**Resumo de algumas temáticas para o exame de Sociologia do Direito**

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***Karl Marx´s Sociology of Law***

Karl Marx and Friedrich Engels discuss the reality of the social world in terms of fundamental ongoing conflict, as famously articulated in *The Manifesto of the Communist Party:* “The history of all hitherto existing society is the history of class struggles”.

For Marx, in any society, the population divides itself into two distinct classes – the proletariat and the bourgeoisies – which distinguish themselves by their contrasting relationship with the means of production. The two classes coexist in a state of ongoing power struggle - the enrichment of the bourgeoisie meant the impoverishment of the proletariat.

The motor of history is in fact the struggle between an ever-bigger proletariat (“the 99%”) and an ever-smaller monopolist bourgeoisie (“the 1%”). The goal is to transform the nature of work so that the need for manual labor would decrease.

Law, is no exception to this rule: law, morality and religion are to Marx a reflection of bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests. Law is defined and implemented in the interest of the economic elite, and subsequently, the dominant class of society as a whole. Law is fundamentally acting out of self-interest. The bourgeoisie axiomatically construct the law and self-serve of the hegemonic structure the law perpetuates by allocating social power, wealth to the few and oppressing the vast majority of society.

In a nutshell, Marx´s interpretation of the sociology of law is that law is fundamentally a hegemonic discourse, defined by the economic elite, thus perpetuating their own class –based interests.

The deterministic view suggests that the law that governs a society is directly related to that society´s economy; specifically, the former is shaped as a direct reflection or consequence of the latter.

Marx’s protracted, poetic opening to his massively influential manifesto sums up the essential concept of historical materialism. From ancient times (defined by the freeman-slave paradigm), through the Middle Ages defined by feudalism (the lord- serf paradigm), and into modernity, Marx suggests that there exists a fundamental binary conflict within society. Regardless of the economic structure that happens to define the society, there will always be a distinction between the ‘haves’ and ‘have- nots’ – the bourgeoisie and the proletariat, respectively. Marx goes on to explain that under capitalism, the ultimate class conflict exists as the economic disparity between the opposing classes reaches its most prevalent form. Therefore, as the economic structure of the contemporary world is dominated by capitalism, the conflict between classes is more intense than during any point in history prior. Furthermore, the percentage of the population that may be considered to make up the bourgeois is lower than ever, which only adds to the binary class antagonism that exists today.

Therefore, the main question we should ask is: how does capitalism, the ultimate form of binary class conflict, shape law? Marx suggests that law under capitalism is defined by inequality, namely, the discrepancy in social power between opposing classes.

Sociologia jurídica na perspectiva de Marx:

* A lei e a economia estão intrínsecamente ligadas
* Por força do conflito de classes, temos uma sociedade com um centro de poder desiquilibrado e consequentemente uma lei que perpétua e agrava este desnível
* A perspectiva determinística sugere que a lei seja uma reflexão da economia.

***Max Weber´s Sociology of Law***

Such as Marx, Weber suggests an approach in which there is a reciprocal and dialetical relationship between the law and economic structure. The existence of certain legal concepts and institutions may influence, even determine, the economic structure.

Furtheremore, Weber’s sociology of law is also situated within the conflict perspective, as in his historical account of the rise of capitalism Weber also sees different groups and classes competing for power.

Weber was involved in writing the Constitution of the Weimer Republic and was a pioneer in what would come to be the semi-presidential system, which would be destroyed by Adolf Hitler rise to power in 1933.

 The end of the First World War meant the dissolution of many European central empires, like the German Empire, the Austro-Hungarian Empire, the Russian Empire and the Ottoman Empire. Several territories were thus up for grabs, particularly in the Balkans, new countries like Poland, the three Baltics states, Bulgaria, Ukraine, as well as Lebanon, Syria, organised in a system of mandates — one for the Europeans, other for Muslims.

Countries like Poland and Czechoslovakia were created under a security system wherein these states were under the military protection of France and Great Britain. As for Muslim territories, these were not deemed capable of self-administration and were put in charge of France (Iraq, Lebanon) and Great Britain (British Mandate of Palestine, Jordan etc).

