

THE MAIN THEMES OF MARX' AND ENGELS' SOCIOLOGY OF LAW*

Little has been written about Marx' and Engels' approach to law. This is largely because Marx never fully developed his theory of the State although, as Sweezy points out,¹ his original intention as stated in the Preface to the *Critique of Political Economy* was to discuss "state, foreign trade, world market" at some length.² He died before he could do this. Thus in piecing together "Marx on law" one is forced to treat sections from different works as additive, as if their central concerns were the same. Sometimes, as in chapter X of *Capital*³ or Engels' *Anti-Dürhing*,⁴ the extracts are sufficiently long to stand alone as statements about law. At other times there is merely an allusion to law in a text dealing with other matters. These snippets are more open to the abuse of being interpreted out of context. Because my aim has been to let Marx' and Engels' writings speak for themselves I hope I have avoided this. I began the research for this paper with no pre-conceived categories in terms of which to order the extracts. My method was to copy onto cards all the relevant passages (with notes on their contexts) and then to classify them in terms of what seemed to be important or recurring themes.

Although I do not have any particular Marxist or academic axe to grind, two approaches to "Marx on Law" worried and still worry me. These are the "worker bashing" interpretation and the criminological interpretation. The former view has been held by lawyers, the latter by sociologists. Neither does justice to the complexity and *potential* of Marxist thought. Although I cannot claim to know what Marx and Engels really meant, I hope to show at least that their theory of law was highly sophisticated and that it is still useful not only in analysing and comprehending present day society but also in sparking off ideas dialectically with contemporary theory and in guiding one to fruitful areas of research.

Previous Discussions of "Marx on Law"

The "putting down the workers" model of Marx' thought is epitomised in the work of Denis Lloyd,⁵ who none the less recognized that Marx "made a major contribution to the foundation of legal as well as other forms of sociology." Lloyd stated that for Marx "Law was nothing but a coercive system devised to maintain the privileges of the property owning class." Alternatively, law

was distilled out of the economic order which gave rise to it, and was an institutionalized form of the prevailing ideology whereby the dominant section of society coerced the masses into obedience.

This is close enough to be recognizably Marx, yet by its dangerous over-simplification it makes it possible to dismiss Marx as incapable of explaining those many laws which have

* An earlier version of this paper was presented to the British Sociological Association Study Group on the Sociology of Law in May, 1972.

¹ P. M. Sweezy, *The Theory of Capitalist Development* (1942 Monthly Review Press, New York).

² K. Marx, "Preface to A Contribution to the Critique of Political Economy" in K. Marx and F. Engels, *Selected Works* (1969 Progress Publishers, Moscow).

³ K. Marx, *Capital* (1970 Lawrence and Wishart, London) Vol. 1.

⁴ F. Engels, *Anti-Dürhing* (1935 Chas. H. Kerr and Co., Chicago).

⁵ D. Lloyd, *The Idea of Law* (1964 Penguin, Harmondsworth) 22, 205-7.

neither this coercive intent nor this effect. Yet in one of his major writings on law Marx, with Engels, comes close to arguing that the law has little to do *directly* with inter-class relationships, the main purpose of laws being to iron out differences *within* the dominant class, and so, *indirectly*, to consolidate their class position.⁶ I discuss this more fully below: to mention it here is sufficient to indicate that there is oversimplification in the “worker bashing” view.

Three recent texts have examined Marx’ work either to discover in it a radical criminology⁷ or to take issue with the radical criminologists’ interpretation.⁸ These three papers develop from the first, which is more literal in its interpretation, through that of Hirst, which points out the force of Marx’ irony and offers a political (and convincing) explanation of Marx’ well-known distaste for the “vagabond” and “parasitical” ways of the lumpen-proletarians, to the third⁹ which takes the point about irony and seeks to give it a contemporary relevance with the claim that Marx was ridiculing the functionalists (unborn).

My own view is that Marx as a writer is very funny, very bitter, and very passionate. The first two are expected elements of irony; the third, Marx’ rage and passionate concern for the sufferings of people, gives way regularly to irony just before it reaches a peak. Having described the processes of dispossession he remarks “In the year 1835, 15,000 Gaels were already replaced by 131,000 sheep.”¹⁰ Later “flung on the sea shore, . . . they became amphibious. . . .”

