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Marxist theory of law

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The object of Marxist theory of law

Marxist theory of law asks: what part, if any, does law play in the reproduction of the structural inequalities which characterize capitalist societies? It is thus a project which does not occupy the same field as orthodox jurisprudence; its agenda is necessarily different. Thus Marxist theory of law cannot simply replace elements within liberal legalism in order to produce an alternative theory and it does not address the same questions which motivate liberal jurisprudence. It has mainly played an oppositional role. Its most frequent manifestations have been directed toward providing a critique of liberal legal thought. The critique is "oppositional" in the sense that it has been directed at controverting the conventional wisdom of liberal legalism.

Marxist theory of law exhibits a number of general themes which have been reworked into new and variant combinations. In summary form the major themes which are present in Marx's own writing and in subsequent Marxist approaches to law are:

1 Law is inescapably political, or law is one form of politics.
2 Law and state are closely connected; law exhibits a relative autonomy from the state.
3 Law gives effect to, mirrors or is otherwise expressive of the prevailing economic relations.
4 Law is always potentially coercive and manifests the state's monopoly of the means of coercion.
5 The content and procedures of law manifest, directly or indirectly, the interests of the dominant class(es).
6 Law is ideological; it both exemplifies and provides legitimation to the embedded values of the dominant class(es).

These six themes are present in Marxist writings on law in a variety of different forms and, in particular, with very different degrees of sophistication and complexity. This point can be illustrated by taking theme 5, concerning the connection between law and class interests. In a simple version this finds expression in the

claim that law gives effect to the interests of the capitalist class and that law is thus an instrument through which the capitalist class imposes its will. This theme is also present in more sophisticated forms which stress that the content of law can be read as an expression of the complex dynamic of class struggle. As such it comes to include legal recognition of the interests of subordinated classes secured through struggle.

These themes raise issues excluded or ignored in orthodox jurisprudence; for example, the focus on the connection between law and politics or between law and class interests either adds to or redirects the concerns of jurisprudence. Other themes have more wide-ranging implications for legal theory. For example, the insistence on the ideological nature of law involves an entirely different way of looking at the texts, discourses and practices of law. Such a point of departure disallows a positivist acceptance of legal rules as the taken-for-granted primary reality of law.

Outline of a Marxist theory of law

What follows is an outline of a Marxist theory of law which concentrates on achieving an integrated theoretical structure from the main themes present in the diverse versions of Marxist theory of law. It is *not* an attempt to offer a précis of Marx's own writings on law. It is important to stress that Marx did not produce anything that could be called a "theory of law." Law was never a sustained object of Marx's attention although he did have much to say about law that remains interesting and relevant (Cain and Hunt, 1979; Vincent, 1993).

The selection of a starting point is the most important step in the development of any theory. Space does not permit a full defense of the starting point selected. The claim is that Marxism is a rigorously sociological theory in that its general focus of attention is on social relations. Law is a specific form of social relation. It is certainly not a "thing," nor is it reducible to a set of institutions. In one of many similar passages Marx stated his relational approach in the following terms:

> Society does not consist of individuals, but expresses the sum of interrelations, the relations within which these individuals stand . . . To be a slave, to be a citizen are social characteristics, relations between human beings A & B. Human being A, as such, is not a slave. He is a slave in and through society. (*Marx, 1973, p. 265*)

The relational approach to law posits that legal relations are first and foremost a variety or type of social relation that are identified by a specific set of characteristics that separates them from other types of social relations. Legal relations take the form of relations between "legal subjects." The legal subject does not coincide with the natural person; thus until relatively recently women were either not legal subjects or were constrained within a specific legal status which imposed duties whilst granting few rights. It should be noted in passing that there is an important

connection between "legal subject" and "citizen," which is neither homologous nor opposed.

The most simple instance of the legal subject is that of the adult person recognized by a court as the bearer of rights and thus able to initiate litigation. Many social institutions are endowed with legal subjectivity or "legal personality," for example, the corporation is accorded the status of a legal subject. It is also important to emphasize the wide variety of legal statuses into which people and groups are interpellated; defendants, witnesses, trustees, beneficiaries, agents, owners, and a host of other legal statuses are summoned into being. Legal interpellation may itself be constitutive of a social relation as is the case with the formation of a corporation where law is performative (a legal act actually changing the position of the parties). In other circumstances the legal interpellation does not create a social relation but rather it affects the terms, conditions and limits under which that relationship is lived out and struggled around.

