

Re-Marx on Repression and the Rule of Law

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For all Martin Krygier's¹ dislike of Marxism, his authorial voice is strikingly like that of Karl Marx. Like Marx, he is capable of very clever, very well-intentioned, highly questionable polemics; like Marx, he often slips, rhetorically, from complex argumentation to argumentative caricature; like Marx, he displays a visceral, ill-disguised distaste for that of which he writes; like Marx, he sometimes confuses political and ideological rationalization for analytic ratiocination; like Marx, he obviously knows how to start an argument—and relishes the prospect.

I respond to "Marxism and the Rule of Law" not purely for the sake of argument, however. Nor do I feel any particular urge, as do some intellectual historians and hagiographers, to engage in debate over what Marx "really" said or meant. Such things are both unrecoverable and, in any case, irrelevant. My own investment in this exchange is critical. It is founded on the belief that Marxism is not merely useful but essential to think with; that it remains a highly effective theoretical position from which to interrogate our taken-for-granted assumptions about economy and society, politics and law. It is not the only critical tradition, of course. But it is perhaps the most thoroughgoing, probably the most unyielding, certainly the most uncomfortable. And, in positive terms, it continues to produce valuable insight. I hasten to add that this presupposes a view of Marxism as a constructive discourse—an argument of images, concepts, and practices, to extend the nice phrase of James Fernandez²—and not as

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1. Martin Krygier, "Marxism and the Rule of Law: Reflections After the Collapse of Communism," 15 *Law & Soc. Inquiry* 633 (1990).

2. *Bwiti: An Ethnography of the Religious Imagination in Africa* (Princeton, N.J.: Princeton University Press, 1982).

a theology. Indeed, it is hardly necessary, after Thompson,³ to point out that there no longer is a single, canonical Marxism—only marxisms. Both the pluralization and the removal of the upper case are intended: as Worsley noted a decade ago,⁴ no tenet of the marxian theoretical lexicon remains inviolate—or even fully intact.

Given this critical spirit, I shall address three of the major themes in Krygier's disquisition—by which I mean part discourse, part inquisition—on marxism: (1) the central thesis that Marx is in some part to blame for the absence of the rule of law in Communist regimes; (2) the unfavorable comparison between such regimes and those of the Western world; and (3) the alleged "moral authoritarianism" to be found in Marx's own writings. All three themes, and they do not by any means exhaust the content of this richly textured essay, raise issues of broad significance. Let us take them in order.

1. MARX, MARXISM, AND THE RULE OF LAW

Martin Krygier blames marxism for more than just the lack of legal restraint in communist regimes. He holds it (partly) accountable for the violent excesses of those regimes, for their "jurisprudence of terror," and for the unbridled power they place in the hands of the state. But the status of his argument requires careful scrutiny. For, by moving implicitly between two quite different levels, it almost invites us to be misled; an ungenerous reader might even see in it a polemical sleight of hand. This form of argument, as a persuasive strategy, may be dubbed theorhetoricist: in rhetorical *spirit*, it suggests a strong thesis; in theoretical *substance*, it makes the case for a rather weak one.

Thus, substantively speaking, Krygier is very careful to hedge and qualify his allocation of responsibility to Marx for the absence of the rule of law in communist states. It is not marxism alone that is to blame, we are told, but marxism "as well." In fact, when it comes down to the fine print, the relationship is not causal in any direct sense at all: it is, rather, one of "elective affinity." Now this Weberian notion raises notorious difficulties of copresence, causation, and explanation, difficulties of the sort that give social scientists nightmares. But even if it did not, Krygier addresses none of the obvious questions raised by his qualifications: In what exact measure may marxism really be held accountable? What are the other factors involved? And how, precisely?

In the absence of answers to these questions, Krygier's account, re-

3. Edward P. Thompson, *The Poverty of Theory and Other Essays* (New York: Monthly Review Press, 1978).

4. Peter Worsley, "Marxism and Culture: The Missing Concept," Department of Sociology, University of Manchester, Occasional Paper No. 4.

garded in its own substantive right, does not offer much support for his central thesis. This is not surprising, since the latter is flawed from the start. Marx and Engels, as we are forcefully reminded, had no systematic theory of law; their silence derived, as is well known, from their pessimistic reading of its historical role in bourgeois society. Yet it is this silence, this theoretical void, that—in some (unspecified) part and manner—is allegedly to blame for the active Communist suppression of the rule of law and the deliberate practice of terror. The notion of an absence, a vacuum, having such causal capacities is curious, to say the least.