Marx is at his funniest when castigating his philosophical rivals¹¹ and his powerful blend of anger and irony is most apparent when concrete cases of human suffering, – mangled mineworkers,¹² bemused rustics driven from the land,¹³ those bearing heavy sentences for trumped up political offences¹⁴ – are presented. His intellectual grasp is best shown as he moves from weaving and demonstrating patterns of relationships at the highest levels of abstraction to the specific concrete case which illuminates the whole. None of these literary or intellectual skills is demonstrated in his comments on crime.

The problem with Marx, and his interpreters, in his discussions of crime is that he lapses into absolutism. Even in the oft quoted section from *Theories of Surplus Value* Vol. 1,¹⁵ Marx speaks of “the criminal” as a *type of person* and implies that crime is a way

⁶ K. Marx and F. Engels, *The German Ideology* (1965 Lawrence and Wishart, London) 349–83.

⁷ P. Walton, paper presented to B.S.A. annual conference, 1971; I. Taylor, P. Walton, and J. Young, *The New Criminology* (1973 Routledge and Kegan Paul, London).

⁸ Hirst, “Marx and Engels on Law, Crime, and Morality” (1972) 1 *Economy and Society* 28–56.

⁹ Taylor, Walton and Young, *op. cit.*

¹⁰ *Capital*, (1974 Lawrence and Wishart, London) Chap. XXVII, p. 683.

¹¹ Two good examples are *The Holy Family* (1957 Lawrence and Wishart, London) and *The German Ideology*, *op. cit.*, both written with Engels.

¹² *Capital*, *op. cit.*, Chap. XV, Section 9.

¹³ *Ibid.*, Chap. X and XXVII.

¹⁴ F. Engels, “The Late Trial at Cologne” in *Selected Works op. cit.*

¹⁵ Quoted at length by both Hirst, *op. cit.* and Taylor, Walton and Young, *op. cit.*

of life. These positive definitions lie behind and are intrinsic to the ironic web he weaves in statements such as

Crime, through its constantly new methods of attack on property, constantly calls into being new methods of defence, and so is as productive as strikes for the invention of machines.

At his worst in discussing crime Marx is a narrow moralist with a veneer of liberal tolerance. Thus, people may have been driven to villainies of various kinds, for example by being rendered homeless and destitute; penalties for these villainies (as well as for being homeless and destitute *per se*) were undoubtedly brutally harsh, this being the best known way of encouraging the landless to value the opportunity to become wage labourers. But both the understanding of the cause and the disgust at the savage punishments carry the implication that the villainy simply exists in itself.¹⁶ Similarly, Engels, when arguing that the bourgeois family causes prostitution by creating a demand for it, treats the prostitute and the prostitution as absolute and given in themselves – even in the course of a polemic to the effect that sexual and familial relationships should and will be *re*-formed.¹⁷

What Marx and Engels have to say about crime, therefore, may produce a wry smile, but the quality of potential, of being complete but not finished, is lacking. Unlike their remarks on law, these comments do not set the mind a-scrampering, tantalised, identifying relationships with other theories, seeking contemporary applications, formulating research problems. And if they do not they should perhaps be spared resuscitation by donnish critics.

Law, the State and Ideology

Criminological interpretations of Marx, as Hirst has pointed out,¹⁸ have crime as their focal concern. This in itself distorts what Marx had to say,¹⁹ for his focus of interest was always the forces and relations of production, the social organisation of the means of life. Marx' and Engels' discussion of law, on the other hand, *arises out of* their more general work. Allusions to law form part of their theory of the State and their sociology of knowledge.²⁰

Nowhere is law defined. The authors deal only with legislation in their discussions of how law is created. They comment on enacted law whether or not it is enforced; one can assume that rules actually enforced by the courts are subsumed under their general discussion. Thus by and large they build their argument on the common sense view that we all know what law means. In so far as in their discussions of ideology they are accounting for other people's constructions and understandings, this is legitimate: law *is* what we all know it means. Law as it exists in "massy" reality is an objectified ideological form. Marx and Engels are interested in *ideology*, a concept integral to their theory of the social order.

¹⁶ For a full discussion of these phenomena see *Capital, op. cit.*, Chaps. XXVII and XXVIII.

¹⁷ See Engels, "Origin of the Family, Private Property, and the State" in *Marx' and Engels' Selected Works, op. cit.*, Vol. 3.

¹⁸ Hirst, *op. cit.*

¹⁹ This would not matter if the distortion were in order to develop new theories: it matters when what is intended is a commentary.

²⁰ I deal with this second aspect at greater length in a forthcoming article.

