

A Socialist Interest in Law

The momentous events that have taken place in the Communist world since 1989 have underlined, even though it may prove to have been too late, the necessity for socialists to take law seriously. I understand the slogan 'taking law seriously' to embrace the following ideas: one, contrary to the thesis that law and state will wither away in the transition to communism, law will play a part in any form of defensible socialist society; two, constitutions are important in providing some degree of protection to the democratic arrangements of public life; three, civil liberties, human rights and the rule of law (legal mechanisms and devices developed within capitalist societies) are essential preconditions for a defensible socialism. The roots of socialist antipathy to law lie deep in its history; theoretically Marx himself evinced a marked hostility to 'bourgeois law',¹ and politically a regard for law and legality has been treated as signifying the wrong side of the revolution—reform opposition. In Britain, Edward Thompson struck the most important blow for a socialist interest in law with his 'scandalous' eulogy to the rule of law as a universal human good.² Since that moment a developing trend on the Left has argued in favour of some version of the 'taking law seriously' position.³ It would be wrong, however, to suggest there had been a debate; rather there persists an implicit opposition, or resistance, concerned to protect Marxist or revolutionary standards, which regards taking law seriously as either reactionary or revisionist—or both.

The appearance of a new and substantial contribution by Christine Sypnowich to the case for socialists taking law seriously affords an

¹ As Maureen Cain and I demonstrated in *Marx and Engels on Law* (London 1979), although the general tenor of Marx's consideration of law is negative, there are interesting and important indications of a more rounded treatment. One important reason why negativity pervades Marx's scattered observations on law is that it never formed his object of inquiry.

² E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, London 1975.

³ See, for example, Tom Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights*, London 1983; Hugh Collins, *Marxism and Law*, Oxford 1982; Stuart Hall et al, *Policing the Crisis: Mugging, the State, and Law and Order*, London 1978; Paul Hirst, *Law, Socialism and Democracy*, London 1986; Colin Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, London 1979.

opportunity both to reassess the issues at stake and to offer some additional reflections aimed at reinforcing the case for a socialist interest in law.⁴ *The Concept of Socialist Law* is a considerable achievement; it is comprehensive in its coverage and provides a philosophical account sensitive to the political issues at stake.

The originality of Sypnowich's approach lies in her starting point: the question 'Is a socialist jurisprudence possible?' The book elaborates an affirmative answer to that question. Marxist discussion of law has, in the main, ignored the tradition of jurisprudence and set out in quite different directions. Sypnowich's work takes the opposite tack; she locates the possibility of a 'socialist law' in the concerns that have motivated English jurisprudence.⁵ The title of her study discloses its roots in Oxford analytical jurisprudence, whose major achievement has been H.L.A. Hart's *The Concept of Law*.⁶ Accordingly she begins with the quest for such a concept;⁷ this requires an account of how we 'identify law' (p. 28).

The advantage of this strategy is its location of the project of constructing a socialist jurisprudence in close relation with the traditions of liberal jurisprudence, thereby facilitating direct comparisons. Yet this approach also has its drawbacks, which distance it from the traditions of Marxist theory and lead to the blurring of certain issues. The most obvious of these is a tendency to treat jurisprudence as the pursuit of 'age-old questions' (p. 28).⁸ This produces an overview of the province of legal theory as an ongoing engagement between legal positivism and natural law. The positivists treat valid law as all those rules that have been validly promulgated (for example, by legislative enactment or judicial pronouncement); they insist on sustaining a distinction between fact and value such that the moral worth of a valid law is simply a different question from its validity. On the other side are the natural lawyers who insist that formal validity is not a sufficient condition, and that for law to be legitimate or binding it must fulfil certain minimum moral criteria. As the history of these disputes has unbound there has emerged a complex set of debates as to whether individual authors are to be located in one camp or the

⁴ Christine Sypnowich, *The Concept of Socialist Law*, Oxford University Press, Oxford 1990, £27.50 hbk. All unattributed page references in the text are to this work.

⁵ I say 'English' deliberately. Although there are important connections, legal theory in the United States has been less directly concerned with the contestation between legal positivism and natural law theory that has dominated English jurisprudence. Scottish legal theory has sustained a connection with the traditions of its distinctive national form of Enlightenment thought.

⁶ Oxford 1961.

⁷ The genealogy of the 'concept of law' represented Hart's break with John Austin's preoccupation with the search for a 'definition' of law. 'Concept' signifies a concern with linguistic usage and evidence of what words 'mean'; but Oxford jurisprudence remained naive about the relevant discursive community and has in the main assumed that community to be constituted by judges, lawyers and jurists. This is exemplified by the way in which Sypnowich follows Hart in assuming that the key question about the 'concept of law' is the one generated by the long-running debate with natural-law theorists about whether 'bad law' is *really* law.

