Marxism and the Political Economy of Law

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1. Marx on Law: A Reductive Conception?

The chapter navigates the complex and diffuse field of the Marxist theory of law in order to argue that we can retrieve from it a *critical* understanding of law. The main problem that such an endeavour faces is posed by the widely-held view that Marxism entertains a reductionist view of law, one that only ever conceptualises law as a *surface* phenomenon, reflecting, or at best sanctioning, the *deeper dynamic* of the capitalist organisation of production. If that assumption holds then the mobilisation of law in the direction of a critique of capitalism is already undercut from the outset.

The chapter looks at the prevalent reductionist view in the first section, by exploring two of its more sophisticated articulations. Next it turns to legal theory, and more specifically to two of the 20th century's most influential theorists, Carl Schmitt and Hans Kelsen, to see whether they have resisted the reductionist understanding, and concludes that they have not. The third section attempts a reconstruction of the legal theory of Marx with a view to retrieving a critical-political moment irreducible to the economic structure, and the reconstruction is picked up again in the final section with an eye to the post-gramscian thinking about constituent power as the question of the space left to political action (and class struggle) in capitalist legal orders. The intervening section, section 4, looks at how the question of the legal institution in its relationship to capitalism was addressed in the context of regimes that purported to have overcome capitalism, and more specifically the early Soviet debates over the continuing relevance of law to the 'socialist' organisation of society. A reductionist understanding of law as the handmaid of capitalist reproduction would see it 'withering away', and yet law endured, and not merely as 'administration'. In the process we observe that Marxist legal theory has often produced, as in the case of Pashukanis, sophisticated analyses of the constitutive role played by law in the organisation of society.

But let us take the argument gradually. The most frequent criticism that Marxist legal theory has had to face has been directed to its reductionist view of the role of law in the formation and consolidation of the social order. Schematically put, the core of the critique states that according to the predominant Marxist legal-theoretical position, the law operates as a tool functional to the strengthening of capital's interests and, of course, their legitimacy. Such criticism is not devoid of textual evidence. The argument that law is an institution that belongs to the superstructure, ultimately determined by the material forces that operate in the economic base, was first developed by Marx in *The German Ideology*. On this understanding, the economy is the *base* of every society, determining its shape and the nature of its institutions. Law, as located amongst the institutions of the superstructure is very much *in*

keeping with the base that conditions of the mode of production. Its operation thus broadly reflects the necessities of the mode of production and its function is to sustain and regulate *capitalist* economic and social relations. But already this is improbably reductive to be attributed to Marxism. If the economic base determines *in the last instance* the kind of institutions we have in the superstructure, the role of the superstructure is not confined to simply reflecting the economic relations of society. For Louis Althusser, 'Marx has at least given us the "two ends of the chain", and has told us to find out what goes on between them: on the one hand, *determination in the last instance* by the (economic) mode of production; on the other, the *relative autonomy* of the superstructures and their specific effectivity.' (Althusser 2005, 111) The first of these formulations – 'in the last instance' – was in fact offered by Engels by way of a clarification and against a pure reductionist reading that would see a one-to-one correspondence between economic forms and legal forms. Production, clarifies Engels, is the determinant factor, but only 'in the last instance': 'More than this neither Marx nor I have ever asserted.' Anyone who 'twists this' so that it says that the economic factor is the only determinant factor, 'transforms that proposition into a meaningless, abstract, empty phrase'.[1] Regarding the second formulation – the 'relative autonomy of law' – the qualification involves the movement, function and therefore also efficacy, of law as conceived of independently of the base: 'relative' because determined in the last instance, but 'autonomous' nonetheless in that law manages its own reproduction.[2]

But concerns remain over whether this is enough to dispel the determinism, and the one-directionality of the economy-law relation. Take the *Preface to the Critique of Political*

[1] And further: "The economic situation is the basis, but the various elements of the superstructure the political forms of the class struggle and its results: to wit constitutions established by the victorious class after a successful battle, etc., juridical forms, and then even the reflexes of all these actual struggles in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogmas – also exercise their influence upon the course of the historical struggles. and in many cases preponderate in determining their form . . ." (Engels, in his letter to Bloch, 1890, English translation available here: https://www.marxists.org/archive/marx/works/1890/letters/90_09_21.htm).

[2] How are these new terms arranged? On the one hand, the structure (the economic base: the forces of production and the relations of production); on the other, the superstructure (the State and all the legal, political and ideological forms). We have seen that one could nevertheless attempt to maintain a Hegelian relation (the relation Hegel imposed between civil society and the State) between these two groups of categories: the relation between an essence and its phenomena. sublimated in the concept of the 'truth of ... '. For Hegel, the State is the 'truth of' civil society, which, thanks to the action of the Ruse of Reason, is merely its own phenomenon consummated in it. For a Marx thus relegated to the rank of a Hobbes or a Locke, civil society would be nothing but the 'truth of' its phenomenon, the State, nothing but a Ruse which Economic Reason would then put at the service of a class: the ruling class. Unfortunately for this neat schema, this is not Marx. For him, this tacit identity (phenomenon-essence-truth-of ...) of the economic and the political disappears in favour of a new conception of the relation between determinant instances in the structure-superstructure complex which constitutes the essence of any social formation.

And famously:

the economic dialectic is never active in the pure state; in History, these instances, the superstructures, etc. – are never seen to step respectfully aside when their work is done or, when the Time comes, as his pure phenomena, to scatter before His Majesty the Economy as he strides along the royal road of the Dialectic. From the first moment to the last, the lonely hour of the 'last instance' never comes.