Law, religion, philosophy, doubtless even social science, are *theoretically equivalent* as manifestations of this. The distinctions between these forms, as their comments on education show,²¹ are not given in the world but are created by it. The allocation of ideological areas for examination is itself an ideological form.

In order to understand ideology (and therefore law) either in general or, what interested Marx and Engels much more, in either a particular historical or an idealised epochal manifestation, it is necessary to look at the bases of power in society, at the formation of classes, and at the structure of the State. In a paper about law these remarks must be scant and oversimplified, creating merely the context for the later exposition.

The basic fact of man's past has been the thrust for survival, individually and as a species.²² The "means of life" at a time are a function of geography, history, and current knowledge.²³ Thus they are social as well as physical creations. The organization of people in relation to them (relations of production) is the social phenomenon which gives rise to classes, groups of people who stand in a particular relation to the means of production, such as slaves, capitalists, peasants, proletarians, and housewives.

To claim that pre-bourgeois history, and each phase of it, has its own economy and an economic base of its movement, is at bottom merely to state the tautology that human life has always rested on some kind of production – *social* production – whose relations are precisely what we call economic relations.²⁴

Capitalist society, which is most relevant for the present analysis, is characterised by *private property*. This is a unique way of conceptualising the relationship between people and things, although it has its conceptual origins in the personal and private use of tools.²⁵ This mode of thought is embodied in a peculiarly comprehensive set of legal rights in relation to the use and disposition of real, or fictitious but legally and socially existing, things. Capital is private property which enables the owner to buy the labour power of another individual, and use it to create surplus value. Workers, to the extent that they do not receive the full value of the labour power they expend, are exploited.

So brief a description leaves out all the dynamics and most of the theory. My hope is that it will give the student new to Marx a grip on some basic terms to help him through the ensuing discussion, but he should bear in mind Marx' warning:

The proletariat and wealth are opposites; as such they form a single whole. They are both forms of the world of private property. The question is what place each occupies in the antithesis. It is not sufficient to declare them two sides of a single whole.²⁶

In order to maintain their position of dominance, capitalists *as a class* gradually create a set of linked organisations (the State) with the dual purpose of protecting their

²¹ K. Marx, *Pre-Capitalist Economic Formations* (ed. E. J. Hobsbawm, 1964 Lawrence and Wishart, London).

²² This does not involve Marx in a denial that men can choose, for example, to die for a cause.

²³ Again, for Marx, this is not an absolute concept.

²⁴ Marx, *Pre-Capitalist Economic Formations*, *op. cit.*, p. 86.

²⁵ *Ibid.*, and also Engels, "Origin of the Family, Private Property, and the State" in *Selected Works*, *op. cit.*

²⁶ K. Marx and F. Engels, *The Holy Family* (1957 Lawrence and Wishart, London).

common internal class interests, such as the establishment of clearly understood rules for commercial transactions, and of protecting them against external threats from other classes or States. Engels clarifies the theory as follows

The modern state . . . is only the organisation which bourgeois society provides for itself in order to support the general external conditions of the capitalist mode of production against encroachments of the workers as well as of individual capitalists. . . .²⁷

The State, for Marx and Engels, is always peopled, never a metaphysical entity – peopled with officials, gaolers, and, late on in its development, with policemen. And these officials are directed, one way or another, by members of the bourgeois class.

If power is taken on the basis of right . . . then right, law, etc., are merely the symptom of other relations upon which state power rests. The material life of individuals . . . their mode of production and form of interest which *mutually*²⁸ determine each other . . . this is the real basis of the state. . . . The individuals, who rule in these conditions, besides having to constitute their power in the form of the state, have to give their will . . . a universal expression as the will of the state, as law. . . .²⁹

The argument then moves on two important steps. First, the State develops a seeming independence of material conditions “Having public power . . . the officials now stand, as organs of society, *above* society.”³⁰ Or sometimes

. . . periods occur in which the warring classes balance each other so nearly that state power, as ostensible mediator, acquires for the moment a certain degree of independence of both. . . . In (a democratic republic) . . . wealth exercises its power indirectly but all the more surely. . . .³¹

Secondly and similarly, politics and law, religion and philosophy develop a seeming independence both of material conditions and of the State.³² The important point is that these seemingly autonomous ideological areas develop according to their own inner logic; their links with “massy” reality (in Marx’ phrase) may indeed become tenuous.

