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Colin Sumner

University College Cork, Ireland

The Rule of Law and Civil Rights in Contemporary Marxist Theory¹

Abstract

The article proposes issues of law and civil rights from the standpoint of other approaches and approaches of contemporary Western Marxist theories. Analysis led by sources of Marxist law theory, by Althusser theoretical perceptions of law, with attention to the positions of Jurgen Habermas and Edward Palmer Thompson and their criticism by Western Marxists. The narrative of this favor is Paul Hirst and is an approach to the law and the meaning of Marxism in the field of law in socialism. The comparison is made by Jurgen Habermas and Evgeni Bronislavovich Pashukanis. Make early the challenges for the theory of law, including civil rights and criminology from the approach of Western Marxist theories.

Key words: criminological theories, law theory, state, civil rights, crime, Marxist theory of law and its approach to law.

Introduction: the problem

One central issue for Marxism today must be: under what social conditions and by what principles can and should individual liberties be developed and sustained? This essay represents an attempt to open up this question and to begin the task of identifying the problems involved in answering it. I want to suggest that the difficulty Marxism has with both the theory and practice of civil liberties is not accidental but, rather, a direct product of certain central weaknesses in its social theory and political philosophy, and that, moreover, a brief survey of currently debated socialist literature (in the U.K.) on the subject (the work of Thompson, Pashukanis, Habermas and Hirst) indicates that modern left libertarianism may only be establishing itself at the expense of some classical Marxist tenets. I shall go on to argue that a coherent Marxist position on the rule of law and civil liberties is tenable and I shall outline some of the premises and developments necessary to its achievement.

In short, I think that our worst fears about the causes of Marxism's poor record on civil rights may well be confirmed and that the issued raises terrifyingly

¹ This is a much revised version of a paper given at the American Society of Criminology conference.

substantial (although not unfamiliar) problems for Marxist theory and practice. This essay will do little more than attempt to identify them and must be seen as a very small part of a much bigger (and rapidly developing) debate in Europe about the state, law, reformism, the nature of class struggle, and the character of socialism itself.

In immediate political practice, our original question becomes one of the utility, priority and *raison d'être* of struggles for legal rights in bourgeois society in relation to the general long-term struggle for socialism. What justification, priority and relevance can be given (by revolutionary socialists) to such struggles as those by Irish Republican prisoners for political status, by ad hoc pressure groups to prevent the legalization of already practically extended police powers, by women's groups to obtain abortion on demand, by black citizens to obtain equal treatment under the law, or by trade unions to retain the right to picket effectively? Of course the list could be a very long one given the complex divisions and conflicts which advanced capitalist societies generate. But it is interesting to pose the issue in terms of practical contemporary political struggles. The question of rights struggles has rarely been posed in this way; normally it is posed and resolved in pure theory. This practical political stance alerts us from the beginning to the fact that such formal support as has been given by Marxist parties to rights struggles has been highly selective, quite limited and fairly pragmatic.

The value of rights struggles for the development of a revolutionary working class or for the advancement of socialism or for the health and safety of citizens in a socialist society has of course been largely neglected within Marxist theory. It is difficult to think of even a single substantial text on the matter. When attention has been given to the question, however, it has had a distinctly schizoid character. On the one hand, Marxism has generally dismissed bourgeois legal rights as ideological fictions betrayed by persistent social inequalities and aggressions, regarding struggles to achieve them as reformist and irrelevant to the necessary revolutionary strategy. But, on the other hand, most Marxists have (quite quietly and sometimes almost incidentally) formally supported the defence of certain established rights, such as the right to form a trade union and the right of public assembly.² Such support, however, seems limited to the protection of the trade union movement.

This conventional Marxist position begs several questions: if a bourgeois legal right can support the political growth of the working class, how can it merely amount to an ideological illusion? How exactly and at what point do we distinguish politically between the conservative and radical functions of a legal right? Which legal rights are irrelevant to the development of the working class? With what criterion in mind do we draw the line between relevance and irrelevance? If *defending* a legal right can have progressive political functions then surely, a fortiori, *establishing* it in law in the first place must be even more progressive? If the protection of the labour

² Most 'rights' of this kind are of course severely limited today by a whole welter of statutory restrictions which make it questionable whether one should continue to use the term 'right.' To pursue this would take us into a territory most Marxists do not even know exists, such is the state of ignorance on civil liberties; suffice it to say that modern rights amount to certain limited powers allocated to individuals or groups by the state legislature or judiciary.

movement is the criterion to use in assessing value and priority of campaigns, then surely the various civil rights of women, blacks, prisoners, pensioners and children (and so on) are just as important as those of male, adult, white trade unionists? Isn't the protection of the labour movement too limited a criterion to use? Wouldn't the value of any rights struggle vary in practice with the precise historical context in which it takes place?

When one considers the weakness of the conventional Marxist position in the light of such questions, it makes me angry to think that it is a position which supports the denigration of the rights struggles of blacks, women, youth, welfare claimants, prisoners and pensioners. It is also an orthodoxy which, in another form and another context, has supported the denigration of peasant revolutionary nationalism (see Foster-Carter 1974: 86-7). Somehow all these struggles were for an awful long time thought of as irrelevant to the transition of socialism: auxiliary to The Class Struggle. But what sense does it make to define Class Struggle in such a limited way? To reduce more than half the Western working classes to mere auxiliaries in the class war is not only male chauvinist, racist, ageist, etc., but it is also to *excise the class character* of their political activities and to reduce the struggle of the working class to the economic claims of the metropolitan, white, male labour aristocracy. Indeed, the conventional Marxist position also seems to display a short memory, for did not some of the earliest and most significant struggles of the white, male, metropolitan working class concern bourgeois legal rights? Once this class fraction gained its rights (and Marxist theory) it seems to have forgotten the importance of rights struggles in the establishment of its social power. To relegate those of other class fractions fought at a later stage to the status of auxiliary or reformist politics is to lend support to Selma James' view that the dominant fractions of the working class have colonised subordinate fractions. We may even thus be drawn to make the heretical suggestion that, if the above thesis is correct, the rights struggles of such groups as women and blacks might be as much an assertion of social power against their internal colonisers as they are against their external colonisers.

By these same Marxist conventions, the lack of civil liberties in Eastern Europe and elsewhere in the socialist camp is never granted the status of presenting a problem for theory. Such oppressions are often explained as the outcome of national peculiarities, historical accidents or individual errors: categories of causation not normally prominent in Marxist explanation. At a minimum, Marxist theory is stunningly ambiguous on the issue of rights struggles within the socialist camp.

It seems clear, even at the outset, that the narrow, incoherent and undeveloped character of the orthodox Marxist position on bourgeois legal rights and working class rights struggles is closely linked to narrow or untenable conceptions of class formation, class struggle, legal right, and the state. Whilst recognising that many issues are involved here, I want to argue that careful reconsideration of the concepts of class struggle and legal right would go a long way to rescuing Marxism from the theoretical cul-de-sac it has entered in the twentieth century. (I shall indicate later how the works of Thompson, Habermas and Hirst are sensitive to this point and, despite their faults, stimulate constructive theoretical development.) This

reconsideration must involve (1) a *broader conception* of class struggle than hitherto and (2) a more historical, less abstract understanding of bourgeois legal rights.

