

The Future of Socialist Legality: A Reply to Hunt

My book *The Concept of Socialist Law* challenges the view that an ideal socialist society would have no need of law.¹ While thinkers on the Left advocate socialism in the name of justice, they have traditionally dismissed those legal institutions which have provided some measure of justice in liberal capitalist societies. This dismissal has its origins in the classical Marxist thesis that law is a capitalist apparatus necessary only to mediate conflicts between egoistic market actors or antagonistic social classes. I argue that the contempt for law in socialist theory has made for a contemptible form of socialist legality in practice, and that any worthwhile socialism will need legal institutions to adjudicate disputes between socialist citizens and between citizen and community. The book aims to establish a socialist jurisprudence which addresses such questions as the identity of law, the relation between freedom and impartiality, the nature and origin of human rights, and the impact of civil liberties on community. These questions are the focus of lively debates in liberal legal philosophy, debates which, I argue, can make a significant contribution to a concept of socialist law.

A socialist legal theory is particularly relevant today for two reasons. First, liberal theories of justice are increasingly the target of a number of non-socialist critiques, from feminists to Foucault. Cultural feminists, figures in the Critical Legal Studies movement, communitarians and poststructuralists share a view of liberal legal ideals of impartiality and individual rights as the palliatives of domination and anomie. If it can be established that law has an important place within the socialist project, then the traditional polarization between radical critique and liberal legality must be reconsidered. Second, and more important, the collapse of Communism in Eastern Europe underscores the need for a socialist jurisprudence. If we can explain the legal nihilism of Marxist theory, we may better understand the legal terror of Stalinist practice, and how this legacy has contributed to the current cynicism of Eastern Europeans about the socialist ideal. The rejuvenation of both the theory and practice of Marxism thus depends, I believe, on a revised socialist legality, which joins socialist values of equality and community with liberal values of impartiality and individual freedom.

I cannot help but find Alan Hunt's review, 'A Socialist Interest in Law',² congenial because he agrees with so many of my views. He endorses my theses that law would be needed to mediate conflict even where class divisions and market egoism have been eliminated, and

¹ I am very grateful to David Bakhurst for invaluable comments on an earlier version of this reply.

² See NLR 192, March–April 1992.

that the extension of democracy under socialism would require individual rights and the rule of law. And, like myself, he takes issue with Marx's claim that it is utopian to speculate about socialist social arrangements, and he rejects Pashukanis's conception of the legal form as necessarily embedded in capitalist commodity relations. Hunt also wants to draw on socialist thinkers central to my argument, such as E.P. Thompson, Karl Renner and Franz Neumann, though he sometimes mistakenly thinks that his suggestions here distinguish his position from my own. Indeed, what I find particularly uncongenial in Hunt's assessment of my work is his claim to make a 'more persuasive' case for socialist law which 'takes up', 'extends', 'underscores' or 'tightens up' my arguments, when in fact he is often simply restating them. Where, then, does Hunt disagree with my argument for socialist law? There seem to be three areas of dispute: first, a critique of my method; second, a dispute about functionalism; and third, a claim that I neglect the 'problem of the transition'.

I will address the muddle about functionalism first. Hunt initially accuses me of adopting a functionalist analysis which is out of keeping with Marxist method; he later claims that I do not intend to endorse a functionalist approach; and he then goes on to say that I am not alone in being guilty of functionalism—Marx and Engels were too. This obfuscating discussion cries out for clarification, so let me set the record straight. I argue that the rejection of law in the classical Marxist tradition stems from a view of law as fulfilling certain functions specific to capitalism: law mediates disputes between bourgeois egoists, provides an ideology of impartiality and freedom which masks domination, and maintains the rule of the dominant class. In order to refute what I call 'the withering away thesis', I maintain that a socialist society might also require the fulfilment of certain functions such as resolving disputes between individuals' differences, best carried out by law. But this strategy offers a limited basis for endorsing socialist legality, and the focus of the book is thus to make a case for law's contribution, not simply to the smooth functioning of socialism, but to the promotion of socialist ideals. I argue that law enables the contribution of diverse voices to democratic debate, the protection of individual autonomy, and the impartial and fair regulation of an egalitarian economy.

Hunt's hostility to functionalism is in fact rather puzzling, since his own reasons for a socialist 'interest' in law seem largely utilitarian: socialist legal institutions are a means of coordinating the complex social arrangements of a redistributive, democratic system. Thus, if either of us is a functionalist, it is Hunt and not I. While Hunt sees law as a contribution to a 'defensible' socialism, there is no talk of the intrinsic value of ideals like justice, freedom, equality or community for which socialism and its system of law would be the means.

