

This article was downloaded by: [Boyd, Christopher M. J.]

On: 7 December 2009

Access details: Access Details: [subscription number 917476683]

Publisher Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Critique

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t741801732>

Can a Marxist Believe in Human Rights?

Christopher M. J. Boyd

Online publication date: 07 December 2009

To cite this Article Boyd, Christopher M. J.(2009) 'Can a Marxist Believe in Human Rights?', Critique, 37: 4, 579 – 600

To link to this Article: DOI: 10.1080/03017600903205732

URL: <http://dx.doi.org/10.1080/03017600903205732>

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: <http://www.informaworld.com/terms-and-conditions-of-access.pdf>

This article may be used for research, teaching and private study purposes. Any substantial or systematic reproduction, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

Can a Marxist Believe in Human Rights?

Christopher M.J. Boyd

This article seeks to highlight an old question which has a renewed importance in light of the contemporary domination of emancipatory politics by the human rights discourse. In it I examine the nature of the concept which we call 'human rights' and the objections to its validity which Marxists commonly raise. It pays particular attention to the ambiguity in the Marxist treatment of the human rights discourse, the difference between the general concept and the current liberal conception which dominates, and the role of law where human rights are theorised as legally protected political claims. I argue that the question is more complex than it first appears and that seeking too simple an answer may run the risk of inadvertently replacing Marxist critique with a distinctly a-critical dogmatism.

Keywords: Liberal Conception; Human Rights; Emancipation; Law; Marxist Critique; Ambiguity

The Question

Can a Marxist believe in human rights? The question appears simple, inviting an unambiguous answer. However, this question has a complex past: although Karl Marx himself tackled the issue in the early 1840s in his review of Bruno Bauer's *On the Jewish Question*, it is one which remains relevant today. That it is such an enduring question is not the only reason to doubt its apparent simplicity. Another is the weight this topic has had in the writings of academics and activists throughout history. Marxist and human rights discourses have existed, and evolved, side by side, despite there being no *a priori* conceptual link between them. The human rights discourse is one which is bound up with questions of law and its relationship with justice, ethics and morality while Marxism is concerned primarily with the economy as the 'base' on which all the other elements of society rest. Nevertheless, while Marx himself made little mention of law, even in criticism, he felt that the relationship between Marxism and human rights was important enough to merit his attention, possibly because the law-as-institution, which exercises the coercive power of the state, is at the core of the

Marxist 'denunciation of exploitation and oppression under conditions of capitalist production'.¹

On the Jewish Question can be considered almost an obligatory starting point for any attempt to tackle this important topic as it gives an insight into Marx's own views. What is important, however, is not to see this piece as both the start and end of a discussion on this question. To restrict oneself to Marx's own writings may lead to blindness not only to the full extent of the answer, but also to the nature of the question being asked: after all, the question is not 'could Marx have believed in human rights', but 'can a Marxist believe in human rights'. These are similar but crucially different. The writings of Marx are the core around which Marxist thought is built, but much has changed since Marx's time, both in the world and in the politics and theories of left-wing thinkers and activists. While a conclusive statement on Marx's view of human rights might well be of great historical and theoretical interest, it would only provide a partial answer to their compatibility with Marxism. Dogmatic adherence to Marx alone is not required of Marxists, and one may accept that Marx's writings are not perfect and that additions and changes can be made without having to step outside the conceptual space which Marxism inhabits. One reason against dogmatic adherence on this issue is that Marx's own writings are not always consistent. In a letter to Friedrich Engels he expresses regret for using the word 'rights' in his drafting of the *General Rules of the International Working Men's Association*, but justifies it by explaining that it was placed in 'such a way that [it] can do no harm'.² Even if Marx is referring to the *word* and not the right itself as doing 'no harm', this seems to contradict his statement in *Critique of the Gotha Programme* in which he says that rights have 'become obsolete verbal rubbish, while again perverting . . . the realistic outlook'.³

The depth of ambiguity left by Marx in the field of rights critique may be seen as part of the reason why the different strands of Marxist thought have such very different views on bourgeois law. These range from a view 'that denounces law as merely reflecting exploitative economic relations of production, a mere instrument of oppression of the working class',⁴ to a belief in 'the "relative autonomy" of law from the economic base'⁵ which sees law still having value for the proletariat whether substantial or merely strategic. Although the instrumentalist view is often attributed to Marxists, few in reality adhere to this in its most simplistic formulation. There are 'both empirical and theoretical reasons why Marxists should avoid associating themselves with crude instrumentalism',⁶ one of which is that it fails to account for the importance of the fact that 'power is presented not as brute power but as

¹ S. Veitch, E. Christodoulidis and L. Farmer, *Jurisprudence: Themes and Concepts* (London: Routledge-Cavendish, 2007), p. 227.

² K. Marx and F. Engels, *Selected Correspondence* (Moscow: Foreign Languages Publishing House, n.d.), p. 182.

³ K. Marx and F. Engels, *Selected Works*, Vol. 1 (Moscow: Foreign Language Publishing House, 1962), p. 25.

⁴ Veitch, Christodoulidis, and Farmer, op. cit., p. 230.

⁵ Ibid.

⁶ H. Collins, *Marxism and Law* (Oxford: Oxford University Press, 1982), p. 63.

authority, justified, fair and creating obligation rather than obliging through force'.⁷ Such deceptive legitimization may be called ideological for through it oppression is 'presented in an emancipatory idiom and redeemed in the process'.⁸ This presentation of the conservative or even reactionary as revolutionary has led Antonio Negri to say that 'we find ourselves . . . with a revolutionary tradition that has pulled the flags of the bourgeoisie out of the mud'.⁹ This issue of emancipation is an important one; if human rights are not emancipatory, but merely present themselves as such, Marxism must be dissociated from them. However, if human rights do contribute towards emancipation, Marxist critique must work to ensure their continued compatibility.

Steven Lukes, an academic whose work is important in this context, does not examine these different Marxist strands, but focuses almost exclusively on Marx himself and what he sees as a core Marxist tradition, which is limited to a small number of well-known Marxists, including Trotsky and Lenin. He devotes a chapter of one of his books to whether a Marxist can believe in human rights and to why this question is important, beyond the purely academic motivation to seek understanding. The effort which has been exerted towards answering the question may indicate why it is important that it be understood to be complex, but it does not explain why we should be interested in it in the first place.

Why Ask the Question?

Having explored the nature of this question, it is, nevertheless, important to provide a justification for why it should still be asked. The human rights discourse plays an important and visible part in contemporary politics, so much so that some claim that we live in an 'age of rights' where political movements are increasingly turning towards the legal protection of human rights in order to confer on their claims a measure of legitimacy and institutional efficacy. The times when these rights are asserted 'arise mostly when they are threatened, restrained or suppressed',¹⁰ and it is often officially socialist countries which are now accused of abusing human rights. In China, for example, the empty rhetoric of being in a 'transitional' proletarian dictatorship is used to justify the banning of 'any serious theoretical work on how the power of state agencies may be limited and controlled in the "higher phase of socialism"',¹¹ which contradicts central ideas in both the human rights *and* Marxist discourses. No discourse can become a dominant force in the political sphere without generating controversy and inviting intensive critique, especially when it justifies its pre-eminence on the basis of providing an emancipatory vocabulary. Marxism has

⁷ Veitch, Christodoulidis, and Farmer, *op. cit.*, p. 232.

