

**THE LEGAL CONSTRUCTION OF AMERICAN COLONIALISM:
AN INQUIRY INTO THE CONSTITUTIVE FORCE OF LAW**

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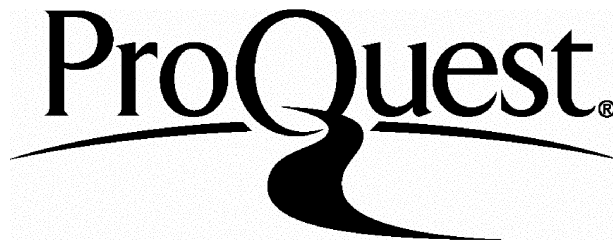
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ABSTRACT

This thesis is an exploration of the relationship between law and colonialism. Adopting the theoretical perspective that law must be viewed as constitutive of the social world, the thesis examines several ways in which law has operated to legitimate, consolidate and reproduce the American colonial project in the Caribbean island of Puerto Rico.

The first chapter sets out the theoretical framework of the thesis: Law -- a social product -- is one of the dimensions of the social world. It is constitutive of social consciousness, provides a context for action and discourse, articulates explicit justifications for the exercise of power, creates legal and political subjects and operates many times as a mechanism for the reproduction of legitimation and hegemony.

The second chapter places in historical context the relationship between the United States and Puerto Rico.

The third chapter discusses how the Supreme Court of the United States, in a series of cases called the 'Insular Cases', justified explicitly the American colonial project. A discussion of the legal doctrine, the legal theory and the ideology of the Cases is followed by an analysis of how the Court's discourse has operated to legitimate colonialism, by constituting the Puerto Rican as a specific legal and political subject, by creating a discursive universe and producing a specific context for social and political action. A socio-historical explanation of the cases is provided.

Chapter IV analyses how the law granting American citizenship to Puerto Ricans has contributed to reproduce American hegemony in the territory.

Chapter V examines the way in which a regime of rights, the ideology of the rule of law and a system of partial democracy have contributed to legitimate the colonial relationship between the United States and Puerto Rico.

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CHAPTER I

THE THEORETICAL FRAMEWORK

In a broad sense this thesis is an exploration of the relationship between normative structures and domination. It deals with a specific type of normative structure: law, and with a particular relationship of domination and subordination: colonialism. To be even more specific, the subject of its analysis is modern law and modern colonialism. Furthermore, the examination of that interconnection is made in the context of a specific case: the relationship between the United States of America and one of its colonial dependencies: the Caribbean island of Puerto Rico. It is, therefore, a case study, conducted with the hope that the insights that it may generate about the relationship between law and other social processes may provide fruitful clues towards the development of a general social theory of law.

The purpose of this chapter is to set out the theoretical framework within which the study has been conducted. That is, to make explicit the basic assumptions, presuppositions and theoretical propositions about law which have guided this inquiry and which, in turn, the case study is expected either to confirm, modify or refute.

The chapter is divided into four sections. Section A explains the basic starting point of the theoretical framework: the adoption of a 'constitutive theory' of law that views law as one of the dimensions of social life. This includes a survey of recent relevant literature that can be situated within this approach. Section B examines some of the problems encountered and considerations involved in any attempt to build a social theory of law and how I have chosen to deal with them.

Section C is dedicated to the analysis of the concepts of ‘legitimation’ and ‘hegemony’, since they are key categories employed throughout the thesis to approach the question of the relationship between law and modern colonialism. Finally, Section D is intended to place this thesis, and the theoretical claims it makes, in the context of other writings on law and colonialism and to specify the concerns and aspects of the Puerto Rican colonial experience that the author will be addressing.

A. THE STUDY OF LAW AS SOCIAL PHENOMENON

1. Law as social fact

During the past two decades there has been an impressive revival of legal theory, both in the traditional field of jurisprudence and what has come to be known as the social theory of law. The latter has included significant developments in existing ‘subdisciplines’, like the sociology and anthropology of law; as well as the emergence of new approaches and, even, subfields, such as the political economy of law, the social history of law, law and development, studies in law and society, law in context, critical legal studies, feminist legal theory, law and economics and various other ways of naming diverse kinds of inquiries into the relationship between law and other social processes.¹

What most of these approaches have in common is the concern with law as social phenomenon, or, to put it in other terms, law as social fact. This is the approach that is taken in this study. We start with the premise that law must be

regarded as social fact for many reasons. For example, it is an observable fact that societies, or particular groups within those societies, have recourse to normative structures for several purposes, and one of those structures is what is referred to as 'law'. It is a social fact that law, once created, has some kind of an impact on the way people perceive reality and structure their behavior. The precise form in which this occurs is, of course, a matter for detailed research. It is a social fact, also, that many people, including government officials, feel a need to justify their decisions and actions making reference to law. Why this is so is also a question for empirical inquiry to determine in each specific society. Related to the above, it is a social fact that normative (specifically, legal) arguments are constantly formulated in diverse circumstances and that those arguments are thought to be important.

But there are other ways in which law shows itself as social fact. Legal decisions and other actions taken by legal actors become part of the context, of the circumstances, in which people must live their lives and pursue their struggles. Judicial decisions, legislative acts, the actions taken by bureaucratic officials are, therefore, social facts, subject to become the object of theorizing -- that is, of being examined in order to discover their connection with other social facts -- much in the same way that economic, political or cultural phenomena are analyzed from the perspective of social theory. Moreover, the legal form itself, that is, that specific mode of social control and regulation which has emerged in Western societies and many parts of the Third World, has become an important aspect of social life susceptible of being studied in the same way and with the same methods used to examine theoretically and empirically other forms of social practice and experience.

The main difference between this approach and that of traditional jurisprudence, or what some prefer to call 'the philosophy of law', is that a social theory of law aims at explanation rather than justification (Abel 1973-74). It seeks to establish the interconnections between legal norms, legal institutions, legal practices and legal ideologies with other social processes: be they labeled as economic, political, cultural or ideological. The interconnections may be causal, or simply of reciprocal conditionality. That is to say, one may want to identify whether and to what extent a legal act or result is caused by specific economic, political or ideological processes, or viceversa; or whether specific sets of legal and other social processes, although not connected in a cause-and-effect relationship may, nevertheless, operate to reciprocally condition each other, so that the specific form in which one comes into social existence cannot be totally understood unless the other is taken into account. The reason why the reference made here is to law and other social processes will become apparent shortly.

One strand of the concern of social studies of law has been to determine the extent to which law is affected by socio-economic, political or cultural phenomena. Within the Marxist tradition one typical response to this general theoretical question had been that law was a mere reflection of the relations of production. (See, e.g. Pashukanis 1987; Stoyanovitch 1981). A similar stance has been taken by some representatives of the Critical Legal Studies Movement (See Gabel and Feinman 1982). This reductionist position is a corollary of the crude understanding of the base-superstructure metaphor used by Marx to describe the relationship between what he took to be the basic determinants of social life and the resulting politico-ideological

structures aimed at sustaining and reproducing the fundamental social relationships, that is, the relations of production.

A much quoted passage from Marx's 'Preface' to his *A Contribution to the Critique of Political Economy* has been used as a basis for the 'reflection theory'.

There Marx stated:

My inquiry led me to the conclusion that neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel...embraces within the term 'civil society'...The general conclusion at which I arrived and which, once reached, became the guiding principle of my studies can be summarised as follows. In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life (1970: 20-21).

A more comprehensive examination of Marx's writings, including some important clarifications of their work made by Engels in his later years (Engels 1979) renders doubtful whether Marx himself would subscribe to a totally reductionist approach to the relationship between law and socio-economic processes. Thus, for example, in his 'Introduction' to the *Grundrisse*, Marx stated that 'The influence of laws in stabilizing relations of distribution, and hence their effect on production,

requires to be determined in each specific instance'. (1973: 98) This seems to allow for a theory that sees law as having a potential conditioning effect on economic processes, at least to a certain extent, and in certain circumstances.

A view akin to the 'reflection theory', emanating, apparently, from some of Marx's assertions about the class nature of the state in capitalist societies, is what is known as the instrumentalist conception of law: that is, the notion that law is fundamentally a tool of the dominant classes to maintain and reproduce their domination. (Cf. Jessop, 1980; Ghai, Luckham and Snyder: 177-178). This conception is reflected not only in the writings of early marxist theorists, but, to a certain extent, appears, perhaps with a greater degree of sophistication, in the work of some of the adherents of the Critical Legal Studies Movement. (See Kairys 1982; and the collection of essays in Vol. 36 of the STANFORD LAW REVIEW, 1984). In the latter version it assumes the form of the proposition that the radical indeterminacy of the law makes it susceptible of being manipulated for the advantage of the ruling class and, that, in fact that is always the case (or at least when it matters most). This perspective rejects the distinction between law and politics; law, in fact, is regarded as a form of politics.

This view has been criticised for its reductionism and its failure to account, among other things, for the fact that law has been used in many instances to the advantage of subordinated classes and groups in society. Fraser has pointed out that instrumentalism 'allows no room for the recognition of the role played by all social actors, including even oppressed individuals and groups, in the constitution of the legal order' (1978: 148). It may be added that even if Marx regarded law as an instrument of domination, or of reproduction of the conditions of domination, he

envisaged the possibility that, in the period of transition from socialism to communism, the necessary remnants of 'bourgeois law' could be used instrumentally by the working class to further the transformation from a class to a classless society. (Cf. Capella 1985: 59). Despite their obvious limitations, however, both the 'reflection' and instrumentalist theories of law raised important questions about the relationship between law and economic and political processes and helped to lay bare the undeniable ideological dimension of law and legal processes.

The structuralist position, developed by Althusser, and further elaborated by theorists like Poulantzas (1969), attempted to provide a more sophisticated account of the relationship between law and other aspects of the social structure. Based on the Marxist notion of totality, this conception furthered three basic and important propositions that contributed to a better understanding of the complexity of the relationship between law and society: (a) that there is an intricate relationship of reciprocity between the so-called base and the so-called superstructure (b) that law, once it emerges, acquires a relative autonomy from the base, develops its own internal logical coherence, and is able to react -- although with limitations -- upon the basic processes of which it is a product² and (c) that the 'function' of law must be understood in the context of the need of social systems to reproduce themselves. For Poulantzas, furthermore, in most cases the relationship between law and the socio-economic base is not mechanical, direct, immediate. It is mediated by the historical values that legal norms, institutions, and processes incorporate, values which can be traced back, in their genesis, to the socio-historical processes that have given rise to the present arrangement of social relations in any given society. (Poulantzas 1969; Rivera Ramos 1987: 255). Although not unproblematic, the notion of relative

autonomy opened up new avenues of inquiry and led, within Marxist theories, to a new concern with the specificity of law as a social form in modern social life.

A second strand in the study of law and society has been concerned with the ways in which law affects social processes. This preoccupation has been characteristic of liberal positivist approaches to the study of law and society. It has been an important component of the current which in Great Britain came to be known as socio-legal studies (See Campbell and Wiles 1976) and of much of the early research conducted by members of the law and society movement in the United States. As Campbell and Wiles point out, those studies have attempted to address the question of the 'actual operation' of law and its effects on people, and have been 'fascinated' with the 'extent to which prevailing legal norms are reflected in reality or are implemented as mandated by law.' One important aspect of that type of research is concern with the so-called 'congruence' or 'gap' problem, that is, the extent to which the 'law in action' correlates to the 'law in the books'. (Abel 1973-74: 184-187; Campbell and Wiles 1976: 550-551). The movement has produced scores of studies on very specific, localised, aspects of the legal system, neglecting more general questions about the relationship between the legal order and the wider social order. (Campbell and Wiles 1976).

Within the Marxist tradition, the work of theorists like Bernard Edelman may be loosely considered to address the general question of the effect of law on social life. His emphasis on the 'interpellatory' character of law -- that is, the extent to which it works to constitute the legal subject (as social actor) -- and his studies of the functions of law in the reproduction of capital are a distinct contribution to the understanding of the ways in which law helps to shape social experience. (Cf. Jessop

1980: 361). Some writers within what Jessop calls the 'Gramscian moment' in contemporary Marxist theories of law, the state and juridico-political ideology (1980: 363) may also be placed within this 'strand'. Their main object of inquiry has been the ways in which law and legal institutions operate to reproduce the hegemony of the dominant classes in bourgeois society. (See Jessop, 1980: 363-364.)

It is undeniable that many of these developments have provided useful insights into the operation of law in society. However, in many cases there is still a very basic flaw in the analysis. As Gordon has pointed out in his excellent review of 'critical legal histories', many of these theoretical accounts tend to perpetuate the view of a fundamental 'separateness' between 'law' and 'society'. Law and society are posited against each other, as independent categories, although related to each other through various mechanisms of causal linkage (1984: 60-61). 'Society' tends to be seen as the 'primary' realm, while 'law' is viewed as a 'secondary body of phenomena'. (p. 60). Thus, points out Gordon, the main questions for these analyses become: Is law dependent of or independent from society? Is it autonomous? And if so, how much autonomy is it granted? (*ibidem*).³ Gordon argues for a theory of law that 'blurs the law/society distinction'.

2. Law as constitutive of society

A growing body of literature -- within different traditions of thought and spanning a wide range of cultural and geographical contexts -- has been pointing towards the development of what can be considered a new paradigm in the social theory of law. As a theoretical perspective it may be able to transcend the

'separateness' of law and society as categories of analysis. It is the view that law is constitutive of social life. (See, for example, Gordon 1980: 102-109; Fraser 1978: 147-154; Kelman 1987: 253-257; Terdiman 1987: 805-806; Bourdieu 1987: 839; Silbey and Sarat 1987-88: *passim*; and the collection of essays by authors from "First' and 'Third' World countries in Snyder and Hay 1987b).⁴ The 1990 Law and Society Convention, held in Berkeley, California, provided an excellent example of the appeal of this new critical way of looking at law and legal processes. As stated by the organizers, the theme of that year's conference -- 'legal identities, scholarly identities, and politics' -- was intended to focus the attention of the participants 'on law's place in constructing the social world'. (L & S 'Final Program': 1990). More than a hundred panels were set up to address a great variety of issues. Many of the participants based their analysis, in one way or another, on the premise that law is constitutive of reality.

But what is meant by the assertion that law is constitutive of society? According to Fraser, it means that the legal process must be viewed as an important dimension of everyday social experience. (1978: 147) Law, in his view, is related to the 'intersubjective meanings' which go into the construction of social life. (p. 148) 'Intersubjectivity' is comprised of the meanings rooted in social practice (and not merely of a convergence of individual beliefs) (p. 185: note 4). Or, to express it in Gramscian terms, law must be viewed as constitutive of the 'common sense' whereby people interpret their lives and reproduce their social existence.

According to Gordon law must be seen as present, or 'imbricated', in all social relations and conditions (1984: 102-109, 125). Law is constitutive of society,

among other reasons, because it is constitutive of social consciousness and because it helps 'to structure the most routine practices of social life' (p. 125).

Many critical writers would, I think, claim not only that law figures as a factor in the power relationships of individual and social classes but also that it is omnipresent in the very marrow of society -- that lawmaking and law-interpreting institutions have been among the primary sources of the pictures of order and disorder, virtue and vice, reasonableness and craziness, Realism and visionary naiveté and of some of the most commonplace aspects of social reality that ordinary people carry around with them and use in ordering their lives. To put it another way, the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live. 'Either this world,' legal actions are always implicitly asserting, 'some slightly amended version of this world, or the Deluge' (Gordon, *supra*: 109).

In Silbey and Sarat's terms:

We would then understand law not as something removed from social life, occasionally operating upon and struggling to regulate and shape social forms, but as fused with and thus inseparable from all the activities of living and knowing (1987-88: 173).

There is, then, an interpenetration of law and other aspects of social life, which in Kelman's view is demonstrated by the following: (a) the socio-economic base includes vital legal elements (such as the notions of 'free' labor, 'property', etc.); (b) law defines the 'status' of social actors; (3) basic norms and legal

structures are part of the fabric of particular societies, so that any given society would be different if it lacked those legal structures; (d) law generates deep 'notions' that affect behaviour and (5) actors come to the social struggle with a given set of legal entitlements (or a lack of them, it may be added) that may make a difference. (Kelman, 1987: 253-257).⁵

Snyder and Hay, working from the perspective of the social history of law, labour and crime, take a similar position when they assert that a general distinction between the legal and socio-economic domains may be 'seriously misleading'. 'It neglects,' they affirm, 'the extent to which law is a fundamental constitutive element in virtually all, if not all, socio-economic relations. It is practically impossible to envisage any set of socio-economic relations without also considering simultaneously the ways in which they are in part created, defined, and sustained by law.' (1987: 10). They suggest that legal norms, legal institutions, legal processes and legal ideologies must be examined for their capacity to contribute to the formation, reproduction, discipline and control of the working class in various types of social formations, as well as for the way in which they help to shape forms of resistance, organization and action and popular culture itself. (*passim*). Law must also be studied in its relationship to the legitimation of the exercise of power (31-32).

This is the approach -- that of law as constitutive of reality -- that is taken in this thesis. More concretely, the view adopted is that of law as *social process*, or law as *social practice*, or law as *one of the dimensions* of social experience. However, four important caveats or outright *modificanda* are incorporated: (a) law itself is constituted through diverse social processes; (b) even if law is generally constitutive of social life, it is not necessarily determinative of other social phenomena; (c) the

'relative weight' of diverse social factors in the constitution of law and of law in the constitution of reality is to be determined by empirical research; and (d) such inquiry has to be made for each society in each historical conjuncture. Further elaboration on these propositions will be provided below. But, before, this vision of law must be placed in the context of a more general vision of society.

3. The multidimensionality of social life

To assert that law is one of the dimensions of social life is to imply that society is a multi-dimensional totality. (Cf. Kellner, 1989a: 1-9; 230-233; see also Giddens, 1987: 109). Society is here envisioned as a whole, constituted by multiple spheres of experience, structure and action. In a very fundamental sense this view is drawn from the conception of totality that permeates the entire *corpus* of Marx's theory of society and history. Yet, it does not adhere to some of the structuralist elaborations of Marx's notion that tend to conceive that totality as comprised by fixed, structurally differentiated, essentially constructed, a-historically defined, and necessarily determined sub-systems. Neither does it subscribe to neo-positivist formulations of systems theories that describe the social world as constituted by functionally differentiated, self-referential, substantially closed domains, such as that found in Luhmann's sociology of law. Rather, the approach to society adopted here is guided by the proposition that the social world is a dynamic, open-ended whole constituted by the constant and complex interaction of processes that take place diachronically --that is, throughout time (or historically) -- and synchronically -- that is, within the specific configuration or articulation of the various spheres or

dimensions of the social existing in a given social formation at a given point in time. Those dimensions or spheres of the social do possess distinctive characteristics -- changing in time and place, both in their internal configuration and in the manner in which they are articulated with each other. There is a constant interaction among the diverse dimensions of the social -- which traditional social science calls economic, political, cultural, etc: a web of multilateral relationships that contribute to the constitution, continuous reproduction (sometimes in altered form), or even modification, both of the distinctive spheres themselves and of the totality of which they are constitutive elements.

This notion of the multi-dimensionality of social life is present in the work of many contemporary social and legal theorists, who have variously referred to the diverse components of the social as 'spheres' (Kellner 1989a), 'regions' (Jessop 1980); 'aspects; (Cotterell 1992); 'sectors' (Díaz); 'fields' or 'social spaces' (Bourdieu 1987, 1990) and similar terms. Of course, the semantic choice to describe generally each of the particular 'domains' is less important than the notion of multi-dimensionality itself. But in choosing the term 'dimension' to refer generally to each of the constituent domains of the social, attention has been given to the need of reducing the risk of conveying the impression that these 'domains' have a separate existence. An analogy can be made with the physical world. In the realm of physical existence, each dimension of the real, although capable of independent measurement for its own sake, is a part of the whole, and only in relation to the other dimensions can it provide a complete representation of the totality, as well as of its particular contribution to that totality. So in the social world, the adequate understanding of the characteristics of the totality, of the particular mode in which each of the

dimensions is constituted, and of the extent to which each helps in the configuration of the dynamic whole, requires a detailed examination of the 'complex articulation' (Jessop, 1980: 366) of the diverse relations, processes and spheres of action which constitute the social. The notion of 'dimension', furthermore, may adequately convey the image, not just of inter-relation, but of 'interpenetration' or 'imbrication' of the spheres of the social, which is at the core of some of the most perceptive writing within this emerging paradigm.

In modern societies law constitutes one of the dimensions of the social. Drawing largely from Weber, by 'law' here is meant the rational-normative structure that defines entitlements and obligations, backed by the coercive power of the state apparatus, with its attendant sets of institutions, processes and specially qualified actors necessary for its effective operation.⁶ The examination of the historical process that led to this development is well beyond the scope of this thesis, yet I would be content to assert that there is much to be said (with qualifications) for the Weberian analysis -- more recently taken up and elaborated by Habermas (1988c: 272-274) -- that correlates (not necessarily in a causal mode) the emergence of the legal order of the modern state to the needs of capitalism for the rationalisation and regularisation of economic and social life; although Weber himself pointed out -- and Habermas would presumably agree -- that economic conditions were not the only, nor necessarily the decisive, factor (Cf. Weber: 882-889). That law and legal processes are a dimension of the social means: (a) that they possess a distinctness that must not be overlooked (more will be said on this point later) and (b) that they are in a constant relationship of reciprocal conditionality with other aspects of social life.

4. The reciprocal conditionality of law and other dimensions of the social

It is now time to elaborate on the four *caveats* formulated above. Let me start with (a): that law is constituted through diverse social processes. This proposition contains two main parts: that law is constituted through social processes and that those processes are diverse. The first part of the proposition is aimed at avoiding several pitfalls. One of them is the potential of the constitutive theory to evolve into an explanation that places the emphasis unilaterally on the effect of law in the construction of the other dimensions of the social world. In this regard it is convenient to heed Bourdieu's warning (with some reservations that will become apparent):

It would not be excessive to say that it [the law] creates the social world, but only if we remember that it is this world which first creates the law...In reality, the schemas of perception and judgment which are at the origin of our construction of the social world are produced by a collective historical labor, yet are based on the structures of this world themselves. These are structured structures, historically constituted. Our thought categories contribute to the production of the world, but only within the limits of their correspondence with preexisting structures. (1987: 839, emphasis in the original)

Although Bourdieu is correct in asserting that the law itself is created by the 'social' world, I would object to the implied separateness of the legal and the social contained in this quotation and to his statement that it is the social world which 'first'

creates the law. In accordance with the vision of multidimensionality and complex reciprocal conditionality advocated here, it would be more adequate to say that the law contributes to constitute a social world which itself serves as the generator of conditions which account for the existence of the law and of particular legal phenomena. Moreover, while it is true that the law contributes to the construction of the world 'within the limits of [its] correspondence with preexisting structures', those structures themselves contain important legal elements. The basic, and most useful, idea contained in Bourdieu's statement, however, is that it must not be forgotten that law is a social product as much as it is an important constituent of the social.⁷

The second pitfall that the notion of law as socially constituted procures to avoid is also pointed out by Bourdieu in his criticism of Luhmann's theory of self-referentiality. According to Luhmann, law, as a functionally differentiated subsystem, contains within itself the principles of its own transformation. (Cf Luhmann 1985; Nelken 1988; and Bourdieu 1987: 816). Bourdieu points out that this new type of formalism -- that 'provides an ideal framework for the formal and abstract representation of the juridical system' -- neglects the fact that, although the law contains within itself objective possibilities of development and, indeed, 'directions for change', the principles of its own dynamic, i. e., of its transformation, lie rather in the struggles between the objective interests (which Bourdieu apparently places 'outside' the legal sphere) associated with the different perspectives that vie for recognition within the 'legal field'. Again Bourdieu is correct, but only if we add the precaution that those 'objective interests' have themselves been shaped and

constituted, to some extent, through processes that have taken place within the legal dimension (although certainly not exclusively within that dimension).

A third pitfall that must be avoided arises paradoxically from Bourdieu's own work. In 'The Force of Law...' he makes the following statement:

The social practices of the law are in fact the product of the functioning of a 'field'⁸ whose specific logic is determined by two factors: on the one hand, by the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and on the other hand, by the internal logic of juridical functioning which constantly constrains the range of possible actions and thereby limits the realm of specifically juridical solutions. (816)

As a sociology of the legal profession and legal practice Bourdieu's analysis offers a wealth of insights into the internal operations of the 'legal world'. And, certainly, as he suggests, the internal logic of legal processes do have an effect on the form in which particular juridical solutions attempt to deal with claims and pressures originating in the economic and political dimensions of social life. Yet, his problematic formulation could be interpreted to produce results similar, although not identical, to those he attributes to Luhmann, or to those that could be imputed to theories that tend to place the emphasis on the constitutive force of law in detriment of the analysis of law as a social product. In the quoted statement Bourdieu seems to miss the importance of economic, political, cultural and ideological determinations in the constitution of the social practices of the law. This failure is incomprehensible in light of the other assertions he makes in the same article, some of which have been quoted above. The flaw in Bourdieu's formulation, however, can be remedied if we

interpret his statement about the internal logic of juridical functioning as a proposition about the force of the internal workings of the legal 'field' as one of several factors that condition the social practice of law.

The second part of proposition (a), above, asserts that law is constituted through diverse social processes. That is equivalent to saying that law -- as a concrete social phenomenon -- must be studied as the 'synthesis of many determinations' (Marx 1973 :101). But this needs some explaining.

Social analysis can be conducted at various levels of abstraction. In Marx's method this means that the higher the level of abstraction the simpler the relations of determination between the categories of analysis. However, the more concrete the analysis, the higher degree of complexity and the greater the number of determinations that must be taken into account in order to explain the social existence of the object of study. (See Marx, 1973: 101-108; Jessop, 1980: 365-366; Snyder and Hay: 35). The *form of law* is the highest degree of abstraction at which law can be studied as a social phenomenon (without losing sight of its specificity).⁹ At that level it is possible to formulate simple theoretical propositions regarding the determinants of the form of law and the relationships it enters into with other realms of the social. However, the more concrete the analysis, that is, the more it focuses on particular systems of law or particular legal orders, or, still at a greater degree of concretion, on particular sets of legal norms, doctrines, theories, institutions, processes and ideologies, the more we need to consider a diversity of determinants that contribute to the production of the particular phenomena we are attempting to explain. Not only do we need to identify and account for the diverse determinations - - for example, geographical, economic, cultural, political, ideological, moral,

historical -- but also we need to explain their 'complex articulation', avoiding 'any unilateral reduction of one to the other' (Jessop, 1980: 366). This can only be done through detailed historical examination in each specific instance (See Snyder and Hay: *ibidem*; see also Mills: 149).

Additionally, while examining the constitutive force of law, one must also explain how that force is constituted: that is, what are the 'multiple determinations' that contribute to invest law (or particular legal norms, institutions, processes, ideologies and actors) with its (or their) specific effectiveness as well as with its (or their) concrete existence. A social theory of law must, then, be an attempt at explaining the ways in which law contributes to construct the social world as well as the way in which law itself, and its constitutive force, are in turn constructed through a complex set of multiple determinations.

Now let us address the second *caveat* or proposition: (b) that although law is constitutive, it is not necessarily determinative, of reality. This proposition means several things. First, it means that what law possesses is a potential for the construction of particular social phenomena, potential which is not always or in all cases realized. Secondly, that even when law does contribute in specific instances to the production of social conscience, experience, relations, structure and action, it may not be the *only* constituent; in fact, it may be only a very minor partner in the process. Other determinants or conditioning factors may exert a greater weight. In many instances what law possesses is a limiting or conditioning capacity, but not the power of absolute determination. In others, it may serve only as generator of possibilities for social action -- possibilities which become part of the social world that social actors inhabit, but which do not necessarily determine their choices or

behaviour. Law may have the effect both of constraining social action and of opening up alternative routes for such action, decreasing or increasing the number of contingencies in the process of creation of the social world. Finally, the proposition must be taken to mean that although legal norms or any number of specific legal acts, once they come into existence, do become part of reality, that is, part of the circumstances in which social actors conduct their lives and struggles, those norms or legal actions do not necessarily determine or even influence consciousness or behaviour. In short, what the proposition ultimately means is that other social phenomena, at the level of their concrete existence, are also the result of many determinations, and that law may or may not be one of them. This leads us, without need for further explanation, to propositions (c) and (d): the 'relative weight' of diverse social factors in the constitution of law and of law in the constitution of reality is to be determined by detailed research for each society in each historical moment.¹⁰

5. The specificity of law

A social theory of law that views the latter as constitutive of society runs the risk of incurring in what Díaz (184, 186) and others have termed legal sociology. That is -- as Poulantzas would say -- the danger of 'dissolving' law into society (or more precisely, into other social phenomena), neglecting law's specific character as a distinct dimension of the social. (See Poulantzas 1969: 81; Rivera Ramos, 1987: 253-254). That specificity is, of course, a historical product. Yet, it is necessary to define it with as much precision as possible, if we are to grasp fully whatever

'function' or 'role' law plays, or whatever constitutive effect it has, in contemporary social orders.

In modern Western legal systems and in systems influenced in their formation or development by Western law -- which includes the legal orders shaped by colonialism -the specificity of law is comprised by an articulation of particular elements.

The first is law's **normative** character. The primary materials of legal orders are legal norms: sets of rules and principles that define rights and obligations, that prescribe or facilitate human conduct. Legal processes and practices are conducted and justified in reference to a normative structure. The second element is law's **cognitive/axiological** character: legal norms incorporate conceptions of the world and values which form their substantive contents.¹¹ Thirdly, law is a type of social practice whose main (though not exclusive) operative medium is **discourse**.¹²

Among other things, this means that the legal text is a central ingredient of the legal world and that **argumentation** about texts is a vital feature of legal practice.¹³ Legal discourse, however, is a special kind of discourse. Its principal attributes are its pretenses of impersonality, generality, and neutrality, which provide the foundation for its claim of formal rationality. (Weber 1978: 654-658; Unger, 1976: 52-54; Bourdieu: 819-21). Furthermore, because of the axiological/normative nature of law, legal discourse is cast in the language of justification.¹⁴ Finally, law is one of the principal sites for the exercise of **power**. This means, first, that legal norms are backed by the coercive power of the state apparatus and, secondly, that it is a medium for the exercise of the multiple, diffuse, decentralized manifestations of

power that are found everywhere in the social world. (Cf Foucault, 1988a, 1988b ; Rabinow (ed), 1984; and Santos 1980: 390-391).

This 'specificity' of law has several implications for a social theory of law. The most important is the following: there is an intricate relationship between the specific (historically constructed) nature or structure of law and its 'function', 'role' or constitutive effect on society.¹⁵ Whatever particular effectiveness law may exhibit in the legitimation, formation or reproduction of social relations and routines, or in the discipline or control of subordinated groups or individuals, or in the shaping of resistances or social struggles, owes much to its normative, rational, symbolic, discursive and coercive character. The 'internal', relatively autonomous, workings of the law, the way legal discourse is constructed, either to justify or criticise, are central elements in the realisation of law's social functions or, expressed in another way, in the production of the constitutive force of law as a dimension of the social.¹⁶

The cognitive\axiological nature of the law has other important implications for social theory. Any social theory of the law must include as one of its tasks the identification of the world views and values incarnated in the existing legal arrangements. A second task is to relate those views and values to the socio-historical processes from which they have arisen. (See Rivera Ramos 1981). And still a third task, to inquire into the ways in which legal ideologies (conceptions of the world, values and theories about law itself) influence social actors and social processes. An important aspect of the latter is the exploration of the ways in which legal ideologies contribute to the formation, legitimation, reproduction, or even modification or abolition, of social relations and practices. (See Snyder and Hay 1987a). If the social theory to which we aspire is also to have a critical edge, then

the fact that law has a cognitive/axiological content provides ample opportunity to draw upon the theories and methodological approaches of those aspects of Critical Theory that focus on ideology and cultural critique. Legal theory can become, in one of its dimensions, a part of a wider theory for the critique of culture.

The 'discursive' element in the law also has an important implication for theory. It makes law a most suitable object of study from the rich and fruitful perspectives developed in the past few decades in fields like linguistic philosophy, interpretive anthropology, ethnomethodology, and semiology, and -- despite their many problematic features -- in the various postmodernist approaches to society as 'text'. In particular, deconstructionist theory has contributed important insights and clues to the problem of interpretation.¹⁷ Undoubtedly these theories can provide valuable analytical tools for the decoding of legal texts. It must be remembered, however, that legal texts and legal pronouncements about texts differ from literary and philosophical texts and their interpretation in a very fundamental way. In the legal field, texts and their interpretation are always linked, in a very basic sense, to the exercise of power.¹⁸ It is precisely this linkage between pronouncement (including interpretation) and power that endows law with one of its most important attributes: what Bourdieu, following Austin, calls the 'performative' character of law: the fact that it possesses the 'power of naming' or 'of instituting' (837-840). That is, because the legal pronouncement is made by an 'authorised' official or body, it has the effect of constituting that which it names. As Bourdieu expresses it, in a rather dramatic form:

Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects (838).

Of course, Bourdieu does not mean that by the mere act of 'naming' law can produce an entirely new order of things. That is apparent by the immediate clarification he makes of his statement. He points out that this 'power of creative utterance' is achieved only to the extent that legal pronouncements propose 'principles of vision and division' objectively adapted to the preexisting divisions of which they are a product.¹⁹ In other words, the representations made by the law are produced according to schemas adapted to the structures and visions already existing in the world, so that what the law really does is to 'confirm the established order'. By that, I suppose he means the order established without having yet been officially sanctioned, or an order which has been previously defined officially in other terms. For he adds that the act of creation consists in conferring upon pre-existing beliefs the 'practical universality of that which is official', i.e., creating a new 'orthodoxy', or belief socially legitimated 'from outside' (839). This is indeed a very powerful attribute, especially if one takes into account that 'that which is official' operates to induce belief in others as well as to legitimate the use of force to ensure compliance.²⁰

6. Law and 'agency'

This thesis incorporates as one of its theoretical underpinnings a particular conception of 'agency', that is, of the role of social actors in the production of social reality. It is the notion that events, social facts, are not the exclusive result either of impersonal forces (or abstract structural interrelationships) or of the will of individuals or groups. They are not produced either by 'a natural necessity' or a 'wilful contingency' (Jessop, et al, 1988: 13). Rather, social events are the outcome of social forces seeking to make their own history, 'but doing so in circumstances they have not chosen' (*ibidem*). As Gordon puts it, social action is conducted by individuals and groups with aspirations and strategies who operate within given structures and systems. They 'participate in and are constrained by structures of discourse, ways of thinking about reality and right, cultural inheritance, and political and organizational forms that shape desire and channel its expression' (Gordon 1984: 74). Groups do possess the capacity to affect the circumstances they have not created, but their struggles and action take place in the context of established practices and routines, which condition, limit, constrain or give direction to their action.²¹ This means that it is important to identify the structures and routine practices that form the context in which social action takes place. But it also means that we must identify the 'social forces' that strive to influence the reproduction, development, or transformation of those structures and practices.

The analysis of the relationship between law and other social phenomena should include, as Gordon suggests, 'a narrative context' with 'subjects and

occasions' -- 'to show that it is human beings with reasons and motives' who 'drive the manufacture of legal concepts' (1984: 119). Or, as Fraser (1978: 160) has said, to demonstrate that law is not created by an unseen hand (like that of 'commodity exchange'), but, again, 'by human subjects in the process of making their own history'.

This view sees normative structures, including law, as the result of historical and contemporary struggles. They are as much a platform for, and instrument of, domination, as one of the contested terrains in which dominated and subordinated groups must carry out their transformative endeavors. In this sense, all social actors play a part in the constitution of the legal order (Cf. Fraser: 148; Fraser later quotes Gramsci who said that, from this perspective, we are all legislators: 184). One of the consequences of this view is that it must be accepted that law is 'used' instrumentally by the various social forces who compete for access to power and for the control of the means of reproduction or transformation of society. This is not the same as adopting an instrumentalist conception of law. The latter implies that the necessary and only function of the law is to serve as an instrument of domination for the ruling classes. The view taken here is to the effect that, while on the one hand, the law may serve a variety of functions and roles, and have a diversity of effects in society, independently of the will of those who attempt to use it as an instrument, yet, the historical fact is that groups, especially those in power, do attempt to use the law instrumentally. Also it is not at all preposterous to assert that those who have greater access to economic, political, and cultural resources are in a more advantageous position to use law instrumentally, within the constraints imposed by the requirements of legitimacy and by the need for social stability (as conceived by

those in power). Of course, as history has amply demonstrated, those constraints also have limits, especially in times of crises, that is, in times when the privileged position of the powerful is severely put into question by social events.

7. The 'functions', 'roles', 'uses', and 'constitutive effects' of law

Here an important theoretical point must be discussed. Is it justified to speak of law as having a 'function' or 'role' in society?

Gordon's critique of 'evolutionary functionalism' (1984) has raised important issues about this mode of talking and theorizing about the law. His critique is justified to the extent that functionalism is described as embracing the notions that law and society are somehow 'separate' categories, that there is an objective, determined, progressive social evolutionary path, and that legal systems should be described and explained exclusively in terms of their 'functional responsiveness' to social needs. He is also correct in proposing, as others have done, a vision of law as constitutive of society. In Gordon's argument that conception of law is intended to replace functional approaches. Yet, his analysis does not convincingly prove, in the end, that there is no place in a constitutive theory of law for a certain conception of 'function' or 'role'.

First, the fact that law is constitutive of society does not preclude the conclusion that in given societies, in given circumstances, law is found to play certain functions or roles. That may be, in fact, the particular mode in which law becomes part of, and helps to constitute, those societies.²²

What must be kept clear is that those 'functions' or 'roles' are not to be viewed as the necessary responses to the overarching historical needs of the various fixed stages of pre-determined social development. They can be as much the product of contingent historical events as the result of the claims made upon the law by the perceived needs of particular social actors, operating within structured social environments; they may be the outcome of willful, purposive, behaviour, as well as the end product of the unintended consequences of social action.

It is important also to be aware of the difference between the 'origin' of a particular legal norm, institution or process, and the objective role it comes to play in a given society at a given moment. To use a simple analogy: a chair may have been built with the purpose of serving as a seating tool, but may end up serving as the base on which to place a television set. In this regard it is helpful to remember that, in the real world, legislators, activists, politicians, pressure groups and all sorts of social actors do press for legal norms, institutions and procedures to be adopted to serve particular purposes. Many times the law ends up serving those purposes. Others, it produces unforeseen effects. In this connection it must also be distinguished between the objective 'functions' or 'roles' of law and the 'uses' to which law is put by diverse social groups.

As long as one keeps in mind the difference between 'origin', 'purpose', 'uses' and 'function' or 'role', there is a place for the latter categories in a constitutive theory of law that views both 'function' and 'role' as contingent and as part of the many possibilities of the operation of law in particular social formations.

In fact, Gordon himself points out that some critical histories of law -- which he opposes to evolutionary functionalism -- take the view that law is to be regarded as constitutive of society in as much as it operates to constitute and reproduce social consciousness. What legal structures 'determine', some of these 'Critics' say, are the 'categories of thought and discourse wherein political conflict will be carried out' (1984: 109, 118). Are these not 'functions' or 'roles' that law plays in society? And furthermore -- a point which Gordon seems to fail to make -- is not the efficacy law may have in the constitution and reproduction of social consciousness or in the determination of the 'categories of thought and discourse' historically contingent, that is to say, could it not vary from society to society and from historical period to historical period?

Another important notion to keep in mind is that law does not have to play one single or exclusive social role or function. Its operation as a dimension of the social may be multi-faceted, even contradictory. In fact, I believe that in most instances that is the case.

Legal norms, institutions, processes, and ideologies, may, then, have multiple, diverse, even contradictory, uses, functions, roles and other constitutive effects in the social world of which they are a part. The question, again, is to determine those specific effects in each specific instance.

B. CONSTRUCTING A SOCIAL THEORY OF LAW

1. Towards a multi-perspectival approach

The vision of society as a multi-dimensional reality requires a social theory that avoids any kind of reductionism: that is, the explanation of given social phenomena by remitting them to one or another theoretically privileged determination.

This point has been addressed with some detail in the above discussion.

Such a theory must also be based on an approach that accounts for the multi-dimensionality of social life; that identifies the multiple dimensions, but also establishes the interconnections, contradictions and complex articulations among them. The only way to achieve this goal is through a 'multi-perspectival' approach.²³

This means, first of all, attempting to develop a 'supradisciplinary' or 'transdisciplinary' social theory²⁴ that not only draws on the insights developed so far by the separate disciplines, but examines aspects of society that for the most part have escaped the scrutiny of those disciplines, notably, the many interrelationships among the diverse dimensions of the social and the precise way in which they are imbricated in each other. Secondly, it means drawing upon several traditions of thought and methods of inquiry. This approach would incorporate critically the contributions of Marxist, neo-Marxist, post-structuralist, post-modernist, feminist and other theoretical traditions. It would make use, to the extent that they prove adequate to the object of study, of the modes of analysis developed by political economy, the critique of ideology and culture, deconstructionist theory, and other methods of

analysis. However, it would avoid falling into an uncritical, hodge-podge, eclecticism that tries to reconcile the irreconcilable, and ultimately explains nothing.

Rather, it would attempt to provide coherent explanations -- to the extent that the ambiguities, contradictions and paradoxes of reality itself allow for such explanations. But it would do so conscious that no single discipline, tradition or method has so far been able to explain to a full satisfaction the rich, many-sided, open-ended, often contradictory complexity of human affairs.

A main objection raised by many postmodernist writers to classical social theory has been that the latter has proceeded by constructing so-called 'grand narratives' that purport to provide totalising explanations of the human experience. In many ways the criticism is well founded. There are many instances of social and historical experience that seem to brim with particularity, that have a certain air of uniqueness, that appear to reject any attempt at subjecting them to the iron chains of a grand scheme of historical development. Social theory must take cognizance of that. The recognition of this fact, however, must not lead to a totally sceptical attitude that forecloses the possibility of finding coherent explanations or, as Kellner puts it, of 'chart(ing) the fundamental tendencies and developments within contemporary society'. (1989a: 231).

What is true for social theory in general in relation to the above considerations is also true for a social theory of law. Such a theory must draw especially on those disciplines, traditions and methods that have a potential for yielding rich accounts of the multi-faceted character of law as a social phenomenon.²⁵ In terms of themes, it means that the study of law must address itself to the many intersections and imbrications between law, the economy, the state, political processes, cultural

institutions and practices, power, domination, struggles, value systems, ideology and everyday life.²⁶ Finally, a social theory of law must attempt to reach at some general conclusions about the constitutive social effects of law; while, at the same time, allowing for the particularities that are bound to be found in concrete social formations, specific historical periods, and even in connection with specified norms, institutions and processes within the same historical or geographical space.

2. The categories of social analysis

Theorising inevitably involves the use of conceptual tools that attempt to grasp, intellectually, the realities that theory tries to comprehend. These tools are what we call the 'categories' of thought. They are used by all types of theorists: scientists, philosophers, literary critics, social theorists. Some categories may prove more 'useful' than others; that is, some may have a greater potential than others for adequately explaining, describing, justifying or criticising the realities with which the working theorist is concerned. Therefore, a fundamental task of the theorist -- philosopher, scientist, social theorist, literary critic, etc. -- is to develop or use those categories of thought or analysis that most adequately capture the characteristics and dynamics of the realities and processes they study.

In accordance with the view of society and of the tasks of social theory adopted in this thesis, it is clear that the most 'useful' categories of analysis for the social theorist (including the social theorist of law) are those that exhibit a potential for accounting for the multi-dimensional, dynamic, character of socialities. That is,

categories of thought that incorporate in themselves the notion of complexity, of the multi-dimensionality, of social life; categories that immediately lead us to the consideration of the many possible aspects that go into the constitution of the particular phenomenon that is our object of study. Of course, much depends on the way that the categories themselves are constructed. Thus, categories like 'class', 'power', 'domination', 'subordination', 'hegemony', 'legitimation' retain their usefulness as long as they are not reduced to any singular determination. Their construction should lead our attention to the multi-dimensional imbrication of elements in the constitution of the realities they purport to describe or explain.²⁷

A second point that must be raised is the warning against the perils of 'reification'. (Cf. Wallerstein 1987: 114). By reification is meant the construction of categories of thought as fixed objects that turn back and control our analysis. For example, if we use the category of 'hegemony' to explain an observed social process by which a ruling group induces consent to its rule through various non-coercive mechanisms, we should always remember that it is from the observation of the process itself that we must draw our conclusions, and not from any pre-determined, fixed, meanings or elements of analysis that the concept of hegemony imposes upon us. In this sense, what must not be forgotten is that categories of analysis are only tools that help us to comprehend and explain. To the extent that the tools are useful, we keep them. To the extent that they prove unable to account for events in social life, we must redefine, modify or, simply, discard them.

This leads to a related point. The use of categories of social analysis must allow for the historical specificity of the processes we are describing or explaining. That is, 'hegemony', as defined at a particular moment, may adequately explain how

a given class or group has been able to maintain its power at a certain point in history. Yet it may not serve to explain how that same class or group, or another class or group in another time or place, has reproduced its domination over those it dominates. Then, we either redefine what we mean by 'hegemony' in order to explain the different process, or we simply look for another category of analysis that more adequately captures the reality to which it is addressed.

3. The role of jurisprudence

I have pointed out already what is the main difference between a social theory of law and traditional jurisprudence. The former is concerned with explanation; the latter, with justification. Justification is here understood to include efforts both to rationally uphold or criticise, from a normative point of view, legal concepts and institutions. That justification is the principal concern of jurisprudence is especially true of normative jurisprudence. Analytical jurisprudence may be said to be concerned more with the 'clarification' of legal concepts. However, to the extent that it takes those concepts as given, analytical jurisprudence many times proceeds on the basis of an underlying, implicit, justification of existing legal concepts and institutions. On the other hand, to attempt to 'clarify' legal concepts by arguing for their redefinition, modification, or abandonment falls clearly within the practice of justification.

Does this mean that there is no place for the study of jurisprudence in a social theory of law? Not so. Jurisprudence may contribute to such a theory in many ways. I will examine some of them briefly.

First of all, despite the highly conceptual, abstract, a-historical perspective employed in much of mainstream jurisprudential work, there have been interesting new developments within analytical and normative jurisprudence which could cast light, from an 'internal' point of view, on the interconnections between law and the wider social and institutional context within which it operates. That is the case with such jurisprudential theories as 'contextualism' and 'institutional' theories of law.²⁸ However, the contributions these theories may make to an explanatory, social theory of law may be fruitful only if we are aware of the danger that Abel has so aptly pointed out referring to quite another approach, that of functional anthropology: that danger is the practice of resorting to the mere enumeration of elements in the 'contemporary milieu' of an institution, but with no clear criteria for the selection of those that are truly relevant, or explanatory. (Abel 1973-4: 190-193).

There is a more fundamental reason for the study of jurisprudence in the development of a social theory of law: the fact that there are several points of intersection between explanation and justification.²⁹

The first, and most important one, for our present purposes, is the following. Law, as a social practice, in a very fundamental sense is a 'practice of justification'. As it has been pointed out already, the discourse of law is a normative discourse. In building a social theory of law, we are, therefore, partially constructing a theory of normative structures, in fact, a theory about one specific normative structure: the law. As I have suggested in the discussion about the specificity of law, such a theory requires a rigorous examination of the 'internal' workings of that structure: its language, its concepts, its forms of reasoning, its formal articulations, its methods, practices and techniques, and its internally legitimating ideologies. One must look



at the way legal arguments are constructed, what counts as a 'valid' legal argument at a given point in history and why. One must also examine the dissonances and conflicting views and claims for legitimacy that are made within the legal 'field' itself. For, as I have already argued, the manner in which the legal discourse is constructed and the way in which its 'internal dynamics' are shaped are vital for the operation of law as a constitutive dimension of the social.³⁰

Many of those inquiries have been at the core of the concerns of traditional analytical jurisprudence.³¹ It can be beneficial, therefore, to take cognizance of whatever insight has been gained, particularly at the phenomenological level, by descriptive efforts within that tradition. Provided, of course, that we proceed with awareness of the many mystifying elements contained in many of those theories.

Moreover, jurisprudential theories themselves become part of the 'internal workings' of the law. They provide justificatory criteria and prescribe or suggest methods of analysis which many times become constitutive elements of the decision making process. Sometimes they even set the limits of what is to be considered 'legitimate' theorising, and thus contribute to exclude from the universe of legal discourse particular perspectives, descriptions, explanations, and critiques. Therefore, they play their part in the operation of law as a dimension of the social, in whatever 'function' or 'role' the law performs within a given social formation. They are to be treated, accordingly, as social facts within the wider context of that dimension of the social which we call law.

When I speak here of jurisprudential theories I do not limit myself to the general propositions about law and legal processes put forward by academic theorists or eminent jurists. I include those theories or general views about the law explicitly

or implicitly present in the actual practice of legal actors. That is, the *applied* jurisprudence of judges, legislators, public officials and other legal operators. Thus, in this thesis, for example, I will be examining the legal theories expressly or impliedly employed by the Supreme Court of the United States in deciding a series of cases about the power the United States Congress could exercise over the territories acquired after the Spanish American War at the turn of the nineteenth century. I will examine also the 'view' of law as an instrument of political aims taken by U S legislators and Executive officials in the aftermath of the acquisition of those territories.

Here those theories are treated as ingredients in the social process involved in the act of making a legal decision, i.e., in the process of producing a specific legal result. Not that they are seen as determinative of the result. But rather, as part of the exercise of justification, and therefore, of the process of 'legitimation', of social and political relations. Jurisprudential theories, then, are viewed as constituents of an 'operative' legal culture, which is to be examined, in turn, as one dimension of a wider cultural context. Within this framework, the origins, uses and prevalence of particular jurisprudential theories at a given moment in given societies are to be related to the values they incorporate or promote, to the wider world view of which they are a part, and to the socio-historical processes whereby they are produced.

A second point of intersection between normative and explanatory discourse is the fact that explanation itself is a form of critique, as Marxist, Critical, Foucauldian, feminist and other approaches to social theory well demonstrate. To the extent that socio-historical explanations of legal phenomena reveal their historical contingency, their relationship to structures and relationships of power, their

interconnections with 'extra-judicial' value systems and world views, to that extent they serve as powerful critical instruments of existing legal concepts, theories, practices, and institutions.

There is still a third point of intersection between normative discourse and explanation. At our present stage of historical development, normative structures constitute a part of our socialities. Social actors take cognizance of, make judgments about, and act either to reproduce or transform those structures. Jurists, government officials, political activists, ordinary people, even social theorists of law, in their capacities as citizens, make recourse to normative arguments, either to justify or criticise the law or particular legal norms or institutions, or the relations or practices which those norms or institutions sanction; or to propose alternatives to them. In the present state of social life we cannot do away with justification.³²

However, if normative arguments about the law are to have any transformative social effect, they must be based on an adequate understanding of how the law in effect functions, of how the law operates as a dimension of social experience. In other words, justification must have explanation as its necessary basis.³³ It must take cognizance of the conclusions offered by the social theory of law. If not, normative jurisprudence runs the risk of, at worst, becoming a mere mystificatory exercise that distorts reality and, ultimately, justifies, without admitting it, existing relations of power and domination; or, at best, fizzling into a speculative irrelevancy that is always reinventing the wheel and posing problems that are no longer real problems.³⁴

4. The limitations of social theory

The renowned Italian semiologist and philosopher Umberto Eco has commented that he decided to write his novel, *The Name of the Rose*, when he became convinced that there are things that can only be explained by narrating them.

Coming from such an eminent theorist, this is probably the most insightful and incisive commentary in recent times about the limitations of all theory.

I have discussed already the need for a social theory of law to account not only for the regularities of the operation of law as social phenomenon, but also for the particularities encountered in the examination of specific social formations, historical periods, and concrete events and experiences related to law as a dimension of social life. It may well be, however, that there are limits to what social theory in general, and social legal theory in particular, are able to 'explain'. The limitations seem to be inherent in the discourse of theory, in the need to use encompassing categories, in the emphasis it places on revealing regularities and patterns, in its obsession with arriving at general conclusions, in its fundamentally rational, organising, systematising approach to reality. This discourse is bound to miss the many forms in which human experience manifests itself as unique, unrepeatable, unboundable, the precise articulations found in fleeting, unretrievable moments, the multiple nuances of particular experiences and events, the numerous interplays between rationality and irrationality, among reason, intuition and passion. These dimensions of the human experience are probably most fruitfully represented through

poetry, art or narrative. We must, therefore, be conscious that, more often than not, what social theory can provide is a partial account of human life.

It is not surprising then that narrative, which has always been at the center of social communication in all civilisations -- particularly in the form of localised, non totalising stories --, has emerged again with so much force in the intellectual world of contemporary cultures. Narrative, of course, has its own limitations. For in focusing on the particular, it may fail to discover the regularities that may be found both through time and at a given point in history. History itself has proven that those regularities do exist. Hence the place for theory. But theory, in our present age, cannot do without localised narrative, for the contributions it can make to the task of explanation. At times, therefore, that contribution must be actively sought and its insights incorporated to the theoretical endeavor. Other times, however, theory must simply recede, take the observer seat, and let experience speak through the work of poets, artists, and storytellers.

C. LAW, LEGITIMATION, AND HEGEMONY

The principal concern of this thesis is with the extent, if any, to which law has contributed to the legitimation, reproduction, and ultimate consolidation of a colonial regime in Puerto Rico. By 'reproduction' is meant the process by which the colonial relationship has been continued through time.³⁵ 'Consolidation' refers to the extent to which that continuity, or reproduction, results in a strengthening of the colonial bond. Legitimation is a necessary ingredient of the processes of reproduction and consolidation. Because of the diverse approaches to legitimation in social theory, it

is necessary to undertake a more extended, though still very schematic, discussion of the concept before we proceed. Similarly, because of its usefulness in helping to explain some of these processes, the concept of 'hegemony' will be discussed briefly.

1. The concept of legitimation

'Consent and not birth is what makes the king', wrote Marx in 1843 (Marx 1961: 132). Since then many writers, Marxist and non-Marxist alike, have grappled with the problem of identifying the factors and explaining the processes that contribute to the production of 'consent' to authority by those over which it is exercised. Theories of legitimation constitute an important aspect of that endeavor.

The concept of legitimation may be discussed from a normative or from a sociological point of view. Normatively, the concept refers to the validity claims that may be made to justify a particular set of power relationships. Sociologically, it alludes to the actual acceptance by a given human collectivity or social group of the power or authority exercised over it by another person, group, or collectivity, directly or through any set of institutionalised structures. Similarly, it refers to the acceptance of the 'validity' of those structures. The relationship between the validity claims made from a normative perspective and the production of the sociological fact of acceptance is not something that can be either presupposed or discarded in advance by theory.

The concept of legitimation raises a variety of important theoretical issues. The first is the obvious definitional one: what is meant by legitimation? Others follow. How is legitimation produced? What are its agencies? What is the role

played by rational argument, by explicit justification? What does 'rational' mean in the context of legitimation strategies? If explicit justification is important, what are the different 'audiences' to which the validity claims are addressed? Are the same claims equally effective within all social groups? What is the role of law in the process? Is ideology the only relevant determination? Does legitimation have a material basis? Why is legitimation needed at all? What is the relationship between legitimation and coercion? What are the determinants of legitimation in modern Western societies? Are they the same in the so-called 'Third World'? Is legitimation a relevant problem in the colonial context? Are its dynamics within the colonial relationship the same as those of the legitimation processes within the metropolitan state itself in regard to its own population? Obviously many of those questions cannot be addressed fully, or even partially, in this dissertation. An attempt will be made, however, to provide some elements for the construction of a theoretical framework within which to analyse the problem in the context of the concerns of this thesis.

It seems to be a non controversial proposition among the leading legitimation theorists of modern social theory, whatever their substantive views on the matter, that the determinants of legitimation are historically specific, that is, they may vary through time and from social formation to social formation.

Because this thesis deals with the relationship between a modern metropolitan state and one of its colonial territories, acquired at the turn of the nineteenth century, and still under its political and economic control, I will address the question of how legitimation is produced in what Weber called 'modern society'.

Weber -- one of the foremost legitimation theorists from a sociological perspective -- constructed, in accordance with his general sociological method, a typology of legitimate authority. According to him, there are three types of legitimate domination. In the first type, *charismatic* domination, people willingly submit to the authority of a person or group because the latter either possess certain special attributes or embody particular ideals or values which justify their claim to rule. In the second type, *traditional* domination, authority is accepted in compliance with custom. In the third type, *legal* domination, the basis for the legitimation of political authority is the existence of a system of abstract, general, rationally formal rules which prescribe not only the powers that may be exercised in accordance with those rules, but also the procedures and institutions by which the rules may be established or modified. Legitimation, therefore, is derived from law. (Weber 1978: 212 ff; see also Cotterell 1983: 70-71; and 1992: 148-157). Weber distinguishes between formal and substantive rationality. Formal rationality consists either in the adherence merely 'to external characteristics of the facts' (for instance, the utterance of certain words or the symbolic performance of certain act); or in the logical derivation of meaning that results in the formulation and application of fixed legal concepts in the form of highly abstract rules. This contrasts with 'substantive rationality', which accords predominance to ethical imperatives or value judgments. (Weber: 656-7). As Cotterell has pointed out, it seems that from Weber's perspective, what induces people to accept this form of 'legal domination' is a rational purposive motive: that is, the perception that only such a set of formally rational, value neutral, rules allows everyone to pursue his or her own interests under

the protection of the law. (1983: 74). According to Weber, Western capitalist societies had come more and more to fit this third ideal type.³⁶

Cotterell's critique of Weber is to the effect that law, even in its 'formal rational' form, ultimately incorporates values, for at the core of law lie deep notions of order and justice. (1983: 84-87). Furthermore, adds Cotterell, legitimation depends, in the end, on the capacity of law to respond to demands for specific values from those subject to its rule. (*Id.*: 87-88).

A different perspective is taken by the prominent contemporary legitimation theorist Jürgen Habermas. Habermas is concerned with explaining the crisis tendencies in advanced capitalist societies, particularly the crises in the production of legitimation (Habermas 1988a). By legitimation he means the generation of mass loyalty to the politico-economic system. From his discussion of how legitimation crises are produced we may infer his view of how legitimation is secured. Habermas's analysis is very complex and sophisticated. Here only a very schematic account can be provided.

For Habermas, the need for legitimation in this stage of development of capitalism responds to the growing participation of the state in economic and social life (p. 36). Legitimation is secured through diverse mechanisms that insure mass loyalty, while restricting real participation in the affairs of the state. This is the real effect of formal democracy (36-37). The requirements for such legitimation are what he calls 'civic patriotism' (political abstinence combined with an orientation to career, leisure and consumption) complemented with an achievement ideology; and the explicit justification of structural depoliticisation by democratic elite theories or technocratic systems theories (p. 37).

There are several crisis tendencies in advanced capitalism: economic, rationality, legitimation and motivation crises (ch. 3). They are related to each other in various ways.

An economic crisis is produced when the falling rate of profit cannot be compensated by state activity (45-46). One obvious task for the capitalist state, therefore, if the system is to avoid that type of crisis, is to secure the conditions for the continued accumulation of capital. But it must do so while at the same time producing the necessary values (goods, services, satisfaction of demands, etc.) indispensable to secure mass loyalty.

The rationality crisis is an output crisis of the political system; it occurs when the administrative subsystem cannot reconcile and fulfil imperatives received from the economic system (p. 46).

The legitimation crisis, in turn, is linked to the normative structures of society (p. 47). These structures help to define needs and expectations. This kind of crisis may occur for several reasons. First of all, it takes place when the state is unable to carry out its multiple 'steering' or management functions so as to reconcile the needs for capital accumulation with the requirement to satisfy needs and demands from the population. If the state's crisis management fails, it lags behind programmatic demands that it has placed upon itself and a withdrawal of legitimation may ensue (p. 69). As Habermas has expressed it:

A legitimation crisis arises as soon as the demands for ...rewards (use-values) rise faster than the available quantity of value, or when expectations arise that cannot be satisfied with such rewards (p. 73).

This notion of 'rise of expectations' is one of the links between legitimation and motivation crises. The reproduction of the overall system requires that the socio-cultural system continuously provide the motivations for the activities, practices and compliances necessary for the process of accumulation to take place. This socio-cultural system, however, exhibits a great degree of independence from the economic and the political systems. It has its own logic of development. Changes in the socio-cultural system may produce a motivation crisis. This occurs when 'the normative structures change, according to their inherent logic, in such a way that the complementarity between the requirements of the state practices and the occupational system, on the one hand, and the interpreted needs and legitimate expectations of members of society, on the other, is disturbed' (p. 48). What Habermas is saying is that members of society may come to interpret their own needs and define their expectations in such a way that they no longer coincide with the requisite degree of motivation to support the reproduction of the economic and political systems. In that case, mass loyalty may be withheld, and a legitimation crisis is produced. (Cf also 74-75).

There are some very problematic propositions in Habermas' theory. One of the most striking is his presupposition that the socio-cultural system operates at a highly independent level and that it can produce, exclusively through the operation of its internal logic, very serious dysfunctions within the overall system. This seems to overlook the imbrication that a multidimensional conception of society supposes among the many dimensions of the social world. Certainly, changes in consciousness may be produced by a multiplicity of factors, including determinations generally thought of as belonging to the 'cultural' sphere. Such changes, moreover, may

impact severely the economic and political dimensions. However, it may very well be that the most significant changes in consciousness are those most closely linked with experience. And all concrete experience in social life is, in itself, the result of many determinations, including determinations proceeding from what Habermas calls the 'economic' and 'political' systems.

Despite the possible weaknesses in Habermas' comprehensive theory of crises in modern capitalist societies, what is of interest to us from his analysis is the link he establishes between legitimation and normative structures, needs, expectations, and demands. This leads to the conclusion that legitimation is not only an ideological phenomenon. It has a material basis that is, nonetheless, closely intertwined with cognitive and evaluative processes.³⁷ A second fruitful aspect of his theory is the possibility of linking law, as one of the normative structures of society, to needs and aspirations, by way of its central role in the process of interpretation of those needs and aspirations, and in the definition of 'acceptable' solutions and modes for their satisfaction. Thirdly, it is possible to arrive at a synthesis of some important elements of Weber's and Habermas' theories. Rationality itself is not sufficient to guarantee legitimation. Nor is it the pure and simple satisfaction of needs. While a given rationality, however defined, must be linked to the satisfaction of needs and aspirations, the latter must occur within a process somehow conceived to be 'rational', that is, responding to a conception of justice (be it procedural, substantive, or a combination of both) that may be 'discursively validated'.³⁸

A theory of legitimation grounded on the basic elements of the view of society adopted in this theoretical framework (multi-dimensionality, reciprocal conditionality, etc.) would look at the multiple determinations that converge in the production of

mass loyalty, or acceptance of authority, in modern society at different moments. I propose, in accordance with that view, that some of the factors that should be examined are the following: (a) explicit justification (that is, the various political, moral, and legal ideologies openly offered as the justificatory basis of power relationships and social relations and practices); (b) the material (e.g. economic) conditions and practices through which the satisfaction of interpreted needs and aspirations are meant to be satisfied; (c) the action-structures (political, organisational, etc.) through which members of society are supposed to channel their input into the definition and interpretation of needs and the elaboration of strategies for their satisfaction (this would include an examination of the dynamics of strategies and practices that operate to grant and withhold participation in those structures); and (d) the several cognitive/evaluative elements (ideological, cultural) that constitute the world view within whose framework the interpretation of needs and aspirations take place and which provide or preclude opportunities for alternative conceptions of the possible and the desirable. The most important theoretical task would be to explain the complex articulation of these various determinants in the process of producing within the relevant population a readiness to accept the existing power structure.

In examining the role of law in this complex articulation one should look, correspondingly, at: (a) the uses and functions of law and legal ideologies in the process of explicit justification; (b) the ways in which law is imbricated with the material processes aimed at the satisfaction of interpreted needs; (c) the relationship of law and legal ideologies to the participatory (whether formal, material, partial, direct, indirect, symbolic, etc.) action-structures that serve as the basis for the claim of legitimacy of the decision-making process; (d) the way in which law is shaped

by, and contributes to the formation of, the dominant cognitive/evaluative frameworks, including the ways in which law participates in the process of interpreting needs, prescribing solutions, fixing visions of conceivable worlds, and constraining or opening up alternative courses of action.