The first requirement is largely beyond the scope of this paper and will be mainly dealt within relation to the second. However, I want to argue that the necessary broadening out of the concept of class struggle can be achieved purely by logical theoretical development without adducing anything as contentious as liberal sympathy, humanism or a blind faith in oppositionalism. The development must come in the concept of social relations. I have indicated elsewhere how this concept can be fruitfully developed (Sumner 1979: 229–234). Essentially, distinguishing between the class and ‘technical’ components of social relations, the argument is that, whilst class divisions and ideologies cut across age, sex and race in constituting the class functions which reproduce the mode of production and its corresponding political and cultural forms, it is most definitely also the case that class divisions in some historical conjunctures (at least in advanced or post-imperial/neo-colonial capitalist societies) are articulated, structurally and explicitly in state administrative practices in striking correspondence with divisions (inter alia) of age, sex, race and religion. The important consequence of this is that *even within an orthodox* definition of class struggle (which envisages the political activities of classes and/or class fractions constituted at the point of production) the campaigns of youth, women, Catholics and blacks (etc.) for greater social power are categorically *class struggles*. Obviously not all women or all Catholics are working class, and as James (1975) points out their political movements will themselves contain conflicts between different class elements, but inasmuch as interior intra-class division sets off one race, religion, or sex against another, inasmuch as conflicts which are fought out in terms of racist, religious or sexist ideologies are tightly structured by class, then the political movements of such groups must logically constitute (at least in part) class struggles. The politics of discrimination are also the politics of class.³ Discrimination issues have unfortunately been parcelled up and separated off as ‘the politics of civil liberties,’ ‘single-issue campaigns,’ or ‘reform movements’ and Marxists have taken this categorisation for granted. I insist that this is a major theoretical and political error, at least in logical terms and probably also in terms of the lack of historical foundation for the distinction between class politics and civil liberties politics (revolution vs. reform?). The last issue needs urgent investigation.

This broader conception of class struggle can be developed, as I have shown above, without reference to the complicated issues concerning the importance and possibility of alliances between classes (e.g., between working and ‘middle’ classes) and alliances between fractions of the working class. If this latter reference were made, of course, the concept of class struggle could be broadened even further. The net effect of a broader conception, for present purposes, would be to move us toward Cabral’s preoccupation with ‘the right of peoples to make their own history,’ towards the concept of Marxism as “a tool of self-crystalization and self-transformation for all manner of oppressed groups” (Foster-Carter 1974: 87), and towards the feminists’

³ Or: ‘Discrimination... within the economic, political and cultural systems of a society is not peripheral to class politics because it is jointly articulated with the class structure’ (Sumner 1979: 234).

concern (articulated well by Selma James) to destroy internal colonialism within the oppressed classes (and the ideology that legitimates it as 'historical accident' or 'biological inevitability'). Yet, importantly, this move would not have been made at the expense of the fundamental Marxist insistence on the primacy of economic relationships and on the role of class struggle as the motor force of social change.

This change of direction, based on a broader and more thoroughgoing understanding of class struggle, is closely connected to my second demand, for a more historical conception of bourgeois legal rights. Socialist theorists, such as Habermas and Hirst (see later) and Picciotto (1979), are beginning to realise that the character of legal rights and the philosophy of the rule of law changes quite significantly even within capitalism. Different concepts of right and the rule of law may attach to different phases of the development of the capitalist mode of production. The bourgeois revolutionary's Enlightenment conception of the Rights of Man, posing an autonomous individual as legal subject, as a 'natural' inhabitant of the 'natural' economy of capitalism, seems quite different from the modern corporatist liberal's concept of state-conferred capacities necessary for the social engineering project of mediating structural conflict. The earlier Hobbes-Locke conception of the rule of law as vital for the establishment of private property rights and the political order based upon them seems sharply different from the Diceyan notion which emphasizes the role of the rule of law in integrating the 'collectivist' threat into the democratic state. Research is needed now on these historical differences.

In anticipation of its findings, my thesis here is that we must begin to consider bourgeois legal rights, or claims thereto, as expressions of political force and claims to social, power which are important landmarks in the development of the social power and identity of a class or class fraction. This dimension of bourgeois law has been lost in the welter of economic structuralism, usually reliant on Pashukanis, which damns bourgeois legal rights for constituting the individual as their subject or bearer (see Picciotto 1979: 170–177). This position, which draws narrowly but heavily on the famous Chapter 2 of *Capital. Vol. 1*, that is on Marx's analysis of exchange, was developed most by Pashukanis (whose work I shall comment on later). Consequently, it damns all law as bourgeois in form since the development of law can be linked to the development of exchange relations. I shall argue that this is an inadequate or limited analysis of the bourgeois legal form, a full consideration of which must encompass the twentieth century shifts in its nature and address the generation of its modern forms within the arena of political practice. That is, it must consider (a) the changing role and form of state power and (b) the effects in the parliamentary and judicial arenas of the political pressure and cultural assertion of various subordinate class fractions and organisations. The modern legal right or state-conferred capacity is, I would suggest, more a product of the balance and forms of political power than of the eternal structure of commodity exchange (a conclusion apparently also reached by Picciotto). Therefore, one of its most important features is that it expresses the relative social power and political coherence of different classes, class fractions and social groups. As such, in this limited and precise sense, modern rights (and their erosion) can be seen in part as milestones in the rise (and fall) of the political power of subordinate social classes. They are

key moments and weapons in the development of the working class as a many-sided, international, democratic, humane force for socialist progress. It is too easy to take these rights for granted (as in the case of the labour movement) or to sideline them as 'civil liberties issues' (as in the case of nearly everything else). Legal rights must be seen as the gained territory of power struggle which only becomes a barren waste if its conquerors fail to settle upon and cultivate it. As Marx put it:

My party considers an English revolution not *necessary*, but – according to historical precedents – *possible*. If the unavoidable evolution turns into a revolution, it would not only be the fault of the ruling classes, but also of the working class. Every pacific concession of the former has been wrung from them by 'pressure from without.' Their action kept pace with that pressure and if the latter has more and more weakened, it is only because the English working class know not how to wield their power and use their liberties, both of which they possess legally (Letter to Hyndman in 1880, in McLellan 1973: 444).

Be under no illusion: Marx, in his later works, was an avid defender of rights struggles and felt no pressure to defend himself against charges of reformism. The above is no isolated quote. I hope I will be forgiven for giving publicity to the following lengthy passage:

...The political movement of the working class has as its ultimate object, of course, the conquest of political power for this class and this naturally requires a previous organization of the working class developed up to a certain point and arising precisely from its economic struggles.

On the other hand, however, every movement in which the working class comes out as a *class* against the ruling classes and tries to coerce them by pressure from without is a political movement. For instance, the attempt in a particular factory or even in a particular trade to force a shorter working day out of individual capitalists by strikes, etc., is a purely economic movement. On the other hand the movement to force through an eight-hour, etc., *law*, is a *political* movement. And in this way, out of the separate economic movements of the workers there grows up everywhere a *political* movement, that is to say, a movement of the *class*, with the object of enforcing its interests in a general form, in a form possessing general, socially coercive force. While these movements presuppose a certain degrees of previous organization, they are in turn equally a means of developing this organization.

Where the working class is not yet far enough advanced in its organization to undertake a decisive campaign against the collective power, i.e., the political power of the ruling classes, it must at any rate be trained for this by continual agitation against this power and by a hostile attitude toward the policies of the ruling classes. Otherwise it remains a plaything in their hands, as the September revolution in France showed, and as is also proved to a certain extent by the game that Messrs. Gladstone & Co. have been successfully engaged in England up to the present time (Marx, Letter to Bolts in 1871, in Cain and Hunt 1979: 240, 1).