⁸ *Ibid.*, p. 233.

⁹ Negri cited in *ibid.*

¹⁰ A.J. Lien, 'A Fragment of Thoughts Concerning the Nature and the Fulfilment of Human Rights' in UNESCO *Human Rights: Comments and Interpretations* (London: Allan Wingate, 1949), p. 24.

¹¹ J. Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987), p. 126.

traditionally provided a critique of human rights and, in spite of the resurgence of capitalist liberal-democracy in once-socialist states, Marxist analysis remains an important lens through which to view the issues of emancipation. The crucial question facing the human rights discourse is ‘whether rights can and do still retain their radical character, as a weapon for the powerless in the struggle against oppression’.¹²

Just as human rights face issues of a changing political landscape, so too does Marxism. It is only through immanent critique and self-reflection that Marxism will ensure its continuing relevance in the modern world, mobilising ‘potentials for change that subsist, but remain unrealised, in current conditions’.¹³ An important factor in the current conditions for a Marxist critique of rights is that Marxist activists are themselves ‘not reluctant to use the language of “human rights”—especially in struggles against reactionary regimes’.¹⁴ While this suggests that Marxists may believe in human rights, it is really only evidence that rights rhetoric can be useful in the struggles in which Marxists are engaged; it does not mean that human rights are being used as anything more than rhetorical tools, in the knowledge that rights themselves are incompatible with Marxism. For those who honestly believe in human rights, it is important not to allow ‘the language of rights to degenerate into a sort of lingua franca in which moral and political values of all or any kinds may be expressed’¹⁵ (a criticism which could be levelled at Marxists who use rights-talk as a tool without ensuring its compatibility with Marxism). A persuasive indicator of honest belief in rights by Marxists is that ‘the establishment and protection of basic civil and political rights often depends on the existence of a strong and well-organised labour movement, and that Marxist parties and groups have often played a central role in achieving this’.¹⁶ While it is entirely possible that Marxists could use rights rhetoric without believing it, it is far less plausible that they should work directly to implement and maintain rights if they did not believe, at least to some extent, in the substance behind the rhetoric. It is clear, therefore, that many Marxists *do* believe in human rights. This would appear to be the unambiguous answer originally invited by the question ‘can a Marxist believe in human rights?’ Yet people are quite capable of having incorrect, or conflicting beliefs—what is being asked is not merely an empirical question. This is why Lukes envisions that the question itself needs refinement before an attempt at an answer can be made. This is also why an answer is important: have these Marxists been tricked into working for the enemy?

¹² Veitch, Christodoulidis, and Farmer, *op. cit.*, p. 27.

¹³ S. Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 2000), p. 136.

¹⁴ S. Lukes, *Moral Conflict and Politics* (Oxford: Clarendon Press, 1991), p. 175.

¹⁵ Waldron, *op. cit.*, p. 2.

¹⁶ Lukes, *op. cit.*, p. 175.

What Question Are We Asking?

In recognising the empirical fact that some Marxists do believe in human rights, Lukes is forced to re-frame his question to read: ‘*Why shouldn’t a Marxist believe in human rights?*’¹⁷ This begins a process of reformulation of his question. Marx said that ‘to formulate a question is already to solve it’¹⁸ and Lukes is indeed thus pointed towards a particular answer. The answer, however, is one which is rendered problematic by this very reformulation. Lukes skips over what might be considered the next logical refinement of the question: whether a Marxist can consistently believe in both Marxism and human rights, because he freely admits that this is possible.¹⁹ Lukes finally concludes that the question ought to be ‘can those whose beliefs and affiliations are Marxist believe in human rights and remain consistent with central doctrines essential to the Marxist cannon—by which I mean the ideas of Marx, Engels, and their major followers, including Lenin and Trotsky, in the Marxist tradition?’²⁰

This formulation differs significantly from the original question’s elegant, if misleading, simplicity. It also raises a number of questions, of which Lukes is clearly aware. In particular, it is not clear what difference Lukes sees between general consistency with Marxism and specific consistency with the ‘central doctrines’ of Marxism, or even ‘how the “Marxist tradition” is properly to be identified and interpreted, who are the “true Marxists”, and so on.’²¹ Lukes, however, believes that these questions are easily answered because of the ‘unambiguous unity of view in the mainstream Marxist tradition which can be identified both at the level of explicit statement and implicit theory.’²² This, however, is far from being an unproblematic statement: it seems to be more of an assumption of Lukes rather than a reasoned conclusion. It ignores, for example, the divergent Marxist schools of thought on Law’s relationship to Marxism. There remain issues, indeed, which Lukes fails to raise, far less answer.

Why is the Marxist tradition for Lukes limited to pre-Second World War thinkers? Why are Lenin and Trotsky specifically exalted to a level with Marx and Engels in questions of Marxism? It could surely be questioned whether Lenin kept closely enough to Marx’s ‘explicit statement and implicit theory’²³ to justify his ideas being set up as canon.²⁴ To accept Lukes’ view of Lenin’s theorising—that it is so similar to that of Marx as to make Lenin’s inclusion as part of the ‘central doctrine’ of Marxism

¹⁷ Ibid., p. 174 (emphasis in original).

¹⁸ K. Marx, ‘On the Jewish Question’ in D. McLellan (ed.), *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977), p. 40.

¹⁹ Lukes, op. cit., p. 175.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ It has even been argued that core features of Leninism owe more to Russian Populism than Marxism. See A. Unger, *The Totalitarian Party: Party and People in Nazi Germany and Soviet Russia* (London: Cambridge University Press, 1974), p. 28.

unproblematic—would render the widely recognized branch of communism known as ‘Marxism-Leninism’ a tautological description. Such a narrow formulation of who is to be included in this selective group of ‘true Marxists’ risks overdetermining any possible conclusion, for the contention that human rights are compatible with Marxism ‘finds precious little basis in Marx’s work subsequent to 1844 and precious little support in the writings of his immediate followers’,²⁵ though not necessarily for reasons which remain persuasive today.

Answering the Question

Marx’s own answer is an important feature of any serious attempt to tackle such an important issue, but *On the Jewish Question* is a relatively short article and there is little room for Marx to provide a detailed discussion of all the important points. For this reason other texts, some which themselves take *On the Jewish Question* as their starting point, will form an equally important part of my analysis.

The Nature of Human Rights

In asking whether Marxism is compatible with human rights, it is inevitable that one will have to define what one means by rights. This is more than a formality—the definition is important as a basis for analysing their relationship with Marxism. One possible, and common, definition—Lukes provides an example by Feinberg²⁶—emphasises their fundamental, universal and unconditional nature. However, this is problematic—many rights depend ‘for their implementation on the availability of resources’²⁷ and thus cannot be ‘absolutely exceptionless’.²⁸ This is true not only of positive social and economic rights, that might be considered the most likely candidates for being Marxist-compatible, but also traditional negative rights insofar as they may require complex and costly institutional systems of enforcement. Also, rights are often in a conflicting position *inter se*,²⁹ necessitating balancing and even a ‘trumping’ of certain rights over others. This does not render the ‘weaker’ rights as less-than-rights, and highlights that a belief in human rights does not require that all rights be considered equal; Marxists may legitimately favour certain rights over others without rendering their belief meaningless.