2. The concept of 'hegemony'

The concept of 'hegemony' has been used with several meanings in social and political thought. In one sense it has been employed to refer to the domination of one country over another. (Sassoon 1983: 201). Thus, historians of American imperialism refer to the 'hegemony' of the United States over countries in the Caribbean. (Cf, for example, Healey 1988). In another sense, 'hegemony' has been utilised to mean the process by which a given class wins consent to its historical project from other classes or groupings in society through diverse, predominantly non-coercive, mechanisms. This is the sense in which it was used by Gramsci (1971) and many later Marxist, neo-Marxist and, increasingly, even non-Marxist writers (cf, for ex, Cotterell 1992). Interestingly enough, both senses may well converge in the context of what in this thesis is referred to as 'modern colonialism', and very much so in the specific case of Puerto Rico and other Caribbean countries.³⁹ In a very fundamental way, this thesis is concerned with that convergence.

Gramsci himself referred to 'hegemony' in several contexts and with varying implications. His point of departure was the distinction between 'state' and 'civil society' inherited from nineteenth century social philosophy. (See, for ex, Marx 1961). According to Gramsci, 'direct domination' over the subordinate classes or

social groups is exercised through the state or the legal apparatus. But 'hegemony', the eliciting of 'consent' to the ruling group, operates fundamentally through the institutions of civil society. He, thus, defines 'hegemony' as

the 'spontaneous' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group. This consent is 'historically' caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production. (Gramsci 1971: 12).

Hegemony is exercised through the 'so-called "private organizations"', like the churches, the labor unions, the schools, etc. (*Id*: 56, editors' note 5). The 'organization' of social hegemony (as well as political domination through the state) is the task of the intellectuals (*Id*: 12-13). The coercive power of the state, according to Gramsci, is reserved to 'legally' enforce discipline on those groups who do not 'consent' either 'actively' or 'passively'. The state apparatus, however, 'is constituted for the whole of society in anticipation of moments of crisis of command and direction when spontaneous consent has failed'. (*Id.*: 12).

Hegemony is both a strategy and the kind of domination resulting from its successful realisation. It hinges on the capacity for intellectual, political, and moral leadership exhibited by the dominant group; on its willingness to incorporate the demands of other groups and, at least partially, or even apparently, satisfy them; on the perceptions by others that the dominant group has the requisite knowledge, resources and experience to manage the general affairs of society; on the extent to which the 'common sense' prevailing in the general population is shaped by the world view of the dominant group.⁴⁰ Hegemony, therefore, has both a cognitive/evaluative

dimension and a material foundation, as Gramsci himself pointed out. This material foundation is what he calls the 'decisive nucleus of economic activity'.⁴¹

The notion of 'hegemony' is not free from difficulties. One of the problems is Gramsci's arguable overemphasis of the relative importance of civil society in the realisation of hegemony, to the detriment of state activity. He did point out that the division was only 'methodological' and was careful to stress the 'overlaps' to be found in actual societies. (Sasoon 1983: 202). But the question is of more substance than that. First of all, there are manifold instances of coercion to be found in 'civil society' (in the discipline of the workplace, in the multiple instances of domestic violence, through the actions of paramilitary groups, etc.). Secondly, the 'legitimation' needs of the so-called interventionist state (Habermas 1988a) require increasingly the production of persuasion through various mechanisms (see also Sasoon 1983: 202). Thirdly, the claims of superior technical knowledge on which the dominant groups frequently justify their rule are tested, validated or ultimately deconstructed, precisely through their performance -- or the performance of those on whom they rely for the task --in the management of the state apparatus for the satisfaction of needs and demands. A theory of 'hegemony' that takes account of the realities of the modern state would have to ponder the many economic, political, and ideological practices whose source is primarily the state and which contribute to the production of consent. Furthermore, such a theory would have to grapple with the problem of conflicting hegemonic strategies within fragments of the dominant group and the diverse reactions to those strategies not only from the various subordinate groups but within those groups themselves.

One interesting theoretical problem is the relationship between 'hegemony' and 'legitimation'. It seems that, as used in the theoretical and political literature, 'hegemony' is a much wider concept, encompassing many more dimensions of the social experience. It includes legitimation, but cannot be reduced to it. (See Sassoon 1983: 202). Furthermore, legitimation needs arguably may be satisfied with a rather passive acquiescence from those over whom the power of particular institutions is exercised (although this could be a very problematic formulation in certain circumstances). Hegemony, on the other hand, appears to refer to a more active acceptance or consent of the dominant position of the group or collectivity exercising it. Furthermore, while normative structures may have a greater relevance for the production of legitimation, the realisation of hegemony could, conceivably, be obtained without reference, in spite of, or even in direct opposition, to existing normative structures. From another perspective, the actual legitimation of systems and power relations seems to be produced precisely through hegemonic practices. (Cf Gordon 1982: 286).

Despite the difficulties discussed above (all of them surmountable), the concept of 'hegemony' provides fertile ground from which to construct explanations of the ways power is exerted and reproduced in modern societies. One of its obvious potentialities -- if combined, for example, with Foucauldian and other analyses of power -- is its adjustability to the explication of the dynamics of power relationships defined by determinants other than class, for example, gender, race, ethnicity, nationality, belief, or geography.

As applied to the social study of law, the concept of 'hegemony' would lead us to inquire, among other things, into: (a) the way law is used as another strategy

to obtain consent and to reproduce relationships of domination; (b) the extent to which law contributes to the formation of the general 'common sense', or prevailing perceptions of the world; (c) the degree to which law records the 'material compromises' made by the ruling classes with those under their rule (Cf Poulantzas 1979: 97); (d) the operation of law as one among several technical knowledge systems whose control provides the basis for the claim to technical superiority and leadership on the part of those who rule; and (e) the role of lawyers and other legal 'functionaries' in the 'organization' of both social hegemony and 'political' domination through the state. (The terms are taken from Gramsci 1971).

D. LAW AND COLONIALISM

Many studies on law and colonialism have focused their attention on the ways in which imperialist powers have imposed their legal concepts and institutions on the conquered populations and on the lasting effects of that imposition in the construction of social and political life in the post-colonial period. (Cf generally, Ghai, Luckam, and Snyder 1987; Luckam 1987). Less emphasis has been placed on the examination of the contribution of law to the legitimation, reproduction and consolidation of the colonial regime itself. (Cf. Snyder and Hay 1987a). Certainly, both aspects are intimately related. An understanding of these two dimensions of the colonial project and their inter-relationship should provide a more thorough comprehension of the complex relationship between law and colonialism. The main concern of this thesis is with the second aspect.

A study of the precise relationship between law and colonialism must take into account the historical specificity of each colonial experience. Variances may result from differences in the stages of economic development and dissimilarities in the political and legal institutions of the colonising powers, as well as from the diverse nature of the economic, legal and political institutions in the pre-colonial past or in the previous colonial experiences of the colonised territories. Thus, for example, law may be found to have played a certain role, or none at all, during the early colonialism that contributed to what Marx called the 'primitive accumulation of capital' (Marx 1987a) and quite a different function in the later colonial projects linked to the expansion of capitalism in the late nineteenth and early twentieth centuries. One of the central contentions of this thesis is that the nature of the American colonial project, the hegemonic objectives it pursued in the Caribbean region, the particular place of law and legal institutions in American political processes, the features of the political, legal, and cultural institutions and the dynamics of the internal economic, social, political and cultural processes of Puerto Rico, both before and after the American occupation, and many other factors, have converged in the production of a peculiar colonial experience with important implications for the legitimation and reproduction of the relationship between the metropolitan power and its dependent territory.

Snyder and Hay (1987) have identified several common traits related to the introduction of European law in the colonised territories of the Third World. Among them:

(a) The usual excision from the law brought to the colonies of most provisions regarding social welfare, basic civil rights and other entitlements;

(b) The markedly 'administrative rather than rights-oriented' character of the imposed legal systems, so that the ideology of the rule of law 'was practically absent in many if not most colonies';

(c) The lack of colonial states, at least initially, of any organic socio-economic and political roots in local society;

(d) A more or less generalised perception among the populations of the colonial territories of the fundamental illegitimacy of law, which was perceived almost wholly as imposed (partly because it comprised mainly authoritarian aspects and, partly, because it was a cultural product without a firm basis in local culture);

(e) The use of ideologies, perhaps more authoritarian in nature, other than the rule of law to legitimate the exercise of power; and

(f) The prevalence of legal pluralism, that is, the co-existence of locally grounded, subordinate, legal concepts, institutions and ideologies alongside the dominant European legal system and many times in direct conflict with it. (Snyder and Hay 1987a: 12-13, 27-28, 31-32; see also, Luckham 1987: 88, 91; Ghai, Luckham, and Snyder 1987: 3-10; Ghai 1986: *passim*; Fitzpatrick 1983).

In all of the above respects there are important differences between the colonial experience of Puerto Rico under the American regime and so many other colonial situations. Thus: (a) basic civil rights, social welfare and other entitlements have been extended, in varying degrees at different times, by the metropolitan state to the Puerto Rican population at large; (b) the ideologies of liberal legalism and the rule of law have been important legitimating ideologies, with varying relative weight *vis-a-vis* other legitimating ideologies; (c) the local colonial state apparatus has had, to some extent, an organic socio-economic and political root in local society;

(d) although some sectors of the Puerto Rican population have impugned, at different times, the legitimacy of the American legal regime in the island, many others have not questioned that legitimacy; furthermore, even among the former, many do accept the legitimacy of law itself, most probably because of the Western legal ideology inherited from the previous (Spanish) colonial experience; (e) finally, the problem of conflicts of legal systems is of a different makeup: it has consisted of the tensions and accommodations between the civil law and common law traditions, both having Western, European roots, and, therefore, many fundamental common traits, especially at the ideological level. (A different question arises regarding the possible conflict between the ideologies of both legal traditions -- located at the level of the power structures -- and the alternative ideologies and practices rooted in popular culture. Cf Luckham 1987: 92.)

As has been suggested above, these differences have not been manifest uniformly throughout the almost one hundred years of the American colonial regime in the island. That regime has undergone several phases in which the reproduction of the relationship, with more or less acquiescence or resistance from the various sectors of the Puerto Rican population, has been obtained either through the introduction of new mechanisms, or through the shift in emphasis, or changes in the precise articulations, of existing ones.

Two fundamental questions have underlied this author's present endeavor. The first one is: What explains the continued existence of a relationship which is decidedly colonial in nature between the United States and Puerto Rico (especially in light of the massive decolonisation movements that erupted after World War II and which led to the emergence of so many new independent states)? The reply that this

has been exclusively the result of the repression of the independence movement is not at all a satisfactory one.⁴² After all, repression, of the most brutal kind, was routinely exercised in other colonial contexts and, in most cases, did not prevent, in fact it may be argued that it flamed, the self-determination drive and, eventually, the political decolonisation of those territories. Hence, the need to look for other contributing, or even, more fundamental factors.

This has led me to propose that the reproduction and consolidation of the colonial regime has been the result of a complex articulation of economic, political, and ideological determinants that has led to the emergence of a 'colonial consensus' among substantial sectors of the Puerto Rican population, cutting across class, racial, and gender divisions.⁴³ In this thesis I will examine with some detail some of those determinants. In doing so I will employ the categories of 'legitimation' and 'hegemony', as useful conceptual tools to grasp the fundamental dynamics of the production of acquiescence or consent (in the sociological sense) to the colonial relationship.

Here two related theoretical problems must be addressed, however briefly. How applicable to the colonial context are theories of legitimation (or basic elements of those theories) developed to explain processes that occur within industrially developed, capitalist countries (e.g., Habermas' legitimation crisis theories, or Weber's theory of legal domination)? The answer is twofold. First, the more general elements of those theories -- as synthesised above in part C -- may provide a general framework within which to analyse processes in various contexts, as long as allowances and adjustments are made to fit the specificities of the case. Thus, it is a sound theoretical proposition to assert that in some colonial contexts, at least, the

satisfaction of interpreted or perceived needs within a given framework of rationality forms the basis, or is a prerequisite, for the production of legitimation. Secondly, the more the society of the colonial territory comes to resemble in very fundamental aspects the society of the metropolitan state, the greater the similarity between the legitimation processes that take place in both societies. It is our contention that in the specific case of Puerto Rico, the parallels between the ways in which legitimation is reproduced in the colony and in the metropolitan state result from the fact that the economic and political institutional framework and some of the social life processes of the colonial territory have been structured in accordance with the organising principles of the metropolitan society (Cf Rivera-Ramos 1990: 122). Of course, the colonial condition adds its own specificity to the process, and that specificity must be taken into consideration and accounted for.

The second, similar, theoretical problem is whether the concept of 'hegemony', used in the Gramscian sense of inducing consent to the rule of a dominant group, is applicable to the relationship between a metropolitan state and the population of its colonial dependency. Several questions arise in this respect. Is it appropriate to speak of the hegemonic project of the metropolitan state? Or are we bound rather to refer to the hegemonic strategy of the dominant groups within that state? In the colonial context, is hegemony realised to a greater degree through the activities of the state? May we correctly speak of an homogenous response to the hegemonic project of the metropolitan state, or its ruling classes, from the 'colonial population', as if it were the subordinate group, or should we distinguish among groups within the colonial society itself? Is there a colonial project that is distinct

from the economic project of capitalist expansion and penetration? Some of these questions will be addressed in the discussion of the chapters that follow.

At this point I will make the following propositions.

First, in its origins the American colonial project in the Caribbean region was tied, on the one hand, to military concerns and, on the other, to the expansion of capitalism and the need to secure new markets for the realisation of capital. (This will be discussed in more detail in chapter 2). In this sense it was a class project as much as it was the immediate project of a particular bureaucratic component of the American state: the military. Therefore, whatever hegemonic strategies were developed responded, ultimately, to the perceptions that the ruling classes and the military establishment entertained about the relationship of those strategies to either their short or long term interests. Throughout this century the relative weight of those perspectives has shifted, but these two fundamental sources of determinations have remained present.

Secondly, in all modern colonial cases the metropolitan state has been the fundamental coordinator of strategies, policies and actions regarding the control of the colonial territory. In this sense, it is appropriate to refer to the hegemonic practices of the metropolitan state. In the type of colonialism that survived the post World War II decolonisation wave, of which Puerto Rico is a typical example, state-directed hegemonic practices have been a central component of the colonialist project.

Thirdly, in the specific context of Puerto Rico, acceptance of the colonial regime has been directly linked with the emergence of a 'common sense' that has seen as natural the development of a capitalist economy. In this sense, class

domination and colonial rule are intertwined, so that hegemonic strategies designed to preserve class rule are integral parts of the colonial project.

Fourthly, although one may speak of a colonial project, it should be remembered that the project is realised through *several* coercive and persuasive strategies and that different groups within the colonial society may relate differently both to the project and to the various hegemonic practices. This, it is hoped, will become apparent through the detailed discussions in some of the chapters that follow.

Before I address my second guiding question, some additional basic theoretical propositions about the state must be advanced, given the importance of the state apparatus in the colonial context. I will limit myself to state them succinctly:

(a) Neither the ruling groups nor the state are constituted homogeneously. There are diverse interests, views, and strategies pursued within the state. Sometimes they conflict. It is, therefore, necessary to identify the conflicting trends and perspectives, as well as the convergences, within the various forces that control the metropolitan state.

(b) States have their own national specificity, reflected, among other things, in their institutional framework and practices. Thus, for example, the separation of powers principle in the United States -- apart from being a legitimating ideology for the exercise of power -- contributes to produce a particular internal logic which must be taken into consideration in analysing the processes by which colonial policies are developed, justified, and implemented. In turn, each of the organs of the state operates with its own internal logic, which is not, of course, totally independent of the total state institutional framework or of the rest of society. One must identify the degree of relative autonomy that the state or each of its constituent organs exhibit in

each particular conjuncture and for each particular area of policy. There is a normative structure, with a corresponding set of ideologies, that serves as a framework within which that internal logic takes place.

(c) The relationship of colonial domination is frequently mediated through an internal state apparatus in the colonial territory. Thus, in the colonial context one may speak of the state as being comprised of two closely intertwined 'levels': one level -- the dominant one -- is the 'metropolitan state' properly called, and the other -- in a relation of subordination -- is the 'internal', 'local', or 'territorial' state apparatus. (In Puerto Rico, this 'internal' level is many times referred to as the 'insular government'.) The colonial state, then, is constituted by the sets of institutions, functions, practices, and relationships that result from the interaction between the two 'levels'. The 'internal' level is an arena for the internal conflicts of the colonial society, and in many ways, is also constituted through conflict.

(d) The specific forms of the relationship of subordination between the metropolitan state and the colony are influenced, shaped, by the efforts from the metropolitan state and its ruling classes or dominant groups to consolidate or maintain their rule, by the mediating activities of groups and individuals within the colonial society that enjoy sub-hegemonic positions or benefit in one way or another from the relationship with the metropolis, and by the acquiescences, struggles and resistances of the various sectors of the people in the colonial territory. Those struggles and resistances are multidimensional, assume various forms, and have differentiated effects. They are not always identical with the pro-independence movement.

The second question that guided my inquiry was: what has been the relationship of law, legal institutions, and legal ideologies to the process of continued

reproduction through time of this type of colonial arrangement? Throughout this chapter I have hinted at many of the ways in which law is imbricated with power relationships and how it may contribute to the reproduction and consolidation of relationships of subordination. I hope to relate that discussion with the processes of reproduction and consolidation of the colonial regime in Puerto Rico. The fundamental theoretical proposition made here is that law must be viewed as one of the multiple dimensions of the colonial experience, as one of the constituents of the colonial regime, as one among many strategies for the realisation of the colonial project. It has also been the arena in which many of the struggles and resistances of the subordinated groups within the population have been pursued.⁴⁴ The remaining chapters of this thesis will examine some of the precise ways in which law has been imbricated with that multi-faceted phenomenon called colonialism in the specific social formation that is the object of this study.

Because of the many aspects of the problem, I have been forced to be selective. I have chosen, therefore, to examine only some of the sociological implications of selected aspects of the legal process that, in my view, contribute or have contributed to the legitimation and the relatively effective reproduction and consolidation of the relationship between the two countries. This has included an analysis of some of the deliberate attempts by the metropolitan state to use law instrumentally to justify and facilitate the exercise of power over its colonial dependency.

A strictly chronological examination of the entire process since 1898 to the present would have proven too ambitious a project. Similarly beyond the reach of this thesis would have been a detailed inquiry into all the economic, political and

ideological dimensions of the problem and their relationship to all the sets of legal norms, legal institutions, and legal processes that form part of the institutional framework and life-processes of Puerto Rican society. Likewise beyond my possibilities was a detailed study of the myriad U S legislative acts and numerous court cases that, in some way or another, have a bearing on the legal and political relationship between Puerto Rico and the United States.

Before addressing the specific aspects selected for examination, I have seen fit to provide a general historical background of Puerto Rico and its relationship to the United States. This is done in Chapter 2. The intention is to allow the reader to refer to this historical context to obtain a better understanding of the processes discussed in each succeeding chapter. Then I move into the analysis of three specific legal developments.

In the third chapter I discuss the first attempts to legitimate the colonial relationship through a series of United States Supreme Court decisions -- the so-called 'Insular Cases' --, which constituted both an explicit justification of the exercise of practically unrestricted power over the newly acquired territories and a perfect example of the ways in which the law has been used to construct the legal subject in a colonial context.

The fourth chapter examines the law that granted American citizenship to Puerto Ricans: its motives, its effects, the ways in which it has affected notions of the self and its eventual contribution to the consolidation of American hegemony in Puerto Rico.

The fifth chapter is devoted to the analysis of the role that the ideology of the rule of law, the discourse of rights, and the establishment of a system of partial

representative democracy have played in the legitimation of the colonial system and in the reproduction of its basic relationship of subordination.⁴⁵

It is possible that the selection of the aspects I have made may have tilted the results towards some determinate conclusions. I do not believe so. I think that those conclusions, if anything, would most probably be confirmed by other studies focusing on other aspects. But that is a matter that better be left for adjudication once the evidence has been brought in.

ENDNOTES

1. For reviews of the development of the various approaches of this type of research in the Anglo-American world, see Campbell and Wiles (1976); Cotterell (1975; 1984); Gordon (1982); Harris (1983); Kelman (1987); Kennedy and Klare (1984); Nelken (1981); Silbey and Sarat (1987); Unger (1983); and Veljanovski (1982). Several specialised journals have emerged both in the United States and Great Britain, including the LAW AND SOCIETY REVIEW, THE JOURNAL OF LAW AND SOCIETY, LAW AND SOCIAL INQUIRY, and THE INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW. In continental Europe the works of sociologists like Niklas Luhmann (cf Luhmann 1985; Nelken 1988) and Pierre Bourdieu have been instrumental in promoting a renewed interest in the sociological study of law. For general reviews of other developments in the Continent see Cotta (1975); Stewart (1981); Díaz (1980: 153-172); Vol. No. 5 of Anales de la Cátedra Francisco Suárez (Granada, Spain); and, in general, many of the volumes of the German based ARCHIVES SUR RECHTS-UND SOCIALPHILOSOPHIE. For some accounts of research in the social study of law in Africa, Asia and Latin America see, for example, Ghai, Luckham and Snyder (1987); Snyder and Hay (1987b); Ghai (1987); Snyder (1980); and Münkner (1984).

2. This notion had been anticipated by Engels in his later writings. (See Engels 1968).

3. For the view that the concept of 'autonomy' itself implies a certain degree of dependence (because 'autonomy' by definition is only relative independence), see Nelken (1988: 199-203).

4. Interestingly enough, recent developments in analytical jurisprudence -- particularly those associated with attempts at constructing a "new legal positivism" -- have emphasised that law must be viewed as forming part of the human and social world, as a constitutive part of reality. See, for example, Nerhot 1989; MacCormick and Weinberger 1986; Twining and Miers 1982.

5. Assertion number (5) is akin to the point made by Bachman that law may be an important instrument in the development of what he calls the "pre-conditions" of social change, e.g., free speech and associational rights of various forms that expand the space of legitimacy within which those contesting the social order may conduct their struggle (1984-85: 21-29). A related, though not identical proposition, was made by Scheingold in his now classic *The Politics of Rights*, in which he argues that the belief that a person or group is endowed with rights can become a powerful mobilizing factor with the potential of altering the balance of forces in a given conjuncture and producing effective social change. (See especially chapters 6, 7 and 9.)

The prominent British historian E P Thompson has summarised

eloquently this notion of interpenetration between law and other aspects of social experience:

...law did not keep politely to a 'level'...it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was similarly present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralising over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out. (Quoted in Cotterell, 1984: 143-144).

6. I am aware that this is a state-centered definition and that there is a growing literature addressing the question of legal pluralism, that is, the existence of diverse normative or legal orders within a given society, operating parallel, in opposition to or in interaction with 'state law'. (Cf Cotterell 1985: 670-678; Fitzpatrick 1983; De Sousa Santos 1987). But since this thesis is concerned with developments in 'state law', I have chosen deliberately to limit my definition of law to the one given in the text. The conclusions derived from this study may or may not apply to the operation of other 'legal orders', but this is a question to be examined through further study, beyond the scope of this thesis.

7. Cf. also Elías Díaz (pp 202-203). According to Díaz a sociology of law must include the 'consideration of the real forces of all kinds and of the infra and suprastructural factors (economic, social, cultural, political, ethical, etc.) which determine the birth, conservation, transformation, destruction and possible death of Law, both in a general historic sense as in reference to a specific positive legal order.' 'It is to be understood,' he continues, 'that all these factors are not autonomous "entities", but that, on the contrary, all of them must be treated as mutually related sectors of an open-ended process of social totalisation.' (My translation)

8. By a 'field' Bourdieu means 'an area of structured, socially patterned activity or "practice"', in this case defined in terms of a discipline or profession. Thus, Bourdieu speaks of the "scientific field", the "academic field", the "intellectual field", the "religious field", and the "legal field". (Terdiman: 805-806)

9. We could raise the level of abstraction and talk of "normative structures", of which law is but one kind, but in placing ourselves at that level we would be losing sight of the distinctness or specificity of law as a social form. Whatever conclusions we could arrive at regarding normative structures in general either would not necessarily hold true at the lower level of abstraction in which we re-enter into the specific category we call "law" or would not explain adequately the specific ways in which the form of law relates to other abstract categories used to designate other realms of social experience.

10. Snyder and Hay have expressed these notions very succinctly and clearly:

Law and society, in so far as they may be distinguished, are reciprocally related. Further, even if for some purposes a distinction may be drawn between socio-economic and legal phenomena, it is essential to bear in mind that they are in fact inextricably linked; each is integral to the other. Thus, although one may begin with the legal sphere, it is important not to presume that law plays only an instrumental role, that it is either simply a determinant or simply a reflection of socio-economic relations and forces, or even that in any given circumstances it necessarily has any particular effects. These are conclusions which can only be drawn by a detailed examination of the role of law in specific historical contexts. (10-11).

This 'principle of historical specificity' (Mills: 149) was applied by Marx himself in relation to law in the passage from the 'Introduction' to the *Grundrisse* we have already quoted: 'The influence of laws,' Marx said, 'in stabilizing relations of distribution, and hence their effect on production, requires to be determined in each specific instance'. (1973: 98).

11. For detailed discussions about the centrality of the normative element in modern law and the relationship between world views/values/norms see, among others, Poulantzas (1969: 81-82); Díaz (1980: 12-13; 52-53; 241-243); Fraser (1978: 154); Lloyd and Freeman (1985: 13-14); Twining and Myers (1982: *passim*); Rivera Ramos (1981: *passim*; 1987: 255).

12. *Discourse* is used here in a limited sense to refer to a specific set of linguistic phenomena. There is a wider meaning of 'discourse', as employed in contemporary philosophical and sociological literature, that includes both speech acts and their corresponding social practices (Cf Foucault 1988a: 163).

13. This is what de Sousa Santos calls the "rhetorical" structural component of modern law: that is, a form of communication and strategy for decision making based in the production of persuasion and voluntary adhesion through the argumentative potential of socially accepted verbal and non verbal artifacts and sequences (1980: 381).

14. Of course, ordinary 'common sense', ordinary language, types of reasoning that are generally found in other spheres of activity, appeals to particularised mercy, contextual arguments, and descriptive/explanatory statements do find their place in day to day legal practice. This is particularly the case in lower courts and other bodies of legal decision making that operate at a level closer to the immediate experience of ordinary people (e.g. some administrative agencies, more or less informal bodies involved in conciliation, mediation and arbitration, etc). However, those forms of discourse, when operating within the 'legal field', do so within the context and constraining limitations of, and always subordinated to, the general framework of a particular kind of discourse that is generally regarded as the 'legal' discourse, and whose characteristics have been briefly described in the text. When I claim, therefore, that legal discourse is a special kind of discourse, what I am asserting is that the dominant language employed in the social practice of law is that of generality, impersonality, neutrality and justification. I am conscious also that 'legal' discourse often finds its way into other spheres or dimensions of the social (accounting for so-called 'legalist' approaches to the analysis of predominantly economic, political or moral issues). In fact, one could argue, it is in those instances where the legal form manifests one of its highest degrees of efficacy as a constituent of social life.

15. Cf. Díaz (1980: 51).

16. Despite the many criticism that may be leveled against Luhmann's self-referential theory of law, and without accepting necessarily his central categories of analysis, it must be recognised that one distinct contribution of his theory is that it opens up many possibilities for the understanding of how the specificity of law as a differentiated structure or sub-system is at the core of its effects on the wider social system. (See generally Nelken 1988).

17. For some very interesting works in ethnomethodology and interpretive anthropology, with clear implications for the study of law, see Geertz (1980); Rabinow (1986); and Bloch (1986). See Twining (1990: 219-261) for an analysis of the importance of narrative in legal theory. For a classic critique of postmodernism see Habermas (1988c). For more sympathetic, though some of them still critical, approaches to postmodernist theories from Marxist or neo-Marxist perspectives, see Kellner (1989a: 167-175; and 1989b); Hall (1989); and the collection of essays in Nelson and Grossberg (1988: Part III, 317-416). For succinct explanations of deconstructionism in general see, for example, Kellner (1989b: 178-181); and Rutherford (1990a: 21-24); and

for attempts to apply deconstructionist theory to law, Manning (1990); and Schlag (1990).

18. For a similar view cf. Bourdieu (1987), who points out that the interpretation of legal texts differs from literary and philosophical hermeneutics in that: (a) legal interpretation is not an end in itself, rather is directly aimed at a practical object and is designed to determine practical effects; (b) in law there is a highly organised hierarchy capable of resolving conflicts between interpreters and interpretations; and (c) 'competition between interpreters is limited by the fact that judicial decisions can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts' (818).

19. By 'principles of division' Bourdieu means the 'structured ways in which different social groups differentiate between rich and poor, elite and mass, "pure" and "vulgar", "insiders" and "outsiders", ultimately between what they value positively and what negatively, between the good and the bad. Division (distribution) of society's rewards then proceeds along the lines of the principles established.' (Terdiman: 812).

20. Sally Merry uses the term 'performative' in a different sense. According to her, law as a mode of colonisation can be analytically separated into three aspects: the ideological, the coercive, and the performative. The ideological introduces new ways of conceiving reality; the coercive imposes those ideologies through force; and the performative -- through public ritual performances (court proceedings, etc.) -- demonstrates the procedures of the new order, demands compliance with it, and illustrates, through the imposition of laws and their enactment in daily life, the ways in which the new order applies to everyday experience (1990: 3-4).

21. Minow (1990: 110) argues that patterns of social, political and economic power within which people relate create constraints against which individuals may push. Within these constraints groups and individuals 'negotiate' their social existence (pp 104-110).

22. I am using the terms 'function' and 'role' with their standard dictionary meaning. To 'function' is to operate, to fulfil a set task; something is 'functional' if it has a special purpose. 'Role' is defined as 'any conspicuous part or task in public life'. (Webster's New Compact Format Dictionary [Larchmont, N. Y.: Book Essentials Publications, 1985]).

23. Here I am drawing heavily from ideas put forth by Douglas Kellner, the American critical philosopher (1989a; 1989b). Arguing for a multi-perspectival general Critical Theory of society Kellner has stated:

First, I have suggested that Critical Theory provides a set of supradisciplinary

inquiries into the many dimensions of social reality and their interconnections within a social system full of contradictions and antagonisms during specific historical eras. Critical Theory thus provides a comprehensive, multidimensional social theory which both builds on and surpasses the limitations of specialized disciplines... Critical Theory is compatible with a multiperspectival approach which allows a multiplicity of perspectives (Marxian, Freudian, Weberian, feminist, post-structuralist and so on) to articulate a complex, multidimensional social reality. (1989a: 231, 232.)

24. The term 'supradisciplinary' is used by Kellner (ibidem); 'transdisciplinary' by Galtung (1987: 112). The notion of a social theory that transcends disciplinary divisions, however, has been long in currency. In many ways that has always been part of the Marxist project. The Critical theorists of the Frankfurt School adopted the same attitude towards the study of society. In the late 1950's C. Wright Mills argued for a 'unified social science', in which specialisation was to be achieved in terms not of disciplines, but of problems, which are studied comprehensively. (See Mills 1959: ch. 7). Today, feminists, especially, have tackled the problems of gender divisions within society by developing theories that take into account the multiple determinations -- economic, political, legal, cultural, scientific, technological, and ideological -- that contribute to the production and reproduction of structures, practices and ideologies of subordination.

With Kellner, I prefer to use the term 'supradisciplinary' (or 'transdisciplinary', as suggested by Galtung) instead of 'interdisciplinary' because of the latter term's association with much of the narrow, empiricist, liberal pluralist research that is being conducted in the United States today. Moreover, as Lowenthal has adequately stated, the term 'interdisciplinary work' 'means nothing more than to leave the disciplines as they are while developing certain techniques which foster a kind of acquaintance between them without forcing them to give up their self-sufficiency or individual claims' (quoted in Kellner, 1989a: 7).

25. See the related discussion, above, about the implications of the specificity of law for the construction of legal theory.

26. An analogous suggestion is made by Kellner (without explicit reference to law) regarding the agenda of social theory in general. (1989a: 232). Similar conclusions can be drawn from the suggestions made by Snyder and Hay (1987a); Gordon (1984); Silbey and Sarat (1987); Fraser (1978); de Sousa Santos (1980) and many others.

27. Thus, 'class' is not to be regarded exclusively as an economic phenomenon, but as a multi-faceted reality. Even more, when we speak of particular 'classes', at a greater level of concretion, we certainly are referring to multi-determined phenomena, irreducible to any one particular constituent element, and, therefore, subject to be studied comprehensively only from a multi-perspectival standpoint. The same may be said for notions like 'hegemony', or 'legitimation'. These two latter categories will be the object of a more detailed discussion below.

28. 'Contextualism' has been defined by one of its leading exponents in the Anglo-American world as:

...[T]he broad, and avowedly open-ended, thesis that for most purposes law and particular aspects of it, cannot sensibly be studied in isolation, but need to be set in some broader context. In respect of adjudication, a standard precept is that adjudicative decisions need to be seen in the context of total legal processes, which in turn need to be set in the context of other social processes and of some broad vision of a particular social order (and, indeed, of an increasingly interdependent world). (Twining, 1990: 133; see too p. 155, where the author states that contextualism may also be referred to as 'Legal Realism', although rejecting some of the 'fallacies' with which Legal Realism has been often (and in his view, mistakenly) associated. Cf. note 4, *ibidem*).

Although reaffirming some fundamental positivist stances, 'institutional' theories of law, among other things, emphasize that laws can be seen as 'institutional facts' and, therefore, as part of the social world which human beings inhabit; they also adhere to the notion that there are historical connections between laws and social conceptions of justice and morality. See, for example, MacCormick and Weinberger (1986). The latter authors, in fact, claim that their theory aims at providing an ontological basis for the sociology of law.

29. Any theory that makes an absolute distinction between explanation and justification, without accounting for the diverse ways in which they intersect and influence each other, misses an important dimension of legal phenomena.

30. De Sousa Santos has made an interesting effort to link what he calls the 'structural components of legality' ('rhetoric', 'bureaucracy', and 'violence' (in his view, the specific characteristics of the legal system) with the way in which power is exercised in late capitalism (1980: 381-388). And, of course, Weber's claims about the importance of the formal

rationality of law for the development of modern societies are well known.

31. It is not surprising that H L A Hart, certainly one of the foremost analytical legal philosophers of the Anglo-American world in the latter part of this century, felt justified in making the claim that *The Concept of Law* was as much an essay in analytical jurisprudence as it was an attempt at 'descriptive sociology' (1961: p. vi).

32. Whether human beings will ever be able to do away with normative structures that require justification is a rather speculative matter which we do not need to address here.

33. Some of the most fruitful attempts at establishing links between explanatory statements and normative arguments have been produced by feminist legal theorists. Driven by a desire, indeed a need, to transform oppressive legal structures, rather than to produce neatly insulated analytical theories smacking of high academicism, many of their critiques and proposals for alternative visions have relied heavily on detailed explanations of the interconnections between those structures and the actual experience of subordination. The same may be said of minority legal scholars in the United States hoping both to explain the dynamics of discrimination and to construct an alternative jurisprudence with transformative aims. In Latin America, the movement called 'alternative law' seeks both to offer coherent explanations of the interconnections between law, power, and oppression and to produce a 'popular' conception of law with liberating effects.

It is in this vein that I understand Andrew Fraser's call to 'reconstitute legal discourse within a mode of intersubjective practical rationality freed from the distortions imposed by all forms of domination and reification' (1978: 150). This clearly Habermasian approach, is adopted, of course, with clear conscience that such a discourse cannot be advocated in abstraction of the realities of power and domination, realities that a social theory of law can contribute to describe and explain, and whose legitimating ideologies such a theory can help to deconstruct.

34. For a rather detailed discussion about the relationships between the sociology of law, legal philosophy, and 'legal science', from a continental European perspective, see Díaz (1980: *passim*). See also his analogous discussion about the relationship between philosophy and science (316-322). On these matters my analysis coincides with Díaz's in some respects, like the relationship between what he calls the 'structure' of law (to which I refer as the 'internal workings' of the law) and what he calls the 'function' of law. In others, however, we are at variance, particularly in the specific way in which he tries to achieve a synthesis among the diverse 'disciplines' of the law, which he identifies as the sociology of law, legal philosophy and 'legal science' (within which he includes the 'General Theory of Law'). Apart from the definitional problem regarding what is to be included in a 'general theory of law', it seems to me that

Díaz's approach, though admirable and fruitful in many ways in his attempts at synthesis, is still embedded, in a very fundamental sense, in the traditional paradigm of keeping the disciplines 'separate' while trying to establish some linkages that, nevertheless, fail to grasp the fundamental problem of imbrication.

35. This definition is drawn, by analogy, from that given by Snyder and Hay (1987a) to refer to the 'reproduction' of the working class, meaning 'the continuity of the working class as a socio-economic group from one generation to the next' (p. 20).

36. Weber, however, took notice of the fact that modern law had also been acquiring increasingly 'particularistic' characteristics (for example, through the creation of 'special laws' and 'specialized tribunals') and that there were definite 'anti-formalistic tendencies' in modern legal development, promoted by various theoretical schools of thought (the sociological school, jurisprudence of interests, etc.), lay pressure and professional interests. (Weber 1978: 880-895).

37. See Kellner's assertion that in late capitalism practically the only thing that capitalist society has to offer as legitimation is increased consumption (1989a: 189) But cf. de Sousa Santos' view that at this stage of capitalist development the state is depending more on the use of symbols than in the production of goods and services to guarantee its legitimacy (1980: 391).

38. For the notion that in modern capitalist societies validity claims still have to be 'discursively' justified, see Habermas, 1988a: Part I, ch 2). Habermas also notes, however, that the growing complexity of modern life may lead to a situation where discursively justified validity claims are no longer necessary. But he does not see that process as necessarily taking place. (Cf. his discussion in *Id.*: Part III, chs 2 and 3). (We will not concern ourselves here with the normative aspects of Habermas' theory, which propose a rational approach by which to judge the legitimacy of normative structures.)

Regarding the relationship between law and legitimation Bourdieu -- without explicitly referring to either Weber or Habermas -- has stated:

There is no doubt that the law possesses a specific efficacy, particularly attributable to the work of codification, of formulation and formalization, of neutralization and systematization, which all professionals at symbolic work produce according to the laws of their own universe. Nevertheless, this efficacy, defined by its opposition both to pure and simple impotence and to effectiveness based only on naked force, is exercised only to the extent that the law is

socially recognized and meets with agreement, even if only tacit and partial, because it corresponds, at least apparently, to real needs and interests. (Bourdieu 1987: 840; emphasis in the original).

39. See my discussion of the 'reproduction of consent' in the context of the colonial relationship between the United States and Puerto Rico in Rivera-Ramos (1990). See also, Mattos Cintrón (1988).

40. Subordinated groups may also exercise their hegemony over other groups -- through their leadership, alliances, etc. -- in their struggle to become the dominant groups in society. (Gramsci 1971: 53).

41. "Undoubtedly the fact of hegemony presupposes that account be taken of the interests and the tendencies of the groups over which hegemony is to be exercised, and that a certain compromise equilibrium should be formed -- in other words, that the leading group should make sacrifices of an economic-corporate kind. But there is also no doubt that such sacrifices and such a compromise cannot touch the essential; for though hegemony is ethical-political, it must also be economic, must necessarily be based on the decisive function exercised by the leading group in the **decisive nucleus of economic activity.**" (Gramsci 1971: 161, emphasis added).

For a critique of 'neo-Gramscian' approaches to hegemony that privilege its politico-ideological dimensions in detriment of its 'decisive economic nucleus', or its relationship to the 'structural sources of power', see Jessop, et al (1988: 16, 109-124).

42. This is not to say that repression has not existed in Puerto Rico. It has. In very direct and more subtle forms. What I am saying is that it is not sustainable at all, in light of the historical process, to argue that repression has been the determinant factor in the reproduction of colonialism in the island.

43. Confer my paper "Self-determination and Decolonisation..." (1991), written and published while I was working on the present dissertation.

44. Although law has been an important site for struggles in the island -- a fact which demands a thorough examination in itself --, in order to keep this thesis within manageable confines, I have opted to leave this aspect for further study in another occasion.

45. In this first chapter I have not examined the current theoretical debates about the benefits and drawbacks of the rule of law and about the ideological effects of rights discourse.

That discussion has been made part of the fifth chapter, in order to address those issues in fuller detail, as well as with the purpose of providing a theoretical context for the examination of the particular situation in Puerto Rico.

CHAPTER H

HISTORICAL SETTING

A. INTRODUCTION

The Puerto Rican territory is constituted by several islands, the largest of which bears the name of Puerto Rico. It is located between the Atlantic Ocean and the Caribbean Sea, to the east of the island known as Hispaniola -- which contains the independent countries of Haiti and the Dominican Republic -- and to the west of the Lesser Antilles. It has an extension of approximately 3,500 square miles and a population of 3.5 million. (Over two million more Puerto Ricans live in the United States mainland).

A Spanish colony since 1493, Puerto Rico became a territorial possession of the United States of America in 1898 as a result of the Spanish American War. As of this writing it is known, officially, as the 'Estado Libre Asociado de Puerto Rico', translated into English as 'The Commonwealth of Puerto Rico', a title adopted in the internal Constitution approved by the Puerto Rican electorate and the United States Congress in 1952. Technically, it remains an 'unincorporated territory' of the United States, a category devised by the United States Supreme Court in a series of decisions dating back to 1901.

According to American constitutional doctrine, this legal and political status means that, under article IV of the United States Constitution, the United States Congress-- in which sovereignty over the territory resides -- has plenary powers over Puerto Rico. By virtue of that power, Congress exercises exclusive control over matters such as citizenship, the currency, the postal service, foreign affairs and

military defence, and legislates on many of the most basic aspects of life in the territory, such as communications, labour relations, the environment, commerce, finance, health and welfare, and many others. The Executive Department of the United States government exercises important functions and conducts operational activities in Puerto Rico. Many provisions of the United States Constitution apply to Puerto Rico and decisions of the United States Supreme Court are binding on the island.

A United States Court for the District of Puerto Rico sits in San Juan, Puerto Rico's capital city, and passes judgement over a variety of legal controversies. Its decisions are, in turn, reviewed by a United States Court of Appeals and, eventually, given certain requirements, by the United States Supreme Court. The latter may also review, in certain circumstances, decisions rendered by the Supreme Court of Puerto Rico.

On the other hand, Puerto Ricans residing in Puerto Rico do not vote for the President of the United States, nor elect representatives to the United States Senate or House of Representatives, except for a non-voting Resident Commissioner for Puerto Rico, who sits in the latter body.¹

Puerto Rico is, in summary, an overseas possession of the United States, in a relationship of political subordination to the latter. The United States exercises control over many fundamental aspects of Puerto Rican life, yet Puerto Ricans do not participate directly or through elected representatives invested with full voting rights in decisions taken on those matters. This, to our understanding, is precisely the definition of a colony.

Furthermore, Puerto Rico is presently the most important military outpost of the United States in the Caribbean, a site for substantial investment for United States transnational corporations and one of the largest markets in the world for American products. At the same time, Puerto Ricans constitute a distinct nationality, with its own national culture and traditions, deeply rooted in the country's Taíno, African and Spanish heritage. That heritage has been continually reaffirmed and transformed, particularly in the past several decades, by a vibrant popular culture. Despite nearly a century of American presence and undeniable influence, Spanish is still the country's language for all practical purposes. Puerto Rican music, literature and art are distinctly Latin American, and, more specifically, Caribbean. Nonetheless, Puerto Rican society and culture (writ large), particularly in many of their institutional manifestations (such as education, the professions, the media, political institutions, the legal system, etc.), have been strongly shaped by American culture, practices and institutions.

The purpose of this chapter is to review very schematically the process through which Puerto Rico's relationship to the United States has developed. This is necessary in order to provide the historical context within which diverse legal norms, institutions and processes have operated both as products and constituent elements of that process. The brief historical survey supplied here extends from pre-Columbian days to the present. It has seemed to me a better idea to present a condensed narration of the entire period in this chapter, instead of furnishing fragmentary accounts in each of the succeeding chapters. The objective is to supply the reader with a comprehensive backdrop that will serve as reference throughout the

entire analysis. Hopefully this will allow for more detailed attention to the theoretical issues in the chapters that follow.

The chapter has been divided in the following manner: first, a panoramic review of Puerto Rican history from the days of the early indigenous populations to the final years of the Spanish regime; secondly, a rather detailed analysis of the expansionist drive of the United States that culminated in the acquisition of territories after the Spanish American War; thirdly, a very brief description of the relationship between the United States and Puerto Rico before 1898; and, finally, an examination of the salient developments in Puerto Rican society under the American regime.

B. PUERTO RICO: FROM THE EARLY INDIGENOUS POPULATIONS TO THE END OF THE SPANISH REGIME²

The island of Puerto Rico was known as Boriken to the Taínos, the last group of its indigenous inhabitants in pre-Columbian days. From the description of early Spanish colonisers and the study of archeological data it is known that the Taínos were grouped in relatively small, hierarchically organised, communities and derived their sustenance from subsistence agriculture, fishing and hunting. They had developed relatively advanced techniques for stone, gold and wood crafting and professed animist beliefs. Occasional hostile incursions from groups living in the nearby islands, especially to the east, had whetted their battle skills, a fact which led some Spanish conquerors to describe them as more warrior-like than their counterparts in Hispaniola and Cuba. (Picó: 27).

The Taínos' first contact with Europeans occurred in 1493, when Christopher Columbus disembarked on the southwestern coast of the island during his second voyage to the 'New World'. Spanish colonisation effectively started in 1508 with the establishment of the first conquistador settlement in the town of Caparra, located in the northern part of the island, close to what was later to become its capital city. Forced to work as slaves, the Taínos were virtually extinguished in a relatively short time as a result of sickness, the hardships of coerced labour, armed rebellions, high suicidal rates and flight to the nearby islands. However, some imprints of their life and interaction in the island are still visible in Puerto Rican culture.

Africans brought to work as slaves in the new colony were to provide the fundamental non-European element in the ethnic composition of the Puerto Rican population of later times. The available documentation reveals that during the seventeenth and eighteenth centuries the majority of the Puerto Rican population were either Negroes or mulattos. In the nineteenth century new waves of immigrants contributed further to the demographic configuration of the country. They included Spanish, Corsican, Irish, Scottish, German, Italian and other immigrants of European descent -- including a strongly conservative contingent of French and Spanish loyals fleeing the independence wars of Latin America and the Caribbean --, creoles from the other Antilles, especially Santo Domingo, and settlers that came from the United States oftentimes with their own slave force.³ Historians agree that by the end of the nineteenth century, in their own eyes and to those of the external world, Puerto Ricans had become a distinct people. Of course this 'new people' was not internally homogenous. Although largely racially mixed, racial differences and the tones of skin colour were still socially and economically relevant in Puerto Rican society, with

the predominantly white, European, dominant groups claiming a right to cultural preeminence and to provide the fundamental codes for the interpretation of Puerto Rican culture. Class and gender also constituted the bases for fundamental cleavages and for the differential distribution of opportunity, power and privilege.

After exhausting its mineral deposits (at least those susceptible of exploitation with the technology of the times), during the seventeenth and eighteenth centuries the Spaniards were to regard Puerto Rico basically as a military outpost to help guard the Empire's possessions in the region against the predatory incursions of the other European powers, particularly the French, the English and the Dutch. This was due to the island's strategic position as 'the gate and key to all the other Antilles'. The condition of military bastion of the imperial power in the Antilles was to afflict Puerto Rico henceforward even to our days. This fact, as well as the strict control that Spain imposed on economic and commercial activity in its possessions, encouraged recourse to contraband on the part of the inhabitants of the island as a way of living. A renewed interest in the colony, partly due to its declining hold in other parts of the Empire, drove the Spanish crown to liberalise migration to the island and to ease restrictions relating to economic activity at several junctures during the nineteenth century. This led to significant developments in agriculture and commerce. By the end of the century Puerto Rico was producing coffee, tobacco, cane sugar, and a variety of fruits, grains and vegetables both for internal consumption and export. It also possessed a small, but significant, manufacturing sector based on small or medium scale factory operations in the main cities.⁴

From the sixteenth to the eighteenth centuries the mode of production based on slavery co-existed with production by small farm holders and *agregados*.⁵

However, the slave economy became the dominant mode of production until the early part of the nineteenth century, with independent production and an incipient capitalist mode of production assuming a subordinate position. Towards the end of the nineteenth century an economic transformation had taken place. A strengthened capitalist mode of production competed with a non-capitalist plantation economy for preeminence, while the independent productive activity of small farmers had started to decline.⁶

Political institutions and the relationship to the metropolis throughout most of the colonial period were characterised by an extreme centralism. (See Trías Monge 1980: 12-30). In the metropolis itself, until the nineteenth century absolute military and civilian authority rested with the Castillian monarchs, while the *Cortes* (or Parliament) exercised very little power, and even then, at the Crown's discretion. From 1524 to 1834 a Royal and Supreme Council for the Indies counseled the Monarch --- with varying degrees of influence throughout the centuries -- on matters concerning the legislative, executive, judicial, military, commercial, and ecclesiastical affairs of the colonies. (Serrano Geysls 1986: 428-429). In the colonies themselves executive, legislative, judicial and military power was exercised by a Captain General or Governor, who operated as the Crown's representative. In Puerto Rico the creole elite participated very little in the government of the colony, except for a limited influence exercised at the municipal level. (See *Id.*: 429). During the nineteenth century Puerto Rico had a Provincial Delegation, with largely advisory and administrative official functions, but in effect subordinated to the Governor. (*Ibidem*).

Starting with the Cádiz Constitution of 1812, the nineteenth century would witness several attempts at introducing constitutional government in Spain, with varying degrees of temporary success, depending on the shifts of the balance of power between the conservative monarchists and the liberal reformers. New Constitutional charters were henceforth adopted in 1834, 1837, 1845, 1869, and 1876. The most liberal of the constitutional reforms was that of 1869. The various reforms were usually designed to reestablish the power of the *Cortes* and increase political and civil liberties at home. Some of them also purported to liberalise the colonial regime. However, in practice, the constitutionalist reforms in the metropolis normally had very little impact on colonial institutions, which, except for brief periods, remained largely untouched. Much of the political activity of the creole elites was to be directed at efforts to gain concessions from Spain regarding self-government and the liberalisation of the strictly regulated economic and commercial fields. In 1868 a radicalised sector of that elite, with some support from the peasantry and rural laborers, led an armed insurrection in the mountain towns of Lares and Pepino (now San Sebastián) and proclaimed the Republic of Puerto Rico. The revolution, known as the *Grito de Lares*, was suppressed rather swiftly by the Spaniards, but was to become a symbol of resistance and struggle for the independence movement even to our days.

The class structure in late nineteenth century Puerto Rican society may be depicted in the following manner. The upper classes included: a substantial group of landowners (*hacendados*), made up mostly of creoles or Puerto Ricans, and, to a lesser extent, of recently arrived immigrants of European origin; a group of merchants, most of whom were Spaniards; a smaller group of city factory owners;

cadres of government bureaucrats, military officers, clergy and others closely linked to the colonial administrative apparatus; and a small group of independent professionals (lawyers, doctors, teachers, etc.). The popular classes included artisans, a small, but growing, urban proletariat, agricultural free-wage labourers and *agregados*, peasants and groups of middlemen.⁷ Throughout the entire structure of social stratification women had a position of subordination, which included being legally and effectively excluded from many areas of economic, political, social and cultural life.⁸

Although there is controversy among Puerto Rican social historians to this effect, it seems that the landowners, who undoubtedly were politically subordinated to the metropolitan government, enjoyed a relative social hegemony over many sectors of the subordinated classes and social groupings.⁹ By and large the landowners tended to view their interests as opposed to the those of the Spanish merchants, closely identified with the metropolitan power, and to those of the colonial and military bureaucracy, who depended from metropolitan authorities in Spain. In the political struggle that erupted during the nineteenth century, the landowners were able to draw support from some sectors of the popular classes, as they succeeded to a relative degree in presenting their interests as the general interests of the country in conflict with the economic and political power of the Spanish government. (See Rivera Ramos 1981: 31). As Quintero Rivera has observed, referring to the ideology and political program of the Party that represented fundamentally the interests of the landowners:

Its two great issues in this struggle were free exchange and political autonomy, i.e., the constitution of a Puerto Rican state politically and economically autonomous within the Spanish nation...In contradiction with the semi-feudal *weltanschauung*, bourgeois liberalism provided the ideological tools for self-affirmance of the landowners *vis a vis* the political absolutism of the Spanish colonial government: to absolutist government they opposed the principle of reason and liberty; to a government of privileges -- oriented to the defense of Spanish commercial interests -- they opposed the principle of equality before the law. Its two great issues in the political struggle, free exchange and self-government, perfectly coincided with this ideology. (1976: 17-18, translation supplied).

This ideological formulation was also very much in line with the world view of the independent professionals, many of whom had studied in Europe or the United States and had become imbued with the liberal ideas circulating in those societies at that time.

On the other side of official party politics stood the Spanish unconditionals -- mostly the Spanish merchants and the bureaucrats -- who defended the colonial regime and the preservation of the political and economic privileges of their members.

The popular sectors, on the other hand, had their own traditions of political struggle, going back to the Taíno rebellions, passing through the slave revolts, the eruptions of localised social upheavals against the oppressive practices of the Spanish merchants, the many forms of resistance against attempts at disciplining the labour force (for example, through the infamous *libretas de jornaleros*¹⁰), and extending to the emerging agitation and economic and political organisation of the artisans and urban workers, with their support for anarchist and socialist ideas at the end of the

nineteenth century. In these struggles their opponents had been, at different moments and for different reasons, the creole and (especially in the nineteenth century) liberally oriented *hacendados* as much as the conservative and unconditional merchants and colonial bureaucrats. In some instances, as during the *Grito de Lares*, sectors of the popular classes would lend their support to the *hacendados*. Another important pole of social and political struggle at the end of the century was to be provided by the incipient feminist movement, with its demands, among other things, of suffrage rights for women, demands which found strong opposition from the male dominated class formations and political institutions of the times.¹¹

The normative structure of the legal system during most of the colonial period was provided by a series of charters, laws, decrees and orders, known collectively as *Derecho Indiano*, enacted especially for Spain's overseas possessions. The most salient institutional feature of the system was the fusion of judicial, administrative and even military functions, exercised by the same officers, from the lowest level of the colonial apparatus to the Governor, who was the head of the system. Appellate recourse could be had to the *Real Audiencia*, a body with judicial and administrative functions. But since Puerto Rico did not have an *Audiencia* of its own until 1832, appeals from the island were heard by the *Audiencia* of Santo Domingo and, later, that of Cuba. Since 1524 review of the decisions of that body could be sought in the *Consejo Real de Indias*, in Spain, and, starting in 1834, in the Supreme Court of Spain and the Indies, which superseded the *Consejo*. Appeals, however, proceeded very slowly and, in effect, the power of the Governor, for most of the period, tended to go unchecked.

Starting in 1832, many times reflecting political developments in Spain itself, throughout the rest of the century there were successive reforms that gradually had the effect of transforming the normative, institutional and, to a lesser extent, practical features of the system. One important development was an evolution towards a separation of the judicial function from the executive and legislative powers, accompanied by the attempt at establishing the judiciary career. In 1832 Puerto Rico acquired its own *Audiencia Territorial*, which in 1861 was formally freed from direct intervention by the Governor. A further reform in 1855 left the *Audiencia* with appellate jurisdiction in civil and criminal cases, original jurisdiction in some controversies, the faculty to issue advisory opinions at the request of the Governor, the general supervision of the judicial system, and the power to administer examinations to those aspiring to the legal profession. The Spanish Constitution of 1876 finally established the principle that the overseas territories were to be governed essentially by the same body of laws governing the metropolis, with those modifications required by their particular circumstances. This provision, as well as other previous legal developments, allowed for the extension to Puerto Rico of the basic codes and procedural legislation in effect in Spain: such as, a Civil, a Commercial and a Criminal Code, the Codes of Civil and Criminal Procedure, a *Ley Hipotecaria*,¹² and an Organic Law for the Court System. A unified Bar Association was established in 1840. Procedures were also established for the provision of free legal assistance to those without means.¹³

By the early 1890's Puerto Rico had in place -- at least from the point of view of its normative and institutional structure -- a relatively modern Western legal system based on the European continental civil law tradition. Whether this formal structure

had represented in effect an advance in the dispensation of justice in the country is something that can be debated. A leading Puerto Rican Constitutional historian and former President of the Supreme Court of Puerto Rico has argued that the formal developments were not matched by changes in the basic attitudes, values and practices that had characterised the legal process in previous times. Authoritarianism and even violent repression of dissidents was still a prevailing feature of the colonial regime. Judges, many of whom were foreigners, did not show much enthusiasm to right the wrongs of the authorities and protect the basic rights of the population. Judicial independence, he concludes, was more an ideal than a consummate fact during this time. (See Trías Monge 1978: 43-44). The repressive nature of the Spanish state apparatus at the end of the century has been brought out also by social historian Negrón Portillo, who points to the fact that after 1870 the notorious Spanish Civil Guard became an important instrument for the surveillance of the restless rural population and the suppression of dissidence. (1987: 3-5). As for the popular perception of judges and the judicial system, it seems that the reforms did not do much to eradicate the idea that the legal system was more an instrument for oppression than for the vindication of rights. Trías Monge quotes the leading representative of the Party of the *hacendados* complaining that peasants thought that 'laws are something misterious ellaborated not with the purpose of protecting [them], both with the aim of oppressing [them]'. The result, Trías concludes, was a state of alienation and indifference to the law and its representatives. (*Id*: 44). This fact, which is a partial indication of the class (and patriarchal) nature of the legal system, has been overlooked oftentimes by many who, in later times, would look back to the

institutions of the Spanish regime with nostalgia as a reaction to the new domination descended upon Puerto Ricans with the military occupation of 1898.

Reforms also took place in the sphere of political relationships with the metropolis. Largely as a result of the Cuban insurrection of the 1890's, and, partly due to pressures from the United States and to the political activity and manouvering of the Puerto Rican autonomists, Spain conceded Cuba and Puerto Rico an Autonomous Charter in 1897. The Charter is generally regarded as a significant step forward in the obtention of self-government for Puerto Rico. (See Trías Monge 1980: 131-134). It provided for the continued representation of Puerto Ricans and Cubans in the Spanish Parliament, the equality of rights between Spaniards and Antillians, universal suffrage, the establishment of an insular Parliament (with an elective Chamber of Representatives and an Administrative Council) and the formation of a parliamentary government, with ministers accountable to Parliament. The insular government was delegated important powers. At the same time, however, its effective scope of action was restricted with countervailing limitations both in theory and in practice. (See *ibidem*). After elections, the insular Parliament was inaugurated on 17 July 1898. Two days later it held its first ordinary session. The Spanish-Cuban- American War, however, was already under way. United States troops invaded Puerto Rico on 25 July 1898.

C. THE UNITED STATES' EXPANSIONIST DRIVE¹⁴

1. From continental to overseas expansion

The United States' expansionist drive and eventual emergence as a world imperial power may only be explained in terms of a complex articulation of forces, motives and determinants whose development, precise configuration and relative weight have varied through time since the early days of the Republic. They include economic, political, social, cultural and ideological forces as well as international and domestic concerns.

The American Republic was born and constituted through expansion. In fact, expansion throughout the North American continent and beyond was envisioned even before the Republic was established. The Articles of Confederation authorised the admission of Canada and other colonies if such admission were agreed to by nine States. In the Treaty of Alliance which Benjamin Franklin concluded with France in 1778 there was a provision to the effect that in the event that the United States succeeded in the 'reduction' of the British empire in northern America or the islands of Bermudas, such territories should be confederated with or made dependent upon the United States.¹⁵ As Judge Fuller expressed it in his dissenting opinion in *Downes v. Bidwell*: 'The rising sun to which Franklin referred at the close of the convention, they well knew, was that **star of empire**, whose course Berkeley had sung sixty years before' (p 374, emphasis added).

Thus the expansionist course throughout the continent was launched. First there was the search for lands, furs and gold, and then the efforts to extend the plantation economy and the slave trade. Throughout, the process was consummated at the expense of the European powers (Britain, France, Spain) and Mexico, and, above all, of the indigenous populations of North America. Expansion in those early days was not only a means to further the process of capital accumulation, but also a convenient escape valve to export to the frontier, through a constant westward stream of settlers, the many pressing social problems attendant to ever increasing populations in the eastern states.

But the vision of empire extended beyond the continent as well. By the mid 1850's Thomas H. Benton, ex-senator from Missouri, referring to the process of expansion, summarised what some may have considered an extreme view, but which was not at all uncommon:

...vast and varied accessions are still expected. Arizona has been acquired, fifty millions were offered to Mexico for her northern half, to include Monterey and Saltillo; a vast sum is now offered for Sonora and Sinaloa, down to Guaymas; Tehuantepec, Nicaragua, Panama, Darien, the Spanish part of Santo Domingo, Cuba, with islands on both sides of the tropical continent. Nor do we stop at the two Americas, their coasts and islands, extensive as they are, but circumvolving the terraqueous globe, we look wistfully at the Sandwich Islands, and, on some gem in the Polynesian group, and plunging to the antipodes pounce down upon Formosa in the China Sea. Such were the schemes of the last administration, and must continue, if its policy should continue. Over all these provinces, isthmuses, islands, and ports, now free, our Constitution must spread...overriding and overruling all anti-slavery law in their respective limits, and planting African slavery in its place, beyond the power of Congress or the people there to prevent it.¹⁶

Senator Benton's statement reflects the degree to which the expansionist movement and mood in the United States in the years preceding the Civil War were related to the slavery question.

American statesmen and politicians had manifested specific interest in the Caribbean region even before the constitution of the Republic. Before the American War of Independence, Benjamin Franklin had advised England to take possession of the island of Cuba. (Trías Monge 1980: 135). After independence, five of the six first presidents of the Republic, with the exception of Washington, were actively concerned with the question of the desirability of acquiring Cuba. (*ibidem*). Worries about the possibility of that island's falling into the possession of one of the rising European powers, notably, England or France, figured prominently in the factors that led to the proclamation of the Monroe Doctrine in 1823. (*Id*: 136). John Quincy Adams, Monroe's successor to the Presidency, referred to the Caribbean islands as the 'natural appendages' of the North American continent (Liska 1978: 123). But it was Adams himself who expressed most clearly, that, desirable though the annexation of Cuba, and perhaps other islands in the region, may have been, the United States was not ready still to tackle the overseas annexationist venture. (See Trías Monge 1980: 136).

Just before the Civil War, however, the United States completed its continental expansion.¹⁷ After the War a renewed interest towards the Caribbean, as well as the Pacific, emerged among merchants, financiers, statesmen and members of the military elite. This interest was buttressed by the vast sums of capital accumulated by the steel and arms manufacturers and traders during the War, a situation which

fostered the search for new sites for investment and expansion. (See Bosch 1983: 636). A steady stream of private investment started to move towards the Caribbean region, leading to the establishment of agricultural, manufacturing, financial and commercial concerns belonging to American corporations or individuals.

The United States Government also made efforts to implant an American presence in the region through the possession of territories or bases. Early attempts at acquiring possessions in the Caribbean included: (a) a treaty signed by Secretary of State William H. Seward to buy the Danish West Indies in 1867 (not ratified by the US Senate); (b) a proposal to authorize the establishment of protectorates over Haiti and the Dominican Republic in 1869 (defeated in the House of Representatives); (c) a proposal by President Grant to annex the Dominican Republic in 1870 (rejected by merely a few votes in the US Senate); and (d) efforts to establish military bases in Mole St. Nicholas in Haiti and Samaná Bay in Santo Domingo (halted by adverse popular reaction in those countries). (See Healey 1988: 30-31; Bosch 1983: 635-636). Repeated efforts were also made to secure the construction of an isthmian canal under the control of the United States. (Healy 1988: 29).

The expansionist drive gained momentum in the 1890's.

By that time American economic interests in the Caribbean region were substantial. In 1893 trade between the United States and Cuba alone amounted to over \$100,000,000 (Beard 1955: 21). By 1897 United States investment in the West Indies and Central America rose to nearly 70 million dollars. The economic interests of the US in the region included agricultural enterprises (especially sugar and bananas), banking and finance, widespread participation in railroad building, and

merchandising. In 1894, for example, 87% of Cuba's exports went to the United States and 38% of its imports came from that country. (See Healey 1988: 9-13, 15).

