MARXIST LEGAL THEORY IN LATE MODERNITY

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ABSTRACT

Following a profusion of interest in the 1970s and early 1980s, Marxist legal theory entered something of a fallow period. This was down to a number of persistent and intractable theoretical problems, and the more general decline in Marxism's popularity as a theoretical perspective following the collapse of 'Marxist' regimes in the Eastern bloc. Despite this, the contention here is that *Marxism can still provide a viable legal theory.*

When grounded in Marx's 1859 Preface, historical materialism raises two key problems for legal scholars: One concerns determination, and the other the notion of base and superstructure. One way of understanding how each theorist tackles the two problems is to realise that their solutions are context bound; bound by time, bound by place, bound by what we might call their concrete socio-political situation. Each theorist takes the insights of Marx and applies them to their own time and place. This has led to a wealth of Marxist approaches to law, which will be detailed in Part 1. The solutions that have been proposed to the two problems, however, have been consistently unsatisfactory.

As Part 2 will outline, socio-economic and political conditions have changed massively over the last three decades or so: A distinctive 'late modern' period has emerged. Just as each Marxist legal theorist responded to their own distinctive milieu, so any contemporary socio-legal theorist must recognise and respond to the realities of the late modem world.

Late modern developments have created the potential for a modified Marxist legal theory that seeks to alleviate the difficulties associated with the old ones. The shape of such a theory is outlined in Part 3. The new theory is based on the work of Hugh Collins, but it is contended that late modern changes in society help to alleviate the great Achilles heel of his Marxist theory of law- the need to rely on an all-encompassing and thus implausibly elastic dominant ideology associated with a well-defined ruling class. Instead, under late modern conditions a series of 'micro-ideologies' guide the creation of law and norms in a number of discrete spheres, and the state's former monopoly on law-making is progressively eroded. Thus, the core idea of Collins' work- the ideological determination of law- is preserved, but adapted to contemporary, late modern conditions.

The result is a prolegomenon for a revived Marxist theory of law that is in tune with current socio-political and economic conditions.

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CONTENTS

INTRODUCTION

"Every beginning is difficult, holds in all sciences"

Marx, *Capital*, Preface to the first German edition of 1867 (1954: 18)

The aim of this work is to demonstrate that the Marxist theory of law, at least in its superior variant, offers a plausible, robust and convincing perspective on the contemporary legal world. At the heart of the argument is the contention that the changes advanced capitalist societies have undergone over the past three decades or so have actually served to render the Marxist theory of law more plausible, and have strengthened its theoretical bite. In short, Marxism remains capable of providing a viable socio-legal theory.

This introduction will briefly outline the context of the task at hand. To that end, the current state of Marxist theory, particularly with regard to law, will be discussed. Following this the idea of 'late modernity' will be introduced, and then the proposed argument will be presented. Finally the structure of the thesis will be outlined.

Marxism and Marxist Legal Theory at the 'End of History'

For Marx, all 'beginnings were difficult', and this was particularly so in the case of *Capital*, which commenced with some rather dry and arid theoretical chapters on the nature of commodities. The difficulty here is rather different; in the face of the declining influence of Marxism, the task at hand is to outline why a theory commonly considered to be all but redundant still has something to offer socio-legal studies.

It would be a mistake to reductively offer a single explanation as to why Marxism's influence has waned so dramatically. Many point simply to the 'fall of the wall' and the end of 'actually existing socialism' as confirmation that Marxism is redundant, and although this is not entirely irrelevant it is a little disingenuous. Broadly speaking, there are two further reasons for the declining influence of Marxism that actually predate the collapse of the Eastern Bloc. Firstly, there are a number of problems *internal* to the theory which came into sharp relief in the fifteen or so years before the fall of the wall. Secondly, partly as a result of this, a number of *external* challenges in the shape of competing theoretical perspectives had a negative effect upon the popularity of the theory. These two reasons will be dealt with in turn, before the fallout of 1989-91 is considered.

The internal crisis of Marxism reached its apogee by the middle of the 1980s. During the 1970s there had been a great optimism amongst Marxist intellectuals that a progressive transformation of society could be effected. However, a number of intractable theoretical problems had proven impossible to resolve satisfactorily and consensually. The exact nature of the relation between base and superstructure, the role of agency and the tendency towards economic reductionism were among the most crucial.[1] But, most fundamentally, it was the failure of the radical left to successfully ally theory and practice in the classical Marxist sense, even in the face of a readily identifiable Thatcherite, neo-conservative enemy in the UK, that contributed to the malaise of the theory. There had been a belief, often implicit, that theoretical work could and would somehow segue into practice, but as this failed to occur, a new pessimism took over and the energy and vigour (and number) of Marxists diminished.[2] Quite simply, Marxists had underestimated the strength and durability of post-war capitalism. A similar pessimism could be detected in the communist parties of Europe over the same period. Many initially adopted reformist 'eurocommunist' policies in the late 1970s, before wholeheartedly embracing social democracy after 1989.[3]

As Marxism saw its internal coherence be increasingly called into question, the situation was compounded by the emergence of new theoretical approaches. This external challenge initially came from poststructuralism, and then, in the 1980s, postmodernism. Indeed many who aligned themselves to these positions were former Marxists. Suddenly Marxism began to look unwieldy and outdated. Further to the right, neo-conservatism and neo-liberalism also grew in popularity. The latter gained ground particularly after the 'fall of the wall' in 1989, when many commentators were quick to point to the death of Marxism and its usurpation by neo-liberalism both theoretically and politically (see Anderson 2000). Fukuyama, for instance, famously declared that we had reached the 'end of history', in the sense that ideological struggles were over and neo-liberalism had emerged victorious on the ideological battleground (1989, 1992).

A second external challenge that Marxism had great difficulty in dealing with was the tumultuous social changes of the late 20th century. Perhaps the most damaging of

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[1] On Marxism's tendency to economic reductionism, see Mouzelis (1990).
[2] Ironically, as Anderson points out, pessimism had been the natural tenor of Western Marxism down the years (1976: Ch 4),
[3] On the continuing role of former Communist Parties in central European politics, see Hough (2005).

these was the rise of 'new social movements' including, inter alia, women's, ethnic, and ecological groupings. Marxism's traditional privileging of class politics hindered its attempts to deal with such movements and contributed to its waning popularity and influence. Of course, postmodernism had the theoretical tools to deal a little more successfully with such non-class groupings.[4]

Thus, by the end of the 1980s Marxism was in serious theoretical difficulty. The situation was then compounded by the collapse of communism in the Eastern Bloc. With this, it seemed that the final blow had been dealt. A theory that, classically, had claimed that it would be ultimately vindicated through practice had suffered the ultimate defeat. As Douzinas and Warrington wrote, somewhat prophetically before the final collapse of the USSR, "the crisis in Marxism is both political and theoretical. Marxism in all its variants has been built on the premise that its validity, the epistemological foundation of its statements, depends on the possibility of verification in political practice" (1986: 802). The events of 1989-91 seemed to confirm the impossibility of the verification, and thus the inapplicability of Marxism to the contemporary world.

The story of Marxist *legal* theory followed a similar course. With a couple of notable exceptions, the study of law was traditionally incidental to the key Marxist thinkers. This was reversed spectacularly in the 1970s, when many of the wider debates within Marxism were conducted through the prism of the law. Collins' *Marxism and Law*, published in 1982, represented the apogee of Marxist legal theory, distilling some of the best work of the previous decade into a concise statement of a coherent Marxist position. But ultimately, as Collins himself acknowledged, the theory was still beset with difficulties. Thus, by the early 1980s over a decades' worth of collective endeavour had failed to produce a convincing total explanatory framework, despite some valuable piecemeal advances. And just as Marxism in general saw its academic ascendancy challenged by new theories in the 1980s, so too did Marxist legal theory. 'Critical Legal Studies', once a term denoting, by and large, Marxist approaches to law, broadened out and became more eclectic. Postmodern legal theory eased Marxism out of its position as the legal perspective of choice for the left-leaning academic radical.[5] Marxist legal theory became almost an archaic survival of an earlier age; it had valuable lessons, no doubt, but it had ceased to be a living, evolving tradition.

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[4] Laclau and Mouffe attempted to unite Marxism with postmodernism to deal with precisely this problem in *Hegemony and Socialist Strategy* (1985).

As a result, remarkably little Marxist legal work has emerged over the last fifteen to twenty years. Despite this, there is undeniably a continuing academic interest in Marxism, and some legal theorists are beginning to tentatively return to it. The question must therefore be, is there anything worth salvaging from this much maligned theoretical tradition?[6]

In Defence of Marxism

If Marxism, and more specifically the Marxist theory of law, is to remain viable, then the three challenges posed above must be met. Marxist legal theory must show that its own internal theoretical problems are not insurmountable. This will in turn enable it to compete once again against other socio-legal theories that have overtaken it in popularity over the last twenty years (the 'external' problem). Finally it must be shown that the dissolution of communism does not render the entire theoretical tradition moribund. Through the course of this work, an argument will be constructed which aims to do just this. The result will be a renovated and revived Marxist legal theory that can contribute once again to socio-legal scholarship.

We can take the first step towards resuscitating Marxist legal theory by repudiating the exclusive link between Marxism and the 'actually existing socialism'[7] of the USSR. Critics claim that the Soviet Union represented Marxism in practice. Thus, when the Soviet Union dissolved, so too did Marxism. These critics implicitly conflate the Soviet version of communism and Marxism. There are two potential responses to this. Firstly, one could argue that Soviet communism represented the bastardisation of Marxism (see Callinicos 1991). Secondly, one could argue that although Soviet

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[5] Postmodernist legal theory is not without its own problems, of course; for critiques, see Hunt 1990a, Wicke 1991, Donaldson 1995 and Edgeworth 2003.

[6] It would be remiss not to note some of the landmark Marxist works that have, in spite of everything, emerged since the end of the 1970s. As mentioned above, Laclau and Mouffe embraced postmodern ideas with their *Hegemony and Socialist Strategy* (1985). Jameson produced landmark studies of postmodernist culture from a Marxist vantage point, while geographer Harvey did the same for postmodern socio-political developments. Eagleton has been a staunch critic of the most radical postmodernism, while Callinicos has maintained perhaps a more orthodox and politically involved line. Following Cohen's rigorous defence of historical materialism, analytical Marxism enjoyed a brief heyday, with Elster (who fused Marxism with rational choice theory), Roemer and Wright its chief protagonists. Outside of the arena of theory, the burgeoning global anti-capitalist movement, despite its theoretical eclecticism, owes a considerable debt to Marx; as Woolf points out, "we can think of Marx as the great-grandfather of today's anti-capitalist movement" (2002: 2).

communism was a legitimate interpretation of the Marxist canon, it is not the only interpretation possible. Many other Marxisms can be and have been theoretically constructed. It is this latter position that will be taken here.[8]

Marxism is far from a unified tradition or a homogenous entity. Few of who Perry Anderson calls 'Western Marxists' (1980) have supported the kind of crude orthodox Marxism that was propagated by the Bolsheviks for almost a hundred years. Instead, Western Marxism has been characterised by variety and multiplicity, debate and argument. As Pierson points out, an initial internal challenge to orthodoxy could be said to have come from the 'revisionist debate' within German social democracy at the turn of the 20th century: "If we date the codification of Marxism from the propagation of the Erfurt Programme in 1891, this might give us eight years of untroubled orthodoxy followed by one hundred years of crisis". Thus even in the period of its greatest political and intellectual authority, the power of Marxist thinking lay as much in its dissenting as in its orthodox tradition (1995: 55). It is certainly true that the best Marxist thinking has always occurred out of the orthodox box, and indeed often as a reaction to that very orthodoxy. Furthermore, Western Marxism was always critical of 'actually existing socialism', and the latter's demise has provided theoretical breathing space for those attracted to the themes and ideas of the former.[9]

Of course, it would be foolish to deny that the interest in and influence of Western Marxism is infinitesimally smaller than it was in its heyday in the 1970s. But that Marxism offers alternatives to its own hypostatised orthodoxy should be clear. It is trite but true that there as many Marxisms as there are Marxists. At the root of this multiplicity is the fact that Marx's own writings are open to a variety of interpretations and often require expansion and extension. Such an expansion and extension will be undertaken throughout the course of this work, but for now it is enough to note that the failure of one branch of Marxism does not render the whole tradition defunct.

In addition, it is also worth noting at this juncture that Marxism, in its best variants, is a non-dogmatic, self-reflexive theory. It is a theory fully aware of the historical conditions of its own possibility; indeed, this is one of its defining features. This is particularly so

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[7] In what follows, 'actually existing socialism' and 'Soviet communism' are used interchangeably. 'Orthodox Marxism' is used to denote the branch of Marxist theory that influenced the two.

[8] The reasons for this choice will be outlined in Chapter 1.

of the variant that will be developed here, based on Gramsci's idea of historical materialism as 'absolute historicism'. What this means for our purposes is that adapting and relating to new circumstances is not antithetical to Marxism; indeed, it is made necessary by the very structure of the theory. The Marxism that will be developed and deployed here is based on the Preface to *A Contribution to the Critique of Political Economy*, in which Marx declares that, "social being determines consciousness". We may extend this by analogy and argue that 'socio-economic conditions determine the content and tenor of theory'. Thus it is within the remit of Marxism to modify itself in order to better account for contemporary developments. The ultimately historical nature of all Marxist thinking is amply demonstrated by Marxist legal theory. Such theory has always been, within the theoretical parameters set by Marxism (chiefly a need to grant some primacy to the economic without lapsing into economism), ultimately dependent upon the socio-political context of each thinker.

If Marxism has always been a multitudinous and complex tradition, then we can plausibly argue that all that happened in the period of its supposed 'demise' was that the orthodox tradition was finally discredited. Most Marxists would welcome this. Perhaps we will soon begin to see the fruits of a re-engagement, whereby those not encumbered by the dictates of orthodoxy will begin to re-theorise contemporary social phenomena from a non-doctrinaire Marxist standpoint. Such is the spirit of this work.

Eagleton has written perceptively on the supposed demise of Marxism: "I have spoken of symptoms of political defeat; but what if this defeat never happened in the first place? What if it were less a matter of the left rising up and being forced back, than a steady disintegration, a gradual failure of nerve, a creeping paralysis? What if the confrontation never quite took place, but people behaved as though it did? As though someone were to display all the symptoms of rabies, but had never been within biting distance of a mad dog" (1996: 19). If one acknowledges the depth and scope of the Marxist tradition, then one can see that the discrediting of just one branch of that tradition does not render the whole edifice moribund. Eagleton is right; Marxism never died in the first place. The challenge is to re-engage with the theory and discover what it can offer us today; the immediate challenge of this work is to perform this very task with specific regard to law.

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[9] Of course 'actually existing socialism' reached its nadir with Stalinism. In some respects it is possible to see Stalinism the logical culmination of the orthodox Marxist project: the belief in 'iron laws' of history, the need for a vanguard party to lead the masses, and so on.

Into Late Modernity

Over the last three decades or so there have occurred a set of far reaching economic, social and political changes that have transformed the nature of the capitalist mode of production to a great extent.[10] For some, these changes taken together herald the beginning of a new era, a postmodern era. Others, although not denying the enormity of the changes, feel that they represent not the opening of a new era, but the speeding up, deepening and intensification of the processes of modernity so forcefully described by, inter alia, Marx. This latter view is the one taken here. We live in 'late modernity'. It is important to note that there is virtually no disagreement as to the nature of the changes that society has undergone between theorists of postmodernity and theorists of late modernity. The empirical evidence harnessed by both camps is identical. The only point of issue is whether the changes agreed upon constitute a decisive break with modernity.[11]

From the 1980s to the present, one of the main preoccupations of sociology has been the description and analysis of the scope and impact of massive changes to the fundamental structures of society. Indeed, in a similar manner to the way in which postmodern philosophy and politics usurped their Marxist predecessors, a concern with late modern or postmodern sociology has, to a degree, supplanted Marxist sociology, particularly in what one might broadly call the 'left-field' of the academy. Yet the bulk of the work on late or post modern social formations has been concerned merely to describe the changes so labelled; theorisations of the rigour and sophistication of Marxist sociology have been a little rarer. Nevertheless, it is little wonder that the status of Marxist theory, so rooted in the familiar structures of modernity, has found its applicability to the contemporary social world questioned in the face of the range of developments so powerfully outlined by theorists of late and post modernity.

The monumental changes in society have been accompanied by far reaching changes in law and legal systems. Any socio-legal theory must take into account these changes if it is to render itself relevant and theoretically forceful. Yet a return to Marx in order to do this does not necessarily evidence a lack of concern with contemporary problems.

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[10] The rise of 'new social movements', as just one example of a new socio-political situation that Marxism has had difficulty in coming to terms with, was noted above.

[11] In the 1980s and early 1990s the 'postmodern' position was the most popular. Lately, particularly under the influence of Giddens and Bauman, premature theorisations of a distinctively new era have been viewed a little more cautiously and the 'late modern' position has come to the fore.

"On the contrary", write Beyleveld and Brownsword, "it is sometimes necessary to return to first principles in order to address contemporary issues" (1986: 50).[12]

The Argument of the Thesis

Existing Marxist theories of law run into difficulties on two axes. Firstly, they have been unable to convincingly articulate a plausible relationship between base and superstructure, as per Marx's theory of historical materialism. Collins' Marxist theory of law represents the best attempt to solve these problems, but it remains flawed. Despite this it still has a great deal to commend it and it is used as the basis here. Secondly, Marxist legal theory has always indissolubly been a product of its time and place. This difficulty is, of course, inevitable, and it only becomes a *problem* when an attempt is made to hypostatise theory and apply it to a time and a place where circumstances are different or have altered. Collins' theory, despite its advantages, is based on outdated concepts and assumptions associated with the height of the modern period. The processes of late modernisation have created a new context, a new concrete reality, which Marxist legal theory must now respond to.

Fascinatingly, the processes of late modernisation, which had barely been documented at the time that Collins constructed his theory, have actually made that theory more plausible. They have done this by providing the means by which the great flaw of Collins' theory, the need to rely on an all-encompassing and elastic 'dominant ideology', can be avoided. Furthermore, making this modification to Collins' theory is perfectly in tune with the idea of a historicist Marxism which is alive and willing to adapt to changes in concrete circumstances.

The upshot is a Marxist legal theory, based on the work of Collins, which is relevant to today's late modern world. Because *late modern developments actually aid the Marxist theory of law by removing the need for an overarching dominant ideology*, that theory can *illuminate late modern developments in law, and provide a convincing and critical explanation of legal phenomena*. In short, Marxist legal theory is shown to be still relevant today. The end result is a prolegomenon for a detailed and nuanced Marxist theory of law applicable to late modern societies and legal systems.

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[12] Beyleveld and Brownsword are discussing natural law theory rather than Marx here, but the

The Plan

Part 1 will commence, in Chapter 1, by outlining the variant of Marxism to be utilised. It is based on Gramsci's notion of 'absolute historicism' and Marx's outline of historical materialism in the 1859 Preface. Then the two key problems that historical materialism raises for Marxist legal theory will be introduced. They are the 'problem of determination' and the 'problem of base and superstructure'. The remainder of Part 1 will then be occupied with an history of the major mainstream Marxist approaches to law, situating each in their concrete socio-political context and analysing how they came to terms with the two problems; Chapter 2 will consider Engels and Lenin, Chapter 3 Pashukanis and Renner, Chapter 4 the debates of the 1970s, and Chapter 5 Collins. Although each of the thinkers has attracted a voluminous literature, such a survey of Marxist legal theory, placing each thinker in their context in order to understand how they applied Marx and where they went wrong, has never been undertaken before. The conclusion will be that, although Collins' theory represents the apogee of Marxist thinking on law, his solution to the problem of determination, through the concept of the dominant ideology, is ultimately unconvincing, and furthermore, his work is based upon assumptions about society and the legal system that are no longer applicable.

Part 2 will describe the changes ushered in by late modernity, initially, in Chapter 6, in society at large, and then, in Chapter 7, specifically with regard to law. The momentous nature of these changes has, as hinted at above, led some to argue that they constitute an entirely new era and a decisive break with modernity. Even if this is premature hyperbole, the impressive scale and scope of change is undeniable. What the late modern social formation provides for our purposes is a decisively new socio-political context in which legal theory must operate. Each Marxist legal theory is the product of its time and its place, in its tenor and approach and its solution to the two problems; thus, in these new times, there is an opening for a new Marxist legal theory that is responsive to and has the concepts capable of dealing with late modernity.

Part 3 thus describes such a modified Marxist legal theory, rooted in the work of Collins but sufficiently realigned to late modern conditions to ensure its contemporary relevance. This nascent Marxist theory of law, it is suggested, theorises in a convincing and plausible way about the nature of late modern law. Specifically, it

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point remains.

articulates with the theory of late modernisation in two mutually reinforcing ways. Firstly, late modern developments in both law and wider society actually render Collins' thesis more plausible, by removing the need for reliance on a single, all-encompassing dominant ideology. Instead, we see the emergence of numerous legal actors each operating with unique 'micro-ideologies'. Secondly, Collins' thesis, with its sophisticated economic determinism, can help to explain the cause of postmodern legal developments, albeit in a provocative and controversial way. Chapter 8 will outline this new theory, whilst Chapter 9 will look at some of the consequences of the new position.

The result, it is argued, is a prolegomenon for a plausible and robust Marxist theory of law that is in tune with current socio-political conditions.

PART 1. MARXISM AND LAW

"*Without a developed theory of ideology the Marxist theory of law must be doomed to stagnate in the platitudes of economic determinism and class reductionism.*"
Sumner, *Reading Ideologies* (1979: 293)

CHAPTER 1. MARX, HISTORICAL MATERIALISM AND LAW

This chapter will provide a foundation for the Marxist theory of law that will be utilised throughout the work. Its central aim is to delineate the specific kind of Marxism that will inform the theory. Firstly, various Marxist responses to the challenges alluded to in the Introduction will be outlined. Drawing on each of these responses, it will be argued that a conception of Marxism as a diverse and evolving tradition emerges. Once Marxism is seen in this light, the argument that the collapse of communism also signals the death of Marxism simply evaporates. Then, the particular strand of Marxism that will be utilised throughout the course of this work will be presented. It is a Marxism based on the Preface to Marx's 1859 work, *A Contribution to the Critique of Political Economy*. The Preface also suggests it is possible to view Marxism as a historicist theory. The idea that this legitimises the project of constructing a new Marxist legal theory applicable to the late modern condition will be explored. Finally, the consequences of the Preface for law will be considered. It raises two particular problems for legal theorists, the problem of determination and the problem of base and superstructure.

Marxist Responses to the Three Challenges

In the Introduction it was suggested that Marxism faces three contemporary challenges. The first was the internal challenge, those theoretical difficulties that have proven difficult to resolve. The second was the external challenge. This involves the rise of new theories, specifically postmodernism, that claim a superior understanding of the social world. The final challenge is the collapse of the political systems of the Eastern Bloc. The idea that Marxism has 'died' is based on the supposed insurmountability of these three challenges. This insurmountability, claim the critics, demonstrates that Marxism has failed in its self-proclaimed tasks of producing a universally applicable theoretical framework and vindicating itself through political practice.

In general, Marxists have offered three responses to these challenges. The first response is an acceptance that Marxism has died, accompanied by either an attempt at reconstruction, or, more commonly, the embracing of alternative theories. The second response is to argue that the collapse of orthodoxy actually *confirms* some of the central

planks of Marxist theory. The final response is to suggest that Soviet Communism was a deviation from or a bastardisation of 'real' Marxism.

The first response, the acceptance of the death of Marxism, has been a common one. Upon acknowledgment of Marxism's passing, two strategies have been typical. Firstly, there are those one-time Marxists that completely renounce the theory. Occasionally a resigned move away from theoretical endeavours occurs, but, more typically, such thinkers have embraced alternative theories, most notably postmodernism. Indeed, some of the most important exponents of postmodernism began their intellectual careers as Marxists, or at the very least were heavily influenced by Marxism, before turning away from the theory.[1] Secondly, some Marxists have readily accepted the demise of the theory as classically conceived, but have taken steps to reinvent or retheorise Marxism away from orthodoxy. Aronson, for instance, argues that Marxists can no longer point to a class or even a broader movement that embodies change away from capitalism. Although he maintains his opposition to capitalism he argues that change must be sought through new movements such as feminism and anti-racism, especially as informed by postmodernism (1995).[2]

The second response has been to argue that far from representing the final discrediting of Marxism, the collapse of the Soviet Union actually serves to *confirm* Marxist theory. The crux of this argument is that pre-Bolshevik, Czarist Russia was a backward, non-industrialised country without a developed proletariat. Therefore, Marx's own analysis, which was targeted at the most advanced industrial capitalist states of the day, was inapplicable. Cohen makes this point emphatically; he regards Soviet failure as no less than a "triumph" for Marxism. He suggests that given the undeveloped state of Russia, revolution was bound to fail according to the central tenets of historical materialism. Indeed, success would have been disastrous for the theory: "the Soviet failure can be regarded as a triumph for Marxism: a Soviet success might have embarrassed key propositions of historical materialism" (1999: 99). Wright agrees that Marx's analysis was inapplicable to Russia and that the core ideas of classical Marxism would also lead one to predict that revolution in such a backward, non-industrialised country would eventually fail

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[1] For instance, Foucault was a member of the French Communist Party from 1950-53, while Lyotard was a member of Socialisme ou Barbarie. This Trotskyist group existed from 1948 to 1965 and became increasingly critical of Marxism, ultimately rejecting it.
[2] Of course, it is not clear that such a programme is incompatible with Marxism.

(1993: 16). The main consequence of these arguments is that Marxism not only survives the collapse of the Soviet Union, but is actually vindicated by it and should be considered to have renewed relevance. McLellan points to the "paradox" that "with Russia's now rejoining the historical trajectory marked out in *Capital*, its citizens are likely to find Marx's work now more grimly relevant than they ever did under Soviet rule" (1999a: xxv).[3]

The third response sees Marxists claim that the Eastern Bloc was a deviation from, or a bastardisation of 'real' Marxism. For instance, Callinicos, who offers a spirited defence of Marxism against those who say it died with the 'fall of wall', refers to the Eastern Bloc as the "negation of socialism". His hope is that "its collapse may thus allow the authentic Marxist tradition, long driven underground, to return to the light of day" (1991: 2-3).[4] Similarly, Sherman argues that "Soviet Marxism" was a "distortion of Marx's thought and was mainly designed to justify the Soviet status quo of dictatorship and extreme central planning" (1995: 3).

All three of these responses act as useful correctives to the rather hyperbolic declarations of Marxism's death. The first response hints that Marxism, if it is to survive, must seek to develop internally. In addition, even those that do adopt other theories imply that Marxism would do well to embrace and learn lessons from other modes of thought rather than attempt to hypostatise and artificially close itself off. The second suggests that, if parts of Marxism seem to actually be confirmed by the demise of communism, then the theory is a good deal more complex than Soviet orthodoxy indicates. The third response implies that some form or forms of Marxism survive intact the collapse of the USSR as they never advocated such a system in the first place. Yet it is only if we take these responses to crisis together as a whole that the fundamental reason for Marxism's persistence emerges. Read collectively, the three responses suggest that it is wise not to see 'Marxism' as a coherent and unified theoretical paradigm that either has died, needs reconstructing, has

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[3] In a similar vein, Marsh argues that the Eastern Bloc's demise removes a constraint on Marxism, namely "the need to justify development in central and eastern Europe". This means that the "collapse of communism frees Marxism from an inhibiting legacy, and [...] at the same time, it offers fruitful new fields of study" (1999: 333). Hence, according to Robinson, the emergence of modern capitalism in the Eastern Bloc means that "Marxist analysis of post-communism might actually be very healthy" (1999: 317).

[4] Callinicos amusingly illustrates this point with a tale of graffiti on a Bucharest wall in February 1990: "Down with communism", it read, underneath which was written in another hand: "What is this phenomenon? We have never experienced it!" (1991: 95). The implication is that the form of social ordering experienced in the Eastern Bloc was not 'authentic' communism, but a deviation from it.

been confirmed, or was bastardised. Instead, it makes a great deal more sense to see Marxism as a living, evolving tradition that contains a great many different braches and modes and styles of theorising, all with equal claim to the label 'Marxist'.

Towards Another Marxist Response

There has always been a tendency within Marxism, perhaps to a greater extent than with other schools of thought, to draw very distinct lines around the theory. Of course, no reasonable Marxist or critic of Marxism would claim that there is only *one* type of Marxism. However, there remains an inclination to see the Marxist tradition as being very clearly delineated and forming a readily identifiable object. Both its adherents and its enemies have always, either implicitly or explicitly, purported to know precisely what 'Marxism' is. Perhaps this stems from Marxism's historical use as a political term denoting allegiance to a very particular set of ideas.[5]

In reality, however, Marxist theory has always been something of a chameleon, exhibiting an array of quite different forms. There are a veritable plethora of approaches all with good claim to the label 'Marxist'. Ever since Engels promulgated a very particular and narrow interpretation of Marx, which will be discussed in the next Chapter, Marxism has been a multifarious tradition, constantly building upon and extending the work of its founder in a variety of directions. At the most banal level, this would seem to be confirmed by even the briefest consideration of Marxism's history. Just how far did Engels take the work of Marx in a direction that the latter may not necessarily have recommended? What of the differences between contemporaries such as Bernstien and Kautsky, Gramsci and Lukacs, or Sartre and Althusser? Yet it is unlikely that anybody would deny any of these thinkers the label 'Marxist'. Each of them stressed different elements and periods of Marx's oeuvre, and very different Marxisms emerged. As Gamble laconically puts it, "there was never one Marxism" (1999: 3).[6]

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[5] Indeed, as Miller notes, one of the problems of defining Marxism has always been its political connotations: "What Marxism is and what it is not is a matter of considerable dispute, partly because of the very wide variety of theories so described and partly *because of the use of the term as one of political approval or disapproval*" (1991: 322 [italics added]). But, as Avineri points out, pre-empting some of the ideas of this section, "it seems a truism, yet it has been repeatedly overlooked, that Marx's political theory should not be judged by Lenin's or Stalin's policies any more than Mill should be judged by Gladstone's performance" (1968: vii).

[6] At the broadest level, Gouldner famously talks of 'the two Marxisms' one being scientific, with a stress on determinism and 'iron laws' of history, and the other being "some kind of critical theory"

In the broadest possible terms, three reasons can be identified for the multiplicity of the Marxist tradition. Firstly, there are ambiguities in the founding works of the tradition, the works of Marx himself. Secondly, there is the interplay between Marxism and other theories. Thirdly, there is the constant adaptation of Marxism to what we might call changed concrete conditions. Of course, this is not unique to Marxism; ambiguities in founding works, the influence of other theories, and adaptation to new circumstances will, almost inevitably, result in the development of any theory in any discipline. Given this, one may wonder why Marxism is often treated as though it is a static and unchanging body of doctrine.

The first reason for the heterogeneity of the Marxist tradition is the ambiguous nature of Marx's own works. Presumably most would agree that the starting point for any 'Marxist' work must be Marx's own writings. And, as Shaw points out, "Marx' and Engels' own conceptions of their work were broadly coherent and unified. [...] However much tensions can be shown to exist within their writings [...] there is little doubt that they saw these as in principle resolvable" (1985:7-8). Despite this, anybody seeking to resolve these tensions is immediately faced with a fundamental problem: the sheer scope of Marx's (and Engels') writings. Marx wrote books, articles, letters, pamphlets and the like over many years, for a variety of different audiences and purposes. As Elster notes, the bulk of Marx's corpus contains unpublished manuscripts and letters "in a very uneven state of completion". Many of the published writings are "largely journalistic or agitatorial and as such are unreliable guides to his considered opinion" (1986: 2). Then one faces the divide, alluded to above, between what was written by Marx and Engels, and how far Engels represents Marx's views (ibid: Ch 2). In addition to this there is the fact that Marx's thought evolved over time. Some argue that all periods of Marx's thought can be reconciled as part of a gradual evolution, while others maintain that there are discontinuous breaks. This debate flowered particularly in the 1960s and 1970s following the work of Althusser.[7] Finally, Elster argues that only two long-published works show Marx at the height of his powers. These are *The Eighteenth Brumaire of Louis Napoleon*, published in 1852, and Volume 1 of *Capital*, published in 1867. Yet even these masterly works "are far from perfectly clear

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(Gouldner 1973: Ch 16, see also 1980). Although this usefully highlights one of the central axes upon which Marxists have disagreed, it fails miserably to capture the bewildering variety of Marxist approaches.

[7] See Chapter 4 below.

and consistent themselves" (ibid: 2). Given all these difficulties, it would be a Herculean task to render all of this consistent and emerge with one correct and complete reading of Marx.

Yet in spite of these difficulties there are numerous examples of writers attempting to accurately outline what Marx wrote, meant or thought regarding specific areas. Such endeavours have often led to internecine debates where interpretations have differed. For instance, according to Cohen (1978), the economic base of society consists of relations of production only. Callinicos, on the other hand, treats the base as comprising both forces *and* relations of production (1988: 175).[8] Another example is provided by the 'Marx and justice' debate that occurred in the 1980s. Geras (1985) claimed that Marx did have a theory of justice, while Buchanan argued that Marx had no non-relativistic concept of justice (1982). Douzinas and Warrigton lament these attempts "to find ever more wonderful explanations for seeming inconsistencies" (1986: 825). Thus it is more appropriate to take a rather modest view of Marx's work and accept that it is riddled with gaps, ambiguities, inconsistencies and contradictions.

Of course, deciphering what *Marx* thought is a perfectly legitimate area of study, if fraught with difficulty, but constructing a *Marxist* theory is a different project entirely. There is a danger, as Gamble notes, that if the former area of study is pursued, then Marxism "might linger on like mediaeval scholasticism, based on textual exegesis of sacred texts, with no observable connection to anything in the real world" (1999: 4). Furthermore, even if a 'correct' reading of Marx *was* possible, this would by no means guarantee the validity of the argument. Instead, we can take Marx as a starting point, and accept that attempts to *understand* his legacy "cannot be confined to a correct exogenesis of his work" (Walton and Gamble: 1972: i). Thus, to arrive at a coherent Marx*ist* theory of law one is forced to clarify and develop many points and consider the work of subsequent thinkers. Different selections or emphases from Marx and the Marxist tradition can lead to different perspectives; this is particularly so in the case of law (Hunt 1981: 91-2). Cohen outlines the flavour of such a venture in the foreword to his defence of historical materialism; "The aim is to construct a tenable theory of history which is in broad accord with what Marx said on the subject [...] to offer a less untidy version of some of his major thoughts than he

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[8] The 'base and superstructure' metaphor will be dealt with below as part of the discussion of Marx's 1859 Preface.

himself provided" (1978: ix). This is analogous to the aim here, the difference being that law is the focus of interest rather than historical materialism as a whole.

It is worth stressing that, if this view of Marx and the Marxist tradition is correct, one can accept that largely discredited interpretations such as the economist reading of Marx, Bukharinist mechanical materialism and even Soviet Communism, are all plausible readings of his oeuvre.[9] As such, these have as much claim to the label 'Marxist' as any other interpretation. However, although one may accept that Soviet communism or even Stalinism can be classed as 'Marxist' systems, this does not remove one's ability to pass judgement on them. Such systems can be criticised for a number of other reasons, and condemned wholeheartedly, whilst still maintaining that they are Marxist. Instead of flatly denying that the Soviet Union was Marxist, it is better for a Marxist to look at the historical conditions of its emergence, ascendancy and downfall in order to account for which elements of Marx's legacy were utilised and how they were put to use in ways that would have shocked Marx. Surely such a historical analysis is the stuff of Marxism?

The second reason for the multiplicity of Marxism is the interplay between it and different theories. The best Marxist thinkers have always been alive to the benefits that other theoretical trends can bring. Take, for instance, Bernstein's support for reformist democracy, Lukacs' restoration of Marx's Hegelian heritage, Gramsci's use of themes from Machiavelli and Croce, Sartre's alliance of Marxism and existentialism, Althusser's structural bent, and more recently Laclau and Mouffe's embrace with postmodern ideas. Indeed, Anderson talks of a cross fertilisation of Marxist and other thought systems as being one of the defining features of 'Western Marxism' (1976: 58). A Marxism incorporating elements of, say, existentialism, is certain to look very different from one incorporating ideas from structuralism.

The third and related reason for the bewildering variety of Marxism is the fact that it is constantly being adapted to changing conditions and circumstances. Every Marxist thinker takes the insights of Marx and applies them to their own time, place and socio-political situation. As, for instance, Bernstein's situation was vastly different to Laclau and Mouffe's, then we should hardly be surprised that their application of Marxist ideas is also

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[9] As Mouzelis puts it, "that authoritarian conclusions can be drawn from Marx's varied oeuvre is undeniable" (1990: 36). Note that some Marxists, such as Cohen and Geras, still embrace major aspects of economism (Marsh 1999: 326).

very different. This will be expanded upon below when we consider Marxism as historicism.

These three reasons suggest that attempts to show Marxism as "a monolithic, systematic world-view must be failures from the start" (Carver 2003: 2). Instead, as McLellan puts it, "the very variety of Marxism shows that the ambivalences inherent in Marx's legacy have indeed been fully explored by his followers" (1979: 333). On this view, Marxism is far from a "monolithic, systematic world-view", but rather can be taken to be a cluster of theories bearing family resemblances and drawing on the same theoretical resources and traditions. This rather messy view of Marxism neatly sidesteps the three problems outlined in the Introduction. The internal problem is negated if one realises that Marxism, like any other theory, is constantly dealing with its own internal blockages and obstacles. As concrete conditions change, new difficulties emerge, and new strands of the theory are produced in order to deal with them. That a branch of the theory runs into difficulties, even if those difficulties render that branch redundant, does not collapse the entire theoretical edifice. The external problem is also blunted. Of course, new and competing theoretical paradigms have emerged, but various strands of Marxism have learned from them and adapted themselves to their challenges. This is only possible if one acknowledges the multifarious, developing and open nature of the tradition. Finally, the dissolution of 'actually existing socialism' does indeed sound the death knell for one particular branch of Marxism. However, other strands of the theory persist, and may even be strengthened by it. The type of theory that was used to legitimise the USSR, and the USSR's actual political system are just examples of some of the many things that can be done with Marx's oeuvre. Their passing cannot possibly render the entire tradition defunct.[10] Instead, the Marxist tradition continues to offer a diversity of approaches, ideas and concepts that remain useful in analysing contemporary society and law.[11]

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[10] At the most the collapse of the USSR has shown the hollowness of Marx's positive proposals, which were always the weakest part of his writings. As Chimni puts it, "Marxism as a critique has not exhausted itself [...] despite its failure to articulate the normative basis for creating a just society" (2004: 3).

[11] Mouzelis (1990: 1-2) makes a similar point.

Marx's 1859 Preface

Having constructed a view of Marxism as a fluid, evolving tradition with multiple branches rather than a hypostatised and brittle orthodoxy, it is necessary to outline which elements of that tradition will inform the legal theory to be developed here. The particular part of Marx's work that will be utilised henceforth is the theory of historical materialism as outlined in the Preface to Marx's 1859 work *A Contribution to the Critique of Political Economy*. Marx began to develop this historical materialism, his "main contribution to social and political theory" (Miller 1991: 319) from around 1845, with the writing of *The German Ideology* with Engels (1970).[12] Marx never again dealt with historical materialism at such length as in the first section of *The German Ideology*, and it remains "rich and exciting" reading (McLellan 1975: 85).[13] By the time of *A Contribution* Marx's focus had shifted; the nascent ideas which would form the basis of *Capital* now occupied his attention. However, for our purposes the splendidly concise outline of historical materialism provided by Marx in the Preface will serve beautifully.

There are a number of reasons for this choice. Firstly, the relevant passages of the Preface offer a sociological understanding of society. Here, 'sociological understanding' is intended in its broadest sense; the Preface purports to uncover the social rules and processes that underlie society and govern its members, institutions and groups. Secondly and relatedly, the Preface offers a macro-level social ontology, a large-scale map of what there is in society, and it explicitly locates "the legal" within that ontology. All socio-legal theory attempts to perform these tasks of understanding law sociologically, locating it within society and identifying its role. Thus the Preface has a certain resonance with the very broadest and foundational aims of socio-legal theory in general and this work in particular.

The third reason why the formulations of the Preface are utilised here is that most previous Marxist legal theory has utilised them, even if only implicitly. The idea of the legal as superstructural is the anchor of almost all Marxist legal theory. Even where that idea is rejected, it is that idea that acts as the starting point. Thus those Marxists who reject the

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[12] *The German Ideology* remained unpublished during Marx's and Engels' lifetimes.

[13] *The German Ideology* is made up of three parts. The first, and most important, deals with the nascent theory of historical materialism, while parts 2 and 3 contain vast "super polemics" against the writings of some Marx and Engels' contemporaries (Arthur 1970: 2).

idea of law as superstructural define themselves in opposition to the Preface. As such, there is a ready tradition of Marxist legal theory rooted in the Preface that one can draw upon and criticise as one seeks to construct a new, superior theory. Put simply, the Preface is the most readily applicable facet of Marx's writings to studying large scale social institutions. Thus it has set the tone for Marxist legal thought through the years.

A fourth reason for the focus on the Preface is the dearth and relatively unsophisticated nature of Marx's writings on law. Because of this, it is far better for socio-legal scholars to look at his broader sociological writings and theories. One is more likely to successfully derive a coherent and comprehensive legal theory from these rather than the piecemeal and scattered writings on law itself. Marx, of course, was the son of a lawyer, began his academic career as a law student, and was happy to defend himself in court in Cologne against charges of slandering officials and inciting insurrection in 1848.[14] Despite this, "neither Marx nor Engels produced anything that could or should be called a theory of law; law was never a sustained object of their attention, although they did have much to say about law that remains interesting and relevant" (Hunt 1991: 104). Indeed, following his degree studies, Marx "quickly lost interest in the subject and wrote nothing systematic or sustained on questions of legal theory, legal history, or the place of law in society" (Bottomore 1983: 274). What can be discerned from these piecemeal writings on law,[15] however, is the clear development in his thought over time. In his period as a 'Young Hegelian', he took the view that 'true' law was the systematisation of freedom. For the young Marx, law was that which expressed the "internal rules of 'universal' coherent human activities and could therefore never confront human beings from outside as a form of coercion" (ibid. 274). In his 1842 *Rheinische Zeitung* article *Debates on Freedom of the Press* he described a statute book as "a people's bible of freedom" (1975: 162). Marx can plausibly be interpreted as a natural law theorist at this point, with the statue book equating to freedom provided it codified those natural laws that existed prior to it (see McBride 1970, Taiwo 1996). These "natural law tendencies" (Phillips 1980: 6) were still in evidence in the next phase of his thought, immediately prior to (and overlapping with) the working out of the materialist conception of history. In this second phase, Marx developed the view that actual, existing law "was a form of alienation, abstracting the legal subject and legal

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[14] For details of Marx as a law student, see Wheen (1999: 15-33). For details of his Cologne defence, see Kamenka 1983: 49.

[15] Which have been collated (along with those of Engels) by Cain and Hunt (1979) and Phillips (1980). See also Vincent (1993).

duties and legal rights from concrete human beings and social realities, proclaiming formal legal and political equality while tolerating, and indeed encouraging, economic, religious and social servitude" (Bottomore 1983: 274). Finally, Marx's mature view, often caricatured, is that law is a form of class domination. This view was worked up more systematically by Lenin, as we shall see in the next chapter. Clearly there are several themes and ideas that may be useful to legal theorists in Marx's' own writings on law, and this variety goes a long way to explaining the range of Marxist legal theory that has developed subsequently. However, Marx never worked up any of these nascent ideas on law, as law was very much a peripheral interest for him. Instead, it is the historical materialism of the Preface that provides the best footing for a more rigorous and coherent Marxist theory.

Following on from this, a final reason for utilising the Preface can be identified. The aim here is to construct a Marxist *theory* of law, rather than conduct a Marxist *analysis* of law. Hunt alerts us to the difference between the two. Analysis makes use of elements of theory and concepts from the Marxist tradition. It refers to explanations or inquiries produced "under the signs" of Marxism, but not the application of a "completed or unitary" theory (1981: 92-3). Theory, meanwhile, may not necessarily involve the substantive analysis of legal phenomena, but it does require the construction of a coherent and comprehensive analytical framework. As Adams and Brownsword point out, "sooner or later, the possibility of staking a general theoretical position must be examined" (1992: 262). Given this, one may conclude that Marx's own writings on law are suited to the purposes of analysis, but not theory.[16] The construction of a Marxist theory of law requires a rather more rigorous starting point, and it is precisely this that the Preface provides.

Put bluntly, one selects the part of Marx's oeuvre that suits their purposes, and interprets it in light of those purposes. It would be equally legitimate to utilise any part of Marx's work

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[16] Hunt acknowledges that analysis and theory never develop autonomously, but their development is related. He suggests that Western Marxism's break from orthodoxy allowed significant advances in the Marxist analysis of law, which bore fruit particularly in the 1970s. Yet that this largely died out by the late 1980s is at least partly due to the fact that Marxist *theory* had not kept pace, as it were, with analytical developments. This in turn has contributed to the comparative dearth of analysis we see today. Of course, the wider problems of Marxism following the demise of Soviet communism discussed in the Introduction are even more crucial in this regard.

or set of ideas and concepts to construct a socio-legal theory.[17] Selection and interpretation are always bound up with interests; no other part of Marx's work serves our interests quite so directly. Thus, we select Marx's Preface due to its promise of underpinning a rigorous and coherent socio-legal theory.

Historical Materialism in the Preface

In the most famous passage from the Preface, Marx writes:

"In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which legal and political superstructures arise and to which definite forms of social consciousness correspond. The mode of production of material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their being, but, on the contrary, their social being determines their consciousness." (1962: 362-3)

This passage, which has been described as the "most pregnant" statement of historical materialism (Hobsbawm 1964: 10), has proved to be of totemic significance for Marxists over the years.[18]

In these few short lines, Marx pitches historical materialism against idealism, which credits the human mind with the ability to transcend its material circumstances and create its own history, and cruder forms of materialism that see people as direct, unmediated products of circumstances. As Woolf relates, utopian socialists such as Owen were materialist in that they saw people as products of circumstances. For them, this meant a change in circumstances would also change people. Hobbes and Feuerbach would have agreed.

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[17] Foucault recommended such tactics with regard to his own work. He saw his books as, "if you like, little tool boxes. If people want to open them, use a sentence, an idea, an analysis as a screwdriver or a spanner in order to short-circuit, disqualify and break systems of power... well, so much the better" (quoted in O' Farrell 1989: 110).

[18] Indeed it was in Engels' review of *A Contribution to the Critique of Political Economy* that the term the "materialist conception of history" was coined (Engels 1962: 368). Engels' phrase can be said to have "brought Marxism into existence" (Carver 2003: 47).

This is what can be termed a 'correspondence' theory and according to it human beings are passive, responding automatically to external stimuli. Yet this is plainly untrue; humans are active in the world. Idealist philosophers such as Kant and Hegel recognised this. For Hegel, the mind developed dialectically, but as an idealist he saw mind, or consciousness, as making up the world. Thus, materialism was unreflective and ahistoric, it did not understand the role humans play in the world, but it did understand man's continuity with nature. Idealism, on the other hand, understood historical development, but restricted it to the development of thought. Marx thus took the best from both schools of thought. He saw that man changes through activity in the world (Hegel) but that this process takes place in the practical world, as practical activity, and not merely in thought (Owen, Feuerbach). Productive labour is crucial here; it is need that provides the main motivation for man's interaction with the natural world (Woolf 2002: 23-8).

With these broad themes of historical materialism in mind, it is possible to provide a general outline of the theory. The claim at the heart of the theory is that the movement of human history can be explained by changes in the underlying economic structure of society. As Engels put it in *Anti Duhring*, "the economic structure of society always furnishes the real basis, starting from which we can alone work out the ultimate explanation of the whole superstructure of juridical political institutions as well as of the religious, philosophical and other ideas of a given historical period" (1969: 37).[19] This economic structure is made up of the *relations of production* and the *forces of production*.[20] The relations of production are the social relations that people enter into as they go about sustaining themselves through the reproduction of, inter alia, food, clothing and shelter. Under capitalism, the relations of production are constituted by the system of what one may call 'free labour', where the wage earner sells his labour power to the employer in return for wages, and the employer takes the profits of the wage earner's labour power. The exact form that the relations of production take at any given time is dependent on the forces of production. The forces of production are made up of the natural resources that are available, and the level of technology (the means of production) that exists in order to exploit them. So "relations of production... exist in relation to material productive forces and at any given time they more or less correspond with the stage of development of the latter" (Cotterrell 1992: 107).

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[19]Engels' *Anti- Duhring: Herr Eugen Duhring's Revolution in Science*, first published in 1878, was the first attempt to provide a systematic account of historical materialism.
[20] Though note the disagreement on this point between Callinicos and Cohen (see above).

Thus the relations of production are always functionally linked to the forces of production. Collins illustrates this idea through the example of a group of nomadic hunters, "the earliest kind of human society". It is probable that such groups entered into some form of arrangement for governing the hunting procedure and dividing the spoils. Such an arrangement, the relations of production, would have been necessarily linked to the forces of production, in this instance "the primitive weapons and the abundance of wildlife". If the arrangement does not enable an efficient use of the forces of production, then "it will probably never arise, or at least be very quickly abandoned" (1982: 19).

It is on this economic base that the *superstructure* of social institutions arises. The form and content of law, as a part of this superstructure, is ultimately determined by the relations of production in the base. The superstructure also includes "forms of social consciousness"- ideas, values and beliefs- so these too are seen by historical materialism as determined by the relations of production. Here is the crux of Marx's anti-idealism. If ideas are determined by the relations of production, by the social relationships that men enter into in order to survive, then we cannot look upon the "history of ideas" as the development of great systems of thought in pursuit of truth or justice, but instead that history must be seen as "a series of responses to transformations within the relations of production" (Collins 1982: 19-20).[21]

Such transformations only occur as a result of conflicts in the economic base between the forces and relations of production. As scientific and technological knowledge increases, more efficient methods of exploiting the available natural resources can be developed. Such changes in the forces of production cannot always be readily accommodated within the existing relations of production. To utilise another example from Collins, "the machines invented for spinning thread could only be utilised if workers were introduced into centralised places of work instead of the raw materials being farmed out to individual households. The new relations of production in the factory provided the opportunity to satisfy the functional requirements of the new technology" (ibid: 20). Social groups that

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[21] This is part of a broader point, made best in *The German Ideology*: It is not man's ideas alone that are determined by the relations of production, but as Arthur puts it, "man produces *himself* through labour" (italics added). Therefore he has neither a "fixed unchanging nature" nor does he develop "in accordance with some spiritual essence" (Arthur 1970: 21). Further support for this idea comes from Marx's famous 6th thesis on Feuerbach: "But the human essence is no abstraction inherent in each single individual. In its reality it is the ensemble of the social relations" (1968: 29).

aim to use new technological developments in order to facilitate a more efficient exploitation of natural resources will involve themselves in political struggle in order to overthrow the social rules that govern the existing relations of production. Such social rules hinder the emergence of new arrangements better suited to accommodating the new technologies. In this way, history can be seen as a series of struggles between groups, or social classes, as pressure to introduce new relations of production is exerted and resisted. A successful revolutionary movement will bring about a major alteration in the relations of production, and consequently in the superstructure.

Historical materialism's *base and superstructure metaphor*, which holds that law and legal institutions are superstructural and are determined by the economic base of society, is therefore the starting point for a Marxist analysis of law.[22] As McLellan points out, "at first sight, Marx would appear to have bequeathed a firm body of doctrine to his followers" (1979: 1). However, the Preface patently leaves a great many questions unanswered. Indeed, it serves to highlight some of the difficulties involved when attempting to come up with a précis of what Marx really meant or thought. For instance, as was noted above, for Cohen (1978), the base consists of relations of production only, while Callinicos treats the base as comprising both forces and relations of production (1988: 175). Such disputes are not uncommon. Many Marxists have also rejected the base and superstructure metaphor outright; indeed few would now adopt it wholesale without any modification or qualification. Spitzer calls this the "flattening project" as the distinction between the upper and the lower levels is being flattened. He points to what he calls 'imbricationists' or 'culturalists' such as EP Thompson, who shy away from the idea that law is constrained, in any strong sense, by the base (1983: 109).[23] Of course it was not the intention of Marx to comprehensively outline his theory in the Preface, nor could he have done so in just a few short lines. Yet

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[22] And interestingly, the base and superstructure model outlined in the Preface is an ontological and sociological insight, and as such it is difficult to see how the collapse of the Soviet Union could, on its own, make such an insight redundant.

[23] Thompson also famously declared in *Whigs and Hunters* that the rule of law is "an unqualified human good" which inhibits the exercise of naked power by the rulers (1975: Chapter 10, especially 262-3, 266). See Sugarman (1983a 1-2) for a sympathetic response to this position, and Horwitz (1977: 566) for a more critical one. Redhead (1982) criticises Thompson's rather indiscriminate use of the term 'rule of law', while Hunt notes that in reaching his conclusion, Thompson "moves, without further argument, from his historically specific study to a generalisation about the function of legal ideology in modern capitalist society". For Hunt, this is illegitimate (1985: 28). See Cole (2001: 189-202) on some other responses to Thompson's position.

"Marx never provided any extended general account of historical materialism as such" (Anderson 1976: 4). Instead we are left with the reasonably lengthy but embryonic account of *The German Ideology*, and the subsequent but brief and somewhat opaque outline contained in the Preface. Thus, with so much unsaid, any theory that utilises the Preface must necessarily interpret and extend it. Any interpretation and extension is inevitably sectional and biased and will reflect the needs and interests of the interpreter. This is perfectly in line with the view of Marxism as a multifarious and developing tradition outlined earlier.

Clearly, however, the Preface does strongly suggest that certain ideas should be at the heart of any analysis of law. If the Preface is taken as a starting point, then it is difficult to avoid the notion that some causal power must be assigned to the economy. It is not clear how much causal power the economy has, or through which mechanisms it makes its influence felt. Nevertheless, that the economy has some determining influence on law would seem to be an inescapable consequence of utilising the Preface. Marxists have always experienced a tension in attempting to remain faithful to this line but avoid lapsing into a crude economism where the economic is seen to mechanically determine everything else. As Laclau and Mouffe put it, "even those Marxist tendencies which struggled hardest to overcome economism and reductionism maintained, in one way or another, that essentialist conception of the structuring of economic space which we have just described. Thus, the debate between economist and anti-economist tendencies within Marxism was necessarily reduced to the secondary problem of the weight that should be attached to the superstructures in the determination of historical processes" (1985: 76). Laclau and Mouffe reject such economism, even if it is latent. Here, it is accepted that a Marxist theory of law based on the Preface will inevitably have to assign some priority to the economic. The challenge is to do so in a plausible and non-reductionist way. As Hunt argues, "there is a self-evidence to the contention that people have to reproduce their physical survival that does not sustain the conclusion that production retains its priority throughout human history". Therefore, we can insist that "theory does not state conclusions but rather provides methodological suggestions about the questions to be asked and where to start with answering them. This means that inquiry should start, not with the conclusion that the economy determines social and political outcomes but, rather, that economic relations should be considered as the appropriate place to initiate the inquiry" (2001: 601-2). Such is the methodology adopted here.

Historicism

In addition to suggesting that economic relations are a fruitful place to start any analysis of law, the focus on the Preface results in a Marxism that may be described as historicist. It is crucial to be precise about what is meant by 'historicsm' in this context, for the term has picked up various meanings. Herder, who can be considered to be the father of historicism, wrote in the 1770s and 1780s. He reacted against the universal assumptions of Enlightenment theories. He saw people as belonging to national groups,[24] each with their own traditions, habits and norms. There existed no "universal set of values by which national values can be assessed" (Birch 2001: 249). In law, the concept tends to be associated most strongly with Savigny and his followers in the German historical school (see Cotterrell 1992: 20-3). Savigny warned against the codification of German law as it would fix what he felt should develop naturally and spontaneously, in accord with the spirit and cultural outlook of the people. Both of these senses of historicism serve as pointers for the sense in which the term will be deployed here.[25]

It was Gramsci who gave the concept of historicism currency among Marxists. He famously referred to historical materialism as "absolute historicism": "The philosophy of praxis is absolute historicism, the absolute secularization and earthliness of thought, an absolute humanism of history" (Gramsci 1971: 465).[26] Although Gramsci only offers a series of hints as to what this may actually entail, three fundamental and interrelated consequences are immediately apparent.

Firstly, Gramsci's is a rigorously non-teleological position. It suggests that society and social outcomes are contingent upon never-ending struggle. As Torfing puts it, "in Gramsci absolute historicism refers to the idea that unity of a social formation cannot be reduced to a moment in the progressive unfolding of an abstract, trans-historical logic, but is a result of political struggles taking place within a particular historical terrain" (1999: 298). This stands a considerable distance from the orthodox Marxist belief in 'iron laws' of

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[24] Indeed, Herder also founded the theory of nationalism.
[25] For a brief overview of other types of historicism, see Miller (1991: 208-10).
[26] Gramsci used the phrase 'philosophy of praxis' in place of historical materialism in order to escape the Italian prison censors.

history whose direction and unfolding can, at most, be accelerated or decelerated through practice, but not fundamentally altered.[27]

Secondly, Gramsci's historicism, read in the wider context of his work, suggests that the 'correctness' of a theory can be measured by its ability to be used practically rather than by its adherence to some abstract form of rationality, logic or natural law. This would appear to render Marxism unscientific, and is one of the reasons Althusser criticised Gramsci.[28] Cain contrasts the two positions: Althusser considers Marxism to be a science, distinguishable from ideology, whereas for Gramsci all knowledge, including Marxism, is of the same status theoretically, but not politically. Gramsci's view suggests that all knowledge is human centred, there are no timeless truths, and all science and philosophy, including Marxism, are temporal human productions "whose correctness relates to their use-values" (Cain 1983: 104). This is, of course, the reason why many, including Marxists, have refused to accept historicism; its acceptance necessitates rejection of ultimate truths, which are seen as philosophically idealist fantasies. Whatever one's views on this position, it is clearly compatible with the Preface, where "social being determines consciousness". Clearly, adherence to this kind of relativism leads into a massive debate well beyond the bounds of this work. For now, one can agree with Cain. As she puts it, "that one's truth must be historical, contingent, political, and mediated by personal experience makes it no less true" (1983: 104).

A third consequence of Gramsci's historicism is that it regards all theory as context dependent. Each variant of Marxism is contingent upon its time, its place and its circumstances. As was alluded to in the Introduction, one of the unique things about much Marxism is an acceptance of its own historical contingency. The best Marxism is alert to its own "historical grounds of possibility" (Eagleton 1990: 220). As Anderson puts it, "Marxism lies apart from all other variants of critical theory in its ability- or at least ambition- to compose a self-critical theory capable of explaining its own genesis and metamorphoses" (1983: 12). This is particularly true of Marxism based on the Preface,

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[27] Contrast this with Popper (1957), a notable critic of Marxism and historicism. He suggests that historicism serves tyrants due to its belief in laws of historical determinism. Popper is guilty of taking a restricted view of historicism. Although some who adopt the label 'historicist' may well take such a view, a belief in laws of historical determinism is the antithesis of the historicism outlined here. Interestingly, Popper also takes a similarly reductive view of Marxism, equating it with orthodoxy.

[28] Popper also suggested Marxism was unscientific as it cannot be falsified (1959: 40-3).

where, again, "social being determines consciousness" and modes of thought (including, presumably, Marxism) rise and fall with the forces and relations of production. This also reinforces the suggestion that there is no one true or correct reading of Marx. If social being does indeed determine consciousness, and we may add, if human nature is the ensemble of social relations, then Marxism by the very nature of its theoretical structure must be fluid and ever changing, and perhaps ultimately self-abolishing.[29] This compels one to study each Marxist legal theorist in their own particular context, considering the concrete socio-political conditions that each theory was conceived in. Each Marxist theorist takes the insights of Marx and applies them to their own particular time, place and circumstances. The classic Marxist legal theorists that will form the focus of Part 1 were very much products of modernity. Today, we are witnessing the emergence of a new context, that of late modernity. Thus, a new Marxist legal theory is possible, desirable and necessary.

A fourth consequence of Gramsci's historicism is that it justifies the view taken here of Marxism as a heterogeneous, fluid and evolving tradition which constantly adapts itself to new circumstances. This is closely related to the above point; as the context for legal theory has changed, then the time is ripe for a new, or at least a modified Marxist theory of law that builds upon the existing tradition and simultaneously extends it in order to better account for the new developments. The result is a contemporary addition to the diverse Marxist canon. In addition, this buttresses the argument that the Soviet version of Marxism, whatever its other flaws, is perfectly entitled to be labelled Marxist. The Soviet hierarchy took a particular brand of Marxism, and guided by their political needs, adapted it to their situation. Historicism accepts that this is what each interpreter of Marx and Marxism must inevitably do. One is reminded of Sherman, who claims that "Soviet Marxism" was a "distortion of Marx's thought and was mainly designed to justify the Soviet status quo of dictatorship and extreme central planning" (1995: 3). Yet Sherman himself then goes on to 'reconstruct' Marxism's basic framework (ibid: xvi). To do this he retains the concepts of the forces and relations of production but jettisons the base and superstructure metaphor as unnecessary and confusing. He replaces this with concepts of 'economic' and 'social' processes, and stresses the reciprocity that exists between the two.

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[29] Of course, the argument that all social thought and philosophy is historically relative is not itself historically relative, and here we are drawn into a peculiar paradox that will be familiar to students of postmodernism.

Society is thus a set of relations, and critical Marxism is the "relational-historical approach". Whatever advantages this may have the fact remains that this is a theory which, although based upon Marx's thought, modifies and extends that thought in certain ways, according to the situation and needs at hand. Is this not precisely what occurred in the Soviet Union? Even if the aims were rather less laudable than Sherman's, the fact is the theorists of the Soviet Union drew on Marx's work and created their own interpretation of it, just as Sherman did, and just as this work seeks to do.

Although few contemporary legal theorists would explicitly align themselves with Marx, Gramsci, or historicism, the usefulness of studying legal theory in its historical context is widely accepted. Cotterrell, for instance, argues that "the succession of dominant approaches in Anglo-American legal philosophy since the 19th century- the approaches which today make up much of modern jurisprudence- can be usefully understood, to a large extent, as responses to particular political conditions and also, especially, conditions of legal professional practice. [...] This perspective may provide a way of showing that debates in jurisprudence which tend to be portrayed as timeless, and which often seem interminable and incapable of resolution, are better understood as reflecting specific responses in legal philosophy to pressures, developments and conditions arising in particular times and places" (1989: v). McCoubrey and White would agree: "There must always be considered the question of the historical and cultural climate in which a theory was originally advanced. The fact that a theory might have been advanced in a historically remote or very different social and political context from that which now exists by no means necessarily deprives the theory of modern relevance. It may, however, have a major impact upon its application and significance in the context of modern societies" (1999: 7).

Despite these good reasons for adopting Gramsci's view of Marxism as 'absolute historicism', it is important to sound a warning at this stage. As Kulcsar suggests, "knowledge of all features of the legal categories, concepts, institutions [...] becomes possible only through historical enquiries" (1993: 146). However, it is important not to *reduce* law and legal theory to its historical context. Thus, just as some Marxists have shied away from explanations that reduce all phenomena to mere effects of the economic, one should be similarly careful not to perform a historical reduction. At the level of legal theory, this may mean ensuring that theory is internally consistent and plausible, and takes

care to address potential blockages, aporias and lacunas. As Eagleton puts it, "there is no reason why an intelligent non-radical should refuse to look at phenomena in their historical context. She may jib at reducing phenomena to their historical contexts, but then so do almost all radicals except vulgar Marxists, who exist these days largely as convenient figments of the anti-Marxist imagination" (1996: 3).

The Preface and Law: Two Problems

Historical materialism, as outlined in this Chapter, raises two major problems for any legal theory constructed upon its foundations. They are the problem of determination and the problem of base and superstructure. The success or failure of the various Marxist legal theories is, to an extent, dependent on the strength of their responses to these two problems.[30]

The Problem of Determination

The first major problem facing Marxist legal theorists surrounds the nature of determination: How exactly is law, as a superstructural phenomenon, determined by the base, and what room is there within this for the conscious intervention of human beings? Taken at face value, the "uncompromising line" of the Preface suggests that individuals are "puppets, controlled from offstage by the interplay of forces and relations of production" (Hollis 1994: 6). Human thought and action (and the "legal and political") are explicitly reduced to superstructural phenomena dependent upon the base. This deterministic interpretation of the Preface, which is certainly a plausible one, relegates the importance of human action; it becomes a mere sideshow, incapable of affecting the march of history. On this view law is a simple response to the processes occurring in the base, somehow representing or mirroring them.

Yet such a line is extremely difficult to reconcile with some other statements issued by Marx. For instance, he also claimed that "men make their own history". Of course he added in the very next breath, "but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly

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[30] These two problems are derived from Collins' *Marxism and Law*. He outlines them most concisely in the introductory remarks to Chapter 4 (1982: 77).

encountered, given and transmitted from the past" (1963: 15).[31] Despite the rider, this would still appear on the face of it to stand a considerable distance away from the line pursued in the Preface. Furthermore, in *The Communist Manifesto*, Marx and Engels urge the proletariat to "unite" and lose "their chains", and praise the revolutionary force of the bourgeoisie in overthrowing the feudal fetters that stood in the way of capitalism. Indeed in the outline of historical materialism above, it was demonstrated how there is space in the theory for assigning an active role to social groups who seek to challenge the existing relations of production when those relations can no longer adequately accommodate the productive forces. Clearly, Marx was concerned to leave some scope for human agency within his scheme. Of course, the aim of this work is not to reconcile all of Marx's statements or produce a theory of law perfectly in line with the Preface. The Preface is simply the starting point for the investigation. However, it is clear that Marx did see human agency as central to his own project.