⁸ For a convincing critique of jurisprudence as the reworking of perennial questions, see Roger Cotterrell, *The Politics of Jurisprudence*, London 1989.

other.⁹ The major expression of this opposition is the classical jurisprudential riddle about whether moral considerations form part of the conception of law itself or merely provide external criteria for evaluating its substantive content. In its simplest form the issue is whether a morally reprehensible law is 'really' law.¹⁰

There may be little to gain by insisting that all positions in legal theory must be classifiable along this fault-line between natural law and positivism; these latter should instead be understood as alternative paradigms which, rather than being right or wrong, simply generate different theoretical problematics. Oddly, it is far from clear that this paradigm choice has much to do with the issue of 'identifying law'. Indeed I want to suggest that the identification of law is not in fact the problem, even for the two sides; at issue, rather, are certain important questions of political theory and ethics concerning when laws are binding. It makes little difference to such arguments if a law is law-but-not-binding-law (positivism) or not-law-because-not-binding (natural law). The issue of identification may be pertinent when dealing with marginal cases—for example, whether we should speak of the rules of disciplinary procedures as law or as administrative regulations; but it is not clear that any contribution is made to the examination of disciplinary process or administration by simply classifying these as 'law' or 'non-law'. Only if one adopts some prior commitment to the view that law is or should be autonomous, is one led to set up sharp classificatory boundaries between law and non-law. The better view is that the conception of law which any theory adopts should be determined by the questions that theory addresses.

It is because Sypnowich is committed to this dichotomous tradition that she does not seek to establish how this classificatory problem of identifying law is relevant to her concern to lay the basis for a socialist jurisprudence. She assumes that Marxists have to make a choice between positivism and natural law. My contention is quite the contrary: that Marxists should refuse such a restrictive either/or choice on the grounds, amongst others, that it is founded on an empiricist conception of knowledge, one which erects a rigid dichotomy between fact and value. Sypnowich explores her restricted field and opts for the view that a socialist jurisprudence should start out accordant with the natural-law tradition and thus espouse a morally inclusive concept of law; and the basis of her rejection of the Marxist withering-away-of-state-and-law thesis stems quite explicitly from that tradition's notion of 'moral danger' (p. 24). Whilst I share her repugnance for the

⁹ For example, H.L.A. Hart, a central figure of the positivist camp, nevertheless conceded that valid law required a minimum content of natural law. Hart's successor, Ronald Dworkin, strenuously resists being labelled a 'natural lawyer', but insists that 'principles' are not the creation of legislative enactment. It is far from clear what is achieved by the insistence shared by both sides that, just as Gilbert and Sullivan allowed boys and girls only the possibility of being a 'little Liberal' or a 'little Conservative', so all legal theories are either positivist or naturalist.

¹⁰ This question was revitalized in the aftermath of fascism when in the trials of Nazi leaders and functionaries the defence was typically constructed around the claim that the defendants were acting consistently with the laws contemporaneously in force. A classic presentation of this dilemma is Lon Fuller's 'The Problem of the Grudge Informer' in *The Morality of Law*, New Haven 1964, pp. 187–95.

Stalinist abuse of legality, I do not share her confidence that committing oneself to a socialist version of natural law helps guard against such abuses; a Vyshinsky committed to natural law would have been no better than a positivist Vyshinsky.¹¹

These criticisms of her approach notwithstanding, there is a welcome facet of Sypnowich's commitment to Oxford jurisprudence: namely, that the concern with clarity and simplicity of exposition has a beneficial influence on her text, which exhibits exemplary lucidity.

Sypnowich devotes little attention to spelling out the political and theoretical considerations that have led generations of socialists to deny the pertinence of law to their project. She does offer some consideration of Marx's early text and a brief discussion of the major Bolshevik jurist, Evgeny Pashukanis; but she does not provide a theoretical or a political interrogation of either thinker. Rather, her philosophical method focuses on the selection of a set of arguments which are attributed to socialists in general and to Marx in particular. The core of her text is concerned with the interrogation of these 'arguments'. The problem with this method is that it imports the assumption that Marxism is constituted by a set of arguments that can be analytically dissected into their primary elements and then evaluated; where these fail to pass muster as 'good arguments', they are rejected and replaced by a more persuasive set. One obvious drawback to this approach is that although it is certainly not her intention to decontextualize the Marxist engagement with law, it does tend to dislocate particular arguments from their historical and theoretical setting.