Against that background, a convergence of factors gave the final impetus to the overseas territorial expansion of the American empire. One note, however, is warranted. Although related, a distinction must be made between the expansionist movement through economic penetration overseas, which had effectively begun well before the 1890's, and the formulation of a colonial project which entailed the acquisition of extra-continental territory. Both modalities of expansion certainly shared some common determinants: for example, the ever increasing accumulation of capital appurtenant to an expanding economy that, despite its recurrent crises, was reaping the benefits of rapid technological advances and that had been transformed, particularly after the Civil War, from a predominantly agricultural, land-based, economy to an industrial and financial one. Yet, as some of the opponents of overseas territorial acquisitions would argue later, economic expansion did not necessarily require the acquisition of colonies. The advocates of 'free-trade imperialism' would have preferred the benefits of economic hegemony without the costs and risks of direct colonial control. That was not, however, the view that prevailed within the American dominant and ruling groups at the end of the nineteenth century and the country soon found itself competing with European powers, Japan and Russia in the *fin de siecle* scramble for colonial possessions.

The factors that led to that result may be summarised as follows. First, there was the overarching preoccupation with the search for new markets. A crisis of overproduction had hit the country since the early 1890's and many leading business people and government officials entertained the perception that the only solution to

the crisis was the opening up of new markets for American products beyond the North American continent. The leading European countries were undergoing a new current of protective nationalism, which included the imposition of tariffs to foreign products, and many parts of the world, especially Africa and the Middle East, had come under, or were targeted for, European influence. The United States, therefore, came to regard the Far East and Latin America, including the Caribbean, as the 'natural' outlets for the increasing stock of American commodities and as sites for further investment. (See Healey 1988: 35) .

A second, interrelated, factor was precisely the intense competition in the international field that ensued as a 'new imperialism' emerged in Europe, Japan and Russia for generally similar reasons. Britain, France and Germany were expanding their power and influence throughout the world through various mechanisms, including the acquisition of territories and ports in Africa, parts of China and other regions. Policy makers and expansionists of various sorts in the United States repeatedly expressed fears that the country would be left behind, economically, politically and militarily, if it did not embark on a similar course. Added to these fears, were the arguments that, if abandoned to the Europeans, particularly the Germans, the West Indies and Central America could be used as platforms from which to launch an eventual attack on the United States. This perceived threat, however real or imaginary, probably served as a powerful instrument of persuasion in a country whose ruling classes had apparently undergone a crisis of self-confidence -- transmitted to the population at large -- during the economic jolts of the early 1890's.¹⁸ Taking into consideration this international factor, George Liska has argued that United States expansion into the Caribbean and the Pacific at the end of

the century, in addition to its predatory character (related to the economic determinants of expansion), had a markedly preemptive nature, that is, it responded, from a 'security' perspective, to the perceived need to exclude other powers from the region. (Liska 1978: 117 ff.)¹⁹ In the end, the West Indies and Central America were to become new pawns in the imperialist chess game of the more industrialised countries and the United States was to assume the principal role as a hegemonic force in the region.

The 1890's also witnessed in the United States the emergence of a new navalist ideology with very articulated and influential advocates. The most prominent among these was Captain Alfred T Mahan, a former President of the Naval War College. In his books and numerous articles he urged the United States to strive for naval supremacy in the world. Mahan's theory propounded, in essence, that foreign commerce was essential to the welfare of any great nation; that in order to protect maritime routes, a world power needed to have a strong naval force; to make viable such a force it was necessary to secure overseas bases and coaling stations; and the possession of colonies would facilitate the control over such installations. (See Pratt 1936: 12-17, 22; Healy 1988: 29; Estades 1988: 26-31). Mahan pointed to the Caribbean and the Pacific as the most suitable places for the establishment of naval bases and coaling stations. By the 1890's Mahan's strategic program included: (a) the construction of an inter-oceanic canal in the Central American isthmus; (b) the establishment of a chain of naval bases in the Caribbean and Central America; and (c) the growth of the United States Navy. (Estades 1988: 31). He also supported the annexation of Hawaii as essential for the defense of

American commercial and strategic interests in the Pacific. (Pratt 1936: 152-154, 319).

Mahan had close connections with prominent expansionists of the time, such as Theodore Roosevelt and Senator Henry Cabot Lodge, whose own proposals were to reflect Mahan's essential theses. In 1895 Senator Lodge called for a much enlarged navy, acquisition of a naval base in the West Indies, some form of US dominion over Cuba, and construction of an isthmian canal under the control of the United States. (See Healy 1988: 36). The Republican Party's Platform of 1896 advocated the construction of an isthmian canal, the continued enlargement of the US navy and a complete system of harbour and coast defenses. (Healy 1988: 36; Beard 1955: 22-23). The newly organised National Association of Manufacturers also backed the idea of an American controlled isthmian canal. (Healy 1988: 36).

Mahan's theses and the related proposals put forward by business, government and military figures and organisations evidence the inter-relationship between economic and military interests regarding the expansionist movement towards the Pacific and the Caribbean. However, it seems that in the latter region military objectives had even a heavier relative weight than in the Pacific theater, where the concern appeared to be more centrally economic in nature. In any event, military considerations can be considered the main determinant in the decision to acquire specific territories and, eventually, in the establishment of direct colonial control, as opposed to informal, or indirect, economic or political hegemony. Such was to be the case with Puerto Rico. As Puerto Rican historian María Eugenia Estades has noted, the reason for this is that direct control of Puerto Rico was to provide

uninhibited access to its territory, its resources and even its people for military purposes. (Estades 1988: 219).

The extent to which military objectives were related to colonialism in the Caribbean was to be demonstrated, in part, by the number of US military and defense departments and agencies which, after the Spanish American War, were entrusted with the direct handling of administrative, diplomatic and political affairs in the region.²⁰

Two additional sets of domestic factors contributed significantly to the expansionist impetus: the dynamics of intra-class politics within the American ruling class and the growing social unrest fuelled by the economic crises of the 1890's.

The American ruling class at the end of the nineteenth century was a composite of diverse fractions that both shared long-term interests and diverged on their perceptions of their immediate needs and on the strategy and means to achieve the objective of continued economic growth and the maintenance of power. They included groups of large scale farmers, industrialists, financiers, merchants, a rising military and bureaucratic elite and what amounted to a 'self-perceived hereditary aristocracy' (see Liska 1978: 183) whose roots went back to the landowning and mercantile elites that had shaped the nation during the revolutionary and post-revolutionary period. Closely connected to them were an influential and highly visible group of professionals and intellectuals that helped both to articulate and mold the prevailing and competing views. Varying degrees of cooptation and fusion among the groups sometimes blurred the distinctions and operated to establish links and to facilitate the sharing of attitudes and insights. Perceptions of the past and future of the nation differed even within these sub-groups themselves, as did their reaction to

the growing demands from the subordinated classes. The main actors within the subordinated groups seemed to be a restless rural population and a largely immigrant, non-Anglo-Saxon, non-Protestant urban proletariat. (See Liska 1978: 179).

According to Liska, what he calls the 'plutocrats' (the industrial, commercial and financial bourgeoisie), while entertaining differences among themselves, generally preferred informal economic expansion, that is, the exporting of American capital and goods to foreign lands, without territorial acquisition or direct political meddling; while the 'neo-aristocrats' predominantly favoured territorial expansion and direct colonial administration (p 175).²¹ Included in the latter group were the 'naval aristocracy' (of which Mahan was a prime example) and a 'younger "Tory" generation' (whose conservative and 'progressive' tendencies were represented by Henry Cabot Lodge and Theodore Roosevelt, respectively) that 'mixed domestic reformism and foreign policy expansionism' (p. 179). According to Hofstadter's interpretation, the expansionist statesmen and intellectuals 'were largely drawn from a restless upper-middle class elite that had been fighting an unrewarding battle for conservative reform in domestic policies and that looked with some eagerness toward a more spacious field of action' or 'larger stage' (Hofstadter 1955: 68, 60). Pratt has asserted that 'the need of American business for colonial markets and fields for investment was discovered not by businessmen but by historians and other intellectuals, by journalists and politicians' (quoted in Hofstadter 1955: 60). Although stating only a partial truth, for many business interests did portray expansion as a necessary step both before and after the Spanish-Cuban-American War, the statement reflects the degree to which the American colonial venture was theorised, articulated, promoted and even organised by a powerful group of what in

Gramscian terms could be called 'organic intellectuals' of the American ruling class of the time.

Whatever initial opposition to direct colonial acquisitions there was among sectors of the business community during the 1890's was soon to be overcome after the outbreak of the Spanish American War, as many rushed to seize the opportunities for economic gain opened to them by the capture of the new territories. (See Hofstadter 1955: 61 ff). As Liska explains it, the 'composite' ruling class made a transaction whereby the aristocrats would help contain domestic instability and promote the search for new markets through expansion.

The American aristocracy would extend support for the survival of the American plutocracy via expansion of foreign markets and containment of the domestic popular mass; in exchange the economic elite would support the political revival of the social elite via effective empire-building and reform-boosting action and rhetoric. (Liska 1978: 185).

The expansive foreign policy that would thereafter follow would be justified as the 'morally superior alternative to stagnation and remedy against the dangers of sociopolitical anarchy'. (*ibidem*).

The 1890's were years of increasing militant popular action, which included labour organising and the rising influence of rural populism, socialism, anarchism and other resistance and transformative struggles and movements. The relationship between the justification of a policy of expansion and the objective of placating social unrest at home was evident throughout the public discussions of the issue. As the editor of the *Louisville Courier-Journal* would express it:

From a nation of shopkeepers we become a nation of warriors. We escape the menace and peril of **socialism and agrarianism**, as England has escaped them, by a policy of **colonization and conquest**. From a provincial huddle of petty sovereignties held together by a rope of sand we rise to the dignity and prowess of an **imperial republic** incomparably greater than Rome... We risk Caesarism, certainly, but even Caesarism is preferable to **anarchism**. We risk wars; but a man has but one time to die, and either in peace or war, he is not likely to die until his time comes... In short, anything is better than the pace we were going before these present forces [the acquisition of colonial territories] started into life... (quoted in Hofstadter 1955: 67-68, emphasis added).²²

By the end of the 1890's public discussion and political and bureaucratic planning had already given shape to a relatively coherent project for expansion. It included: the enlargement of the US Navy, the acquisition of colonies, the establishment of bases and coaling stations in the Caribbean and the Pacific, and the construction of an inter-oceanic canal in the Central American isthmus. The opportunity for territorial expansion came with the outbreak of the Spanish-Cuban-American War in 1898.

The explosion of the American warship *USS Maine* on February 15, 1898, in the port of Havana is generally regarded as the starting point of the War. However, the evidence unearthed by historians has established that planning and preparation for the conflict had started in the US Naval War College as early as 1894. Between 1896 and the summer of 1897 American naval officers had elaborated three successive war plans whose common elements included: a blockade of Cuba and Puerto Rico, a land operation directed to Havana, the occupation of Puerto Rico, a blockade or direct assault on Manila, in the Philippines, and naval incursions in

Spanish waters. (Estades 1988: 40-41). On December, 1897, the Undersecretary of the US War Department sent instructions to Army General Nelson A. Miles, who was to become the chief commander of the armed forces during the War, concerning his 'political mission' upon the outbreak of the programmed hostilities. He advised Miles that the campaign would probably commence on October, 1898, unless events forced the US to precipitate the action. (Bosch 1983: 621-622).

Cuban insurrectionists had been waging a prolonged war of independence against Spain in that island. Their representatives had been actively engaged in the mobilisation of support for their cause in the United States. As the decade ended there were repeated calls in the American press for an American intervention to expel the Spaniards from Cuba. The motives, however, varied. Largely as a result of the successful propaganda effort of the Cuban revolutionaries, many Democrats and Populists favoured intervention to help secure the independence of Cuba. The Republicans, with some exceptions, saw it as an opportunity to initiate the process of expansion and exert the longed control over the largest of the Antilles. The explosion of the *USS Maine*, that resulted in the death of scores of US crewmen, was blamed on the Spaniards by the American yellow press. A feverish, jingoistic, campaign for US armed intervention developed. War was formally declared on April of 1898. The War came to a swift end after the American forces occupied Cuba, Puerto Rico, the island of Guam (in the Marianas), and Manila, in the Philippines (also a Spanish colony at the time). The Peace Treaty was signed on December 10, 1898, in Paris. The prizes for victory for the United States included the acquisition of Puerto Rico, Guam and the Philippines and, for all practical purposes, effective political control

over the soon to be formally independent Republic of Cuba. The United States had entered the world stage as an imperialist power.

2. The ideology of expansion

A certain rhetoric, a particular discourse of power, distinctive notions of history, society, order, progress and of the relations among peoples served as justifications and contributed to provide impetus to the expansionist drive. Ideology -- as the set of perceptions, assumptions, ideas, beliefs, explanations and values dominant at a given time and place or within particular social classes or movements -- is not just an epiphenomenon, a mere distortion or reflection of underground material forces. As Marx pointed out, when ideas grasp the imagination of the masses they become a powerful material force in themselves. (Lustig 1982: xi).²³ In this sense, the ideology of expansion in the United States -- as a 'power in the domain of consciousness' -- must be included among the factors that converged to produce the imperial enterprise. It is a factor, however, that itself must be explained in reference to socio-historical experience and as constituted through a multi-dimensional process. As all ideology, the ideology of expansion was not necessarily coherent, had contradictory elements, was not universally accepted, and different groups in American society, including the various fractions of the ruling class, related to that ideology in different ways. Nevertheless, it is possible to identify some of its most important constituent elements, many of which were either widely shared or forcefully propounded by the advocates of expansion in one form or another. It is to those elements that the attention is now turned, however briefly.

One very important implicit assumption that can be extricated from the variety of arguments for continued expansion, and that seems to have been a fundamental feature of the ethos of the times, was a certain ingrained notion of an inherent 'right' to expand that had accrued to the American people. This was probably rooted in a perceived 'tradition of expansion', developed through a century of an almost continuous practice of territorial enlargement throughout the continent. The collective 'habitus'²⁴ of expansion had created its own justificatory principles, an imperial 'common sense' that was most prevalent among the self-perceived hereditary aristocracy that, more than any other group, felt attached to the origins of that tradition through very concrete ancestral and material ties. The renewed political ascendance of that aristocratic element at the end of the century, with new and vigorous intellectual spokesmen, provided the needed justificatory discourse that both related to the past and articulated a vision of the future -- a future now projected as linked intimately to the newly found powers of an expanding industrial, commercial and financial society.

This 'right to expand' was in turn predicated on a very strong belief on the principle of the inequality of peoples. (See Healey 1988: 288). A belief that many thought was buttressed by History itself. After all, was not the world replete with contemporary examples of peoples living in patent conditions of inequality, and were not the Anglo-Saxon Americans one of the few privileged groups who, through hard work, dedication, special 'natural' endowments and, above all, divine design, were enjoying the blessings of the most advanced economic and political institutions? The dominant view was articulated in a series of binary oppositions: the civilised and the barbarous, the prosperous and the stagnant, the rational and the irrational, the

hardworking and the indolent, the self-disciplined and the disorderly, the meritorious and the undeserving. The categories were constructed in direct reference to race: the white, Anglo-Saxon race was the privileged pole in the discourse of power; the 'others', the non-white and non-Europeans, those of mixed races, were to be in the receiving end of the exercise of that power. Those 'others' were the barbarous, the stagnant, the irrational, the indolent, the disorderly and the undeserving, more fit to be governed than to govern. There was also a geography of power. Whereas the temperate zones were thought to be more conducive to hard work, self-discipline and, therefore, capacity for self-government and economic and scientific progress, the 'tropics' were considered to be breeders of lazy, ignorant and inferior populations incapable of self-government and condemned to be governed from outside in order for progress and civilisation ever to flourish in their midst. (See Healey 1988: 65-66).

The notion of racial superiority had been present in American life since colonial times. The male, white, Anglo-Saxon ruling elites had had ample occasion to put in practice domestically what was later to become the guiding ideology of the nation's imperial career. As Robin Weston (1972) has pointed out, the attitude that would permeate the metropolitan state's dealings with the peoples of its insular possessions after 1898 had been shaped through white America's experience with, and treatment of, the Native Americans, the Chinese, the Japanese, the Negroes and, we may add, the Mexicans and, with varying degrees, the non-Anglo-Saxon European immigrants of working class and peasant origin. Furthermore, in a convenient interplay of dialectical reenforcement, the policies sustained abroad would, in turn,

be used as justification for the continued subjugation, on racial, ethnic and social grounds, of the various subordinated groups at home.

John W. Burgess, a leading political and constitutional theorist of the times, whose classes at Columbia University were attended, among others, by Theodore Roosevelt, would express it patently:

...The North is learning every day by valuable experiences that there are vast differences in political capacity between the races, that it is the white man's mission, his duty, and his right to hold the reins of political power in his own hands for the civilization of the world and the welfare of mankind. (Burgess 1902: p. ix, quoted in Weston 1972: 16).

For Burgess, 'the Teutonic nations' were 'intrusted, in the general economy of history, with the mission of conducting the political civilization of the modern world', by taking that civilization 'into those parts of the world inhabited by unpolitical and barbaric races; i.e., they must have a colonial policy'. (Quoted by Pratt 1936: 8-9).

'Right', 'duty', 'mission', those were the key concepts in the ideology of Manifest Destiny, that special calling of the 'superior Anglo-Saxon race' to spread the gospel and practices of civilisation throughout the world.

Social Darwinism added a new philosophical base to the discourse of imperial power. The 'survival of the fittest' was not only the inescapable law of the natural world, but of social and international life as well. In the struggle for international survival and supremacy only the strong would prevail. This was not merely a distorted application of the renowned English scientist's theory to the political field. Darwin himself had encouraged the notion with his characterisation of the American

as 'the heir of all the ages, in the foremost files of time' and with his statement in *The Descent of Man* that: 'There is apparently much truth in the belief that the wonderful progress of the United States, as well as the character of the people, are the results of natural selection'. (Quoted in Pratt 1936: 3, 4). The competition for new markets and territories that was the hallmark of the 'new imperialism' of the end of the century provided a material justification to the Social Darwinists of the day.

The United States must do as the other imperial powers, they argued, lest it become a second rate nation threatened with eventual extinction. The Social Darwinist perspective included a peculiarly American corollary which, according to Liska, had been present since the early days of the Republic: the postulate that weak powers must be unavoidably replaced by a stronger power. This served to 'justify interposing the United States in the chain of succession', as was to be demonstrated with particular clarity in regard to Spain in the insular territories in the Pacific and the Caribbean. (Liska 1978: 115).

As Liska has noted, underlining the American justification of expansion was a peculiar conception of security: one that equated self-preservation with self-aggrandizement, safety with total immunity, sustenance with unlimited growth. (*Ibidem.*)

Present throughout, particularly among the new industrial, commercial and financial elites and their organic intellectuals was the economic ideology of liberal capitalism: the unquestioned belief in 'free enterprise' and the promotion of the idea that investment in foreign lands would be necessarily beneficial for the investor and the 'host' country alike. Experience would later refute this axiom, as it would become more and more evident that in the case of the poorer countries of Latin

America and other regions the greatest beneficiaries by far would almost invariably be the foreign capitalists and, to a lesser degree perhaps, the local ruling classes. Of course, the coupling of economic expansion and colonial acquisitions at the end of the century proceeded regardless of the fact that there might be certain contradiction between the notion of free-trade and the imposition of economic and political control -- but those were finer distinctions that could not stand in the path of American national growth and development.

The ideology of expansion at this stage was predicated on a certain vision of order, tied to the rationality of capital and the market and to the institutions of liberal government, a vision obsessed with stability as the cornerstone of progress, but stability conceived as the unquestioned acceptance of hierarchy and subordination under the normalising control of the institutions of capital, patriarchy, racism and elitist representative politics.

This vision of order would be used repeatedly as a justification for outright intervention in the internal affairs of the Caribbean and Central America and even for the establishment of diverse forms of prolonged political and military control.

Just as the American Revolution and the founding of the nation had been permeated by the early rhetoric of the Enlightenment -- with its emphasis on a particular conception of freedom, reason, and progress -- so the new phase of imperial republicanism, very much like its European counterpart, was to incorporate the consummate discourse of latter day Enlightenment culture: a true 'imperial culture...whose forward march of power and knowledge, of rationality and control led spatially across the globe while penetrating internally with new modes of

regimentation' (Nederveen Pieterse 1990: 21). As the referenced author perceptively suggests, this is inevitably linked to the question of hegemony.

Both Liska and Healy have made the point that although in many respects the American ideology of expansion was not unlike that of European imperialism²⁵, the former was provided with an added intensity and poignancy due to the deep-seated belief in the uniqueness of the American polity and the experiment which it was thought to represent (Liska 1978: 115; Healey 1988: 288).

3. The 'anti-imperialist' position

The acquisition of new territories overseas opened up an intense controversy in the United States regarding the desirability and constitutional legitimacy of holding colonies. The debate took place in academic journals, the public press, Congress, and eventually the courts.²⁶ During the debate a group of self-denominated 'anti-imperialists' took it upon themselves to campaign against the United States' pursuing a policy of overseas territorial expansion. Many of its members had been actively engaged in the successful opposition to previous attempts at extra-continental territorial enlargement, such as the proposed annexation of the Dominican Republic in 1869-70.

Prominent among this group was Carl Schurz, a liberal German-American, with a long involvement in journalism and politics, including a stint as senator from the state of Missouri. In 1899 Schurz delivered a lecture at the University of Chicago which contained what was in effect an archetypical statement of the 'anti-imperialist' stance.²⁷ For that reason it is worth summarising.

The decision to expand or not, argued Schurz, would affect the future and character of the nation, which had been so far dominated by the idea of government by popular consent. There was a difference between the new and the old territories. All the former acquisitions: were on the continent and, excepting Alaska, contiguous to American borders; had been thinly populated and were situated in the temperate zones ('where democratic institutions thrive[d]' and where Americans could emigrate in mass); could be organized as territories expected to become states, with populations 'substantially homogenous' to that of the United States; and they did not require an increase in the army or the navy either for their subjection or defense. The new territories, on the other hand: were beyond the seas, not contiguous to the continent; were situated in the tropics, where Germanic peoples had not migrated in mass to stay; were densely populated with races 'to whom the tropical climate is congenial -- Spanish creoles mixed with negroes in the West Indies, and Malays, Tagals, Filipinos, Chinese, Japanese, Negritos, and various more or less barbarous tribes in the Philippines'.

The question, as Schurz put it, was: What shall the United States do with such populations? In order to keep the new territories, there were only two alternatives: accept them as states or govern them as colonial dependencies.

The fundamental objection to bring them in as states was that they would then participate in the government of the Republic.

If they become states on an equal footing with the other states they will not only be permitted to govern themselves as to their home concerns, but they will take part in governing the whole republic, in governing us, by sending senators and representatives into our Congress to help make our laws, and by

voting for president and vice-president to give our national government its executive. The prospect of the consequences which would follow the admission of the **Spanish creoles and the negroes of West India islands and of the Malays and Tagals of the Philippines to participation in the conduct of our government is so alarming that you instinctively pause before taking the step.** (Schurz: 79).

On the other hand, opposition to governing the new possessions as mere dependencies was grounded on the following arguments: (a) A colonial policy was contrary to American principles of government: for the first time since the abolition of slavery there would be two kinds of Americans -- first and second class Americans -- , a situation which would result in a type of government where one part of the people, the stronger, would rule another, the weaker; (b) this would lead to the production of 'ways of thinking' and 'habits of action' that would revert domestically, especially to the detriment of the 'least powerful classes' in American society -- imperialism, in other words, would pose a threat to internal democracy by the abandonment of the principle of 'equality of rights';²⁸ (c) a colonial policy would produce an increase in militarism and a danger of involvement in imperialist wars; (d) in order to expand commerce, there was no need for colonies; the penetration of new markets could be achieved by an increase in the efficiency of methods of production and trade; (e) coaling stations for the navy could be secured without the need of owning the countries where they would be established; and (f) the 'duty to civilize' other peoples should be accomplished not by ruling them, but by 'helping' them.

In programmatic terms Schurz advocated for the independence of the newly acquired territories, with institutions of government corresponding to their own

character and interests; obtaining from the European and Asian powers a guarantee of neutrality towards the Philippines; promoting the creation of a Confederacy of the Antilles that included Cuba and Puerto Rico, with agreements as to open ports and free trade with the United States; and a program of 'assistance' to those countries, involving economic aid and the introduction of popular education and other 'civilising agencies'.

There were obvious differences between the position of the expansionists and the so-called 'anti-imperialists'. Yet there were also shared assumptions and objectives. In the first place, it was clear that many among the 'anti-imperialist' group were not opposed to overseas economic expansion, nor would they object to the enlargement of the country's military and naval capabilities. What they opposed was the actual acquisition of overseas territories because of what were perceived as the complications of pursuing a direct colonial policy. What Schurz and others were in effect proposing was an alternative hegemonic strategy, based principally on the modernising effects of capital penetration, and geared more towards the eliciting of consent than the subjection through coercion.

A second striking similarity lied in the basic assumptions, prejudices, conceptions and values of both camps. The anti-imperialists' discourse was constructed with many of the same binary categories used by the expansionists. They reproduced the racist notions and arguments of their adversaries, as the quoted passage from Schurz's address clearly demonstrates.²⁹

This fact had been evident also in the mid-nineteenth century debates over territorial expansion. In 1870, House Democrat Fernando Wood, from New York, stated that he opposed annexation of the Dominican Republic because it would add

to the country's Negro population (May 1968: 100). Representative John F Farnsworth of Illinois scolded his colleagues for considering inviting 'semi-civilized, semi-barbarous men who cannot speak our language, who are unused to our laws and institutions, to vote with us, to help legislate for us'. (Quoted in May 1968: 100-101). A similar stance was taken by Senator Charles Sumner of Massachusetts, deploring the danger posed by 'taking into this country any of the Latin race, with its treacherous blood and its notions of superstition and bigotry' (*Ibidem*). As May points out, '[b]oth Sumner and Carl Schurz...argued [in 1870] that Manifest Destiny ran only on the continent and that expansion beyond the water's edge would involve dangers such as the republic had never faced before'. (*Ibidem*).

In 1901, David Star Jordan, author of a book entitled *Imperial Democracy*, and well within the anti-imperialist camp, argued that whenever the United States had 'inferior and dependent races' within its borders, the country found itself with a political problem (referring to 'the Negro problem, the Chinese problem, the Indian problem'). He warned that if the United States insisted in governing other peoples, then those peoples would in turn claim a right to participate in the governing of the people of the United States. (See Weston 1972: 17-18).

The anti-imperialists eventually lost to those who advocated the acquisition of overseas territories. But, as will be seen later, their arguments would have an impact on United States' policy towards those territories and in the production of new legal theories that would in effect exclude from participation in the American polity those peoples subjected to direct political rule by the American government after 1898.

4. Strategy and mechanisms for hegemonic control

The American strategy to extend its hegemony³⁰ over the Caribbean after 1898 would involve extensive economic penetration, effective political and military control -- either directly or indirectly -- and attempts at cultural transformation. The mechanisms for securing control or allegiance would vary in time and from country to country, depending on the convergence of diverse factors, including the dynamics of international and domestic politics and the degree and nature of acceptance or resistance within the countries of the region.

In the early part of the twentieth century those mechanisms included: massive private investment, special trade ties, financial supervision of local governments, formal protectorate arrangements, direct political (or formal colonial) control, armed interventions, the establishment of military bases, the imposition of blockades, interference with local electoral processes, and outright reform of legal and political institutions in those countries more directly under American rule (including the colonial territories, the protectorates, and those temporarily occupied by the US military). In later stages, other means would be added to or substituted for the above: military coups, financing and supporting counter-revolutionary movements, control of regional organizations, debt-manipulation, the imposition of models and strategies for development, arming and training local constabularies and military forces, the joint persecution of revolutionary and reformist movements, and cultural penetration through advanced communications technology.³¹

The combination of military coercion with 'persuasive' practices attests to the complexities of the process as well as to the will and determination to guarantee American control and hegemony in the region at whatever cost.

5. The role of law

From the earliest stages, law was envisioned as playing an important role in the overseas expansionist movement. First of all, the American ideology of the rule of law and the particular place that courts had come to occupy in American political life would soon require that the policy of expansion be tested for its constitutional legitimacy within the judicial process. The legal justification of that policy would be provided eventually by principles developed by the Supreme Court as the final arbiter of constitutional controversy within the United States, as will be discussed in greater detail in the following chapter.

Secondly, inasmuch as economic expansion in many cases meant introducing modern industrial and commercial enterprise into a preindustrial world, it was necessary to promote -- through legal reform -- the development of the appropriate normative and institutional framework for American economic activity to flourish.

Thirdly, to the extent that the expansionist drive of the United States was a hegemonic project -- which involved eliciting consent by drawing the subordinated populations into the American dominant ideological framework -- that project included exporting to the Caribbean and Central American region, and especially to the new territorial possessions, the economic, political, legal and cultural institutions of the new metropolitan power. President Theodore Roosevelt's assertion that the

Caribbean countries, abounding in natural riches, only needed 'the reign of law and justice' for prosperity to come to them (Healey 1988: 268), was not just the cynical rationalisation of an avowed imperialist, but the expression of a belief deeply held by many, predicated on the prevailing faith in the superiority of Anglo-Saxon, and specifically, Anglo-American, institutions. Of course, that reign of law and justice was meant to be modeled closely on the American vision of order and procedure. Not only those territories under direct colonial administration, like Puerto Rico, but formally independent countries like Cuba would undergo a revamping of their public law -- especially electoral and civil service laws -- under American supervision and according to American legal principles.

Although perhaps of less direct impact, but still important as a reflection of the legalistic approach to many of the problems resulting from the colonial or semi-colonial administration of the occupied or intervened territories, was the number of functionaries with formal legal training that were entrusted with direct responsibilities in this area of American foreign policy.³²

The remaining three chapters of this thesis will consider specifically the way in which law or legal 'events' have operated to reproduce American hegemony in a specific case, that of Puerto Rico.

D. THE UNITED STATES AND PUERTO RICO BEFORE 1898

Economic relations between the United States and Puerto Rico had started well before the military occupation of 1898. By the mid 1800's Puerto Rico already exported a significant amount of its sugar production to that country and was

importing a good number of American goods. However, exports declined later in the century as sugar was replaced by coffee and tobacco as principal crops. Puerto Rican coffee had its main markets in Europe and Latin America.

On the other hand, American statesmen and military strategists had envisioned the possibility of acquiring Puerto Rico as a military base early in the final decade of the nineteenth century. In 1891 President Harrison wrote to Secretary of State James G Blaine about the need for overseas bases. Blaine advised him that only three overseas locations were of sufficient importance for the United States to acquire them: Hawaii, Cuba and Puerto Rico. (Healy 1988: 29-30).³³ One author has argued that during the Spanish American War the United States became interested in Puerto Rico 'almost as an afterthought' (Torruella 1985: 18). However, the evidence quoted by him and by others suggests another conclusion. According to Healy, General Nelson Miles, the Commanding General of the Army, had from the start given priority to the conquest of Puerto Rico, preferring an opening campaign there rather than in Cuba (although in this regard he was overruled) (Healy 1988: 47). In May, 1898, Theodore Roosevelt, then commanding a group of Army volunteers, wrote to his friend, Senator Henry Cabot Lodge: 'Do not make peace until we get Porto Rico(*sic*)...' Lodge responded that the Administration had given him assurances that Puerto Rico would not be forgotten. (Pratt 1936: 231; Healy 1988: 47; Torruella 1985: 20; Trías Monge 1980: 144). In June, Whitelaw Reid, editor of the *New York Tribune*, who was later appointed to the United States peace delegation, declared that 'the judgement of the American people' was so intent in acquiring Puerto Rico that the Administration 'could not make peace on any other terms if it wanted to'. (Healy 1988: 47-48).

Still a third link that would facilitate the American conquest of Puerto Rico operated in the realm of ideology. But in this case, on the part of substantial numbers of the Puerto Rican elite. Many among them, particularly the intellectuals and independent professionals, had been steeped in the liberal ideology of the time. Their political ideals hinged around the notions of liberty, equality before the law and representative democracy. Some regarded the American political system as the most advanced of its time. This admiration was compounded by a shared faith in science and education as the hallmarks of progress. Theirs was an 'enlightened' creed, whose realisation, they thought, was only hindered by the backwardness of the Spanish regime. This view would contribute eventually to a warm welcome of the American intervention in 1898 on the part of many.³⁴

E. PUERTO RICO UNDER THE AMERICAN REGIME: A PANORAMIC VIEW

Because of the highly schematic nature of this introductory summary, the exposition has been broken into five parts: (1) constitutional and political developments, (2) economic and social transformations, (3) strategic importance, (4) cultural transformation and resistance, and (5) the legal system. It must be remembered, however, that all these aspects of Puerto Rican history are interrelated in a complex multidimensional articulation and that only from that perspective can they be understood fully.

1. Constitutional and political development

Upon occupying the island, the United States installed a military regime. Three successive military governors administered the territory, introducing from the start, by decrees or general orders, many reforms of the legal and institutional structure of the country. The United States Supreme Court, reaffirming doctrines previously adopted in other contexts, later validated the authority of the military government.³⁵

After an extensive debate, in 1900 the United States Congress passed the Foraker Act,³⁶ which replaced the military regime with a civilian government. This Organic Act³⁷ provided for a civilian Governor and a Legislative Assembly. The latter would exercise legislative power over vaguely defined local matters ('all matters of a legislative character not locally inapplicable'), including the power to modify and repeal any laws then in existence in Puerto Rico. The Assembly would consist of two chambers: an Executive Council, invested with legislative and executive functions (a clear departure from the American principle of separation of powers), and a House of Delegates. The US Congress retained the power to annul the acts of the Puerto Rican legislature. The law vested the judicial power in the courts and tribunals already established by the military governors. The members of the House of Delegates would be elected by qualified voters residing in the island; but the Governor, the members of the Executive Council and the Justices of the Supreme Court of Puerto Rico were to be appointed by the President of the United States. Only five of the eleven members of the Executive Council had to be native

inhabitants of Puerto Rico. Until 1946 all governors appointed by the President of the United States were continentals. This fact was to be the source of many frictions and conflicts between the governors and the local legislature, always controlled by Puerto Ricans of the various political parties that gradually came into life under the new regime. The Organic Act of 1900 also extended to Puerto Rico all statutory laws of the United States 'not locally inapplicable', specifically exempting from application United States internal revenue laws. Special provisions were made for the collection of duties on merchandise entering and leaving Puerto Rican ports. Puerto Ricans were declared to be citizens of Puerto Rico, a status with no international recognition.

The Foraker Act was perceived as a colonial statute by many disillusioned political leaders in Puerto Rico, who initially had called for the integration of the island into the United States as another State of the Union. That disillusion, together with the adverse reaction produced by the economic displacement of the Puerto Rican *hacendados* and smaller farmers by the American sugar corporations, was to result in important cleavages in the political programmes of the Puerto Rican elites. While some would still advocate for integration, others would seek a greater degree of autonomy and still others complete independence from the United States. To this day the *status* question has revolved around these three political projects.

In 1917 Congress passed the Jones Act.³⁸ This second Organic Law conferred United States citizenship on Puerto Ricans. However, Puerto Ricans residing in the island would not be eligible to vote for the President of the United States, nor elect representatives to the United States Congress. In terms of the internal structure of the government of the island, the Jones Act abolished the

legislative functions of the Executive Council and established a bi-cameral legislature to be elected by popular vote. It also provided for a bill of rights. The basic political and constitutional relationship with the United States remained unaltered.

In a series of cases spanning the period from 1901 to 1922, the Supreme Court of the United States decided that neither the Foraker nor the Jones Acts had 'incorporated' Puerto Rico to the United States. This meant that Puerto Rico should be considered as belonging to, but not being a part of, the latter. One practical effect of those decisions was to recognise the full authority of Congress to legislate over Puerto Rico, with only those restrictions imposed by what the Court termed 'fundamental rights' guaranteed by the United States Constitution to those persons under the jurisdiction of the United States.³⁹

It was not until 1946 that the President appointed the first Puerto Rican to hold the position of Governor of the island. In 1947 Congress authorised Puerto Rico for the first time to elect its own Governor. The following year the Puerto Rican electorate voted for the first Puerto Rican elective Governor in the history of the country.

A resurgence of the nationalist movement in the island and the international pressure resulting, in part, from the post-World War II decolonisation wave drove Congress and the ruling Popular Democratic Party to look for ways to defuse pro independence support and seek a new international legitimacy for the regime. In 1950 Congress approved legislation to allow the Puerto Rican population to adopt their own Constitution, subject to certain limitations.⁴⁰ Drafted by a Puerto Rican Constitutional Convention (with the abstention of the independence movement), the new Constitution was submitted to the Puerto Rican electorate, which approved it.

The approved charter was amended by the US Congress, before its final adoption in 1952. The Constitution provided for the internal structure of the Government of Puerto Rico and for a Bill of Rights. Although some have advanced arguments to the contrary, this Bill of Rights is generally regarded to limit only the actions of the Puerto Rican government, and not those of the government of the United States. Constitutional protection of individual rights of Puerto Ricans against the actions of the 'federal' government has been held by the US courts to be grounded on the fundamental provisions of the Bill of Rights of the United States Constitution.

After approval of the new Constitution, Puerto Rico became officially known as the *Estado Libre Asociado de Puerto Rico*, or the Commonwealth of Puerto Rico, in its English language version. Despite the new official name, the legislative history of the entire process clearly reveals that the US Congress never intended to alter the basic legal and political relationship between the two countries.⁴¹ In fact, the provisions of the Foraker and the Jones Act pertaining, not to the internal governmental structure of the country, but to its relationship with the United States, were left unmodified and codified in a new Federal Relations Act.⁴²

Continued allegations about the colonial nature of the arrangement led the Puerto Rican government to conduct a plebiscite in 1967 in which the electorate was asked to express its preference for one of the three traditional alternatives: statehood (meaning becoming a state of the Union), commonwealth or independence. In the election the Commonwealth formula obtained slightly over 60% of the votes. But the plebiscite was boycotted by most of the independence movement and part of the pro-statehood movement. Electoral participation turned out to be much lower than had been usual in general elections. (See Bayrón Toro 1989: 245-6). Moreover, the

United States had not made any commitment to honor the results of the plebiscite. These and other factors led to the general conclusion that the outcome had been in effect inconclusive. On the other hand, all attempts made by the pro-commonwealth faction to 'enhance' that status by gaining more autonomous concessions -- both before and after the 1967 plebiscite -- had met with indifference or outright rejection by the Congress of the United States.

Again in part due to international pressures, especially within the Decolonisation Committee of the United Nations, and partly as a response to economic and political crises in Puerto Rico and the United States, in 1989 the Bush Administration and the United States Senate, in conjunction with the three main political parties in the island, set out a process designed to culminate in a plebiscite to be held in 1991. This process occupied much of the political energies of the political parties and other groupings in the island for nearly two years. It came to an end, without producing the expected plebiscite. But it revealed many interesting and complex questions about the relationship between the two countries and the attitudes of diverse segments both of the metropolitan political elites and the Puerto Rican population. The central aspects of that process are directly relevant to the concerns of this thesis and will be discussed in some detail in the chapters that follow.

2. Social and economic transformations

The American occupation of Puerto Rico set in motion a series of profound economic and social transformations that would eventually change the character of that social formation. The first period of those sets of transformations occupies the

initial three decades of this century. The central process of the period was the definitive entrenchment of capitalism as the dominant mode of production in the island. The old world of the *haciendas* started to give way to the American sugar plantation, organised on the principle of free wage-labor, and, to a lesser extent, to the relations that emerged from a growing capitalist manufacturing sector in the cities and towns. The result was an increasing proletarianisation of the labouring classes, whose ranks were joined by displaced artisans, independent small farmers, *agregados*, and others. Coffee was replaced by sugar as the main crop, due to several factors, including the economic policies of the new colonial administration, which tended to favour American investors. As many of its members became impoverished, the local landowning class linked to the coffee and tobacco economy was eventually displaced from its position of relative economic predominance. Land began to be concentrated in the hands of the foreign sugar barons, whose influence on the political process became stronger and more evident with time. By 1930 US corporations owned sixty percent of the island's sugar industry, eighty percent of the tobacco industry, and sixty percent of banking investments and public utilities (Healy 1988: 267). Between 1898 and 1930 some \$120 million flowed to the island in the form of private capital. (*Ibidem*). Puerto Rico became an export enclave dependent on a single crop: sugar. (Dietz 1989). Simultaneously its dependence on imported goods for domestic consumption increased. By 1910, eighty five percent of Puerto Rican trade was with the United States. And by 1940 the island, in spite of its small size and dire poverty, was already the ninth consumer of US goods in the world, and the second in the whole of Latin America. It was also the tenth source of supplies in the world for the American market, and third in Latin America. (Torruella 1985: 238).

The colonial administration undertook the task of improving part of the infrastructure (roads, sanitary facilities, sewage, etc.) and to provide better health and educational services. But despite the evident growth in economic activity and the relative degree of modernisation that resulted from improvements of the basic infrastructure, social conditions for most of the population remained dismal. In 1930 a commission of experts from the prestigious Brookings Institution in Washington reported that the conditions of the population at large were 'deplorable'; that consumer prices were high because of the reliance on imports from the United States, while the average daily wage was only seventy cents of a US dollar; that rural schooling was still poor and that seventy four percent of the rural population was still illiterate. The commission report concluded that: 'While it cannot be denied that the influx of capital has increased the efficiency of production and promoted general economic development, it does not follow that the benefits of this have accrued to the working people of the Island'. (Healy 1988: 267; Dietz 1989: 145-148). It was evident that the main beneficiaries of the process had been the American investors and some fractions of the Puerto Rican socially dominant class.

Political struggles would in many ways reflect these social transformations. The displaced *hacendados* and their organic intellectuals would return to the demand for autonomy, and even independence, while those closely linked to the American sugar industry would generally favour statehood. The workers, on the other hand, would develop their own economic and political organisations to confront both the sugar barons and the local landowner and capitalist class. In part due to the particular oppressiveness of the former Spanish regime, the Socialist Party, the party of the workers, sharing many of the views prevalent among the liberal elite at the

beginning of the century regarding the progressive nature of American society, adopted a pro-American stance and also favoured statehood for the island. That position, buttressed by a gradual weakening of the economic base of the working class as a result of several factors, would, at the end of the period, lead the party to forge the strangest of alliances with the local Republicans, who represented the interests of American capital and its intermediaries. Eventually the Socialist Party would lose its capacity to represent the interests of the super exploited rural and urban proletariat.

The situation became critical in the 1930's, partly as a result of the Depression. Workers' strikes multiplied and the nationalist movement became more militant. The Nationalist Party, founded in 1922, was violently suppressed and its leadership incarcerated. The crisis led to efforts to restructure the colonial regime and improve social conditions, partly as a way to insure the stability of a colonial enclave whose strategic importance had become more evident during the Second World War.

The restructuring process was made possible by three important developments: (a) the economic and political transformations associated with President Roosevelt's New Deal policies in the United States; (b) the newfound prosperity ensuing from the War; and (c) a rearticulation of the political process and class alliances in Puerto Rico.

In 1938 a group of Puerto Rican professionals and intellectuals broke from the existing Liberal Party and founded a new movement, which led to the formation of the Popular Democratic Party. The movement was able to attract enough support from the landless peasants and the rural and urban proletariat to become the dominant

political party for several decades to come. With support from Washington, in the final years of the 1940's the PDP, in firm control of the local government, launched a new drive for development.

After an initial, and soon to be abandoned, experiment with what some have called 'state capitalism' (See Dietz 1989: 201-212), the Puerto Rican government embarked in a strategy of 'industrialisation by invitation' which has had profound effects on Puerto Rican society.⁴⁸ The main strategy has consisted in providing extraordinary tax and other incentives to foreign investors. In its first phase Operation Bootstrap was able to attract a large number of labour intensive enterprises, that required very little technology, and paid very low salaries. The 1950's and 1960's witnessed a very rapid process of industrialisation and urbanisation that transformed the former predominantly rural, agrarian, Puerto Rican social formation into a relatively modern industrial, urban society.

As wages rose in Puerto Rico, and other Latin American and Asian countries were able to offer more profitable opportunities for capital accumulation, the labour intensive, low paying, American enterprises began to resettle. The Puerto Rican government then decided to offer incentives to capital intensive industries, with the hope that these would trigger a process of linkages in the chain of supply and distribution of goods that would have the effect of stimulating the emergence of local enterprise (Dietz: ch 5). The capital intensive industries came (petrochemicals, pharmaceuticals, and others), but the structural problems of the economy were not solved. In fact, because of the very nature of the development programme, many of Puerto Rico's most basic problems have been intensified.

As Dietz very correctly points out, Puerto Rico remains an export enclave (now of manufactured goods), extremely dependent on foreign capital and, largely because agriculture has been marginalised, very dependent on imports for the satisfaction of the needs of its population. The 'linkages' in the chain of production have not materialised, local capital has either been displaced or subordinated, most of the productive wealth of the country remains under external control, and Puerto Rico still suffers a very high unemployment rate, which likens its economy, in that respect, to those of the developing world.

Certainly the standard of living is higher in Puerto Rico than in many Latin American and Caribbean countries (although lower than in the continental United States). But this has not been the product of a self-sustained productive economy. To achieve that result the system has had to depend on several mechanisms. First, recourse to the government as a source of employment. At present the Puerto Rican government is the largest employer in the Puerto Rican economy. Secondly, an extreme dependence on the transfer of monies from the US government to the Puerto Rican government and individuals to finance social and economic welfare. In 1980 'federal' transfers to Puerto Rico amounted to thirty percent of personal income and twenty seven percent of the recurring revenues of the Puerto Rican government. In 1982 those transfers represented 28.1% of Puerto Rico's Gross National Product. (Dietz 1989: 317, 319). A third mechanism has been a substantial increase of the public debt. And a fourth, and perhaps the most painful of all, the stimulation of migration of the Puerto Rican people to the United States as an 'escape valve' to the country's social and economic problems. Between 1950 and 1970 net migration to the United States from Puerto Rico amounted to more than 600,000 people, that is,

an equivalent of 27.4% of the population in 1950 (Dietz 1989: 306). There are presently more than two million Puerto Ricans living in the United States, the majority of them in conditions of harsh poverty and suffering from the most diverse forms of discrimination. There is no doubt that whatever 'prosperity' was to be enjoyed by at least some of those who remained was made possible by the harsh sacrifices of those who left.

While the Puerto Rican population experiences many pressing social and economic problems, Puerto Rico is in fact a haven for foreign investment and a very profitable market for American products. In 1978, 34.1% of American direct investment in Latin America went to Puerto Rico, while 42.4% of the profits accruing to US corporations from the region came from the island (Dietz 1989: 282). US corporations operating in Puerto Rico, exempted from the payment of US taxes under a special provision of the US Internal Revenue Code, enjoy a rate of return of 98.6% over their invested capital. For the pharmaceutical industry the rate is higher, going up to 246% over invested capital. In fact 50% of world profits in this industry are generated in Puerto Rico. (Dietz 1989: 322, 275). On the other hand, in the capital intensive industries promoted by the government, only 25% of their income is distributed to the workers. In the chemical industry, the percentage is as low as 16. (*Id*: 272). As a market Puerto Rico is also very profitable for US corporations. In 1976-77, Puerto Rico was the fifth market in the world for US products. In 1978, it was the seventh market and the largest per capita importer of American commodities in the world. (*Id*: 310, n. 109).

3. Strategic importance

From the very beginning Puerto Rico was viewed as an important strategic site by the metropolis. As a result, throughout the century there has been an ongoing process of militarisation that permeates all aspects of Puerto Rican life. As one of the foremost experts on the military question in Puerto Rico has perceptively noted, the US military presence in Puerto Rico must not be viewed merely in terms of the location of military bases there, but as a multidimensional, integral, phenomenon that penetrates all the spheres of the political, social and economic life of Puerto Rico. 'Colonial society is also a militarised society' (Rodríguez Beruff {a}: 6).⁴⁴ This theme cannot be pursued here, but it has to be noted.

Puerto Rico's strategic importance for the United States was summarised recently in an official report of the United States General Accounting Office to the Committee on Energy and Natural Resources of the United States Senate:

The island's central location is considered valuable as a communications and control center as well as an intermediate staging area for military operations elsewhere. Also, the island provides the potential for expanded military operations if necessary, and it affirms American presence in the Caribbean -- a region considered vitally important to the United States (GAO Report 1989: 9d-7--9d-8).

The Caribbean region's importance, the report states, arises because much of the United State's petroleum supplies and other strategic materials, such as bauxite, travel sea routes from the Panama Canal and South America (p 9d-8). Moreover, the

Caribbean as a whole is viewed as 'an area of endemic weakness and potentially serious instability', a situation aggravated, in Washington's eyes, by the presence of Cuba, the largest and most populous island in the region. (*Ibidem*).

The United States operates an extensive network of bases and military installations in Puerto Rico. The most important complex is the Roosevelt Roads US Naval Station, on Puerto Rico's eastern coast. It is the largest US naval base in the world and the most important training site for American military personnel in the Atlantic. It is used, besides, as a training facility for the navies of NATO members and Latin American countries. The military facilities in the islands comprising the territory of Puerto Rico have been also an important component of the nuclear weaponry infrastructure of the United States.⁴⁵

Puerto Rico has been a source of military personnel for the US Armed Forces. Over 200,000 Puerto Ricans have served in those forces throughout this century. Puerto Ricans have participated in all major armed conflicts in which the United States have been involved since World War I, including the Gulf War, at a very high cost in terms of human life and suffering (Rodríguez Beruff {a}: 14; Suárez 1990: 1).

The end of the Cold War may not have seen an end to the perception of the American military regarding Puerto Rico's strategic importance. There are many indicators that the functions of the US military are being reformulated to focus on the 'War on Drugs', the control of illegal immigration, the protection of American markets and operating as an international police force aimed particularly at checking 'troublesome' regimes, especially in the 'Third World'. In each and every one of those respects, Latin America and the Caribbean seem to feature as priority areas in

the strategic thinking of the American military and political establishment. It would not be strange that, as in the past, Puerto Rico be considered one of the most fitting locations to serve as a support base for those new political and military objectives. (Cf Gautier Mayoral 1992; Jaramillo 1992; Rodríguez Beruff and García Muñiz {c 1993}; Matos 1992; McKim 1992). Not even the dramatic reductions in nuclear weapons called for by the latest agreements between the United States and Russia should be expected to produce a drastic curtailment of military installations in Puerto Rico. The United States has made clear that it will retain a substantial part of its naval nuclear capacity, announcing its intention to use it, if necessary, as a deterrent in so-called 'regional conflicts'. Puerto Rico's link to the nuclear infrastructure of the United States is to be found, precisely, *via* the latter's naval force.

Comments made by key military officers of the United States in recent times must be taken as a message that, far from diminishing, the strategic importance of Puerto Rico may have increased. In October, 1990, the Commander of the US Naval Marine Air Force in the Caribbean stated that the Persian Gulf conflict had enhanced the Caribbean's strategic importance for the United States and called the Navy in Puerto Rico 'a sentinel for sea lanes...through which more than 50 percent of all oil and other materials are imported into the United States'. The Roosevelt Roads Naval Base also became a place to train fleet ships and squadrons heading for the Arabian Gulf.⁴⁶ In the process pertaining to the plebiscite proposed for 1991, the US Defense Department took the position that even if Puerto Ricans chose to become an independent Republic, the US must keep its military bases in Puerto Rico and have guaranteed access to its territory for defense related activities.⁴⁷

4. Cultural transformations and resistance.

In a broad sense all the aspects of Puerto Rican reality discussed above have a cultural dimension, for constitutional, political, economic and military processes involve conceptions of the world and values from which they cannot be extricated. Cultural transformations and resistances have been imbricated in all the structural and institutional transformations described so far. However, it is worth noting certain specific aspects of Puerto Rican culture that have been a central part of the discussion on colonialism in Puerto Rico.

The first one is the language question. The American colonial project, from its very early stages, entailed an effort at 'americanisation', which had as one of its principal components the imposition of English as the language of communication in Puerto Rico.⁴⁸ With varying degrees of emphasis, English was used as the language of instruction in Puerto Rican private and public (state operated) schools, until the policy was abandoned (for public schools) as late as 1948. The change in policy was due to the strong resistance offered by many sectors of the Puerto Rican people. Today most Puerto Ricans residing in Puerto Rico have Spanish as their native tongue. Although the number of those who read, write and speak English with relative ease has increased, in 1981, according to governmental reports, a majority could not be considered bilingual (GAO: 9c-2). In 1991 the Puerto Rican legislature passed a law making Spanish the official language of Puerto Rico.⁴⁹ The measure, which garnered applause overseas,⁵⁰ generated substantial controversy internally. In 1993, after winning the 1992 general elections by a considerable

margin of votes, the pro-statehood New Progressive Party managed to pass another 'language law' that established Spanish and English as the official languages of Puerto Rico.⁵¹ This action has also produced a strong reaction, this time from sectors identified with the independence movement and the pro-commonwealth Popular Democratic Party.⁵²

Other aspects of the cultural inter-relationship between the metropolitan society and the people of its colonial territory exhibit a greater degree of complexity. Certainly, more than ninety years of American influence have left an imprint on Puerto Rican society. The signs of that presence are everywhere. But they are more entrenched in the country's institutional framework and processes. In many ways the metropolitan society has become an 'exemplary center' for Puerto Rican society.⁵³

Economic practices, political processes, legal forms, educational policies, communication techniques, knowledge systems (including specific ways of problematising reality and providing solutions to social and personal conflicts), and, to a certain degree, the very style of life of the metropolitan society have become paradigms to be adopted or simply imitated by many in the colonial society. This has been especially, though not exclusively, the case among the Puerto Rican middle and upper classes. The process has led to a gradual incorporation and acceptance of some of the fundamental premises and values that underlie the institutional framework and life processes of the dominant society. (See Rivera Ramos 1991a).

On the other hand, despite this undeniable influence, Puerto Ricans tend to view themselves as a distinct people. A strong popular nationalism runs throughout the society. The country's rich artistic, literary, and musical traditions have a distinctive flavour that places them squarely within the wider framework of Caribbean

and Latin American culture. There is a vibrant national popular culture that incorporates the European and African past as well as the many experiences and influences accruing inevitably from so many decades of American presence and contact. The synthesis is notably Puerto Rican, not continental American.

5. The legal system

The legal system has been one of the areas of Puerto Rican institutional life most directly influenced by American culture. One of the first tasks of the American military governors was to initiate a transformation of the legal institutions existing in Puerto Rico before the occupation. Eventually, many provisions of the Civil Code were amended, and the Penal Code, the Political Code and the Codes of Civil and Criminal procedure were replaced with codes taken from the states of Montana, California and Idaho. New corporation and labour laws were adopted following North American models. In later years many of these codes and statutes would undergo revision by the Puerto Rican Legislative Assembly, but the influence of American legal principles and methods would remain evident.

A constant source of controversy has been the presence in Puerto Rico of a United States federal court, manned by judges appointed by the President of the United States. Originally, all justices were Americans. But currently the Court is integrated entirely by Puerto Rican lawyers appointed to the bench by the President of the United States. Proceedings in the Court are conducted in English. In practice it operates as any other court in the American federal judiciary. Its decisions are

reviewed by the US Court of Appeals for the First Circuit, located in Boston, Massachusetts.

Also, from the earliest part of the century, Presidential appointees to the Puerto Rican Supreme Court undertook to 'americanise' the judicial system and Puerto Rican substantive law.⁵⁴ Gradually, in its workings the Court abandoned the civil law judicial tradition and came to resemble more and more a common-law court, and more specifically, an American court. The process was furthered by later Puerto Rican appointees. As I have stated elsewhere:

Even during the period of highest influence of the heirs to the political tradition of self-government -- the years of PDP absolute control of governmental institutions -- when the Court was clearly the turf of the elite liberal professionals, this tendency continued. In fact, during that time the tendency was reaffirmed and carried to its logical conclusion. The precedential value of the Court's decisions and the faculty to invalidate legislative and executive acts were firmly established. Inevitably, constitutional argument followed closely the tenets of American constitutional law. (Rivera Ramos 1981: 40-41, footnote omitted).

Many of the Puerto Rican Justices (as well as many law school professors) have been trained in the leading American law schools where they have imbibed the prevalent legal culture. This had been the case even before the Constitution of 1952, which adopted a judicial structure, still in place, that closely follows the American tradition. The development of the Puerto Rican legal culture has also implied changes in the structure and practices of the legal profession and in legal education. Those changes, however, cannot be attributed entirely to the 'americanisation' of the legal system. They have been conditioned too by the processes that have transformed Puerto Rico from a chiefly rural, agrarian, social formation to a

predominantly urban, industrialised, capitalist (dependent) society, with an increasingly service-oriented economy and a relatively modern, technocratic, colonial welfare state.

ENDNOTES

1. The Resident Commissioner can vote in the Congressional committees to which he is assigned. But he cannot cast a final vote on legislation proposed in the House.

On 5 January 1993 the House amended its rules to allow Resident Commissioners and Delegates from the territories to vote in the 'Committee of the Whole'. This is the name given to the House when it considers amendments to most bills reported out of the standing or select committees. However, as adopted, the amended rules require that a new vote be taken if the votes cast by the Commissioners or Delegates in the 'Committee of the Whole' have made the difference. This new vote is taken technically in the full House itself. The Commissioners or Delegates cannot participate in the decisive second round. (Cf Rules XII (2) and XXII (2) (d) of the Rules of the US House of Representatives). This rule change survived an attack on its constitutionality by Republican Members of the House of Representatives. The Republicans alleged that granting the Delegates and the Resident Commissioner the prerogative to vote in the 'Committee' endowed them with legislative power, in violation of Art I and other provisions of the US Constitution. See *Michel v Anderson*, Civil Action No 93-0039 (HHG), US District Court for the District of Columbia, decided 8 March 1993. Judge H H Greene, rendering the opinion of the Court, characterised the new rules as 'meaningless', failing to grant the representatives from the territories any effective legislative power.

2. The main sources used for this section and sections C, D and E, below, have been the following: Dietz (1989); González (1980a); Picó (1986); Quintero Rivera (1976 and 1988); Rodríguez Beruff {b}; Silvestrini and Luque (1987); Serrano Geyls (1986); Trías Monge (1978, 1980 and 1982); the GAO Briefing Notebook (1989). Others will be cited specifically as the need arises.

3. For an interesting analysis of the various historical 'layers' of ethnicity and class that have gradually contributed to the formation of Puerto Rican society, see González (1980a). See also Picó (1986: esp. ch. 9); and Dietz (1989: 70-74).

4. For a more detailed description of the economic structure and economic development of Puerto Rico during the Spanish colonial period, see Dietz, ch 1.

5. The *agregados* were peasants who lived and worked in land belonging usually to a large or medium scale landowner. The *agregado* was bound to the landowner by certain types of obligations, like surrendering part of his crop or providing specified services.

6. This summary of the development of the modes of production in the island is taken from Dietz 1989, pp 76-86.

7. See Dietz (1989: 74-76); Quintero Rivera (1976); González (1980a). Many times there were no clear cut boundaries among these groups. For example, there were landowners who were also merchants. (See Quintero Rivera 1988: 313-324). Nevertheless, it is still useful to use these categories to refer to the shared experiences and identities, however nebulous or fluid at times, that emerged from social situations conditioned by existing relationships to the means and the processes of production.

8. We cannot discuss here the complex theoretical issue of class attribution or classification in the case of women. Suffice it to say that we find extremely problematic the common practice of categorising women in class terms in reference to the class attributed to their husbands, fathers, or other male members of their households. I am indebted to Esther Vicente for raising this point.

9. See Quintero Rivera (1988: 313-324) for a brief discussion of the controversy. The situation, as Quintero explains it, is that the *hacendados* had a predominant control of the means of production yet, due to the colonial situation, did not control either the macro-economic or the political structure of society. This made it difficult, in his opinion, for the landowners to extend clearly their cultural dominance over the rest of the population. But, he seems to imply, this did not mean that they did not exert a relative degree of influence in the production of consciousness among the subordinated groups. This is what I have called here 'relative social hegemony'.

10. The *libretas de jornaleros* were part of a system designed to force 'free' labourers to work for the landowners or the municipal authorities. Each person considered a *jornalero* or 'free-labourer' was required to carry a special notebook or register to keep record of her labor contracts and other related information. If caught without possession of the notebook the labourer was punished with forced labour for a public authority at a reduced wage. The *jornaleros* devised many ways to circumvent the system and on occasions burned the notebooks as a form of protest.

11. See Vicente, E (1987), p 590, esp. notes 10-13 and works cited therein.

12. The *Ley Hipotecaria* is an important feature of the civil law tradition. It is a comprehensive body of norms regulating the registration of title and diverse procedures relating to the protection of property-related rights.

13. For a fuller account of the origins and development of the judicial system in Puerto Rico see Trías Monge (1978), from which most of the above information has been taken. For the period under discussion, see especially chapters I-III. For a more succinct description, highly laudatory of the Spanish legal system in operation in Puerto Rico, see Delgado Cintrón (1988), pp 45-72.

14. The main sources consulted for this section have been Pratt (1936; 1955), Greene (1955), Hobson (1965), May (1968), Weston (1972), Liska (1978), Triás Monge (1980), Bosch (1983), Estades (1988), and Nederveen Pieterse (1990). For a commentary on the American historiography on American imperialism see Delgado Cintrón (1988: pp 11-16).

15. See Argument of the Solicitor General of the United States in *De Lima v. Bidwell*, 141-2.

16. Thomas H. Benton, *Historical and Legal Examination of the Dred Scott Case* (1857), quoted in the Argument of the Attorney General of the United States in *De Lima v. Bidwell*, p. 29.

17. Louisiana was purchased from France in 1803 and Florida from Spain in 1819; in 1845 the Republic of Texas was annexed; in 1846 Great Britain ceded the Oregon territory; and Mexico lost part of its territory to the United States through successive treaties in 1848 and 1853.

18. Richard Hoftadster has referred to the 'psychic crisis' of the 1890's in an attempt to explain the expansionist drive that led to the taking of the Philippines during the Spanish American War. See Hoftadster, in Greene, ed (pp 54-70). Although it is doubtful that such a 'crisis', if in fact it was as pervasive as Hoftadster argues, had such a decisive impact in the development of the imperialist policies of the times, it can be argued that the public mood that had resulted from the economic difficulties of the decade provided a fertile ground for the arguments of the pro-annexationist camp that imperialist expansion was a necessary development to cure the ills of the nation.

19. '...[E]xtending American possessions into the Caribbean and Central America', states Liska, 'was anticipated from the early nineteenth century on, in opposition to European designs on the continent's "natural appendages" to the "American seas", illustrated by the French in regard to Cuba, the British in Central America, and, in due course, Imperial Germany in Haiti and the Danish West Indies.' (p 118).

20. For a detailed analysis of the 'agents of (American) hegemony' in the Caribbean and Central America from 1898 to 1917, see Healy (1988: Ch 14, pp 238-259).

21. Liska's argument finds support in Pratt's analysis of expansionist views during the period. (See Pratt 1936: esp Ch VII, pp 230-278).

22. The explanation of imperialism as a strategy to deflate domestic crises (known as *social imperialism*) has been put forward by many writers, including early socialists like Kautsky, Hilferding and Luxembour, liberals like Hobson, partisans of imperialism like Cecil Rhodes, and later theorists like Karl Rennner and Hans Ulrich Wehler. (Nederveen Pieterse 1990: 20). However, as the referenced author himself notes, it cannot be offered as an exhaustive explanation of the phenomenon, but

rather as one of the constituent elements of a multi-dimensional explanation that takes into account a multiplicity of forces, motives and causal linkages.

23. Referring to the economic theories of Adam Smith, Marx asserted that they 'can be considered both a product of modern industry and a force which has accelerated and extolled the dynamism and development of industry and had made it a power in the domain of consciousness'. (*Paris Manuscripts*, quoted in McLellan 1980: 181).

24. The notion of *habitus* is taken from Bourdieu (1977), who defines it as a system of durable dispositions, structured through collective practice, to act in certain ways that in turn reproduce the very collective practices that generated the *habitus* in the first place. Those practices, however, do adjust to the 'demands inscribed as objective potentialities' (e.g. for change) as defined by the cognitive and motivating structures making up the *habitus*. (See Bourdieu 1977: ch 2, 'Structures and the *habitus*').

25. For a detailed analysis of the influence of European, especially British, imperial thought on the American statesmen and intellectuals of the late nineteenth and early twentieth century, see May (1968).

26. A survey made by this author of the *United States Index for Legal Periodicals* for the years immediately following the Spanish-Cuban-American War yielded well over a hundred titles of articles published in the leading American law journals concerning the legal and constitutional problems raised by the acquisition of the new territories. For summaries of the different positions expounded during the discussions in Congress, the press and the courts, see, among others, Torrruella (1980: chs 2 and 3), Serrano Geys (1986: 449-450), and Greene (ed) (1955: esp. chs 7-10).

