having examined the evolution of domestic violence against children, I shall take these more general questions up again, rehearsing the answers which one could infer, starting from this peculiar form of legal violence.

This work is presented as an essay. In it I explore the features of the institution of domestic penal power over children in Chile, And I examine some authors who offer explanations of the meanings and functions of the same, to end up proposing hypotheses which explain about the evolution of the same, and the role that the law has played in transforming domestic violence against children. A study in depth of the problem should start by examining the sources in historical documents, and making an extended analysis of cases registered by the judicial authorities and others, cases related to parents and children, and speeches made from day to day to justify or criticize them. After that, it should place these pieces of evidence and analyse them in the context of the ideology and the public discourse of the republican elites who founded the legal order about the family. The same should have to be done regarding each important change of direction of the institution. Part of this work has been carried out through research, which investigated other angles of children's home life, which throw light on questions dealt with by this essay<sup>4</sup>.

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<sup>4</sup> Thus Gabriel Salazar dedicates the fifth volume of his "Historia Contemporánea de Chile", devoted, together with Julio Pinto, Santiago, LOM 2002, to childhood and youth, analysing domestic experience and its cultural construction as "emerging actors" of children and youths, both the Chilean "patrician" and popular classes, and he refers as well to the violence which the social and economic order imposes. Gabriel Salazar himself, in

## II. Function and transformations of domestic penal power over children.

### The rule of the father of the family.

The legal violence of the father over his children, like the family itself, is of a private and public nature. It is a faculty that is recognized by state law as belonging to the father, as part of the father's private domain, and at the same time it is a function which the State wishes to preserve, to the point at which it put the public apparatus of violence (police and prisons) at the disposal of the father in order to strengthen his role.

Even before the Civil Code was written, in Spanish law which was in force in the American colonies, and which continued to be applied in the new republics which became independent of the Spanish metropolis, you could already observe the public dimension of the legal violence of the father, though it was not incorporated as formally as it would be by the codification process.

“It is within the father's competence, in virtue of the authority given by the laws, to govern and direct his children... he may correct them and punish them moderately when they break the law... and he may ask for help from the public authorities in order to control the child who is disobedient, or who is in the hands of another, or who is a vagabond...”<sup>5</sup>

In the Civil Code of 1855, as we saw, liberal republican law takes up this public dimension of the faculty of punishing which was present in Spanish colonial law; but it redefines it in terms which are much more precise, following another model, which I shall refer to next. In fact, as we saw, in the Civil Code a father's faculty of punishment is fixed with more detailed rules, and explicitly states the right of the father to take unilateral decisions (regarding minors under sixteen) or, after the magistrate has evaluated the motives (in the case of over-sixteens), and it establishes maximum duration (one or six months, according to whether the son is under or over sixteen), although the arrest could be renewed if the son persists in his disobedience.

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“Labradores, peones y proletarios”, Santiago, LOM 2002, (first and second edition, Stgo, SUR 1985 and 1990), pp. 260 et seq., when he examines the identity and development of “peonaje femenino” – feminine labour force – (pp.260 et seq.), he refers to the daily experience of the children, sons of those women, reporting on the practice of the confiscation of children by the public authorities. Recently Nara Milanich, “The children of fate: Families, Class and the State in Chile, 1857-1930” thesis (unpublished) presented to obtain the degree of Doctor of Philosophy, Yale University, December 2002, examines the social practice of the circulation of children born out of wedlock, and their bringing up in other houses, in tje framework of an extended system of informal slavery, uncovering aspects of the legal regulation of the family which are illuminating, too, for examining domestic violence against children. Likewise Ana María Farías, “El difícil camino de la construcción del niño como sujeto del derecho. Resistencias en los discursos y prácticas de los sistemas de atención a la infancia en Chile”, thesis (unpublished) to obtain the degree of Master in Sociology, Universidad Católica, June 2002, concentrates on the foundation and development of normalizing discourse and the practice of social control over marginal childhood in the 20th century, offering a wide view of one aspect of public violence which was developed against children under the aegis of the law.

<sup>5</sup> “Diccionario teológico, canónico, jurídico, litúrgico, bíblico, etc., by the Most Illustrious and Most Reverend Justo Donoso” volume IV, Valparaiso, El Mercurio Press and Bookshop, 1859; the entry on “patria potestad” p.202, quoting *Las Partidas*.

In its codified version, Chilean law follows the French civil code<sup>6</sup>. Analysed by Donzelot<sup>7</sup>, in the context of the evolution of public regulation of family life in France, this vision of the domestic penal power of the father over his children, whose rules are laid down in article 376 of the French Code, stems from the “lettres de cachet” used during the Old Regime, and consisted of letters under the king’s seal which contained an order of arrest or exile without trial.

In the case of Chile, both in Spanish law and the Civil Code, the father’s faculty of punishment, reinforced by his domestic penal power, gives him wide powers of government over the family:

Thus it is that, in Spanish law, broadening the previous quotation, in order to “govern and direct his children” the father may:

“...prescribe rules of behaviour for the family ... he can make use of them (his children) without paying them wages, since he feeds and educates them ...”<sup>8</sup>

And although the father cannot make his son marry against the latter’s will, canon law lays down that:

“...if the son spontaneously wishes to get married, he is obliged to accept the person proposed by his parents, unless he finds that person hateful.”<sup>9</sup>

Just how binding are the dispositions of this law, which brings together norms from the Registers, the exemptions, canon law and catholic doctrine, depends on the will that paternal power of punishment offers to the father to stop his son from committing the “sin” of breaking his mandate.

Thus in 1758 Captain Antonio Poblete began a legal action against his son; Mateo Poblete, for being a “vagabond and disobedient”, or more precisely – as the son complained – “for having wanted to marry, against his wishes”, and he was sent to San Antonio jail on the pretext that, according to his father, he would be safer there while the case was being settled. Mateo Poblete alleged that, since his offence was no other than the disobedience, it would already have been “well punished by the more than two months in prison”<sup>10</sup>.

In the Civil Code, on the other hand, the powers of the father, which are well served by his publicly reinforced faculty to punish, cover a wide field. In fact in the 1855 Civil Code:

“The legitimate children owe respect and obedience to their father and their mother: but they will be particularly submissive to their father.” (Article 219)

Obedience is extended to all aspects of domestic life in general, but also to the great decisions to be taken in the life of their children. In fact the Code gives the father:

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<sup>6</sup> According to the commentary of Robustiano Vera on the Chilean arrangement in the “Código Civil de la República de Chile comentado i explicado por Robustiano Vera”, First volume, Santiago de Chile, 1892, p.228.

<sup>7</sup> Donzelot, Jacques, “La Policía de las Familias” 2<sup>nd</sup> edition, translated from the French by José Vásquez Pérez and Umbelina Larraceleta, Valencia, Pre-textos, 1998, pp.52-53 and 87.

<sup>8</sup> “Diccionario...”, cit., p. 202.

<sup>9</sup> “Diccionario...”, cit., Vol. II, 1856, p. 427.

<sup>10</sup> Quoted by Araya, Alejandra, op. cit. 104.

“... the right to choose the state or future profession of the son, and to direct his education however they think is best for him.” (Article 235)

And, while he cannot oblige him to marry against his will, the father has the right to veto the person his son or his daughter wants to marry, up to the age of twenty-five, since his consent is necessary for the marriage of anyone under that age.

Anyway, the father’s domestic penal power is certainly not unlimited in the Civil Code. Habitual ill treatment of the son, which endangers his life or causes him serious harm, is an acceptable cause for that son’s legal emancipation and, at the same time, of divorce (separation) between the husband and wife.

#### Order and authority in the ideology of legal domestic violence: the rule through the families.

The blessing of the law on the father’s domestic penal power during the 19<sup>th</sup> century answers to a commitment which is right at the heart of the modern project led by the governing elites right from the beginnings of the republic. It concerns a public commitment, linked to the needs of social order.

The idea of a social order, which should be promoted by the State, is a co-founder of republican legality, as much, or more, as the idea of freedom. In the liberal republic being born that tension is expressed which is proper to illustrated modernity between the expansion of liberties, limiting the power of the state, and the consolidation of a social system which guarantees order and progress, ensured by the principle of authority, tension between subjectivity and system<sup>11</sup>.

For the Illustration, as important as the discovery of the subjectivity of childhood, which needs to be freed from the brutal power of traditional authority (as much the family kind as the religious kind), is the affirming of public interest in education and in civilizing customs, from childhood up, under a new principal of authority – the one that is rational, expressed in republican legal order.

Thus together with a vigorous rejection of the discipline based on physical violence, which was traditionally employed with children, and which we appreciate in his book “Emile”, Rousseau observes, in his Discourse on Political Economy (1758) the need to teach them obedience, and to form them as orderly citizens by means of public education:

“...just as we take part in citizens’ rights from the moment we are born, that same moment should mark the beginning of the carrying out of our duties ..... (and) the government should avoid everywhere abandoning its sons education indiscriminately to the intelligence and prejudices of their parents, considering that education is of greater importance to the state than to the parents ..... families dissolve ... but the state remains”<sup>12</sup>

Again Locke, while on the one hand he rejects violent discipline,

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<sup>11</sup> Regarding that tension modernity is defined by Touraine, Alain, “Criticism of Modernity” translated from the French by Alberto Luis Bixio, Buenos Aires, Fondo de Cultura Económica, 1994

<sup>12</sup> Rousseau, Jean-Jacques, “Discourse on Political Economy”, in Kramnick, Isaac (Editor) *The portable Enlightenment Reader*, New York, Penguin Books, 1995, p. 234

“Blows, then, and every kind of corporal and enslaving punishment, are not the appropriate discipline to be used in the education of those who would like to have men that are wise, good and innocent...”

On the other hand he warns about the importance of punishment, and even of fear:

“...but if you abandon the rod with one hand, and those little incentives with the other, how would it be possible to govern the children? Eliminate hope and fear and there you will have the end of discipline... reward and punishment are the only motivations for a rational being ...and for that reason they should be used with children, too”<sup>13</sup>.

Order should first be administered through the families. To that end conserving and consolidating the domestic power of the father is a necessity that arises as the counterpart of the limiting of the power of the state, preached by illustrated liberalism, operating a redistribution of social power that imposes order:

“It is an axiom of political science that you have to make the authority omnipotent in the family so that it becomes less necessary in the state...”<sup>14</sup>

Donzelot has underlined that this father’s power is recorded in a configuration of the family, which makes the family at the same time subject and object of rule. The state does not only wish to recognize the ambit of the father of the family’s domain, but it also wished to fulfil political aims through this recognition, that is to say governing the family and governing the individual by way of the family. In the Old Regime, that meant that, in exchange for the public protection of the head of the family, and the recognition of him as such, the latter must guarantee loyalty to public order on the part of his folk, and pay a tribute to the monarch in the form of work and men tax (military service). In exchange for that responsibility, then, the head of the family exercises an almost discretionary power over those who surround him, to make use of them in operations designed to increase the importance of his condition; decide about the future of his children, employ his relations, contract alliances and punish them if they fail to fulfil their family obligations. Precisely regarding this faculty is where the public authorities through the lettres de cachet support him.<sup>15</sup>

This political project of “government through the families”<sup>16</sup> spreads over all those people for whose behaviour the head of the family makes himself responsible. At the beginning, in France, the women, the children, the youths and the insane, all alike are subject to the domestic penal power of the father, and can be confined at his order in virtue of a law of 1838, which reproduces the system of lettres de cachet<sup>17</sup>.