Having expressed these doubts about her methodology, I will examine the elements of her argumentative strategy before attempting to show how a different approach can provide a stronger, and hopefully more persuasive, version of the case for a socialist interest in law. It should be emphasized that I am in agreement with her general conclusions and have elsewhere advanced a similar line of argument.¹²

The Cost of the Functional Fallacy

Sypnowich's account constructs Marxism as advancing a jurisprudential conception which identifies law by reference to a set of 'functions' characteristic of class societies in general and capitalist societies in particular. What is distinctively Marxist about this conception is its denial that law has any part to play in a future socialist society, since Marx was committed to the thesis that the state, and by implication law, would 'wither away' in the transition from socialism to communism. The next step in Sypnowich's reconstruction of Marxism determines her subsequent exposition. She argues that Marxism, like analytical jurisprudence, is grounded in a 'definition' of law. I find this view problematic, not least because Marx himself was generally

¹¹ Arkady Vaksberg, *The Prosecutor and the Prey: Vyshinsky and the 1930s Moscow Show Trials*, London 1990.

¹² See, in particular, A. Hunt, 'The Politics of Law and Justice', in D. Adlam et al, eds., *Law, Politics and Justice: Politics and Power IV*, London 1981; A. Hunt and A. Bartholomew, 'What's Wrong With Rights?', *Law & Inequality* 9, 1990.

careful not to construct accounts of complex social phenomena by starting out from definitions; rather he always insisted on the complex reality of social phenomena, which could only be appropriated theoretically by a series of successive approximations. Sypnowich's definition of law attributes three distinctive 'functions' of law to capitalist society. These are: (1) law is an expression of egoism in that it reflects the alienated self-interested monads that result from capitalist economic relations; (2) law is a source of ideological mystification which functions to legitimate the inequalities of capitalist social relations; and (3) the substantive content of law functions to consolidate the interests of the capitalist class.

Her exposition fails to make clear the nature of the connection between the general 'withering away' thesis and the three functions of law. It seems to rest on the assumption that since law in capitalist society fulfils these functions, an explanation is thereby provided as to why Marx espoused the withering-away thesis.

The three conceptions of law in the Marxist tradition, despite their differences, all share a commitment to the doctrine of the withering away of law and state: the source of law lies in relationships of conflict, domination, and alienation intrinsic to capitalism, and under perfect socialist conditions, law would be inconceivable. (pp. 23–4)

In a lapse from her otherwise careful argumentation, the claim that such conceptions disclose a commitment to the withering-away thesis is not defended. The difficulty I encounter with her exposition stems from her tendency to deploy a functionalist form of argument. This is not to contend that to talk of 'function' is itself to commit a functionalist heresy; rather, functionalism is to be avoided because it elevates functions into explanatory principles, of which social practices and institutions are the bearers. It is clear that Sypnowich does not intend to advance such an explanation, but the trouble starts with the definitional strategy itself in which she claims that functions are the results of the objectification of human capacities and wants. This mode of analysis produces a certain circularity: first define the functions of law under capitalism; then, since socialism puts an end to the conditions which produce these functions, it follows that law itself is rendered obsolete.

If instead we take as our starting point not a definitional but a sociological conception of law, then law is not reducible to a set of prescriptive functions. Rather, we should seek to identify specific sets of practices and discourses. Even if we wish to use the convenient linguistic shorthand, nothing allows us the definitional freedom to abolish law by abolishing one set of functions. Talk of 'functions' impedes our ability to grasp the change or transformation of the effects of law; consequently there is merit in avoiding the problems that result from defining law in this way.

Sypnowich is not alone in relying on a problematic recourse to talk of functions. Marx and Engels depended, in part at least, on just such a mode of argument in advancing the 'withering away' thesis. Engels's famous summary of the thesis invokes the assumption of a single functional definition of the state. 'As soon as there is no longer any social

class to be held in subjection; as soon as class rule, and the individual struggle for existence . . . are removed, nothing more remains to be repressed, and a special repressive force, a state, is no longer necessary.¹³ Engels took one important step further in excluding the possibility of a transformation in the functions of the state under socialism: '[T]he government of persons is replaced by the administration of things . . . The state is not "abolished". It *withers away*.'¹⁴

Sypnowich quotes this well-known formulation without comment, and in spite of her subsequent argument that shows her view of socialism to be far more complex than Engels's 'administration of things'. The idea that the disappearance of classes leaves only the non-political task of administering 'things' has the serious consequence of 'abolishing' *politics*. It is perhaps not too severe to insist that Engels's formulation is simply nonsense. Any arrangement of the processes of production must always involve the 'government of people'—or better, the regulation of social relations; such government may be more democratic and less oppressive and non-exploitative, but it involves, under any conceivable form of the social relations of production, a system of social, economic and political *regulation*.