Economy, where, in one of the most discussed passages of his work, Marx notes in characteristically deterministic fashion that 'the mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness'. (Marx 1991, 426) The organisation of the modes and relations of production dictates historical development, and the law as a product of such development, the latter too often presented as a 'reflex' of the underlying dynamics of the process of production: 'At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or – this merely expresses the same thing in legal terms – with the property relations within the framework of which they have operated hitherto'. (Ibid) This last quote has often been highlighted as proof of Marx's advocacy of a reductive view of the legal order, where property relations are mere instantiations of an already constituted set of modes and relations of productions. According to this interpretation other legal institutions (e.g., the family) are also seen as reflexes of underlying structures of production (i.e. modes and relations). The *German Ideology* is usually read as a paradigmatic text of this reductive view: in it, Marx attacks directly a certain way of understanding the law as the product of an act of pure will, an idea which he denounces as 'the legal illusion', and which makes him suspicious of purely positivist descriptions of law. Marx rejects altogether the conception of law which makes it the outcome of a purely autonomous political decision. And yet the *German Ideology* contains a clear and important distinction between two conceptions of the law, first as Will and then as Power. Marx's efforts are often directed to dismissing the will-based conception of law by linking the law back to the concrete relations of power from which it emanates, and in the context of which even those who find themselves in an advantageous position cannot simply deploy the law to impose their arbitrary will freely. The will of those empowered by the structure of social relations cannot but be conditioned by the 'real relations' which are the source of their power: 'The individuals who rule in these conditions — leaving aside the fact that their power must assume the form of the *state* — have to give their will, which is determined by these definite conditions, a universal expression as the will of the state, as law, an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way: '[J]ust as the weight of their bodies does not depend on their idealistic will or on their arbitrary decision, so also the fact that they enforce their own will in the form of law, and at the same time to make it independent of the personal arbitrariness of each individual among them, does not depend on their idealistic will'. (Marx 1976, 327) This is an instantiation of Marx's concern *qua* materialist author to go beyond the phenomenal world in order to retrieve the logic of the principles that animate that world. In the third volume of *Capital*, this methodology is summarised in a context where the discussion revolves around the main pillars of modern political economy: 'But all science would be superfluous if the outward appearance and the essence of things directly coincided'. (Marx 199 , 897) This statement sums up in an elegant way both how Marx addresses the relation between the material and the phenomenal (matter and appearance) and how he tries to overcome Hegel's idealist take on historical development. Though still a matter of intense debate amongst Marxists, this point might mark an essential difference between the two thinkers. While in Hegel, History is animated by the

Idea which takes *form* in its unfolding in a way that it is difficult to imagine a disjunction between the two without sacrificing the rationality of reality, in Marx the relation comes across as more ambiguous.[4] As we shall argue, within the perimeter of Marx's works there is room to recover a *richer* - though never *systematic* - conception of law without having to abandon the critique of political economy. But before we explore this, a few words on how the reception of this reductive interpretation of the place and function of the law consolidated a particular understanding of Marxist legal theory, with the help of two, key, examples.[5]

Ferdinand Lassalle, in a much celebrated essay on the essence of constitutions (Lassalle 2002), provides an exemplary case of the deterministic analysis of the law. For Lassalle the constitutional is a layer that supervenes on a deeper dynamic. He famously remarked that the formal constitutional order is only a cover ('a mask') of the real constitution, the former (sometimes pejoratively referred to by him as a 'piece of paper') fully conditioned by the latter. Extrapolating from this, the law quickly becomes the site of registration of the underlying relations of power. To the question 'what is the nature of the constitution?' Lassalle replies with the following definition: 'a constitution is the fundamental law proclaimed in a country which disciplines the organization of public rights in that nation'. (Ibid) This is because, fundamentally, Lassalle thinks that 'constitutional questions are not primordially legal questions, but a matter of relations of force'. (Ibid) By stating that the constitution is the fundamental law of the country, Lassalle assumed that it has higher force than ordinary law and that it provides for its own grounding, so that 'it must be none other than what it is. Its basis will not permit it to be otherwise'. (Ibid) The nature of law-making is here purified from any contingency – *in other words, from its political origins* – and associated with the idea of necessity. The grounding of the constitution has to be found 'always and exclusively in the real effective relations among social forces in a given society'. (Ibid) Yet, this definition of the constitutional order is problematic, because it assumes that the real constitution becomes law only when codified in written form and with the introduction of explicit sanctions: 'These actual relations of force are put down on paper, are given written form, and after they have been thus put down, they are no longer simply actual relations of force but have now become *laws*, judicial institutions, and whoever opposes them is punished'. (Ibid) But this leaves open the question of the legal force of the real constitutional order, which in his work is never fully answered. In Lassalle's account, the formal constitution represents the juridification of the 'real' relations of power or, in the most trivial sense, it is just the registration or codification of the real constitution. Lassalle is adamant in stating that the formal constitution is stable and lasting 'only when it corresponds […] to the real constitution, that is, to the real relations among social forces'. (Ibid) Otherwise, it is just a sham constitution. Be that as it may, according to Lassalle the relation between material and formal is that of over-determination of the former over the latter. In other words, Lassalle maintains that the social organisation of production is already shaped

[4] While this discussion is beyond the scope of this chapter, let us note nonetheless that the idea of appearance does not exhaust social reality but this recognition does not entail the complete dismissal of the form of law. Otherwise, instead of the law reduced to will, we would have the law reduced to the undergirding economic relations.

[5] In the field of *political theory* this view was expressed in a clear way, in the work of Karl Kautsky at the end of the 19th Century. The seminal reference is Engels, Kautsky 1977.

and achieved pre-politically and, perhaps, pre-legally. At best, one could say that the formal legal order operates as part of the justificatory ideological apparatus. The key message of this Marxist approach to law is that the constitution of society is represented as independent from the formal constitutional order, and that the latter simply codifies ex post an underlying relation of forces. Relations of production are placed at the centre of the analysis, but they are represented as static and set up from the perspective of capital's primacy. The limit of such a rigid materialist take is that it underestimates the political potential of both legal and subjectivity formation. How those relations came to take up those particular *modes* and *forms* is never made into a question of political and legal analysis.