In its origin, in contrast, as Foucault has highlighted, this form of social control of domestic behaviour does not seem to have answered to a governing technique directed from the state, but rather to the needs of certain local groups, including the families, to guarantee the order of its members as a way of escaping from control and intervention by the state, in exchange keeping their autonomy<sup>18</sup>. A defensive method, which the state itself will later be

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<sup>13</sup> Locke, John, “Some thoughts concerning education”, in Kramnick, op. cit., p. 226.

<sup>14</sup> Jules Simon, quoted by Perrot, Michelle, “Figuras y Funciones”, in Ariès, Philippe y Duby, Georges, Vol IV, Madrid, Taurus, 2001.

<sup>15</sup> Donzelot, op. cit., pp. 52-53.

<sup>16</sup> *Ibid.*, p. 51.

<sup>17</sup> Perrot, op. cit., pp. 127-128.

<sup>18</sup> Foucault, Michel, “La verdad y las formas jurídicas”, pp. 104-105 and 109



promoting, for the extraordinary economy of public violence which this decentralized control technique offers for the political needs of public order.

In the newborn Republic of Chile –as in Latin America- one of the main concerns of the architects of the post-independence social order was “to establish structures of authority, which would replace the ones that collapsed with the Spanish colonial empire”<sup>19</sup>.

Diego Portales, one of the founders of the modern republican state of Chile, understands the important role played by force in the constitution of order, through interest and punishment:

“I see that you have the prudence and firmness, and that you understand the most useful way of conducting peoples and individuals to a good end. Stick and cake, fairly and opportunely administered, are the specific treatment with which you can heal any people, however set they are in bad ways...”<sup>20</sup>

In the same way both President Manuel Montt, who promulgated the Civil Code in 1855, and Andrés Bello, who was mainly responsible for drawing it up, are deeply concerned about the problems of order and authority. Bello, who writes in favour of “a strong and solid government” and is in favour of the death penalty, would have had a “fundamental concern, all his life... (about) ...the problem of order”<sup>21</sup>.

In the Exposition of Motives of the Civil Code, Andrés Bello admits that maintaining “patria potestas” over sons up to the age of 25 goes against the present tendency in other countries to make it shorter in time, freeing the children from such authority at earlier ages. According to Bello, “it has not seemed convenient to imitate them”. In exchange for that, they do indeed free from the control of their patrimony, which their fathers exercise over them, those sons who have their own funds, which they can administer freely. So the only important limit to paternal power, which strengthens the judicial standing of the son, is obtained through wealth.

#### The father’s domestic penal power effectiveness, and its function.

Although studying the deep social roots that the use of the father’s domestic penal power may have attained is a task that is pending, the characteristics of family life in the 19<sup>th</sup> century which Chilean historians have portrayed suggest that the practice of that power was not significantly deep-rooted.

On one hand, if we look at the “patrician” families, of the social and economic elite in the early days of the Republic, the way in which that power was exercised by the patriarch of the family appears to have been much more sophisticated than this measure, and a shameful one at that, of sending one’s son to be jailed, thus letting the public penal apparatus (created for “the others”) come right into the family.

The life of the child of the oligarchy, the “little master”, is much easier to understand if it is compared with that of a prince, who from an early age is looked after and spoiled by an

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<sup>19</sup> Milanich, op. cit., p. 66.

<sup>20</sup> Letter from Diego Portales to Fernando Urizar Garfías, in Gres, Sergio, La “cuestión social” en Chile. Ideas y debates precursoras (1804-1902), Santiago, Dirección de Bibliotecas y Museos, 1995, p. 61.

<sup>21</sup> Milanich, op. cit., and quoting Ivan Jaksic.

army of servants, looked upon with pride and great expectations by his elders, who form part of a small, welcoming and protective court of relations and distinguished friends who form part of the governing and economic elite of the country, all of whom the oligarch child has known since he was little in the social gatherings in his house. The father was respected, and to some extent feared, and symbolically he was a figure that could exercise force, but the oligarch boy was seen by his father as an heir to his power, not as someone to be sacrificed to that power. The child, too, was aware of his power<sup>22</sup>.

Salazar, quoting the story of a patrician family, offers a vision that seems to me to be revealing of the indemnity of the heir faced with the merely symbolically violent power of the patriarch:

“... His authority (that of the owner of the house) was supreme and unquestioned. Francisco Javier Ovalle – writes Teresa Pereira de Correa – used a bamboo pole with which he corrected, from his seat the least misdemeanour of any of his 14 children, who occupied the lower seats at the table, according to the age of each. Francisco Javier’s pole was, without doubt, a patriarchal toy, but down to the youngest of his children they knew that that idyllic picture was based on the family estate, a property that they would inherit, in whole or in part, some day. Including the pole”.<sup>23</sup>

It is not there, then, regarding the little master, that one can imagine that the domestic penal power enshrined in the 1855 Civil Code was exercised. Then what did the patriarch do with a son who was frankly rebellious? Probably there was not a great deal of room, nor of reasons, to be rebellious. After being in the hands of the maids, and the “second patio”, there followed a somewhat rigid education in a boarding school run by monks or nuns, and then, regardless of success or lack of it at school – of secondary importance for an heir – came a long educational journey through Europe. Indeed, if he had experiences there that were too liberal, or picked up ideas that were too revolutionary, as Salazar again illustrates it:

“the powerful oligarchic identity which awaited the little masters round the corner did not incite them to “change the world” but rather to preserve it ..... For this reason the “taking possession” tended to take place at an early age...”<sup>24</sup>

Even so, one can imagine that the little master might be so senseless as to reject his inheritance, thus betraying even the most basic expectations of the patriarch, and to rebel violently. Donzelot, for the case in France, explains that even in such cases, the domestic penal power is applied very little in this social milieu, due to the dishonourable character of the prison, the promiscuity implied with criminals and people from the town. In this case the parents preferred to confine them in the asylum, which we shall see reappear in our times for other reasons. Or they make a deal with convents or with certain private establishments created for this purpose.<sup>25</sup>

On the other hand, when it comes to plebeian children, for quite a different reason, they do not seem to have been the object of the father’s domestic penal power on a massive scale: 80% of those children during the 19<sup>th</sup> century were alone, that is to say fatherless, and often motherless. Those that managed to survive infant mortality (between 30% and 40% on

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<sup>22</sup> Salazar, Gabriel, in Salazar and Pinto, op. cit., pp. 20 et seq.

<sup>23</sup> *Ibíd.*, p. 24.

<sup>24</sup> *Ibíd.*, p. 27

<sup>25</sup> *Op.cit.*, p. 87.

average, and which reached 80% in the Orphanage), or they lived under a roof other than that of their original family, employed as servants, or from a very young age, wandering over hills and vales, getting work precariously or seasonally, or becoming delinquents, always seeking their fortune, and escaping the danger of losing their freedom. And the father's violence could only have been one chapter in their lives, and did not last too long, since it usually ended very early with a break, also violent on the son's side, with that marginalized patriarch who was often absent, drunk or wanted by the law.<sup>26</sup>

What function, then, did the domestic penal power fulfil?

I think in the first place it fulfilled a symbolic function in legitimising the figure of the patriarchal father, with wide powers to decide about the lives of those in his custody, in those layers and families where this patriarch existed, independently of whether he ever exercised the domestic penal power that the law recognized him.

In the second place, and related to that function, the domestic penal power legalized by the law served to legitimise early a rhetoric typical of violence against marginalized children, which would later acquire a public shape: the rhetoric of paternal violence, legitimised because it would be used in the interests of the child himself, and for that very reason should be left to the father's will, without public interference except to help the father. Then, although it is not employed in any relevant way, the domestic penal power of the father over his children inaugurates a moral argument which will grow important with time, "I do it for you good", showing a legitimacy which the traditional forms of state violence (like classic penal law) will never be able to claim, and which qualifies the father to exercise his discretion, as an act which is private, intimate, not examinable by the state, (the judge may not evaluate the motives for the arrest, when the son is under 16), only understandable to the one who is most concerned for the child's interests: his own father.

This moral argument will enjoy a long life, once the State itself formulates a rhetoric in which its employees define themselves as parents of marginalized children.

#### The expanded use of the father model: paternalism and class domination.

The expansion and the reformulation of the father figure by the state, as a model of the legitimate exercise of discretionary violence, "in the interests" of the child himself, though it comes into bud early with the creation of the Juvenile Court in 1928, did have some early bursts of expression, not entirely public (though in a certain sense they are so, too) but which certainly show they have escaped from the intimate space of the family, and which make evident their potential for class domination.

Indeed, if the daily use of violence as a form of domination and subjection by the father against the children is not present at a relevant level in the 19<sup>th</sup> century between patrician fathers and sons, nor between plebeian ones either, there are reasons to believe that it does indeed occur between patrician fathers (or half-and-half fathers) and plebeian sons.

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<sup>26</sup> Salazar, en Salazar y Pinto, op. cit., pp. 48 y ss.

If 80% of the children in the 19<sup>th</sup> century were “orphaned”, a significant proportion of these were raised in the house of another family, as Milanich’s study reports<sup>27</sup>. Salazar also thinks “a great number of lone children – and others that were not lone – began life under an alien roof, working as “servants” rather than having lived as “sons”, and being disciplined by a boss rather than being loved by their parents”<sup>28</sup>. It is here that the father’s domestic penal power becomes more visible under the form of the master’s domestic penal power, but preserving the model of the father, or at least of the tutor, who civilly has legal faculties analogous to those of the father. A form of unpaid quasi-slave domestic service, upheld by means of a power of exercising violence.

The roads by which these children arrived at those houses were various. Some were handed over voluntarily or “sold” (by indigent mothers to more affluent families:

“... the poverty is so great that many mothers ..... are always anxious to sell their children and even show themselves happy to hand them over. Boys and girls of eight to ten years of age are sold like slaves, for 3 or 4 pesos” (report of an English traveller<sup>29</sup>)

“...the little boys and girls in Arauco used to be given away like the little horses in Chiloé today. They were used for errands, to the storeroom, and the little girls as “carpet-girls” or as “keep-awakers” at night. Both had to go barefoot ... and also with their heads shaved ..... they used to leave them a lock of hair on the forehead, to be “pulled”. (Benjamín Vicuña Mackenna<sup>30</sup>)

Others, especially in the case of the girls, were “confiscated” from their marginalized fathers or mothers, and forced to work.

“The sons of beggars who are over seven years old will be handed over to the corresponding inspectors, prefects or subdelegates, or to craftsmen of upright character and judgement, or honourable houses so that for (in exchange for) their service they may be fed, clothed and taught; they will prudently dispose the minors of that age.” (Instrucción from the Governor of Concepción 1824<sup>31</sup>)

“The 26th of last month I received the communication in which the request of Gregoria Llivillínque is included, about the handing over of her granddaughter, who has been taken from her by order of the Governor. It is necessary, Your Worship, that in some cases which agree with reason and justice, we should agree with the ideas of the Spanish despots. They did indeed take away children with the same aim as this one was taken away, and many others should be taken away, and that is that they may learn religion and acquire some degree of civilization among people the Government has in mind. I wish to inform you of the vices of the grandmother and of what goes on among the Indians, namely drunkenness, scandal, and no religion.” (Police report 1928<sup>32</sup>)

During the second half of the 19<sup>th</sup> century, the practice of circulating children to act as house servants, finds an incentive in the intervention of the civil and ecclesiastical authorities, and also philanthropic institutions like the Orphanage, and others that arose towards the end of the century, and indeed the prison too. Through this intervention, as

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<sup>27</sup> Milanich, op. cit. pp. 199 et seq.