The error of the functional fallacy perpetrated by Engels has had significant political repercussions. It was taken up by Lenin and found expression in his views that the fledgling Soviet Republic had no need of 'bourgeois' constitutionalism; for not only would the state wither away in the transition to socialism, but all the processes of government would become radically simplified and thus less in need of a constitutional or legislative framework. For Lenin, law served largely educational or propaganda functions.¹⁵

The consequences of the line of political thought that developed from this famous thesis have been severe: a complete absence or void in the socialist politics of law, administration and constitution. The problem was not simply that the Bolsheviks embarked on the project of socialist construction under extremely adverse conditions (civil war, backwardness, encirclement, and so forth), nor that there existed a latent tendency towards authoritarianism within the Leninist tradition. Far more serious was that the whole of the classical Marxist tradition bequeathed a deathly silence about the constitutional and legal problems that must inevitably confront any project of socialist construction. This is not to suggest that had this important set of absences within classical Marxism not existed, then the complex problems confronting socialist construction would have been resolved. Such a view would grossly simplify the complex range of social, economic and political issues that constituted the project. My point is more simple, but nonetheless important: that whilst the socialist and Marxist tradition has focused on such problems as the planned economy,

¹³ Friedrich Engels, *Anti-Dühring*, Moscow 1959, p. 387.

¹⁴ *Ibid.*

¹⁵ For discussion of Lenin on the 'withering away' thesis, see A. Hunt and P. Beirne, 'Law and the Constitution of Soviet Society: The Case of Comrade Lenin', in P. Beirne, ed., *Revolution in Law: Contributions to the Development of Soviet Legal Theory 1917–1938*, Armonk, NY 1990. The wider implications for Marxist theory are discussed in A.J. Polan, *Lenin and the End of Politics*, London 1984.

bureaucratism, the party form, little or no attention has been paid to 'socialist constitutionalism'. This absence is no mere gap, ready to be filled, but rather a yawning void which has led most Marxists, past and present, to deny and ridicule the idea that such an issue has any proper place amongst the concerns of socialists.

Perhaps I overstate the matter by speaking of a 'silence'. For there does exist a legacy that might serve as a basis for fruitful interventions in the future. This legacy includes Karl Renner's ideas concerning the 'functional transformation' of legal forms, and Franz Neumann's reflections on the possibilities of democratic constitutionalism.¹⁶ However, the set of issues I have aggregated as 'socialist constitutionalism' were not central to the work of these or other socialist thinkers; in any case, the rupture between the Communist and socialist movements ensured that their contributions remained marginal, and could be dismissed as revisionism.

Why Does Socialism Need Law?

Sypnowich's argument sets out to refute the orthodox Marxist case against a socialist interest in law. On the positive side, she explores major themes around the rule of law, human rights and justice. On the first, she argues a more persuasive case than does E.P. Thompson with his dramatic contention that the rule of law is a universal human good;¹⁷ her more modest aim is to establish that the rule of law is compatible with socialist priorities concerning freedom and equality—indeed, that it is a vital precondition for the democratic and effective operation of socialist institutions. In addition, she draws attention, by means of a critique of Hayek, to the ways in which market relations may be incompatible with the requirements of the rule of law. Procedural justice demands that liberty—in both its positive and negative forms—be equally enjoyed by all. Thus freedom and equality are not synonymous, but should rather be understood as mutually supporting (p. 83).

Sypnowich acknowledges the legitimate suspicion with which socialists have regarded the atomistic and individualistic characteristics of rights. She therefore sets out to 'reconstruct' a doctrine of human rights that avoids any reliance on notions of 'natural rights'; instead they should be understood as social and historical phenomena which emerge at the margins of society, and which are secured by struggles against prevailing conditions. Human rights expand, like T.H. Marshall's citizenship, as the polity becomes both more extensive and more expansive. Sypnowich seeks to build on a progressively enriched notion of citizenship enhanced by the socialist ideal of fraternity; such a conception, she suggests, would readily embrace the collectivist and welfarist aspirations characteristic of the socialist project.

Sypnowich seeks subsequently to elaborate a socialist body of human

¹⁶Karl Renner, *The Institutions of Private Law and Their Social Functions*, edited by Otto Kahn Freund, London 1972; Franz Neumann, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory*, edited by H. Marcuse, New York 1957.

¹⁷E.P. Thompson, *Whigs and Hunters*, p. 265.

rights, employing as her main vehicle a close critique of Tom Campbell's interest-based version of a socialist-rights doctrine.¹⁸ The key feature of her alternative is to refuse the linkage between self-interest and selfishness, but without importing the implausible assumption that a socialist society would be lucky (or maybe unlucky) enough to be populated with altruists. Sypnowich insists that rights provide a useful means for weighing and comparing competing claims and interests, even though they cannot resolve such conflict. A self-interested concern to secure satisfying work and protection of the conditions of political participation are examples of such rights.