These astounding quotes give no warrant for the view that only legal struggles over pay and conditions in factories can be seen as political/class struggles. That would surely be a very facile literal reading of Marx's point. What they do support is

my contention that, since ultimately in capitalist societies the oppression of women, youth, blacks or religious groups (e.g., Catholics in Ulster) is rooted in the interests and forms of bourgeois class rule, the organised rights campaigns of such significant fractions of the modern working class must be considered as political or class struggles which enhance and speed the all-round development of the working class as a politically organised force capable of taking over and exercising state power.

Without this many-sided character, working class political organisations must logically develop, and frequently have developed, in stunted, bigoted, economistic forms which, through the rampancy within them of racist, sexist and anti-youth ideologies, amount to a vehicle to colonise the majority of the working class in the name of 'practical' politics. In effect, after their incorporation into the structures of state power, at most times in most advanced capitalist countries, the trade union form could be seen as a stunted form of political growth which was in effect operating as an instrument of 'indirect rule' over the colonised potential politics of various fractions of the working class. In sum, at its most outrageous, my argument is that the rights struggles of such groups as the Ulster Catholics, the women's movement, prisoners' rights organisations, black citizens' groups, immigrants, youth and so on are (at a minimum) *extremely important* potential agencies for the advancement of the degree of civilisation, democracy and genuine liberality within the political organisations of the working class; and that is apart from the main function of such struggles in developing the social power, confidence, identity and, of course, comfort of the members of these so-called 'minority' groups so that they can take their full place in the reorganisation of society. I suggest that the economism of workers' organisations in the twentieth century has combined with the incorporation of their leadership into the state with the effect of sidelining certain forms of class politics into the cul-de-sac categories of 'minority group' or 'civil liberties' politics, and therefore of putting a substantial brake on the political and cultural development of the working class. In addition, the class character of 'minority' group or 'civil liberty' questions has been lost in the process and a substantial, false and retrogressive distinction established between the two main forms of modern political activity.

All this is to go too far, too fast, too soon, but it does indicate the direction of my enquiries and headlines my contention that the question asked at the outset raises the most far-reaching problems for Marxist social theory and political philosophy. Let us now retrace our steps by looking at the stimulus for the reconsideration and development of Marxist legal theory.

Origins of the current debates within Marxist legal theory

In the twentieth century, the sharp end of working class power has often been blunted by its absorption into bourgeois parliamentary democracy, and one can see why such democracy and the rule of law have often been dismissed as mere disguises for bourgeois class rule.

However, there is no doubt that 1970 is a turning point in British history, and subsequent events raise a challenge to orthodox Marxist legal theory. 1970 marks the beginning of the deconstruction of welfarism (through the decline of 'humane'

conservatism and the increasing power of the right in the Labour Party), and of an increase in state authoritarianism. The processes leading up to and illustrating this shift are well described in *Policing the Crisis* (Hall et al. 1978: chs. 8 and 9; see also Glyn and Harrison 1980).

The emergence of Thatcherism (involving monetarism, paranoid militarism, a nineteenth century free enterprise philosophy requiring tough control over public sector wages and over union power, welfare/social service cuts, and an aggressive, patronising manner of government) articulates this shift to a higher power. A necessary part of Thatcherist ideology is a strong emphasis on law and order, which here means 'the protection of the rights of the individual against the threats from the undemocratic forces of socialism.' 'Rights of the individual' in this context means the rights of workers to refuse trade union membership, the rights of people to demonstrate fascistic views on the streets, and the rights of capitalists to make profit without union interference, etc. Thatcherist ideology itself resurrects the rule of law as an important part of political debate and within her strategy it has a very specific function: to legitimate her offensive against the economic well-being and the political organisation of the working class (and other progressive forces). The drift to the right since 1970 therefore not only sees a return to nineteenth century political economy but also to a nineteenth century view of 'the natural rights of the individual.' Such a depoliticisation of law has, of course, very modern political purposes and has therefore reinforced Marxist cynicism about law in general, and civil liberties and human rights in particular.

On the other hand, the reduction of welfare services/rights and legislative encroachments into longstanding civil liberties inspires a defensive support of legal rights (e.g., those protecting people from arbitrary or brutal police harassment) and even human rights (e.g., the Socialist Workers' Party's right to work campaign). Such support clearly induces the birth of a problems for the Left: on what theoretical grounds does one support laws that were previously derided as vacuous and mystificatory? This problem was undoubtedly reinforced by two other developments.

Firstly, since the mid-sixties, various movements, not in practice closely linked to the orthodox 'class struggle,' grew rapidly and increasingly fought campaigns on legal terrain (e.g., for new legislation or against abuse of existing legal powers). These political forced primarily include the women's movement, West Indian/Asian organisations, local community groups, the gay liberation movement, student unions, civil liberties groups, and Catholic groups in Northern Ireland. In addition, one should not forget that because of Tory legislation, such as the Industrial Relations Act of 1971, the orthodox class struggle was increasingly fought by trade unions within the legal arena. For all these groups, representing large sections of the working and middle class, gains at law were always important defensively, but sometimes represented major, positive assertions of a power which had not previously been recognised. None of these gains, especially the latter sort, could be dismissed as empty or illusory, and some of them might even be regarded as important moments in the development of the political power of these social groups.

Secondly, the increasingly Right-wing nature of policy during the 1974–1979 Labour government was matched by a drift to the Left at the grass roots, constituency

level of the Party. The latter has resulted in demands for the greater responsiveness of the parliamentary Labour Party to the beliefs and policies of the people who keep the Party alive at its base. In a period of declining Party membership and after an electoral defeat that could have been avoided (in 1979), these demands have had great force and support. They have come in the form of calls for more rights, such as the right to submit MPs to a re-selection procedure, and have raised acute questions about the relationship in a parliamentary democracy between the competing political rights of MPs, Party workers and voters; and therefore about the nature of democracy itself (e.g., relative weighting of election and appointment). Large sections of the Left, whether members or merely supportive of the Labour Party, therefore have their own specific reason for coming face-to-face in practical reality with issues surrounding the rule of law in a parliamentary democracy. None of these questions could be easily dismissed as merely problems for bourgeois politics and political scientists. The capture of new rights by the grass roots of the Party could result in a sharpening, of the drift to the Left in the Party (as a whole) and thus a radical transformation of the face of British politics (in one way or another).

In short, although Thatcherist ideology itself begets classical Marxist cynicism about rights, the rule of law and democracy, there are strong reasons why Marxists should re-examine their theory of law and their political philosophy. Recent political history has starkly exposed the ahistorical character of out theories of law. It is precisely because E. P. Thompson's recent interventions (in *Whigs and Hunters* and *Writing by Candlelight*) played sharply on this weakness that they became so controversial.

Thompson and the break with Althusserian legal theory

At the end of *Whigs and Hunters*, Thompson added a theoretical polemic on the Marxist theory of law which was consciously and specifically aimed at Althusser. Slating structuralist Marxism as reductionist and deterministic, he posited that (a) law is relatively autonomous, (b) any society requires a legal order, (c) law was a general form 'deeply imbricated' within production relations and supported by community norms, (d) law and legal procedure were the key expressions of the hegemony of the eighteenth century aristocracy, (e) law was not just an instrument of class control, but also mediated class relations, i.e., acted as the expression and arena of class conflict, (f) the success of law as an hegemonic force depended on its real value in providing some protection against arbitrary state power, (g) some of our limited legal freedoms are the result of arduous struggles by reformers and working class organisations, and (h) the rule of law (legal restraints on state power and the primary regulation of major conflicts by law) was one of the great cultural achievements of the agrarian and mercantile bourgeoisie (Thompson 1977: 258–269).