<sup>28</sup> Salazar, in Salazar y Pinto, op. cit., p. 53.

<sup>29</sup> Quoted by Salazar, *ibídem*.

<sup>30</sup> *Ibídem*.

<sup>31</sup> Quoted by Salazar, ““Labradores, peones y proletarios”, op. cit., p. 293.

<sup>32</sup> *Ibíd.*, pp. 293-294.

Milanich points out, an attempt was made to formalize the handing over of children by poor mothers to better-off families<sup>33</sup>.

This official procedure provided by civil employees and public institutions (the Orphanage was established at the instance of the authorities, and was financed by public funds) offered the bosses a certain authorization to “bring up” their servants. Thus the stay in the Orphanage often lasted no more than a day, which was enough for the boss to make a “contract” with the institution, which could later be displayed as a less precarious authorization than a verbal agreement with the child’s mother<sup>34</sup>. In these cases the term used was to “adopt” a boy or girl, although adoption as a way of creating the son-relationship did not exist in Chilean law. The bosses looking for servants even registered at the Orphanage, requesting an “heir” or a “son”<sup>35</sup>. With that language, in which the boss appears at the same as father of his adopted servant, not seldom it expressed a reality of paternalist feelings, fed by the faithfulness of the servant, whom the boss ended up including in his will, with some legacy which converts them into heirs.

The discourse in support of this practice, which would otherwise conflict with the convictions of the republican elite, is based entirely on the image of a work of charity. The boss appears receiving for charity a boy or girl (or several) who lives in misery, who has no mother, or whose mother can not raise him, and he does it for his good, offering him a house, food and safety, religious education and good customs, or incorporating him into service in the house as a way of giving his life some meaning, and even promising to compensate him in his will.

However the reality of the practice represents the interests of the bosses, whose home economy depended on being able to secure a large band of male and female servants, and from the same distinguished intermediaries, for similar reasons. Thus, for example, when Benjamín Vicuña Mackenna, who was then Governor of Santiago, wrote to the Orphanage to request the admittance of a boy, he wished to help the wet nurse who served in his own house to get rid of her own child, looking after whom was incompatible with dedication to the children of the house of the famous Governor<sup>36</sup>.

To make sure of the obedience of the woman servant, up to 1850 it was no rare thing for the master of the house to beat her, and it should not surprise us that on occasions he abused her sexually<sup>37</sup>.

After the Civil Code was adopted, the master’s power of punishment is less clear, according as the Civil Code does not explicitly recognize his power. But in fact the image of a boss-father, who performs quasi-parental functions, functions fully. That continued to include the use of important levels of violence. Thus, for example, at least two adolescents handed over by the Orphanage died as a result of bad physical treatment in their bosses’ house in 1910<sup>38</sup>.

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<sup>33</sup> Milanich, *op.cit.*, pp. 267 et seq. The ideas that follow, in the main text, are a summary of Part III of the work of this author.

<sup>34</sup> *Ibíd.*, p. 272.

<sup>35</sup> *Ibíd.*, p. 271.

<sup>36</sup> Case quoted by Milanich, *op. cit.*, p. 282

<sup>37</sup> Salazar, “‘Labradores, peones y proletarios’”, *op. cit.*, p. 297.

<sup>38</sup> Salazar, “‘Labradores, peones y proletarios’”, *op. cit.*, p. 297.

But more than physical violence, the practice largely seems to be upheld –as I have already stated- in the feelings, and in an ideological discourse of charity and gratitude. Paternalist charity is present, not only as a pretext, but also as a genuine feeling. The bosses, and those who participate in the networks of the circulating of children, are accustomed to believe that the reception of the servants, in the end, is a necessary work for the good of those poor creatures. And also, as a consequence of that, the boss often feels that the service of his servant is a gesture of loyalty and gratitude which is owing to him. On other occasions, in contrast, more than the loyalty – the boss cultivates the interest of the servant, promising him part of the inheritance if he does not abandon him in his old age.

The bosses feel they have legal power – in spite of the silence of the law – to claim the return of their servant-pupil who has run away. Thus, for example, when his maid Ernestine Pérez runs away from the house of Luis Siderey, the latter sues her new boss for kidnapping<sup>39</sup>.

This brief description of the institution of the circulation of children, for them to be raised in houses where they were not born, in which they will be employed as servants without pay, allows us to draw some preliminary conclusions, some almost like a hypothesis, and others a mere repetition of conclusions reached by Milanich.

The practice described develops, with the law silent on the subject<sup>40</sup>, but under a model built or consolidated by the law: that of father-patriarch with wide power to make arrangements for his children, including about their work.

The use of the model of the father, in this way, allows him to obtain from the children received as servants an unpaid service which is essential for the domestic economy of the houses of families of the elite, and also of others not so elite.

Physical violence is used against the servants, but not in the out-of-control way in which the marginalized father of a plebeian family, or a drunkard, treats his son, but rather as a legitimate way of administering relationships with the service, which can certainly not be governed by the more sophisticated ways that the patrician patriarch can employ with his sons and heirs.

The ideological discourse which justifies it “for the good of the child-servants”, inspires and strengthens this practice, and offers reasons and convictions to those who intervene in it.

This way of exercising domestic violence cannot be explained simply as a private phenomenon. The practice occurs with the participation of the elites, which act simultaneously in their private role as patriarchs, and in their public role as political, judicial etc, authorities, and who preserve, for economic and domestic needs proper to their class, an institution which, upheld by the legal model of the father-patriarch – does not, however, have express authorization in republican legislation, among other reasons because it struggles against liberal principles which inspire it. The silence of the law, in this case, seems necessary for this pre-liberal (almost enslaving) use of domestic penal power.

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<sup>39</sup> *Ibíd.* P. 261.

<sup>40</sup> Milanich has much to say on the subject, drawing conclusions which I will come back to when I make a more general examination of the relationship between violence and law (in the second part of this paper).

### The public shifting of domestic penal power over children.

In 1928, as has been said, the father's domestic penal power over one's own sons is repealed. A faculty of correcting them and punishing them moderately is maintained, but the faculty of imposing arrest on them with the aid of the law disappears. This repeal, and the creation of tribunals for minors, happen simultaneously. And this represents a profound transformation in the way of conceiving the state's role regarding poor families and marginalized children.

The legal faculty of paternal correction and punishment now acquires a new look.

Article 233, Civil Code (1928)

“The father will have the faculty of correcting his children and punishing them moderately. When he deems it necessary, he may resort to the tribunal for minors, so that the latter may decide about the future life of the minor, for the time he thinks convenient, which may not exceed the time remaining for the minor to reach 16 years of age. The resolutions of the magistrate of the juvenile court may not be modified by the sole wish of the father.”

In its new edition, the disposition of the Civil Code substitutes the power of the fathers, that of sending his son to be arrested for a short time, for a power of a new actor, the juvenile court, to decide about the future life of the minors, until they reach twenty years of age.

Apparently the father's power is not substituted, but merely reformed, reduced, “domesticated” by the introduction of a magistrate, who now can deliberate, and not merely fulfil the father's orders. In fact it is the father -who preserves his faculty to correct and punish- the one that may resort to the magistrate “when he considers it necessary”. Apparently, the nature of the faculty is modified too, since now there is no question of imprisoning the child, but rather to reach fair decisions about what to do with his life. The effect is celebrated as a reduction of the father's violence for the counterweight represented by the faculty of the juvenile court, and for the new direction which its intervention will have, compared to the original power of the father. As a consequence, with the new disposition “...the right of lord and master which the father had regarding the son under the age of sixteen came to an end”<sup>41</sup>

A more careful examination of the 1928 reforms allows us to see another reality behind these two appearances.

The decision of the father to resort the judge, as will be seen, implies resigning his paternal power, and interference by the State, with no turning back, in family life. But to tell the truth, it is not even necessary for the father to resort to the juvenile court, for the latter to be authorized to take his place.

In fact, the modification of Article 233 of the Civil Code is no more than a consequence of a much more significant legal reform produced in 1928: the promulgation of the Minors Law N° 4,447, which creates the Juvenile Courts, and gives them broad

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<sup>41</sup> Somarriva, quoted by Cillero, op.cit., p. 99

competence for the protection, control and repression of childhood marginalized, abandoned, vagrant or delinquent.

Following the model of the tutelary juvenile court created in Chicago in 1899<sup>42</sup>, inspired by the idea of an informal justice, with a magistrate who has to proceed with the children with the closeness, and the firmness of a good family father, the new Minors Law in Chile gives wide discretionary powers to the tribunal to intervene in the lives of the minors, to take them away from their families, and hand them over to other families, or intern them in Minors' Houses, or in other special educative establishments, where it will be possible to educate them or correct them until they come of age<sup>43</sup>. These powers can not only be exercised when the father resorts to the tribunal, but every time the minor "is in material or moral danger". Jurisprudence understood this as a broad competence to intervene over poor and marginalized children and their families:

"Material danger is equivalent to the physical risk a minor may be in, such as the lack of food, developing in a toxic environment, or in any other which may affect his corporal integrity"  
"Moral danger refers to the risk that may affect his conduct with his fellows and with himself, a danger of behavioural development, living in antisocial environments"<sup>44</sup>.

The substitution of the father is specifically enshrined in the law. Once it was decided to hand the minor over to another family or intern him in a Home for Minors, the father de facto lost his father's power over his son. The State, in one sense, is converted into these minors' new father.

Art, 1 Law N° 4,447

"The function of attending to the personal care, the moral, intellectual and professional education of minors, which, in the cases contemplated in this Law, corresponds to the State, will be exercised through the General Directorate for the Protection of Minors."

With the 1967 legal reform, this displacement of the father's role towards the state is specified, regarding the minors interned in Homes for Minors and correctional institutions, through an explicit substitution of the father by the Director of the establishment where he is interned. The juridical model of the father-son relationship continued to be used, indeed in many cases (the most frequent ones) in which the internment, for lack of special institutions for minors, was effected in the prison: the director of the prison himself, regarding the minors imprisoned, will have the faculties which the Civil Code recognized as belonging to fathers, including that of correcting and punishing for educative reasons:

Art. 57 Law N° 16,618

"While a minor remains in one of the establishments or substitute homes governed by this law, the care of his person, of his education, and the right to correct him will be in the hands of the director of the establishment, or the head of the respective home".

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<sup>42</sup> For a critical revision of the creation and functioning of the tutelary tribunals for minors in the U.S.A, see Platt, Anthony, "Child savers. The Invention of Delinquency", Chicago – London, The University of Chicago Press, 1969.

<sup>43</sup> This aspect of the evolution of social control over childhood in Chile has been the object of more attention in legal-historical research. Cfr. for all, Cillero, op. cit., and Farías, op.cit.

<sup>44</sup> Supreme Court, Oct., 2<sup>nd</sup>, 1978. RDJ, Vol.. LXXV, sec. 1., p. 453.



Resorting to the prisons seems to answer to a need of the moment, which arose for lack of funds to commission Minors Homes. In fact, the Minors Law, N° 4,447, foresaw the creation of one Minors Home in each place that where there was a juvenile court, and it laid down that minors aged twenty “can only be detained in Minors Homes or – it added with foresight – in those establishments that the Regulations and the President of the Republic shall determine.” The Regulation of the Law, in turn, in Article 12, solved the problem of lack of funds for creating the Homes for Minors, but in doing so it said a lot about the real meaning, according to the public authorities, of the faculties given to the new Minors Tribunals.