The problem of agency is rendered "particularly acute" in the arena of law because law and legal systems are usually seen to be "purposive human creations, the product of deliberate conscious action" (Collins 1982: 16). A plausible legal theory should therefore make room for human action. Concomitantly, any theory that sticks to a rigidly determinist line and denies the possibility of conscious human thought and action must be viewed with caution. The wealth of deliberately created statutes, regulations and case law that abound in contemporary society would seem, on the face of it, to immediately empirically falsify any theory that does not render the possibility of human action open. As Adams and Brownsword put it, "explanation should start with the reasons and purposes of individual actors" (1992: xii). Yet to remain within the bounds of historical materialism, that conscious action must somehow be demonstrated to be ultimately determined by material factors. This balancing act between structure and action within the confines of historical materialism has informed, sometimes explicitly, sometimes implicitly, each of the Marxist theories of law we shall consider presently. Understanding how each theorist addresses this issue is one of the keys to understanding their view of law.

The debate over how structure and action are to be precisely balanced within the framework of historical materialism has been one of the enduring controversies in Marxist

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[31] This is one of the opening lines of *The Eighteenth Brumaire of Louis Napoleon.*

philosophy generally, not just in Marxist legal philosophy.[32] The most famous example is the attack launched by Thompson on the theories of Althusser. The latter's "theoretical anti-humanism" (Bottomore 1983: 17) explicitly reduced humans to "supports of the relations of production" (Althusser 1970: 112). This stood in marked contrast to Thompson's own ideas. In *The Making of the English Working Class* (1980)[33] Thompson argued that the working class effectively created itself when the conditions were ripe. Later, in direct and open confrontation with Althusser, he wrote that men and women are the "ever baffled and ever resurgent agents of an unmastered history" (1978: 280).[34]

Many Marxists have, in more sober fashion, attempted to find a plausible middle position between the two extremes of unmediated structural determination (Althusser) and anarchic, unconstrained human freedom (Thompson). Raymond Williams outlines a useful way of conceptualising the concept of 'determination' which allows room for agency. He suggests that we can see determination as the "setting of limits" and the "exertion of pressures [...] in effect a compulsion to act in ways that maintain and renew [a social mode]". On such a view, 'society' is "never only the 'dead husk' which limits social and individual fulfilment. It is always also a constitutive process with very powerful pressures which are both expressed in political, economic and cultural formations, and, to take the full weight of 'constitutive', are internalised and become 'individual wills'. Determination of this whole kind- a complex and interrelated process of limits and pressures- is in the whole social process itself and nowhere else" (1977: 87). In a similar vein, Wright suggests that the Marxist theory of "historical trajectory" can be saved if we shift the emphasis to "historical possibility". Instead of arguing for determinate series of stages, "it may be more useful to focus on the ways in which alternative futures are opened up or closed off by particular historical conditions". This "does not presume that sequences follow a single trajectory as opposed to a variety of possible trajectories" (1993: 24). Thus, he concludes "structures limit practices but within those limits practices transform structures" (ibid: 28). Larrain too is in broad agreement with this concept of determination. He argues that "social change is neither arbitrary nor absolutely predetermined" as "individuals can try to

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[32] Indeed, the debate on structure and action is one of the constants of social and political science generally, not just Marxism. See Hollis (1994: Ch 1).
[33] First published in 1963.
[34] These issues will be explored further in Chapter 4. For a balanced assessment of the debate between Thompson and Althusser on the issue of agency, see Anderson (1980: Ch 2). Cohen (1978: 73-77) criticises Thompson's definition of 'class' and suggests a return to a more traditional Marxist formulation, where one's 'class' is their objective position within the relations of production.

transform these [existing] circumstances within a finite set of options which the very circumstances allow" (1986: 123).

Such formulations offer a useful starting point, but the precise machinations of legal determination need to be specified in more detail if the aim is for a comprehensive and coherent legal theory. As the rest of this Part will show, Marxist legal theorists have been largely unsuccessful in producing a concept of determination that is sufficiently sophisticated to allow for the type of human agency that Williams, Wright and Larrain talk of.

The Problem of Base and Superstructure

If one's aim is to demonstrate precisely how the base determines law as an element of the superstructure, then it follows, logically, that one should also be able to distinguish between the two. Marx himself implies such a distinction, for in the Preface he writes that "legal and political superstructures" arise upon the economic structure of society, which is "the real foundation". As Williams points out, "in the transition from Marx to Marxism and in the development of Marxism itself, the proposition of the determining base and the determined superstructure has been commonly held to be the key to Marxist cultural analysis" (1977: 75). Law has always raised particular problems in this respect, for it is especially difficult to think of law as belonging exclusively to the superstructure.

John Plamenatz famously and forcefully criticises Marxism's base and superstructure metaphor, and he does so through an analysis of law's place in it. He argues that, contrary to the Preface, law is necessarily part of the economic base. Plamenatz gives the example of the law of contract. It seems difficult to envisage capitalist commodity exchanges, which are for the most part transactions carried out between strangers who need never meet one another, functioning successfully without the rules and regulations provided by contract law. On the face of it, contract law is thus at the very heart of the capitalist mode of production. How, then, can it be classed as 'superstructural', when it is concerned with regulating and conditioning the very relations that people enter into in society? As Plamenatz puts it, "it is easy to see that the system of property often has a great influence on the form of production". Given this, he asks "in what sense... are they [the relations of production] the real foundations of these other sides?" (1963: 282-3).

Furthermore, Plamenatz argues that modes of production cannot actually be described other than by reference to legal rights and legal duties concerning ownership and exchange. "Unfortunately," he writes, "it is quite impossible to define these relations except in terms of the claims which men make upon one another and recognise" (ibid: 281). For him, this is further evidence that law goes to the root of a mode of production. Because of these and other problems with the metaphor, opposition to it is one of the constants of Marxist theorising. Lukes, for instance, denunciates it in the starkest of terms, arguing that it is "a dead, static, architectural metaphor, whose potential for illumination was never very great and which has for far too long cast nothing but shadows over Marxist theory and Marxist practice" (1983: 119).

In light of these and other criticisms, Marxist legal scholars must either demonstrate how law *can* be classed as superstructural, or otherwise modify or even, as Lukes suggests, abandon the metaphor altogether. Yet if the metaphor is modified too radically, or if it is completely abandoned, it would seem to be the case that the potency, power and distinctiveness of Marxist explanation would be lost at a stroke. Any Marxism based on the Preface is surely wedded to the idea that there a fundamental element of society that does the determining, and a number of peripheral elements that are so determined. The strength and directness of this determining and the effect that the superstructures themselves can have may be open to debate, but it is surely anathema to any Preface derived Marxism to deny the split, at some fundamental level, between determining base and determined superstructure. Stone would agree. What he terms the 'Superstructure-structure dichotomy', "is one of the cornerstones of both the Marxist view of society in stasis and the Marxist conception of historical change" (1985: 48), and should be maintained.

Perhaps the metaphor can be preserved by taking a rather more modest view of it, and accepting its status as no more than a theoretical model, a cognitive aid that presents a simplified picture, rather than an accurate reflection or distillation of society. Williams suggests that, over time, the metaphor has become hypostatised and its original intention has been forgotten. The main sense of the original arguments was "relational", rather than denoting precise concepts and descriptive terms for observable areas of human life. However, Marxist writers have tended to separate the base and superstructure either temporally (first base, then superstructure) or spatially (the 'layers' of the social formation).

Ironically, Marx's original criticism was against the separation of areas of thought, precisely the flaw of idealism (1977: 77-8). Williams himself maintains that "contrary to a development in Marxism, it is not the 'base' and the 'superstructure' that need to be studied, but specific and indissoluble real processes, within which the decisive relationship, from a Marxist point of view, is that expressed by the complex idea of 'determination'" (ibid: 82). Kinsey also accepts that in concrete reality base and superstructure cannot be separated; "Any separation of the legal expression and the social-economic relation is wholly artificial". However, he does not rule out the possibility of separation for the purpose of theorising (1978: 206). The challenge for Marxist legal theory is to produce a plausible reading of base and superstructure that acknowledges the messy and interrelated nature of reality along these lines. Again, Marxist legal theory to date has struggled in this task.

The Two Problems in Précis

The Preface, then, provides the guiding threads for the construction of a coherent and plausible Marxist theory of law, but there remains considerable work to do. A coherent and plausible Marxist theory of law must successfully perform two key tasks:

1. Explain how the base determines the legal superstructure without denying human agency: *The problem of determination.*

2. Divide the base from the superstructure for theoretical purposes while acknowledging the complexity of real-life social formations: *The problem of base and superstructure.*

How far have Marxist legal scholars satisfied these demands? It is to this question that our attention will be directed in the remainder of this first part. The following chapters will assess how the mainstream Marxist legal theorists have dealt with law and provided solutions to these two problems.[35] The context that each theorist worked in will be

[35] Part 1's primary focus is on the most influential Western Marxist legal theory. The Bolsheviks Lenin and Pashukanis are the exceptions. It should also be noted that a great deal of Marxist legal theory will not be assessed. For instance, aside from Pashukanis, there was an abundance of legal theory in Russia in the 1920 and 1930s. In the post-war period, the Eastern Bloc also produced many contributions that will not be analysed. This is for two reasons. Firstly such theory has had

outlined, and their ideas presented and critiqued. This critique will particularly address the nature of the solutions offered to the two problems. The aim is to arrive at the superior variant of Marxist legal theory.

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little influence in the West. Secondly, as Varga relates, much of this "Marxian legal theory was nothing but the function of Soviet rule". Its discrediting in the post-Cold War era "could even be favourable for the future of Marxist legal theorising" (Varga 1993: xvii-xviii). Other Western Marxists, such as Lukacs, Benjamin and Bloch have also considered law, but their contributions are marginal, somewhat maverick and less influential, so they too will only be mentioned in passing.

CHAPTER 2. ENGELS AND LENIN

Engels and Lenin are, of course, amongst the most influential Marxists. Law, however, was not the focus of their interest: "the truth is that the classic Marxist theorists devoted very little attention to law", instead treating it "casually as part of the apparatus of the state" (Collins 1982: 107). Despite this, by looking at their thoughts on the state, and their scattered and fragmentary remarks on law, one can begin to see how Marxists have applied the insights of the Preface. Engels' and Lenin's approaches are very different, but there is one crucial similarity; they both fail to provide adequate solutions to the problems of determination and base and superstructure. Yet their monumental influence on the entire Marxist tradition means that their work is regularly utilised by Marxist legal theorists despite its unsatisfactory nature. As such, it is useful to consider their ideas and identify where they went wrong.

Friedrich Engels

Context

Engels "was the first Marxist, and he had a defining influence on Marxism" (Carver 2003: 38). As friend, benefactor and intellectual sidekick, he vigorously promoted Marx's ideas, particularly in the later years of his life and after the death of Marx: Engels, "far more than Marx, was responsible for the diffusion of Marxism as a world view within the socialist movement" (Bottomore 1983: 151). Indeed, historical materialism can be seen as "something left to us by Engels", rather than by Marx, for it was Engels who invented the term itself, and who has been its most "effective exponent" to date (Carver 2003: 75). His attempts to work up more thoroughly the slippery metaphors of the Preface left an indelible mark on the entire Marxist movement. Despite only dealing with law peripherally, it is in Engels' formulation of historical materialism that the difficulty of resolving the problems of determination and base and superstructure first reveals itself.

Two decisive contextual factors played a significant role in Engels' reading of Marx. The first was the need, particularly towards the end of Marx's life and after his death, to produce a coherent and systematic version of his theory, in order to clearly delineate what

'Marxism' was. The second factor, which dovetailed neatly with the first, was the increasing influence and prestige of natural science.

As Marx and Engels grew old, the "need for a systematic and complete synthesis of socialism, [...] an encyclopaedic manual of Marxism" became increasingly urgent. Many of what are now considered to be Marx's finest works remained unpublished, and much of what was published consisted of his newspaper articles. In addition, there was growing criticism of Marx, particularly within the socialist movement and from anarchists such as Proudhon. Engels famously satisfied the need for a concise distillation of Marx's worldview with his 1878 work *Anti Duhring*.[1] Yet in spite of, or perhaps because of, its encyclopaedic nature, *Anti Duhring* readily lent itself to interpretations "that eventually led to the development of a rigid orthodoxy" (Larrain 1986: 30). Engels presented Marxism as a relatively inelastic and comprehensive doctrine. Yet his was a very particular reading of Marxism. Instead, Engels *could* have recommended Marx's work as providing a "*hypothesis* for investigating historical and contemporary conflicts in society". In the Preface, for instance, Marx did not "assert that all individual actions and social conflicts would be effects in some traceable sense to the mode of production of material life", nor did he ever claim that he had uncovered "a historical law in accord in some ultimate causal sense with all events" (Carver 2003: 79). But the need for a confident and forceful exposition of his friend's theories led Engels to present historical materialism as something of an iron law.[2]

One possible explanation for Engels' proceeding in this way was that he was attempting to attain for Marx some of the prestige and legitimacy that was being increasingly accorded to natural science. This can be seen as the second decisive contextual factor explaining Engels' later output. The ascendancy of natural science was crystallised in 1859, the year Marx wrote the Preface, with the publication of Darwin's' *Origin of the Species*. The "cultural climate of the late nineteenth century" valorised such advances; it was hoped that a complete knowledge of the human condition could somehow be achieved through the scientific method, and students of social processes were caught up in the excitement.

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[1] *Anti- Duhring* is an abbreviated title. The original title is *Herr Eugen Duhring's Revolution in Science*.

[2] Indeed, the vast majority of Marxist theorists since the 1920s have rejected, in whole or in part, Engels' interpretation of Marx. The most notable exception to this is the Italian Sebastiano Timpanaro (Anderson 1976: 60).

Engels thus presented Marx's thought as being of the same genus as the latest successes of natural science and "made claims about its universality and certitude that were not made by Marx"; for Carver, such claims merely amount to "spin" (2001: 38). Engels' attempt to tap into the zeitgeist pushed him towards an exposition of historical materialism "couched in scientific- and even positivist- terms" (McLellan 1979: 4).

Theory

Engels' desire to present Marxism as a complete and unified worldview, and his related attraction to the themes and prestige of natural science, led him to argue that Marx had indeed discovered the laws of motion of human history in the manner of a positivist scientist. Consequently Engels tended towards "simple materialistic explanation" (Phillips 1980: 209). His general view of the base and superstructure metaphor is that the superstructure 'expresses' or 'reflects' the relations of production or economic base. He arrives at this conclusion through an analysis of the state. In *Ludwig Feuerbach and the End of Classical German Philosophy*,[3] Engels argues that "the state- the political order- is the subordinate, and civil society- the realm of economic relations- the decisive element". The superstructural nature of the state could not be any clearer; the state "is not an independent domain with an independent development, but one whose existence as well as development is to be explained in the last resort by the economic conditions of life of society". Therefore the state "is on the whole only a *reflection*, in concentrated form, of the economic needs of the class controlling production" (Engels 1968b: 615-6 [italics added]).

Engels does pay some attention to law, albeit briefly. To do so he draws upon another famous passage from the Preface, immediately following the selection utilised in Chapter 1. Marx claims that property relations are but the "legal expression" of the existing relations of production (Marx 1962: 363). This is a development of his idea that the superstructure "rises" upon the base. On the face of it, Marx seems to be asserting an even closer link between determining base and determined superstructure. Not only does the legal superstructure *rise* upon the base, but it actually *expresses* the base's fundamental, underlying nature.[4] Engels follows Marx almost to the letter. He claims that

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[3] This was Engels' last major work. It was published in 1886 in issues 4 and 5 of *Die Neue Zeit*, the chief theoretical journal of the German SDP, and in book form in 1888.

[4] The more recent work of Stone (1985) also relies heavily on this passage from Marx. Stone claims that particular legal rules are created in accord with the "essential legal relations" that are the

law "in essence only sanctions the existing economic relations between individuals. [...] Legal rules merely express the economic life conditions of society in legal form" (Engels 1968b: 615-7). Thus law would seem to be no more than a codified version of the relations of production. This is certainly a tidy interpretation of historical materialism, and it clearly resonates with Engels' "leanings towards scientific study" (McLellan 1979: 16). This is because it suggests that explanation of all social phenomena, including law, is possible if one refers to the base of society, the rules of which Marx had purportedly already uncovered.[5]

One of Engels' most famous theoretical contributions to Marxism is the 'withering away' thesis. He argues that as capitalism is superseded and the economic base comes to be constituted of socialist relations of production, the state will begin to gradually 'wither away'. This is because the primary function of the state is class oppression, and in a classless society there is no need for this function to be performed. The state and, by extension, law, thus becomes superfluous. Engels first developed this thesis in *Anti Duhring*. His declaration that the *state* will wither away in communist society[6] has been taken to mean that *law*, either as a part of the state or an analogous element of the superstructure, will also disappear. Yet Engels adds a significant qualification to this. He notes that there will still be a need to administrate the new planned economy and the distribution of goods: "The interference of the state power in social relations becomes superfluous in one sphere after another, and then ceases of itself. The government of persons is replaced by the administration of things and the direction of the processes of production" (Engels 1943: 309). So, to be precise, the *bourgeois* state will wither away, but there may well still be a role for something akin to the state, and indeed law, in a new communist society.

"expressions of economic life" (1985: 57-9). As such, Stone is vulnerable to the same criticisms that can be levelled at Engels (see below).

[5] In his speech at Marx's graveside in 1883, Engels declared that "just as Darwin discovered the law of development of organic nature, so Marx discovered the law of development of human history" (Engels 1968a: 429).

[6] This famous quote reads "the state is not 'abolished', *it withers away*" (Engels 1943: 309 [italics in original]).

Critique

Clearly, Engels comes nowhere close to providing the kind of comprehensive legal theory that this work is aiming for. Yet his work is of lasting importance to Marxists, and its weaknesses have bedevilled much Marxist jurisprudence over the years. For our purposes it is the inability of his theory to offer convincing solutions to the problems of determination and base and superstructure that is of utmost importance.

The solution that Engels' work offers to the problem of determination is far from satisfactory. The economic base is seen to mechanically determine all the peripheral elements of the superstructure. On Engels' view, the relations of production determine the superstructure, and therefore law, automatically; the superstructure always aligns itself to the needs of the base. Analyses in the style of Engels' have been termed 'economist', 'economic reductionist' or 'crude materialist' "because of the extreme emphasis placed upon the determining influence of the material base of society" (Collins 1982: 23). The superstructure, and law as a part of it, is seen as the mere *reflection* of the base. But despite its theoretical neatness, this interpretation of historical materialism is problematic for a number of reasons (see Collins 1982: 23-4).

Crucially, Engels' formulation cannot tell us *how* the base determines the superstructure. It is asserted that the superstructure will always correspond to the base, but the mechanism through which this process occurs is not detailed. It was suggested earlier[7] that law is particularly problematic in this respect, for, on the face of it, it seems to be the deliberate creation of human subjects. Thus some room must be found within the bounds of historical materialism for human action. Yet Engels implies that, far from being active and even idiosyncratic in the process of law-creation, humans are actually passive and not integral to the process, other than as the supports or conduits of it. This is plainly unsatisfactory. Engels fails to provide "an account of how conscious action is determined by the material base" (Collins 1982: 25).

According to Hunt, the reflection metaphor imports into Marxism a "dubious epistemology derived from naïve materialism" (1985: 18). This is evidenced by Engels' work, for the only way that human action can be accommodated within his scheme is if one subscribes

[7] See Chapter 1 above.

to an empiricist epistemology. Generally, empiricism holds that "the only way to ensure that knowledge of matters of fact is sound or scientific is to base it on observations, or more generally, experience" (Miller 1987: 395). The empiricist epistemology claims that knowledge can only be "the passive assimilation of a ready made universe" (ibid: 180). Hence, upon experiencing the relations of production in any given society, humans will consciously create law that is in line with those relations. So the process of creating law is not entirely automatic, as it does rely on human activity, but that activity is always conditioned *exactly* by the relations of production. There is no scope for thought to diverge from the relations of production; in this way, we can see how law 'reflects' the relations of production. However, Marxists have consistently rejected the empiricism necessary to sustain Engels' theory of reflection on a number of grounds.[8] Crucially, empiricism is rejected as it "sees the world as a collection of unconnected appearances, ignores the role of theory in actively organising and critically reorganising the data provided by such appearances, and fails to identify its function as the attempt to re-present in thought the essential relations generating them" (Bottomore 1983: 149-50).

In addition, Engels' theory is ultimately a functionalist theory. The superstructure, including law, is assumed to function in order to secure the existing relations of production. As well as limiting the scope for active human intervention, design and creativity, this also assumes the law's functions. Of course one should not deny that law has functions, but care should be taken not to specify them theoretically in advance of any empirical study. To do so is to lapse into functionalism. As Hunt puts it, "we must distinguish between function and functionalism, and reject the latter" (1985: 17). Functionalist accounts reductively reify functions and assume their existence; all social practices and institutions are classified and judged in terms of them. In reality, law may serve a number of functions, some of them contradictory, or it may not be functional at all. As such, it is prudent to avoid broad statements to the effect that 'law reproduces social relations'.[9]

Engels' crude materialism leads to two other related difficulties that are also worth noting. Firstly, it renders an analysis of the relationship between law and all other social institutions largely meaningless. This is because the superstructure in its entirety is simply held to be the mere reflection of the base. If law and, say, politics are derived from the

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[8] Of course, an anti-empiricist stance does not necessitate a hostility to empirical research.
[9] Such a formulation, as Hunt again points out, also presents 'the law' as if it were a coherent and fully integrated phenomena. This is not the case (Hunt 1985: 28).

same source and perform the same tasks, then any analysis of their relationships and linkages is bound to be simplistic and impoverished. Secondly, the metaphor of 'reflection' does not tell us *why* law is needed to express the relations of production. It fails to consider exactly what is it about law that makes it so well suited to buttressing the relations that make up the fundaments of society.

Late in his life, Engels admitted that "Marx and I are ourselves partly to blame for the fact that the younger people sometimes lay more stress on the economic side than is due to it. We had to emphasise the main principle vis-à-vis our adversaries, who denied it" (Engels 1968c: 683). Having realised his mistake, in much of his later correspondence he attempted to distance himself from his rigidly economist line. For instance in 1894 he wrote, "it is not that the economic situation is *cause, solely active*, while everything else is only passive effect" (Engels 1968d: 694). For Cain and Hunt, this suggests that "Marx' and Engels' comments on and discussions of law are not capable of an economic determinist reading, despite the fact that their summary statements of their position may give credence to such an interpretation" (1979: xiii). However, despite his later retreat, Engels' economic determinism, or crude materialism, profoundly influenced many Marxists, including legal theorists.

Engels also fails to resolve the problem of base and superstructure. For him, there is a clear and unproblematic distinction between the two. This is best evidenced by the withering away thesis. Engels argues that once the capitalist relations of production are replaced by socialist relations of production, the entire superstructure of the former society will be superfluous, and will wither away, presumably to be replaced by a new superstructure better suited to the needs of the new society.[10] This assumes a simple division between base and superstructure, with the state and law belonging to the latter, and vulnerable to disintegration once the relations of production that they are based on are themselves swept away. Yet the position regarding law is not quite so straightforward, for it is not possible with any confidence to claim that law is exclusively a superstructural phenomenon. Plamenatz argues that law is often part of the base itself, and that relations of production cannot be described other than in terms of legal rights and duties concerning ownership and exchange (1963: 281-83). Similarly, Collins points out that "it seems impossible to conceive of the relations of production without resort to the basic legal

[10] Note again Engels' functionalist bent.

framework of contracts and the protection of private ownership by the law of tort and criminal law" (1982: 33). Collins adds that the material base must also include some kind of normative element, which may be made up of legal rules, or indeed Engels' 'administration', in order to be stable and reliable enough for an entire social formation to arise upon it (ibid: 81). Given this, a more sophisticated take on the relationship between base and superstructure than Engels provides is required.[11]

In addition, Engels' notion of 'administration', presumably an attempt to avoid charges of utopianism, is problematic and raises a number of issues. Firstly, the differences between administration and law are not clear, and Engels is silent on this matter. The only way the withering away thesis can be sustained is if one adopts a definition of law that seems to be unduly narrow. Yet if one utilises a wider definition, it is perfectly possible that Engels' 'administration' could be considered to be law. Thus Engels, in spite of himself, suggests the potential durability and persistence of law, albeit under another name (Collins 1982: 106). Secondly, Engels' concept of administration highlights the difficulty of envisaging a social system that can function without law or its equivalent, whatever name is given to it. Thirdly, any attempt to locate the *differentia specifica* of law in order to support the withering away thesis may lead one to miss a more crucial issue. That issue is how 'law', or, for that matter 'administration', serves to maintain the existing social order.

Vladimir Ilyich Lenin[12]

Context

Lenin's theoretical work was conducted in a very different situation to that of Engels. By the time of the latter's *Anti Duhring*, the hopes of revolutionary action stoked by 1848 had been all but extinguished in Western Europe. Thus, Engels' concern was to provide a systematic and comprehensive account of the Marxist worldview, rather than *directly* contribute to revolutionary struggles. Lenin, however, was a revolutionary first and a theoretician second. His theoretical work was always given its shape by the immediate political situation, and as such it underwent a number of revisions and metamorphoses over time. As Geoghegan suggests, the "theoretical diversity of his voluminous writings"

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[11] These arguments were introduced more fully in Chapter 1.
[12] 'Lenin' was a pseudonym, adopted by Vladimir Ilyich Ulyanov in 1901 duirng clandestine party work.

and the "complexities of his political life", make it "very difficult, even impossible, to portray an essential Lenin; however, ironically, the very boldness of some of his statements and acts encourage people to do precisely this" (1994:105).

The political context of Lenin's work changed with the ebbs and flows of the revolutionary movement of which he was a part. Lenin himself spoke of the importance of considering his work with reference to its socio-political context. He was specifically referring to his 1902 pamphlet *What is to be Done?*. In it, he called for a Party of tightly disciplined professional revolutionaries dedicated to steering the working class away from spontaneous trade unionism and towards 'true' socialist consciousness. Such consciousness could not be formed without the aid of this revolutionary vanguard.[13] But as the particular socio-political circumstances that gave rise to *What is to be Done?* began to change, Lenin began to modify his views. Significantly, his pessimism as to the revolutionary potential of the unaided masses was rendered largely out of date by 1905, with a wave of strikes and unrest in Russia and a tenfold increase in Party membership. As a result "the distinction between an elitist party and a mass organisation became less rigid" (McLellan 1979: 89). Lenin acknowledged this and began to advocate 'democratic centralism', with 'freedom of discussion' and 'unity of action' at its core. Then, in 1917, another tenfold increase in membership led to an even more open and liberal Party, as its highly centralised structures collapsed. But the civil war of 1918-21 "necessitated a clampdown on previous liberties". After the war, the proletariat had been devastated and the newly renamed Communist Party commanded little support. The 10th Party Congress in March 1921, just weeks after the brutal repression of the Kronstadt rising, marked the end of free expression and proportional representation within the Party. Its role as 'vanguard', in line with Lenin's' earlier views, was reaffirmed. Shortly afterwards Stalin became Party General Secretary. He canonised, for obvious reasons, *What is to be Done?* (McLellan 1979: 88-90).

These socio-political changes undoubtedly influenced Lenin and led to distinct changes in his outlook over time; as a revolutionary he was bound to be aware of and responsive to the fluid nature of social reality. Yet his overall project was not fundamentally different to

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[13] *What is to be Done?* was the last publication to have the assent of all orthodox Marxists. Its proposals were adopted by the majority (the 'Bolsheviks') at the 2nd congress of the Russian Social Democratic Labour Party in 1903, against the broader conception of the party suggested by Martov (and supported by the minority, or the 'Mensheviks').

that of Engels. As suggested above, the early unity of Marxism had been largely due to Engels' systematisation of historical materialism. The central aim of Lenin's theoretical programme was to "reassert" the orthodoxy of that early period against the growing variety and "disarray" of the then current movement (McLellan 1979: 86). Lenin attempted to do this whilst always keeping one eye on the practical political consequences of the position arrived at.

This partly explains the central difference between the theories of Engels and Lenin. Engels, concerned primarily to provide a systematic and comprehensive Marxism, promulgated a crude but straightforward version of the base and superstructure metaphor. Lenin, on the other hand, being increasingly engaged in the realities of political revolution, saw the state and, by extension, law as a tool of the ruling classes.[14] This has become known as the 'class instrumentalist' theory.

Theory

The 'class instrumentalist' view of law largely rests upon the argument laid out in *The Communist Manifesto.* Two particular features of this work are integral to Lenin's conception of the state. The first is the idea that all societies, up to and including the capitalist one, have been divided into antagonistic classes. This is made abundantly clear in the opening line of the first chapter of the *Manifesto*: "The history of all hitherto existing society is the history of class struggles" (Marx and Engels 1968: 35). In capitalism, there are, according to Marx and Engels, increasingly just two classes. The owners of the means of production's interests stand diametrically opposed to those of the wage labourers. Thus, this is a conflict view of society. The second central idea from the *Manifesto* that Lenin draws on is Marx and Engels' famous declaration that "the bourgeoisie has at last [...] conquered for itself, in the modern representative state, exclusive political sway. The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie" (Marx and Engels 1968: 37).

Lenin, following both the *Manifesto* and Engels' individual work, focussed on the state, but his ideas have been extended and applied to the legal sphere. He offers a straightforward and provocative definition of the state in the style of the *Manifesto.* In *State and*

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[14] As Chapter 1 outlined, such a view was also that of the later Marx.

Revolution,[15] Lenin declares that the state is "an instrument for the exploitation of the oppressed class" (Lenin 1969: 13). On this view, the state is the institution through which the dominant class "imposes and defends its power and privileges against the class or classes which it dominates and exploits" (Bottomore 1983: 467). The legal system can be regarded as an integral part of the state apparatus, which shares the state's functions. Thus, extending Lenin's theory of the state, laws are not the mere 'reflections' of the mode of production, but instead are "direct expressions of the will of the dominant class" (Collins 1982: 27). Laws are specifically created in order to further the interests of the ruling class, and help maintain their place atop the social hierarchy. "The state and the legal system are within the exclusive control of the dominant class, and [...] they deliberately use the law to pursue their own interests at the expense of the subordinate classes" (ibid: 29).

Lenin also developed a theory of ideology. As McKenzie outlines, in *What is to be Done?* Lenin broke with the idea of ideology as 'false consciousness' (1994: 16). Marx and Engels had tended to favour a view of ideology as the opposite of truth, forming a veil over the contradictions of capitalist society. Lenin moved away from these ideas of truth and falsity. For him, "ideas were not deficient for their being ideological but solely for the class interest that they might serve" (McLellan 1995: 22). Thus ideologies should be judged on the basis of their use-value in the revolutionary struggle. Lenin was also the first to explicitly establish a relationship between different classes and different ideologies. He argued that there was no middle way between bourgeois and socialist ideology, as these were competing world-views that represented the two remaining classes in society.[16] Therefore, an ideology that is useful to the working class will be dangerous to the bourgeoisie, and vice versa. However, as was alluded to above, according to Lenin the working class was unable to successfully develop socialist ideology unaided. The ascendancy of the bourgeois world-view made it appear natural, even to those workers whose interests it did not represent. Socialist ideology therefore had to be developed outside of the working class and be imported into it by the party intelligentsia (McLellan 1995: 62-63).[17]

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[15] *State and Revolution* was written in 1917, barely a month before the October revolution.
[16] "The *only* question," writes Lenin, "is *this*: The bourgeois ideology or the Socialist ideology. There is nothing in between (for humanity has not worked out any 'third' ideology and, in general, in a society torn by class contradictions, there can never be an ideology that is outside or above classes). Hence, *any* belittling of the Socialist ideology, *any withdrawing* form it, means by the same token the strengthening of the bourgeois ideology (1963: 71 [italics in original]).
[17] Marxist theories of ideology, including Lenin's, will be considered in more detail in Chapter 5.

In addition to his class instrumentalist view of law and ideology, Lenin also defended Engels' withering away thesis. In *State and Revolution*, he argues that once the 'dictatorship of the proletariat' phase has ended following the crushing of all resistance to the revolutionary movement, the state, including law, will indeed disappear (1969: 16-22, Ch5). Lenin, like Engels, thus maintains the line taken in the Preface and sees law, along with all other social institutions in society, as superstructural. Therefore he too is able to confidently assert that once new productive relations have succeeded the existing relations of bourgeois society, the entire superstructure of that bourgeois society will evaporate. Yet, in a further echo of Engels, Lenin adds a significant qualification. As was noted above, Engels recognised the continuing need to administrate the new planned economy and the distribution of goods in communist society. Similarly, Lenin acknowledges that even communist society will be bound together by "elementary rules of social intercourse" (1969: 81). Evidently, as Lenin has claimed that law will wither away, he does not consider these 'elementary rules' to be law, but he does not elaborate any further on what they may be. Presumably, Lenin felt that as these rules will not promote the interests of a particular class, and as they will not require institutional systems for their enforcement, then they cannot be 'law'. So, for Lenin, 'law' is only that which helps to ensure social order for the benefit of a dominant class.

Critique

The class instrumentalist view of law has significant advantages over the crude materialist approach associated with Engels. Rather than seeing law as the inevitable reflection of fundamental processes, it offers an explanation of the role and necessity of law. Law is seen to be a crucial element in the ruling class' maintenance of their pre-eminent position in society, and a mechanism for the diffusion of their worldview or ideology. This also suggests how it can be related to the other institutions of the superstructure, for the superstructure is seen to be an active creation of the ruling class; a set of institutions and practices deliberately designed to support ruling class dominance. Thus legal and political institutions are active creations designed to fulfil the same goal; the preservation of bourgeois domination.

More crucially, at first sight the class instrumentalist theory seems to provide what was missing in the crude materialist account of law, namely a plausible solution to the problem of determination. Instead of relying on an ill-defined notion of 'reflection', class instrumentalism demonstrates how the "origins of legal and political institutions are located in the pursuit of self interest by a dominant social class" (Collins 1982: 28). So the dominant class themselves are seen to provide the link between the base and the superstructure; "In short, the economic base determines the legal superstructure, not instantaneously and mechanically, but through a process of class rule in which the participants further their interests through the legal system" (ibid. 29). It seems that not only is there scope for human action in the class instrumentalist theory, but that the conscious, deliberate actions of the ruling class are at the very heart of its analysis.

However, Lenin's brand of class instrumentalism remains unsatisfactory. Collins suggests there is an "ambiguity" in the theory. If class instrumentalism claims that all laws serve the best interests of the ruling class, then it requires that all the conscious behaviour of that class somehow coincides with their best material interests. This approach, then, sees Marxism descend into a crude conspiratorial theory, where "motivations inevitably coincide with a person's objective class position" (Collins 1982: 31-2). This is a difficult argument to sustain. On the face of it, it does not appear that classes of any kind have such a definite idea of where their best interests lie.

In addition, this crude class instrumentalism has to confront the empirical reality that *not* all law does in fact directly benefit the ruling class. But as soon as one accepts this, the class instrumentalist theory is presented with a real difficulty. How can it account for laws that do not further the ruling class' cause?

One solution would be to argue that laws that do not benefit the ruling class have been passed in error. However, this would suggest that the ruling class' hold on power is, at best, precarious, something that does not appear to be backed up by the evidence of the last two centuries of capitalist rule. On the other hand, this could also suggest that law is not quite such an intrinsic part of the ruling class' power base as one may intuitively feel; if laws are passed in error but the capitalist system continues regardless, perhaps law plays only a minor supporting role. However, if the ruling class are unable to ascertain precisely where their best interests lie, then they would presumably commit dangerous errors in

whichever superstructural sphere *was* most crucial to them, so to raise this objection is to miss the force of the argument against easily identifiable objective class interests. A second solution would be to hold that laws that do not benefit the ruling class have been passed by them as some kind of ruse to mystify the real class nature of the legal system. By offering strategic concessions to subordinate classes the ruling class may be able to protect its lofty position in society. But again, it does not appear plausible that any class has such a clear picture of what is necessary in order to maintain its position, nor does the image of a unified ruling class pursuing its interests and clandestinely making concessions to a suitably ignorant, compliant and malleable working class seem a particularly realistic view of the messy reality of law.

In fact, the class instrumentalist position is premised on an empiricist epistemology similar to the one inherent in Engels' work. Lenin assumes that a class can ascertain where its best interests lie from a simple reading of the relations of production. But we have already seen that a coherent and plausible Marxism must deny that knowledge merely mirrors or reflects a prior empirical reality. However, once such an empiricist epistemology is rejected, another way to explain how a social group sees itself as such and formulates ideas about where its best interests lie must be found.

These difficulties are compounded by Lenin's theory of ideology. It requires that class interests can be objectively 'read off' from the relations of production. Of course this too is problematic as it also relies on a crude empiricist epistemology. In addition, Lenin's rider that the working class themselves cannot perform this reading, and must rely on the intelligentsia to tell them what is in their best interests, has led many Marxists to reject the theory. It is not clear what gives intellectuals the capability to perceive so clearly the objective interests of all. Are they too not reliant on theory to actively organise and critically reorganise the data provided by surface appearances? If so, like the average labourer, they cannot escape subjectivity and the potential to misread. In addition, the dangers of granting 'intellectuals' too much power is obvious; it is hardly surprising that Stalin saw *What is to be Done?* as a key work.

Moreover, Lenin fails to provide an adequate link between the relations of production and the development of ideology. In fact, his view of ideology is implicitly idealist, for it sees ideology as something developed in the minds of intellectuals and transposed onto the

working class. Only intellectuals can grasp the consequences of the relations of production for the working class, and develop appropriate responses and strategies. Luxemburg, and more penetratingly, Plekhanov, were the most notable critics of this idea; Plekhanov pointed to its implicit idealism (Larrian 1983: 65-69), an idealism unwittingly captured by Utechin: "Theories develop in the heads of intellectuals and are not born spontaneously among the masses" (1963: 17).[18] There is no sense that ideas and consciousness are somehow the product of, or *active* responses to, actual lived situations; surely this is the thrust of the Preface and at the heart of Marx's anti-idealism?[19]

Lenin also fails to provide a satisfactory solution to the problem of base and superstructure. His defence of Engels' withering away thesis leaves him open to exactly the same criticisms as were outlined above. Most crucially, the idea that superstructural elements can be simply split from the base, and the related view that such elements have no influence on that base, does not seem plausible. This is particularly so in the case of law, where, for instance, contract appears to go to the very heart of the relations of production in a capitalist society.

The Influence of Engels and Lenin

Engels and Lenin have had a monumental and lasting impact on the entire Marxist tradition. Their treatments of historical materialism and the state have formed the backbone of subsequent Marxist analyses of law. Interestingly, those who utilise or are influenced by Engels tend to focus on the *form* of law, while those for whom Lenin's work resonates are more inclined to concentrate on its *content* or *substance*.[20]

Engels' crude materialism, and chiefly the notion of 'reflection', lends itself to an analysis of the form of law as it suggests how fundamental structures in society are represented at more peripheral levels. It suggests ways of theorising the broad outline and shape of the

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[18] Utechin is summarising the ideas of *What is to be Done?*

[19] Nevertheless, by broadly relating ideology to class position Lenin provides a signpost that will prove useful in Chapter 5.

[20] Interestingly, Engels' and Lenin's distinct approaches are occasionally conflated by critics. For instance, Thompson writes of a strand of Marxism that sees law as "by definition a part of the superstructure, adapting itself to the necessities of an infrastructure of productive forces and productive relations. As such, it is clearly an instrument of the *de facto* ruling class" (1975: 259). Thompson thus combines Engels' notion of reflection, or 'adaptation', and Lenin's notion of law as an 'instrument' of the ruling class.

legal system. This was taken on and developed by Pashukanis, as will be demonstrated in the next chapter. Meanwhile, the massive influence of Lenin's *State and Revolution* helped to ensure that the "prevailing trend from the 1930s to the 1960s displayed an almost exclusive emphasis on the repressive or coercive character of law, conceived as the direct embodiment of the interest of the ruling class. In this conception law itself is unproblematic: the analysis of legal developments or new legislation has the task merely of exposing the class interests contained in them" (Cain and Hunt 1979: x-xi). Thus, this "'law as coercion' tradition" (ibid: xi) directs attention to law's content or substance. Furthermore, Lenin's theory of ideology, which began the move away from the notion of 'false consciousness', is also massively influential. Collins adopts and significantly refines this thesis, in the process formulating the strongest Marxist theory of law yet produced.[21]

In addition, Engels' and Lenin's 'withering away' thesis has proven to be an enduring influence on Marxism as a whole. Many Marxist legal theorists have adopted the theory; the most sophisticated variant is provided by Pashukanis. However, the withering away thesis has tended to lead to a rather caricatured view of Marxism as unduly hostile toward law and unjustifiably utopian, despite the qualifications that both Engels and Lenin were careful to make.

Ultimately, however, as this chapter has demonstrated, Engels' and Lenin's works do not provide the theoretical tools for adequate solutions to the problem of determination and the problem of base and superstructure. The search for a coherent and plausible Marxist theory of law must continue.

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[21] See Chapter 5 below.

CHAPTER 3. RENNER AND PASHUKANIS

Law was clearly not a central focus of classical Marxist analysis. Marx, Engels and Lenin only dealt with law tangentially and it is not possible to construct a robust Marxist legal theory from what they did write on the subject. Of course, this is perfectly understandable; Marx identified the material circumstances of life, the relations of production, as the key to understanding society. Law is undoubtedly peripheral in such a schema. However, Karl Renner and Evgeny Pashukanis, two Marxists from very different traditions, did take law as the focus of their studies. Until the 1970s, theirs were the only Marxist works to have "attracted interest and respect among non- Marxist legal theorists" (Bottomore 1983: 275). Renner and Pashukanis are what one may term the classical Marxist legal theorists.

Karl Renner

Context

Karl Renner was part of the Austro-Marxist tradition. This "was not a political or workers organisation," but an "intellectual tendency" (McLellan 1979: 58), although its adherents did become prominent members of the rapidly growing Austrian Social Democratic Party (SPO). Austro-Marxism began to crystallise as an identifiable school of thought just after the turn of the 20th Century, flourished before the First World War, and died out in the inter-war years. Among its chief proponents were Victor Adler, the founder of the socialist movement in Austria, Max Adler, Otto Bauer, Rudolf Hilferding, Friedrich Adler and Renner himself (See Kolakowski 1978a: Chapter 12). Austro-Marxists reacted against the growing orthodoxy and dogmatism of contemporary Marxism, as "they did not regard Marxism as a closed, self-contained system" (ibid: 240). They also "virtually abandoned any notion of economic primacy" (Stone 1985: 42), although not always convincingly, as Renner's work shows.

In addition, the Austro-Marxists became very much associated with reformism. This attracted criticism from more orthodox Marxists who favoured the original Marxist notion of a tumultuous and decisive revolution. Yet as Kinsey outlines, the Austro-Marxists actually represented something of a third position, placing them somewhere in between reformists and revolutionaries. Portrayals of them as reformist is somewhat simplified and

caricatured and fails to take into account their socio-political situation. In Austria, the SPO were making rapid gains through the ballot box. Suffrage was granted after a general strike in 1907. At that year's elections the Party became the second strongest in the country, and in 1911, the strongest. Thus, it was felt that the decisive victory over capitalism had already been won. As such, "their problem was not how to gain political power, but how to use it" (Kinsey 1983: 13).

The Austro-Marxists thus saw themselves as being involved in the actual construction of socialism. Renner himself, for instance, did not see his work as being academic, but as a political statement and active intervention in this process of construction (Kinsey 1983: 12). Measures that orthodox Marxists may have considered to be reformist, such as the progressive extension of the socialisation of the means of production and the democratic organisation of the labour process, were seen as essential if the revolution was not to be a merely spontaneous gesture, doomed to failure. Previous Marxists had paid scant attention to the actual practical problems that those involved in the construction of the new society would face. This was not an option for the Austro-Marxists; they had to show what they were *for* and how they would attain it, rather than what they were simply *against*.

In such a context, the question of law was a pertinent one, of immediate social and political relevance. As an existing bourgeois institution, did it have a role in the new society? If yes, what precisely was this role? Alternatively, would law wither away as Engels and Lenin had predicted? It is these questions that guide Renner's foray into legal theory. His work provides a splendid example of the Austro-Marxist concern with immediate, practical problems that other Marxist writers had not faced.[1]

Theory

Three basic Austro-Marxist concepts were developed in response to this concrete socio-political situation. Renner implicitly utilises these linked concepts to underpin his analysis

[1] After the First World War the socialist movement broke decisively in two. Renner allied himself with the explicitly reformist wing which stressed, to an even greater extent than the Austro-Marxist movement, that the working class should value incremental advances rather than aim for violent revolution. He held the posts of Chancellor, Minister of Home Affairs and Minister of Foreign Affairs in the First Austrian Republic. After surviving the counter-revolution of 1934 and the Second World War, he became the first Chancellor of the Second Republic in 1945. Later that year he was elevated to the position of President, a position that he held until his death in 1950 (See Bottomore 1983: 36-38, 417, and Kolakowski 1978a: 257).

of law (Kinsey 1983: 16). '*Political power*' is the power of the 'common will' of the state. This is power exercised in the name of all citizens. The sovereign thus applies not individual but social power. '*Socialised man*' is the supra-individual entity that exercises this power. Individual power holders, including lawmakers, are merely the agents or trustees of political power. What appears as the product of their individual wills is actually the will of this entity. It is the entity, not the individuals, that holds the power. '*Social evolution*' is the idea that society becomes progressively more conscious of the needs and requirements of social organisation. In bourgeois society, the illusion that labour is not a social duty but a private affair for which no regulation is required persists. As consciousness increases, this myth is debunked. Law develops in line with this. Under socialism, which is fully conscious, law reaches its zenith (Kinsey 1983: 17-20).[2]

For Renner, it had become evident that capitalist private property was functionally inadequate as a means of social organisation. The ever-increasing productive potential of society had made centralisation, public law and the state regulation of the economy rational necessities. A fully conscious socialism, with highly developed material conditions of production, would allow for extensive co-operation, and the common will would be personified in the state and its role as legislator.

Renner's classic work is *The Institutions of Private Law and Their Social Functions*, which was first published in 1904. It is anchored in these themes and concepts of Austro-Marxism, but its explicit focus is far narrower. Renner asks "how can one account for the functional transformation of a norm which remains stable" (Kahn-Freund 1949 2); the most prominent example, and the focus of Renner's analysis, is the property norm.

On the basis of his study, Renner offers four theses on law that constitute his underlying position:

1. Fundamental changes in society are possible without accompanying changes in the legal system;
2. Law does not cause economic development;
3. Economic change does not immediately and automatically bring about changes in the law;

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[2] Note here the similarities with Marx's early views on law (see Chapter 1 above).

4. Development by leaps and bounds is unknown in the social substratum, which only knows evolution, not revolution. Revolution only occurs at the level of political institutions (Renner 1949: 252-3).

This immediately suggests a number of things. Firstly, if fundamental changes in society are possible without accompanying changes in the legal system then law is presumably not fundamental to society; in other words, it is superstructural. Secondly, if law does not cause economic development then this superstructural law has, at best, only limited effects on the base. Thirdly, if economic change does not immediately and automatically bring about changes in the law then one may assume that law has a degree of autonomy from the base. However, that autonomy is minimal, as point 4 would seem to suggest that the gentle and steady evolution of the base occasionally forces the superstructural elements to realign themselves through a revolution. In sum, Renner's position, at first glance, would appear to be that of an orthodox Marxist.

The revolution Renner alludes to will take the form, inter alia, of a legal revolution. There will occur a "cognitive reappropriation" and "normative reordering" of the social relations of production; this will be a "revolution of reform". The new socialist legality will fully order and regulate the key economic functions of production, distribution and consumption, functions presently fulfilled by the owner of private property. The all-powerful state, in its role as legislator, will be the "fully conscious rational embodiment" of the common will (Kinsey 1983: 21).

According to Renner, such societal changes occur in line with the level of development in the economic base. He argues that the greater the level of development in the base, then the greater the possibility of fully conscious or rational regulation of social relations in the form of law. In effect, the legal forms necessary for socialism already exist, but they are nascent or embryonic and require further development (Renner 1949: 298). The problem of transition to socialism is therefore one of articulating the 'social power' through the state and dispossessing the capitalist as 'trustee' of that power (Kinsey 1983: 27). The abolition of private property is the most crucial step in the transition as it signals the end of the private, irrational exercise of social power. Renner saw the Joint Stock Company as the

most crucial movement in this direction.[3] Joint Stock Companies bring together 'particles' of the total social capital which was previously aggregated by the market. As such they demonstrate the increasing tendency to establish production as explicitly social, for the 'shareholder capitalists' who operate in Joint Stock Companies are too small to operate in isolation from one another. Joint Stock Companies also enable the capitalist to leave the minutiae of the day to day running of the company to a salaried manager. As a result, the capitalist is revealed as a parasite. Rationally organised production is thus identified with management and 'technical experts'. This contrasts starkly with capitalism, where those best qualified to run things are excluded by private property (Renner 1949: 281-7, 294-5).

This notion of progressive social evolution, with new forms of social ordering growing out of rather than replacing the old forms, directly influences Renner's most renowned contribution to jurisprudence. This is the idea that legal norms themselves can remain stable while their social function changes. As Kamenka puts it, Renner looks at "the remarkable persistence of certain basic legal norms and institutions over time through fundamental social and economic change" (1983: 60). In *The Institutions*, Renner argues that legal norms are neutral and relatively stable, but that they "perform different social functions according to the mode of production in which they were serving a function" (Bottomore 1983: 275). He analyses the functional transformation of the property norm to illustrate this thesis. He claims that while the property norm that existed in societies of simple commodity production still exists in capitalism, its function has dramatically changed. The norm formerly buttressed the system whereby the peasant or artisan owned the means of production; in such a system his possessions, such as his tools, safeguarded his livelihood. In capitalism, the property norm, in itself largely unchanged, supports an economic system where the worker does not own the means of production, and the product that he produces is owned by another (Renner 1949: Ch 2). Thus in the legal sphere, changes do not occur at the level of legal norms, which are relatively fast and unwavering. Instead, the connections between the norms are rearranged, and subsidiary norms are brought to the fore (Kamenka 1983: 64).

Renner is able to deploy this theory because, in his view, legal institutions are neutral and detached; "the legal norm is indifferent to its social function, the economic effect

[3] Other important factors include the extension of credit and loan facilities, and the growth of co-operatives. For Renner, all are evidence of the increasing rationalisation of social production (Kinsey 1983: 28).

extraneous to the definition of a legal concept" (Kahn-Freund 1949: 2). This highly formal, positivist view of law places Renner at a considerable distance from the Marxists we have already encountered. For them, legal institutions are never neutral, for they always inherently favour the ruling class. For Engels this is because law directly reflects the mode of production that privileges a particular class, while for Lenin, law is the active creation of the ruling class and so is the very antithesis of neutrality. Renner instead sees the imperative form of law as neither inherently capitalist nor socialist, but as an empty form only given content and meaning in application. Law is an instrument, as Lenin held, but it is an instrument at the disposal of society as legislator, rather than just one particular historical class bloc (Kinsey 1983: 21-2).

Renner suggests that law's most general role is to "hold [...] together and to stabilise" the economic base. Indeed, the "existence of society as it is, depends on and presupposes a determined, historically conditioned, legal order" (Renner 1949: 252). This buttresses the argument that law is a fundamental component of *any* society, and there is nothing to suggest that it will 'wither away'. As Kolakowski indicates, Renner regarded law "as a permanent instrument for the regulation of relations between individuals" (1978b:51).

Yet by holding that society is in some sense 'dependent' upon its legal order, Renner begins to move away from his basic position, encapsulated in his four theses. He argues that not only is law imperishable, but it also may have important effects upon the base: "Law does not create the development of capitalist economics although it may be a condition of it", he writes (Renner 1949: 253). In fact, Renner goes further, hinting that "legal concepts are part of the description of the mode of production" (Bottomore 1983: 275). As Kamenka puts it, for Renner "the norms were part of the fundamental organisation and description of economic and social processes, not something to be derived from them" (1983: 16). This clouds the distinction between base and superstructure, for it suggests that law and legal norms are not exclusively a phenomenon of the superstructure. This appears to be inconsistent with his basic position.

Despite this, the bulk of Renner's work does appear to be broadly consistent with more orthodox interpretations of the base and superstructure metaphor and law's place within it. For Kahn-Freund, Renner's work ultimately suggests that legislation should still not be thought of as a prime mover in social change. It remains, "at best, a response of the law

to a change which has already taken place in the womb of society" (Kahn-Freund 1949: 4). Such a position is in accordance with Renner's first thesis: "Fundamental changes in society are possible without accompanying changes in the legal system" (Renner 1949: 252).

Critique

Renner's *The Institutions* remains "a key Marxist text" on law (Kinsey 1983: 36). Renner was the first Marxist to take law as his object of study, and the first of a minority who seriously theorise about the potential role of law in socialism. This alone makes his work, according to Kinsey, "of singular importance and [...] an advance over that of Pashukanis" (1983: 13). Renner also usefully acknowledges the durability of some legal norms across very different modes of production. This theme of continuity and evolution, redolent of Austro-Marxism in general, is manifest in Renner's realisation that any socialist law must necessarily be a development of existing bourgeois law.[4]

Despite this, Renner fails to provide convincing solutions to the problems of determination and base and superstructure. This is because notwithstanding his hostility to economic reductionism and crude takes on the base and superstructure metaphor, he himself is unable to provide superior formulations, and ultimately his attempts to escape them are unconvincing. Unfortunately, as Kinsey puts it, Renner "lost his way" (1983: 38).

Renner fails to provide an adequate solution to the problem of determination. Furthermore, he issues a number of statements that, on the face of it, appear to be flatly contradictory. As shown above, Renner's position, based upon his four theses, seems to be that law, despite a degree of autonomy, is ultimately dependent upon the base. Renner provides for law's autonomy in his third thesis: "Economic change does not immediately and automatically bring about changes in the law" (1949: 252). This allows scope for a

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[4] For a more recent contribution to the enduring but often ignored issue of socialist law, see Sypnowich (1990). She argues that "law is essential to socialism, not in order to abolish social problems for all time but to permit their resolution by a socialist citizenry who subject their world to constant review with the aim of ever-possible improvement" (ibid: 170-1). However, Sypnowich wrongly asserts that the 'withering away thesis' is a "central tenet of Marxism" (ibid: 169). This leads to a certain reluctance to describe herself as 'Marxist', favouring the term 'socialist' (see, for example, her Preface, p. vii-viii). Yet if the argument in Chapter 1 on the multifarious nature of Marxism is accepted, it would be more accurate to argue that the withering away thesis is a central tenet of *some*, but not *all* Marxisms.

'time lag' between economic cause and legal effect, and perhaps also for a degree of institutional separation from the base that allows doctrines and the like to enjoy their own internal history. Yet the only way this can be rendered consistent with his other theses is to accept that, in the last resort, law is determined by the economy. This is a broadly orthodox position, precisely of the type that one may not expect from an Austro-Marxist.

Yet according to Kamenka, Renner rejected "in its crude form, the conception of an active, independent economic base and of a passive, dependent legal superstructure (1983: 63). This argument is made plausible by some other statements by Renner. For instance, he bluntly claims that "the relation [between the base and superstructure] is not merely one of cause and effect" (Renner 1949: 56). In addition, he argues that "laws are made with the intention of producing economic results, and as a rule they achieve this effect [...] they play a part which I will call their economic function" (ibid: 56-57). This appears to run directly counter to his second thesis, "law does not cause economic development (ibid: 252).

Thus, despite his best attempts, it seems Renner did not ultimately escape economic reductionism. Indeed Sumner claims that Renner carried out an "economist reduction by limiting the origin of law to economic relations. [...He] assumed an economy- law dialectic which effectively excludes all else". In attempting to escape this reductionism, suggests Sumner, Renner "weakly points to uneven relations between the law and the economy and he refuses to assert a one-to-one movement or correspondence" between the two. Renner's view that legal institutions remain constant over time but serve different economic functions "tends to negate a more sympathetic reading because Renner seemed to think that he had avoided economism by allowing for a time gap between economic origin and economic function" (Sumner 1979: 248).

If Sumner is correct, then it seems that all Renner provides is a slightly more sophisticated variant of the crude economic determination thesis. At no point does Renner suggest that it is something other than the economy, such as politics, that determines law, nor does he sufficiently develop his idea that law can have its own effects upon the economy. There *is* potential space for human intervention in Renner's theory; the economy may determine the function of the norm but the actual content of individual pieces of legislation is, presumably, still a human creation. However, this is not something that Renner devotes

any time to. Presumably any conscious action would still need to be finely calibrated by the economy otherwise humans would be able to undermine the norms' function. Furthermore, Renner does not theorise the role of active human intervention in the process of changing the function of norms; this is something that seems to occur automatically as part of a superstructural realignment to changed economic conditions. Despite himself, Renner proffers an "essentially Bukharinist, mechanical materialism" (Sumner 1979: 256), susceptible to the same kinds of criticism that have already been levelled at such approaches.[5]

Similarly, although Renner's attempted rejection of crude economist Marxism promises to yield a more plausible response to the problem of base and superstructure than that provided by Engels and Lenin, ultimately he leaves more questions unanswered. Renner's suggestion that law actually forms part of the base of society provided a timely acknowledgement of the complexity of real-life social formations which, as Plamenatz (1963: 281-3) and others point out, cannot be simply divided into basic and superstructural elements. However, Renner fails to reconcile this acknowledgement with his triple insistence that fundamental changes in society are possible without accompanying changes in the legal system, that law does not cause economic development, and that economic change does not immediately and automatically bring about changes in the law. If law really is part of the base of society, then Renner must explain more carefully why law cannot cause economic development and why economic changes do not necessitate legal ones. In short, he does not render compatible his acknowledgement of law's place in the base with his maintenance that the economy is ultimately determining element in society.

It seems that Renner is caught between two extremes. On the one hand he adheres to the typically Austro-Marxist denial of the crude base and superstructure metaphor. Yet on the other, he conforms to a Marxism which holds that the relations of production are the fundamental and determining element in society and can be analytically separated from the determined superstructural elements. His theory usefully directs attention to the complex nature of social reality, but in his drive to avoid the crude orthodox base and superstructure metaphor he fails to reconcile this complexity with a clear picture of the position, causes and effects of law.

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[5] See Chapter 2 above.

There are a number of other criticisms that can be levelled at Renner's theory. Crucially, it is not what one might call a 'general theory' of law. Instead, Renner's focus is very narrow. He is concerned only with the continuity of legal concepts across different modes of production. Even then his analysis covers only the transition from 'simple commodity production' to factory based capitalism. Furthermore, as the title of his book suggests, Renner examines only the institutions of 'private law' such as property ownership and contracts; "public law, which includes the organisation of the state and of local government bodies is outside the purview of his analysis" (Kahn-Freund 1949: 1). Indeed, Sumner criticises Renner for treating public law as an "afterthought" (1979: 248). Renner's theory seems to imply that private law is a reflection of the economy whilst public law is a reflection of politics and culture. Sumner argues that it is simply not possible to conceive of public law as a pure and uncomplicated result of the state's expansion during the 20th century (ibid: 253).

One must therefore be cautious when trying to apply Renner's results in a more general fashion. Renner himself acknowledges that he leaves many pertinent questions unanswered (Renner 1949: 299). For instance, due to his focus on the process of functional change, he completely ignores the question of how legal norms *emerge* in the first place. This is something of a lacuna in his theory. Renner also fails to specify the connection between legal form and content. His focus on general norms and their changing functions fails to illuminate individual pieces of legislation. A more finely grained theory must be able to incorporate the political and ideological factors that shape such legislation (Spitzer 1983: 100). In addition there is no consideration of whether and how norms themselves may change if the law changes its functions, or if norms are in fact "indestructible, eternal, changeless" (Renner 1949: 299).

There are also difficulties with his analysis of Joint Stock Companies and his view of them as the harbinger of social change. For Renner, their mix of private production without private property heralded the end of capitalism. But Joint Stock Companies merely release production from the control of private property in the market. The aim of their production is that of all capitalist production: the creation of a surplus. Indeed, Joint Stock Companies actually *aided* the expansion of capitalism. Combined with other measures such as the extension of credit, it allowed production to continue uninterrupted without the need to wait for surplus value to be realised in the market before the next cycle could

begin (Kinsey 1983: 31-3). Yet because Renner adopts the basic concepts of Austro-Marxism, he focuses on the relation between individual wills rather than the social relation between class forces. Hence he reduces the problem to one of the power of the individual capitalist, and seriously misreads the potential of the Joint Stock Company.[6]

Another more general difficulty with Renner's work is its idealist undertones. As Kinsey points out, there is a significant difference between Marx's and Renner's concepts of 'socialised man': "For Marx 'socialised man' refers to a potential condition which is to be actualised in socialism, whilst Renner is referring to an actual condition which is to be, and now can be realised cognitively". For Marx, this condition could only be achieved through actual class struggles and conflict. Yet for Renner, socialism seems to be a condition of pure knowledge, to be achieved through critical reflection (Kinsey 1983: 24). Socialism is thus a cognitive phenomenon; it is the move from partial understanding to science and fully conscious regulation. The implicit influence of Hegelian idealism is clear; Renner's is an idealist history.

Evgeny Pashukanis

Context

Engels, Lenin, and Renner have all provided ample demonstration of the notion that theory is always indissolubly tied up with the socio-political conditions of the theoriser. The Bolshevik jurist Evgeny Pashukanis provides an even starker illustration of this idea. His theoretical work, as well as his professional practice and teaching, are all intrinsically bound together with each other, and with the extraordinary socio-political context he found himself working in. Ultimately, his theory led to his death; rarely has Marxist jurisprudence had such profound consequences.

Pashukanis was the first Marxist to outline a systematic and comprehensive theory of law. As an orthodox Bolshevik, he was determined to speed the progress of the revolution that had been set in motion in spectacular fashion in 1917. Having seized power, the task for the Bolsheviks was to fulfil their historical mission and rapidly usher in a fully-blown

[6] Marx's own understanding of Joint Stock Companies is "at best ambiguous" (Neocleous 2004: 158). In Volume 1 of *Capital*, Marx saw Joint Stock Companies as aiding the process of capitalist centralisation (Marx 1954: 588). However, by Volume 3, he takes a line closer to that of Renner's.

communism. Pashukanis' work represented the legal aspect of this process. He had emerged as the pre-eminent jurist in Russia on the basis of his celebrated *General Theory of Law and Marxism*, and also because he lined up against Trotsky's 'left opposition' as early as 1925, just after Stalin completed his *de facto* rise to power (Head 2004: 269).[7]

Pashukanis was a staunch critic of Renner.[8] For Pashukanis, Renner's great flaw was that he failed to see the bourgeois form of law as problematic.[9] Pashukanis saw law as an inherently bourgeois form, and therefore of little use to the burgeoning socialist society. This theoretical difference can, in part, be explained by the very different socio-political conditions each was working in. Renner's SPO had taken power in Austria electorally, and so it seemed that socialism could be attained peacefully. If the ballot box had proved useful to the movement, then there was no reason to suppose that other bourgeois institutions, such as law, could not be put to the same use. In Russia, meanwhile, power had been taken through the revolution. In the heady days of the early 1920s, society seemed a blank canvas. The old institutions and privileges had to be forcibly swept away; new and uniquely socialist ones were required to take their place. As such, Pashukanis was hostile to law, the bourgeois institution *par excellence*. He thus worked up in a more systematic manner the withering away thesis of Engels and Lenin. As Sumner puts it, "Pashukanis' position was no more than a sound reflection of his social circumstances" (1979: 251). [10]

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[7] On Pashukanis' life prior to his rise to fame, see Head (2004: 274)

[8] Pashukanis refers to Renner as 'Karner'. This was a pseudonym Renner adopted when working as a public servant in the Austrian Parliament as a librarian (Kamenka 1983: 61). Early editions of *The Institutions...* carried the pseudonym.

[9] Pashukanis also criticised Kelsen, another whom he saw as bourgeois. Kelsen worked from an abstract notion of law; Pashukanis instead proceeds from "actually existing law", from the abstract to the concrete, in the style of Marx in the *Grundrisse* (Mieville 2006: 79).

[10] Pashukanis' work was also "in accordance with the interpretation of Marx advanced at the time by Lukacs and Korsch" (Kolakowski 1978: 51). Lukacs elevated Hegel "to an absolutely dominant position in the pre-history of Marx's thought" (Anderson 1976: 61). In his 1923 work *History and Class Consciousness* (Lukacs 1971), Lukacs outlines his basic thesis that the proletariat is the 'identical subject- object of history', a position derived from Hegel. This allowed Lukacs to overcome "the problem of the social relativity of knowledge" (Anderson 1976: 61). Having done so, he was able to assert that once 'alienation', the objectification of human activities, had been abolished through a socialist revolution, the working class would be free to attain true consciousness.

Before Pashukanis' emergence as the doyen of Soviet legal philosophy, his contemporaries had tended to follow a line close to that of Lenin. Stuchka, for instance, the founder of Soviet Marxist legal philosophy, was the leading voice in this somewhat crowded field during the early 1920s.[11] He saw law as an instrument of class struggle, which is necessary only in societies where class struggle exists in order to suppress the resistance of subordinate classes. Consequently, in a classless society, where class antagonisms have ceased to exist, there is no need for law (Kolakowski 1978b: 51). Pashukanis was a pupil of Stuchka, but his theory of law, as set out in the *General Theory*, led to him "eclipsing even his juridical mentor" (Beirne and Sharlet 1980: 4).

Warrington notes that the *General Theory*, which was first published in 1924, was only intended to be the first draft of a more definitive work that, in the event, never arrived (1983: 44). Head describes it as an "outline" written for "self-clarification" (2004: 275). Nevertheless, its impact was immense. Pashukanis provides "a theory of the historical specificity of the legal form" (Beirne and Sharlet 1980: 5). The work is concerned to identify the *differentia specifica* of law; Pashukanis outlines "what *distinguishes* law from other social manifestations, particularly from *other* bodies of rules or commands. The difference, according to Pashukanis, does not lie in the source or function of law, but in its *form*" (Kamenka 1983: 59).