It is one thing to accuse Marxism-as-theory of having failed, by its limitations, to prevent repression in Eastern Europe; few abstract social-scientific theories, after all, succeed in preventing world-historical movements from taking their course. It is, however, quite another to argue that *Capital* or the *Communist Manifesto* was an active cause of terror or totalitarianism. There is enough even in Krygier's brief historical account to suggest perfectly good proximate reasons for the "jurisprudence of terror," for the particular role of law in the USSR, and for the nature of the state during the "dictatorship of the proletariat" (namely, the practical difficulties of creating an integrated political economy in a highly heterogeneous, largely immiserated society; the theoretical interventions of Pashukanis, with his idiosyncratic reading of Marx; the increasingly contradictory relations between the center and the peasantry; the autonomic reactions of Stalinism to both internal and external threat). In short, the fact that Marx's writings, with all their silences and ambiguities, might have been called upon as a political justification, a legitimating charter, for state repression does not of itself prove anything. The Old Testament was, until recently, invoked to justify and explain apartheid, but it would be egregious to hold the Bible to account for the predicament of black South Africans.

Krygier himself goes on to note that Marx was not Stalin, and had nothing to say in favor of barbarism. It is especially distressing, therefore, that he hints insidiously at Marx's culpability for things later done in his name—without providing any real support for the allegations. Thus, for example, the essay closes with a statement that (presumably the older) Marx saw no need to protect individuals against their species or against any institutions that came to rule over them. Even if this was an oversight, says Krygier, it would not have been trivial. "There are reasons to believe," he adds darkly, "that it was no accident" (at 663). Are there really?

A sharp line ought always to be drawn between criticism and aspersion, and it seems to have been overstepped at just this point: baldly stated, we are being ushered here from the realm of analytic reason to that of diabolical machination. The effect of Krygier's insinuation is—wittingly, one must assume—to impute to Marx the satanic authorship of the East European inferno. Hence, what began as a carefully qualified causal

argument slips into a polemic of passion. And Marx himself, in an irony he might have appreciated, is made into a fetish and a phantasm in order to be found guilty. Not that he would have had any difficulty in answering to the charge: apart from having no demonstrable grounds, the imputation to him of diabolical motives is refuted, loudly and directly, by his entire oeuvre: by the fact that its spirit was one of compassion and concern for those who suffered domination; by its outspoken commitment to liberation; by its effort to reveal the hidden chains by which ties of inequality were sustained. Marx may be accused of many things, idealism among them; but conspiracy to enslave humanity is just a little farfetched.

As this suggests, and the flimsy empirical evidence confirms, Krygier is correct to frame his substantive argument in weak causal terms. It is a weak argument. This is not, I stress, to imply that the nature of the state, the law, and the anatomy of terror are insignificant questions, or that Krygier does not offer some valuable clues to their analysis. It is simply that the reduction of the argument to crass antimarxism is unfortunate. Indeed, Krygier might have produced a much more interesting discourse on the issue of the jurisprudence of terror and legal restraint had he set aside the issue of marxism from the start. After all, as he freely admits, there are many forms of fascism—some, like Mussolini's Italy, grew directly out of the contradictions of European capitalist systems; others, like Amin's Uganda, arose out of the ashes of colonialism—that have a similar history of terror and totalitarianism without the intervention of Marx or marxism. Why not, therefore interrogate the phenomenon in its own right, as a comparative world-historical issue? There is plenty of ground to hypothesize, for example, that suspensions of the rule of law and the rise of repressive state apparatuses have to do with rapid changes in social scale, especially in multiethnic societies, under the impact of disadvantageous global political and economic forces; that they are one (albeit not the only) response to the problems of managing social difference under conditions of extreme material pressures. In this light, marxism may turn out to be no more than a red herring.

It is hard not to conclude that Krygier sidesteps the difficult questions of causality—of which he seems fully aware—because he is more concerned to persuade us of the evils of modern marxism than to engage with the evidence. Perhaps he has a political motive to which we are not made party. In any event, this, as I said, is his strong rhetorical suit. Or, at least, it is the rhetorical effect of the *form* of argument we are offered. The aesthetic of this form is easily recognizable to linguists, rhetoricians, and advertising agencies: it is based on the illocutionary strategy of establishing enough parallels between two things to impute (a spurious) causality and efficacy to one of them. Aesthetics apart, however, the substantive argument over which it throws its gloss remains, from a scholarly perspective,

disturbingly empty. In my view, Krygier simply fails to demonstrate, empirically or logically, the kinds of connections he claims to exist between marxism and the lawlessness of the communist world.