A legal relation always generates a potential "mode of regulation"; it is "potential" in the sense that many legal relations may be wholly or largely passive in that the legal dimension of the relation may play no part at all in the way the concrete social relations is lived out. Law provides a wide variety of different modes of regulation of social relations. In many instances this is directly apparent in the conventional classification of types of law; thus criminal law employs different agents (for example, police) and imposes different sanctions (for example, imprisonment) from those techniques associated with private law (for example, litigation, damages). The concept of a mode of regulation serves to focus attention on law as an ongoing set of practices which contribute to the reproduction and transformation of social relations.

The major ingredient of a legal mode of regulation is the form which flows from the attribution of rights to interpellated legal subjects. The discourse of rights needs to be understood as consisting of a bundle of rights/duties distributed between legal subjects located within social relations. Both rights and duties embrace a variety of different types of attributions whose significance is that they not only provide a relatively unified legal discourse which can handle a range of different social relations, but which also overlap with wider normative and moral discourses. This interface of legal and moral rights provides for both the authoritative determinations of rights/duties in litigation, a meta-discourse which provides legitimation and also a terrain, a contestation, and change in which new or variant claim-rights are articulated and asserted.

The significance of the rights-grounded discourse is that it provides an integrated field within which all forms of social relations can be made subject to a common discursive apparatus. This is not to suggest that rights discourse is or can be fully coherent or free from internal tensions or contradictions. One of the major contributions of the "critical legal studies" school has been to highlight the internal incoherence and contradictions within the discourse of rights (Hutchinson, 1989). It is important to note that rights-discourse figures in other forms of dispute handling outside litigation such as negotiation and public debate.

Law and legal process have the potential to change the relative positions of legal

subjects within social relations; in this basic sense law is a distributive mechanism. Again it is necessary to stress "potential" since it does not follow that change in legal capacity necessarily effects positions within social relations. This is particularly obvious where law "fails", for example, in not achieving an adequate mechanism to enforce child support payments by deserting fathers. The general process of legal distribution is that interests and claims are transcribed into rights discourses, and in that process the capacities of legal subjects are confirmed or varied. Law is a major distributive mechanism by varying the relative positions and capacities of the participants in social relations. Thus one important dimension of legal regulation is that it regulates the boundaries or spheres of competence of other modes of regulation. This process frequently manifests itself in the never ending process in which legal discourse invokes and redraws the boundary between the public and the private.

It is important to emphasize the quest for consistency in legal doctrine. Engels formulated the issue clearly in his letter to Conrad Schmidt:

> In a modern state, law must not only correspond to the general economic conditions and be its expression, but must also be an *internally coherent* expression which does not, owing to internal conflicts, contradict itself. (*Cain and Hunt, 1979, p. 57; Marx and Engels, 1975, p. 399; emphasis in original*)

Two important points follow. First, it explains why law is rarely if ever the direct instrumental expression of the interests of a dominant class. Second, it is the persistent quest for coherence, rather than its realization that is significant. Indeed a necessary tension between competing versions of legal boundaries, such as that between public and private, ensures the flexibility and responsiveness of law to changing contexts and pressures.

Marxism's central concerns are: (1) to explain the relations of subordination or domination that characterize particular historical epochs; (2) to account for the persistence and reproduction of these relations; and (3) to identify the conditions for ending these relations and realizing emancipated social relations. The method and content of a Marxist theory of law will necessarily be concerned to explore the role of law in these three areas.

Alternative Marxist approaches to law

The characteristics of this relational theory can be illustrated by contrasting it with two other variants which have been influential in the history of Marxist work on law. The first draws on Marx's imagery of base and superstructure which distinguishes between "the economic structure of society," which forms the base or "real foundation," "on which rises a legal and political superstructure and to which correspond definite forms of social consciousness" (Marx, 1971, p. 21). Law is assigned to the "superstructure" which "reflects" the "base" or "economic structure." Thus it is the economic structure which determines or has causal priority

in determining the character and content of the law (and all other features of the superstructure).

The base–superstructure thesis is problematic in a number of respects. The notion of base–superstructure is a metaphor; it seeks to advance our understanding of social relations by importing an analogy which involves imagery derived from thinking about society as if it were a building or a construction project. The base–superstructure metaphor runs the risk of committing Marxism to an "economic determinism"; the objection to which is that it proposes a causal law (analogous to classical scientific laws) which asserts the causal priority of the economic base over all other dimensions of social life (Williams, 1977, pp. 83–9). There is a "weaker" version of the idea of determination in which "determination" is conceived as a mechanism whereby "limits" are set within which variation may be the result of causal forces other than the economic structure. Thus the economic base is pictured as prescribing the boundaries or as setting objective limits for the different elements of the superstructure. This sense of determination is theoretically more attractive because it does not foreclose or pre-determine the causal relationship that exists between the different facets of social life.