²⁵ Waldron, *op. cit.*, p. 126.

²⁶ J. Feinberg, *Social Philosophy* (Englewood Cliff: Prentice-Hall, 1973), p. 85.

²⁷ Lukes, *op. cit.*, p. 176.

²⁸ *Ibid.*

²⁹ For example, the contest in the modern world of (especially tabloid) journalism between the right to free speech and the right to privacy.

Distinctions within Human Rights

The relationship between different rights is a topic which, although not explored in Marx's text itself, is touched upon and may be considered one of the most important points in answering the question. In his review Marx identifies human rights 'in their authentic form'³⁰ as being the rights imagined in the revolutions of America and France. This should not be taken as simply a clarification of what 'genuine' rights are, as opposed to some sort of class of quasi-rights; it may be taken as the basis for an argument that there is more than one type of right. This is a very important argument indeed, even before the distinction between types of rights is explored, for those who analyse the interrelationship between Marxism and human rights have a tendency to consider human rights as an internally homologous category to be accepted or dismissed as a whole, despite the developments in the human rights discourse since the time of Marx.

For Marx, writing in the 1800s, it was only natural to concentrate on the 'rights of man'—first-generation civil rights—and not on economic and social rights which did not come to the fore until claimed by socialist movements themselves.³¹ While it is not true that later generations of rights simply superseded these civil rights—after all, the 1936 Soviet Constitution outlined 'such familiar rights as freedom of conscience, freedom of speech, and freedom of the press and public assembly'³² in addition to economic rights—neither is it accurate to 'suppose that the new and the old can simply be put side by side without reacting mutually on each other'.³³ To take Marx's criticisms of natural rights to apply to more modern conceptions of rights is to assume that the differences between rights are insignificant, and this risks ahistorical theorising.³⁴ Even some who are critical of combining Marxism and human rights recognise heterogeneity of categories of rights to an extent—for example, recognising that believing in natural rights requires far more intellectual 'commitment'³⁵ than believing in human rights—yet this is often absent from their substantive arguments, something which leads to under-theorised conclusions in this regard.

Acceptance of the modern recognition of the heterogeneity of rights is an important step in the realisation that whether Marx believed in human rights is a different question from whether a Marxist can believe in human rights. There has been a shift from the 'first generation' civil/political rights (claimed by individuals) criticised by Marx, through the addition of economic/social rights (claimed by groups), to the 'third generation' solidarity rights (claims affecting the whole of humanity) that are to the forefront of so much of the modern rights discourse.³⁶ The

³⁰ Marx, 'On the Jewish Question', op. cit.

³¹ R.K.M. Smith and C. Anker, *The Essentials of Human Rights* (London: Hodder Arnold, 2005), p. 153.

³² E.H. Carr, 'The Rights of Man' in *UNESCO Human Rights: Comments and Interpretations* (London: Allan Wingate, 1949), p. 20.

³³ Ibid.

³⁴ Marx, 'On the Jewish Question', op. cit.

³⁵ Lukes, op. cit., p. 176.

³⁶ Veitch, Christodoulidis, and Farmer, op. cit., p. 32.

case for second and third ‘generations’ of rights is based on ‘indivisibility of rights’³⁷—essentially the idea that the basic standard of living they demand is a prerequisite for the enjoyment of civil/political rights and cannot be thought of as merely additional. Not to accept this, it is claimed, is to perpetuate an individualistic, non-organic, imperialistic, predominantly white, Western liberal conception of human rights.³⁸

Another important categorisation of rights is an original Marxist one which separates rights into the ‘rights of man’³⁹ and the ‘rights of citizens’.⁴⁰ The ‘rights of man’ are the rights in a civil society that is artificially separated from the political sphere (which is set up as a ‘framework exterior to individuals’)⁴¹ and in which man operates not as a communal being but as an egoistic individual. Through these rights man is ‘separated from other men and the community’⁴² and this limiting separation amongst men, and between the political and the civil, is itself protected and promoted until each man sees others as ‘not the realization but the limitation of his own freedom’.⁴³ This separation is the moment of the formation of the political state and while the rhetoric of the political sphere is that it is set above civil society, in fact ‘the citizen is declared to be the servant of egoistic man’.⁴⁴ Politics is reduced to the protection of individualistic ‘rights of man’ and indeed must itself be sacrificed as soon as it ‘contradicts its end’.⁴⁵ If Marxism is compatible with human rights, it is the task of the Marxist to determine how rights may be involved in taking ‘the abstract citizen back into himself’,⁴⁶ as Marxism requires. The ‘rights of man’ are unquestionably incompatible with Marxism in their operation, but what of the ‘rights of citizens’? The ‘rights of the citizen’ are rights to participate in forming the general will (the free communication of thoughts and opinions, the right to demand an account from public officials, etc.) because these rights cannot be conceptualised in terms of isolated man-as-monad or egoistic man acting ‘without regard for other men’.⁴⁷ Rights such as these ‘are only exercised in community with other men’.⁴⁸

This provides a clear criterion by which to determine which rights may be compatible with Marxism and which are inherently incompatible. The distinction itself suggests that Marx saw the apparent incompatibility of rights and Marxism to be due to the conception of rights and not something inherent with rights as a concept. The movement towards ‘distinguishing between the *concept* and the

³⁷ Ibid., p. 33.

³⁸ Ibid.

³⁹ Marx, ‘On the Jewish Question’, op. cit.

⁴⁰ Ibid., p. 52.

⁴¹ Ibid., p. 54.

⁴² Ibid., p. 52.

⁴³ Ibid., p. 53.

⁴⁴ Ibid., p. 54.

⁴⁵ Ibid., p. 55.

⁴⁶ Ibid., p. 57.

⁴⁷ Waldron, op. cit., p. 130 (quoting Marx).

⁴⁸ Ibid. (quoting Marx).

conception of something'⁴⁹ may therefore be of some value in evaluating rights. It should act as a warning against assuming that valid criticisms of the current liberal-democratic conception of rights, or indeed any particular conception, are automatically applicable to the concept itself. Although rights as a concept may indeed have inherent flaws, it is important not to mistake these for problems which arise from the content of specific sets of rights, or context in which these rights are claimed or exercised.

Relationships Between Categories of Human Rights

To understand better this distinction between the 'rights of man' and 'rights of citizens' it is important to look at the relationship between them. It may be argued that Marx sees that 'the rights of man and the rights of the citizen are *correlatives* which mark a division between man's existence as an independent egoist in civil society and his idealised life as a citizen.'⁵⁰ As such, 'in communism, where the concept of the egoistic, isolated individual is no longer applicable, the correlative concept of man as citizen, along with the notion of the rights of the citizen will no longer apply.'⁵¹ This simple view, rightly, does not even satisfy critics of Marxism's relationship with human rights because 'it does not follow that a communist community will not be constituted in part by rights *rather like* those of the rights of the citizen (in this special sense) under capitalism.'⁵² It would appear wildly utopian to assume that there will be no provision for the protection of people's 'participation in articulate decision-making'⁵³ in such a community, or any need for such.