Arguments, Ethics and Jurisprudence

A more interesting (though no more clear) feature of Hunt's challenge to my argument lies in the question of method. An important aspect of my approach is to assess critically how the liberal tradition, from Hume onwards, may contribute to a socialist jurisprudence. Thus the book builds on, besides Marxist and other critical political theories, legal

theories of contemporary liberals such as H.L.A. Hart, Ronald Dworkin, John Rawls, Joel Feinberg and Joseph Raz. Hunt, however, takes exception to my use of this tradition (what he inaccurately terms 'English' or 'Oxford' jurisprudence). There are two ways in which Hunt's objection can be understood.

First, it seems that Hunt is unhappy with what he considers abstract philosophizing 'dislocated' from historical context. I agree that debate about ideas in isolation from the societies in which they develop would offer a poor prospect for a socialist legal theory. Thus my book explores how the Soviet Union put the idea of the withering away of law into practice in, for example, state policy about the future of law under socialism, institutions such as the Comrades' Courts, and political campaigns such as Stalin's purges and the attack on 'parasites' by Khrushchev and Brezhnev. I also examine how law under capitalism facilitates the development of socialist law: how on the one hand, the ideal of impartiality is hampered by the inequalities of the market, and how on the other the model of law as an instrument of market relations has evolved to make room for the administration of social-welfare policies. However, I do not think the argument for socialist legality can restrict itself to the sociology of law. Philosophy is crucial, first because legal reality has gone hand in hand with theoretical debate. This is true of liberal capitalist legal orders, but it is especially obvious in the history of Marxist practice, where the hegemony of a certain concept of law is central in explaining how socialist legality developed. Furthermore, the dialectic of theory and practice underscores the need for philosophy not just in our historical excavations. Now, more than ever, the Left needs to ask itself what is so good about socialism. This is a philosophical question, and it requires philosophical debate about values and ideals in its answer.

Alternatively, perhaps it is not philosophy in general, but my use of liberal jurisprudence in particular, which is Hunt's complaint. Hunt belittles this tradition's focus on rigorous argumentation as somehow inappropriate for a socialist theory. According to him, 'political and theoretical considerations' of the sort developed by 'generations of serious socialists' who 'deny the pertinence of law within the socialist project', are to be preferred over 'good arguments'. The implication that good arguments are inimical to socialist ideals is, I hope, unintended. Hunt's objection not only has an unhappy history in the persecution of innovative (though invariably socialist) intellectuals in Eastern Europe. It also makes for bad Marxist theory—bad arguments, in other words—since its implication is that inconsistency and opaqueness are tolerable so long as a theory is 'politically correct'. The most cursory survey of the sophistry and unreality of intellectual debate under Stalin suggests that it is only in the pursuit of good arguments that theoretical advances in socialist ideas can be made.³ And indeed, how ironic to find suspicion of rigorous argumentation in what is supposed to be an endorsement of the legal ideal, since central to the adversarial process, rule of law, rights claims, precedent, and so forth, is the idea of a judicial

³ See David Bakhurst, *Consciousness and Revolution in Soviet Philosophy*, Cambridge 1991, for an analysis of these debates.

process of debate and disagreement which finds resolution in a fair and impartial procedure of 'winning arguments'.

I believe that a socialist jurisprudence is not only capable of embracing liberal legal notions, it must embrace them. This is not just because a pure doctrine of socialism no longer has a voice in our post-Communist world. Socialists should look to the liberal tradition for insights about liberty and fairness. As Marx himself contended, legal concepts achieved their fullest expression with the emergence of liberal doctrines of rights in bourgeois societies. And the wealth of liberal jurisprudence since Marx, influenced by the rise of socialist and social welfare ideas in this century, points to the possibility of a progressive jurisprudence. Of course, this does not mean uncritically helping ourselves to any liberal theory, and certainly not to the blend of conceptual analysis and logical positivism parodied by Hunt. Instead, I believe that a socialist jurisprudence should undertake C.B. Macpherson's project of 'retrieving' liberal ideals.⁴ Retrieval will inevitably mean revising not just Marxist theory, but 'bourgeois' jurisprudence, by means of a dialogue between them. (In contrast to Hunt's disconcerting claim that 'existing "capitalist" law contains all the legal mechanisms that would be necessary to institute the most radical socialist programme.') A socialist jurisprudence should thus build on the achievements of liberal legal theory just as Marx argued that socialism would build on the achievements of capitalism in practice. Although Hunt concedes that socialists should 'engage with quite specific features of the liberal tradition', in banishing the arguments of liberal theory, he denies the Left any resources to do so.