Rather than counterposing individual and social interests, a socialist system of rights requires an extensive range of individual or self-interested rights—as indeed does capitalist law, although it clearly possesses different content and has its basis in the priority of property interests over other interests. I take one of the lessons of the demise of 'actually no longer existing socialism' to be the necessity for any defensible socialism to provide, and to guarantee, individual rights against the state and bureaucracy. More significant, perhaps, is the fact that if, as I have argued above, socialist society will be inherently complex, it follows, as Sypnowich argues, that 'a flourishing altruistic society requires disputes' (p. 132). This can be pushed a step further by suggesting that rather than there being a simple need for more law, there exists a strong incentive to provide more and varied mechanisms of dispute resolution. Such mechanisms may, of course, include traditional legal litigation; but they also open up a space for experimentation with community justice, mediation, arbitration and other forms of non-legal process. Rather than displacing or expanding the field of law, we should envisage a shift toward a more extensive, but not necessarily more intensive, realm of disputation as an essential ingredient of both state and civil society.

Liberal legal theory believes that once a legal system is identified as providing the conditions of justice (rights, rule of law, and so forth) then citizens within such a system have an obligation to obey the law. Sypnowich's quite proper concern to ensure that no future socialism repeats history by lapsing into authoritarianism leads her to reject the notion that citizens have such an obligation. This perhaps goes too far; it seems sensible to balance a requirement to obey the law with an appropriate right to rebellion.

I shall now expand upon the reasons why any feasible socialism requires a developed system of law. Firstly, it is necessary to confront the noted silence within the classical Marxist tradition: to trace its origins and to explore the possible conditions for advance. Significantly, the treatment of social conflict in the transition to communism is heavily dependent upon the anarchist tradition. Anarchism insists upon the inherently repressive character of all macro-political institutions and of the state in particular; it holds that once freed of the coercive and alienating consequences of hierarchy and political centralization, 'natural' participatory conditions of cooperation between

¹⁸ *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights*, London 1983.

people will flourish. Thus a key vision is that of a *non-legal social order* that valorizes spontaneous sociality, counterposing it to 'law' which is conceived as the embodiment of external and imposed sociality. The Marxist borrowing from anarchism expressed itself in the vision that the transcendence of class antagonism would create conditions conducive to natural and spontaneous cooperation, under which the external constraints of state and law would wither away. The resulting set of social relations would exhibit a fundamental *simplification* of social coordination. The drawback is that this vision ignores all other sources of structural social conflict; after all, are we not only too aware today of the intractability of conflicts generated by ethnicity, gender, religion and nationalism? But perhaps it is the projected simplification of social coordination that has the most dangerous ramifications.¹⁹ The disappearance of class antagonisms is presumed to leave only non-antagonistic conflicts that are resolvable through consensual mechanisms of democratic participation. But is this a warrantable assumption? I would suggest not. The root difficulty lies in the idea that socialism would provide greater scope for direct or participatory democracy—there is an underlying assumption made by Marx that communism would herald a return from the alienated *Gesellschaft* relations to a higher level of direct relations of *Gemeinschaft*. This idea is caught in Marx's strikingly premodern imagery of communist 'man' being able to 'hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner'.²⁰

As is well known, Marx, reacting against the dreams of the 'utopian socialists', explicitly refused to speculate about the specific shape or features of a future communist society. But there is, paradoxically, an element of utopianism in Marx's thought: eschewing detailed plans, he nevertheless asserted the thesis that communism would simplify the problems of social coordination. Once we reject the romanticism of the simplification thesis, which underpins the theory of the withering away of state and law, we can readily perceive the emptiness of this famous dictum.

The contention that politics, as an expression of the clash of interests, must continue under socialism, and that complex social arrangements require coordination and regulation, is not—or should not be—controversial. The more important issues are whether this implies a continuing necessity for law, and whether the development of a specifically socialist law should be pursued. It is certainly the case that expansion and extension of democracy, a central goal of the socialist project, would itself involve more complex social coordination. For this reason the ideal of a non-legal social order which envisages the displacement of the formal structures of law by direct or 'popular' justice provides no adequate mechanism for handling conflict. The traditional aspiration for workers' control has tended to assume the existence of dispersed sites of self-governing units, small enough to

¹⁹ Lenin articulated this idea of the simplification of social coordination under socialism when he argued that with the abolition of classes 'people will become accustomed to observing the elementary conditions of social life *without violence and without subordination*.' (*The State and Revolution*, in *Collected Works*, Vol. 25, p. 456.)

²⁰ Marx and Engels, *The German Ideology*, in *Marx-Engels Collected Works*, Vol. 5, p. 47.

function through direct participatory democracy; but this vision ignores the problems of coordination between units and the need to take account of the dispersed and divergent interests inherent in complex interdependence.²¹ It is in this context that any feasible socialism would require law.

It is not necessary to rely on this most typical liberal case for law, namely, that relatively complex social arrangements need the predictability and certainty of rules. More specifically, socialism needs law because its commitment to democracy requires extensive guarantees of participatory and procedural regularity. An expanded democracy would necessitate a complex system of rules about entitlements to participation in democratic decision-making; this would require a 'jurisprudence' which identified those interests that are to be accorded 'standing'—the entitlement to consultation, information, participation, rights of appeal, and so on.