The second example derives from the work of the historian Charles Beard (1913) on the economic origins of the American constitution. Breaking away from the interpretation of the American constitution as the first experiment in modern political science, Beard focuses on the economic interests which were at the forefront of the Founding Fathers' concerns in order to find out the grounds of that constitutional order. In a clear methodological statement he is careful not to reduce the analysis to the personal motivations of the involved actors:

> 'The purpose of such an inquiry is not, of course, to show that the Constitution was made for the personal benefit of the members of the Convention. Far from it. Neither is it of any moment to discover how many hundred thousand dollars accrued to them as a result of the foundation of the new government. The only point here considered is: Did they represent distinct groups whose economic interests they understood and felt in concrete, definite form through their own personal experience with identical property rights, or were they working merely under the guidance of abstract principles of political science?' (Ibid, ii)

And while Beard's particular emphasis is on the materialist dimension of the constitution, the materialism that informs the historical work is largely reductive. A Marxian critique of the political economy does indeed shadow Beard's masterpiece, but it never hones it adequately to the importance of valorisation processes (i.e., how value is generated) and a labour-centred understanding of class struggles. As in the case of Lassalle, little attention is given to the role of political agency of the involved classes and on the role of the law in constituting the field of struggle. This lack becomes evident in the underestimation of the role of slavery in the process of valorisation and the parallel overestimation of what he defines as 'personalty' (i.e., mobile capital represented by investments in securities, commerce, manufacturing) in contrast with the other major interest of the time, 'realty' (i.e., capital invested in agricultural production). In brief, Beard introduces a simplified and deterministic narrative of the rise and development of the American legal order where legal constructs that are essential for the shaping of the American political economy are (either ignored or) taken as a direct reflection of already established economic relations.

Against such deterministic understandings of the law, our aim is to show that Marxian (a term preferred to 'Marxist' as connoting a materialist but not reductionist methodology) legal theory can still provide precious epistemic insights for a more accurate understanding of the legal order. In brief, we will retrieve those conceptions that avoid falling into the trap of the reductive determination of the relation between the base and the superstructure. Some Marxist legal scholars might have adopted some version of that form of reductionism, but

Marxism is a rich constellation that offers more nuanced conceptions which are still - if not increasingly - relevant. In particular, we intend to highlight how Marx's methodology – the critique of the political economy – can be extended usefully to the study of law while, at the same time, maintaining a complex idea of the legal order as internal to society, that is, against the dominant liberal mode of law as an external tool applied over society, as a building block of social relations. Instead of an ossified conception of the relation between base and superstructural law, such a mapping offers the potential of critique as leverage for change. In brief, the critique of law and political economy is, first of all, a science of the contradictions and tensions affecting the legal regime of concretely organised modes and relations of productions, but also a study of the ambivalent role of law within that system. This presents two major concerns: the *first* relates to the study of the production and reproduction of society under the conditions of modern political economy and the essential role of the law in the organisation and development of those two poles of production (in brief, the materiality of the legal order); the *second* relates to the study of the transformative potential of the law as force and instrument of social change, with a special emphasis on the conception of constituent power, or, more accurately, on the material conditions for the emergence of constituent power. (Christodoulidis 2007) For these purposes, we assume that, once a reductionist account of the law has been sidestepped, the critique of the political economy is still a core component of critical legal theory.

2. *Classic Challenges to Marxist Legal Theory: Kelsen and Schmitt*

Among the reasons for the rather marginal impact of Marxism on the legal theory of the 20th century[6] are two important criticisms that were levelled against it by two of the most influential legal thinkers of the century, Kelsen and Schmitt.

In a collection of essays on the communist theory of law, Hans Kelsen famously attacked Marx for a series of contradictions and antinomies that affect his conception of law. (Kelsen 1955) Among many points, Kelsen puts forward two connected, major criticisms that would not only deprive Marx's methodology of any validity, but also deny any critical relevance to a Marxist approach to the study of law. First, Kelsen thinks that it is not possible to state *at the same time* that the law as 'superstructural' is fully determined by the economic base to the point that it is simply a mirror or a reflex of what happens at the material level of production, and also that it is ideological (Kelsen understands ideology in the pejorative sense of the term, that is, as a product of false consciousness). For Kelsen, Marx cannot state that the law is ideological (false) if it is at the same time the mirror of the material reality.[7] Second, and related is the argument that it is unsustainable to view law is a reflex of the underlying material reality, because it does not take into account the *normativity* of the law, which in effect reduces legal theory to legal sociology.[8] Here, Kelsen harbours a basic methodological disagreement with Marx: to comprehend legal norms as a mirror-effect of a concrete reality is to miss the point of the normativity of law because 'first, the legal norm must be established and only then may there be a real behaviour corresponding to this norm, that is, a real behaviour similar to that prescribed or permitted by the legal norm. Hence, it is the real behaviour which, analogous to the mirror, reflects the legal norm or the behaviour which, prescribed or permitted by the legal norm, is the content of this norm'. (Ibid, 15) The disagreement here runs deep, and while Kelsen's 'reversal' forces Marx's conception of law into an impasse, the type of pure normativism that is advocated by Kelsen is the type of abstraction that the young Marx found fatally flawed in Hegel's conception of the State. But the disagreement does not stop there. In Marx's legal theory Kelsen discerns at work another essential tenet of the former's more general philosophy, that Kelsen is highly critical of: it is the distinction between the *essence* of social reality and its *appearance* of its visible forms: 'Reality has, so to speak, two layers: an external, visible, but illusive and hence ideological reality; and an internal, invisible […], but true, "real" reality.' (Ibid, 17-8).

There can be little doubt that Kelsen's critique of Marx should be taken seriously. Marx's thinking about law is not systematic, and Kelsen is careful to point to contradictions, that his own strong defence of the institution of law avoids. Nonetheless, there is arguably enough material in Marx's works to shield off the objections. While Kelsen's criticisms of Marx all turn on the Marxist reduction of law to a superstructural phenomenon, there is, as we shall

[6] While Marxism has been extremely important in moral and political philosophy, it has not enjoyed the same relevance in legal philosophy.

[7] See the analyses by Guastini 1982 and Manero 1986.

[8] This is why, according to Kelsen, a Marxist legal theory is doomed to fail: 'it substitutes a normative interpretation of law with a structural analysis of the conditions which make possible for a normative system to emerge and be effective': Kelsen 1955, 202.

see, a different understanding of the function of law in Marxism that treats it as determining (rather than determined), constitutive (rather than other-reflective). But even if confined to the superstructure, Kelsen's idea of ideology as false representation misses the functional element of the concept (of ideology) in Marx, which, ironically not unlike the *Pure Theory,* never collapses the law into pure technique.