Social Practice and the Identity of Law

Hunt's hostility to liberal legal philosophy causes him to dismiss the question of what makes a system of rules a valid system of law. Legal positivists argue that law can be identified by reference to institutional sources alone, while natural lawyers argue that law must meet certain moral criteria to be valid as law. For Hunt, the debate between these two camps is irrelevant for socialists, and a 'morally inclusive concept of law' has nothing to offer a socialist jurisprudence. Hunt implies that such inquiries are idealist, in both the philosophical and everyday senses of the word.

The question of 'what is law?', however, is not merely of academic interest for socialists. The tortured history of socialist legality makes clear that there are issues of justice at stake in our understanding of the nature of law. Not any understanding will do. As E.P. Thompson insists, 'faced with a bad law, we feel contempt not because we are contemptuous of the notion of a just and equitable law but because this notion has been betrayed by its own professors.'⁵ If any system of rules can count as law, then a distinctive theory of socialist legality is unnecessary. We can rest content with the positivist account of law consistent with either the authoritarian legal system or Engels's idea of the administration of things: law is a system of societal rules whose

⁴ See especially C.B. Macpherson, *Democratic Theory: Essays in Retrieval*, Oxford 1977.

⁵ *Whigs and Hunters: The Origins of the Black Act*, London and New York 1975, p. 268.

normative content does not bear on its validity as law. The Marxist who seeks a concept of socialist legality will thus resist the idea that the connection between legal institutions and the requirements of justice is a purely contingent matter. Indeed, Hunt himself evokes a morally loaded conception of legality when he remarks that he shares my 'repugnance' with the 'Stalinist abuse of legality'. The question of whether bad law is 'really' law is thus at the heart of a socialist jurisprudence.

Hunt considers the upshot of my analysis to be an unreconstructed natural-law conception of the sources of law. But it should be emphasized that to contend against legal positivists that law has a moral aspect need not propel us to a natural-law position such as that of Thomas Aquinas or Ronald Dworkin, where the standards of Catholic theology or American liberalism are reified as eternal criteria of legal validity. I argue that Marxist theory, which has in other contexts taken issue with both the idea of value-neutral human institutions and the idea of ahistorical moral truths, offers us a position between the positivist and natural-law extremes. This position lies in the idea of social practice, on Marx's model of labour as a creative, material activity which writes significance into the world. Social practices are historical, social and institutional on the one hand, and normative, value-engendering and ideal on the other. Law-making is thus analogous to Marx's idea of productive labour, where we objectify ourselves, fashion our purposes and needs into objects and institutions which then serve as the sources of significance and authority for social life.

The criteria for legal validity will thus turn on this idea of practice. And essential to a legal practice is the capacity of law to govern our social practices. Law must be capable of being obeyed: it must be framed in such a way that citizens can plan their lives with some certainty that the law's incursions into these plans will be consistent and intelligible. This is what is meant by the idea of the rule of law. Contrary to the efforts of authoritarian regimes to construe it as exacting an absolute obligation of obedience from citizens, the rule of law obligates those who make and apply the law to fulfil certain conditions of fairness. If a rule is constructed in a way that makes it difficult to act in accordance with its commands—if it is vaguely worded, retroactive in scope, or inadequately publicized—then it is unfair in a sense which makes it self-defeating as law. To be truly lawful, law should meet the criteria of the rule of law.

Hunt suggests that I inflate the rule of law's potential to secure socialist ideals. However, I emphasize that we should not confuse the freedom that comes with predictable rules with what is often termed 'positive freedom' in the sense of the resources to fulfil our capacities. Procedural justice is not substantive justice, and freedom under the rule of law is largely the freedom to act where the law is silent rather than the autonomy that comes with self-realization. Nonetheless, I argue that substantive justice provides conditions of equality hospitable to the ideal of procedural justice, while procedural justice would be an important check on the potential for arbitrary power in a context of substantive justice. Thus even as a formal, negative value, the rule of law is still worth a great deal for a socialist legal system.

The idea of legality as a historical, normative practice forms the basis for my revision of the concept of human rights. Rights need not be understood as having a presocial, 'natural' status, as is argued by classical social-contract theories. Rights protect human dignity or self-respect from social incursions, but dignity derives its meaning from human—that is social and political—life. As such, what constitutes human dignity is constantly evolving, and the discourse of human rights can thus expand to make way for new rights. The historical achievements of rights to welfare, education or employment should inspire a socialist legality to forge new conceptions of what, as human beings, is rightfully ours.