Expanding the Scope of Participation

Without attempting to set out a full programme for a 'socialist law', we might suggest one important general characteristic for such a legal order. The pervasive form of capitalist law, as elaborated by Pashukanis, is the private regulation of the exchange of commodities as embodied in the complex elaborations of property law.²² The equivalent socialist form would be a public law laying down the framework for democratic decision procedures for multiple interactions within an expanded realm of public life. Such a view is entirely consistent with the possibility of a reduced sphere for coercive substantive rules of conduct ('Thou shalt not . . .'). It is important to stress that such a shift from private to public would not involve a radical breach with capitalist law, given that one of its major transformations in the last century has been just such a growth of public law. From the narrow field of administrative law that regulates state institutions and their interrelationships, there has emerged a complex of laws governing the decision procedures in both the public and private sectors.

The role of socialist law would be to expand and facilitate the scope of participation, and to enhance its democratic character, thereby opening up possibilities for informed participation in all areas of social life. But such mechanisms could not be encompassed within a project of direct democracy; they would necessitate, rather, a complex mechanism of representation, some tentative and limited aspects of which are prefigured in developments such as worker representation in corporations and consumer representation in public enterprises. To reduce what would inescapably be a complex system to its simplest form, we can suggest that socialist law would involve a shift from substantive law (explicit rules of conduct) to procedural law (governing

²¹ Pat Devine is surely right in seeking to resist the wholesale retreat from planning; see *Democracy and Economic Planning*, Cambridge 1988. But I am less confident than he is that participatory democracy is itself a sufficient vehicle for a renewal of socialist planning; rather, I suspect that a complex framework of planning law which stipulates not only procedures but also distinctively legal mechanisms of appeal would be an essential ingredient of a democratic system of planning.

²² E.V. Pashukanis, *Pashukanis: Selected Writings on Marxism and Law*, edited by P. Beirne and R. Sharlet, London 1980.

how decisions are to be taken and less concerned with the content of those decisions).

This brief account of the case for 'socialist law' is not at odds with Sypnowich's argument, but it differs in one significant respect. Sypnowich argues that the classical Marxist thesis of the withering of the state and law is not only unsustainable, but is morally dangerous in that it provided significant theoretical rationalization for the authoritarianism of the systems we should perhaps now describe as 'actually no longer existing socialism'. She argues that the actual course of the debates in the Soviet Union during the 1920s and 1930s over the future of law can be understood as the triumph of the third strand in the Marxist theory of the functions of law—namely, of law conceived as an instrument of class rule. 'The view that law was unambiguously an instrument of class rule and that coercion was necessary to sustain it, and law would disappear only upon the full flowering of socialist society, justified an epoch of legalized repression under Stalin.' (p. 20). The practical result was that Pashukanis fell into disgrace and was arrested (presumed murdered) within weeks of the introduction of the 1936 Stalin Constitution that enshrined the project of 'socialist law'. Sypnowich's case is weakened by a double slippage: the first involves a misconstrual of Pashukanis's argument, and the second a misunderstanding of the role played by disputes around the problem of 'transition' in the Soviet debates.

Sypnowich emphasizes in Pashukanis what might be called the substantive withering away of law, (that as commodity relations disappear under socialism then law will have no continuing social role). Perhaps the more challenging feature of his argument revolves around the contention that it is the very *form of law* itself which is distinctively capitalistic and is accordingly inappropriate to the regulation of the social relations of a socialist society. (I take up this issue below to argue that the form of law is not in fact inimical to socialism.) Pashukanis's position is compatible with a recognition of a variety of modes of regulation under socialism—for example, the assigning of a considerable role to popular adjudication through Comrades' Courts. His central theoretical argument is directed toward what he insists is the inherent incompatibility between socialist relations of production and the bourgeois legal form. This clarification is not intended to suggest that we should accept Pashukanis's thesis, but rather to insist that to be of value a critique must question whether his distinction between the form and the substance of law can be sustained.²³

A second way in which Sypnowich's case can usefully be extended is by taking more direct account of the 'transition' debate within Marxist theory and politics. Her argument deploys only a generalized conception of 'socialism', whilst the actual course of the debates revolves around two important distinctions: that between socialism and communism (with its roots firmly in classical Marxism), and that between the dictatorship of the proletariat and socialism (rooted in Lenin's

²³ For critiques of Pashukanis, see Paul Hirst, *On Law and Ideology*, London 1979; Steve Redhead, 'The Discrete Charm of Bourgeois Law: A Note on Pashukanis', *Critique* 9, 1978, pp. 113–20; Ronnie Warrington, 'Pashukanis and the Commodity Form Theory', *International Journal of the Sociology of Law* 9, 1981, pp. 1–22.