It has been suggested that Marx was 'convinced that the rights of man were bourgeois and egoistic, and that the rights of the citizen considered apart from them [sic] were empty and considered alongside them were tainted to a considerable extent by the atomistic flavour of capitalism.'⁵⁴ This reading of the rights of citizens is problematic in that it would appear to leave no conceptual room for them at all, and certainly renders implausible Marx's positive attitude towards them.

Marx could well have simply *criticised* the 'rights of man' but instead engaged in rights *critique* in order to create space for an emancipatory conclusion also couched in terms of rights. This critique, unlike criticism which uses external criteria by which to judge, uses Right's own standards to reveal its inability or unwillingness to live up to its claims and to explore new possibilities.⁵⁵ It is important that 'though Marx foretold the end of capitalism, he never wrote much about the shape or structure of the socialist society he expected to take its place.'⁵⁶ Marx saw the move to socialism as

⁴⁹ Ibid., p. 179 (emphasis in original).

⁵⁰ Ibid., p. 132.

⁵¹ Ibid., pp. 132–133.

⁵² Ibid., p. 133.

⁵³ Ibid.

⁵⁴ Ibid., p. 135.

⁵⁵ Marks, op. cit., p. 25.

⁵⁶ Waldron, op. cit., p. 124.

inevitable and so saw no need to pre-empt it by ‘writing recipes for the cookshops of the future.’⁵⁷ This reticence leaves open the question of whether rights may feature in this new society; it opens up the discourse of rights to change from within. It is the essence of critique that a single, contained, moment of critique is never enough—it must remain an unbounded, continuous process of opening possibilities to retain its emancipatory character.⁵⁸ It is therefore not enough for a set of Marxist-compatible rights to be formulated and enacted; even these rights must continually be critiqued to ensure that they do not take on the *form* of emancipation while becoming conservative in practice. What must be guarded against is the ‘collapse’⁵⁹ into regulation (measures which ‘guarantee the stability of expectations’)⁶⁰ of emancipation (aspirations upsetting those expectations in order to eradicate injustices). By invoking a regulatory idiom of legal rights, the Marxist struggle for emancipation risks being colonised in this way if rights are given too much importance without adequate and ongoing critique.

Emancipation through Human Rights

The separation of the civil and political realms is related to the issue of emancipation. Bruer advocated political emancipation—the equal participation provided by the state for involvement in the state—and neglected human emancipation. Marx viewed Bruer’s solution to ‘the Jewish question’ as being inadequate precisely because it ignored ‘*what sort of emancipation*’⁶¹ it is that is owed to humanity⁶² (just as it ignored the distinctions between political and civil life, and between man as communal citizen and private bourgeois.).

Marx sees political emancipation as ‘abstract, limited and partial’⁶³ insofar as ‘a state can liberate itself from a limitation without man himself being truly free of it.’⁶⁴ It is achieved through the state as a medium, one which is self-limiting since using the state as a means to freedom cannot allow one to be free of that state. Rather than providing a meaningful emancipation, this results in a hidden form of oppression-presented-as-emancipation: all the impediments to equal participation still exist in the sphere left behind by politics when it locates itself above material social relations. It is solely political emancipation which creates the situation where man ‘leads a double life’⁶⁵ in the political and civil communities. The problems of political emancipation are seen by Marx not as signs of incomplete political emancipation, but

⁵⁷ Ibid., p. 125.

⁵⁸ Marks, op. cit., p. 26.

⁵⁹ B. de Sousa Santos, *Toward a New Legal Common Sense* (London: Butterworths LexisNexis, 2002), p. 9.

⁶⁰ Ibid., p. 2.

⁶¹ Marx, ‘On the Jewish Question’, op. cit.

⁶² Ibid., p. 39.

⁶³ Ibid., p. 44.

⁶⁴ Ibid.

⁶⁵ Ibid., p. 46.

an inherent inadequacy which 'lies in the nature and category of political emancipation',⁶⁶ even when completed.

This is problematic for Marxists who would believe in human rights. If emancipation via the state is limited, how can rights be made concrete outwith a system of state enforcement? It also appears to render rights alien to Marxism insofar as they claim to create equality in and of themselves even in the face of continuing material inequality and insofar as they are political claims residing in the artificially abstract realm of politics. However, to believe in human rights is it necessary to view rights in this way as ends unto themselves? Are Marxists not *more* committed to human rights when they regard their formal existence as *necessary but not sufficient* to achieve full, human emancipation, than those who would regard the formal equality of rights as emancipation enough?

The Nature of 'Belief' in Human Rights

An issue which ties in closely with the nature of rights is the nature of belief in rights. It has been argued that 'to believe in [human rights] is to be committed to defending them, even (or rather especially) when one's goals or strategies are not to be served, and indeed may be disserved, by doing so'.⁶⁷ This would appear explicitly to set rights against a commitment to the goals of Marxism, and is an important element in Lukes' account of why a Marxist cannot believe in human rights. However, one might ask whether rights are, or need to be, 'constraints upon goal-directed behaviour'⁶⁸ or whether they can be used in achieving Marxist ends without rendering them meaningless *qua* rights. This phrase 'or rather especially' is important: it seems to suggest that rights which support a goal are somehow *less than rights* because they do not constrain the person to whom the rights attach—or that belief in goal-supporting rights is not *real* belief. This appears to be a self-serving and ultimately problematic definition insofar as it renders the question always-already answered: no right under this definition could be compatible with Marxism, because if a belief in a right is compatible it is preemptively disqualified as a genuine right or genuine belief.

It has been asked whether a Marxist is prepared to defend rights against the aim of bringing about a state in which rights will no longer be required.⁶⁹ However, this creates a contradiction which I would argue does not exist—defending rights (which recognise the need for the protection of people against unequal forces) can sit comfortably alongside the aim to rid the world of the need for rights by removing the foundational problem of inequality. A point which Lukes makes, ostensibly as a

⁶⁶ Ibid., p. 51.

⁶⁷ Lukes, op. cit., p. 177.

⁶⁸ Ibid., following Nozick's idea of rights as 'side constraints'. See R. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), ch. 3.

⁶⁹ Ibid., p. 187.

criticism, is that Marxists who defend rights often do so in situations where there is no conflict between the goals of their struggle and the rights they defend. This may be countered with the following observation, however banal: that some rights can be compatible *at all* with Marxist goals is a point which weakens the thrust of Lukes' argument. A Marxist need not accept *all* rights, or indeed the current conception of rights, in order to believe in the general concept of rights.