More or less the same general points were made in his subsequent essay on 'The Secret State' (in Thompson, 1980). Here, he argued that by the end of the eighteenth century the 'common people' adopted some of the libertarian elements in Whig anti-State rhetoric and 'insisted that the civil rights of the "freeborn Englishman" were

not the privileges of an elite but were the common inheritance of all' (Thompson 1980: 153).

The insurgent British working-class movement took over for its own the old Whiggish bloody-mindedness of the citizen in the face of the pretensions of power (Thompson 1980: 153).

Consequently, Thompson berates the Left of today for forgetting or underestimating the libertarian tradition amongst ordinary people in Britain, and for adopting a 'profoundly pessimistic determinism' towards the increasingly authoritarian state (see 1980: 164–180).

To a certain extent, Thompson's attacks are misguided. Althusser's critique of orthodox Marxist philosophy in fact opened up a theoretical space which enabled Marxists to adopt positions like Thompson's (emphasizing the role of national culture in determining the movement of the current conjuncture) without making excuses. Althusser's very precise concept of overdetermination (see Althusser 1969: 106) was formulated in such a way as to cover the historical possibilities Thompson has in mind. The old Positivist and Hegelian views of the economy-law connection receded before a conception of the dialectical interpenetration of some forms of law and economy, an interpenetration contextualised and dialectically mediated by distinct historical forms of politics and ideology. This recession allowed in the determination of the infrastructure by the superstructural circumstances and forms 'in which it is exercised' (Althusser's phrase), by national traditions, feudal residues and international context, etc.; items which had rarely entered the calculus of orthodoxy, Thompson's own epistemological position is not convincing:

In the last analysis, the logic of process can only be described in terms of historical analysis; no analogy derived from any other area can have any more than a limited, illustrative, metaphoric value (and often, as with base and superstructure, a static and damaging one); 'history' may only be theorised in terms of its own properties (Thompson 1978: 276).

Whilst this view has great value in reminding us that theoretical categories are structured and limited by history, it is dangerously empiricist in implying that general concepts of the social formation are only heuristic guides or conjectures. It seems to me that all historical analysts use such a general concept, consciously or unconsciously, and that we cannot avoid the question of which conception is the least problematic. Althusser's contribution was to offer a very convincing general conception of social formations (as a result of his philosophical interrogation of dialectics). It certainly allows for Thompson's interpretation of English legal history and the current conjuncture in Britain, and of itself by no means dictates a 'pessimistic determinism.'

However, despite coming closer to reality and the needs of adequate causal analysis, Marxist legal theory under Althusserian hegemony said little that was positive about law, continuing to regard it as an ethical, ideological abstraction specifying equal rights undermined by economic inequality. It did reassert the need to preserve the freedoms mentioned by Marx as vital for the development of the workers' movement (e.g., rights to vote, to a free press, and to associate in free trade

unions, see Hirst 1975: 212–221). This exception, however, is not as substantial as it might look since the civil liberties of bourgeois public law were only regarded as a strategic necessity for the protection of the labour movement and not valued in themselves for their contribution to working class political culture or for post-revolutionary society.

Primarily, the Althusserian view was that as an ideological and repressive state apparatus, law worked to reproduce the necessary conditions of the capitalist mode of production through its coercive and ideological interpretation of the bourgeois legal subject; the latter being an ideological concept generated by the historical growth of capitalist relations of production and their concomitant empiricist philosophy. For the Althusserians, the juridical subject was the pivotal ideology of the whole bourgeois repertoire, infecting and underpinning all the rest (Althusser 1976: 117, n. 12). No longer simply an instrument of class struggle, and, as Gramsci suggested, a force educating us into the habits of bourgeois morality and practice, law was now designated as the key agency in the atomisation and neutralisation of social classes brought about by bourgeois individualism. As Poulantzas (1973: 124–141) has it, the juridical subject reflecting capitalist relations of production (both as relations of commodity exchange and of private exploitation) not only masks the class struggle but re-presents it as a series of issues of individual interest; thus laying the basis for the political hegemony of the capitalist welfare state.

It seems to me that Thompson's insistence on the positive functions of bourgeois civil liberties and the rule of law are an important corrective to the Althusserian critique of the form of bourgeois law. At the same time, however, I would suggest that Thompson has not sufficiently defined these functions, either historically or theoretically. In particular, it is still unclear which form of the rule of law philosophy Thompson sees as a strong limit on state power and under what political conditions it can 'work.' Like Habermas, Thompson regards democracy as the rule of law as restraints on state power which apply as much to Stalinist as to bourgeois societies. Both writers are rightly anxious about the ambivalence on the left about these matters. Neither, however, to my way of thinking, adequately formulates the relation between civil liberties and class struggle.

Stimulated by the contemporary political situation, Thompson's interventions have caught the moment and the debates they have brought about have advanced Marxist legal theory. On the agenda now are the forms of power, politics and legality appropriate for socialism, present and future. On the other hand, we must be quite clear that Thompson's approach must constantly be guarded from the danger of abstracted liberalism and be continually linked with socialist political goals and class analysis.

As Anderson says in conclusion to his extensive commentary on Thompson's work:

The fight for the preservation of civil liberties will only be truly successful if it is capable of *advancing* them beyond the threshold of liberal opposition between State and individual, toward the point where the emergence of *another kind of State* – not just safeguards against the existing State – is their logical and practical terminus. For this

transitional demands, linking immediate to ultimate, democratic to socialist goals are essential. The full potential of the political issues of democracy raised by Thompson can only be realized by persistent and public demonstration of their convergence in socialism. Radical libertarian campaigns in the present are not to be won with continuist appeals to a constitutional past, but by credible programmes for a common future finally emancipated from it (Anderson 1980: 205).

More of the same? Habermas vs. Pashukanis

It seems to me that, for all its problems, Habermas's work on law is of great significance to our contemporary political-theoretical dilemmas. I suggest that this significance lies in his direct interrogation of the status of legal rights within Marxist theory and socialist political discourse. Like Thompson, his perspective is more historical than that of formalist-structuralists such as Pashukanis, Aithusser and Hirst: it addressed the changing meaning of rights in the social development of bourgeois society.

Habermas criticises Marxist theory for its dismissal of natural law rights as ontologically rooted in exchange relations (see Sumner 1981, for a full account of Habermasian jurisprudence). He argues that Marx misread the natural law tradition, because he was too close to its radical continental interpretation, with the effect of glossing the fact that rights after the Enlightenment (on the radical view) were now increasingly the result of public-political debate/struggle and not merely ratifications of the main structures of the economy. In denouncing the more conservative Anglo-American view of natural law and the bourgeois revolutions, Marx posited the 'merely political' nature of the freedoms of bourgeois law and denigrated formal justice as nothing but an empty shell which mystified exploitative class relations of production. Habermas suggests that, for many years, this effectively prevented Marxism from developing an adequate critique of democracy and the rule of law in bourgeois society. Marx's sociological reductionism has discredited the revolutionary aspect of natural law philosophy along with its reactionary features: the belief that it should be a normative expression of popular ethics was dispatched along with the belief that it was a natural expression of the structures and functions of a natural economy.