extrapolation from Marx's reflections on the Paris Commune). It is not my intention to reopen here the debate about the dictatorship of the proletariat, but, rather, to suggest that it is important to keep the question of transition on the agenda. It remains one of the more difficult problems that confront any contemporary socialist project. One lesson of the Bolshevik legacy is that an insurrectionary strategy not grounded on the prior achievement of political hegemony results in a predisposition to authoritarian tendencies. It follows that socialists have to confront a much more complex set of problems associated with how legitimacy and legality can be sustained under those conditions of heightened political struggle that will confront any government seeking to embark on major transformations of economic or social relations. The problem of how to secure conditions of legal continuity, while at the same time pursuing radical socioeconomic change, presents a major challenge to the socialist imagination. And significantly this problem has never formed any part of the socialist agenda.

Socialism and the Form of Law

The most persuasive case for a socialist hostility to law rests on the contention, articulated by Marx and elaborated on by Pashukanis, that the very *form of law* is inherently and inescapably bourgeois. The form of law generates a discourse of 'legal subjects'—abstracted from their material social relations as bearers of rights and duties—which mirrors the reified relations between the buyers and sellers of commodities.²⁴ There is no disputing that the homology between commodity relations and legal relations provides the simplest illustration of the legal form, and that historically the elaboration of private law provided the fertile soil within which legal doctrine developed. What is controversial is the extent to which legal relations are constrained by and limited to the model of commodity relations, and can thus be said in some significant sense to be 'bourgeois'. Whilst the simple contract provides one pervasive model, modern legal systems exhibit a much wider and more complex range of legal relations. The history of modern law has involved a significant extension of the range of social entities recognized as 'legal subjects'; not only are business corporations endowed with legal status, but so, in varying forms, are trade unions, voluntary associations and charities. There have been significant shifts in according legal recognition and voice to a diversity of interests, particularly in the wake of the rapid developments in environmental law. In this respect the USA is significantly more advanced than Britain in recognizing 'public interest' representation, in permitting group actions by coalitions of interest groups, and in allowing test cases. While there remains an important agenda for securing legal recognition for group and collective interests, it is simply wrong to contend that the legal form restricts recognition to atomized economic agents. Similarly, it is important to stress that legal rights do not simply accrue to private interests; legal status has increasingly

²⁴ Some of Marx's sharpest formulations of the critique of rights were made in 'On the Jewish Question'; for example: 'Not one of the so-called rights of man goes beyond egoistic man, man as a member of civil society, namely an individual withdrawn unto himself, his private interest and his private desires and separated from the community.' (*Early Writings*, Harmondsworth 1975, p. 230.)

been secured by 'citizens', both individually and through group representation. The enormous expansion of public law over the last century has undermined the homology between law and private interests. Nor can it any longer be contended that the form of law bears any necessary relationship to either private or property interests. The existing law of the major capitalist democracies exhibits a multiplicity of potential mechanisms of control, restriction and limitation, and regulatory capacity over private interests. Although it would require detailed demonstration, it is probably the case that existing 'capitalist' law contains all the legal mechanisms necessary to institute the most radical socialist programme. The transformations of modern law can be generalized as a shift from a simple unitary form grounded in an extrapolation from commodity relations, to a diversity of coexisting legal forms whose existence and potential breaks any necessary connection between the legal form and capitalist social relations.

Socialism, Rights and the Rule of Law

A similar line of argument is pertinent to another facet of the classical Marxist critique of law: that which contends that 'legal rights' necessarily operate preferentially to secure and protect capitalist interests. The assertion that the substantive content of legal rights favours the interests of capital merely confirms the obvious truth of continuing capitalist political and legislative hegemony. It tells us nothing about any necessary elective affinity between capital and law which the argument presupposes. In its place a more adequate account must ground itself in the contention that law is an arena of struggle; the content of law both contributes to and is an index of the balance of political forces.²⁵

Sypnowich's most valuable contribution is the development of a positive account of those legal fields that require sustained attention from socialists. She argues that a socialist version of 'the rule of law' is necessary if socialism is to deliver its emancipatory promise. Nothing ties the rule of law to the protection of individual property interests; the substantive content delivered by legal process is an outcome of concrete political struggle. Thus, as E.P. Thompson has argued, the rule of law can be brought into play to curb the authoritarian impulse of the powerful. By extension, Sypnowich argues that the rule of law can provide important checks on official discretion under modern welfare legislation, and provide the precondition for effective socialist institutions. This argument can be further extended and tightened: for, if, as I have argued, a viable socialist society will be inherently complex, it follows that importance must be attached to guaranteeing effective democratic decision-making. A socialist version of the rule of law would provide a means of distinguishing between the decision procedures themselves and the substantive results of those procedures, thus enabling a viable separation between law and politics.