For Max Weber, a comparative historian, who lived through all the changes of the late 19th and early 20th century, the notion of the nation-state, that had existed since time immemorial was simply not true. Weber believed history to be a set of changes articulating itself, progressing in a positive way (from a worse situation to a better one). The idea behind this was the evolution of rationality, evolving from primitive forms of empirical rationality to more scientific forms of rationality and eventually to an ultimate, highly efficient state bureaucracy (applicable to Germany).

For Weber, rationality meant laws, and laws were an embodiment of an increased intrusion of the state in private lives.

In his sociology of law, Weber will also reflect on the emergence of capitalist institutions as they come to exist in a pre-capitalist society.

*Law and Economy: A Fundamentally Dialectical Relationship*

The economic structure of a given society is determined by the law that exists there, however law may also be considered to be determined by the economic structure – the two are therefore necessarily connected.

In Weber´s view, the Germanic law is the successor to the Roman law. As a result, he attributes the imminent rise of capitalism to the adoption of Germanic law as a replacement of Roman law. This early work of Weber does not yet present a fully developed version of the dialectical sociology of law, but will eventually develop in to it.

The adoption of a capitalist system may not be attributed to factors of economics or law on their own, rather, to both simultaneously. Weber does not fail to address the importance of ideology in the construction of law, as he discusses the effect of ideology on economic structures and changes.

Weber sociological explanation of law goes beyond economics as he recognizes and understands the ideological foundations of the rise of capitalism.

The implications that ideological concepts have on the shaping of the economic structure may be argued to be also responsible for the shaping of the law. The dialectical nature of this relationship necessarily suggests that in shaping the economic structure, law may be argued to indirectly determine dominant ideological values of the given society.

Since Weber suggests a dialectical relationship between ideology and economic structure, as well as a dialectical relationship between economic structure and law, ideology and law must be in some way connected. Though they are not directly related to one another, Weber argues that they are social phenomena of the same order, or same standing vis à vis the economic structure.

Conclusões sobre a sociologia jurídica na perspectiva de Weber:

* A concepção de Weber examina as relações entre a economia, as ideologias (especificamente, ideologias religiosas) e as leis;
* A sua perspectiva dialética vê a economia e as ideologias em constante relação de reciprocidade;
* Tal como Marx, considera que a economia é um dos fundamentais contribuidores para a construção das leis;

Max Weber quer entender a evolução das nossas formas de pensar o mundo, antes da modernidade muito ligadas à religião, a formas de “magia”; agora “racionais”, no sentido em que podemos olhar para a realidade sob vários ângulos: científico, jurídico, artístico, etc., tendo o nosso pensamento perdido o antigo nexo com formas tradicionais de religião. As transformações do direito contribuíram para esta evolução – Racionalização – nomeadamente pela maneira como os juristas se especializaram num saber sobre o direito apoiado cada vez mais nos conteúdos do direito positivo, desligando-o nomeadamente da religião. Transformações favorecidas pela Reforma e pelas necessidades geradas pelo desenvolvimento do comércio e da indústria.

***Emile Durkheim´s Sociology of Law***

Born in Alsace-Lorraine to a well-off Jewish family, Durkheim was marked by the importance of community, moral, and the law. He was socially oriented in the strongest way, being considered one of the founding fathers of sociology: “*La société est une chose.*” The society is external to us and it is exerted for and upon us, and the social is a material force.

A teoria deste autor, fundador da disciplina de Sociologia Jurídica é, pois, dirigida para tentar reintegrar a sociedade e por termo aos fenómenos de desagregação que se tinham vindo a assistir. O seu grande contributo encontra-se concentrado na sua obra “A divisão do trabalho social” (1893). A grande questão que se levanta é a relação entre a personalidade individual e a solidariedade social.

He started trying to organise people for popular action. In *La division du travail social*, he looked at something akin to the “means of production” in the Marxist way and organised it in a different way: a so called Meta Division - in the beginning, we lived in communities organised around mechanical solidarity, which would later be substituted by organic solidarity.