The state presents itself to us as the first ideological power over man. . . . Hardly come into being, this organ makes itself independent *vis-à-vis* society; and indeed, the more so the more it becomes the organ of a particular class . . . the consciousness of the interconnection between this political struggle (ruling v oppressed class) and its economic basis *becomes* dulled and can be lost altogether. . . . But once the state has become an independent power *vis-à-vis* society it produces forthwith an ideology. It is indeed among professional politicians, theorists of public law and jurists of private law that the connection with economic facts gets lost for fair. . . .³³

Engels, in particular, struggles with the apparent contradiction between the notion of ideas as *really* determined, and ideas developing in accordance with the rules of logic which

²⁷ Engels, *Anti-Dürhing*, *op. cit.*, Vol. 2, p. 290.

²⁸ My italics.

²⁹ Marx and Engels, *The German Ideology*, *op. cit.*

³⁰ Engels, “Origin of the Family, Private Property, and the State” *op. cit.*, p. 577. Engels goes on in the passage to note the special rules necessary for the protection of policemen as State officials because they are “forced to represent something outside and above” society. This point is taken up by Durkheim, *The Division of Labour in Society* (1964 Free Press, New York).

³¹ *Ibid.*, p. 578.

³² The advantages of this process for the ruling group are discussed in the next section.

³³ F. Engels, “Ludwig Feuerbach and the End of Classical German Philosophy” in Marx and Engels, *Selected Works*, *op. cit.*, p. 616.

members of the particular discipline regard as proper. In the Old Preface to *Anti-Dürhing*³⁴ he castigates those who regard logic or the laws of thought as “eternal truth, established once and for all”. However, he also argues

Every ideology, however, once it has arisen develops in connection with the given concept material, and develops this material further, otherwise it would not be an independent ideology . . . that the material life conditions of the persons inside whose heads this thought process goes on in the last resort determine the course of this process remains of necessity unknown to these persons.³⁵

In *Origin of the Family* Engels indicates how the dilemma might be resolved. Changes in material conditions of existence are necessary before certain concepts, legal or otherwise, can be developed. There is bounded choice about how the material conditions of existence are understood – bounded in that the group which controls the means of production in the new conditions will be constrained to conceptualise and “explain” the situation in a manner supportive of its position. Material conditions can be affected by the way they are conceived but material conditions must be capable of existing in order to be thought about. Thus, appropriation of instruments of production for private use (by the male) necessarily preceded the elaboration of property “rights”.

Marx had earlier made a similar point³⁶ in the well-known section³⁷ in which he argues that “the mode of production of material life *conditions*³⁸ . . . intellectual life process in general” and that “consciousness must be explained . . . from the contradictions of material life”. The *dialectical* nature of this inter-relationship between thought and things comes out more clearly in the discussion of property.

Engels too indicates one way in which the legal ideology influences behaviour which otherwise would have been directly determined by the economic base. The law can set the ground on which struggles must be fought and by so doing may, in particular cases, influence the outcome.

Since in each particular case the economic facts must assume the form of juristic motives in order to receive legal sanction, and since in so doing, consideration of course has to be given to the whole legal system already in operation, the juristic form is, in consequence, made everything and the economic context nothing. . . . *Fuerbach, op. cit.*, p. 619.

It is important to remember that it may be necessary to lose a battle to win a war; that it may be more important to uphold values fundamental to the capitalist order than to gain a particular legal victory, e.g., equality before the law is linked with freedom of the individual, the break up of feudal society and ascriptive rights, without which capitalism could not have developed. The ideology now has a second, symbolic consequence in legitimating the entire social structure. But this is pre-empting the discussion in the next section.

³⁴ In the three volume 1970 edition of *Selected Works, op. cit.*, Vol. 3, p. 60.

³⁵ “Ludwig Feuerbach and the End of Classical German Philosophy”, *op. cit.*, p. 618.

³⁶ See “Preface to a Contribution to the Critique of Political Economy”, *op. cit.*

³⁷ Discussed by Hirst, *op. cit.*

³⁸ My italics.

As far as the law is concerned, Engels argues that the particular legal form within which and in terms of which conceptual development takes place is not relevant. Renner, of course, has elaborated these developments, though he fundamentally confuses legal words and concepts with what he calls legal norms.³⁹ Max Weber made a similar point that in a two tiered legal system such as our own, full rationality, yielding above all predictability of outcome, is necessary only in the upper tier in order for capitalism to be able to develop.⁴⁰ Engels' remarks deserve full quotation.