“Where there are no minors homes, a special department will be set up, completely separate from the adults, in the penal establishment or detention centre that exists, and that department will be governed by the same regulations as the homes for minors”<sup>45</sup>.

The fact that they had resorted to the prisons – even if they were creating special sections of them for minors, as a place in which they could comply with the “protection measures” or those of “rehabilitation” adopted by the minors courts, makes it quite clear that the father’s domestic penal power was not really repealed and replaced by judicial benevolence and protection, but instead it was intensified it in a way that would have been unimaginable when the father was in charge. If initially the confinement could be up to six months, now it could be extended for years.

A contributing factor to that intensifying of the domestic power to punish probably was the unifying carried out by the Minors Law of the treatment for the subordination or rebelliousness of the marginalized child (and of his abandonment) with the treatment for juvenile delinquency as such. When the Juvenile Courts were created the raised the minimum age for penal responsibility (although it depended on the minor being declared “with discernment”) from the age of 10 to 16, subjecting to the correctional faculty of the juvenile court those who in the previous century had been within the competence of the criminal justice judge<sup>46</sup>. This unifying answered to the idea that, in the end, insubordination, delinquency, abandonment, vagrancy, and marginalization are all manifestations of one same social ill: “the abandoned and delinquent minor” and that for lack of any other answers to the policies of redistribution to favour the poor, they all need the same treatment<sup>47</sup>.

In turn, with the unifying of the legal treatment of the abandoned, insubordinate and delinquent minors, the offence loses its specific features as the basis for repressing it. It dissolves among the whole set of social problems which require the intervention of the state’s power of pseudo-paternal correction. The offence, like insubordination, is confronted with the means placed at the disposal of the minors magistrate, but no longer under the juridical form of Penal Law, but under the power of a father or tutor to correct and punish. Although this new form prevents imposing punishment which lasts too long (the measures end where the judge’s competence does, when the youth reaches the age of twenty), as a counterpart it

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<sup>45</sup> Art. 2 (trans) of Law N° 16,618, which replaced Law N° 4,447 as Minors Law, maintained this faculty of the President of the Republic to determine what other establishments should be used as minors homes where these have not been created. The Regulation of the Law continues to establish that these other establishments will be special sections located in the prisons.

<sup>46</sup> Cfr. Cillero, op. cit., p. 106.

<sup>47</sup> Critically emphasizing that this punitive “remedy” expands in the countries of Latin America at times when the basic social policies in favour of childhood are shrinking, García Méndez, Emilio, *Derecho de la Infancia-Adolescencia en América Latina: de la Situación Irregular a la Protección Integral*, Santa Fe de Bogotá, Forum Pacis, 1994, pp. 41-44 y 79 et seq.

allows effective intervention without having to prove the offence – it is enough to argue that the youth is “in material or moral danger” – and, without having to maintain the formal proportion between the seriousness of the offence and the duration of the measures taken, which even for a simple robbery could last for years, until the rehabilitation of the minor (with a limit of age up to 20).

As time passes the prisons for adults are substituted by special establishments for minors, which perform the same function as the others, and have the same character of deprivation of liberty. The Centres for Observation and Diagnosis (COD), as fast as they install safety measures, similar to those of the prisons, make it unnecessary to resort to the prisons, which towards the year 2000 diminish drastically, but do not disappear<sup>48</sup>.

Shutting children up for an indeterminate length of time in the prisons (and later in the COD), without proof of their having taken part in an offence, and often explicitly only because of behaviour problems, or their “material or moral danger” is no longer legally treated as a penal measure, which demands respect for guarantees of due process and the principle of the legality of the offences and of the punishments, to convert itself into a simple expression of the right of paternal custody over minors, now being exercised by the director of the prison or COD, as a substitute father. Thus, it becomes impossible to control the formal legality of the measure.

Thus, for example, in 1991 the Supreme Court heard a habeas corpus allegation in favour of three minors interned by order of a judge of Minors, one of them being in a COD. The Supreme Court confirmed the decision of the Appeal Court of Valparaiso, which reveals the “paternalising” of the penal control of the state:

“...this cause cannot prosper since the minors are interned in the establishments named as a measure of protection for them, and in no case are they deprived of their freedom, as their representatives would seem to think”<sup>49</sup>

Recently, in 2001, the Supreme Court, which was regulating the situation of minors accused of offences, and interned in COD or prisons by order of the Minors Magistrate, was waiting for the report on whether they acted “with discernment” (on which depends the possibility of their being tried in a penal trial, as adults) reiterates the thesis that internment is not comparable to a deprivation of liberty proper to a criminal trial, and it is not subject to the guarantees which limit this kind of measures, since it constitutes a preventive measure established for the benefit of the minor<sup>50</sup>.

To sum up, since 1928 we see how the adoption of a legal language proper to the civil domestic faculties of the father, of custody, education and correction, allows the State, through the figure of a magistrate of minors, legitimises the exercise of public violence against children, without repeating the formal guarantees that limit that violence in the case of adults, being supported by the rhetoric of the minor’s benefit. Domestic penal power over

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<sup>48</sup> Cfr. Cillero, Miguel and Bernales, Martín, “Derechos humanos de la Infancia-Adolescencia en la Justicia Penal de Menores” de Chile: Evaluación y Perspectivas”, in *Revista de Derechos del Niño*, Santiago, Universidad Diego Portales – Unicef, Número Uno, 2002, pp. 21 et seq. and 24 et seq.

<sup>49</sup> Valparaiso Appeal Court’s sentence, Nov., 27th, 1991, Case N° 295-91, confirmed by sentence of the Supreme Court, Dec., 23th, 1991, N° 28.831, in *Fallos del Mes*, Santiago, 1991, N° 397, pp. 771 y et seq. (emphasis added by me).

<sup>50</sup> Cillero and Bernales, op. cit., p. 18.

children, turned over to the state and exercised within one of the institutions most typical of public violence – the prisons – remains camouflaged under the well-known discourse of paternal concern for the right education and protection of the minors.

#### Dissolution of legal domestic violence in normalizing social knowledge and practices.

The public displacement of domestic penal power, and its intensifying in the figure of the minors tribunal and the director of the minors home, in spite of its paradigmatic visibility, is not the most representative transformation of legal domestic violence during the 20<sup>th</sup> century. The number of children subjected to this form of violence, through confinement, in the end only represents a small part of the children, and indeed only a small part of the marginalized children, the ones that are a worry from the viewpoint of public order.

For the majority of the children who are simply poor, who are the most numerous group of the child population of Chile during nearly all the 20<sup>th</sup> century, the rise of greater cultural sensibility about childhood needs and the care necessary, translated – during that century – into a sophistication in the forms of day to day converse. Free of the legal violence of the father, repealed and culturally disreputable, and fr, too, from the domestic violence of the minors court and the correctional establishments for minors, reserved for a sector of marginalized youth, the great majority of the children who are simply poor experience the benefits, but also the contradictions, of a new form of public concern for childhood in the liberal state: moralization and normalization.

Intellectual and moral education, hygiene and public health, learning skills and attitudes at work, together with an autonomous management of one's own needs through savings; orderly political expression, and one that is respectful of the law and the institutions; the regularizing of family unions under legal marriage, putting down roots with a dwelling in a well-defined and orderly space; these are some of the principal commitments of the normalizing project, as a way of governing the poor population, from childhood on. The foundations of this project are already in place, in the discourse which the governing elites hold during the 19<sup>th</sup> century about the “Social question”, but the normalising project reaches a significant political expression only in the 20<sup>th</sup> century.

Donzelot tells of the development of this look in France as an answer to the double dilemma, which the intellectual elites and the government expound, about the poor:

- 1) How can one resolve the question of extreme poverty and indigence without putting at risk the liberal concept of the state, which might find itself threatened by growing demands for subsidies, and social services? and
- 2) How can the working classes be reorganized disciplinarily, once those traditional links of vassal or patron, which kept them obedient, have dissolved? <sup>51</sup>

The answer is to be found in private and public philanthropy, by means of two different forms: the “assistance pole” and the “medical-hygiene pole” <sup>52</sup>

By means of the “assistance” practised by private philanthropic organizations, even when they get some financial help from the state, those demands directed to the state, which would threaten its definition as liberal, are redirected to the private sphere. The assistance is

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<sup>51</sup> Donzelot, op. cit., p. 57.

<sup>52</sup> *Ibíd.*, pp. 58-59.

accompanied by teaching the popular classes the virtues of saving, of a morality of the modest satisfying of their needs with the fruit of their work. Those who continue to ask for help, showing their lack of economic morality, are answered with guidance: an intervention in the family based on the supposition that he is restrained from facing up to his poverty.

The assistance has, thus, a moralizing function that privatizes the needs of the poor. On the occasion when they help a family that has asked for help, philanthropic societies like to give advice about the right way to conduct their lives, and to that effect they bring out the negligence and moral relaxation which there is in misery. The family that does not adjust to this ethic stays in misery, and goes on asking for help, gives up its autonomy, and becomes vulnerable to tutelary intervention.<sup>53</sup>

In Chile, the Minors Law, Nº 4,447, of 1928, reflects this aspect of the new moralizing policy towards the poor, when it regulates in which cases it will be understood that the parents are physically or morally disqualified from continuing to look after their children. Now, besides the significant introduction of ill treatment, which informs on the degree to which the father's domestic penal power fell into disrepute, they also include conditions and actions proper to the ways in which marginalized groups survive, such as vagrancy and mendicancy – and also the exercise of trades in the street which could be considered mere pretexts to cloak mendicancy – together with alcoholism, and “whatever other causes which place the minor in moral or material danger”. It is poverty itself, its style of life and survival, which leads one to suspect inability to raise children according to the standards, which the elites define. Private philanthropy in any case will offer them the moral orientation, the advice, and even professional aid, to avoid this loss of autonomy.

Via the medical-hygiene pole, on the other hand, the State acts to face up to the danger of society being destroyed by the physical and moral weakening of the population. In this case it is the political concern about the way to introduce order into the families before “a population free of territorial ties, but which preserves from its origins a weight that posited a force in movement that was unforeseeable and uncontrollable”<sup>54</sup>. As we saw at the time, when the governing elites in Chile and Latin America were founding the new republics they sought new “structures of authority” to replace the traditional ones, which fell together with Spanish colonial empire<sup>55</sup>. Only that if the answer was first the consolidation of paternal authority, now it is a matter of confronting the insufficiency of that resource in the midst of poor families, not provided with an adequate paternal authority.

This medical-hygienist concern will find expression in an effort to create institutions and social practices, which introduce civilized norms of behaviour among the poor. One means is industrial discipline, which put order into the life and customs of the working class. Another is the school, through which, besides taking the child out of the world of the poor family's survival strategies, (informal work, begging) the teacher uses the child against the ill-famed paternal authority, introducing civilization into the home<sup>56</sup>.

Already during the 19<sup>th</sup> century, à propos of the public debate held by the governing elites about the “social question”, the problem of vagrancy and mendicancy unleashes demands for a normalizing strategy, which combines repression, assistance and moralization

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<sup>53</sup> *Ibíd.*, pp. 65-72.

<sup>54</sup> *Ibíd.*, p. 83.

<sup>55</sup> Milanich, *op. cit.*, p. 66.

<sup>56</sup> Donzelot, *op. cit.*, pp. 75 and 80.

through saving. A Chilean republican newspaper demands, in 1972, that the mendicancy should be faced up to by using various normalizing techniques.