Pashukanis argues that "the juridical element in human conduct enters where the isolation and opposition of interests begins" (Arthur 1978: 13). This isolation and opposition of interests enables the growth of capitalist society based upon commodity exchanges, where each agent in the exchange is an owner of private property and is formally equal to the other agent. Indeed, "commodity exchange presupposes an atomised economy" (Pashukanis 1978: 85). As the system of commodity exchange emerges, isolated man comes to be seen as an individual legal personality, a bearer of rights. Law involves the mutual recognition of those rights, no more, no less. The law regulates exchanges between autonomous individuals, crucially the exchange of property rights in the market.[12]

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[11] Other lesser-known Soviet Marxist legal theoreticians of the period include Adoratsky, Reisner, and Krylenko.

[12] Head notes that Pashukanis, in his chapter on 'Law and Morality' (1978: Ch 6), outlines "an underlying relationship between commodity exchange and capitalist morality based on the ethical

At the heart of Pashukanis' perspective, which came to be known as the 'commodity exchange' theory of law, is the assertion that law is the "product of fetishistic social relationships and therefore [...] is a historical manifestation of the age of commercial production" (Kolakowski 1978b: 50). As Mieville indicates, "the legal form is the necessary form taken by the relation between these formally equal owners of exchange values" (2006: 78). This position is considerably different to the position of Lenin. As we saw in the last chapter, he holds that law is a 'tool' of the ruling class, used to help maintain their dominant position in the social order. However, the influence of Engels on Pashukanis is plain. Pashukanis essentially conceptualises law as the reflection of commodity exchanges that occur in the economic base; law reflects the very relations that are the stuff of capitalism.

Nevertheless, Pashukanis does introduce an element of class conflict into his theory by outlining how law helps to ensure the dominance of the ruling class. The state, which stands above each individual wage labourer and capitalist, does not force the labourer to work for a particular employer, or endorse the relationship of exploitation. Instead the employment (and exploitative) relationship is established through a formally 'free' contract between two autonomous commodity owners, the labourer's commodity being his labour power. As Mieville puts it, "in its very neutrality, law maintains capitalist relations. Law is class law, and cannot but be so" (2006: 101). This supposed neutrality is personified by the state: "class authority must take the form of a public authority which guarantees contracts in general" (Arthur 1978: 17). Hence, the class nature of the state and of the law is concealed (Pashukanis 1978: Ch 5).

Pashukanis also contends that law has extended its role from that of regulating trade to regulating "other types of personal relationship" (Kolakowski 1978b: 50). He intends to demonstrate that his commodity exchange theory is applicable to all types of law, not just the law concerned with exchange. It was on this point that critics and more moderate members of the commodity exchange school dissented, with Stuchka leading the criticism. They felt that Pashukanis extended his theory beyond breaking point. However Pashukanis maintains that, for example, 'criminal law' does not start from the violation of a

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idea of the equal worth of human personalities" (2004: 282). This is an interesting precursor to the work of Taiwo (1996).

norm established by the state, but from the damage suffered by the injured party. Hence, in the criminal trial, "the public prosecutor demands, as befits a 'party', a 'high' price, that is to say a severe sentence. The offender pleads for leniency, for a 'discount', and the courts pass sentence 'in equity'. If one were to reject this form of transaction completely, one would deprive criminal proceedings of their 'juridical soul'" (Pashukanis 1978: 177).

The best-known facet of Pashukanis' work is his defence of the 'withering away' thesis. For Sugarman, Pashukanis' "overwhelming theoretical commitment" to this thesis marks it out as "the cornerstone of his jurisprudence" (1983a: 4). The withering away thesis dovetails neatly with Pashukanis' insistence that law is the codification of the relationship between commodity owners. If law is the institution that regulates the relations between commodity owners in the marketplace, then when such relations no longer exist, it follows logically that law too will disappear. As Pashukanis puts it, the "immortality of the legal form" is a fallacy, as law is the result of "particular historical conditions which had helped to bring it to full fruition". Therefore, 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).

Pashukanis also draws a distinction between legal regulation and what he dubs 'technical' regulation. He famously classifies train timetables as belonging to the latter category (Pashukanis 1978: 79). This is because train timetables lack the crucial element that makes legal regulation legal; the opposition of private interests. Train timetables cannot be legal, for, as Pashukanis puts it, "a basic prerequisite for legal regulation [...] is the conflict of private interests" (ibid: 81). Technical regulation, on the other hand, has a "singleness of purpose", and all concerned parties "are interested in the smooth running of the service" (Arthur 1978: 15). Another example of non-legal regulation is suggested by Kamenka. He talks of the rules and regulations of the army. They cannot be legal under Pashukanis' scheme because they are based upon relations of domination and submission, and rely upon obedience to rules, rather than the opposition of private interests (1983: 56).

Pashukanis' withering away thesis can be said to be a jurisprudential expression of Lukacs' core ideas. Pashukanis sees law as buttressing the "fetishistic character of personal relations in a society dominated by commodity exchange". Given this, it follows

that once "social life returns to its unmediated form", human beings will no longer conduct their relationships through abstract legal rules (Kolakowski 1978: 51). Hence the attainment of true consciousness (Lukacs) goes hand in hand with the end of law (Pashukanis).[13]

Critique

A number of criticisms have been levelled at Pashukanis' theory. For instance, Warrington suggests, inter alia, that Pashukanis 'over-extends' the commodity exchange theory of law, applying it to areas that it cannot explain such as criminal law (1983: 62). Von Arx argues that the commodity form theory, although it may have had explanatory power in Pashukanis' day, no longer provides a convincing picture of the legal form, given developments over the 20th century such as transformation of the legal subject in private law (1997: 203, quoted in Mieville 2006: 102). As Hunt points out, it is "simply wrong to contend that the legal form [today] restricts recognition to atomised economic agents" (1992: 116). Gregory feels that the incredible growth of administrative or public law undermines Pashukanis' theory (1979: 141); in seeing law as exclusively based on commodity exchange, Pashukanis' theory is blind to the growth of administrative law, or at least it cannot grant it the status of law, something which seems counter-intuitive.

In addition, Pashukanis' withering away thesis is problematic. Just as it did for Engels and Lenin, the entire thesis rests upon a narrow definition of law. Of course, Pashukanis is perfectly entitled to define law in whichever way he pleases. But in defining it solely as the codification of commodity exchanges in the base, it becomes more difficult to account for phenomena that most would consider to be law. For instance, victimless crimes, such as the taking of soft drugs, cannot be explained by the mutual recognition of rights thesis. Instead, in such crimes, sanctions are imposed because the offender "has violated the established norms in the community which must be upheld in order to deter other disruptions to the social order" (Collins 1982: 109). This is not to suggest that conventional understandings are necessarily correct, but Pashukanis defines out of the

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[13] The introduction of Hegelian categories into interpretations of Marx has always been controversial. Those who have done so, particularly Lukacs, Korsch and Marcuse, have claimed legitimacy from Marx's early works, particularly the 1844 '*Paris Manuscripts*'. Della Volpe and his followers, most notably Colletti, and the Althusserian school have been the most trenchant critics of this trend. See Anderson (1976: Ch 3).

category 'law' a great many things that would ordinarily be considered to fall within it. His narrow definition also forces him to create another category to cover those norms that will not perish in the transition to communism. This is his category of 'technical regulation'.[14] On the basis of other, more commonly accepted definitions, these too would be classed as law. An uncharitable and unsympathetic critic may well wonder whether Pashukanis' insistence on such a narrow concept of law is a definitional fiat designed to sustain the withering away thesis.

There are two further powerful criticisms of Pashukanis' work. They are, firstly, that he focuses on exchange at the expense of production and thus misses the thrust of Marx's critique of capitalism, and secondly, that there is no space in his theory for politics.

For Head, the "real problem" with Pashukanis is his focus on exchange rather than production. This is because the source of surplus value, the existence of which is necessary for the successful continuation of capitalism, is not to be found in exchange, but in production; "therefore, the essential role of law must relate to the extraction of surplus value in the production process" (2004: 290). Warrington concurs, arguing that "Pashukanis appears to have written production out of the law", concentrating instead on exchange (1983: 53).[15] Furthermore, Warrington suggests that Pashukanis "severely misreads Marx's economics", focussing narrowly on just the opening sections of *Capital*, and taking these to constitute the entirety of Marx's economic theory (1983: 56-57). In these sections Marx did indeed focus on commodity exchange, but elsewhere he analyses the production process itself. It is through this process, not through exchange, that labour power reproduces itself and creates the all-important surplus. Volumes 2 and 3 of *Capital* then go on to consider the circulation and distribution of this surplus. This is ignored by Pashukanis, and the centrepiece of Marx's economics, the production of surplus, does not figure in his theory (Warrington 1983: 57).[16]

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[14] Pashukanis' 'technical regulation' is analogous to Engels' category of 'administration' and Lenin's 'elementary rules of social intercourse', which were also utilised in order to cover the norms and rules required by communist society.

[15] In a similar vein to Von Arx's criticism above, Warrington adds that Pashukanis ignores the process of transformation that commodity production undergoes in the development of the modern world. His theory is only applicable to petty commodity production (1983: 53-4).

[16] The futility of attempting to outline a 'correct' reading of Marx has already been noted. Even if such a reading was possible, it would not automatically produce a coherent and comprehensive theory of any field, let alone law. Nevertheless, the argument is that Pashukanis' own selections and interpretations render his theory hopelessly flawed.

The second major criticism of Pashukanis is that he leaves no room open for politics. The actual processes of creating law seem to be written out of his theory. As Kamenka notes, Bolshevik propagandists who saw law as a "hypocritical cloak for bourgeois interests" were critical of Pashukanis' theory. More sincere critics felt he "minimised the normative element in law and ignored the ideological interests enshrined in specific legislation" (1983: 59). Pashukanis' one-time mentor Stuchka was one such critic. He was concerned about the absence of any notion of coercion in Pashukanis' theory. As we have already seen, the idea that law is a weapon in the hands of the ruling class is not an entirely helpful one, but nevertheless many Marxists feel that Pashukanis fails to understand the reality of law as an instrumental tool at the disposal of the ruling class. For such critics, some notion of law as part of the means of ruling class control ought to be incorporated in Marxist legal theory.

In a recent work, China Mieville deals successfully with these and other objections to Pashukanis' theory.[17] In particular, his response to the critics who castigate Pashukanis for focusing on exchange at the expense of production, and who claim that his theory leaves no room for politics are largely successful. In addition, they provide a useful optic through which to view Pashukanis' solutions to the problems of base and superstructure and determination.

Mieville suggests that Pashukanis' concentration on circulation and exchange at the expense of production is not problematic. In outlining why this is the case, he also offers a promising solution to the problem of base and superstructure. Mieville notes the confusion that has arisen over whether Pashukanis felt that law was part of the base (2006: 86-7).[18] He argues, convincingly, that Pashukanis did hold that law is a part of the base. The problem is that Pashukanis' law is based on exchange relations rather than productive

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[17] *Between Equal Rights: A Marxist Theory of International Law* (2006). See particularly pages 101-115 for Mieville's counters to Pashukanis' critics. Mieville's is not an uncritical acceptance of Pashukanis' theory, however. He demonstrates where the commodity exchange perspective needs extension or reconstruction, and offers criticism where necessary. For instance, he argues that Pashukanis' concept of technical regulation would be "excessively bureaucratic, and has no mechanism for dealing with continued conflict under socialism" (2006: 99-100).

[18] Mieville (2006: 89-90) cites the work of Binns (1980), who criticises Pashukanis for asserting that law is part of the base, and Warrington (1981), Eldred (1984) and Taiwo (1996) who disagree. See also Kinsey, an adherent of Pashukanis' commodity exchange theory. He rejects the base and superstructure metaphor "in its entirety", and holds that legal relations are intrinsic to the economic order of capitalism (1978: 202-205).

relations. This raises an obvious question: How can a phenomenon based on relations of *exchange* rather than relations of *production* be fundamental to the Marxist scheme?

Mieville suggests that social relations of production only become penetrated by economic and juridical aspects at a certain stage of development. This is the capitalist stage, the stage of generalised commodity exchange, where the overwhelming majority of production is production for exchange. Indeed, at this stage production actually becomes *dependent* upon exchange, for a market for its products and for the ability to purchase worker-owned labour power, without which the entire system of production would grind to a halt. To exploit labour, capitalists rely on exchange in the market rather than legal or physical coercion. Exchange relations thus become part of the base under the capitalist mode of production. Hence the legal form too is part of the base (Mieville 2006: 93-5).

Mieville concedes that at various points in the *General Theory* Pashukanis appears to be arguing that law is superstructural. But the component of law that is superstructural, according to Mieville, is not the legal form itself, but the actual legal content; such content is the superstructural mechanism through which the legal form makes itself visible. "The various particular mechanisms by which the legal form is actualised in various historical conjunctures are superstructural", writes Mieville, and these may include pieces of legislation, or courts, trials and the like; "so, the legal form is of the base, and it actualises through the necessary particularities of the legal superstructure". In sum, those relations directly connected with production (the legal form) are part of the base, while those not directly connected with production (particular legal proceedings) are superstructural. "'Law' is a complex of social relations, norms, rules and formal proceedings which, under capitalism, straddles both levels of society" (Mieville 2006: 95-6).

For the first time we have a solution to the problem of base and superstructure that acknowledges the central role that law plays in capitalist society, yet does not waver from the line of the Preface that suggests that it is the relations of production that are the key to sociological understanding. Mieville's work is singularly important in bringing out what is latent in Pashukanis' theory. Not only does he convincingly rebut the critics who find Pashukanis' focus on exchange problematic, but he offers a sophisticated and plausible solution to the problem of base and superstructure.

Mieville's response to the critics who argue that Pashukanis' theory leaves no room for politics is also a successful one. Yet it also highlights the real lacuna of Pashukanis' theory; this is its failure to successfully meet the challenge posed by the problem of determination.

According to Mieville there are a number of ways in which Pashukanis' theory leaves room for politics. Firstly, Mieville maintains with Pashukanis that the legal form is derived form exchange relations. Yet he adds that the form of law should be differentiated from its content; norms, rules, regulations and the like may well manifest class relations of production. All the actual form of law itself does is reflect exchange relations. Class exploitation is an extra-legal fact and within the form prescribed by the exchange relations there is scope for struggle over the actual content of norms (Mieville 2006: 91-3). This suggests that Pashukanis' theory does incorporate space for politics. Secondly, this space is also provided by Pashukanis' notion of 'technical regulation', or what Mieville calls 'administration'. Mieville points to administrative law which does not seem, on the face of it, to belong to the genus 'law' according to Pashukanis' scheme. Yet Mieville proposes that it *can* be considered to be law, if not in its purest sense. Administrative law is derived from the commodity form of law, and it plugs the gaps left by the abstract nature of commodity exchange law; it is necessarily particularistic and political as it deals with problems at the micro-level that cannot be dealt with by the broad, overarching categories of commodity exchange law (Mieville 2006: 103-111).

Yet there is another, even more central reason why Pashukanis' theory leaves open room for politics. Pashukanis insisted that the content of legal norms should not be fetishised. For him, it was the form of law that was all important. Analysis of law's content is useful, but privileging such analysis can lead to a "nebulous left functionalism" (Mieville 2006: 118), where all is assumed to correspond to the needs of the ruling class. Yet Pashukanis himself did not outline with any precision the relationship between form and content. Mieville argues that his theory does provide the means to deal with this, however. Pashukanis' theory can be read in a way that suggests form and content should not be looked at in isolation; it is the very form of law that supports capitalist domination, but

within that the powerful can and do utilise law for their own ends, and weaker parties can and do resist such uses (Mieville 2006: 117-21).[19]

As shown above, Mieville's defence of Pashukanis' focus on exchange yields a plausible solution to the problem of base and superstructure. His defence of Pashukanis' theory and its implications for politics is also a sturdy one. However, it highlights the limitations of Pashukanis' theory when confronted with the problem of determination. On the face of it, Pashukanis' solution to this problem is little different to that of Engels'. The form of law is seen as determined by economic relations. Law is thus the *reflection* or the *expression* of commodity exchange; this is very much a crude materialist theory of law. Law is seen to spring, fully formed, from the economic base of society and always functionally corresponds to the base. The critique of Engels in the previous chapter outlined the problems inherent in the crude materialist approach. For all its nuances, Pashukanis' commodity exchange theory of law cannot escape these reductionist moorings, and, inter alia, it cannot convincingly account for the role of conscious human action in shaping law and legal systems.

Mieville's reading of Pashukanis does successfully avoid the worst vices of reductionism, where potentially the entire institution of law, both its form and its content, is determined rigidly and automatically by the 'base'. He points out where Pashukanis leaves space for the operation of politics in law. However, Mieville is concerned primarily to develop a theory of international law, and one is forced to wonder how far the theory so developed is applicable to domestic law. International law is presented as the ideal type of law by virtue of the fact that it lacks an overarching sovereign power. But what does this mean for other forms of law, for instance domestic law? What is its status? Is it somehow a lesser form of law? Is it even law in Mieville's sense? It is here that the active intervention of human

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[19] On this basis Mieville takes Pashukanis' basic argument that law is the relation that inheres between the owners of commodities, those 'sovereign, formally equal individuals' who meet in the capitalist marketplace to partake in exchange, and applies it to international law. The relationship between states, he argues, is analogous to that between commodity owners in the marketplace. States face each other as property owners, each with exclusive ownership of their territories. Furthermore, there is no overarching institution to act as an arbiter in cases of dispute. Thus, despite the fact that both states in a dispute enter that dispute as formal equals, the interpretation of law that will be triumphant is inevitably that of the stronger party. For Mieville, this constitutes the great paradox of international law: 'it is simultaneously a genuine relation between equals, and a form that the weaker states cannot hope to win. That [...] is the meaning of Marx's words that "between equal rights, force decides"' (2006: 142). Thus, law is neither the opposite of force or a check on force. Instead, it is recast *as* force. Just as commodity exchange conceals class relations, so international law conceals power relations between formally equal states.

beings in designing institutional apparatus needs to be theorised. This is the lacuna of the commodity exchange theory. Pashukanis also fails to tell us why certain classes, in filling the empty form of law with its content, are attracted to certain ideas and have an understanding, however imperfect, of their needs and interests. Why is the content of law as it is? Of course these questions are way beyond the scope of Mieville's book, which by its own admission is concerned only with public international law. Thus he should not be criticised for not addressing such questions, but they lie tantalisingly in the background.[20]

The Influence of Renner and Pashukanis

Given that law was the focus of Renner and Pashukanis' analysis, it is hardly surprising that they provide a more sophisticated and nuanced jurisprudence than Engels and Lenin. Indeed, Hunt suggests that Renner and Pashukanis "may be treated as signposts" in the construction of a Marxist theory of law. However, he adds that caution must be exercised when utilising their work for this purpose, for it is not certain "whether they point in the right or even a hopeful direction" (1981: 92).

Renner's work only began to exert a real influence on Marxist jurisprudence in the 1970s, when a resurgence of interest in the subject occurred. McManus, for instance, argues that the ability of legal norms to remain stable while their social function changes, a phenomenon he describes as law's elasticity, allows the holders of power to refrain from over-intervention. This preserves law's autonomous image. Instead, the powerful can achieve their goals through the renegotiation of existing legal forms. In this way legislations' real relationship to power is concealed. Indeed, "resort to legislation may be atypical" (1978: 201).[21] More recently, Renner's arguments for law playing a central role in socialism have been taken up by, among others, Hunt (1992) and Sypnowich (1990). Renner's work certainly remains pregnant with potential and there is undoubtedly scope

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[20] Kamenka is similarly appreciative of Pashukanis' achievements, though sees them in a more modest light than Mieville: "I interpret Pashukanis as grasping an important legal 'moment'- a systematic logical tendency built into the structure of law, working itself out over time. This I call the *Gesellschaft* moment- adjudicative, individualist, contractual- and I contrast it, as Pashukanis to some extent does, with other 'moments' that can be or have been called part of law- the *gemeinschaft* moment and the bureaucratic –administrative moment." Any legal system is a mix of all three (Kamenka 1983: 59). Similarly, Stone maintains that "one need not accept his commodity form theory of law to accept its insights into the legal subject, individual responsibility and the structure of the legal system generally" (1985: 42).

[21] McManus attempts to demonstrate his theory through an analysis of hire-purchase legislation. (1978: 185-201).

for it to be developed and extended. Even so, this would be no small task; it would require a systematic but careful renovation, of the type Mieville provides for Pashukanis. As it stands, Renner's work does not provide the answers to the two problems of concern here.

Pashukanis' influence in his homeland in the wake of his *General Theory* was massive, and unique among Marxist legal scholars. As a Vice-Commissar of Justice, and aided by his colleagues and followers at Moscow State University, he began devising draft criminal codes to replace the legal codes of the New Economic Policy with "shorter, simpler models". He reasoned that if bourgeois law "could be gradually thinned out, the ground could eventually be cleared, with the remaining legal structures becoming increasingly superfluous and falling into disuse towards that time when they would eventually be razed" (Beirne and Sharlet 1980: 24-5). None of these draft codes was ever taken up. Nevertheless, students in the law schools were instructed to write essays on the pointlessness of their studies; an atmosphere of "disarray" prevailed (Warrington 1983: 43).

However, by 1930 the commodity exchange perspective and its accompanying withering away thesis stood in marked opposition to official Soviet policy. The processes of large scale industrialisation and collectivisation made a collision inevitable, "as it became apparent that the intervention and active support of strong and stable legal and political systems would be necessary in the USSR" (Beirne and Sharlet 1980: 26). Indeed, the concept of the gradual withering away of law and state was explicitly rejected by Stalin at the 16th Party Congress in 1930 (Hazard 1951: 234).[22] As Pashukanis called into question the survival of law in a truly communist system, he therefore simultaneously cast doubt on the communist credentials of his homeland. Such dissent was not to be tolerated in Stalin's Russia. Criticism of Pashukanis grew, although most opponents did not genuinely engage with his theory, instead wisely contenting themselves with simple restatements the new Soviet orthodoxy (Warrington 1983: 64). In response to this, Pashukanis began to modify his theory, primarily by asserting that law is not simply reducible to economic relationships.

[22] See Head (2001) on the Soviet Union's steady move away from the position that law would eventually be dispensed with, culminating in the announcement at the 16th Party Congress.

The first 'correction' to the *General Theory* was issued as early as 1927. Responding to Stuckha, Pashukanis conceded that Soviet law was not simply residual bourgeois law, and agreed that it could serve socialist purposes and aid the transition to communism (Head 2004: 270). In 1932, he redefined law as "the form of regulation and consolidation of production relationships *and also of other relationships of class society*" (Pashukanis 1980: 287 [italics added]). The great thrust of Pashukanis' *General Theory* is thus lost at a stroke. Of course, it is not clear how much ground Pashukanis conceded simply in order to protect his position at the Moscow Institute of Soviet Law, and indeed his own safety.[23] Regardless, his efforts in this regard proved fruitless. Although Stalin ordered Pashukanis to work on the 1936 constitution (Head 2004: 271), in January 1937 he was arrested as part of the infamous Vyshinski purges,[24] "as a symbol of the defeated revolution of the law" (Beirne and Sharlet 1980: 32). He was shot without trial (Head 2004: 275).

There were calls for Pashukanis' rehabilitation at the 20th Party Congress of 1956, and although it was recognised that he was "unjustly condemned for sabotage" (Arthur 1978: 10), the official opposition to his theory remained until the USSR collapsed. However, McCoubrey and White point out that that following Stalin's death, Nikita Khrushchev moved some way towards renewing the withering away theory in practice. After the 22nd Party Congress in 1961 "there was some movement towards less formal proceedings in minor cases before 'comrades' courts' and the use in minor criminal cases of techniques of shaming". This move toward communal dispute resolution never occurred on a large scale, however (1999: 130).

In the 1970s, Marxists in the capitalist world began to return to Pashukanis' theory.[25] As a result of his 'liquidation' by Stalin in 1937, Pashukanis' ideas were effectively hidden from view for many years. Their reappearance formed "part of the process of recovery of the heritage of Bolshevik thought repressed by the Stalinist bureaucracy" (Arthur 1978: 9), and contributed to the growth of Marxist debate, and particularly Marxist legal debate, in the

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[23] As Beirne and Quinney put it, it is "impossible to distinguish between those modifcations to his theory of law that he may actually have intended and those that were forced on him by a political climate in which personal survival became increasingly hazardous" (1982: 303).

[24] Andre Vyshinski went on to assume Pashukanis' position as the central figure of the Soviet legal system. His notion of 'socialist legality' which would serve the ends of the Soviet socialist state was the antithesis of Pashukanis' withering away thesis, and theoretically legitimised Stalin's political programme.

[25] Although, as Head notes, praise for Pashukanis was forthcoming in the intervening years, from such jurisprudential luminaries as Kelsen, Hazard and Fuller (2004: 271).

1970s. Pashukanis' work reverberated with many of the themes of the Althusserians.[26] Althusserian theories of law, with their focus on the form of law, clearly belonged to the same tradition as Pashukanis' commodity exchange theory. Balbus (1977), Holloway and Picciotto (1978) and Edelman (1979) were structuralist Marxists who clearly owed a theoretical debt to Pashukanis. More recently, Mieville's deployment of a "Pashukanisite theory of international law" (2006: 77) is not only the most sophisticated reading of Pashukanis, but promises to renew interest in him.

Nevertheless, many writers feel that Pashukanis, and particularly the withering away thesis, have had a negative impact on Marxism. Hunt, for example, stresses that law should be taken seriously because it will not simply 'wither away'. This is because "any feasible socialism would require law", as the "complex social arrangements" that would constitute socialism "require co-ordination and regulation". According to Hunt, this "should not be controversial" (1992: 113-4). Redhead (1982) also argues that Marxist theory laboured under Pashukanis' opposition to law for many years. It was only with the publication of EP Thompson's controversial *Whigs and Hunters* in 1975 that space was opened up within Marxism for the serious theorisation of the role of law under socialism. Santos has also argued for a Marxist theory *of* law, rather than a Marxist theory *against* law (1982: 364-6).[27]

There are clearly vast differences in the tenor and approach of Renner's and Pashukanis' theories. The starkest difference is in Renner's advocacy of law and Pashukanis' hostility to it. For our purposes, however, what is of utmost importance is Renner and Pashukanis fail to provide adequate solutions to the problems of determination and base and superstructure. Fundamentally, this is because they both place too much stress on the economic and subsequently there is not enough focus on human agency. One should also remember the non-comprehensive nature of their theories. Renner is concerned only with the persistence of the norms of private law, whilst Pashukanis concentrates entirely on law's form. Yet their theories represent clear advances over those of Engels and Lenin. Renner, although he ultimately failed to escape economic determinism, does at least acknowledge the redundancy of crude takes on the base and superstructure metaphor. Pashukanis, when read in conjunction with Mieville, promises to provide the foundations

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[26] See Chapter 4 below.
[27] Santos' chapter appears in the same collection as Redhead's.

for a rigorous solution to the problem of base and superstructure. However, although he potentially leaves space for human intervention in the process of creating laws, nowhere is this expanded upon, and in any event it is secondary in his work to the notion of reflection in explaining the form of law. Renner and Pashukanis, then, provide useful insights and offer us a staging post in the quest to solve the two problems that the Preface leaves for Marxist legal theory. However, more work needs to be done.

CHAPTER 4. THE 1970s: INSTRUMENTALISM AND STRUCTURALISM

One of the central propositions of much sociology is the portrayal of "modern Western societies" as "cohesive entities". Law is often seen as "expressing this cohesion and playing a significant part in guaranteeing it" (Cotterrell 1992: 71-2). Such themes run counter to some of the core notions of classical Marxism, which holds that, at root, society is inherently the site of conflict between classes. Given this, one may have expected the Marxists of the mid-20th century to have devoted considerable energy to the study of law, in order to challenge the position of mainstream sociology.

Yet this was not the case. The omission of law from the Marxist programme was particularly surprising as the philosophers who made up what has been dubbed 'Western Marxism' centred their investigations on the superstructural mechanisms that had foiled revolution in advanced capitalist societies. Law *could* have formed one of the central foci of these investigations. Instead, "it was culture that held the central focus of its attention" (Anderson 1976: 4). As such, Marxist jurisprudence entered something of a fallow period after the murder of Pashukanis and the suppression of the commodity exchange school. The early theoretical work of Renner and Pashukanis was not built upon.[1]

It was not only Marxists who neglected jurisprudential questions during the immediate post-war years. As Cotterrell relates, "legal scholarship and education" at the end of the 1960s was a "claustrophobic world": "Most legal study [...] at the end of the 1960s, seemed to focus on technicality as an end in itself and was unconcerned with fundamental questions about law's nature, sources, and consequences as a social phenomenon or about its moral groundings. Value judgements pervading legal studies cried out for theoretical examination but were routinely treated as obviously correct or simply unrecognised. [...] Legal study [was] confined to interpreting rules and analysing their logical or plausible interrelations" (2002: 633). The slowly dawning recognition of the limits of this mode of study led to a "deeply felt crisis" (Hunt 1980: 49). A revitalised Marxism

[1] There *were* isolated attempts at legal study during this period. Lukacs, for instance, made frequent though passing references to law (see Kamenka 1987, Varga 1981, 1985). From the Frankfurt School, Walter Benjamin suggested that the foundation of all law is force (see Mahlmann 2003), while Otto Kirchheimer sought to establish the political nature of law in *Political Justice* (1961). Ernst Bloch, whose work represents the "most extravagant of the peripheral manifestations of Marxism", with its metaphysical concerns (Kolakowski 1978b: 419), attempted to combine Marxism with a theory of natural law.

greatly contributed to the easing of this crisis. It came in two forms: instrumentalism and structuralism.[2]

Instrumentalism

Context

As late as 1971, Currie could quite plausibly claim that there were "very few Marxian analyses in the academic sociology of law" (1971: 137). Little did he realise that he was writing on the cusp of an enormous sea-change. Interest in Marxism and socio-legal studies was about to explode. Three central contextual factors propelled this shift. The first was the realisation, alluded to above, that the strictly 'black-letter' approach to law was severely limited. The second was increased working class unrest. The third factor, brought on in part by the second, was increased academic interest in Marx and Marxism. These factors will be dealt with in turn.

In the legal field, as the limits of the 'black-letter' approach began to be felt more keenly, interest in jurisprudence flowered. However, with some notable exceptions such as Durkheim and Weber, traditional jurisprudence had focussed on matters such as the relationship between law and morality, and the delineation of a precise concept of law. The discipline of the sociology of law grew in response to this; Hunt calls it the "forced offspring of the deficiencies of sociological jurisprudence and the jurisprudential tradition in general" (1978: 137). The rise of socio-legal studies represented a "breakout" from the crisis of legal scholarship (Cotterrell 2002: 633).

The second central contextual factor was the upsurge in working class activity of the late 1960s and early 1970s. For a brief moment, the historical impasse that had led to Western Marxism appeared to be coming to an end. As Downes and Rock relate, "both the American 'war on poverty' and the Labour Government in Britain were seen as failing crucially to correct structural inequalities of class, status and power". In such a context, the events in Paris in May 1968 "came to symbolise the possibility of revolutionary change

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[2] Gold, Lo and Wright introduced the categories of 'instrumentalism' and 'structuralism' (and 'Hegelian Marxism') in their discussion of Marxist theories of the state (1975: 30). Their aim was to reconcile them, but their typology only succeeded in intensifying debate.

in affluent, western societies" (2003: 262). May 68 provided a catalyst for Marxists to sharpen their focus; capitalist subordination of the proletariat, without recourse to force or violence, appeared, fleetingly, to be coming to an end. Problems of organisation and tactics, and the state and law, were back on the agenda; the lofty philosophical debates that had characterised much of Western Marxism were forced into the background.

The third central factor was the explosion of "Marx studies". The increasing academic interest in Marx was the result of a number of mutually reinforcing and interpenetrating dynamics. The rise in working class activity provided much of the impetus for the return to Marx. McLellan adds that the translation and publication in English of Marx's early writings and the revival of interest in Hegel in the Anglophone world were also crucial. Moreover, Khrushchev's denunciation of Stalin at the 20th Party Congress of the CPSU in 1956 reinvigorated many Western Marxists. It allowed those in Western Communist Parties "a new freedom of criticism and of intellectual movement" (McLellan 1999b: 956-8).[3] Furthermore, the Soviet invasion of Hungary in the same year alienated many Western Marxists and freed them from any attachment they may have previously felt to the 'actually exiting socialism' of the USSR.

As a consequence of these three factors, by the late 1960s, Marxism had begun to re-emerge as a popular theoretical paradigm, and there was a rising tide of interest in sociological jurisprudence. Furthermore, 'socio-legal studies' was very much a movement in search of a theory. A group hitherto largely external to the Marxist tradition was largely responsible for their cross-pollination. A number of radical criminologists with a background in labelling theory and pluralist conflict theory brought law back onto the Marxist agenda and simultaneously established Marxism as possibly the most popular theoretical perspective in the socio-legal arena.[4]

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[3] Benton, specifically referring to the *Parti Communiste Français* (FCP), suggests that prior to this shift, "official theoretical work [...] was largely subordinated to the requirement of legitimating policy options already settled in advance by the political leadership" (1984: 3-4). This had seriously limited the space for meaningful philosophical and theoretical work within the orthodox tradition. Of course, to a certain extent this remained the case even after 1956.

[4] There were two notable precedents for the new Marxist criminology. Willem Bonger's *Criminality and Economic Conditions* (1969) was first published in 1916. He argued that capitalism encourages egoism and greed rather than altruism. The poor and insecurely employed have their greed criminalised, unlike the rich. Thus capitalism itself, and the social inequality it generates, is the major driving force behind criminality. According to Bonger, even non-economic crimes such as prostitution and rape occur due to the low economic status of women. Whatever the merits of this argument, it was certainly ahead of its time (Jones 1998: 215). So too was the attention he paid to

Labelling theory gained real popularity in the US in the mid 1960s. The work of Becker was central. At the heart of the perspective lies his insight that "deviance is not a quality of the act a person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'. The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label" (1963: 9). From this starting point, labelling theorists embraced an anti-establishment political message that on the surface was not dissimilar to that promulgated by Marxists. However, Marxists complained that labelling theorists did not take their contentions through to their logical conclusions. Labelling theorists focussed on the interactive processes between rule definers, rule breakers and the social audience, but did not then go on to consider the nature of the social totality in which those processes occurred (Beirne 1979: 375-7). In short, labelling theory seemed to be morally neutral. Yet for many thinkers in the wake of Vietnam and the civil rights movement, and with the growing fragmentation of interest groups, such neutrality seemed "inadequate to explain the ferment that was growing around them" (Jones 1998: 208). Indeed, "a fierce impatience was expressed with the gradualism of liberal, social democratic politics" (Downes and Rock 2003: 262).

Conflict theory addressed precisely these theoretical weaknesses. Among its chief early proponents were Dahrendorf and Turk (see Jones 1998: 206). Quinney and Chambliss introduced a steadily more radical political element. Conflict theory began from the contention that "power is the basic characteristic of social organisation [...] wherever men live together conflict and a struggle for power will be found" (Quinney 1970: 11). Legislation thus occurs as a result of conflicts that are resolved according to the desires of those holding power. Conflict theorists were essentially pluralists; they saw society as

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white collar crime. Nevertheless Bonger's position was, at root, an economically determinist one (Russell 2002: 115). Rusche and Kirchheimer's *Punishment and Social Structure* (2003) was first published in 1939. Melossi details the unusual genesis of the book (2003: x-xxi). What came to be known as the 'Rusche and Kirchheimer hypothesis' was that there was a direct positive relationship between changing imprisonment rates and changing unemployment rates. Melossi suggests that there is a rather more complex argument within their work, particularly in Rusche's early work. When the labour market is flooded with the 'offer of labour', wages and general living standards of the working class decline, along with conditions of life in prisons. The converse is also true; when labour is rare and therefore valuable, living standards and wages improve. This is accompanied by better working class organisation, such as the formation and consolidation of trade unions and more effective resistance to exploitation. During such periods, forced labour, which undercuts ordinary labour, is introduced in prisons as a means to break this resistance (Melossi 2003: xxiii-xxxvii).

consisting of numerous groups all attempting to promote their interests and gain a foothold on the ladder of power. From here, it did not take long for "an impressive body of research [to accumulate] that strongly indicated that all legislation was typically the product of conflicts of interests" (Beirne and Quinney 1982: 11).[5]

It was a short step from this point to the adoption of a more explicitly Marxist position. Marxist criminology "is essentially a more specific form of conflict theory" (Jones 1998: 214). Marxist conflict theory's distinctiveness was that it located the source of conflict in that central feature of capitalist society, the division between the bourgeoisie and proletariat; all law was held to be "created and coded according to the narrow interests of dominant social classes" (Beirne and Quinney 1982: 11). Armed with this basic theoretical insight, radical criminologists rehabilitated the Marxist instrumentalist perspective first advanced by Lenin.[6]

Theory

The class instrumentalism of the 1970s was not a unified theoretical paradigm but rather a loose collection of theories sharing the same basic theoretical insight; law, just as Lenin argued, is a tool of the ruling class. Three main strands of the theory will be considered here. Firstly, the criminologists who embraced instrumentalism and gave the perspective its intellectual cachet will be considered. Secondly, two notable instrumentalist theories of the state will be introduced. Finally the work of Pritt, focussing exclusively on law, will be presented.

Among the central figures in the shift from conflict theory to a Lenin-esque class instrumentalist position were two American scholars, Richard Quinney and William Chambliss. By the mid-1970s they had fully embraced the instrumentalist perspective. The most trenchant statement of this was Quinney's *Critique of Legal Order* (1973). Quinney's aim was no less than the "development of a new consciousness- a critical philosophy", which would render possible "a whole new way of life" (1973: 1). To this end,

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[5] Beirne notes conflict theory's imprecision; 'power' and 'conflict' were loose terms, and how and why conflicts were resolved was never properly considered (1979: 377).
[6] Beirne and Quinney (1982) detail growth of interest in Marxism and law from the late 60s through the 70s. For a good summary of Marxist critical criminology in the 1970s see Russell (2002: 115).

he confidently asserted that a critical theory of crime control could be systematically outlined in just 6 points:

"1. American society is based on an advanced capitalist economy.
2. The state is organised to serve the interests of the dominant economic class, the capitalist ruling class.
3. Criminal law is an instrument of the state and ruling class to maintain and perpetuate the existing social and economic order.
4. Crime control in capitalist society is accomplished through a variety of institutions and agencies established and administered by a governmental elite, representing ruling class interests, for the purpose of establishing domestic order.
5. The contradictions of advanced capitalism- the disjuncture between existence and essence- require that the subordinate classes remain oppressed by whatever means necessary, especially through the coercion and violence of the legal system.
6. Only with the collapse of capitalist society and the creation of a new society, based on socialist principles, will there be a solution to the crime problem." (Quinney 1973: 16)

The influence of Lenin is clear: Law "is a tool of the ruling class," and "any threats to the established order can be dealt with by invoking the final weapon of the ruling class, its legal system" (Quinney 1973: 52, 55).[7]

Quinney also deploys a theory of ideology similar to Lenin's. He claims that one is able "to get at the objective interests that are external to the consciousness of the individual [... and] to determine the interests of those who make and use the law for their own advantage" (Quinney 1973: 54). These interests manifest themselves in an ideology. The ideology of the ruling class becomes dominant in a society; "whether the process is a deliberate effort to shape public consciousness or simply a general conception of the world, an ideological hegemony is established" (ibid: 140). Quinney uses this concept of ideology to buttress his rigidly instrumentalist line, stressing the role of ideology in the "deliberate effort to shape public consciousness" (ibid: 137). Hence, he talks of the ruling

[7] Notice too the influence of Marx's 1844 *Paris Manuscripts*, specifically in Quinney's reference to "the disjuncture between existence and essence".

class "manipulating the minds of the people" and of the "process of indoctrination" (ibid: 140).[8]

The bold confidence and polemical tone of Quinney's work is rather startling today. But he was not alone. By the mid 1970s, Chambliss had also fully embraced instrumentalist Marxist theory. He argued, inter alia, that acts are defined as criminal when it is in the interests of the ruling class to define them so, that members of the ruling class will be able to violate the laws with impunity while members of the subject class will be punished, and that as the gap between the two classes widens, penal law will expand in an effort to coerce the subordinate class into submission (Chambliss 1975: 152).[9]

This rather simplistic instrumental Marxism has, to a certain degree, endured in the US. For instance, Reiman (1990) argues that the "American criminal justice system methodically created a misleading imagery of the criminal as young, black, working class and male, an imagery that filters out the middle class and the white collar crime by differential treatment" (Downes and Rock 2003: 274). This system generates and reproduces crime, and ensures that Middle America remains firmly against those classes below them, rather than those above them (Reiman 1990: 4).

UK criminologists tended to be rather more sophisticated than their American counterparts, although some unmistakably class instrumentalist themes persisted. Taylor, Walton and Young provided "the most vigorous attempt to supplant existing approaches by a neo-Marxist alternative" (Downes and Rock 2003: 282). *The New Criminology* (1973) carried out a "ground clearing critique", which salvaged certain elements from theoretical predecessors for incorporation into a new Marxist framework (Downes and Rock 2003: 282). *The New Criminology* sought to create a comprehensive Marxist theory of deviance,

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[8] Quinney's position constantly shifted. Having already moved from the conflict perspective to the Marxist position detailed here, in the latter part of the decade he advanced an Althusserian position. By the 1990s he had embraced 'peacemaking criminology' (see, for instance, Pepinsky and Quinney 1991).

[9] In *On the Take* (1978), Chambliss provides a flipside to the argument that law serves the ruling class. His claim here is that *crime itself* serves the ruling class. *On the Take* looked at racketeering in Seattle. Based upon several years' participant observation, he argued that the "'hidden hand' in organised crime in America is not 'the Mafia', but leading representatives of the city's ruling class"; even Presidents Nixon and Johnson had substantial dealings with businessmen involved in illegal businesses (Downes and Rock 2003: 272). Crime, and the growth of the networks that support it, is inevitable in capitalism; crime, government and business are interlinked. In a similar vein, Platt argued that street crime is not merely a by-product of capitalism, but is endemic to it (1978: 29).

focussing on how certain acts came to be classed as deviant; "this involved highlighting the role of the powerful in the creation and enforcement of law". Deviance and crime were seen as "simply diverse forms of behaviour which are criminalised by the powerful in society to protect their own interests" (Jones 1998: 226). The lingering influence of labelling theory is clear, as is the notion of law, specifically criminal law, being in the hands of the ruling class.

Taylor, Walton and Young were heavily influenced Marx's earlier work, particularly the 1844 *Paris Manuscripts* (Downes and Rock 2003: 263). Thus they stress that human behaviour is not determined, but a willed form of freely chosen political action, and they focus on alienation and consciousness as well as modes of production. For them, all societies based upon exploitation and oppression, such as capitalism, are necessarily criminogenic. However, there is nothing inherently deviant about any act and as such, in a form of society where material differences are abolished and diversity is tolerated, the power to criminalise would be unnecessary and a crime free society could be realised.

The three authors later responded to criticism in *Critical Criminology* (1975). They lamented their "individualistic idealism" and concern with "expressive deviance" and the meaning deviants give to their own actions. Young in particular was particularly keen to repudiate much of his earlier position (see Jones 1998: 244-8). Of course, at least initially, this "radical critique" was "essentially an orientation", or even a "mood" or "stance", rather than a fully worked up theoretical perspective (Hunt 1981: 95). On this basis, Jones argues that criticism of *The New Criminology* was a little unfair, for it was the product of "a fermenting British criminology scene which had discovered interactionism and wanted to use it to attack 'the system'" (1998: 229).[10]

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[10] Later Marxist criminologies would move away from the framework of *The New Criminology*. The Birmingham School, under Stuart Hall, focussed on the reproduction of capitalist order in Britain. This theme was explored largely in the "context of youthful deviance and adult control" (Downes and Rock 2003: 265-7), most famously in Hall et al's *Policing the Crisis* (1978). Many of those initially attracted to *The New Criminology*, most notably its co-author Young, would become disenchanted with its focus on grand, large-scale theorising at the expense of empirical inquiry and practicality. They formed the 'left realist' school, the central work being Lea and Young's *What Is To Be Done about Law and Order?* (1984), although the key ideas can be ultimately traced to Young's chapter in *Critical Criminology* (1975). For more recent applications, see Taylor (1999a) and Young (1999), which specifically focus on crime in late modernity (see Downes and Rock 2003: 285-92; Hopkins Burke 2001: Ch 15). Marxist criminology also suffered, like its parent theory, from the rise of postmodern approaches: Russell claims that postmodernism "has certainly attained the pre-eminent status of 'meta-narrative' within [...] critical criminology" (2002: 118). Nevertheless,

The second strand of class instrumentalism in the 1970s focussed on the state. Taylor, Walton and Young had particularly regretted the fact that they neglected to fully consider the role of the state. However, some Marxists attracted to the themes and concepts of instrumentalism but working outside of the criminological tradition did take the state as their object of study. This trend was hardly surprising, for it could claim intellectual ancestry from Marx's own writings, particularly *The Communist Manifesto*. The American Paul Sweezy outlined an instrumentalist analysis of the capitalist state in his influential 1942 work *The Theory of Capitalist Development* (1968). Sweezy, like Lenin, closely follows the line of the *Manifesto*. He argues that the essential feature of the state is its maintenance of the system of private property. He claims that the class occupying the key positions in the process of production "gets the upper hand over its rivals and fashions a state which will enforce that set of property relations which is in its own interest" (1968: 242). This is necessary because the structure of society is not "self-enforcing". Instead, the class or classes that are the chief beneficiaries of the existing society must monopolise state power in order to maintain it. Thus the state is "an instrument in the hands of the ruling class for enforcing and guaranteeing the stability of the class structure itself", and the system of private property on which it is based (ibid: 242-3). In the UK, Ralph Miliband closely followed this line. His 1969 work *The State in Capitalist Society* is the classic example of Marxist instrumentalist analysis of the state. Miliband includes "judicial elites" in his category of "servants of the state", claiming that they are biased towards the dominant classes (1973a: Ch 6). Miliband's work proved enormously influential on the burgeoning instrumentalist movement. Indeed, the debate between Miliband and the structuralist Nicos Poulantzas, conducted in the pages of the *New Left Review* from the late 60s through the 70s, presaged the debate that would later flower in the arena of jurisprudence.[11]

The third and perhaps least developed strand of 1970s class instrumentalism was the strand that focussed specifically on law itself. Undoubtedly the most exhaustive instrumentalist survey of law itself was conducted by Pritt; his *Law, Class and Society* spreads over four volumes. Pritt declares that "law is one of the weapons of the ruling

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see Taylor (1999b), who maintains that Marxism is still relevant for criminologists. On more recent examples of Marxist criminology, see Jones (1998: 220-22).

[11] See Poulantzas (1969) and Miliband (1970). The debate continued into the middle and late seventies: See Miliband (1973b) and Poulantzas (1976).

class in the class struggle" (1970: 6). He adds that "law is determined above all by the work and wishes of the dominant or ruling class, [...] the ruling class by no means uses its power impartially [...], nor are its servants, including the legislators, judges and lawyers, in any sense neutral". For Pritt, then, the ruling class "governs in its own interest, which it professes to believe, and perhaps sometimes does believe, to be identical with the interests of the whole people" (1971: 8).

However, Pritt's analysis is decidedly more nuanced than, say, Quinney's. He suggests that law is determined not just by the wishes of the ruling class, but by the process of class struggle. As ruling class power is not unlimited or absolute, "in most countries [...] it always has to take account of the wishes and resentments- and the actual or potential strength- of the majority of the people" (Pritt 1971: 8). The majority can, through strikes, boycotts, or other forms of resistance "short of revolt or revolution", get "something of its own way". As such, the body of legal rules is not simply imposed upon the masses from above. Instead law is the cumulative work of those who have enjoyed "direct power to shape it in their own interests, and of those who could do no more than obstruct or modify this shaping in varying degrees by their organised insistence or passive resistance" (ibid: 9). Pritt thus steps back from the basic instrumentalist line that law is simply naked ruling class power; instead, law is a site of struggle. Nevertheless, the ruling class only gives way to resistance "as far as it must" (ibid: 10).[12]

Pritt also adds a second qualification to standard instrumentalism: Not *all* law is designed to further the interests of the ruling class. For Pritt, some law is "neutral", for it is designed to "govern the relations between individuals or groups within fields with no strong element of class conflict". He gives the example of rules regulating which side of the road traffic must drive on. Nevertheless, Pritt does suggest that these rules, despite their lack of connection to class struggle, were probably developed in accordance with what the ruling class believes is best (1971: 11).

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[12] Despite belonging to a vastly different tradition, Kirchheimer mounts a similar argument in *Political Justice* (1961). He argues that as the intensity of the conflict between the bourgeoisie and its opponents increases, so too does the significance of law and legal procedure as a political force. Kirchheimer suggests that the political trial is a functional authentication of political repression (see Sumner 1979: 259).

Ultimately, Pritt holds that "in its general form and character", law "corresponds" to the economic base of society (1971: 6). Based upon this, in a flourish of optimism typical of the era, he concludes that "what we need is a fundamental change in our political and economic structure, carrying with it a corresponding change in our law and our legal system" (1972: 184).

Critique

At their best, the various strands of class instrumentalism of the 1970s offered a valuable insight into the enduring nature of the stratified class system of capitalism. For instance, Michalowski argues that "by framing the class structure and the institutional arrangements of 20th century corporate capitalism as causal forces in the labelling of crime and criminals, radical criminologists linked social constructionism with a critique of domination as manifest in the politico-economic framework of the nation and the world. At its best, this analysis helped reveal the subtle dynamics of race, class and gender oppression in the making of laws and the administration of justice" (1996:11-12).

In addition, it is important to remember that the 'instrumentalism' described above consists of a number of related but separate approaches. Each of the approaches that fall under the banner of instrumentalism can be criticised individually on very different grounds. For instance, when compared with its more critical British counterpart, Downes and Rock feel that American based Marxist criminology was "relatively uncomplicated", pointing to a "more obvious and uncomplicated set of relations between American crime and American capitalism" (2003: 271). Care should therefore be taken to differentiate between the various strands of instrumentalism and ensure that criticism is specific.

Furthermore, any deficiencies in the theories of the instrumentalists can be at least partly explained by the fact that, like Renner, instrumentalists were not primarily concerned with advancing a perspective on law. Only Pritt took law to be the exclusive focus of his analysis. Instead, the focus of writers such as Sweezy and Miliband was the state, with law taken to be a simple extension of it. Meanwhile, the criminologists of the 1970s such as Quinney were concerned with developing theories of crime and deviance. Perhaps it is

unfair to expect such necessarily partial perspectives to provide the basis for a more all encompassing theory of law.[13]

Nevertheless, the revived instrumentalism of the 1970s, in all its variants, patently failed to resolve the two central problems of any Marxist legal theory based upon the Preface: the problem of determination and the problem of base and superstructure. Taken together, 70s instrumentalism starkly illustrates the problems raised by a "narrow class analysis" (Sumner 1979: 254).[14]

Firstly, instrumentalism represented a step backwards from the more sophisticated version of the base and superstructure metaphor that was latent in the work of Pashukanis. Instead, instrumentalism remains largely silent on the matter of law's relationship to the base. However, the implication of the theory is clear. For instrumentalism to remain coherent, law must be exclusively a phenomenon of the superstructure: the law is explicitly created by the ruling class to suit its needs, which are determined by the base. Pritt suggests as much by relying on a notion of "correspondence" (1971: 6) and suggesting that changes in economic structure will bring about concomitant changes in the legal system (1972: 184). Yet law often appears to be functioning as part of the base of society; it regulates and indeed constitutes the relations of production.[15]

Secondly, class instrumentalism fails to provide a robust solution to the problem of determination. This may seem counter-intuitive, because class instrumentalism *does* offer

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[13] Indeed Hirst (1972, 1975) argued that crime and deviance are inappropriate subjects for Marxist analysis, and suggested that theorists should stick to the more traditional concerns, for instance the mode of production, class struggle, state and ideology (1975: 204). Although it is undoubtedly important to remain cautious of the claim associated with Engels that Marxism can explain everything in a manner analogous to natural science, such a dogmatic and reductive view of the ambit of Marxism must also be viewed with suspicion. Hunt rejoins that Hirst's conclusion "is incorrect because it is premised upon an insistence that Marxism can only constitute objects of inquiry at the level of its own concepts; this suggests Marxism has a finite range or set of concepts and that they exist at the macro or general societal level" (1980: 43). See also the reply to Hirst from Taylor and Walton (1975).

[14] Sumner is specifically referring to Quinney's work.

[15] See Chapter 1 above. During the 1970s, the view that law formed part of the base was aired by EP Thompson. For him, "law was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law [...] rules and categories of law penetrate every level of society" (1975: 261). Later, in the course of a memorable slight at Althusser, Thompson returned to this theme. In his characteristically effervescent prose, he declares, "I found that law did not keep politely to a level but was at every bloody level; it was imbricated within the mode of production and productive relations themselves" (1978: 96).

space for human intervention in the process of creating laws. Indeed, this space is at the very heart of the theory, for instrumentalism holds that law is the deliberate creation of the ruling class. In effect, then, the ruling class become the mediating link between base and superstructure. However, none of the instrumentalist theorists convincingly demonstrate how a class can become aware of its interests, and how it can act as one in pursuit of them.[16]

Merely asserting that the ruling class use law to pursue their own ends does not provide a solution to the problem of determination. If one cannot demonstrate how the base conditions the thought of those controlling the law, then class instrumentalism does not get us far beyond the notion of 'reflection' utilised by crude materialism. Take, for instance, Pritt's notion of 'correspondence' between base and legal superstructure. Pritt's suggestion is that the latter must always correspond to the needs of the former. Not only is this functionalist, but human action can only be preserved on the basis of a crude empiricism of the sort that that has already been rejected.[17] As Taylor, Walton and Young argue in relation to the 'conflict approach' (1973: 267), it "is in danger of withdrawing integrity and purpose- or idiosyncrasy- from men: and, thus, is close to erecting a view of crime as non-purposive (or pathological) reaction to external circumstance".

Quinney's concept of ideology also fails to resolve the issue, for it requires that the ruling class can somehow 'read off' their best interests from the relations of production. This notion is untenable, as it relies on empiricist epistemology. Quinney also assumes a unified and coherent ruling class, a means of effectively disseminating the dominant ideology, and a pliant and malleable working class.[18] However, Quinney's idea of ideology being a "general conception of the world", though nascent and undeveloped, is crucial to the salvaging of the class instrumentalist perspective.[19]

Overall, then, the instrumentalism of the 1970s did not represent much of an advance on the theories outlined by Lenin half a century earlier. The central problem of how the relations of production determine the conscious thought that shapes law is barely

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[16] Lenin had also failed to adequately address this issue. See Chapter 2 above.
[17] For more detail on the objections to crude materialism and related functionalism and empiricism, see Chapter 2 above.
[18] Lenin's notion of ideology is defective for precisely the same reasons. See Chapter 2 above.
[19] See Chapter 5 below.

considered, and would appear to be reliant on a crude materialism that is easily dismissed. Furthermore, the challenges to the base and superstructure metaphor, which were gaining momentum, are not adequately addressed.[20]

In addition to this, no sooner had class instrumentalism gained a foothold than the concrete socio-political context it was premised upon began to shift. Two changes were particularly pertinent. Firstly, the social struggles of the 1960s and 70s on such issues as racial and sexual oppression seemed to render a focus on class conflict alone redundant. A new mode of analysis was required that located the new, non-class struggles within the "dynamics of capitalism as a total system, yet did not reduce them to mere epiphenomena incidental to the 'real' struggle at the 'point of production'" (Picciotto 1979: 166). As White and Haines put it, power "may not be totally encapsulated or explainable in class terms. Power and powerlessness can exist in a sense outside the class structure, such as the power of men over women" (1996: 109).

Secondly, it was becoming increasingly evident that the state was not unequivocally the tool of the ruling class. In Lenin's day, *laissez faire* capitalism was being aggressively diffused around the globe through imperialism, and the Russian establishment was fighting a doomed counter-revolution against the Bolsheviks. To take an instrumentalist line in such circumstances was perhaps understandable. But by the 1970s, the state and the law had demonstrated themselves to be capable of securing very real gains for the working class. In the UK, the promotion of Keynesian economics and the creation of the welfare state, comprising chiefly of education, health, social security and welfare provision, was a notable achievement.[21] Meanwhile, the ability of trade unions to decisively affect the political climate of the day was amply demonstrated by the successful miners' strikes of 1972 and 1974. The 1974 strike was of particular significance, for it "led to a three day week, precipitated a general election and brought about the defeat of the [Conservative] Heath government" (Milne 1994: 6). In such a climate, the idea that the state and law were tools of the ruling class, and that the working class was largely powerless against its

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[20] For further balanced assessment of instrumental Marxism see Young (1979). For critiques specifically focussing on Marxist criminology, see Jones (1998: 222-225), Hopkins Burke (2001: 155-7) and Downes and Rock (2003: 277-84).

[21] Of the many works on Keynes, Stewart's (1986), written at the height of Thatcher's monetarism, provides a sympathetic but still worthy introduction. On the history of the welfare state, see Timmins (2001).

might, seemed outdated.[22] The state and law increasingly appeared to be neutral; rather like Renner's legal norms, they were 'blanks waiting to be filled in'. There appeared to be a degree of *autonomy*, and this was something that the class instrumentalist perspective could not readily accommodate within its theoretical scheme. The stage was set for a new Marxist theory of law, and the work of Louis Althusser provided its underpinnings.[23]

Louis Althusser and Structuralist Marxism

Context

The work of the French Marxist philosopher Louis Althusser was a very deliberate and considered intervention in response to a very particular state of affairs in French Marxism.

Intellectually, Althusser pitched his theory directly against the work of 'humanist' or 'existential' Marxists, who had embraced the Marx of the recently published 1844 *Paris Manuscripts*. Chief among this group were Sartre and Merleau-Ponty. They rejected Stalinism and Marxist orthodoxy which presented historical materialism as a science; all economically and technologically determinist accounts were shunned. In the place of these 'iron laws', existentialists "posited a 'subject-centred' history, and the lived experience of the historical actor as the source of cognition" (Benton 1984: 10). They stressed the central role of creative human activity in history. As Benton explains, "Althusser's critical vocabulary and in many respects his positive attempts to at the construction of alternative concepts constitute an effort to detach the legacy of Marxism from the tradition defined by these two thinkers" (ibid: 5). Althusser also rejected Gramsci's notion of Marxism as historicism.

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[22] Nevertheless, it is not only instrumentalist Marxists who argue that law and the judiciary is conservative, protective of the interests of capital and property, and supportive of established institutions of authority. See, for instance, Griffith (1997), Thomas (1999) and Wedderburn, who writes, "because we live in a society whose inequalities are strongly related to social class, it should be no embarrassment to discuss the class character of the legal product" (1986: 861).

[23] Sumner attempted to sound the final death-knell for deviance theory in *The Sociology of Deviance* (1994). He claims that the entire concept of 'deviance' was based upon the social democratic 'consensus' of the post war period. Sumner suggests that the universality and strength of the consensus may have been overstated, but in any case it was definitively abandoned during the Reagan-Thatcher years of the 1980s. Thus the 'common view', against which deviance was to be measured, disappeared. Sumner proposes in its place 'censure', an ideological tool used to uphold and reinforce the capitalist system (see Jones 1998: 230).

Instead, Althusser embraced the 'structuralist' theories of thinkers such as the linguist Saussure, the anthropologist Levi-Strauss and the psychoanalyst Lacan. This school of thought, which was hugely influential in the 1960s, stressed that the key to understanding humans was not their conscious activities, but the unconscious structure of society that their activities depended upon and presupposed. Althusser provided a structuralist interpretation of Marx. Although Althusser did not explicitly align himself with the structuralists, their influence upon him was clear (Benton 1984: 14).

Politically, three events decisively shaped Althusser's outlook. These factors contributed to an increasing freedom of thought within the communist parties of Western Europe, and allowed Althusser to re-theorise Marxism from within the confines of the PCF. As outlined above, the renunciation of Stalin's crimes by Khrushchev at the CPSU's 20th Congress in 1956 and the Soviet invasion of Hungary in 1956 allowed for a greater intellectual freedom; no longer did Western Marxists feel so strongly attached to the USSR. The rather difficult task of justifying the Soviet system ceased to be the primary objective for many Western Marxists. The third key political factor was the Sino-Soviet split, which gathered pace through the 1960s. For Western Marxists this meant that, "increasingly, China could be looked to as a model of socialist construction which challenged the paradigm status of the Soviet pattern" (Benton 1984: 3).[24]

Althusser's theory proved attractive to many Marxist legal scholars in the 1970s. Such scholars were working in the same context as their class instrumentalist counterparts; socio-legal studies was very much a nascent movement in search of a theory. Althusser's promise was to provide a comprehensive and rigorous Marxism that could underpin a theory more specific to the legal field, and more alive to the changes in concrete circumstances that were beginning to derail the instrumentalist project. In addition, the

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[24] Indeed the Sino-Soviet split prompted the Chinese Communist Party to attack existentialist Marxism as a form of bourgeois revisionism. Maoists saw individual identity as culturally rather than individually determined, so refused to accept the existentialist Marxist vision of individuals freely creating themselves. The emphasis on unconstrained subjectivity was seen as a bourgeois concern that obscured class conflict, and a product of the west's decadence. Althusser's own attack on existential Marxism coincided with this; he too dismissed 'subjectivity' as bourgeois ideology. For him, all culture was ideological and all ideologies subjected people by imposing individual identities on them (see below). Indeed, Althusser cited Mao's *On Contradiction*, although he did not share Mao's optimism that culture could be a liberating force (Binder 1989: 1368-9). Meanwhile, the USSR began to warm to the themes of the existentialists in the post-Stalin days. As a result, many Althussserians lauded the Chinese system as superior to the Soviet one. Only later was the terror of the Cultural Revolution exposed.

allure of fashionable structuralism and Parisian philosophy proved an irresistible combination for many on the left. Althusserian theories of law began to constitute a rival to class instrumentalist theories; very quickly, and certainly by the mid 1970s, they were the more popular of the two.

Theory[25]

Althusser's first contention was that the humanists, historicists and economic reductionists had misinterpreted Marx's work. For Althusser, that work did not constitute a coherent whole. Instead, there existed an 'epistemological break' between Marx's early works and his mature works. Prior to the break, in works such as the 1844 *Paris Manuscripts*, Marx was tied to a Hegelian notion of the subject, utilising such concepts as 'alienation' and 'species being'. Marx was advancing a "theoretical ideology" (Benton 1984: 53). After the break, Marx replaced this 'problematic'[26] and "established a new philosophy" of dialectical materialism (Althusser 1969: 33). His mature works, chief amongst them *Capital*, were governed by the new "scientific problematic" (Benton 1984: 53).

Only a 'symptomatic' reading of the texts could reveal this; it was "impossible to innocently and straightforwardly grasp the meaning of a text" (McLellan 1979: 299). A symptomatic reading is one where the "explicit discourse is read cojointly with the absences, lacunae and silences, which [...] are so many symptoms of the unconscious problematic buried in the text" (Geras 1977: 245). According to Althusser, such a reading reveals Marx's rejection of empiricism. As noted earlier, empiricism holds that "to know is to abstract from the real object its essence, the possession of which by the subject is then called knowledge" (Althusser and Balibar 1970: 35).[27]

For Althusser, this is not satisfactory; the object of thought and the real object must be separated. Knowledge "does not work on the real object", but instead on the 'object of knowledge', which exists only in thought and is therefore totally distinct from the real object

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[25] For a good short summary of Althusser's structuralist Marxism, see McLellan (1979: Ch 22). Callinicos (1976) provides an excellent book length critique, written at the height of Althusser's popularity, while Benton (1984) offers a more distanced but still engaging commentary from the viewpoint of the mid 1980s.

[26] Althusser defines a 'problematic' as "the objective internal reference system of its particular themes, the system of questions commanding the answers given' (1971: 90).

[27] See Chapter 2 above.

(Althusser and Balibar 1970: 43). Theoretical practice consists of three elements, 'Generalities 1, 2 and 3'. Generalities 1 is the raw materials of a discipline, its ideas and concepts. These are worked upon by Generalities 2, the means of theoretical production. These are the "framework of concepts of a science which constituted its problematic" (McLellan 1979: 300). Generalities 3 is the end result of this process; the concrete in thought which provides knowledge of the real concrete (Althusser 1969: 183). The Marxist philosophy of dialectical materialism is the theory of this theoretical practice, and "the result of this epistemology when applied to society was the science of historical materialism" (McLellan 1979: 300). The role of historical materialism, which is a theoretical practice, is to "study the different practices in their specificity, and their relations to one another in the complex unity of social practice which is the social formation" (Geras 1977: 239). In this way, Althusser sought to theoretically justify one of his key contentions; Marxism is not ideological, but *scientific.*[28]

The separation of thought objects from real objects allows Althusser to reject the Hegelian notion of a totality in which each element is but the expression of an inner essence, and economist interpretations of Marx that hold that all essences can be reduced to the economic. Instead, Althusser advances a notion of society as a complex totality, constituted by three 'relatively autonomous instances', the economic, political and ideological (Althusser 1969: 232).[29] Thus the superstructures are instances "which are distinct from the economic structure" (Geras 1977: 250). Each instance is a structure and despite their degree of autonomy, they are united in a structure of structures. Causality is itself structural, for "the effects are not outside the structure [...] on the contrary, it implies that the structure is immanent in its effects [...] the whole existence of the structure

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[28] Althusser, however, does not tell us how to judge whether or not a theory is scientific. His notion of the opposition between science and ideology is therefore a mere assertion (McLellan 1995: 29).