If the state and public law are determined by economic relations, so, too, of course, is private law, which indeed in essence only sanctions the existing economic relations between individuals which are normal in the given circumstances. The form in which this happens can, however, vary considerably. It is possible . . . to retain in the main the forms of the old feudal laws while giving them bourgeois content: in fact, directly reading the bourgeois meaning into a feudal name. But also . . . Roman Law, the first world law of a commodity producing society with its unsurpassably fine elaboration of all the essential legal relations of simple commodity owners (of buyers and sellers, debtors and creditors, contracts, obligations, etc.) can be taken as the foundation.⁴¹

The Functions of Law

If the law as ideology is the first of Marx' and Engels' themes, the second theme in their sociology of law concerns the three functions of law. The State develops after irreconcilable class antagonisms have arisen, when it becomes

necessary to have a power seemingly above society, that would alleviate the conflict and keep it within bounds of "order", and this power, arisen out of society but placing itself above it and alienating itself more and more from it, is the state. . . .⁴²

The State is the creation of the class wielding real power, i.e., control over the means of production. By creating a seemingly autonomous State (1) real power relationships are obscured; (2) the exercise of real power is legitimated. The second consequence requires the development of an ideology "explaining" the State together with the development of a further ideology based on this earlier explanation. This second, higher order, ideology explains the use of "State" power in certain situations. This second higher order ideology is jurisprudence, which, among other things, tells lawyers what the law is for.

Real power relationships are obscured because legal forms of power (the right to vote, the right to enter freely into contracts) are equally available to all. Engels inveighs against legal forms which "put both parties on an equal footing *on paper*." He continues

The power given to one party by its different class position, the pressure it exercises on the other – the real economic position of both – all this is no concern of the law. . . . That the concrete economic situation compels the worker to forego even the slightest semblance of equal rights – this again is something the law cannot help.⁴³

³⁹ K. Renner, *The Institutions of Private Law and their Social Functions* (1949 Routledge and Kegan Paul, London).

⁴⁰ M. Rheinstein (ed.) *Max Weber on Law in Economy and Society* (1954 Harvard U.P., Cambridge) Chap. VII.

⁴¹ Engels, "Ludwig Feuerbach and the End of Classical German Philosophy", *op. cit.*, p. 616.

⁴² Engels, "Origin of the Family, Private Property, and the State", *op. cit.*, p. 58.

⁴³ *Ibid.*, p. 500.

Marx puts the point even more succinctly

The recognition of the rights of man by the modern state means nothing more than did the recognition of slavery by the state of old.⁴⁴

This is probably familiar territory which needs little elaboration. One further example is relevant, given the improvements in the legal position of women. Men have, as Engels noted "a dominating position which requires no special legal privileges."⁴⁵ Thus, women can be liberated to fulfil a useful economic role and the dominant values such as equality can be reinforced while real power relationships remain unchanged except in so far as their greater obscurity may strengthen them.

Before leaving the parallel mystifying and legitimating functions of law it is important to note that both Marx and Engels were aware that by emphasizing the autonomy of the State and law it was possible to create the mythology of a "total society" in whose interests these institutions operated, coupled with the belief that the State and law by reason of their apparent autonomy are value neutral. This last point does not even follow in logic. However, that the State should operate in the interests of the mythical whole community is in fact written into is as a guiding principle.

What is good for the ruling class should be good for the whole of society with which the ruling class identifies itself. Therefore the more civilisation advances the more it is compelled to cover the ills it necessarily creates with the cloak of love, to embellish them, or to deny their existence.⁴⁶

The third function of law is of a rather different order. In *The German Ideology* Marx and Engels for the first time discuss law as representing the "average interests" of the ruling class – the interests of the class conceived as a whole rather than of particular sections or individuals.

Their (the capitalists) personal rule must at the same time be constituted as an average rule. Their personal power is based on conditions of life which as they develop are common to many individuals, and the continuance of which they, as ruling individuals, have to maintain against others and, at the same time, maintain that they hold good for all. The expression of this will, which is determined by their common interests, is law.⁴⁷

Within the ruling class the law, it seems, operates as systems theorists would have us believe. It irons out conflict in the best interests of the whole, and maintains the unity and integrity of the class. But to see law only this way is to fall prey to the mythology of a "total society" outlined above. Because of this characteristic of law, many studies, such as Joel Barnett's examination of Rent Act legislation,⁴⁸ will yield considerable information about the effectiveness of different pressure groups, about means of access to ruling élites and about the importance of early contact to define the ground, but little evidence of *inter-class* struggle. In the *German Ideology* Marx and Engels at times come close to seeing law

⁴⁴ Marx, *The Holy Family*, *op. cit.*

⁴⁵ Engels, "Origin of the Family, Private Property, and the State", *op. cit.*, p. 501.