Another important criticism levelled against Marx in legal theory, comes from the late work of Carl Schmitt. While as a political thinker, Schmitt goes some way to endorsing the key idea of class struggle as a political concept,[9] he maintains a profound scepticism of Marx as a theorist of law. In a couple of short articles republished, in the English translation, as appendix to the *Nomos of the Earth* (Schmitt 2006, 324-5) Schmitt criticised Marx's view of the formation of the legal order as excessively reductive in light of the emphasis and primacy attributed by him to modes and relations of production. The charge is clear: the critique of the political economy obfuscates the origin and the modality of development of the legal order (*nomos*), and in this way the political dimension of the legal order is reduced to the reflection of an economic structure. According to Schmitt, the main mistake that Marx makes is to put the organisation of production at the inception of the process. As is well known, according to Schmitt the right sequence of the creation and development of legal orders is different: appropriation, distribution and production. The point for him is that the legal order's birth originates in an initial act of theft (an original appropriation), an origin that reveals the ineradicable *political* nature of each and every legal order. The beginning is, according to Schmitt, a genuine political moment, where a decision to appropriate (usually, but not necessarily, land) sets up the main principles of the incipient legal order and its main lines of conflict. Following this reconstruction, Marx confused the relation of cause and effect between appropriation and production because of his own reductive blend of economism and sociologism. For this reason, Schmitt thinks that Marxists' and liberals' conceptions of law are affected by the same problem. They both believe that the organisation of the legal order is a reflection of processes of production and distribution. In their view, the legal order does not enjoy any autonomy and, most importantly, it does not really have a political content in the Schmittian sense.

As an accusation of reductionism against Marx, it is doubtful that Schmitt's critique holds up to closer scrutiny. First, as Schmitt himself recognises, Marx is fully aware of the crucial importance of the original appropriation at the beginning of the capitalist phase of accumulation. The last chapters of the first volume of *Capital* are devoted to describing the intimate link between appropriation and accumulation, with its devastating effects on human beings and nature. The original appropriation sets up capitalist legal orders by granting a first channel of accumulation of wealth. While Marx does not build a systematic conception of the role of law in the phase of the original appropriation, it seems quite evident that his reconstruction implies at least two important points. First, the coercion entailed by the act of dispossessing the inhabitants of the land or appropriating commons is a feature of State law; chapter 28 of volume 1 of *Capital*, for example, details the creation of the wage labourer in

[9] Schmitt 2007, 38. Much has been written in the last three decades on the ambiguous relation between a Marxist conception of politics and Schmitt. See, for example Mouffe 1999.

England through legislation. Second, appropriation is not the effect and production the cause; when Marx affirms that the original accumulation is the outcome of the capitalist mode of production, he does not mean that one is the effect and the other the cause. In fact, in another chapter of the same part (chapter 26), he states that the original accumulation 'is not the result of the capitalist mode of production but its point of departure' (Marx 1991, 876). Remarkably for the author of *Political Theology*, Schmitt misses Marx's use of a theological metaphor to explain the role of the original appropriation as the constitutive element of capitalist production: 'this primitive accumulation plays approximately the same role in political economy as original sin does in theology.' (Ibid)

But the insight regarding law's function is not limited to the original appropriation; for Marx each and every mode and set of relations of production is the outcome of a legally organised way of appropriating. In fact, across his work, references to the constitutive role of property as a *legal* relation play a remarkable role. More precisely, appropriation is not conceived as a derivative moment which consolidates a concrete mode of production and a set of distributive principles. To the contrary, Marx often alludes to the fact that the mode of appropriation and the mode of production are deeply intertwined from the outset. The mode of production of capitalism cannot be disconnected meaningfully from the mode of appropriation of the surplus value generated by labour. But in order to appropriate surplus value, it is necessary to have a legal system which turns labour into an exchangeable commodity (turns it into labour force) and a legal formalisation of property (in particular, the legal *form* of capitalist private property) which makes room for the acquisition of dead labour under the form of accumulation of wealth.[10] Marx's discovery, at this stage, can be seen in the definition of the relation between capital and labour in terms of property relations in a process dictated by the imperative of valorisation. Law is not only an expression of the underlying material production of value. It is a historical *prius* for the existence of these processes of production. Of course, law is neither the *only* constitutive factor, nor is it a *sufficient* one; and yet it remains *necessary* for the establishment of capitalist social relations.

[10] This is the difference between the legal form of individual private property (whose content is linked to individual labour) and capitalist private property, 'which rests on the exploitation of alien, but formally free labour': Marx 1991, 928.

3. *Marx and the Political Economy of Law: A Reconstruction*

The best place, perhaps, to begin a reconstruction of Marx's critical theory of law is an often neglected text: *The Critique of Hegel's Doctrine of the State* (Marx 2005, 57-198). This is Marx's unfinished first manuscript, which appeared only later (in 1927) in the Soviet Union. Besides offering us Marx's most extensive account of his complex but decisive relation with Hegel,[23] it also contains his most elaborated statement on the law, the role of property, the form of government and the State. The key idea that Marx extrapolates from Hegel is to be found in the productive effects of *negation*. The dialectic unfolding of history is indeed moved by the power of negation (see also chapter 1, supra). But a key difference already emerges at this stage, one which turns Hegel's insight on the formation of consciousness onto its head: negation is the constitutive act for the formation of subjectivity.[24] Famously, Marx will translate this intuition into the idea that history is made by and through class struggle, moved by a class that draws constitutively on the *negation* of its identity, role and speaking position in the extant order.