The Problem of 'the Transition Period'

This brings us to the third point of Hunt's critique, that is, his complaint that I ignore the problem of 'the transition period'. Again I am uncertain as to the thrust of his objection, since I do in fact consider the idea of a transitional legality in my examination of the definition of law as a weapon of class rule (Chapter One). But if Hunt seeks a justification for special arrangements in a period of transition, he is correct to find no basis for it in my account. Surely the idea of a transition period is completely discredited in the context of the collapse of the Soviet Union. A transition period of seventy-three years which comes to an end without even the hint of a Communist utopia should make us especially wary of the concept.⁶

Moreover, the idea of a transition has been integral to the argument that socialism has no need for law. Orthodox Marxism conceives of the full withering away of law and state to take place after an interim period of the dictatorship of the proletariat, or socialism (as opposed to Communism). This period is characterized not by fidelity to legal procedures, but by manipulation of them in the name of the requirements of the class war, or an alternative normative system such as the proletarian morals commended by Trotsky. The idea of a transition thus suggests that present, 'socialist' injustice can be tolerated because it is a means to a Communist end, an end which will transcend the category of justice in any case.

The tyrannies perpetrated under the aegis of transition suggest that if the idea of a transitory, exceptional post-capitalist phase has any remaining relevance, it is as a representation of the socialist project as a whole. An ideal socialism is continually constituted by an open-ended, democratic debate ever mediated by legal institutions such as rights and impartial procedures. Once we get rid of the idea of an endpoint in human history inherent in the idea of an ideal society beyond law, we come to see that socialism would always be 'in transition'. Law is essential to socialism, not to abolish social problems for all time, but to permit their resolution by a socialist citizenry who subject their world to constant review with the aim of ever-possible improvement.

⁶ The Russians themselves betray their cynicism about talk of transition periods in the current joke: What is the definition of Soviet socialism? A long, drawn-out and painful way of undergoing the transition between feudalism and capitalism!

Certainly the concept of socialist law excludes any concept of transition which would license the suspension of legality. I have argued that law is important for socialism, not merely as a means of social coordination, but as a guarantor of liberty and justice. If these are our reasons for defending legality, then legal institutions cannot wait until the administration of a final, socialist order, but should instead guide the whole process of constructing socialism. If we have learned anything from the disasters of the Bolshevik project, it is that once standards of justice are abandoned in the process of seizing power, they are not likely to be resurrected once power is assured. Jettisoning the idea of a transition period means that socialism should be held accountable for the justice of its struggle as well as its goal, and thus must strive for a socialist legality worthy of the name from the outset.

Individual rights, a central feature of my concept of socialist law, look especially vulnerable to considerations of transition periods. The Left has tended to accept the liberal understanding of rights as necessary in conditions of scarcity and selfishness, and on that basis argued that individual rights would have no place in a socialist community. But instead of rejecting individual rights, or watering them down to instruments of philanthropy or tools of administration,⁷ I hold that a socialist concept of law should retrieve the idea of the individual with rights which, as Dworkin puts it, 'trump' society's policies.⁸

I have come to believe that retrieving individual rights should mean giving them more force and consistency as 'trumps' than that afforded by liberal theories. Liberal advocates of rights tend to assume that rights may on occasion be deprived of their 'trumping' status, particularly in wartime. While legitimated by reference to classical liberal ideals of self-determination, the war in the Persian Gulf was at the same time presented as an occasion for limiting the 'trumping' force of rights in the allied countries themselves. Rights to freedom of expression were overridden in the name of national security, as the press was denied access to information about the war. And in Britain in particular, there were disturbing reports of residents of Arab descent being denied procedural rights—to a fair hearing, to legal counsel—in the name of the war effort. But as critics of the Gulf War can attest, in times of emergency our rights do not diminish in importance or worth; on the contrary, it is at precisely such times when fundamental civil liberties are especially precious, and when overriding them can open the floodgates of political repression. A socialist jurisprudence should thus move beyond the schizophrenic policy of guaranteeing rights in peacetime and suspending them in times of war, characteristic of liberal constitutions, to construct a more consistent doctrine of rights as 'trumps'. One way of doing this without reifying the discourse of rights would be to give effective 'trump' status to those rights which make possible historical improvement in our human rights. These would be the rights which render us legal and political subjects who participate in the construction of rights. Far from being antithetical to a socialist democracy,

⁷ I argue that this idea of rights animates Tom Campbell's call for rights for altruists. See his *The Left and Rights*, London 1983.

⁸ R. Dworkin, *Taking Rights Seriously*, Cambridge, Mass. 1978, p. xi.

these rights are 'citizen rights' which require that society make its political and legal institutions accessible and fair, even in times of emergency or 'transition'. The guarantee of citizen rights will enable continual review of the inevitable tension between individual and community which is the foundation of socialist legality.