Marx and Engels both occasionally came close to this softer version of "determination". Perhaps its best known formulation is provided by Engels's letter to Bloch (September 21, 1890):

> According to the materialist conception of history, the *ultimately* determining factor in history is the production and reproduction of real life. Neither Marx nor I have ever asserted more than this . . . The economic situation is the basis, but the various elements of the superstructure – political forms of the class struggle and its results, such as constitutions . . . juridical forms, and especially the reflections of all these real struggles in the brains of the participants, political, legal, philosophical theories . . . also exercise their influence upon the course of the historical struggles and in many cases determine their *form* in particular. There is an interaction of all these elements in which, amid all the endless host of accidents . . . the economic movement is finally bound to assert itself. (*Marx and Engels, 1975, pp. 394–5; emphasis in original*)

This version of the determination thesis is usually referred to as the "theory of relative autonomy"; its central idea is that law and other elements of the superstructure can have causal effects in that they "react back" upon the economic base which, however, still retains causal priority, but now only "ultimately." Marx and Engels also used phrases such as "in the last instance" and "in the final analysis" to express this long-run sense of the determination by the economic.

Many Marxist writers on law have been attracted to this "softer" version of determinism. Its merit is that it retains some sense of the causal weight or importance of the economic order while at the same time it provides an invitation to explore the intriguing specificity of law.

Despite the undoubted attractions of "soft determinism" plus "relative autonomy" it cannot provide a satisfactory starting point for Marxist theory of law. In its simplest form the objection is that it says both too much and too little. It says too

much in that instead of providing a theoretical starting point it, rather, imposes a conclusion for each and every piece of investigation, namely, that the economic is determinant. But it says too little because it offers no account of the mechanisms whereby this ultimate or long-run causality is produced.

A quite different starting point for a Marxist theory of law was employed by the early Soviet jurist, Evgeny Pashukanis, who, in the 1920s, produced what still remains the most comprehensive Marxist theorization of law (Beirne and Sharlet, 1980; Pashukanis, 1978). Pashukanis set out to model his theory on the framework that Marx had employed in Volume I of *Capital* which opens with a rigorous discussion of the concept "commodity" (Marx, 1970, ch. 1); he sought to elucidate "the deep interconnection between the legal form and the commodity form" and for this reason his theory is often referred to as the "commodity form" theory (Pashukanis, 1978, p. 63). His key proposition was that "the legal relation between subjects is simply the reverse side of the relation between products of labour which have become commodities" (1978, p. 85). In its simplest form Pashukanis viewed the contract as the legal expression of this primary relationship of capitalism, namely the commodity exchange. "Commodity exchange" and "legal contract" exist in a homologous relation; they are mutually dependent.

The most succinct evaluation of Pashukanis is that while he correctly identified law as a social relation, he blocked that insight by reducing law to a single and inappropriate relation, the commodity relation. The root source of both his success and his failure was the rather simplistic reading of Marx, in general, and of *Capital*, in particular, on which he relied. He treated Marx's opening discussion of the commodity as if Marx was propounding an economic history of capitalism which traced its development from the general growth of "simple commodity production." For Marx the famous chapter on commodities was a means of approaching what he regarded as the most basic relationships constitutive of capitalism, namely, capitalist relations of production; for this reason the standard Marxist criticism of Pashukanis is that he reverses Marx's priority of production relations over commodity relations. Thus in grounding his analysis of legal relations upon the homology with commodity relations Pashukanis skewed his whole subsequent analysis.

That Pashukanis took this wrong turn can be readily explained. The most important feature of his work, both theoretically and politically, is his contention that law is irredeemably bourgeois; that is law is especially and distinctively associated with the existence of capitalism. Hence for Pashukanis there could be no post-capitalist law; thus the idea of "socialist law" was both unnecessary and contradictory. The alternative Marxist view is that socialism would involve the development of new sets of relationships and these in turn would necessitate new forms of legal relations. For example, socialism would be likely to accord increased importance to a range of semi-autonomous bodies which would operate with large measure of self-regulation whilst drawing its resources from public sources; such bodies would require new legal property forms. To recover the general relational orientation proposed by Pashukanis it is necessary to free Marxist theory of law from the narrow focus on commodity relations.

Ideology as law and law as ideology

Law is ideological in a double sense; law is ideologically constructed and is itself a significant (and possibly major) bearer of ideology. This can be expressed in two theses:

1 Law is created within an existing ideological field in which the norms and values associated with social relations are continuously asserted, debated, and generally struggled over.
2 The law itself is a major bearer of ideological messages which, because of the general legitimacy accorded to law, serve to reinforce and legitimate the ideology which it carries.