[29] The German 'capital logic' or 'state derivation' school provided an interesting contemporaneous take on the relative autonomy thesis. Their ideas were brought into the Anglophone world by Holloway and Picciotto (1978). As Spitzer outlines, they argued that the state has to perform several functions, such as securing social order and providing infrastructure, in order to maintain capitalism (1983: 113). In 1776, Adam Smith had argued much the same in the *Wealth of Nations* (1976). As Steinert puts it, "since the state and state intervention developed exactly because these tasks could not be performed profitably by single capitalists (otherwise they would have) and since the state has to step out of the competition between capitalists to fulfil these tasks it must (and does) have a certain amount of independence from capital and its factions" (1977: 439). The approach was criticised on familiar grounds; Hunt, for instance, felt that it was a functionalist method of explanation (1981: 100). The debates surrounding the state derivation perspective now seem a rather marginal and even "occult" sideshow (McLellan 1999b: 959).

consists of its effects, in short [...] the structure, which is merely a specific combination of its peculiar elements, is nothing outside its effects" (Althusser and Balibar 1970: 188).

The relationship of the three instances or levels to one another at any given time Althusser terms the 'conjuncture'. A conjuncture is 'overdetermined', as each level determines the structure whilst simultaneously being determined by it. 'Overdetermination' refers to the process of "determination by multiple factors" (Williams 1977: 83). This complex notion of determination stands in opposition to the classical Marxist idea that there exists just the one contradiction between the forces and relations of production. This, according to Althusser, was the result of a flawed reading of Marx.

Nevertheless, Althusser maintains that the autonomy of the instances is only relative. This is because in the last instance the economy is always determining, even if it merely determines which of the other instances is dominant, as it did with the political level in feudalism. Hence society is a 'structure in dominance', with the economy as the determining element. However, the economy cannot be isolated from the overall structure; "the lonely hour of the last instance never comes" (Althusser 1969: 113).[30]

Following from this notion of structural causality was Althusser's most famous proposition, that history is a process without a subject. For Hegel, the subject was the 'Absolute', and "according to Althusser, all Marx did in his early writings was to substitute the idea of human essence for the Absolute as the subject of history" (McLellan 1979: 302). Only during the period of the epistemological break did Marx begin to see that human nature "is no abstraction inherent in each single individual" but instead "the ensemble of social relations" (Marx 1968: 29). With this new understanding, history could be understood as a process without a subject: "The structure of the relations of production determines the *places* and *functions* occupied and adopted by the agents of production, who are never more than the occupants of these places, in so far as they are the 'supports' of these functions". The real subjects of history were the "definers and distributors: the relations of production". However, as these were simply 'relations', "they cannot be thought within the category *subject*" (Althusser and Balibar 1970: 180).

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[30] In *Reading Capital*, Balibar extended the idea of relative autonomy and argued for law's 'non-correspondence' with the social relations of production. Hindess and Hirst (1977) took this idea further and saw the political as almost totally autonomous and dominant (see Sumner 1979: 260).

This theoretical system was largely developed in *For Marx* and *Reading Capital*.[31] Later Althusser offered a number of refinements and addendums to his basic position. The most "fundamental departures" from his earlier work were the development of a new conception of philosophy, and the refinement of his theory of ideology. Both of these advances posed the question "of the role of agency in social transformation" (Benton 1984: 83).

The first new development was the new conception of philosophy. In his earlier work, Althusser somewhat avoids the issue of the relation of theory to practice by claiming that theory itself is a practice. This allows him to effectively cut off theoretical work from the real struggles of the working class. His revised position attempts to remedy this. Althusser's later conception of philosophy sees it as "in the last instance, class struggle in the field of theory" (Althusser 1976: 37). Philosophy is no longer held to provide an external guarantee of validity to the sciences, but instead it can defend existing sciences by providing their own specific, internal criteria of validity. The materialist and idealist positions that are taken up in philosophy reflect the class position the philosophers represent; Marxist philosophy's novelty is that it openly admits its partisan nature (Callinicos 1976: 80-1). Theory, then, is no longer autonomous. Instead it is an extension of class struggle. This rejection of epistemology, of the guarantee of the validity of the sciences, marked a significant retreat from his earlier position (Benton 1984: 92).

The second new development was a more detailed theory of ideology. In Althusser's early work, ideology was the set of illusions that opposed the truth provided by science, a position largely in line with the classical Marxist view of ideology. Marxists had traditionally seen ideology as shrouding the real nature of the relations of exploitation. Thus, once such relations are abolished, the need for ideology will disappear.[32] Althusser's new conception resonated with one of the central features of his earlier work; the idea that the essence of reality is not present in surface appearances, which led to his distinction between 'thought objects' and 'real objects'. As such, ideology becomes a necessary and permanent feature of any society, for even in communism, history would not simply

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[31] Both *For Marx* and *Reading Capital* were originally published in French, in 1965 and 1968 respectively.
[32] See Larrain (1983), and Chapter 5 below.

become transparent; "there is no practice except by and in ideology" (Althusser 1971: 159).

Althusser outlined his revised theory of ideology in his famous essay *Ideology and Ideological State Apparatuses* (1971), and in doing so hinted at the scope and, more importantly, the limits of human action.[33] Althusser contends that ideology is the imaginary relation of men to the relations of production. The function of ideology is to constitute concrete individuals as subjects, in order that they fulfil the role allotted to them in the relations of production; "all ideology hails or interpellates concrete individuals as concrete subjects" (Althusser 1971: 162). This concept of ideology is connected to the idea of history as a process without a subject. Ideology "is the way in which men are formed to participate in a process of which they are not the makers" (Callinicos 1976: 70). It is the cement that binds the social together and provides the indispensable framework for every action (McKenzie 1994: 17).

Althusser classes law as an 'ideological state apparatus' (ISA), concerned with reproducing the conditions of production by securing the ideological domination of the ruling class. ISAs are "superstructural formations that function by ideology rather than by violence" (Benton 1984:101). Other examples include schools, churches, the family, the media, literary, cultural and sporting organisations, trade unions and political parties. ISAs inculcate the requisite worldview and the skills and attitudes necessary for the continuation of capitalism.[34]

Althusser's work inspired a significant amount of Marxist scholarship on the state and law. Although this scholarship was of a varied nature, at the heart of all Althusserian approaches is the contention that the "functions of the state are broadly determined by the structures of society rather than by the people who occupy positions of state power" (Gold, Lo and Wright 1975: 36). Furthermore, the state and law were seen to help ensure the reproduction of the capitalist system. So, despite Althusser's distance from class instrumentalism, he still saw the state as working unequivocally for the benefit of the ruling class; "not for one moment can there be any question of rejecting the fact that this really is

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[33] In this essay Althusser refines themes that first surfaced in *For Marx* (1969: 231-6).
[34] The ISAs operate behind the shield of the 'repressive state apparatuses' (RSAs), which include the police and the army. In effect, the RSAs are the state more narrowly and commonly defined.

the essential point" (Althusser 1971: 132). Of the many Althusserian approaches, the work of Nicos Poulantzas is the most important. Other major legal works were provided by Edelman and Balbus. Each will be dealt with in turn.

According to Spitzer, one of the reasons that Althusser's theory was taken so seriously in the legal arena was because of the extensions and refinements of Nicos Poulantzas, the most feted and one of the most prolific of Althusser's 'disciples' (1983: 108). Yet as McLellan points out, "the work of Nicos Poulantzas got more interesting the further he departed from his original Althusserian inspiration" (1999b: 959); Poulantzas certainly did not shy away from supplementing Althusser's basic concepts with insights of his own.[35] He offers a detailed account of the capitalist state, and the place of law within it. Although his work is extremely complex, Jessop identifies its key theme: "the crucial role of the legal order and juridico-political ideology in mediating the political class struggle as well as securing the institutional matrix necessary to capital accumulation in the economic sphere" (Jessop 1980: 351).

Poulantzas' key contribution to Marxist jurisprudence is his theory of the 'effect of isolation'. For Poulantzas, the juridical and ideological structures of the capitalist mode of production create the effect of isolation, which is indispensable to it (Poulantzas 1973: 130). "Juridico-political ideology" sets up "individuals-persons" or "subjects of law" who are "free" and "equal" to one another. Socio-economic relations are thus experienced by the "supports" as fragmented and atomised. This allows the proper functioning of those juridico-political structures that are essential to the mode of production, for example the labour contract, private property, and competition (ibid: 214). The atomisation of the supports of the mode of production conceals from them their actual class relations in the economic struggle and the real structure of capitalist relations of production.

In actual fact, there exists an unprecedented socialisation of the labour process under capitalist relations of production, but this is hidden by the isolation effect. The capitalist state presents itself as representing the isolated unity, even though this isolation is largely its own effect. This is the "double function" of the capitalist state; it isolates individuals and

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[35] Ultimately, Poulantzas embraced eurocommunism and its reformist thrust. The extent to which this is compatible with Althusser's theory, which maintained the class nature of the state, is debatable.

then represents the atomised unity (Poulantzas 1973: 134). In effect, in place of the real class unity that actually exists under capitalist relations of production, there is a "forced unity and cohesiveness in a social formation" (Milovanovic 1989: 111).

Juridical ideology thus fulfils the key function of ideology identified by Althusser in *Ideology and Ideological State Apparatuses*: it "cements together" the social formation "under the aegis of the dominant class" (Poulantzas 1978: 88).[36] This, then, is the process of interpellation in action. Law interpellates social agents and provides them with a place in the social formation endowed with rights and obligations: "Law institutes individuals as juridico-political-subjects-persons by representing their unity in the people nation. Law establishes individualisation" (ibid: 86-7).[37]

This theory of the isolation effect and interpellative role of law is the main feature of Poulantzas' jurisprudence. However, there are other facets of his work directly applicable to legal theory.[38] For instance, Poulantzas outlines law's role and effects in the economic, political and ideological spheres. He also charts the rise of 'authoritarian statism' as hegemonic crisis deepens. This is accompanied by the growth of 'state administration' and 'particularistic regulation', which suggests that "while the law is evidently not defunct, it is undergoing a clear retreat" (Poulantzas 1978: 203-4, 220).[39] In addition, Poulantzas contends that law is not merely an ISA. In the face of working class political struggle it also organises and sanctions rights for the dominated classes, and limits the exercise of state power by the dominant classes (Poulantzas 1978: 91).[40] This is the autonomy of law, a feature that the instrumentalists, with their view of law as a tool of the ruling class, have great difficulty accommodating. However, the rights that the legal system grants to subordinates are inevitably saturated with the dominant ideology. Thus they also help to

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[36] See also Hunt, who is in agreement with Poulantzas on this point (1976: 178-87).

[37] Poulantzas explicitly adds that the state, in its relatively autonomous capacity, plays a role in "forging" individualist ideology (1978: 66-7). This suggests an active role for the state in the creation of isolation.

[38] See Jessop (1980) for a detailed summary.

[39] This echoes Pashukanis' theory of administration replacing law in socialist society, except that for Poulantzas, the process is occurring *within* capitalism. The idea that we are experiencing a "breakdown in legal autonomy" is also a theme of much contemporary non-Marxist legal scholarship (see Cotterrell 1992: 298-303).

[40] Perhaps surprisingly, this position is close to that of the arch anti-structuralist EP Thompson, who claims that law is a "central area of [class conflict]" and famously adds that "the rule of law [...] seems to me to be an unqualified human good" (Thompson 1975: 264, 266. See also Chapter 1 above). Beirne and Quinney note this rare point of contact, and wonder "whether or not this is sufficient ground to establish a dialogue between Poulantzas and EP Thompson" (1982: 182).

guarantee the preservation of the mode of production (Poulantzas 1982: 190). Ultimately, the mode of production promotes the narrow interests of the dominant group; "an unstable equilibrium of compromise" results (Jessop 1980: 353).

Edelman does not exhibit quite the catholic sweep of Poulantzas. His focus is far narrower. He is concerned with "the juridical constitution of the individual as a legal subject" and the "manner in which changing conditions of accumulation and/or class struggle are reflected in the redefinition of juridical categories" (Jessop 1980: 361).

Following the premise that the levels of a social formation are relatively autonomous and have their own relatively independent histories, Edelman analyses the doctrinal development of law as a specific instance. To this end, he examines the property rights of photography and cinema in France in order to demonstrate the changing role of the subject in law. French law, with its doctrine of 'author's right', did not originally see photographs as the property of the photographer as they merely mechanically reproduced reality and did not involve any creative activity. However, as capitalism advanced, the role of the subject as producer grew; "all production is the production of a subject" (Edelman 1979: 52). As a result of this, photographs (and films) soon became the property of their creators. However, this "ideology of individual creativity is then transformed and travestied in the service of the economic realities of capitalist industrial production of images" (Hirst 1979: 15). Creative activity becomes subject to a contract, and "the authors become proletarians who are paid for the job [...] capital takes on the face of art but retains the necessary methods of capital" (Edelman 1979: 58).[41]

At the heart of Edelman's work lies Althusser's theory of ideology and interpellation. For Edelman, law is "the imaginary relation of subjects to their conditions of existence which has the effect of representing them in such a way that the reproduction of the relations of production is secured" (Hirst 1979: 3). Law constitutes its subjects as commodities in order to guarantee the continuation of the capitalist mode of production, which itself functions through the process of commodity exchange: "Law depends on reference to the subject for the constitution of its categories", yet simultaneously "it constitutes the very subject whose existence it refers to" (ibid: 2). As Jessop puts it, for Edelman "law

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[41] As Hirst notes, Edelman's analysis holds only for French law. The English law of copyright "would not serve Edelman's purpose" (1979: 14-17).

addresses people as legal subjects and, in accepting this form of address, people simultaneously affirm their status as juridical subjects and confirm the effectivity of legal institutions and practices" (1980: 362).

As suggested earlier, the work of Pashukanis dovetailed neatly with the themes and foci of Althusserian approaches to law.[42] Pashukanis' commodity exchange theory, largely dormant since his murder, was picked up by some Althusserian scholars and began to make its influence felt once again. Although Poulantzas rejected the theory, Edelman placed commodity exchange at the heart of his analysis. However, it was in the work of Balbus that the decisive marriage between Althusserian and Pashukanisite theory took place; Balbus provides, according to Warrington, "the most sympathetic development of Pashukanis' commodity form theory" (1983: 67).[43]

Balbus bemoans instrumentalism's failure "to pose the problem of the specific *form* of the law and the way in which this form articulates with the overall requirements of the capitalist system" (Balbus 1977: 571). For him, the logic of the legal form and the logic of the commodity form are identical. He argues that this "homology between the legal form and the commodity form" ensures that the legal form develops, like the commodity form, autonomously from the "preferences of social actors". However, it does not develop autonomously from the system in which those actors participate (Balbus 1977: 585). It is the very fact that law is divorced from the particular needs and interests of a particular class that helps to maintain the capitalist mode of production; "the autonomy of the law from the preferences of even the most powerful social actors [...] is not an obstacle to, but rather a prerequisite for, the capacity of the law to contribute to the reproduction of the overall conditions that make capitalism possible, and thus its capacity to serve the interests of capital as a class" (ibid: 585). The influence of Pashukanis is clear.

Balbus supplements this theory with a Poulantzas-esque view of capitalist isolation and forced unity. Individuals in capitalism are essentially commodities, "which are viewed legally as equal, although qualitatively different" (Reasons and Rich 1978: 9). By viewing individuals in this way, the legal form successfully replaces the "actual needs of socially

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[42] See Chapter 3 above
[43] This was, of course, written before the more recent work of Mieville.

differentiated individuals" with abstract concepts of "will" and "rights" (ibid: 9). Class differences are thus ignored, and the development of class consciousness is hindered.

Critique

Althusser's theory provoked hostility and reverence in equal measure, and was the central reference point for all British Marxism in the 1970s and early 1980s. For a time it seemed that if one was not amongst Althusser's 'disciples', then one defined oneself in opposition to their ideas and work.

Of the many criticisms levelled at Althusser's theory, perhaps the most fundamental were those that attacked not Althusser's work itself, but that of the structuralism that it was constructed upon. During the course of the 1970s structuralism began to fall out of fashion. As Bauman recounts, many sociologists became concerned about its ahistorical nature and its apparent inapplicability to advanced societies. Many also found the link between society and language untenable (1992: 211).

Althusser's work itself was subject to a raft of more specific criticisms.[44] Some found his theory of knowledge unattractive. Althusser correctly saw the limits of empiricism. However, in his desire to reject empiricism, he went too far and lapsed into a theoreticism where knowledge is held to work in a separate domain, divorced from real objects and not subject to empirical verification and re-verification. His notion that knowledge works on a 'thought object' rather than the real object, and his theory of the 'generalities' led to the charge that he was an idealist (see Bottomore 1983: 17; Geras 1977: 262-72). The link suggested in the Preface between human ideas and consciousness and the relations of production is in danger of being lost in Althusser's scheme.[45]

Related to this, Althusser's conception of philosophy as an external guarantee of validity to the sciences and the notion of ideology as the opposition to science and truth legitimised the separation of Marxism from everyday politics and struggles. Scientific Marxism

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[44] A frequent, though relatively marginal, complaint against Althusser was his use of unwieldy, pretentious prose at the expense of clarity. He has been variously accused of "pretension and posturing" (Miller 1991: 10), and of making declarations "unargued and cryptic, smacking of evasion or apologia" (Bottomore 1983: 17).

[45] As Geras wryly remarks, it seems that "the real object is the object, 'but only in the last instance'" (1977: 244).

operated at a level above the concrete, and was thus effectively closed off from actual working class activity. This view justified the existence of an intellectual elite; such an elite would be adept in the 'sciences' and therefore properly qualified to use the scientific tool of Marxism.[46]

Althusser's epistemological break, although finding favour among many, was also the subject of a great deal of concern. Avineri neatly captures the thrust of the opposition: "Instead of considering the mature writings of Marx as a closed system with which his earlier writings must be confronted, I prefer to view Marx's life works as one corpus" (1968: 2). Similarly, Vincent argues that "Marx worked his way towards his fundamental premises on political economy- which subsequently became the 'guiding thread' of his life's work- with philosophical and ethical tools. His decision to concentrate on the particular processes was clearly derived from this philosophical critique. This philosophical element underpins all his later work" (1993: 390). Althusser was, of course, free to select the part of Marx's oeuvre that he was most attracted to and that best suited his purposes. However, his mistake is surely that he denies those parts not selected the status of Marxism and attempts to draw very definite boundaries around what can be classed as authentically Marxist.[47]

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[46] This is not too dissimilar to Lenin's notion of the vanguard group of professional revolutionaries. Like Lenin's, Althusser's was a position with "serious political consequences" (Callinicos 1976: 101). It served to justify the Party, for it was only through the organisation of an intellectual elite that progress could be made. This in itself was unremarkable, for Althusser was theorising from within the PCF, and was under pressure to make his position acceptable to the leadership. However, according to some, Althusser provided Stalinism with the theoretical systematisation that it had lacked during Stalin's own lifetime (see Benton 1984: 202). "It is only in our own time that Stalinism has been given its true rigorous and totally coherent theoretical expression" wrote Thompson; "the Althusserians [...] are working hard, every day, on the theoretical production line of Stalinist ideology" (1978: 333). Many French Trotskyists and PCF members agreed, and left the Party in the wake of Althusser's work to set up short-lived Maoist factions (Benton 1984: 16-7). Benton calls Thompson's charge "outrageous", arguing that by re-opening the channels of communication between French Marxism and the rest of French philosophy, Althusser can be said to have contributed to the de-Stalinising of Marxism (ibid: xi). Anderson also rejects Thompson's claim that Althusser provides a *post facto* theorisation of Stalinism (1980: Chapter 5). Benton does neatly outline Althusser's dilemma, however: anybody who sees Marxism as science, he argues, must outline how that science "can become a living force in history". Failure to do so means that "theory has no relevance to socialist practice ('theoreticism, Althusser calls this). Resolve it through imposition via a coercive party or state apparatus and you have Stalinism" (1984: 19-20). Thus, perhaps "one of the limits to Althusser's anti-Stalinism" is his refusal to separate the question of "'what is authentically Marxist?' from the question 'what is authentically scientific?'" (ibid: 31).

[47] See the argument of Chapter 1 above. Of course, Althusser "was not obliged" to agree with anything that Marx wrote. However, "to pretend to have read *in* Marx the opposite of what is there is a form of obscurantism" (Bottomore 1983: 17). Bottomore is referring to Althusser's idea that Marx himself rejected his earlier works. On this point, see also Geras (1977: 259).

More pertinent here, however, is Althusser's failure to solve the problems of determination and base and superstructure. As outlined above, Althusser attempts to escape crude economist versions of determination. He does so by developing the more complex notions of structural causality, 'overdetermination' and 'determination in the last instance'. As Williams points out, this serves as a useful corrective to more orthodox Marxist notions of determination which place far too much stress on economic processes or technological developments (1977: 88). However, Althusser's determination is not without its own problems.

Crucially, as Laclau and Mouffe point out, Althusser fails to render the concept of 'overdetermination' compatible with the notion of 'determination in the last instance': "If the economy is an object which can determine any type of society in the last instance, this means that, at least with reference to that instance, we are faced with simple determination and not overdetermination. If society has a last instance which determines its laws of motion, then *the relations between the overdetermined instances and the last instance must be conceived in terms of simple, one directional determination by the latter*" (1985: 98-9). Thus it appears that Althusser barely moves beyond the crudest Marxist notions of economic determination.

Douzinas and Warrington agree. For them, "relative autonomy seems to give a linguistic rather than a theoretical answer to the bipolar opposition between determination and autonomy" (1991: 118). If Althusser were to stress the idea that the economy determines, even if only in the last instance, then there is still a clear causal relationship; the link between economic base and determined superstructure remains linear and mechanical. On the other hand, if Althusser stressed the autonomy of the instances, then his theory would not fit the parameters of the Preface, where it is the relations of production that ultimately determine the superstructure. Indeed, for Douzinas and Warrington, if autonomy is emphasised, then the theory ceases to be Marxist (ibid: 119). This is asserted on the basis of what they call "Hall's law". According to Hall, "when we leave the terrain of 'determinations', we desert not just this or that stage in Marx's thought but his whole problematic" (1977: 52).

Althusser cannot offer a route out of this impasse because he does not leave space for an adequate theory of human agency. Such a theory would begin to make the link between base and superstructure more plausible, provided it could account for how the machinations of the relations of production. condition and shape human action. Yet Althusser, in his early works, not only fails to provide this space, but he explicitly denies that there is any need for it in the first place. His rejection of Sartre and Merleau-Ponty's existentialist Marxism leads him to argue that humans are but the supports of the mode of production, the passive units that fill in the spaces allocated to them by the process of capitalist production. This 'theoretical anti-humanism' completely removes the possibility of conscious human action effecting a change in society.[48]

This stance attracted a great deal of criticism. Althusser's response, as outlined above, was to distance himself from some of his earlier positions, and to rework some of his central concepts in order to create the theoretical space for active human intervention. Philosophy was recast as "class struggle in the field of theory" (Althusser 1976: 37), while ideology was retheorised as a permanent feature of society and the omnipresent framework for all action. Yet even these new concepts failed to resolve the difficulties, and remained beset with tensions carried over from the earlier work. The notion of philosophy as the class struggle in theory implies that it is intellectuals like Althusser who are at the forefront of the class struggle, and that such struggles take place on a philosophical level rather than at the point of production. The working class alone cannot constitute an adequate revolutionary agent. The new theory of ideology also suggests that, as the masses must always labour under ideology, it remains open for theoreticians to work at a level far removed from class struggle in pursuit of a pure theory, although whether and how intellectuals themselves can escape the fog of ideology is not clear. Both refinements do little to assuage fears of a lapse into theoreticism and idealism. Additionally, it is not clear that the notion of the permanence and omnipresence of ideology is compatible with Althusser's continued maintenance that Marxism is scientific.[49]

More importantly, Althusser's attempts to resolve the problem of human agency clearly do not provide a solution to the problem of determination. The old, flawed and incompatible

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[48] Thompson was the most forceful critic of this idea. See especially *The Poverty of Theory* (1978).
[49] Indeed, there were doubts on many counts as to the compatibility of Althusser's refinements with his earlier work. See, for instance, Bottomore (1983: 17) and Geras (1977: 255-6, 272)

notions of 'overdetermination' and 'determination in the last instance' are preserved. No clues are given as to how the relations of production condition the thought and consciousness of individuals, and how those individuals can shape and reshape the various levels of society. Instead, the populous are beholden to an ideology essentially imposed upon them from above which they have little, if any, opportunity to interact with and alter.

Althusser's solution to the problem of base and superstructure is also problematic. Althusser attempts to abandon the crude base and superstructure metaphor by outlining an ontology of 'instances'. The economic, political and ideological instances are autonomous from one other, but are ultimately united in a structural conjuncture. This more complex social ontology has a distinct advantage over the more traditional base and superstructure metaphor, for it accepts that each instance has its own internal histories and development, and allows them to be studied in their 'specificity'. However, ultimately Althusser's idea of instances collapses for precisely the same reason as his theory of determination. If the economy determines the other instances, even if that determination is in 'the last instance', then it is difficult to avoid the conclusion that what Althusser presents is more verbose and unnecessarily complex version of the orthodox base and superstructure metaphor. There is little sense of the effects that the political and ideological instances can have upon the economic, or how exactly their interpenetrations and the notion of structural causality works. Society may be made up of a number of distinct instances, but if one of those instances is more fundamental than the others, then this is merely the old Marxist theory in new clothes.

Given these problems with Althusser's theory, it is hardly surprising that the legal scholars that followed in his wake also failed to provide a robust jurisprudence. There was one significant advantage associated with Althusser's theory, however: It legitimised a more detailed study of law, for it conceptualised law as a specific instance with looser connections to the economic. This encouraged Althusserians to look at law in its specificity, and they offered a range of detailed analyses unencumbered by the need to conform to the tenets of Marxist orthodoxy.

The general thrust of Althusserian legal scholarship echoed that of Pashukanis; they argued that "law serves the ruling class, not because its substance embodies their

interests, but because its form does" (Grau 1982: 207). Indeed, the further away from Althusser's own work they got, the more useful their insights become. Yet this in itself became a problem, for Althusserians tended to be perfunctory in their treatment of economic determination in the last instance and focussed almost exclusively "on the specific properties of the several regions as if they were autonomous" (Jessop 1980: 342).

A number of criticisms can be levelled at each of the Althusserian theories of law outlined above on an individual basis. Poulantzas seems to overestimate the effectiveness of law as an ideological mechanism (Sumner 1979: 263). Does law really conceal from individuals the real nature of the class system *and* establish them as legal individuals as comprehensively as Poulantzas suggests? How would one then account for the industrial action that was rife when Poulantzas was writing, or, for instance, Paris 68?

Edelman, according to Jessop, "offers no more than the trite observations that law fixes and assures the realisation, as a natural given, of the sphere of circulation and thus makes capitalist production possible". He is silent on the structural limitations of the legal form (1980: 362). There is also a danger that his reduction of the law to a unitary sphere that corresponds to the needs of accumulation is too simplistic and misses the complex reality of law, which on the face of it seems to be shot through with a variety of competing interests (ibid: 361). Kamenka argues that Edelman turns Pashukanis' theory into Althusserian "jargon" and, more crucially, he "converts a problem about copyright that is partly infrajural and partly a specific problem of French law into a 'contradiction' of bourgeois conceptions of ownership" (1983: 51).

Balbus' application of Pashukanis is criticised by Young. He suggests that Balbus does not offer "any substantive link between commodity fetishism and legal fetishism. Their coexistence is argued on the level of metaphor with the invocation of the notions of homology and functionality". Any legal devices that are not analogous to the commodity form are "baldly linked to the occurrence of decommodifciation" (1979: 24).

As well as these individual problems, there are also a number of collective failures associated with Althusserian legal theory. Firstly, taken as a group these theories rely too much on the notion that individuals, be they workers or capitalists, are the "archetypal and

necessary form of capitalist organisation" (Hirst 1977b: 99).[50] This is in spite of Althusser's objections to humanist Marxisms and his view of people as the mere 'supports' of the mode of production. As a result of this reliance, Althusserian legal theories were unable to come to terms with the existence, and even dominance, of other forms of economic organisation and property ownership in capitalism, for instance the joint stock company or the corporation (ibid: 99).

Secondly, despite the insights provided by the Althusserians' focus on ideology and interpellation, difficulties remain. Crucially, whatever the merits of Althusser's reformulated ideology thesis, it needs to be harnessed in a more robust conceptual scheme. Poulantzas talks of legal ideology as though its place in Althusserian scheme is assured and non-controversial, but this is not the case. Its relationship to Althusser's other concepts requires further elaboration, for it is by no means a given that the two are compatible. In addition the relationship of ideology to the relations of production needs to be carefully outlined. Yet Althusserian legal scholars proceed as though Althusser's theory of ideology is unproblematic.

As Picciotto suggests, a key problem for Althusserian theories of law was "to explain how the 'relatively autonomous' legal logic and procedure can succeed in reinforcing and maintaining the wage-labour relation in a way that is functional for capital" (1979: 170). Their solution to this is problematic; the "functions and effects of law and ideology tend to be specified theoretically in advance of empirical analysis" (Cotterrell 1992: 116). Of course, this tendency is hardly surprising, given that Althusser himself held that theoretical work can legitimately take place completely sealed off from the real world, a world whose essence cannot be properly grasped anyway. This leads to a functionalism, where it is assumed that the needs of the mode of production will be met (ibid: 116). Poulantzas provides a good example of this when he claims that the state plays a role in forging individualist ideology. Yet "to explain the advantages of juridical ideology for the rulers (in terms of its 'isolation effect' on the working class) does not explain how this ideology came into being" (Fine 1979: 36). This functionalism also tends to lead back to an economic determinism. The law supports the needs of the social system, and these needs are

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[50] Note that Hirst is not only directing his criticisms at structuralist theories of law: "The position on property right I am criticising is no aberration of one particular and divergent 'school' of Marxists" (1979b: 100).

ultimately determined by the economy, even if only in the last instance. As Grau suggests, structuralists reduce form to a reflection of ruling class interests (1982: 207). It seems that Althusserian theories of law fall into the very trap that they set out to avoid.

A final and related problem is the "simple equation of law with state" (Grau 1982: 199). Despite the notion of 'instances' allowing a more detailed study of the specificity of law, the state and law tend to be seen as functionally identical. Both institutions are held to operate in order to guarantee the reproduction of the mode of production. As such they are frequently conflated, if only implicitly.[51] Indeed the same could be said of all of Althusser's ISAs; do the state, the law, schools, the media, churches and the like really all pull in the same direction by functioning to preserve the mode of production?[52]

These problems with Althusserian legal theories severely curtail their usefulness. However, what is more pertinent is their collective and now familiar failure to resolve the problems of determination and base and superstructure.

Following Althusser, the orthodox Marxist view of economic causation is abandoned in favour of the somewhat ill-defined notions of 'structural causality' and 'determination in the last instance'. How does determination 'in the last instance' occur, and what are the mechanisms for the process? Althusser's jurisprudential followers add no further insights. Ultimately, Althusser's concept of determination cannot help but collapse into the very economism that he and his followers purported to reject.[53] These problems are compounded by the Althusserians' reluctance to theorise on the role of human agency in the process of creating law; again, this omission is hardly surprising, for it is demanded by the parent theory.

The difficulties associated with Althusser's rejection of the base and superstructure metaphor are also not adequately addressed by the legal scholars he influenced. Means to avoid the collapse back into an orthodox ontology of a determining base and determined superstructure are not outlined. The potential for law to interpenetrate, affect and even constitute the economic level is not adequately addressed; as Cotterrell puts it, the relative

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[51] As suggested above, this criticism also applies to the instrumentalist theories of law.
[52] For other criticisms of Althusser's theory of ISAs and RSAs, see Benton (1984: 101-5)
[53] Poulantzas goes some way to conceding this when he accepts that that law's roots "have to be sought in the social division of labour and the relations of production" (1978: 86).

autonomy formulation adopted by Althusserian legal scholars "often merely ignores the difficult problem of specifying the exact nature of the relationship between law and economic structure" (1992: 116). Poulantzas is particularly vulnerable to this criticism; the sheer scope and weight of his work on the 'instances' leads to a degree of "overpoliticisation" (Jessop 1980: 358). Once again, Althusserian legal theorists do little to advance the original framework that inspired them.

The Influence of 1970s Instrumentalism and Structuralism

In a sense, during the 1970s, Marxist legal theory blossomed. Never before had there been such interest in the way that Marxism could shed light on the institution of law, and there was certainly a sense among some that their theoretical endeavours could contribute to the process of concrete change in society. Yet the instrumentalists and Althusserians of the 1970s collectively failed to provide answers to the problems of determination and base and superstructure that are so crucial. These theoretical difficulties, and the difficulties that Marxism in general soon began to encounter,[54] ensured that the influence of the 1970s Marxist legal scholars was surprisingly brief and modest.

It was gradually realised that the crude instrumentalist perspective, if it was to avoid collapsing into a conspiratorial theory where the ruling class cleverly manipulated society and its institutions for their own ends, required extension and supplementation. From the late 1970s and into the 1980s, Marxists began to take seriously the need to produce a sophisticated theory of ideology to help account for the formation of class interests. The fruits of this engagement will be analysed below.[55]

Althusser's star burned brightly but briefly. By the beginning of the 1980s his position was largely discredited, and the Althusserian 'moment' had passed. Indeed, as early as 1984 Ted Benton was able to title his book *The Rise and Fall of Structural Marxism*. In one sense Althusser provides the clearest evidence of the context-bound nature of theory; once the circumstances that gave rise to Althusser's thought had passed, it withered away, so to speak, remarkably quickly.

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[54] See Introduction and Chapter 1 above.
[55] See Chapter 5 below.

Laclau (1990) suggests two key reasons for the sudden disappearance of the Althusserian school. Firstly, it had little time to mature intellectually as the events of 1968 led to an explosion of interest and new interpretations of Marx's holy texts. Althusser's key works were old news almost before they had been published, particularly with the delay in publication in English.[56] Secondly, Althusser's work was conceived as an attempt at internal theoretical renewal of the PCF. This project gradually lost its significance in the 1970s. As McLellan intimates, Althusser's disappearance was at least partly due to the fact that as a member of the PCF his work was intended to contribute to revolutionary class struggle (1999b: 959-60). As this prospect receded, so to did Althusser's prominence.[57]

For all his flaws, it would be remiss not to note Althusser's achievements. Walton and Gamble, critics who reject the notion of the epistemological break, recognise his accomplishments. For them, "Althusser's strength is that he insists on the centrality of the theoretical. He recognises that from the point of view of contemporary Marxism, textual exegesis of Marx's work have little interest. What is important is to understand Marxism as a theory, to look for the coherences and the absences in Marx's system of concepts, and to grasp the object these concepts create" (1972: 140). In addition, Althusser's theory of ideology as the permanent 'cement' of society became increasingly influential both within and outside of Marxism, particularly once uncoupled from its theoretical moorings in Althusser's early work.[58] It is also important to acknowledge Althusser's recognition of the flaws in other forms of Marxism, despite his failure to fully transcend them. Through this recognition, however, he did "leave the field open" for new efforts at reconstructing Marxism, chiefly Laclau and Mouffe's (Torfing 1999: 2).

The body of work produced by instrumentalists and Althusserians over the course of the 1970s may not have provided a comprehensive and robust Marxist legal theory.

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[56] *For Marx* (1965) and *Reading Capital* (1968) were only published in English in 1969 and 1970 respectively. *Lenin and Philosophy and Other Essays*, containing work from throughout the 60s, was published in English in 1971.

[57] On Althusser's self-criticism and revisions, see Benton (1984: Ch 5). On Althusserianism's decomposition and the critical attacks launched on it, see Benton (1984: Part 3). Sadly, Althusser was admitted to a psychiatric hospital in 1980 after admitting to the killing of his wife. Upon release in 1983, he lived reclusively until his death in 1990. The end of Poulantzas' life was also tragic; he committed suicide in 1979.

[58] See Chapter 5 below.

Nevertheless, it did provide the intellectual context and point of departure for the next wave of Marxist legal theory.

CHAPTER 5. SALVAGING THE MARXIST THEORY OF LAW

Despite the explosion of Marxist thinking on law during the 1970s, the collective efforts of a multitude of scholars failed to produce a satisfactory theory. Gradually, however, increasing interest in the concept of ideology began to suggest that there was still potential for such a theory. However, it was not until Hugh Collins' 1982 work *Marxism and Law* that this potential was realised. It is this work that will form the focus of this chapter.

Hugh Collins' *Marxism and Law*

Context

The proliferation of academic interest in Marx that occurred in the 1960s and early 1970s coincided with a period of great social upheaval. The events in Paris in 1968, set against a backdrop of increasing political activism, and the deepening capitalist crises of the 1970s, suggested to Marxist scholars that revolutionary change was not only possible, but may even be imminent. Furthermore, there was a feeling amongst such scholars that their work could contribute to the success of any movement for change. The polemical confidence of much of this work is startling today.[1]

Yet these revolutionary hopes soon faded, and the 'New Right' gained a political foothold. There was a sharp decline in the number of works that were conceived as political interventions with the explicit aim of contributing to an upsurge in revolutionary consciousness. According to McLellan, "the late 1970s was characterised by a post-coital *tristesse* compared to the excitement of the previous decade" (1999b: 960). Alternative theoretical perspectives, most notably postmodernism, quickly began to grow in popularity.[2]

Nevertheless, during the late 1970s and early 1980s, a healthy level of interest in Marxist theory persisted. Many thinkers saw a great deal of latent, unrealised potential in it, and works that set out to address the theoretical difficulties of Marxism remained common.[3] These works, as theoretical ones, tended to be purely academic excursions. Their aim

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[1] See especially Quinney (1973).
[2] See Introduction above.
[3] Most notably GA Cohen's *Karl Marx's Theory of History: A Defence* (1978).

was not expressly political; rather, the intention was simply to produce a more workable and robust theoretical framework. Collins' *Marxism and Law* (1982) fell precisely into this category. As such, it mattered little that Marxism's momentum had faltered; Collins' was an attempt to resolve the theoretical impasse of Marxist legal scholarship.[4]

Despite the failure to develop a satisfactory Marxist theory of law, valuable progress *had* been made over the course of the decade. Collins harnessed some of these advances. Crucially, he placed ideology at the heart of his approach. This concept had a long history in the Marxist tradition; indeed, it was the writings of Marx that "gave the concept of ideology the wide currency that it now enjoys" (McLellan 1995: 9).[5] However, during the 1970s, interest in the concept, and deployments and developments of it, increased exponentially; for Hunt, it was "no accident" that advances in Marxist legal thinking were accelerated once ideology began to be taken seriously (1985: 13-4). The heightened interest in ideology was the result of a number of factors. Firstly, there was an increasing awareness of the work of Antonio Gramsci, particularly his notion of hegemony (Vincent 1993: 374).[6] In the Anglophone world this interest was fostered by the translation of his writings through the 1960s and 70s; *Selections from the Prison Notebooks*, for instance, was published in English in 1971. Secondly, Althusser's *Ideology and Ideological State Apparatuses* (1971) gave the concept currency among the then booming structuralist movement.[7] Thirdly, and perhaps most importantly, was the need to theoretically understand the persistence of capitalism. Despite the social upheavals of the 1960s, the shock of Paris 68, and the crises of the 1970s, capitalism had proven remarkably durable and the perceived prospects of revolutionary change sharply receded as the 70s progressed. Ideology and the notion of hegemony provided a means to theoretically understand this.[8]

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[4] Note that Collins does outline the political implications of his theory in the final chapter of *Marxism and Law*, 'Class Struggle and the Rule of Law' (1982: 124-46).
[5] See 'Theory' section below.
[6] Indeed, Gramsci's famous aphorism regarding the 'pessimism of the intellect' fitted the prevailing mood of late 70s and early 80s Marxism perfectly. Of course, in the same breath Gramsci also called for "optimism of the will" (1978: 19).
[7] Albrow characterises the development of Marxist legal theory during the 1970s as a movement "from a Gramscian interest in politics to an Althusserian interest in ideology and finding in law a bridge between the two" (1981: 127).
[8] Interestingly, it was largely the same concerns that had prompted the rise of Western Marxism half a century before. Thinkers such as Gramsci and the members of the Frankfurt School asked how capitalism had sustained itself in the face of economic depression and war.

Collins' overwhelmingly theoretical bent marks him out from almost all the other legal scholars that have been considered thus far. As Eagelton puts it, Marx's aim was to "fashion a kind of practical philosophy which will help transform what it is seeking to comprehend"; his was an "action oriented theory" (1997: 3). Correspondingly, Marx, Engels, Lenin, Renner, Pashukanis and Althusser were all politically committed, and combined their theoretical concerns with more practical endeavours, be it party membership or the leading of a successful revolutionary movement. Tellingly, Collins has never returned to the subject since.[9]

Theory

Collins explicitly sets out to resolve the problems of determination and base and superstructure. As he puts it, the first task is to "differentiate clearly between the material base and all aspects of the superstructure. If we should fail to disentangle the political, legal and cultural aspects of a society from its relations of production, then Marxism would lapse into incoherence. Second, the mechanisms by which the material base determines the form and content of the superstructure have to be explained" (Collins 1982: 77). Although he draws upon an eclectic range of Marxist thinkers and ideas to resolve these difficulties, fundamentally his is a class instrumentalist position. His solution to the problem of base and superstructure will be considered below. Firstly, his solution to the problem of determination will be outlined.

Collins attempts to provide an attractive and workable theory of the determination of the legal by the economic without lapsing into reductionism. After the convoluted efforts of Althusser to escape 'economism', Collins recognises that for any Marxism some notion of economic determination must, ultimately, be preserved. This is particularly the case for a Marxism based upon the Preface. As Douzinas and Warrington put it, "whatever degree of conceptual or verbal sophistication is introduced in the base-superstructure metaphor, economic determinism cannot be fully exorcised [...] The priority may be defined as causal, methodological or even aesthetic, the superstructure may be given maximum autonomy consistent with the scheme. But the way the question is posed already concedes the main point. The search for a determined autonomy will always discover

[9] Indeed, *Marxism and Law* is written in a style which suggests that Collins has very little attachment to Marxism at all. The book outlines what a defensible Marxist theory of law looks like; that Collins would actually support such a theory is less clear.

necessity at the relatively determining and contingency at the relatively autonomous [...] This cleavage cannot be closed" (1991: 120). Collins accepts this, but maintains the possibility of an attractive theory; such a theory is possible if room is created for human agency.

Collins is well aware that his instrumentalist predecessors, going back to Lenin, failed to adequately resolve the problem of determination.[10] Collectively, they are unable to explain "how the ruling class become aware of their interests and then act as one body in pursuit of them" (Collins 1982: 35). This is the defect that Collins' theory of ideology is designed to remedy. In both Marxism and social and political science more widely, ideology is a notoriously slippery and elusive concept. The term has become associated with a variety of different meanings; no single uncontested and uncontroversial concept of ideology exists.[11] Thus Collins is forced to outline very precisely what his own use of the term entails.

Two basic approaches to ideology have developed within Marxism: Larrain terms them the 'negative' and the 'positive' approach (1983: 4). Marx's own work, which Larrain claims for the negative tradition (ibid: 42), can be divided into three stages. The first stage, in his early writings up to 1844, consists in a critique of religion and the Hegelian conception of the state. Marx describes these as 'inversions' concealing the real character of things; the term 'ideology' is not used. During the second stage, from 1845 until 1857 and exemplified best by *The German Ideology*, Marx introduces the word 'ideology' to describe those thought-systems that start from consciousness rather than the real, material world. As Marx and Engels memorably put it in the Preface to *The German Ideology*: "Once upon a time a valiant fellow had the idea that men were drowned in water only because they were possessed with the *idea of gravity*. If they were to knock this notion out of their heads, say by stating it to be a superstition, a religious concept, they would be sublimely proof against any danger from water" (1970: 37). Instead, Marx and Engels "do not set out from what men say, imagine, conceive, nor from men as narrated, thought of, imagined conceived, in order to arrive at men in the flesh. We set out from real active men, and on the basis of their real life processes we demonstrate the development of the ideological reflexes and echoes of this life process" (ibid: 47). There are a number

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[10] See Chapters 2 and 4 above.

[11] Indeed, Eagleton lists 16 "definitions of ideology currently in circulation" (1991: 1-2). See also, inter alia, Miller (1991: 235-7), McLellan (1995:1) and Heywood (2003: 5).

of problems with this passage, not least the language of "reflexes and echoes", which lends support to crude materialist notions of the superstructure reflecting the base (Williams 1977: 59). Nevertheless the general thrust against idealism is clear. The third stage in Marx's work on ideology again saw the actual term largely disappear. Beginning with the *Grundrisee* and culminating in *Capital* Marx reworked the idea of inversion through a detailed analysis of capitalist social relations. Here, ideology conceals "the hidden essential pattern by focusing on the way in which the economic relations appear on the surface" (Bottomore 1983: 220).

As Larrian argues, "although the elements of Marx's concept of ideology are scattered, are not systematically elaborated and are sometimes ambiguously presented, there is a remarkable continuity and consistency in Marx's treatment". The perspectives that Marx offers are "complementary and progressively complex, not contradictory" (1983: 41). Larrain claims that Marx cultivated a 'critical' and 'negative' approach to ideology: Ideology arises where contradictions exist in order to mystify or conceal those contradictions.

Despite this basic and persistent theme, there is support for different conceptions of ideology in Marx's work. Sumner accepts that Marx and Engels used ideology to refer to false representations, but "such statements do not warrant a conclusion that ideologies always mask and thereby sustain social structures". Sumner suggests that Marx's 'ideology' could reasonably and defensibly be said to include "sentiments, illusions, modes of thought, views of life, principles, ideas and categories. None of these things themselves seem to be the sole referent of ideology in Marx's work" (1979 : 12-13). Larrian concedes that there are the seeds of a 'positive' and 'neutral' conception of ideology in Marx's work.[12] Most notably, the Preface seems to refer to ideology not as a veil masking the real nature of things, but as an all-encompassing superstructural form: "a distinction should always be made between the material transformation of the economic conditions of production [...], and the legal, political, religious, aesthetic or philosophic- in short,

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[12] On the precise meaning of 'positive' and 'neutral', see Larrain (1983: 239 n.73). For him, 'positive' refers to the idea that "the same notion of ideology expresses the political ideas and interests of all classes in society". Intrinsically related to this, the term 'neutral' "refers to the fact that this notion of ideology no longer passes judgement upon the validity or adequacy of ideas". The conception advanced by Marx in *The German Ideology*, meanwhile, can be described as 'negative' and 'critical'; Negative in the sense that it refers not to ideas and interests in general, but only those that mystify reality, and as this implies that those ideas are not accurate representations of that reality, critical.

ideological forms in which men become conscious of this conflict and fight it out" (Marx 1962: 363). Similarly, Engels talks of the "ideological superstructure" and "ideological sphere" in *Anti Duhring* (1969: Ch 9).[13]

As a result of these ambiguities, there was potential for a 'positive' conception of ideology to flourish. Two additional factors ensured that this potential was realised. Firstly, there was a growing need to theoretically account for "the political ideas of the classes in conflict" (Bottomore 1983: 221).[14] The positive conception allowed this task to be fulfilled more readily than the neutral one. Secondly, the ascendancy of the positive conception was assured to a large extent by the fact that "the first two generations of Marxist thinkers after Marx's death did not have access to *The German Ideology*" (Larrain 1983: 54); key Marxists such as Lenin, Gramsci and Lukacs "were not acquainted with Marx' and Engels' most forceful argumentation in favour of a negative conception of ideology" (Bottomore 1983: 221).[15] In the absence of *The German Ideology*, Marx's other statements on ideology, supporting the positive conception, were elevated to a greater level of importance.

The first significant break from Marx' and Engels' negative conception of ideology was provided by Lenin. He argued that all classes in society had an associated ideology. Ideologies were not 'false' as such, but were to be judged according to their utility in the revolutionary struggle.[16] Following Lenin, Lukacs continued the move away from the negative conception of ideology. Throughout his oeuvre, "there is overwhelming evidence that Lukacs conceived of ideologies as expressions of different class interests, and in struggle with one another" (Larrain 1983: 71). In *History and Class Consciousness*, Lukacs emphasises that "we can only be liberated by knowledge" (Lukacs 1971: 262); a change in class consciousness can effect a change in actual class situation. Hence, "power is ultimately ideological. A ruling class dominates and organises its social totality by the impregnation of it by its own consciousness". Lukacs claims that the proletariat, by virtue of its structural position as the alienated class of capitalism, is the "first class to

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[13] Despite this, Carver notes that it was Engels who most avidly promoted the idea of ideology as 'false consciousnesses' opposed to science, for it fitted with his view of science as truth. He castigates Engels for coining the phrase 'false consciousness', which is "poorly thought through and productive of muddle", and thus "typical" of Engels (2001: 39).
[14] See also Anderson (1976: 7, 11) on this point.
[15] The crucial Part 1 of *The German Ideology*, 'Feuerbach', was first published in Russian in 1924 and in German in 1926.
[16] See Chapter 2 above.

acquire an adequate social comprehension of society and history" (Stedman Jones 1977: 44-6); it is the 'identical subject-object of history'. Hence the development of proletarian ideology is crucial if capitalism is to be overthrown. Lukacs' latent Hegelian idealism is clear, but what is crucial here is this furtherance of the positive conception of ideology.

It was the theories of Antonio Gramsci that truly confirmed the ascendancy of the positive conception of ideology. Gramsci used the concepts of ideology and hegemony as part of his attempt to theorise away from the rapidly ossifying and outmoded Marxist orthodoxy. That orthodoxy, best represented by Kautsky and Plekhanov, suggested that "the unity and autonomy of the working class, and the collapse of the capitalist system, virtually appeared as facts of experience" (Laclau and Mouffe 1985: 17); reality, it was felt, would eventually coincide with classical Marxist theory, and any appearances to the contrary were merely transitory.[17] That capitalist collapse did not occur in the West, despite the turmoil of war, economic depression and the example of the Bolsheviks, provided Gramsci with his intellectual point of departure; he was concerned with the means by which capitalism had managed to survive these crises.

For Gramsci, it is the dominant ideology that legitimises the dominance of the ruling class. These "ideological formations correspond to the interests of the dominant class"; however, "they cannot be reduced to mere emanations or epiphenomena of the structure" (Merrington 1977: 152). Instead, the dominant ideology is actively cultivated in both public and private institutions by intellectuals who exercise an "organisational function" (Gramsci 1971: 97). Indeed, "the world view of the ruling class was so thoroughly diffused by its intellectuals as to become the 'common sense' of the whole society, the 'structure of feeling' in which it lived" (McLellan 1995: 27). Hegemony is thus established. The overwhelming power of ideology and its utility to those in power leads Gramsci to redefine the state as force plus consent, or as he puts it, "hegemony protected by the armour of coercion" (Gramsci 1971: 263). Within this, force (or coercion) is provided by political society, and consent (or hegemony) is provided by civil society. [18]

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[17] Conversely, Bernstein's revisionism can be regarded as an attempt to accept and work within the developments of the capitalist mode of production (Laclau and Mouffe 1985: 29-36).

[18] Some relatively recent work picks up these Gramsican notions. Hall et al (1978) argue that in response to crises of authority and the economy, by the 1970s there developed a series of 'moral panics' (following Cohen (1972)). These culminated in a general 'law and order' campaign which reinforced the element of coercion in bourgeois hegemony and compensated for the decline in spontaneous consent. Similarly, Jessop places the work of Hay et al (1975) in the Gramscian camp

On the basis of Gramsci's analysis, it becomes crucial for the working class, through the mechanism of the party, to develop its own 'organic intellectuals'. Only then can the working class challenge the hegemony of the ruling class by developing its own 'counter-hegemony' and engaging in a 'war of position'.[19] Once a working class counter-culture has gained hegemony in civil society, the full frontal attack on the capitalist state can begin. Ideology is thus conceived as a site of struggle. Once again, it is clear that this 'positive' conception of ideology stands a considerable distance from Marx's own.[20]

Althusser was initially hostile to Gramsci's historicism, but he openly acknowledged that Gramsci provided the intellectual precedent for his own notion of ISAs and RSAs in *Ideology and Ideological State Apparatus* (1971: 136 n.7). In arguing for the permanence of ideology in all forms of society as the indispensable framework for every action, Althusser's essay represents the culmination of the positive conception of ideology in Marxism.[21] With his intellectual cachet, Althusser's work also served to accelerate interest in ideology among Marxists to an unprecedented degree.[22]

Collins' Marxist theory of ideology belongs firmly in the positive tradition. He begins by contrasting the Marxist positive conception of ideology with the idealist notion of how ideas are formulated. Hegel had famously argued that the motor of historical progress lay in the dialectal transcendence of contradictory world-views. Such world-views were immanent in the human mind, and could be discovered by reason and reflection. Collins, following Marx, rejects this; he argues that knowledge and ideas are neither "arbitrary flights of the

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(1980: 363). See also Cain (1983) for a detailed take on Gramsci's 'narrow' and 'wide' conceptions of the state, and Williams (1977: 108-113) for a critical appreciation of Gramsci's concept of hegemony.

[19] Despite Gramsci's opposition to reformism his notion of the 'war of position' and the concept of 'permanent revolution' influenced reformists such as those in the Eurocommunist movement (Bottomore 1983: 195).

[20] Within Gramsci's scheme, law figures at the levels of both state and civil society. At the former level law operates "coercively to maintain hegemony, and directively in periods of ideological and political crisis". At the latter level, legal enactments "educate and adapt the masses to the goals of civil society" (Sumner 1979: 257).

[21] As suggested above, however, Althusser ultimately struggled to reconcile the notion of ideology as the cement that binds together all societies with his earlier insistence that ideology is the opposite of science. See Chapter 4 above. For a detailed critique of Althusser on ideology, see Sumner (1979: 25-50).

[22] Spitzer (1983: 114) notes this increase in work on ideology, citing the work of Lichtman (1975), Kellner (1978), Hirst (1979), and Sumner (1979).

imagination nor the product of research into the recesses of the mind," but are in fact "constructed in response to practical experiences" (Collins 1982: 37).

The view that knowledge and ideas are responses to practical experiences is consistent with the empiricism associated with crude materialism and much of the work of Engels. Its "central tenet [...] is that the position of participants in the exploitation of natural resources determines what data they receive and what world views they form. Thus their ideas are reflections of productive activities, the relations of production". For Collins, this "simple" materialism is unsatisfactory (Collins 1982: 37).[23] A more sophisticated materialism is necessary. This is because, firstly, "men are not the passive recipients of ideas from an external world" (ibid: 37). Instead, there is an interaction between consciousness and material circumstances. Deliberate human action can lead to a change in material circumstances, and this in turn affects consciousness. Secondly, empiricism is flawed as men's ideas and consciousness do not automatically 'reflect' the real material world. Instead, knowledge is formed "through the ideological classification and comprehension of sense perceptions [...] these ideologies act as grids for analysing experiences" (ibid: 38). Williams makes a similar point. He suggests that consciousness and its products "are always, though in variable forms, parts of the material social process itself" (1977: 61).

According to this more sophisticated materialism, each individual carries with them an "ideological grid", which is formed in the processes of socialisation and education.[24] It is by means of this grid that "experience is translated into knowledge". The "continual interaction between thought and practice" ensures that the grid is fluid rather than static (Collins 1982: 38-9). As Douzinas and Warrington put it, "people in everyday life get on by using an unnoticed but extensive grid of tacit meanings about the world, its objects and institutions, and the acceptable forms of social behaviour. These meanings have not been explicitly installed, nor are we fully aware of their existence or function. We are socialised into them by imitation, usage, and custom" (1991: 33). Bourdieu also deploys a similar idea. He argues that individuals posses powers of regulated improvisation which are shaped by experience. These powers allow an endless capacity to engender products; thoughts, perceptions, expressions, and actions. The limits to these products are set by the historically situated conditions of their production. The result is something of a halfway

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[23] See Chapter 2 above.
[24] The concept of an 'ideological grid' was previously deployed by Sumner (1979).

house between idealism and crude materialism; it is neither unconstrained freedom leading to the creation of unpredictable novelty, nor is it the simple mechanical reproduction of initial conditionings (Bourdieu 1977: 95; Harvey 1989: 345). This is precisely the middle ground, according to Collins, that Marx himself was aiming for (1982: 36).

With this concept of ideology, class instrumentalist theory is provided with the means to avoid its traditional weaknesses.[25] Law is not merely a 'tool' of the ruling class, used to ensure the subordination of the masses, as crude instrumentalism supposes. Instead, groups which hold power in a society, by virtue of their similar positions, similar roles and similar experiences of the productive processes, also share similar ideologies; "The ruling class share common perceptions of interest as a result of similar processes of socialisation and experiences of productive activities. A consensus of values is established by the transmission of ideologies and their vindication through practical work" (Collins 1982: 40). As such, the ruling class enact "laws pursuant to that ideology", an ideology that "permeates their perceptions of interest". Objective class positions need not even be clearly perceived, and the theory does not require that that the ruling class develops an ideology that always represents its best interests. Instead the theory merely holds that people who occupy similar positions in relation to the productive process are likely to develop similar ideas *precisely as a result of* their shared position. Furthermore, there is certainly no conspiracy among an elite group that "deliberately sets out to crush opposition". Quite the opposite, in fact; the ruling classes' "perceptions of interest will appear to be the natural order of things since they are confirmed by everyday experience". Hence, laws will not be enacted with the aim of oppressing subordinate classes. Instead, the ruling class will simply have the maintenance of social and economic order in mind (ibid: 43).

The ideology of the ruling class in society becomes the "dominant ideology" (Collins 1982: 43). It permeates and is promulgated by the institutions of power and authority, and as such is largely adopted by the subordinate classes. Here, Gramsci and Althusser's ideas about the working class being bombarded with propaganda containing the dominant ideology are particularly important (ibid: 50). Althusser's theory of ISAs (1971), for instance, suggests how schools, churches, the media and so on inculcate the dominant

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[25] See Chapters 2 and 4 above on these weaknesses.

ideology among the masses.[26] According to Collins, this dominant ideology is not only omnipresent, but it is also 'plastic'; it can be stretched to cover matters not immediately relevant to the productive process. For instance, the ruling classes "support through law for the established church or familial responsibilities can be accounted for by extensions of ideologies which are pertinent to practices in the relations of production. The church teaches deference to authority and private property, which could be useful to the owner of the means of production seeking to discipline his workforce. Similarly, familial ties such as paternal control over marriages of his offspring could be linked to dominant ideologies concerning ownership and disposition of property". Across the variety of interest groups and issues, then, is an "underlying unity of perceptions and values steered by the ideologies of the dominant class" (Collins 1982: 57)

A number of further points are worth making about this notion of ideology. Firstly, there is "the possibility of divergences, inconsistencies, gaps and changes. The origin of the ideology in social practice permits individuals to express the variety of their experiences in diverse ideas and values [...] there is always scope for a different interpretation of a set of production relations" (Collins 1982: 71). In short, the theory provides scope for human agency. This is inherent in the theory; as Sumner puts it, "each individual surely embodies a unique configuration of social experiences, structures and ideologies" (1979: 219). Moreover, according to Collins, "not every detail of ideologies is influenced directly by the relations of production. Only the broad outlines and elementary themes of the dominant ideology are determined by social practices within the mode of production" (1982: 43). Sumner adds that ideologies can also form in non-economic practices, for "social relations take more than an economic form" (1979: 216). Thus "law is not just a reflex of economic structures but also a reflex of political and cultural relations" (ibid: 253). Clearly, this provides space for human individuality and idiosyncrasy, but there are structural limits to the kinds of ideologies that are likely to form,[27] and a finite number of common interpretations of social relations; for instance, few would interpret slave relations as being 'free'. Furthermore, those ideologies formed in non-economic practices will always inevitably be shot through with the effects of one's position in the relations of production. Simultaneously, the fact that those with access to power are likely to occupy similar positions in the relations of production ensures the broad consistency of the legal order.

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[26] For criticisms of Althusser's theory of ideology and ISAs, see Chapter 5 above.
[27] See Sumner (1979: 220-222) and Chapter 8 below.

This is because by virtue of their similar positions in the relations of production they will share similar ideologies.

Secondly, as already alluded to, ideology can no longer be seen as a superstructural phenomenon. Instead, as Althusser suggested, all social practice occurs within ideology. As Sumner puts it, "the concept of the ideology-social formation link as a connection between externals is a false one. [...] Ideology [...] is not a thought-mirror of the social formation but an active aspect of social practice and hence an integral, determinant part of the social formation at various levels" (1979: 35). And again; "the old notion of ideology as a gaseous effect of the economic structure is inadequate and must be replaced by a conception of ideology as an integral and substantive element of all social practice. In this way, ideology is an active force within all aspects of social development and not just an animal that roams around the ephemeral reserves of the superstructure" (ibid: 290).

Thirdly, this conception of ideology entails that *all* ideologies "must always in a sense be true for they incorporate plausible conceptions of reality" (Sumner 1979: 287). The opposition between truth and falsity is thus rendered inappropriate; "all understandings, ideas and perceptions are obviously perfectly sensible" (ibid: 287). "Criteria of truth and falsity become unrealisable," adds McKenzie, "because there is no original, non-ideological moment against which to judge them" (1994: 19-20). Williams agrees: If ideology is the complicated process within which men become aware of their interests, then the "distinction between 'true' and 'false' consciousness is then effectively abandoned, as in all practice it has to be" (1977: 68). Law, then, embodies appearances "as they have been seen and interpreted by the classes and groups that make the law" (Sumner 1979: 265). The phrase 'false consciousness', if it is to be retained at all, can now simply refer to the adoption of the dominant ideology of the ruling classes by the subordinate classes: "To the extent that this dominant ideology fails to match up to their experiences it is a misleading form of consciousness" (Collins 1982: 40).[28]

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[28] Sumner maintains that some ideologies are "more accurate representations of reality than others [...] relations of accuracy between discourse and reality are real phenomena" (1979: 291). On this basis Parekh (1982) suggests that the two notions of ideology in Marx can be reconciled. He argues that for Marx "an ideology is a body of thought systematically biased towards a specific social group". This bias is "socially derived". But according to Parekh, Marx "continued to uphold the traditional concept of objective truth". This is possible if one accepts that "ideological thought owes its origin to the lack of social self-consciousness and self-criticism, and the consequent unwitting acceptance of the characteristic forms of thought of one's own social group". So an

Finally, this theory of ideology suggests how the legal system consistently works in favour of the ruling classes, despite the fact that law is not simply a 'tool' of the powerful. Collins adopts the Althusserian theory of the 'relative autonomy' of the state. According to Collins, the state's autonomy is derived from the fact that, contrary to the feudal system, economic status under the capitalist mode of production requires little political support. This is because capitalism primarily relies on the "dull compulsion of economic necessity to preserve the continuity of the processes by which surplus value is extracted" (1982: 131).[29] As a result, the state is merely required to "guarantee the inviolability of private property and to provide a reliable system for the enforcement of contracts". Thus there is a relatively miniscule amount of direct manipulation of the organs of political power by those with economic power (ibid: 131). This entails that subordinate classes do have some access to the state and the legal system. However, any action by subordinate classes to utilise the machinery of the state to force legal reforms is likely to be rendered toothless for two reasons. Initially, the dominant ideology of the ruling class, in the absence of a well developed counter-ideology, sets the bounds of all action. The pervasiveness of the dominant ideology ensures that working class initiatives are invariably "founded on bourgeois conceptions of rights" (Collins 1982: 51). Thus, "the apparent variety of interest groups conceals [...] an underlying unity of perceptions and values steered by the ideologies of the dominant class" (1982: 57).[30] Secondly, only those initiatives that are broadly amenable to the ideology of the ruling class are likely to be accepted at all. The ruling class' worldview and position is thus buttressed without the need for direct control over the organs of the state.

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objective truth does exist in opposition to the unreflective bias of ideology (1982: 214-16). How one can escape one's own socially derived biases and uncover this objective truth is not clear, however.

[29] Abercrombie, Hill and Turner (1980) suggest that the relative stability of capitalism is more a consequence of this "pragmatic acquiescence" (Hill 1990) than ideological factors. They see the main role of ideology as preserving the coherence of the dominant class itself. Eagleton agrees that such "dull compulsion" undoubtedly has a role in stabilising "late capitalism", and Abercrombie et al's thesis is therefore a valuable corrective. However, he adds that "their claim that late capitalism operates largely 'without ideology' is surely too strong" (1991: 36).

[30] Beirne and Quinney agree: "Law reflects the ideologies of different fractions within the bourgeoisie and ideologies of other classes". Furthermore, law "also reflects the ideologies of occupational groups, minority groups, and the ideologies relating to family structure, morality, the environment, political representation and so forth". Nevertheless, ultimately it "expresses the ideologies of the dominant class" (1982: 253). Notice also the progression in Quinney's position compared to his work of the early 1970s.

Collins illustrates the theory's applicability with an analysis of the Combination Act 1800. This Act declared all trade unions to be criminal conspiracies with the aim of "discouraging the spread of trade unions amongst wage labourers" (Collins 1982: 41). Clearly, such a piece of legislation is amenable to crude class instrumentalist analysis; it seems that the ruling classes have responded to the growing threat of worker's combinations by simply outlawing them. However, the 1800 Act also made combinations of manufacturers illegal. "The presence of such a section in the Act could not be persuasively accounted for by a conspiracy theory, for cartels could benefit entrepreneurs enormously" (ibid: 42). Only a Marxist explanation conducted under the principles that Collins outlines can successfully explain this. The capitalist relations of production that were then emerging were based upon the exchange of commodities; "these transactions took place between individuals who bargained for favourable terms". From these practical experiences arose an ideology that "stressed the naturalness of an individualistic market economy" which ensured efficiency and fairness. The ideal was for sovereign property owning individuals to bargain in the marketplace. Workers' combinations clearly presented a threat to the realisation of such an ideal. Equally threatening were the manufacturers' combinations, so they too had to go. Only a Marxist theory of law that looks to "the sources of ideologies in productive activities [...] would provide the focus for an assessment of how the dominant class came to perceive legislation against combinations to be desirable" (ibid: 43).