27. See Carl Schurz, 'American Imperialism' (The Convocation Address delivered on occasion of the 27th Convocation of the University of Chicago, January 4, 1899), as reproduced in Greene (ed) (1955: 77-84).

28. Of course, arguments (a) and (b) presupposed that the American polity was effectively ruled on the basis of equality and that the existing racial, gender and social cleavages did not prevent 'equal participation' by Native Americans, Blacks, ethnic minorities, women and the poor.

29. Senator Bates of Tennessee, an 'anti-imperialist', opposed the incorporation into the United States, of 'millions of savages, cannibals, Malays, Mohammedans, head hunters, and polygamists', which he contended inhabited the Philippines. 'Let us beware of those mongrels of the East, with breath of pestilence and touch of leprosy,' he warned. And he added: 'Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.' (Cabranes 1978: 431-2).

30. 'Hegemony' is used here in its dual meaning of 'domination of one country over another', as it is employed in studies on international relations and history, and as employed in social theory to refer to the process by which the rulers obtain consent to their domination from the ruled. Cf Chapter I.

31. For more detailed analyses and historical documentation of some of these mechanisms, particularly from 1898 to 1917, see Healey (1988) and Estades (1988).

32. In 1899, after the War, President McKinley appointed Elihu Root as Secretary of War, the dependency in charge of overseeing the new territorial possessions. According to Root's account, the White House informant told him that the President had authorised him to say that he was not looking for anyone with knowledge about the army, but rather for 'a lawyer to direct the government of these Spanish islands'. (Healy 1988: 50).

33. Others, like Secretary of the Navy Benjamin Tracy, thought that the United States needed even more bases than that. (Healy 1988: 30). See also the discussion about Mahan's position in part C.1 of this chapter.

34. For a revealing fictionalised account of the reception of the occupying American forces, see González (1980b).

35. See *Dooley v. United States*, 182 US 222 (1901); *Santiago v. Nogueras*, 214 US 260 (1909).

36. 31 (US) Stat at L 77 (1900), 48 USCA 731.

37. In the American legal tradition, an Organic Act is a statute that provides for the basic structure of a territorial government.

38. 39 (US) Stat at L 951 (1917), 8 USCA 731.

39. These cases will be analysed in full detail in chapter III.

40. Public Law 600, 64 (US) Stat 319 (1950).

41. See references in Leibowitz (1989: 165-178); Fernós Isern (1974: 81-197); Trias Monge (1982: 274-310); *El Informe Johnston*, in García Passalacqua and Rivera Lugo (1990: 94-95).

42. See section 4, Public Law 600 (1950).

43. For an excellent comprehensive discussion of the subject see Dietz (1989). The brief description that follows draws heavily from his analysis.

44. For detailed analyses of the relationship between the military question and political, social and economic processes in Puerto Rico, see, among others, Estades (1988); Rodríguez Beruff ({a} and {b}); and García Muñiz (nd).

45. See, generally, Bar Association of Puerto Rico, *Report of the Special Commission on Nuclear Weapons and the Treaty for the Proscription of Nuclear Weapons in Latin America*, San Juan, 17 August 1984.

46. 'P.R.'s strategic position said enhanced', *San Juan Star*, 2 October 1990, p 5.

47. See 'Prepared Statement of Brigadier General M J Byron, Acting Deputy Assistant Secretary of Defense (Inter-American Affairs), Department of Defense Before the Committee on Energy and Natural Resources, United States Senate', 11 July 1989, in 3 *Hearings*: 134.

48. For a comprehensive study, see Negrón de Montilla (1975).

49. Public Law No 4 of 5 April 1991 (Puerto Rico), 1 LPRA 51.

50. As a result of the passage of the Official Language Act, the people of Puerto Rico, represented by Governor Rafael Hernández Colón, of the Popular Democratic Party, were granted the prestigious Prince of Asturias award by the Spanish Government for their 'defense of the Spanish language'.

51. Public Law No 1 of 28 January 1993 (Puerto Rico).

52. For a recent study on the language controversy and its relationship to the colonial question, see Rúa (1992).

53. The term is taken from Geertz (1980).

54. For a review of the process see Trías Monge (1979), particularly pp 14-22.

CHAPTER III

THE EXPLICIT JUSTIFICATION OF COLONIALISM AND THE CONSTRUCTION OF THE LEGAL AND POLITICAL SUBJECT: THE INSULAR CASES (1901-1922)

A. INTRODUCTION

The purpose of this chapter is to analyse how a specific set of legal events -- a series of decisions of the United States Supreme Court rendered from 1901 to 1922 -- have contributed to the constitution of the American colonial regime in Puerto Rico. The argument will draw both from the theoretical framework developed in Chapter I and the historical context described in Chapter II. The main proposition of this chapter is that those decisions -- known as the 'Insular Cases' -- had four general effects: (a) they provided an explicit legal justification of the American colonial project in Puerto Rico; (b) they played a central role in the process of construction of a legal and political subject over which the American metropolitan state could exercise its power; (c) they created a discursive universe within which all further discussion of the colonial problematic would have to be conducted, that is, they provided the 'legitimate' discursive framework for subsequent political struggles in relation to the question of the status of Puerto Rico and the legal and political entitlements of Puerto Ricans; and (d) they constructed a context for action that resulted in practices that further reproduced both the conditions for the realisation of the colonial project and the framework for its discursive validation. In these four

significant respects -- with their attendant consequences --they became an important constituent element of the colonial project: a significant dimension of Puerto Rican reality as conditioned by the colonial experience.

I will proceed by analysing first the legal doctrine established by the cases. Then I will examine the legal theory that informs them: the conceptions of law, of the legal process and of legal interpretation adopted by the Court, expressly or implicitly, to develop its argument and justify its conclusions. Thirdly, I will try to identify the wider world view -- the 'ideology' -- that permeates the Court's discourse. In fourth place, I will discuss in detail the effect of what the Court was actually doing: that is, the four important respects, described above, in which that doctrine became a constituent part of the colonial project. Finally, I will attempt to provide a socio-historical explanation of the decisions: a relation of the factors that converged in their production and the extent to which those factors can be related to the determinants and the ideology of expansion discussed in Chapter II. It is hoped that the vision that emerges from this analysis is one of a set of socially constituted legal events that, in turn, become important constituent elements of a wider social and political process, through the workings of internally specific operations that include a particular mode of reasoning and a particular type of discourse.

B. THE LEGAL DOCTRINE OF THE INSULAR CASES

1. The background

Prior to the acquisition of the new territories as a result of the Spanish American War, the unswerving policy underlying territorial expansion in the law and tradition of the United States had been the eventual admission of the new territories as States of the Union (Leibowitz 1989: 6; Serrano Geys 1986: 449). The pattern was supplied by the provisions of the Northwest Ordinance of 1787, a statute governing the vast territory that lied to the Northwest of the original thirteen states of the federation at the time of the adoption of the Constitution. As Leibowitz has pointed out, 'the Northwest Ordinance was either implicitly accepted as the governing statute for the newly acquired territories by the courts or was followed as the model in other governing legislation' (*ibidem*). The model provided for several stages that included investing total governmental authority in an appointed Governor, a later establishment of an elected legislature and local courts, and final admission into statehood.¹ (Cf Leibowitz 1989: 6). Leibowitz argues that the broad powers accorded Congress to deal with the territories was premised upon the notion that territorial status was to be transitory and statehood would be the eventual result (Leibowitz 1989: 8).

The legal basis for the exercise of broad Congressional authority over the territories (as opposed to the several states of the Union) was construed to lie in what is known as the Territorial Clause of the Constitution (Article IV, Section 3, Clause

2)² and in the 'inherent powers of a national sovereign government'. (Cf Leibowitz 1989: 10-16).

The acquisition of overseas territories as a result of the Spanish American War and other events opened up an intense debate regarding the future of the new possessions. In Chapter II I discussed the main features of the political debate, which took place in Congress, in the press, in universities and other public forums. The starting point for much of the controversy was the allegation that these territories were different: far off, not contiguous to the continent, densely populated, unamenable to colonisation by settlement on the part of Anglo-Americans, and, above all, inhabited by alien peoples untrained in the arts of representative government. Some had argued that since the peoples of those territories would never be assimilated into American culture, the territories should be relinquished. This had been one strand of the so-called 'anti-imperialist' movement. Another strand went even further and stood for the proposition that the United States could not constitutionally acquire territories and govern them as colonies. Others maintained the contrary position and defended the power of the federal government not only to acquire territories but to hold them as permanent dependencies, much in the manner in which the European powers governed their possessions. Still others argued that the territories should be retained, but eventually be granted equal rights with the other states. During the debates leading to the approval of the Foraker Act in 1900 -- which replaced the military government with a civilian administration in Puerto Rico (see Chapter II for the details) -- the so-called 'imperialist' position had prevailed. The Foraker Act was premised on the view that the United States could constitutionally acquire territories, free of constitutional restrictions, and govern them indefinitely as

dependencies without steering them towards statehood. (Cf Serrano Geyls 1986: 450; Torruella 1985: 32-39; Estades 1988: 105-129).

The legal community joined the debate centering on the constitutional questions. Numerous articles appeared in many law journals, including the most prestigious ones, addressing the various issues involved, as construed by the American legal establishment. Eventually the United States Supreme Court would be called to pass upon those issues. By the time it did, however, acquisition was already an accomplished fact; the Foraker Act had come into effect; President MacKinley, siding with the 'imperialists', had won a presidential campaign in which the matter of the new territorial acquisitions had been a central issue; and the questions raised had been narrowed to a determination of the extent of the power of Congress to govern the territories. These developments, nonetheless, did not diminish the importance of the Court's intervention. The centrality of the Supreme Court of the United States in the resolution of important public issues -- a development which we cannot analyse here -- invested its adjudication of the issues with a special significance. It finally put to rest the allegations of unconstitutionality of the American colonial venture and, for all practical purposes, closed the debate within the American intellectual and governing elites. In fact, there is historical evidence that at least some of the proponents of the Foraker Act had sought to create a test case that would prompt the Court's intervention in order to achieve precisely that result. (Cf. Torruella 1985: 34).

2. The doctrine of territorial incorporation

The name 'Insular Cases' is properly given to a series of nine decisions rendered in 1901.³ Seven of those cases arose from Puerto Rico, one from Hawaii and one from the Philippine Islands. However, some authors have extended the name to another set of cases decided from 1903 to 1914, dealing with the same or related issues,⁴ and, finally, to a decision handed down in 1922.⁵ Of the thirteen cases belonging to the second group, five originated in actions relating to Puerto Rico, six referred to the Philippines, one to Hawaii and another to Alaska. The 1922 case dealt with the status of Puerto Rico. I will refer to all of them as the 'Insular Cases' because all the issues were related, the second group of cases rested on the decisions made in 1901, and the 1922 case, *Porto Rico v. Balzac*, must be read as the culmination of the series.

During the academic debate in the law journals about the status of the territories and the rights of their inhabitants three general propositions had been made. One group of writers held the view that the Constitution of the United States extended to the territories *ex proprio vigore*. That is to say, Congress and the Executive were restrained in their actions over the newly acquired lands by the limitations imposed by the US Constitution. These limitations became operative by the mere fact of acquisition. (Cf, for example, Randolph 1898 and Baldwin 1899).

Another group of commentators argued that Congress enjoyed plenary powers over the territories, and could act entirely as it saw fit, without constitutional limitations. (Cf Langdell 1899 and Thayer 1899). Finally, a third position suggested that

although Congress had greater power over these territories -- which were deemed not to have been 'incorporated' into the Union -- than over the territories subject to previous acquisitions, that power was limited by the 'fundamental' provisions of the Constitution. (Cf Lowell 1899). These arguments would figure prominently in the various decisions subscribed by the Justices (both in the majority and the minority) in the Insular Cases.

In terms of past judicial pronouncements, two of the most frequently cited in the debate, especially by those who opposed the 'colonial' solution to the problem, were the opinions of Chief Justice Marshall in *Loughborough v. Blake*,⁶ and Chief Justice Taney in *Dred Scott v. Sandford*.⁷ In the former, Marshall had defined the United States as including both states and territories, equally subject to the provisions of the Constitution. In the *Dred Scott* case the Court had held that a slave owner could not be deprived of his right to 'property' over his slaves just by the fact that he brought his 'property' into a particular 'territory' of the United States. In his opinion Chief Justice Taney had made the following statement:

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States...[N]o power is given to acquire a Territory to be held and governed permanently in that character. ...The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to

be held as a colony and governed by Congress with absolute authority (pp 446-47).

As formulated finally by the Court, the issues in the Insular Cases could be summarised in the following questions: What was the status of the new territories? How much power did Congress enjoy in their governance? And what were the rights of their inhabitants?

The Court rendered its decision on seven of the first group of nine cases on the same day: May 27, 1901. Despite this circumstance, in important respects they do not form a consistent set of decisions, especially due to the fact that Justice Henry Billings Brown, who wrote the majority opinion in *De Lima v. Bidwell* and the first *Dooley case*, joined the judges who had formed the minority in those cases to constitute a new majority in what was to become eventually the most important of the cases in the group, *Downes v. Bidwell*. Let us examine briefly the development of the legal doctrine adopted by the Court. At this stage I will limit myself, for the most part, to the statement of the doctrine, leaving the reasoning of the Court for more detailed analysis in further sections of the chapter.

The first case was *De Lima v. Bidwell*. It was an appeal from the Circuit Court of the United States for the Southern District of New York involving an action originally instituted by the firm D A de Lima and Co against the collector of the Port of New York. The claimant sought to recover duties exacted under protest upon certain importations of sugar from San Juan, Puerto Rico, during the autumn of 1899; that is, subsequent to the cession of Puerto Rico to the United States, but before passage of the Foraker Act. The petitioner argued that the United States Tariff Act of 1897, under which the exactions had been made, did not apply to Puerto Rico

because the latter was not a foreign country as defined by the Act. Puerto Rico, the argument went, had become a part of the United States by virtue of the Treaty of Paris, and any imposition of taxes and excises not applicable to other parts of the United States violated the Uniformity Clause of the United States Constitution.⁸ The Attorney General of the United States replied that the Uniformity Clause applied to the States and not to territories (pp 94-124). The Solicitor General, in turn, in an extended argument covering many aspects of the question, argued essentially that: (a) the act of cession did not make the territory, *ipso facto*, a part of the United States, but merely a possession; (b) newly acquired territory becomes a part of the United States only if Congress so determines; (c) the power of Congress over those territories that have not become a part of the US is 'plenary', 'absolute', 'full and complete', subject only to fundamental limitations imposed by the Constitution, as defined by the Courts (pp 124-174).

The Court divided itself over the issue, with five Justices holding against the validity of the tariff and four supporting the Government's position.⁹ Justice Brown wrote the majority opinion. He framed the issue narrowly: Whether territory acquired by cession from a foreign power remained a 'foreign country' within the meaning of the tariff laws. He concluded that at the time the duties were levied (after the cession took place) Puerto Rico was not a foreign country within the meaning of those statutes, but a territory of the United States. Therefore the duties were illegally exacted. His argument hinged basically upon the definition of a 'foreign country': 'one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States' (p 180). In his opinion, the judicial, executive and legislative precedents (including the Foraker Act) had established the principle that

the mere cession and possession had the effect of changing the status of the territory for revenue purposes from foreign to domestic (pp 181-194). There was no necessity for an Act of Congress to make the territory domestic after cession (p 197).

He went on to say that the right to acquire territory -- which he did not question -- involved the right to govern and dispose of it (p 196) and that Congress had complete authority over the people of the territories. Quoting Chief Justice Waite in *National Bank v. County of Yankton*, 101 US 129 (1879), Brown added that Congress 'may do for the Territories what the people, under the Constitution, may do for the States' (p 196). That authority rises 'not necessarily from the territorial clause, but from the necessities of the case'. (*Ibidem*). Once acquired by treaty, the territory belongs to the United States and is subject to the disposition of Congress. The Court could not acquiesce in the assumption, he concluded, that a territory may be at the same time both domestic and foreign (p 197). Justice Brown's opinion does not address the issue whether there is a distinction between belonging to and being a part of the United States.

Mr Justice Gray dissented very briefly on the grounds that the Court's decision was incompatible with the Court's unanimous opinion in a previous case, *Fleming v. Page*,¹⁰ and with the majority's opinion in *Downes v. Bidwell*, decided that very day (p 220). Justice McKenna filed a longer dissenting opinion, joined by Justices Shiras and White (pp 200-220). The gist of his argument involved a frontal rejection of what he obviously considers Justice Brown's excessive reliance on a definition (what is a 'foreign country' or a 'domestic territory?'). Between those 'extremes' there are 'other relations', argues McKenna, and Puerto Rico occupied one of them. Arguing that the administration of government entails more complexity than the

administration of a piece of real estate and the that the issues were more complicated than a 'mere definition', Justice McKenna calls attention to what he believes are the 'practicalities' of the situation and the 'great public interests involved'. The Court's position that the mere cession of territory by a foreign power converts the former into a part of the United States would have the effect of reducing the flexibility accorded the nation's government by the treaty-making power enshrined in the Constitution. The consequences of the rigid interpretation rendered by the majority, he believes, would have the effect of crippling the nation as a power among other nations, for it would not be able to behave like them, to acquire territory -- as an incident or not of war -- and to make whatever provisions it saw fit in the appropriate treaties. The nation's representatives would enter into any negotiation bound beforehand and with their options limited. (Cf pp 218-220).

In *Goetz v. US* and *Grossman v. US*, decided together, the Court followed the *De Lima* case and reversed an administrative decision to collect duties on merchandise imported from Puerto Rico and Hawaii into the United States. These territories were not foreign countries within the meaning of the tariff laws, the Court held (pp 221-22).

Dooley v United States (the first *Dooley* case), presented the same issue, but in a reverse factual situation: the legality of imports from the United States into Puerto Rico. The Court again followed *De Lima*, with opinions divided among the same two groups of judges. Once more Justice Brown wrote the majority opinion. The majority held that duties collected under the authority of the military commander of the occupying forces and of the President of the United States as Commander-in-Chief during the period running from the time of actual occupation to ratification of

the Treaty of Paris had been legally exacted under the War Powers of the Executive. They had been imposed according to 'the law of arms and the right of conquest' and to the 'general principles in respect to war and peace between nations'. (p 231). But the duties exacted after ratification of the Treaty had been illegally seized, because Puerto Rico had ceased to be a foreign country. Brown offers as further justification a consideration of the 'disastrous' consequences of a contrary decision for the economy of Puerto Rico. The country would be 'foreign' for both Spain and the United States, becoming practically isolated in terms of trade, in detriment to 'the business and finances' of the island (p 236). Justice White's dissent, joined by Justices Gray, Shiras and McKenna, emphasised the impracticality of the theory of immediate incorporation by cession. It would deny Congress the flexibility necessary to make the required practical adjustments for the incorporation of the territory. The result in *Dooley* was followed in *Armstrong v. United States*, which also involved duties upon goods imported into San Juan prior and after ratification of the Treaty of Paris.

The next case was *Downes v. Bidwell*. Again the controversy revolved around duties exacted upon imports from Puerto Rico into the United States. But this time the collection occurred after passage of the Foraker Act, which, as has been explained, established a civilian government in the island and expressly levied the tax in question in the case. The issue, therefore, involved the constitutionality of the pertinent provision of the Foraker Act. The case produced a new majority in the Court: Justice Brown joined the four dissenting judges in *De Lima* to uphold the validity of the tax. However, the Justices filed five separate opinions. Justice Brown delivered the conclusion and judgement of the Court; Justice White concurred

in the judgement, but rendered his own opinion -- joined by Shiras and McKenna -- expounding the reasons for his conclusion; and Justice Gray, concurring also, stated that he agreed in substance with White but had decided to 'sum up the reasons' for his concurrence separately. Chief Justice Fuller wrote a dissenting opinion, adhered to by Justices Harlan, Brewer and Peckham. But Harlan, 'in view...of the importance of the questions' involved and of the 'consequences' that would follow from the Court's decision, saw fit to 'add some observations' in a vigorous dissent that was to become the first in a series of protestations against the course that the Court would henceforth follow regarding the territorial question.

The main conclusion of Justice Brown's opinion was that the Uniformity clause of the Constitution did not apply to Puerto Rico because Puerto Rico was 'a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution' (p 287) (emphasis added). The Foraker Act was constitutional so far as it imposed duties upon imports from the island. The main practical, immediate, effect of the decision was that the United States could now collect duties on imports from Puerto Rico, as authorised specifically by Congress; whereas, prior to the Foraker Act, according to the *De Lima* case, such collection was not permitted under the general tariff laws, because Puerto Rico was not a foreign country. Of course, as will be discussed throughout this chapter, the larger effects were of much more substance than that.

The rationale of Justice Brown's conclusion included an appeal to what, to his mind, were the relevant legislative and judicial precedents and a consideration of what would be the consequences of a contrary holding. Some aspects of his reasoning will be examined in further sections of this chapter. At this point it should be noted that

his conclusion included the view that Congress had plenary power over the territories, but subject to 'fundamental limitations' in favour of 'personal rights' (p 268). 'The power to acquire territory by treaty,' he affirmed, 'implies the power to govern such territory, and to prescribe upon what terms the United States will receive its inhabitants and what their status shall be "in what Chief Justice Marshall termed the 'American Empire' " ' (p 279). In sum, the plenary power of Congress arose from the inherent right to acquire territory, from the Territorial Clause, from the treaty-making power and the power to declare and conduct war (p 268). The Constitution applied to the territories only to the degree that it was extended to them by Congress. As to the probability of despotism resulting from such plenary power, the inhabitants of the new territories should not fear: 'There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests' (p 280).

The significance of *Downes v. Bidwell*, however, lies in Justice White's concurring opinion, in which he advances his 'incorporation' doctrine. The opinion obtained the total adherence of two of the Justices and a third agreed 'in substance' with it. Eventually his reasoning would become the unquestioned position of the Court.

White commenced by agreeing that Congress had plenary power over the territories.

It [Congress] has the right to create such municipal organizations as it may deem best for the territories whether incorporated or not; to give the inhabitants as respects the local government such degree of

representation as may be conducive to the public well being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion (pp 289-90).

But, like Justice Brown, he believed that that power may be checked by 'fundamental restrictions', that may not be even expressed in the Constitution.

Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed principles which are the basis of all free government which cannot be with impunity transcended (pp 290-91).

Regarding the applicability of the Constitution, White believed that the question was not whether the Constitution was operative ('for that is self-evident'), but whether the provision relied on by Congress to legislate for the territory was applicable (p 292). In legislating for Puerto Rico (or the other territories) Congress was limited only by the 'applicable' provisions of the Constitution. What particular provisions apply depends 'on the situation of the territory and its relation to the United States' (p 293). The issue, then, whether the impugned tax violated the Uniformity Clause of the Constitution had to be resolved by answering the question whether Puerto Rico had been incorporated into the United States and had become an integral part of it. In formulating the issue in this way, White was constructing a new category in American constitutional jurisprudence: the unincorporated territory. Establishing a difference between incorporated and unincorporated territories was

justified, according to him, by the 'general principles of the law of nations', the Constitution itself, the Constitution 'as illustrated by the history of the government' and the past decisions of the Court.

There was an inherent right of sovereign nations, he argued, to acquire territory and to determine the relation of that territory to the new government, absent stipulations upon the subject between the old and the new masters (p 300). He quoted Chief Justice John Marshall in *American Insurance Co. v. Canter*, 1 Pet 511 (1828), to buttress his reading of International Law and the US Constitution. There Justice Marshall had stated:

The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty (p 303)...

If it (conquered territory) be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose (emphasis added by Justice White, p 302).

Justice White made an extensive review of the history of territorial acquisition in the United States indicating the ways in which, in his view, Congress had expressed its intention of 'incorporating' each and every one of the territories (pp 304-5; 320-329). His final argument rested on what he perceived to be the consequences, or the 'evil(s) of immediate incorporation', among them: curtailing the government's ability of terminating a successful war by acquiring territory through a treaty, without immediately incorporating such territory into the United

States; or -- in a nightmare scenario -- opening up the possibility of 'millions of inhabitants of alien territory' being able, by their immediate incorporation to the United States by treaty, to overthrow 'the whole structure of the government' (pp 311, 313).

The decision to incorporate implies a decision to divide with the 'alien people' the 'rights which peculiarly belong to the citizens of the United States' (p 324). Incorporation, therefore, was a political decision to be taken by the 'people' of the United States, represented in Congress, and not the automatic legal result of the acquisition of territory (pp 311-12). Incorporation could be effected either expressly or implicitly (p 339). One indicator of the intent of Congress would be whether the inhabitants of the acquired territory had been granted US citizenship and had been extended the rights and immunities of people residing in the Northwest Territory (pp 332, 333).

Had Puerto Rico been incorporated into the United States by the provisions of either the Treaty of Paris or the Foraker Act? No, answered Justice White. Article IX of the Treaty expressly provided that: 'The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress' (pp 339-340). In other words, the Treaty had left open the question of the status of the territory and the civil rights of Puerto Ricans, to be determined by further Congressional action. On the other hand, Justice White concluded, the Foraker Act, 'taken as a whole' showed the 'manifest intention of Congress that for the present at least Porto Rico (sic) is not to be incorporated into the United States' (p 340).¹¹ In arriving at that conclusion, White referred to the fact

that the provision to confer US citizenship on Puerto Ricans had been extricated from the Bill before its enactment (p 341).

The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession (pp 341-42).

It should be noted that although the doctrine of incorporation was accepted only by four of the five Justices constituting the majority,¹² all members of the majority agreed on the following points: (a) that Congress had plenary power over the territories acquired by conquest or treaty, subject to some still unspecified fundamental restrictions and (b) that Puerto Rico was a possession belonging or appurtenant to the United States, but not a part of it, for the purposes of the revenue clauses of the Constitution.

Chief Justice Fuller's dissent advanced the proposition that the Constitution, being operative wherever the government acted, commanded uniformity in the imposition of taxes, as in other matters. This included commerce between the States and the territories. The plenary power of Congress referred to the determination of the political status of places over which it exercised exclusive jurisdiction, but not over rights, commerce, or other such activities affecting the life of the inhabitants of those places. Fuller criticised the concept of 'incorporation', on which Justice White relied 'as if possessed of some occult meaning' (p 373). He denounced the view that the protection of the fundamental rights of the peoples in the territories did not

include guarantees against the differentiated imposition of impository measures (p 373). He rejected the notion that...

...if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions (p 372).

Justice Fuller added that the incorporation theory

assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power (p 373).

In his dissent, Justice Harlan agreed with the Chief Justice that Puerto Rico had become a part of the United States within the meaning of the Uniformity Clause at least after the ratification of the Treaty of Paris. He made two basic points in his argument: (a) that the Constitution applied to 'all the peoples and all the territory' over which the United States could exercise jurisdiction or authority, whether within or without the States properly called, and (b) that the Constitution did not authorise Congress to institute a colonial regime anywhere in the world. Warning that the majority's decision could lead to 'a radical and mischievous change' in the American system of government, passing from 'the era of constitutional liberty' to an 'era of

legislative absolutism', he rejected the idea that the United States could embark in European style colonialism.

Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments...(p 381).

The idea that this country may acquire territories anywhere upon the earth by conquest or treaty, and hold them as mere colonies or provinces -- the people inhabiting them to enjoy only such rights as Congress chooses to accord them -- is wholly inconsistent with the spirit and genius as well as with the words of the Constitution... (p 380).

Justice Harlan derided the notion that the inhabitants of the islands could rely for their protection on the supposed libertarian attitudes of their new masters. The Founders of the Nation themselves, he recalled, had been unwilling 'to depend for their safety' on what Justice Brown had described as 'certain principles of natural justice inherent in Anglo-Saxon character which need no expression in constitutions or statutes', for they 'well remembered' the oppression visited on 'Anglo-Saxons on this Continent' by 'Anglo-Saxons across the ocean' (p 381).

Harlan considered that the notion of 'incorporation' was too imprecise. In any event, a domestic territory of the United States, with an organised civil government established by Congress was, for all purposes, under the complete jurisdiction of the United States, and, therefore, a part of, and incorporated into, the United States (p 389). Puerto Rico, he argued, had been 'incorporated' by the Treaty of Paris

(specifically by the act of its ratification by the Senate), or by the appropriation of moneys by Congress for the administration of the territory, or by the multiple provisions of the Foraker Act. To contend that it had not been incorporated was to rely solely on the fact that Congress had failed to use the word 'incorporate' in the latter statute. 'I am constrained to say,' he commented, 'that this idea of "incorporation" has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel' (p 391). Harlan recalled Justice Brown's assertion in the *De Lima* case to the effect that territory cannot be 'domestic for one purpose and foreign for another' (p 385). 'How Porto Rico can be a domestic territory of the United States, as distinctly held in *De Lima v. Bidwell*, and yet, as is now held, not embraced by the words "throughout the United States", is more than I can understand,' Justice Harlan concluded (p 386).

Harlan's rejection of the incorporation doctrine continued for several years until his death in 1911. In *Rasmussen v. United States*, a 1905 case, the Court decided that the constitutional requirement of a trial by jury of twelve applied to the territory of Alaska, because the latter had been incorporated into the nation. Harlan concurred on the judgement, not because there was evidence of Congress's intent to incorporate Alaska, as Justice White argued in the principal opinion, but because of his belief that the Constitution applies immediately upon acquisition. (Cf pp 528-31).

He stated:

The proposition that a people subject to the full authority of the United States for purposes of government may, under any circumstances, or for any period of time, long or short, be governed, as Congress pleases to ordain, without regard to the Constitution, is,

in my judgement, inconsistent with the whole theory of our institutions (p 530).

In that same case Justice Brown also rejected the incorporation doctrine as 'confusing' and 'of no practical value' (p 535). There were several difficulties with the doctrine, Brown indicated: May incorporation be direct or indirect? What is the difference between an 'organized' and an 'incorporated' territory? What language must Congress use to effect the result? (See pp 533-34). He adhered, rather, to the 'extension' doctrine: Congress may deal as it pleases with a territory, until it decides to extend to it the Constitution (p 536) 'formally or by implication' (p 532), with the constraint that there are some 'natural rights' that could not be infringed upon. According to him this test was more easily and less confusingly applied. (Although it seems evident that it entailed the same or similar problems of interpretation, especially when the intention to extend the Constitution was to be implied from Congressional action).

One further case decided on May 27, 1901, and another decided on December 2 of that year reaffirmed the conclusion arrived at in the *De Lima* case (although in different factual contexts and, in the later case, with quite the opposite practical results): that Puerto Rico was not a foreign country, but domestic territory. In *Huus v. New York and Porto Rico Steamship Company*, a unanimous Court held that vessels engaged in trade between Puerto Rico and ports of the United States were engaged in coasting trade in the sense in which those words were used in the New York pilotage statutes (which meant 'domestic', not 'foreign' trade) and that the steam vessels taking part in such trade were to be regarded as coastwise steam vessels (therefore engaged in domestic trade) under certain federal laws. The decision was

based on the language of Section 9 of the Foraker Act. That section provided for the 'nationalization of all vessels' owned by inhabitants of Puerto Rico, and for the admission of the same to all the benefits of the coasting trade of the United States, and stated that 'the coasting trade between Puerto Rico and the United States [should] be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States'. (Cf p 396 of the decision).

In *Dooley v. United States* (the second *Dooley case*) the Court, in an opinion written by Justice Brown, upheld the constitutionality of the Foraker Act in so far as it fixed the duties to be paid upon merchandise imported into Puerto Rico from the United States (in this case, the state of New York). It had been argued that such provision violated Article 1, Section 9, of the Constitution, which provides that 'no tax or duty shall be laid on articles exported from any state'. Justice Brown reasoned that that constitutional provision referred to articles exported to foreign countries. Puerto Rico was not a foreign country, according to *De Lima*. Congress was exercising here wide powers conferred by Article I, Section 8 of the Constitution, which authorised it to 'lay and collect taxes, duties, imports and excises' (p 155). On the other hand he envisaged no problems arising from the Uniformity Clause. 'There is a wide difference,' he argued, 'between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce' (p 157). Justice White, who had joined Justice McKenna's dissenting opinion in *De Lima* (maintaining that Puerto Rico was not either foreign nor domestic, but somewhere in between), and who had concluded in *Downes* that Puerto

Rico had not been incorporated into the United States, concurred in the judgement in *Dooley* and argued that Puerto Rico was not a foreign country, citing *De Lima* and *Dooley* (I) and referring to the fact that in *Downes* all members of the Court had agreed that Puerto Rico had either become a part of the United States or come under its jurisdiction (pp 163, 164). Chief Justice Fuller dissented again, joined by Justices Harlan, Brewer and Peckam (the majority in *De Lima*, minus Justice Brown). He argued, in short, that the Constitution prohibited Congress to levy duties on exports, that the duties in question here were duties on exports, and that the decision now made would enable Congress, under the guise of taxation, to exclude the products of Puerto Rico from the States and viceversa, notwithstanding what had been decided in the *De Lima* case (that since Puerto Rico had ceased to be foreign and had become domestic territory, it was not covered by the tariff laws of the United States) (pp 175-76). It is to be noted that both the majority and the minority opinions in this case relied on the rationale of the *De Lima* case to justify their differing conclusions. The disparate results in these cases (especially those decided on May 27, 1901) has led one commentator to exclaim that 'thus, amazingly, in one day, the Court held Puerto Rico to be in and/or out of the United States in three different ways!' (Torruella 1985: 61).

In *Fourteen Diamond Rings; Emil J Pepke, claimant v. United States* (decided the same day as *Dooley*, II), the Court held that some diamond rings imported from the Philippines after the ratification of the Treaty of Paris were not subject to duties as imports from a foreign country. Chief Justice Fuller, writing for the majority,

cited *De Lima*. The Philippines were in the same situation as Puerto Rico, he concluded. Justice Brown concurred. The minority in *De Lima* dissented again.

Neither in *Huus, Dooley (II)* or *Fourteen Diamonds* was there any discussion of the incorporation doctrine. However, the doctrine followed an ascending course.

In *Hawaii v. Mankichi*, decided in 1903, the question arose whether the Sixth and Ninth Amendments of the US Constitution required that criminal convictions in the territory of Hawaii be secured only by indictment found by a grand jury and by a verdict rendered unanimously by a petty jury. The Republic of Hawaii had been annexed by virtue of a joint resolution adopted by Congress on July 7, 1898, known as the Newlands Resolution.¹³ The resolution provided for annexation of the Hawaiian Islands 'as a part of the territory of the United States'. It further dictated that: 'The municipal legislation of the Hawaiian Islands...not inconsistent with this joint resolution nor contrary to the Constitution of the United States...shall remain in force until the Congress of the United States shall otherwise determine'. Formal transfer of the islands did not occur until August 12, 1898, and it was not until June 14, 1900 that Congress provided for the formal incorporation of the Republic under the name of the 'Territory of Hawaii', with special provisions regarding the empanelling of grand juries and for unanimous verdicts of petty juries. (Cf pp 210-211). No such provisions existed in the municipal legislation of the Republic prior to that date. The conviction in question in the case occurred before June 14, 1900. The Attorney General of the Territory argued that mere annexation did not have the effect of incorporating Hawaii, and cited *Downes v. Bidwell*. The appellee contended that Congress had incorporated Hawaii by virtue of the Newlands Resolution, and therefore, the referenced provisions of the Constitution applied since

the date the resolution came into effect. Notice that the doctrine of incorporation had not been adopted yet by a majority of the Court.

Justice Brown delivered the opinion of the Court, which held that the Newlands Resolution did not automatically abolish the criminal procedure theretofore in existence in Hawaii, and, therefore, grand jury indictments and unanimous verdicts were not required. He was joined by two new Justices, Oliver Wendell Holmes and William R Day, appointed to the Court by President Roosevelt in 1902 and 1903 to replace Justices Gray and Shiras, respectively. Justices White and McKenna concurred, but in a separate opinion argued on the basis that Hawaii had not been incorporated into the Union by the Resolution. The islands had been only annexed, not absolutely, but merely 'as part of the territory of the United States' and simply declared to be subject to its sovereignty (p 219). The proviso about the Constitution in the Newlands Resolution 'clearly referred only to (those) provisions...which were applicable and not those which were inapplicable', that is, those fundamental provisions which were 'by their own force applicable to the territory with which Congress was dealing' (p 221). The latter did not include indictment by grand jury or unanimous verdicts, according to White. In their separate dissents, Chief Justice Fuller and Justice Harlan maintained that the history of the treaty of annexation, including the Resolution, unambiguously showed the intention of Congress to 'incorporate' the islands into the United States.

The doctrine of incorporation was finally adopted by a majority of the Court in 1904. The case was *Dorr v. United States*. The specific holding of the Court was similar to that in *Mankichi*: the constitutional right to trial by jury did not extend to the Philippines unless so provided by Congress. Eight Justices adhered to the

conclusion. Only Justice Harlan dissented. Justice Day delivered the opinion of the Court. He claimed that the 1901 Insular Cases had settled the question of the power of Congress to govern newly acquired territories:

The recent consideration of this Court and the full discussion had in the opinions delivered in the so-called 'Insular Cases', renders superfluous any attempt to reconsider the constitutional relation of the powers of the government to territory acquired by a treaty cession to the United States. *De Lima v. Bidwell*, 182 US 1; *Downes v. Bidwell*, 182 US 244 (p 139).

He then proceeded to adopt the doctrine of incorporation, as had been expounded by Justice White in his concurrence in *Downes v. Bidwell*.

The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not **incorporated** into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*...

Until Congress shall see fit to **incorporate** territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation (pp 142-43) (emphasis added).

Regarding the specific question at hand, Justice Day determined:

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated (p 149).

In a concurrent opinion, joined by Justices Fuller and Brewer, Justice Peckham clarified that he voted with the majority because the specific point about trial by jury had been decided in the *Mankichi* case, but rejected that the *Downes* case be regarded as authority for the case at hand because the various opinions rendered on that occasion were 'plainly not binding' (p 154). He was manifestly unwilling to adhere to the incorporation theory. However, there were no other concurrent opinions, and only Justice Harlan dissented. That meant that five Justices of the majority of eight, including Justice Brown, were technically adhering to the opinion delivered by Justice Day. Despite the disparity of opinions in the 1901 cases, the Justices chose to read those cases as supporting the view first expounded by Justice White in his concurrence in *Downes v. Bidwell*. That reading meant that the doctrine of incorporation was now the position of a majority of the Court. The fact was noted unambiguously one year later by Justice White himself, writing for the majority in *Rasmussen v. Alaska (supra)*. Stating correctly that in *Dorr* the majority had adopted the doctrine of incorporation, Justice White relied on its rationale to hold that

Alaska had been incorporated into the Union. A similar statement about the import of *Dorr* was made by Chief Justice Taft in the *Balzac* case in 1922.

By mid-1904, therefore, the doctrine of the differentiated status of the newly acquired territories and of the plenary power of Congress to govern them had been established. The colonial condition of the territories and their peoples -- totally subordinated and subject to the mercy of Congress and, in many ways, of the federal Executive -- had been given legal sanction by the highest court of the land.

Rasmussen v. Alaska, decided in 1905, represented the final play-out of the debate in the highest judicial forum of the new imperial power. It was, however, only a *post-mortem* ritual. As if in a didactic summing up, the case brought into sharp focus the three contending positions, eloquently expounded by the principal characters themselves. Justice White, as it was fit, explained and applied his incorporation doctrine with the new authority invested on his pronouncements by the concurring vote of a substantial majority. Justice Brown, in a minority of one, reiterated his extension doctrine, while Justice Harlan insisted on his belief that the Constitution applied to the territories immediately upon acquisition. The irony of it all was that their differing analyses led to the same conclusion in the specific situation at hand: all of them agreed that the constitutional requirement of a trial by jury of twelve was extensive to Alaska. Of course, there were other ironies: the fate of the Caribbean and Pacific territories (with the exception of Hawaii), at least as far as the judicial sanction of colonialism was concerned, was consummated in the very case which clearly demonstrated one of the fundamental reasons for the differential treatment. After all, Alaska was sparsely populated and subject to control by white American settlers, a fact which guaranteed a relatively easy governance and assimilation.¹⁴

After 1905 there were no dissents in the Court in cases dealing with territorial matters, until 1911, when Justice Harlan filed a last dissent, without opinion, in *Dowdell v. United States*. There, among other holdings, the Court reaffirmed *Dorr* regarding the extension of trial by jury to the Philippines. After that decision there were no dissents from what had become clearly the doctrine of the Court. In *Ocampo v. United States* (1914), also a case relating to the extension of constitutional guarantees in the criminal process in the Philippines, the Court rendered a unanimous decision reaffirming earlier cases and quoting, specifically, *Mankichi*, *Dorr* and *Dowdell*.

The test to determine what Constitutional provisions and rights applied to the territories was now whether the territory had been incorporated to the Union. This raised the question of the criteria to ascertain whether incorporation had occurred. In *Downes v. Bidwell*, Justice White had mentioned the granting of US citizenship to the people of the territory as a clear indicator (p 332). In *Rasmussen* he listed additional factors: (a) the intention of Congress as expressed in the treaties of acquisition (p 520); (b) the character of the rights conferred by the treaty (p 523)¹⁵; and (c) the nature of the legislation adopted by Congress concerning the territory (for example, the extension of laws concerning internal revenue taxation, customs, commerce and navigation, etc.) (p 523).

Justice White also considered relevant whether Section 1891 of the Revised Statutes of 1878 was made applicable to the territory (pp 521-22). That provision reads:

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized as elsewhere within the United States.

This provision presented a stumbling block for the majority of the Court. Even if it was considered that the Constitution did not extend *ex proprio vigore* to the territories, through § 1891 Congress had made the Constitution's provisions applicable to all 'organized' territories of the United States, unless otherwise indicated by Congress itself.¹⁶ It could be argued that the extension of the Constitution to a territory -- which of course meant the full extension of rights as enjoyed by people in the States -- was a clear indication of the intent to incorporate. By the mere act of 'organizing' a territory, therefore, unless otherwise indicated, Congress would be declaring its will to incorporate that territory. In the case of the Philippines, in fact, Congress had expressly provided that Section 1891 would be inapplicable to the islands.¹⁷ This declaration of Congress was taken by the Court in *Dorr* as one indicator that Congress had not wished to incorporate the Philippines. Congress, however, has never made the same declaration respecting Puerto Rico. If Puerto Rico was an organized territory, then Section 1891 would apply. As one critic of the Insular Cases has correctly argued, the Court never dealt satisfactorily with this issue when deciding the status of Puerto Rico as a territory (Torruella 1985: 108-09).

In *Kopel v. Bingham*, decided on January 4, 1909, the Court, in fact, held that Puerto Rico was an organized territory of the United States. There the question was whether Puerto Rico was a 'territory' for extradition purposes, as defined in the relevant federal statute.¹⁸ In an opinion delivered by Chief Justice Fuller, with no

dissents, the Court held that Puerto Rico, although not a territory incorporated into the United States, was a completely organised territory (p 476).¹⁹ To explain what was meant by an ‘organized’ territory, the Court adopted the language used in a federal District Court case and in a previous Supreme Court decision to define the term ‘territory’, as contained in two different federal statutes.

The Court quoted the following part of the definition of ‘Territory’ adopted by the District Court for the Western District of Arkansas in *Ex parte Morgan*:²⁰

A portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws with a separate legislature under a territorial governor and other officers appointed by the President of the United States (*Morgan*: p 305; *Kopel*: p 475).²¹

In *In re Lane*,²² the Supreme Court had referred to

...that system of organized government, long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not in any sense independent governments; they have no Senators in Congress and no Representatives in the lower house of that body except what are called Delegates, with limited functions. Yet they exercise nearly all the powers of government, under what are generally called organic acts passed by Congress conferring such powers on them (*Lane*: p 447; *Kopel*: pp 475-6).²³

Puerto Rico, the Court concluded, had been completely organised by the Foraker Act (p 475).

After *Kopel*, then, the new doctrine regarding territories had completely crystallised: Territories can be either incorporated or unincorporated; organised or unorganised. The determination of their status depends on the will of Congress. A territory could be unorganised, yet incorporated. In fact that had been the case of Alaska for some time, according to the *Rasmussen* case. By the same token, a territory could be fully organised, yet unincorporated. That, in the Court's opinion, was the situation of Puerto Rico. The description made in *In re Lane*, adopted fully in *Kopel*, fitted the Puerto Rican situation perfectly. With some modifications, it still does.

3. The question of the 'applicable' rights

As the Court's doctrine developed it was obvious that the determination of what constitutional rights could be claimed by the inhabitants of the newly acquired territories would be left to the judiciary. Most of the cases decided after 1901 dealt with this issue. In those territories held not to have been incorporated by an act of Congress (after the doctrine was accepted by a majority), the determination hinged on whether the right in question was considered fundamental. But even before that, a majority of the Court had already accepted the fundamental/non fundamental distinction as a basis for deciding the question.

In *Hawaii v. Mankichi* the Court held that the rights to be indicted by grand jury only and to be convicted solely upon an unanimous verdict were not extensive

to Hawaii prior to its incorporation, because those were not fundamental rights, but mere methods of procedure. The notion was rejected by Justices Fuller, Harlan, Brewer and Peckham. Fuller not only refused to accept the distinction, but argued that, in any event, the rights in question were 'fundamental' enough. 'This is not a question of natural rights, on the one hand, and artificial rights on the other, but of the fundamental rights of every person living under the sovereignty of the United States in respect of that Government. And among those rights is the right to be free from prosecution for crime unless after indictment by a grand jury and the right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve' (p 227). Harlan referred to those guarantees as part of 'Anglo-Saxon liberty' (p 244). The Court reached the same result in regards to the Philippines in *Dorr v. United States* and *Dowdell v. United States*.²⁴

To justify its position the Court in *Dorr* appealed to a perceived need to respect the customs and traditions of the people in the territories. Justice Day also referred to the Instructions transmitted by the President to the Philippine Commission charged with organising a civil government in the new possession. Although the Instructions provided for the extension of a great number of guarantees analogous to those contained in the Bill of Rights of the US Constitution, the right to trial by jury was carefully excepted, 'doubtless due to the fact', Justice Day concluded, 'that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury' (p 145).

The Court's thinking in the *Dorr* case must be contrasted with Justice Day's own opinion in *Kepner v. United States*, decided the same day. In the latter case the

question was whether the guarantee against 'double jeopardy', extended to the Philippines by Presidential declaration and by an act of Congress, had to be interpreted as that expression was used in the Constitution, from which it was taken. The Attorney General for the Philippines and the Solicitor General of the United States had argued that the guarantee was not a fundamental right, but a question of method of procedure, and that respect for the institutions of the civil law prevalent in the Philippines demanded an interpretation of the guarantee as understood by Spanish law. Justice Day responded that it was the evident intention of Congress to 'carry some at least of the essential principles of American constitutional jurisprudence' to those islands and to 'engraft them upon the law of this people'. He quoted the President's view that this must be done for 'the sake of [the Filipino's] liberty and happiness, however much [those principles] may conflict with the customs or laws of procedure with which they are familiar'. He further quoted the President as being confident 'that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent' (pp 122-23).

The difference in rhetoric, however, does not make the decisions in *Dorr* and *Kepner* irreconcilable. In the end the latter hinged upon an interpretation of an Act of Congress which provided for the extension of a guarantee against double jeopardy. In *Dorr* no such provision was present. The decision in *Kepner* does not question the power of Congress, it only interprets what Congress intended to do. Taken together the decisions ultimately underline the fact that Congress has plenary power to govern the territories as it sees fit.²⁵

Ocampo v. United States reaffirms the rules established in *Kepner*, *Trono*, *Dowdell*, *Mankichi*, and *Dorr*. It reasserts the doctrine that the Constitution does not apply to the Philippine Islands of its own force. The case is also of some importance because it allowed the Supreme Court of the Philippines to retain some of the powers of the old Spanish *Audiencia* (see Chapter II), a body which had been abolished by an Act of Congress. Thus, for example, the Philippine Court was allowed to find criminal defendants, upon their appeal, guilty of a higher offense or to increase their penalties. It was held also that that Court's appellate jurisdiction in criminal cases was not confined to review mere errors of law, but was extended to a review of the whole case. The effect was to strengthen the powers of the territorial government, under American control, to deal with violations to the new legal order.

Ochoa v. Hernández, decided in 1913, presented a different matter. In an unanimous opinion the Court declared invalid an order by General Guy V Henry, during his tenure as military governor of Puerto Rico, shortening retroactively the period for acquisition of property by prescription. The General's action, the Court decreed, exceeded his Presidentially delegated powers. The order was tantamount to a deprivation of property without due process of law, a violation which offended 'fundamental principles' of the American political order. Using this rationale the Court did not feel obligated to discuss whether the military governor's action constituted an infringement of a constitutional right.

In 1904 the Court, unanimously again, determined that citizens of Puerto Rico were not 'aliens' within the meaning of the United States Immigration Act of March 3, 1891.²⁶ The case, *Gonzáles v. Williams*, involved a Puerto Rican woman detained in the port of New York as an alien. The Court did not find it necessary to

adjudge whether Puerto Ricans had acquired US citizenship with the Foraker Act, as had been argued by the then Resident Commissioner of Puerto Rico, Federico Degetau (appearing as an *amicus curiae*) (Cf pp 3-4; 12). The relevant test, rather, was alienage, the Court resolved. Chief Justice Fuller, who authored the Court's opinion, reasoned that the Treaty of Paris had transferred the allegiance of the 'native inhabitants' of Puerto Rico to the United States and that nothing in the Foraker Act indicated the intention of Congress that Puerto Ricans should be considered aliens and the right of access to the United States denied to them (p 12). In sum, the Chief Justice surmised: Puerto Ricans owed allegiance to the United States, lived in the 'peace of the dominion' of the latter, their organic law (the Foraker Act) had been enacted by the United States and was enforced by officials sworn to support the US Constitution -- all of which indicated that they were not to be considered 'aliens' for purposes of entry into the mainland (p 13). Furthermore, Gonzales was not a passenger from a 'foreign port' (p 16). Fuller referred extensively to an opinion rendered in 1902 by the Attorney General of the United States²⁷ advising the Secretary of the Treasury that a Puerto Rican artist temporarily living in France and there on the date of proclamation of the Treaty of Paris should be considered a citizen of Puerto Rico, under section 7 of the Foraker Act, and, as such, an 'American artist' for purposes of the exemptions contained in the tariff laws of the United States. Relying on the ruling in *De Lima v. Bidwell*, the Attorney General had concluded that the artist in question came from a place that had ceased to be 'foreign' within the meaning of the tariff laws and was now 'fully organized' as a country (*sic*) of the United States by the Foraker Act (Cf p 15).²⁸

The judgement in *González v. Williams* reflected well the legal situation of Puerto Rico, and the other new territories, as fashioned by the decisions of the Supreme Court in the Insular Cases. Both the territory and its people came to inhabit an intermediate status, a sort of juridical limbo: Puerto Rico belonged to, but was not a part of the United States; Puerto Ricans were not citizens of the United States, but were not aliens either. At the same time outside and within the Constitution (Thompson 1989: 213), they could only claim the protection of some but not all the rights that the American legal system formally sanctioned.

4. *Balzac v. Porto Rico*: citizenship and incorporation

In 1917 Congress conferred US citizenship on Puerto Ricans by virtue of the Jones Act (See Chapter II). From a legal point of view that raised the question whether Puerto Rico had been finally 'incorporated' into the United States. As noted in section 2, above, the bestowal of citizenship had been mentioned by Justice White as one of the indicators of the intent to incorporate on the part of Congress. The issue was resolved by the Supreme Court in 1922 in *Balzac v. Porto Rico*. By this time there had been a substantial change in the Court's composition. Of the original participants in the 1901 cases only Justice McKenna remained. Some of the judges who intervened in the second group of territorial-related decisions were still sitting in the Court, such as Justices Day, Holmes, Mahlon Pitney, Willis Van Devanter, and James Clark McReynolds. But there were three new Justices: Louis D. Brandeis, John H. Clarke and the new Chief Justice, former US President William Howard Taft.

Balzac, editor of a Spanish language daily newspaper in Puerto Rico, had been condemned to serve one five month and another four month jail sentence, with payment of costs in each case, for certain comments -- considered libelous by the Government -- alluding to the American Governor of the island. The defendant had requested a trial by jury, although the code of criminal procedure of Puerto Rico granted a jury trial only in felony cases and not in misdemeanors. He alleged that he was entitled to a jury under the Sixth Amendment to the Constitution of the United States. The Supreme Court rejected his claim.

Chief Justice Taft wrote the opinion of the Court. Quoting the *Mankichi* and *Dorr* cases, he commenced by stating that it was 'clearly settled' that the right to trial by jury does not apply to territory of the United States which has not been incorporated into the Union (p 304). It was 'further settled', according to *Downes v. Bidwell* and *Dorr*, that neither the Philippines nor Puerto Rico had been incorporated by the statutes providing for their provisional government (in the case of Puerto Rico, the Foraker Act) (p 305). He then proceeded to consider whether the Jones Act had had the effect of 'incorporating' Puerto Rico to the United States.

The Chief Justice noted that the 1917 Act did not indicate by its title that it had the purpose to incorporate the island nor did it contain any clause which declared such purpose or effect (p 306).

Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference (*ibidem*, emphasis added).

Probably aware that he was now requiring an express declaration of Congressional intention, contrary to previous expressions of the Court that incorporation could be inferred from relevant indicia (and also presumably conscious that the doctrine of incorporation itself was no more than a recent judicial invention), Taft added:

Before the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important, or at least it was not fully understood and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference from various legislative acts; but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view (p 306).

The Chief Justice also took as an indication of Congress's lack of intention to incorporate the fact that the Jones Act included a 'Bill of Rights'. Incorporation would have made the Constitution's Bill of Rights applicable *ex-proprio vigore*, Taft reasoned, therefore a statutory Bill of Rights would have been needless. This, to him, was a 'conclusive' argument (pp 306-7).

But what about the extension of US citizenship? Under the described circumstance, he explained, conferring citizenship was 'entirely consistent' with non-incorporation. The granting of citizenship to the inhabitants of Puerto Rico only had the following purposes: (a) 'to put them as individuals on an exact equality with citizens from the American homeland'; (b) to extend them the protection of the new sovereign against the world; and (c) to allow Puerto Ricans to move into the continental United States and, becoming citizens of any State, there to enjoy every

right of any other citizen of the nation, without the need of naturalisation (pp 308, 311). Nothing further could be inferred from that act.

While residing in Puerto Rico, the Puerto Rican could not insist on a federal constitutional right to a trial by jury. For 'it is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it' (p 309). And Puerto Rico was not of the kind of territories to which the Constitution fully applied.

The Chief Justice was conscious that his reasoning was at odds with the import of the Court's decision in *Rasmussen v. Alaska*. There the Court had considered as sufficient ground to infer an intention to incorporate the fact that in the treaty of acquisition Congress had declared its desire to confer political and civil rights on the inhabitants of the territory as American citizens.

But Alaska was a different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States.²⁹ It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury (p 309).

He expounded on what he considered those 'difficulties' to be:

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume.³⁰ The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at

once to acquire... Congress has thought that a people like the Filipinos or the Porto Ricans (sic), trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. Hence the care with which...the United States has been liberal in granting to the Islands acquired by the Treaty of Paris most of the American constitutional guarantees, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it (pp 310-11).

Taft again addressed the issue of the advisability of inferring an intention to incorporate from the act of granting citizenship status:

We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that when such a step is taken it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction (p 311).

The Court rejected Balzac's argument that Puerto Rico had also been incorporated by the effect of the numerous Congressional statutes providing for the organisation of a United States District Court in the island, the review by the federal judiciary of the Puerto Rican Supreme Court in cases in which the Constitution of the United States was involved, the entry of Puerto Rican youth into the American

military academies, the sale of US stamps in the Island, and the extension to Puerto Rico, in one way or another, of revenue, navigation, immigration, national banking, bankruptcy, federal employers' liability, safety appliance, extradition, and census laws. 'None of these nor all of them put together,' Justice Taft pronounced, 'furnish ground for the conclusion pressed on us' (pp 311-12).

Concluding that 'on the whole' there were 'no features' in the Jones Act from which to infer the purpose of Congress to incorporate Puerto Rico into the Union 'with the consequences which would follow', Taft added that, in any event, substantially the same question had been disposed of by the Court in a very brief *per curiam* decision rendered in 1918, without full length discussion of the issues.³¹ The decision involved two cases: *Porto Rico v. Tapia* and *Porto Rico v. Muratti*.³² In the first case the issue was whether a defendant charged with a felony some twelve days after passage of the Jones Act could be brought to trial without indictment by a grand jury as required by the Fifth Amendment of the US Constitution. In the other case the felony charged was alleged to have been committed before passage of the 1917 Act but prosecution was begun afterwards. The United States District Court for Puerto Rico and the Supreme Court of the island, respectively, had held that indictment by grand jury was required after the Jones Act came into effect. The US Supreme Court summarily reversed both, citing *Downes v. Bidwell*, *Mankichi* and *Dorr*. This, the Court now declared, amounted necessarily to holding that the Jones Act had not incorporated Puerto Rico (p 313).

In *Balzac* Chief Justice Taft summarised the import of the Insular Cases thus:

The Constitution of the United States is in force in
Porto Rico as it is wherever and whenever the

sovereign power of that government is exerted. This has not only been admitted but emphasized by this court in all its authoritative expressions upon the issues arising in the *Insular Cases*...The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements (pp 312-13).

Within the logic of the discourse adopted by the Court in this and some of the previous cases, some of Chief Justice Taft's statements are certainly problematic. It is important to address them briefly in order to enrich the context of the discussion that is to follow in further sections of this chapter.

First, according to Taft the 'real issue' in the *Insular Cases* was not whether the Constitution extended to the Philippines or Puerto Rico, but which of its provisions were applicable. A perusal of the debate within the Court indicates that the applicability of the Constitution *ex-proprio vigore* was a central issue. 'Whether the Constitution follows the flag', was the popular formulation of the controversy. Justice Brown's extension doctrine was a straight negative answer to the question. It was only as a result of the decisions in the cases, with the development of the incorporation doctrine, that the issue became **which** constitutional clauses applied. The Court created a doctrine to allow Congress and the Executive to deal with the 'new conditions and requirements' to which Taft so candidly refers -- the acquisition of overseas territories inhabited by peoples of different race and culture and not yet subject to the control of white American settlers. The issue had been whether the

United States could constitutionally subject those people to a condition of permanent subordination. The majority in the previous cases answered the question, elaborating a doctrine that provided the legal justification for the new expansionist venture.

Secondly, that 'locality' and not the status of the people became now the determinative criterion regarding the applicability of constitutional guarantees in matters of judicial procedure was the product of a kind of circular reasoning, operating at two different levels, resulting from the development of the cases as a whole. The status of the territories -- as 'localities' -- had been determined initially with reference to the characteristics of the peoples inhabiting them. It were those characteristics -- racial and cultural differences, different legal and political traditions, etc -- that justified, in the Court's mind, the creation of a distinct new category, the unincorporated territory. Moreover, before *Balzac*, the nature of the rights conferred on the people was considered to be indicative of the will to incorporate: in other words, incorporation -- that is, the status of the territory -- flowed, among other things, from the nature of rights extended. Now, *Balzac*'s rationale, coming full circle, made determination of the status of the territory dispositive of the question of the nature of the rights to be enjoyed by the inhabitants.

Thirdly, the reasons given by Taft for the conferral of citizenship to Puerto Ricans do not convincingly refute the argument that the action implied incorporation, and, therefore, the full extension of constitutional rights. It does not make much sense to assert, as Taft did, that the intention not to extend the protections of the Sixth Amendment of the Constitution regarding trial by jury can be inferred from the desire of Congress to put Puerto Ricans 'on an exact equality with citizens from the American homeland'. As to mobility to the continent, the Court itself had held in

González v. Williams that it was not necessary for Puerto Ricans to be US citizens to enjoy the right of free access to the States proper. His argument also implies that there is a need to move to one of the States in order for a US citizen to ‘complete’ her citizenship, that is, to have full access to the enjoyment of political and other rights. American constitutional doctrine, however, had long rejected the notion that a person has to be a citizen of one of the States in order to be a citizen of the United States (*Slaughter House Cases*, at 74). What the Court’s position entails is the inevitable conclusion that what Puerto Ricans were getting was a ‘second-class’ citizenship, as so many critics have pointed out. (E.g. Torruella 1985). Lastly, historical research has demonstrated that there were probably other reasons for the granting of citizenship (Cf Serrano Geyls 1986: 478; Estades 1988: 165-215; Torruella 1985: 85-93). But this is a point that will be taken up in another chapter.

Finally, there is the question of the reasons for refusing to extend to Puerto Ricans the right to trial by jury. The argument that it was out of respect for local legal customs and traditions is hardly convincing. After all, from the very first days of the occupation, the military regime, and Congress later, had engaged in a massive effort to overhaul the legal system in effect in Puerto Rico since Spanish times, especially regarding criminal and procedural matters.³³ Impositions of an even more profound nature were also attempted, as in the matter of language (Cf chapter II), political institutions and education. Furthermore, it must be remembered that jury trials were already in effect for felonies in Puerto Rican courts, as provided by the Code of Criminal Procedure, a product of one of the many legal reforms carried out under the American regime. A probable explanation for this refusal to grant trial by jury the status of a constitutional right will be offered in section E, below.

The flaws in Taft's reasoning, however, do not necessarily mean that he and the other Justices had misread the intention of Congressional and Executive policy makers. The explanation more probably lay in the fact that -- for reasons that have been suggested already and (hopefully) will become more apparent further below -- both the Court and the so-called 'political' branches of the Government were pursuing a policy of differential treatment regarding the former Spanish possessions that was difficult to square with past (and current) practice, traditions and principles.

In summary, the Court in *Balzac* took the doctrine of incorporation one step further to require practically an express declaration of Congress, in so many words, of its intention to incorporate a territory. It also put to rest the allegation that the status of a territory is altered by granting citizenship to its people. It made revealingly clear the considerations that both the Court and Congress had in mind when treating these territories differently. And it 'settled' for many years to come the question of the status of the countries acquired by the United States as a result of the Spanish American War.

C. THE LEGAL THEORY OF THE INSULAR CASES

In the process of developing the doctrine of territorial incorporation and determining the juridical status of the new territories the members of the Court applied explicit or implicit conceptions of law, theories of interpretation and adjudication, notions about the nature of rights, and assumptions about the function of the judicial process and the Supreme Court itself. It is to this 'applied jurisprudence' or 'practical' legal theory that the attention is now turned. For, as

proposed in Chapter I, the applied jurisprudence of legal operators must be viewed as ingredients in the social process involved in the act of making legal decisions -- part of the exercise of justification, and, therefore, of the process of legitimation of social and political relations (Ch I, Section B.3).

1. Conceptions of law and theories of interpretation and adjudication

a. Pragmatic instrumentalism v. formalism

A striking feature of the jurisprudential implications of the Insular Cases is the tension, interplay, and at times attempts to accommodate formalist and instrumentalist views of law and of the process of legal interpretation. By formalism I mean the conception of law as a system of concepts, rules and principles that must be logically and coherently applied to every situation, to a large extent irrespective of immediate social or practical consequences. Of course there are degrees of formalism. But its fundamental proposition is the one described.³⁴ By pragmatic instrumentalism I refer to a mode of reasoning predicated on the proposition that law, laws and the legal process serve identifiable goals, purposes and policies and that the adjudicator must take into consideration the social and political consequences of his or her decision.³⁵ Again there are several versions of instrumentalism. In the cases at hand instrumentalism takes fundamentally the form of a central preoccupation with the consequences of the decision made or the doctrine adopted.

A more or less distinct pattern emerges from the decisions. In general, the members of the majority responsible for the development of the incorporation doctrine

in the 1901 cases adopt a strongly instrumentalist stance, while the dissenters, Harlan especially, argue for what amounts to a 'principled' approach that is generally formalist, although not crudely so. After 1904, when the doctrine has already been established, the majority swings to a generally formalist approach, relying heavily on the precedential value of the 1901 cases and 'logically' deducting from them the applicable rules. In 1922, in the *Balzac* case, Chief Justice Taft grounds his decision on the 'precedents' established by the previous cases, but adds a heavily consequentialist analysis to confront the 'new situation' created by the Jones Act of 1917, conferring citizenship on Puerto Ricans.³⁶ A brief examination of some examples will suffice.