In accepting Robert Nozick's conception of rights as 'side-constraints', Lukes also accepts that rights 'express the inviolability'⁷⁰ of people where violation may lead to a greater good, in this case Marxism, and that this violation is prohibited because there is 'no *social entity* with a good that undergoes some sacrifice'⁷¹ for a greater common good, only individuals. The argument is that individuals *qua* individuals cannot be asked to bear 'costs that benefit other persons more',⁷² yet this does not recognise that Marxism is *inherently* about correcting the exploitative inequality in the bearing of costs that exists in capitalist society. Nozick's argument also requires the untenable position that there may be common, non-individual goods without there being communities (except as reducible to individuals) to which these goods accrue. Rights are, in this situation, set against goods as they were set against goals previously: this does not allow for the possibility of rights themselves being a greater social good (insofar as they may create material rather than purely formal equality).

Marxist Criticisms of Human Rights

While the human rights discourse has had tangible positive results, it also carries with it problems of which even activists outwith Marxism are aware.⁷³ These problems are not necessarily inherent within the rights discourse and instead may arise only when rights are '*misused, distorted, or co-opted*'.⁷⁴ However, 'we should be suspicious if costs are *always* attributed to people and forces outside the movement'.⁷⁵ To produce an intellectually satisfying answer to the question of this article requires sensitivity to the possibility that 'the very idea of rights has features which are uncongenial to a socialist'⁷⁶ and requires that these features are explored. As has been said, it is important to 'understand what someone might be getting at when she repudiates the idea of rights altogether'⁷⁷ as some Marxists do.

⁷⁰ Ibid., p. 178 (quoting Nozick).

⁷¹ Ibid., (emphasis added).

⁷² Ibid.

⁷³ Not all of these are relevant to Marxists, however, and those that are not are not mentioned here.

⁷⁴ D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004), p. 5 (emphasis in original).

⁷⁵ Ibid. (emphasis in original).

⁷⁶ Waldron, *op. cit.*, p. 133.

⁷⁷ Ibid., p. 2.

Human Rights are Only an Idea

In *Capital* Marx criticises rights as existing merely as an idea,⁷⁸ unhelpful for the solving of definite, concrete problems: ‘Do we really know any more about “usury” when we say it contradicts “justice éternelle”?’⁷⁹ However, even if rights are worthless as a descriptive device, this does not disqualify their worth in other terms: rights may not explain injustice, but Marxists have their own explanations and are not dependent on human rights for this. For a Marxist to believe in human rights, therefore, it must be in a practical sense, a belief-in-action rather than belief-as-explanation. Since they are not being used as a descriptive device, even if rights *do* only exist as an idea they may still be useful and if they are useful then ‘more power to the society which constructed them.’⁸⁰

It may be argued that the idea of human rights is not useful because it is ‘unduly abstract’⁸¹ in its characterisation of society and its members. The conceptualising of political actors as interacting in direct *victim-violator* relationships *legitimises by ignoring* wider yet more concrete forces which do not actively violate rights but which serve to create conditions in which violations occur. Insofar as human rights exclude these wider forces, for example by concentrating on compensating victims rather than ending practices, they ‘treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself.’⁸² This is a shallow reading of what rights attempt to do, even in the absence of Marxism, for rights are often seen as, at the very least, a condemnation of the violating practice. In this same vein, rights have been criticised for concentrating on issues of participation rather than the continuing inequality in the distribution of wealth and power which can ‘seem more legitimate after rights have been legislated, formal participation in government achieved, and institutional remedies for violations provided.’⁸³ However, this criticism does not apply to economic rights which are almost exclusively ‘welfarist’⁸⁴ and thus *consumption*-orientated, providing a balance to more participatory categories of rights.

Human Rights Occupy the Field of Emancipatory Possibility

The criticism of the abstract nature of rights is double-edged. It may also be claimed that rights are not abstract *enough*: instead of being universal and eternal as they promise, they are mired in a narrow context of capitalist politics. Despite this political

⁷⁸ Marx is not alone in this. The belief in the existence of rights as any more than an idea has even been described as ‘one with belief in witches and unicorns’. See A. MacIntyre, *After Virtue*, 2nd ed. (London: Duckworth, 1985), p. 69.

⁷⁹ Lukes, *op. cit.*, p. 180 (quoting Marx).

⁸⁰ Kennedy, *op. cit.*, p. 7.

⁸¹ *Ibid.*, p. 13.

⁸² *Ibid.*, pp. 24–25.

⁸³ *Ibid.*, p. 11.

⁸⁴ Waldron, *op. cit.*, p. 159.

context, human rights promise ‘a legal vocabulary for achieving justice outside the clash of politics’⁸⁵ fetishising an impossibly apolitical realm of determination of problems where the rights discourse fails—such as where rights are too vague or conflict with one another—because the discourse itself does not provide the reasons for abandoning it and resorting to politics. The solution here for Marxists is not to abandon rights as a concept, but to create a conception of rights which *allows* space for the political, which looks to Marxism not as a competing emancipatory idiom but as a complementary force. Indeed, if legal debates are allowed to stand in for political struggles rather than sit alongside them, this risks reducing the ‘range of political argument’.⁸⁶ Sometimes however, the human rights discourse does set itself up as the sole measure of emancipation ‘as if doing something *for human rights* was, in and of itself, doing something *against* evil’.⁸⁷ This colonises emancipation by ‘implicit or explicit deligitimation’⁸⁸ wherein rights present themselves as practical and other possibilities as overly ideological. That the Marxists who most use the language of rights are grass-roots activists, engaged in practical struggles, suggests that this colonisation may be resisted successfully by Marxism.

Human Rights Function in Class Mediation and Ideological Deception

Where such synecdochic colonisation occurs, with rights coming to stand in for full emancipation, this may have the effect ‘of toning down, of reconciling [class] antagonisms, not of overcoming them’.⁸⁹ The human rights movement may also hinder emancipation when it demobilises and alienates activists from class struggles by offering ‘the confidence that these matters are being professionally dealt with’⁹⁰ by others. This in turn presents an unrealistic picture of the professional and political elites involved in determinations of right as ‘benevolent, disconnected from economic actors and interests, and connected in some diffuse way through the media to the real aspirations of the world’s people’.⁹¹ To claim that the rights discourse *necessarily* has this effect, however, ignores the empirical history of rights being a focal point, rallying cry and even *cause* of antagonism between activist workers and their oppressors. Rights may play an important part in the effort to ‘unite all the working people around the proletariat’,⁹² the most obvious being the ‘freedoms to join political associations, to hold meetings’⁹³ and to engage in demonstrations. The claims that, ‘by furnishing principles for the regulation of conflicting claims and

⁸⁵ Kennedy, *op. cit.*, pp. 21–22.

⁸⁶ Veitch, Christodoulidis and Farmer, *op. cit.*, p. 32.

⁸⁷ Kennedy, *op. cit.*, p. 23.

⁸⁸ *Ibid.*, p. 9.

⁸⁹ Lukes, *op. cit.*, p. 182 (quoting K. Kautsky, *Ethics and the Materialist Conception of History*).

⁹⁰ Kennedy, *op. cit.*, p. 26.

⁹¹ *Ibid.*, p. 22.

⁹² V.I. Lenin, ‘The Economic Content of Narodism and the Criticism of it in Mr. Struve’s Book’ in *Collected Works* (Moscow: Foreign Language Publishing House, 1960–1963), pp. xxxi, 291–294.