For Habermas, the rise of Stalinism and the continually growing role and power of the capitalist state since its inception, have exacerbated this theoretical error. The emergence of the highly interventionist, complex and technocratic, twentieth century advanced capitalist state means that there is no way that legal rights can be understood, in the tradition of Anglo-American natural law philosophy, as natural laws emanating from a natural economy. They have to be understood as state-conferred rights, in the radical natural law tradition. The 'repoliticisation' (Habermas's term) of the realm of exchange involved in the demise of 'liberal capitalism' means that human rights and citizens' rights are one and the same. The natural laws of society, argues Habermas, no longer dominate naturally but through the government's philosophical comprehension of them and political will (and capacity) to assert

them, subject to the theoretical sovereignty of the general will or national interest. Dominated by the politics of functional democracy and armed with science, state capitalism renders existing Marxist jurisprudence irrelevant; and Stalinism makes it positively dangerous. The Victorian conception of rights, as 'natural' emanations of the society of commodity exchange, held by classical Marxism (which Habermas closely identified with Stalinism) must, in the hands of successful revolutionaries, lead to the overthrow of any legal protection from the state won by workers, reformers and dissidents in previous struggles. The very tenets of orthodox Marxist theory and politics logically lead to a state that disarms its masses, literally and legally, and organises them 'scientifically' into forms of production, policy and culture which the Party's 'correct line' specifies. The mass lose their rifles and their rights, and get the benefits of Party science instead.

This at least is the logic of Habermas's position, even if my precis makes blunt and bold what in his writing is more subtle and tentative. Clearly, this is a direct critique of the formalist, structuralist-economistic reading of Marx, which in the U.S.S.R. led Lenin to put all his revolutionary legal eggs into the basket of informal, party-dominated democracy only to find that they hatched into very orthodox legal chickens under the sway of Stalin's party dictatorship.

Habermas's neglected views on law make a nice contrast from those of Pashukanis, now receiving considerable attention. Widely received as valuable, and gather much commentary in writing and at conferences, Pashukanis's recently retranslated theories (Pashukanis 1978; Beirne and Sharlet 1980) have also been widely criticised (see e.g., Kinsey 1978; Hirst 1979; N.D.C./C.S.E. 1979; Sumner 1979; Binns 1980; Jessop 1980b; Warrington 1981). This difference of opinion over the value of Pashukanis's work echoes the difference between Thompson and Althusser and the mixed response to Thompson's writings. I will not rehearse now the details of this argument about Pashukanis, but just summarise the general points at issue. No treatment of recent developments in Marxist legal theory could ignore this argument since it has taken up so much energy.

Pashukanis's commodity exchange theory of law contains one of the key theses of classical Marxism: that the juridical subject, the pivot of bourgeois private law and jurisprudence, is constituted through the practice of commodity exchange. Arguing that all law is private law, Pashukanis rejects classpower and ideology as the origin of the form of law and explains the universality of rights in bourgeois law as a direct reflection of the logic of the commodity form which masks concrete particular with its necessary assertion of equivalence (Beirne and Sharlet 1980: 10). Even the form of criminal law is held to be a reflection of this principle of equivalence inherent in commodity exchange. In consequence, with the advance of socialism, after the revolution all law must disappear along with the demise of market relations; planning law, and such like, was not law at all for Pashukanis, merely technical regulation. Criminal law would give way to the political strategies of 'social defence' and deviancy would be handed over to the doctors, psychiatrists and social workers! Stalin's later need for law of all kinds, and for the legitimacy the law contains, led to Pashukanis's disappearance from the scene.

Given that some of Pashukanis's theories are quite crude, that they were lucidly and widely criticised in the U.S.S.R. at the time (see Beirne and Sharlet 1980), that he himself withdrew from several of his key positions (Beirne and Sharlet 1980), and that even the recantations he made are a regression from the advances made by Althusser and Thompson, it is a total wonder to me why he has attracted so much attention. To hold to such a tight contiguity of law and economy is a serious regression. Clearly his ideas resonate both the general features of modern structuralism and its obsession with the ideologically constituted subject. I suggest that the main reason is, however, that Pashukanis feeds the current debate about the very form of law; he provides an answer to the question about whether it is peculiarly bourgeois or suitable for socialism. This concern flows from the political issues mentioned earlier. It is also why he has been heavily criticised in Britain: his theories cannot say anything to the complex problems which we face concerning the value of law. In particular, his economistic view of legal ideology, his downplaying of the role of the state in creating law, his blindness to the historical complexity of public law and its value for the development of the working class, and his neglect of the fact that the form of the rights won by workingmen, the later women's movement and 'minority' groups did not just flow from commodity exchange but also from structures of production and the exigencies of specific political campaigns, all amount to decisive weaknesses. Pashukanis's work, in my view, cannot fulfil our contemporary needs and is a theoretically backward step from Marx's work.

The wealth of forms contained in juridical regulations, concepts and proscriptions cannot be derived solely from the analysis of commodity exchange (c.f., Kinsey 1978: 205). Therefore, the concept of 'rights' in political discourse cannot be rejected on the supposed grounds that it is forever rooted in a bourgeois liberal philosophy lodged in relations of commodity exchange (cf., Clarke 1978). Commodity exchange may tell us everything about the form of contract law (sic – maybe even there only up to the twentieth century), but it is difficult to see what it tells us about the form of the criminal law, the law relating to political rights, family law, and the mass of statutory instruments. Pashukanis gave us no reasons why we should not take 'rights-claims' in political discourse seriously simply on the grounds that they are claims for quantities of power by one group as against other groups and/or the state.

In contrast to Pashukanis's work, Habermas very clearly shares Thompson's concern with the retention of democracy and the rule of law within Marxist political philosophy: this concern runs throughout Habermas's social theory, politics and epistemology. Without doubt, Habermas, like other Critical Theorists, believes that Marxism has no coherent critique of democracy and the rule of law in advanced capitalist states, and that it could not develop one without reconsideration of its theory of law.

Habermas has subsequently tried to revise Marxist theory to encompass his beliefs (see Habermas 1971, 1974, 1976 and 1979). His 'opening out' of Marxism goes so far as to suggest, in idealist fashion, that social crises are only really ever resolved through changes in moral-practical consciousness (which has its own developmental logic not reducible to that of the mode of production) and that, therefore, law and morality are the key mechanisms of normative integration (see Habermas 1979).

Contiguity between economic and cultural dialectics becomes very slender indeed in Habermas's writings.

For Habermas, the increasing threat to democracy and civil liberties is not so much a threat to the working class and other subordinate groups, but a threat to the tie between norm and reason. From his perspective, the critical social evolution of norms is vitally dependent on that connection. Since normative consciousness is rooted in free social interaction and rational debate, precisely the forms liberated and supported by bourgeois liberal democracy and the rule of law, any threat to that democracy and rule from a fascist direction must, for Habermas, challenge the development of a principled culture and the survival of an ethically informed politics. Of course, such a perception of challenge is *based* on the assumed economic incorporation of the working class and their allies, and is not entirely abstract: it is a typical Critical Theory perspective (see Slater 1977). However, Habermas does not seem to recognise that such a challenge is *in itself* yet another challenge to the power and culture of the subordinate classes and the development of socialism, precisely because bourgeois liberal democracy is much more the result of proletarian pressure rather than bourgeois enlightenment. In other words, Habermas's denigration of the continued utility of class analysis reduces severely the value of his support for the rule of law because the latter cannot be divorced from class relations or from its purposes of limiting dominant class power. The rule of law is only comprehensible as an arena of political belief and practice at the centre of conflicting class powers. The defeat of liberty is no abstract disaster but a victory for the dominant class. Politics and culture are not as separate from economy as Habermas would have us believe.