Ideology is not falsity or false consciousness, nor is it a direct expression or "reflection" of economic interests. Rather ideology is a contested grid or competing frame of reference through which people think and act. The dominant ideology is the prevailing influence which forms the "common sense" of the period and thus appears natural, normal, and right. The key project of every dominant ideology is to cement together the social formation under the leadership of the dominant class; it is this process which Gramsci called hegemony (Gramsci, 1971).

The content of legal rules provides a major instance of the condensation of ideology. Law has two important attributes as an ideological process. First, it offers a deep authoritative legitimation through the complex interaction whereby it both manifests a generalized legitimacy, separated from the substantive content of its constituent rules and, on the other hand, confers legitimacy. Modern democratic law involves a change in the form of legitimacy itself; it involves a movement towards impersonal, formal legitimation of social relations in which "law" becomes increasingly equated with "reason." Increasingly the legitimation of social order appeals to law simply because it is law, and, as such, provides the grounds for the obligations of obedience by citizens. Law also comes to be seen as the embodiment of the bond between citizen and nation, the people-nation, as law both constitutes and expresses the state's sovereignty.

The foregoing discussion of legal ideology makes no claim to completeness; it does, however, serve to put in place two major themes: first the doubly ideological character of law; and second the need for attention to the historical dynamic whereby the role and significance of legal ideology has expanded with modern democratic law (Collins, 1982, ch. 3; Hunt, 1985, 1991; Poulantzas, 1978, pp. 76–93; Sumner, 1979, chs 7 and 8).

Law and state

The relational approach highlights the importance of the law-state connection. It seeks to find a way of furthering our grasp of a connection which is on the one

hand close, but within which a significant degree of autonomy and separation of law from the state is manifest. Orthodox jurisprudence tends to be preoccupied with the issue of the identification and legitimation of the boundaries of legal control of individual conduct.

The state is an institutional complex whose dynamic emerges from the tensions within and between state institutions (Poulantzas, 1973; Jessop, 1990). Coexisting and competing projects are pursued by different state agencies. Whilst some are directed towards the cohesion of the state, such as those pursued in the course of the political projects of governments, it is equally common for agencies to operate in such a way as to create spheres of autonomy. The bureaucratic imperatives within state institutions frequently favour such functional separation. The legal system has a distinctive project of state unity whose ideological source stems from the theory of sovereignty. The unity of the state is always a project, but it is one which is never realized.

The most difficult feature of the law–state relationship to give an account of is the manner in which the state is both within and outside the law. It is not just a matter of pointing to the persistent reality of state illegality, but even more important of the large sphere of state action which is not unlawful but which is not subject to legal regulation. The really important issue is the way in which law marks out its own self-limitations. The ideological core of the modern state lies in the varieties of the idea of a state *based on law* (*Rechtsstaat*) epitomized by the constitutional doctrine of the rule of law. The considerable variation in the degree of judicial review of state action that exists between modern capitalist states should be noted.

It is within the law–state relationship that the important but difficult question of the relationship between coercion and consent needs to be posed. Marxists have historically stressed the repressive character of law; they have done so in order to redress the blindness of most liberal jurisprudence which has systematically played down the role of coercion and repression in the modern state. But in reacting against the omissions of liberal theory some Marxists have come perilously close to simply reversing liberalism's error by equating law with repression. The really difficult problem is to grasp the way in which repression is present in the course of the "normal" operation of modern legal systems.

One possible explanation along these lines posits a fall-back thesis: normally law operates more or less consensually, but in exceptional moments the repressive face of law is revealed. Such an account emphasizes the role of special powers and emergency legislation as providing the means for the legal integration of repression. This focus on legal exceptionalism is important, but potentially misleading. It draws attention to the capacity of the state to suspend the operation of democratic process. But it draws too stark a distinction between normal and exceptional conditions. A more adequate view draws attention to the fact that a wide range of legal procedures are coercive and where they are deployed systematically set up patterns of repression. For example, the role of courts as debt enforcement agencies, able to order repossession or grant seizure powers runs counter to the liberal image of civil law as a mechanism for resolving disputes.

Economic relations and the law

A core question for Marxist theory of law is: what part does law play in the production and reproduction of capitalist economic relations? A number of key legal relations form part of the conditions of existence for capitalist economic relations without which they could not function. Law provides and guarantees a *regime of property*. The expansion of the forms of capital and their complex routes of circulation require such a regime which protects multiple interests falling short of absolute ownership.