“Invalid mendicancy, off to the asylum with you! Mendicancy in health, mendicancy which is youth and strength embargoed by idleness, off to a workshop with you, to acquire habits of work, and to understand the needs of the job!... (and if you are a beggar because you are handicapped) ...I'll give you a hand, but at the same time I'll try to see that those who come behind you start forming themselves through saving the means to live from the fruits of their foresight and not from gifts of charity...”<sup>57</sup>

Compulsory attendance at the state school was a privileged field, and it was such, too, for the groups leading Chile, in developing the normalization. For that, as the Minors Law itself laid down, Law N° 4,447, in 1928 – education should go much further than mere instruction:

“Art. 2. In every educational establishment, public or private, morals and hygiene must be taught as fundamental matters”

As Foucault has emphasized, the creation of certain fields of knowledge, grouped under the domain of “human sciences”: psychology, psychiatry, sociology, criminology, etc, made a decisive contribution to perfecting and intensifying the normalization that imposed discipline. All these fields have a common technique for acquiring knowledge: examination, which, as it were, keeps watch permanently over individuals, a watch meant to direct, and correct, their behaviour<sup>58</sup>.

This normalizing vigilance is evident in a judicial practice regarding the marginalized children, which is applied much more massively than is imprisonment, and which represents a third and late kind of “philanthropy”: juvenile probation or educational assistance in an open surrounding, etc. By means of this, the juvenile court, which has assumed the “*patria potestas*” over a child “in moral or material danger”, keeps him under vigilance and control, but returns him to the family. Through this normalizing technique, Donzelot points out, “The norm of the State and the philanthropic moralization place the family under obligation of having to retain and watch their sons if the family itself does not want to become the object of vigilance and disciplining”<sup>59</sup>.

Although the child stays in his family, nothing is the same once that family has been discovered and included in the court’s register. The minors magistrate, and a new profession, the social visitor who work with him, are provided with legal and social power to watch over the lives of the poor, and to introduce as norms of behaviour the program which human sciences formulate as to how to guide life normally and surely.

But normalization is common to institutions, which fix the rules of the life of families and children in a far wider field. The public health centre, the compulsory school which the children attend –the children are forbidden to work–, the factory where working life starts, the mental hospital for these who does not adapt, –all these have something in common. According to Foucault, they are institutions which “have the curious property of considering the control, the responsibility, over the whole or nearly the whole of the individuals’ time:

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<sup>57</sup> Editorial del *El Ferrocarril*, 3 de mayo de 1872, en Gres, op. cit., pp. 220-221.

<sup>58</sup> Foucault, op.cit., pp. 99-100.

<sup>59</sup> Donzelot, op. cit., pp. 86-87.

they are institutions which in some way take over the whole time dimension of individuals”<sup>60</sup>. Also common to them is a control over the bodies of the individuals; they all fix the place in space of individuals<sup>61</sup>. In this way, the institutions of normalization attempt to create a great mechanism of transformation, which answers to the question of “how to make the individuals’ time, body and life a productive force”<sup>62</sup>.

The different forms of normalization and social control over poor childhood, in any case, have functional links. The existence of the jail and the homes for the young makes sense of the juvenile probation and of all the judicial measures carried out in liberty, which they wouldn’t have without the looming threat of being interned, which weighs on children and families who do not behave according to norm of conduct. Philanthropic assistance for the poor is offered with the normative expectation that the poor will acquire habits of autonomy, with the risk that the same philanthropic organization which helps them, a witness to their inability, may resort to the juvenile court’s tutelary power if the inability persists. The compulsory schooling is associated with the risk that the failure to adapt -bad behaviour, learning problems, and other causes of school “dropouts”- may serve as reason for tutelary intervention too. Failures in the mental health treatment of a child or youth with difficulties, for example with an addiction, can turn into an occasion for internment in a mental hospital or for the intervention of tutelary justice itself.

#### Normalization and violence.

So far I have not defined violence. The definition was not necessary in order to review the violent character of the forms of domestic penal power in those where common sense has not difficulty in speaking of violence. The word “violence” has a semantic field that is partly evident, which embraces, of course, blows and bad physical treatment, and likewise involuntary confinement in an institution. So the definition was not necessary while reviewing the violence of the father’s domestic penal power in its original formulation.

Regarding the practice of circulating the children to employ them as retainers or unpaid servants in alien houses, the almost slave-like implications of the institution can also probably allow to consider them within the semantic field of the word “violence”, as the word in commonly used. To make someone work, to make use of his work without consent, as a slave, is also violence. If the way we got it is to “adopt” a servant when little, make his food and clothing depend on his serving, and that without pay, in the context of social and economic subordination, serving a master who is incomparably more powerful, it would be difficult to call it voluntary service: it is embedded in a social structure in which will has no meaning, and makes no difference. That is what its quasi-slave character refers to. It is not necessary to define violence. Still less if the maintenance of that relationship of servitude serves the use of correction and punishment faculties proper to a father’s role, a father-master.

Neither is it necessary to define violence when reviewing the public displacement of domestic penal power in the faculty of the juvenile court to intern minors against their will in prisons or in places with functions equivalent to those of prisons.

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<sup>60</sup> Foucault, op. cit., p. 129

<sup>61</sup> *Ibíd.*, p. 132

<sup>62</sup> *Ibíd.*, p. 136.

However if we review the social practices and institutions for normalizing childhood, it may be necessary to define the semantic contours of the word violence, to avoid that, if we end up calling everything “violence”, that the word could no longer be used to say anything meaningful. If we observe the practice of juvenile probation or of educative assistance in liberty, ordered by the juvenile court, under the looming threat that if the measure are resisted by the child, the judge will be able to decide to intern him, it would probably not be so difficult either to agree about its violent nature. But what are we to say of the mental health interventions of a youth with addictions or some other kind of problems? And –even more difficult- what are we to say of compulsory primary education?

In other words, if, with the practices and institutions of normalization, the result is what I have called the “dissolution” of violence, does that mean that the fluid or “solution” that follows ceases to be violent? Or is it that that voluminous fluid, made up of the normalizing practices continues to be -though with lower “density”- “chemically” violent all the way through?

The use of the word violence has a political function: it means casting suspicion on the legitimacy of a social practice. Violent practice, in order to claim legitimacy, must claim exceptional reasons that justify it in certain cases, besides submitting to limits and guarantees imposed by law. That is, for example, the technique by which the State claims to legitimise acts which are evidently violent such as the imposition of punishments in the criminal justice system. The State finds it necessary to appeal to these justifications, and techniques which limit and guarantee, because qualifying such punishments as “violence” casts suspicion on the legitimacy of the one who uses them, unless he shows that passes a particularly rigorous test of legitimacy.

It is only when the word violence is used within a semantic field which common sense can understand, that that word will keep its capacity to denounce, forcing the person who exercises violent practices to show that special reasons exist which justify him and to submit to limits that are a guarantee.

A thorough examination of the practices of normalizing childhood, to denounce its violent nature, is beyond the aims and possibilities of this essay. But I am indeed interested in presenting a hypothesis about the violent character of some of the manifestations of normalization.

In any case I should like to emphasize, in the first place, the difficulty of undertaking a global critique of the violence of the practices and institutions of normalization.

A first attempt to define violence, with an eye to normalization, laying hold to the intuition that appears to guide Foucault, could be making the person submit to the needs of the social system. The submission may be “involuntary”, which makes it easier to qualify as violent, but it could also be “formally” voluntary, to the extent in which the ideology configured by the normalizer wisdom (the idea of what is morally correct, what is psychologically normal, what is medically healthy, what is politically safe) produces attitudes of conformity, of meek submission of the individual to those practices which, ignoring their needs and subjective desires, use it in function of the needs of the social system.

The problem of this first attempt is that it supposes that the subjectivity of the individual, his needs and desires, are something naturally independent of the definitions of

social system. And that supposition is more questionable. If the normalizing demands of education, paediatrics, psychology, on one hand determine the behaviour of individuals in function of the political needs of the liberal state, and the economic needs of advanced capitalism, on the other hand they contributes towards defining one's own individual identity, including the auto-comprehension of the subject, and the definition of his needs and desires. As Foucault warns us, this identity has been determined by relationships of social power, and it is supported by speeches that, though presented in the guise of objective science, are in fact a function of the exercise of power. But any critical discourse about the "true" needs of human subjectivity (for example, of a subjectivity not alienated by the dominant ideology), and whatever social project to redefine social practices, as Foucault himself admits, also represents a form of exercise of power, which competes with that of the hegemony<sup>63</sup>. Resorting to a supposed science not alienated by power (as Marxism claims) is one more ideological tactic to hide the exercise of power.

The only resource for a critique of the "wisdom", practices and institutions of normalization which, without evidently subjecting the will of the individuals, configure their subjectivity in function of the needs of the social system, is the examination of the extend to which that wisdom, those practices and institutions, and the social system itself, represents forms that are clearly hegemonic for exercising power<sup>64</sup>, for example, because its "social output" basically serves certain groups at the cost of others. The disciplinary society that Foucault describes, built by normalizing knowledge, practices and institutions that France knew during the 20<sup>th</sup> century, and which are common to many other societies, expresses forms of political, economic, social and cultural hegemony such that the subjection of the subjectivity for the systemic needs of government, order and productivity, in the case of many individuals it is alienating.

An example taken from the reality of Chilean education may illustrate contradiction between systemic outputs and the needs of the children's subjectivity. The development of a national system for measuring the quality of the education has allowed a revelation in the last few years: that a percentage of around 20 % of the population included in the compulsory primary education do not, in the first four years, learn the minimum skills of reading and writing, nor those of applying the four basic arithmetical operations. In some school installed in a particularly poor and marginal place, it was found that children who had passed the eight years of compulsory primary education (which the Chilean State has just raised to twelve) had not yet learned to read and write. For those children the school basically represents a form of supervision of their use of time, and a way of administering their bodies through the discipline of daily attendance, frequently encouraged by the offer of breakfast and lunch in the school, which possibly at home they would not have. For the social system, the school attendance is a form of prevention of vagrancy and child mendicancy, and, in the last instance, of child and juvenile delinquency and certain forms of social conflictiveness, which may turn against the social system. The cost for the children who do not learn is usually high, if one bears in mind the problems of adapting, of self-esteem, and of conflict with the disciplinary demands which the children face who have experienced "failure at school", apart from the cost in time lost, time of effective learning, of playing, etc. To conclude, beyond the failure to achieve the educative objectives in the case of so high a percentage of children,

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<sup>63</sup> Foucault, Michel, "Truth and Power", in Collin Gordon (Editor) *Power/Knowledge: selected interviews and other writings*, translated into English by Collin Gordon and others, New York, Pantheon Books, 1980, pp. 131-132.

<sup>64</sup> *Ibíd.*, p. 133.



there are important social functions, which the complete school matriculation is fulfilling, basically linked to social control and normalization.

If we examine the field of normalizing social practices of childhood in the area of mental health, we face another difficulty. Regarding children, from paternalist arguments, it is held that medical interventions practiced in the interests of health should be decided on by the parents, and may be practiced even without the child's consent. His parents, better than he, have the competence to take that decision, and they will do so regardless in his higher interests. The conceptual difficulty which this argument proposes is that it invalidates, in the case of children, a concept of violence that defines it as an intervention in the bodies of the subjects, which is not consented to by them. Or, at least, under this line of argument, that form of violence does not carry the suspicion of illegitimacy which interventions without consent on the bodies of adults do carry.