For the legal theorist, the main challenge is to understand the place of the law within the historical developments brought about by class struggle. The critique of Hegel's dialectic, applied to the philosophy of law, reveals two key aspects of Marx's thought, central to the materialist aspect of his methodology. First is the rejection of Hegel's version of the dialectic method as prone to mystification, at two levels. The first mystification (referred to by Marx as 'mystique of reason') is the equivalence established by Hegel between being and thought, the real and the rational. This equivalence entails a double inversion. At one level, being is reduced to thought and hence the concrete is denied autonomous reality. At another level, reason becomes an absolute and self-sufficient reality. In order to assume autonomous existence, the idea has to be embodied, it has to be carried into concrete existence. Such a move corresponds to the inversion of the order and meaning between subject and predicate. The universal is turned into a category of its own and guarantor of its own existence, while the subject becomes a mere manifestation of the idea. Commenting on §279 of the *Philosophy of Right*, Marx notes: 'Hegel makes the predicates, the objects, autonomous, but he does this by separating them from their real autonomy, *viz*, their subject. The real subject subsequently appears as a result whereas the correct approach would be to start with the real subject and then consider its objectification'.[25] Hegel's 'mystical' approach to the real fundamentally denies its material existence. The second major mystification concerns Hegel's idealised concept of the State. While according to Hegel, the state is an achieved synthesis of ethics (*Sittlichkeit*) and morality beyond civil society, that is, a rational expression of the Spirit, Marx (whose conception of the state remained notoriously underdeveloped) takes it to be a complex field whose formation and growth are intimately

[23] Marx's intellectual debt to Hegel is undeniable, but it does not prevent him from harshly criticising the German philosopher in this unfinished work.
[24] This might explain why many Marxist scholars would later find Foucault's work on resistance and subjectivity so intriguing: see, among many, Chignola 2018.
[25] Marx 2005, 78.

linked to the development of capitalism.[26] Although later described as the political agent of the bourgeoisie, and despite the lack of a fully-fledged theory, Marx' concept of the state hints at its constitutive role in both allowing capitalism to flourish and in serving as an internal limit to certain forms of accumulation.

In light of the previous remarks, it is not surprising that, unlike Hegel, Marx does not see the law as necessarily rational. However, this judgment does not imply that the legal order ought to be classified as a super-structural feature of the political economy nor as a tool which can be used in infinite ways according to the needs of capital. If the legal order resists such reductions, it is because its form does not lend itself easily to manipulation. Instead, there are important passages in Marx' oeuvre which allow to imagine a more active, and at times even constitutive, role for the law. These passages, although not systematic, suggest that capitalist development is not dictated by a mechanical dialectic, or that law is properly understood to fall on the side of *structure* rather than *agency*. In other words, the political economy of capitalist societies evolves because its central engine is class struggle. This is the true political core of capitalist developments. To acknowledge its centrality is to acknowledge that all actors involved in the struggle can play an active or reactive role. It is not necessarily capital that is 'in charge' of the development of the social order. Labour as well can impose constraints on capital and forces, with, for example, innovation offering a way to defuse or alleviate class struggle.[27]

Another vivid example of the capacity for agency of labour can be found in *Capital*, in the chapter on the legislation on the working day. The reconstruction of the struggle around labour time, both for young persons and children, is obviously a crucial theme for the exploitation (and the relation between productivity and surplus-value) of labour force. Marx connects legislation (a modern form of law) with class struggle in the most direct way: 'The establishment of a normal working day is therefore the product of a protracted and more or less concealed civil war between the capitalist class and the working class'. Hence, a precious lesson can be learned: legislation is not inherently the reflection of the interests of the owners of means of production as, unlike a 'pompous catalogue of the inalienable rights of man', it establishes the moment the time of the worker is its own and not for sale any longer (Marx 1991, 412 & 416). This chapter of *Capital* illustrates two important points. First, it clearly indicates that class struggle can be driven by labour's initiative and can shape legislation (but also lawmaking in general) in a way that is not overdetermined by capital's interests. Second, it shows that law (in this case, in the form of legislation) is not exclusively an instrument in the hands of owners of means of production for the moulding of labour relations in favour of their own interests. Law is embedded in class struggle and whether it can be bent or used in different ways remains a question of internal constraints (meaning: internal to the form of the law) and external social context (meaning: economic incentives and culture).

[26] The definition of the state is famously left unaddressed by Marx. There are tensions among parts of his work, but this lack of clarity has not impeded Marxist scholarship to develop a rich and diversified constellation of analysis over the state. For a reconstruction of Marxist theories of the state see the chapter by Bob Jessop in this handbook.

[27] The classic insight is offered by Tronti 2010.

These points raise broader issues of course, some of which we will pick up again in the final section. In the meantime however we will take a short detour through 'proletarian law'. What this detour achieves is to reflect further on the relationship of law to the economy under conditions where the law's dependence on the underlying capitalist economic structure is, at least theoretically, no longer at issue. Would law 'wither away' as a result (along with the State structure) once the transitional period to socialism had been effected? The question obviously raises complex issues about the autonomy of the institution of law even beyond the historical situation in question, and also allows us to explore, in the case of the most famous jurist, Evgeny Pashukanis, one of the most sophisticated analyses of the constitutive role played by law in the organisation of society.

4. 'Proletarian law'

It is interesting to see how the embeddedness of law in the social organisation, as well as its structuring function, were tested in the concept of proletarian law. *Tested* because if law was inevitably tied to the logic of bourgeois rule, then should it not 'disappear' alongside the 'withering away' of the bourgeois state, once socialism had done away with the requirement to sustain relations of private property?