⁹³ Collins, *op. cit.*, p. 142.

interests, *Recht* serves to promote class compromise and thereby delays the revolutionary change that will make possible a form of social life that has no need of *Recht*⁹⁴ assumes too much. Marxism is not anarchistic; it does not need a 'revolution or nothing' approach. It is not incoherent to work towards a revolutionary change in social relations while accepting other measures short of revolution which help workers. Indeed, is it unwarranted to presume that a belief in human rights must be a belief-for-all-time, and not as a useful though historically limited form.

Where they function to uphold the existing social order through mediation of class conflict, rights become 'crucially implicated in providing legitimation of the capitalist mode of production',⁹⁵ which is inherently ideological insofar as they simultaneously claim to be separate from 'particular partisan or sectional interests'.⁹⁶ This is a 'well-worn Marxist point':⁹⁷ in Trotsky's 1938 pamphlet *Their Morals and Ours*⁹⁸ he calls rights a 'necessary element in the mechanics of class deception'. He later goes on to say that 'permissible and obligatory are those and only those means, we answer, which unite the revolutionary proletariat'. Trotsky assumes that rights cannot be one of these means; they are only a necessary element in deception, but also *necessarily* deceptive.

However, as Slavoj Žižek demonstrates, the rights discourse can also be interpreted using the Lévi-Straussian idea of 'symbolic efficiency' as containing 'a tension in which the "appearance" of *égalité* is not a "mere appearance"'.⁹⁹ Instead, 'the appearance of *égalité* is a symbolic fiction which, as such, possesses actual efficiency of its own'¹⁰⁰ through the highlighting of the difference between the ideal and the actuality of socio-economic relations. Lukes follows Trotsky's argument, claiming that the 'real functions and the bourgeois interests'¹⁰¹ that lie behind rights are incompatible with Marxism, which acts to reveal them. However, the specific understanding of rights involved in this claim, borrowed from Gierke,¹⁰² does not leave conceptual space for Žižek's argument, predetermining the conclusion because of its underlying assumptions. The 'unmasking' of rights does not negate the possibility of them being remoulded in the way that the Soviet jurist Evgenii Pashukanis imagined law initially being used for Marxist ends, even after the overthrow of the old order. Even accepting the historically limited genesis of the concept of rights, and their past service to ideological functions, insofar as rights

⁹⁴ Lukes, op. cit., p. 187. Lukes refers to 'rights' by the term *Recht* here, but for our purposes these terms may be used interchangeably.

⁹⁵ Veitch, Christodoulidis and Farmer, op. cit., p. 228.

⁹⁶ Lukes, op. cit., p. 185.

⁹⁷ S. Žižek, 'Against Human Rights', *New Left Review*, 34 (July–Aug 2005), p. 130.

⁹⁸ Trotsky cited in Lukes, op. cit., p. 182.

⁹⁹ Žižek, op. cit., p. 130.

¹⁰⁰ Ibid.

¹⁰¹ Lukes, op. cit., p. 185.

¹⁰² '...that branch of morality concerned with determining when one person's freedom may be limited by another's'. Lukes, op. cit., p. 184.

work for the proletariat in the struggle against domination, Marxists not only can believe in rights but can be benefited *as Marxists* by doing so. The rights discourse ‘that was originally an ideological edifice imposed by the colonisers is all of a sudden taken over by their subjects as a means to articulate their “authentic” grievances’:¹⁰³ as well as serving to justify domination, rights may be used by the exploited to express their ‘indignation against this domination’.¹⁰⁴

Human Rights Promote Individualism and Conflict

The charge of individualism rests on the belief that *all* theories of right (and therefore the ‘rights of citizens’ just as much as the ‘rights of man’) justify themselves by reference to individuals *acting in their own interests*. It is argued that ‘compared to other vocabularies, human rights renders those who use it inarticulate about and less capable of both solidarity and more open-ended [possibilities]’¹⁰⁵ such as the more Marxist option of ‘justification-to-a-community’.¹⁰⁶ To some extent it is true that ‘we never attempt to secure things *as a matter of right* unless there is some individual or individuals whose rights are in question’.¹⁰⁷ However, Marxism does not try to eliminate individuals, but *individualism*: the valuing of the individual as the proper unit of society. That individuals exist by no means requires that rights are seen as accruing to the individual *qua* individual instead of the individual-as-community-member. Even in capitalist society there is no such thing as ‘an absolute individual’¹⁰⁸ except rhetorically—in reality man is always an ‘*individual-in-society*’.¹⁰⁹

Does it even make sense to refer to the individual as the site for rights which by their nature would be rendered meaningless if exercised singularly? There exist inherently communal goods¹¹⁰ which cannot be viewed in a purely individualistic way, rights which can only be realised in concert with others, even if rhetorically applied to individuals. That ‘we treat ourselves as independent centres of consciousness, thought and responsible agency’¹¹¹ does not render these goods any less communal when seen *as* rights, and it would be reductionist to argue that rights are individualistic simply because they are exercised by individuals, even when acting in concert in relation to common goods which cannot even be experienced by a single individual.

¹⁰³ Žižek, *op. cit.*, p. 130.

¹⁰⁴ F. Engels, *Anti-Dühring* (Moscow: Foreign Languages Publishing House, 1959), p. 131.

¹⁰⁵ Kennedy, *op. cit.*, p. 16.

¹⁰⁶ Waldron, *op. cit.*, p. 183.

¹⁰⁷ *Ibid.* (emphasis in original).

¹⁰⁸ Don Salvador de Madariaga, ‘Rights of Man or Human Relations?’ in UNESCO *Human Rights: Comments and Interpretations* (London: Allan Wingate, 1949), p. 47.

¹⁰⁹ *Ibid.*

¹¹⁰ I. Loader and N. Walker, *Civilising Security* (Cambridge: Cambridge University Press, 2007) provides insightful analysis on the inherently social or public nature of some goods and the nature of ‘public-ness’ itself.

¹¹¹ Waldron, *op. cit.*, p. 184.

The criticism of individualism has even been extended to group rights, which are seen as treating groups as being *individual* groups in relation to each other. However, to equate all possible holders of rights, including communities, with individuals risks rendering the charge of individualism itself meaningless: this charge makes more sense if seen as a criticism of the conflictual nature of rights, setting up people or groups in competition with one another. It has been claimed that the rights discourse, unlike Marxism, views 'human life as inherently conflictual'.¹¹² Such a reading appears, with little justification, to sideline the possibility that rights instead express a recognition of human life as *currently* conflictual (as Marxism itself does) yet not *necessarily* so.

Human Rights Promote Egoism

A criticism of rights which looks similar to individualism but is nonetheless distinct is that of egoism—the charge that rights are exercised for individual interests and that this reduces feelings of solidarity. This complements the criticism that rights are naturally conflictual, pitting victims of oppression against each other because 'a right or entitlement is a trump card. In emancipating itself, the right holder is, in effect, queue jumping'.¹¹³ However, the right to free speech can be, and often is, used 'in the pursuit of some common endeavour',¹¹⁴ such as Marxism, rather than personal reasons. Here again a reductionist argument may creep in—that free speech involves some individuals persuading others for their own benefit—although this fails to do justice to situations where the claim for rights is a claim for rights *for all*, not just for the claimant, and where the right may not even benefit the claimant.