2. THE RULE OF LAW AND COMPARATIVE LEGAL REGIMES

Perhaps the major political thrust of Krygier's argument lies in his unfavorable comparison between communist regimes and those "governed by the rule of law"; between "societies where law can plausibly be said to count as a restraint on power and where it cannot." I neither desire nor intend to defend those totalitarian regimes of Eastern Europe with histories of mass murder and dictatorship—although, as I have said, the connection between them and marxist theory, *pace* Krygier, remains questionable. But we may be forgiven for worrying about the extraordinarily optimistic view offered of Western democratic societies and their legal institutions. To wit, it is this form of optimism and ideological apologetics that has done most to stimulate critical legal studies.

It is no longer necessary, surely, to reiterate all the forms of disempowerment that lie behind the ostensible rule of law in the so-called free world. Do we have to point out, yet again, the inequalities and inequities of our legal culture as it breaks down along the fault lines of gender, race, and class? How does Martin Krygier answer to inner-city blacks who see and experience existing legal institutions as bald tyranny—in the United States and France and England and Holland and any number of places? Do we have to rehearse, yet again, the manner in which Western governments and their agencies often invade other sovereign states, and suspend the rule of law, on the ground of collective self-interest? It is dangerous, surely, to cite examples of murdered Third World leaders in order to pretend that the West is more substantially committed to legal restraint; for those of us who grew up in colonial and postcolonial societies, the historical memory of domination with limited legal protections has barely been erased. Even today, for that matter, is there much difference between a Northern Irish political prison and an Azerbaijani one? The soon-to-be published, breathtaking study by Feldman of the brute violence of the former⁵ makes the answer shamefully clear. Surely, in the postmarxist age of Foucault, we cannot still believe that our ideology of democratic freedoms yields a sufficient comparative sociology of law? Or that surveillance of increasing aspects of our lives, from creditworthiness to political subversion, is not real?

5. Alan Feldman, *Formations of Violence: The Narrative of the Body and Political in Northern Ireland* (Chicago: University of Chicago Press, 1991 (in press)).

The answer to this standard litany, of course, is that “it’s still much better than the communist alternative!” If communism is dead, one might be forgiven for suggesting, that is beside the point. Nor does it address the fact that an apparently gender-, race-, and class-blind legal order turns out, in the realpolitik of social life, not to be blind at all. Indeed, the danger of Krygier’s celebration of the rule of law in the West is that it encourages us, whether he would admit it or not, to suspend the critical apprehension of our own world. What otherwise is the point of a comparison in terms so black and white, positive and negative, as to become caricatures of themselves? At one point in the essay, Krygier raises the question of whether the “welfare” state—and, by extension, any bureaucratized government—is compatible with the rule of law (at note 23); he points out that there are those on both right and left who think not. (That right and left may converge, *analytically* if not prescriptively, on this issue should have warned Krygier that his causal excoriation of Marx was ill considered, that something else was at issue.) The fact that this question is posed, albeit unfortunately passed over, points to something very important: namely, that it is in the mechanics of the state itself—not in Marx or Adam Smith, communism or capitalism—that the logic of legal enablement and limitation may lie. If so, the whole inquiry becomes a very different issue.

In this respect, note again that Krygier is himself careful to qualify his broad correlations. It is not only in marxist contexts where the rule of law has been suspended, where there has been a jurisprudence of terror; horrendous exceptions like Nazi Germany are to be condemned as well. Krygier, however, does not detain himself with the question of where and how these exceptions arose—how they issued forth from precisely the kinds of civilized society he so obviously admires. Nor does he concern himself with the circumstances, more numerous than we like to admit, in which “normal” societies suspend the rule of law, except, again, to see these as unusual, as emergencies. Had he confronted such issues, Krygier might have felt a lot less sanguine about the “free” world—and been a lot more critical of its forms and practices. Which is the sacred task of analytic scholarship. Nobody, after all, would suggest that the United States or Britain is governed in a manner utterly unrestrained by law, or that we all live in a crypto-fascist society. The point rather is that, since only critical scholars are likely to unmask the hidden restraints and inequalities in the law, our obligation to do so is unremitting. Let others provide apologetics and panegyrics.