Collins addresses the problem of base and superstructure by engaging with the most forceful criticisms of it. Opposition to the metaphor had proliferated over the course of the 1970s both within and outside of Marxism.[31] Plamenatz, not a Marxist, outlined the objections most precisely.[32] He argues that law is fundamental to society and as such cannot be considered to be superstructural. Contract law, for instance, appears to go to the very heart of the capitalist mode of production. In addition, he contends that modes of production cannot be described other than by reference to legal rights and legal duties concerning ownership and exchange; this too suggests that law cannot be merely superstructural. Collins, playing devil's advocate, proposes a third reason why law cannot be considered superstructural. He suggests that the material base "must include a normative dimension in order for it to possess the necessary stability and reliability to last

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[31] Within Marxism this opposition crystallised around Thompson's *Whigs and Hunters* (1975). Thompson questioned whether law could be limited to the superstructural level alone. See Chapter 4 above.
[32] See Chapter 1 above.

long enough for an entire social formation to arise upon it". More often than not, these "norms" or "rules" will be legal ones. All in all, there is a powerful case to suggest that law functions "in both base and superstructure and cannot be pigeonholed at the periphery of a social formation" (Collins 1982: 81).

GA Cohen provided the classic response to these criticisms in his influential *Karl Marx's Theory of History: A Defence* (1978). He crisply surmises "the problem of legality": "If the economic structure is constituted of property (or ownership) relations, how can it be distinct from the legal superstructure which it is supposed to explain?" (Cohen 1978: 217-8). Cohen's solution is beguilingly simple. He "provide[s] a means of eliminating the legal terms [...] used when production relations [are described]" (ibid: 218). Thus, instead of describing "rights", one can describe "powers"; the right to ownership becomes the power to ownership (ibid: 219). In this way, legal terms can be purged from descriptions of the mode of production. However, in a stable and law abiding society, "men's economic powers match the rights they have with respect to productive forces" (ibid: 232). This is because "law enforces rules containing the rights to exercise those powers" (Collins 1982: 82). Nevertheless, this simply obscures the real distinction that exists between rights and powers, which becomes evident during periods of transformation. Only then is it clear that the economic base is "developed through extra-legal relations", which are subsequently formalised by law (ibid: 83). [33]

Utilising this method, Cohen "successfully meets Plamenatz's criticism that it is impossible to disentangle the legal superstructure from the material base" (Collins 1982: 83). However, while Plamenatz's two criticisms may be blunted, there remains Collins' third criticism: the base must contain a normative element of some kind in order for it to be stable enough for a social formation to arise upon it. Cohen's focus on distinguishing powers from rights blinds him to this. Lukes attacks Cohen on precisely this point. He claims that Cohen ultimately fails to distinguish the base from the superstructure because the norms that support and sustain the relations of production cannot do so without becoming part of their content. According to Lukes, norms themselves enable and constrain agents, for "there must exist a high degree of intersubjective acceptance of rules" if behaviour is to be regulated in a stable fashion (1983: 113). Given this, it is difficult to conceive of norms as being external to the base. Lukes, then, disputes Cohen's

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[33] Cohen reaffirms this method in *History, Labour and Freedom: Themes From Marx* (1988: 30-2).

claim that such enablements and constraints can ever be identified in non-normative terms. He gives the example of contract law, holding that it is essentially norm-governed, for contract law itself defines the social practice of contracting; "the norms that define the practice of contracting enter into the description of the activities involved in that practice" (1983: 115).

Cohen responds to this criticism by accepting that "powers generally need the support of norms" and that "in the standard case, norms [...] are what enable people to exercise powers". However, he maintains that powers "are not essentially normative" (1988: 34, 36). Cohen thus extends his existing argument to deal with the third criticism of the base and superstructure metaphor: One can "distinguish between powers on the one hand and norms which arise subsequently on the other" (Collins 1982: 84).

Even if this argument is successful, Collins suggests that it remains unsatisfactory for other reasons. Cohen adopts what he calls a "functional explanation" to explain the content of the superstructure.[34] His argument is that the superstructure "has the content it does because that content is required to suit the relations of production" (Collins 1982: 84). As Cohen puts it, "legal structures rise and fall according as they promote or frustrate forms of economy favoured by productive forces [...] bases need superstructures, and they get the superstructures they need because they need them" (Cohen 1978: 231-33).[35] So, Cohen's superstructure always aligns itself to the requirements of the powers that form the base; "the normative superstructure arises in order to suit the temporary power nexus" (Collins 1982: 84). The difficulty with this view is that it threatens to remove the possibility of conscious human action. If the superstructure always mechanically adapts itself to the needs of the base, what room is there left for the active interventions of individuals?[36] Collins suggests that Cohen "simply claims that superstructural norms arise to accommodate the exercise of power but gives no reason to suggest why [and how] that happens" (ibid: 84). So although Cohen successfully separates the base from the superstructure while admitting the complexity of real-life social formations, he can only do so by simultaneously negating the role of conscious human action in the creation of that

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[34] See Cohen (1978: Chs. 9,10) for a detailed defence of this "functional explanation".
[35] Perhaps tellingly, the section in which these lines appear is itself entitled 'Bases need Superstructures'.
[36] This point has been made repeatedly throughout Part 1, notably in the sections on Engels (Chapter 2) and Althusser (Chapter 4).

superstructure. His position is, at root, a crude materialist one.[37] Indeed, as Larrain (1986) argues, despite his opposition to Althusser, Cohen ends by suggesting precisely what Althusser advocates; a type of determination that largely sidelines agency.[38]

To avoid this, Collins resolves the problem of base and superstructure through an alternative method. Upon rejecting Cohen's solution, Collins concedes that rules do constitute part of the material base (1982: 85). Yet, once again, if we cannot then separate the base from the superstructure and isolate the determining and determined elements, Marxism lapses into incoherence. Collins' novelty is to argue that "it is possible to accept that legal rules both express and constitute the relations of production, but to argue also that these laws are determined by the relations of production" (ibid: 87). Again, it is the theory of ideology that is crucial in supporting this argument.

Collins' contention is that ideologies are determined by social practices in the relations of production. This in turn presupposes that those social practices are relatively "settled", where "norms of behaviour had established a degree of regularity of behaviour within which persistent conceptions of the world could emerge" (Collins 1982: 85).[39] As a conscious form of social regulation, law is inspired by the dominant ideologies. "These ideologies will be articulated initially in customary rules and moral standards. Legal regulation inevitably coincides with such norms of behaviour as it is merely a more precise and positive articulation of the requirements of the dominant ideology" (ibid 87). Yet once a formal legal rule is announced, the "special quality" of law is that it seems to "subsume the existing customs within itself", and it is the legal rule rather than the customary norm that people look to to guide their conduct. Collins terms this the "metanormative quality of law", because it "overlays and swallows up" existing norms of behaviour and standards of conduct (ibid: 88). It is this *metanormativity* that allows Collins to propose a solution to the riddle of disentangling the base from the superstructure. The dominant ideology, which arises from the relations of production, determines the content of law. Therefore, law is superstructural in origin. However, "the metanormative quality of law then places the legal

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[37] Collins criticises Cohen on this point. He suggests that "crude materialist theories merely assert that conscious action is determined without locating the mechanisms by which this is effected" (Collins 1982: 84). Tushnet, whilst acknowledging that Cohen's is a "masterly contribution", holds that Collins' "analysis seems correct to me" (1983: 285-6).

[38] For a further, detailed critique of Cohen, see Taiwo (1996: 45-54).

[39] Again this stands a considerable distance from Cohen's theory, where it is unclear whether a base made up of "transitory power relations" would have the requisite stability to support the rise of complex ideologies (Collins 1982: 85).

rules in the position of closely regulating the relations of production, to the extent of being the sole institution giving them concrete form and detailed articulation. Thus law is superstructural in origin but because of its metanormative quality it may function in the material base" (ibid: 88-9).[40]

Collins adds that the legal rules in the base provide a platform from which new or more sophisticated variants of ideologies may arise. Thus, the "connection between base and superstructure is one of ideological derivation and incremental growth" (1982: 89). This process will continue, and an increasingly sophisticated political and cultural life will develop, until such time as the relations of production are abruptly transformed; then, a new set of practices and dominant ideology will arise and the whole process of the cumulative development of a social formation will begin again.[41]

Collins' scheme undoubtedly "destroys the simplicity of the traditional interpretations of the base and superstructure metaphor" (1982: 90). The question of whether law functions in the base or the superstructure becomes irrelevant; law can and does function in the base as the critics of the metaphor have consistently argued, but it is still demonstrated to be superstructural in origin.[42]

Critique

Collins' work quickly became the standard text on Marxism and law. Even his critics are happy to concede its undeniable strengths; "Collins' book is a landmark in Marxist jurisprudential writings. It is clearly written, analytically rigorous, and makes a genuine

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[40] Sugarman makes a similar point on the basis of his study of law, economy and state in England from 1750-1914 (1983b). He questions whether modern contract, commercial and property law was essential in securing certainty in commercial transactions as capitalism grew. Instead, private law may merely facilitate and legitimate. Whether Sugarman would agree wholly with Collins' metanormativity thesis is unclear, however.

[41] As Wright pus it, "instead of understanding historical variation in terms of discrete, qualitatively discontinuous modes of production as in classical Marxism, historical variation can be analysed in terms of more complex patterns of decomposition and recombination of elements of modes of production" (1993: 24).

[42] A further "incidental advantage" of this formulation is that it "becomes unnecessary to distinguish clearly between social rules and legal rules once it is conceded that the base and superstructure do not always differ in form or function". Consequently, "no importance need be attached to the term law" (Collins 1982: 89). Again, this is in tune with Gramsci, who "makes no distinction between legal and other norms" (Cain 1983: 103).

attempt to pull together a Marxist theory of law within a fairly short book" (Douzinas and Warrington 1986: 818). The chief reason for such praise is that Collins' theory goes a considerable distance to resolving the problems of determination and base and superstructure. However, a number of criticisms have been levelled at it.

Firstly, there remains unease at Collins' modification of the base and superstructure metaphor. Hunt, in a passage that "can be read as a criticism of Hugh Collins' solution to 'the legal problem in Marx'" (1991: 130), argues that the view of law as merely giving "retrospective recognition to those economic relations which develop spontaneously in the course of economic change and innovation" and "formal expression to already exiting normative practices" is "misleading" (ibid: 121). Hunt is hostile to the idea that "all that law adds is a slice of formality" to what already exists, for he feels that this "ignores the extent to which legal relations have distinctive effects", the most important of which is that legal relations actually constitute economic relations. He cites the formation of the modern corporation with limited liability as an example of this (ibid: 122). However, it is not clear that Collins would disagree with Hunt's assertion that law has distinctive, economic effects. Indeed it is precisely this argument that he accepts, while simultaneously attempting to defend the idea that ultimately law is conditioned by the relations of production.

Hunt adds that even when law does not create or constitute economic relations, it can still "make it possible for a social relation to exist in the complex form necessary to support and sustain its contemporary economic role" (1991: 122). Here the example given is the complexity of the modern contract, which "involves a degree of complexity that could not be sustained within informal normative mechanisms". Such is the sophistication of modern contracts, argues Hunt, that drawing analogies with "the simple [normative] act of barter" is not satisfactory (ibid: 122). Once again, though, Collins would seem to have already accepted such propositions, and made room for them in his scheme. Collins argues that once law has commenced its operations in the base of a social formation, it can itself form the basis for new, more complex ideologies which in turn may lead to new, more complex laws. Thus modern, sophisticated contracts have developed out of the less complicated exchanges that characterised the era of simple commodity production in capitalism's infancy. This process of accretion will continue until a set of productive relations are swept away in a revolutionary moment.

Hunt also suggests that for any set of economic relations "to operate with any regularity they must do so within conditions of a reasonable and sustainable degree of social peace and security". Law is one of the key mechanisms in providing such general conditions. Similarly, Hunt states that the mechanisms of law provide the "background conditions" which constitute the framework within which economic relations are conducted", and that law "provides the central conceptual apparatus of property rights, contract and corporate personality which plays a double role in both constituting a coherent framework for legal doctrine and providing significant components of the ideological discovery of the economy" (ibid: 122-3). Once again, it is difficult to envisage Collins disagreeing with this supposed criticism of his theory. As we have seen, he very definitively admits the role of law in the base. He would presumably be extremely amenable to Hunt's ideas, for he is at pains to point out the requirement for a normative element in the base on which ideology can form and progressively accrete.

In short, Hunt's criticisms of Collins seem rather misplaced. His concern seems to be that Collins does not appreciate just how intertwined law is in the base. Yet this is something that Collins readily accepts. His breakthrough is to show how this can be the case, and yet retain the idea that the relations of production ultimately determine law, as demanded by the Preface.

Cohen attacks Collins' metanormativity thesis from precisely the opposite angle. He describes Collins' criticism of his own work as a "mistaken polemic" (1989: 100), and in response he seeks to reassert the strict separation of base and superstructure, and maintain that law is exclusively an element of the latter. Cohen writes that "the centre of Collins' critique of my position proceeds from a premiss I endorse to a conclusion I reject" (ibid: 99). The premiss is that norms are required for stability and order in relations of production. The conclusion is that these norms are therefore *in* the relations of production. Cohen agrees that norms are essential to the stability of production arrangements, but claims that it does not follow that "the superstructure is *in* the base that needs it" (ibid: 99). Cohen suggests that his position is correct because both he and Collins identify the base as a set of productive relations. Cohen construes these relations as sets of *de facto* powers. So therefore law cannot be in the base. Collins never defines relations of production any differently, so he either accepts Cohen's definition, or he fails to define

them at all, "in which case nothing constrains what can be said about them", and anything could be part of them (ibid: 100).

Therefore, despite his agreement that norms are essential if the base is to remain stable, Cohen defines the base in such a way as to exclude norms. This is, of course, perfectly legitimate. Yet the advantage of Collins' formulation is that it robs the criticisms of the base and superstructure metaphor, most notably those of Plamenatz, of their potency. By maintaining the superstructural origins of law, but accepting and demonstrating how it can go on to become part of the base, Collins responds directly to the central thrust of the objections to the metaphor. In addition, although Cohen's strict separation of base and superstructure may have the merit of clarity and crispness, Collins' formulation has the great advantage of more readily acknowledging the messy reality of real-life social formations in a manner that retains theoretical coherence. Raymond Williams reminds us of the importance of taking "indissoluble real processes" to be the objects of study, rather than a temporally or spatially correlated metaphor (1977: 82).[43]

Collins, then, provides a robust solution to the problem of base and superstructure. It is not without difficulties; the source of law's metanormativity is not specified and whether other superstructural elements have the same quality is not explored. But these are more peripheral issues. The problem of dividing the base from the superstructure for theoretical purposes while acknowledging the complexity of real-life social formations has been shown to be surmountable.[44]

However, it is with Collins' solution to the problem of determination where the real difficulties lie. Of course, there are a number of advantages. Most importantly, Collins provides a theory in line with the Preface that demonstrates how the relations of production are the ultimately determining element of the legal sphere. Yet he does so in a way that maintains a central place for human agency. This alone makes it a singular advance over all the other theories of law assessed here. In addition, Collins' theory offers

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[43] See Chapter 1 above.

[44] Mieville (2006) also deals with the problem of base and superstructure in a convincing manner (see Chapter 3 above). Despite their different solutions, the common thread that contributes to Mieville's and Collins' success is that they both treat the base and superstructure formulation as the metaphor it was always intended to be. The base and superstructure metaphor is simply a mechanism designed to simplify complex real processes for analytical purposes; Mieville and Collins do not shy away from reconstructing it to take account of the complexity of real-life social formations.

scope for "each piece of law [to] be examined independently for its economic, political and cultural roots" (Sumner 1979: 253) rather than bluntly asserting that all law reflects the interests or preserves the domination of the ruling class. Collins' is a "politically important polemic against idealism", which warns against "the reification of ideas" and focuses attention on "the vital importance of economic considerations which are often disguised in idealist rhetoric". It also "challenges the notion of law's neutrality" and stresses that "currents of ideas and beliefs are instruments of power" (Cotterrell 1992: 136). At the very least it provides useful insights into law: "In particular, the perception of the non-autonomy of law is an important counterpoint to the implicit assumptions of much formal legal discourse" (McCoubrey and White 1999: 142).[45]

Collins' solution to the problem of determination also resists the criticisms of it mounted by Cohen. Cohen suggests that there *is* common ground between his theory and Collins', for his model of superstructural determination tends to confirm "what Collins calls the 'class instrumentalist' view of law, which he is therefore wrong to contrast with my own view". Cohen maintains that "the essential mechanism is struggle between classes" (1989: 97). He reasserts that "people fight, successfully, to change the law so that it will legitimate processes they either have or perceive to be within their grasp, and lawmakers alter the law to relieve actual or potential strain between it and the economy" (ibid: 98).[46] However, Cohen then distances himself from Collins. Collins argues that classes are free to enact laws that are completely contrary to their interests, a position he adopts in order to avoid a reductive economic determinism. Cohen's historical materialism is more demanding of the ruling classes; he claims that classes must *always* act broadly within their best interests: classes must always "pursue their larger interests competently", he writes. If this was not the case, the class structure at any given time would not be, as Marx held, determined by the level of development of the productive forces. As Cohen puts it, paraphrasing Marx's *The Poverty of Philosophy*, "the 'steam mill' would not give you 'society with the industrial capitalist' if industrial capitalists systematically misread the opportunities the steam mill provides" (ibid: 98).

Yet even here there is an element of common ground. Cohen accepts that "classes may, of course, misprosecute their interests in this or that respect" (ibid: 98). This is similar to

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[45] Note that Cotterrell and McCoubrey and White are not talking specifically of Collins, but of Marxist legal theory in its best variants.
[46] A point Cohen originally made in *Karl Marx's Theory of History* (1978: 231).

Collins' position. Presumably, if this occurs, the negative consequences that would surely result ensure that speedy corrective action is taken. Given this, even in the worst case it is likely that favourable, if not best, interests will ultimately be pursued. So Collins is right to say there is nothing *forcing* best interests to be pursued in *any particular case*, but Cohen is also correct in asserting that, *over time*, ruling classes *will* follow what is in their interests.

However, Collins' notion of an omnipresent, overarching dominant ideology leads to real difficulties. If, on the basis of the theory, one maintains that *all* law is conditioned by the relations of production, one is forced to stress the plasticity or the elasticity of the dominant ideology. Only then could it possibly explain those laws that are far removed from the processes of production. But the further ideology is stretched, the more "the link between the material world and ideologies" is strained, or even "disappears" (Collins 1982: 76). For instance, how can ideologies evolved from the relations of production explain the laws of marriage, or prohibitions of victimless crimes? It is not impossible that they can explain these and other rules and regulations, but often the dominant ideology must be implausibly extended in order to do so.[47] On the other hand, if one was to make "a serious attempt to situate the ideologies behind all legal rules in productive activities, large areas of the law are left unexplicated [...] as our attention shifts to legal rules which govern subject matter only remotely connected to productive activities" (ibid: 76).

There seems to be no way out of this impasse. The plasticity and malleability of the 'dominant ideology' is, in the final analysis, a kind of necessary aporia. It is necessary as it is the only way a Marxist theory of law that is in line with the Preface and maintains scope for human agency can be rendered workable. Yet at the precise point where the theory should be engaging empirically in order to explain the content of law, it appears as toothless and vacuous. Collins himself suggests his "dissatisfaction" at the "ultimately unconvincing" theory (1982: 75).

Tushnet agrees; he argues that this most "sensible" of Marxist analyses ends up as "an empty analytic theory that states no more than that particular laws are explained by the

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[47] There is also a need to locate the source and limits of this malleability.

state of the class struggle" (1983: 282, 287).[48] Stone concedes that the Marxist theory of law cannot be expected to predict specific laws. "The propositions underlying Marxism are too general to yield unequivocal predictions at an operational level". What Marxism can do is "provide a shape or structure to revealed relationships" (Stone 1985: 40-1).[49]

Mathiesen, writing prior to Collins, worried that it is "uncertain whether one can ever prove- in a strict sense- the materialist conception of law". Thus, "like other generalised conceptions of society, the materialist conception remains in the final analysis a political and theoretical interpretation of the world, a paradigm, a way of grasping the world conceptually" (1980: 72).[50] This, however, need not necessarily be a problem. As Cotterrell puts it, "the issue here is not proof, for social theory cannot prove or be proved [...] the issue is the rigour of the concepts used" (1992: 136). The concept of an elastic and omnipresent dominant ideology, however, does not appear to be rigorous enough to be of much use theoretically or as a guide to empirical research.

So, despite Collins' best efforts, Marxism would appear to be incapable of providing a complete and comprehensive explanation of law. Collins' theory, undoubtedly the apogee of Marxist thinking of law, fails to provide an adequate solution to the problem of determination.

Beyond Collins?

As this chapter demonstrates, Collins maintains the distinction between the norms that make up the base, and the legal norms that originate in the superstructure by relying on the concept of metanormativity. Collins holds that formal laws, once formulated, swallow

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[48] According to Tushnet, the difficulties of Collins' theory demonstrates that "the only candidate for a viable Marxist theory is one that deals with the form and not the content of the law", and seeks to explain only the broad outlines of this form (1983: 289-90).

[49] This means, according to Stone, that Marxism cannot be falsified. On Popperian terms this renders it unscientific (Stone 1985: 40-1). Tushnet feels that this is problematic, for he believes that "many Marxists" hold a Popperian view of science (1983: 284). This may be so, but there are also many Marxists who are not committed to such a view.

[50] Mathiesen's *Law, Society and Political Action: Toward a Strategy Under Late Capitalism* (1980) is something of a staging post between the Althusserian structuralism that was very much the vogue of the time, and a return to a more traditional Marxism. Mathiesen harbours doubts about the traditional base and superstructure metaphor, but acknowledges the need to locate the "precedence of materiality" (ibid: 18). Thus he adopts Althusser's concept of the mode of production (ibid: 166), yet remains committed to political action capable of effecting a change in society in the manner of more traditional Marxisms. For a summary of his works, see Feest (2006).

up the informal norms that make up the relations of production. In this way Collins shows law to be superstructural in origin, but capable of functioning in the base. Once established, law becomes an important component of the base, and central in guiding conduct.

The idea that formal legal rules subsume the previously informal norms is one that Collins is perfectly entitled to use. As we have seen, it does provide a solution to the problem of base and superstructure. However, there is a sense in which the argument remains unsatisfactory. The key problem is that the method Collins utilises to solve the base and superstructure problem is entirely arbitrary within the Marxist framework that Collins adopts. The idea that law is metanormative and that it adds formality to previously existing norms has no particular significance from a Marxist standpoint; it is not grounded in the theory that Collins elsewhere strictly adheres to, and goes to great lengths to preserve.

The criticisms of Collins outlined in the previous section hint at this problem. Hunt is uncomfortable with the idea that law merely adds a slice of formality to already existing norms (1991: 121-2). However, the basis of his unease is that law has distinctive effects, something that Collins would readily accept. Hunt's criticism misfires because he does not outline why law is distinctive; he does not provide a definition of law that can separate it from norms, and that has meaning from within Marxist theory. Cohen is aware of the importance of defining law in a way that distinguishes it from norms: he criticises Collins for failing to provide an alternative definition of the relations of production (1989: 99-100). But, with his view of norms as *de facto* powers, Cohen also fails to go beyond the notion of formality and his solution, like Collins', seems arbitrary and rather meaningless within a Marxist framework.

What is required to go beyond Collins, then, is the construction of a concept of law that distinguishes it from mere norms. This concept should maintain the distinction between base and superstructure, but also be simultaneously meaningful within the Marxist framework.

Collins himself argues that Marxists should avoid specifying a concept of law with any precision. He holds that Marxists should reject the 'fetishistic' idea that there is one unique phenomena that can be described as law, for this obscures the more important point that

in each historical epoch there are a variety of institutions that preserve order and facilitate the smooth running of the relations of production for the benefit of the ruling class (1982: 99, 111). For Collins, the focus for Marxists should not be on proposing definitions of law and drawing up lists of its functions, but on explaining the functions that law and other social institutions perform in particular historical contexts (ibid: 13).

Whatever the merits of these arguments, they do not prevent Marxists from holding that *within capitalism* there *is* something specific called law that can be identified, even if this law and its features are not trans-historical and universal. This position does not contradict Collins' insistence that there are various other social institutions in addition to law that preserve order. More importantly, if there is no attempt to specify what law is, then it is not possible to separate it from the non-legal norms that make up the relations of production. Therefore, without a suitable concept of law it is not possible to differentiate adequately between base and superstructure.

Of course, Collins' theory of metanormativity necessitates the abandonment of simple versions of the base and superstructure metaphor. However, the maintenance of the idea that law originates superstructurally means that there must be something that marks it out as different from those norms that make up the relations in the base. This must be the case even if the picture at any given point is a complex one and there is no clear divide between base and superstructure in a complex society where the process of "incremental growth" (Collins 1982: 89) is well evolved.

Capitalism, Law and Legitimacy

It is possible to construct a concept of law that maintains the divide between base and superstructure and is simultaneously meaningful from the Marxist perspective if one focuses on the notion of legitimacy.

As Collins has persuasively argued, law is ultimately an instrument of class oppression, even though less sophisticated variants of instrumentalist theory must be abandoned. This raises the question of laws' legitimacy. Why is law seen as legitimate by the very peoples whose continuing subordination it contributes to? Why do such people accept it as providing legitimate standards of conduct and boundaries of acceptable action?

The writings of Max Weber offer a series of interrelated ideas that suggest why law is seen as legitimate in capitalism. These ideas can be profitably linked to the Marxist theory developed by Collins. Three of Weber's ideas in particular are of use; his typology of social action and rationality, his typology of legitimate domination, and his outline of law's logical formality.

For Weber, the essence of capitalism consists in its privileging of one particular 'ideal type' of social action (Cotterrell 1992: 150). Traditional (habitual) action, affectual (emotional) action, and value rational action (which is "determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other form of behaviour, independently of its prospects of success") (Weber 1968: 24-5) are increasingly marginal within capitalist society. Prevalent at their expense is instrumentally rational action (*zweckrational*), where "the end, the means, and the secondary results are all rationally taken into account and weighed" (ibid: 26).[51] Instrumentally rational action within capitalism is economic in nature, and oriented toward profit in the market (Cotterrell 1992: 150).

Weber also outlines three ideal types of legitimate domination. These are legal domination, charismatic domination, and traditional domination. "In a system of domination characterised by legal authority, legitimacy rests on 'rational grounds' and on the belief in the inherent 'legality of enacted rules and the right of those elevated to authority under these rules to issue commands'" (Morrison 1995: 291 [quoting Weber 1968: 215]). The form of domination in advanced capitalist societies is clearly closer to this pole than the alternatives.

The third facet of Weber's oeuvre that is of use concerns types of 'legal thought'. According to Weber, such thought can be either rational or irrational, and formal or substantive in orientation. Formally irrational law employs means that cannot be controlled by the intellect. An example of this would be the use of ordeals in criminal trials. Substantively irrational law is where decisions are made on the facts of individual cases

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[51] It is crucial to recognise that Weber intended these as ideal types: "It would be very unusual to find concrete cases of action, especially of social action, which were oriented *only* in one or another of these ways" (Weber 1968: 26). As such they do not exist in pure form in experience, but are models of possible motivations for action (Cotterrell 1992: 150).

evaluated on ethical, emotional, or political grounds rather than by general norms. Rational law, on the other hand, is guided by general rules as opposed to subjective reactions to individual cases. Substantively rational law is guided by general rules that are determined by an ideological system other than itself, such as a system of morality, religion, or political authority. Formally rational law is guided by general rules which are applied to the facts of the case. Logically formal law is chief kind of formally rational law. It consists of highly abstract rules applied to fact situations. This type of law has commonly been seen as typical of the west and critical to capitalist development as it is best able to provide adequate and intelligible support for purpose rational economic activity (Cotterrell 1992: 153). It is systematised, logically formal, clear, internally consistent, gapless, it can subsume all conceivable fact situations, is self justifying and requires no appeal to outside forces for its legitimacy (Weber 1954: 62).[52]

There is a clear affinity and interrelationship between these three ideas. Capitalism is dominated by instrumentally rational social action; indeed, such action is the very stuff of the capitalist mode of production. Legitimacy thus comes to rest on rationality, so domination takes a rational-legal form. Within this, formally rational law is best placed to ensure continuing capitalist development. Law is increasingly important and accepted as "it provides a commonsensical and comprehensive framework of predictable rules which make it possible to pursue purpose rational social action. [...] Law provides the basis for its own acceptance through its own logical form: as a set of rules within which individuals can orient their conduct in a purpose rational manner, a manner that becomes pervasive not only within economic life but well beyond it too" (Cotterrell 1992: 152).

Where does this leave the search for a meaningful concept of law? Based upon Weber's observations, law can be distinguished from mere norms in terms of its legitimacy. The source of its legitimacy is its very form, its rational nature: Law is seen as legitimate as it buttresses the economic order and echoes the logic of the economic system. It resonates with the broader set of ideas that are current in society, as it 'fosters and expresses' the "general processes of rationalisation of life in capitalist society" (Cotterrell 1992: 152). One recalls Hart's famous distinction between habits of obedience and 'social rules' (1961). According to Hart social rules differ from habits in three crucial ways. Firstly, for a group to have a habit it is sufficient if their behaviour converges. Deviation from such a habit is not

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[52] On the four ideal types see Weber (1954: 63) and Milovanovic (1989: 63-68).

a matter for criticism. This is not the case with social rules, where deviation is a cause for criticism. Secondly, with rules criticism is justified simply because of that deviation; "not only is such criticism in fact made but deviation from the standard is generally accepted as a *good reason* for making it" (ibid: 54 [emphasis in original]). Finally, we come to the internal aspect of rules. According to Hart, when a habit is general in a group, it is externally observable. However, "by contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record" (ibid: 55). Hart uses the example of chess players to illustrate this point. They do not merely have similar habits of moving the Queen which an observer who knew nothing of their attitude could record. The also have a "critical reflective attitude" about the proper way of moving the Queen. As a result, the internal aspect is not the same as feeling bound to rules. People may accept rules but feel no compulsion. "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'" (ibid: 56).[53]

So, in sum, law is a formal, rational, abstract system of rules that finds its legitimacy in the fact that it fosters and expresses something of the underlying nature of capitalist rationality, and it is internalised by at least some members of the society. This then, is a concept of law that distinguishes it from mere norms. As a result, the distinction between base and superstructure can be maintained. In addition, the concept is meaningful from a Marxist perspective as it locates the source of law's legitimacy in the types of social action and rationality that are central to the capitalist mode of production.

Nevertheless, there remains a point of friction between Weber's account and the Marxist legal theory developed by Collins. Weber's relationship to Marxism is complex[54], and in

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[53] Hart adds that it is only the officials of the system who require this internal aspect (1961: 59-60, 113).

[54] Weber is commonly seen as being fundamentally opposed to Marx, crucially stressing that ideas and forms of rationality are drivers of history as opposed to Marx's emphasis on material conditions

this context there is a clear difficulty. Weber holds that the formally rational law that is dominant within capitalism requires no appeal to outside forces for its legitimacy (Weber 1954: 62). In this it is unlike substantively rational law which is made up of general rules that are determined by an ideological system other than itself, such as a system of morality, religion, or political authority. Yet this would appear, on the face of it, to be inconsistent with Collins' theory of determination. According to that theory, the legal is *always* determined by reference to a dominant ideology; law is the product of a dialogue with that ideology. Clearly, there is a potential inconsistency here. However, in resolving that inconsistency, it becomes clear that by adopting the Weberian/Hartian concept of law outlined above, Collins' Marxist theory of law can actually strengthen its critical edge.

Towards a Critique

Collins himself points out this inconsistency. Contrasting his own approach with that of Weber, he suggests "instead of legal thought being a discrete, non-instrumental, and rational investigation of justice, it was portrayed as a dialogue with the background dominant ideology on the basis of the formal constraints of coherence and consistency" (1982: 136). How can this inconsistency be resolved?

It is possible to accept Weber's view that capitalist law aspires to the ideal of being formally rational, and yet maintain Collins' idea that it is conditioned ideologically. This is possible if one sees the formally rational ideal as something valued by the dominant ideology; *that law should be formally rational is something that is demanded by the dominant ideology*. The idea that law should be purged of ideology and based purely upon principles of rationality is itself a product of ideology.

In making sense of this, it is instructive to consider why law took a largely formally rational guise in capitalism. To remain true to the historical materialist method, in doing this one should look to the properties and processes of the material base for clues as to how the dominant ideology, and subsequently law, has developed (Collins 1982: 131). Why does the dominant ideology in capitalism value formal rationality? There are a number of interrelated reasons for this.

(Cotterrell 1992: 150). However, the precise nature of Weber's relationship with Marx is not quite so clear (see Morrison 1995: 215).

Firstly, in capitalism, for the first time classes are constituted on a purely economic basis. There is no longer any need to tie labourers to the land as there was in feudalism. Instead, "capitalism relies primarily on the dull compulsion of economic necessity to preserve the process by which surplus value is extracted". As a result, the state and law are not required to explicitly support economic structures and status relations (Collins 1982: 131). Ideologically, this represents a levelling of the traditional status distinctions that were upheld by law. Employer and employee became technically equal in their ability to make contracts and own and divest of property. Given this, it becomes unnecessary for law to expressly maintain the hierarchy that characterised feudalism. Instead, the development of law that is formal and abstract is encouraged by the ideology derived from the new relations of production.

Secondly, as capitalism developed the system of commodity exchange saw the capitalist class of entrepreneurs enter the marketplace as equals in order to trade goods. These peoples had no mechanisms for establishing systems of authority or hierarchy, unlike the feudal system which was comprised of defined ranks. However there was a need for a stable and predictable framework within which economic transactions could take place. Clearly, as the parties to each transaction were equals, the law could not favour one over the other. As Collins puts it, all that was necessary were guarantees as to "the inviolability of private property" and the provision of "a reliable system for the enforcement of contracts [...] this is the night-watchman state of liberal political theory" (Collins 1982: 131). Formal, abstract law was able to provide this without undue interference in the process of commodity exchange. Clear, abstract legal rules provide the space for instrumentally rational action in the marketplace to occur, no more, no less. They provide the background context within which people can orient their conduct in instrumentally rational ways. Law became drained of any explicit class content and moved towards the formally rational ideal of Weber. In addition, in case of dispute "an impartial arbiter within the bourgeoisie was required" (Collins 1982: 132-3). The 'neutral' state, divorced from economic power, was ideal for this role, and its formal, abstract law, disinterested and impartial and not reliant on any political or spiritual ideology, was entirely appropriate.[55]

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[55] These arguments could also be related to Weber's ideas of 'disenchantment' and bureaucratisation (Weber 1930, 1968).

The move toward formally rational law can therefore be seen in Marxist terms as being grounded in ideological shifts themselves related to changes in the relations of production. Law is not autonomous from ideology; its appearance to the contrary is precisely as a result of ideological processes. The dominant ideology that emerged during the transition to capitalism placed value on instrumental rationality as it was through instrumentally rational social action that capital could be reproduced most effectively. The legal regime that was created on the basis of this ideology buttressed this, and by taking a formally rational, abstract form, was able to provide the framework for such action to continue.

This also furnishes the basis for a Marxist critique of legal arrangements. Despite appearances to the contrary, the legal system and its laws are not neutral, autonomous, non-ideological phenomena. They actually play a central role in the preservation of the existing set of inequitable social relations. Given this, law should not be uncritically accepted as a source of action guiding rules. Indeed, for Collins, the demystification of law is the central task for Marxist jurisprudence (1982:139).

Overall, by looking to the work of Weber and Hart it is possible to construct a concept of law that differentiates it more precisely from norms. This ensures that the critical distinction between base and superstructure can be maintained. By focussing on law's legitimacy in terms of the underlying rationality of the capitalist system, that concept of law is also rendered meaningful within the Marxist framework. Furthermore, utilising such a concept of law sharpens the critical edge of the theory of law offered by Collins, for it brings into sharper relief the ideological nature of law, despite its appearance to the contrary. However, adopting this concept of law does not alleviate the real difficulty with Collins' Marxist theory of law, which remains the notion of an elastic and omnipresent dominant ideology.

Marxist Legal Theory in the Wake of Collins

Collins' *Marxism and Law* was published at a highpoint for not just Marxist legal scholarship, but Marxist theory in general. His work is plainly part of the burgeoning tradition of the time; this is evident in its central concerns, its tenor, its language, and

above all, its hope for a complete, general theory of law. Yet no sooner was the book published than Marxism entered into a serious decline.[56]

As a result, Marxist legal scholars since then have been forced to work in a less conducive atmosphere, isolated from any large, evolving tradition. Consequently, much of the Marxist legal scholarship that has occurred over the last quarter of a century or so is what Hunt calls 'analysis' (1981).[57] These attempts tend to take the "signs" (Hunt 1981: 92) of Marxism and use them to explore very particular areas of inquiry. Chimni (1993, 1999, 2004) and Koskenniemi (2004) both explore international law using Marxist concepts. Neocleous (2003) analyses company law, while Roth (2004) seeks to apply Marxist insights to the human rights 'project'. Roth in particular is alive to the nuances and potentially conflicting interpretations of Marxism, but none of these more recent authors attempts to resolve the question of what Hunt calls "completed or unitary" theory (1981: 92-3) in the manner of Collins. Instead, Marx and Marxism are treated as repositories of ideas ready to be deployed as and when it is necessary.

Hunt himself did attempt to address this lacuna. His work is notable for it is self-evidently a product of the ferment of the 1970s and 1980s and is clearly steeped in the traditions and ideas of the Marxist legal theory of that time. Hunt outlines a "relational" Marxist theory of law (1991). He argues that law is one of many types of social relation. Others include economic, political, class and gender relations. Each relation is made up of different dimensions; power, institutional, ideological and discursive. Legal relations contain all these elements. They are unique as they always generate a potential mode of regulation and they are interpellative; legal relations only exist by calling into existence legal subjects. Law is also distributive as it can change the relative positions of legal subjects in social relations. This "intentionally abstract" theory is in tune with Marxism's fundamental focus on relations and according to Hunt, it has the potential to explain relations of subordination and domination, accounting for their reproduction and persistence, and identifying the conditions for ending them (1991: 105-11). It is not clear that this scheme is incompatible with Collins' work, but the lack of focus on the questions of determination and base and superstructure is obvious.

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[56] See Introduction and Chapter 1 above.
[57] See Chapter 1 above.

Another attempt to produce a systematic theory is provided by Taiwo (1996). He develops a Marxist theory of natural law which he terms "legal naturalism". His essential claim is that the positive law of any society is "reflective of deeper structures" (ibid: 1). According to Taiwo, the necessary or constitutive relations in a mode of production that are legal provide the 'natural law' of that mode of production (ibid: 58-9). 'Good' positive law expresses these natural laws. For instance, slavery was made illegal in capitalism as capitalism is based upon the freedom of individuals to dispense of their labour power as they see fit (ibid: 70-1). Taiwo's notion of natural law is potentially compatible with Collins' notion of ideology, where positive laws are enacted pursuant to the underlying dominant ideology.

As demonstrated earlier, Mieville (2004, 2006) has attempted to produce a fully-blown theory of international law based upon the work of Pashukanis.[58] Its applicability to forms of law other than international law is not clear, however. Mieville, following Pashukanis, also focuses on the form of law, whereas Collins' is a theory of content and as such sets up no strict rules about what can and cannot be classed as law.[59]

Conclusion: Theoretical Weaknesses, Contextual Changes

As Part 1 has demonstrated, existing Marxist theories of law run into difficulties on two axes. Firstly, they all exhibit major theoretical weaknesses that seriously undermine any claims to defensibility. No one Marxist theory has been able to provide convincing solutions to the problems of determination and base and superstructure. Collins comes close, but ultimately his theory is also found wanting.

Secondly, Marxist legal theory has always indissolubly been a product of its time and place. The flawed solutions to the two problems are very much the result of the particular concrete pressures and socio-political context of the day. Would Engels have constructed such a rigid materialism if he was not attempting to attack the theories of his rivals? Would Lenin have been so keen to conceptualise law as the weapon of the ruling class had he

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[58] Indeed, Mieville's work, and that of Chimni, Koskenniemi and others such as Susan Marks (2000), suggests that *if* we are to see a revival of Marxist legal theory, then it seems it will be scholarship on international law that will be its motor.

[59] Interestingly, the two major attempts at theory in the last decade, that of Mieville and Taiwo, both support the withering away thesis (Taiwo 1996: Ch 6; Mieville 2006: Ch 3).

not been on his way to leading a successful revolutionary movement? Would Pashukanis have been so aggressive in his condemnation of law if he had not been a leading figure in a newly created society determined to sweep away the last vestiges of the old one? Would Althusser have sidelined human agency quite so readily if he had not defined himself in opposition to existentialist Marxism? Time and again, one sees that context is absolutely central in understanding the tenor, the strengths, and the weaknesses of theory.

Recognition of the importance of context also alerts one to the fact that theories from different times and places must be utilised with extreme caution in the contemporary world. Even Collins' theory, the most recent in this study, is based on outdated concepts and assumptions associated with the height of the modern period. A decisively new and novel context has emerged which Marxist legal theory, if it to remain relevant, must respond to. Part 2 will detail *late modernity*.

PART 2. LATE MODERNITY AND LAW

"All fixed, fast-frozen relationships [...] are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air [...]."
Marx and Engels, *The Communist Manifesto, February 1848* (1968: 38)

CHAPTER 6. LATE MODERNITY

Part 1 demonstrated that the flawed legal theories that Marxists have developed are heavily context-dependent; that is, they respond to the particular socio-political environment of the time and place of their conception. To understand each of the theories, and their flaws, it is therefore necessary to situate them in their contextual milieu. However, since Collins' work, the most recent of that analysed in Part 1, a series of decisive economic, social, political, and cultural shifts have occurred. As such, many of the concepts and assumptions that Collins based his work upon are now outmoded. Part 2 will outline the nature of these shifts, which, taken together, constitute 'late modernity'; not an entirely new and novel era, but an era significantly different form the modern era that preceded it. This Chapter will firstly discuss the terminological issues: The adoption and precise meaning of the term 'late modernity' and its division into three constituent parts; late modernity itself, late modernisation and late modernism. Then, the central developments within each of these categories will be described. Following this, Chapter 7 will detail the concomitant changes in the legal sphere.

Some Notes on Terminology

Late Modernity, Postmodernity and the Persistence of Capitalism

One of the central preoccupations of sociology over the last twenty years or so has been to document and theorise the nature and scope of the changes that contemporary society is undergoing. Despite widespread agreement on the extent and nature of the changes, notwithstanding differences in theoretical outlook, there is a considerable level of disagreement as to whether the changes constitute a decisively new era that is in some way beyond modernity, or whether they simply represent the continuation, extension and deepening of modern processes. Those in the former camp tend to favour the label 'postmodernity'.[1]

[1] Theories of postmodernity were not the first to suggest a decisive break with a modern, capitalist past. Bell's theory of 'postindustrial society' (1974) focused on the form of production. According to him, industrial societies manufactured goods, while today's postindustrial society increasingly produces services. The professional and technical class thus constitutes the new ruling class. Despite identifying a central trend of contemporary society, Bell's theory has been much criticised. See, for example, Callinicos (1989: 121-2) and Smart (1990: 14).

The term 'postmodern' was deployed expressly to denote a new phase of human history for the first time, and most famously, by Jean-François Lyotard in *The Postmodern Condition* (1984). Crook, Pakulski and Waters also argue that there has been a "phase shift" to a distinctive and radically new postmodern era (1992: 34).[2] The novelty of this postmodern phase is such that just as the "emergence of the modern era provided a nascent sociology with both its reason for theory and its topic to be theorised", the postmodern era now requires its own sociology (ibid: 1). In addition, the term is of value as it registers the fact that "the emerging social form is still indeterminate and problematic: we have no firm knowledge of what it is but only that it is not modernity" (1992: 2). For Smart, the deployment of the label 'postmodern' suggests that there has been "a realisation that the goals and values which have been central to Western 'European' civilisation can no longer be considered universal, and that the associated 'project of modernity' is unfinished because its completion is inconceivable and its value in question" (1990: 27). Marxists have also argued that a new era has been entered. Harvey, for instance, claims that 'postmodernity' has seen capitalism become "ever more tightly organised through dispersal, geographical mobility, and flexible responses in labour markets, labour processes and consumer markets, all accompanied by hefty doses of institutional, product and technological innovation" (1989: 159).

Some commentators, such as Beck, Giddens and Lash (1994) have utilised the term 'reflexive modernisation'. This draws attention to the processes by which modern society has come to reflect upon itself, understand its excesses, and question whether the progress that modernity and the Enlightenment promised has been or can ever be realised. Central to this reflexivity is a loss of faith in science, and also the idea that as society becomes increasingly individualised, people have greater opportunities to reflect upon their own lives and shape them in ways of their own choosing.[3]

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[2] Crook, Pakulski and Waters argue that this new era represents the continuation and extension, to "extreme levels" (ibid: 32), of modern trends, principally differentiation, commodification and rationalisation. These had been identified by Durkheim, Marx and Weber respectively, the giants of modern sociology (ibid: 3, 10).

[3] See also their individual works: Beck (1992), Giddens (1998: 115-7) and Lash (1994). Beck's *Risk Society* (1992) is perhaps the definitive statement of reflexive modernity. For him, reflexive modernity is a society defined by risks that are increasingly less time- and place- bound. Perhaps the best example of this is environmental pollution. Consequently, society is increasingly organised around the response to risk; the main divisions in society are no longer between classes. Instead people occupy 'social risk positions' in society. Some individuals are more exposed to risk while others are safer. Wealth may well be a useful insulator against risk, but information and knowledge is even more vital.

Giddens has also talked of 'high', 'late' and 'radicalised' modernity (Giddens 1990; 1991; Giddens and Pierson 1998). He sees these terms as interchangeable (Giddens and Pierson 1998: 117); they all denote a society where the consequences of modernity become more radicalised and universalised than ever before.

The dilemma of adequately labelling contemporary society is perhaps most evident in the work of Zygmunt Bauman. Initially Bauman held that postmodernity was discontinuous and distinct from modernity, although he maintained that it was "brought about by the logic of modern development" (Bauman 1992: 64). Its distinctiveness was such that a new "sociology of postmodernity" was required (ibid: 27). The postmodern reality is "much more fluid, heterogonous and 'under-patterned' than anything the sociologists tried to grasp intellectually in the past" (ibid: 65). Although Bauman "continues to deploy the same methodological tools, and offers a similar analysis and conclusion about present social change to the kind evident in his earlier works" (Edgeworth 2003: 273), he has more recently described the contemporary social world as one of *Liquid Modernity* (2000). This suggests a retraction from the earlier, more confident assertions of a decisively new period.

Lash and Urry sidestep the controversy over whether we still live in modernity or have moved into a postmodern era with their notion of "disorganised capitalism" (1987).[4] This appears contrary to Harvey's idea of capitalism becoming more tightly organised, although Lash and Urry stress that disorganisation is not "a sort of high-entropy random disorder; disorganisation is instead a fairly systematic process of disaggregation and restructuration" (1987: 7). But crucially, both Lash and Urry and Harvey insist that capitalism itself, perhaps the central feature of modernity, persists. As Lash and Urry put it, "capitalist social relations continue to exist [...] a certain level of capital accumulation is a necessary condition of capitalism's disorganised era in which the capitalist class continues to be dominant" (1987: 8). It seems undeniable that "we still live, in the west, in a society where production for profit remains the basic organising principle of economic life". So while it is important to register and understand the changes of the last 30 years or so, one should "not lose sight of the fact that the basic rules of a capitalist mode of production continue to operate" (Harvey 1989: 122).

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[4] This is in spite of Lash elsewhere favouring the term 'reflexive modernity' (see above).

It is the persistence of the core features of modernity, despite their transformed nature, that has led Giddens to be cautious about theorising the emergence of a novel postmodern period. Again, capitalism's tenacity is central to this. Giddens' world of 'reflexive modernity' is one increasingly constituted by information where individuals are forced to make "future-oriented decisions". But this more open and problematic way of living is not, for him, postmodern, because "the dynamic sources of modernity are still there: the *expansion of capitalism*, the transformative effects of science and technology, the expansion of mass democracy." As a result, Giddens argues the current era is one of reflexive modernity: "There is only modernity and we can only reflect on modernity through modernity" (Giddens and Pierson 1998: 115-7 [italics added]).

In fact the changes that some believe to be the harbingers of a new postmodern era were actually identified by Marx himself, the definitive modern social theorist.[5] As Marshall Berman (1982) evocatively outlines, Marx's own *Communist Manifesto* is *the* classic outline of the uncertainty and creative destruction that modernity itself unleashed upon the world; Marx's passage from the Manifesto, "all that is solid melts in to air" (Marx and Engels 1968: 38), is "probably the definitive vision of the modern environment" (Berman 1982: 21). Marx also followed these themes through in *Capital*. Harvey notes that Marx demonstrates how the social processes operating under capitalism lead to "individualism, alienation, fragmentation, ephemerality, innovation, creative destruction, speculative development, unpredictable shifts in methods of production and consumption, a shifting experience of space and time, as well as a crisis ridden dynamic of social change". If this is correct, then it seems entirely possible that "the turn to postmodernism does not reflect any fundamental *change* of social condition" (Harvey 1989: 111). Instead it appears that the processes of modernity have just speeded up and intensified to the point where instability and uncertainty are the dominant *leitmotifs* of the social world. Current trends represent the continuation, *but to extreme levels*, of the central processes of modernity. In such a context it becomes difficult, despite the ever-increasing pace of change, uncertainty, and lack of stability, to talk of a distinctly new postmodern era; most significantly, the western world remains a capitalist world.[6]

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[5] As McLellan puts it, "Marx is one of the great early modernist writers, a true child of the Enlightenment in the self-confident sweep of his historical perspective" (1999a: i).

[6] Indeed, the persistence of capitalism leads Callinicos (1989) to argue that we are not experiencing an epochal change in our social life. Quite the opposite, in fact; it is business as usual for capitalism.

To deny that we have entered postmodernity is not to underestimate the enormity of the changes that have occurred. As Smart puts it, "if the view is taken that the time in which we live may not after all be a unique moment or an 'interruptive point in history', it nevertheless does remain a time in which on a number of fronts (for example socially, politically, culturally, economically), and in relation to a range of matters (for example epistemology, morality, ethics), significant forms of change can be identified. In brief, if our time, our present, is in an important sense a 'time like any other', it nevertheless may in turn be regarded as marked by transformations of various significant kinds" (1990:14).

It may be the case that "the protracted debate about modernity versus postmodernity has become wearisome and like so many debates in the end has produced rather little" (Beck, Giddens and Lash 1994: vi). As Lyon suggests, "quite unprecedented social and cultural shifts are occurring. Whether or not 'postmodernity' is the best term to sum them up is a moot point. The important thing is to understand what is happening, not to agree on a concept to capture it with" (1999: 108).[7] The term 'late modernity' is adopted here; it avoids the problems associated with the postmodern insistence on the emergence of a distinctive new era, and it seems to have gained popular acceptance now the vogue for the postmodern has somewhat passed. Nevertheless, as the point is indeed to 'understand what is happening', the work of those who do deploy the term 'postmodern' will be considered alongside those who favour other labels. It is the substance of their arguments, not their terminology, which is of interest.[8]

Disentangling the Late Modern: Modernisation, Modernism, Modernity

Berman proposes a useful categorisation of the 'modern', subdividing the phenomena into three constituent categories. For Berman, the term 'modernisation' refers to the technological, economic and social processes that were ushered in during the rise of capitalism. 'Modernism' is the "variety of visions and ideas" that accompanied the processes of modernisation (1982: 16). The term 'modernity' is an "umbrella concept [...] an historical and spatial category" that "locates when and where this dialectical interchange happens" (Edgeworth 2003: 7). Ås Harvey puts it, "modernism is a troubled and fluctuating aesthetic response to conditions of modernity produced by a

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[7] Lyon, for his part, favours the term 'postmodernity'.

[8] Of course, the label 'late modern' is not without its problems: As Downes and Rock put it, although use of the term 'late modernity' seems preferable, "even that raises the question, 'How late is late?' or 'Late in relation to what?'" (2003: 257).

particular process of modernisation" (1989: 99). This tripartite division is adopted here; modernisation, modernism and modernity become late modernisation, late modernism and late modernity.[9]

A Description of Late Modernity

Modernity

As Turner puts it, "modernity is broadly about the massive social and cultural changes which took place from the middle of the sixteenth century, and it is consequently and necessarily bound up with the analysis of industrial capitalist society as a revolutionary break with tradition and a social stability founded on a relatively stagnant agrarian civilisation" (1990a: 4).[10] As such, modern societies "can be identified by the appearance of a cluster of historically unique features" (Edgeworth 2003: 67).

The "most striking indicator" of modernity is its political and administrative structure (Edgeworth 2003: 67). Political authority became centralised in the sovereign state. The "classic regime of sovereignty" gave national governments free reign in the constitution of economic and political relations, and untrammelled, effective power over a defined territory (Held 2003). In addition, traditional modes of economic organisation, based around locales and the household, were replaced with markets organised along predominantly national lines. Capitalist industry expanded rapidly, and became concentrated within relatively few industrial sectors and within a small number of significant nation states. This industry was predominantly concerned with manufacturing and the extraction of natural resources, and became a major source of employment (Lash and Urry 1987: 3-4). The various subsystems of modern societies also became increasingly differentiated, or "organised into separate spheres". Thus law, politics, the economy, science, religion and art became increasingly distant and "characterised by their own distinctive and autonomous functions" (Edgeworth 2003:

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[9] In a similar vein, Edgeworth has adapted Berman's scheme for his study of the postmodern. Thus, modernisation, modernism and modernity become postmodernisation, postmodernism and postmodernity (2003: 6-7). This suggests the usefulness and durability of Berman's model.

[10] Note that "although there has been a tendency to equate the emergence of modernity with the Enlightenment and the advent of a 'tradition of reason' at the turn of the 18th century, other historical moments have been identified as marking the beginning of what we have been accustomed to regard as the 'modern' age or era" (Smart 1990: 16). For instance, Kroker and Cook argue that the modern age began in the 4th century with Augustine's radical reformulation of the philosophy of progress (1988: 62). Toynbee, meanwhile, suggests that modernity began amongst the peoples of the Atlantic seaboard of Europe in the last quarter of the 15th century

67). By the end of the nineteenth century, the increasing concentration of capital had given rise to an 'organised economy', and this had in turn led to the organisation of classes (Lash and Urry 1987: 7).

These developments did not occur simultaneously and in a uniform manner across all western countries. Nevertheless, there was an unmistakable drift towards modernity in the advanced world. Bauman (2000) describes this modernity as being 'heavy' and 'solid' and characterised by firm structures. It is modernity's solidity and firmness that is increasingly being transcended in the late modem era.

Late Modernity: Where and When?

Despite the differences in terminology and theoretical outlook of those who have documented the changes that society has undergone, there is remarkable consensus as to when and where these processes have occurred.

Ernest Mandel was among the first Marxist thinkers to take seriously the immense changes that capitalism was undergoing. Pre-empting the periodisation of Lash and Urry, he argues that a third stage of capitalism, *Late Capitalism*, has emerged which is 'purer' than the stages that preceded it. This third stage represents an expansion of capital into previously uncharted and uncommodified areas (Mandel 1975).[11]

Similar themes emerge in the work of Jurgen Habermas, who "might be described as the last modern social theorist" (Crook, Pakulski and Waters 1992: 27). During the 1970s Habermas saw organised capitalism as entering a series of crises. The state was increasingly unable to insulate its citizens against these crises by delivering welfare and support. As such, the state began to suffer its own crisis. This was a crisis of legitimation as support for the state's 'steering' role eroded. By the 1980s, Habermas reasoned that capitalism had resolved these crises by evolving into a new, highly organised form, where the economy and state (the 'system', characterised by strategic action, or following Lyotard, 'performativity') increasingly 'colonise' the community and domestic subsystems (the 'lifeworld', characterised by 'communicative action'). The chances of communicative action in the lifeworld taking place are thus

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and derives from the emergence of a "cultural pharisaism" and an associated "technological conquest of the ocean" (1954a: 144).

[11] The stages that preceded Mandel's 'late capitalism' were 'market capitalism' and the 'monopoly' or 'imperialist' stage.

progressively reduced as social participation becomes increasingly driven by rational and instrumental demands (Habermas: 1976, 1984, 1987).[12]

More recent work agrees that the early 1970s marked the genesis of late modernity. Harvey, for instance, argues that "there has been a sea-change in cultural as well as in political-economic practices since around 1972" (1989: vii). Fellow Marxist Jameson similarly contends that the "economic preparation of postmodernism or late capitalism began in the 1950s", and the cultural "structures of feeling"[13] began to change in the 1960s. However, it was not until 1973 that "both levels in question, infrastructure and superstructure [...] somehow crystallised". 1973 is marked out as a significant year due to "the oil crisis, the end of the international gold standard, [...] the end of the great wave of 'wars of national liberation' and the beginning of the end of traditional communism" (Jameson 1991: xx-xxi). Lash and Urry suggest that "crucial aspects" of what they term 'capitalist disorganisation' emerged in Britain and the USA from the 1960s, in France from the late 1960s/early 1970s, in Germany from the 1970s, and in Sweden from the late 1970s/early 1980s (1987: 7).

Significantly, Lash and Urry specify exactly where the processes of late modernity have been occurring. The phenomenon is one associated with the advanced capitalist world; in addition to the countries mentioned by Lash and Urry, one may add places such as Canada and Japan, and other Western European nations. Countries with different levels and types of capitalist development have experienced very different processes during the last thirty years or so. Of course, to the extent that the world is increasingly interconnected, late modernity will still have impacts in these other regions. But the specific processes of late modernity have only been experienced in the fullest sense in what may be referred to as the traditional capitalist heartlands.[14]

Thus, it is possible to claim with a reasonable degree of certainty that, from around the early 1970s in the advanced capitalist world, a late modernity that is distinctive from its

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[12] Habermas' one-time collaborator Claus Offe takes a different line, arguing that capitalism has overcome its crises by 'disorganising' rather than further organising; capitalism's contradictions have led to an unravelling of state management (1985). Indeed, much of the work on late modernity runs counter to the idea that the state has consolidated its power through a readjustment of its form, and instead asserts that various components of both state and civil society have become increasingly uncoupled from the centres of power and authority.

[13] An idea borrowed from Raymond Williams (1977).

[14] Furthermore, the effects of late modern processes may be felt more intensely in areas where populations and economic and political power are concentrated; late modernity's greatest impacts have generally been in urban centres rather than rural areas, even within advanced capitalist states.

modern predecessor has begun to emerge. However, Crook, Pakulski and Waters remind us that these societies are not even remotely "complete". They stress the incremental rather than the cataclysmic nature of the contemporary changes. As a result, "we can fully expect modernity and postmodernity [or late modernity] to coexist until well into the twenty-first century" (1992: 2). This serves as a useful reminder that late modernity is a nascent set of processes, and that however new and novel they appear, they are rooted in and stem from modernity itself. As such the idea of a clean break between modernity and late modernity is a redundant one. Late modernity is emerging and the features associated with it are becoming more dominant, but this is a continuing set of processes rather than a completed episode.[15]

Late Modernity and Globalisation

During the period in which late modernity has emerged, related processes of globalisation have also been taking place. To a certain extent, the work on late modernity has been somewhat overshadowed by interest in globalisation over recent years. Rather like work on postmodernism in the 1980s, globalisation "is in danger of becoming, if it has not already become, the cliché of our times" (Held et al 1999: 1).[16]

Speaking in the broadest possible terms, globalisation can be thought of as the "widening, deepening, and speeding up of worldwide interconnectedness in all aspects of contemporary social life" (Held et al 1999: 2).[17] Clearly, there are a great many

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[15] On the other hand, Charles Jencks (1977) suggested that the emergence of what he calls 'postmodern' architecture can be dated and placed with the utmost precision. According to him, "modern architecture died in St Louis, Missouri, on July 15, 1972 at 3.32pm (or thereabouts) when the infamous Pruitt-Igoe [housing] scheme, or rather several of its drab blocks, were given the final *coup de grace* by dynamite. [...] Boom, boom, boom" (1977:9). Jencks celebrated the demise of modern architecture and pre-empted many of the themes of the sociologists and philosophers who followed him. He was also significant in helping to popularise the term 'postmodern'. See Edgeworth (2003: 21-23) and Anderson (1998: 21-4).

[16] As Held and McGrew note, some observers feel that the terrorist attacks on the United States on September 11 2001 "mark the end of globalisation". Hoffman (2003), for instance, claims that post 9/11 we are witnessing the continued centrality of states and military power to the maintenance of world order. However, this overlooks the ways in which the responses to September 11 "are themselves products of, and conditional upon, a globalising world. In such a context, making sense of globalisation "has become a more, rather than less, urgent intellectual and political task" (Held and McGrew 2003: 1).

[17] Held et al (1999) identify three general positions regarding globalisation. 'Hyperglobalisers' or 'globalists' hold that globalisation defines a new era in which the marketplace increasingly becomes dominant. In this epoch, "traditional nation states have become unnatural, even impossible business units in a global economy" (Ohmae 1996: 5). The 'sceptics', on the other hand, believe that globalisation is essentially a myth. Instead, we can see the emergence of an increasingly international economy, but one that is not historically unprecedented, made up of regional blocs and within which national governments remain hugely powerful actors (Hirst and Thompson 1999). Finally, the 'transformationalists' contend that globalisation, as a historically

overlaps between the ideas at the heart of late modernity and those central to globalisation. Indeed, in what follows, ideas from writers whose concern is primarily with globalisation will be used to illustrate some of the features of late modernity. However, the exact nature of the relationship between globalisation and late modernity is open to debate, and specifying it is beyond the scope of this work.

Nevertheless, it is undoubtedly true, if trite, to say that globalisation is part of late modernity and late modernity is part of globalisation. Giddens argues that "modernity is inherently globalising" (1990: 63). According to him, modernity led to the intensification of worldwide social relations and globalisation is the natural apogee of this process. Globalisation has thus ushered in the era of late modernity, where the consequences of modernity become more radicalised and universalised than ever before (1990; 1991).[18] This idea that late modernity and globalisation are intertwined processes, but that one cannot be reduced or collapsed into the other, is a valuable one.

Late Modernisation: The Erosion of the 'Solid' Features of Modernity

Processes of late modernisation are "best understood as a continuation of the processes of modernisation, where those processes operate with increasing scope and intensity to erode what appears in retrospect as the regional stability of modernity" (Crook, Pakulski and Waters 1992: 220). The resultant changes are best seen in three main realms of society. They are the economy and production, the state and politics, and class structure. Each will be dealt with in turn.

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unprecedented phenomena, is "a central driving force behind the rapid social, political and economic changes that are reshaping modern societies and world order". Governments and societies are forced to adjust to a world in which the old distinctions between international and domestic, and external and internal affairs are blurring. Globalisation is thus a powerful transformative force, but the direction of the 'shake out' remains uncertain (Held et al 1999:7; Rosenau 1992, 1997). This middle position seems soundest, soberly registering the extent of contemporary change. The best academic work on the debate can broadly be said to fall under this category. Contrast this with the decidedly more hyperbolic accounts of what Brown (2003: 564) describes as the "very popular genre of anti-globalisation jeremiads", including Monbiot's *Captive State* (2000), Frank's *One Market Under God* (2001), Hertz's *The Silent Takeover* (2001) and Klein's *No Logo* (2001).

[18] Some have argued that globalisation itself "has effected the dawn of postmodernity" (Scholte 2000: 24-5). Albrow (1996), for instance, argues that the global age is beyond modernity. Indeed he suggests that even the term 'postmodernity' confuses the issue by maintaining its reference to the modern; the break is more decisive than this allows. In addition, Lyon

Economy and Production

One of the central themes of late modernity is the idea, developed most substantially by theorists of globalisation, that we now live in an era characterised "by the existence of a single global economy transcending and integrating the world's major economic regions. [...] The pattern and intensity of contemporary economic globalisation is historically unprecedented; a single global economy can be said to be in the making".[19] Although it is probably the case that the global economy may not be as highly integrated as the most robust and developed national economies, the trends seem to "point unambiguously towards intensifying integration within and across regions" (Held and McGrew 2003: 24, 299).[20]

Scholte sees economic changes as crucial to the development of what he terms "superterritoriality". "It is hard to see how transworld connections could have emerged and proliferated in the absence of capitalism" he argues (2000: 96). For Scholte, capitalism has spurred globalisation in four ways. Firstly, driven by the capitalist logic of ever increasing accumulation, many firms have pursued global markets in order to increase sales. Global distribution, sales and communications networks have been set up to facilitate this process. Secondly, "superterritorial accounting" has also increased accumulation. Companies can maximise profits by varying prices across the globe; higher profit margins in mature markets can help the setting up of new sites at other points. Global accounting also allows profits to be concentrated in 'tax havens'. Thirdly, "global sourcing" is highly advantageous as firms can place their production facilities where costs are lowest. Finally, the rise of global communications and global financial flows "have done more than enhance the possibilities for accumulation through primary production and traditional manufacturing [...they offer] vast potentials for accumulation in their own right". "The very process of creating supraterritorial spaces has been a boon to capitalism" (Scholte 2000: 97-9).[21]

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tantalisingly raises the possibility that postmodernity is merely a western phenomena, and one that may have been transcended in the global age (1999: 7).

[19] Among those espousing such a line are Dicken (2003) and Castells (2003). Hirst and Thompson (1999) dispute their conclusions, arguing that the world economy is becoming regionalised into three major blocs, Europe, Asia Pacific and North America. Many states in the 'south' are excluded or marginalised from the international economy, so it cannot be classed as 'global' in any meaningful sense of the word.

[20] Scholars whose focus is not exclusively on globalisation have also recognised these trends. See, for example, Lash and Urry (1987: Ch 4, Ch 5) and Harvey (1989: Part 2).