In his dissenting opinion in the first case decided, *De Lima v. Bidwell*, Justice McKenna, joined by Justices Shiras and White, decried the excessively 'definitional' approach taken by the majority, through Justice Brown's opinion, to conclude that Puerto Rico was not a foreign country. Justices McKenna and Shiras, it must be remembered, were the first to adhere to Justice White's theory of incorporation. In *De Lima* Brown's reasoning had been founded on his interpretation of the relevant precedents and on logical deduction from the provisions of the Constitution, expressly refusing to take account of the resulting 'inconvenience' of the Court's holding. McKenna's principal argument is consequentialist. The interpretation of the Constitution adopted by the Court would 'cripple' the United States as a power among other nations, for it would not be able to behave like them, with the ability to acquire territories and govern them as it best fitted its interests as a nation. He advises to consider the 'practicalities' of the situation and to heed attention to the 'great public

interests' involved. The Constitution is to be viewed as an instrument, rather than a limitation, of power for the nation.

The argument must have had an impact on Justice Brown, for in *Dooley* (I) he adopts the consequentialist approach of his adversaries to arrive at the same conclusion as in *De Lima*. There are constant references to the 'necessities' of the case and the practical requirements of the administration of the territory (pp 232-3).

He details the 'disastrous' consequences for the economy of Puerto Rico to hold that it still remained a foreign country after the ratification of the Treaty of Paris (pp 235-6). His arguments were countered by the dissenters, Justices White, Gray, Shiras and McKenna, with equally consequentialist considerations that demonstrated, to their mind, the 'impracticality' of the theory of immediate incorporation by cession. Immediate incorporation, they argued, would deprive Congress of the necessary time to act and put in place a machinery for the collection of duties and other incidents of administration before the territory could be considered a part of the United States (p 242).

In *Downes v. Bidwell* Justice Brown joined the previous dissenters to hold that Puerto Rico belonged to but was not a part of the United States.³⁷ Brown timidly attempts to make what nowadays would be called a 'principled' decision by examining at length what to his mind are the relevant legislative and judicial precedents.³⁸ He even tries to distinguish the *Dred Scot* case. But by now totally converted to instrumentalism his main argument consists in warning of the 'extremely serious consequences' of the proposition made by the new dissenters, notably Harlan and Fuller, that the Constitution applied immediately upon acquisition of the new territory:

Indeed it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States (p 279).

In effect the new majority feared that any other interpretation would curtail the flexibility of the United States to act in the course of its expansionist drive. Brown envisioned another set of consequences if the theory of the immediate application of the Constitution were upheld: the extension of the general revenue laws of the United States could upset the economy of the territories, inviting 'violations of law so innumerable as to make prosecutions impossible', and almost certainly 'alienat(ing) and destroy(ing) the friendship and good will of that people for the United States' (p 284). This latter argument could be interpreted as a mere rationalisation that played to the concerns of Puerto Ricans -- particularly the business and commercial elites. But it also shows, I believe, a perceptive preoccupation with, on the one hand, problems of law and order relating to the governance of the colony and, on the other, the necessity to procure a degree of consent to colonial rule, in other words, to assure the hegemonic character of the project.

Justice White's famous concurrence in *Downes* -- the judicial source spring of the theory of incorporation -- also draws substantially on consequentialist reasoning for its conclusions. He lists what he considers the 'evils of immediate incorporation' and alludes to the 'dangers' to the American people of such a result (p 308). Referring to the necessities arising out of a war successfully fought by the United States and leading to the acquisition of territory, he comments:

It being true that incorporation must necessarily follow the retention of the territory, it would result that the United States must abandon all hope of recouping itself for the loss suffered by the unjust war, and, hence, the whole burden would be entailed upon the people of the United States. This would be a necessary consequence, because if the United States did not hold the territory as security for the needed indemnity it could not collect such indemnity, and on the other hand if incorporation must follow from holding the territory the uniformity provision of the Constitution would prevent the assessment of the cost of the war solely upon the newly acquired country (p 308).

Adroitly choosing his examples, perhaps with a certain audience in mind (Mahan, Roosevelt and the promoters of naval expansion?), White elaborates:

Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such an island, under the rule which is now insisted upon, be taken? Suppose again the acquisition of territory for an interoceanic canal, where an inhabited strip of land on either side is essential to the United States for the preservation of the work. Can it be denied that, if the requirements of the Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result? (p 311).

In the context of the discussion of the applicability of the grand jury and unanimous verdict guarantees to the 'unincorporated' territory of Hawaii, Justice Brown, in the *Mankichi* case, argues that to ascertain the intention of a legislative body (Congress in this case) the adjudicator must look at the consequences or results of a 'literal' interpretation of the legislative enactment. If the consequences are

'disastrous', one must infer that the result was not intended. In this case, he points out, holding that the constitutional guarantees applied *ipso facto* by virtue of the act of annexation (the Newlands Resolution, discussed *supra*) would have as a consequence that 'every criminal convicted of a felony' between the annexation (1898) and the Organic Act of the Philippines (1900) would have to be released and every verdict in civil cases by less than unanimous jury would have to be nullified (p 216). The 'law of necessity' prescribed a different result (*ibidem*).

The instrumentalist stance of the new majority composed by Justices Brown, White, Shiras, McKenna and Gray, in the early stages of the development of the doctrine regarding the territories, was most frontally rejected by Chief Justice Fuller and Justice Harlan in several of the opinions. Dissenting in *Downes*, Fuller called for a 'textual' reading of the Constitution:

Some argument was made as to general consequences apprehended to flow from this result [the invalidation of the tariff provisions of the Foraker Act], but the language of the Constitution is too plain and unambiguous to permit its meaning to be thus influenced. There is nothing 'in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution' in giving it a construction not warranted by its words (p 374).

He likewise refused to accept as valid the arguments made by representatives of 'certain industries' that filed briefs supporting the power to impose tariffs on the new territories in order to 'diminish competition'. If US producers in the States believed the Constitution should be amended to achieve that result, the amendment procedure should be followed (p 374). Nor was it true, Justice Brown contended,

that absolute power was essential to the acquisition of vast and distant territories (*ibidem*). But after all, he concluded, these were merely political arguments which had not 'the requisite certainty to afford rules of judicial interpretation' (p 375). And he called for the application of 'well settled rules which govern the interpretation of fundamental law, unaffected by the theoretical [political, it is to be presumed] opinions of individuals' (*ibidem*). In his dissent in the *Mankichi* case Fuller again referred to the 'plain and unambiguous' language of the Newlands Resolution which had the effect of incorporating Hawaii and precluding any legislation contrary to the Constitution. Resort to construction or interpretation was absolutely uncalled for (p 233). Moreover, arguments '*ab inconvenienti*' were an 'unsafe guide'. To depart from the 'plain meaning' of the statute was to 'usurp legislative functions' (*ibidem*). It must be noted that Fuller also thought it proper to scrutinise the 'intention' of the legislator. But his procedure is to examine the words of the statutes and treaties, including the preambles, to search for their 'meaning', disregarding the possible 'inconvenience' of the practical consequences of the Court's decision.

A similar stance was taken by Justice Harlan in that same case. He advocated interpreting the law 'as it is written', rejecting arguments from policy or convenience and leaving the 'consequences for the lawmaking power' (pp 247-248). His position, however, is somewhat more complex, as demonstrated by his arguments in the *Downes* case. At one point he derides the imprecise nature of White's incorporation theory. It seems to be endowed, Harlan comments caustically, of some 'occult meaning' which must be deciphered. Moreover, Justice White seemed to be requiring an express inclusion of the word 'incorporation' in the legislation enacted by Congress; while, Harlan believed, the Court must look at the effects of the action

taken by Congress. He reviewed the provisions of the Foraker Act to describe those effects (p 389). This line of argument can be read as an attack on an extreme variety of formalism -- conceptualism -- to which Harlan believed Justice White's theory paradoxically led. In other passages Justice Harlan adopts his own variety of formalism. He argues that the Constitution is not to be obeyed or disobeyed 'as the circumstances of a particular crisis' in history may suggest (p 384); that its operation 'cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies' (p 385); and that its 'meaning' cannot depend 'upon accidental circumstances' (*ibidem*). 'We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands', he proclaims (*ibidem*).³⁹

An interesting case is presented by Justice Holmes, notorious, of course, for his 'realism' and his famous assertion that experience rather than logic is the life of the law. In *Kepner v. United States*, a Philippines case, he filed his only dissent in these cases, at odds with the interpretation of the double jeopardy guarantee adopted by the majority. In what probably should be taken as a tongue in cheek argumentation he declares that the Court's decision (in favour of the defendant) would have serious consequences.⁴⁰ Yet, he adds, he will not stop to examine them, 'as such considerations are not supposed to be entertained by judges except as inclining them to one of two interpretations, or as a tacit last resort in case of doubt'. He preferred, in this case, to have recourse to 'logic and rationality' (p 134). The result, of course, would be a stricter interpretation of the provision in question.

The shift to a more formalistic approach on the part of the entire Court was evident after the first group of cases was decided, and especially after 1903. A good

example is *González v. Williams*. As will be remembered, the controversy there was whether Puerto Ricans were aliens for the purpose of the Immigration Acts. The reasoning of the Court hinged largely around a definition: ‘what is an alien?’

As a whole, however, the most important opinions, those that proved to be the foundation of the doctrine of incorporation and of the plenary power of Congress were decidedly, even explicitly, instrumental in tone. It is not mere coincidence that this instrumental approach was pressed upon the Court straightforwardly by the Government. The closing paragraph of the Solicitor General’s argument before the Court, as reported in the published decision of the *De Lima* case, contains an exemplary formulation of a purposive interpretation of the Constitution:

Is the Constitution a stumbling block, or a trap, caught in which we shall excite the pity of our friends and the derision of our foes? I refuse to believe so. The Constitution is no mere declaration of denials. It created a nation...when it conferred power, it took care not to cripple action. It still remains the most perfect instrument ever struck off at a given time by the brain and purpose of man, under which we are armed for every emergency and able to cope with every condition (p 173).

b. Contextualism

It is not surprising that those judges who advocated the instrumentalist approach promoted also a contextualised reading of the relevant judicial precedents and past governmental practice. (See, for example, Justice McKenna’s dissent in *De Lima* and White’s concurrent opinion in *Downes*.) McKenna’s argument further suggests a view of interpretation as a collective process involving those who drafted

the Constitution and those who are called subsequently to apply it. Hence, the need to consider the interpreter's contemporary context as well. The process involves consideration of the institutional context in which interpretation takes place -- the functions of each branch of government, for McKenna, and the 'nature of the government', for White. In a turn of the argument that would sound curious in the light of later jurisprudential debates, the rigid formalism attributed to Justices Harlan and Fuller, and to Justice Brown in *De Lima*, is equated by McKenna and White with an usurpation of the 'political' functions of the legislature. It was the highly contextualised, instrumentalist, approach that they adopted that, to their mind, permitted respecting the will of the political branches. That will was read as denying immediate 'incorporation' to the new territories.

Chief Justice Taft further developed this contextualised methodology in *Balzac v. Porto Rico*. The shift from the doctrine of 'implied' to 'express' incorporation that his opinion practically signifies was mandated, he stated, by the needs of 'these latter days' (See the discussion of the case *supra*). A change in the historical situation required a modification of the legal test, according to Taft. His opinion provides several concrete examples of contextualised readings of past and recent governmental decisions, such as his discussion of the differences between Alaska and the situations of Puerto Rico and the Philippines. Equally suggestive of attention to contemporary events is his speculation about the reasons that prompted Congress to confer US citizenship on Puerto Ricans, such as his reference to the need to afford them protection 'against the world'. Related to an action taken by Congress in 1917, this argument resonates with sub-textual allusions to the presence of German submarines in the Caribbean.

Of course, this 'contextualised' reading of everything, from the debates in the Constitutional convention and the decisions in the *Fleming*, *Rice*, and *Scott* cases, to the various treaties and Acts annexing other territories, allowed the Court to create a new doctrine fitted to what the Court, Congress and the Executive understood were the 'new conditions' attendant to these most recent acquisitions.

c. Instrumental eclecticism

The alternation between a predominantly instrumentalist/contextualised interpretative technique in the 1901 decisions to a largely formalist approach in the second group of cases and back to instrumentalism and contextualism in *Balzac* provides a picture of a strategy of interpretation⁴¹ that is, ultimately, profoundly instrumentalist. In effect, this strategy of contextual selection of interpretative techniques-- evident in those shifts as well as in the intermingling of approaches within some of the opinions themselves -- can best be described as instrumental eclecticism. The techniques and modes of reasoning utilised were influenced heavily by the results that they were likely to produce. Thus the explicit instrumentalism of the first group of decisions allowed the new doctrine to develop; the formalism of the second group had the effect of confirming and settling the theory of incorporation; and Taft's contextualised approach in *Balzac* was able to take account of the 'new conditions' and the legal challenge that the granting of citizenship implied, in order to reaffirm the earlier rulings and leave the status of Puerto Rico as a territory unchanged.

This instrumental eclecticism was evident also in the combination of arguments from natural law -- the references to 'higher principles', 'natural rights', 'inherent, although unexpressed principles', etc. -- and consequentialist considerations of policy (Cf, for ex, Brown in *Downes*, p 282, and White in *idem*, pp 290-1). In similar vein is the oscillation between modes of logical reasoning (Cf White's explicit assertion that he would rely both in deductive and inductive reasoning to arrive at his result, *Downes*, p 300) and the use of multiple sources from which to draw the criteria for constitutional and statutory interpretation: text, general principles, precedent, 'opinion of contemporaries', history, traditions, consequences, context, 'nature of government', etc. (Cf esp. Brown and White in *Downes v. Bidwell*; See Ramírez 1946: 135).

From the point of view of American legal history this feature of the cases is highly revealing. It is generally believed that the end of the nineteenth and the beginning of the twentieth centuries mark a period of heightened formalism in American legal thought and judicial practice. (Cf Horwitz 1977; Summers 1982; Lloyd and Freeman 1985: 679).⁴² How can this fact be reconciled with the explicit instrumentalism adopted by the majority of the Court in 1901 in the *Insular Cases*? A probable answer is the following. Formalism and instrumentalism as techniques of interpretation always coexist to a certain degree in the legal system. Whether one prevails over the other at a given moment is always the result of the convergence of internal and external factors that must be analysed in their specific articulation.⁴³ As a general proposition one could assert that formalism tends to be adopted in situations of relative stability in the legal and political system, when struggles about legal meanings have already been settled (however provisionally), or in controversial

situations in which -- due to the particular conjunctural balance of forces -- conflicts are in the process of being settled through the reaffirmation of principles previously adopted. Instrumentalism as a judicial technique tends to prevail, however, when the legal system is either confronted with new challenges -- such as was the case during the period of New Deal legislation in the United States -- or when there is a fundamental shift in policy (or in the conditions for the pursuit of an established policy) that requires new legitimation. Thus, the formalism of the latter part of the nineteenth century was adequate for domestic issues. As Horwitz has argued, by that time the business elite had already established its hegemony and the basic principles of American 'private' law had been settled (Horwitz 1977: 254-259). But at the end of the century the United States was entering a new stage in international relations: the imperialist-expansive stage. That situation called for flexibility in the application of law and the development of legal doctrine in matters relating to the results of the imperialist drive, such as the definition of the legal status of the newly acquired possessions. The judiciary was thus confronted with the need to have recourse to the instrumental eclecticism apparent in the cases under discussion. For a time, then, formalism in domestic legal issues would cohabit with instrumentalism in legal matters relating to the territories, until the legal principles best suited for the 'new situation' (according to the metropolitan point of view) became settled.

A second conclusion relevant to modern day theoretical debates may be drawn from the analysis of the Insular Cases. Today there is a tendency to equate formalism with 'conservative' views, with the legitimation of existing power structures. On the other hand it is not infrequent to encounter 'progressive' approaches to legal interpretation that call both for consequentialist reasoning and

contextualised methodologies for the determination of 'meaning'. The lesson that may be drawn from the Insular Cases is that contextualism itself must be contextualised. After all, the determination of the relevant 'context' in the course of interpretation is ideologically informed: what counts as pertinent contextual data - - whether historical or contemporary -- is to a great extent conditioned by the views of those making the selection and by their own biographical and social context. Indeed all theories of interpretation -- including contextualism -- need to be analysed in the context of their genesis, development and application. In other words, there must be a sociology of theories of interpretation. We have seen how, following an instrumental, contextualised, approach to legal interpretation the Supreme Court of the United States in effect legitimated colonialism. In the process of determining the relevant history and the consequences of its decisions the Court was continually engaging in acts of ideological selection and thematisation (Cf Habermas 1988a: 60). What are the history that counts and the consequences that matter is as much a site for struggle in the conflicts over meaning as the selection of the pertinent legal data and interpretative techniques.

2. The judicial function

There was not much rhetorical disagreement among the different majorities and minorities in the cases about the need for the Court to exercise 'judicial restraint' in their resolution of the important matters under discussion. What they disagreed upon was who was actually exercising that restraint. Thus Justice McKenna, in his dissent in *De Lima*, advises the exercise of judicial moderation. The Court, he

believes, is casting unnecessary legal fetters upon Congress and the Executive by denying them the required flexibility to deal with the new territories. On the other hand, Justice Harlan, arguing for quite different results, more than once urged the Court not to 'amend' judicially the Constitution by extending Congress and the Executive a power not sanctioned by the latter instrument (See, for example, *Dorr v. United States*, p 155).

3. The nature of rights

The edifice of the incorporation doctrine -- not less than the 'extension' doctrine advocated by Justice Brown -- is mounted upon a hierarchical conception of rights that draws distinctions in terms of the importance and degree of protection among the various claims that subjects can make to a legal system. Thus, at various points, the Court's opinions elaborate a discourse based on the differences between 'natural' and 'artificial' rights (Brown in *Downes v. Bidwell*), between 'fundamental' and 'non-fundamental' rights (Brown in *Downes* and *Mankichi*), and between 'fundamental rights' and 'questions of procedure' (*Mankichi*, *Dorr*, *Kepner*). Of course, the distinction between 'natural' and 'artificial' rights is part of the long standing polemic between positivists and natural law theorists within the liberal tradition. In Brown's opinion the difference is posited as one between those rights that are 'indispensable to a free government', which he calls 'natural rights' (he lists among them freedom of religion, of speech and press, personal liberty and individual property, due process of law, free access to courts of justice, equal protection of the laws, and immunities from unreasonable searches and seizures and from cruel and

unusual punishment), and those rights ‘peculiar to Anglo-Saxon jurisprudence’, which he terms ‘artificial or remedial rights’ (*Downes*, pp 282-3). The opposition between fundamental and non-fundamental rights is played out in the cases as part of two different approaches to constitutional interpretation. The majority in *Downes*, *Mankichi*, and similar cases held the view that even if Congress possessed plenary power over the territories, the Constitution imposed certain fundamental limitations wherever Congress exerted its power. These limitations concerned the inhabitants’ ‘personal’ rights as opposed to political rights. Furthermore, even personal rights, particularly in the context of criminal law, could be classified into those that were ‘fundamental’ and those that referred to mere ‘questions of method or procedure’. These distinctions were rejected or questioned expressly by Justices Harlan and Fuller (See section B.3 *supra*). The Constitution, they believed, did not make such classifications, especially regarding ‘personal’ rights.

D. THE IDEOLOGY OF THE INSULAR CASES

The discourse elaborated in the lengthy discussions carried out by the Justices in the Insular Cases was permeated by wider conceptions and values whose analysis is necessary in order to understand properly the import of the legal doctrine established by the decisions. This is the cognitive/axiological dimension of law and legal doctrine referred to in Chapter I. It is in this sense that the term ‘ideology’ is used in this section.

1. Racism, Manifest Destiny, Social Darwinism and the Construction of the 'Other'

The discourse of the Insular Cases was overtly racist. A few quotations will suffice to prove the point. It is fitting to start with the arguments pressed upon the Court by the Government's representative. The Solicitor General of the United States, referring to the effect of the Treaty of Paris respecting the Philippines, argued:

Certainly the treaty never intended to make these tropical islands, with their savage and half-civilized people, a part of the United States in the constitutional sense, and just as certainly did make them a part of the United States in the international sense (*De Lima v. Bidwell*, p 138).

In *Downes v. Bidwell*, Justice Brown expressed:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians (p 282)...

A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies toward large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice,

according to Anglo-Saxon principles, may for a time be impossible, and the question at once arises whether large concessions ought not to be made for a time that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them...(p 287).

Chief Justice Taft in the *Balzac* case crowned the series of decisions with the following statement:

We need not dwell on another consideration which requires us not lightly to infer...an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people (p. 311).

Justice Harlan rebutted Justice Brown's racial argument thus:

Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution (p 384).

In the *Dorr* case, lamenting the Court's refusal to extend the constitutional right to a trial by jury to the Philippines, Harlan commented:

Guarantees for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution (p 154).

The obvious racism of the Court's expressions cannot be separated from others reflecting an adherence by some members of the Court to the tenets of the ideologies of Manifest Destiny and Social Darwinism, which were part of the ideological framework of the dominant circles in the United States at the time. Permeating the decisions is the notion that the peoples of the new territories were incapable of self-government. Moreover, that they were not fit to become full-fledged members of the American polity, with a right to participate in its government. In this sense the majority opinions, especially, share in many fundamental ways the principal features of the ideology of expansion discussed in detail in Chapter II.

Closely related to this attitude is a discourse that stresses the separateness between the conquering people and the conquered. Again it is a discourse constructed around binary categories that privilege one pole of the equation (See Chapter II). Justice White refers to 'alien and hostile peoples' (*Downes*, p 311) -- those peoples are the 'others', constructed as such, as Justice Harlan perceptively notes, by labelling them 'dependent peoples', 'subjects', inhabiting territories that are named 'dependencies' or 'outlying possessions' (See Harlan in *Mankichi*, p 240). The 'other' is always inferior, less capable, predestined, of course, to be governed, to be held in tutelage, to be 'civilised' or 'protected', to be brought within the ideological world of the dominating power, but sufficiently at a distance so as not to

confuse the respective communities they inhabit, in short (in the 'constitutionalised' world of American political life) to be kept at the same time 'within and without' (Thompson 1989: 213) the Constitution.

Ideologically, all imperialism is ultimately based on this imaginary construction of the other as inferior (Fitzpatrick {nd}). This is the symbolic basis of the doctrine of incorporation. Keeping the 'other' as a 'separate', but subordinated, identity and entity justified governing it without the restraints imposed by membership in the political community of the imperial power. At the same time, constructing the 'other' as inferior, as incapable, justified not treating the group as an equal in the community of nations, therefore justifying again its subordination as a colonial territory. Even that formal equality which had come to be accepted by Western liberal political theory could be flouted in its two prevailing senses: equality of participation within the domestic political community and equality of respect within the international community.

2. The 'territories' as property

The strategy of interpretation adopted by the Court's majority in *Downes* and its progeny rested in a very central way in the decision to treat the newly acquired territories and its people as property. Of course treating peoples as property was part of the American political and legal heritage. It was part of the ideological justification of slavery and of the subjection of women. Treating other peoples as property was also a key feature of the various waves of European colonialism.

The relatively recent history of the United States, however, prevented the simple declaration that the new peoples were 'chattels' of the federal government. The process in the reasoning of the various arguments proffered and the decisions delivered was somewhat more sophisticated. It consisted first in addressing the matter of the status of the territory as a question of defining the legal characterisation of a 'locality' and then transferring to its people the characteristics of the place. But, as has been noted already, the definition of the 'locality' itself was performed in reference to the supposed deficiencies of its people. This continuous conflation between 'people' and 'locality' -- in which the 'locality' was ultimately privileged as the conceptually determining category -- allowed addressing the question as one relating to the power to 'dispose' of the 'territory'. The textual basis for the analysis was provided by the Territorial Clause of the Constitution, which empowers Congress 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States' (Art IV, Sec 3, Cl 2). The reasoning also involved equating the terms 'territory' and 'property' used in the cited provision. The resulting discourse was one in which the 'territory' -- denoting the locality, but including its people -- could be described as 'belonging to' but not 'a part of' the United States. Its inhabitants became derivatively 'subjects' to be ruled and 'disposed of'.

Thus the Attorney General of the United States could argue that

We must not forget that 'territory belonging to the United States' is the common property of the United States and is to be administered at the common expense and for the common benefit of the States united, who jointly, as a governing entity, own it.
Porto Rico and the Philippines were not won by arms

and taken over by treaty through the efforts or influence or at the expense of the inhabitants, but through the might of the United States, upon their demand and upon the assumption by treaty of solemn national obligations which the United States, not the islands or their inhabitants, are bound to observe and keep. The inhabitants of the islands are not joint partners with the States in their transaction. The islands are 'territory belonging to the United States' not a part of the United States. The islands were the things acquired by the treaty; the United States were the party who acquired them, and to whom they belong. The owner and the thing owned are not the same (p 102, emphasis added).

It is within the framework of this type of discourse that Justice White finds it necessary to argue, quoting writers in international law, that a sovereign nation has the right to acquire 'territory' and to determine its relation to the new government by 'any of the recognized modes by which private property is acquired by individuals' (*Downes v. Bidwell*, p 301; see his fuller discussion in pp 301-304).

This process, typical of liberal legalism, is what Kelman calls 'substantive reification': the construction of a value-laden general category under which the most diverse realities are subsumed, allowing them to be treated in a similar fashion. Thus 'private property' is turned into a 'thing'. Categorising something as 'property' then permits discussion of different actions (e. g. plant closures, expelling someone from one's home, etc.) as instances of the exercise of the right of private property (Kelman: 270-1).⁴⁴ In this case, classifying the countries recently annexed as 'property' allowed treating them as objects at the disposal of their 'owner', the United States of America. This is part of the process of legitimation.⁴⁵

Of course this was not a necessary result: an inevitable product of the 'correct' application of some legal principle that mandated that the territories be

treated as property. The contingency of the event is suggested, if not by anything else, at least by the fact that some of the members of the Court were willing to rely on other categories, referring to the acquired territories as 'countries' or 'provinces' and to their inhabitants as 'peoples' (Cf Fuller, in *Downes*, p 373).

3. The vision of democracy

Running throughout the cases there was a certain vision of democracy. One of its fundamental tenets was the conception of political participation as a privilege, not a right. Access to the privilege was restricted to those capable of exercising it, and this, in turn was determined with various degrees of manifest or subjacent racial overtones. One of the crudest formulations of this conception had been provided by John W Burgess, the prominent constitutional theorist of the times, who seems to have had substantial influence on many statesmen and legal scholars of the day (Cf Chapter II, the section on 'The ideology of expansion'):

The Teutonic nations can never regard the exercise of political power as a right of man; such a right must be based on political capacity of which the Teutonic nations are the only qualified judges (quoted in Weston 1972: 16).

This vision implied that democracy -- in the sense of a prerogative to take part in the decisions affecting the political community -- was not intended for the colonies. The Solicitor General in his argument put it quite succinctly:

Now, notwithstanding this expansive outlook [he refers to the view of the Founders that the United States was bound to expand even beyond the seas], it does not appear that the fathers of the Constitution worried themselves about 'the consent of the governed' outside of the States they lived in, which alone were to participate in political power (*De Lima v. Bidwell*, p 142).

In the same vein Justice White would assert that the principle of 'no taxation without representation' -- so central in the political discourse of the American revolutionaries of the eighteenth century -- did not apply to the territories (*Downes v. Bidwell*, p 299); he also argued that the rights of the conquered people were to be determined by the conqueror, in other words, that determination was not subject to democratic theory (*Id.*, pp 303-4).

One thing is to acquire territory, the other is to incorporate that territory into the nation, Justice White's theory asserted. To incorporate implies a decision to share with the alien people 'the rights which peculiarly belong to the citizens of the United States' (p 324). Incorporation, then, means bringing the 'other' into the political community that was designed for the 'we'. That is a step that cannot be taken lightly and not certainly with everyone. Again, democracy is viewed not as a matter of right, but of being worthy of belonging to the political community. This was the rationale that had excluded Blacks, Native Americans, Asians, Mexican Americans, women and the poor from the political process throughout American history.

Justice White and the other members of the majority in *Downes* and related cases were careful to establish that 'plenary power' did not mean absolutely 'arbitrary power'. Thus they fashioned the corollary doctrine of 'fundamental rights' as a

means of recognising certain claims relating to the personal protection of individuals and their property, irrespective of the status of the territory. This was to be a colonial project, indeed, but one worthy of an 'enlightened' colonialism. Ultimately this view was compatible with the old distinction between liberalism and democracy that went back to the European political struggles of the seventeenth and eighteenth centuries. Regarding the 'rights' discourse, liberalism has always been more a matter of carving out for the individual an autonomous zone that is to be free from governmental intervention, while democratic claims are more to do with collective aspirations to participate in community processes. In other words, the discourse of the judges revealed a tension between negative and positive conceptions of liberty (Cf Berlin 1969: 118-172). Hence the recurrence of notions of 'higher principles' and 'natural rights' -- referred always to 'negative liberty', in an all too familiar liberal discourse -- while at the same time the Court insistently negated any implication that those 'natural' or 'fundamental rights' included the claim to become part of the American political community or to participate in decision making (even if subject to the authority) of the American state.

Justice White himself expressed it very clearly:

There is in reason then no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide and in so doing to accord only such degree of representative government as may be determined on by that body (*Downes v. Bidwell*, 298-9).

Reason is taken as the guide to the definition of freedom and justice. This colonialism -- in its justificatory rhetoric -- was definitely a child of the Enlightenment, as much as liberalism was.⁴⁶ By 1901, just slightly over one hundred years after the Declaration of Independence, democracy, however, was not to be derived from reason, but from convention, from the will of a particular community.

Other, less capable, less enlightened, communities, that through the operation of the inevitable forces of social evolution came to be wards of their more advanced counterparts, had to content themselves with the 'blessings' bestowed upon them by a liberal Constitution that guaranteed the protection of some claims -- as defined by the superior polity --, while being denied the right to govern their own destinies.

A related distinction elaborated by the cases is that between the 'civil rights' of the inhabitants and the 'political status' of the territory. This conceptual differentiation -- that was present already in the language of the Treaty of Paris -- has been a key ingredient in the development of a political framework that has facilitated the reproduction of American hegemony in Puerto Rico. It has allowed for the establishment of a partial democracy, and an internal regime based on the rule of law, while preserving the fundamental political subordination of the country to the metropolitan state. This aspect will be discussed in more detail in Chapter V.

This vision of democracy, as applied to the peoples of the newly acquired possessions, entailed both discontinuity and continuity with previous history. It departed from the standard policy regarding territories acquired in the past and from the legal trend towards formal inclusion established by the Post-Civil War Amendments to the Constitution. At the same time, it was consistent with the

practices of exclusion -- both formal and material -- that were still prevalent in American political, social, and economic life at the turn of the century.

4. Two views of imperialism

The conflict between the majority (best represented by Justices White and McKenna in the early stages, and later by Justices Day and Taft) and the minority (especially Justices Fuller and Harlan) in these cases embodied a tension between two views of imperialism. The majority view -- which became that of the entire Court eventually -- sanctioned the realisation of the expansionist project through formal colonialism, that is, through the direct political subordination and control of overseas territories and peoples that were not considered part of the nation. The minority position rejected this form of colonialism, but was not opposed necessarily to overseas expansion and the annexation of other countries and peoples -- even through conquest.

It only had different conceptions about the formal political and legal consequences of such ventures. Thus, Chief Justice Fuller would argue that while the Founders did not exclude expansion, the latter had to be carried out within the framework of the Constitution (See *Downes v. Bidwell*, pp 374-5). This meant that if overseas territories were annexed, they had to be incorporated into the Union and its inhabitants accorded full civil rights. Whether that meant also being accorded immediately political rights is not made clear. But according to the past practice it probably implied eventual admission as states. A similar outlook is taken by Justice Harlan. Furthermore, the latter seemed to harbour the view that the United States could exert its 'authority' and 'influence' in the world arena through other means

(Downes, p 386). This stance was shared by many in the 'anti-imperialist' group that had opposed colonial acquisitions since the middle of the nineteenth century, while favouring the extension of American hegemony through commercial activity (an anticipation of what in modern times has come to be known as the 'Coca-Cola Empire').

Expansion through acquisition of territory, then, was not the issue, but the consequences of that acquisition. Nor was there any disagreement as to the need to accord Congress and the Executive a wider latitude in dealing with the territories. It was the extent of that latitude that bothered the minority. Justice Harlan's position is best clarified through an analysis of *Grafton v. United States*⁴⁷, a case rarely cited in discussions about the Insular Cases. In this case the Court held unanimously that an American soldier who had been acquitted by a military court, proceeding under the authority of the United States, of a crime allegedly committed in the Philippines, could not be tried subsequently for the same offense in a civil court exercising authority in the Territory. The Court's rationale, in an opinion written by Justice Harlan, was based on the notion that both courts existed and operated by virtue of the authority of the same government -- that of the United States (p 355). In developing his argument Justice Harlan explained that the relation between the Philippines and the United States was not the same as that between a state and the United States government. The government of a state does not derive its powers from the United States, while the government of a territory owes its existence wholly to the United States. 'The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government is paramount' (p 354). Puerto Rico, of course, was in the same condition. This reasoning meant, then, that a

distinction had to be drawn between the question whether the Constitution applied *ex proprio vigore*, as Harlan had so strenuously argued throughout the cases, and the question of the relationship between the territory and the government of the United States. Even if the Constitution applied of its own force and immediately upon acquisition, Congress had absolute --in the sense of exclusive -- power to govern the territory. It could exert over the territory power that it could not exercise over the States. Justice Harlan's concern throughout his various dissents was the limitation of that power of governance in the classical liberal tradition. Hence, his opposition to the 'fundamental rights' corollary of the incorporation theory. He saw the overtly colonial scheme sanctioned by the Court as an abdication of liberal constitutionalism. The implications of this conception are important from the point of view of the distinction analysed in the previous section between liberal and democratic conceptions of governance. The 'paramount' power that Congress could exercise over the peoples of the territories -- even according to Harlan -- was not the result in any sense of the consent of the governed -- as in democratic theory -- but of the act of conquest that brought those peoples into the dominion of the United States -- a decidedly imperialistic conception of right.

This conflict of visions echoed the debate that had taken place and was still current in academic, journalistic and other political fora. It must be remembered that one strand of the anti-imperialist position rejected annexation because it would provide the 'alien people' of the possessions a basis to claim a right to participate in the government of the nation (See chapter II). Once the acquisition of territories was an accomplished fact, some 'anti-imperialists' argued that the Constitution mandated the full incorporation of those peoples into the country's constitutional framework.

In sum, the position taken by Justices White, McKenna, Day, and the others would result in the total subordination of the peoples of the territories. While, notwithstanding their denunciation of colonialism and domination, that espoused by Justices Harlan and Fuller implied the immediate full annexation and, presumably, accelerated americanisation of those peoples.

5. The Insular Cases and Self-Determination

The conceptual scheme of the Insular Cases is entirely incompatible with any notion of self-determination. Despite the competing conceptions that have been advanced in the struggles to provide it with specific content, at a minimum the concept of collective self-determination, from a normative point of view, implies the right (be it legal or moral) of a people or group (however it is defined) to determine its own status and associations with other peoples or groups and to fashion for itself the organising principles of its social existence.⁴⁸ The logic of the Court's discourse, however, presupposes the plenary power of the metropolitan state to determine the political condition and the civil and political rights of the people of the acquired territory. In the *Downes* case Justice White explicitly proclaims that it is the prerogative of the conqueror to decide the destiny of the conquered (pp 303-4).

Of course this principle already underlied the transaction involved in the Treaty of Paris. And both Congress and the Executive had proceeded under its fundamental premiss. This normative theory of hetero-determination cannot be separated from the other elements of the ideology permeating the cases which have been discussed above.

It is not anachronistic to level this critique against the Court's political rationale. First of all, by the end of the nineteenth and beginning of the twentieth centuries the concept of collective and, specifically, national self-determination was already current in international political debates, particularly in Europe (Cf Pomerance 1976; Rivera Ramos 1991a). Secondly, the principle of 'consent of the governed' had been part of American political discourse since the Revolution. Thirdly, the political debate contemporary to the cases in the United States had produced explicit affirmations of the right of the peoples of the territories to be consulted regarding their future.⁴⁹ Fourthly, some of the members of the Court made references to the fact that the Court's position entailed establishing a 'system of domination' (Fuller in *Downes*, p 373) 'not as the Constitution requires, nor as the people governed may wish' (Harlan in *Mankichi*, p 239). (It must be added that although this revealed an awareness of the colonial nature of the project, it is not clear whether Justices Harlan and Fuller believed that some sort of consultation with the people of the territories was required before annexation. The rest of their analyses suggests, on the contrary, that they shared the premiss that the United States could acquire territory as it desired, irrespective of the wish of its inhabitants.) Fifthly, by the time the *Balzac* case was decided (in 1922), the principle of self-determination had been explicitly espoused by President Woodrow Wilson as a fundamental principle in international relations (See Pomerance 1976; Rivera Ramos 1991a).⁵⁰ And, finally, some prominent Puerto Ricans, particularly Eugenio María de Hostos, a noted intellectual and advocate of independence for the island (who at one point had integrated a commission that met with President McKinley to discuss the Puerto Rican problem) had been promoting the idea of a plebiscite to determine

the political condition of the country (See Hostos 1988: 240; Delgado Cintrón 1992). All of this clearly indicates that there were contemporary alternative visions upon which to found a policy to deal with the peoples of the territories in accordance with self-determination principles.

E. THE CONSTITUTIVE EFFECTS OF THE INSULAR CASES

Having discussed the doctrine, the legal theory and the ideology of the Insular Cases, I turn now to an analysis of the effects of those series of decisions in the configuration of the imperial/colonial experience that was being created. What was the Court actually doing? To answer the question is to reveal important aspects of the constitutive power of law.

1. The explicit justification of power and the legitimation of the colonial project

The doctrine developed in the Insular Cases provided an explicit justification of the new American colonial project. It produced an authoritative rationale for the claim that Congress could exercise almost unrestricted power over the peoples of the territories, maintaining them in a situation of subordination. In this sense the cases represented the effort to legitimate -- through discursively validated claims (Habermas 1988a) -- a particular power relationship.

In the multi-dimensional theory of legitimation proposed in the theoretical framework developed in Chapter I, it was suggested that the study of legitimation

processes should include an examination of the following: (a) explicit justification (that is, the various political, moral, and legal ideologies offered overtly as the justificatory basis of power relations and social practices); (b) the material conditions and practices through which the satisfaction of interpreted needs and aspirations are meant to be satisfied; (c) the action-structures designed to channel -- or exclude -- the input of members of a particular community in the process of needs definition and elaboration of strategies for their satisfaction; and (d) the world views within which the interpretation of needs takes place. In relation to (a), it was argued, a social theory of law would call for an examination of the ways in which law and legal ideologies are used in the process of explicit justification.

The centrality of constitutionalism as an ideology for the justification or critique of the exercise of power in American political and social life provides law and legal processes with an equally central role in the processes of explicit justification as an ingredient of legitimation. For historical reasons beyond the purview of this thesis, the Supreme Court of the United States has been entrusted with the task of being final arbiter in the struggles about constitutional meaning. The fact is that, in the course of the nineteenth and early twentieth centuries, the United States experienced an accelerated process of 'institutionalisation of general practical discourse' (Habermas 1988a: 16) through the judiciary, epitomised in the functions of the Supreme Court, perhaps more than any other industrial capitalist society. Law became objectified morality, given with an authoritative voice by judges throughout the land, with the ultimate sanction of the body of Brethren that sat in Washington.

It has been noted already how any system of legitimation in modern societies must, in some degree or other, combine explicit justification, by reference to a

discursively validated rationality, with the production of perception that the system somehow is effective in the satisfaction of interpreted and articulated needs. One probable explanation of the particular effectiveness of the judicially based system for the production of legitimations in the United States is the fact that, since the early days of the Republic, the Supreme Court has been able to elucidate and 'settle' important questions of state and social life in the course of adjudicating highly particularised disputes. The pronouncements of the Supreme Court are never made in response to abstract questions, but in the context of the resolution of practical problems that are perceived as important by the litigants -- in their immediate consequences -- and by jurists, academics, politicians, interest groups, the media and others -- for their longer range implications. The Insular Cases provide an example of how the larger questions of the nature of the American government and the degree to which the Constitution sanctioned a system of colonial domination were always answered in the process of adjudicating specific conflicts among concrete agents promoting their interests in the context of the new conditions and relationships whose legitimacy was now being questioned through the judicial apparatus. This continual movement from the experience of power as it is felt in very concrete situations to the elucidation of the more general, 'political', questions not only serves an important ideological function⁵¹, but is itself a source of legitimation -- although certainly not the only one -- for the authority of the Court. The pronouncements of the Court -- invested with that practically legitimated authority -- have a force lacking in the proclamations of other agents. After all, 'in the case of the social world, speaking with authority is as good as doing' (Bourdieu 1990: 53). This explains in part the

need felt by the American ruling elites of having the new colonial project explicitly justified by the highest tribunal in the land.

Explicit justification, as an incident of legitimation, always raises the question of the audience. To whom was the Court addressing itself? First of all, to the litigants, it is obvious, and all those similarly situated. This allowed for the authoritative settling of many of the localised conflicts and disputes that the new situation promoted -- including disputes among sectors of the American agricultural, manufacturing and commercial establishments, whose immediate interests clashed or became threatened either by the economic activity of others in the territories or by the practices of the metropolitan state. But, in a wider sense, regarding the question of the legitimacy of the colonial order, it seems to me that there were two principal audiences. On the one hand, there were the Puerto Rican political elites, to whom the rulings of the Court generally came as an unwelcome, imposed reaffirmation of the policies established already by Congress and the Executive. In this sense the exercise was not strictly one of justification, but rather an example of what Bourdieu would call 'symbolic violence', which he defines as the imposition of 'principles of division', that is, of the categories created for the unequal distribution of power (Bourdieu 1990; Terdiman 1987). On the other hand, the explicit justification of the exercise of colonial power was probably most directly addressed to the intellectual and political elites of the United States. The material and symbolic stratification of society provides a context for the differentiation of needs for justification.⁵² Social consciousness is not homogenous, even among members of the same social group. There are many 'common senses' (in Gramscian terminology) that must be satisfied by those exercising power. The intense debate that had accompanied the process of

acquisition of new territories had to be settled in order for the process to continue its course. There was a need to develop a truly common sense among the organic intellectuals of the metropolitan state.

The decisions of the Insular Cases had precisely that effect. We have seen how by 1904 the doctrine of incorporation had already been established. Gradually the doctrine came to be accepted -- by the dissenting Justices (except Harlan), by the academic community, by the politicians. The legal 'truth' that Puerto Rico and the Philippines were 'unincorporated territories', that Congress had plenary power over them, that their inhabitants could claim only limited protection from the Constitution, etc., came to be part of the social understanding of the policy makers, part of the way in which the political reality of the new territories came to be perceived. In this sense the doctrine became part of the 'reality' of the colonial project. When the decision in *Balzac v. Porto Rico* was delivered in 1922 there was hardly any discussion of its implications (Torruella 1985: 100, n 347). The colonial venture had been justified at the representational level of law.

2. The constitution of the legal and political subject

The force of law as constitutive of society consists in a very fundamental way in its capacity to create a legal subject: that is, an agent or entity endowed with entitlements and obligations. In the social understanding that is part of the ideological basis of law's effectivity, this agent or entity is considered capable of making juridically recognisable claims, but at the same time becomes an object over which power may be exercised legitimately. The 'subject' is constructed, then, both

as an agent (relatively) capable of willing and acting (someone endowed with 'subjectivity') and as a body submitted to authority (someone 'subjected' to a given power).³⁹ Law -- especially constitutional law -- also creates political subjects, in the sense that it serves to legitimate the status of political actors -- that is, agents endowed with the legal capacity to make certain claims in the political field -- while legitimating simultaneously the exercise of state power over those subjects. The Insular Cases created both legal and political subjects in the senses described above. The subjects were defined as: the inhabitants of an unincorporated territory.

The process by which a subject is created through law has several dimensions and involves several 'capacities' of the law as a constitutive discourse. Let us examine them in operation in the cases under discussion.

a. Reification

Creating a subject involves a process of reification: that is, constructing a category that acquires the quality of an object. The category substitutes the physical referents. The particularities of the realities which the category is intended to represent fade away as they are subsumed in the universal quality of the category. In a sense the particular realities exist no more. The category, treated as a reality, becomes the real REAL, distinct from other 'realities'.

Or, as Bourdieu would express it, reality is reduced to the 'useful fiction we term its juridical definition' (1987: 835).

In this case the 'reality' created was that of the 'unincorporated territory'. It did not have any existence before the cases were decided. But the authoritative

pronouncement of the Court brought it into existence 'in reality, in other words, in people's minds (in the form of categories of perception)' (Bourdieu 1990: 54).

Those 'unincorporated territories' were inhabited by individuals -- which, in their relationship to the new colonial power now became subjects, both in the legal and political sense.

Categorising, of course, has consequences (Kelman 1987: 271). It involves the creation of a status, from which rights emerge or by virtue of which they are denied. Puerto Rico was converted -- through categorisation -- into an 'unincorporated territory'. And that justified subsequent exercises of power over its people. Not being included into a certain category also has consequences. Certain consequences would have followed, for example, from a declaration by the Court that Puerto Rico was an 'incorporated territory'.

But those were not the only alternatives at the Court's disposal. Probably different consequences would have attained if the Court's discourse had been constructed around other categories. For example, treating Puerto Rico as a 'nation', or Puerto Ricans as a 'people', in the sense that those concepts circulated in the world of images that had been produced since the middle of the nineteenth century. Much more so if Puerto Ricans were described as a people with a history, aspirations, capacities, etc., that is, in the way in which many Puerto Ricans thought of themselves and of their identity.

Legal struggles are often struggles to define the subject. All of the cases were part of that process. But the sense of struggle over this construction of the subject becomes very evident in a case like *González v. Williams (supra)*. In this regard the central questions were: what is a Puerto Rican? To whom does he or she

owe allegiance? (Allegiance, of course, is fundamentally a matter of having certain obligations) Is a citizen the same as a subject? The case ultimately defined Puerto Ricans not as a nation, but as inhabitants of an island that had become a possession of the United States.⁵⁴ The choice of categories was crucial. The concept of 'inhabitant' has a neutral quality to it, deprived as it is of any reference to culture, history, language or other elements constituent of a national identity. Moreover it connotes a certain atomisation, an ultimately individualist reduction, that avoids the consequences of any notion of collective right.

This process of creation of the subject had started from the very moment of the acquisition. It was part of the process of negotiation of the Treaty of Paris. Congress and the Executive had uttered their own authoritative word in the Foraker Act. In Section 7 of that Act the political entity known as the 'people of Porto Rico' was defined as the 'inhabitants' of Puerto Rico -- that is, those former Spanish nationals that had not sworn allegiance to Spain after certain date and continued to reside in the island -- and United States citizens residing there.

The 'people of Porto Rico' (the altered spelling is symbolically significant, for it signified both the identity of the definor of the identity and the fact that it involved an act of 'mis-identification') was a legal construct imposed from the metropolitan center -- another act of symbolic violence. This legal subject consisted of the 'inhabitants' of a place, categorised in a certain way. It was not a nation, a historical community that defined itself with reference to a common language, culture, experience, etc. Those facts were only relevant in so far as they were constructed as defining an inferior people --needed of tutelage. The Insular Cases, then, were part of a process of construction of a new identity and of the constitution of a new

legal and political subject -- a process that involved several participants in the power structures of the metropolitan state.

b. The 'power of naming'

The creation of the subject through processes of reification is an instance of the performative power of law (Bourdieu 1987, 1990; Lyotard 1984; see Chapter I: pp 31-33). This is the power to constitute by naming, that is, to 'create the things named' (Bourdieu 1987: 838). As Bourdieu points out, its power consists in 'confer[ring] upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects' (*Ibidem*). It involves an 'ontological slippage' which 'leads from the existence of the name to the existence of the thing named' (Bourdieu 1990: 55). The effectivity of the performative utterance resides in the authority of the speaker (Lyotard 1984: 9). It does not matter, of course, what is the source of that authority, which could be, as in this case, an act of conquest.

In the Insular Cases the Supreme Court was exercising its 'power of naming': it named the 'others' in order to constitute them. Labelling the newly acquired lands 'unincorporated territories' was to constitute them as such. The process of constituting the 'others' by naming them was in turn informed by the world view described in Section D.1, above, and was predicated upon the type of binary reasoning discussed in Chapter II (Section C.2).

c. Conflating the descriptive and the normative

Creation of the subject as bearer of entitlements and as an object of the exercise of power involves also a process of conflation of the descriptive and the normative (Kelman 1987: 291, 294). This entails another type of 'slippage' in two mutually reinforcing directions: the prescribed becomes the described (Kelman 1987: 294), but also the described -- or the thing constituted through naming -- acquires a moral quality.

In this case the status of 'unincorporated territory' was the result of a normative conclusion: the Court concluded that there were lands that should be treated as things called 'unincorporated territories'. The normative conclusion was presented as the discovery of a truth: that there are such things as unincorporated territories. That entity, normatively created, became a 'thing' that had its own existence. From then on the United States possessed lands that were unincorporated territories.

At the same time there was a reverse slippage that occurred especially when dealing with specific territories: the Court spoke a legal 'truth', that is, it described a legal reality; the denotative statement was: Puerto Rico is an unincorporated territory. From that description flowed a normative conclusion: Puerto Rico should be treated as an unincorporated territory.

Of course the linkage between the authority to declare the truth and the authority to declare what is just is part of all processes of legitimation (Lyotard 1984: 9). The cognitive and the evaluative cannot be separated in the discourses of power. As has been indicated in Chapter I, their fusion is one of the elements that help

constitute the specificity of law. Bourdieu has perceptively noted that the force of law hinges in part on the fact that it operates at the intersection of the discourse of politics and the discourse of science (Bourdieu 1987).

3. The creation of a discursive universe

A third effect of the Insular Cases was the creation of a discursive universe within which further discussion of the colonial problem would be conducted. Taking as its point of departure the categories of perception and valuation produced by Congress, the Executive and others engaged in the academic and public debate, the Supreme Court elaborated and to a great extent crystallised the parameters of future legal and political discussions regarding the territories. It constructed the framework for the production of further discourse. In so doing it determined what would be a legitimate argument and what would not. This is a very powerful attribute of courts. It involves a process of thematisation and selection -- a determination of what categories, arguments, interests, values, themes, claims and aspirations will be granted access to the discourse of law.⁵⁵ In the Anglo-American legal tradition, the rule of precedent provides this power with an internally legitimated basis and an added force. One of its effects is to allow for the application of the *ratio decidendi* of cases -- and the discussion of the legal doctrine established by a series of cases -- without reference to the ideological presuppositions, the wider world view, which underlie the 'holdings' of the Court. This feature accounts to a great extent for the perception of fixity of legal doctrine, masking its fundamentally contingent character.

The way in which further discussion of legal issues was to be affected by the Insular Cases is evident in a number of cases decided after *Balzac v. Porto Rico* until this day. This is not the place to discuss them in detail. Suffice it to say that the cases have been part of a process of piecemeal judicial decision making regarding the applicability of constitutional provisions to Puerto Rico and the constitutional guarantees that its 'inhabitants' may claim.⁵⁶

After the process that led to the creation of the 'Commonwealth' in 1952 there has been much theoretical discussion about whether Puerto Rico ceased to be a 'territory' of the United States. Three general positions have been adopted: (a) that a new status emerged in 1952; (b) that, although it introduced some changes, 'Commonwealth' is just another type of unincorporated territory; and (c) that nothing was fundamentally changed by the 'creation' of the Commonwealth (GAO 1989: 4-6). Federal and Puerto Rican courts have dealt with the issue in conflicting and largely ambiguous language.⁵⁷ In practice, however, Congress, the Executive and the Supreme Court have proceeded under the assumption that Congress has plenary power to govern the country in the fashion authorised by the holdings of those early twentieth century cases. In 1978 and 1980, more than three quarters of a century after the first group of cases was decided, the Court relied on their language and rationale to hold that, pursuant to its powers under the Territorial Clause of the Constitution, Congress can discriminate against residents of Puerto Rico when legislating on social and welfare matters.⁵⁸

The conceptual categories created by the Insular Cases have also provided a framework for political discussion outside the judicial sphere. In this respect the opinions and decisions of the Court constituted one of the first attempts to bring the

discussion of the problem of the acquired lands and their peoples under the discursive universe of the imperial power. For example, the term 'colony' -- so common in the debates of the day -- would eventually disappear. The United States -- from very early on -- refused to admit that it had 'colonies'. It had only overseas 'territories'. The Court has legitimated this political use of language by always treating the question as one of distinguishing between 'incorporated' and 'unincorporated' 'territories'.

The weight of this force in the realm of political discourse was evident during the intense process that took place during 1989-91 regarding the proposal to hold a plebiscite to decide the political future of the island. The Congressional reports and background materials produced by legislative committees had to adopt as their working premiss the doctrine that had been established by the Court between 1901 and 1922. Much of the public debate reflected both the constraints imposed by the discursive universe created by the Court as well as attempts to break away from those parameters. The public conflicts and struggles about meaning that are always a central feature of political debate hinged around questions such as: Was this a 'decolonisation' process or an exercise of the power of Congress to 'dispose of the territory'? Was this an instance of a people's drive for 'self-determination', subject to the rules and principles of international law, or was it merely the resolution of a 'domestic' problem of the United States regarding the future of several million United States citizens? (Here surfaced the problem of how and by whom is an identity constructed.) Was Congress willing to relinquish its 'powers' under the Territorial Clause?

One of the final strokes that eventually produced the death of the plebiscite legislation was the testimony, on February of 1991, of the Attorney General of the United States, Richard Thornburgh, on behalf of the Department of Justice, before a Senate committee considering the bill. In essence Thornburgh declared that Puerto Rico was subject to the sovereignty of the United States by virtue of the Territorial Clause, that there was serious doubt whether Congress would ever limit its powers under that clause as long as Puerto Rico did not become either an independent Republic or a state of the Union, and that, because the United States exercised sovereignty over Puerto Rico, the principles of international law (regarding self-determination and decolonisation) were not applicable. This is, clearly, the framework of analysis sanctioned by the Supreme Court in the Insular Cases.⁹

4. The construction of a context for action

The Insular Cases provided a normative justification for the exercise of power that became part of the context for future action both on the part of the different organs of the metropolitan state and on the part of the Puerto Rican elites and the Puerto Rican people. Creating a context for action is one of the ways in which law becomes part of social reality. The doctrine established by the Court legitimated -- that is, authorised -- certain practices, which, when realised, reproduced both the conditions of existence of the colonial project and the framework for discourse and action that the doctrine provided. The Court's doctrine provided both constraints and opportunities for action. The opportunities were of a wider latitude for Congress and the Executive, while the constraints were to weigh more heavily upon the people of

the territories. Reference has been made already to the later cases decided by the Court authorising Congress to discriminate against the 'residents' of Puerto Rico when legislating on social and welfare matters. As will be discussed in fuller detail below, the cases illustrate -- respecting the legitimated power of Congress -- the facilitative power of law: they provided the metropolitan state with the needed flexibility to govern the newly acquired lands at discretion and to shape gradually the policies that the new stage of overseas expansion required.

5. Conclusion

In sum, the doctrine established by the Supreme Court of the United States in the Insular Cases became a constitutive part -- a dimension -- of the colonial project.

The Court's decisions (and their rationales) had four major effects, with their corresponding ramifications: (a) they provided an explicit justification of the exercise of power over the peoples of the territories; (b) they created a legal and political subject; (c) they produced a discursive universe that supplied the framework for the evaluation of the legitimacy of future claims and action; and (d) they created a context within which both the colonisers and the colonised would have to carry out their projects and play out their struggles.

All of these effects were part of the wider process of legitimation. In fact, the discursive framework constructed by the Court would be imbricated in the four dimensions of the process of legitimation identified in the first chapter. The doctrine of the unincorporated territory, the plenary power of Congress, and the distinction between fundamental and non-fundamental constitutional rights (as the criterion for

the determination of the claims that could be made legitimately by Puerto Ricans and the peoples of the other territories) would not only serve as an explicit justification of colonial subordination. They would affect also: the material conditions and the practices designed to satisfy interpreted needs; the mechanisms devised to channel claims and input into the process of definition of needs; and the ideological framework within which those needs would have to be defined.

To assert, however, that the doctrine of the Insular Cases became a constitutive dimension of the colonial project is not to say that those cases necessarily determined future events in the island. One must avoid the legal determinism implicit in the analysis of at least one critic of the cases who sees the Supreme Court as the ultimate culprit for the perpetuation of the colonial condition of Puerto Rico, and who has attributed to the doctrine established by the cases everything from the emergence of the pro-independence movement, the 'politico-legal schizophrenia' that, according to him, underlies the adoption of Commonwealth status, the extreme economic dependence of Puerto Rico, the inadequacies and politization of the educational system, the serious social ills brought about by the dislocation of the population and the processes of mass migration to the United States. (Torruella: Chapter V, pp 117-265). The position taken by Torruella fails to take account of several fundamental questions. Why has Congress declined to incorporate Puerto Rico expressly and make it an offer of statehood, or in the alternative, provide for its eventual independence? The present status of Puerto Rico is not just the result of the doctrine established by the Supreme Court of the United States. In fact, all the evidence shows that the latter has always acted in accordance with Congressional policy. More fundamentally still, the Insular Cases, by themselves, do not explain

why there has not been a stronger and more effective movement for independence within Puerto Rico that would have forced Congress and the American Executive to end the colonial situation. The full explanation for the latter situation has to take account of a multiple set of factors that include legal processes, events and ideologies, but is not exhausted by them. Views like that expressed by Torruella turn legal phenomena into the ultimate determinants of political, social and economic conditions. In that view the present colonial situation is a direct result of those early decisions of the Court. Those decisions have to be seen as producing important effects, that have become imbricated with the entire social, economic and political life in Puerto Rico, but not as the ultimate determinants of the reproduction of the colonial condition. The reproduction of the relationship of subordination that colonialism entails is the resultant of diverse factors that have served to reinforce each other in a multidimensional process. In fact, the doctrine established by the Insular Cases is not even the only example of the way in which law has become a dimension of the colonial project. There are others, some of which will be examined in the coming chapters.

One further comment is apposite. There was a certain paradox haunting the different positions within the Court. We have noted already how, on the one hand, the view taken by Justices White, Day and the other members of the eventual majority would result in the total subordination of the peoples of the territories; while, on the other, the position espoused by Justices Harlan and Fuller would have led to the immediate full incorporation and unattenuated americanisation of those peoples. This set of options raises a series of questions. Despite their denunciation of colonialism and domination, if Harlan's and Fuller's had been the winning

argument, would the result have been a foreclosure of the possibility of independence for Puerto Rico? Was not the most overtly colonialist position -- that taken by the majority -- the one that, at the same time, left open the doors to a future successful independence movement? (Cf Cabranes 1978: 441). Was the Court, in justifying the crudest form of colonialism, sowing the seeds of its critique? By legitimating the exercise of colonial power, was the Court creating the basis of the delegitimation of that power? Paradox, rather than contradiction, seems to be at the root of some of the most complex of human affairs.

F. THE SOCIO-HISTORICAL EXPLANATION

This section will attempt to provide an account of the socio-historical factors that converged to produce the doctrine adopted by the Court in the Insular Cases. Evidence of those factors must be sought both in the text and the context of the opinions. That context includes the set of forces identified as the 'determinants of expansion' in Chapter II, the ideological currents and debates of the time among the American ruling elites, the composition of the Court, and the relationship of the latter to the so-called 'political' branches of Government in the United States, particularly in the field of foreign policy and international activity. Furthermore, in providing an explanation, one must look to the effects of the cases, for when those effects can be reasonably related both to the text and the context, they provide important clues that cannot be overlooked.

1. The determinants and ideology of expansion and the political debates of the day

I have already analysed in some detail how the ideology that permeates the cases related to the prevailing notions, perceptions, and values prevalent among the American ruling class during the latter part of the nineteenth century. This ideology -- as a 'power in the domain of consciousness' -- must be regarded as one of the factors converging in the production of the doctrine of territorial incorporation after the acquisition of the territories from Spain.

Moreover, there are abundant clues in the texts of the opinions that the Justices were perfectly aware of the economic, strategic and international forces that were shaping the imperial adventure of the United States at the turn of the century.

In chapter II three fundamental drives were identified: the search for new markets, strategic considerations, and the felt need to compete with the other imperial powers of the day in the control of routes, markets and advantageous military locations. The justifications provided by the majority of the Court and the protestations of the minority reflected an understanding of these forces and of the debate over the long term interests of the United States as interpreted by the dominant groups. This consciousness was articulated with great clarity especially in the dissents filed by Justices Harlan and Fuller.

In general the opinions subscribed by Harlan and Fuller disclosed the perception that the Court was engaging in an explicit justification of colonialism, that the doctrines were being developed as an instrument of the colonial project, under the guise of attending 'suppose[d] extraordinary emergencies' (Harlan in *Downes*: 385).

Justice Harlan's famous dissent in the *Mankichi* case is worth quoting, for the revealing summary that it contains of how he discerned those forces at work in the arguments, rationales and decisions of the Court:

It would mean that the will of Congress, not the Constitution, is the supreme law of the land only for certain peoples and territories under our jurisdiction. It would mean that the United States may acquire territory by cession, conquest or treaty, and that Congress may exercise sovereign dominion over it, outside of and in violation of the Constitution, and under regulations that could not be applied to the organized Territories of the United States and their inhabitants. It would mean that, under the **influence and guidance of commercialism and the supposed necessities of trade**, this country had left the old ways of the fathers as defined by a written Constitution, and entered upon a new way, in following which the American people will lose sight of or become indifferent to principles which had been supposed to be essential to real liberty. It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of **trade and commerce**, and to gratify an **ambition to become the dominant political power in all the earth**, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called 'dependencies' or 'outlying possessions', we will exercise absolute dominion, and whose inhabitants will be regarded as 'subjects' or 'dependent peoples', to be controlled as Congress may see fit, not as the Constitution requires, **nor as the people governed may wish**. Thus will be engrafted upon our republican institutions, controlled by the Supreme Law of a written Constitution, a colonial system entirely foreign to the genius of and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States, one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in

virtue of an unwritten law to be declared from time to time by Congress, which is itself only a creature of that instrument (pp 239-240) (emphasis added).

The implications of this quotation are several. First of all, Harlan realises that the United States is entering a new phase. This recognition of a new situation is also apparent in Chief Justice Taft's reference in the *Balzac* case to the demands made by 'these latter days' both to the policies adopted by Congress and the Executive and the decisions of the Court (*Balzac*: 306).

Secondly, Harlan's reference to 'commercialism' and the 'necessities of trade' clearly suggests that the new doctrine was being elaborated in response to the perceived needs of the new stage of capitalist expansionism that expressed itself in the active search for new markets. Of course, apart from this general economic drive, the cases illustrate the conflicts that emerged among specific economic interests. The search for new markets and colonial enclaves had created a new contradiction: the possibility of competition from products coming from the newly acquired territories. There were frequent allusions in the arguments put before the Court about the fear of opening up US markets to those products (Cf the arguments of the petitioner and the Solicitor General in the *De Lima* case: 90; 137). In the *Downes* case, Chief Justice Fuller refers to 'certain industries' that wanted to 'diminish or remove competition' (374). To a great extent it was this immediate conflict that gave rise to the first group of cases. The situation was complex, for while some producers in the US feared competition from the territories, the US importers and some of the exporters from the colonies were also American businesses. In a way the Court was confronted with the conflict between the protection of some of those specific interests

and the provision of a legal justification for the grander imperial project. Some of the specific results of the cases seemed contradictory from the point of view of the immediate question of the restriction of trade with the territories. Thus, in *De Lima*, the result favoured free trade; while in *Downes*, the specific outcome resulted in its restriction. The difference may be explained by the fact that in the former case Congress had not yet expressed its view specifically on the matter (the case involved the application of the general tariff laws of the United States), while in the latter case the Court was reviewing a statute (the Foraker Act) especially adopted to regulate the situation regarding one of the territories (Puerto Rico). In the end the Court opted for allowing Congress the maximum flexibility: it justified the latter's exercise of plenary power and the subordination of the new territories to the absolute will of the federal government, which the colonial scheme provided. This allowed for the possibility of protecting or not the local producers, through the imposition of tariffs and duties, as Congress saw fit, according to the circumstances. In many cases, protection to the American producers was afforded, while the acquisition of the new territories was justified.