Ultimately, the main problem with Habermas is that he offers us visions of popular democracy, a republic of reason, and ideal communication situations which are not closely grounded in an historical materialist analysis of the economic and political conditions under which they do or might come about in practice. My feeling is that, on balance, he throws away too much of importance to Marxism. Most notably, he buries the centrality of the laws of surplus value extraction and of class struggle to Marxist class analysis. The class struggle has clearly reappeared in sharp forms in Britain since 1970, since the beginning of the demise of the very welfare state which Habermas thought had incorporated it. Abandoning surplus value theory and class analysis is the wrong direction: rather we need to re-examine what we mean by 'working class,' what we understand as 'reformism,' (on this latter, point, see the important contribution of Corrigan et al. 1978; Corrigan 1980), and what we define as 'class struggle' (see James 1975: 12–17). Only on this basis, I suggest, can we really grasp the significance of rights-struggles.

However, despite this, and other problems related to Habermas's often 'straw' target Marxism (more or less conflated with Stalinism), his work is directed at a real target. Socialist states do seem like a Physiocrat's dream: the state has the science and political techniques and until the citizen comprehends the laws of necessity and state (and thus obeys) he or she is deemed to remain in a depraved condition (see Habermas 1964: 100). Socialists, in Britain at least, often talk as if the U.S.S.R. was the only failure, as if Stalinism and Left culture in Britain were worlds apart, as if it was not a fault in the theory but in history, as if law was a complete myth. Socialists

also still talk about the 'correct line' as if the critique of science had never happened; the links between facts and values, theory and its social context, classification and purpose, and knowledge and interest seem only to apply to scholars defined as 'bourgeois.' And one has to wonder whether Marxist parties dominated by lecturers, professors, schoolteachers, students, writers and other intellectuals will ever abandon their culture of scientific dirigisme to the limitations posed by ethics, realism and procedure contained in the rule of popular law. Whilst it is still true that the biggest threats to democracy in Britain come from the Right, the Left seems to have had great difficulty in even recognizing that Thompson's support of the rule of law is in small part intended to protect ordinary people from the Left itself. Rights-talk is still anathema and dismissed as either 'Rightist ideology' or 'liberal idealism'; until it affects the Left directly and then we enter the dilemma now existing.

Habermas has entered the very centre of the problem within European Marxist legal theory. For Habermas, the reduction of Western democracy to a technical mechanism for electing faceless technocrats to an elitist state (demanding obedience to a barely defined national interest) is a great threat to the ethical-liberative content of bourgeois democracy and the rule of law. He fears that Marxism lacks the tools to recognise this. These perceptions are thematised through his arguments about the state-conferred character of legal rights, the legitimation crisis of advanced capitalist states, and the need for popular-democratic political forms. My disagreements with him do not alter the importance of this contribution. The probable fact that there really is no legitimation crisis makes his analysis all the more worrying.

Beyond Marxism? Socialist pluralism in Hirst's discourse

Clearly some of Habermas's heresies, the non-Marxist but libertarian character of Bennite socialist democracy, and the link between Pashukanis's blunders and the rise of Stalinism in Russia, might reasonably make people question whether Marxist theory (or any logical development of it) is at all compatible with talk about the rule of law and democracy. Both Thompson and Habermas have been heavily criticised by Marxists (see Hirst 1979b on Thompson, and Held 1980 on the Marxist critique of Habermas). Both have been categorised as non-Marxist. Without confronting these debates, because it would involve a substantial and textual digression, I now want to cast a glance at this issue of the limitations of Marxism by examining the positions of Paul Hirst in his recent essay on 'Law, socialism and rights' (Hirst 1980). This essay is important because Hirst tries to deal with the question of the rule of law in socialism from a point of view which is socialistic but clearly at a distance from mainstream Marxism. Again, I will suggest that no one has yet found a clear and developed Marxist position from which to conceive of the rule of law and civil liberties or to justify their defence as a positive political strategy.

Hirst is well on the way to having broken his connection with even a broad definition of Marxism, having declared that there is no necessary correspondence between the economic and the political, that Marxist political theory is irrelevant to contemporary Western Europe that knowledge and social being are only related in

epistemology, and that (since epistemology is not a privileged discourse) political calculation is no longer tied to any general theory of social evolution or the current social structure (see Hirst 1977, 1979a, 1979b and 1980; see also Cutler et al. 1977 and 1978). Marxism, he says, has been disarmed by sustained capitalist development and continued mass support for parliamentary democracy. It has settled, he says, into a scientific mode which has completely established the necessary conditions and conjunctures for socialist revolution, and thus accommodated itself to the present with a withdrawal from contemporary politics. It has frozen and refuses to fight for democracy under conditions of parliamentary democracy. 'Reformism' is defined as an ideological political mode and, since ideology is defined by science, current political calculation has been disastrously transformed into a purely epistemological issue (Hirst 1979a).

Declaring himself outside of epistemology because there is no 'knowledge process in general' (1979a: 21), Hirst leaves the dangerous terrain of the ideology-science couplet and posits that there are merely a range of discourses each with their own criteria of appropriateness and adequacy. So within a distinctly political discourse, Hirst posits the political objective of constructing 'co-operative, non-authoritarian social relations' (1979a: 9).

Actually many Marxists have been following such political objectives for at least ten years now; Hirst's theoretical moves offer a socialist legitimation for it. The politics of a popular anti-capitalist front certainly have more to offer than the ritual Marxist subordination of the women's and black movements (for example) to *The Class Struggle* and *The Affairs of State*: but rather than theorise the actual connections between the working class movement and the subordination of (such groups as) women and blacks in post-war Britain, Hirst abstractly adopts what looks rather like a typical relativist-pluralist progressive pragmatism. Its relation to Marxism is not obvious. In his essay on the rule of law in socialist political theory, Hirst argues that Marxism has never thought through organisational questions because it has never given them autonomy and has reduced them to effects of the class struggle (Hirst 1980). But, on his analysis, committing oneself and the Party to adequate forms of regulation of state power is not aided by adopting a concept of absolute rights or the sovereignty of the 'people' (on the latter, see also Jessop 1980a). Like Habermas, he recognises that rights today are specific, state-conferred, legal capacities, not general norms reflecting the inherent attributes of the unitary human subject (the Rights of Man in the days of 'liberal' capitalism). Taking unconditional general rights seriously, as ontologically given, is very dangerous for socialists, Hirst argues, because it logically entails speaking the language of the bourgeois, liberal, political philosophy with inevitably individualistic, anti-social, anti-rational planning effects. Moreover, ontological doctrines of right are simply incapable 'of sustaining the complexity and heterogeneity of state institutions and social relations' (Hirst 1980: 96). Rights should exist in socialist law, but they would be legal capacities flowing from a democratically established social policy. The important thing about them would be their enforceability against all social agencies and their democratic origin.

Again rejecting the unitary subject, in favour of the pluralistic dispersal and specificity of powers, Hirst criticises the orthodox Marxist Left for its reliance on 'popular democracy' as the political mechanism of socialist society. It is too un-specific a concept, he says, and often means that local organisations are outweighed by central Party power and that the Party can dress any policy up as the will of the 'people' (the 'working class' or the 'masses'). The 'people' is a notion of a unitary sovereign or general will which is too general, rarely empirically, viable and too weak to stand up against 'a single disciplined party machine and state agencies whose actions are unfettered by special purpose bodies competent to do so' (Hirst 1980: 86). Instead he advocates a combination of different forms of representation; democracy not being defined by representativeness but by a mechanism for providing personnel. That is, ultimately the representativeness of a body is not assessable, all one can do is set up mechanisms of provision of personnel which are appropriate for the work of the agency in question. Thus a village commune or a small factory could be run by direct democracy but a central legislature would probably work best using personnel who were partly nominated and partly elected by universal suffrage. Such a differentiated democracy would, he suggests, probably be more efficient and more representative than the more usual populist organisations dominated by the party.