Key amongst the Soviet legal scholars of the early decades of 'actually existing socialism' (both died during the 1930s) were Piotr Stuchka and Evgeny Pashukanis. Both were careful readers of Marx and both took from him the idea that with the advent of communism the State would 'wither away' and both were keen to explore what it mean to organise human society without legal forms. Both struggled to justify the continued persistence of 'proletarian law' at a time when Stalin had already announced that socialism had been achieved in the Soviet Union. Marx had of course predicted in the late writings (the 'Critique of the Gotha programme') that bourgeois law would continue into the first phase of communism, and there was a widespread consensus that law and the exercise of state power would be necessary during the *transitional* period of the 'dictatorship of the proletariat'. But with the transition effected, there could be no grounds for maintaining the structure of bourgeois law, and the notion of proletarian law could be maintained at best only to describe the forms of administrative/technical regulation, not undergird and sustain the regime of private property. But in the hands of Stalin 'socialist legality' acquired staying power that both Stuchka and Pashukanis found impossible to reconcile with Marxist thinking about the law, a failure that Pashukanis paid for with his life during the purges of 1936 (Stuchka had died a few years earlier of natural causes.)[33]

[33] Among the many interpreters of Marx's reflection on law, Stuchka's main contribution assumed as starting point the recognition of the protean nature of law. Accordingly, he relies on three different levels of analysis: the first one is defined as 'the concrete juridical form', the second as the 'abstract form' of the law (which is legislation), and the third is the 'intuitive form' as ideological form. In particular, Stuchka sees in Marx's unsystematic notes on law the underdeveloped conception of a juridical order with clear social origins because law is a system of social relations: 'law is not only a set of norms […] but a system, an order of social relations' (in Stuchka 1988, 134ff). In his *State and Law in the Socialist Construction* (ibid, 188ff) he distinguishes

Pashukanis' staggering contribution to Marxist legal theory is contained in his 1924 masterpiece *The General Theory of Law and Marxism.* Its central insight was to transfer into legal theory Marx's analysis of the fetish-form of labour. Marx famously identified the mystifying element of the fetishisation of labour to the form that labour took under capitalist conditions: that of the commodity. In other words, capital calls forth (wage) labour as always-already invested the form of the commodity. The mystification consists in this: that as always-already there is no stepping behind the appearance of labour as commodity to retrieve it in its un-alienated form. Pashukanis transfers the logic of this process to the form of law. Consequently, the logic of production and exchange that constitutes the political economy based on the exploitation of wage labour, acquires the mystifying form of private law as the latter sanctions the relationship between holders of property in capital and labour respectively. Fetishism names the phenomenal forms in which the social processes are experienced by the agents. Those forms of bourgeois law cannot be stepped behind to recover the relationships of production in terms that are not already constitutively complicit with capitalist representations.

Take the key concept of the subject of rights. For Pashukanis 'every sort of juridical relationship is a relationship between subjects,' the subject constituting the 'atom of juridical theory'. The intersubjectivity that law constitutes is one that conceives social relations as relations between possessors of commodities and the subject positions instituted by law are the nodal points in the network of exchange for the circulation of commodities. A right is the form in which possession is recognised, the nexus between subjects and their rights is proprietal, and law provides for an intersubjectivity of formally equal subjects who meet to mediate their conflicts and strike their deals around the pursuit of rights. It is the exchange of equivalents by free subjects that is expressed in juridical relations. The juridical element enters at the point of the identification and opposition of interests. Here is Pashukanis:

> 'A basic prerequisite for legal regulation is the conflict of private interests. This is both the logical premise of the legal form and the actual origin of the development of the legal superstructure. Human conduct can be regulated by the most complex regulations, but the juridical factor in this regulation arises at the point when differentiation and opposition of conflicts begins.'

Pashukanis' main emphasis is on Private Law and he sees Criminal and Public Law as derivative extensions; derivative in the sense that in both cases the law serves to buttress and reproduce class exploitation under the guise of neutrality, a neutrality that in situations when class conflict becomes acute, gives way to overt class oppression. While there is secondary literature on his analyses in these legal fields, it is fair to say that Pashukanis' main contribution to legal theory centres on Private Law.

If we return briefly to the earlier problématique of the relation between base and superstructure, and the place of law, we note that Pashukanis clearly circumvents the reduction of the (super-structural) legal phenomenon to any underlying real relation. For him

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between Marxist conception of law as a legal order distinct from law as modern legislation. This insight is based on the idea that law is proper to any class-based society and not only to modern capitalism.

the categories of bourgeois law are constitutive rather than epiphenomena of economic relations because they provide the formal representation of subjects as possessors of either labour or capital. Subjects are constituted in the form of law. Furthermore, for relations of production to be carried out and reproduced as the production of commodities, these relations have to be fashioned, and *are* fashioned in the form of law. The material premises of legal relations cannot be distinguished or separated from their expression through that form (of law), and as a result the logic of supervenience does not obtain.

Since for Pashukanis law is an inherently bourgeois phenomenon that organises social relations amongst property holders, it would 'wither away' under socialism. Under socialist conditions, where the social bond would assume a different logic and form, and while social organisation would still require to be regulated, law in the form of rights and legal entitlements would disappear, and only technical forms of regulation would remain. The running of the trains would still need to be regulated, even if under socialism the law would not need to settle disputes between companies, shareholders, consumers and investors, or maintain any relationship of equivalency between labour expenditure and compensation therefore, because, for Pashukanis, 'an end will have been put to the form of the equivalent relationship.' 'The withering away of the categories of bourgeois law will mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations.' (Pashukanis 1978, 61) As Chris Arthur puts it in his excellent introduction to *the General Theory*, 'Pashukanis' bold perspective on the revolutionary development of post-capitalist society forces criticism to go beyond sniping at abuses or denouncing the current *content* of legal norms. The revolutionary overthrow of capitalist forms of social organisation cannot be grasped in terms of a quantitative extension of existing rights; it forces us to project a qualitative supersession of the form of law itself.' (Ibid, 9-10)

It is something of a historical irony that Pashukanis was 'disappeared' by the Stalinist regime for pushing Marx's radical insight about commodity fetishism to its legal application, and expression as legal fetishism. By the mid-nineteen thirties Stalin had consolidated his grip on power and deployed the state apparatus to sustain it; the adoption of the New Economic Programme (NEP) had required a clear suspension of the critique of private property, with the Party's Tenth Congress proclaiming that 'enterprise and local initiative must be given manifold support and developed at all cost'.[39] In the meantime the defeat of the Left Opposition (headed by Trotski) in the late twenties had meant that the strong Marxist line of critique of the early period had given rise to a market-friendlier approach coupled with the brutality of State terror. The following statement of Stalin's henchman Prosecutor-General Vyshinsky countered the 'withering away thesis' with the following statement: 'History demonstrates that under socialism law is raised to the highest level of development.' For Vyshinsky, 'the state [is] an instrumentality in the hands of the dominant class [that] creates its law, safeguarding and protecting specifically the interests of that class.' And thus 'our laws are the expression of the will of our people as it directs and creates history under the leadership of the working class.'[40] These strong statements in support of 'proletarian law'

[39] Quoted in Head 2007, 102.
[40] Quoted in Berman 1963, 55

assume that the institution of law is neutral and can be filled with any given class content according to the will of the dominant class. What it missed is Pashukanis' insight that it is the very form of law as tied to the institution of subjectivity and private right that over-determines content and ties the institution inexorably to the structure and logic of commodification.