An "unprecedented financial globalisation" has also occurred. Finance has "shifted very substantially out of the territorialist framework that defined most banking, securities, derivatives and insurance business before 1960" (Scholte 2000: 79-82). Finance has become 'commodified'; dealings in the various instruments are undertaken not only to further capitalist production in the traditional sectors of agriculture, manufacturing and the like, but are also seen as "a means of accumulation in their own right". Indeed, the growth of financial markets "has given surplus accumulation one of its greatest boosts in history" (ibid: 116-20). As Held et al outline, national economies now struggle to insulate themselves from the operation of this global market: "National financial markets and the world's key financial centres are increasingly embedded within a global financial system". As a result, financial conditions in one region "almost instantaneously impact on national financial markets across the globe". The central feature of the global financial marketplace "is the sheer magnitude, complexity and speed of financial transactions and flows [...] contemporary financial globalisation represents a distinctive new stage in the organisation and management of credit and money in the world economy; it is transforming the conditions under which the immediate and long term prosperity of states and peoples across the globe is determined" (1999: 234-5).[22]

There have been similar developments regarding trade: "The historical evidence at both the world and country levels shows a trend towards higher levels of trade today than ever before" (Held et al 1999: 176). This is related to the increasing liberalisation of international trade relations "that is unprecedented in the modern epoch". Today, virtually every national economy, with the odd exception such as North Korea, is bound up in an intensive global network of trading relations; "national markets are increasingly enmeshed with one another" (ibid: 176). This new global trading order "has significant impacts on the management of national economies but most especially the capacity of governments to ensure national prosperity" (ibid: 182). It is true that institutionalised regional trading arrangements have grown, but for Held et al these, "have tended to reinforce the trend toward freer trade" by providing a mechanism through which national economies and regional blocs can engage more strategically with global markets. Such is the interconnectedness of this global trading system that "autarky, or

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[21] Scholte stresses that capitalism is not the sole generator of globalisation; rationalist knowledge, technological innovation and supportive regulatory frameworks are also crucial (2000: Ch 4).

[22] The volatility of global financial markets has also, as Scholte notes, "heightened insecurity among the world's wealthy and poor alike" (2000: 217).

'delinking' is also off the political agenda"; the Westphalian notion of state sovereignty has thus been significantly renegotiated (ibid: 187-8).

Indeed Lash and Urry suggest that "individual nation states are unable to 'organise' a given national economy" (1987: 197). This is largely due to the fact that capital is no longer dependent upon labour thanks to its new freedom of movement, or 'footloose' quality. "The reproduction and growth of capital, profits and dividends and the satisfaction of stockholders have all become largely independent from the duration of any particular local engagement with labour" (Bauman 2000: 149). Although this independence can be overstated, capital has become "extraterritorial, light, unencumbered and disembedded to an unprecedented extent". National governments are forced into trying to attract capital to their territories through a host of deregulation and liberalisation policies; lower taxes, fewer rules, a 'flexible' labour market. Also crucial is a "docile population, unable and unwilling to put up any organised resistance to whatever decision the capital might yet take". Bauman captures the paradoxical nature of this situation: "Governments can hope to keep capital in place only by convincing it beyond reasonable doubt that it is free to move away- at short notice or without notice" (2000: 149-150).

Closely related to these economic shifts is the emergence of a distinctive set of production arrangements. Indeed, one of the most visible features of late modernisation is industrial realignment. Crook, Pakulski and Waters identify three forms of this realignment; postindustrialism, renewed entrepreneurialism and flexible specialisation (1992: 173). It is the latter phenomenon that is of most significance, for "increases in service labour and entrepreneurship [...] do not have the effect of dismantling the core industrial arrangements of modernity, those of Fordist manufacturing". Flexible specialisation, on the other hand, is doing precisely that (ibid: 178).

Fordism represented an advance on Taylorism, which involved "breaking work down into its component elements so that each could be accomplished by the application of minimum skill and then engaging in detailed measurement of levels of production in relation to effort". Taylorism's "key weakness" was the fact that it necessitated close supervision of workers. Henry Ford solved this by utilising the newly invented moving

assembly line to replace the supervisor (Crook, Pakulski and Waters 1992: 171).[23] Fordism's novelty consisted in the "explicit recognition that mass production [partly due to the high fixed costs involved] meant mass consumption, a new system of the reproduction of labour power, a new politics of labour control and management, a new aesthetics and psychology, in short, a new kind of rationalised, modernist and populist democratic society" (Harvey 1989: 125-6). As such, profits were supported by consumer demand based upon high and growing wages. This was generated through compromise between large employers and trade unions. The resultant purchasing power of substantial parts of the working class ensured the mass consumption of mass produced consumer durables (Freidman 2000: 59). Thus the Fordist model became a great deal more than a way of organising industry. It became "an epistemological building site on which the whole world view was erected". The Fordist factory's "meticulous separation between design and execution, initiative and command following, freedom and obedience, invention and determination [...] was without doubt the highest achievement to date of order-aimed social engineering. No wonder it set the metaphorical frame of reference [...] for everyone trying to comprehend how human reality works on all its levels" (Bauman 2000: 56-7). Post-war Fordism was less a system of production; rather, it was a "total way of life" (Harvey 1989: 135-6).[24]

By the 1970s however, "the inability of Fordism and Keynesianism to contain the inherent contradictions of capitalism became more and more apparent". Crucially, they were too 'rigid'; long term, large-scale investment in mass production systems, the rigidities of labour markets, allocation, contracts and state commitments, and the corporatist compromise all began to undermine accumulation. The solution was "a series of novel experiments" in the political and social spheres that have ushered in a new regime of "flexible accumulation", or 'post-Fordism' (Harvey 1989: 142, 145-7).

Post-Fordism sees the economy increasingly dominated by small-batch and niche production of goods with short life-cycles. Manufacturing systems have become more

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[23] Mass production assembly line technology only really developed in Europe after the mid 1930s. Despite being already well established in the US at this point, it still did not account for the *entirety* of US production at that time. 'Full' Fordism only came to fruition in Europe from the 1950s (Harvey 1989: 128).

[24] For Bauman the supremely modern Fordist mindset of rational planning was so all pervasive that even the "confrontation between socialism and capitalism [was not] much more than a family squabble. Communism, after all, wished only to clean up the Fordist model of its present pollutions (nay imperfections)- of that malignant market-generated chaos which stood in the way of the ultimate and total defeat of accidents and contingency and made rational planning less than all-embracing" (2000: 57). As such, communism "was thoroughly modern in its passionate

flexible through adopting "adaptable, reprogrammable technology", by dispersing "organisational authority and responsivity so that differentiated organisational segments are free to stay in contact with and respond to market developments", and by developing multi-skilled workers "with an advanced capacity and freedom to acquire skills and knowledge and to apply them in decisive ways in order to enhance productive capacity" (Crook, Pakulski and Waters 1992: 181).[25] This means that firms are able to alter product lines quickly and cheaply, which is necessary as demand is less stable as consumer goods are increasingly subject to the unpredictable and ever-changing dictates of fashion.[26] This flexible production has led to the vertical disintegration of industries. Firms increasingly establish quasi-market, network relations with a myriad of suppliers, distributors and even their direct competitors. Large firms are broken up into smaller units, and new "small craft-like companies" flourish, especially in certain "hot-house development areas" (Friedman 2000: 59-60). The Fordist norm of male workers earning a "family wage" has also broken down. This contributes to the demise of the 'nuclear family' and creates further uncertainty and flux (Room, Lawson and Laczko 1989: 165-176).

Crook, Pakulski and Waters argue that these transformations are driven primarily by the market rather than technological advances. The growth of small batch and niche production occurs as "producers in the advanced societies can no longer compete with second-wave industrialisers of the third world at the level of cost in mass producing commodities. Instead they must compete at the level of product variability, quality and customisation" (1992: 180).[27]

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conviction that a good society can only be [...] carefully designed [and] rationally managed". Its collapse was therefore the "final nail in the coffin [of] modern ambitions" (1992: xxv, 166).

[25] Lash and Urry make similar observations about what they term "flexible specialisation" (1987: 198-9).

[26] This is particularly so in the world of consumer electronics. Continual innovation and rapid obsolescence, as well as swings in fashion, provide an excellent example of what Toffler called "future shock" (1971). This was based upon Toynbee's idea that technological advances had led to a crisis in human affairs for the pace of change was now beyond "the adaptational capacity of a single life" (1954b: 468). Indeed, Harvey suggests that the 'half-lives' of consumer products has tumbled. There is "much greater attention to quick-changing fashions", with the result that "the relatively stable aesthetic of Fordist modernism has given way to all the ferment, instability and fleeting qualities of a postmodernist aesthetic that celebrates difference, ephemerality, spectacle, fashion, and the commodification of cultural forms" (1989: 156).

[27] At the apogee of post-Fordism are firms such as Benetton. Ostensibly a producer of clothing, Benetton actually "engages in no production directly, but simply operates as a powerful marketing machine, which transmits commands to a wide array of independent producers" (Harvey 1989: 158-9). For a globalist's take on the Benetton model, see Castells (1996: 162).

As Held et al point out, "aside from global finance, perhaps the commonest image of economic globalisation is that of the multinational corporation [MNC]: huge corporate empires which straddle the globe with annual turnovers matching the entire GNP of many nations". MNCs are absolutely pivotal to the process of economic globalisation. They account for around two thirds of world trade, and up to a third of world trade is intrafirm trade between branches of the same company. The ability of MNCs to "adjust and reorganise production in an era of more flexible production systems is considerable and has significant repercussions for national economic management".[28] In addition, small and medium sized enterprises are being increasingly integrated into global production and distribution networks as communications technology advances and the infrastructural conditions become ever more conducive to global trade and production (1999: 236, 270). Indeed, it is now argued that global corporate capital "exercises decisive influence over the organisation, location and distribution of economic power and resources in the contemporary global economy" (Held and McGrew 2003: 26). The increased power and influence of MNCs tends to come at the expense of the power and influence of nation-states and their governments.

State and Politics

The notion that the world was made up of a collection of sovereign nation states was one of the centrepieces of modernity. According to Scholte, the "traditional conception" of sovereignty entailed "a claim by the state to supreme, comprehensive, unqualified and exclusive rule over its territorial jurisdiction" (2000: 135).[29] It was the case that "even in Westphalian times practice sometimes fell short of this definition of sovereignty", but "nevertheless, sovereignty remained hypothetically realisable in the territorialist world of old" (ibid: 135-6).

The ability of states to rule over their territories in this sovereign manner is increasingly being eroded. Held and McGrew, for instance, note that "the globalisation of economic

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[28] Though often described as 'footloose', MNCs "still have to produce somewhere and the advantages of familiarity, agglomeration, and economies of scale necessarily generate a certain geographical concentration"; production is rarely shifted on the basis of cost alone. Nevertheless, it cannot be denied that capital and business have become increasingly mobile over time (Held et al 1999: 269).

[29] Scholte outlines precisely what this means: "With *supreme* rule, the sovereign state answers to no higher authority; it always has the final say in respect of its territorial ream and its cross-border relations with other countries. With *comprehensive* rule, the sovereign state governs all aspects of social life: money supply, language, military affairs, sexual behaviour, formal education etc. With *unqualified* rule, sovereign states respect a norm of non-intervention in one

activity exceeds the regulatory reach of national governments". Thus it often seems that "world markets effectively escape political regulation" (2003: 26-7).[30] But it is not only increasing economic integration and the power of the multinational corporation that impacts upon the nation state. There are now a range of other actors, forms of political power and sites of authority (Scholte 2000: Ch 5; Held et al 1999: Ch 1; Ohmae 1996; Strange 2003; Crook Pakulski and Waters 1992: 97-101). 'Above' the state, a diverse set of "extra" or "supra-state" bodies have emerged. Examples of such actors include UN bodies, political-military blocs such as NATO, supra-national integrative organisations such as the EC, trading blocs (NAFTA), financial organisations (World Bank, IMF) and cartels (OPEC).[31] Meanwhile, 'below' the state, privatisation, marketisation, deregulation, the increasing delegation of powers to semi-autonomous agencies and a variety of sub-state bodies, often tied to particular locales, have emerged.[32] Of these processes, "the privatisation of state-owned corporations is perhaps the most central and spectacular of all. What makes it spectacular is its almost universal acceptance by governments and parties, regardless of ideological shade" (Crook, Pakulski and Waters 1992: 98-100). Privatisation also encompasses the selling off of public housing, the extension of private initiatives in schooling, reductions in the level of state controlled healthcare, the private contracting of services, reductions in state provided welfare and the gradual erosion of state protectionism.[33]

As Crook, Pakulski and Waters put it, "both the functions of the state as a tool of social and economic regulation and reconstruction, and the scope of state power and

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another's territorial jurisdictions. With *exclusive* rule, the sovereign state does not share authority over its realm with any other party" (2000:135).

[30] For one of the strongest globalist statements that politicians and governments have lost the authority which they used to possess and world markets are now more powerful than states, see Strange (2003). Even Habermas (2001), a staunch defender of the project of modernity, accepts that one of the central planks of the modern world, the nation state, has had its sovereignty eroded by the global economy.

[31] The majority of these international organisations pursue or at least support neo-liberal economic globalisation. This suggests that "neo-liberal globalization represents a political as much as an economic phenomenon"; global neo-liberal markets have to be, and have been, actively engineered (Rupert 2005: 460).

[32] This is Slaughter's 'disaggregated state', where the state is not disappearing but 'disaggregating' into its component institutions. Administrative agencies and devolved bodies dominate both domestic and international politics through newly emerging transgovernmental networks that are informal rather than organised and rigid. It is through such mechanisms the global economy is regulated (2003, 2004). This has also been described as the "hollowing out" of the state (Rhodes 1994, 1997).

[33] Ladeur (2004: 1-2) argues that globalisation's influence on nation states is still negligible when compared to national economic factors: "Major sectors of the economies of the leading industrial countries develop without the underlying major impact of the world economy". Globalisation may well be occurring, but in a much more institutionalised way than many are prepared to accept. According to Sassen (2004), states themselves have undergone a process of 'denationalisation' so their influence now extends beyond their own territory, although they are not the most powerful actors in the transnational order.

responsibility, have started to diminish" (1992: 79). The state is fragmenting, and increasingly its domains have "fuzzy boundaries and unspecific functions [...] the very notion of 'the state' as a separate and autonomous institutional entity, intimately linked with the notion of 'politics' and 'public sphere' and clearly separated from the domains of economy, societal community and culture, is increasingly problematic" (ibid: 103-4). Ultimately, any new sociological model "cannot be grounded in the realities of the nation state, by now clearly not a framework large enough to accommodate the decisive factors in the conduct of interaction and the dynamics of social life" (Bauman 1992: 65).

The effect of these changes on politics has been significant, for in modernity politics tended to be primarily organised on national lines. National interest groups with relatively straightforward relationships to the economy and capital were a typical feature of modern capitalism. As these groups consolidated in the middle of the 20th century, they began to organise at a state level. In Western Europe, "the deprivations of the depression and the spectre of the revolution propelled welfare reforms, economic regulation, and defensive consensus building the national level. The world wars further strengthened these tendencies" (Crook, Pakulski and Waters 1992: 84). The result was 'corporatism', a system in which, broadly speaking, "national organisations representing industry and labour work in co-operation with government representatives to constitute an intermediate layer [...] between the state and civil society" (Birch 2001: 212).[34] These organisations strike a *quid pro quo*, whereby they control their memberships and accept "reasonable settlements in a spirit of 'national unity', in exchange for which the national level organisations are given considerable powers within the state apparatuses" (Lash and Urry 1987: 232). Corporatism thus "constituted a sort of 'middle solution', a state sponsored and state controlled Great Armistice" (Crook, Pakulski and Waters 1992: 84).[35]

Corporatist arrangements have collapsed as the processes of late modernity have unfolded. The globalisation of the world economy is central to this, for corporatism was

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[34] Classical tripartite corporatism sees groups representing labour, capital and the state. Where labour movements were weaker, a corporatism which excluded labour was possible, for instance in 1920s Italy, Third Reich Germany, Gaullist France (Lash and Urry 1987: 280), and 1930s Portugal (Birch 2001: 213). To avoid this stigma, post war corporatism was sometimes dubbed "neo-corporatism" (Birch 2001: 213).

[35] Crook, Pakulski and Waters point out that "the corporate solution worked well". Even critics acknowledge that "in relative terms, it was successful", for it produced an enduring period of peace and prosperity, promoted social cohesion, economic growth, the spread of citizenship

very much a national project, set in a very definite national context. In addition, the decline in mass production in the west has meant that the workers who were once at the centre of the corporatist system "have become so unrepresentative of the national labour force that a corporatist solution [has] become increasingly unworkable". The loss of collective working class identity has also reduced the plausibility of the corporatist framework. By the mid 1980s, "there was virtually no unified 'working class' able to deliver a corporatist bargain to capital and the state". In addition the oil crises of the 1970s reduced the capability of the leading western economies to 'buy off' the workers through the annual wages round; Keynesian stability crumbled (Lash and Urry: 234-5).[36] As Crook, Pakulski and Waters put it, "the main social forces that the corporatist state has represented and empowered have ceased to be the principal and coherent actors, while the new, potentially disruptive social forces cannot be incorporated in the old deals" (1992: 95).

The demise of corporatism is evidence of the "decoupling of political conflicts and cleavages from the old structural class divisions". Another central aspect of this is the "progressive decline in class voting" (Crook, Pakulski and Waters 1992: 138). The social differentiation that has resulted in class decomposition has weakened the "stable socio-political milieux which were the 'natural' constituencies of traditional parties" (ibid: 142). Lash and Urry stress that in the era of organised capitalism "one's occupational class provided a fairly good predictor of one's voting patterns".[37] However, particularly in Britain, "there has been a considerable process of class dealignment; in other words, the association between an individual's occupational class and party support has faded away" (1987: 212). Indeed, occupational class has now become a "relatively poor predictor of voting" (ibid: 214). The British political parties, for instance, traditionally relied on large class based voting blocs, but in the late modern world there is a much greater diversity of transitory groups with very particular sets of demands.

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rights and welfare, and "above all, [...] prevented total warfare and the nuclear holocaust" (1992: 89).

[36] Lash and Urry note that as corporatism crumbled in the West, British labour took a particularly dramatic "beating". This proved important, for "the collective actor in a given country which most clearly puts its mark on the organisation process will also be well placed to exercise considerable influence over the process of disorganisation". Thus capital has "almost solely determined the course of the new restructuration" in Britain (1987: 282-3).

[37] As recently as 1984, Taylor could confidently assert that the Labour Party had no need to maintain "an efficient vote mobilising machine" in the Yorkshire coalfields, such was their electoral dominance. This was due to the social homogeneity" and "one class character" of the area (1984: 107-8).

A wave of 'new social movements' or 'new politics' has moved in on the terrain of traditional class-based politics. Habermas points to the difference between an 'old politics' of economic, social, domestic and military security, and a 'new politics' concerned with quality of life, equality, individual self-realisation, participation and human rights (1981).[38] These concerns manifest themselves in a range of new movements and actors.[39] Their social bases "are contingent rather than structurally determined, they are socio-cultural rather than socio-economic, and they are related to consumption and lifestyle rather than to production" (Crook, Pakulski and Waters 1992: 146). The new social movements can appear to be apolitical as they reject the "conventional institutional idiom of politics" (ibid: 140); the state is often ignored or bypassed, and an anti-bureaucratic stance is cultivated. The international mass media exposure they enjoy is also historically unique, and tends to give the movements "a specific exhibitionist and didactic character"; indeed, "appeals combine with symbols and icons", and "images rather than discursive arguments determine outcomes". Movements come in various guises, such as formal organisations, and highly decentralised informal groups, loose social circles and "periodically activated networks of contacts and co-operation". Indeed, within each movement may be hundreds or even thousands of individual campaign groups with varying objectives and forms of action (Lash and Urry 1987: 223-4). The individual groups themselves tend to exhibit a "fuzziness and openness" which makes them difficult to confront and attack; often there are no formal criteria of membership, and activists, supporters and sympathisers, who need not share a "programmatic consensus", can all share in activities. Indeed, non-affiliated supporters and sympathisers "always form the large majority of participants in movement events". Such events may include conventional lobbying, mass rallies,

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[38] For an even earlier recognition of this 'new politics', see Inglehart (1977). In a similar vein to Habermas, Offe talks of the "new values" of "personal self-realisation, creativity, and freedom to make decisions". These are gradually replacing the "traditional", work-oriented concerns of "income, security, diligence, subordination, discipline" (1985: 154). On the new subjects, 'life politics' and forms of intimate relationships that late modernity creates see Bauman (2003), Giddens (1991) and Giddens and Pierson (1998: Part 5).

[39] Examples include the nuclear disarmament movement, the ecological movement (CND and Greenpeace are the most visible and well-known organisations in these fields), the anti-globalisation movement and the women's movement. Single-issue movements have also emerged, such as the anti-war protests in the UK surrounding the invasion of Iraq in 2003. Single issue politics often has more micro-level concerns; Lash and Urry point to the growth of the 'urban left', such as tenants' associations and community groups (1987: 224). See also Laclau and Mouffe (1985: 159-65). Confronting power in this small-scale way resonates with Foucault's work (1980). He argues that there are multiple sites of dispersed power (prisons, asylums, hospitals, universities, schools, etc.). These forms of power are independent of any overall 'discourse', logic or class domination. Instead it is the localised practices of repression that must be challenged. See also Aronowitz (1981). But, as Harvey (1989: 46) argues, it is difficult to see how "such localised struggles might add up to a progressive [...] attack on the central forms of capitalist exploitation and repression".

protest marches, and direct action. New social movements operate outside of the conventional forms of old politics "as protests combine with leisure activities and merge into a total countercultural *Gestalt*". Ultimately, unlike the "student revolts of the 1960s, [new social movements] have proved to be persistent, widespread and politically fertile". As such, "they cannot be treated as residuum of conventional politics, or dismissed as transient outbursts of conventional politics" (Crook, Pakulski and Waters 1992: 146-54).[40]

These developments raise significant questions for the traditional labour movement. As Offe suggests, "if wage labour is no longer the self-evident centre from which the subjective perspectives on life of the propertyless segments of the population emerge, problems arise for the organisation and policy of those associations- the trade unions- that traditionally presupposed precisely this". Not only does membership and influence of the unions decline, but "the global aim of the labour movement- 'emancipating labour'- becomes unclear" (1985: 151). Indeed, it is possible that "the new politics marks a permanent shift away from structurally determined class politics" (Crook, Pakulski and Waters 1992: 162).

Class Structure

The industrial working class has undergone massive changes, to the point of disintegration. The idea of the decomposition of the working class is not a particularly new one. Dahrendorf (1959) highlighted some fundamental changes to class structure, including working class fragmentation and embourgeoisement, the growth of a middle class of professional and technical workers, and a growing diversity of lifestyle and consumption patterns. However, the pace and scale of working class disintegration has grown massively. Central to this is the decentralisation of industry, employment and population (Lash and Urry 1987: 102). Populations and employment have been spatially redistributed "away from the industrial heartlands and especially from the older central areas of large cities, which has led to the breakdown of old-style 'occupational communities". This has a very practical effect; organising a section of the labour force

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[40] In sum, the "substantive novelty" of new social movements "lies principally in the increased *diversity* of political processes- more open organisational structures, more diverse elites, more fluid and fragmented alliances and loyalties, and more complex networks" (Crook, Pakulski and Waters 1992: 162-4).

is now extremely difficult (Lash and Urry 1987: 108).[41] As Gorz puts it, "the sites of production are no longer the sites of decision making and economic power", and thus "grass roots workers power" is something of an impossibility "within the framework of the existing structure of production" (1982: 48, 51).

Flexible specialisation has also had major impacts. There has been a growth in the number of small plants, and an increase in self-employment. In addition, there has been a rise in service or tertiary sector employment. This has occurred extensively in all the major western economies. Bauman also notes the rise of work on short-term contracts, rolling contracts, or no contract at all. These are positions with little security, and as such "working life is saturated with uncertainty" (2000: 147). Indeed, subcontracted, temporary and part time work is now the norm. The relatively large, stable working class that modernity brought into being and which class-based politics presupposed has largely disappeared. As Hobsbawn (1981) puts it, the 'forward march of labour' has been 'halted'.[42]

In addition, mass consumption and consumerism, which "elevates the principle of individual competitiveness" and the resultant atomisation of the worker has also helped to "dissolve" occupational communities (Lash and Urry 1987: 227-8). Indeed, "there has been an increasing articulation of various status groups and categories, including ethnic minorities and generational and lifestyle groups, whose identities and political aspirations have been shaped in the socio-cultural sphere of consumption and lifestyle rather than in production" (Crook, Pakulski and Waters 1992: 95). Ultimately, "work can no longer offer the secure axis around which to wrap and fix self-definitions,

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[41] To an extent this was always the case, even at the height of modernity. See Nichols and Armstrong (1976); their study, conducted on the cusp of late modernity (1970-3), looks at the problems involved in creating a homogenous working class bloc, even in a single factory.

[42] Lash and Urry suggest that working class struggles may actually increase in disorganised capitalism, but they are more likely to be "sectional" and ideologically "community centred" and "radical democratic" rather than class based. Although "considerable working class capacities" do still exist, it is undeniable that "the power of a mass industrial working class to shape society in its own image are for the foreseeable future profoundly weakened" (1987: 8-13, 311). Hardt and Negri (2000) have suggested that the rise of the information and knowledge economy creates greater potential for mass resistance and reappropriation of citizens' own labour power than was previously the case. As Rustin puts it, "the 'virtual' character of much modern production, and the importance of symbolic production, especially the media, invests power in active subjects and thereby removes it from the owners and controllers of material resources" (2002: 452). For Balakrishnan, this suggests that "contemporary capitalism, although seemingly impervious to anti-systemic challenge, is in fact vulnerable at all points to riot and rebellion" on the part of a "global multitude" (2000: 144).

identities and life-projects. Neither can it be easily conceived of as the ethical foundation of society, or as the ethical axis of individual life" (Bauman 2000: 139).[43]

Bauman argues there is a major schism between a modernity that engaged its members as producers and a late modernity that engages its members as consumers. "The difference is seminal", he writes, for "life organised around the producer's role tends to be normatively regulated" whereas life organised around consumption "must do without norms" and is guided instead by "seduction, ever rising desires and volatile wishes" (2000: 76). Furthermore, "to the extent that these class/gender positions are structured by consumption rather than production, further and more intensive differentiation becomes possible" (Crook, Pakulski and Waters 1992: 131). The patterns of inequality in society become much more "fluid"; society begins to resemble "a mosaic of multiple status identities rather than a small number of enclosed social capsules". Personal status ceases to depend upon one's location in society, and instead will rely on "one's status accomplishments in the sphere of consumption, one's access to codes". This will include "the products one uses, the places one goes, the leisure pursuits in which one engages, the clothes one wears" as opposed to work and ownership (ibid: 132-3). Scholte argues that this 'consumer democracy' fostered by the global marketplace "has in practice allocated voice in proportion to assets" (2000: 281). As such, a new 'underclass' has emerged, which is largely excluded from consumption (Crook, Pakulski and Waters: 121).[44]

Once consumption is established as the focus for individual freedom, then "the future of capitalism looks more secure than ever", for social control becomes significantly easier and less expensive. The old methods of control, described by Bauman as "panoptical" (after Bentham and Foucault) are replaced by the more efficient tool of "seduction". Subjects do not experience this form of control as an external imposition, and as such there is no reason to resist it. Indeed consumption choices become a conscious articulation of the subject's 'freedom'. Panoptical control is reserved for that minority who, for whatever reason, "cannot be integrated through the consumer market" (Bauman 1992: 51).[45]

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[43] As Eagleton puts its, "thoughts fall apart from feelings, so that nobody thinks through their fingertips any more" (1990: 366).

[44] The term underclass was popularised by Charles Murray's *Losing Ground* (1984). Of course, the idea of an underclass was pre-empted by Marx and Engels' notion of the 'lumpenproletariat'. See Marx and Engels (1968: 44), Engels (1956: 14) and Marx (1963: 75).

[45] In addition, Harvey notes that there has been an increasing move towards the consumption of services as opposed to goods. These include personal, business, educational and health services, but also "entertainment, spectacles, happenings and distractions", such as visits to

According to Gorz, the cumulative effect of these changes has been the emergence of a "post-industrial neo-proletariat" (1982: 69). However, it is not only among the working class that processes of late modernisation are having significant effects. Concomitant to the erosion of the traditional working class is the rapid growth of the 'service class' or the 'new middle class', whose roots can be traced to the Taylorist and Fordist requirement for scientific, rational management of production. This class forms a "professional managerial strata" which has become a "powerful third force" in capitalism (Lash and Urry: 11, 161).[46] The service class is made up of the "dominant positions or places within the social division of labour which do not principally involve the ownership of capital, land or buildings"; instead, they 'service' capital by controlling labour power in the workplace (ibid: 163-3).[47]

The service class has an "irredeemably disorganising effect on capitalist society" (Lash and Urry 1987: 162-3), as professional specialisation and fragmentation give rise to a variety of class fractions in place of the relatively unified working and ruling classes of old. Thus, "while the service class *dis*places the capitalist class it does not precisely *re*place it". Its structural location is different; the service class occupies a new position in a fundamentally reconstructed class system (Crook, Pakulski and Waters 1992: 115).

In addition, the service class is even more 'consumption centred' than the classes it is eroding. The identities of its members are more intimately tied to consumption rather than their position in the social division of labour (Callinicos 1989: 162-4). As Anderson puts it, "the bourgeoisie as [inter alia] Marx knew it, is a thing of the past. In place of that solid amphitheatre is an aquarium of floating, evanescent forms- the projectors and managers, auditors and janitors, administrators and speculators of contemporary

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museums, attending rock concerts or movies, and going to health clubs. The "lifetime" of such services is difficult to estimate, but it is certainly shorter than the lifetime of consumer durables; "if there are limits to the accumulation and turnover of physical goods [...] then it makes sense for capitalists to turn to the provision of very ephemeral services in consumption" (1989: 285).

[46] The concept of the 'service class', comprised of mangers, social service workers and public service officials, was first elucidated by Renner, one of the Marxist legal theorists studied in Part 1. According to Renner, the service class (as opposed to service workers; cleaners, cooks etc.) do not receive wages in return for the sale of their labour power, but receive salaries or commissions which are fractions of profits (1978: 249-52). Indeed, Marx himself had predicted the increase of the number of workers in service industries in *Results of the Immediate Processes of Production* (1999), which had been intended for inclusion in volume 1 of *Capital* but was left out at the last minute (McLellan 1999a: xii).

[47] The service class can be seen as occupying a "contradictory class location" between labour and capital (Wright 1978: 61-2). Members of this class are simultaneously capitalists dominating labour and workers who do not own the means of production and are forced to sell their own labour (Wright 1993: 29). For refinements to the basic idea of 'contradictory class locations', see Wright (1985, 1993).

capital: functions of a monetary universe that knows no social fixities or stable identities" (1998: 85).

Meanwhile, globalisation means that "class formation is progressively less tied to territoriality" and as such the capitalist class is no longer organised within individual nation states. A "transnational capitalist class" has emerged as a global ruling class, which accumulates capital globally and also "controls the levers of an emergent transnational state apparatus and of global decision making" (Robinson and Harris 2000: 12). Members of this transnational capitalist class are the owners of the major productive resources of the world. They are increasingly distinguished from national or local bourgeoisies due to their involvement in globalised production and circuits of accumulation. The transnational capitalist class is also increasingly class conscious and has actively pursued a project of globalisation through an emerging transnational state apparatus (ibid: 22).[48]

Late Modernism: the cognitive accompaniment of late modernisation

Late modernism is the cognitive accompaniment to late modernisation. It is the set of visions, ideas, worldviews and forms of consciousness that have emerged in tandem with late modernisation. Late modernism can be divided across one central axis. Firstly, among many philosophers there has been a general rejection of epistemology and the notion of truth and the adoption of a thoroughgoing relativism. Secondly, there has been the growth of a distinctly late modern cultural realm.[49]

Philosophy

At the heart of the philosophical strand of late modernism is a rejection of the certainties and notion of progress that characterised the Enlightenment project. This definitively 'modern' project, as Hollis relates, is the "grand attempt to discover all nature's secrets, including those of humanity". Through the scientific method, rapid advances were made in the physical sciences, and before long the attention began to be paid to "the enquiring mind itself and [...] the nature of society" (1994: 5). Modernity

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[48] All these changes taken together have led Pakulski and Waters to theorise *The Death of Class*, arguing that the "season and purpose" of class analysis is over (1996: vii). Even though social inequality and conflict remain rife (ibid: 157), the most advanced western societies are no longer class societies as they are no longer structured by productive industrial property (ibid: 4).
[49] These trends are generally referred to as 'postmodern' ones. For the purposes of this section, the terms 'late modernism' and 'postmodernism' are interchangeable.

"came to be conceived of as the society in which the Enlightenment project is realised" (Callinicos 1989: 32). The ultimate aim of the social sciences, then, was for a rationally ordered society. The great modern thinkers saw that "the universe is essentially deterministic and that the human task consists in making a full inventory of its laws so that there will be no more groping in the dark and human action will be unerring and always on target" (Bauman 2000: 136).

Today, this idea(l) has lost its potency; faith in the power of human reason has declined. As Morrison formulates the "postmodern problem", modernity "is founded partly on the belief that it will be possible to attain full self-consciousness concerning social reality". But "the more knowledges we gain, the harder it becomes to tell a master story, to present a rationally coherent picture of social reality [...] telling the truth of social reality has become problematic" (1996: 13). Broadly speaking this mode of thought operates on two distinct levels. Firstly, the social world seems beyond control, manifestly too complex to understand fully, never mind to manage and mould. Secondly, single phenomena can be understood in a variety of different ways. Each of these ways is equally valid; there is an infinite subjectivity. As such, "the idea of 'total' order to be erected floor by floor in a protracted, consistent, purpose-guided effort of labour makes little sense" (Bauman 2000: 136-7).[50]

Many philosophers are thus increasingly attracted to epistemological relativism. Typically, there is seen to be nothing in which to 'ground' any notion of rationality or justice except the contingent and ever-changing field of language. Thus, 'truth' is held to be relative to time and place to the extent that it is effectively a redundant category.[51] Edgeworth considers the French triumvirate of Derrida, Foucault and Lyotard to be the prime exemplars of this style of thought. These thinkers were united in their aim of

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[50] Some of the greatest modern thinkers lost faith in the Enlightenment project well before the emergence of late modernity. At the turn of the twentieth century, Weber warned that the Enlightenment had led to the triumph of purposive instrumental rationality in all social spheres, resulting in the infamous 'iron cage' of bureaucratic rationality (see, for example, Weber 1930: 181). Contemporaneously, Nietzsche saw modern life, dominated by science and rationality, as merely concealing the underlying 'will to power' (1968). In 1944 Horkheimer and Adorno of the 'Frankfurt school' famously argued, in *Dialectic of Enlightenment* (1997), that lurking behind Enlightenment rationality is a logic of domination and oppression. This finds its fullest expression in the 'totally administered world' of fascism in the twentieth century. A revolution would thus consist of a revolt of human nature, personality and culture against purely instrumental reason. Interestingly, the intellectual heir to the Frankfurt tradition, Jurgen Habermas, retains faith in the project of Enlightenment.

[51] This is an ahistorical position, for it is implied that this has forever been the case; as such, Enlightenment ideas of progress were *always* deluded. As Eagleton puts it, this position necessarily entails that "just as it was true all along that the emperor was naked, so in a way

subjecting Enlightenment discourse to radical critique, particularly the relationship between reason and freedom, and they also enjoyed shared roots in structuralism (2003: 23).[52]

Derrida, Foucault and Lyotard all clearly display the 'three negations of postmodernism': They take a defiant stance against science, reject totalising understandings of the social world, and display a loss of faith in utopian thinking (Hebdige 1988: 187-203).[53] Indeed, Derrida, with his notion of 'deconstruction' (1976), Foucault, with, inter alia, his ideas that behind every knowledge claim there is a will to power, and that power is omnipresent (1973, 1980), and Lyotard, with his rejection of 'metanarratives' and his concept of 'performativity' (1984), are among the most influential thinkers in a wide range of fields.[54]

Culture

The cultural strand of late modernism has made its influence felt in fields as varied as art, film, literature, and design. However, it was in the domain of architecture where the reaction against modernism first made it presence felt, in the work of writers such as Robert Venturi and Charles Jencks.[55] As Anderson suggests, "the architectural capture of the blazon of the postmodern, which can be dated from 1977-78, proved

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postmodernism was true even before it got started. [...] There was never any Progress or Dialectic or World-Spirit in the first place; this is not the way the world is, or ever was" (1996: 29).

[52] France's particular socio-economic, cultural, theoretical and political situation was also crucial. Rapid modernisation after World War 2, developments in philosophy and social theory in the 1950s and 60s, and "the dramatic sense of rupture produced by the turbulent events of 1968" fed "apocalyptic impulses" and feelings of a "fundamental rupture in history" (Best and Kellner 1991: 16-17). But the political hopes of the radicals were quickly dashed and there emerged a general disillusionment at the inability to effect revolutionary change (Callinicos 1989: 6). Furthermore, the FCP's support for De Gaulle in 68, as well as the growth of new social movements, encouraged the abandonment of Marxism, which had been the perspective of choice for many radicals: Althusser identifies Foucault as his "student" (1969: 257) and, in turn, Derrida calls himself Foucault's "admiring and grateful disciple" (1978: 31), although his actual instruction consisted merely of help with preparation for university entrance examinations (Binder 1989: 1370).

[53] Of these three thinkers, only Lyotard has explicitly described his work as 'postmodern'. Perhaps the central figure of postmodernism outside of the triumvirate identified by Edgeworth is Jean Baudrillard (see especially 1981, 1988, 1991).

[54] For a critique of Derrida, see Harvey (1989: 350) and Lehman (1991). On Foucault see Edgeworth (2003) and fellow 'post' modernist Baudrillard (1987). On Lyotard see Edgeworth (2003) and Anderson (1998: 26-7, 54). More generally, see Callinicos (1989), Eagelton (1996) and Best and Kellner (1991). Critics of the post or late modernist philosophical position see weaknesses in its anti-foundationalism, its relativism, its inherent conservatism and politically disabling implications, and its tendencies towards reductionism and essentialism, especially when dealing with rival theories such as Marxism.

[55] Once again, it is far more common to hear these developments referred to as 'postmodern' rather than 'late modern' ones.

durable. The primary association of the term has ever since been with the newest forms of built space" (1998: 24).

Due to its eclecticism, the defining features of 'late' or 'post' modern style are difficult to specify.[56] Crook, Pakulski and Waters identify three trends. They argue that the "processes of differentiation, rationalisation and commodification which generated the syndrome of cultural modernity are themselves responsible for its fragmentation and transformation as they operate at a 'hyper' level" (1992: 58). For them, hypercommodification, the spread of the commodity form into all areas of life, "erodes the distinction between commodified and noncommodified regions" so that "institutionalised distinctions between cultural 'levels' give way to the proliferation of style and its packaging as a lifestyle". Thus the modern era of separate 'high' and 'low' cultural realms has passed. 'High' culture is dragged into markets and 'low' culture becomes more knowing and self-aware and borrows elements of 'high' culture. Thus, the hierarchy of cultural forms is eroded. Hyperrationalisation in modernity led to the "elitist splitting-off" of expert cultures. But as the idea of a logic of cultural development and aesthetic progress loses its appeal to producers and consumers, "aesthetic rationality become fragmented, and authoritative tradition mutates into an archive", free to be mined at will. The result is "a flat archive of 'styles' which furnishes materials for pastiche and parody in place of a developing tradition". In addition technical developments promote the privatisation of cultural consumption. Finally, hyperdifferentiation "produces the effects of dedifferentiation', freeing symbolic meaning from the constraints of value spheres, so that "fragments of cultural meaning [can] transgress boundaries between the spheres of modern culture and between culture and society" (ibid: 36-7, 74-5). Again, the result is the collapse of culture into a depthless collection of packaged styles, ready for deployment in whatever context. Additionally, there is often an attempt to deconstruct what are seen as the pretensions of modern cultural forms. Eagleton neatly captures the essence of these changes. "Postmodernism is a style of culture which reflects something of this epochal change, in a depthless, decentred, ungrounded, self reflexive, playful, derivative, eclectic, pluralistic art which blurs the boundaries between 'high' and 'popular' culture, as well as between art and everyday experience" (1996: vii).[57]

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[56] A thorough survey of these cultural tendencies is beyond the scope of this work.

[57] Of the many examples of 'late' or 'post' modernist cultural products, some of the most prominent are: In art, the 'pop art' of Andy Warhol, in music, the late 1970s genre of punk, and in architecture, Michael Grave's Portland Public Service Building, Frank Gehry's 'deconstructivist' Guggenheim Museum in Bilbao, and the Las Vegas Strip.

The Question of Causation

The major sociological debate surrounding late modernism, in both its philosophical and cultural variants, is the nature of its relationship with late modernisation. At the very least, there can be little doubt that late modernism "articulates with" (Lash and Urry 1987: 286) late modernisation; there is a clear affinity and compatibility between the disintegration of the familiar features and structures of modernity and the doubts that plague late modernist philosophers, for example. But are the emerging worldviews and cultural outputs somehow a result of or a reaction to the processes of late modernisation, or does late modernism actually drive forward late modernisation?

Crook, Pakulski and Waters suggest that there has been "a reversal of determinacy so that the fragments of a hyperdifferentiating culture impact upon, disrupt and deconstruct arenas of social structure which might previously have been thought impervious to change." (1992: 167). Culture, then, can be said to have an increasing "effectivity", and "models in which cultural processes appear as functions of 'deeper' economic or social dynamics cease to apply". Cultural components are thus free to "proliferate, split off and recombine in ways which do not correspond to any supposed 'logic' of modernity". So the "conventional hierarchies of material and ideal determination", associated with Marxism, are reversed (ibid: 229).

Bauman, on the other hand, is keen to stress the social moorings of contemporary cultural transformations. He reasons that cultural and artistic phenomena "can be viewed in fact as surface symptoms of a much deeper transformation of the social world" (1992: 64). Similarly, Lash and Urry also prefer to see late modernism's cultural and ideological features as related to the more concrete changes of late modernisation (1987: Ch 9).

Unsurprisingly, Marxists such as Harvey and Jameson also argue that 'late' or 'post' modernism is a reflex of more fundamental changes in social structure. Harvey "seeks explicitly to establish a determinate link between a disorganising social structure and a dedifferentiating or postmodernist culture" (Crook, Pakulski and Waters 1992: 29-30). He contends that "the confidence of an era can be assessed by the width of the gap between scientific and moral reasoning. In periods of confusion and uncertainty, the turn to aesthetics (of whatever form) becomes more pronounced". For him, we have entered just such a period where aesthetics, image, ephemerality and fragmentation

"take precedence over eternal truths and unified politics" (1989: 327-8). It is also now "conventional" to "dismiss out of hand any suggestion that the 'economy' (however that vague word is understood) might be determinant of cultural life even in (as Engels and later Althusser suggested) 'the last instance'". And yet ironically, "the odd thing about postmodern cultural production is how much sheer profit-seeking is determinant in the first instance" (ibid: 336). The idea of economic determination, even of the cultural realm, is still valid for Harvey: "Precisely because capitalism is expansionary and imperialistic, cultural life in more and more areas gets brought within the grasp of the cash nexus and the logic of capital circulation" (ibid: 344).

Jameson (1984, 1991) broadly agrees with Harvey's position.[58] He argues that what he terms postmodernism "is not the cultural dominant of a wholly new social order, but only the reflex and the concomitant of yet another systemic modification of capitalism itself" (1991: xii). The cultural and epistemological take of postmodernism is a mere "response" to a "very peculiar socioeconomic world indeed" (ibid: xv). For Jameson, contemporary cultural forms "replicate, reproduce and ultimately serve to reinforce the logic of consumer capitalism". Furthermore, the expansion of the cultural realm means that everything from economic value to the structure of the psyche has become cultural, although this in itself is a process initiated by the logic of late capitalism (Smart 1990: 25). Jameson's postmodernism is therefore the cultural counterpart of late modern capitalism.[59]

Summary and Conclusion

The nature of contemporary society has changed to such a degree that it appears that the age of modernity has passed. The advanced Western capitalist countries have entered an era of 'late modernity'. Processes of technical, economic and social change

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[58] For a detailed discussion of Jameson's work, see Anderson (1998: Ch 3). Jameson was the first scholar to decisively anchor 'postmodernism' "in objective alterations of the economic order of capital itself". This "prodigious inaugural gesture [...] redrew the whole map of the postmodern at one stroke" and "has commanded the field ever since" (ibid: 54). In 1976 Anderson claimed that the Western Marxist tradition was exhausted as the conditions that produced it had passed. He predicted a return to questions of political economy and strategy. He has now reversed this judgement, seeing Jameson's work on postmodernity as being among the great intellectual monuments of Western Marxism, even its culmination or "grandiose finale" (ibid: 70-6).

[59] Jameson's other main theme is the idea of spatial disorientation in contemporary society. He argues that subjects have lost the ability to position themselves as individuals and collectivities within the decentred communications networks of contemporary capitalism. This is the background to his call for 'cognitive mapping', "one possible form of a new radical cultural politics" (1984: 83-89).

can be labelled as processes of 'late modernisation'. They have occurred in three key areas. *Economy and production* have become increasingly globalised. A global marketplace and post-Fordist production techniques have emerged. In the realm of *state and politics* national governments have increasingly ceded power to actors both above and below them, as well as finding it increasingly difficult to control global economic processes. New political and social movements have materialised. *Class structure* has been profoundly transformed; the traditional working class has declined in both size and strength, and consumption is increasingly at the heart of self identity in place of work. The 'service class' has grown, and a transnational capitalist class has developed. The cognitive accompaniment to these processes is 'late modernism'. Philosophically, there is increasing adherence to relativism and anti-foundationalism, and the idea that truth is an impossibility. Additionally, a distinctive new cultural realm has emerged with a style significantly different from that of modernity.

There are varying theoretical explanations of the transformations that society is undergoing, disagreement on whether they constitute a decisively new postmodern era, and dispute as to whether late modernism is a response to or a driver of the changes. There is also argument as to whether the changes should be resisted and feared or celebrated and embraced. Nevertheless, there is remarkable agreement that "something significant has changed in the way capitalism has been working since about 1970" (Harvey 1989: 173). The how and the why remain contested, but that there has been change is not seriously disputed.

It is also important to recognise that late modernity represents the continuation of modern processes: What is described here is not the 'final' manifestation of some new type of society. Instead it is a series of interlinked processes, with roots in modernity, which are ongoing. Significant elements of modernity persist and show little sign of disappearing.[60] Scholte neatly captures the essence of the argument outlined here in his discussion of the impacts of globalisation. He claims that the changes that capitalism has undergone are broadly comparable to the changes that the state has undergone; "in both cases, the core circumstance remains entrenched while some of

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[60] Harvey makes this point with regard to the rise of flexible specialisation: "There are many different ways of making a profit- of gaining surplus value: whichever way works, you are likely to find increasing experiments with it- so there might be a trend towards flexible accumulation; but there are some key limits to the process. Imagine what it would mean for social cohesion if everyone was on temporary labour- what the consequences would be for urban life or civic security. We can already see the damaging effects of even partial moves in this direction. A universal transformation would pose acute dilemmas and dangers for the stability of capitalism as a social order" (2000: 87).

its major features have altered" (2000: 133). This is also a useful way to conceptualise late modernity. Its 'core circumstance', the capitalist economy, remains entrenched, but it is increasingly difficult to deny that 'some of its major features have altered'. In outlining some of these alterations, this Chapter is neither exhaustive nor comprehensive. It is merely an indication of the direction, nature and extent of the changes.

Late modernity has significant repercussions for Marxism and Marxist theories of law. Marxism is very much a perspective with its roots in modernity; indeed it is *the* classic modern social theory. But the modern premises that Marxism is based on have disintegrated. Perhaps most obviously, any contemporary model of society "cannot be grounded in the realities of the nation state, by now clearly not a framework large enough to accommodate the decisive factors in the conduct of interaction and the dynamics of social life" (Bauman 1992: 65). Other concepts at the heart of Marxist legal theory, such as the concept of a bipolar class division, are also becoming progressively more outmoded. Furthermore, the notion of a unified and coherent dominant ideology, which was questionable at best, is increasingly implausible in a late modern landscape. That this feature was at the heart of the most robust Marxist theory of law yet developed does not bode well for the continuing utility of that theory.

Yet Marxism and Marxist legal theory can respond to these changed circumstances. The nature of this response will be the subject of Part 3. Before that, Chapter 7 will focus its attention on late modern developments in the field of law.

CHAPTER 7. LATE MODERNITY AND LAW

Chapter 6 detailed the processes of late modernity that are reshaping society. These processes are having significant effects on the legal field. This chapter outlines those effects. Firstly, some of the central features of modern law will be outlined. Then, the processes of change that are progressively eroding this law of modernity will be detailed.

Modern Law

The modern belief in progress, and the idea that human beings could successfully understand, control and manage the social world, increasingly led to the emergence of a 'social welfare' or 'welfare state' paradigm, in place of the liberal paradigm that characterised early capitalism and modernity (Habermas 1996: Ch 9; Edgeworth 2003: Ch 3). These welfare societies aimed to redress "the social and economic inequality pervasive in liberal capitalist societies". To this end, markets became more systematically regulated in an attempt to alleviate boom-bust cycles. This meant many sectors of the economy became nationalised, and where the economy was not brought under direct state control, interventionist policies designed to reverse inequalities in wealth and power were introduced. Citizens' general welfare became one of the central concerns of the state (Edgeworth 2003: 75).

The apogee of modern law was the law of these 'welfare states'. Welfare state law represented "both an enhancement and a revision" of the liberal legal system (Edgeworth 2003: 80). Law was increasingly used to actively direct social life by the interventionist state; in a typically modern manner, law was seen as a tool to help construct a rational and reasoned social order. As a result, the "mass and density" of legal rules increased (ibid: 82).

Legal change was most evident in five respects (Edgeworth 2003: 82). Firstly, there were significant reforms of private law. The liberal paradigm of private law, where law governs dealings between autonomous and formally equal private individuals, was eroded. Instead, contractual freedom was increasingly restricted to limit exploitation of the weak and poor. A raft of legislation designed to equalise the bargaining power of parties in commercial transactions was introduced. The form and content of, inter alia, employment contracts, credit agreements and residential leases became increasingly fixed. 'Consumer law' grew, which, amongst other things, specified product standards.

Laws were also introduced to fix prices of various key commodities, for instance residential rents, transport costs and loan interest rates. Increasingly, the idea of a formal, abstract legal subject and the principle of generality were abandoned and one's actual material context was taken into account; whether one was landlord, tenant, employee, employer and so on became increasingly legally relevant. Concomitantly, in the courts the 'market individualist' paradigm was replaced by the 'consumer welfarist' paradigm (Adams and Brownsword 1987). The conventional notion of property, as tangible or intangible things created and transferred by individuals in the market also underwent transformation. The welfare state began to create positive rights for individuals to resources obtainable and enforceable against the state. Reich described this as "new property"; it included such things as subsidies to struggling industries and unemployment benefit (1964).[1] As the expanded welfare state became the dominant mechanism for allocating resources, private law doctrines of binding agreements and promises were displaced by the duties of officials, reasonable expectations of citizens and fairness of decision making, all public law principles. The rise of administrative law saw contract law decline in importance.[2]

The second major area of legal change was the emergence of the entrepreneurial and corporatist state, which led to "an historically unique structure of government" (Edgeworth 2003: 88). The state took on entrepreneurial functions by assuming ownership of large slices of the economy with the aim of rationally modernising industry and society. Nationalisation of key industries required legally novel control and management entities. Nationalised industries exhibit some features of private business, but are also responsible to governments with explicitly political objectives. Their legal form thus evades traditional public/private definitions. Nationalisation also led to novel forms of accountability. As a result, private contract, tort and property law were displaced and public law expanded. Corporatism emerged as employers associations and trade unions began to negotiate compromises on legal rights with the state. These took legal form as collective bargains, which were enforceable in courts.

Thirdly, the growth of welfare provision and rights was a key feature of the new legal landscape. The aim of redistributing wealth led to a "torrent of legislation", enacted to confer monetary and other entitlements upon citizens (Edgeworth 2003: 90).

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[1] As the state retained the power to withdraw these rights, the individual was placed in a vulnerable position *vis-a-vis* an increasingly dominant bureaucratic apparatus, despite the increased security that new property was supposed to (and of course did) engender.

[2] Indeed, Atiyah was able to evocatively title his 1979 work *The Rise and Fall of Freedom of Contract* (1979: see especially Ch 22).

Unemployment benefits, pensions and various state-funded compensation schemes replaced the partial and unreliable support of charities and communities. The extension of universal rights transformed the relationship between citizens and state. The state became increasingly subject to legal obligations, and the individual became the holder of rights that guaranteed a minimum level of security. This deepened the legal conception of citizenship. Rights to political and economic participation were increasingly buttressed by a package of rights that began to reverse class inequalities.

Fourthly, the spatial and temporal co-ordinates of law were reconfigured (Edgeworth 2003: 91). Welfare states continued and indeed extended the monocentric tendencies of liberal sates, as power became increasingly situated in sovereign national governments. Ever increasing realms of social life came under legal control; the social sphere became 'juridified'. This led to a spatial reorganisation of legal jurisdiction, as nationally uniform rules increasingly came to dominate over local norms, institutions and arrangements. National space became more systematically subject to legal regulation. The temporal co-ordinates of law were also recast. The separation of powers had traditionally seen the legislature attempt to regulate the future, the judiciary apply law by looking to past principles and precedents, and the executive implementing rules by reference to present circumstances (Edgeworth 2003: 92). This arrangement was placed under sever strain. The pressure to respond to rapid social change saw legislative output explode, with older legal rules increasingly rendered obsolete. Pre-eminence naturally passed to the legislature in such circumstances, but all three branches of law were increasingly required to look to the likely future impact of their decisions and rulings. In addition, the judiciary increasingly began to look to the purpose of law to guide decision-making in the case at hand.[3]

The final major area of legal change in the modern welfare state was increasing levels of access to justice (Edgeworth 2003: 94). In liberal societies, access to justice was largely reserved for those atop the social hierarchy, for not all formal, abstract legal subjects enjoyed equal power and resources. The welfare state saw the introduction of heavily funded schemes to make formal justice more accessible. State funded legal

[3] Despite this future-oriented nature of law, in one sense legal relations became more secure during the modern period. Previously, short-term contractual relations could be terminated at will. But in modernity, jobs and employees were bound in a more secure and enduring manner as the employment contract began to resemble a property right. This led to a more stable life for many citizens.

aid was introduced and progressively grew, as did the actual number of legal institutions, personnel and number of lawsuits.[4]

As the modern legal world developed, the unifying theme that underlay all the changes was the centrality of the nation state. Increasingly the state made law, dispensed justice and managed the relationships within its territory. 'Law' was something very much associated with the nation state during this period.

Late Modernism's Critique of Modern Law

Ideas associated with late modernism, or postmodernism as it is more commonly referred to, have "engendered a huge, sometimes angry, sometimes anxious debate in many disciplines" (Lyon 1999: 6). Although this mode of thought made its presence felt in legal scholarship later than in other disciplines, once it had arrived its influence was profound: "It is precisely because law seems to carry the whole burden of civilisation on its shoulders that legal scholarship has been so deeply, almost passionately, affected by the general mood of self doubt, failure and hopelessness that has been the most distinctive manifestation of postmodernism" (Hunt 1990a: 540). As such, a vast body of work has emerged that critiques the modern legal system, much of it based upon the ideas and theories of Edgeworth's triumvirate of key 'postmodernist' thinkers, Foucault, Derrida and Lyotard. According to Hunt, this critique of law has proceeded on two distinct levels. Firstly, on a more "immediate" level, is a concern with textuality.[5] Secondly, on a more "general" level, is a challenge to legal practice and theory's philosophical and epistemological underpinnings (1990a: 511).[6]

This body of work has undoubtedly provided a range of innovative and useful insights into law. However, what it signally fails to do is register the extent of the changes that law *itself* has undergone since the height of the modern period. Instead, a variety of perspectives *on* law have been developed; law itself is generally not seen to have

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[4] On the 'three waves' of access to justice, including a third wave where informal justice mechanisms began to emerge, see Edgeworth (2003: 94-96).

[5] This level is, for instance, the concern of Carty and Mair: "Law is a text. Or law is found in texts. The great obsession of postmodernity is that 'all is text'". There is a "sense of being prisoners of, or trapped by, language" (1990: 395-7).

[6] As Hunt puts it, "in its most general form postmodernism is anti-foundational in the sense that it denies the possibility of philosophy providing any epistemological guarantees for legal discourse" (1990a: 519).

assumed a new and novel identity (Edgeworth 2003: 2).[7] Yet it is possible to talk of the emergence of a distinctive late modern legal system.

The Late Modernisation of Law

Law in the most developed societies has changed in ways that mirror the wider social, economic and political changes outlined in the previous chapter; just as modern law "reflected the character of modern societies" (Edgeworth 2003: 2), so contemporary law has taken on a distinct late modern identity. This late modern law has not simply replaced modern law. Instead, "rather than announcing the wholesale dismantling of the edifice of modern law [...] a process of substantial renovation is in place" (ibid: vii).

Edgeworth (2003: Ch 5) isolates five distinctive but interrelated processes that are central to this renovation. These are privatisation, deregulation, the domestic fragmentation of legal systems, the rise of supranational law, and the emergence of globalised legal hermeneutics. These processes alone do not capture the entirety of the transformations the legal sphere is undergoing, but they do provide strong evidence of the reality and direction of change. In addition, Santos' concept of 'interlegality' (1995a, 2002) is a useful device through which to understand the changes that are occurring. Each of these six elements of the late modernisation of law will be discussed in turn.

Privatisation

The transfer of once state-owned assets to the private sector has been one of the most notable features of late modern society. Processes of privatisation in the advanced

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[7] Edgeworth's triumvirate address law or produce theories applicable to law in a number of notable works. Foucault once explained law in an 'ultra-Marxist' form as the total penetration of the being of man by the exigencies of production (1978: see also Carty 1990a: 5). More important is his work on 'governmentality' (1991). Derrida argues that "deconstruction is justice" (1992: 15), while Lyotard argues that justice has nothing to do with universal principles, but is always local, context dependent, provisional and revisable (Lyotard and Thebaud 1985). See also Lyotard on the 'differend' (1988) and human rights (1993). Hunt (1990a) traces the increasing influence of late or post modernist ideas on the Critical Legal Studies (CLS) movement. For him, the exchange between Gabel and Kennedy (1984), in which Kennedy rejects the possibility of theory, was the moment when CLS became explicitly aligned with postmodernism. For other good examples of late or post modern thinking on law, see Goodrich (1986, 1990a, 1990b, 1996, 1998), Fitzpatrick (1983, 1987, 1990, 1992), Schlag (1990, 1991), Carty (1990a, 1990b, 1991), Barron (1990), Douzinas and Warrington (1991; see also the critical appraisal from Balkin (1992)), Douzinas and Nead (1999) and Douzinas (1999, 2002). For critique of these ideas, see Sunstein (1989), Hunt (1990a), Duxbury (1991), Wicke (1991), Donaldson (1995), Barron (2000a; 2000b; and Goodrich's response (2001)), and Edgeworth 2003 (Ch 6).

societies of the west have been uneven and proceeded at different speeds, but the general drift in the direction of privatisation is unmistakable. The most obvious form of privatisation is the direct sale of public assets to the private sector. However, there are other forms, such as the contracting out or 'outsourcing' of public functions, the private provision of formerly public services, the exposure of state monopolies to competition from the private sector, the application of private sector management practices to state bureaucracies, 'contracting in' schemes where internal markets are utilised to regulate dealings between different sectors of the state, and the introduction of 'user pays' schemes in the realm of public provision (Edgeworth 2003: 136).

The major legal consequence of privatisation is that the legal forms that enabled public ownership and government involvement in the economy have been progressively abandoned. For instance, privately owned service providers function chiefly through contracts made between private parties. Services cease to be public entitlements, instead being private commodities to be purchased in the marketplace by individual economic actors. As a result contract, and more generally private law, has risen at the expense of public law; regulation is ultimately conducted through market pressures, with contractual decisions made by "citizens recast in law as consumers" (Edgeworth 2003: 137).[8]

The social role of contract has therefore expanded, and the 'package of rights' that constituted citizenship in the welfare states of modernity is eroding. Private companies by definition have less social responsibility. Commitments to full employment or universal access to services are sidelined as commercial considerations become paramount. Where governments do impose community service obligations, they are often vague, easily avoided or impossible to enforce (Edgeworth 2003: 138).[9] Citizens are no longer allocated services on the basis of need, but are seen as consumers of services motivated by individual desires. The uniform provision of the state is rolled back and access to such services is based upon payment of taxes, or payment to a private provider. This concept of citizenship, which places the emphasis on 'choice' rather than the entitlement to a basic minimum, is largely blind to substantive inequality (ibid: 141). 'New contract' is replacing the 'new property' associated with the welfare

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[8] Such contracts do tend to be highly structured and regulated; quality control mechanisms such as measurable performance targets or oversight by regulatory bodies are often introduced. Nevertheless, they remain contracts.

[9] This is particularly problematic when nationalised monopolies are sold intact as one to a private company. Where this occurs, market distribution of services does not come into play and states are forced to set up special regulatory regimes governing prices and services. Despite these regulations, weaker social responsibility and representation inevitably results.

state; relations between state and citizen become conditional and short term rather than fixed and long term (ibid: 143-4).[10]

Privatisation in general tends to reconfigure the public/private distinction in law. The welfare state had introduced a public element into what were previously considered to be private domains. Nationalisation was a powerful expression of the belief that economic activity was a legitimate concern of the state as it acted as a guardian of the public interest. Privatisation has reversed this, and it is reflected in changes in the law. Dealings between state as purchaser and private company as provider escape parliamentary scrutiny and freedom of information legislation, as do the internal operations of privatised institutions. The traditional administrative remedies for citizens are often removed, and as citizens are not parties to the contract between government and provider, they win no compensatory contractual rights. Yet it is often difficult to see how such contracts can be classed as 'private' in the ordinary meaning of the word; for instance prison contracts which remain confidential despite the ostensibly public nature of such matters. The 'public interest' is now less a concern of states and is instead seen to be best achieved by the aggregation of numerous private interests in the market (Edgeworth 2003: 142).[11] It is in this context that contract undergoes its renaissance, operating once again in spheres that it was forced out of. Free choice becomes central in ascribing rights and responsibilities.[12]

The privatisation of services and utilities means that different regions of national territory often now have different levels of service and cost. Uniform national conditions have given way to differentiated local patterns. The shift from a universal state provider to market based distribution also strengthens the position of certain groups; large industrial consumers may get preferential pricing agreements at the expense of individual domestic consumers. Additionally, despite the growth in the number of shareholders, privatisation still results in universal legal entitlements being transformed into the private property rights of a smaller group of individuals and institutions (Edgeworth 2003: 139).

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[10] Note, however, that the contractual provision of private services does give consumers 'exit rights' that did not exist when state monopolies provided them.
[11] This echoes Adam Smith's notion of the 'invisible hand', famously deployed in 1776's *The Wealth of Nations* (1976).
[12] The rejuvenation of contract also sees the state itself shrink in size, capacity and reach. Increasingly it manages itself internally and governs by contractual means.

Of course, privatisation need not inevitably corrode the legal entitlements of citizens, and a number of positive developments have occurred. If nothing else, it has addressed the problematic areas of the welfare state; its rigidity and undoubtedly over-optimistic faith in rational, technocratic expertise in guiding complex social spheres. In addition, the transparency of public limited companies both during the sale process and in their routine operations has aided accountability to a degree, and novel forms of consumer representation, often implemented at the contract awarding stage, have been pursued. State costs and costs to consumers are also potentially reduced. But the suspicion must remain that any advances are being unequally and unfairly redistributed (Aronson 1997).

Deregulation

Edgeworth outlines three distinct ways in which legal deregulation is occurring. Firstly, there has emerged what he terms "the new private law" (2003: 145). The 'materialisation' typical of the law of the welfare state is reversed; measures to equalise bargaining power and provide price and quality control in contracts are progressively abandoned. The classical concepts of contractual freedom, namely abstract equality between parties, and the decontextualised interpretation of language and intent, have made a return. For Buckley, the time when judicial and legislative interference with freedom of contract was the norm, barely two decades ago, now seems like a distant past (1999: 2). Of course, there is "no systematic return to pre-welfare state liberal principles in law" (Edgeworth 2003: 149); materialisation persists in some respects, as workers, tenants and consumers all retain important legal protections. However, there is undoubtedly "a significant reversal of the more extensive forms of materialisation", and contractual rights are expanding at the expense of 'new property' rights (ibid: 149-50).