Hirst argues that the very nature of socialism, with its emphasis on socialisation and rational planning, will demand an expanded state not a declining one: thus abandoning one of the oddest, most contradictory elements in Marxist political theory. This state would be a set of highly differentiated agencies, not a unitary whole. Crucially, there would be an increased need for an effective framework of public law to regulate these agencies of state. The autonomy of legislative and adjudicative bodies is decisive; for Hirst, only this can block the abuse of power by the Party and by mass action. Hirst is not specific about which general principles the regulatory bodies would use to limit state power, but he is certain that without the limitation of politically autonomous regulatory agencies the notion of socialist legality, the rule of law in socialism would be meaningless.

Hirst's is plainly a useful contribution to the rule of law debate and is very constructive. He offers us a clear advance over Habermas's transcendental notions of democratic dialogue and Thompson's lack of a theory of the necessary political conditions for a functional rule of law. He is moving in a direction, towards detailed political analysis of the form's and conditions of democracy, which we do need to follow. However, I have to be old-fashioned and say that its problem lies in its very nature as a purely political discourse. I believe that economy, politics and culture are always related and that therefore a purely political programme is always going to run up against the problems of the economic and cultural context within which it takes place:

Right can never be higher than the economic structure of society and its cultural development conditioned thereby (Marx 1973: 320).

Hirst does not address the major problem: under what social conditions can the regulatory agencies stand above the class structure, the political situation and the common culture?

The rule of law must be discussed within the debates about forms of political structure, as Hirst does, but the forms of politics cannot be discussed outside of debates about forms of economy and culture. If this argument is correct then his comments are purely prescriptive or normative; and a little less useful for being so. One could in fact be even tougher and ask: what relationship at all does Hirst's political blueprint have to the theory and reality of a socialist economy? The answer would not be obvious from Hirst's essay. Even worse, it is not at all clear what the connection is between this new socialist (or 'progressive'?) pluralism and the revolutionary overthrow of capitalist society. Convenient though it would be to discuss socialist society in the abstract, I am afraid we cannot. It cannot be separated from the form of the revolution, the international context, the form of class structure (before and after), and so on. For as soon as we juxtapose such aspects of reality against the Hirstian abstraction we find that it contains little beyond a pipe-dream and begs all the real questions. Moreover, as a merely normative or political prescription, it is not clear what it demands in terms of the critique of or the struggle against the failures of the rule of law, civil liberties and the democracy in bourgeois society; failures which, in my view, must surely be produced by the inherently undemocratic nature of the capitalist mode of production. Hirst's epistemological position, I suggest, denies him the possibility of saying anything concrete or relevant about the relationship between economy and democracy in either capitalism or socialism.

Whilst Habermas is right to suggest that Marxists should not simply dissolve the normative content of law and politics with their sociological realism, I would suggest that it is equally true that to abandon social context in favour of abstract prescription is to liquidate the practical reality of law and politics. This criticism applies to the present as well as the future. Hirst is wrong to criticise the modern women's movement for its 'woman's right to choose' slogan on the grounds that it posits an absolute (bourgeois) right emanating from some transcendental quality of the abstract female subject. The slogan and the more complex position behind it are surely no less than the assertion of power (existing or putative) of women as against that of men, doctors and the state's legislators: a movement in a distinct power struggle. To fear about the women's movement's neglect of the rights of men, or of foetuses, as Hirst does, is to adopt (in the current political context) a very reactionary political position. It seems to me that for groups to establish their power in society they need to fight for the basic social recognition of their existence. By definition, these must be rights struggles. So women had to be able to own property, had to be recognised as legal persons, had to get the vote, and had to get increased rights to initiate divorce before the kind of women's movement we see today could exist. I know that this is theoretically heretical, but it does seem that the formation of the class-for-itself has *necessary legal conditions* (de jure and de facto), e.g., legal personality for all (i.e., including prisoners, bastards, lunatics, women, immigrants – all at one time or place effectively split off from the rest of the class by legal procedures and institutions), universal suffrage, the right to free association, the right to own property, the right of disposal of one's own body, etc. I would suggest that some substantial experience of winning and enjoying all these freedoms is a necessary precondition of the formation of a class culture with a full sense of socialist democracy.

To accept that the democratic character of decision-making is vital to the justice and acceptability of legislation and judicial pronouncements does not mean (contra Hirst) that we need to reject the concept of, or struggle for, prima facie presumptions of legal right. Such presumptions exist conceptually somewhere between absolute rights and pragmatic social policies. It is very important to recognise the political value of having a prima facie presumption of right established in law. Rights are guidelines which strongly suggest to decision-makers that unless there is strong contrary right or statute they must make a particular type of decision, or risk moral and political calumny. They are different from social policies in that they usually cut across 'issues' or 'social problems.' This is a point Hirst signally fails to recognise. Rights are the socially rooted legal principles guiding democratic policy-making. As such, they are indispensable to a socialist society that desires to prevent the emergence of an autocratic party power, to produce a consistently libertarian culture, and to avoid the development of a professional/technocratic state based on scientific dirigisme.

Of course, other things would be indispensable too. The principles of law mentioned above would have to be produced (or recognised) democratically and that begs the whole question of the class nature, political form and cultural character of the revolution – which brings me back to the beginning of my critique of Hirst. At the end of the day, the class nature, cultural character and possibly international context of the revolution determine the chances of a libertarian socialist culture.

Concluding remarks

Events in Europe, especially in Britain, in the 1970s have forced the re-examination of Marxist political theory (in all its variants). This has, in turn, forced the reconsideration of Marxist legal theory, particularly on the issue of the value of the rule of law and civil liberties. Since 1970 the British state has become increasingly authoritarian and its welfare/social services have been cut back. As the pressure on capital reproduction sharpens, the capitalist state concentrates and increases its power. The higher echelons of the state power take a tighter grip on middle and lower levels, and the whole state seems to make increasingly narrow definitions of affordable liberties to the citizenry. The profit squeeze produces a 'civil liberties squeeze' and Marxist legal theory is caught with its pants down.

A long-overdue overhaul of some basic political issues has ensued; this essay has briefly examined some of the most discussed writings within these debates. I have indicated in my critique the specific weaknesses of these writings and concluded generally that no-one has satisfactorily analysed bourgeois legal rights or the rule of law in a thoroughly Marxist manner. The present essay will not upset that deficit. However, I have, suggested two possible ways of opening up the blockage without having stepped beyond the classical Marxian concepts: (1) by giving 'the class struggle' its fullest meaning, and (2) by recognising that economic formalism in legal theory must be thoroughly tempered with a historical or diachronic awareness of the political character and role of law in the development of the class struggle.

I suggested earlier that it may be the case that, to become committed members of a revolutionary socialist mass proletariat, certain sections of that class which have been colonised internally as well as externally may first have to gain and experience the basic civil rights of bourgeois society. The political struggles of 'grass roots' workers (low paid and powerless), the unemployed, women, blacks, prisoners, various religious fractions, even in gaining or exercising basic bourgeois legal rights may be vital in politicising and mobilising them for revolutionary socialist struggle for state power. My assumption or claim is that the development of a libertarian socialist culture across the whole of the working class in capitalist society is a necessary precondition of the development of such a culture in a socialist society, and that this culture is a vital condition for the possibility of the 'rule of law' in a socialist society.