5. *Between Structure and Agency: the Question of Constituent Power*

That the juridical concept of the subject was key to Pashukanis' general theory and focus of his critique was not incidental; the question of subjectivity, the question whether the collective subject would be in a position to carry the emancipatory project, or whether it was inexorably caught in the logic of bourgeois rule, has always been central to Marxist thought, and, once again, it hinges on an anti-reductionist view of the political economy of law. With the Hegelian strand of Marxism the subject would come into its own as agent of emancipation, in the dialectical unfolding of History. But such faith in the redemptive role of history was tested on a number of fronts. The 'negative dialectic' associated with the Frankfurt School while steeped in Hegelian thought afforded the subject no 'transcendence' from its capture in the capitalist imaginary, especially under conditions of fascism, and (later in the work of Horkheimer in particular) 'really existing socialism'; in both cases negation remained the constitutive moment (see above, section 3). And the promise that the subject of history would transcend the condition of that entrapment in the very undertaking of collective, revolutionary *praxis* (a theory most intriguingly put forward by Lukács) was rebutted in the emphatically anti-Hegelian currents of Marxism associated with the rise of structuralist thought. For structuralists, the unfolding of subjectivity in history would only ever repeat the logic of the reproduction of the structure of Capitalism, and it was naïve to assume that the subject would be in a position to resist the reification that ran alongside it with the development of capitalism. Amongst the most important instances of this line of thought are the theories that emanated from the Ėcole Normale Superieure in Paris around the key figure of Louis Althusser, perhaps the most typical exponent of the anti-Hegelian, structuralist current of Marxism, with its emphasis on the structural determination of subject positions and possibilities of action *without* dialectical overcoming. Reading *Capital* closely, Althusser takes from Marx the notion that the fetish phenomenon – the commodity form – on which capitalist exchange is based arises as co-original with what may be envisaged as the possibilities of human association under capitalist conditions.[41] It cannot be stepped back from, or put to question dialectically. In one of his most quoted essays, on the function of 'ideological state apparatuses', Althusser distinguishes between forms of capitalist state repression (police, prison service, military) and ideological forms that operate behind the backs of agents, as it were, in calling them forth ('*interpellating*' them is his term) under specific descriptions to occupy subject positions that reproduce the relations of production according to the logic and the exigencies of capitalism. The subject of these relations is not in

[41] Note the important overlap with Pashukanis at this point, though Althusser makes no explicit reference to the Bolshevik theorist. For one of the most interesting works combining both Pashukanis and Althusser, see Edelman 1979.

a position to step behind the ideological forms and put them to question because they inform constitutively what it means to be a 'free' subject and what it means to exercise those freedoms. The constitutional imaginary of bourgeois democracy cannot be put to question by actors who rely on its *semiosis* of freedom, subjecthood and self-determination to make sense of their social experience. To contest bourgeois democracy was to transcend those terms, and with them the juridical condition of the construction of sense, a condition that a successful revolution alone could deliver.

A similar impasse relating to the subject position is theorised in the tradition of revolutionary syndicalism in Italy and the post-Gramscian currents of the autonomist syndicalist movements. The central question for them became how to claim a speaking position for the subject that breaks with the system of capitalist social reproduction. For Antonio Negri, the most famous theorist amongst the radicals of the workers' movements, the (collective) revolutionary subject, as wielder of constituent power, must remain under-determined and resist subsumption under the dominant symbolic order. To pick up the thread of this *incongruent* representation, we will need to go back to a certain Italian current of Marxism out of which Negri's work grew: the 'operaismo' movement of the 1960s that formed the springboard for the later 'autonomist' current of Italian Marxism in the 1970s, in which Negri was a leading figure. What is distinctive about the autonomist movement is the centrality within it of a project of working class *self-valorisation*, and with this self-valorisation, crucially, a resistance to accept the hegemonic representational orders of Capitalism, a refusal to define the movement through its (capitalism's) vocabularies. What this entailed was the rather paradoxical refusal to identify the revolutionary-subject-to-be—the working class—through work, since the system of work, they argued, provides a context within which the self-identification of the proletariat as potential revolutionary subject is always-already undercut. That is because, to put it in the terms Marx used in the Manifesto, 'a class of labourers, live only so long as they find work, and find work only so long as their labour increases capital'. At the conceptual level, the possibility for *self*-identification of the working class is cancelled in this undertaking Thus, practically, political action for the Autonomia was undertaken in terms of refusal to work, wildcat strikes, spontaneous slow-downs, acts of sabotage, bad-faith reformism (the political programme of demanding more from management than management could possibly deliver, etc). And Negri called upon this 'project of destruction' to undo the symbolic grip that capitalism exerted on the proletariat with its control—at the very point of the recovery of meaning—of the vocabularies and representational orders within which self-valorisation might have taken place. The injunction of Operaismo and then Autonomia to undertake political praxis 'dal punto di vista operaio' becomes tragically both urgent and impossible because that point of view forever slips back to existing schemata, and makes alternatives visible only in terms of dislocations it marks rather than any consistent programme of 'self-valorisation'. 'We find ourselves', protests Negri, 'with a revolutionary tradition that has pulled the flags of the bourgeoisie out of the mud.' (Negri 1991, 37) Like the Marx of *The 18th Brumaire*, his call is to 'let the dead bury the dead'. And yet, despite its tragic contradiction, for Negri it is of paramount importance to remain with the project of self-valorisation.