In labour law, for instance, individual rights based upon contract are becoming the norm, for example the right to not be in a union, and the right to negotiate pay directly with an employer. Statutory provisions on redundancy and unfair dismissal have been pared back.[13] The old corporatist mechanisms designed to collectively advance workers' rights have been dismantled, and unions have had their legal priority to represent workers curtailed. The ability to strike is now significantly more difficult and fraught with danger, with the introduction of procedural hurdles and re-establishment of

[13] One notable exception to this general trend is the persistence or actual introduction of minimum wage legislation, for example in New Zealand (Edgeworth 2003: 146) and the UK.

civil liability for loss caused to employers resulting from industrial action (Wedderburn et al 1994: 23). Any benefits that the move towards contract does bring are felt individually rather than collectively. The move away from equalising bargaining conditions and the commitment to redistributionary policies sees inequality become institutionalised, and wages and conditions become increasingly localised, even individualised.[14]

The second chief way in which legal deregulation is occurring is through the "attenuation of agency command and control". State agencies and ministries have had their duties, powers and resources restructured, primarily due to the loss of faith in centralised planning (Edgeworth 2003: 152). This mode of deregulation began on a large scale in the US in the late 1970s and continued through the 1980s, with, inter alia, the airline, transport, telecommunication and financial sectors deregulated, and oil and natural gas prices removed from statutory control. Canada, Western Europe and Australia soon followed similar paths. Of course, legal rules were not completely removed from these sectors, but the centralised bureaucratic command and control polices were abandoned and the market was reintroduced. The reconfigured forms of regulation tend to be based upon flexibility and consensus, and are less directed at achieving specified goals. Typically they may take the form of codes of practice, charters, private compliance units, or government backed agencies. They are often the products of non-state actors and private bodies, who also implement and police their operation. Such regulation is decentralised and manipulative rather than state-based and authoritative (Edgeworth 2003: 155). The state is no longer the prime driver of regulation; increasingly it "steers rather than rows" (Osborne and Gaebler 1992).[15]

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[14] Dematerialisation has also occurred in housing law, particularly in the area of tenants' rights. State provision of public housing has reduced as the public housing stock is sold off. Thus, tenants' former rights in public law against the state, crucially the right to tenancy based upon need, are replaced by private rights of ownership in the property market. Security of tenure is therefore based solely on contract. Where housing is still public, market rents are now common. Of course, duties to provide adequate and safe premises do remain (Edgeworth 2003: 148).

[15] Deregulation in one area often requires an increase in regulation in others; increased product safety legislation is necessary where the consumer sector is deregulated, and the marketised financial services sector has required extensive consumer protection regulation. Indeed, the very process of deregulation inevitably produces new, market-affirming forms of regulation (Edgeworth 2003: 153). Similarly, Picciotto recognises that the 'rolling back' of the state has not "simply given free rein to market-mediated social relations, but has introduced new forms of regulation and normativity. Although liberalisation and privatisation initially involved 'deregulation' by undermining existing forms of state action, they were swiftly followed by 'reregulation' by a wide variety of new means, and the rise of a regulatory state" (2002: 2-3).

The third main way in which deregulation is occurring is through the increasingly contractual form of welfare rights. There has been a general shift away from welfare principles in all advanced countries. The welfare "safety net" is gradually removed and a novel legal regime governing welfare has thus emerged (Edgeworth 2003: 156). Crucially, welfare provision is increasingly made conditional and discretionary. Universal entitlement is reduced and conditions, time limits and mutual obligations become commonplace. As a result it is more difficult to attain and retain benefits. Contract is now the mechanism by which the terms on which benefit is to be paid and the obligations of the claimant are structured. The notion of welfare entitlement as a set of enforceable lifelong claims against the state gives way to "a more fluid sense of entitlement"; welfare is increasingly seen as a mutual bargain of rights and duties rather than an entitlement owed unconditionally to the citizen on establishment of legally predetermined need. Uniform national entitlements are replaced by localised and differentiated provision. 'Caseworkers' have greater discretion, and there is less chance of a tribunal review of an agreed contract. In addition, the move to private providers of welfare sees efficiency and targets valorised at the expense of notions of public service, and also makes redress against the state more difficult. 'Clients' who are poor bargainers are placed at a disadvantage. The security provided by the 'new property' is gradually being eroded, and the concept of citizenship diluted (Edgeworth 2003: 156-9). As Kosonen argues, the capacity of welfare states to reverse class inequalities has declined (1995: 99). Quigley (1998) compares US welfare arrangements to mediaeval and early modern English Poor Laws; as Edgeworth suggests, this is an exaggeration, but nevertheless draws attention to the "eerie parallels with the welfare state's ungenerous ancestor" (2003: 158).[16]

The Domestic Fragmentation of Legal Systems

In modernity, law and justice became centralised in the nation state. Recent developments have seen this unified 'system' begin to fracture. Edgeworth identifies three central elements to this process; the rise of informal justice, the increasing exposure of the legal profession to competition, and changes to the legal aid system (2003: 160).

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[16] Other spheres of welfare, such as education, health and pensions have undergone a similar reconfiguration. The right to purchase services in the market is increasingly valorised over collective public provision (Edgeworth 2003: 159-60).

The first and central element is "the explosive rise of informal justice" Edgeworth 2003: 160). Informal justice covers a plethora of initiatives; court annexed alternative dispute resolution (ADR) and diversionary strategies, specialised informal tribunals, the incorporation of third parties such as victims into the legal process, the rise of community based initiatives such as justice centres, and the emergence of private adjudication and mediation services that compete with the formal justice system (ibid: 160-1). Furthermore, conditions attached to legal aid increasingly encourage the use of informal justice. Initially such informal justice mechanisms were seen as an inadequate and second-class alternative to formal justice. However this perception has gradually changed and in many respects informal justice now overshadows traditional formal law and justice.[17] Informal justice is advocated by a diverse alliance; the government and judiciary see it as an effective way to combat system overload, whilst ordinary citizens appreciate its relative speed, efficiency and lack of expense, as well the greater respect it pays to local norms.[18]

Formal dispute processing has always been exceptional rather than normal; that the majority of disputes are resolved informally is obvious. But as Mnookin and Kornhauser (1979) note, disputes resolved outside of the courtroom tend to be resolved in "the shadow of the law", with law structuring and influencing outcomes. Yet today many *legal* disputes are processed by informal means, and it is increasingly annexed to the operations of formal courts. Edgeworth refers to this as "hybridisation" (2003: 162).[19] This has led to an increasing "judicial managerialism", as judges become increasingly focussed on the management of caseloads (ibid: 163). Cases can be diverted to court annexed schemes, and also referred to nominally independent tribunals and community justice centres. This managerialism is a far cry from Dworkin's image of a Herculean judge manfully pursuing a 'right' answer (1977: 105-30). Once disputes are diverted from the formal court system to the informal sphere, traditional legal discourses of objective rights and obligations merge with moral, economic and other discourses, and subjective needs and interests are given greater weight; the "harmony" of the parties' relationships assumes a more central importance

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[17] Despite this 'explosion', Galanter (1992: 1) also notes that the formal court apparatus- judges, caseloads, lawyers, officials- has continued to expand. Edgeworth suggests that ADR is increasingly not an 'alternative' at all, but the only viable option for many disputants, so inaccessible are the courts (2003: 171). This may be problematic if ADR is unsuited to the needs of the case at hand, or if it fails to offer strategic or just resolution. Indeed, in this respect, informalism can lead to "second-class justice for the poor, the badly advised and the powerless" (ibid: 166).

[18] With this focus on cost effectiveness and efficiency, informal justice provides a fine example of Lyotard's 'performativity' (1984: 46).

[19] Capelletti (1993: 288-294) outlines the extent of this process across a number of jurisdictions.

(Nader 1988).[20] As such, it becomes increasingly difficult to view law as a closed, autonomous social subsystem. Concomitantly, the process of informal negotiation is also transformed. It too cannot maintain its autonomy from legal discourse, which leads to what Galanter has called "litigotiation" (1985: 1). The system as a whole becomes dedifferentiated as legal and non-legal discourses mesh.

Informal justice mechanisms have also led to an increasing privatisation of justice. Private dispute resolution bodies, which have grown exponentially over recent years, offer their services directly to disputants. Often, industries and institutions set up their own dispute processing mechanisms such as ombudsmen or they pledge to utilise ADR. The personnel of these bodies are not constrained by public legal norms, so other, more private values can be brought to bear in cases. The reasons behind settlements are generally not revealed publicly and therefore they cannot go on to serve as norms or precedents in subsequent cases, nor can decisions be scrutinised. Additionally, issues of public significance, such as the conduct or accountability of public servants, remain hidden.[21]

The second key element of domestic fragmentation is the increasing exposure of the legal profession to competition; the profession's monopoly on legal services is eroded and a deregulated market in legal services is created (Edgeworth 2003: 172). Competition is fostered within the profession itself, through the breakdown of monopolies such as that of barristers to appear before higher courts, the introduction of market principles into professional practice, and a relaxation of the rules on advertising. Additionally, competition from outside of the profession is encouraged; for instance non-lawyer professionals are increasingly allowed to perform legal tasks such as conveyancing. The provision of legal services is now overwhelmingly driven by consumer preference rather than professional expertise, and the increased choice means each branch of law must be more responsive in order to survive and flourish.

The final major factor in the domestic fragmentation of the legal system is the progressive restrictions on legal aid (Edgeworth 2003: 174). In the modern welfare state, legal aid was the primary means of equalising access to formal justice.

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[20] Again this finds an echo in the work of Lyotard, who celebrates the local and small scale. In *Just Gaming* (1985) he argues that justice is always necessarily local and context bound; as Edgeworth points out, the rise of informal justice has promoted this "justice of proximity"- local, private and communal norms (2003: 169).

[21] Fiss (1984) has criticised the growing legal culture of 'settlement', arguing that it may divert important matters from public scrutiny and resolution by reference to legal norms.

However, since the 1980s, restrictions have been placed on legal aid, largely based upon the financial status of recipients or the subject matter of the case at hand.[22] Consequently, large sections of the population are now excluded. Market principles have also been introduced. The state now contracts with private firms to provide legal aid services, mirroring the 'user pays', consumer citizenship policies evident in other spheres. Regan et al conclude that in "some important respects, eligibility provisions in the late 1990s bore a striking resemblance to those of the charitable schemes prior to World War 2" (1999: 2).

There are other markers of domestic fragmentation aside from the three identified by Edgeworth. For instance, Boon, Flood and Webb argue that the Law Society's Training Framework Review threatens some "familiar landmarks" such as the Legal Practice Course and the training contract, while work-based learning is increased.[23] For Boon, Flood and Webb, this is driven by a desire to provide flexibility and accommodate diversity, differentiation, mobility, market needs, growing legal internationalisation and the increased specialisation of practice. As such, the "TFR clearly fits with the growing marketisation of higher education and the move towards a neo- or perhaps fully post-Fordist, [...] system of education and training" (2005: 478-81). Another marker of domestic fragmentation is the creation, usually in developing countries, of 'export processing zones'[24], most famously the *maquiladoras* of Mexico. These zones have a qualitatively different legal regime from the rest of national territory, with duty, tariff and tax incentives and relaxed labour laws in order to entice multinational firms. Perhaps the most fundamental marker of all is the idea that the body of legal rules, the mass of statutes, delegated legislation, administrative legislation and adjudication, judicial and quasi judicial decision making, institutions and personnel, and non-formal methods of dispute avoidance and resolution "cannot be seen any longer as a coherent, closed ensemble of rules or values" (Douzinas and Warrington 1991: 27).

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[22] In absolute terms legal aid expenditure has generally increased. This is because of the litigation boom and the increased cost of those matters that do still attract aid (mostly criminal rather than civil cases). Also, despite the reduction in classes of the population that are eligible for legal aid, the numbers in those classes have tended to increase. So, while aid is now largely limited to poorer sectors of society, the number of individuals in those sectors has increased (Edgeworth 2003: 174-5).

[23] The TFR was launched in 2001 and is due to conclude in 2007.

[24] 'EPZs' are also known as special economic zones (SEZs) and free production zones (FPZs). They have also been set up by substate authorities (Scholte 2000: 77, 105).

The Rise of Supranational Law

Sovereignty was at the heart of modern law. National governments were able to effectively regulate tightly defined domestic spaces. Laws originating outside of national borders were only binding once the sovereign had incorporated them, and the nation state itself was the basic unit of international law. Legal theory thus largely ignored non-national law. This is now unsustainable; as Carty and Mair point out, laws are no longer "centred around one enduring axis" or "point of reference" (1990: 396). Recent years have seen the rise and increasing influence of supranational law and "increasingly permeable domestic law" (Edgeworth 2003: 176-7). There are several interrelated elements to these changes.

To an extent, nation states have given up their sovereignty voluntarily. Interdependency is seen to further national interests as economic globalisation increasingly means that problems cannot be confined to the domestic sphere. States are also compelled to partake in transnational law-making structures as they attempt to secure effective regulation beyond their own borders (Edgeworth 2003: 177-8). The bilateralism typical of modern international law is progressively replaced by multilateralism, and a raft of new institutions has emerged which deliberate over, implement and monitor compliance with treaties, which now often have priority over domestic legislation and do not require domestic legislation to enforce them. This is particularly the case for human rights treaties. Thus the "evolving jurisprudence of supranational institutions becomes directly incorporated into domestic law" (ibid: 179).

The emergence of new supranational institutions increases the number of sources of law. As globalisation is most advanced in the economic realm, so global law and governance is correspondingly most advanced there. Global economic law overwhelmingly promotes the creation and consolidation of free markets, and aids the processes of privatisation and deregulation. Nationally based 'protectionist' legislation that favours local industry declines (Arup 2000: 307). Bodies such as the World Trade Organisation (which emerged out of the General Agreement on Tariffs and Trade), International Monetary Fund, World Bank, European Union and North American Free Trade Area all promote laws, rules and norms that directly impact upon individual nation states. In addition, multinational corporations, non-governmental organisations and professional associations all have influences in these bodies, confusing the picture

further.[25] In such a context, it becomes impossible to identify a single location where sovereignty can be said to definitively lie.[26] The network of supranational law makers tends to harmonise law across nation states, and even technically non-aligned nations are under ever increasing pressure to give effect to treaties as interdependency grows. The growth of international trade demands this convergence. Consequently, the 'globalisation' of law is best described as "a change in the range of sources of national law,[27] and the interpenetration of national and supranational legal orders" (Edgeworth 2003: 180).[28]

Perhaps the best example of supranational law is the growth of supranational human rights law; this is "one of the most significant contemporary transformative influences on the legal doctrines of municipal legal systems" (Edgeworth 2003: 182). International human rights law primarily addresses the relationship between the citizen and the state, and as such it directly threatens sovereignty. Given this, governments clearly have little incentive to enact such laws, and so the primary movers have tended to be more esoteric groups such as citizens' groups and NGOs, often transnational in their membership. Even where states have resisted the pressures to implement human rights law, new social forces and practicalities have meant that in practice, citizens tend to enjoy recourse to higher supranational bodies, such as the United Nations Human Rights Committee under The International Covenant for Civil and Political Rights. This creates additional pressure for domestic change (ibid: 183).

The global consolidation of human rights norms has coincided with the decline of the social citizenship and solidarity associated with the modern welfare state. Human rights express a very different universalism from that expressed by the modern state; national social solidarity gives way to a global discourse of humanity that transcends national boundaries and is captured in ideas such as the 'common heritage of

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[25] Multinationals have particularly visible effects on state law. Their ability to organise production internationally "puts downward pressure on wages and working conditions", notably in the clothing and footwear industries (Held et al 1999: 278-80).

[26] The most advanced example of a supranational law making institution is of course the EU. Indeed, the European Court of Justice has been compared to a Supreme Court enforcing a federal constitution (Schachter 1997: 11).

[27] As such, Hart's 'rule of recognition' (1961: Ch 6) grows more complex.

[28] Koskenniemi and Leino (2002) point out that successive International Court of Justice presidents have expressed concern at the proliferation of international tribunals and the substantive fragmentation of international law, which is seen as damaging to the unity, coherence and manageability of international law. But Koskenniemi and Leino argue that international law has never really been unified and coherent, and the ICJ is simply worried about losing its pivotal role. For them, fragmentation is actually an institutional expression of international political pluralism.

mankind'. States are forced to align laws to very general concepts of human dignity, which has resulted in, inter alia, the increasing domestic recognition of indigenous peoples, customary landholding practices and powers of local governance. This polycentricity and fragmentation is anathema to the modern process of nation building (Edgeworth 2003; 184-5, Santos 1995: 318).

The rules promulgated by supranational institutions are not the only kind of supranational law. Ladeur suggests that "private networks of inter-relationships" generate forms of "spontaneous law". This law becomes increasingly important as the state "can no longer deliver stable rules of guidance for private actors". Thus self organisation through, inter alia, self generated laws and norms helps fulfil law's classical role of stabilising expectations (2004: 6-7). Perhaps the best example of this spontaneous or "global informal law" (Edgeworth 2003: 190) is the revival of an international lex mercatoria. As Teubner (1997) outlines, the new lex mercatoria does not derive from international institutions or treaties, nor is it based upon custom or embedded practice as the old lex mercatoria was. Instead, it "derives from newly constructed cultural practices attendant on the peculiarities of contemporary transnational trade" (Edgeworth 2003: 190). Lex mercatoria's legitimacy is not drawn from its rationality or adherence to the popular will, but from its reflexivity; the subsystem itself generates the norms that regulate it, and is therefore self-validating (Banakar 1998: 361). Given its simultaneously supranational and local origins, lex mercatoria reflects the contraction of the state in both upwards and downwards directions: The norms used are autonomous from the national legal sphere, and the process operates in closer proximity to the dispute, and is speedier than traditional formal legal remedies; it is essentially a form of ADR. As Edgeworth puts it, "procedurally and substantively, the regime is essentially one of private norm creation" (2003: 191).[29]

For Teubner (1997), the new lex mercatoria is the key to the emerging regime of "global law without a state". This regime is decentralised and autonomous from the state, value pluralistic, and lacks the unity of national law. It regulates flexible, volatile and fragmented domains as opposed to a clearly defined, bounded national space. The idea of a hierarchy of norms, with sovereign positive law at the pinnacle, must be

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[29] The new lex mercatoria's primary field of operation is in international commercial arbitration. The International Chamber of Commerce in Stockholm has emerged as the leading forum of arbitration that applies this informal law (Banakar 1998: 347).

abandoned. Instead there now exists a "heterarchy of legal discourses", with law developing at the peripheries (ibid: 14, 7).[30]

Contract law, which is enjoying a resurgence in late modernity, is considerably renovated due to supranational pressures. Collins suggests that the once 'closed' and 'insular' systems of classical contract law are "breaking down under the globalisation of markets and the evolution of international political structures to regulate such markets" (1997: 41). The sources of contract law have expanded; rules now emanate from transnational legal orders, often considerably independent from any political origin (ibid: 41). Collins notes that contract law has always emanated from a variety of sources,[31] but despite this, it always "remained tied to the political authority of the nation state". This is no longer the case (1997: 42).[32]

Globalised Legal Hermeneutics

Closely related to the rise of supranational law, judges are becoming increasingly prepared to look beyond the rules provided by domestic positive law; their normative horizons are progressively widening to include laws of supranational origin and laws from other jurisdictions, even where such laws have not been formally incorporated into domestic law, and particularly in 'hard' cases. Edgeworth captures these phenomena with the concept of "globalised legal hermeneutics" (2003: 185). This growing 'legal

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[30] According to Ladeur (1999), lex mercatoria can be considered an example of Teubner's 'autopoietic law' (1988). Autopoesis, a biological term, was applied sociologically by Luhmann (1990). He argued that social subsystems are largely closed and self-generating. Validity is an internal product of the system, and is constantly recreated as the system reproduces itself. For a critique of these ideas see Neves (2001), Mahlmann (2003: 26-8) and Mieville (2004: 274). Teubner argues that law is autopoietic, for it is a self-generating, closed system that does not refer to any higher truth or rationality; this is particularly so of the self-created laws of private regimes in global society (1988, 2004). On this basis, Laduer calls for a 'postmodern constitutionalism', where each subsystem is permitted to observe and modify itself and its own internal rules (1997). Collins suggests two readings of lex mercatoria are possible. First, as its standards ultimately remain dependent on state sanctions for enforcement, it may simply be an elaborate form of contract regulated by state law. However, to the extent that the standards applicable to contracts "derive from other sources such as conventions, customs of business, rules of private associations, then it can be regarded as an independent source of legal regulation of contracts" (1997: 45). Above all, Edgeworth suggests that it is important to remember that global informal law is still "overshadowed by the spread of formal legal globalisation" (Edgeworth 2003: 192).

[31] These include specialist commercial courts within jurisdictions, common law, chancery courts, and historical antecedents such as the natural law tradition. In addition, international business transactions "always forged their own miniature legal orders", such as commercial standard-form contracts (Collins 1997: 41).

[32] For Collins, the great strength of contractual, private law regulatory strategies is their reflexivity (1999: Ch 4).

commerce' or 'cross fertilisation' results in the "horizontal sharing of legal principles and values" (ibid: 188).[33]

Judges are particularly willing to utilise supranational norms, rules and law, particularly where there are interpretative difficulties in domestic law.[34] Global informal law is often used in this way, but above all, supranational human rights norms are increasingly referred to domestically. Hunt (1997) traces how references to the European Convention on Human Rights and judgments of the European Court of Human Rights exploded in the UK even in the years before the Convention was formally introduced into UK law by the Human Rights Act 1998.[35] Both the Convention and the Court continue to influence jurisdictions that are not formally bound by them.[36] Human rights obligations created at the supranational level bind citizens extraterritorially, so the old idea of sovereign immunity no longer applies;. the International Criminal Court and various *ad hoc* war crimes tribunals have been thrust into the spotlight in a number of high profile cases, such as those of Pinochet, Milosevic, and Hussein.

Additionally, a notion of "global citizenship" has emerged (Edgeworth 2003: 192). Individuals and organisations have increasing layers of legal rights that neither originate in the positive law of sovereign nation states, nor are exclusively enforceable before municipal courts. As such, citizenship is no longer monopolised by the laws of nation states.[37] New legal subjects have also appeared, such as national and international NGOs, and they often participate in decisions in cases and enforcement.[38]

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[33] This trend is particularly evident in the former communist states of the eastern bloc, as they become increasingly aligned with the west both through global economic processes and active design. See also Friedman (2004) on the intertwining of family law, Choudhry (1999) on constitutional design, and Van Hoecke (2004).

[34] Collins notes that the rise of supranational law often forces alien concepts into domestic jurisdictions. For instance, the European Directive on Unfair Terms in Consumer Contracts (1999/13) refers to good faith, a concept that has traditionally been resisted in UK law (1997:24). On good faith in general, and its potential for impacting upon UK law, see the series of articles by Brownsword (1993, 1996, 1997, 1999).

[35] Hunt found that in the period from 1953-1996, judges made 473 references to the European Convention on Human Rights or judgments of the European Court of Human Rights. The first substantive reference did not occur until 1973, and over half of the total occurred in the last five years of the study.

[36] Note also the 'Bangalore Principles', which were formulated in 1988 by a number of appellate judges from many common law jurisdictions to guide the application of international human rights norms, especially where local laws are unclear or incomplete (Edgeworth 2003: 188).

[37] Of course, reliance on these rights still depends on the individual belonging to a sovereign nation; such is the case in the EU (MacCormick 1997: 342). Global citizenship is also relatively 'thin', largely comprising of civil and political rights, rather than social rights such as entitlements to basic minimums.

[38] National and international non-governmental organisations are also particularly involved in enforcing environmental treaties and agreements.

Often standing is also given to non member-state citizens such as refugees and indigenous peoples (Edgeworth 2003: 193-4).

Given these developments some classical notions of jurisprudence begin to appear increasingly inapplicable. Dworkin's notion of "community" (1977: Ch 4, 1986), for instance, now seems inadequate descriptively and unrealisable normatively, and unable to capture the complexities of a "world of overlapping, and provisional, communities" (Edgeworth 2003: 189). Dworkin's 'Hercules' cannot simply look to the background principles of a particular community's jurisprudence in order to resolve difficulties in hard cases. Similarly, Hart's exhortation for judges to look to public policy in cases where, due to the 'penumbra of uncertainty' or law's 'open texture', meaning is unclear (1961) seems equally unsuited to contemporary conditions (Edgeworth 2003: 189).

A raft of constitutional questions is also raised. Where judges look to human rights norms their reasoning tends towards moral reasoning. Given that moral norms tend to be very general, there is an inbuilt flexibility, which in some circumstances may confer a greater degree of judicial freedom and political power on unelected judges. The norms of international human rights jurisprudence may be so malleable as to allow scope for personal ideologies or politics to fill out their meaning (Hunt 1997). Questions as to whether human rights norms should be more binding than other international and domestic norms and whether judges owe any special loyalty to local laws are also raised. Alternatively, it is possible that "the advance of human rights norms domestically may be both a consistent and principled interpretation of the democratic sovereign will, as expressed in both the original ratification of international human rights instruments and their incorporation into domestic law" (Edgeworth 2003: 199).[39]

Interlegality

Boaventura de Sousa Santos' notion of 'interlegality' is a useful concept when attempting to understand how the various elements of the late modern legal world relate to each other.[40] Santos 'maps' law, pointing to "local, national and world legality"

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[39] For the potential impacts of globalised legal hermeneutics on the rule of law, see Edegworth (2003: 197-9).

[40] Despite embracing some 'postmodern' themes, Santos has a Marxist heritage; see, for instance, his arguments, contra Pashukanis, for a Marxist theory *of* law rather than a Marxist theory *against* law (1982).

(1987: 287, 1995a: Ch 7). At the local level, there are the laws of rural areas, the laws of marginalised urban areas, and the laws of churches, sports, and professions; this law is often informal and unofficial. National legality is predominantly made up of state law, while world legality includes lex mercatoria, the laws promulgated by supranational institutions, and the internal laws of MNCs. According to Santos, "these different legal scales do not exist in isolation but rather interact in different ways [...] as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but interlaw and interlegality" (1987: 288). Although the centrality of state law is increasingly shaken, it is "still a decisive political factor" (ibid: 298). But increasingly legality is complex and porous; multiple networks of legal orders coexist, overlap and interrelate.[41] Santos grounds his interlegality thesis empirically with his study of the law of the Pasargada squatter settlement in Rio (1995a: Ch 3).[42] Santos analyses thirteen local dispute settlements within Pasargada which demonstrate the power of non-state law and norms, yet simultaneously show how this unofficial legal system does not challenge the formal system or claim jurisdiction outside of its territorial borders (Santos 1995a: 236).[43]

Santos also argues that modernity is crumbling, and embryonic new forms of social ordering and modes of knowledge are emerging.[44] The possibility of new forms of

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[41] Santos is not alone in pointing to the complexity of the contemporary legal order. Held talks of 'layers' of laws beyond the state (2003: 173). MacCormick argues that we must "escape from the idea that all law must originate in a single power source, like a sovereign", and "discover the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system". Legal orders should instead be understood as the "complex interaction of overlapping legalities" (1993: 8-10). Twining has suggested that there are eight "levels" of law: global, international, regional, transnational, inter-communal, territorial state, sub-state and non-state. He argues that "these different levels of relations with which law has to deal are not neatly nested in a single hierarchy", but instead they "interact" (2000: 139-40, 228).

[42] Pasargada is a fictional name for a real squatter settlement. Santos also studies a dispute between squatters and developers in Recife, Brazil.

[43] Santos' image of globalisation dovetails neatly with his notion of interlegailty. Santos sees globalisation as increasing legal uniformity in some aspects whilst increasing local differentiation in others (1998). There is a mix of top-down imposition and bottom-up creation, and the changes cannot be accounted for by any monocausal explanation: Thus, legal change is "a highly complex phenomenon that mirrors the complexity and ambiguity of the much broader, seemingly all-encompassing process of globalisation of which it is only a very partial manifestation" (Santos 2002: 163). Twining makes a similar point: "Globalisation does not imply homogenisation". Instead, "globalisation does not minimise the importance of the local, but it does mandate setting the study of local issues and phenomena in broad geographical and historical contexts. For most legal scholars the maxim should be: think global, focus local" (2000: 252). See also Santos on 'globalised localism' and 'localised globlaism' (1987, 1995a: 263).

[44] This argument is made in his landmark 1995 work *Toward a New Common Sense*. For Santos, the new era is a 'postmodern' one. Critical reaction to *Toward a New Common Sense* was favourable, but for critique see Sciulli (1996), Warren-Perry (1997), Darain Smith (1998) and Twining (2000).

common sense has emerged; such a common sense would not be dominated by the west, but would be built upon traditions and cultures that have been repressed and marginalised by modernity and capitalism. Santos sees six clusters of social relations that relate to six configurations of power or common sense: the householdplace, workplace, marketplace, communityplace, citizenplace, and worldplace (1995a). In keeping with the idea of interlegality, each of these clusters can be seen to have a unique and differentiated order of laws and norms, but there is interaction and interpenetration between each one.

In addition, Santos suggests that law can and is being used profitably by emancipatory movements at the local, national and global level. Often, such movements use informal, non-official forms of law, but state law is also used in unconventional ways. For instance, Pasargada's "internal legality [hints] at some of the characteristics of an emancipatory legal practice". Although the risks of it being co-opted or undermined are great, Pasargada's legal tools are "amenable to use in a radically democratic manner"; there is a wide distribution of legal skills expressed by the absence of a specialised professional monopoly, manageable and autonomous institutions that are accessible and encourage participation, and a style of non-coercive justice "expressed in both the predominance of rhetoric and the orientation toward consensus". To supplement this, concepts and techniques from state municipal law are borrowed (Santos 2002: 162). With law being used in this way, there is a flowering of "subaltern cosmopolitan legality" (ibid: 494-5). Santos and Rodriguez-Garavito outline the main features of this blossoming form of legality: Most crucially, there is a proliferation of "bottom up" as well as "top down" legal reform (2005: 1-2).[45] In addition, there is the construction of a nascent global solidarity, the emergence of a grassroots struggle to reform the international human rights regime in order that it better reflects multiculturalism, and a radicalisation of democratic politics through new forms of participatory democracy. However these developments and the movements they depend on remain "fragile" (ibid: 18).[46]

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[45] Santos and Rodriguez-Garavito suggest that scholars who focus on law and globalisation tend to fail to register the extent and nature of these 'bottom up' changes. Despite their value, the 'governance' scholars' concepts of, inter alia, 'responsive regulation' (Ayers and Braithwaite 1992), 'post-regulatory law' (Teubner 1986), and 'soft law' (Snyder 1994) are focused on 'top-down' regulatory responses to globalisation. Meanwhile, 'hegemony' theorists (Dezalay and Garth 1996, 2002a, 2002b) assess the failure of ostensibly progressive global legal designs such as the human rights movement. Again the focus here is on elites, who are oversimplified and portrayed as monolithic, whilst space for resistance is closed down and the inevitability of hegemonic incorporation assumed (Santos and Rodriguez-Garavito 2005: 6-12).

[46] Rather than suggest a programme for law, Santos invokes three metaphors that are already forming the basis of new consciousnesses: the 'frontier', the 'baroque' and the 'south' (1995a:

Summary and Conclusion

Just as the nature of contemporary society in the advanced capitalist west has changed to such a degree that the era of modernity appears to be ending, so too it seems that the modern legal system is disintegrating. A distinctive 'late modern' legal system is emerging. Central to this are the five aspects of legal change identified by Edgeworth; privatisation, deregulation, domestic fragmentation, the rise of supranational law, and the emergence of globalised legal hermeneutics. In addition, Santos has outlined the notion of interlegality. This is not exhaustive, but it is clear that significant changes are afoot. Just as modernity fostered its own unique legal order, so too is late modernity.

Of course, the modern legal order has not been completely destroyed and replaced by a new one; instead some of its central features are being reconfigured and renovated in a series of incremental changes. These processes do not occur with the same speed and intensity in all jurisdictions, but the broad and general trends that point to the emergence of a new legal order are unmistakable. Most significantly, it is no longer the case that the state is the only, or even the major unit of analysis when considering law.[47] Sovereign state law can no longer be held up as an ideal type against which other forms of law and norms are to be measured (Cotterrell 1992: 29-31). Instead, law emanates from a plethora of different and interacting sources and comes in a variety of different and interacting forms. The result is something of a 'patchwork quilt' of legality.[48] As such, "black box" theories that treat nation states and legal systems as discrete, impervious entities that can be studied in isolation either internally or externally are now of limited value (Twining 2000: 51).[49]

The most prominent socio-legal theorists "at best offer only partial understandings of the present legal landscape" (Edgeworth 2003: 203). Their theories tend to rely upon

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Ch 8, 1995b). The 'frontier' is "characterised by a preference for the institutional and social ferment of life on a frontier" (Edgeworth 2003: 129), the 'baroque' is a "cultural metaphor" that privileges eccentricity and a "temporary suspension of order and canons" (Santos 1995a: 499-500), while the 'south' "signifies the form of human suffering brought about by capitalist modernity" (ibid: 507). For critique of the metaphors, see Sarat (1995), Darain Smith (1998) and Twining (2000).

[47] The other most notable change is perhaps the renaissance of contract law.

[48] It has been speculated that the emergence of an unsystematic plurality of law signals a return to pre-modern law. Hicks, for instance, talks of "a new middle ages of law" (1995: 13).

[49] Twining includes Rawls' *A Theory of Justice* in this category. Rawls states that his theory is restricted to societies which are "closed system[s] isolated from other societies" (1972: 8). As a consequence, its relevance in contemporary conditions is questionable.

outmoded concepts of nation states, bounded polities and monocentric legal systems. None provides the conceptual tools adequate to the task of understanding the legal order of late modernity.[50] The same could be said of all the Marxist theories of law assessed in Part 1. They belong firmly in the tradition of modernity and as such assume the bounded, territorial nature of law and accept the nation state as the focus of analysis. Yet Marxist legal theory can respond to these changed circumstances, and in the process both rejuvenate itself and offer a plausible account of the late modern legal order. Part 3 will outline how this is so.

[50] Edgeworth accuses several socio-legal scholars of this failing: From the "high watermark" (2003: 99) of modernity are Freidmann (1959, 1971), Unger (1976), Nonet and Selznick (1978) and Habermas (1987, 1996). More recent theorists are more alive to some of the processes of change but still fail recognise the enormity of these processes and are unable to offer an adequate conceptual framework in which to ground analysis: Teubner (1983), Willke (1986) and Ladeur (1997). Even Santos does not furnish a sufficient description of the profound changes the legal sphere has undergone (Edgeworth 2003: 131-2).

PART 3. MARXIST LEGAL THEORY IN LATE MODERNITY

"While I do not believe that we should jettison all the grand theories of the past we certainly have to be careful in applying previous paradigms to contemporary conditions."
Kellner in *Theory, Culture and Society* (1988: 267)

CHAPTER 8. MARXIST LEGAL THEORY IN LATE MODERNITY

In Part 1 it was suggested that the work of Hugh Collins represents the culmination of Marxist thinking on law. However, in solving the problem of determination, Collins' work is forced to rely on a notion of 'dominant ideology' that must be implausibly omnipresent and elastic if it is to account for all law. Part 1 also showed how Marxist legal theory is always indissolubly linked to its concrete socio-political conditions. In Part 2 the momentous changes that society is undergoing were outlined; a distinctive period of 'late modernity' is emerging. Such changes are plainly evident in the legal sphere. Given this, the task of Part 3 is clear. Late modernity has provided a new context for a renovated Marxist theory of law, based upon the work of Collins. This Chapter will outline this renovated Marxist theory of law. The argument is that late modern conditions are actually alleviating the central weakness of Collins' theory; it seems, then, that the facts are starting to fit the theory better. Following this, Chapter 9 will discuss some of the consequences and difficulties of the new position.

The Argument

As was outlined in Part 1, Collins solves the problem of determination by arguing that the base determines the superstructure through the medium of the dominant ideology. Briefly, ideologies are formed through social practice as individuals and groups engage in and with productive processes. One's experiences of productive processes crystallise in the form of a set of ideas or a worldview; this Collins terms 'ideology'. A 'dominant ideology' emerges, associated with a dominant class, and as this class controls the mechanisms of power in society, including its legal system, laws are enacted that are in line with, or pursuant to, that ideology. Collins' solution to the problem of determination thus avoids mechanical notions of 'reflection' and restores human agency to a central place in Marxist legal theory. However, this human agency is conditioned by ideologies that are formed in the relations of production, through people's experiences of productive processes. As such, the economic sphere retains ultimate primacy, there is no 'lapse' into idealism and the theory retains its Marxist credentials based on the Preface.

Yet in solving the problem of determination in this way, Collins opens up another great difficulty, which he acknowledges. As he puts it, "if a serious attempt is made to situate the ideologies behind all legal rules in productive activities, large areas of the law are left unexplicated. [...] As our attention shifts to legal rules which govern subject matter

only remotely connected to productive activities, it becomes progressively more difficult to provide a Marxist account of the ideologies behind the laws". The "dilemma" is therefore as follows: "If the principles of Marxist explanation of ideologies are strictly adhered to, large gaps in the account of laws appear. If, on the other hand, the plasticity of the dominant ideology is stressed, there seems to be a break with the original structural style explanation of ideologies for the crucial link between the relations of production and the ideological superstructure appears to be broken and replaced by a crude form of conspiratorial instrumentalism" (Collins 1982: 76). If this Marxist legal theory is to explain the content of *all* law, then it is forced to rely upon an implausibly elastic conception of the dominant ideology.[1]

However, the recent developments that are forging a late modern society and legal order can help to alleviate this theoretical weakness. Crucially, Collins' theory is, first and foremost, a theory about the determination of the legal by more fundamental elements in society. Essentially, Collins suggests a way in which the base determines the superstructure, whilst simultaneously preserving space for conscious human action. Within this scheme, modern ideas such as the sovereign state and the idea of unified working and ruling classes play only a peripheral, non-essential role. Of course, Collins does refer to conditions of modernity; his theory is a self-confessed attempt to update the old Marxist 'class instrumentalist' theory of law, and the dominant image of law throughout his work is that of a ruling class actively codifying its ideology and worldview through the mechanisms and apparatus of the nation state.[2] That Collins' theory was promulgated immediately following the height of the modern period and is therefore grounded firmly in the modernist tradition of sociological explanation makes this hardly surprising. But his adoption of the categories of modernity is peripheral to the main thrust of his argument. As a result the passing of those conditions does not, on its own, invalidate the central arguments of the theory.

Instead, the processes of late modernity mean that it is no longer necessary to rely on a single, all-encompassing dominant ideology, the Achilles heel of Collins' work. The core of Collins' theory, the idea that law is created in line with ideologies formed in the

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[1] See discussion in Chapter 5 above.

[2] Note that Collins suggests that the "elementary instance of law, in its most basic form", is not a code or a regulation, but "a court applying customary norms of behaviour" (1982: 93). This is because a court responding to a particular case in line with its ideology is the most direct expression of his theory. This notion "delineates the least complex form of social institution which can fulfil the standard functions of law satisfactorily. [...It is] the simplest example of the phenomenon, an archetype from which sophisticated systems are derived" (ibid: 90).

processes of production, can be retained. Other notions, specifically those associated with modernity such as the idea of a coherent, well-defined ruling class, dominant state apparatus and a single dominant ideology, can be safely jettisoned without compromising the force of the solution to the problem of determination.

The remainder of this Chapter will outline just how this is so. Firstly, the effects of late modern processes in the economy and production, state and politics, class structure, and the emergence of late modernism will be discussed. Then, the impacts of the concomitant changes in the legal sphere, namely privatisation, deregulation, domestic fragmentation, and the rise of supranational law and globalised legal hermeneutics, will be detailed. The suggestion will be that Marxist legal theory can articulate with late modernity in two distinct but related ways. Firstly, Marxist theory can identify and account for late modern developments in society and in law, albeit in a controversial way. Marxism suggests a distinct chain of causation that explains how developments in fundamental levels of society have impacts upon law. Secondly, the late modern developments that Marxism can account for simultaneously render Collins' Marxist theory of law more plausible; they help to resolve its central flaw and ensure that its theoretical 'bite' is strengthened.

Late Modernity and Marxist Legal Theory

The processes of late modernity that were detailed in Chapter 6 provide the key to the renovation of Collins' Marxist legal theory. The changes to the economic and productive sector suggest the underlying causes of the emergence of a distinctive late modern period. The changes to the state, politics and class structure highlight what needs to be jettisoned from Collins' theory if it is to remain relevant. Finally, on the basis of Collins' solution to the problem of determination, contemporary law can be seen as an example of late modernism; a cultural, cognitive accompaniment to more fundamental processes. Each of these ideas will be dealt with in turn.

Economy and Production

According to Collins' Marxist legal theory, an understanding of the underlying economic structure of society provides the key to understanding what is going on at the superstructural level. As Marx's Preface suggests, developments in the economic base of society, the forces and relations of production, are the fundamental cause of

changes in the legal sphere. Therefore, the starting point for any explanation of late modern legal developments must be the developments in the economic base.

Harvey develops an argument along these lines. He sees the "current transformation [as] merely a modification of capitalism which allows it to accommodate its own contradictions and crises" (Crook, Pakulski and Waters 1992: 30). Harvey argues that capitalism cannot deliver "steady and unproblematic growth" (1989: 180). Instead, capitalism has inbuilt "crisis tendencies", most notably a tendency to overaccumulation.[3] Post-war Fordism suppressed and stifled this tendency for a time through spatial and temporal displacement,[4] and by controlling devaluation and technical and organisational change (ibid: 184-5). Inevitably, however, the effectiveness of such interventions was finite: Ultimately, the Fordist "mechanisms evolved for controlling crisis tendencies were finally overwhelmed by the power of the underlying contradictions of capitalism". What Harvey terms 'flexible accumulation' is a "superior regime of capitalist production [...] which would assure a solid basis for further accumulation on a global scale" (ibid: 186). Nevertheless, "the underlying logic of capitalist accumulation and its crisis-tendencies remain the same" (ibid: 189).[5]

Melossi supplements Harvey's arguments with his observations on the role of labour in the late modern economy. Melossi suggests that capitalist entrepreneurs, workers and the state continually try to overcome the limits imposed upon their development and freedom of action by the other two groups. As such, "innovation would therefore

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[3] Overaccumulation occurs as productive capacity increases above a level that consumer markets can bear, as competing capitalists continually try to make the productive process more efficient. Harvey defines it as "a condition in which idle capital and idle labour supply could exist side by side with no apparent way to bring these idle resources together to accomplish socially useful tasks. A generalised condition of overaccumulation would be indicated by idle productive capacity, a glut of commodities and an excess of inventories, surplus money capital (perhaps held as hoards), and high unemployment". Such conditions prevailed in the 1930s and periodically since 1973 (1989: 180-1). Devaluation, geographical expansion of capital and labour, and the extension of credit can contain overaccumulation for a time, but the underlying trend will inevitably assert itself in the end.

[4] For instance the geographical expansion of capital and labour and the speeding up of the turnover time within which money relays profit to the investor.

[5] According to Harvey, the shift to modes of flexible accumulation "is a rather traditional response to crisis. The devaluation of labour power [which flexible accumulation partly relies upon] has always been the instinctive response of capitalists to falling profits" (1989: 192). Furthermore, the emergence of "an ill-remunerated and broadly disempowered under-class [...] raises the spectre of a crisis of underconsumption" of the type that Fordism and Keynesianism were adept at avoiding. As such, flexible accumulation may not even offer a short term solution to capitalism's crisis tendencies (ibid: 192). What is unique about present arrangements, however, is the emphasis on innovative financial and monetary solutions, such as the role of credit, in postponing the crisis (ibid: 192-7). Ultimately, Harvey maintains that the recent transformations are "certainly within the grasp of historical materialist enquiry" (1989: 328). For doubts as to the validity of this argument, see Crook, Pakulski and Waters (1992: 235).

constitute a crucial tool by which entrepreneurs undercut the power of labour in situations during which a prolonged spell of prosperity has placed workers in a privileged position. The result of innovation, usually backed by political-legal power, is to destructure and disorganise the type of economy in which the former type of working class has achieved its dangerous (for the entrepreneurs) power" (2003: xxxii-xxxiii). He adds that innovation "is often the result of a common feeling that the boundaries of the 'old' social system are too rigid and suffocating for the development that the long period of prosperity has made possible" (ibid: xxxiv).[6]

Ultimately then, late modern processes can be seen as large scale responses to problems of capitalist accumulation and the unprecedented power of organised labour at the height of modernity. Clearly, many would not be prepared to accept that these processes are at the root of a more thoroughgoing renovation of society that includes the cultural sphere[7] and the legal sphere. However, for a Marxist theory of law based upon the Preface, these arguments are indispensable. Such a theory, having isolated the economic and productive sphere as the driving force of society, and having identified that society has undergone massive changes, must be able to point to the cause of those changes in the economic and productive sphere, otherwise it will lapse into incoherence. The arguments mounted by, inter alia, Harvey, enable Marxism to do just that, and are therefore vital to the theory developed here.

State and Politics

Collins' Marxist legal theory concentrates on nation-states and their domestic legislatures. Its explicit focus is "the role of law in governing relations between individuals and groups *within one society*" (1982: 14-5 [italics added]).[8] As such, the law that Collins discusses is the positive legislation of national governments and the judicial pronouncements of national courts. Such a focus is to be expected, of course, as Collins' ideas were formulated just after the height of the modern era, but before the enormity of the late modern changes had been properly registered. In modernity, relatively strong national governments wielded largely undisputed power over their territorial jurisdictions. However, as Chapter 6 outlined, national governments have increasingly ceded power to actors both above and below them and are increasingly toothless in the face of processes of globalisation. Indeed, the relative decline of the

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[6] One is reminded of Schumpeter's notion of "creative destruction" (1943: 81-6).
[7] As Harvey and Jameson argue: See Chapter 6 above.

nation state is one of the central features of late modernisation. The state remains an important player, but just a single player nonetheless. As such, any contemporary sociological study of law that restricts its focus in this way whilst simultaneously attempting to produce a general theory of law is plainly unsatisfactory.

However, Collins' refusal to outline a precise concept of law means that it is relatively straightforward to apply his theory to contemporary conditions; nowhere does Collins suggest that the term 'law' should be reserved for the positive legislation of national governments and the judicial pronouncements of national courts. Even if one were to adopt the more sophisticated concept of law influenced by Weber and Hart, detailed in Chapter 5,[9] there remains no need to see law as exclusively the product of nation states. Once again, Collins' is a theory about the determination of the legal, and references or allusions to the nation state are peripheral to the main argument. The late modern processes that have eroded the central importance of the nation state therefore do not render Collins' Marxist theory of law redundant. On the basis of his theory, it is open for bodies and groups other than the state to create and implement law and norms.[10]

Class Structure

An important element of Collins' theory is the idea that there is a relatively straightforward social stratification. His theory utilises a notion of reasonably coherent and large scale class groupings: A ruling capitalist class which is in control of the state apparatus successfully promulgates its dominant ideology, while a subordinate working class is effectively controlled.[11] Divisions and schisms exist within these two groups, and their may be a number of peripheral groups, but the basic division between working and ruling class blocs is maintained. Such notions were relatively plausible in modernity, where a largely unified and clearly delineated working class, based in the extractive and manufacturing sectors, could reasonably be said to share objective class

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[8] See also the section on relative autonomy (1982: 47-52), which continually refers to "the State".

[9] See pages 140-148 above.

[10] Collins himself suggests that on the basis of his theory, the "minimal conception of law" is a "court applying customary norms of behaviour" (1982: 92-3). Although Collins himself may well have had quintessentially modern national courts in mind, there is nothing inherent in his formulation that ties it to the nation state; courts and similar bodies applying customary norms of behaviour can, and increasingly do, operate at levels above and below the nation state. How far this is compatible with the Weberian-Hartian definition of law suggested in Chapter 5 is open to question, however.

interests which were, in many respects, opposed to those of the ruling class of society. Similarly the ruling class could be said to have possessed a reasonably consistent and coherent ideology. Again, Collins' theory is very much a modernist theory, produced at the climax of the modern age.

The classical Marxist notion of two large opposed class blocs has always been something of a caricature. Marxists themselves have regularly attempted to better theorise the more complex and messy nature of reality.[12] As Chapter 6 outlined, the substantial reorganisation of the traditional class make-up in late modernity has decisively ended any thoughts of society being neatly divided into large scale, neat blocs. Instead, a number of ruling groups have emerged, field or sector specific and with no one single group in overall control of clearly defined territorial spaces. Even more significant is the demise of the traditional working class. No longer do substantial sectors of the population work in a limited number of industries and live in tightly bound occupational communities. Instead, classes have become more fragmented as the number of potential relationships to productive activities has increased. Reflecting this, a range of new interest groups have formed. As a result, any theory of law, even a Marxist one, will struggle to coherently argue that law is solely or even predominantly the product of class divisions and class conflict.[13]

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[11] This idea permeates the entirety of *Marxism and Law*; Collins introduces it very early in the book (1982: 8).

[12] Marx and Engels themselves made such an attempt with their notion of the 'lumpenproletariat' (see Marx and Engels (1968: 44), Engels (1956: 14) and Marx (1963: 75). Of many more recent attempts, perhaps the best known, discounting Laclau and Mouffe's 'post Marxism', is that of Poulantzas, who developed the idea of 'class fractions' (1973, 1978).

[13] Strictly speaking, the old categories of proletariat and bourgeoisie can be retained if one utilises the kind of classical Marxist definition of class outlined by Cohen: "The proletarian is the subordinate producer who must sell his labour power in order to obtain his means of life. This definition [...] defines the class with reference to the position of its members in the economic structure, their effective rights and duties within it. A person's class is established by nothing but his objective place in the network of ownership relations, however difficult it may be to identify such places neatly. His consciousness, culture, and politics do not enter into the definition of his class position. Indeed, these exclusions are required to protect the substantive character of the Marxian thesis that class position strongly conditions consciousness, culture and politics" (1978: 73). Robinson and Harris offer a similar definition: "By class, we mean a group of people who share a common relation to the processes of social production and reproduction, constituted relationally on the basis of social power struggles. This concept can apply to antagonistic polar opposites, such as the bourgeoisie and the proletariat, and also to fractional interests within a single class". Class is a "collective position *vis a vis* the means of production and the productive process" (2000:21). Consequently, the notions of proletariat and bourgeoisie can be retained as umbrella categories so long as it is recognised that they are far too broad in the late modern world to be of any analytical use. Although they alert one to a crucial division in society, they singularly fail to capture the complexity of contemporary social arrangements.

Yet once again, the idea of two opposed class blocs is not actually *central* to Collins' theory. The theory suggests a way in which the legal is determined. Potentially *any* group, class or otherwise, could enact law in line with it. So, that the stratification of society has become more complex is not sufficient to render Collins' theory invalid.

Late Modernism as Cognitive Accompaniment

In Chapter 6 it was suggested that late modernism is the cognitive accompaniment to late modernisation; it is the set of visions, ideas, worldviews and forms of consciousness that have emerged in tandem with late modernisation. Meanwhile, on the basis of Marx's Preface, law is the superstructural accompaniment to more fundamental economic processes.[14] Clearly there is an affinity and a correspondence between these two separate arguments. Indeed, they dovetail so neatly that one may suggest that, firstly, late modernism belongs to the superstructural realm,[15] and secondly, contemporary law and institutional design is an example of late modernism; it is a cultural, cognitive accompaniment to more fundamental processes. This is also in tune with the argument laid out by Harvey, where the driving force of late modernity is seen to be the fundamental economic processes; such processes are prior to late modernism, including law.

As was suggested above, the fragmentation of the great class blocs of modernity does not render Collins' legal theory moribund. However, it does have important consequences for it. As society has fragmented, the number of potential relationships to production has increased. Indeed, many people are increasingly remote from production in the traditional sense. Unlike in modernity, the world is no longer experienced in a very similar manner by huge numbers of people. Individuals with shared relationships to productive activities have come to form an increasing number of differentiated and specialised groups. Each groups' experiences of the world differ according to their vantage point, their position within productive relations. As a result, the social basis for a multitude of worldviews and ideologies exists. Increasingly, these ideologies are sectional, emerging from particular zones of society with very little relation with or contact to other zones.[16]

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[14] Collins goes to great lengths to preserve this idea, whilst acknowledging the effects of law on the base, with his concept of metanormativity. See Collins (1982: Ch 4) and Chapter 5 above.
[15] Though, in accordance with Collins' theory of metanormativity, it still may have effects on the base.
[16] Sumner suggests that "technical divisions divide a class within itself. [...] Hence ideologies will arise which reflect these technical relations. These could include ideologies related to

Such ideas resonate with themes developed by 'postmodernist' social commentators. Stanley Fish, for instance, has promulgated the notion of 'interpretive communities' (1980).[17] He argues that truth is produced and located within such communities. Visions and notions of truth from one community may have little validity for other communities with different standards of truth.[18] Similarly, Bourdieu speaks of the "habitus" of various classes and class fractions; this refers to a set of classificatory schemes or cognitive structures which structure the "orienting practices" and activities of agents. They underpin and are more fundamental than consciousness and language, and provide ultimate values (1984: 466-72).[19]

As a consequence of the fragmentation of society, it has become more plausible to talk not of the 'dominant ideology' of the ruling class, or the 'revolutionary' or 'reactionary' ideologies of the working class, but instead of the '*micro-ideologies*' of a multitude of different groups, each of which expresses something of the very particular nature of

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occupational status and consumption patterns based on different incomes. [...] Groups organise to establish their power and social units and to create situations of leisure and culture. The technical divisions of the economy thus fix themselves at the political and cultural levels. Once established, the political and cultural relations between technically founded groups themselves form the basis for ideological differences and the picture is further complicated" (1979: 231). Collins himself echoed this idea of ideologies and social formations gradually accreting and becoming more complex over time (1982: 89; see Chapter 5 above). Sumner adds that any study of ideology should also consider "differences in age, sex and race based on biology and developed in social forms in earlier modes of production", as well as the social divisions of "town versus countryside and intellectual versus manual labour". Ideologies and the consequent political and cultural forms that arise from these groups do reflect their class character, "but are not solely founded on class relations" (1979: 233-4).

[17] See the introduction to Fish (1980) for a fascinating personal account of his intellectual development over the course of the 1970s and his development of the notion of interpretive communities. For a good summary of this notion, see Fish (1989: 141).

[18] For example, Fish suggests that visions from the community of theorists cannot claim validity in other spheres. As such, normative theories from outside of professional spheres such as law are not only largely invalid within the legal sphere, but are also impotent in the face of their normal, routine operations. Although Fish maintains that there is no way of judging between or ranking different communities, he is keen to distance himself from relativism. He argues that even though standards of right do not exist independently of interpretive communities, "within a community [...] a standard of right (and wrong) can always be invoked because it will be invoked against the background of a prior understanding as to what counts as fact, what is hearable as an argument, what will be recognised as a purpose, and so on" (Fish 1980: 174). Fish does, however, accept that "once one removes literal meaning as a constraint on interpretation", the conclusion that "we live in a rhetorical world" is inevitable (1989: 25). Fish also suggests that communities are the 'motors of change' in society. This idea has distinct Marxist undertones. Interpretive communities are an "ongoing project"; "the community [...] is always engaged in doing work, the work of transforming the landscape into material for its own project; but that project is then itself transformed by the very work it does" (Fish 1989: 146,150). Fish has been criticised for only loosely defining the concept of interpretive community, and for his relativistic bent (see Edgeworth 2003: 260, and for Fish's response to charges of relativism, Fish 1989: 29-30).

their place within the relations of production. As Turner puts it, the existence of late modern culture "means that by definition there cannot be a single, dominant, or coherent ideology" (1990b: 250).[20]

Similarly, it was also suggested above that the decline of the nation state and its territorial government does not lead to the redundancy of Collins' theory. But again, there are important consequences. No longer is the worldview of a single dominant class promulgated through a coherent and powerful national state apparatus, as Collins supposed. Instead, as the state has ceded power to a range of other actors, the number of outlets for micro-ideologies to be expressed legally has increased. Of course, the modernist view of state and law was an intensely idealised one. To an extent a number of individuals and groups have long enjoyed the ability to make or at least influence law. Similarly, traditional state based law, what most would still intuitively regard as 'law', has not been completely sidelined in late modernity. Modern state law still exists, and is still one of the most important forms of law. However, increasingly it is 'just another' form of law. The old, monocentric view of legal systems must be abandoned.

Taken together, the fragmentation of classes and the demise of the state, far from sounding the death-knell for Collins' theory, actually signpost a way in which that theory can be successfully renovated and made relevant in late modernity. Society is now, more than ever before, made up of many groups each with their own ideology derived from their own unique position in the relations of production. As a result it is becoming increasingly unnecessary to 'stretch' the concept of the dominant ideology in order to explain the concept of all law. Instead, it is more useful to look to individual and differentiated micro-ideologies in order to explain the content of sector specific law and norms. Furthermore, with the eclipse of the state as the sole law making institution, micro-ideologies can be manifested in legal enactments, rules and norms promulgated by a variety of groups through a variety of institutions; these tend to be focussed more narrowly on individual areas or specific problems.[21] Thus, Collins' general theory is preserved, and by taking into account late modern conditions, *the key weakness of the*

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[19] Bordieu, in *Distinction: A Social Critique of the Judgement of Taste* (1984) links aesthetic judgements to positions in social space. See Lash and Urry (1987: 292-3).

[20] Turner himself is talking about 'postmodern' rather than 'late modern' culture, put the point remains.

[21] Of course, the nation state is not completely sidelined; it still produces law, perhaps more so than any other body. However, not only is the state merely one player of many, but often experts in particular fields are increasingly used to create state law. As such, even within the state, micro-ideologies are increasingly brought to bear.

theory is actually alleviated. The dominant ideology thesis' inability to comprehend all the fine detail of law is solved, the theoretical 'gap' filled.

The key component in the renovation of Collins' theory is the new concept of micro-ideologies. This replaces the concept of the dominant ideology and thus removes the Achilles heel of Collins' theory. Yet micro-ideologies are formed in exactly the same way as Collins suggested the dominant ideology was formed; they are responses, themselves rooted in ideology, to practical experiences.[22] It is the increasing variety of practical experiences that leads to the increasing number of ideologies, which reflect ever more sectional and specialised modes of living, working and producing. Crucially, these micro-ideologies are not centred upon the nation as the central axis of experience. Although national ideologies persist, and indeed remain significant, they are but one form of micro-ideology.

Micro-ideologies form on two central axes. The first can be called the 'axis of genus', which relates to particular interests, pursuits and occupations. The second is the geographical axis, which relates to the physical origin and reach of the ideology; micro-ideologies can form at the substate level and the suprastate level, or indeed on the national level. So, for example, the international capitalist class involved in trade will develop an ideology based upon their position in the social hierarchy and the very specialised nature of the tasks they perform; their ideology is of an international, even global nature. Meanwhile, the ideologies of indigenous groups in, say, Australia, may emerge at the substate level and reflect the very particular situation, interests and needs of indigenous people. Interpretive communities in academia may form within disciplines or subdisciplines, and be limited to single university departments or reach around the world. Of course, micro-ideologies do not form in a vacuum, and significant cross fertilisation, combination and separation can be expected. The multitude of groups in late modernity, each with their own micro-ideology, have unprecedented

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[22] See Chapter 5 above. As Sumner points out (1979: Ch 8) it is clear that not all ideologies form in economic practice. To maintain that they do is economically reductionist. Ideologies can and do form in political and cultural practice. Indeed, as society fragments, it is more likely that micro-ideologies formed in non-economic practice will come to the fore, as many individuals have increasingly little contact with actual productive processes. However, there are structural limits to the kinds of ideologies that are likely to form, as Sumner argues by reference to Marx: "In *Capital*, Marx demonstrates that the regular production of capital depends in part upon the generalised exchange of commodities between private owners. Where exchange is a dominant social relation, the ideologies necessitated by it [ideologies of ownership, legal personality and contract] become dominant social ideologies. [...] These three ideologies are inseparable from the regular practice of exchange. [...They] form the backbone of those legal systems which exist in societies where exchange is a dominant social relation" (1979: 220-222).

access to law making mechanisms. Such mechanisms are often self-created, and may only have legitimacy within a single interpretative community, but the nation state no longer monopolises the law making machinery.[23]

In short, Collins' Marxist theory of law is amenable to modification in order to retain its explanatory power. Previously, Marxism saw "laws in modern societies [as] ideological formations given legal form and sanction by the state" (Sumner 1979: 51). In late modernity, it sees laws as ideological formations given legal form and sanction by not only the state, but by a plethora of other bodies which concretise, give expression to and operationalise the ideological outpourings of a range of disparate groups.[24]

Legal Late Modernity and Marxist Legal Theory

Processes of late modernity, far from rendering Collins' Marxist legal theory defunct, actually suggest that its key theoretical weakness can be transcended. The late modernisation of the legal system itself strengthens the plausibility of this claim. In modernity, not only was the development of micro-ideologies stifled due to the existence of well defined class blocs, but even where such ideologies did develop, the sovereign power of the nation state and its dominance of the legal meant there existed far less scope for them to be expressed legally. Late modern legal systems, on the other hand, have opened up considerable space within which micro-ideologies can operate. This will be illustrated by focussing on each of the six areas of legal late modernisation that were detailed in Chapter 7; privatisation, deregulation, domestic fragmentation, the rise of supranational law, globalised legal hermeneutics and interlegality. Each of these developments provides opportunities for micro-ideologies to flourish. As a result the idea that the central weakness of Collins' Marxist theory of law is alleviated is significantly reinforced.

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[23] Of the examples given above, international traders' micro-ideology may be expressed legally and normatively through global governance institutions or lex mercatoria. That of indigenous peoples may be expressed though normative codes and regulations with jurisdiction over only those indigenous peoples, or through state law that increasingly recognises their rights and claims. Finally, the micro-ideologies of academic communities may be expressed through regulations and norms governing research and conduct, and may also influence more formal laws, such as those of the nation state.

[24] As Kamenka puts it, "what the 18th and 19th centuries did to religion- showing that there were many religions, and that they are all made by men, reflecting different climates, periods, values and aspirations, and much dastardliness and cynicism- the 20th century is doing to law" (1983: 47).

Privatisation

The major legal effect of privatisation has been a renewal of the importance of contract law, particularly in dealings between the state and its citizens. The uniform national standards, agreements, terms and conditions that were particularly associated with the modern welfare state in areas such as public housing rents and utilities provision has declined. Increasingly, citizens are recast as consumers who purchase goods and services in the marketplace. The rise of contract enhances the chances of micro-ideologies being set to work in individual bargaining situations. Individuals and groups at more local levels have the opportunity to negotiate deals in tune with their micro-ideology, or at least only enter into contractual relationships where an outcome compatible with their micro-ideology is likely.

Of course, it is inevitably the micro-ideologies of more powerful groups such as utility providers and state agencies that are reflected in supposedly individualised contracts, so the capacity of the average individual citizen to advance their own interests remains severely curtailed. Nevertheless, the ability to contract in more and more spheres of life undoubtedly increases the potential for micro-ideologies to be exercised, even if complete freedom of contract remains a myth.

Deregulation

Deregulation has similar potential effects to privatisation. The materialisation of individuals at law which was typical of the modern welfare state is being progressively abandoned. The classical principles of contractual freedom, such as abstract equality between parties, and the decontextualised interpretation of language and intent, render individuals as equal bargaining units in the marketplace, with the ability to contract on their own agreed terms, regardless of their actual material circumstances. Thus, just as privatisation has led to a renaissance of contract law, so deregulation ensures that the form that this renaissance takes is very much along the lines of classical contractual principles. As a result, the micro-ideologies of individuals and groups are better able to flourish and be reflected in legal and normative agreements and standards.

The late modern form of welfare rights, highlighted by Edgeworth as one of the key facets of deregulation (2003: 156), provides an example of these processes. Welfare

rights tend now to be based upon a contractual model, with conditions attached. Thus local terms and norms and the particular sectional interests of the parties involved can be reflected in each individual welfare agreement. The micro-ideologies of individuals, and perhaps to a greater extent local agencies or welfare providers, are brought to the fore in place of nationwide governmentally implemented standards.

Similarly, the "attenuation of agency command and control" (Edgeworth 2003: 152), which has led to a decline in centralised government planning, and the reintroduction of the market in many spheres, has led to a growth in flexible and consensual regulatory mechanisms. Codes of practice and charters now increasingly govern conduct in areas formerly subject to centralised state control. These mechanisms give vent to the micro-ideologies of whichever body or agency is responsible for them, often non-state organisations or private bodies. They also allow for the development of norms and standards that are increasingly specialist and technical. As a result, regulation of an ever finer grain spreads its tentacles into an ever greater number of orifices of the social whole.[25]

Domestic Fragmentation of Legal Systems

The 'domestic fragmentation of legal systems' (Edgeworth 2003: 160) is centrally important in giving scope for the legal expression of micro-ideologies. The creation of an increasingly deregulated market in legal services, the break-up of the old monopolies and the introduction of competition from outside the legal profession all increase the specialisation of particular firms and providers, as they seek to carve out their own profitable niche in the market. This increasing fragmentation, differentiation and specialisation increases the chances of field specific micro-ideologies developing and influencing practice in the various branches of law. For instance, a private provider of legal aid services is likely to operate with very different ideological guiding principles than a traditional city barrister.

However, the chief mechanism through which the domestic fragmentation of legal systems aids the ascendancy of micro-ideologies is informal justice, which has undergone an "explosive rise" (Edgeworth 2003: 160) over recent years. Alternative dispute resolution, tribunals and the like are not only cheaper and more efficient than

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[25] Such a notion is reminiscent of ideas about the increasing juridification of the social world, which has been termed "legal pollution" (Teubner 1986, 1987), and the colonisation of the 'lifeworld' by the 'system' (Habermas 1987; see also Deflem 1996).

the formal court system, but they are more able and willing to take into account non-legal as well as legal discourses and the subjective needs and interest of the parties at hand. This clearly provides an outlet for the micro-ideologies of the parties involved. In addition, the fact that proceedings are often private means that precedents tend not to be created and followed to the extent that they are in traditional common law. As a result, each case is dealt with largely in isolation and on its own merits, with the needs and interests of the parties and ideologically driven notions of 'fairness' or 'reasonableness', at the heart of the decision making process. Thus proceedings utilising these fora are truly local and context dependent, and open to the expression of micro-ideologies.

Another strand to domestic fragmentation is the increasing ability of sub-state bodies, often devolved from national state governments, to enact their own laws and norms. Regions within nations are increasingly operating and being perceived as discrete economic entities (Scholte 2000: 133), which compete for business and investment, particularly from MNCs. "Substate governments", according to Scholte, have begun to develop "direct transborder contacts with each other". For large 'global cities' this has entailed the regulation of, inter alia, supraterritorial telecommunications webs, air corridors and capital flows, while for smaller towns "transborder policy initiatives" in areas such as development and crime control are common (2000: 144-5; see also Hocking 1993).[26] With this comes an increasing ability to formulate laws and norms at the sub-state level, and thus there are further openings for micro-ideologies to exert their influence on law. Similarly, semi autonomous non-governmental bodies, or QUANGOs, are often given the power to effect rules and regulations in a particular geographical space and in specific fields of interest. Furthermore, the creation of export processing zones sees national governments deliberately create a separate legal regime so that parts of its territory are more attractive for multinational investment. Thus the state itself can be seen to be differentiating into its component sectors, each potentially guided by different ideologies.