Relating the doctrine of the Insular Cases to the strategic concerns of the United States is more difficult to do by merely examining the text of the opinions. However, there are some indications that the members of the Court appreciated the importance of their decisions in this regard. Harlan's reference to the ambition of the country's leaders to turn the United States into the 'dominant political power of the earth' manifests his grasp of the nature of the hegemonic drive of the American bureaucratic elite of the moment. That hegemonic drive was definitely perceived to depend on the implementation of a program for naval expansion whose contours had

already been elaborated by the end of the 1890's (Cf Chap II). But more revealing in this respect are Justice White's comments in his seminal concurrence in the *Downes* case, linking the advisability of the adoption of the incorporation doctrine to the known military and foreign policy objectives of the United States, including a specific reference to the need to acquire naval stations and territory to build an interoceanic canal (White in *Downes*: 311). (See the discussion of the strategic program of the United States in Chapter II.)

The most important link between the cases and the strategic concerns of the United States at that time, however, comes from the effects of the doctrine itself. While stating, to a great extent for racist considerations, that Puerto Rico was not a part of the United States, the Court held that the island belonged to the latter. This formulation allowed for Congress and the Executive to dispose of the territory at will for military purposes, including segregating land to establish bases and other military installations, using the island for military exercises, and, eventually, even recruiting Puerto Ricans to engross the ranks of the American military forces. This military presence in Puerto Rico was crucial for the establishment and reproduction of American hegemony in the Caribbean and the wider Atlantic region. (Cf, generally, *Estades*).⁶⁰

The arguments put forth both by the majority and the minority in the *Insular Cases* also reflected the concern about the role of the United States in the new scramble for colonies that had erupted among European and other powers. There were constant allusions to the need to allow Congress and the Executive the required powers to contend advantageously with other nations and not to be 'left behind' in the international competition for power. Apparently, such was the force

of this argument that it obligated Justice Harlan to meet it with the following comment:

It was said that the United States is to become what is called a 'world power', and that if this Government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it must be allowed to exert all the power that other nations are accustomed to exercise. My answer is that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution (*Downes*: 386).

The arguments, the language, the references, the notions contained in the Court's discourse bear a striking similarity with the discourse that permeated the political debates of the day regarding the territories. In fact, if in any group of legal texts there is an almost complete and overt blurring of the alleged difference between legal and political discourse is in the cases under study. This fact in itself provides evidence of the degree to which the decisions of the Court were influenced by those debates.⁶¹

It is no coincidence, for example, that arguing for the ratification of the Treaty of Paris, Senator Joseph B Foraker of Ohio, who later was to sponsor legislation establishing a civil government for the Philippines and Puerto Rico, would assert the following:

We find in this instrument [the Constitution] a grant of power to the United States Government to make war, a grant of power to make treaties, each and both carrying along with it and with them the power also to acquire territory and, as a result of that, the power to govern territory (quoted in Thompson 1989: 44).

Territory could be acquired through a variety of means and a diversity of purposes, including establishing coaling station or as an indemnity after war. Since these were constitutional purposes, 'no consent of the people is necessary' (Thompson 1989: 45). Foraker further alleged that the Constitution did not extend to the territories of its own force (*ibidem*). In that same debate Senator Henry Cabot Lodge would argue that 'the power of the United States in any territory or possession outside the limits of the States themselves is absolute, with the single exception of the limitation placed upon such outside possessions by the thirteenth amendment [the prohibition against slavery]' (quoted in Thompson 1989: 46-47). These and numerous other examples have led Thompson to conclude that: 'Although the arguments were not generally as finely crafted nor the complexities of the issues as carefully weighed, the fundamental constitutional issues had been framed [during the political debates in the Senate] along lines that are readily recognizable in the later decisions of the Supreme Court in the Insular Cases' (p 47).⁶² Officers linked to the Executive and the military had produced similar arguments. Thus, the Schurman Commission, appointed by President McKinley to advise the administration on the exertion of authority and the implementation of policies over the Philippines,⁶³ had taken the view as early as 1899 that the power of Congress to define the relationship of the territory to the United States was virtually unlimited (Thompson 1989: 57). According to the Commission:

The Constitution gives Congress authority to make rules and regulations for the domain beyond the limits of the States. But the restrictions which the Constitution imposes upon Congressional power when operating within the States do not adhere to it when operating

outside the States; that is, in the Territories (quoted in Thompson 1989: 57).

As an example, the commissioners argued that there was no constitutional requirement to establish uniform duties or excises throughout the territories in the same fashion as in the states, a matter which rested totally on the discretion of Congress (Thompson 1989: 57-58). Again this was a position that prefigured substantially the outcome of the Insular Cases.

2. Insuring flexibility

The most important underlying rationale of the Insular Cases -- and, therefore, an indispensable element in any attempt to explain the reasons for the doctrine established by them -- is the view taken by the majority that the Court must allow Congress and the Executive the widest latitude and flexibility in shaping the policies toward and dealing with the peoples of the newly acquired lands. Both the text of the opinions and the effects of the decisions substantiate this conclusion.

The conscience of this 'need' for flexibility is already present in Justice McKenna's dissent in *De Lima*, the first of the cases decided (pp 218-220). It is further elaborated by Justice Brown in his opinion in the *Downes* case (see p 279), where he explicitly states that 'a false step at this time might be fatal to the development of...the American Empire' (p 286; cf also Ramírez 1946: 140). In the *Dorr* case, Justice Day, writing for the majority, stresses the fact that the framers of the Treaty of Paris intended to reserve to Congress 'a free hand' in dealing with the newly acquired possessions (p 143).⁶⁴ Chief Justice Taft, speaking on behalf of

a unanimous Court, expresses his view that the real issue of the Insular Cases had been the extent of the power of Congress to deal with these 'new conditions and requirements' (p 313).

The doctrine adopted by the Court, in effect, would provide this flexibility for the colonial project -- for this new phase in the expansionist drive of the American Empire. In fact the doctrine heightened not only Congressional and Executive, but also judicial, discretion, in matters relating to the territories. (See Leibowitz 1989: 29; Ramírez 1946: 141). The piecemeal application of constitutional provisions -- overseen by the Court itself -- resulting from the fundamental rights corollary of the incorporation doctrine provides an excellent example. Although at times expressed as responding to a concern for the territories themselves, this process of gradual extension of rights was based ultimately on a preoccupation with the viability of the colonial project.

The doctrine allowed for flexibility and adaptability in several areas. For example, it permitted Congress to protect American producers when it saw convenient to do so, by imposing tariffs and duties on trade between the states and the territories.

Congress and the Executive -- through their control of the territorial governments - - enjoyed a freer hand to deal with questions of law and order. The reform of criminal law and criminal procedure in the territories and the withholding of important rights -- such as the right to trial by jury or the right to bear arms -- have to be understood in the context of the need to ensure the governability of foreign peoples now under the jurisdiction of the United States and not always acquiescent to its rule. This was a crucial matter especially in the Philippines where an armed insurrection against the American regime had been waged for several years.

Additionally, Congress was left to adopt policies for the colonies unhindered by the need to provide political participatory rights to their inhabitants. Moreover, as has been noted already, in the years to come the doctrine would serve also to justify discriminatory treatment in the extension of social and welfare entitlements and benefits (which, incidentally, resulted in lowering the costs of maintaining the colonial regime). And, finally, both Congress and the Executive would have greater latitude to dispose of the lands, the resources and the peoples of the territories for military purposes. In sum, the doctrine of incorporation authorised the United States government to exert direct rule over other lands and other peoples without the difficulties inherent in dealing with formally sovereign states and unencumbered by the complications of admitting these distant and different peoples into the American federation.

3. The composition of the Court

The composition of the Supreme Court of the United States during the period under study is another factor that must be taken into consideration. Many of its members proceeded from the ranks of, or had been linked to, the bureaucratic and military elite, the neo-aristocratic element and the group of professionals and intellectuals who had been central in the promotion of the expansionist drive at the turn of the century. Some had performed specific functions and played important roles either in the elaboration or the implementation of the policies and practices of the American government in the territories.

Justice William R Day -- who wrote the majority opinion in the *Dorr* case -- was appointed to the Court by President Roosevelt -- an avowed expansionist -- in 1903. He had been Assistant Secretary of State, had been involved in the negotiations with Spain just before the Spanish American War, and presided over the negotiations and eventual signing of the Treaty of Paris (Torruella 1985: 65-66, n 237).

Justice Henry Moody also had been closely connected to the military establishment and the expansionist project. Appointed to the Court by President Roosevelt in 1906, he had served as the latter's Secretary of the Navy from 1902 to 1904 and supported the President's expansionist views. As Congressman he led a mission to Cuba that resulted in the acquisition of Guantánamo and the enactment of the Platt Amendment to the Cuban Constitution of 1902. He had been instrumental in the establishment of a Naval Base in the Philippines and served as co-chairman of a committee with Alfred Thayer Mahan, which proposed a complete restructuring of the Navy (See Torruella 1985: 77, n 270).

After acceding to the Presidency in 1908, William Howard Taft appointed four new Justices (Lurton, Hughes, Lamar and Devanter) and successfully nominated Justice White (the author of the incorporation doctrine) to the post of Chief Justice. In 1921 Taft himself became Chief Justice of the Supreme Court and wrote the opinion in the *Balzac* case. During his political career Taft had been a key figure in the development of the colonial policy of the United States. Despite an effort to substitute dollar for gunboat diplomacy in Central America and the Caribbean, as President, Taft had overseen an American armed intervention in Nicaragua and the near occupation of the Dominican Republic in 1912 (See, generally, Healy 1988: 145-163). In 1909 he intervened directly in a critical conflict between the American

Governor of Puerto Rico and the local legislature, overriding an action of the latter.

He had been Governor of the Philippines, Secretary of the War Department, with direct jurisdiction over matters affecting the Philippines, Puerto Rico and the Panama Canal, and provisional governor of Cuba under the provisions of the Platt Amendment (Cf Torruella 1985: 95, n 332).

4. The Insular Cases as a compromise

Within the context of the various factors that contributed to its production, the doctrine of incorporation developed by the Court can be read as a compromise between the contending political forces of the moment: that is, between the 'imperialist' camp and the two strands of the so-called 'anti-imperialist' position. It must be remembered that in the latter camp there were two groups: those who, on racist grounds, opposed the acquisition of territory, for it meant the incorporation of inferior peoples into the American polity; and those who argued that, having obtained the territories, the full protection of the Constitution must be accorded to their peoples.

The Court's decisions sanctioned the colonial project of the imperialists, recognising the right of the United States to acquire territory through conquest or otherwise and to govern it at discretion. The 'fundamental rights' corollary of the doctrine may be regarded as a gesture to those 'anti-imperialists' who favoured full extension of the Constitution; while the other strand, the most overtly racist one, had reason for relief in that aspect of the incorporation doctrine -- that the territories were

not 'part of the United States' -- that resulted in the effective exclusion of the colonials from the American political community.

If read in this light, the cases illustrate how law is oftentimes an arena for the provisional resolution of political conflict and how legal doctrine serves to crystallise the compromises among feuding political camps. It must be noted, however, that in this instance, the conflicting views were largely those of members of the American ruling elites. And the compromise had little to do with the desires of those most directly subjected to the rigours of its consequences. In the end the compromise had more to do with the viability of the colonial project than with the possibility of an alternative resolution of the power relationship.

G. CONCLUSIONS

Confronted with the question of the legitimacy of the colonial enterprise of the United States at the turn of the century, the Supreme Court fashioned a legal doctrine that provided an explicit justification for the exercise of almost unrestricted power over peoples and lands acquired as the result of the Spanish American War. Establishing a hitherto unexisting difference between 'incorporated' and 'unincorporated' territories, the Court in effect allowed Congress and the Executive the maximum flexibility and leeway possible to develop and implement the policies that the new phase of overseas expansionism required.

To fashion the doctrine, the majority of the Court adopted a strategy of interpretation characterised by a pronounced contextualism and an instrumental eclecticism that allowed it to shift from overtly instrumental to strictly formalist

approaches to adjudication as the circumstances required. The Court's discourse, moreover, was permeated by an ideological outlook that incorporated many of the elements of the prevailing notions, conceptions, and values of the times: manifest destiny, social darwinism, the idea of the inequality of peoples, and a racially grounded theory of democracy that viewed the latter as a privilege of the Anglo-Saxon race rather than a right of those subjected to rule. Treating the new lands as mere property, the Court precluded any conception of governance that would require the consent of the governed.

The doctrine of the Insular Cases became a constituent part of the American colonial project -- a dimension of the realities of power in the new American colonies. In this sense, the cases illustrate clearly the performative power of law: its capacity to create the realities that it names. The Court constructed a world populated by inhabitants of so-called 'unincorporated territories': a world that, by virtue of being so categorised, could be legitimately ruled over with almost unrestricted discretion by the functionaries of the imperial state. The cases also created a discursive universe that provided the parameters for any future discussion of the destiny of the inhabitants of that legally (politically) constructed world. Both the legal fiction and the discursive universe so constructed would be part of the practical context -- of the opportunities and constraints for action -- in the new colonial societies.

The elaboration and adoption of the doctrine of territorial incorporation has to be explained in terms of the complex articulation of factors that had converged to drive the capitalist industrial, partially democratic, republic to its new phase of imperial expansionism. They included the search for new markets, military

expansion overseas, and the felt need of its ruling classes to compete favourably with the new imperial powers of Europe and Asia. The Court's composition -- many of whose members were closely linked with the groups that favoured expansionism -- and the inter-class transactions of the ruling elites of the American state were additional factors in the production of the doctrine. Moreover, the centrality of the Supreme Court in the resolution of important political disputes in the United States made almost inevitable its eventual intervention in one of the great controversies of the times, and provided its pronouncements with an extraordinary force whose consequences are being felt to this day.

However, as has been argued above, the Insular Cases cannot be read as the ultimate determinants of the colonial condition of Puerto Rico -- as some seem to believe. They are but one example -- albeit a very important one -- of the series of legal events that have contributed to shape the colonial experience of modern day Puerto Rico.

ENDNOTES

1. The term 'statehood' is used in the political and legal language of the United States to refer to the status or condition of each one of the 'states' that constitute the federation. It is in this sense that it will be employed in this thesis. To avoid confusing it with the sense in which it is commonly used in International Law, instead of 'statehood' (the condition enjoyed by sovereign states in the international community), I will use the term 'independence' to refer to the latter status in connection with the debate regarding the status options of the American territorial possessions.

2. The Territorial Clause reads: 'The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State'.

3. *De Lima v. Bidwell*, 182 US 1; *Goetze v. United States*, 182 US 221; *Grossman v. United States*, 182 US 221; *Dooley v. United States*, 182 US 222; *Armstrong v. United States*, 182 US 243; *Downes v. Bidwell*, 182 US 244; *Huus v. New York and Porto Rico Steamship Company*, 182 US 392; *Dooley v. United States* (the 2d Dooley Case), 183 US 151; and *Fourteen Diamond Rings; Emil J. Pepke, claimant v. United States*, 183 US 176.

4. *Hawaii v. Mankichi*, 190 US 197 (1903); *González v. Williams*, 192 US 1 (1904); *Kepner v. United States*, 195 US 100 (1904); *Dorr v. United States*, 195 US 138 (1904); *Mendozana v. United States*, 195 US 158 (1904); *Rassmussen v. United States*, 197 US 516 (1905); *Trono v. United States*, 199 US 521 (1905); *Grafton v. United States*, 206 US 333 (1907); *Kent v. Porto Rico*, 207 US 113 (1907); *Kopel v. Bingham*, 211 US 468 (1909); *Dowdell v. United States*, 221 US 325 (1910); *Ochoa v. Hernández*, 230 US 139 (1913) and *Ocampo v. United States*, 234 US 91 (1914).

5. *Balzac v. Porto Rico*, 258 US 298 (1922).

6. 18 US 317 (1820).

7. 60 US (19 How) 393 (1856).

8. Article I, Section 8, Clause 1: 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.' (Emphasis added).

9. The judges comprising the majority were Justices Brown, Rufus Wheeler Peckham, John Marshall Harlan, David J Brewer and Chief Justice Melville Weston Fuller. In the minority were Justices Joseph McKenna, George Shiras, Jr, Edward Douglas White and Horace Gray.

10. In the *Fleming Case*, 50 US (9 How) 603 (1850), the Court had validated the collection of duties upon merchandise imported from Tampico, Mexico, while under military occupation of the United States. It held that, although subjected to American military occupation, Tampico had not ceased to be foreign territory. In a previous case, *United States v. Rice*, 17 US (4 Wheat) 246 (1819), however, the Court had held that a region of the later state of Maine had been converted into a foreign territory by virtue of its temporary military occupation by the British during the War of 1812.

11. During the first decades of this century Puerto Rico's name was changed by the Americans to *Porto Rico*. In the ensuing text the form used in the original will be retained in all quotations, without resorting to the *sic* notation.

12. I am including here Justice Gray's agreement 'in substance' with Justice White's opinion.

13. 30 (US) Stat 750.

14. See Chief Justice Taft's comments to that effect in *Balzac v. Porto Rico*, p 309.

15. In *Downes*, for example, White considered that conferring upon the people of the new territories the rights and immunities enjoyed by people in the Northwest Territory would suggest the intention of Congress to incorporate (p 333).

16. As has been pointed out, according to the text, the 'not locally inapplicable' proviso refers only to 'laws' and not to the Constitution (Torruella 1985: 108-109).

17. Act of July 1, 1902, c 1369, Section 1, 32 (US) Stat 692.

18. The governor of Puerto Rico had sought the extradition of an indicted person from the state of New York. The plaintiff argued that Puerto Rico was not a territory of the United States for purposes of the extradition Act.

19. The main rationale of the decision was that it was 'impossible to hold that Porto Rico (sic) was not intended to have power to reclaim fugitives from its justice, and that it was intended to be created an asylum for fugitives from the United States' (p 474). Note that in this case Chief Justice Fuller, a notorious dissenter in *Downes* and other previous cases, adopted the language of the doctrine of incorporation in his analysis.

20. 20 Fed Rep 298 (1884).

21. The full definition given in *Ex Parte Morgan* was the following:

A territory, under the constitution and laws of the United States, is an inchoate state, -- a portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws with a separate legislature under a territorial governor and other officers appointed by the President of the United States (at 305, emphasis added).

Notice that in his quotation, Justice Fuller excised the term *inchoate state*, which implies that a territory is a state in formation.

22. 135 US 443 (1889).

23. Fuller did not discuss the fact that in some of the previous cases the Court seemed to be using the term 'organised' in the same or similar sense as the Court would later use the term 'incorporated'.

24. As has been noted above, in *Rasmussen v. Alaska* the Court decided that since Alaska had been incorporated by the terms of the treaty with Russia, a trial by jury of twelve was required as a matter of Constitutional law.

25. In a companion case, decided the same day, *Mendoza v. United States*, 195 US 158 (1904), the Court briefly disposed of a similar question, following *Kepner's* rationale. In *Trono v. United States*, 199 US 521 (1905), the Court divided itself regarding the interpretation of the same 'double jeopardy' clause. There the majority held that it was not a violation of the guarantee for the Supreme Court of the Philippines to find guilty of a greater offense a defendant who appeals of his conviction of a lesser crime.

26. 26 (US) Stat 1084 (1891).

27. 24 Op Att Gen US 40, May 13, 1902.

28. It is interesting to note the contrast between the Government's positions as expressed in the Attorney General's opinion regarding Mr Molinas, the artist, and in the Solicitor General's argument in the *González* case. Perhaps a relevant clue to deciphering the difference in positions is to be found in the fact that Ms *González* was detained under the authority of a clause of the Immigration Act calling for the exclusion of persons 'likely to become a public charge'. As the Solicitor General argued: '...the attitude of the United States simply is that dangerous or feeble defectives among our island inhabitants are not to be admitted to the country as if they were citizens' (p 7). Did this reflect a desire to stem an influx of poor people from the new territories?

29. Whether Alaska was within easier reach than Puerto Rico is doubtful. And of course distance or difficulty of access was not a factor considered relevant in the case of Hawaii, which was also 'incorporated' into the Union.

30. Of course no mention is made of the treatment that African Americans and other minorities had experienced at the hand of 'impartial' white jurors 'trained' to the 'exercise of the[ir] responsibilities' in the common-law system of the United States.

31. A *per curiam* decision is not signed by any one of the Justices and normally is very succinct.

32. 245 US 639 (1918).

33. For a detailed analysis regarding the legal reforms carried out in the Philippines, with less extensive reference to the situation in Puerto Rico, see Thompson (1989). For analogous processes in Puerto Rico see Delgado Cintrón (1988: 45-72), Trías Monge (1978: 67-69) and Torres (1976).

34. Discussions of formalism abound in legal literature. For some examples see Unger (1976: 48-58; 1986: 1-2, 8-11); Weber (1968: 657-658); Kennedy (1973); Horwitz (1977: Ch VIII).

35. I take the term 'pragmatic instrumentalism' from Summers (1981). In the sense it is used here 'instrumentalism' must be distinguished from the meaning given to it in discussions of Marxist legal theory to designate the position taken by those who view law essentially as an instrument of the ruling classes (Cf Chapter I). For detailed analyses of instrumentalism as a theory of legal interpretation in the sense used by Summers, see also 'Symposium...' (1981), Lloyd and Freeman (1985: 695-698) and Horwitz (1977).

36. The consequentialist nature of the Court's reasoning in the first group of cases has been noted in Ramírez (1946). The Ramírez article, however, does not consider fully the extent to which formalism and consequentialism interact in the opinions of the Court. Moreover, since the author analyses only the cases decided until 1904, he is unable to discuss the shifts in interpretative techniques adopted by the Court from 1904 to 1922.

37. The switch in Justice Brown's position from *De Lima* to *Downes* has puzzled more than one commentator (Cf Torruella 1985: 53). I believe that Brown was especially impressed by the fact that the action questioned in the first case was a purely administrative decision taken before Congress had legislated specifically for Puerto Rico. After Congress had expressed its will to impose a duty on imports from the island, Brown simply followed suit. It must be remembered that of the three positions taken by the Justices in the cases, his extension doctrine provided for the widest congressional discretionary latitude.

38. A failed attempt at 'integrity' in the Dworkinian sense? (Cf Dworkin: 1986).

39. One of Harlan's typical statements regarding the matter is the following: 'Indeed it has been announced by some statesmen that the Constitution should be interpreted to mean not what its words naturally, or usually, or even plainly, import, but what the apparent necessities of the hour, or the apparent majority of the people, at a particular time, demand at the hands of the judiciary. I cannot assent to any such view of the Constitution' (p 241).

40. 'At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny' (p 134).

41. For the usefulness of the concept of 'strategy' to explain behaviour in anthropological and sociological studies see Bourdieu (1990).

42. Conscience of the prevailing formalism of the times is evident in the Solicitor General's argument in the *Insular* cases, in which he rhetorically presses his consequentialist reasoning almost reluctantly, apologetically even (*De Lima v. Bidwell*, p 137).

43. Horwitz, for example, has argued that during the Post-Revolutionary period in the United States instrumentalism in 'private law' coexisted with formalism in the adjudication of issues of 'public law'. According to him the instrumentalist approach in private law allowed for shifts in power to the merchant and entrepreneurial groups that were then vying for a hegemonic position, while formalism in public law prevented redistributive efforts that would be detrimental to the interests of those same groups (1977: 254-256). Only after the 1840s would there be a convergence leading to a heightened kind of formalism both in private and public law (258).

44. The examples are Kelman's.

45. A commentator has noted that 'half a century after the United States proclaimed the inadmissibility of the ownership of persons the Court affirmed its acceptance of the contemporaneous European concept of the ownership of peoples' (Cabranes 1978: 487).

46. For the historical connection between European imperialism and the Enlightenment, see Fitzpatrick (nd) and Nederveen Pieterse (1990).

47. 206 US 333 (1907).

48. For detailed discussions of the various conceptions of self-determination in a variety of contexts see Twining (1991), Pomerance (1976, 1984), Markovic (1980), Alexander and Friedlander (1980), de Obieta Chalbaud (1985) and Ronen (1979).

49. For example, Senator William E Mason, Republican of Illinois, presented the following resolution to express the sense of the Senate:

Whereas all just powers of government are derived from the consent of the governed: Therefore be it RESOLVED BY THE SENATE OF THE UNITED STATES, That the Government of the United States of America will not attempt to govern the people of any other country in the world without the consent of the people themselves, or subject them by force to our dominion against their will.

See Thompson 1989: 43. For other examples see *Idem*, pp 43-46.

50. Of course, for Wilson the principle was applicable only to European peoples. The peoples of Latin America, the Caribbean and other 'less civilised' regions were thought to be incapable of determining their own destinies (See Weston 1972: 19).

51. As Roger Cotterell has stated: 'What may be much more central to law, understood primarily but not exclusively as state law, is the production of ideologically and technically important doctrine by courts and other state controlled dispute institutions on the occasion of dispute processing, rather than the processing itself, which concerns only a small minority of disputes arising in society' (Cotterell 1983: 677).

52. Chambliss and Reidman, for example, have argued that in capitalist societies the rule of law only governs the lives of the middle class. Legal-rational legitimacy, they contend, is used as a way of disciplining dissident elements of the ruling class, while the working class is subjected to other methods. Whether the example would hold true in all situations, all historical periods and all capitalist social formations is open to question; but the argument does suggest that not all legitimation strategies, methods or techniques are equally effective in all sectors of a given society. (See Chambliss and Reidman 1982: 315).

53. It is perhaps this double operation of the law in the process of creating a subject that gives it its ambiguous quality in relation to experiences of emancipation/oppression. For at one level it provides a discourse of right -- fuelling aspirational drives -- while at another it is felt as a constraint, as a submission to power.

54. The Court quoted approvingly from the Attorney General's opinion in the *Molina* case, in which the former referred to the Puerto Rican artist stranded in Paris as 'one of those turned over to the United States by Article IX of the treaty [of Paris]', adding that he was 'also clearly a Porto Rican, that is to say, a permanent inhabitant of that island' (pp 43, 44, quoted at p 15).

55. As Cotterell has pointed out, one of the vital forms of power is the power to set the agenda of debate or decision (1983: 678).

56. See, for example, *Bianchi v. Morales*, 262 US 170 (1923); *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 US 663 (1974); (due process of law); *Examining Board v. Flores de Otero*, 426 US 572 (1976) (equal protection of the laws); *Segurola v. United States*, 275 US 106 (1927); *Torres v. Puerto Rico*, 442 US 475 (1979) (search and seizure clause of the Fourth Amendment); *Califano v. Torres*, 435 US 1 (1978) (right to travel).

57. For discussions of the relevant judicial decisions see GAO 1989: 4-6 to 4-28; Serrano Geyls 1986: 496-561; and Leibowitz 1989: 47-53; 178-185.

58. See *Califano v. Torres*, 435 US 1 (1978) (Congress may constitutionally exclude Puerto Rico from applicability of Supplemental Security Income Program, for aid to qualified aged, blind and disabled persons in the United States); *Harris v. Rosario*, 446 US 651 (1980) (Congress can determine that Puerto Rico receive less financial assistance than the States to provide aid to families with needy dependent children).

59. See, generally, the GAO Notebook 1989; US House of Rep, Committee on Interior and Insular Affairs, Report, 1990; García Passalacqua and Rivera Lugo (1990); Turner (1990); Hernández Colón (1989); Romero Barceló (1989); Berríos Martínez (1989); Serrano Geyls (1989); Gallisá (1991); Mari Brás (1990); García Passalacqua (1990).

60. For an analysis of how the military importance of Puerto Rico enhances even more the power that Congress and the Executive may exercise over its affairs, in accordance with American constitutional doctrine, see, Leibowitz 1989: 16.

61. For an account of the Senate debates, see Thompson 1989, ch 3, pp 35-48.

62. An analogous point has been made by Cabranes:

The doctrine of territorial incorporation developed by the Court in the *Insular Cases* and the cases following was based on precisely the same considerations that determined the nature of the 1900 legislation for Puerto Rico: an apprehension that the peoples of the new insular territories were aliens and a belief that the United States ought not to deal with them as though they were Americans (1978: 440, emphasis added).

63. The Commission was composed by its chairman, Jacob G Shurman, president of Cornell University, and commissioners Charles Denby, a former minister to China; Dean C Worcester, a

scientist with prior experience in the Philippines; Rear Admiral George Dewey, of the United States Navy; and Army Major General Elwell S Otis, then commander of the American troops in Manila (Thompson 1989: 52).

64. Cabranes quotes F R Coudert, a lawyer involved prominently in the litigation of the *Insular Cases*, who, referring to a conversation with Justice White regarding their outcome, stated:

It is evident that he was much preoccupied by the danger of racial and social questions of a very perplexing character and that he was quite as desirous as Mr. Justice Brown that Congress should have a **very free hand** in dealing with the new subject populations (Cabranes 1978: 441, emphasis added; see also Ramírez 1946: 141, n 33, and 144).

CHAPTER IV
CITIZENSHIP, HEGEMONY AND COLONIALISM

A. INTRODUCTION

This chapter will analyse the effects of one of the most important legal events in the history of the relationship between the United States and Puerto Rico: the extension of American citizenship to Puerto Ricans in 1917. The central argument is that American citizenship has become a crucial element in the process of legitimation of the colonial relationship. It has produced significant consequences in the realm of experience as much as it has operated, at the representational level, to help construct a particular world view. This world view has been at the basis of the social consensus on which the legitimacy of the regime has been founded.

In summary, I argue that the extension of citizenship has had the following effects: (a) It created a context for social practice; (b) it constituted a political subject: the Puerto Rican as American citizen (with important attendant consequences); (c) it has had an appreciable impact on the process of the formation of the 'self'; (d) it has constructed a new juridico-political 'reality' that has placed significant constraints on the metropolitan state itself; and, ultimately, (e) it has been a salient factor in the multidimensional process involved in the reproduction of consent to the colonial relationship.

B. BACKGROUND

Prior to the Spanish-American War the acquisition of new territory by the United States had always led at some point to the extension of citizenship to the inhabitants of the territory as part of the process of eventual admission to the Union. The territories acquired in 1898, however, opened up a new debate. Should their inhabitants be granted citizenship? And if so, what would be the consequences of such action? Underlying the debate was the fear -- at times expressed very explicitly -- of incorporating into the Union peoples deemed to be different, even inferior.

As a scholar has argued convincingly, many Congressmen and decision makers in Washington made a distinction between the Philippines and Puerto Rico (Cabranes 1978). The peoples of the Philippines, fundamentally of asiatic origin, were considered to be even more 'alien' than the Puerto Ricans, whose European roots were stressed by those who favoured granting citizenship to the latter. Moreover, the fact that the American occupation of the Philippines had been met by armed resistance from sectors of the local population and hostilities were still raging had cast doubts regarding the governability of the new territory. Cabranes argues that delay in considering a bill granting citizenship to Puerto Ricans was due mainly to the desire to avoid setting a precedent for the Philippines.¹

The fact of the matter is that from 1901 until the passage of the Jones Act in 1917 (Cf Chapter II), there were twenty one bills of law presented in Congress with the purpose of making Puerto Ricans American citizens (Torruella 1985: 85; see also

Cabranes 1978). The decision was made finally during the 64th Congress of the United States.²

Section 5 of the Jones Act provided that all 'citizens' of Puerto Rico, as defined by section seven of the Foraker Act³, and all 'natives' of the island who had been absent temporarily from their country at the date of proclamation of the Treaty of Paris and had since returned and established residence in Puerto Rico, without holding the citizenship of any other country, were declared and should be held to be citizens of the United States. It further provided that any person who did not wish to become a US citizen could so declare before a court of law within a period of six months of the taking effect of the Act, thereby retaining his or her current political status. Furthermore, the Act made provision for certain persons born to an 'alien' parent in Puerto Rico and residing permanently in the island to acquire US citizenship by making a sworn declaration of allegiance to the United States before the United States District Court for Puerto Rico.

The citizenship provision of the Jones Act in effect amounted to a collective naturalization of Puerto Ricans. However, persons born thereafter in Puerto Rico would not acquire citizenship automatically, although they could do so derivatively, in accordance with the relevant statutes then in force. (Alvarez González 1990: 325). Subsequent enactments were required to produce the current legal situation whereby all Puerto Ricans become American citizens at birth.⁴ For the purpose of this thesis, nevertheless, it is not the legal specifics that are fundamental, but the basic decision to grant citizenship to Puerto Ricans. It was that political decision, implemented effectively through law in a process that began with the passage of the Jones Act in 1917, that has had the important consequences analysed in this chapter.

1. The question of motives⁵

Why did the United States grant American citizenship to Puerto Ricans? The question has been debated at some length by leading historians and constitutional scholars in Puerto Rico and the United States.⁶ Early interpretations tended to attribute the decision to the need to recruit Puerto Ricans for the Armed Forces (Cf, for example, Maldonado Dennis 1972: 108). The argument has been countered with some degree of persuasiveness by Cabranes (1978). The latter author has pointed out that American citizenship is not a prerequisite to conscription. In fact, he argues, aliens were made subject to the draft during the Civil War, the Spanish-American War and World War I. His research has established that even the men among those few Puerto Ricans who chose not to become American citizens after the Jones Act were considered by the American authorities to be subject to military conscription under existing American law. (Cabranes 1978: 407-408). Moreover, as the Supreme Court of the United States correctly noted in the *González* case in 1904,⁷ by virtue of the Army appropriation Act of March 2, 1903, the 'citizens' of Puerto Rico were already eligible for enlistment in the Regular Army of the United States.⁸

The preceding facts and arguments, however, do not warrant Cabranes's conclusion that 'nothing in the annals of Congress would suggest that the collective naturalization of the Puerto Ricans was a matter concerned in any way with military concerns' (p 408). If not conscription, certainly wider strategic concerns figured principally among the considerations borne in mind by American decision-makers, as will be discussed below.

What the most important and best researched scholarship on this particular issue -- including the works by Cabranes (1978), Leibowitz (1989), Estades (1988) and Serrano Geyls (1979) -- does seem to agree upon is the following: the decision to extend American citizenship to Puerto Ricans was predicated on the will to retain Puerto Rico as a permanent possession of the United States.

Leibowitz reports that then Secretary of War, Henry Stinson, considered the granting of citizenship 'as a step toward full self-government following the Canadian model with citizenship *assuring a continuing bond between Puerto Rico and the United States*', and that some Congressional figures 'viewed citizenship as *assuring permanent association*' (1989: 146, emphasis added).

Cabranes concludes expressly that the citizenship provision responded to the 'widely shared assumption that Puerto Rico was permanently to remain under the American flag' (1978: 443-4). He quotes the author of the bill, Representative Jones, as saying that 'the purpose of the United States seems clearly to be to retain Puerto Rico permanently' (at 473). The American Governor of Puerto Rico, Arthur Yager, is also quoted to the effect that: 'Puerto Rico...will always be a part of the United States, and the fact that we now, after these years, make them citizens of the United States simply means, to my mind, that we have determined practically that the American flag will never be lowered in Porto Rico and it is for their good, and for ours, that the American flag remains permanently in Porto Rico' (*ibidem*).⁹ Within this larger objective, according to Cabranes, the citizenship provision was envisioned as a way to defuse the growing independence sentiment among the population by reinforcing in them a sense of 'belonging' to the United States (pp 466, 442).

Historian Estades Font (1988) comes to the conclusion that the underlying motive of the citizenship provision was to consolidate American hegemony in Puerto Rico. The need for such a step arose as a consequence of two internal factors, according to Estades: (a) the growth of the independence movement (in this she coincides with Cabranes) and (b) the emergence of a strong labour movement that was showing an increasing tendency to participate in Puerto Rican political life. Although generally pro-American, the labour movement had a radical pro independence wing. The extension of American citizenship was viewed as a means to promote loyalty to the American regime and to confront the growing wave of social and political agitation. With the imposition of citizenship, she argues, the United States government was making patent its will to retain Puerto Rico permanently. (See pp 202-215).¹⁰

It is also evident from the research conducted by these and other scholars that strategic considerations were central to the decision. The United States was becoming involved increasingly in World War I and was plunging itself headlong into international affairs. Its colonial policy was viewed by many, even within the political and military establishment, as a blight that could backfire during its struggle to consolidate and expand the space newly gained or about to be gained in the world arena. Moreover, there was a perceived need to consolidate control of the island for its strategic value.

President Woodrow Wilson had been foremost among those expressing some of these concerns. In his third Annual Message to Congress in December, 1915, he had urged the nation's lawmakers to deal with the Philippine and Puerto Rican questions, which he considered to be related intimately to the country's national

security and preparations for its defense. He urged Congress to take action regarding the then pending bills on the matter, so that the US would be free to assume its new 'duties' in the world scene (quoted in Estades Font 1988: 202).

Congressional leaders expressed their views on the subject very clearly. According to Leibowitz, for some of them citizenship would guarantee not only 'permanent association', but also 'the long-term benefits' of 'Puerto Rico's strategic military placement' (p 146). Both Cabranes and Torruella quote Representative Cooper of Wisconsin, who during the final debate on the Jones Act, in 1917, expressed:

We are never to give up Porto Rico for, now that we have completed the Panama Canal, the retention of the island becomes very important to the safety of the canal, and in that way to the safety of the Nation itself. It helps to make the Gulf of Mexico an American lake. I again express my pleasure that this bill grants these people citizenship. (Cabranes 1978: 485, n 459; Torruella 1985: 86, n 290)."

Similar expressions regarding the importance of Puerto Rico for the defense of the Panama Canal were made by other members of Congress during the Congressional debate on the bill (Cf Serrano Geyls 1979: 444-445).

After a brief examination of the historical context in which the citizenship provision was approved, Serrano Geyls correctly concludes that Cabranes's assertion that military considerations were not related at all with the extension of citizenship cannot hold. If one accepts the facts, Serrano Geyls argues, that the island was important strategically for the United States, that the latter was already immersed in World War I by the time the bill was approved, and that the citizenship provision was

viewed as the principal means to contain and weaken the strong pro-independence feeling among Puerto Ricans, it is inevitable to conclude that the war situation had to be a precipitating factor in the decision made by Congress in 1917 to take action on a bill that had been under its consideration since 1900 (*Id*: 446-447).

To conclude otherwise would be to think that while they were discussing the Puerto Rican case, the American lawmakers were totally oblivious of the war situation in which their country was involved and of the vital strategic importance of the island, and that they failed to see the intimate relationship between both matters. That position seems to me frankly indefensible. (*Id*: 447, translation supplied).¹²

One must conclude, with Estades Font and Serrano Geysls, that the decision to grant citizenship was made as a means to further American hegemony in Puerto Rico at a time when the United States was confronting an international crisis (World War I), while social and political agitation was growing in its strategically important colony.¹³ The decision must be seen also in the context of persistent American efforts to expand its control of the Caribbean region at the time. For example, while the Puerto Rican citizenship provision was passing through Congress, the US was in the process of acquiring the Virgin Islands from Denmark. The relevant Convention was signed on 4 August 1916 and proclaimed by the President on 25 January 1917.¹⁴ Congress acted to provide for a temporary (military) government for said Islands on 3 March 1917,¹⁵ the day after President Wilson signed the Jones Act for Puerto Rico.¹⁶

It must be noted also that, although objections and reservations were expressed by some members of Congress and others regarding the extension of citizenship to

Puerto Ricans, it seems that, when the final decision was made, there was a consensus among the dominant sectors of the metropolitan society, and its various fractions, about the desirability of such a course of action.¹⁷

2. An imposition

The Puerto Rican pro-independence movement especially has always maintained that American citizenship was imposed on Puerto Ricans. The Cabranes study¹⁸ -- certainly one of the most important on the question -- arrives at the conclusion that Congress did not impose citizenship on the Puerto Rican population.

The author argues that the grant of citizenship involved 'no element of compulsion' as it 'was generally believed to conform to the wishes of the people of Puerto Rico' (p 487). And further adds that any opposition to the measure was isolated or expressed in equivocal terms (*Ibidem*). But Professor Serrano Geys --one of the leading constitutional experts in Puerto Rico --¹⁹ has countered persuasively Cabranes's arguments using the very data of the latter's study (See Serrano Geys 1979).

Certainly, from the early days of the American occupation there had been unanimous support among the Puerto Rican political parties to the grant of citizenship (See Estades 1988: 202-215; Cabranes 1978: *passim*). However, the situation started to change around 1912 (Estades 1988). Important sectors of the Puerto Rican elite, especially among the *hacendados* and liberal professionals, had become increasingly disillusioned with the American regime. Not only were many of them being displaced economically by the new American sugar barons, but the American

political establishment had denied consistently substantial political reforms and had refused outright to make any promise to incorporate Puerto Rico as a state of the Union.²⁹ Since the adoption of the Foraker Act of 1900 -- perceived clearly as a colonial statute -- and the blessing bestowed by the Supreme Court to the colonial policy pursued by Congress and the Executive, in the Insular Cases, the party of the *hacendados* and their organic intellectuals had begun to lean appreciably towards a pro-independence or pro-autonomy stance. In 1913 the Union Party, which held an effective electoral majority among enfranchised Puerto Ricans, adopted independence as its 'supreme ideal' (Serrano Geyls 1979: 441). In 1914 Puerto Rico's House of Delegates, the only elected body of the island at the time, expressed its opposition to American citizenship and the declaration was transmitted to Congress (*Ibidem*; Cabranes 1978: 468; Torruella 1985: 90). That same year, then Resident Commissioner for Puerto Rico in Washington, Luis Muñoz Rivera, the foremost leader of the Union Party, expressed his reservations to a citizenship bill pending in Congress, on the grounds that it would compromise Puerto Rico's possibility of becoming an independent state in the future (Cabranes 1978: 464-470). In 1916, during the debate on the Jones Bill, Muñoz Rivera reaffirmed his opposition and called for a plebiscite on the matter among the Puerto Rican population (Cabranes 1978: 479; Serrano Geyls 1979: 441). Congress paid no heed to the plebiscite proposal. As Serrano Geyls correctly concludes, the only declarations on the Congressional record from official representatives of Puerto Rico from 1914 to 1916 were in opposition to the citizenship provision of the Jones Act (pp 441-443). Furthermore, the President of the Bar Association of Puerto Rico, representing his and several other professional, civic and cultural organizations, testified before a

Congressional Committee against the citizenship proposal, arguing, as Muñoz Rivera had done, that it would constitute an obstacle to Puerto Rican independence (Cabranes 1978: 474-5).²¹

Whether the majority of the population favoured or opposed citizenship is unclear. Serious research on the question must still be conducted. Many questions remain unanswered. To what extent the political elites actually represented the views and interests of the majority? Was the citizenship question of importance only to the elites at the time of its extension to Puerto Ricans? As will be shown further below, the question of citizenship has become an important element in the popular imagination with the passing of time. But has this been merely an effect of the accomplished fact of the extension of citizenship in 1917? In any event there is no evidence that Congress made any effort to ascertain the wishes of the population at large at the time. As has been noted above, the proposal to hold a plebiscite on the matter, made by Puerto Rico's official representative to Congress, was disregarded.

As Serrano Geysls and others have argued, the most important fact that sustains the imposition thesis was the mode in which the acquisition of citizenship was prescribed. Congress decreed that residents of Puerto Rico would become American citizens unless they declared affirmatively their wish not to become so, before a court of law, within six months of the passage of the Act. The requirements for rejection must have been particularly burdensome to a population that was largely illiterate at the time, and unaccustomed, even culturally resilient, to participate in legal proceedings.²² Moreover, the Jones Act placed significant restrictions and political penalties on those who rejected citizenship. Non citizens would not be able to vote or hold important public offices in Puerto Rico. In effect they would be proscribed

from the 'official' political life of the country. Further prohibitions would be added later concerning the capacity to engage in certain professions (Serrano Geyls 1977: 411; 1979: 443). Under the circumstances, it is understandable that 'only 288 persons took the legal steps necessary to decline United States citizenship' (Cabranes 1978: 488). One has to wonder what would have been the results if Congress had determined that people had to take affirmative steps to acquire US citizenship, and had resolved to preserve the political rights of those who chose to remain 'citizens of Porto Rico'.

As Serrano Geyls concludes:

This was obviously an imposed citizenship, because those who did not accept it would become outcasts in their own land, and because that option, repugnant as it was, was offered only to those who were adults at the time. Minors and the millions of Puerto Ricans born afterwards, did not have even that opportunity. (Serrano Geyls 1979: 443).²³

C. LEGAL EFFECTS OF THE CITIZENSHIP PROVISION ON THE JURIDICO-POLITICAL STATUS OF PUERTO RICO

Legal consequences are largely a matter of social understandings. Of course, it is the understanding of legal actors with authority that accounts ultimately for the 'legal effect' of a juridical proposition. Reading 'meaning' into a legal text is one of the fundamental activities of legal operators. But the effective fixation of meaning in legal texts is a function of power. Moreover, it is a characteristic of liberal legal systems that the distribution of power to read 'meaning' into texts is asymmetrical, and, more specifically, hierarchical.²⁴

To ask the question: What were the legal effects of the citizenship provision of the Jones Act on the legal and political status of Puerto Rico? is to ask: What was the understanding, among legal decision makers with authority in the United States, of the normative consequences of the grant of citizenship? In other words, how did they interpret that the metropolitan state became bound by such a decision regarding its position *vis a vis* the Puerto Rican community?

Of course, one could ask also: what was the understanding among Puerto Ricans of the normative consequences that should follow from the fact that they had been forced, for all practical purposes, to become American citizens? Answering the question would not be a simple matter. For Puerto Rico was not by far a homogenous society, as some political discourses, including the nationalist, would seem to suggest. Taking due regard of the class, racial, gender and other social cleavages then existing in the Puerto Rican community would most probably affect the results of the inquiry. The historical record seems to show that, at least among some within the Puerto Rican elites, particularly those favouring the statehood option for the island, the hope was kindled that citizenship implied 'incorporation' into the United States, as that term was then understood within the dominant legal and political circles of American society (Cf Leibowitz 1989: 147). However, the extension of citizenship had not been a negotiated event, an exercise in co-determination, not to say self-determination. It was not the social understanding shared within the dominated society that counted, but the meaning that the decision-makers in the highest echelons of the dominant state would be willing to read into their unilateral action. The asymmetry of the power relationship was to become evident once again.

Legal actors endowed with some authority in the lower ranks of the hierarchy of power in the colonial apparatus -- including judges of Puerto Rican origin -- had come to the conclusion that the grant of citizenship implied a decision to make Puerto Rico not merely a possession, but part of the United States. Thus, shortly after the passage of the Jones Act, the Supreme Court of Puerto Rico, in a decision written by Justice Adolph J. Wolf,²⁵ determined that by virtue of that statute Congress had in effect incorporated the island into the United States.²⁶ The United States District Court for Puerto Rico took a similar stance.²⁷

The matter would be settled authoritatively by the Supreme Court of the United States in due course. In 1917 it reversed summarily both the Supreme Court of Puerto Rico and the federal District Court on the question.²⁸ In 1922 the highest US tribunal stated explicitly its grounds for holding that the legal consequences of the citizenship provision were negligible, as far as the political status of Puerto Rico was concerned.²⁹ Puerto Rico, after the Jones Act, continued to be an unincorporated territory of the United States.³⁰ The only juridical effect of the Jones Act, according to Chief Justice Taft, was that residents of Puerto Rico who were American citizens could move into the continental United States and there enjoy the 'civil, social and political' rights of any other citizen of the nation (at 308; Cf also Cabranes 1978: 442).³¹

It must be remembered, as was discussed in the previous chapter, that citizenship had been considered generally an indication of incorporation (Ch III, sec B.2; cf also *Downes v. Bidwell*, at 332, 333.) After the precedent setting *Balzac* case, the United States Congress would feel free to extend US citizenship to the

peoples of other American territories without the implication of incorporation or the promise of eventual statehood.³²

Despite criticisms of the *Balzac* Court for not having decided in accord with the thesis that citizenship meant incorporation,³³ the historical context examined in this and previous chapters can lead only to the conclusion that the Supreme Court of the United States interpreted correctly the intentions of Congress and the Executive Branch. The problem was not exclusively the Court. The real situation was that those at the helm of all the branches of the metropolitan government -- including its highest judicial forum -- saw fit that citizenship be granted for particular reasons -- political, strategic reasons -- without effectuating a change in the political condition of the territory.³⁴ It was the social understanding among the legal and political actors located at the highest tiers of the metropolitan state that alien peoples of conquered or recently acquired territory could be made citizens of the United States while maintaining them in a subordinate political condition. Citizenship did not efface colonialism. Under the circumstances, it was meant to consolidate it. To make it more palatable. To make those subject to it more easily governable.

To affirm that the citizenship provision did not have any significant 'legal' effects (regarding the status of Puerto Rico), is not to say that it has had no effect at all. The contrary is true. Its most important effects have been socio-political, as the rest of this chapter is dedicated to demonstrate.

C. CITIZENSHIP AS A REPRESENTATIONAL CONSTRUCT

The concept of citizenship has had a long and varied history in Western political thought and practice.³⁵ However, there are certain recurrent themes that have been associated with the notion. As Derek Heater (1990) has stated:

Very early in its history the term already contained a cluster of meanings related to a defined legal or social status, a means of political identity, a focus of loyalty, a requirement of duties, an expectation of rights and a yardstick of good social behaviour (p 163).

In a most basic sense citizenship has been used ordinarily to connote a certain relationship between individuals or groups of individuals and a body politic. A relationship that implies both subjection and the notion that certain claims may be made reciprocally between the individuals involved and the political body they either constitute or to whom they think they owe allegiance. In other words, the meaning of citizenship flows from an understanding that a particular bond ties the individual and the political community. The bond is cemented through the exercise of power, either to protect or to demand, and through the feeling that emanates from the experience of being protected or somehow included in the group.

In more specific terms citizenship has been thought to imply the recognition of a defined legal status, as Heater argues. That status operates to equate, at least at an abstract level, members of a community, as well as to differentiate others within and without the community (Cf Andrews 1991: 9). Thus in many communities

citizenship conjures up powerful images of belonging and expectations of a certain treatment. It is also an efficacious medium for the construction of barriers to exclude 'others' not belonging to the community. It is in this sense that citizenship is often used in the context of questions relating to immigration and naturalisation.

Especially in modern times, the reciprocal claims that citizenship is considered to justify are formulated in terms of rights asserted or obligations imposed. The main obligation on the part of the individual is usually thought to be the display of loyalty, both symbolically or materially (as in the actual offering of the citizen's body and time for the defense of the political community through military service).³⁶ The main claims or 'rights' are 'minimally the right to a civic identity and to civic participation' (Selznick 1969: 249; cf also Held 1991: 20). 'Citizenship is political identity par excellence,' asserts Heater (1990: 184), adding that 'a citizen's identity is an awareness of his relationship to his state and to his fellow citizens' (p. 183).

Traditionally, citizenship rights were confined to the so called civil and political rights. However, during the course of the twentieth century the notion of citizenship rights has been extended by some to include claims for social, economic and cultural entitlements. Thus, Raymond Plant (1991) has argued that:

'[T]he idea of citizenship is not just concerned with civil and political rights, vitally important though these are. The left also has to articulate and defend a concept of social citizenship, and this has two broad aspects. The first is that citizenship as a status confers some rights to resources such as income, health care, social security and education. The second aspect is that citizens should be empowered more as consumers whether in the market or in the public sector. It also implies that as we have equal civil and political rights

as citizens -- that is, equality before the law -- the distribution of the *social means* of citizenship should be as fair and as equal as can be attained without infringing the other rights of citizenship (p 56).

The argument is formulated in the following manner by Heater:

We need to be clear about what is meant by the term 'social citizenship'. It is the belief that, since all citizens are assumed to be fundamentally equal in status and dignity, none should be so depressed in economic or social condition as to mock this assumption. Therefore, in return for the loyalty and virtuous civic conduct displayed by the citizen, the state has an obligation to smooth out any gross inequalities by the guarantee of a basic standard of living in terms of income, shelter, food, health and education (p 267).

Claims of citizenship status have been wielded as a weapon of 'liberation', as in the struggles of the French revolutionaries against the *ancien regime*. But the extension of citizenship has served also the purpose of consolidating domination and reaffirming subjection. Empires have employed the imagery of citizenship to allure potential subjects into their fold, to extend their control over territories and peoples without excessive recourse to force. Thus, *civitas*, which at first connoted a privileged status among Roman subjects, was used eventually as a tool of 'Romanization' among the peoples conquered in the sweeping growth of the Roman empire, and as a means to exact their loyalty.³⁷

In recent years there has been a renewed interest in the concept of citizenship especially in the most advanced industrialised countries. The debate has hinged principally around the need to demand an enhanced participation in the affairs of the

political community; and around the increasing awareness that, despite, the recognition of formal equality, many groups and individuals enjoy only a 'second class citizenship', due to racial, gender, class and other differences (Cf Heater 1990: 60, 99-104; Held 1991: 20; Young 1989). The latter awareness has led to harsh critiques of the 'ideal of universal citizenship' as a mask for group oppression and subordination (see Young 1989). Calls have been made for a redefinition of citizenship that takes into account the social realities of difference (Andrews 1991: 14; Young 1987, 1989; Minow 1990).

In the United States the meaning of citizenship has undergone several transformations in the course of the development of American political and constitutional discourse. It seems that originally the Framers did not accord much importance to the concept, as the Constitution was meant to protect persons rather than 'some legal construct called citizen' (Bickel 1973: 370). To the extent that there was concern about the issue, it apparently focused on questions relating to naturalisation and to the relation of individuals to their respective states of residence (*vis a vis* the federal government) (Heater 1990: 47).

According to Professor Bickel, it was the confrontation with 'the contradiction of slavery' (p 372) that led the Supreme Court of the United States, in the famous *Dred Scott* case, to render constitutional rights dependent upon the condition of being a citizen -- a condition that Americans of African descent were made by definition incapable of meeting. This was a decision oriented obviously to the exclusion of that group of Americans from the political community. It took the Fourteenth Amendment to the Constitution, which operated to make African Americans citizens at birth, and the Civil Rights Act of 1866,³⁸ to reverse the legal consequences (at the

formal level) of the *Dred Scott* opinion for this particular group in American society.

Eventually, the Court would downplay again the importance of citizenship as a source of rights, reducing to a very few the number of rights springing from American citizenship, most of them related to matters of international import.³⁹

However, the time would come again when citizenship would acquire a new significance, especially as a political symbol. As the nineteenth century progressed, in many European countries the notion of citizenship came to be associated more and more with the concept of nationality (Heater 1990: 57). An analogous development occurred in the United States, where the need to build a nation out of diverse waves of immigrants was perceived as paramount by the ruling elites. As Heater has expressed it, the legal process of naturalisation was to be accompanied by a socio-psychological process of assimilation (p 59). The process was aimed at making Americans out of those arriving at the country's shores from other places and cultures.

This process of assimilation came to include several characteristic features: (a) the adoption of a certain political creed: American liberalism as interpreted, expounded and popularised by the political and intellectual elites of the country; (b) professed reverence for certain basic symbols: the flag, the Constitution, the institutions of government; (c) the commitment to certain patterns of behaviour: invariably referred to as 'the American way of life'; (d) the ability to communicate in the English language; (e) loyalty, manifested particularly in the willingness to render military service in the case of men, and, in the case of women, to support in various ways the military engagements of the country; and (f) a belief in the uniqueness of the American 'experiment'.⁴⁰

At the turn of the nineteenth century the emphasis on citizenship took another turn. At that time, as Cabranes has pointed out, 'the exaltation of American citizenship -- by imperialist and anti-imperialist alike -- was a notable and not surprising characteristic of the expansive and optimistic period during which the United States embarked upon its colonial enterprise' (1978: 396, n 12). The touting of the privileges of citizenship became a way of reinforcing 'a sense of permanent inclusion in the American political community, in a non-subordinate condition, in contrast to the position of aliens, subjects or even nationals" (pp 396-7, n 12). The elaboration of a new legal construct -- that of 'national' in opposition to the 'citizen' - - would allow governing the peoples of the newly acquired territories while holding them in a position of political subordination (*ibidem*).

After the *Balzac* case, in 1922, the concept of citizenship was divested again of its special meaning denoting full membership in the political community, a connotation that had been developed during the course of the debate regarding the future of the new possessions. In the new 'legal situation', to be a full member of the political community a person had to be a citizen, but being a citizen of itself was not a sufficient condition to become a full member of the political community -- especially if the person was a resident of one of the territories.⁴¹

Detaching citizenship from the right of political participation has become a central feature of the legal framework of the American colonial enterprise.⁴² That has been one of the major effects -- at the representational level -- of the Jones Act and the *Balzac* case. This result was similar to that operated by another conceptual separation -- or delinking -- brought about by the first group of the *Insular Cases*, discussed in Chapter III. There, it must be remembered, the Court had stressed the

difference between fundamental human rights and democratic rights (or rights of political participation). In *Downes v. Bidwell*, for example, Justice Brown established a distinction between 'natural rights', such as freedom of speech or the guarantee against cruel and unusual punishments, and 'artificial rights', such as 'the rights to citizenship, to suffrage' and to certain methods of procedure (at 282-283). That particular disjunction would allow for the establishment of a regime of liberal rights within a colonial context. (This theme will be developed further in the next chapter). The Jones Act and the *Balzac* case gave birth to another conceptual cleavage, this time within the category of what Justice Brown had called 'artificial rights': in the new social understanding of the American governing elites, citizenship and the rights of political participation had parted company.

This recasting of citizenship in a fresh representational mold allowed for a new construction of the 'other': the former 'aliens' residing in the recently acquired territories, who later had become 'nationals' of the United States (different from its 'citizens'), now were transformed into 'citizens', but still of a different kind. The prevailing feeling that Puerto Ricans are only 'second-class citizens' and the debate regarding the status of their citizenship (that is, whether that citizenship is invested with constitutional or merely statutory rank) may be understood as a manifestation -- in the realm of experience -- of that differentiated construction. Ultimately that construction can be viewed as an effect of the sustained tension between the perceived need to retain and exercise control over subordinated communities, while legitimating the exercise of such power by means of pursuing what is taken to be an 'enlightened' territorial policy.

In the section that follows I will discuss the effects of the extension of American citizenship to Puerto Ricans. I will not formulate a normative argument about what legal meaning should be accorded that decision. But in the process of examining those effects, both at the level of consciousness and practice, it will be inevitable to see surfacing the various meanings and claims associated with citizenship discussed above.

D. THE CONSTITUTIVE SOCIAL EFFECTS OF THE CITIZENSHIP PROVISION

1. Creating a new context for social practice

The social world is constituted through human practice. One of law's contribution to the constitution of social experience is the extent to which it creates a context for action. The extension of US citizenship to Puerto Ricans created a new context: a new ensemble of meanings whithin which certain practices in which Puerto Ricans engaged or would engage in the future would have to be conceptualised and evaluated. This new set of meanings would also stimulate certain practices that would affect significantly the relationship between the metropolitan state and the colonial society. This was the case with migration.

One of the principal effects of the citizenship provision was to facilitate the movement of Puerto Ricans from the island to the continental United States. From a strictly 'legal' point of view, the citizenship provision was unnecessary for that purpose. As early as 1904 the Supreme Court had decided that Puerto Ricans could

move freely into the United States, although they were not citizens.⁴³ However, it is obvious that citizenship made it easier for many Puerto Ricans to migrate (Cf Cabranes 1978: 400). Expectations of equal treatment once in the continent would certainly be entertained more readily by those bearing the condition of 'citizens' than by those who, although subject to the jurisdiction of the United States, fell into the lesser category of 'nationals'.

At the end of the first decade of the current century net migration of Puerto Ricans to the United States had amounted to a bare 2,000 persons. By 1919, two years after the Jones Act came into effect, the number had increased more than five fold. By 1929 net migration had jumped to 42,000 people. The great mass movement to the United States, however, occurred after World War II. It is estimated that in the decade of 1950 about 470,000 people left Puerto Rico for the United States.⁴⁴ Between 1950 and 1970 net migration from Puerto Rico amounted to 605,550 people, an equivalent to 27.4 percent of the island population in 1950 (Dietz 1989: 306). While in 1910 there were only some 1500 Puerto Ricans living in the United States, by 1970 there were close to a million and a half (Picó 1986: 256).

It must be emphasised, of course, that the grant of citizenship was not the cause of this mass movement of people. The 'expulsion factors'⁴⁵ that accounted for this migration included the conditions of dire poverty prevailing in Puerto Rico, especially before World War II, and, later, the sustained high unemployment rates characteristic of the Puerto Rican economy. There is evidence, also, that both the government of Puerto Rico and the government of the United States at various points have fostered very actively the migration of Puerto Ricans to American cities and

farms as a means to deal with the 'excess population' in the island (Dietz 1989: 301-308) and to supply the need for labour force in the American economy, especially during the economic boom following World War II (See Silvestrini and Sánchez 1987: 582-585; Picó 1986: 255-257). But it must be noted, again, that although citizenship was not the cause, it was certainly a facilitative condition.

The effects of this massive migration cannot be underestimated. Economically, it served as an escape valve that made easier the much touted 'economic miracle' that took place in the island after the decade of 1950. The sustained economic growth made possible by a strategy of development that relied heavily on the exportation of excess human resources served to defuse social agitation and instability. Moreover, the possibility of migration presented itself as a ready 'individual solution' to the problem of poverty, an alternative that acted as a disincentive to organised social struggle.

Massive migration has nourished the development of a complex demographic reality and extensive and intensive cultural contacts between Puerto Ricans and the dominant society. It has produced a society divided demographically and culturally.

The Puerto Ricans in New York and other cities of the United States have suffered not only acute discrimination, but are also caught up in a cultural tension between the Anglo-American culture in which they have to struggle for subsistence and a Puerto Rican identity which most of them cherish and fight to preserve.

Puerto Ricans in Puerto Rico are linked to the United States, not only by virtue of the formal political and legal relationships between the two countries, and the economic and military presence of the US in the island; but very significantly also, through family ties with relatives who live in American cities throughout the entire nation,

through lived experiences in those cities as students, workers or unemployed migrants at some point in their lives, and, not least important, through the ever present possibility of having to migrate at some future date in an attempt to escape the harsh realities of the island.

Citizenship is an idea. A legal and political construct. But in Puerto Rico it has proven to be a very powerful one. Inasmuch as it has opened possibilities for action -- in this case, massive migration to the United States -- its consequences have been very material, tangible, real.

2. The constitution of the political subject: the Puerto Rican as American citizen

The citizenship provision of the Jones Act may be seen also as part of the process of creation of the political subject. In Chapter III I analysed how the Foraker Act of 1900 and the Insular Cases had in effect contributed to create a legal and political subject -- a social actor endowed with the right to make certain claims while becoming subject to the authority of the metropolitan state. That legal and political subject was defined as a 'resident' or 'inhabitant' of an unincorporated territory. That 'resident' or 'inhabitant' -- considered legally a citizen of Puerto Rico -- now became an American citizen. We have seen already how that category was interpreted to have little juridical import. It did, however, have significant political effects.

The category created by the Jones Act and the *Balzac* case -- in other words, by the combined action of the three branches of the metropolitan state -- has become

a discursive instrument, an ideological basis, for the formulation of reciprocal demands between the dominant state and the subordinated colonial society.

a. Demands from the metropolis: loyalty and military requirements

The main demand the metropolitan state has placed on Puerto Ricans as individuals and as a community during the nearly eight decades that have followed the imposition of citizenship has been loyalty -- both at the symbolic and material levels. This has included prominently the requests for compliance with military requirements. In Chapter II a brief description was given of the military importance of Puerto Rico for the United States throughout this century. The island has served as a location for important US military installations, as a convenient platform for military intelligence activities in the Caribbean, as a most suitable site for training the Armed Forces of the United States and its allies, including NATO forces, and, not least of all, as a source of personnel for the American Army, Navy, Air Force and other military bodies. Over 200,000 Puerto Ricans have served in the US Armed Forces during the present century.⁴⁶

The massive incorporation of Puerto Ricans to the American military has fostered an intensive contact with one of the most ideologically oriented institutions any country can have. It is the function of the military to inculcate a sense of loyalty, a pronounced 'patriotic' feeling among its ranks. The US Armed Forces have been keenly instrumental in the process of creating an attitude of admiration and 'loyalty' towards the USA among substantial sectors of the Puerto Rican population (Cf Picó 1986: 252; see also Estades Font 1988: 18, 95-99, 141, 143, 222)⁴⁷

Fernando Picó, a prominent Puerto Rican historian, has observed also that the generation of World War II veterans constituted a modernising influence in the island. Benefits accruing to them because of their military service opened up access to secondary or higher education, to funds for the construction of modern housing units, to relatively well compensated employment in the federal government and other institutions, and to a variety of services and goods not available to other sectors of the population (Picó 1986: 252). Modernisation, however, has been associated generally in Puerto Rico with americanisation (Lewis 1963: 316), a fact that has led either to a rejection of the institutions of modernity, on nationalist grounds, or to a blind adherence to anything American in the name of progress. It is understandable, then, that the modernising influence of American military institutions has operated to consolidate the hegemonic position of the United States within significant sectors of Puerto Rican society. Citizenship, images of modernity, an admiration of American institutions, and loyalty to a powerful state have been conjoined in a formidable manner to produce an active acquiescence to American rule.

b. Demands from Puerto Ricans

The Puerto Rican as American citizen has been an actively demanding subject. The citizenship rationale has served as a justification to formulate two types of claims: claims for access to the social and economic programmes administered by the US government and, to a lesser degree, demands for greater political participation (Cf Rivera Ramos 1991a: 120; Cabranes 1978: 400-401; Leibowitz 1989: 150).