In part this is the logic followed by such an influential actor in the world of Law as is the Supreme Court of the United States in *Parham v. J.R.* in that case it declared that, although minors have a constitutionally protectible interest in being free of unnecessary bodily restraints and in not being erroneously labeled as "mentally ill", the parents can decide to intern their children in a mental hospital without a judicial hearing, since that internment must be characterized as "voluntary", and not forced (as one decided by the State would be). The internment arranged by the parents must be considered voluntary because it must be assumed that the parents due to their natural bonds of affection act in the best interests of their children<sup>65</sup>.

Under this conception, the rates of children internment in mental health facilities have dramatically increased in the United States. The critical literature holds that many of those children are only status offenders or other "troublesome" children to their families, who cannot longer (unlike Chile) be legally institutionalised under these criteria because of the deinstitutionalization mandate in the Juvenile Justice and Delinquency prevention Act of 1974<sup>66</sup>. Due to this legal restriction, "hospitals are rapidly becoming the new jails for middle-class and upper-middle-class kids... usually committed for medical problems that do not require hospitalisation and for which there is little evidence that psychiatric intervention is appropriate or effective"<sup>67</sup>. Thus, for example, an investigation conducted by the National Institute of Mental Health in a mental hospital (St. Elizabeth's Hospital) showed that only 30 % of the patients under the age 20 that were confined in that institution really required that hospitalisation<sup>68</sup>.

## **II. The Relationship between violence and law in the case of domestic penal power over children.**

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<sup>65</sup> *Parham v. J.R.*, 442 U.S. 584 (1979), 42-43, 321-24

<sup>66</sup> Ramsey, Sarah H. and Abrams, Douglas E., "Children and the Law in a Nutshell", St. Paul, Minn., 2001, p. 325.

<sup>67</sup> Schwartz, Ira M., "(In)justice for Children: Rethinking the Best Interests of the Child", 1989, quoted by Ramsey y Abrams, op. cit., pp. 325-326.

<sup>68</sup> Ramsey, Sarah H. and Abrams, Douglas E., "Children and the Law. Doctrine, Policy and Practice", American Casebook Series, St. Paul, Minn., 2000, p. 770.

In the introduction to this essay, I stated that, starting from the case of legal domestic violence against children, and its transformations, I would tackle the problem of what the concrete contribution is of the law, the juridical form, in the genesis and transformations of violence. The following questions in particular are the ones which concern me: What interaction exists between the law and the social and ideological forces which sustain violence? Is a neutral instrument equally useful to the social and ideological forces which sustain violence as it is to those which reduce it? Or does there exist a certain intrinsic capacity of law, of juridical regulation of human cohabitation, to reduce or domesticate violence, even partially? Or, on the contrary, are there reasons to believe that, when the law regulates violence, it consolidates it, institutionalises it, embeds it and perpetuates it in social life beyond what social and cultural forces would have done?

I shall do this by making a very brief summary of some theoretical approaches about the relationship between violence and law, and then I shall examine which of them best allow us to explain legal domestic violence against children in Chile.

#### Some theoretical approaches about the relationship between violence and law.

At this point I wish to summarize, or simply remember, some approaches or arguments about the relationship between violence and law, which I believe, reflect a large part of the theoretical alternatives for solving the questions that underlie this relationship.

In the first place I shall expound an argument or approach which I shall call *extrasystemic*, in the measure which allows us to understand the violence of the law as the result of its instrumental use by economic, social and political forces alien to law itself, external to it. In this approach the law ends up appearing as an instrument, while not neutral, certainly considerably susceptible to being employed, by forces of different brands, either in favour of violence or against it.

In the second place, I shall summarize two arguments or approaches which I shall call *intrasystemic*, in the measure in which they hold that the law, intrinsically, and relatively independent of the other factors in violence, has an effect on the same. One of them holds that the law precisely contains an intrinsic capacity to produce violence, to an extent that makes it impossible to obtain justice. From the other approach, in contrast, one can deduce that the law has an intrinsic capacity to reduce violence, including that violence which those who create the law would like to employ. I shall end this exposition contrasting these two approaches with contributions one can deduce from Foucault, regarding the relationship between law, legitimacy and ideology, and quoting a very significant picture offered by Walter Benjamin.

Although it will not be possible for me to analyse it here, I would just like to mention in passing, as an approach which converts the law into an ambivalent factor regarding violence (usable in favour or against it), the proposal which – from a vision of Law which is Marxist in principle – holds that it is possible to make an “alternative use of the law”. For classical Marxism, the Law, like the State which creates it, is part of a superstructure whose basis is to be found in the relationship of production which exists in society, and which is its infrastructure. The Law (and its effects of violence, we might add) does not have autonomy regarding the way material life is produced, that is, the social system of the ownership of the

means of production and the organization of work<sup>69</sup>. The law depends on the Economy, and serves to reproduce its unjust infrastructure defined by the exploitation of the work of the proletariat: the Law reproduces the structural violence imposed by the Economy.

Without denying this dependence of the judicial superstructure regarding the economic infrastructure, the exposition in favour of the possibility of an alternative use of the law recognizes that in the social struggle within capitalism there exist spaces of material power which are in dispute; the material domination of the capitalist bourgeoisie is not total. Those spaces in which the material hegemony is not total allows expressions and uses of the law in favour of the interests of the proletariat and the subordinate classes. In this measure, the Law can be employed to limit the structural violence imposed by unjust relationships of production.

Regarding the “intrasystemic” approaches, the first one I want to mention is that which Austin Sarat and Thomas Kearns developed recently, in a critique of the work of Robert Cover<sup>70</sup>.

Robert Cover, examining the judicial moment of the law, particularly in the case of penal law, holds critically that the violence in the law becomes almost invisible through the discourse which aims to redefine it as “legitimate use of force”, a violence which, with the predictability and orderliness of its imposition, receives and “alchemy” change whereby, according to this extended discourse, the law could not, by definition, be violent<sup>71</sup>. Cover answers that this “abuse of language” must be unmasked, to recognize as an anomalous fact, which cannot deserve a supposition of legitimacy, that through the law violence is imposed. On one hand the law is normativity, principles of justice, arising from social life, with its richness and variety, a normativity which is located in the domain of freedom; but on the other hand, the law is coercion, the violent imposition of certain normative contents, a violent imposition which “kills” all the other varied normativity present in social life. The violence of the law is “jurispathetic”, since it kills the law (as normativity).

However, in recognizing this Cover is not aiming to make a radical critique of the violence of law, but rather that the law should use violence as little as possible, and he holds that, in the measure that this happens, then violence should be defended as an instrument of the law. For the violence of the law is located in a political and social medium that is also violent, and the only way to discipline the violence that is present in ordinary political and social life is through the law. As long as the varied social normativity remains unregulated it is chaotic. Its disciplining must be effected by means of the law, with normative contents that aspire to justice, but shutting out the chaos through the imposition – through the execution of the sentence – a necessarily violent imposition, of normative contents. This technique, however, should be used as little as possible, because in some degree it always kills other visions of what is just; visions which are necessary to avoid the jurispathetic and imperial nature of the law of the state. Within this reserve, according to Cover, the violence is transformed into peace.

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<sup>69</sup> Cfr Novoa Monreal, Eduardo, “El Derecho como obstáculo al cambio social”, 4<sup>th</sup> edition, Mexico-Spain-Argentina-Colombia, Siglo XXI, 1980, pp. 202-203.

<sup>70</sup> In Sarat, Austin and Kearns, Thomas R., “Making Peace with Violence”, in Austin Sarat (Editor) *Law, Violence and the Possibility of Justice*, Princeton and Oxford, Princeton University Press, 2001, pp. 49-84.

<sup>71</sup> Quoted by Sarat and Kearns, op.cit., p.53. The ideas expounded from here onwards, in the main text, are a summary of these authors’ article.

Sarat and Kearns criticize this final twist in Cover's reasoning, by which he defends the possibility of limiting the jurispatheic nature of the law, reaching peace by means of a legal order which is "homicide" (and not only in a figurative sense, the death penalty is a case of legal violence which is in the background of the discussion).<sup>72</sup> These authors stop at the picture, offered by Cover, of the violence of the law - in its judicial moment - as a pyramid of violence, in which is produced a rigidly hierarchical social organization of work. Thanks to this organization, the judge achieves a notable coordination with those who execute his sentences, a coordination which allows the judicial words to be translated into acts of executive violence. That first requires an act of judicial interpretation and justification, behind which, at the judge's side, is the whole community of judges as a community of interpretation and justification. In the second place, the judge rests on a structure of cooperation which works to overcome the moral and cultural inhibitions which we face when imposing pain on other people. The division of work allows us to overcome these inhibitions: the judge just interprets and justifies; he does not put his hands in play in the execution of violence; as far as the officials of the "cooperation structure" are concerned, they just carry out the judge's orders, being able to attribute to him primary responsibility for the violence which they apply.

The necessity the judge finds himself in of being successful in stimulating the structure responsible for executing the sentence, so that it is motivated to do what has been ordered, conditions the way in which the judge interprets the law. The interpretation is "altered" by the fact that the judge practises it bearing in mind the possible reactions of others in the chain of command. The judicial interpretation of the law thus has a tactical nature: it is not transparent. If it were transparent, the normative nuances might cause uncertainty in the execution structure, putting at risk the efficacy of the judicial order. Judges are not poets; they are not free to say what they really think. If they were, they might act on the basis of their sense of the best theory of meaning or of political ethics. But judges know that their acts of interpreting are nothing, in a juridical sense, unless they cause an impact in the world. The world of interpretation is thus altered by the needs of order.

The judges, then, in order to overcome the risk that their acts of interpretation will not be carried out in a chain of command, or that interference will be produced by the officials in charge of the execution, have to provide powerful reasons and justifications. Only thus will the cooperation structure, which will carry out the violence, be able to overcome the inhibitions which imposing death and pain on others produces in us. For there are limits to what the other agents in the pyramid are disposed to do, even if it is the judge who has given the orders.

In conclusion, according to Sarat and Kearns, the imperatives of the violent context in which the law must operate transform the law. Violence changes the law, in the measure in which the latter loses its capacity to recognize nuances, to recognize the differences between each case, and it becomes tactical and rigid in function of the need that it be obeyed, and that its violent programme should in fact be carried out.

It is also possible to consider "intrasystemic", though with the opposite sign, the approach of the relationship between violence and the law which arises from the thought of Jürgen Habermas, which, to be more exact, is an approach about the relationship between

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<sup>72</sup> Op.cit., p. 66.

what is in force and factic imposition (coercive) of the Law and normative legitimacy of the Law<sup>73</sup>.

For Habermas the Law serves individuals' social integration, only to the extent that, together with its factic validity, derived from its legal authorization and effective imposition, it also acquires normative validity or legitimacy. The Law only manages to acquire the normative validity or legitimacy in the measure in which those people the norms are destined to regulate are able to consider them rational. And, given that, in a plural and secularised society, no contents of the Law can claim objective rationality, those the law is destined for will only consider rational those norms which they can feel to be the "rational authors" of. That appeals to the existence of a procedure of creating norms, which potentially allows us all to participate in, and of the political conditions of autonomy and participation in which the individuals and groups can really contribute to creating and modifying the norms which the law sends their way.