Apologetics and Revisionism

To conclude. In his assessment of my work, Hunt ostensibly agrees with me that the Marxist legacy is inadequate for a socialist legal theory. He baulks, however, at any remedy that might involve 'distance' from 'the traditions of Marxist theory'. In particular, he criticizes me on the following grounds: (1) for misconstruing the 'inattention' of Marx and Engels on the question of law; (2) for restricting myself to Marx's 'early texts'; (3) for dislocating theories from their political contexts; (4) for relying on bourgeois authors for their 'good arguments'; (5) for not appreciating that Pashukanis's approach to law is 'compatible' with non-capitalist forms of adjudication;⁹ and (6) for not taking account of the concrete circumstances which beset the Bolsheviks in the transition from capitalism to Communism (failing to understand that 'an insurrectionary strategy not grounded on the prior achievement of political hegemony results in a predisposition to exhibit authoritarian tendencies').

These objections have a familiar ring to them. More than any single argument in Marxist theory, or any particular historical factor in the circumstances of socialism, the biggest obstacle to a socialist jurisprudence has been the preoccupation with doctrinal purity. Hunt is perhaps more wedded to the theoretical underpinnings of the tradition he wittily describes as 'actually no longer existing socialism' than he realizes. He sometimes focuses on the fidelity to doctrine at the expense of confrontation with the weaknesses of the doctrine itself. But Eastern Europe is abandoning Marxism, and Western Marxists cannot assume that they automatically have the resources to correct the theoretical disasters that Eastern Europeans and Soviet peoples have had to live with in practice. Apologetics must stop. As I am sure Hunt would agree, Marxist theory must not be treated as a set of sacred texts which will furnish all answers on questions of ideals, methodology or strategy. Any historical materialism worthy of its name instead must be a dynamic approach, informed by the insights of other perspectives.

Legality is not a panacea for all social ills. Socialist legality should not be allowed to reduce the ideal of community to a litigious creed. But socialists should not suppose that any critique of atomized models of society must eschew the real contributions of liberal legal theory to our understandings of liberty and fairness. If socialism is to be characterized by lively political debate, individual flourishing, fellow-feeling and community, then socialism will need law. We may still be tempted by the picture of a society where, as on the orthodox view, law has 'withered away'. Or we may want to imagine a Marxist canon

⁹ On my reading, Pashukanis revised his views and countenanced socialist legal institutions in an unsuccessful effort to escape Stalin's purges.

that emerges from its current dilemmas unscathed and unchanged. But as I have argued, such imaginings can only be retained at the price of the withering of socialism itself. A new concept of socialist legality will renew the socialist vision of freedom, community and equality, to animate ordinary people's struggles for justice both inside and outside Eastern Europe.

Alan Hunt replies:

I am, I confess, somewhat taken aback by Christine Sypnowich's reply. She attributes to me a set of positions that even a mildly charitable reading of my piece would not have made possible. She presents me as a defender of an unreconstructed orthodoxy in a manner that lines me up as an enemy of liberalism and as an apologist for Stalinism. I am none of these things.

Rather than seeking to rebut these rather wild charges, I want to identify the grounds on which my piece sought to engage with our shared interest in articulating a socialist theory of law. I contended that the realization of such a project has to engage with the problem of syncretism, that is, the conditions under which the project of effecting the synthesis of different theoretical traditions that exhibit some degree of incompatibility can be secured. I maintained that a stronger case for a socialist commitment to legality has to engage with the major political and theoretical traditions of socialism. I argued that a defensible socialist legality cannot simply deploy what may pass for 'good arguments' in Oxford while omitting consideration of the resistance and reservations that have led the Marxist tradition to espouse a commitment to a 'non-legal social order'.

To take just one aspect of that problem. I did not raise the question of the 'transition period' to smuggle in a defence of the 'dictatorship of the proletariat'. Rather, I was concerned to acknowledge that the Marxist tradition posed a real problem. Any government concerned to embark on some version of the socialist project has to encounter conditions of sharpened political class struggle, and its capacity to operate within the rule of law may be compromised. I introduced this issue to advance the view that such a project, while difficult, was indeed possible precisely because the existing legal systems of virtually every liberal democracy provided all the powers necessary to take the first steps along the road to socialism.

The linking of the socialist and liberal traditions poses questions of both a theoretical and political nature. There is nothing to be gained by avoiding an engagement with them—indeed to do so would be to disarm socialist aspirations. To raise such issues, then, does not express a yearning for a past orthodoxy, but rather a determination to help strengthen the case for a socialist commitment to legality in general and the rule of law in particular.