This criticism also relates to the idea of individuals claiming rights *against* each other and the state, though this appears to be more of a criticism of method and mechanism rather than the concept of rights. This point does, however, address the important point that rights may be coercive, something which contradicts the Marxist prediction that under socialism 'the sources of conflict and insecurity will be so diminished that no one will feel the need to *demand* these as matters of *right* or look for *guarantees* in these respects'.¹¹⁵ This is a particularly utopian reading of Marxism that is not without its own problems, and does not answer the question of whether coercion is compatible with *yet to be* perfected socialism.

That rights are balanced against other rights, material resources and, importantly, the rights of others, while remaining rights, places 'limits on what critics call the egoism of rights'.¹¹⁶ Egoism is, in fact, more a criticism of the people invoking rights than of the rights themselves: even a right which is *de facto* incompatible with Marxism, if demanded out of a sense of altruism, out of a sense of duty towards

¹¹² Lukes, *op. cit.*, p. 185.

¹¹³ Kennedy, *op. cit.*, p. 17.

¹¹⁴ Waldron, *op. cit.*, p. 192.

¹¹⁵ *Ibid.*, p. 133 (emphasis in original).

¹¹⁶ *Ibid.*, p. 201.

common humanity rather than personal entitlement, cannot be invalidated by egoism.

Human Rights as Legally Protected Claims

Discounting as a genuine belief in human rights the use of them as simply rhetorical tools which may express all possible political values, it can be assumed that when rights are demanded that they are instead sought as a specific set of legally enforceable claims. It is therefore important to deal briefly with the relationship between Marxism and law, although this topic is itself complex and a thorough examination of it is beyond the scope of this article. As has been noted, on this subject Marx himself was often silent or unclear which has led to a wide variety of interpretations, all of which may be fairly labelled 'Marxist'.¹¹⁷

One particular interpretation has been termed the 'Bolshevik wing'¹¹⁸ of Marxism and is exemplified by Pashukanis. This interpretation sees the 'underlying abstractions'¹¹⁹ of law as being inherently bourgeois and denies that Marxists can or 'should find alternative general concepts'¹²⁰ on which to base a new, proletarian, law once bourgeois law has 'withered away'. Law is simply 'an instrument of the *de facto* ruling class'¹²¹ both defining and defending that class' claims in that it 'says what shall be property and what shall be crime'.¹²² The idea of proletarian law appears, from this perspective, to present itself as 'revolutionary par excellence'¹²³ while being, in fact, highly conservative in that it 'proclaims the immortality of the legal form'.¹²⁴ This is wrong because it attempts to dissociate the legal form from its historical genesis and present it as being permanently renewable, whereas the 'withering away of certain categories of bourgeois law . . . in no way implies their replacement by new categories of proletarian law'.¹²⁵ According to this view 'the revolutionary can have no interest in law . . . it should be his aim simply to overthrow it'.¹²⁶ Other Marxist traditions question whether the utopian element inherent within the 'Bolshevik' interpretation is as well theorised as the rest of the tradition. Thompson's Marxist humanism in particular is a tradition which advocates the continuing importance of law out of a 'bloody-minded distrust'¹²⁷ of unregulated power. This can be seen when, in response

¹¹⁷ R. Fine, 'Marxism and the Social Theory of Law' in R. Banakar and M. Travers (eds), *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002), p. 101.

¹¹⁸ *Ibid.*, p. 106. Fine uses this term to refer to structural Marxism and its 'repressive-instrumentalist' view of law.

¹¹⁹ E. Pashukanis, 'Law and Marxism' in M.D.A Freeman, *Lloyd's Introduction to Jurisprudence*, 7th ed. (London: Sweet & Maxwell, 2001), p. 1031.

¹²⁰ *Ibid.*

¹²¹ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), p. 259.

¹²² *Ibid.*

¹²³ Pashukanis, *op. cit.*, p. 1031.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Thompson, *op. cit.*, p. 259.

¹²⁷ Fine, *op. cit.*, p. 111.

to the claim that there will be a new society in which law is not required, he argues that there is no historical evidence on which to base these claims, and warns utopian theorists to ‘watch this new power for a century or two before you cut your hedges down’.¹²⁸

Even if utopian predictions may be made, the move to a post-legal society is clearly impossible without a transition period which needs particular theoretical attention and which is often left under-theorised by traditional accounts. This period is ‘characterised by the fact that social relations will, for a time, necessarily continue to be constrained by the “narrow horizon of bourgeois right”’.¹²⁹ Indeed, communist society will be ‘in every respect . . . still stamped with the birth marks of the old society from whose womb it emerges’.¹³⁰ This entails not only the continuation of the legal form, but also the bourgeois state as the coercive force behind law, so that there remains ‘the bourgeois state, without the bourgeoisie!’¹³¹ However, according to the ‘Bolshevik wing’, since bourgeois legal and social forms cannot be ‘developed further or be permeated by a socialist content’¹³² they will, and ought to, finally ‘wither away’. Is it the fate, therefore, of human rights to be considered in these terms also, as an unwelcome and doomed relic? When the ‘narrow horizon of *bourgeois* right’¹³³ is transcended, is it only *bourgeois* right which will wither away, or will Right itself, because it *is* bourgeois? Is the legal form so inherently bourgeois that it is irredeemable?

Not necessarily. Even if it is accepted that law, and rights with it, must be overthrown, Marxist critique should not ‘throw aside the generalisations and abstractions elaborated by bourgeois jurists’¹³⁴ but instead ‘demonstrate their true significance and lay bare the historically limited nature of the legal form’.¹³⁵ Indeed, during the transition, ‘the proletariat will of necessity exploit this form inherited from bourgeois society in its own interest’¹³⁶ as long as the proletariat continue to be mindful of the form’s historical origin. For the legal form to continue to be compatible with Marxism after such a transition, it needs to be conceived of as a ‘bottle in which different social contents can be poured’,¹³⁷ neutral in itself and as able to be Marxist as it is able to be bourgeois. A much stronger argument is that ‘*only* under socialism that the rule of law can be realised since under capitalism law is corrupted by private interests’,¹³⁸ although this itself poses the problem that these

¹²⁸ Thompson, *op. cit.*, p. 266.

¹²⁹ Pashukanis, *op. cit.*, p. 1031 (quoting Marx).

¹³⁰ *Ibid.* (quoting Marx).

¹³¹ *Ibid.*

¹³² *Ibid.*, p. 1038.

¹³³ Waldron, *op. cit.*, p. 135.

¹³⁴ Pashukanis, *op. cit.*, p. 1033.

¹³⁵ *Ibid.*, p. 1033.

¹³⁶ *Ibid.*, p. 1038.

¹³⁷ Fine, *op. cit.*, p. 107.

¹³⁸ *Ibid.*

private interests may corrupt human rights to an unacceptable degree until socialism is instituted.

Regardless of which Marxist tradition correctly conceptualises the role of law in the perfected socialist society, it is the present in which the Marxists who believe in human rights reside and here E.P. Thompson's work provides greater insight than that of Pashukanis. Taking the Whigs of the 18th century as an example, Thompson argues that even where the law is used 'both instrumentally and ideologically, very much as a modern structural Marxist should expect it to',¹³⁹ it does not follow that the bourgeois need law in order to oppress the proletariat, while the law was of no use to the proletariat.