So the Law will not be efficacious in its "systemic" functions, and it will lose its capacity to direct human conduct, unless it treats those whom it wants to govern as autonomous individuals and as citizens. There is, therefore, a great obstacle in the way of those eventual pretensions of effectively imposing on individuals a law which does violence to and subjugates their autonomy.

This condition of law, according to Habermas, derives from a characteristic of language, which the law also has in every act of speaking. It is proper to human language that the speaker aims for validity regarding what he says. Indeed if he wants to obtain something in his own interests, the human being uses language with the expectation that the person he is talking to will consider valid what he says, in the double sense of true and legitimate. The person who knows beforehand that the other person will consider his pretension illegitimate will try to satisfy it violently; he will not speak. The person who speaks attempts to justify himself. So, too, the law is a linguistic way of exercising power, which, together with its advantages, has the limitation of not being efficacious if it is not capable of appearing as valid before those citizens whose lives it will regulate. Indeed the dictator who chooses to give his dictatorship a legal basis, must try to get his law to appear valid to those who will be submitted to it. The law, then, as transpires from Habermas' conception, cannot be purely violent subjugation of individuals. To choose the juridical form to exercise power implies imposing on oneself the need to seek legitimacy for what the law disposes. And as that legitimacy will only be reached by making the citizens feel they are "rational authors of the norm", to exercise power through the Law is to limit the power, in the measure in which it is necessary to assure the citizens of an acceptable measure of private autonomy (freedoms) and public autonomy (democratic participation), and procedures which allow participation in creating and modifying the law.

So the relationship between violence and the law, which may be inferred from Habermas' theory of law, contrasts with the conclusion of Sarat and Kearns precisely in relation to the effect that the pretension of validity, and, more precisely, that the pretension of legitimacy, produces in relation to the violence of the law. While for Sarat and Kearns that pretension of validity makes the law more violent, annulling the possibility of a just

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<sup>73</sup> The following paragraphs summarize the ideas of Habermas set out in "Faktizität und Geltung. Beiträge zur Diskurstheorie des rechts und des demokratischen Rechtsstaats", 4<sup>th</sup> edition, Frankfurt, Suhrkamp, 1994, pp. 41 et seq. Illuminating, too, is García Amado's summary, "La Filosofía de Derecho de Jürgen Habermas", *Doxa-13 Magazine*, 1993, pp. 238 et seq.

normativity, for Habermas it obliges the Law to stay within a field of respect for the autonomy of the individuals and for the normative contents which they can, at least “discursively”, consider just. This difference is explicable if one remembers that, for the first named authors, the pretension of legitimacy which they are interested in is that which the judge who orders an act of violence which those officials to perceive who will carry out the violence, which leads the judge to make his order and its justifications more eloquent, distorting and making less sincere the juridical interpretation. In contrast, Habermas homes in on the pretension of political and procedural validity which the legislator wants the people the law is destined for to perceive. Even so, both approaches rebel against a different conception about the capacity which a distorted language, not a very sincere one, and one which manipulates, has to convince the receiver of the justice of a judicial decision (judicial and legislative). Habermas considers that we could not be convinced so easily by an ideological use of language (which falsifies reality), while Sarat and Kearns believe that – if we are officials of the “cooperation structure” which carries out the violence ordered by the judge – the ideological discourse, false as it is, will indeed manage to persuade us.

Without trying to resolve this difference, I should like to throw into the melting pot the ideas of Foucault about the relationship between ideological discourse and power, which may be of use to understand the way in which the Law builds and fills out the contents of its pretensions of validity.

Foucault does not believe that there is knowledge – nor language, which is the vehicle for expressing knowledge – which is free of power. Following Nietzsche, he considers that knowledge and its discourse are always a tactical and political exercise, which, far from “sincerely” describing the object of knowledge, wishes to submit it to relationships of force<sup>74</sup>. Specifically, when he describes disciplinarian society, in which the law plays an important configuring role, Foucault identifies as a key instrument for the policy of controlling the time and the bodies of individuals, in order to increase their productivity and governability, the contribution made by the human sciences (psychiatry, psychology, sociology, criminology) to justify practices and institutions of vigilance and control of the individual<sup>75</sup>. These sciences “invent” a piece of knowledge, items of knowledge and speeches, which serve to exercise a disciplinary power at micro-social level, under the pretension of scientific validity. The human sciences, as sciences of behaviour, produce their knowledge in function of the political objective of the control of human behaviour.

With this perspective, then, we may conclude that the Law formulates pretensions of validity making use of speeches and knowledge which are not “neutral” (no kind of knowledge is), but have a political charge related to the programme of intervention in individuals which underlies them. In doing so, these bits of knowledge are made normative, their advice becomes normative prescription, measures which justify violent intervention in the lives of people. In fact, as soon as those bits of knowledge of the “human sciences” contain a vision of what is the “normal” behaviour of human beings, it is proper to them to try to get us all to behave normally. The law goes half way to meet this pretension, offering it an efficacious instrument to fulfil it; thus the violence of the law would not be capricious, but a putting into practice of exactly what the “scientists” recommend.

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<sup>74</sup> Foucault, “La verdad y las formas jurídicas”, op. cit., p. 28, quoting Nietzsche, in “La Gaya Ciencia”.

<sup>75</sup> Ibid., pp. 99-100.

To end this brief review of theories that explain the relationship between violence and the Law, I wish to bring into view a picture from Benjamin, which reflects another dimension of the same thing<sup>76</sup>:(75)

“..... power is the principle of every mythical foundation of the law..... From the above derives an application pregnant with consequences for the law of the State. To its domain belongs the establishment of frontiers, just as “peace” from all wars is proposed... In it is shown, with the greatest clarity, that all violence which is a founder of law comes to guarantee a power. The establishment of frontiers does not mean the brief annihilation of the rival. He is given rights, even in those cases in which the winner has an absolute superiority of violent means. And, in a diabolically ambiguous manner, they talk of “equal” rights. For both parties signing the contract, the line which must not be crossed is the same one... (quoting Anatole France) the law prohibits rich and poor alike from spending the night under bridges.....”

I want to emphasize two aspects of the theory on the violence of the law that underlie this quotation. The first is that, under the formal equality of the Law is hidden the inequality from the start between the diverse parties bound by it, and a violent past, which the Law, in its efforts to be an act of founding and originating, hides. The second is that, while the Law is not more unjust and violent than “the war” (violence) that preceded it, because it fixes its frontiers just where the winner managed to conquer, without extending them beyond that line, it does indeed seem to offer the winner the permanent enjoyment of the territory which the war only offered him on a precarious basis. So on one hand the Law does not appear to be creating violence, but putting an end to it, and on the other hand it turns out that it comes to legitimise violence and perpetuate the fruits of violence, under the form of an apparently just equality.

#### Application to the case of legal domestic violence against children.

1. I shall start this last brief reflection by applying the last picture, that of Benjamin, to the case of legal domestic violence against children.

The 1855 Civil Code does not appear to have created this violence. There are signs of a similar practice, with a certain legal-cultural basis, in the colonial period, and that of the Republic previous to the civil codifying. But the formal institution of the faculty which I have called “domestic penal power” by means of a legal power clearly established in the Civil Code, as a private autonomous power, not questionable by the State, and which, however, merits the help of the state, contributed to perpetuating the territory which the father-patriarch had reached de facto, and that the most heterogeneous and least clear norms of Spanish law at the end of the Colony seemed to support only with nuances. The Civil Code institutionalised quite clearly the father’s power to exercise violence against his children with the help of the State.

2. If Habermas is right, sovereign power needs to display pretensions of validity acceptable to individuals, as a condition of the efficacy of the prescriptions which it establishes through the Law (although for Habermas it is not a matter of criteria of substitutive validity but rather procedural ones), domestic penal power appears to have been upheld, at different times, by recurring to moral and scientific justifications, which may have met with wide acceptance in the adult world.

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<sup>76</sup> Benjamin, Walter, “Para una crítica de la violencia”, in *Iluminaciones IV: “Para una crítica de la violencia y otros ensayos”*, Madrid, Taurus, 1998, pp. 23 et seq., in particular, p. 40.

At first the justifications appear to have been based on criteria of which public morality, linked to the need of the principle of authority, of the obedience of children to the father, as a way of guaranteeing order in families and society. These reasons are linked, both in Roman Catholic thought and in the ideas of the philosophers of the Illustration, with the needs of an honest education of the children, whether as good catholics or as good citizens. In any case, a sensitivity favourable to protecting the welfare of the children – already in this period – allows the power of punishment to be orientated and limited (hypothetically), defining it in function of its needs.

At a second moment, both in the public expansion of paternal penal power and in the social practices and normalizing institutions in which that state power dissolves, the power to intervene violently against children rests on “scientific” arguments, linked to the educative, medical, psychological needs of the children, from a perspective of social prophylaxis, foreseeing the risk of maladaptation, physical and moral depravity, mental illness, etc. The knowledge built up by “human sciences” has, in this field, as in few others, an enormous capacity to “lend” the Law criteria to justify violent intervention in the lives of other individuals. Regarding the marginalized children the prescriptive pretension of those “sciences” is efficacious – that abnormal behaviour should be corrected and the illness cured. The Law assumes this charge and accepts the powerful criterium of justification.

In both cases, it is important to take note, the justification for the violence with which the Law seeks validity is in the form of a well-intentioned paternalistic argument: “for his own good”, “in the highest interests of the children”. The maintenance of civil faculties proper to family law, on the part of the minors’ tribunal and the directors of the internment centres (including the prisons), is related to the persistence of that argument in favour of the children. The parents, or the State acting as “substitute father”, would always act in the children’s interest. That justifies the violence. The argument seems to have enormous capacity to penetrate the world of adults, which thinks that moderate violence exercised for the good of the children is necessary and justified.

3. Even with all this, as Milanich pointed out, in order to exercise certain forms of domination over the children, in republican Chile it was necessary for the Law to keep silent. Specifically the regime of semi-servitude of the child servants was maintained thanks to the silence of the law about the juridical status of the children “adopted” by other families. If it was like that, this was because the Law could, in one sense, put obstacles in the way of the use of these practices. It is significant that prominent members of the very elites that participate in building up republican juridical order, and who daily took part in that semi-slave-making practice, knew that the Law should not regulate it, because it did not adjust to their institutions.

In this case it seems certain that the use of the juridical form presents demands on the plane of justification, which many a practice fails to satisfy.

That does not mean to say that the practice commented on was not backed by a cultural justification expressed through a certain kind of discourse. The employment of child servants in the master’s house, as unpaid servants, rests on moral arguments which consider this institution a matter of charity with children who would otherwise starve.



But this is a justification which, half way through the 19th century, did not satisfy the criteria for legitimacy which govern private relationships in the Civil Code, which posit an individual who is free, only bound by commitments he entered into voluntarily, or by the authority his legitimate father has (and not a master who pretends to protect him as such) in function of the interests of his own son. That is why it is expressed in informal discourse, in a low voice, and not in public discourse, which in those days had to be formulated in a way compatible with the political suppositions of a liberal State.

Thus it seems that the Law contributed, with the legal institution of a strong father-patriarch, endowed with domestic penal power, to configuring the model of a social actor that served for dominating poor children, through the father-master/adopted-servant relationship, but he had to keep quiet precisely regarding the surroundings of the authority of this actor, because if he had had formal regulation, it would have limited such authority inconveniently in areas of social life in which it was socially, economically, and politically necessary, although not altogether acceptable for the criteria of validity of a Law inspired in liberal principles.