The United States Supreme Court has held that Congress may discriminate against Puerto Rico in the allotment of funds for social programmes.⁴⁸ However, this has not prevented Puerto Rican political leaders belonging to the major political parties -- including those who favour some form of autonomous status for the island - - to levy claims for broader access to social and welfare programmes of the federal government, justified with the political argument that Puerto Ricans are American citizens.⁴⁹

Spending on social programmes for the island on the part of the US government rose from \$30 billion to \$110 billion in the ten year period running from 1963 to 1973 (Leibowitz 1989: 150). Transfer payments from the United States Government to individuals amounted to thirty percent of personal income in Puerto Rico in 1980. That same year grants in aid from the federal government constituted thirty five percent of recurrent receipts of the Government of Puerto Rico (*Ibidem*).

This extreme dependence on US federal monetary transfers both to the Government and to individuals in Puerto Rico has become one of the characteristic features of what I have referred to as the modern colonial welfare state (Cf Rivera Ramos 1991a).⁵⁰ Of course, the widespread extension of social welfare programmes cannot be understood exclusively as a response to demands from Puerto Ricans because they are American citizens. Those programmes have served a key function in the preservation of social stability in a military bastion of the United States in the Caribbean. They have contributed also to produce a higher consumer capacity in a community that, because of its location, was offered to the region as a counter-example, an alternative, to the communist regime of Cuba, as part of the ideological struggles that characterised the Cold War. Nevertheless, the citizenship rationale has

acted as a powerful justificatory principle for those demands, and to the extent that that rationale has become part of the social understanding of the Puerto Rican masses, it has become 'a power in the domain of consciousness' (Marx, quoted in McLellan 1980: 181).

The citizenship rationale has served also to formulate political arguments for broader political participation. One important demand justified on the basis of citizenship has been the request made by a significant sector of the population that Puerto Rico be admitted as the fifty-first state of the Union.⁵¹ The pro-statehood movement has grown steadily during the past three decades.⁵² However, demands for greater political participation in the decision making process of the metropolitan state, including statehood, have not met with any significant success to this day.

The Puerto Rican American citizen was so constituted as a subject as an act of imposition. However, in their daily practices, in their demands, in the rhetoric of their claims, a substantial number of Puerto Ricans have negotiated their status as subjects and impressed new meanings, perhaps unintended ones, to the category constructed as an exercise of symbolic power (Bourdieu 1987; 1990) from the commanding heights of the imperial state.⁵³

3. Citizenship and the formation of the 'self': the identity question

It cannot be doubted that Puerto Ricans form a distinct national group: with a common language, a common heritage, common traditions and centuries of intensely shared experiences. Yet, the condition of American citizen, with all its attendant images and material effects, has tended to attenuate the relative weight of

historically significant factors like ethnicity, language and culture in the process of formation of the identity of the 'self'. Many Puerto Ricans oscillate between the repeated, at times obsessive, reaffirmation of our difference, of our separate identity, as an act of cultural survival, and the proclamation of our American citizenship as an act of political necessity. Inside many, two distinct discourses struggle for their control as subjects: the discourse of citizenship and the discourse of *la puertorriqueñidad* (the set of characteristics thought to define the Puerto Rican identity). This has constituted an agonising experience for many people, especially among intellectuals. Others seem to exhibit an astonishing capacity to dissolve, in their daily lives, any contradictions (or at least act as if there were none).

The citizenship provision can be interpreted as an attempt to impose an identity from above.⁵⁴ The construction of this legal identity was not negotiated at the normative level. However, it has been 'negotiated' at the level of ordinary social practice.⁵⁵ Many have assumed actively the imposed identity and have made it work to their individual advantage.⁵⁶ One would have to distinguish in this respect among social classes or groupings.⁵⁷ Different social groups have responded differently to the situation. But throughout the entire society any observer can detect specific ways of managing citizenship to produce an economic, political, social or psychological benefit. Of course, the imposition has met also with resistance, from the most violent to the most subtle. The theoretical conclusion must be that structures and discourses of domination are not constructed solely 'from above'. Those subjected to them many times participate actively in their production and have a capacity to affect their form and even their consequences. Very often this is the only kind of resistance possible (or considered possible) under the circumstances.⁵⁸

4. The construction of a new juridical reality

We have seen how the citizenship provision was interpreted by the highest legal decision makers in the United States as an act of little juridical consequence as far as the political condition of Puerto Rico was concerned. This does not mean, however, that it is entirely devoid of juridical implications. As any other legal event, it has contributed to create a new normative context within which action is to take place. Moreover, both as text and as performative speech act (Cf Lyotard 1984; Bourdieu 1987; Goodrich 1987), the provision operates of necessity within a broader normative universe, a hermeneutic tradition (that is, a particular history of acts of interpretation) and an ensemble of practices produced by the normative context it itself created, which condition the possibilities of interpretation and place restraints even upon the metropolitan state, the institutional actor which authored the provision, in the first place, as an act of symbolic power. This is precisely one of the ways in which 'law' becomes part of and contributes to constitute the social world.

The phenomenon became apparent in an extraordinary fashion in the year 1989, during the course of hearings held by the Committee on Energy and Natural Resources of the United States Senate on several bills proposing a plebiscite on the political status of Puerto Rico, and the intense public discussion they generated.⁹⁹

Each of the three principal political parties in Puerto Rico -- the Popular Democratic Party (PDP), which endorses the present *Estado Libre Asociado*, the New Progressive Party (NPP), which favours statehood, and the Puerto Rican Independence Party (PIP) -- were asked to submit drafts of the terms and conditions

they wished to be included in the plebiscite bill pertaining their respective status options. The proposals of the political parties became the subject matter of the hearings held by the Senate Committee.

During one of the public sessions, the Chairman of the Committee, Senator J Bennett Johnston, a Democrat from Louisiana, announced that, upon the Committee's request, the Congressional Research Service (CRS) had conducted a study⁶⁰ that concluded that the American citizenship of most Puerto Ricans would not be protected constitutionally if the island's residents opted for independence (1 *Hearings*: 180).

The rationale for the CRS study was based on the distinction established by the United States Supreme Court between what it has labelled 'statutory citizenship' and the status of citizen acquired by virtue of the provisions of the first sentence of the fourteenth amendment to the Constitution, which declares that all persons born or naturalised in the United States are American citizens.⁶¹ Although, according to a 1967 decision, a United States citizen may not be deprived of citizenship against his or her will,⁶² the Court in the *Rogers* case decided that the principle applied only to fourteenth amendment-first sentence citizens and not to those who become citizens by virtue of a statute. The CRS memorandum argued that, since according to the decisions in *Downes v. Bidwell* and *Balzac v. Porto Rico*, Puerto Rico was not a part of the United States, persons born in Puerto Rico cannot be considered to have been born in the United States. Therefore, they are not fourteenth amendment-first sentence citizens. Accordingly, their citizenship, of statutory origin, can be revoked against their will.

The CRS memorandum caused an uproar in Puerto Rico. As a commentator has correctly noted, 'the potential political impact of the memorandum went far beyond the issue of independence' (Alvarez González 1990: 315). For 'if the Constitution does not constrain congressional discretion in decision making with regard to the citizenship status of Puerto Ricans, this is due to the legal structure defining Puerto Rico's *present* political status of commonwealth' (*Ibidem*, emphasis in the original). This explains why not only the Puerto Rican Independence Party, but the PDP, the pro-commonwealth Party, objected vigorously to the conclusions drawn by the CRS. Both parties filed their responses with the Senate Committee.⁶³

The Puerto Rican Independence Party submitted a position paper⁶⁴ refuting the CRS opinion. Its author formulates a well reasoned argument regarding the legal complications that a decision to revoke citizenship unilaterally, even in the case of independence, would entail. The paper admits the premise that the citizenship most Puerto Ricans hold is of a statutory character. In that sense, they would not be protected by the citizenship provision of the fourteenth Amendment to the US Constitution. However, in view of current American constitutional doctrine, other constitutional guarantees (like the due process and the equal protection clauses and the prohibition against bills of attainder), could be interpreted to preclude Congress from either depriving Puerto Ricans of their citizenship unilaterally or forcing them to make an election between their American citizenship and the citizenship of the new Puerto Rican independent nation (Alvarez González 1990: 337-357).⁶⁵ The Alvarez González paper also highlights some of the 'practical problems' that could thwart effectively any attempt by Congress to limit dual citizenship (if that were the option chosen) to those Puerto Ricans holding American citizenship before the proclamation

of independence (Alvarez González 1990: 357-361). The author concludes with an endorsement of dual citizenship as the 'only practical solution for an independent Puerto Rico' (p 365).⁶⁶

Of course, as Alvarez González himself acknowledges, any argument about the resolution of the perceived constitutional and legal problems relating to the collective deprivation of citizenship, involves ultimately an exercise on prediction regarding the course that the US Supreme Court may elect to take, if ever the problem arose (pp 343-345).⁶⁷ The highest US tribunal may decide eventually to sanction (or refuse to intervene with) whatever decision is made in this regard by Congress and the Executive, as it did in the Insular Cases, and as it has done so often, especially concerning matters related to the foreign policy interests of the United States.⁶⁸ However, as Alvarez González and others suggest, it could not do so without having to confront, or choosing to ignore, fundamental problems of the American normative order and its constitutional discourse.

What the entire discussion indicates is that the decision to impose American citizenship on Puerto Ricans in 1917 has created a complex web of legal problems that have become part of the political reality within which any decision on the future political status of Puerto Rico would have to be made. In this sense, the citizenship provision, in combination with other fundamental norms and principles of the American legal system, has become part of the normative context in which American colonialism operates in Puerto Rican society and with which any decolonisation process would have to contend.

From the perspective of a theory of power and discourse, in the Foucauldian sense, the situation created by the citizenship provision can be considered a prime

example of how those who construct a particular type of discourse, in the exercise of power, many times become subject to the constraining effects of their own discourse.

5. Citizenship and the reproduction of consent

One of the main arguments of this thesis is that, from its inception, the American colonial project in Puerto Rico has been a hegemonic project in the Gramscian sense. In other words, it has sought to create mechanisms capable of inducing an active consent to -- or a relatively generalised acceptance of -- American domination among the Puerto Rican population.

The reproduction of consent to American colonial rule -- especially after the 1940's -- has been the result of the complex articulation of multiple factors. Some of them relate to the material conditions of existence which have become part of the experience of several generations of Puerto Ricans, again particularly after the social, economic and political transformations the country underwent following World War II. Others are to do with the set of representations -- the ensemble of categories of perception and evaluation of reality (Bourdieu 1990) -- that have constituted the dominant frameworks for the interpretation of experience.

American citizenship has operated at the intersection of both the realm of experience and the domain of representation to help construe a particular interpretation of the social world in the Puerto Rican community. It is undeniable that American citizenship is associated by many in Puerto Rico with tangible economic, political and social benefits. To that extent, the condition of being an American citizen has been a prime factor in the process of reproduction of consent

to American rule. But the situation goes even further. American citizenship has become an important value. It is appreciated to the extreme that the mere possibility of its loss generates fears and anxieties. As the position taken by the Puerto Rican Independence Party during the plebiscite process clearly indicates, even political independence is inconceivable to many without retention of the citizenship of the former colonial power.

The social construction of American citizenship as value has involved the complex interaction of the experiences and practices described in the previous sections of this chapter. It has been also the product of a particular official rhetoric that has emphasised the virtues of being an American citizen. Thus, for example, the Preamble to the Constitution of Puerto Rico, which came into effect in 1952, proclaims expressly that the people of Puerto Rico consider as ‘determining factors’ in their lives the citizenship of the United States of America and the ‘aspiration continuously to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges’. Another determining factor, according to the Preamble, is the people of Puerto Rico’s ‘loyalty to the principles’ of the US Constitution. That rhetoric has been reproduced in the official discourse of the pro-commonwealth and pro-statehood political parties.⁶⁹

Apart from the official rhetoric, however, the recent political developments in the country corroborate that citizenship as a value has become internalised by the majority of Puerto Ricans.

Measurement of the long time effects of a particular legal provision is normally a very difficult matter. However, those interested in the social study of legal and political processes in Puerto Rico have had a rare opportunity to confirm

several important hypotheses in the two and a half year period extending from January 1989 to December 1991. The opportunity came with the public discussion hinging around the plebiscite proposal mentioned several times in this thesis, and with the process that culminated in December of 1991 with the holding of a referendum by the government of Puerto Rico to ascertain the opinion and will of Puerto Rican electors on several political and cultural issues.

The publication in early June of 1989 of the Congressional Research Service Memorandum on the nature of the American citizenship held by Puerto Ricans produced a very strong reaction in Puerto Rico. One of its implications, as pointed out above, was that the citizenship currently held by most Puerto Ricans was vulnerable to any action by the US Congress if the latter wished to modify or even revoke it. The governing party, the PDP, objected to the conclusions of the CRS. The Puerto Rican press recorded the apprehensions of many Puerto Ricans at the prospect of losing their citizenship.

The reaction was so vehement that Senators Johnston and McClure, the Chairman and the ranking Republican member, respectively, of the US Senate Committee on Energy and Natural Resources, felt the need to declare publicly in Puerto Rico that the US citizenship of Puerto Ricans under either statehood or commonwealth was deemed unrepealable by the US Congress. The CRS memorandum, Senator Johnston commented, referred only to the situation that would emerge in the event Puerto Ricans voted for the option of independence in the proposed plebiscite.⁷⁰ The 'assurances' were given by the Senators the day that their Committee was to commence hearings in San Juan on the pending plebiscite bills. During the hearings, prominent leaders of the governing PDP made it a point

to congratulate the Senators for their stance and to stress their view that even under Commonwealth the American citizenship of Puerto Ricans should be 'guaranteed' (2 *Hearings*: 41, 85). Probably due to their assessment of the complexities of the issue and the strong reaction generated in Puerto Rico, eventually both Senators Johnston and McClure would be won over to the idea that even in the case of independence Puerto Ricans should be able to retain their American citizenship. Thus, they subscribed the 'dual citizenship' proposal of the Puerto Rican Independence Party.⁷¹

What the entire discussion brought forcefully to the public's mind, both in Puerto Rico and, to a certain degree, in Washington, was the strong attachment that many Puerto Ricans profess to their American citizenship as a 'value' to be preserved.

The point would be brought home even more clearly in December 1991. After a two-year process, the plebiscite bills died in the US Congress due largely to differences in approach between the leadership of the House and the Senate, and to the reservations and, in some cases outright opposition, expressed by influential members of Congress regarding some of their provisions.⁷² The failure of Congress to provide for the plebiscite was interpreted by many especially as a blow to the statehood movement.⁷³ With national elections due in Puerto Rico in November 1992, apparently the principal leaders of the Popular Democratic and the Puerto Rican Independence Party felt the need to foreclose the possibility that a victory of the pro-statehood NPP would give way to a plebiscite organised locally that would include only the statehood option (a plebiscite of the YES or NO variety). In this context, the leaders of the PDP and the PIP sought to obtain a binding expression from the Puerto Rican electorate concerning several 'principles' that would guide future attempts to solve the political status of the island. Originally they gained the consent

of the NPP leadership. But, partly as a result of an internal conflict within the latter's ranks and a subsequent change at the party's helm, the NPP withdrew from the project. The governing PDP and the legislative representation of the PIP, against the protestations of the NPP, proceeded to approve a law providing for the December 1991 referendum.⁷⁴

Billed as a 'Referendum on Democratic Rights', the event was clearly an aftermath of the public discussion that had engaged much of the energy of government, parties and people alike concerning the plebiscite bills.

The electorate would be asked to vote YES or NO to a list of 'democratic rights' that should be honoured by the US and Puerto Rican governments in case of any change of status.⁷⁵ The six 'rights' were contained in Article 2 of the Act and were defined as:

(a) the inalienable right to determine freely and democratically the political status of Puerto Rico;

(b) the right to choose a status of 'full political dignity without colonial or territorial subordination to the plenary powers of Congress';

(c) the right to vote for the three recognised status alternatives, Commonwealth, Statehood and Independence, based on the sovereignty of the People of Puerto Rico;

(d) the right to demand that the winning alternative in a status consultation shall obtain more than half the votes cast;

(e) the right that any consultation on status shall guarantee, under any alternative, Puerto Rican culture, the Spanish language and the country's identity, including its current independent participation in international sports events;

(f) the right that any consultation on status shall guarantee, under any option, 'the American citizenship safeguarded by the Constitution of the United States of America'.

The inclusion of the provision on citizenship was a clear indication that the leadership of both the pro-commonwealth PDP and the Puerto Rican Independence Party considered that no change in status would be possible without guaranteeing the permanence of American citizenship.

The pro-statehood NPP took a vehement stance against the list of 'democratic rights' and organised a vigorous campaign in favour of the NO option in the referendum. Despite the provision on citizenship (which the NPP characterised as a hoax, arguing that only statehood could provide an effective and permanent guarantee of US citizenship), the pro-statehood forces interpreted the referendum as an attempt to 'separate' Puerto Rico from the United States. In fact, the gist of the campaign for the NO vote consisted in asserting that a YES majority would be considered by the US as a desire on the part of Puerto Ricans to follow a more independent course in the future. The NPP pointed to the clause in the Referendum bill that sought to preserve Puerto Rico's culture, language and identity as an indication of the presumed underlying purpose of the proponents of the YES vote. They argued further that a YES victory would jeopardise the many federally funded social and welfare programmes to which Puerto Ricans have access currently and would, ultimately, lead to the loss of US citizenship.⁷⁶

The proponents of the YES vote, on the other hand, interpreted the exercise as an opportunity to affirm Puerto Rico's national identity. They also expended much effort trying to explain that US citizenship was not at risk. In fact, they

argued, the sixth clause of the list of claimed rights sought precisely to make that citizenship unassailable under any political status.⁷⁷ The argument, apparently, was not convincing enough.

Despite predictions by political pundits to the contrary, the result of the referendum was a resounding victory for the NO option.⁷⁸

Given the background of the previous public discussions on the plebiscite bills, the context of the referendum, the nature of the campaign, the arguments and interpretations put forth by all parties, and the opinions and commentaries of the general public recorded by the Puerto Rican written and electronic press, it must be concluded that a substantial number of those voting for the NO option did so out of apprehension for the possible loss of benefits associated with the relationship with the United States, not least of which is the condition of US citizen.⁷⁹

To this author it is clear that the 'discourse' of American citizenship -- the set of perceptions of reality, beliefs, values and social practices that have emerged around that concept -- has been a crucial element (although not the only one) in the production either of an active 'loyalty' to the metropolitan state or, at the very least, of a generalised acquiescence to American rule.⁸⁰

E. CONCLUDING COMMENT

Almost two decades after its acquisition of Puerto Rico, the United States Government decided to extend American citizenship to Puerto Ricans. The decision reflected a determination to retain the island -- an important military site -- under its control permanently. The citizenship provision was conceived primarily as a means

of inducing a sense of loyalty to American rule. It was strictly a hegemonic mechanism, in the Gramscian sense.

The Act of Congress granting citizenship cannot be interpreted as anything else but an imposition, basically because of the way it was implemented.

The Supreme Court of the United States decided eventually that the grant of citizenship had not incorporated Puerto Rico into the United States. In other words, its legal effect on the political status of Puerto Rico was considered to be negligible.

Nevertheless, that legal event -- the extension of citizenship -- has had important social and political effects. It has become a crucial building block in the construction of the American colonial project in Puerto Rico. It has contributed powerfully to shape the social world that Puerto Ricans inhabit. It has been a fundamental force in the constitution of experience and the production of the social understandings and the world of images that populate that human community we call the Puerto Rican nation.

Citizenship created a new context for social practice -- facilitating massive migration and other fundamental processes in the lives of Puerto Ricans. It constituted a new political subject: the Puerto Rican as American citizen, providing a base for reciprocal demands between the colony and the metropolitan society. Those reciprocal demands contributed to the massive incorporation of Puerto Ricans to the US Armed Forces, a fact that has had important ideological consequences, and to the eventual development of a colonial welfare state. US citizenship has had also an effect on the ways Puerto Ricans conceive of themselves, the mode in which they construct their identity. The complex web of legal complications emerging from the fact that Puerto Ricans are American citizens is part of the normative context within

which any future decision on the political status of the island must be made. American citizenship has become a value for most Puerto Ricans, a fact which has exerted and probably will continue to exert a specific weight in discussions about changes in the relationship between the island and the United States. In all, US citizenship has become an important ingredient in the reproduction of consent to American presence and, indeed, American rule in this, otherwise, very Caribbean nation.

In short, the way in which the granting of American citizenship has intervened in the construction of social reality in Puerto Rico is a telling, a most revealing, example of the force of law in modern societies.

Another theoretical conclusion may be derived from this case study. What Bourdieu calls symbolic violence -- the imposition of principles of vision and division in a given society --, in this case exemplified by the attempt to create an identity and constitute a political subject from above (from the vantage point of power), can and often does have the consequence of becoming the point of departure for a negotiated construction of reality. American citizenship was imposed on Puerto Ricans. But out of a necessity to survive economically, politically and culturally, most Puerto Ricans have 'negotiated' in practice their status: they have appropriated the category imposed upon them, and have tried to make the most of it, in the different social contexts in which they operate. And this has been done even to the puzzlement of their dominators.

ENDNOTES

1. Extended discussions about the background to the citizenship bill can be found in Trias Monge (1981: 70-110); Cabranes (1978: 435-471); and Serrano Geyls (1986: 467-470).

2. The bill was presented as H.R. 9533 on 20 January 1916 by Representative William A Jones of Ohio. It was approved by the House on 13 May 1916. On 5 December of the same year President Wilson urged Congress to pass the bill, which was voted on favourably by the Senate on 20 February 1917. After a legislative Conference to iron out differences, both Houses of Congress passed the bill on 24 and 26 February, respectively. It was signed into law by President Wilson on 2 March 1917. (Cf Torruella 1985: 90-91).

3. 31 (US) Stat at L 77, 48 USCA 731. Cf Chapter II for a brief description of the provisions of the Foraker Act.

4. The key statutory provisions are sections 201(a) and 202 of the Nationality Act of 1940, 54 (US) Stat 1137, 1139 (1940), which became effective on 13 January 1941, and section 302 of the Immigration and Nationality Act of 1952, 66 (US) Stat 236 (1952), codified as 8 USC 1402. The Act of 1940 provided that 'a person born in the United States, and subject to the jurisdiction thereof' was a citizen of the United States at birth. It included Puerto Rico in the definition of 'United States'. Apparently to cover the situation of all those born prior to its effective date, Section 202 of the Act provided that all persons born in Puerto Rico on or after 11 April 1899, and still subject to the jurisdiction of the United States, were declared to be citizens of the United States. The Act of 1952, which is considered to have merely restated the provisions of the 1940 Act (See Alvarez González 1990: 325), declared that all persons born in Puerto Rico on or after 11 April 1899 and prior to 13 January 1941, subject to the jurisdiction of the United States but not yet citizens thereof, should be regarded as American citizens as of 13 January 1941. It further provided that 'all persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth". 8 USC § 1402 (1988). See the discussion in Alvarez González 1990: 325-326.

5. In chapter I reference was made briefly to the problem of ascertaining the 'motives' or 'intentions' of a legislative body. It was cautioned also that a difference must be established between the 'purpose' of a legislative enactment and its effects. (For a distinction between the concepts of 'function' and 'purpose' in law, see Cotterell 1992: 72-73). Although this thesis is concerned mostly with the effects of law, the theoretical framework it adopts calls for attention to the 'motives' and 'intentions' of social actors. Moreover, the very concept of hegemony, so central to the basic argument of the

thesis, suggests the need to focus on questions of social strategy, that is, on the purposive dimension of social action. Finally, as my argument will hopefully demonstrate, in the particular case under discussion, there has been a remarkable connection between the 'motives' of Congress and other American decision-makers and the 'effects' of the citizenship provision of the Jones Act.

6. See Cabranes (1978), Leibowitz (1989), Estades (1988), Serrano (1979), Torruella (1985), and Trías Monge (1981).

7. *González v. Williams*, 192 US 1, 6 (1904).

8. 32 (US) Stat at L 927, 934 (1903).

9. Representative Austin of Tennessee made a similar comment: 'I think it is a waste of time about this independence of Porto Rico...They are not going to have independence, but are going to stay under the flag, not only this year, but for all years to come (quoted in Cabranes 1978: 475).

10. Among others, Estades Font quotes US Army Coronel George Colton, military Governor of Puerto Rico, who on 15 November 1911 had recommended granting citizenship to Puerto Ricans in order to placate criticism within the United States and in Latin America regarding American colonial policy and to counter the emerging pro-independence sentiment in Puerto Rico (at 208). The Bureau of Insular Affairs, the agency charged with the supervision of territorial matters, had expressed that Puerto Rico had become a 'permanent part' of the United States and that it was 'wise' to strengthen that bond (Estades Font: 209).

11. The Panama Canal commenced operations in 1914 (Torruella 1985: 87).

12. The original Spanish text reads:

Lo contrario nos llevaría a pensar que mientras discutían el caso de Puerto Rico, los legisladores norteamericanos estaban totalmente ajenos a la situación de guerra en que se encontraba su país y a la vital importancia estratégica de la isla, y que no alcanzaban a ver la íntima relación entre ambos asuntos. Esa postura me parece francamente indefendible.

13. In the *Balzac* case, Chief Justice Taft concluded that the decision to grant citizenship to Puerto Ricans was to be explained by the 'desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights" (*Balzac v. Porto Rico*, at 258). In light of the research discussed in the text, Chief Justice Taft's explanation of the intentions of Congress seem more like an

exercise in judicial rationalization than a plausible interpretation of the historical record. It must be noted, however, as will be discussed below more amply, that the 'opportunity...to move into the United States' was one of those, perhaps unintended, effects of the citizenship provision that has had an appreciable impact on the history of the Puerto Rican people.

14. 39 (US) Stat 1706 (1916).

15. Act of March 3, 1917, 39 US Stat 1132 (1917).

16. For a detailed study of the 'drive to hegemony' by the United States in the Caribbean from 1898 to 1917, see Healy (1988).

Other actions by President Wilson's Administration in the region at the time included: (a) the invasion of Haiti on June 1915 and the establishment of a 'protectorate' which lasted until 1934; (b) the invasion of the Dominican Republic on May 1916, initiating an occupation which lasted eight years, during which US Admirals and generals ruled the country directly; (c) a treaty with Nicaragua in 1916 virtually establishing a protectorate over the Central American nation; and (d) sending American troops to Cuba in 1917 with the declared intention of training the year round, but which amounted to an effective military and political intervention (Healy 1988: 180-199).

17. I have quoted expressions from leading spokespersons from Congress and the Executive, including the military establishment. Important endorsements were consigned also from organisations representing commercial interests and the American labour movement. Thus, in 1909, support to the citizenship provision came from the National Board of Trade and the American Federation of Labor (Torruella 1985: 88, n 300). In 1908 both national political parties promised American citizenship to Puerto Ricans (*Ibidem*).

18. The Cabranes study was published first as 'Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans', 127 *Univ of Penna L Rev* 391 (1978). It appeared one year later in book form, with the same title, published by Yale University Press, New Haven. Quotations in this thesis are from the *University of Pennsylvania Law Review* article.

José A Cabranes is a prominent Puerto Rican attorney and scholar who served as General Counsel to Yale University and currently holds a judgeship in the United States federal judiciary. He was mentioned as a possible nominee to the United States Supreme Court in replacement of retiring Associate Justice Byron White.

19. Professor Serrano Geysls is a former Associate Justice of the Supreme Court of Puerto Rico.

20. For a more detailed explanation of the economic and social transformations Puerto Rico was undergoing at the time, see Chapter II.

21. It must be noted that Resident Commissioner Muñoz Rivera died on 15 November 1916, during the Congressional recess and before the Jones Act was passed. Cabranes makes much of the fact that, after the Resident Commissioner's death, a bi-partisan Commission from Puerto Rico, headed by the politician who was to become Muñoz Rivera's successor, testified before the relevant Senate Committee in support of the Jones Bill (pp 482-484). He takes this as a definitive indication that opposition to the citizenship provision had waned in the island. The argument, however, is riddled with problems. First of all, the group's opinion did not represent the position of any official political body or functionary from Puerto Rico. Secondly, the event took place during an evidently transitory situation within the Union Party, which had very recently lost its principal leader and spokesperson. Thirdly, it is not clear to what extent the leaders of the Puerto Rican political parties viewed their position as a pragmatic stance before what they considered an inevitable development. After all, as Cabranes himself informs, the commission appeared before the Senate Committee shortly after President Wilson urged Congress to take favourable action on the pending Jones Bill, characterising the matter as of 'capital importance' (pp 482-3). It must be remembered also that, besides extending citizenship, the Bill provided for reforms in the colonial government, some of which could be perceived as having the potential effect of increasing the influence of the Puerto Rican political elites in the affairs of government. Finally, as drafted, the Bill would deprive any person who rejected American citizenship of substantial political rights, including the right to hold important offices in the government of the United States or Puerto Rico.

22. Puerto Rican *campesinos*, who comprised the majority of the population, tended to pride themselves of not having ever had to appear before a court of law. For a poetic expression of this feeling, see the poem "El desahucio" ("The eviction") by Puerto Rican poet Lorenzo Coballes Gandía.

23. The text in Spanish reads:

Esta era obviamente una ciudadanía impuesta, porque los que no la aceptaran se convertirían en parias dentro de su propia tierra, y porque esa opción, aún deleznable como era, se ofreció sólo a los que entonces eran adultos. Los menores de entonces y los millones de puertorriqueños nacidos después, ni tan siquiera tuvieron esa oportunidad

Cabranes himself states: 'The bill made any...decision to decline American citizenship an effective waiver of participation in the public life of the island' (1978: 484) and '[t]he intended exclusion of non-citizens of the United States from the

public life of the island...clearly gave Puerto Ricans little real choice in the matter' (p 459).

24. Concerning the broader question of the relationship among meaning, power and structures of domination, Anthony Giddens has stated: 'The reproduction of structures of domination, one must emphasize, expresses asymmetries in the forms of meaning and morality that are made to "count" in interaction, thus tying them in to divisions of interest that serve to orient struggles over divergent interpretations of frames of meaning and moral norms' (Giddens 1976: 157).

25. Justice Wolf was appointed to the Supreme Court of Puerto Rico by President Theodore Roosevelt on 15 May 1904 and served until 15 November 1940. At the time of the decision the Supreme Court was composed of three Puerto Ricans and two Americans.

26. *Muratti v. Foote*, 25 DPR 568 (1917).

27. Cf *Porto Rico v. Tapia*, 245 US 639 (1917).

28. *Porto Rico v. Muratti*, 245 US 639 (1917) and *Porto Rico v. Tapia*, 245 US 639 (1917).

For a critique of the position taken both by the Supreme Court of Puerto Rico and the US District Court for what is characterised as their 'absolute disconnection' with the political realities of the day, see Triás Monge (1991: 170-172). According to the cited author, the results of the appeals to the US Supreme Court were easily predictable.

29. *Balzac v. Porto Rico*, 258 US 298 (1922).

30. The *Balzac* case is discussed in detail in Chapter III, dealing with the 'Insular Cases'.

31. Leibowitz has commented:

The significance to be accorded the grant of citizenship has never been resolved. The unilateral conferring of citizenship was regarded by both Puerto Rico and the United States as extremely important; in Puerto Rico as an act of legal consequence but in the United States Congress as primarily of psychological significance. Despite the grant of citizenship, Congress continued to treat United States citizens in Puerto Rico as aliens for a variety of purposes; and in the key areas of political and economic participation, citizenship was of no consequence at all. Puerto Rico in recent years, like other territorial areas, has sought to give effect more generally to the grant of citizenship, again without success (Leibowitz 1989: 147-8, emphasis added).

One arguable effect, according to Leibowitz, has been to increase federal judicial control over the Puerto Rican government. He points to cases like *Ortiz v. Hernández Colón*, 475 F2d 135 (1st Cir, 1975), where a US Court of Appeals, referring to the need to protect the 'U.S. citizens resident in Puerto Rico', affirmed the decision of the US District Court for Puerto Rico to intervene in a matter relating to actions taken by the Puerto Rican government in the electoral field (Leibowitz 1989: 146).

32. US citizenship was extended to residents of the Virgin Islands in 1927, of the Pacific island of Guam in 1950 and of the Northern Mariana Islands, also in the Pacific, in 1976.

33. See, for example, Torruella (1985).

34. In seeming accord with this interpretation, see Cabranes (1978) at 442, and Trías Monge (1991) at 171.

35. For a recent comprehensive study of the concept from Greek antiquity to the present, see Heater (1990).

36. Regarding the subjection of bodies in pre-modern and modern times, see generally Foucault (1988a). For the association of the notion of citizenship with military duties throughout ancient, medieval and modern history, see Heater (1990).

37. Cf 3 *The New Encyclopaedia Britannica (Micropaedia)* (1991) (15th ed) (Chicago et al: Britannica), at 341; see also Heater (1990: 16-20). 'The Romans annexed the loyalty as well as the territory of their defeated enemies, for the status of Roman citizenship became much prized' (Heater: 16).

38. 14 US Stat at L 27 (1866).

39. Those rights were limited practically to the right to travel to the seat of government, to invoke the protection of the US government when abroad, to use the navigable waters of the United States, and to sue in federal courts under the constitutional provision vesting those courts with jurisdiction in cases of diversity of citizenship (*Slaughter-House Cases*, 83 US (16 Wall) 36, 21 L Ed 394 (1873); Bickel 1973: 374-380; Gunther 1991: 408-411; Cabranes 1978: 396). For a discussion of the 'demise' of the clause of the Fourteenth Amendment which protects the 'privileges or immunities of citizens of the United States', see Stone et al (1986: 704-707).

40. The 'exclusionists' argued that some people -- like the Chinese and Japanese -- were simply incapable of assimilation. Therefore, citizenship should be denied to them. (See Salyer 1990).

41. Senator Foraker stated: 'In adopting the term "citizens" we did not understand, however, that we were giving to those people [Puerto Ricans] any rights that the American people do not want them to have. "Citizens" is a word that indicates,

according to Story's work on the Constitution of the United States, allegiance on the one hand and protection on the other'. Citizenship 'conferred the right to vote or to participate in the government upon no one' (quoted in Cabranes 1978: 428).

Divesting the concept of citizenship from any automatic association with the right of political participation has been a familiar device in Western political practice. Two salient examples have been the Roman concept of *civitas sine suffragio* and the distinction between 'active' and 'passive' citizens drawn by the Abbe Sieyes during the French Revolutionary period (Cf Heater 1990: 16, 49-50).

For a contemporary example of the establishment of formal categories of citizens with divergent legal consequences, see the British Nationality Act of 1981 (Cf Heater 1990: 104).

42. The dilemmas faced by the American colonisers regarding the extension of citizenship rights to the peoples of the territories was not unlike the predicament faced by European powers in their own colonies. Derek Heater has expressed the matter, regarding European imperialism, in the following manner:

The truth of the matter is that no modern imperial power solved the riddle of citizenship. There were two possible approaches: a unified imperial citizenship or local citizenship specific to individual colonies. The status presupposes some sense of community and common loyalty. Yet cultural heterogeneity rendered this extremely difficult for the great bulk of Asians and Africans, especially in an age when the mother countries were culturally homogenous. Secondly, citizenship as the right to a certain minimum of social welfare was impossible of extension to, say, the poverty-stricken millions of the Indian sub-continent. And thirdly, citizenship as equal political participation was impossibly dangerous for the imperial power to conceive, since the overseas electorate would in total submerge the domestic (1990: 130-131).

According to Heater, the alternative strategy adopted by the British and the French consisted in the introduction of political rights at the local level (p 131).

43. *González v. Williams*, 192 US 1 (1904).

44. The figures quoted in the above sentences are taken from Silvestrini and Sánchez (1987: 582).

45. Some of the sociological literature on migration designates as 'expulsion factors' the various conditions prevailing in the country of origin that contribute to the decision to emigrate. The conditions that make the receiving country an attractive destination for migrants are referred to as 'attraction factors'. (Cf Pastor 1982: esp pp 121-122).

46. Puerto Ricans had been eligible to enlist in the US Armed Forces before 1917. But the granting of citizenship undoubtedly facilitated their conscription thereafter, as I argued in Section B, *supra*.

47. It has been noted also that negative experiences within the American Armed Forces have produced in some Puerto Ricans a heightened anti-Americanism, stronger anti-military stances, a greater sense of their Puerto Rican identity and a more pronounced willingness to engage in social struggles (Cf Picó 1986: 252).

48. *Califano v. Torres*, 435 US 1 (1978); *Harris v. Rosario*, 446 US 651 (1980).

49. For a typical mode of formulation of such demands, cf the Statement by the Governor of Puerto Rico, Rafael Hernández Colón, before the Committee on Energy and Natural Resources of the US Senate on 1 June 1989 (1 *Hearings* 170).

50. For further analysis of the economic conditions of Puerto Rico under the American regime, see Chapter II.

51. See, for example, the Statement by former Governor Carlos Romero Barceló before the Committee on Energy and Natural Resources of the United States Senate, given on 1 June 1989 (1 *Hearings* 113-131).

52. A poll conducted in 1989 by a professional polling firm for *El Nuevo Día*, a Spanish-language daily published in San Juan, revealed that, for the first time in Puerto Rican history, preference for the statehood option among registered voters came out ahead of other status options: 41% of respondents chose statehood; 37% commonwealth; 4% favoured independence; 12% were undecided and 6% stated they would not vote (*El Nuevo Día*, 2 Oct 1989, p 4). Another poll conducted in July 1992 by a different polling firm for one of the major Puerto Rican broadcasting companies produced slightly different results, but the statehood option still led the list of alternatives (42% compared to 41% for commonwealth status, 4% for independence, 2% for a new option, the Associated Republic, and 10% undecided). (Data furnished by Marilú Torres, from the Statistics Office of the News Department of TV Channel 2, Telemundo; see also García 1992). On November 1992 the New Progressive Party, which advocates statehood, won the general elections by a wide margin. Not all those who voted for the NPP may be considered statehooders. Many may have cast a protest vote against the pro-commonwealth incumbent or may have been unattracted by the

Popular Democratic Party's candidate for governor. However, the fact that a pro-statehood party was voted into office is not devoid of significance.

For a good collection of documents that reflect the development of the annexationist ideology throughout this century, preceded by a thoughtful commentary by the editor, see Ramos (1987).

53. For the suggestion that 'people vested with little or no power may nevertheless exercise control' over their lives, see Minow 1991: 106. Forbath, Hartog and Minow (1985) have argued also that law's meaning is constructed from 'below' as well as from 'above'.

54. A good example of the effort to define the Puerto Rican identity in terms of American citizenship, rather than in reference to cultural or related characteristics, can be found in a commentary made by US Senator J Bennet Johnston in San Juan to the effect that the status of being Puerto Rican is not a racial or ethnic question, but a question of residency and citizenship. The Senator was answering a question regarding the demand made by many Puerto Ricans living in the United States that they should be given the opportunity to participate in any plebiscite on political status held in Puerto Rico. (Notes taken by the author during the press conference held by Senator Johnston in San Juan on 16 June 1989).

However, a somewhat different perspective seems to be contained in HR 4765, a bill approved by the US House of Representatives, titled 'Puerto Rico Self-Determination Act', which, if it had finally become law, would have authorised the Government of Puerto Rico to extend the right to vote in the plebiscite to Puerto Ricans not resident in Puerto Rico. Such persons were defined to include 'those born in Puerto Rico or those who have at least one parent who was born in Puerto Rico (HR 4765, 101st Cong, 2d Sess, § 3, 1990; Cf also House Committee on Interior and Insular Affairs, *Report together with Additional Views to accompany H R 4765*, 101st Cong, 2d Sess, 15-16, 1990).

55. For an excellent analysis of the 'negotiated quality of identities', see Minow (1991). The author examines how people 'negotiate their identities' in the course of their daily lives (See esp p 127).

56. Minow suggests that 'people with little power may also find latitude for action by creating expectations in others or by remaking their own desires in line with others' expectations' (1991: 106).

57. '...each person is situated differently in relation to constraints...The weight of one's own experiences and social position and the press of others' expectations and practices stack the negotiations over identity" (Minow 1991: 110).

58. According to Minow, 'signs of assimilation by a group treated as less powerful than the majority deserve a second look because they may indicate subtle acts of resistance and accommodation by people seeking to retain an independent identity without risking conflict or further suppression' (1991: 115).

59. For detailed information on the entire process, see *Hearings*, 3 vols; García Passalacqua and Rivera Lugo (1990 and 1991); Turner (1990); Schmalz (1989); Botsford (1990); De la Torre (1989); Alvarez González (1990); Walker (1990); Gautier-Mayoral (1990).

60. Congressional Research Service, *Discretion of Congress Respecting Citizenship Status of Puerto Rico*, 9 March 1989 (hereinafter CRS Memo).

61. *Rogers v. Bellei*, 401 US 815 (1971).

62. See *Afroyim v. Rusk*, 387 US 253 (1967).

63. See Alvarez (1990: 315-316, n 23). For journalistic accounts and commentaries on the polemic see Díaz Alcaide (1989a, 1989b; Cerezo (1989).

64. Preliminary Position Paper Submitted by the Puerto Rican Independence Party to the Committee on Energy and Natural Resources of the United States Senate Concerning the March 9, 1989, Memorandum of the Congressional Research Service on the Subject of the Citizenship Status of Puerto Ricans, 14 June 1989.

The paper was written by José Julián Alvarez González, professor of Constitutional Law at the University of Puerto Rico School of Law. An expanded version was published later in the *Harvard Journal on Legislation* under the title 'The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans' (Alvarez González 1990). Further references will be to the Alvarez González article.

65. The well known American Constitutional scholar Lawrence Tribe made analogous arguments on behalf of the PDP in a letter addressed to the Senate Committee. (See 3 *Hearings* 60; Alvarez González 1990: 315-316, n 23). See also the written Statement submitted by the President of the House of Representatives of Puerto Rico, Mr José R Jarabo (2 *Hearings* 86).

66. This was the position held by the Puerto Rican Independence Party throughout the remainder of the process.

67. Alvarez González quite appropriately quotes Holmes (p 343, n 141).

68. Cf *Mora v McNamara*, 389 US 934 (1967); Newberry (1984). For a recent Supreme Court decision blessing actions by American federal law enforcement agents that many consider to be flagrant violations of International Law principles, see *United States v Alvarez Machaín*, 60 USLW 4523 (1992). See also Lewis (1992); Golden (1992).

69. In its 1980 Party Platform the NPP solemnly declared to be its duty to 'strengthen continuously the rights inherent to our American citizenship and the bonds that tie us permanently to our fellow citizens of the 50 states' (*Programa de Gobierno del Partido Nuevo Progresista para el cuatrienio 1981-84*, Hato Rey, P R, 20 July 1980, p 6). The 1988 PDP Platform, in turn, stated that 'Puerto Rico values its relationship with the United States of America, whose citizenship it shares' and declared the 'inviolability of the common American citizenship' (*Partido Popular Democrático, Programa de Gobierno 1989-1992: Vamos por buen camino*, San Juan, P R, 23 July 1988, pp 3, 38).

70. Notes taken by the author during the press conference held by Senators Johnston and McClure in San Juan, Puerto Rico, on 16 June 1989. Cf also 'Johnston: Citizenship safe', *The San Juan Star*, 17 June 1989, p 1; Díaz Alcaide, M (1989) 'Johnston lamenta "mal entendido"', *El Mundo*, 17 June, p 3; Johnston, "Irrevocable la Ciudadanía", *El Mundo*, 17 June 1989, p 27 (an article published by the US Senator in one of the main Spanish-speaking newspapers in the island). See also García Passalacqua and Rivera Lugo (1989: 13; 1990: 39).

71. However, Edward S G Dennis, Acting Deputy Attorney General of the United States, testifying before the Committee at a later date, "on behalf of the [Bush] Administration", voiced the latter's opposition to the dual citizenship concept because it would 'obscure the reality of independence for the Puerto Rican voter' and it would be 'fundamentally inconsistent with granting full independence to the Island' (Statement of Edward S G Dennis, 3 Hearings 27-28).

72. The Senate Energy and Natural Resources Committee reported favourably, on a close vote of eleven to eight, Senate Bill 712, which contained detailed provisions about each of the alternatives to be presented to the Puerto Rican electorate. The House of Representatives approved on a voice vote a much shorter bill, HR 4765, which did not specify the substantive content of each of the status options, providing only for the procedure to be followed. The Chairman of the Senate Committee refused to consider the House version, and the differences could not be reconciled in time to have a plebiscite law before the desired date in 1992.

During the course of the debates and discussions it became evident that some of the most important concerns in each chamber related to the statehood option. Some had objected to what they considered a bias towards that alternative in the bill reported originally out of Senator Johnston's Committee; others expressed reservations about the 'cost' of statehood to the US treasury (particularly by virtue of an inevitable increase in social welfare benefits for the residents of the new state); still others opposed firmly any suggestion that the proposed plebiscite law be self-executing, i. e., that the winning formula be implemented automatically, without further action to the effect on the part of the US Congress. This latter provision was found problematic particularly regarding the statehood option. A fundamental concern that emerged with peculiar force in the final

phases of the process had to do with the obvious cultural differences between Puerto Rico and the United States, a fact viewed by many as particularly problematic for, if not an insurmountable obstacle to, the statehood solution. Cf, generally, *Hearings*; García Passalacqua and Rivera Lugo (1990; 1991).

The proposed plebiscite also encountered some opposition in Puerto Rico, especially from the more radical pro-independence groups, from sectors of the academic community and from organisations and individuals active in diverse social movements. The main criticisms referred to what was perceived as the excessive control of the process by the US Congress; the almost exclusive role conferred to the political parties, in exclusion of other social movements, organisations and sectors of Puerto Rican society; the reluctance of the US Congress to admit expressly that it was dealing with a colonial problem, and to recognise the applicability of International Law and the need for an active participation of international organs, such as the United Nations; and the failure to incorporate into the discussions important social and economic problems faced by the Puerto Rican community, such as the need to guarantee environmental safeguards, human rights, and the demilitarisation of Puerto Rico under all the formulas. For examples of the various positions, see Mattos Cintrón (nd); Gautier Mayoral (1990); *Afirmación Socialista Unitaria* (1989); *Movimiento Socialista de Trabajadores* (1989); and the respective Statements to the Senate Committee by Carlos Gallisá, Secretary General of the Puerto Rican Socialist Party, and by attorney Roberto Roldán Burgos, General Coordinator of the *Instituto Puertorriqueño de Derechos Civiles* (Puerto Rican Civil Rights Institute) in 2 *Hearings* 131-139 and 446-465.

73. Cf García Passalacqua and Rivera Lugo (1991: 378); see also note 64, *supra*.

74. Public Law No 85 of 17 September 1991, also known as the 'Guarantee of Democratic Rights Act'.

75. Strictly speaking, the legal effect of a victory by the YES option would have been to mandate the Puerto Rican government to conduct another referendum to amend the Constitution of Puerto Rico in order to incorporate six 'guarantees' that should govern any future action on the status of Puerto Rico. Also, it would have constituted a petition to the US Government to honour such guarantees.

76. In a much publicised and controversial lecture delivered at the University of Puerto Rico School of Public Communication on 22 April 1992, a public relations expert, named Joe Franco, who worked on the Referendum campaign on behalf of the NPP, explained how the 'fear' campaign was designed and implemented. One of the principal features of the massive campaign, he stated, was to emphasise that a YES vote would put US citizenship at a high risk. Franco's candorous remarks were the subject of intense controversy during the campaign leading to the general elections

held in the island in November 1992. (Cf Estrada Resto 1992: 24; Cardona 1992: 44).

The NO option obtained significant support from at least one important Washington lawmaker. Several days before the Referendum was held, Representative Robert J Lagomarsino, a Republican from California, and the ranking minority member of the House Insular and International Affairs Subcommittee, which handles questions relating to the status of Puerto Rico, criticised the Referendum for 'purporting to offer guarantees on US citizenship under status options other than statehood'. Echoing the arguments of the NPP, the long-time supporter of statehood for Puerto Rico added that a YES vote would further distance the island from the United States. If Puerto Ricans wanted to be outside the plenary powers of Congress, Lagomarsino stated, they should know that that also means 'no US citizenship'. The Congressman backed his remarks with a letter from an Assistant Attorney General of the United States that concluded that only statehood could offer constitutional guarantees to US citizenship. Under independence or a Commonwealth status outside the plenary powers of Congress, the letter argued, even if the US passed laws allowing Puerto Ricans to retain their citizenship, that citizenship would have only statutory, not constitutional, guarantees. (Hemlock 1991: 3).

The US Congressional Research Service was brought to the fray once again. In answer to an inquiry, the CRS released a memorandum stating that no action taken by the Puerto Rican government would be binding on the US Congress. It also reaffirmed its position that the US citizenship of most Puerto Ricans was not protected by the first sentence of the Fourteenth Amendment to the US Constitution, although it recognised that there could be due process problems if an attempt was made to revoke that citizenship unilaterally. Those problems, the CRS opined, would be solved easily if the option favoured eventually was independence, since in that case the Supreme Court could find that that was legitimate reason enough to revoke citizenship collectively. (CRS 1991).

77. Cf, for example, statements made to the press, and published the very day of the referendum, by the Presidents of the PDP and the PIP (Luciano: 1991).

78. 60.7% of registered voters participated in the referendum. Of those voting, 53% favoured the NO option, while 44.9% voted YES. (Estado Libre Asociado de Puerto Rico, Comisión Estatal de Elecciones, *Referendum 8 de Diciembre de 1991: Informes de Resultados*, 11 July 1992, p 1).

79. For a journalistic commentary interpreting the results, see Rivera Ramos (1991b).

80. Two paradigmatic expressions of that attitude, common especially on the part of statehood supporters, can be found in two articles published in July and August 1992 in the English language daily *The San Juan Star*. In one, the author proclaims:

It is, therefore, the duty of all loyal U.S. citizens in Puerto Rico to join fellow U.S. citizens throughout the nation in exalting the celebration of its 216th birthday and its values as a great nation. It is also imperative, more than ever before, on this Fourth of July, for loyal U.S. citizens in Puerto Rico to reaffirm their strong determination to continue struggling for real permanent union with the United States. I say more than ever before because of the evident moves these days to separate us from the United States... (Moscoso 1992)

The second columnist writes:

My primary loyalty goes to the United States of America. Oh, yes. The nation that helped us raise from extreme poverty, to the point of now enjoying the highest per capita income of Hispanic America. The nation that helped us have the democratic system we enjoy. The one that helped us improve significantly our life expectancy and our level of literacy; and which established, only five years after arriving (1903), our first university. The one that embraced us and *granted us our much cherished citizenship*. The nation which has helped us look to the future with optimism (Pagán 1992, emphasis added).

A noted journalist and NPP legislator wrote in March 1992:

Maybe what Puerto Ricans treasure most is their American citizenship. And with good enough reasons. If we were to value it for its emotional significance, possibly we would not get an electrifying effect. But certainly it is useful in other ways which make us feel proud of being American citizens. Our citizenship offers us security, stability and opens up opportunities (Fernández 1992, translated from the Spanish).

CHAPTER V

RIGHTS, DEMOCRACY, THE RULE OF LAW AND COLONIALISM

A. INTRODUCTION

The two previous chapters analysed specific legal events that have contributed to the reproduction of the colonial regime in Puerto Rico. This chapter focuses on more general features of the legal and political system and their role in the construction of the colonial experience. Specifically, I will discuss the extent to which the discourse of rights, the system of representative democracy, and the ideology of the rule of law may be regarded as constituents of the complex articulation of factors that have operated to produce consent and to construct the legitimacy of the existing political structure. To address this question, of course, is to raise important issues that lie at the core of the relationship between law and domination.

Referring to European colonialism, Peter Fitzpatrick has pointed out that law always was 'a prime justification and instrument' of imperialism, portrayed by imperialists as the means by which to raise the mass of uncivilised millions to 'a higher plane of civilisation' (Fitzpatrick 1992: 107). A similar view was held by the American colonisers. In an often quoted statement, General Nelson A Miles, the commanding officer of the American troops that landed in Puerto Rico in 1898 proclaimed solemnly that it was the intention of the occupiers to bring to this newly conquered land 'the immunities and blessings of the liberal institutions' of the

American Government and the 'advantages and blessings of enlightened civilization' (Ramírez Lavandero 1988: 49-50).

In most colonial experiences, however, the importation of Western law suffered important transformations. As Snyder and Hay have indicated, the law exported to the colonies was not simply metropolitan law. 'It comprised the most authoritarian aspects of European law, from which most provisions regarding social welfare, basic rights and other entitlements largely had been excised' (1987: 12). The legal system had a 'markedly administrative rather than rights-oriented' character and the ideology of the rule of law 'was practically absent in many if not most colonies' (*ibidem*). In fact, as Yash Ghai has argued, even in the African post-colonial states ideologies other than the rule of law and the idea of legality have proved more fruitful as legitimating discourses (Ghai 1987: 253-261). A similar point has been raised by Issa Shivji, who claims that in many African societies 'legal ideology has little hegemonic significance' (Shivji 1989: 282).

In these respects the modern brand of colonialism that is exemplified by the Puerto Rican experience, especially after the 1940's, represents a significant departure from previous colonial patterns. Of course, this is not an exclusively American phenomenon. The remaining French, British and Dutch colonial dependencies in the Caribbean exhibit similar characteristics.¹ The revealing fact, however, is that, in the long run, colonialism (even in its most direct form) seems to have been better served not by excising the discourse of rights and legalism from the metropolitan claim to authority, but by extending such discourse and ideology to those colonial societies.

Fitzpatrick has perceptively noted another important, more fundamental way, in which the law of Europe and the law of the colonies differed. While European societies regarded themselves as self-determining subjects (they gave themselves their own law), this quality was denied those subjected to colonial rule. Fitzpatrick quotes Westlake, who in 1894 expressed the opinion that although all rights were not denied 'uncivilized natives', the 'appreciation of their rights is left to the conscience of the state within whose recognized territorial sovereignty they are comprised' (Fitzpatrick 1992: 108, 109). It is in this respect that there are fundamental similarities between classical European colonialism and the newer version of colonial domination exemplified by the American model.

But it is the differences between the European colonialism of the end of the nineteenth and first half of the twentieth centuries and the more recent mode prevalent in the modern colonial welfare states that will occupy my attention. Those differences account, to an important degree, for the phenomenon of colonialism by consent with which this thesis is concerned. This chapter will analyse precisely the dynamics resulting from the interplay among a rights-oriented, 'ethical', as well as repressive, state, a regime of partial democracy and the ideology of the rule of law in the context of a colonial relationship.

The main proposition put forward is that the discourse of liberal rights, the experience of partial democracy, and the ideology of the rule of law have contributed to the reproduction of consent to American rule in Puerto Rico. They have been key features of the American hegemonic project and one of the constituents of the legitimation process. As in the previous chapter on citizenship, it must be stressed that diverse sectors of the Puerto Rican population have participated actively in

shaping this particular colonial experience through responses that have involved varying degrees of acceptance, resistance, and 'negotiation'.

B. A NOTE ON COERCION AND CONSENT

1. The theoretical problem

Before proceeding further it is necessary to make some comments about the relationship between coercion and consent. The problem is posed in much recent sociological writing about law. The discussion has been motivated by a realisation that modern political systems, particularly in the industrial and post-industrial societies of the West, have relied in mechanisms other than physical repression or the use of force to reproduce themselves and secure a high degree of either acquiescence or active consent from the mass of the population.

In fact, Alan Hunt has argued that the main trends in contemporary sociological theories of law have not been able to transcend a 'dichotomous conception of law organized around the polar opposition between coercion and consent' (Hunt 1982: 95). Although to conceptualise law in terms of the dimensions of coercion and consent may help to capture important characteristics of law, Hunt argues, none of the positions examined by him -- which includes liberal and marxist approaches -- has succeeded in 'advancing a coherent presentation of a mode of combination of the apparently opposed characteristics of law so as to produce a unitary conception not reducible to a choice between opposites or a fluctuation

between them' (at 95). Hunt's argument reveals an important insight. However, his formulation fails to express the problem with precision.

First of all there is the problem of defining 'coercion'. Certainly the use of physical force to repress -- by means of imprisonment, the infliction of corporal punishment and death -- are means of coercion. But other, more insidious forms of imposing someone's will, may too be considered coercive: such as surveillance, discrimination, ostracism, job dismissals and psychological harassment. Also certain practices, which Bourdieu would characterise as 'symbolic violence' (Bourdieu 1987: 812), could be arguably classified as forms of coercion. They consist essentially in the imposition of ways of viewing and evaluating the world. And may take the form of explanations, principles or rules -- as in the handing down of administrative or judicial decisions not subject to question. In other words, coercion shows itself in multifarious forms that range from those that rely on the use of extreme physical force to those that depend on other, non physical, yet forceful, means of imposing compliance.

Secondly, in sociological terms the binary oppositions to be transcended are not those of 'coercion' and 'consent', but 'coercion' and 'persuasion'. In contemporary societies, especially those of the more industrialised countries, consent, in the sociological sense, has to be viewed as the result of a complex articulation of 'coercive' and 'persuasive' mechanisms. Consent is not a polar category to be reconciled with its opposite 'coercion'. Rather, consent is the synthesis: the end result of a complex process in which both persuasion and the different forms of coercion I have described combine to produce an active acceptance of, or at least a

passive acquiescence in, the existing social arrangements. Coercion, then, is an active ingredient in the process of legitimation.

Thirdly, in many contemporary societies, in order to be effective coercion must be regarded as 'legitimate'. In other words, it must rely on consent. Either because it is viewed as legitimate by those to whom it is directed, or because it is sanctioned by the majority when directed against selected groups or individuals.

Is law principally a coercive or a persuasive mechanism? This is the question that much sociological literature seems to intend to address when discussing the (mistakenly formulated) coercion-consent dichotomy. Some theoretical approaches at times provide seemingly contradictory responses to the question. Thus, Gramsci at one point states that 'the law is the repressive and negative aspect of the entire positive civilising activity undertaken by the State' (Gramsci 1971: 247); while in other passages he stresses the educative function of law (195, 196). This has led Hunt to criticize the Gramscian approach as being riddled with the coercion-consent dichotomy. 'The coercion-consent dualism,' writes Hunt, 'finds its most general expression in Marxist theory through the very widespread recent influence of Gramscian theory...Within such a perspective the central focus has been upon the noncoercive face of law...Yet there coexists in Gramsci an emphasis upon the repressive role of law and state' (Hunt 1982: 86, 87).

Maureen Cain, however, provides a more illuminating reading of Gramsci. She interprets Gramsci as proposing that law can be used both coercively and persuasively. 'It is persuasive because it assists the directive group by *creating* a "tradition" in an active and not in a passive sense. Law has an umbrella effect whereby the standards and ways of thought embodied in it penetrate civil society and

become a part of common sense' (Cain 1983: 102, emphasis in the original). But in Gramsci the relationship between law and 'consent', between law and hegemony, goes even further than the fact that law may be used both coercively or persuasively.

For Gramsci 'the function of law' is to assimilate, educate, and adapt the majority of the population to the requirements of the goals to be achieved as set by the ruling groups in society (Gramsci 1971: 195). Through law the State 'tends to create a social conformism which is useful to the ruling group's line of development' (*ibidem*).

The crucial proposition, if Gramsci is read carefully, is that law performs these functions both through persuasion and coercion. For Gramsci the 'ethical' dimension of hegemony consists in the creation of a 'correspondence' between individual conduct 'and the ends which society sets itself as necessary' (1971: 196; cf also Cain 1983: 102). But this correspondence is achieved as much by persuasion as by coercion (through 'the sphere of positive law') (Gramsci 1971: 196). In other words, the coercive effect of law is as much a factor in producing consent as its persuasive capacity. Hegemony, for Gramsci, is the result of the operation of both persuasive and coercive mechanisms. Law is a particular form which combines both modes of producing consent.

For Gramsci hegemony is a particular mode of exercising domination. One may, then, reformulate the proposition in other terms, by concluding that domination is the result of a complex articulation of technologies of power that include the use of force, insidious forms of coercion, symbolic violence, regulation, and a host of practices that work in the persuasive mode. These practices and technologies of power reinforce each other in a multidimensional process.

2. The coercive dimension of the American colonial project in Puerto Rico

The Puerto Rican colonial experience under American rule has been characterised by various combinations of coercive and persuasive mechanisms as means of consolidating American hegemony. Moral and political persuasion has coexisted with intense periods of selective persecution and repression of different sectors of the population. Coercion has included the overt use of physical force, more insidious forms of repression, and acts of 'symbolic violence'.² Repression and selective persecution have been aimed particularly at the independence movement, as well as against other social and political forces that, at different times, have questioned either the legitimacy of the colonial regime as a whole, or some of the discrete and immediate manifestations of colonialism in Puerto Rican life. Their effects, however, have been more generalised in nature, as their exemplary dimension has succeeded in inducing fear of the independence movement. Repressive activities have been conducted by direct agents of the metropolitan state -- like the US Armed Forces, the CIA and the FBI; by agents of the local Puerto Rican government -- such as the Puerto Rican police and the Puerto Rican Justice Department; by political parties; and even by 'private' actors operating in the realm of what Gramsci and others would call 'civil society'.

A few illustrations of these repressive practices may be given to provide a rough picture of the coercive dimension of American colonialism during the present century.

They should dispel any notion that American colonialism has been a benign phenomenon totally devoid of the harshness and painful, even brutal, effects of European colonialism.³

The first three decades of American colonial rule were particularly harsh. Despite a relative degree of modernisation brought about by a programme of public works to develop transportation, communications and sanitation facilities, and the changes in the economic organisation of the island introduced by American capitalism, poverty was widespread. Absentee American corporations which controlled the sugar industry exploited Puerto Rican workers. The depression of the 1930's aggravated the condition of the Puerto Rican population. This was fertile ground for an upsurge in social agitation. Furthermore, the imperial refusal to solve the colonial problem fostered the radicalisation of the independence movement.

The first direct, radical and organised challenge to the legitimacy of colonial rule came from the Nationalist Party, led by a charismatic Puerto Rican lawyer trained in Harvard University, named Pedro Albizu Campos. Initially, the Nationalists participated in the electoral process, but after the elections of 1932 they opted for a more confrontational politics aimed at inducing a crisis that would lead the United States to relinquish its control over Puerto Rico. The colonial administration responded violently. A rapid succession of events led eventually to the incarceration of Albizu Campos and other Nationalist leaders.

In October 1935 four nationalists and a policeman died in a shootout produced after four members of the Party were detained by Police. In February of 1936 the Chief of Police, an American, was killed. Two young nationalists arrested for that action were, in turn, assassinated while in police custody. As a result of these

events, Albizu Campos and others were indicted for attempting to depose the government of the United States and were sentenced to jail terms of up to fifteen years to be served in a prison in Atlanta, Georgia. In 1936, while Albizu was imprisoned, the Police attacked a peaceful nationalist demonstration in the southern city of Ponce. Nineteen people, including two policemen, were killed and more than a hundred were wounded. A report by a commission of the American Civil Liberties Union, presided by the well-known American attorney Arthur Garfield Hays, concluded that the Police action had constituted a massacre and put the blame on the American Governor.

Nationalist activity subsided until after the return of Albizu to the island in 1947. Another series of events, including a Nationalist revolt in several towns in Puerto Rico in 1950 and an armed attack against the Blair House, the residence of President Harry S Truman, in Washington, ended in a new period of incarceration for the Nationalist leader. He was released again in 1953. But in 1954 three young nationalists fired gunshots into the floor of the US House of Representatives. Albizu was arrested and imprisoned once more. He was not freed until 1964 and died in 1965.