⁴⁶ *Ibid.*, p. 582.

⁴⁷ Marx and Engels, *The German Ideology*, *op. cit.*

⁴⁸ M. J. Barnett, *The Politics of Legislation* (1969 Weidenfeld, London).

making as a middle class game, wholly irrelevant to proletarians. But they do not maintain this position elsewhere.

Finally it scarcely need be said that law can be used for instrumental short-term purposes. But its utility as a legitimator limits the extent to which this is possible, as has been demonstrated by the fate of the Industrial Relations Act which exposed the fact that law and legislation serve *particular* masters.

Law and social change

This third theme is most easily presented as four sub-themes: the development of private property, the relationship between social and legal change, the usefulness of law in the class struggle, and law as a means of social reform. Here, however, the danger of distortion arising from the extraction of quotable sections is greatest, since *all* Marx' and Engels' analyses were concerned with change, society was *conceived* in terms of motion.

I have indicated already Marx' and Engels' view of private property as a legal phenomenon, a "general juristic conception" which, true to the second function of law, presents property relations as relations of volition rather than "in their real form as relations of production".⁴⁹

The discussion of property is difficult because the authors use the term to mean *both* the general appropriation of land and things by labour *and* the developing bourgeois forms arising from their historically particular conceptions of relationships between people and things. The law elaborates the distinction between ownership (private property) and possession, and by so doing may well create a gulf between common sense or working class understandings of what it means to say something is mine, and for example the conceptions of lawyers or upper class persons involved in holding companies. Horning has produced evidence of these varying conceptions.⁵⁰ Property, however conceived, has always been a social phenomenon. "An isolated individual could no more possess property in land than he could speak";⁵¹ and "Only in so far as the individual is a member – in the literal and figurative sense – does he regard himself as an owner or possessor".⁵²

The notion of *private* property is to be found in the appropriation of tools for personal use (which still exists in Horning's factory). This is perhaps the seminal notion, pre-existing, which is elaborated when material conditions change and personal appropriation on a wider scale takes place. As Marx points out, the original meaning of "capital" was "cattle"; taking by *vi et armis*, in feudal Britain the only form of theft, embodies the same idea.⁵³ In order for something to be *stolen* it has to be *owned*. (Differing conceptions of ownership may also in part account for differential rates of "stealing" between social classes). Thus criminal law developed alongside civil law and, through the eighteenth century in particular, buttressed with its own elaborations the conceptual developments of the notion of private

⁴⁹ K. Marx, "On Proudhon" (Letter to J. B. Schweitzer) 1865 in *Selected Works, op. cit.*, Vol. 1, p. 355.

⁵⁰ D. Horning, "Blue collar theft" in E. Smigal and H. Ross (eds.) *Crimes Against Bureaucracy* 46–64.

⁵¹ Marx, *Pre-Capitalist Economic Formations, op. cit.*, p. 81.

⁵² *Ibid.*, p. 69.

⁵³ See Jerome Hall's discussion of this in *Theft, Law and Society* (1952 Bobbs-Merrill, Indianapolis).

property in the civil law. In civil law, especially, such developments continue. We too “. . . might well reflect on the extent to which civil *law* is linked with private *property* and to what extent civil law determines the existence of a multitude of other relations . . .”⁵⁴ Property, of course, is not just in the mind “Actual appropriation takes place not through the relation to these conditions (material) expressed in thought, but through the actual, real relationship to them.”⁵⁵

It is, however, a dialectical relationship. This is what is so vital for sociologists of law about Marx’ discussion of the development of property. The legal conception *shapes* the external reality, develops with it, and is *developed by* change within the new external world thus created. The hoary old question, which comes first, the law or social change, push or pull, chicken or egg, cannot exist for Marx. The conception *becomes* the material world as the material world gives rise to the conception.