3. MARX AND MORAL AUTHORITARIANISM

The third theme concerns the alleged “moral authoritarianism” of Marx and his writings. Although this issue is dealt with only briefly to-

ward the end of the essay, the manner of its treatment suggests that it features prominently in Krygier's antimarxist concerns. To wit, the fact that the accusation of moral authoritarianism is linked, in the final pages of the essay, with Marx's discussion of Jews and the Jewish question—which Krygier (and many Jews) find deeply offensive—adds to the impression that its political valence here is not trivial. Nor should it be. For present purposes, I leave aside the Jewish question; it is simply too vexed to deal with. But the general issue to which it is addressed is both interesting and significant.

Krygier berates Marx for moral authoritarianism on the ground that his social vision celebrated community over difference, social wholeness over separateness. Argues Krygier, quite correctly, this view—and its presumption of emancipation lying in the unity of mankind—has not worn well. There has, of course, been a century or more of bitter debate within marxism (and Leninism) over the issue of difference; the “nationalities question” in the USSR today is the political and intellectual progeny of that debate. But two things are to be said about it which, it seems to me, put Krygier's position into perspective. One is that Marx was hardly alone in the 19th century in arguing against difference in the name of modernity. As Benedict Anderson⁶ and several others have recently shown, the modernist idea of nationalism was predicated also on the celebration of sameness and the quieting of (cultural and moral) distinction. Arguably, too, the image of the nation as a moral community—and society, following the classical tradition in sociology, as a moral order—presumes that collective being depends on moral authority. In this respect, Marx was no different from Durkheim or any other functionalist concerned with the apparent anomie and alienation, the immanent disorder and dislocations, of the period. There is, in short, nothing unusual about Marx in this respect.

The other point is that the recognition of difference in itself is no protection—as Krygier seems to believe—against moral authoritarianism. South Africa, after all, has fetishized ethnic pluralism in the name of authoritarianism. And, although an extreme case, it is hardly alone. There may be many blacks, of various cultures, in Britain. But, as we are shown by Gilroy⁷ and by a recent BBC documentary series, “There ain't no black in the Union Jack.” In many places in the modern world people have their ethnicity tolerated and pluralism celebrated—only to find their culture relegated to museum exhibits, craft shops, and gastronomic guides. The step from ethnic difference to moral equality is, typically, very wide. Israel, and the fate of both Sephardi Jews and Israeli Arabs, is a prime case in point—and an especially poignant one in light of Krygier's concern with “the Jew-

6. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

7. Paul Gilroy, *There Ain't No Black in the Union Jack* (London: Hutchinson, 1987).

ish Question.” Moral authoritarianism was, and is, not a prerogative of marxism; indeed, Marx sought, even if he failed, to find a principled answer to the authoritarianisms around him, authoritarianisms that invoked that used difference to disempower. At least he addressed the problem. The more common solution is either to deny its existence and/or to hope that it will go away. And that, it seems, is the most repressive form of cultural authoritarianism of all. Krygier is quite correct to remind us of its dangers. Perhaps he will help to open the American mind against precisely the kind of cultural closures essayed by some celebrated antirelativists in our academic midst. If marxism is dead in Eastern Europe, as he asserts, it is no longer necessary to worry about it. Perhaps the time has come to worry about moral authoritarianism right here. There is certainly enough to be concerned about.

A final note. I began by pointing out some similarities between Krygier and the Marx of whom he writes. There are two more. One is that, as Marx was himself aware, he and his writings were historically situated, creatures of their time and place. So, too, is Krygier. Just as Marx lamented the Western Europe of which he wrote and looked forward to a new future, Krygier appears to be writing a coda for Eastern Europe and its future. Just as Marx did not see how roseate were his utopian visions of an all-powerful, just communist state, Krygier appears to have a roseate view of his utopia, a “free,” democratic world of legal rights and the rule of law. After all, there are many already living in that utopia. Some of its place names are Harlem and inner-city Detroit, Soweto and East St. Louis, Brixton and the barrios of Mexico City. It may be as well to learn from Marx’s disillusion, and not wait until history proves how diabolical such utopias sometimes turn out to be.

The other point is that, whatever else he did or did not do and see, Marx always offered a good argument and fought a good fight. He was a limited god, of course. And so is the rule of law. But Martin Krygier, in the best marxian tradition, has tried hard to make a good argument in its name.