Even where the state itself remains the dominant legislatory body, it is increasingly forced to regulate increasingly technical and specialised areas. As such, the state legislature itself is forced to become increasingly fragmented and specialised, or at the

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[26] Indeed such is the foreign policy autonomy of some Chinese Provinces from Beijing, some commentators (Goodman and Segal 1994) have pondered whether the country can remain united in the long term.

very least rely on expertise from outside the state body.[27] For example, the burgeoning legislation on biotechnology clearly requires the involvement of specialist personnel right from the initial planning, through the drafting process, and continuing through to implementation. Another example is provided by patent law, where practitioners are involved in creating 'self-reflexive' laws (Armitage and Davis 1994). This increasing specialisation and reliance on experts within particular fields provides further potential for micro-ideologies to affect law and norms in decisive ways, even when the laws that are eventually passed bear all the hallmarks of traditional state law.

The Rise of Supranational Law

The rise of supranational law has offered considerable opportunity for the legal expression of micro-ideologies. As Chapter 7 described, a range of bodies operating 'above' the nation state are increasingly involved in the supranational creation of law and norms. Examples of such bodies include the EU, IMF, WB and multinational firms. As a result the micro-ideologies of these various groups and organisations are brought to bear during the creation of supranational law and norms. For instance, a multinational corporation is concerned primarily with its operative performance and efficiency, and its normative interventions are largely directed to this end. Meanwhile, an organisation such as the International Monetary Fund attaches conditions to its loans and assistance, usually in the form of 'structural adjustment programmes', which are in tune with its broadly neo-liberal guiding principles. As supranational organisations tend to operate in very narrow sphere, their legal and normative interventions are often finely tuned, technical ones. Multinationals and the IMF will not, for example, legislate on murder or the rules of the road. Where supranational bodies' competence is wider and they enjoy jurisdiction over a wide range of areas, for example in the case of the EU, they are increasingly likely to turn to experts in the field for guidance;[28] this leads to a specialised, reflexive and technical style of regulation that mirrors that of the nation state.

In addition, the rise of "global informal law" (Edgeworth 2003: 190) offers a particularly effective avenue for micro-ideologies to flourish and influence law. It is increasingly important in international trade, where speed and efficiency are paramount and traders

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[27] Of course, this has always been the case to some degree, but the trend in this direction is accelerating.

[28] There are many examples of highly specialist knowledge being utilised at supranational levels: the drafting, implementation and enforcement of the European Patent Convention of 1973 is a well documented one (Armitage and Davis 1994).

require some means to stabilise expectations without overbearing institutional interference, and outcomes favourable to their interests. The revived lex mercatoria performs precisely these functions. Its lack of complex institutional mechanisms, its spontaneous, responsive and self-reflexive bent, and its focus on narrow problem areas allows the micro-ideologies of the individuals and groups involved almost unmediated expression: As Edgeworth suggests, "procedurally and substantively, the regime is essentially one of private norm creation" (2003: 191). Global informal law such as *lex merctaortia* is possibly the single form of late modern law that responds most easily to the analysis proposed by Collins; it provides a straightforward example of practice conditioning ideology, from which field-specific norms and rules to guide, enable and inhibit are derived.[29]

Globalised Legal Hermeneutics

Even where the laws and norms of supranational bodies are not formally incorporated into domestic legislation, the trend towards globalised legal hermeneutics means that domestic law itself is becoming increasingly satiated with laws and norms that themselves result from micro-ideologies in a number of disparate fields. As such, micro-ideologies that are embedded in various discourses do manage to find their way into traditional state based law and legal institutions. This is particularly so of human rights norms, which national legislatures are finding progressively more difficult to ignore, even if they are not formally bound by them. As a result of this, even traditional domestic law becomes progressively infused with micro-ideologies from a wide variety of discrete fields.[30].

Interlegality

Santos' notion of interlegality provides a useful conceptual framework with which to analyse contemporary law and legal systems. Late modern legality is something of a patchwork quilt; a variety of groups create laws and norms in line with their unique micro-ideology. Indeed, the acknowledgement of a multitude of overlapping legal

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[29] Collins suggests that according to his scheme, the "elementary instance of law" is a "court applying customary norms of behaviour" (1982: 93). This is because such courts make authoritative pronouncements that "articulate norms which are in tune with the dominant ideology" (ibid: 92). As such, in late modernity global informal law is potentially this 'elementary instance of law'. It makes authoritative pronouncements and guides conduct in tune with micro-ideologies, and tends to lack complex institutional machinery.

[30] This further buttresses the idea that a self-contained national legislative system is increasingly becoming anomalous in late modern conditions.

orders is perhaps the single most significant factor in opening the way for an exploration of the influence of micro-ideologies. However, there is a risk involved in the adoption of this framework for a purportedly critical theory such as Marxism. Law may begin to appear to be "shot through" with the competing interests of various groups, with no deeper pattern discernable (Adams and Brownsword 1992: 17). Late modernity may therefore appear to be a *Gesellschaft* society; a multitude of groups, all with their own distinct worldview, are free to create their own laws and norms through an exploding plethora of institutional mechanisms. This is potentially a somewhat benign, pluralist vision of contemporary social order.[31]

However, the paradigm of interlegality *is* compatible with a more conflict-oriented view of society. As such, Marxist legal theory can incorporate the paradigm and yet simultaneously retain its critical edge. There are two central reasons for this. Firstly, it tends to be the case that only those groups with sufficient power and influence in their particular sphere are able to gain access to or create their own law making machinery and institutions; all groups inevitably form their own micro-ideologies in the course of practical experience, but there is no equal access to institutionalised power. Those groups that do have such access inevitably favour current productive arrangements for it is those very arrangements that have conferred upon them their power and influence. So, despite variations in micro-ideologies, ultimately it is likely that the majority of those who are in a position to influence laws and norms will, broadly speaking, seek to maintain existing productive relations, whether consciously or subconsciously. As a result, instead of a single ruling class operating through the state machinery, there exists a number of elite groups, disparate in background, expertise and aims, but nevertheless united by a faith in existing economic and productive arrangements. Thus the ability of various different groups to influence law does not threaten capitalism and its associated social stratification in any fundamental sense.[32]

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[31] Marxism's difficulty in accounting for such plurality has been noted before. As Gorz suggests, "classical socialist doctrine finds it difficult to come to terms with political and social pluralism, understood not simply as a plurality of parties and trade unions but as the co-existence of various ways of working, producing and living, various and distinct cultural areas and levels of social existence. Yet this kind of pluralism precisely conforms to the lived experience and aspirations of the post-industrial proletariat, as well as the major part of the traditional working class" (1982: 79). For Laclau and Mouffe "the very wealth and plurality of contemporary social struggles has given rise to a theoretical crisis" (1985: 2).

[32] Sumner has argued this point. He suggests that "the economically dominant classes have been able to make their power and ideology the dominant features of the society's superstructure. Despite the qualification that there have always been ideological differences within and across classes, reflecting their subdivision within social practice and the national and

Secondly, it is possible, though more unlikely due to a lack of resources, that subordinate groups *can* create their own effective legal and normative orders, often utilising innovative mechanisms and institutions that diverge considerably from the modern ideal of positive state legislation. Santos' work on Pasargada (1995a: Ch 3) clearly demonstrates this possibility. Indeed, laws and norms that are generated internally by particular groups are likely to be more readily accepted and effective than laws and norms imposed from above. However, the legal orders that subordinate classes create are extremely unlikely to affect the dominant classes in any meaningful manner, whereas the legal orders of the powerful may have very potent effects on the weak. For instance, the laws of Pasargada play a crucial role in regulating and normatively ordering the lives of its residents, and resolving local disputes. However, they have very little impact on the international capitalist class or heads of state.[33] Meanwhile, the rules and norms promulgated by those elite groups have potentially very serious impacts upon the residents of Pasargada; rules governing, for instance, trade, property rights, contractual rights and planning matters may affect Pasargada in significant ways. So, legal orders can be ranked in terms of their scope and reach. Some orders have little penetration beyond the narrow confines of the group in which they originated. Others radiate effects across vast swathes of the social spectrum.[34]

The continuing influence of elite groups and the inability of subordinate groups to have significant effects beyond their locales ensures that Marxist legal theory's critical edge need not be lost, even if the notion of interlegality is accepted. Indeed, by allowing for the possibility of a multitude of sometimes competing legal and normative orders, the notion of interlegality reinforces the Marxist idea that law can be a site of struggle.

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international extensions of the social structure, this is the most general form of ideological patterning in a class society" (1979: 53).

[33] Despite this, Hunt suggests that even if the notion of class or party hegemony is abandoned, "local hegemony", which refers to "the construction of some hegemonic project within some particular area or region of social life", remains important (1990b: 312-3).

[34] Sumner suggests that subordinate groups come up against political power barriers in establishing their legal orders: "Some classes, some occupational groups, some pressure groups and some individuals have more power than others in the legislative process. It is not as pluralistic as other ideological forms because it is subject to the political process and, hence, the relative ability of different classes and political groups to establish their ideas as law. Political success requires money and power as well as potent ideas, even more so than other fields of superstructural practice. Thus law as an ideological form is less pluralistic, than, say, the novel or music. It is a much closer reflection of class inequality than other forms. It tends to express the ideologies of the dominant class and their political and cultural representatives. [...] When the chips are down, the essential function of the legal system is revealed as itself: the reproduction of class power" (1979: 270). However, since Sumner wrote, institutional innovations have perhaps reduced the barriers to creating legal and normative orders, although the barriers to those orders becoming influential outside of their group of origin remain.

The Persistence of Capital

Despite the far reaching changes that constitute late modernity, it is crucial to stress that from the Marxist perspective the changes can be seen as part of the unfolding logic of capitalism, rather than as constituting a qualitatively new epoch. In short, Marxists can continue to argue that capital and capital accumulation still shape late modernity, and insist upon the primacy of economic factors in determining socio-political relations and ideological formations. This has been alluded to previously,[35] but it is useful to outline in more detail some of the arguments that can support the idea that recent developments are explicable in terms of the classical Marxist framework.

Of course, Marx and Engels themselves were among the first thinkers to suggest that, firstly, capitalism would necessarily become a global phenomenon, and secondly that it would bring about almost incessant and cataclysmic social change.[36] These ideas were famously expressed in the opening section of *The Communist Manifesto*.

Marx and Engels on the Destructive Power of Capitalism

Marx and Engels provide the definitive statement of the destructive power of capitalism:

"Constant revolutionising of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch form all earlier ones. All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober sense, his real conditions of life, and his relations with his kind." (Marx and Engels 1968: 38).

This perpetual uncertainty and flux manifests itself in a variety of ways. Harvey has attempted to show how "the repeated intentional destruction of the built environment is integral to the accumulation of capital" (Berman 1982: 100). Berman suggests that even the class system itself is also constructed on loose and shifting soil, and is no more permanent than any other feature of capitalist modernity: "if [Marx's] overall vision of modernity is true, why should the forms of community produced by capitalist industry

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[35] See pages 181-82 and 211-12 above.

be any more solid than any other capitalist product? Might not these collectivities turn out to be, like everything else, only temporary, provisional, built for obsolescence?" Industrial workers can thus be seen to be as transient as their machines and products, sustaining each other today but finding themselves scattered tomorrow among different collectivities with different conditions, different processes and products, different needs and interests (Berman 1982: 104). Rather than being seen as marking the demise of capitalism, or the entry into a new historical period, the fragmentation of the great class blocs of modernity may on this view be an integral part of capitalist development, something predictable on the basis of Marx's theory and intrinsic to the laws of motion of capitalism as Marx formulated them.

Marx and Engels on Crisis

Building on this notion of instability and flux, the pair also note capitalism's tendency to crisis, and highlight the manner in which such crises are overcome. Here the *Manifesto* is worth quoting at length:

"Modern bourgeois society, with its relations of production, of exchange and of property, a society that has conjured up such gigantic means of production and of exchange, is like the sorcerer who is no longer able to control the powers of the nether world whom he has called up by his spells. For many a decade past the history of industry and commerce is but the history of the revolt of modern productive forces against modern conditions of production, against the property relations that are the conditions for the existence of the bourgeois and of its rule. It is enough to mention the commercial crises that by their periodical return put the existence of the entire bourgeois society on its trial, each time more threateningly. In these crises, a great part not only of the existing products, but also of the previously created productive forces, are periodically destroyed. In these crises, there breaks out an epidemic that, in all earlier epochs, would have seemed an absurdity — the epidemic of over-production. Society suddenly finds itself put back into a state of momentary barbarism; it appears as if a famine, a universal war of devastation, had cut off the supply of every means of subsistence; industry and commerce seem to be destroyed; and why? Because there is too much civilisation, too much means of subsistence, too much industry, too much commerce. The productive forces at the disposal of society no longer tend to further the development of the conditions of bourgeois property; on the contrary, they have

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[36] See page 156 above.

become too powerful for these conditions, by which they are fettered, and so soon as they overcome these fetters, they bring disorder into the whole of bourgeois society, endanger the existence of bourgeois property. The conditions of bourgeois society are too narrow to comprise the wealth created by them. And how does the bourgeoisie get over these crises? On the one hand by enforced destruction of a mass of productive forces; on the other, by the conquest of new markets, and by the more thorough exploitation of the old ones. That is to say, by paving the way for more extensive and more destructive crises, and by diminishing the means whereby crises are prevented." (Marx and Engels 1968: 40-41)

These themes were followed up by Marx, particularly volume 3 of *Capital*, where he outlined the tendency of the rate of profit to fall. According to Marx, as men were replaced by machines in the labour process, the opportunities to realise surplus value through labour in the productive process were progressively reduced, leading to crisis. Capitalists respond by further streamlining and making the labour process more efficient, but this further implicates one in a cycle of diminishing returns (Marx 1959: Part 3).[37] As noted earlier, Harvey notes how in *Capital* Marx demonstrates how the social processes operating under capitalism lead to "individualism, alienation, fragmentation, ephemerality, innovation, creative destruction, speculative development, unpredictable shifts in methods of production and consumption, a shifting experience of space and time, as well as a crisis ridden dynamic of social change" (1989: 111).

Marx, Engels and Globalisation

Marx and Engels also outline an early notion of globalisation, relating it back to capitalism's destructive tendencies:[38]

"The need of a constantly expanding market for its products chases the bourgeoisie over the entire surface of the globe. It must nestle everywhere, settle everywhere, establish connexions everywhere.

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[37] Of course, this theory has been much criticised, classically by the Japanese Marxist economist Nobuo Okishio (1961). However, a modest version of the theory holds that the tendency of the rate of profit to fall an underlying, but not the exclusive cause of crisis in complex economic systems.

[38] Indeed, the expansion of markets through globalisation is one mechanism through which crisis and the tendency of the rate of profit to fall can be averted, at least temporarily.

"The bourgeoisie has through its exploitation of the world market given a cosmopolitan character to production and consumption in every country. To the great chagrin of Reactionists, it has drawn from under the feet of industry the national ground on which it stood. All old-established national industries have been destroyed or are daily being destroyed. They are dislodged by new industries, whose introduction becomes a life and death question for all civilised nations, by industries that no longer work up indigenous raw material, but raw material drawn from the remotest zones; industries whose products are consumed, not only at home, but in every quarter of the globe. In place of the old wants, satisfied by the production of the country, we find new wants, requiring for their satisfaction the products of distant lands and climes. In place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal inter-dependence of nations. And as in material, so also in intellectual production. The intellectual creations of individual nations become common property. National one-sidedness and narrow-mindedness become more and more impossible, and from the numerous national and local literatures, there arises a world literature.

"The bourgeoisie, by the rapid improvement of all instruments of production, by the immensely facilitated means of communication, draws all, even the most barbarian, nations into civilisation. The cheap prices of commodities are the heavy artillery with which it batters down all Chinese walls, with which it forces the barbarians' intensely obstinate hatred of foreigners to capitulate. It compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what it calls civilisation into their midst, i.e., to become bourgeois themselves. In one word, it creates a world after its own image." (Marx and Engels 1968: 38-9)

With these passages, Marx and Engels were among the first to suggest that capitalism's expansionary tendencies would progressively see it engulf the globe. Contemporary processes of globalisation are thus plainly explicable within the framework set down by the founders of Marxist theory.

Many classical Marxist thinkers also emphatically believed that the logic of capitalism would necessarily see it expand into new markets. This is best evidenced by the plethora of Marxist work on imperialism. Lenin (1950), Bukharin (1972) and Hilferding (1981), the central figures of what Brewer calls "the classical Marxist theory of imperialism" of the 1910s (1990: 20), all argued that capitalist development would

engulf the world. Similarly, Rosa Luxemburg, in *The Accumulation of Capital* (1951),[39] argued that capitalist economies suffer from the problem of 'realisation'. This problem occurs when firms cannot sell enough of the products they produce. Therefore, they seek new markets abroad. In addition, competitive pressures such as the need for raw materials and cheap labour also drive capital on its expansionary mission.

More recently, Baran (1973) suggested that capitalism would not bring development to the entire world, but that the underdeveloped world would remain frozen at low levels of production and income while the developed world continued to benefit from the fruits of capitalism. This became a key idea in the 'dependency theory' of Frank (1969) and the 'world systems' theory of Wallerstein (1974, 1983). Amin (1974) also argued that the countries of the capitalist 'periphery' would become increasingly dependent upon the countries of the 'core'.[40]

Marxism and the Emergence of Late Modernity

Marxism, then, can account for the rising tide of globalisation. However, the question remains as to why the structures and relations associated with the height of the modern period have crumbled. Why is it that a distinct 'late modern' period has emerged? Once again, Marxism provides possible answers to this question.

Harvey provides the definitive Marxist line on the transition to late modernity. Consistent with the arguments of the Preface, he suggests that shifts in the economic sphere have led to the emergence of late modernity. As outlined above,[41] Harvey sees late modern arrangements as representing a modification of capitalism that ensures it can contain its contradictions and crises. The basic outline of his argument is worth repeating here, for it suggests why we have experienced the transition to late

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[39] Originally published in 1913.
[40] See also Bill Warren's iconoclastic argument outlined in *Imperialism: Pioneer of Capitalism* (1980). In a similar vein to Marx's praise in the *Manifesto* for the bourgeoisie's revolutionary zeal, Warren argues that capitalism is a progressive force as only it can successfully render the conditions for socialist transformation, such as social democracy and the proletariat. For Warren, then, imperialism is "the work of young and vigorous capitalism economies" (Brewer 1990: 280), rather than its 'highest stage' as Lenin supposed. Ideas of imperialism have been given a contemporary twist by Hardt and Negri (2000). They reject the old notion of imperialism based around individual nation states and replace it with a new construct they call '*Empire*'; in this new Empire, there is no centre to speak of, no seat of power, and the proletariat is recast as a 'multitude' of poor and oppressed around the world. Rather than ensure the continuance of the capitalist system, however, this renders it increasingly vulnerable at all points to attack.
[41] See pages 204-5 above.

modernity, and does so within a theoretical framework rooted in the key themes of Marxism and the writings of Marx himself.

Harvey returns to Marx's theory of capitalist crisis: "Steady and unproblematic growth" is not possible within the logic of capitalism, for there are inbuilt tendencies to crisis, particularly to overaccumulation. Overaccumulation occurs as productive capacity increases above a level that consumer markets can bear, as competing capitalists continually try to make the productive process more efficient. Harvey defines it as "a condition in which idle capital and idle labour supply could exist side by side with no apparent way to bring these idle resources together to accomplish socially useful tasks. A generalised condition of overaccumulation would be indicated by idle productive capacity, a glut of commodities and an excess of inventories, surplus money capital (perhaps held as hoards), and high unemployment. The conditions that prevailed in the 1930s and have emerged periodically since 1973 have to be regarded as typical manifestations of the tendency towards overaccumulation". Devaluation, the geographical expansion of capital and labour, and the extension of credit can contain overaccumulation temporarily, but ultimately the underlying trend will inevitably assert itself. For Harvey this is one of the core features of "the Marxist argument": in short, "the tendency to overaccumulation can never be eliminated under capitalism. It is a never ending and eternal problem for any capitalist mode of production. The only question, therefore, is how the overaccumluation tendency can be expressed, contained, absorbed, or managed in ways that do not threaten the capitalist social order" (Harvey 1989: 180-81).

Post-war Fordism contained, absorbed and managed the tendency to overaccumulation chiefly through spatial and temporal displacement. Crucially, this involved the geographical expansion of capital and labour, the speeding up of the turnover time within which money relays profit to the investor, and by controlling devaluation and technical and organisational change (Harvey 1989: 184-5). Ultimately these techniques ran up against their limits.[42] As such, "the crisis of Fordism can to some degree be interpreted [...] as a running out of those options to handle the overaccumulation problem [...] it was simply that the mechanisms evolved for controlling crisis tendencies were finally overwhelmed by the power of the underlying contradictions of capitalism" (ibid: 185-6). The 'flexible accumulation' that is for Harvey the central feature of late modernity is a "superior regime of capitalist production [...]

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[42] See Harvey (1989: 182-6) for a detailed discussion of this point.

which would assure a solid basis for further accumulation on a global scale" (ibid: 186). Nevertheless, "the underlying logic of capitalist accumulation and its crisis-tendencies *remain the same*" (ibid: 189 [emphasis added]).

In one sense, the shift to modes of flexible accumulation is not a surprise. As Harvey puts it, it represents "a rather traditional response to crisis. The devaluation of labour power [which flexible accumulation partly relies upon] has always been the instinctive response of capitalists to falling profits" (1989: 192). Indeed, for Callinicos (1989) the current transformations represent not an epochal shift, but 'business as usual' for capitalism.[43]

While Harvey outlines the fundamentals of the shift to late modernity from a Marxist point of view, and shows how the process is explicable within a traditional Marxist framework, Melossi offers a theoretical understanding of the changed position of labour within the late modern economy, also rooted in classical Marxist themes. Melossi suggests that there are three significant "actors" in the economic arena; capitalist entrepreneurs and workers being the main two, and the state being "a third party increasingly important in the adjudication of the results of conflict between the first two" (2003: xxxii). This conforms to the model of corporatism outlined in Part 2, which was an important feature of Fordist modernity. Each of these actors continually attempt to overcome the limits imposed upon their development and freedom of action by the other two groups. As such, "innovation would therefore constitute a crucial tool by which entrepreneurs undercut the power of labour in situations during which a prolonged spell of prosperity has placed workers in a privileged position. The result of innovation, usually backed by political-legal power, is to destructure and disorganise the type of economy in which the former type of working class has achieved its dangerous (for the entrepreneurs) power" (ibid: xxxii-xxxiii). He adds that innovation "is often the result of a common feeling that the boundaries of the 'old' social system are too rigid and suffocating for the development that the long period of prosperity has made possible" (ibid: xxxiv).[44] So, the move away from the modern economy, with its

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[43] Despite this, for Harvey there is uniqueness in the emphasis on innovative financial and monetary solutions, such as the role of credit, in postponing the crisis (1989: 192-7). Furthermore, the emergence of "an ill-remunerated and broadly disempowered under-class [...] raises the spectre of a crisis of underconsumption" of the type that Fordism and Keynesianism were adept at avoiding. This suggests that flexible accumulation may be found wanting even as a short term solution to capitalism's crisis tendencies (ibid: 192).

[44] One is reminded of Schumpeter's notion of "creative destruction", the "essential fact about capitalism" (1943: 81-6), where individual capitalists, particularly entrepreneurs, will seek to innovate in production and crate new markets in order to speed accumulation and efficiency.

large, well organised working class bloc is in part a result of capitalists simply acting in their own interests to limit the power of labour. In essence, the corporatist system and the collective strength of the working class at the height of modernity was a fetter on the full development of the capitalist class. That latter class took action to remove that fetter.

Melossi's arguments ultimately complement those of Harvey. By devaluing labour power, reducing the collective strength of labour, and removing barriers to capitalist innovation, the problem of overaccumulation can be postponed.

Taken together, these arguments demonstrate that Marxism can account for contemporary developments without abandoning its central insight about the primacy of economic factors in determining social and political relations. The destructive power of capitalism, its crisis tendencies and expansionist logic were all outlined by Marx and Engels. Recent moves away from Fordist welfare statism toward late modern forms of organisation can also be explained within a unashamedly Marxist framework where central importance is ascribed to economic relations. Indeed, Harvey's theorisation of this transition is perhaps the most rigorous and sophisticated available.

Given this, it makes sense to consider how Marxist legal theory moored in classical Marxist ideas about the centrality of the economic can be updated in order to better account for the unique features of the late modern legal order. It is precisely this task that our updated version of Collins' legal theory performs.

Summary and Conclusion

The momentous social changes of the last thirty years or so have not rendered Marxist legal theory defunct. Instead, Collins' Marxist legal theory is able to articulate with late modern developments in such a way as to alleviate its central weakness. This articulation occurs in two distinct but related ways. Firstly, Marxist theory can identify and account for late modern developments in society and in law. Secondly, the late modern developments that Marxism can account for simultaneously render Collins' Marxist theory of law more plausible. This is because they remove the need to rely on an all-encompassing dominant ideology.

Indeed, Schumpeter echoes many of Marx's ideas regarding capitalism's power to incessantly transform itself.

On the first point, Marxism holds that a move to a more flexible economy was necessary in order to avert an impending capitalist crisis. The roots of this crisis can ultimately be traced to the inevitable problem of overaccumulation. There was also a desire amongst capitalist elites to undermine the growing power of labour in modernity.

Secondly, late modern developments in society and law have helped to resolve the central flaw of Collins' theory. The state has ceded power to a variety of other actors, and the classical Marxist vision of two competing class blocs has been exploded; classes have fragmented and a multitude of groups have taken their place. Yet Collins' central thesis, that ideologies are formed as people experience productive relations, and that law is created in line with those ideologies, can be retained. It is no longer necessary, however, for the theory to rely on an implausible notion of an elastic and omnipresent dominant ideology that is credited with explaining the content of all laws: law is no longer the product of a single sovereign ruling class operating with a single dominant ideology. Instead, various groups create laws, regulations and norms in line with their own micro-ideology that is the result of their differentiated experiences of and relationship to productive activities. The late modern legal system affords ample and increasing opportunity for the development and implementation of laws derived from micro-deologies through the processes of privatisation, deregulation, domestic fragmentation, and the rise of supranational law, globalised legal hermeneutics and interlegality. The dominant ideology thesis' inability to comprehend the rich tapestry and the fine detail of law is solved; the theoretical 'gap' left by Collins is filled.

The final result is a theory that allows space for the study of variation, difference and specificity at the micro-level, yet still locates and accounts for this in a macro-level, total explanatory framework. In other words, it allows for analysis of local, small scale situations while anchoring this to a more total understanding of the social and legal world. Furthermore, as late modern processes continue to develop and become ever-more entrenched, Collins' theory in this renovated form will become increasingly relevant and plausible.

China Mieville, suggesting the continuing utility of Pashukanis' commodity exchange theory when studying international law, suggests that "we need Pashukanis to make sense of international law and the legal form: and we need international law to make better sense of Pashukanis" (2006: 115). The same could be said of the relationship between Collins' Marxist legal theory and late modern legality: We need Collins to

make sense of late modern law, and we need late modern law to make better sense of Collins.

CHAPTER 9. FACING THE CONSEQUENCES

In this chapter some of the issues raised by the theory outlined in Chapter 8 will be discussed. Firstly, the utility of purely theoretical excursions such as this one will be defended. Secondly, the difficulties involved in theorising late modernity will be explored. Thirdly, some of the consequences of sidelining traditional Marxist notions such as class and state will be suggested. Finally some of the potential limitations of the position sketched in chapter 8 will be outlined. The overall insistence is that despite its limitations and the fact that Marxism has always encountered severe criticism and even outright hostility from those opposed to its most basic theoretical underpinnings, the theory developed here offers a useful contribution to socio-legal studies at a time of significant change.

Why Theory?

The exclusively theoretical nature of this project can be justified on a number of levels. Firstly, theory itself is a crucially important aspect of all scholarly practice. As Sumner argues, "facts never speak for themselves". As such, general theory "is indispensable to the production of any concrete knowledge. Every researcher works on the basis of general concepts and assumptions. Whether it is acknowledged or not, this is an eternal fact of research practice. It is therefore better that these concepts and assumptions are clearly specified and organised so that they are openly available to scrutiny, enabling the limitations of the produced knowledge to be clearly identified" (1979: 59).[1]

The Marxist theory of law developed here is pitched at the macro level. As such, it suffers from the problems that all theories of this nature do: Excessive simplification, false generalisation, and a neglect of variation (Garland 2001: viii). But there are also

[1] Twining outlines the importance of theory in a more schematic manner. He suggests that there are six "standard services of theorising": Theory provides a "coherent 'total picture', or series of such overviews, of law in the world"; it facilitates the construction and clarification of important general concepts; it aids the development of general normative principles and helps to clarify values and their universalisability; it allows for the generation of "middle order empirical hypotheses and general working theories"; it advances the development of an "intellectual history of law as a discipline"; it contributes to the critical examination of the "assumptions underlying legal discourse" (Twining 2000: 242). This work seeks to perform all of these functions, with the exception of generating normative principles, although these could potentially be inferred from the work. As Twining himself suggests, legal theorising may occasionally "provide leadership with inspiring visions and grand designs or hypotheses, but more often it is reactive, setting contexts, sharpening tools, suggesting refinements, questioning assumptions and generally tidying up" (ibid: 242).

benefits that justify theorising at more rarefied levels. In particular, there is "an ability to point to the structural properties of the field, and to identify the recurring social and cultural dynamics that produce them"; such properties do not become visible in localised case studies (ibid: viii). Santos (1987) suggests that "large scale maps" should not be discarded just because they gloss over some local details. As Edgeworth puts it, "like maps of an entire continent, they reveal *more* because of what they leave out, and should not be rejected simply because they omit the topography of individual cities" (2003: 17). Indeed, analysis conducted at the local level alone is unlikely to adequately identify the significance of the local case and how it relates to the bigger picture.[2]

However, despite its focus on the macro level, the Marxist theory of law deployed here is structurally able to accommodate smaller scale theorisations. This is because it views society as being constituted of a plethora of small groups, an increasing number of which are beginning to shape the legal order in various ways. It is therefore open for further theorisation to be conducted regarding processes at these more local levels. In addition, there are clear opportunities for empirical work to take place at the micro-level, focusing on the multitude of groups, micro-ideologies and legal mechanisms in a more detailed manner.[3] This dovetails with Mills' suggestion that large-scale theoretical generalisations should allow users to shuttle between different levels of conceptual and empirical abstraction (1959: Ch 2). Ultimately, "the challenge is to unite generalisation with specificity" (Mieville 2006: 229). Furthermore, the empirical is not completely sidelined in the endeavour of constructing a new theoretical framework; the theory developed here is no ungrounded idealist fantasy. Instead, it is heavily based upon the work of scholars who have studied and measured the phenomenon of late modernity; this is a theory based upon and driven by empirical work.[4]

Finally, the purely theoretical approach is further justified by the currently parlous state of Marxist theorising. Marxist *legal* theory in particular requires significant development: A refurbished set of robust and coherent analytical concepts anchored in

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[2] Garland suggests that although individual authors cannot escape this dilemma, for the scholarly community as a whole it disappears as a range of studies, some "sweeping accounts of the big picture" and others "more focused case studies that add empirical specificity and local detail", complement and reinforce each other: "One kind of study provokes and facilitates the other, in a scholarly dialectic that requires them both" (2001: vii).

[3] As Sumner suggests, "theory on its own [...] does not produce concrete knowledge. It requires a consistent extension in research practice" (1979: 59). Possible avenues of future theoretical development and empirical research will be suggested in the conclusion.

[4] As such, it shares some affinity with Glaser and Strauss' 'grounded theory', where theory is generated from empirical data (1967).

an internally consistent, general Marxist framework is necessary, both to address the flaws of previous Marxist approaches to law, and to better account for the emerging processes late modernity. Only once such concepts have been constructed can fruitful empirical work take place. As Sumner suggests, "the study of law will not be advanced by continually investigating specific pieces of legislation or specific legal systems. These investigations must be accompanied by enquiries into the theory of law and the methodology and philosophy of the social sciences" (1979: 9).[5]

Towards a Prolegomenon

The theory developed in this work is very much a prolegomenon, with rather modest aims; it is an initial redrawing of Collins' Marxist theory of law that aims to render that theory more relevant to late modern conditions, and introduces new arguments and concepts, chiefly the notion of micro-ideologies, in order to do so. As Mouzelis puts it, the aim is "not to provide a highly detailed, fully worked out conceptual map", but instead to provide, "in as tentative and parsimonious a fashion as possible, a set of interrelated concepts" (1990: 81).

The nascent and open-ended status of the theory is by no means a weakness. Hunt talks of 'a new sense of theory'; theory not as "a complete or formal model" that condenses or concentrates reality, but instead as a "provisional metaphor, as a potentially useful way of thinking and saying something new. Such a view of theory makes no claims to Truth or truths, but is subject only to a rigorously pragmatic evaluation: does a shift or change in the theoretical metaphor help or hinder articulating something that is otherwise ignored, neglected or otherwise unsayable? In short, it involves a conception of theory without guarantees" (1990a: 539). Mouzelis calls this a "conceptual framework" as opposed to a "substantive theory" (1990: 22). A conceptual framework does not aim to provide "a set of empirically verifiable and knowledge-producing statements" (ibid: 22), but rather "maps out the problem area and thus prepares the ground for its empirical investigation" (Nadel 1962: 1), and therefore suggests useful ways in which phenomena can be explored in a theoretically consistent manner. Conceptual frameworks "should be seen more as flexible, malleable kinds of scaffolding than as finished, rigid structures with fixed functions and built-in furniture" (Mouzelis 1990: 154). Given this, the "task of sociological theory" consists not of

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[5] Of course, more traditional Marxisms tended to be more concerned with effecting real change in society, rather than just elucidating a set of concepts with which to study it. Such is the metamorphosis of Marxism (see chapter 5 above). As Shaw puts it, "the job of interpreting the world is always to be done, even when ways of changing it are difficult to identify" (1985: 2).

providing "universal substantive generalisations" but "the tentative construction of conceptual tools facilitating empirical research either by solving methodologically crippling puzzles, or by suggesting fruitful ways of looking at and raising questions about the social world" (ibid: 81). As such, "it is clear that the Marxist analysis of law need not stand or fall, [...] as some ideologs would have it, on its ability to provide a logically impenetrable, appropriately pedigreed, and totally explanatory system" (Spitzer 1983: 121).[6]

Theorising Late Modernity

Theorising successfully at the macro level has always been an undertaking fraught with difficulty. The onset of late modernity has served to increase that difficulty in a number of ways. Most importantly, there are increasing reservations regarding the legitimacy of theorising social 'totalities' at the macro level. Firstly, from the sociological perspective, there are doubts that grand, totalising theoretical schemes are adequately able to come to terms with a dividing and fragmenting social world. Secondly, from a more philosophical perspective, there is a feeling that there is little value in grand theoretical schemes in a relativistic world of infinite subjectivity where it is impossible to ascertain 'truth'.[7]

On the sociological objection, it is clear that studying society as a 'totality' is an archetypally 'modern' thing to do. When totality is asserted reductively and all social phenomena are fitted into rigid straightjackets then it is problematic. However, there is nothing *inherently* wrong with totalising analysis. As Jameson has consistently argued, "the problem is not with employing a totalising mode of analysis, but rather with instantiating a too abstract totality and constructing interconnections which are too simple, direct, and unmediated." The real issue, then, is to construct a sufficiently sophisticated framework which can "map the full complexity" of social practices in a

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[6] Mouzelis calls this general approach "theoretical pragmatism". He suggests that "the most fruitful way of assessing the worth of a conceptual framework [...] is neither to put the major emphasis on its philosophical, epistemological underpinnings, not to demonstrate its logical consistency. Although both these tasks are important in themselves, what really matters is heuristic utility: the ability of a conceptual framework satisfactorily to solve methodologically and theoretically recalcitrant social science issues, as well as to assist in the empirical investigation of concrete problem areas (1990: 3). Consequently "theoretical pragmatism is critical of the philosophical, epistemological turn in the social sciences, as well as of the wholesale adoption of paradigms used in such disciplines as linguistics, semiotics, or psychoanalysis" (ibid: 3).

[7] On the sociological doubts, see Bauman (1992). On the philosophical ones, see Lyotard (1984).

non-reductive way (see Best and Kellner 1991: 187).[8] Indeed, to understand the specific features of the capillaries of the social world may actually *require* totalising analysis, as "difference itself cannot genuinely be understood outside of a relational and systemic context" (ibid: 187).[9] Furthermore, as Best and Kellner point out, much modern thought, including that of Marx, "calls for theory to be reflexive and self-critical, aware of its presuppositions, interests and limitations. This tradition is thus non-dogmatic and open to disconfirmation and revision. [...] These critical themes in modern theory present a model of theory that is non-scientistic, fallibilistic, hermeneutical, and open to new historical conditions, theoretical perspectives and political applications. We therefore believe [...] it is a mistake to reject this tradition" (1991: 257-8).

As suggested above, macro level theory offers a vision of the social whole and the interconnections between its discrete elements that micro-level theory simply cannot. Best and Kellner have made this point: "From our perspective, social, cultural and political theory cannot be divorced from a theory of capitalism and an analysis of the systemic relations between the various levels and institutions of capitalism, both in terms of their independent dynamics and their interconnections within a capitalist mode of production. Thus, we would insist upon the continuing relevance of neo-Marxian theories which attempt to theorise social phenomena in terms of the contemporary stage of capitalism, though we would argue that the existence of new phenomena, such as those analysed by postmodern theory, requires extensive reconstruction of all social theories of the past" (1991: 262). As Chapter 6 suggested, despite all the changes, the late modern era remains a capitalist one, and so the construction of a total picture of that system remains important: "Nothing has fundamentally changed in the nature of world capitalism to invalidate the relevance of Marxism today" (Russell 2002: 122).[10]

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[8] This applies equally to 'postmodern' analyses. Indeed, perhaps the most 'totalising' claims of all are that metanarratives are dead and that all truth is relative; these are both claims advanced by postmodernists. Best and Kellner argue that "most postmodern theories tend to be reductive, dogmatically closed to competing perspectives, and excessively narrow. Most postmodern theories neglect political economy and fail to present adequately connections between the economic, political, social and cultural levels of society" (1991: 263).

[9] Best and Kellner are here invoking themes from the work of Jameson.

[10] Totalising analysis is important in another respect. As Jameson suggests, "without a conception of the social totality (and the possibility of transforming a whole system), no socialist politics is possible", and political struggle is doomed to a reformism that focuses on isolated aspects of the capitalist system (1988a: 355).

On the philosophical objection to totalising theory, some ground can be conceded to postmodernist thinkers. According to Larrain, "the problem is that, ultimately, in the social sciences, one can give reasons for holding a position but there cannot exist final guarantees which could convince everyone of a certain position" (1983: 211). However, Larrian adds that "relativism and scepticism are self defeating and contradictory, for they implicitly postulate the absolute truth of their own positions. [...] In fact, all positions necessarily posit a claim to validity. This is so even if one says that one's own position is only relatively valid, for in the end one has to accept a proposition that is not relative, namely that one's position is only relatively valid. [...] One cannot therefore criticise Marxism for dogmatism because it claims to have the truth. This is an *a priori* of all positions. One can criticise the specific way in which a claim to validity is justified, but not the fact that the claim is posited. [...] To raise, as an objection of principle to Marxism, the fact that it implicitly lays claim to validity, and yet cannot give a final guarantee, is also a fool's way out of a very difficult problem" (ibid: 211). Twining also rejects the more extreme claims of postmodern relativism. His epistemological concept of "innocent realism" holds that there is one world that exists independently of us and it can be truly and accurately described. However, it "acknowledges that there can be many different descriptions of an object, event or phenomenon, all of which may be true, provided that they are compatible. It accepts that we can look at an object from different points of view, but it is the points of view not the object that are different" (2000: 215-6).

Marxism has long been alive to these ideas. It happily acknowledges that there is no pre-theoretical access to facts. This is evident in the work of countless theorists, such as Althusser[11] and Collins[12], whilst Hunt has called for a "pragmatic conception of truth" that is rooted in social practice. Such a conception embraces contingency and social construction, but insists on structural limits to variation (1990a: 529-31). In addition, the theory developed here is fully appreciative of the importance of studying phenomena in their context and specificity; indeed this is the very thrust of the concept of micro-ideologies and the exhortation to look to smaller groups rather than the large scale class blocs of modernity. But it is also willing to probe the historical nature of these developments; why is it that the class blocs of modernity have fragmented and why is it that micro-ideologies have come to dominate? It is this quest for causal, historical understanding that separates Marxism from more extreme variants of late- or

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[11] See Chapter 4 above.

[12] See Chapter 5 above. Collins "stresses the ideological nature of the acquisition of knowledge [...]. Each person carries around an ideological grid acquired through education by which experience is translated to knowledge" (1982: 38-9).

post- modernist relativism.[13] Postmodernism may be useful in alerting theorists to the inherent limitations of theory and the marginal perspective of the theoriser. As these ideas were never antithetical to Marxism anyway, at best postmodernism has made clearer what was previously latent. But in doing so, there is a sense in which it has 'thrown the baby out with the bathwater'. Historical materialist sociological analysis need not be abandoned; it remains a useful tool. To acknowledge the limits of theory need not entail a lapse into relativism.

Applying the 'Marxist' Label

Clearly, the theory outlined here jettisons much that was central to traditional Marxist analysis. The state is sidelined, and class, perhaps the central feature of most Marxist sociological study, is also demoted in importance. According to the argument in Part 1, this a perfectly legitimate use of the Marxist canon; no one single mode of thought has exclusive rights to the Marxist label, and concepts and ideas from Marx and Marxism can be used in ways that diverge from the central strands of the tradition. However, it is also undeniable that some would scarcely recognise the final product as Marxist. Why, then, retain the label?[14]

One reason to retain the Marxist label is the fact that the theory is based upon Marx's Preface. As such, it maintains "one of Marxism's lasting contributions to social science methodology" (Mouzelis 1990: 157). This is "its portrayal of collective agents in a dialectical relationship to their social environment- with economic, political and ideological structures setting limits to collective action, while at the same time collective agents (classes, social movements and so on) react to these limitations and try, more or less systematically, either to change or maintain them. In other words, Marxist methodology shows human beings as both the producers and the products of their social world" (Mouzelis 1990: 157). The Preface compels us to look to the relations of

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[13] Postmodernism often appears to theorise away the possibility of socio-historical investigation. This is because, as Eagleton puts it, postmodernism asserts that, "just as it was true all along that the emperor was naked, so in a way postmodernism was true even before it got started [...] There was never any Progress or Dialectic or World-Spirit in the first place; this is not the way the world is, or ever was" (1996: 29).

[14] In Chapter 1 it was suggested that the Marxist canon is open to interpretation and extension in a plethora of ways, and no one way or collection of ways has exclusive claim on the term 'Marxist'. Even a belief that capitalism can persist indefinitely, or the suggestion that if it does perish, it will not be replaced by communism, is not necessarily incompatible with a Marxist position (Woolf 2002: 110-11). There are limits to what a 'Marxist' can plausibly believe in, however (see Eagleton 1996: 102-3).

production as the decisive factor in determining superstructural instances such as law, but reminds us that these relations are themselves a site of struggle.[15]

Secondly and relatedly, there is value in retaining the Marxist label as it situates the theory in an intellectual tradition and identifies its heritage. Marxist concepts may require transformation, development or even abandonment, but that does not necessarily require one to step out of the tradition altogether. As Elster (1986: 2) suggests, if one can trace the ancestry of their most important beliefs back to Marx, then that is good reason to consider themselves a Marxist. Wright argues that even though Marxist ideas are regularly utilised by non-Marxists[16], there is still value in adopting the label: "what was really at stake to me was the nature of the constituency or audience to whom I wanted to feel accountable" (2003: 19).

Ultimately, whether a theory is Marxist or not has no bearing on its utility. Laclau feels that Marxism should be treated in the same way as other ideologies such as 'liberalism', 'conservatism' or 'socialism'; that is, as a vague term of political reference, whose content, boundaries and scope are open to constant redefinition (1990: 203). If a theory is useful, it is of little consequence if it happens to be Marxist as well. As Dworkin suggests, "it is better to look at theories than labels" (1982: 165).[17]

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[15] Mouzelis suggests that Marxists can retain a faith in the universal primacy of the forces and relations of production, yet still avoid the worst tenets of economic reductionism by developing a separate, non-economic set of conceptual tools for analysis of the non-economic spheres. Such concepts should avoid analysing non-economic phenomena in terms of class or the reproductive requirements of the mode of production (1990: 49, 173). The concept of micro-ideologies developed here is a move in this direction.

[16] It is undeniable that the boundaries between Marxist and non-Marxist thought have become somewhat fuzzy. As Downes and Rock argue, "it is more difficult than in the past [...] to see where Marxism begins and ends" (2003: 368). The central thrust of Marxist theory is now widely adopted by social theorists of all hues: "a materialist explanation is one in which the motive forces are competition, scarcity, supply and demand; an idealist one emphasises the role of ideas, usually of certain 'great men', which are taken to be the exogenous driving element [...] [today there is an] almost completely materialist approach to these questions now taken by social scientists and historians. [...] Indeed it is questionable what it means to take a specifically Marists approach to history when the materialist axiom, the cornerstone of the Marxist approach, has become central to almost all contemporary social thought" (Roemer 1988: 124). Indeed, like any theory, Marxist social theory will disappear if it is not plausible. On the other hand, if it is plausible, it is likely to enter into the mainstream of social science and cease to be specifically Marxist (Elster 1986: 5).

[17] Indeed, even Marx himself was happy to claim that he was not a Marxist. This was in response to the French socialists, including his son in law Paul Lafargue, adopting the 'Marxist' label in the 1870s (see Engels 1968e: 679).

Remaining Difficulties

There are a number of remaining difficulties with the renovated Marxist theory of law itself. Firstly, the theory does not outline a precise concept of law; it fails to identify law's *differentia specifica*. This is because it is primarily concerned with content and not form. Of course, micro-ideologies also guide institutional design and creation, but there is nothing in the theory that tells one what law actually *is*, unlike say, Pashukanis or Hart.

However, late modern conditions have made the construction of a core concept of law that differentiates it from other social phenomena increasingly problematic. This is because of the overwhelming multiplication of different forms of 'law'.[18] As such, "to develop a broad theory of law that goes beyond state law to include religious law, traditional law, and much else besides, a theorist has two main options: to abandon any attempt to hold on to a single coherent conception of law or to attempt to construct a minimalist core concept of law" (Twining 2003: 206).[19] Collins pursued a third option. Rather than outlining a concept of law, he talks instead of an "elementary instance of law", which is "a court applying customary norms of behaviour" (1982: 93).[20] This has the advantage of not 'writing out' any phenomena. At the expense of a clear and rigorous concept of law, Collins instead provides a formulation which can accommodate various phenomena which share a 'family resemblance'. As such it is open to retheorise law away from the state alone. This would appear to be a more pragmatic approach in late modern conditions. It also allows for the possibility of subordinate forms of law, such as Santos' Pasargada law.

Nevertheless, it remains possible to loosely elaborate the starting point for a concept of law on the basis of theory here. Sumner's suggestion that law "is a collection of ideologies, sanctioned in the correct manner by the institutionalised executors of social power" (1979) can be updated to take into account late modern conditions: Late modern law is a collection of ideologies, sanctioned, *in varying ways (custom, legislation)*, by the executors of social power *in a given sphere*. The vision of law implied by the theory also resonates with Unger's concept of law: "in its broadest

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[18] Theorists who are less concerned with elucidating a sociological concept of law that is grounded in empirical reality will be less inconvenienced by this multiplication. Natural law theorists may fit into this category. See, for example, Beyleveld and Brownsword (1986).

[19] Tamanaha (2001) has attempted the latter strategy, but his concept of law, necessarily thin in order to encompass the manifold forms of late modern law, is frustratingly vague (Twining 2003: 253).

[20] See Chapter 8 above.

sense, law is simply any recurring mode of interaction among individuals and gropus, together with the more or less explict acknowledgement by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied" (1976: 53). Of course, there remains open the possibility, outlined in Chapter 5, of adopting a defintion of law based on the work of Weber and Hart but rendered consistent with Collins' Marxist framework.

The second difficulty with the theory as it stands concerns the persistence and durability of capitalism. Marx's idea of unremitting class conflict culminating in revolution has, thus far, proved well wide of the mark, and so subsequent Marxists have been forced to account for this. Collins' solution was the notion of the dominant ideology. Its diffusion helps to ensure that capitalism is maintained. But the abandonment of this concept means that it is necessary to find a new mechanism of capitalist preservation. The concept of micro-ideologies cannot perform this task on its own, for the emergence of a host of groups potentially threatens the stability of the existing social order. There must be some underlying unity among the multitude of groups in order that capitalism is maintained. What is it that holds them in check? There are various potential answers to this question. Firstly, the number of plausible and commonly accepted ideologies is necessarily limited structurally by the relations of production, and it may be the case that ideologies that portray existing relations as natural and eternal are privileged in this. Secondly, the fragmentation of society means that even if counter ideologies *are* formed they may be too isolated to constitute a real threat to the capitalist system.[21] Thirdly, in an era of unprecedented ideological difference, capitalism may be increasingly preserved by the dull compulsion of economic necessity rather than any underlying ideological consensus (Abercrombie, Hill and Turner 1980). On the other hand, it may be the case that due to its changed nature, capitalism *will* gradually find it more difficult to keep the splintered elements in check.

This final possibility ensures that the hope of a radical transformation of society remains open. However, such a radical transformation will not be exclusively along the

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[21] This idea finds a curious ancestor in the shape of Alexander Hamilton, a founding father and creator of the Federalist Party in the US. His political pluralism aimed to ensure that "the danger of any one faction [in America] gaining a position of dominance would be greatly reduced" (Birch 2001: 178): In *The Federalist* no. 51 of 1787, Hamilton argued that "[US] society itself will be broken into so many parts, interests and classes of citizens that the rights of individuals or of the minority will be in little danger from interested combinations of the majority" (Hamilton et al 1901: 287). Precisely this trend in late modernity may well contribute to the persistence and durability of contemporary capitalism.

class lines set out by Marx and classical Marxists. As Shaw puts it, "that a classical working class no longer confronts a classical capitalist class does not invalidate 'class' as a mode of analysis altogether, but it does imply that any socialist project must move beyond simple historical class terms [...] a range of social forces are opposed to it [the interests of capital] which are far more complex and diverse, with less obviously coherent aims, than the classical Marxist model has proposed" (1985: 13). Politically, identifying what is common to the various subordinate groups then becomes the key to forming large scale alliances.[22]

There is, it would seem, already an identifiable "common object" in the experiences of various marginal, oppressed and dominated groups (Jameson 1988b: 71). This common object is the "the determination of structures of constraint within late capitalism" (Best and Kellner 1991: 191). As a result, the task is to emphasise the specificity of each group's experience of domination, "while asserting the ultimate commonality of their oppression within late capitalism, thereby implying an alliance politics and some sort of engagement with the new social movements" (ibid: 191). Best and Kellner make this point forcefully. According to them, there is a "concrete and substantive basis for a radical political alliance to lie in a common anti-capitalist politics. The exploitation and repression of diverse groups and individuals by the capitalist economy and state provides a fundamental point of commonality to unite a myriad of

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[22] Many from the Marxist tradition, such as Hindess and Hirst, Stedman Jones and the Eurocommunists, gradually began to turn away from many traditional Marxist themes, particularly the notion of class, as the plausibility of large-scale class politics decreased. Their ideas rose to prominence in the 1980s in the journal *Marxism Today* (Callinicos 1989: 4), and reached their fullest expression in the work of Laclau and Mouffe (1985). Laclau and Mouffe famously see Marxism as economically reductionist and 'classist', and argue that any attempts to soften this by stressing indeterminacy, complexity, agency and autonomy are merely *ad hoc* additions to the theory that do not solve its underlying tendencies. They promulgate a 'post-Marxism' that rejects essentialism and foundationalism, and stresses the non-correspondence of economic and political, the disassociation of politics from class, the dissolution of social life into discourse, the replacement of working class by a discursively constructed plural subject, and the subordination of socialist struggle to a plurality of democratic struggles. Many criticisms of their position have been launched, most famously by Geras (1987, 1988; see also their response (1987) and Mouzelis (1988, 1990 Ch 2)). See also Wood (1986), Best and Kellner (1991) Eagelton (1991), Howarth (1998) and, more sympathetically, Philips and Jorgensen (2002). Among the common criticisms of Laclau and Mouffe are their caricatured view of Marxism and implication that where there is no absolute mechanical determination, there is no determinacy or relationship at all. They stray close to relativism and neglect power. Politically, they tend to a reformism which fails to identify where best to target to effect change and whether some agents or practices may be more central than others in achieving change. They fail to specify precisely what their 'radical democracy' entails. Finally, they stray close to an idealist position where socialism becomes a moral option. Despite this, they have consistently reaffirmed their position (Laclau 1990, Laclau and Mouffe 2001), although there is now a clear "intellectual division of labour", with Laclau focussing on theoretical issues and Mouffe moving into political philosophy (Townshend 2004: 275). A loosely defined 'Essex School' of discourse theory has emerged in their wake (Smith, 1998; Torfing, 1999; Howarth, 1998, 2000).

oppressed social groups. While the oppression of women, workers, blacks, Asians, gays and lesbians, and so on, is not reducible to economic conditions, they are all conditioned by them insofar as they live within a capitalist society" (ibid: 292). Such a programme does not reduce the import of workers struggles; the working class have the potential to disrupt the economy and production in a way that, say, the women's movement could not.[23] However, it accepts that their struggle is merely one among many.[24]

Summary and Conclusion

This Chapter has outlined some of the issues raised by the theory developed in Chapter 8. It suggests that macro-level theory is a necessary element of the sociological canon as it provides a large scale picture that locates more local phenomena in their proper context. There is nothing inherently disabling about macro-level theory, provided it is seen as an open ended framework or a constantly evolving prolegomenon. Secondly, the need to theorise late modernity can be defended on similar grounds; despite societal fragmentation and doubts as to the possibility of grounding knowledge, attempts to theorise the social system as a whole remain necessary so long as they are alive to context, specificity and the limits of theory. Thirdly, the advantages of applying the 'Marxist' label to the theory were discussed. The theory takes Marx's Preface as its staring point, and classing it as Marxist

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[23] Equally, working class struggle is unlikely to be able to significantly impact upon patriarchal relations. The abolition of capitalist relations of production will not automatically eliminate all inequalities (Laclau and Mouffe 1985: 192). As Eagleton puts it, "Since nobody can accomplish anyone else's emancipation for them, it is a question of democratic principle that those victimised by oppressive power must free themselves from it; and in the area of material production, this means that those who are most directly disadvantaged by it. But it follows from the same principle that, for example, women, and not working people as such, are the agents of political change when it comes to the swat of patriarchy. If it is a mistake of Neanderthal Marxists to imagine that there is a single agent of social transformation (the working class), it is equally an error of new-fangled postmodernists to imagine that this agent has now been outdated by 'new political movements', for this would mean either denying that economic exploitation exists, or imaging with 'elitist' presumption that women or gays or ethnic groups who were not part of the working class could substitute themselves for it in challenging the power of capital" (1996: 60). Best and Kellner agree: "While capitalism cuts across all social groups, the specific concerns of any one group do not intersect with all other groups [...]. The privileging of anti capitalist politics does not entail the privileging of labour and class politics within an alliance, since the dynamics of male domination, racism, homophobia, etc, are not reducible to class oppression and not automatically eliminated with the creation of non-exploitative social relations. The abolition of capitalism, then, is a political objective relevant to all oppressed groups, but it is only one step in the creation of a free and democratic society" (1991: 292).

[24] Hunt is pessimistic that significant political change can be fashioned on this basis. He suggests that "Marxist socialism is simply too encrusted with its history to provide contemporary inspiration [...] few would retain a hope that the working class (or any other unitary subject) has the capacity to bring the fragments together" (1990a: 511).

identifies its intellectual heritage. Finally, some of the specific theoretical difficulties of the position were considered. That the theory does not specify a precise concept of law ensures that nothing is 'written out' of the theory. In addition, it remains open on the basis of the theory to acknowledge the persistence and durability of capitalism, whilst simultaneously leaving open the possibility of agents effecting radical social change.

The net result is a plausible and workable prolegomenon for a renovated Marxist theory of law which is alive to its own limitations.

CONCLUSION

"It is the capacity to grapple with the reproduction of mechanisms of domination that makes Marx an essential companion into the 21st century." (Hunt 2004: 603)

This research demonstrates that the Marxist theory of law, at least in its superior variant, offers a plausible and attractive perspective on the contemporary legal world. Marxism remains capable of providing a viable socio-legal theory.

Part 1 considered Marxist legal theory. Chapter 1 argued that Marxism is far from being 'dead'. This is because there are a variety of 'Marxisms', all based on different and sectional interpretations and extrapolations of Marx's work. Thus the exhaustion of one strand of Marxism does not sound the death knell for the entire tradition. Chapter 1 then demonstrated that Marx's outline of historical materialism in the 1859 Preface provides a useful starting point for a feasible legal theory. However, historical materialism raises two problems that are particularly pertinent for legal theoreticians; the problem of determination and the problem of base and superstructure. The coherence and plausibility of each Marxist legal theory is determined by the quality of the solutions to these two problems. Chapter 1 also suggested that the solutions offered by each theorist are indissolubly linked to their concrete socio-political situation. In other words, Marxist legal theory, like any theory, is context bound; bound by time and bound by place.

Chapter 2 considered the contribution to Marxist legal theory of Engels and Lenin. Both, it was argued, fail to provide convincing solutions to the problems of Marxist legal theory. Engels lapses into a crude materialism, while Lenin promotes an equally limited class instrumentalism. Chapter 3's focus was the work of the classic Marxist legal theorists, Pashukanis and Renner. Once again, they both fail to adequately solve the problems of determination and base and superstructure. Pashukanis ultimately fails to provide room for conscious human action in the determination of law, while Renner's theory collapses into economic reductionism. The object of Chapter 4 was the golden age of Marxist legal thinking, the 1970s. The views of the two main camps were explored; the instrumentalists with their roots in radical criminology, and the structuralists influenced by Althusser. Yet despite the advances and increasing sophistication in Marxist thinking about law during this decade, the twin problems remained unresolved. A century of Marxist thinking on law had passed, and still the old dilemmas persisted.

The search for a workable Marxist legal theory led, in Chapter 5, to the work of Hugh Collins. His 1982 work *Marxism and Law* represents the pinnacle of Marxist legal theory, learning from the lessons of the 1970s. Collins provides, in general terms, the most theoretically attractive solutions to the problems of determination and base and superstructure. Yet the downfall of his theory comes with his solution to the former problem. The problem of determination is resolved by recourse to a notion of the 'dominant ideology', but in order to make the theory account for law in its entirety, the notion must be stretched to a point where it becomes unworkable. And so there the tour of Marxist legal theory ended; with provisional solutions to the two key problems, but solutions that need further refinement and renovation if they are to become convincing.

Part 2 was concerned with the emerging set of economic, political and social arrangements that are forging a new context within which Marxist legal theory has to operate. This nascent period can be termed 'late modernity'. Chapter 6 outlined the massive changes that have occurred over the last three decades or so in the fields of economy and production, state and politics, and class structure, and discussed the notion of late modernism as a cultural accompaniment to these processes. Chapter 7 described the concomitant changes that have occurred in the legal sphere, to the extent that it is possible to speak of the existence of a 'late modern legal order'. The renovation of the modern legal order through processes of privatisation, deregulation, domestic fragmentation, the rise of supranational law and globalised legal hermeneutics and the concept of interlegality were explored.

Part 3 sketched a prolegomenon for a renovated Marxist theory of law. This theory is based upon the work of Collins, but it responds to the new context provided by late modernity. Chapter 8 outlined the renovated theory. It suggested that Marxist legal theory can articulate with late modernity in two ways. Firstly, Collins offers an explanation of how fundamental socio-economic changes impact upon the legal sphere. Secondly, late modern developments help to alleviate the central weakness of Collins' theory. The state has ceded power to a variety of other actors, and the class blocs of modernity have fragmented. Thus, in late modernity, various groups create laws, regulations and norms in line with their own 'micro-ideology'. These micro-ideologies are formed in the manner that Collins outlines. As such, the core of idea of his theory, the ideological determination of law, can be retained. However, late modern developments remove the need to rely on an all encompassing and therefore

implausibly elastic dominant ideology. Instead, field specific micro-ideologies guide law and norm creation in discrete spheres. The late modern legal system provides scope for the expression of these laws derived from micro-ideologies through the processes detailed in Chapter 7. The theoretical 'gap' left by Collins is filled; late modern developments render the Marxist theory of law more plausible.

Chapter 9 looked at some of the consequences of the new position. The utility of purely theoretical exercises, particularly macro level ones, the difficulties involved in theorising late modernity, the consequences of jettisoning some traditional Marxist notions such as class and state for the theory's designation as Marxist and some of the limitations of the position arrived at were assessed. Despite these issues, it was suggested that a viable prolegomenon for a renovated Marxist theory of law is created.

So What?

The central significance of this project is that it demonstrates that Marxist legal theory can retain a central place as a socio-legal perspective on late modern law. Historical materialism remains a plausible take on society and societal development. Any legal theory based upon it therefore has the potential to say interesting and worthwhile things. In addition, the work adds to the considerable body of work which suggests that a late modern legal order is emerging. The work's novelty is to locate the source of this emerging legal order in more fundamental societal changes, utilising a Marxist explanation to suggest how this process of causation may occur. The overall result is a prolegomenon for a plausible and robust Marxist theory of law that is in tune with current socio-political conditions.

The legal theory developed here is embryonic and requires a great deal of further development. But it is a necessary first step in resuscitating Marxist legal thinking, and renovating its much maligned theories. Thus, despite its fledging nature, it provides a workable starting point from which Marxist legal theory can develop anew. Marxism is not exhausted as many suppose, and it should not be ignored when thinking about contemporary law.

This nascent Marxist theory of law provides clear and ample opportunities for further theoretical development and empirical research. Theoretically, two avenues of development are immediately evident. Firstly, it may be useful to attempt to resolve the question of law's *differentia specifica*. Can a concept of law be arrived at that does not

'write out' significant examples of late modern ordering? Clearly, such a project would need to take account of the classical concepts of law, such as those of Hart and Unger. However, there may also be fruitful lines of investigation based upon Mieville's redrawing of Pashukanis. Secondly, there are clear possibilities for further theorisation on the durability of capitalism in late modernity: What role do micro-ideologies play in the persistence of capitalist relations of production?

Empirically, the theory offers a rich seam of research possibilities. The beauty of the approach for empirical research is that the multitude of late modern legal actors and their micro-ideologies can be studied in their specificity, with full attention given to their own peculiarities. Indeed, in principle, the approach allows even the study of the individuals involved in the law making process.[1] Previously Marxist theory, with its focus on large scale class blocs and ideological hegemony, has found this difficult. But this focus on the local and small scale can simultaneously be related back to a total picture of the social and legal world. Empirical studies could focus upon the makeup of groups, their position in the relations of production, and the interests and ideologies that stem from this. Their levels of access to institutional mechanisms, or their ability to create new legal orders can also be studied. How each groups' micro-ideology manifests itself in law can be studied through analysis of legal texts, regulations, decisions, policy statements and actual practice.[2] In addition, the existence or potential for alliances between the groups, and the nature of them, is also a ripe area for research. Such research may be able to shed light on how powerful groups help to maintain capital's dominance, and how subordinate groups can challenge that status quo.

In sum, Marxist legal theory is revived and made relevant in the late modern era, and a platform for further theoretical development and empirical research has been laid. Marx's theory is patently "rife with potential" (Vincent 1993: 391), and there is no need to treat it as a museum piece. As Best and Kellner argue, "since capitalism continues to be a major constitutive force in many contemporary societies, the Marxian theory and critique of capitalism continues to be a crucial element of a critical theory of society" (1991: 296). Indeed, "far from being over, the argument with Marxism is only

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[1] As Adams and Brownsword suggest, "explanations should start with the reasons and purposes of individual actors" (1992: xii). This ability to study groups and even individuals in their specificity, locality and context also resonates with late- and post- modernist ideas.
[2] Sumner's guide to *Reading Ideologies* (1979) may be extremely useful in endeavours of this nature.

just about to begin all over again, this time in the context of a capitalism careering out of control" (Downes and Rock 2003: 367).

Marxism is inherently a theory of its time. Its own theoretical structure suggests that once its social basis disappears, then it will necessarily and unavoidably wither away. As Eagelton suggests, "socialist theory [...] is only too content to view itself as belonging to a particular age- that of capital itself- and will thankfully no longer need to stay in business when that era comes to a close, if it ever does. Socialists will then be released from the inconvenience of their beliefs, in which there is little profit and scant pleasure, and feel free to talk about something more enjoyable for a change, such as colour imagery in Joseph Conrad or the curiously mellow quality of Cotswold stone" (1996: 29). But the emergence of late modernity does not signal that this is about to occur. True, circumstances have changed to such a degree that much that is commonly associated with Marxism must be abandoned. But Marxism *can* still contribute to an understanding of contemporary society. Jean-Paul Sartre's words resonate: "Far from being exhausted, Marxism is still very young, almost in its infancy; it has scarcely begun to develop. It remains, therefore, the philosophy of our time. *We cannot go beyond it because we have not gone beyond the circumstances which engendered it*" (1968: 30 [italics added]).

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