My second question, that of the relationship between social and legal change, is already in part answered. In spelling it out the dialectic discussed above must not be forgotten. But the point I specifically wish to make is that for Marx and Engels a legal form cannot hold back developments if a change in the real economic conditions has taken or is taking place. Engels points out that, as feudal society was breaking up

Where economic conditions demanded freedom and equality of rights, the political order opposed them at every step with guild restrictions. Local prerogatives, differential tariffs, exceptional laws of all kinds in commerce, not only affected foreigners or inhabitants of colonies, but also often whole categories of the State’s own subjects.⁵⁶

The demand for legal equality, for free labour, grew. This is the basis of Enlightenment philosophy. But this bourgeois ideology gave and gives the workers a handle, they can extend the same arguments to demand *equality* in other spheres. Material conditions give rise to an idea or an ideal: who can say where it will lead?

The other case of the legislators standing out against change, real economic power having already shifted to the bourgeoisie, occurs in one of Marx’ many discussions of the creation of the proletariat.⁵⁷ He describes how a century and a half of legislation designed to prevent enclosures – such as the Act of 1533 which restricted the number of sheep for one owner to 2,000 – proved fruitless. When the bourgeoisie gained control of the *political* institutions, however, the policy was reversed, the forms of feudal land tenure were abolished. The aims were now to extend large scale agriculture, to increase the supply of masterless “free”, proletarians, to increase the dependence of the new proletarians on the market for goods also, and to increase “efficiency” on the farm and so provide a surplus for the manufacturers. Thus Marx demonstrates, obliquely for it was not his central purpose, that legal noises when not backed by real power achieve nothing beyond irritation, but that legal institutions in the control of the economically powerful can undoubtedly facilitate and expedite real economic change.

⁵⁴ Marx and Engels, *The German Ideology*, *op. cit.*, p. 350.

⁵⁵ Marx, *Pre-Capitalist Economic Formations*, *op. cit.*, p. 92.

⁵⁶ Engels, *Anti Dürhing*, *op. cit.*, Vol. 1, p. 105.

⁵⁷ The present example occurs in *Capital* Vol. 2, Chap. XXIV, *Primary Accumulation* (1930 Everyman, London).

In the light of this, what can proletarians hope to achieve by using legal institutions? Marx and Engels suggest that much is possible through such usage. In the first place, an alliance may be formed with some of those within the bourgeoisie who need their help to achieve a particular sectional aim. Marx suggests that this happened at times during the struggle for the shorter working day.

However much the individual manufacturer might give the rein to his old lust for gain, the spokesmen and political leaders of the manufacturing class ordered a change of front and of speech towards the work people. They had entered the contest for the repeal of the Corn Laws, and needed the workers to help them to victory.⁵⁸

The notion of the “average interests” of the bourgeoisie is apparent again here. Marx emphasises also the point that the death rate of wage earners was alarming, that it was in the “average interests” of the manufacturers, therefore, to take action to improve conditions. “It would seem, therefore, that the interest of capital itself points in the direction of the normal working day.”⁵⁹

Two other factors were at work:

After the factory magnates had resigned themselves and become reconciled to the inevitable, the power of resistance of capital gradually weakened, whilst at the same time the power of attack of the working class grew with the number of its allies in the classes of society not immediately interested in the question.⁶⁰

Moreover, the working class itself became more organized and more determined, so that “the Factory Inspectors warned the government that the antagonism of the classes had arrived at an incredible tension”.⁶¹

The lessons of this for a politically conscious working class are first, that changes can be achieved if differences *within* the bourgeoisie are exploited. A united bourgeoisie, as in the case of the mines where landed and manufacturing interests were coincident,⁶² is more difficult to persuade. However, (lesson two) if workers present a sufficient threat (as in the last extract) concessions can be achieved. The final lesson is that class alliances must be formed where possible. Let Engels have the last word:

But if the laws were in the hands of a government dominated by or under pressure from the workers . . . it would be a powerful weapon for making a breach in the existing state of things.⁶³

Marx leaves one major effect of this, the impetus given to technological development, dangling as an unintended consequence. This is unsatisfactory. Why should unintended consequences so fortuitously and so frequently have effects favourable to the dominant economic class? Unintended consequence is little more than a residual sociological category meaning “we don’t know”. Carson has attempted to go beyond this in the case of factory

⁵⁸ Marx, *Capital* Vol. 1, Chap. X, p. 281 (1970 Lawrence and Wishart, London).

⁵⁹ *Ibid.*, p. 266.

⁶⁰ *Ibid.*, p. 296.

⁶¹ *Ibid.*, p. 292.

⁶² *Ibid.*, p. 464.