Legal relations have distinctive effects. The most important of these is the extent to which legal relations actually constitute economic relations. The most significant example is the formation of the modern corporation with limited liability; these are legal creations in the important sense that it is precisely the ability to confer a legal status which limits the liability of participants that makes the relationship not only distinctive but a viable vehicle for the co-operation of capital drawn from a range of sources (Hunt, 1988). Similarly, the modern contract must embrace contract planning for a range of potential variables. The same consideration affects the expansion of issues embraced in collective agreements between labor and capital which necessitates a level of detailed specification that cannot be sustained within traditional notions of custom and practice.

It is important to stress the complex interaction that exists between legal and economic relations. Some of these features can be briefly indicated. Legal doctrines and processes must make provision for the interrelations of capital, through commercial law, insurance, banking, and other financial services. One traditional way of identifying these activities is to speak of the conflict-resolution role of law. But it may be wise to avoid this formulation since it focusses too narrowly on litigation and the courts. It is probably more helpful to think of these mechanisms as background conditions which constitute the framework within which economic relations are conducted.

Law also provides the central conceptual apparatus of property rights, contract, and corporate personality which play the double role of both constituting a coherent framework for legal doctrine and, at the same time, provides significant components of the ideological discourses of the economy. Conceptions of rights, duties, responsibility, contract, property, and so on, are persistent elements in public discourses. The inter-penetration of legal and non-legal features of these discourses play a significant part in explaining the impact of legal conceptions on popular consciousness.

Legal relations and class relations

Another important question for Marxist theory of law is: what contribution, if any, does law make to the reproduction of class relations? This requires attention to the impact of law upon the pattern of social inequality and subordination. Two general theses can be advanced:

1 The aggregate effects of law in modern democratic societies work to the systematic disadvantage of the least advantaged social classes.
2 The content, procedures, and practice of law constitute an *arena of struggle* within which the relative positions and advantages of social classes is changed over time.

The important point to be stressed is that these two theses are neither incompatible nor contradictory; they are *both* true at one and the same time. The first thesis that law disadvantages the disadvantaged operates at all levels of legal processes. It will be assumed that these unequal consequences are either self-evident or so well evidenced in empirical studies as not to require support here. Substantive inequalities disadvantaging the working class (and other subordinate categories) are embedded in the content of legal rules. The procedures of law, the discretion of legal agents, the remedies and sanctions of law and other dimensions manifest unequal social effects. In order to produce a complete analysis of law's capacity to participate in and to reinforce the reproduction of social inequality it is necessary to trace the detailed interaction between the different processes involved.

The second thesis about law as an arena of struggle requires some means of registering and establishing the connection between economic interests and the categories of legal doctrine. Here attention needs to be directed toward the manner in which social interests are translated into rights-claims and the degree of "fit" between those claims and the prevailing form of law expressed in existing legal rights. Analysis of this type generates hypotheses such as: claims capable of translation into a discourse of individual rights and those interests congruent with existing rights categories are more likely to succeed than claims not matching these characteristics.

Conclusions

This essay has outlined a general framework for a Marxist theory of law. There are inevitably issues that have been omitted. Most significantly almost nothing has been mentioned about what Marx himself said about law, or about the history of Marxist writing and debate on law. Another omission concerns the relationship between Marxist theory of law and orthodox jurisprudence. The agendas of Marxist theory and jurisprudence overlap but do not converge. Marxism gives prominence to issues omitted or marginalized within jurisprudence such as the repressive role of law and the fundamentally political character of law. In these respects Marxism can provide a much needed supplement to jurisprudence by its stress on the rootedness or connectedness of law with social, cultural, and economic relations. It provides a powerful source of resistance to the prevalent tendency within orthodox jurisprudence to treat law as disconnected, even autonomous. Marxism further refutes the timeless or ahistorical quality of much liberal jurisprudence. Marxism insists that the role and place of law are always a consequence of a

concrete and historically specific dynamic of the interaction of institutions and practices.

If Marxism supplements jurisprudence, it should not simply seek to negate or displace orthodox jurisprudence. The pervasive jurisprudential issues, such as the grounds for the obligations of citizens to obey law, the means of determining the proper limits of state action and the conditions under which it is permissible to restrain the conduct of citizens are also important questions for Marxism. The renewal of socialism requires, not the withering away of law, but the realization of a legal order that enhances and guarantees the conditions of political and economic democracy, that facilitates democratic participations and restrains bureaucratic and state power. The implication is that a Marxist approach to law will be concerned, on the one hand, with characteristically jurisprudential issues but will also be concerned about the potential contributions of legal strategies to achieving effective political strategies for the social movements that reflect the Marxist political and ethical commitment to the poor and the oppressed.

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