That the Law remained silent regarding this aspect of domestic violence is something that was possible just because it is about the domain of domestic life. What is domestic, linked with family affairs, is largely outside the reach of the liberal Law of the state. The domestic authority is recognized to be of a discretionary nature, whereas the public authority is strictly regulated. Domestic penal power allows what the father considers is insubordination to be punished, while the state penal power can only punish actions or omissions that the laws typify as offences.

4. Regarding domestic penal power which has been transferred to the state in the figure of the juvenile court, the Law also seems to have kept silent about the limit of his authority. Only that the way of keeping quiet was through the use of a language which hid the use of a power of a penal nature. The authority of the minors' magistrate, completely defined rhetorically in function of the needs and interests of the children, in reality had a penal function covered up by means of obscure juridical instruments: for example, one regulation which authorizes the President of the Republic to determine that, if there is a shortage of Homes for Minors, he can resort to the prisons, as a provisional and exceptional measure which, however, had a great vocation of permanence and generality. And so much so, that even in the cases in which they had created special establishments, necessarily they had a character functionally equivalent to a prison.

In this case, the juridical form, as liberal penal law knew it in the 19th century, would not stand handing over to the state the power to impose punishment, shutting up individuals in prisons, without the limits proper to Penal Law which are applied to any adult. Without those limits (whose introduction would also have frustrated the programme of vigilance and control of conflictive marginalized childhood) the Law could not have spoken of punishment, and for that reason only talks of "protection".

However, the Law in this case, unlike the case of the almost slave-like servitude of the 19th century, does accept a transformation of the liberal model of family relations: the faculties of the father of the family have now been assumed by the state in the case of the marginalized classes, because the incompetent father can be replaced or helped by the minors' magistrate, who acts as State-father (*parens patriae*). But even so, you cannot talk

openly about confinement and prison. It is necessary to use a more appropriate language to make it possible to go on using the model of family relations, which is exactly what is used to hand over to the director of the institution when minors are interned, taking care personally, directing the education and the faculty of correction and punishment, which the civil law entrusts to the father.

But, for the legal rhetoric that promotes it, that transformation does not convert the juvenile court's violence into public violence. It continues to be a violent domestic power. A power which, therefore, like that of the father, should be discretionary. In this sense, perhaps, more than speak of nationalizing the father's violence, we are witnessing a privatisation, a "domesticating" or "paternalizing" of the violence of the magistrate.

5. So far I have suggested two kinds of relationship between violence and law, regarding the case of legal domestic violence towards children. In the first place the Law, colonized for moral reasons and "scientific" justifications, obtains criteria of legitimacy from the violence towards children, at least to institute a violent authority legally, which is accepted socially and culturally because in the end it acts "in favour" of the children. In the second place, beyond the institution of that power, the Law finds itself obliged to keep silent, leaving without regulation the limits of that authority, because the juridical form would impose limits on it that would affect its function of political, social and economic domination.

But one has to recognize a "movement" in another direction, within this game of the relationship between violence, law and justifications, which complicate the analysis.

The reasons which "justify" the institution of a violent authority, on the basis that it acts "in the interests" of the children, also has a capacity to limit the violence of that authority.

If the tutelar Juvenile Law allows children to be confined for reasons that do not justify locking up an adult (hiding the violence behind the paternalist discourse), the extension of a confinement "for the good of the child", however, could rarely be what the Law permits in the case of an adult, who is locked up "for the good of society", in the case of serious offences, or the one that the Law permits regarding a minor in whose case the State refuses to go on acting "for his good" and decides to act exclusively "for the good of society", as if he were an adult. In the United States of America that could not be more evident, in the measure in which the answer to crimes of seriousness committed by minors, when it is defined exclusively "for the good of society" (judging the minor as an adult) can go as far as the death penalty or life imprisonment. A paternalistic discourse which seeks legitimacy could not justify those punishments "for the good of the child"; in fact, if he is judged as a minor, in that same country, it would not be possible to impose – for the same crime – a punishment which goes beyond his coming of age, or the age of broadened competence which in certain states they give to the minors tribunal (for example 24 years old, in several states).

Thus the Law, even if it does not create paternalistic powers, does not reach legitimacy if it does not show itself, to a minimum degree, sincere about its intentions to act "for the good of the child". Of course, the ideological charge which the normalizing pieces of knowledge impose on this law allow it "sincerely" to seek the good of the children while doing violence to their bodies. But even so, in a culture that identifies welfare with the

material dimension (which is where bodies are located, after all) there exists a limit to the violence, which the Law can impose pretending to do so in favour of the welfare of the subject it is imposing it on. On the other hand, in a culture built on the idea of a spiritual welfare (in the Catholic Inquisition) it reached the point of justifying being tortured to death, with paternalistic arguments, for the sake of the spiritual salvation of the person tortured (who through the pain expiated his sin)

In short, not only the juridical form, in a liberal Law, offers obstacles to the violence of the Law, but also the aims declared by the Law, in a culture which is based on objectives linked especially to material welfare, offer obstacles to the exercise of violence. If they are paternalistic objectives, the limit consists of this: that even the imposition of violence “for his good” can only be justified if, even in a medium term, it allows a material welfare to be reached which is not compatible with the exercise of violence.

6. To sum up, the relationship between violence and law, in the case analysed, appeared marked by ambivalence.

The civil codified Law contributes to consolidating a violent power on the domestic plane of the family, which with nuances already existed in the culture and in a less clear and formal law.

The same law allows one to apply the “domestic” model to forms of violence against children which are beyond the family. The Law, however, largely keeps silent about the contours and formal limits of this power. That the Law should keep silent on the domestic plane is no accident; the domestic plane is precisely an ambit which, for liberal ideology, remains relatively outside the intervention of the State (and therefore of State Law), and which should enjoy a certain degree of discretionality, so that the domestic authority can, with “public” interference, work for the good of the child. This aim, proper to the domestic plane, however, also limits violence “teleologically”.

Thus the Law was necessary to send to the world of the domestic plane social power and political power to exercise violence against children. Once it is in this world, that power can become discretionary, renouncing the Law, to assure the children a welfare which the juridical forms hamper.

The relationship between violence and Law is largely one of opposites, then, according to whether it is a out view of Law which institutes the power in substance, or that view which regulates it formally. In the first case, the only limitation possible is a teleological one, in the second case, a “guarantor”.

7. If the Law matched the treatment of the children with that of the adults, making uniform the relationship between the individuals and the power, the ambivalences would be largely done away with. Then we could ask ourselves whether the Law isn't, as Cover would say, “killing off” different normativities of the model of full responsibility.

To say it another way, in this difference which the children have had compared to adults in the treatment they are given by the Law ... Isn't a certain normative capacity of society expressed -influenced by bits of knowledge from the “human sciences”, it is true- of recognizing nuances and differences between cases? The arbitrary nature, and the discrimination against the children, in the enjoyment of the guarantees and formal limits to

penal power – are they not only a negative secondary consequence of a distinction that in principle is normatively richer and more sophisticated than egalitarian and standardized treatment?

If it were so, it is not possible to maintain the difference on the plane of the purposes of the Law, through a principle which allows us to put the children’s welfare – their “higher interests” – as a basic criterium in the juridical decisions which affect them, but without renouncing the juridical form, as a technique for limiting the power?

To a great extent, the social and political movement in favour of children’s rights, which has taken shape in the writing of an International Convention on the Rights of the Child, seems to respond to the purpose of maintaining the difference in relation to the aims, which are enriched with criterium which give priority to the child’s interests, but taking advantage of the guarantees which the juridical form offers to the individual.

In any case, as this movement has correctly guessed, the opening of the Law to a richer normativity, which recognizes the differences between children and adults, and takes charge in the best way of the nuances, avoiding the standardizing and making rigid the programme of decisions about what is best for the children, is not reached with a more informal justice, endowed with discretionary powers. On the contrary, with it you do not avert the danger of a “jurispathetic” effect of the juridical interpretation; social work and psychology are always complaining about the rigidity of the answers of juvenile justice faced with complex problems, loaded with subtle points, which the tribunal and its juridical technique is unable to answer in a sophisticated way. Justice, even if it is informal and with discretionary powers, appears to keep killing the subtle points. And as the counterpart, this lack of formalization of the judiciary deprives the law of one aspect of the standardization which is very dear to individual rights: the guarantees, the limits of power, a case in which the “jurispathetic” and rigid character of the jurisdiction “kills” what should be killed, namely, the discretionary character of the exercise of power, imposing a rule of equality in the limits, which serves to avoid a multiform violence. The guarantees, as the exercise of violence becomes more rigid, make it more foreseeable and egalitarian.

On the other hand one might expect greater normative richness, greater subtlety and sophistication, in the dejudicialized ways of attention to the welfare of the children. That would be acceptable provided that it is a matter of forms in which we do without a power able to intervene violently against the children themselves.

It is important, however to note that the normalizing social practices largely justify themselves as dejudicialized forms, more subtle and sophisticated, of following special ends, which configure the policy of attention to childhood. What usually happens, however, is that often these practices and institutions do not give up the exercise of violent power, except in a “diluted” style, but rather they uphold the model of a domestic authority whose purpose in favour of child welfare legitimises an intervention which was not agreed on with the child, who generally postpones his declared interests due to the needs of the system (order, discipline, forestalling social risk, authoritarian standards of normality).

So, too, in the ambit of dejudicialized practices of answers to the needs of the children’s welfare, the juridical form is necessary, although in this case, only as a guarantee, precisely to make sure that we are doing without an exercise of violent power, that there is a reduction in the sacrificing of the manifest interests of the children to the systemic needs,

after all, that they reduce the more hegemonic forms in the construction of public policy of child welfare.

To sum up, the best programme for limiting the violence of the Law, and by means of the Law, should be sought in a regulation which proposes equality in the juridical form, imposing the same “formal” limits to the violence exercised against children and adults, “killing off” the normative differences here, and at the same time preserve a distinction in the purposes of violence, consequently opposing more and better “teleological” limits to the violence imposed on the children, in this respect keeping the normative subtleties. The greatest subtleties are to be expected in the field of the dejudicialized forms of promotion of child welfare, which should be the most widespread possible. But even there the juridical form preserves a guarantee function, against a covered up use of domestic violence.

8. While this essay has not been the object of a specific study, I would like to end with a reference to the subject of subjectivity or legal status.

Under the model of liberal Law, to have dealings with someone within the domestic ambit, under the domestic authority of the father-patriarch, implies denying or reducing one’s legal status, one’s condition as a subject of law. As a counterpart one is protected from the consequences, which, for subjects of law, usually come to the person with full responsibility for his acts; for example, they are taken out of the ambit of Penal Law.

The silences of the Law, as far as the regulation of the limits of the authority is concerned, are more easily justifiable before people with diminished legal status. They are represented by, protected by, controlled and governed by the father-patriarch, the only great juridical subject in the family in the 1855 Civil Code. Child servants, children under the guardianship of the minors’ magistrate, and children controlled and civilized by institutions of normalization remain not only subject to the discretionary power of an authority who is not completely juridified (but is instructed in law), but also their relationship with the Law seems to be mediated by that authority, who is their representative.

The recognition of the children as subjects of law, would imply a redefinition of the domestic plane, as a space in which the juridical form should also penetrate, imposing limits there where the Law itself has institutionalised a violent power, and also in those spaces where social practice seems to renounce the exercise of that power. The domesticity of the Law regarding the children understood to be subjects, should translate into a treatment which favours the welfare of the children in the field of the ends of the Law, without renouncing the juridical forms to which, in their condition as subjects of law, they are entitled.