The most interesting work as far as legal theory is concerned is undertaken in the field of Constitutional and Labour Law (Negri 1994; 2005). If 'to speak of constituent power is to speak of democracy,' as Negri puts it in the opening sentence of his early work on the concept (*Il potere constituente*, translated as *Insurgencies*) the fact that it appears as constitutional, that is, comes always-already implicated with constitutional form, means that democracy is already straitjacketed to the conditions and limitations of capitalist legality. To be valid, popular will must be imputed to the constitution that establishes the conditions under which the popular will can be expressed *as* sovereign. Law and democracy are reconciled only via the suppression of a paradox that impacts on constitution-making as never, inevitably, fully democratic, if democracy, *ex hypothesi* must remain sovereign to contest and determine the conditions of its exercise. The tradition of thinking about revolution - a tradition that also informs Negri's work - in the variety of its instantiations typically returned to the promise of *constituent power* to face up to precisely that reflexive question. 'What is constituent power from the perspective of juridical theory?' asks Negri, whose priority of course lies with constituent power as an expression of the potentiality *to break with* the logic of capitalist reproduction. Here is Negri (1999, 2):

> [The constituent] is the source of production of constitutional norms – that is, the power to make a constitution … in other words the power to establish a new juridical arrangement … This is an extremely paradoxical definition: … Never as clearly as in the case of constituent power has juridical theory been caught in the game of affirming and denying, absolutising and limiting that is characteristic of its logic (as Marx continually affirms.)

Negri tracks a sequence of reductions, inflicted by juridical reason in the context of its 'taming' and instrumentalising the constituent, and in the process inflicting 'every type of distortion':

Constituent power must itself be reduced to the norm of the production of law; it must be incorporated into the established power. Its expansiveness is only shown as an interpretative norm, as a form of control of the State's constitutionality, as an activity of constitutional revision. In this the juridical

> 'covers over and alters the nature of constituent power.' … 'This is how the juridical theory of constituent power solves the allegedly vicious circle of the reality of constituent power. But isn't closing political power within representation nothing but the negation of the reality of constituent power?' (Negri 1999, 3-4)

The 'interpreters of law' are at pains to maintain the 'vitality' of the system, while navigating that vitality away from any kind of dangerous democratic excess. Amongst the jurists it is only Schmitt, for Negri, who posed the question of constituent power 'with extraordinary intensity.'(Ibid, 24) In fact, the 'constituent' is preserved in Schmitt in the logic of the decision, that is never purely of the order of the 'constituted'. But in tying it to the logic of the exception, Schmitt 'capitulates to the force of an attraction that is by now devoid of principles.'(Ibid, 21) In this way, the question of constituent power is rightly disentangled from the grip of the exception and replaced in the material context of radical social change.

6. *Conclusion*

The fall of the Berlin Wall, the loud proclamations of the 'end of History', together with the rise of globalisation and its supranational and international legal forms, initially at least appeared to have pushed Marxist thinking aside for good. Critical legal scholars often preferred alternative views on the law, borrowing from different traditions and schools.[45] While often recognised as the main source of inspiration for critical thought, critical legal scholars have often dismissed (at times with good reasons) central tenets of Marx's work (for example, dialectic materialism) and borrowed their conceptual apparatuses from other disciplines. in the process they also neglected one of Marx's key intuition: the materialist understanding of the social order. It is our contention that legal analysis can still benefit, and in the current condition of financial sovereignty more than ever, from the renewal of this materialist conception of the law and of its forms.

Let us highlight three methodological tenets of a materialist conception of law. First, the materialist study of law must maintain the political economy clearly within its sights, in terms of the analysis of production and reproduction. Let us be clear: production and reproduction have to be tied to a broad, not a rigid, definition of labour. That is to say that a materialist analysis of the law should go well beyond the boundaries of a political economy based on waged labour. A second clarification follows: the legal analysis will have to take into account the political economy of the *concrete* legal order as only in this way it is possible to retrieve how the production of economic value determines what counts as labour. that is to say that the forms of the legal order and its institutions will have to be studied against the background of the logic of valorisation concretely (and differentially) at play each time. It has been a key argument throughout this chapter that the formation of the legal order has to be understood as itself a field of struggle, and not as the *outcome* of the operation of the political economy.

The second tenet of the materialist study of law stems directly from the first and concerns the relation between the legal order and society. The materialist study of law cannot begin with the assertion of a difference between the economic basis and the super-structure, because it studies the law and its forms as *internal* to the production and reproduction of the social order.[46] Accordingly, law is immanent to the social order, not an epiphenomenon of the economic order, and class struggle both shapes and is shaped by legal instruments. The legal and constitutional impact of the role of class struggle represents the political dimension of a Marxian approach as it makes room for the political action of the subjects. For this reason, it is not reducible to a version of legal sociology. The emphasis on the ordering properties of law and its internal connection with class struggle implies a relative autonomy of the legal field[47] and the recognition of the contingency of certain legal decisions (i.e., legal

[45] See, for an overview, the chapters on deconstruction, aesthetics and post-critique in this Handbook.
[46] This type of analysis is very close to two influential socio-legal approaches to legal studies. The first one is inspired by Gramsci (see Gill 2008) and the second by legal institutionalism (see Romano 2017).
[47] The work of Nicos Poulantzas 2015. Poulantzas maintains the necessary political unity of every capitalist social order and he assumes that the stateis its guarantor. However, the state is the condensation of certain social forces around a number of objectives, assuming that these forces are capable of political organisation and action.

arrangements could have been otherwise) which maintains open the potential for a genuine political imagination.[48]

The third point, a consequence of the above recognition of the solidity and at the same time contingency of the legal order, concerns the value of legal critique. Here, the task of a material study of law is, first of all, to study the legal and political institutions of a concrete regime of valorisation and, secondly, to imagine and theorise alternative institutions. For this reason, the theory of constituent power remains an essential component of the materialist study of law. An accurate reconstruction of the main tenets of the legal order and its procedures is a pre-condition for conceiving alternative avenues for political and legal action.

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[48] An example of work in this vein is Rancière 2012.

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