²⁵ Any detailed social or political analysis of law needs to take account not only of the contest over the substantive content of law but also of its procedural context, a point illustrated by Doreen McBarney's demonstration of the importance of criminal procedure, in *Conviction: Law, the State and the Construction of Justice*, London 1981.

Sypnowich argues against the conventional Marxist association of the rule of law with the classic 'negative liberties' that have formed the bulwarks of private-property interests under capitalism. She insists that the rule of law can also buttress the 'positive freedoms' bound up with the collectivist ends of egalitarian socialist policies. In refusing the liberal opposition between liberty and equality, she argues that these states can be 'mutually supporting' (p. 83). She rightly rejects any necessary opposition, but does not give enough attention to the significant differences that exist between negative and positive freedoms. To mention only the most important, it should be noted that the securing of positive freedoms requires something more than a no-cost abstention from interference, whether by public or private agencies. For example, to secure the right to abortion as a positive freedom requires more than decriminalization; it necessitates positive provision of medical and other resources. Practical problems relating to the quantity of resources and their distribution are less justiciable, because they are less readily reduced to the kind of question upon which courts of law can effectively adjudicate, or on which judges should be the appropriate decision-makers.²⁶ It is therefore a more secure argument to contend that the rule of law can provide effective procedures for demarcating the boundaries between law and politics, than that this doctrine can provide practical solutions to the problems that typically concern socialists. I would urge a more modest, but nevertheless positive, role for the rule of law under socialism.

Socialism beyond Liberalism

Sypnowich's achievement is to mount a thorough and persuasive case for a socialist interest in law. Her work is located squarely within the mainstream of English jurisprudential thought; as I have argued, the implications of the adoption of this tradition are problematic, since it generates certain tensions when melded with Marxism. But there can be no doubt about both the theoretical and political correctness of her argument. For, as she states, 'Law is not merely congenial to socialism. It is an essential pre-condition of its attainment' (p. 155). The defence and elaboration of this case touches on, as she makes clear, the necessity for socialist theory to retrieve some of the important legal ideals of liberal legal and political philosophy. Such a position necessitates a clear breach with that feature of the Marxist tradition which, in both theory and politics, poses the necessity of a fundamental cleavage between Marxism and bourgeois theory in general and liberalism in particular. This issue of the relationship between Marxism and liberalism has been raised over a range of recent debates, perhaps in its most developed form in discussion of the relationship

²⁶ The concept of justiciability is especially important with reference to the judicial review of administrative action. For example, where ministers are required by legislation to hold an inquiry on some planning question, or to initiate an environmental-impact inquiry, a court of law is generally ill-equipped to review the technical evidence or the merits of the substantive decision; but what is justiciable is whether the decision procedure meets legislative requirements or more broadly those of natural justice.

between Marxism and democracy.²⁷ One significant feature of the socialist engagement with law is that it poses in a particularly concrete way the need to engage with quite specific features of the liberal tradition. These include discussion of the place of rights in socialism, and specifically of the compatibility of individual and social rights, and the status to be accorded to the principles surrounding the rule-of-law doctrine. To these should be added the emerging debate around constitutionalism.²⁸ It is important to distinguish between the two facets of constitutionalism. Firstly, there is the issue—much to the fore in both East and West, with the new constitutionalism in Eastern Europe²⁹ and the constitutional reform debate in Britain stimulated by ‘Charter 88’—about the role and significance of state constitutions. There is a second, broader and more pervasive, issue which spans both the state and civil society; this concerns the importance of formal delineation of spheres of competence, scope of jurisdiction, modes of accountability, and the interrelationships between social institutions.³⁰ This second arena poses perhaps sharper challenges to important components of the Marxist tradition, and in particular to Leninism, in that it requires the explicit rejection of the view that ‘the Party’ mechanism can provide a substitute for a thorough constitutionalism of both state and civil society.

What is clear is that an important convergence is generated: on the one hand, by the theoretical trajectory of Western Marxism, and on the other, by the political imperative of redressing the experience of Eastern Europe. One significant and illustrative exemplification of the vital agenda for socialism is the engagement with the problems posed by law, legality and constitutionalism. These issues must come in from the cold of the superstructure into the mainstream of the socialist agenda.

²⁷ See, in particular, John Keane, *Public Life in Late Capitalism: Toward a Socialist Theory of Democracy*, Cambridge, 1984; Christopher Pierson, *Marxist Theory and Democratic Politics*, Cambridge 1986.

²⁸ See Jon Elster and Rune Slagstad, *Constitutionalism and Democracy*, Cambridge 1988; Hunt and Beirne, ‘Law and the Constitution of Soviet Society’.

²⁹ Ralf Dahrendorf, *Reflections on the Revolution in Europe*, London 1990.

³⁰ It is this double sense of ‘Constitution’ and ‘constitution’ that is developed in Hunt and Beirne, ‘Law and the Constitution of Soviet Society’.