An important argument against the traditional view of law as 'a pliant medium to be twisted this way and that'¹⁴⁰ by the ruling class is that 'if the law is evidently partial and unjust then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony'.¹⁴¹ This suggests two possibilities: that the law is not totally unjust or is merely not *evidently* so. Hegemony does exist and the law does contribute to it—which would suggest the latter—yet people have a 'strong sense of justice'¹⁴² which acts as a resistant force to blatant injustice through law. If law is to appear just then this must be done by upholding its own inherent logic which prevents it being made synonymous with the power politics of the ruling class, and which renders rulers 'prisoners of their own rhetoric'.¹⁴³ This goes beyond the vision of law as the neutral 'bottle' in that it sees something inherently good, and good for Marxism, in the law.

This inherent positive force is what ensured that, for the Whig oligarchy, law 'could not be reserved for the exclusive use only of their own class'.¹⁴⁴ Law's internal logic did not prevent class relations being mediated to the advantage of the Whigs, but by mediating the relations particularly through law, restraints were placed upon the actions of the Whiggish class. In some cases, they were forced into 'actually *being* just'.¹⁴⁵ It may even be argued that the Whigs were at least partly *willing* prisoners who believed enough in the rules and rhetoric of law 'to allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out'.¹⁴⁶ This, however, is a problematic position: how genuine this forum actually was can be called into question, for while legal rules may restrain, they may also serve to 'disguise the true realities of power'.¹⁴⁷ Such deception would be incompatible with Marxism since it would serve 'to consolidate power, to enhance its legitimacy, and to inhibit revolutionary movements'.¹⁴⁸ This question of the

¹³⁹ Thompson, *op. cit.*, pp. 260–261.

¹⁴⁰ *Ibid.*, p. 262.

¹⁴¹ *Ibid.*, p. 263.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, p. 264.

¹⁴⁵ *Ibid.*, p. 263 (emphasis in original).

¹⁴⁶ Thompson, *op. cit.*, p. 265.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

compatibility of revolutionary and legal-rights discourses is made particularly immediate where they meet, in the courtroom. 'Breaching the law for principled political reasons has been, and will no doubt continue to be, an important engine for social change; and one through which a large number will often stand to gain'¹⁴⁹ and yet claims for human rights, when translated into law, cannot contain the anti-legal revolutionary idiom, however emancipatory the content of these rights. The languages of the revolutionary Marxist and the judge are in this way incommensurable, forced into a problematic 'reciprocal and simultaneous denunciation by both sides of the politics of the other as violence *simpliciter*'¹⁵⁰ when these discourses clash without ever engaging with one another.

A fine line must be walked then, given that 'we ought to expose the shams and inequities which may be concealed beneath this law'¹⁵¹ without losing what is good about law in the process. As said eloquently by Thompson, 'the rule of law itself, the imposing of effective inhibitions on power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good'.¹⁵² To deny this good, he claims, is to 'throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger'.¹⁵³

Conclusion

The Marxist fascination with human rights is an integral part of the struggle *about and within* law and serves to illustrate the problems, ambiguities and possibilities inherent in attempting to merge two distinct discourses with contemporary relevance which both lay claim to a vocabulary of emancipation. The question at the heart of this merger, and one which has remained without satisfactory resolution for so many years, is whether a Marxist can believe in human rights. Although I do not propose that I have presented a definitive answer to this question, I hope to have highlighted the ambiguities and the heart of the issue and the direction in which it would appear the answer lies. These ambiguities stem partly from Marx's own ambivalence towards the subject of rights:

Sometimes it seems that right as such is identified with bourgeois right. But elsewhere in the same work, we are told that only certain *formulas* of right are 'stigmatised by a bourgeois limitation'.¹⁵⁴

¹⁴⁹ S. Veitch, 'Judgement and Calling to Account: Truths, Trials and Reconciliation' in A. Duff et al. (eds), *The Trial on Trial 2* (Oxford: Hart, 2004), p. 157.

¹⁵⁰ E. Christodoulidis, 'The Objection that Cannot be Heard: Communications and Legitimacy in the Courtroom' in A. Duff et al. (eds), *The Trial on Trial 1* (Oxford: Hart, 2004), p. 181.

¹⁵¹ Thompson, *op. cit.*, p. 266.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Waldron, *op. cit.*, p. 135.

They also arise from the problematic nature of the human rights discourse itself, though to accept this should not invite despair for Marxists who would believe in a regime of legal rights. Instead, ‘the general dilemma faced by many radicals with regard to law must be approached pragmatically.’¹⁵⁵ The tension between reformist and revolutionary methods and the need to investigate the consequences of each, the distinction between the general concept of human rights and the limited conception promoted by capitalist liberalism, and complexities involved in even framing the question through which the concept may become subject to critique, are not things which Marxists can or should ignore.

The complexities of this problem are what make this question so enduring and so important. Perhaps searching for a simple answer is the wrong aim completely—perhaps it is more helpful to play a part in re-problematising an issue to which it is too easy to give a simple answer. After all, had an intellectually satisfying simple argument been proposed already it would have left no conceptual room for the question of this article at all: if Marx’s position was simply a ‘crude and predictable’¹⁵⁶ rejection of rights then ‘socialist hostility to human rights in the Marxist tradition would have an obvious canonical explanation’.¹⁵⁷ On the other hand if the conclusion were to be that Marxists *can* believe in rights simply because the Marxist-approved ‘rights of citizens’ are rights, socialist hostility ought never to have arisen to rights *as a general concept* at all.

While the self-understanding of the rights discourse as ‘an unhistorical “essentialist” Beyond with regard to the contingent sphere of political struggles’¹⁵⁸ cannot be sustained in the face of Marxist critique, neither should the whole concept be simply dismissed ‘as a reified fetish’¹⁵⁹ which cannot be consistent with the goals and methods of Marxism. It is entirely consistent for a Marxist ‘to be suspicious of modern legal systems in general, but at the same time to preserve a strong determination to support fundamental political liberties’,¹⁶⁰ so long as these liberties, these human rights, do not become seen as ends in themselves, rather than a means to achieve ‘the higher goal of transcending bourgeois society’.¹⁶¹ It remains important for Marxists to provide a critique of the human rights discourse even when it appears that a conception of rights has been formulated in which Marxists may believe. A single, contained, moment of evaluation is never enough to ensure that human rights do not begin to colonise the rhetoric of emancipation while in reality acting as a conservative, or even reactionary, political force. Human rights must continually be reviewed to maintain space for the opening of emancipatory possibilities which Marxism can, and should, provide.

¹⁵⁵ Collins, op. cit., p. 141.

¹⁵⁶ Waldron, op. cit., p. 127.

¹⁵⁷ Waldron, op. cit., p. 129.

¹⁵⁸ Žižek, op. cit., p. 131.

¹⁵⁹ Ibid.

¹⁶⁰ Collins, op. cit., p. 142.

¹⁶¹ Ibid.