⁶³ Engels, *The Holy Family*, *op. cit.*, p. 472.

legislation, pointing out *inter alia*, that those bourgeois operating with steam, the more advanced technology, initially favoured such legislation as a weapon against their less technologically advanced competitors, whose costs were lower.⁶⁴

The final question to be raised is, can the law bring about social reform? Marx and Engels discuss this point not because it is raised by their theory (which largely precludes it) but because they are constrained to do so by those with whom they are arguing, especially Proudhon and his followers. Marx in 1865 inveighs against Proudhon for mistaking the "legal expression" of property relations (as relations of volition) for their "real form" as relations of production.⁶⁵ In the *German Ideology* he had remarked "such concepts (as right) if they are divorced from the empirical reality underlying them can be turned inside out like a glove".⁶⁶

In 1872 Engels developed this critique further, arguing strongly against attempts to bring about piecemeal reform by legal changes (separate solutions for so called political questions) and in particular emphasizing the point that the *criterion* of reform which would be used (human rights, etc.) is itself contingent upon existing relations of production.⁶⁷ He recognized that such attempts do take place and argued that if they really operated against the interests of the ruling groups then the law would not be applied or would be only partially applied. (There is a great risk of circularity in actually working with this idea). More probably, such attempts lead to the improvement of the position of one section of the ruling class *vis-à-vis* another rather than to any improvement in the relative position of the workers. For example, in response to Proudhon's argument in favour of a legal limit on the rate of interest he says "the only difference will be that renters will be very careful to advance money only to persons with whom no litigation is to be expected".⁶⁸

Because forms of law are ultimately dependent on relations of production, because the effects of law, in diverse and subtle ways are usually to maintain an existing set of such relations, because, therefore, legal "reforms" cannot really change the pattern of interclass relationships, improving the access of the poor to law is a doubtful advantage. In attacking Sue, a young Hegelian, Marx writes

(According to Sue) the only failing of French legislation is that it does not provide for payment of the lawyers, does not foresee exclusive service of the poor, and makes the legal limits of poverty too narrow. As if righteousness did not begin in the very lawsuit itself and as if it had not been known for a long time in France that the law gives us nothing but only sanctions what we have.⁶⁹

Conclusions

If the foregoing is to be more than another exercise in literary criticism, the question "where does that get us?" has to be asked. It takes us, I think, a very long way.

⁶⁴ W. G. Carson and B. Martin, *The Factory Acts* (Forthcoming, Martin Robertson, London).

⁶⁵ "On Proudhon", *op. cit.*, p. 357.

⁶⁶ *Op. cit.*

⁶⁷ Engels, *op. cit.*, pp. 495-574.

⁶⁸ *Ibid.*

⁶⁹ Marx and Engels, *The German Ideology*, *op. cit.*

Theoretically we now see that Marx' and Engels' work not only influenced Durkheim and Weber, as has long been known, but also that it has links through Durkheim with modern functionalism, and, through whom I do not know, with phenomenology. Marx' comments point up criticisms of each of these two contemporary approaches. By showing that a *schema* very like that of Parsons works within a class but not between classes they emphasize again that the systems approach's main weakness is its empirical lack of fit rather than its logical flaws. In their discussions of the role of the subjective in world creation they remind us that in the last resort there is a human body which needs water, however either is conceptualised, if it is going to go on being a creative subjectivity.

The stimulation to current research is as great as the intellectual delights. Briefly, their remarks about law, the State, and ideology give guidelines for research about State personnel, about their relationships with capital and capitalists, about their beliefs, the occupational pressures to which they are subjected, and their professional socialisation. We are encouraged to regard jurisprudence as a higher order ideology, explaining lawyers to themselves. Which lawyers are exposed to this, and which take it on board? What are the limits to the autonomous development of legal thought in terms of its own concepts and thought-rules? The ramifications are endless.

We move on to the functions of law. Here emergence studies come into their own, and are given direction. We can explore the dimensions of intentionality and unintended consequence. And what of those on the receiving end? Do laws really legitimate and mystify? How are they understood by their various enforcers?

Law and change should speak for itself. We have four ready made research topics. I would argue that the first, the role of legal concepts in world creation and its converse, is the most important. I would want to investigate how everyone's world comes to be shaped by the lawyer's world and that of his capitalist clients of the past, how commonly understood statements like "I bought a second-hand car" *came* to be commonly understood. And as I indicated in the text, we must also question the *extent* to which such understandings, for example of what it means to own something, *are* shared.

For the rest, the fact that a reading of Marx and Engels will incite to laughter and to anger should not put them beneath the dignity of the sociologist of law.

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