These claims can be grounded in Marx's general conception of social formations. For Marx, certain elements and forms of politics and culture (and therefore law) are organic to a mode of production at a given phase of its development and without their establishment and maintenance such a mode of production cannot survive (see Sumner 1979: chs. 2 and 7). This conception of the dialectical connections of necessity and interpenetration is not well grasped by orthodox base-superstructure or radical, highly open relative autonomy models of society. Talking about the economy-culture relation, Marx undermined such models when he argued that:

It is not enough that the conditions of labour are concentrated in a mass, in the shape of capital, at the one pole of society, while at the other are grouped masses of men, who have nothing to sell but their labour-power. Neither is it enough that they are compelled to sell it voluntarily. The advance of capitalist production develops a working-class, which by education, tradition, habit, looks upon the conditions of that mode of production as self-evident laws of Nature. The organisation of the capitalist process of production, one fully developed, breaks down all resistance (Marx 1974: 688, 9).

In capitalism, education, tradition and habit combine with the 'dull compulsion of economic relations' to complete 'the subjection of the labourer to the capitalist' (Marx 1974: 689). That is, new general ideologies and forms of culture, interpenetrating and sustaining capitalist economic relations, must emerge to overwhelm prior ideologies and forms of culture. Now, it is presumably fair to assume that *all this applied to the development of a socialist society too*.

Once established, the capitalist mode of production breeds and matures its own internal contradictions, and, therefore, new forms of resistance to its oppressions must arise. Presumably, these forms of resistance have distinct cultural as well as economic characteristics, if the above reading of Marx is valid. Scarcely necessary to say, but given that forms of law contain combinations of power and ideology, it must also be true that certain legal forms of resistance emerge alongside economic forms. Like feudalism, capitalism must breed its successor in legal forms (as well as in all the other forms – economic, political and cultural) before it leaves the scene. Now if that is true the question of socialist legality is hardly one for 'after the great day' and we are confronted with an issue to which hardly any attention has been given: what are the forms and principles of socialist legality developing within capitalist societies? But perhaps that formulation is too retrospective and scientific and

perhaps the issue should be put in a more active, embryonic and normative mood: what forms and principles of law should we try to develop now as a necessary precondition for a libertarian socialist future? Given that formulation of the issue, one of the answers seems to be that we should support rights struggles which effectively remove the legal inequalities between different subordinate class fractions, and therefore remove one of the obstacles to united, revolutionary class action.

Lest this argument be misinterpreted, some qualifications are necessary. Clearly, given the uneven development of different fractions of the working class and given the need for united class action at particular moments for very limited goals (such as removing the Thatcher government), it would be idealistic to suggest that the above type of rights struggles should get total and infinite priority. But they must be given more significance in Marxist political theory and more practical support by socialist political organisations than they currently get. For if one froze the current scene and transformed (in the imagination) the unevenly and hierarchically developed Western working class of today into a post-revolutionary proletariat, then we would have the foundation for the development of the kind of oppressive, racist, illiberal, sexist, corrupt and divided society that we see today in the socialist bloc. Today's internal colonizers would become tomorrow's Party apparatchiks and today's colonized could look forward to more of the same. Of course, let us not forget too that today's external colonizers know all about, and indeed rely on, these inequalities and divisions within the modern working class. They should, for they developed and sustained them, using law as one of the key instruments in the process of divide and rule.

It might be objected, against my suggestions, that rights struggles have been tried and failed and that, therefore, violence is the only answer. I am sympathetic to this view, and feel cynical about the fact that the current political debate amongst the (middle class) Left centres on law, rights, political organisation, reform and gradual change. There has hardly been a word about the value of armed struggle. That seems inexcusable when so many groups at the sharp end of the capitalist weal have been forced into violent resistance, e.g., colonised nations, Ulster Catholics, blacks (here and in the U.S.A.), and prisoners; not to mention the phenomenon of young upper middle class terrorists. Obviously, it seems to me, armed struggle is the only option for some groups and for some oppressed classes, e.g., in the Third World. However, successful armed struggle requires massive support from the whole community (or class base of the movement) and that support will not usually be forthcoming unless rights struggles or established, channels of political action have been tried first. The failure of rights struggles politicises the relevant class fraction or community, as much as their success, if not more so: precisely because *rights struggles are the political struggles of a class or class fraction*. This politicisation is vital to successful armed struggle; and I would submit that proposition to historical scrutiny. Therefore, my argument is not at all dented: armed struggle is only on the agenda after rights struggles or democratic channels have failed. Both forms of struggle are part of the same armoury and part of the same objective in furthering the development of the power of the oppressed classes. Of course, rights struggles can be failures, can partially succeed and-hit a brick wall, and can succeed but be undone (and,

of course, such temporary success may be merely a strategic ruling class concession), but they are a definite stage in the political development of the revolutionary movement against capitalism. We do urgently need an understanding of the history of the political strategies hitherto adopted in that movement, but in anticipation of that history my hunch would be that rights struggles have not yet been exhausted by historical logic.

Some will argue that because the form of law, at any state of bourgeois social development, is essentially bourgeois, or at a minimum controlled by the bourgeois class bloc, political struggles for legal rights are always in the long run doomed to failure; and that any such established civil rights will always be undermined. Well, of course; but that does not at all negate the political and cultural value of such struggles and liberties, nor does it allow for the mundane fact that gained liberties have alleviated suffering for many individuals. To ignore this last point would be to adopt an eschatological and, as I showed earlier, quite un-Marxian view of the development of working class politics.

Ultimately, to be sure, the realisation of meaningful civil liberties and a meaningful rule of law depends on the overthrow of capitalist economic relations and the establishment of a democratic socialist mode of production. Capitalism must always betray its legal promises. But the nub of my arguments here is that to say this is not enough. To realise concepts of civil liberty and the rule of law we have to know what they mean for us and to build them into our political philosophy. Such a knowledge and political construction cannot be developed solely in the abstract now, nor can they be left pragmatically to the future. They must be developed today in the course of resistance to the present. Of course, 'reformism' can mean incorporation and submergence, but that is not all it can mean. Placed within Marxist theory and socialist strategy, it must play a part in the radical political growth of the oppressed and in generating our conceptions of a more just future and therefore is not reformism at all.

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Reguła prawa i prawa obywatelskie we współczesnej teorii marksistowskiej

Streszczenie

Artykuł podejmuje kwestie zasad prawa i praw obywatelskich z punktu widzenia różnych podejść i ujęć współczesnych zachodnich teorii marksistowskich. Analiza poprowadzona została od źródłowej marksistowskiej teorii prawa, poprzez Althuserskie teoretyczne postrzeganie prawa, ze zwróceniem uwagi na stanowisko Jurgena Habermasa i Edwarda Palmera Thompsona oraz ich krytykę przez zachodnich marksistów. W narracji tej przywoływany jest Paul Hirst i jego podejście do prawa oraz ograniczeń marksizmu w zakresie prawa w socjalizmie. Porównaniu podlegają też podejścia Jurgena Habermasa i Evgenija Bronislavovicha Pashukanisa. Uwagi końcowe dotyczą współczesnych wyzwań dla teorii prawa, w tym praw obywatelskich oraz kryminologii z podejścia zachodnich teorii marksistowskich.

Słowa kluczowe: krytyczne teorie kryminologiczne, teoria prawa, państwa, prawa obywatelskie, przestępstwo, marksistowska teoria prawa i jej podejście do prawa.