Durkheim was born at the peak of the Industrial Revolution (particularly where he was from, Alsace-Lorraine). Mechanical solidarity: families → clans → tribes (higher degree of complexity) → kingdoms → empires – all these entities acted as machines. There was a material world and there were representations (like Marx), but, unlike Marx, these ideas were not fabrications, there were real representations. Durkheim did not see class struggle, but instead forms of solidarity instead with dysfunctional side-effects.

All this changed with the Industrial Revolution. With organic solidarity, we now have jobs (which Durkheim called “functions”), and there was a lack of fit between the representations and social relations.

Foi com a solidariedade orgânica que começaram a surgir teorias e ideias, nomeadamente políticas, devido às diferenças entre os grupos. Para Durkheim, o direito era sempre bom, porque era a cristalização da moral e da solidariedade social.

Para os três (Marx, Durkheim, Weber):

* Marx: alienation, i.e. afastamento dos trabalhadores com o produto, o que faz com que se sintam deslocados
* Durkheim: anomy, i.e. o trabalhador tem de se sentir conectado com a sociedade, porque se não a sociedade resvala para comportamentos destrutivos (ex suicídio, abuso do álcool etc)
* Weber: modernity is a gilded cage

For both Marx and Durkheim, law is not autonomous from society. For Marx is essentially a trick, a mask for the reality of the world. For Durkheim, it is the basic moral principles and the primal connection between the self and society — law is a social fact and it is dependent on society.

Law and crime are considered to be contributors to the maintenance of society, as an organism. For Durkheim, law (and the sanctions that it imposes) can be viewed as a means of maintaining social solidarity, and thus maintaining the society as a whole (o direito é o “símbolo visível” da solidariedade social). Contrastingly, crime – though often devalued as a social phenomenon – for Durkheim serves a necessary function in society as well. Crime is a normative aspect of all societies that, much like law, seeks to maintain social solidarity, broadly conceived.

 *Mechanical Solidarity* arises from a simple division of labour in society, and thus a lack of individuality of members of society – suggests a prevalent and defined collective consciousness. The sanctions imposed by the law are, as a result, charged and seek to impose suffering on the perpetrator through vengeance. In doing so, law restores a sense of solidarity by denouncing any act that contradicts the rigidly defined collective values.

A society that is defined by minimally developed division of labor, thu having well-defined collective consciousness, uses law (and punishment) as a weapon to sustain this solidarity, in order to prevent anomie.

Durkheim criticized this type of law due to the fact that it tends to perpetuate laws that seek to punish acts that are not detrimental to society.

*An illustrative example:* Indeed, mechanical solidarity, which is the result of an under-developed division of labour, and produces penal law, has particular weaknesses. In the case of marijuana use in the contemporary context, for example, which does not seem to cause social harm, nor harm to the user, remains illegal. This is likely due to deeply rooted religious values that oppose its use, if not traditional conservative political values that do the same. Changing the legality of marijuana use would act as a shock to the political and religious values that dominate society, and tend to shape the collective consciousness. Though modern society has a complex division of labour, and therefore is not necessarily defined by mechanical solidarity, this particular case may be used as an example of a contradiction to the collective consciousness of society resulting in penal sanctions, likely in an attempt to retain social solidarity.

*Organic Solidarity* is on the opposing end of the spectrum in Durkheim´s binary understanding of law and it´s relationships. This type of solidarity rises from a complex division of labour, however, it does not suggest a rigidly defined collective consciousness, since members of society are relatively unique due to the complex division of labour. This highly complex division of labor is caused by industrialization and modernization of society (increased economic output 🡪shift to capitalism 🡪 worker specialization and simplification of tasks I order to maximize output).

As a result of the high degree of labour specialization, workers no longer share tasks and their values and morality start to differ as well. As a result, he collective consciousness is less rigid, contradictions are, as well, less strict and prevalent. Criminal activity does not result in penal sanctions but rather retributive sanctions which seek to restore social order as existed prior to the crime (from here arises restitutive law).