The events of 1950 triggered a massive wave of persecution against independence supporters of all political shades. Many were detained without trial. MacCarthyism showed its face in the colony using as its principal instrument a gag law adopted by the Puerto Rican legislature in 1948 (popularly called 'La Mordaza' or 'The Muzzle'), a Puerto Rican version of the infamous American Smith Act of 1940. Other forms of persecution became common. Many independence followers were routinely denied jobs in government and private firms. Police surveillance and

the monitoring of legitimate political activities became a common practice. The more militant became subject to visits in their homes by American federal agents for harassment purposes. At one point even possession of a Puerto Rican flag was sufficient to prompt intervention by the Puerto Rican Police.

These measures have had long lasting consequences in Puerto Rico. The independence movement was, in effect, criminalised. Pro independence advocacy was equated to 'lack of patriotism', 'communism' and 'subversion'. To be an *independentista* in Puerto Rico after 1950 meant, for many practical purposes, to become a political and social outcast. The result has been a pervasive fear and rejection among significant sectors of the population of anything that hints at separation from the United States.

New economic, social and political crises in the following decades created the conditions for new challenges to the colonial system, which, in turn, were met with new repressive policies.

Towards the end of the decade of 1960, a strong movement against the drafting of Puerto Rican youngsters into the US military and opposition to the Vietnam war produced a succession of confrontations. The US Federal Bureau of Investigation and the federal judiciary intervened actively to curb the tide. In the 1970's the role of the US military in the island was again put into question by militant movements that called for the withdrawal of the US Navy from Culebra and Vieques, two offshore islands within the jurisdiction of Puerto Rico used for military training by the US Armed Forces. Dozens were arrested and indicted on account of their participation in acts of civil disobedience.

In 1978 two young *independentistas* were killed in an ambush to which they had been led by a Police undercover agent. Although the official version, supported by the Puerto Rican Justice Department and the pro-statehood Governor, Carlos Romero Barceló, claimed that the Police had acted in self-defense, an in-depth investigation conducted by the PDP controlled Senate revealed that, as many pro-independence activists and intellectuals had alleged, the two youngsters had been murdered cold-bloodedly after surrendering to the Police. The *Cerro Maravilla* killings, so named after the mountain top where the events took place, shook the public conscience and at moments seems to have served as a starting point to reassess the relationship of the colonial state to the independence movement.

In the 1980's a new clandestine organisation, *Los Macheteros*, staged a series of dramatic actions against the US military. In 1985, in a commando style operative, hundreds of American enforcement officers arrested a group of Puerto Ricans in their homes in the early hours of the morning and charged them with participating or aiding or abetting in several ways in the 1983 multi-million dollar robbery of a Wells Fargo facility in the United States, an action for which the *Macheteros* had claimed responsibility. The action was taken, they had declared, as a means to finance their revolutionary activities. Many of those arrested were later convicted in a US court in Connecticut and have served or are serving time in several American prisons. One of the alleged leaders, Filiberto Ojeda Ríos, who has since gone into hiding, was acquitted by a Puerto Rican jury of charges arising from incidents surrounding his arrest by FBI agents, who claimed that he had fired against them and wounded one of the agents. Ojeda Ríos alleged he was only defending himself and his wife against the gun-wielding officers.

The public hearings conducted to ascertain the truth of the *Cerro Maravilla* murders opened up new windows for the understanding of the nature, extent and dimensions of the decades long persecution of the independence movement and other popular struggles. One such discovery was the revelation that the Intelligence Division of the Police and the Bureau for Special Investigations of the Puerto Rican Justice Department had for many years kept so called 'subversive files' to keep track of persons who were known to be, or were suspected of being, followers of the independence, socialist, labour, feminist, environmentalist or other social or political movements or organisations. The information contained in the files had been collected through undercover agents, police informers and even unsuspecting sources that included job supervisors, co-workers, relatives and neighbors. A civil action filed in a Puerto Rican court led to the release of thousands of such files.⁴ Both the Superior Court that decided the case and a separate inquiry by the Puerto Rico Civil Rights Commission⁵ concluded that for decades independence followers and others considered 'subversive' for engaging in perfectly legal activities had been subjected to a systematic pattern of persecution.

One illuminating aspect of these inquiries has been the evidence that suggests that US enforcement agencies have taken an active participation, if not a leading role, in these practices. In fact, the interference of the US Federal Bureau of Investigation (FBI) in Puerto Rican political affairs had been documented before. Documents obtained from the US Justice Department through the US Freedom of Information Act revealed that the FBI conducted a systematic campaign of disinformation and destabilisation against the independence movement in the 1960's and 1970's. There

is evidence, also, that the agency meddled in the 1967 plebiscite and the 1968 general elections.⁶

From the nature of the activities and practices described above it is obvious that law has been imbricated at various levels and in multiple forms in the coercive dimension of the colonial state.

Many of those practices and actions have come to be perceived as illegitimate by important sectors of the Puerto Rican population. But others have been 'validated' with reference to the notion that they are appropriate ways of dealing with 'subversives.' In that sense, those practices have depended on the existence of a social understanding sanctioning their legitimacy.⁷ More than that, they have had the effect of buttressing the very social consensus on which they have depended for their efficacy.⁸

C. THE DISCOURSE OF RIGHTS

The crucial thing to remember in the context of this new form of colonialism is that the coercive dimension of the colonial regime has been imbricated, in a relationship that transcends mere coexistence or contradiction, with a widely accepted discourse of rights, the institutions of representative democracy and an otherwise generalised observance of the rule of law. In the three sections that follow I will discuss how these phenomena have operated to consolidate American hegemony in the island. I will start with the discourse of rights.

The notion of rights is a key feature of modern law. A right may be defined as a claim that a subject may make on others with the legitimate expectation of

securing compliance through established mechanisms. The central actor in a modern legal system is the legal subject, who is conceived as a bearer of rights and obligations.

In classical jurisprudence the debate about rights was mostly confined to an argument about the sources of rights. Positivists would accord the status of rights only to those claims sanctioned by positive law. Natural rights theorists would justify rights by reference to higher principles or norms conceived either as emanating from divine authority or as requirements of 'natural' or practical reason. Present day debates still reflect these tensions. Contemporary human rights philosophy locates the source of rights in various conceptions of human nature or by reference to the notion of human needs.

In recent years, however, a new controversy has erupted, largely as a result of the writings of critical legal scholars. The debate hinges generally around the extent to which rights discourse is linked to diverse forms of domination. Most of the debate has focused on the dynamics of rights discourse within Western industrial or post-industrial, democratic, societies. Little, if any, attention has been given to the dynamics of rights discourse in a colonial setting.⁹ Before addressing the particular situation of Puerto Rico, I must discuss, because of its relevancy, the main features of what has been called the 'critique of rights'.

1. The critique of rights

As formulated by critical scholars in the United States, Europe and other countries within the Western legal tradition, the critique of rights has revolved around two fundamental problems: (1) the limits of liberal rights discourse and (2) its (negative) political and ideological effects.

a. The limits of rights discourse

Writing from a feminist perspective Carol Smart has summarised some of those limits, particularly for subordinated groups (Smart 1989: 138-159).

The most obvious limit, conceded even by some liberal theorists, is that the recognition of rights is not a guarantee of their actual enjoyment (Smart 1989: 143-144). This is the famous problem of the ever present 'gap' between formal declaration and 'reality' (Cf also Denninger 1989; Parker 1989; and Shivji 1989: 273).

Secondly, rights do not necessarily solve problems; they tend to oversimplify complex power relations, focusing on one aspect of those relations, most of the time failing to contextualise that single aspect within the multiple dimensions in which social problems usually present themselves (Cf Smart 1989: 144).

Thirdly, although formulated to deal with a social wrong, rights are always focused on the individual who must prove that her rights have been violated (at 145). This tends to preclude any formulation of collective right.¹⁰

Fourthly, rights may be appropriated by the powerful to further their own interests in detriment of those whose protection was sought by the enactment of a particular right (at 145).

Finally, any claim of rights can be effectively countered by resort to competing rights (at 145). This, in fact, is a variant of a deeper critique that has been one of the fundamental contributions of the Critical Legal Studies Movement: what has come to be known as the indeterminacy critique (See Olsen 1989: 242; Postema 1989: 116-119). As Olsen has expressed it: 'in any important social conflict each side can present equally logical arguments that the concept of protecting individual rights requires that they prevail over the other side' (at 242).

For critical scholars law is riddled with a radical indeterminacy: its provisions do not have a fixed meaning. Any meaning is provided by the interpreter. Interpretation, especially judicial interpretation, is an exercise of power. Rights discourse, therefore, is a malleable instrument that many times ends up serving the interests of the dominators.

This radical indeterminacy has been explained in various ways. Its source may be located in the equivocal nature, the pliability, of language, as the Realists demonstrated long ago. But it may go even further. Sol Picciotto, for example, refers to an inherent contradiction in law arising from the tension between the requirement of generality of application and the need for specificity (as a precondition of predictability) (Picciotto 1982: 178). The indeterminacy of law may well reside in the very purpose which the liberal ideal ascribes to it: the definition of a sphere of autonomy for the individual. In the liberal world view individuals are subjects competing for social goods and their claims cannot be but conflicting demands in an

ever expanding field of commodified relations where needs are satisfied and personality defined. The question, of course, remains whether rights discourse, as a form of referring to social relations, can survive the transcendence of a 'liberal' world and whether, even in such a world, such discourse would still be afflicted by a radical indeterminacy. If such were the case, we would have to look to deeper causes, that extend beyond law and even beyond existing social relations. Duncan Kennedy, for one, has referred to a 'fundamental contradiction' between the need and the fear of others that is reflected in law's provisions and, inevitably, in judicial interpretations of rights (Kennedy 1979: 211-213).¹¹ In this line of thinking one could pose the hypothesis that, in as much as all social life is riddled with paradox, any attempt at capturing social relations through normative discourse would be doomed to bear the burden of indeterminacy.

b. The effects of the discourse of rights

Three distinct critiques can be identified from the most recent theoretical debates about the political and ideological effects of rights discourse: (a) the individualism (or alienation) critique; (b) the disciplinary effect of rights claims and (c) the 'rights fetishism' critique.

The individualism or alienation critique can be traced back to Marx himself. For Marx liberal rights not only defined autonomous zones for the individuals, but also set them apart from others and alienated them from their own social nature and their community. In his famous essay 'On the Jewish Question' he stated:

Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community. Far from the rights of man conceiving of man as a species-being, species-life itself, society appears as a framework exterior to individuals, a limitation of their original self-sufficiency. The only bond that holds them together is natural necessity, need and private interest, the conservation of their property and egoistic person (1987b: 147).

In sum, the discourse of rights reinforces individualism and alienation from self and from others. Bob Fine replicates this critique by asserting that 'the law seems to engender community and common humanity, but at the same time, it produces mutual isolation, indifference and antagonism' (Fine 1984: 145).¹² Picciotto adds that the channelling of struggles into the form of claims of 'bourgeois legal rights' breaks up any movement towards solidarity, through the operation of legal procedures which recognize only the individual subject of rights and duties (Picciotto 1982: 175).¹³

It may be added that the tendency in market oriented societies to commodify all relations, and to conceive of all aspirations in terms of value, results in the transformation of 'rights' into things owned. This development reinforces inevitably what Habermas calls the 'possessive individualism' (1988a: 77, 82-83) that characterises the dominant world view in capitalist societies.

Building upon a Foucauldian analysis of power, Carol Smart asserts that the claim for rights has another important effect: it generates new mechanisms for surveillance, regulation and control. The recognition of a legal right immediately calls for the establishment of a machinery to enforce it. This machinery enhances

the power of the state and regulatory apparatuses which claim the need for more information about the subjects entitled to rights (Smart 1989: 142, 143). A similar insight had been advanced more than two decades ago in relation to welfare recipients by Piven and Cloward, among others (Cf. Piven and Cloward 1971; see also Alfieri 1987-88: 667-668).

The Australian jurist Valerie Kerruish (1991) has authored an elaborate formulation of the 'rights fetishism' critique. Working from the basic categories of Marxist political economy, Kerruish concludes that liberal legal practices and jurisprudence, operating as ideology, have helped to produce a social phenomenon which may be described as 'rights fetishism'. One aspect of rights fetishism consists in the attribution of a universal value to rights, much in the same fashion as commodities are ascribed a universal value (of exchange) apart from the specific use value of each object produced. Another aspect is the process whereby 'rights' become an abstract reality which begins to command certain veneration. Finally, fetishisation involves a process by which the identity of a person is defined by his or her rights -- by the fact that he or she is a legal subject. (Kerruish 1991: esp 139-165). In short, it is having rights that constitutes the person, or more precisely, rights are the source of her value as a person. This is the most profound effect, in the realm of consciousness, of the discourse of rights.

c. The benefits of rights

The critique of rights has elicited vigorous responses. In the United States, particularly, feminist and minority scholars and lawyers engaged in activist

work have taken to task the Critical Legal Studies critique of rights by stressing the benefits that the claim for rights entails for those in subordinated positions in society (Cf, for example, Sparer 1984; Olsen 1989; Crenshaw 1989; Matsuda 1987). For Crenshaw 'rights have been important'. 'They may have legitimated racial inequality, but they have also been the means by which oppressed groups have secured both entry as formal equals into the dominant order and the survival of their movement in the face of private and state repression' (1989: 293). Frances Olsen has suggested that one important value of the possibility of claiming rights is the sense of human worth that such claims reinforce in those making them (1989: 244). 'On a personal level,' Olsen writes, 'to claim a right is to assert one's self-worth, to affirm one's moral value and entitlement. It is a way for a person to make a claim about herself and her role in the world' (Olsen 1989: 244).

That rights do provide benefits for people, including the less powerful, is something that even most critics of rights discourse would concede. Marx himself did not rule out 'bourgeois rights' as a mere sham. Bob Fine has interpreted Marx's critique as one directed not to individual rights in themselves but to the limited nature of those rights in bourgeois society. The question for Marx, according to Fine, is not the abolition, but the enlargement of individual rights, the limitless extension of right until it encompasses the totality of human experience. (Cf Fine 1984: 129). Sol Picciotto admits that a right 'encapsulated in bourgeois legal form is certainly better than no right at all'; the aim, however, is to transcend the limitations of this form if social transformation on behalf of the working class is to succeed (Picciotto 1989: 175).

Valerie Kerruish, whose keen indictment of rights fetishism has been sketched above, also proposes that rights 'be taken seriously' in at least two senses: (1) the claims of subordinated people are claims for rights, and must be attended to and (2) rights, if properly kept to their specific contexts, have a political use value (1991: 144-145).¹⁴ There are both political and moral reasons for this attitude. 'The political point', she writes, 'is that in a society structured by materially unequal social relations, people on the down-side of these relations would be worse off without law than they are with law'; while the 'moral point is still the Kantian perception of the ethical value of equal concern and respect for individuals' (at 145).¹⁵

Her 'political point' implies that the valuation of rights has to be contextualised. To the extent that the critique adopts the form of an absolute rejection of rights, without attending to the historical, social, and political context, it slips into abstract, *a-priori*, theoretization, becoming at times what Frances Olsen has characterised as a 'new Scholastic Orthodoxy' (Olsen 1989: 253). A similar point is made by Shivji, in the African context, who argues that the 'struggle for formal legal equality and democracy', cast in a new language of 'collective rights', 'has still a role to play in the African formation' (Shivji 1989: 282-283). The Japanese jurist Onuma Yosuki, emphasising that the 'rights' formulation has a particularly strong appeal to those who are oppressed or alienated from various values and interests in society, predicts that 'as long as there remains an apparent hierarchical structure in terms of power, a frustration resulting therefrom, and a keen desire to express the claims of the powerless in a legitimate and effective manner, the attempts to formulate these claims as rights will continue to exist'. This, he adds, is also valid for international society, where there are enormous gaps between a small

number of rich and powerful nations and a large number of poor and powerless ones.

The latter, he suggests, will benefit from recourse to the discourse of rights. (Onuma 1989: 150, 151).

2. The Puerto Rican experience

As has been suggested already, the Puerto Rican experience under American rule has differed in one important respect from other colonial settings: the language of rights has been a key feature of the dominant discourses in Puerto Rican society and an important mediating phenomenon between the metropolitan state and the Puerto Rican population.

At the representational level, one explanation lies in the fact that Puerto Rican liberals of the nineteenth century had already made of the claim of rights a central element of their political discourse to confront the oppression of the Spanish regime.

Another factor may be the extent to which the subordinated sectors of Puerto Rican society -- the peasants, workers, women, black and mulatto Puerto Ricans -- from the early days of the American occupation were attracted to the new regime, and the forms and symbols of its dominant political discourse, as an opportunity to shed a state of social oppression they identified with Spanish colonialism and with the class of creole *hacendados* that had exploited and marginalised them (Cf Mattos Cintrón 1988: 27-28). A third factor may well be the fact that, especially since the middle of this century, Puerto Rican society in many respects has come to resemble more and more, in its organising principles and daily practices, the societies of advanced capitalism. To the extent that the liberal discourse of rights embodies a certain

equivalence to the ideological framework of commodity exchange in a capitalist economy, as Pashukanis and other marxists and neo-marxists have suggested (Cf Pashukanis 1983; Fine 1984; Kerruish 1991), to that extent it is understandable that a colonial society, with a modern, capitalist, though highly dependent, economy, would become the site of a normative discourse of social relationships that assumes the form of expanding claims of individual rights. Finally, another contributing factor has been the basic conceptual and normative framework developed by the ruling elites of the metropolitan state to facilitate its exercise of authority over the territory, while making compromises with the material and symbolic demands emerging from the various sectors of the territory's population. It is to this last factor that I will turn now.

a. The basic conceptual scheme

The governing elites of the United States who intervened in the process of shaping the country's colonial policy at the turn of the century had differing views regarding the treatment that should be accorded the populations of the territories acquired at the time. A strong current argued that the establishment of a colonial regime in those territories was not incompatible with (rather, to be successful, would have to rely on) the recognition of basic fundamental rights to the subjected populations. The idea was expressed very clearly by Senator Teller, who saw 'no reason...why the United States may not have a colony', but felt that the country was bound to extend to any colony the 'great principles that underlie the government' and

to maintain there 'a free government' and 'liberty' (quoted in Cabranes 1979: 429, n 146).

Senator Teller's remarks synthesized the basic theoretical and political framework that would, in due course, be adopted by the three branches of the government of the United States.

This basic framework is clearly evident in the rationale of the Insular Cases, discussed in Chapter III. Those cases had drawn a sharp distinction between civil rights and democracy, between 'fundamental' individual rights and the rights of political participation. They relied also on another conceptual cleavage: one that distinguished between the 'civil rights' of the inhabitants and the 'political status' of the territory. These conceptual differentiations would justify extending certain rights deemed 'fundamental', while preserving the basic subordination inherent in a colonial system.

b. The normative structure of the regime of rights

The Insular Cases made clear that the inhabitants of the unincorporated territories could claim the 'fundamental' rights enshrined in the Constitution of the United States. They are deemed to be limitations imposed on the actions of the territorial government as well as on those of the 'federal' government (i.e. the metropolitan state). In the nine decades that have elapsed since the first group of cases were decided, the Supreme Court of the United States has been engaged in the exercise of determining what are those 'fundamental rights'.

As was seen in Chapter III, the Insular Cases themselves decided that indictment and trial by jury were not fundamental enough.¹⁶ Either by express holding or by implication the Court has determined that at least the following constitutional rights should be considered 'fundamental', and therefore applicable in Puerto Rico: freedom of expression,¹⁷ due process of law,¹⁸ equal protection of the laws,¹⁹ the right to travel,²⁰ and the protection against unreasonable searches and seizures.²¹ It has been suggested that, regardless of the rationale of the Insular Cases, most of the Bill of Rights of the US Constitution should be considered extensive to Puerto Rico.²² Puerto Ricans may also claim against the government of the United States those rights extended to them by Congressional legislation creating 'federal' entitlements.

A second dimension of the normative structure of rights in Puerto Rico is provided by those claims that may be made exclusively to the government of Puerto Rico. They constitute what may be called the internal regime of rights. Their source may be legislation passed by the US Congress that limits the powers of the Puerto Rican government or provisions contained in the Constitution of Puerto Rico and in Puerto Rican laws.

A group of such statutory rights created by the US Congress was contained in Section 2 of the Jones Act of 1917,²³ a Bill of Rights claimable against the government of Puerto Rico. The list included most of the rights found in the Bill of Rights and other provisions of the US Constitution. The provisions of Section 2 were repealed in 1950 by Public Law 600,²⁴ the Congressional legislation that authorised Puerto Ricans to draft their own Constitution. The Bill of Rights

contained in the Constitution of 1952 replaced the statutory scheme of basic civil rights adopted in the Jones Act.

The Constitution of the Commonwealth of Puerto Rico²⁵ provides the current fundamental formal framework for the internal regime of rights in the country. The Constitution adopts the American institutional arrangement of separation of powers. Article II contains a Bill of Rights that in many respects goes well beyond the provisions of its American counterpart. It recognises the familiar rights protecting against the deprivation of liberty and property without due process of law, the guarantees of equal protection of the laws, freedom of speech and assembly and the rights of the accused in the criminal process. Furthermore, it expressly consigns the right to privacy (which protects against state *and* private action), several important rights relating to employment (such as the right to equal pay for equal work and to a reasonable minimum wage) and a direct condemnation of discrimination on account of race, color, sex, birth, social origin or condition, or political or religious ideas.

It was evident that the writers of the Constitution of 1952 wished to go further than the traditional liberal conception of rights. In consequence they drafted a section providing for certain social rights, such as the rights to obtain work, to an adequate standard of living, to social protection in the event of unemployment, sickness, old age or disability and to special care during motherhood and childhood.²⁶ That section was approved by the Puerto Rican electorate, together with the rest of the Constitution. However, the Congress of the United States rejected the provision, excluding it from the approval it extended, with certain conditions, to the remainder of the document drafted by the Puerto Rican Constitutional Convention and ratified by the Puerto Rican people.²⁷

The Constitution provides for a judicial system very similar to that existing in the United States. Judicial review of legislative acts is expressly provided for. Supreme Court Justices enjoy life tenure. Judges of the inferior courts are designated for specified periods of time. The system is predicated on the principle of judicial independence.

The Supreme Court of Puerto Rico has made it a point, since 1952, to assert the principle that the Constitution of Puerto Rico, in questions relating to human rights, should be regarded to enshrine a much broader scope of protections than those contained in the Constitution of the United States.²⁸

The Constitution of 1952 articulates a particular political vision: a combination of American political theory and the world view of the Puerto Rican elites that led the process of economic, social and political reform during the 1940's. Those elites were, in a large measure, the biological and political heirs of the creole *hacendados* and liberal professionals who, in the late part of the nineteenth century and the early years of the current one, had embraced the liberal political creed, first as a response to the absolutism of the Spanish regime, and, later, as a way of reaffirming their identification with, and admiration for, American institutions. Many of them had been trained in American universities and professed the basic values of the American political system. However, many of them also exhibited a pronounced inclination for social questions, influenced either by early contacts with, and even participation in, the labour-led Puerto Rican Socialist Party, or by the social democratic ideals of the Rooseveltian New Dealers. That explains partly the inclusion of certain social rights in the Constitution. The explanation also lies in the fact that, to a certain degree, the Constitution crystallised some of the claims that had

been made throughout the first four decades of the century by some popular movements, such as labour and the women's rights movement.

c. The limits and benefits

Of course this 'regime of rights' has limits. Those limits are of the type indicated above in our general discussion of the critique of rights. The most obvious is the 'gap' existing in many instances between the formal declaration of rights and the 'reality' of their enjoyment. The profound social inequalities that still exist in Puerto Rican society effectively preclude many people from a full enjoyment of their 'rights'.²⁹

Secondly, the liberal conception of rights exerts an ideological pressure that tends to force the formulation of demands into the mold of individual rights, to the detriment of demands more collective in nature. This tendency, however, seems to be countered by other types of discourses, arising from a long tradition of social struggles, that bring to the surface a more collective vision, such as when diverse groups claim the protection of the 'rights' of a certain community, or the 'rights of workers' or 'of women', viewed as distinct groups. The clash between 'individual' versus 'collective' rights becomes more apparent in the context of discussions about the future political status of Puerto Rico. The demands of a collective right, such as the right of self-determination of the Puerto Rican people, encounters difficulties when confronted with the 'individual rights' of Puerto Ricans viewed as individual American citizens or as individual voters. The demand of a collective 'right' of the people to preserve its identity clashes with the claims of individuals who assert their

individual rights to self-expression. This has become apparent, for example, in discussions about which should be the official language of Puerto Rico.

Thirdly, the Puerto Rican situation confirms Carol Smart's insight that rights do not necessarily solve complex social problems. Despite the profusion of rights recognised by the legal system, there still prevail fundamental oppressions and unequal power relations that include class, gender, racial and colonial subordination.

This is not to say that the discourse of rights is a mere sham. The language of rights and the concrete experience of a regime of liberal rights, despite its limitations, has produced opportunities for the vindication of important claims, both internally (against the sectors of the Puerto Rican elites who control the state apparatus) and externally (*vis a vis* the metropolitan state). In this sense, rights are not simply an illusion. They are part of the material experience of negotiating, on a day to day basis, the very conditions of existence.

d. The constitutive effects of the regime of rights

One important effect of the discourse of rights concerning the relationship between the United States and Puerto Rico has been the development of a machinery for the 'protection of rights', that includes the supervision of the local state apparatus by the United States federal court, and the status of the United States Supreme Court as ultimate arbiter of many individual and collective conflicts. This has made possible a type of subjection to metropolitan control that is viewed as legitimate and, to many, even desirable.

However, there are more profound ways in which the discourse of rights has served to consolidate American hegemony in Puerto Rico.

The vision enshrined in the Puerto Rican Constitution has developed a force of its own. The language of rights has become a central feature of political discourse in Puerto Rican life. The rights discourse is operative throughout the Puerto Rican social spectrum. Because of its visibility and great weight in public life, the legal profession -- which to a large measure has taken as its 'exemplary center' (Geertz 1980) the American bar -- has been instrumental in spreading this vision and transforming it into part of the dominant, hegemonic, culture. In this sense, the discourse of rights has been not only a product of an ideological consciousness, but a primary producer of that consciousness (Gordon 1984: 112, n 120).

I have discussed already how rights are associated closely with notions of personal worth. Based on my observations of Puerto Rican society, I believe that substantial sectors of the Puerto Rican population ascribe a great significance to the notion of rights.³⁰ For many it is having rights that constitutes one as a person, as a moral being. In this sense, their identity as persons is to a great extent defined by their perceived status as bearers of rights. To what extent does that identity as 'rights-bearers' outweigh the sense of identity produced by such factors as language, ethnicity or other shared 'cultural' practices? This is something very difficult to determine. Certainly there are bound to be differences in this construction of the self depending on such variables as class or generation. But what seems obvious is that many express a great appreciation for the idea that we have rights. The crucial fact is that for substantial parts of the population this source of moral worth is the

American legal and political system. It is in the institutions of the metropolis that 'safeguards' of this worth are perceived to be located. The paradox that results is that the devaluation that colonialism has historically entailed becomes invisible, concealed, as it is compensated by the sense of worth that is felt to derive from being an American citizen and a bearer of rights.

Independence supporters traditionally have minimised the relevancy of this 'reality' of rights and have stressed the importance of the collective and personal devaluation inherent in a colonial relationship. For the more radical the discourse of rights has been a mere illusion, a 'hoax' that conceals colonial domination and exploitation. In many ways this radically sceptical counter-discourse has seemed to miss the point. It has been the product of a reductionist view. It has failed to see the contradictory, paradoxical, nature of social life. The recognition that there is a very real sense in which rights 'exist' within this colonial framework does not preclude the possibility and desirability of exposing the 'devaluation' resulting from a relationship of political subordination.

The sense of liberty that is associated with the notion that the system is protective of rights has led many Puerto Ricans, from all social classes, male and female, black, white or mulatto, from diverse political and religious persuasions, to link the conditions of relative freedom they experience with the colonial relationship itself. They seem to tend to attribute the 'existence' of rights to the American presence. In Puerto Rico 'modernity' tends to be equated to the particular brand of modernity incarnated in American institutions and the American 'life world' (Habermas 1988a: 4). In the same fashion 'rights' are thought to be equivalent to the particular regime of rights characteristic of American political life. Association --

or 'permanent union' -- with the United States is considered a pre-condition to the preservation of rights.³¹ As may be seen readily, herein lies a partial explanation of the growth of the pro-statehood movement. Some among its leaders, when confronted with the argument about the devaluation inherent in the colonial relationship, propose that the way to overcome it is by becoming 'full-fledged' members of the American polity. 'Equality of rights' has become the slogan of the movement. According to this rhetoric, the complete dignity of Puerto Ricans can be achieved only through the 'equality of rights' perceived to be the inevitable by-product of incorporation as a state of the Union. Arguably, it is within this sector of the Puerto Rican population that the 'identity' created by the sets of 'rights' deemed to be inherent in the condition of a member of the American Union has attenuated with most effectiveness the weight traditionally accorded to such factors as ethnicity and language in the formation of a collective identity.

In sum, the discourse of rights has served to perpetuate American hegemony. To the extent that 'rights' are associated with the American presence, to that same extent that presence is legitimated. The goal of establishing a liberal colonial system has been achieved. In the end, the discourse of liberal rights has been an important factor in the reproduction of colonialism.

D. THE REGIME OF PARTIAL DEMOCRACY

Puerto Rico is not a sovereign state. It is subjected to the political control of the United States. Despite this fact, the internal governing processes of the country have been organised according to the principles of liberal representative democracies.

Officials of the government of Puerto Rico are elected by popular vote. The system is considered 'democratic' by most of the population. Yet, it is a system of partial democracy in two senses. First of all, although the Puerto Rican government is subjected to scrutiny through popular elections, Puerto Ricans residing in Puerto Rico are deprived of full participation in the election of officials of the government of the United States and in decisions taken by that government regarding fundamental aspects of Puerto Rican life. Thus, a regime of 'internal' democracy coexists with a system of colonial subordination. The other sense in which the system is only partially democratic -- even in the internal dimension -- is to do with the shortcomings, the limitations, inherent in all modern systems of representative democracy. The two sections that follow will discuss these two dimensions of the limitations of the democratic experience. Finally, I will turn my attention to the fact that, despite these limitations, this 'partial' democratic experience has also contributed to acquiescence, if not active consent, to the existing relationship between the two countries.

1. The non-democratic character of colonial subordination

The status of non incorporated territory, as defined by the United States Supreme Court, implies that the US Congress is invested with 'plenary' powers over Puerto Rico.³² This means that, constitutionally, Congress has exclusive control over matters like immigration, citizenship, the currency, defence, foreign affairs, and the postal service, and has the power to, and in fact does, legislate over such fundamental aspects of life in the territory as communications, labour relations, the environment, commerce, finance, education, health and welfare, and many others. The Executive Department of the United States government exercises important functions and conducts operational activities in Puerto Rico. The US federal judiciary has jurisdiction over and decides upon important legal controversies emerging from activities or conduct occurring in or pertaining to Puerto Rico.

Despite this massive intervention in so many aspects of Puerto Rican life, Puerto Ricans residing in Puerto Rico do not vote for the President of the United States nor elect representatives to the United States Congress, except for a non-voting Resident Commissioner for Puerto Rico, who sits in the House of Representatives (Cf Ch II).

This obviously non-democratic arrangement is one of the fundamental reasons that lead to the conclusion that Puerto Rico is a colonial dependency of the United States. This fact has been stressed continuously since the early decades of the century by the independence movement³³ and has been at the core of the claim for admission into the Union made by followers of the statehood movement.³⁴ Even many supporters of the current 'Commonwealth' status, including influential leaders of the

Popular Democratic Party, find the situation problematic and have striven to obtain reforms that would, in their assessment, eliminate the most flagrantly undemocratic features of the system. Thus, during the 1989-1991 plebiscite discussion,³⁵ the PDP proposed various measures to increase the participation of the people of Puerto Rico in those decisions of the United States government that affect the island.³⁶

Jaime B Fuster, former Resident Commissioner of Puerto Rico in Washington, and now an Associate Justice of the Puerto Rico Supreme Court, explained the matter in the following terms to the US Senate Committee on Energy and Natural Resources during hearings held in San Juan in the Summer of 1989:

That even today the United States should stand accused of being a colonialist power by both those who favor independence and by those who favor statehood is largely due to this question of the applicability of Federal laws to Puerto Rico... To us it is necessary to do away with indiscriminate extension of Federal laws to Puerto Rico which occasionally hamper our development efforts. And we should also like to remove the cloud of doubt that hovers over the legitimacy of the Commonwealth relationship.

For both these practical and theoretical reasons, we need a mechanism that will allow for adequate consent and participation in Federal legislation not dealing with overriding national interests. (2 *Hearings* 6, 8).³⁷

Throughout this century the US government has been adamant in its refusal to augment that participation in any significant way (See, generally, Fernós Isern 1974), an attitude that was apparent also during the process that led to the scuttling of the plebiscite proposal in 1991.³⁸

2. The internal government of the colony

From the early days of the American occupation, Puerto Rican politicians of different persuasions sought to gain control of the internal governmental apparatus.

However, despite the proclamations heralding a new age of democracy and freedom, the United States soon showed itself reluctant to entrust the administration of the colony entirely to Puerto Rican hands. In fact, the metropolitan state was more inclined to recognise formally certain individual rights, than to release its direct control over the island internal governmental structure. Liberalism and democracy, it must be remembered, are not necessarily identical. And the governing elites of the American state always had made a point of reasserting the difference. The basic assumption that justified withholding control from the 'native population' was that Puerto Ricans were unfit for self-government. (Cf Fernández 1992: Ch 1).

After the initial two year period during which the island was governed by military commanders, the United States established a civilian government. The first such government consisted of a Governor, appointed by the President of the United States, a House of Delegates whose members were elected by qualified voters residing in the island, and an Executive Council, integrated by appointees of the US President.

The latter body had both executive and legislative functions, serving in effect as a second legislative chamber, in an obvious departure from the traditional American model of separation of powers. This structure would facilitate achieving the goal of devising an internal government with some degree of participation of the native elites while preserving as great a control as possible for the metropolitan power (Cf Fernández 1992: 19-21). As a result of continued pressure from the Puerto Rican

political elites, the Executive Council's legislative functions were abolished by the Jones Act of 1917, which established a bi-cameral legislature elected by popular vote.

In 1947 Congress authorised Puerto Ricans to elect their own governor. Since 1947 Puerto Rico has had six elected governors, three belonging to the Popular Democratic Party and three to the pro-statehood New Progressive Party.

The reform movement that culminated with the promulgation of the 1952 Constitution shifted the power to adopt the internal structure of the government to the Puerto Rican people, under the supervising eye of the US Congress. The Constitution has established a three-branch government, with a bi-cameral legislature and a Governor as executive officer, all elected by popular vote, and a Supreme Court, whose members are designated by the Governor, with the advise and consent of the Senate.

Puerto Rico has been engaging in party politics for more than a century. The first political party in the modern sense (the Liberal Reformist Party) was founded in 1870. Most political parties, since then, have forged their identities in great measure around the positions they take regarding the political status of the island.

The country has also had a long experience of general elections,³⁹ starting from the time of the Spanish colonial regime. From 1809 to 1898 there were twenty four such elections, to elect different types of functionaries, including representatives to the Spanish *Cortes* (or Parliament), when such representation was allowed (Bayrón Toro 1989: 3). Voting was severely restricted to some classes of people (*Op cit*: 4).

Under the American regime -- throughout the various phases of organisation undergone by the internal government structure -- there have been twenty eight general elections (*Cf Op cit*: 3).⁴⁰

The first four decades of American colonial rule were characterised by electoral practices fraught with irregularities, the purchase of votes, physical and psychological coercion and other corrupting activities. Despite this generally recognised fact, voter participation in the fourteen elections held from 1900 to 1936 averaged 74.47% (See Bayrón Toro 1989: 348). In 1940 the newly formed Popular Democratic Party strove to imprint a new meaning into the electoral process, presenting it as the vehicle for the oppressed masses to get rid of the old political bosses and to facilitate the needed social and economic transformation so many were claiming for. The definitive victory of the PDP at the polls in the election of 1944, repeated in 1948, and the subsequent social, economic and political reforms the Party was able to put in motion, with support from the Roosevelt and Truman administrations, gave credence to the argument put forward by the populist reformers that voting did make a difference. Since then voter participation in electoral events in Puerto Rico, especially general elections, has augmented even more. The fourteen general elections held from 1940 to 1992 have averaged a registered voter participation of 81.41% (See Bayrón Toro 1989: 349; CEE: 1).⁴¹ Notwithstanding occasional allegations of fraud, the results of the elections are generally accepted as valid, transitions from one government to another are peaceful, and, in cases of controversy, the judiciary's resolution of conflict enjoys a great degree of legitimacy. Of even more significance is the fact that voting has acquired a special mystique, a special value, for the majority of Puerto Ricans. Of course, it should not be forgotten that voting is closely tied with important material interests. The past fifty years have witnessed the development of a colonial welfare state, a situation which converts the state into a crucial actor in the economic and social life of the

community. This means that the results of electoral events, especially those that determine who controls the internal government, always involve high stakes, particularly for those whose daily lives and enterprises are most directly affected by governmental decisions.⁴²

These features of Puerto Rican internal democracy have coexisted with others that have acted as important constraints for the democratic process. First of all, Puerto Rican politics have exhibited even to this day a great measure of paternalism and *personalismo*⁴³ (See Lewis 1963: Ch 17). Political parties have relied heavily on patronage to preserve the loyalty of their followers. The strong charismatic leader is still the norm, rather than the exception; although there have been growing signs of dissatisfaction in this regard, including an increase in the number of 'independent' voters who cross party lines to endorse candidates of other parties, based on their performance as administrators or legislative leaders. Paternalism and *personalismo* may be the surviving political traits of a former cultural milieu, associated with the world of the *haciendas*. This, of course, is not an unfamiliar phenomenon in modern societies. As Habermas has indicated, the socio-cultural systems of many western societies have contained diverse blendings of pre-capitalist and bourgeois elements in their traditions (1988a: 32-33).

Furthermore, the democratic system prevalent in Puerto Rico -- at least for its internal governance -- is riddled with the limitations of all modern formal democracies. Citizens are in fact excluded from real, substantive, participation through various mechanisms and practices. Among them, a 'structural depolitisation' that relegates citizen participation to occasional voting, or even the public expression of protest, while entrusting real decisions to political, bureaucratic or technocratic

elites (Habermas 1988a: 36-37). 'The arrangement of formal democratic institutions and procedures,' argues Habermas, 'permits administrative decisions to be made largely independently of specific motives of the citizens'. 'This takes place through a legitimation process,' he adds, 'that elicits generalized motives -- that is, diffuse mass loyalty -- but avoids participation' (at 36). In fact, modern formal democracy 'counts now as only a method for selecting leaders and the accoutrements of leadership' (at 123). Formal democracy replaces the notion of self-determination of the people by a process intended 'to make possible *compromises* between ruling elites' (*ibidem*, emphasis in the original). The same tendency is observed in the Puerto Rican political system. Despite a certain populist rhetoric that became part of the codes for political communication with the masses since the middle of this century, real decision making (in the limited spheres over which the Commonwealth government can exercise control) has been effectively withheld from the population. More fundamentally still, modern political democracy constitutes only 'partial emancipation' (Marx 1987b: 138-9) inasmuch as it confines public participation to the 'public' sphere. As MacCormick has expressed it, echoing both Hegelian and Marxist perspectives, 'as long as the state stands apart and above civil society' there is only partial self-determination, or, to the degree that self-determination and democracy are equivalent, only partial democracy (Cf MacCormick 1991: 15).

The conclusion, then, is that even regarding the structure set up for the internal governance of the territory, the Puerto Rican political system is only partially democratic. It is so both because it still suffers from the paternalism and *personalismo* of old, and because it partakes of the characteristics of the new (i.e., the liberal form of state and government).

3. Effects of the (partially) democratic experience

Despite the shortcomings described above, the fact that the internal government of the territory has been structured according to the organising principles of modern representative democracies has had important legitimating effects.

First of all, it has produced a sense of popular participation. The fact that in general elections the population may express itself voting for parties which include in their platforms the three traditional alternatives to the political status problem -- commonwealth, independence or statehood -- has convinced many that the country's present relationship with the United States is the result of popular will. The situation described has helped generate the belief that the relationship with the metropolis -- though subordinate, therefore colonial in nature -- has been established by, and ultimately depends on, the will of the people. That will, however, always must be expressed within the limits of colonial legality. But the latter imposes strictures on ways of transforming the very social and economic conditions that operate to reinforce dependence, acceptance, 'consent'. 'Consent' is thus continually reproduced. The will of the people in the colony is conditioned, through the effect of heteronomously- determined needs, by the colonial situation. Therefore, that 'will' (as expressed through colonial legality) is usually to reaffirm the relationship. Acquiescence becomes the justificatory principle of the relationship of domination. It is colonialism by consent in its most elaborate and sophisticated version. (Cf Rivera Ramos 1991a: 120-121).

Secondly, this structure has provided a context for action. It constitutes the framework within which any 'legitimate' discussion and action regarding the colonial

question must be conducted. Even the forms of resistance to colonial rule are conditioned by the existing 'action-structures' (See chapter I) that both the metropolitan state, those who control the internal government structure and a substantial part of the population consider appropriate. Thus, many forms of revolutionary or 'radical' methods have been delegitimised.

Thirdly, there is a tendency to relate the existence of a democratic regime, however limited, to the American presence itself. In other words, the experience of democracy, for many, is the direct result of the American occupation of 1898. To the extent that formal democracy, elections, and other features of the political system are associated with the American presence, to that same extent that presence is legitimated (Cf Mattos Cintrón 1988: 28-29). Conversely, separation from the United States raises in many minds the specter of an anti-democratic future. The fears expressed by many people during the campaign leading to the 1991 referendum (fostered mercilessly by the supporters of statehood) were related not only to the possible loss of economic benefits and American citizenship (See Chapter IV), but also to the imagined threat that the exercise posed for the continuity of the 'democratic' experience.

Of course, this world view has been continuously reinforced by interpretations of Puerto Rican reality put forth by colonial elites that have emphasized, among other things, the desirability of modernisation American style, the virtues of American citizenship, the need to keep at bay the 'enemies of progress', i. e., those who advocate independence or socialism, and the superiority of the democratic nature of the colonial regime vis a vis the 'dictatorships' and 'corrupt governments' of Latin America.

American hegemony, then, is predicated not only on a perceived superiority of the American economic system, and its capacity to satisfy needs, but also on the perception that its political system is the best imaginable. This perception has seemed to be powerful enough to obliterate the reality of political subordination that is endemic to colonialism, whatever its guise.

E. THE IDEOLOGY OF THE RULE OF LAW

This section will address the effects of the ideology of the rule of law as a mechanism of moral and political persuasion coexisting with the repressive dimension and the other features of the colonial project analysed in the previous sections.

The rule of law has been given different definitions. One view, associated with neo-conservative doctrines in the Anglo-American world, seems to equate it with the notion of 'law and order', or with the idea that people should obey the law and be ruled by it.⁴⁴ The traditional liberal conception, on the other hand, emphasizes that the main purpose of the rule of law is to impose inhibitions on state power: the government should be ruled by law and be subject to it. This is the main sense in which E P Thompson uses the concept, in an attempt at reinvigoration of what he understands to be the original import of the doctrine (Thompson 1982).⁴⁵ From a sociological perspective, the rule of law has been defined as 'the use of legal forms to regulate and legitimize state power' (Ghai, Luckham and Snyder 1987: 651). In this chapter the concept will be used to encompass both the normative liberal conception, as explicated by Thompson and others, and the sociological definition just cited.

1. The theoretical debate and the critique of the rule of law

The principal debate in recent times regarding the rule of law in the Anglo-American world -- particularly among neo-marxist scholars -- has been sparked to a great extent by E P Thompson's defence of the liberal ideal of the rule of law as a universal value (Thompson 1982). For Thompson

...the rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful and mystify the powerless. They may disguise the realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very rhetoric that a radical critique of the practice of the society is developed... (Thompson 1982: 134).

According to the British historian, 'the inhibitions upon power imposed by law' are an important legacy, a cultural achievement of the agrarian and mercantile bourgeoisie of the seventeenth century, and of their supporting yeomen and artisans. Insofar as the rule of law itself imposes 'effective inhibitions upon power' and can be invoked for 'the defence of the citizen from power's all-intrusive claim' it must be regarded as an 'unqualified human good' (at 135). Even in the colonial context, Thompson argues, the rules and rhetoric of law imposed some constraints upon the imperial power (*ibid*). 'Even rulers', comments Thompson, 'find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just'.

The most important criticisms of Thompson's position do not deny the benefits and advantages of the rule of law for subordinated groups and peoples. Some of them, in fact, do little more than reemphasize what Thompson himself concedes: that law's effects are contradictory. Others go beyond this critique.

Bob Fine summarizes Thompson's contribution as reviving the liberal conception of the rule of law as a weapon against the growth of state authoritarianism, successfully demolishing the conservative view that the 'rule of law' means unconditional obedience to the state, and attacking with success the tendency on the left to dismiss civil liberties as a sham and law as merely a class instrument (Fine 1984: 8). However, he criticizes Thompson for 'reducing' law to one of its functions and neglecting the democratic limits of liberalism (at 8, 175). Valerie Kerruish echoes an aspect of Thompson's claim when she asserts that 'law can and has conferred benefits on people who are subordinated and devalued within existing social relations and it imposes constraints of some kind on dominant and empowered people' (Kerruish 1991: 3). 'We need not doubt', Kerruish remarks, 'that law is useful or beneficial to some people some of the time. Indeed it is hard to imagine how legal practices and institutions could have the vitality and persistence they do have if that were not the case' (at 19). Yet that does not warrant according to law a universal value (*Ibidem*). Sol Picciotto, on the other hand, declares that the strategy for subordinated groups, especially the working class, must be 'not to uphold the impossible ideals of the liberal forms of state and the "rule of law", but to insist on the necessity that it be transcended, in forms which challenge the dominance of capitalist social relations' (1982: 179).

What the debate certainly reveals, once more, are the complexities of the legal phenomenon, the paradoxical quality of law.

As it was pointed out in the Introduction of this chapter, one critique of Western imperial law has consisted in exposing how 'the ideal of the rule of law' was not extended to many colonial societies (Cf. Snyder and Hay 1987: 12; Kerruish 1991: 142). As Kerruish has perceptively noted, some of those criticisms entail the notion of 'a pure, uncorrupted form' of the law. Nonetheless, in so far as a regime based on the rule of law is better than one based on despotism, this flaw of imperial law had significant consequences for those subjected to the most extreme forms of authoritarian rule in the colonies. Due to the characteristics of the American colonial project in Puerto Rico, this chapter is concerned, however, with another type of critique: the extent to which the ideology of the rule of law, extended as it was to the colony, has operated to reproduce colonial domination.

2. The Puerto Rican experience

As it has been suggested already, in the course of their struggles against the authoritarian Spanish regime, the Puerto Rican liberals of the nineteenth century had become attracted to various versions of the ideal of the rule of law. In this sense, the organic intellectuals of the Puerto Rican socially hegemonic classes would be wilfull recipients of the Anglo-American notion of the rule of law as an organising principle of the country's political and legal system. Throughout this century the heirs of that liberal tradition -- regardless of their position concerning the future status of Puerto Rico -- have replicated, refined, and expanded the vision that the best form

of government is one subject to law. They have not been alone in the reproduction of this discourse. Many of those located in the socially and economically subordinated sectors of Puerto Rican society -- in their localised struggles and resistances against either the metropolitan state or the local elites -- have also tended to view the ideal (expressed in various forms) as something close to an 'unqualified human good'. The law is perceived by many, not only as a repressive mechanism, but as a shield against arbitrary power. It is not surprising, then, that the ideology of the rule of law has become firmly entrenched in the dominant discourse particularly since the political reforms initiated in the decade of 1940.

The constraints imposed upon the local government and the metropolitan state by this discourse on occasions have operated to benefit powerless individuals and groups. But it has operated also to legitimate the colonial regime in two fundamental ways.

First, the metropolitan state has sought to justify its exercise of power by reference to law. As it was seen in Chapter III, this was the primary function of the constitutional doctrine of territorial incorporation developed by the Supreme Court of the United States in the Insular Cases. The ideology of the rule of law, as a powerful element of the idea of legitimacy in the American political and constitutional order, compelled the American governing elites to obtain an authoritative statement from the highest tribunal of the land sanctioning their decision to install a colonial regime in the territories acquired after the Spanish American War. Of course, it must not be forgotten that this legal benediction came from another organ of the metropolitan state. This was not an independent arbitrator located in a position of neutrality between the metropolitan power and the people of the conquered territory.

Furthermore, the sources used as interpretive guides, the traditions examined, the interests weighed and the normative principles developed and applied were part of the history and the world view of the framers and rulers of the metropolitan state itself. Nevertheless, it was the shared understanding of the governing elites that the word spoken by the members of the Supreme Court would be the law of the land regarding the power that could be exercised over the new colonial dependencies. If that power could be grounded in the Constitution, it would have to be considered legitimate. Since then, the exercise of Congressional power over Puerto Rico has been justified with reference to the notion that the Constitution of the United States sanctions it. The law of the metropolitan state itself has become the justificatory basis for the exercise of imperial power (Cf Merry 1991: 890). Furthermore, specific exercises of power are considered legitimate only if sanctioned by Congressional legislation in accordance with established constitutional norms and procedures, or if they are undertaken pursuant to the constitutional prerogatives of the Executive or the Judicial Branch. In sum, the colonial regime is justified with the argument that it is sanctioned by law. In fact, for the metropolitan state, most of Puerto Rico's political elites, and substantial, if not most, segments of the population even processes aimed at dismantling colonialism must follow the law.

There is a second way in which the ideology of the rule of law has operated as a hegemonic mechanism for American rule. Many Puerto Ricans associate many of the things they value with the American presence in the island: from American 'modernity' to the ability to travel abroad. This is also the case with the 'rule of law'. In the popular imagination -- an imagination fueled by the legitimating discourses propagated by the ruling elites -- the 'freedom' that the rule of law

guarantees is possible because of that presence. Whether that perception is justified or not, the fact is that it operates as a powerful force in the domain of consciousness. It acts as a forceful mechanism in the process whereby consent to the relationship with the United States is reproduced.

ENDNOTES

1. The British dependencies or crown colonies in the Caribbean region include Anguila, Bermuda (geographically located in the Atlantic, but historically a part of the region), the British Virgin Islands, the Cayman Islands, Montserrat, and Turks & Caicos. The Dutch possession is a six-island federation known as the Netherlands Antilles (constituted by Curacao, Aruba, Bonaire, St. Marteen, Saba, and St Eustatius). French Guiana (on the Caribbean coast of the South American mainland), Martinique, and Guadeloupe are formally integral parts of the French nation, but their social, economic, political, and cultural conditions resemble very much those of the dependent territories of the region. Cf generally, Sunshine 1985: 163-170.

2. The imposition of American citizenship in 1917, discussed at length in Chapter IV, is a good example of an act of 'symbolic violence', an instance of coercion that, in the versatile manner in which law many times operates, eventually assumed a 'persuasive' character, becoming one of the key pillars of American hegemony.

3. Further description and analysis of the historical events described herein may be found in Lewis (1963), Picó (1986), Trías Monge (1981), Fernández (1988; 1992), Acosta (1987), Meléndez López (1989), and Nelson (1986).

4. See *Noriega v. Hernández Colón*, 88 JTS 141 and 92 JTS 85.

5. Estado Libre Asociado de Puerto Rico, Comisión de Derechos Civiles, *Informe - Discrimen y persecución por razones políticas: la práctica gubernamental de mantener listas, ficheros y expedientes de ciudadanos por razón de ideología política* (San Juan, P R, 1989).

6. See Fernández (1992: Ch 8). According to documents cited by Fernández the FBI's primary tactics in 1967 and 1968 consisted in 'confus(ing) the *independentista* leaders, exploit(ing) group rivalries and jealousy, inflam(ing) personality conflicts, emasculat(ing) the strength of these organisations, and thwart(ing) any possibility of pro-independence unity' (p 217).

Fernández concludes:

The electoral impact of this harassment and interference was felt in two primary areas. First, by creating dissension within the groups, agents helped avert the possibility that...independence activists would once again become a significant force in island politics.

Second, and more important for any understanding of the island from 1968 until

today, the FBI continued a policy of harassment that "began" with Muñoz's [the founder of the PDP and first elected Governor of Puerto Rico] enactment of La Mordaza in 1948. A youngster born in 1950 or 1960 grew up fearing the consequences of any independence activity. That fear became (and remains) an institutionalized part of Puerto Rican political life, and the FBI must assume a good degree of responsibility for helping the Populares strike fear into the heart of anyone considering an independence posture. (pp 217-218).

7. This assertion is supported by the findings and conclusions of the Puerto Rico Civil Rights Commission in its cited report (*supra* note 5). See also the concurrent opinions of Associate Justices Hernández Denton and Fuster Berlingeri in *Noriega v Hernández Colón*, 92 JTS 85, at 9656 and 9658, respectively.

8. Kimberle Crenshaw has suggested that the 'coercion of nonconsenting groups may provide an important reinforcement to the creation of consensus among classes that do accept the legitimacy of the dominant order', alluding specifically to the 'possibility that the coercion of Blacks may provide a basis for others to consent to the dominant order' in American society (Crenshaw 1989: 274).

9. For a discussion of the importance of rights claims among states in the international arena see Onuma (1989).

10. But see Postema (1989: 110), who argues that there is 'no logical barrier to speaking of rights of groups, classes, states, corporations, nations or families, which rights are not reducible to rights of members considered apart from their membership in the group...It is conceivable, then, that some rights might secure collective goods or interests'. This possibility is also raised from a marxist perspective by Issa Shivji, who claims that in the specific context of Africa the struggle for rights has to be reconceptualised so that the central demands be cast in terms of collective rights, particularly the 'right to self-determination' and the 'right to organise' (Shivji 1989: 283). In the context of international law there has been, since World War II, an emergence of the recognition of collective rights in the forms of 'rights of people' (Cf Onuma 1989: 144-145; Michalska 1991: 72-75). From the critics' point of view it may be argued that these arguments and developments represent only an apparent transcendence of classical individualism by replacing it with a new kind of 'group individualism' that, ultimately, separates one group from another, and precludes the formation of truly universal relations of solidarity. From the perspective of political economy, these phenomena may be explained as a reflection of the transformations involved in the development of corporate capitalism, on the one hand, and, on the other, the tendency towards a global economy based both on competitiveness and interdependency.

11. Kennedy, however, has later 'recanted' the fundamental contradiction analysis as a 'reified abstraction' (Gabel and Kennedy 1984: 15-16, 36).

12. Writing from another perspective, Mary Ann Glendon has described recently how American 'rights talk' enhances individualism, insularity, and the neglect of responsibility (See Sherry 1992).

13. But see Scheingold (1974: esp Ch 9), who argues that the claim of a right, particularly through litigation, implies a certain politicization of a demand, which may contribute to the formation of a collective identity, to the extent that the claim is made by groups of individuals who view themselves as sharing a common plight.

Suzanna Sherry has argued that many of the most important rights that eventually made their way into the US Constitution 'serve a communal or civic purpose'. 'Certainly many of the rights were necessary or useful to a deliberative republican citizenry (freedom of speech is one such right), and others offered "protection to various intermediate associations ...designed to create an educated and virtuous electorate"' (Sherry 1992: 498).

14. One of the best analyses of the political use value of rights has been provided by the American political scientist Stuart Scheingold. In his now classic *The Politics of Rights* (1974) Scheingold sees rights as political resources that can be employed for the effective activation and mobilisation of social groups to achieve social change.

15. A question Kerruish does not seem to answer is whether the 'moral' reason for taking rights seriously would imply that rights, in the end, do have a universal value, apart from their obvious specific use value in particularised political contexts.

16. *Hawaii v. Mankichi*, 190 US 197 (1903); *Dorr v. United States*, 195 US 138 (1904).

17. *Balzac v. Porto Rico*, 258 US 298 (1922); *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 US 1046 (1986).

18. *Bianchi v. Morales*, 262 US 170 (1923); *Secretary of Agriculture v. Central Roig*, 338 US 604 (1950); *Calero Toledo v. Pearson Yacht Leasing Co*, 416 US 663 (1974); *Examining Board v. Flores de Otero*, 426 US 572 (1976).

19. *Examining Board v. Flores de Otero*, 426 US 572 (1976); *Califano v. Torres*, 435 US 1 (1978); *Harris v. Rosario*, 446 US 651 (1980).

20. *Califano v. Torres*, 435 US 1 (1978).

21. *Segurola v. United States*, 275 US 106 (1927); *Torres v. Puerto Rico*, 442 US 465 (1979).

22. Former Associate Justice William Brennan's concurrent opinion in *Torres v. Puerto Rico*, 442 US 465, 474 (1979), adhered to by Justices Stewart, Marshall and Blackmun, contained the following expression: 'Whatever the validity of the old cases such as *Downes...Dorr...and Balzac...*, in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment -- or any other provision of the Bill of Rights -- to the Commonwealth of Puerto Rico in the 1970's.' (At 476).

For more detailed discussions of the matter see Leibowitz (1988), Helfeld (1986), Cabranes (1986), and Pérez-Bachs (1986).

One question the Supreme Court has refused to decide is by virtue of what clause of the United States Constitution do the 'due process' and 'equal protection' guarantees apply to Puerto Rico. The Fifth Amendment of the US Constitution applies only to the Federal Government, while the Fourteenth Amendment is addressed to the states. The issue is not without legal significance. In order for the Fifth Amendment to protect against actions of the Puerto Rican government, the latter would have to be considered no more than an extension of the 'federal' government. If the Fourteenth were the source of the protection, then Puerto Rico would be considered a sovereignty akin to a state of the Union. In a well known footnote in the *Calero v. Pearson* case, 416 US 663 (1974), Justice Brennan stated:

Unconstitutionality of the statutes was alleged under both the Fifth and Fourteenth Amendments. The District Court deemed it unnecessary to determine which Amendment applied to Puerto Rico...and we agree. The Joint Resolution of Congress approving the Constitution of the Commonwealth of Puerto Rico, subjects its government to "the applicable provisions of the Constitution of the United States,"...and there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law as guaranteed by the Constitution of the United States. (At 668-669, n 5, citations omitted).

In *Examining Board v. Flores*, 426 US 572 (1976), Justice Blackmun, writing for the Court, referred to Brennan's footnote thus:

The Court, however, thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection. *Calero-Toledo*, 416 U.S., at 668-669, n. 5. Once again, we need not resolve that precise question because, irrespective of which Amendment applies, the statutory restriction [under discussion]...is plainly unconstitutional. (At 601).

23. 39 (US) Stat at L 951, 8 USCA 731.

24. 64 (US) Stat at L 319, 48 USCA 731b (1950).
25. Cf Chapter II for a brief description of the process that led to its adoption.
26. Section 20 of the Constitution of Puerto Rico.
27. Public Law 447, 66 (US) Stat at L 327, 48 USCA 731d (1952). The requirement imposed by the US Congress on the Puerto Rican Constitutional Convention and the Puerto Rican people that Section 20 be excised from the Constitution can be considered another instance of 'symbolic violence'. It constituted an imposition, in the manner of rejection, of certain principles of social organisation.
28. See, for example, *Figueroa Ferrer v. ELA*, 107 DPR 250 (1978) (declaring that the right to obtain a divorce on mutual agreement, without stating the reasons for the request, is part of the right to privacy protected by the Constitution); *Soto v. Secretario de Justicia*, 112 DPR 477 (1982) (recognising the right to obtain certain information from the government as part of the freedom of speech guarantee).
29. Class and gender inequalities are still very profound. It is estimated that over 60% of Puerto Rican families live below the poverty level (Cf the 1992 Report on Poverty by the Governor's Council for the Strategic Development of Puerto Rico, p 28; the extent and nature of poverty in Puerto Rico is discussed extensively also in the film documentary *Pobreza y Desigualdad en Puerto Rico*, produced by professor Linda Colón, of the Faculty of General Studies of the University of Puerto Rico). Poor communities often bear the brunt of police brutality and, despite the existence of legal aid programs, acute problems of access to the courts are prevalent. In 1991 72% of the men convicted and under custody had been unemployed at the time of their arrest; 65 % did not have an occupation or trade; and one out of two had not obtained a formal education beyond the ninth grade. Among women convicted and in jail, 99.7% were unemployed at the time of their arrest; 93.4% did not have an occupation or trade; and four out of ten had not studied beyond the eighth grade. Among young adults, 81% of those in jail had been unemployed; 65% did not engage in any trade or occupation; their total family income came from government aid; the majority had been convicted for crimes against property; and 90% of the crimes had been motivated by economic reasons (1992 Report: 7).
- An increasing number of poor households are headed by women. Working women are still paid less than men for comparable work. Moreover, women are often victimised when they take part in judicial processes (Cf Vicente 1987;).
- Poor immigrants from nearby Caribbean countries, like the Dominican Republic, have been increasingly subjected to discriminatory practices and are often the object of bigoted remarks, both in private and in public, not only by ordinary citizens, but by officials in the highest positions in government.

30. This fact is made patently clear in a documentary produced by the Puerto Rican Bar Association under the title *Nosotros, el Pueblo de Puerto Rico*.

31. A paradigmatic expression of this belief can be found in the interview of a poor, black Puerto Rican, who lives in a public housing project, published recently in a cultural newspaper:

...I am a statehooder. I believe in permanent union between Puerto Rico and the United States...The United States has made me identify myself with freedom, with the kind of democracy that has always existed in that country, with the capital it generates. I have been a poor person who wants to get ahead, a person who believes in freedom of expression, which is fundamental to democracy. That made me become a statehooder. (Otero 1992: 3).

32. See the full discussion of the matter in Chapter III.

33. Cf the Statement by Rubén Berríos Martínez, President of the Puerto Rican Independence Party, to the Senate Committee on Energy and Natural Resources in 1 *Hearings* 143.

34. See, for example, the Statement by former Governor Carlos Romero Barceló to the Senate Committee on Energy and Natural Resources in 1 *Hearings* 113.

35. See Chapters III and IV for more detailed discussions of the process that took place during 1989-1991 as a result of the proposal to hold a plebiscite in Puerto Rico to 'solve' the status question.

36. Cf Title IV of S 712, 101st Cong, 1st Sess (1989).

37. Similar comments were made by such PDP stalwarts as former Resident Commissioner (and former President of the University of Puerto Rico) Jaime Benítez, the President of the Puerto Rican Senate, Mr Miguel Hernández Agosto, and the Speaker of the Puerto Rican House of Representatives, Mr José R Jarabo (See 2 *Hearings* 41, 63 and 83).

38. Before reporting favourably on Senate Bill 712, one of the original plebiscite bills, the Senate Energy and Natural Resources Committee eliminated from it a provision to grant non-voting representation to Puerto Rico in the US Senate and diluted significantly, almost to the point of obliteration, the PDP proposal that Puerto Rico have a greater say in federal decision making (García Passalacqua and Rivera Lugo 1990).

39. 'General elections' are those whose purpose is to elect the officials of the government, be they functionaries of the internal government or representatives or delegates to the government of the metropolitan state (Cf Bayrón Toro 1989: 2-3).

40. The cited work covers elections held until 1988. The most recent general election, as of this writing, occurred in 1992.

41. The CEE is the Puerto Rico State Electoral Commission. The full citation of the report referenced here is *Estado Libre Asociado, Comisión Estatal de Elecciones, Resultados Finales: Elecciones Generales 3 de Noviembre 1992*, 27 January 1993 (San Juan, P R).

42. Regarding the political status question there has been only one occasion in which Puerto Rican voters have been asked in a plebiscite to express their preferences. This occurred in 1967. However, the plebiscite was organised by the Puerto Rican government, the US government had not truly bound itself to accept its results, the United Nations nor any other international organisation was involved, it was boycotted by the independence movement, and voter participation was relatively low. Although 60% of those who voted expressed their preference for an 'enhanced' Commonwealth status, no concrete measures have been adopted by the US Congress afterwards to increase effectively the degree of autonomy of the island.

43. By *personalismo* is meant an attitude that accords greater importance to the personality of the leader than to his or her ideas or programme.

44. Cf the discussion in Picciotto 1982: 169-170. Here I have drawn also from a lecture delivered by M D A Freeman, entitled 'The Rule of Law: Liberal, Marxist and Neo-Marxist Perspectives', on 20 July, 1990, as part of the Anglo-Soviet Symposium sponsored by University College London.

45. References here are to Thompson's concluding chapter in *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), as it appears, in extracted form, under the title 'The Rule of Law', in Beirne and Quinney (1982: 130-137).

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