Conclusões da teoria de Durkheim:

* A sociologia do direito numa perspectiva lei e a solidariedade social
* Cada tipo de direito corresponde a um diferente tipo de solidariedade social, o direito é por isso, uma forma de mensurar a solidariedade
* A solidariedade mecânica, que surge da deficiente divisão do trabalho, corresponde a sanções legais repressivas – a consciência coletiva é elevada
* A solidariedade orgânica surge da dependência inter-pessoal (e advém de uma divisão altamente especializada do trabalho) relaciona-se com sanções legais restituitivas – consciência coletiva diminuta
	+ Mechanical solidarity = widespread similarities = prevelent collective consciousness
	+ Organic solidarity = uniqueness = collective consciousness is less prevelent

***Jurgen Habermas´ Sociology of Law***

A tese teoria da acção comunicativa é a de que a sociedade moderna encontra-se dividida em duas esferas: o mundo da vida (lebenswelt) e os sistemas. O mundo da vida, informado pelas convicções formadas comunicativamente e partilhadas entre sujeitos, obedece a uma dinâmica consciente e normativa. Por outro lado, os sistemas, nomeadamente o sistema económico e o sistema burocrático, obedecem a uma dinâmica não-consciente e funcional. Habermas alerta para a colonização do mundo da vida pelos sistemas, que submetem os consensos do mundo da vida às suas exigências funcionais.

A conciliação entre a lebenswelt e os sistemas (que compõem a sociedade contemporânea) é favorecida por um Direito conscientemente aplicado pelos juristas, de três modos distintos:

* Formalista/Legalista, que atende sobretudo à letra da lei, podendo agravar a esfera de insensibilidade dos sistemas face à *lebenswelt.*
* Providencilaista, que consiste numa maneira de aplicar o Direito procurando resolver os casos concretos através de critérios de equidade e justiça social, de modo a diminuir as assimetrias entre as partes em litígio.
* Processualista, que coloca o jurista numa posição privilegiada, pois é a este que cabe aferir se os processos de resolução dos litígios na sociedade são os mais adequados, de modo a garantir-se uma comunicação idónea entre as partes.

Há que distinguir também Foucault de Habermas. Enquanto Foucault procura destrinçar quais aquelas estruturas de poder que estiveram na base do desenvolvimento das sociedades ocidentais no século XIX, encontrando o seu expoente máximo na panóplia dos sistemas prisionais, Habermas constrói uma teoria da sociedade contemporânea – tendo em vista o período que se segue à II Guerra e à génese do Estado-social (estado que providencia) – indexando a crise que se vive na sociedade à colonização da *lebenswelt* pelos sistemas económico e político-administrativo, a qual conduz aos chamados processos de judicialização levados a cabo pelo Direito positivo. Não obstante, o indivíduo ainda consegue salvaguardar alguma autonomia através da sua atividade comunicacional, pelo que ainda há nas sociedades modernas, graças a essa atividade, vestígios de resistência a esses ímpetos colonizadores da economia e Administração.

Contrariamente, Foucault defende que o poder se manifesta como uma disciplina omnipresente de todas as relações sociais, sendo o indivíduo completamente anulado e arrastado pelas estruturas de poder, e rejeita liminarmente qualquer conceção localizada ou parcelar deste.

***Networked International Law and it´s Linkages***

The idea of “state” is outdated and the concept of sovereignty is no longer the same as it was in the post Westphalian Era. Westphalia sovereignty consists in a State being free inside its territory and free from any interference from another State.

Nowadays, this concept faces to main challenges: its ineffectiveness (a State cannot properly manage a country with no interference from other states) and the inevitable need to interfere in other states national affairs (there is a growing state tendency to act upon others using force or political mechanisms in order to prevent human rights violations, for example). Yhe concept of soverginity is changing and a new deinition of it is going to emerge.

Since the late 20th century we´ve seen States transfer their state power either upwards to supranational organizations, downward to regional or local governments and sometimes even sideways towards nonstate actors.

Nonstate actors, such as NGOs have had an ever-increasing influence in the making of international law in a variety of different areas raging form environmental issues, to humanitarian law, to human rights law, to education, etc. NGOs take part in international negotiations and work with other nonstate actors in other to combat and compensate for state incompetence in many areas.

On the private sector, Multinational Corporations are being replaced by Transnational Corporations (TNCs), as said by Peter Drucker. Transnational Corporations are implementing codes of conduct and regulating their own industries, pushing for more uniform standards. At the same time, they are developing dispute resolution mechanisms based on international commercial arbitration. By generating their own law, TNCs are separating this attribution from state power, transnational law is shadowing over national law.

As for substate actors we´ve seen individuals become increasingly more conscious of multiple identities as members of local, national and regional communities. We´ve seen the growth of regional consciousness particularly in Cataluña over the last year, but also in Quebec and many other regions from Latin America to East Asia.

But what is the actual meaning of “transnational law”? In 1956, Philip Jessup defined it as “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such categories”. Keohane and Nye actually saw transnational relations as occurring outside of state-to-sate relations, arguing against a state-centric analysis since there is a high number of nonstate actors in the international scene.

At last, there is one important questions to be asked: *are actors other than states just periodically intervening in the international system or is globalism here to take internationalisms place?* It seems as though this is not a temporary shift, but rather will linger on for many years. The state will keep standing, but it will be a very different type of state. It will network up, down and sideways with counterparts either at a domestic as at an international level.

So, what will be the impact of this new world order on National and International Law?

Up until now, international law has been a set of legal rules and institutions and it´s foundation has reflected the Westphalian principles of absolute state sovereignty within a given states physical borders. In a nutshell, Westphalian sovereignty proclaims the “right to be left alone”, but also the right to be recognized as an autonomous agent in the international system.

Yet, globalization and the new transnational threats have changed the world order and must not stay behind these Winds of Change. Before we go on to the future functions of international law, let´s take a look at the new threats I this new world order and some possible solutions.

The main threats are Poverty, infectious disease, environmental degradation, civil war, geocide, nuclear, chemical and biological weapons, terrorism and international organized crime. The origin of these threats can only be addressed directly by domestic governments. The result is that the external security of many nations depends on the ability of international governments to maintain international security sufficient to establish and enforce national law.

Slaughter argues that the European way of law is the future of international law and is in the frontline of combating these imminent threats.

Taking the EU example in to account we can see that in extending membership to new countries over the course of the past decade, the EU has relied on EU law as its primary tool of reform and socialization. And even the original member states continue to perform the types of backstopping, strengthening and mandating functions.

And what must international law start to focus on in these upcoming years? In the first place, International law will have a key job in strengthening domestic institutions through improving the capacity of government officials (such as judges, legislators and government) and through the inclusion of government networks as a mechanism of global governance. This will help build trust and establish positive relationships among their participants.

Secondly, international law will help backstop domestic institutions where they fail to act. An example of international law as a backstop is the International Criminal Court. The ICC is designed to operate only where national courts fail to act as a first line of prosecution, stepping in and providing a second line of defense, either in cases where domestic institutions fail, or where a State is unwilling to prosecute “independently or impartially”.

The backstopping effect of international institutions will take different forms and often be case specific, in any case, they directly affect domestic governments decisions, changing the incentives for domestic action and providing a second, international, mechanism of action.

Lastly, international law shall, as well, compel action by national governments. In most cases, national governments alone can use the police power, the instruments of a judiciary, or the military, and these are the most effective tools and will surely be enough to address potential dangers. But, at times, domestic governments may be unwilling to put these institutions in to force, either for differing perceptions of national interest, a lack of political will, or infighting within governments themselves.

Due to this possibility, law must find new ways to ensure that even in these cases, national governments do, in fact, use the tools at their disposal to address such threats before they spread. This compulsion function seeks to compel sub-state institutions to act in particular ways. Though these obligations may still be directed at States themselves, they specifically reference the affirmative duties of states to utilize their domestic institutions to further international objectives.

On one level, using international law to build the will and capacity of States to act domestically offers great opportunities to enhance the effectiveness of the international legal system, yet, one should be aware that each of the suggested functions is a double-edged sword:

* Backstopping national institutions can be counterproductive to the degree States defer to an international forum as a less politically and financially costly alternative to national action;
* The process of strengthening domestic institutions, if not properly designed and implemented, can also squeeze out local domestic capacity;
* By compelling national action, the international legal system may undermine local democratic processes and prevent domestic experimentation with alternate approaches.

The challenge, then, is to differentiate between domestic institutional structures capable of furthering the international system and those most likely to be abusive and repressive.