MARXISM, ECONOMICS AND LAW

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I

1. Since the late 1960's there has been a remarkable burgeoning of Marxism and neo-Marxism in Western European, American and Australian intellectual life and a penetration, in many instances for the first time, into the work of the academy and the professions. There has been growing interest among Marxists, pseudo-Marxists and radicals generally in tackling in a Marxist way disciplines that Marxists have long neglected and failed to catch up with: anthropology, literature, political theory and most recently law.

2. The appeals of Marxism are many and most of them are non- or extra-intellectual, though the flowering of serious Marx scholarship and of a much wider and varied climate of Marx interpretation since World War II has done much to give Marxism increasing academic respectability.

Part of the new academic, strictly intellectual, appeal of Marxism has been its concern with and emphasis on the sociological dimension, the wider social connections of such objects of study as history, classical antiquity, literature and now law.

3. Ever since Rudolf von Ihering poured scorn on the Platonic heaven of juristic concepts and proclaimed the jurisprudence of interests, there has been a growing trend in Western societies toward so-called legal realism, toward discounting the internal coherence and historical integrity of law, its claim to mould society and to represent specifically legal traditions, procedures and ideals. This has been strongest in English-speaking countries with their "empiricist", i.e. anti-theoretical, tradition. Court decisions have been studied to bring out the extent to which they allegedly are not and cannot be derived from legal maxims, so-called principles of law, statutes or precedents, but reflect wider, social conflicts and interests. The operation of law has rightly been recognized to extend far beyond the courtroom

dramas recorded in law reports and casebook –positively in the operation of that "living law" internalized in a community's customs, expectations and ways of behaving, negatively in the use and abuse of threat, negotiation and extra-legal power that precede or replace the courtroom appearance. The trend has been to de-intellectualize law, to pit life against what is written in the law books, to demolish the fences that an earlier generation had put up to distinguish law from custom, morality, politics and the legally irrelevant. We now insist, above all, that law stands neither above nor outside society, but within it, and that it does not make its own history. All this, of course, is true. When we go on to argue that law is or should be a neutral, flexible and totally characterless instrument responsive to or serving uncritically elevated goals and needs alleged to have logical priority over the law, that is another matter.

More recently, anthropology and sociology have combined to strengthen this trend. If law is a method of settling disputes in a regularized, predictable way without violence, then what past Western theorists called "law" is only one possible method among the many practised by different societies. Anarchic and violent self-help, or utter lawlessness, are not the only alternatives to a centralized, state-sanctioned codified legal system. Hobbes' social defense theory of law is clearly wrong, both logically and historically. Societies have rules, and quite sophisticated rules and procedures, without having a sovereign, codes, courts and constables. It may be, indeed, that the elevation of state-centred law, of the will of the sovereign and of a complex machinery devoted to producing stability and justice, is in inverse proportion to the authority of other norms: religion, custom and sheer fellow-feeling and neighbourliness. Some theorists make this point by saying that law is only one form of domination, or social control, and not necessarily the most important or the most admirable; others reject altogether the claim that law is produced by or controlled on behalf of society. They insist that law stands not above but within class conflict or social conflict –that law is the will of the ruling class, of notables or elites, and seeks to organize social life in the interest of one group at the expense of another. What the eighteenth and nineteenth centuries did to religion– showing that there were *many* religions, and that they were all made by men, reflecting different climates, periods, values, and aspirations and much dastardliness and cynicism –the twentieth century is doing to law. We live, in many respects, in a renewed Feuerbachian Age.

4. The rejection of traditional, external authority, of an authority of origins, was an important theme of Protestantism and then, more

nakedly, of the French Enlightenment and the French Revolution. It has been followed more recently by a further rejection of the so-called "liberal" conception of the rule of law, of the authority, that is, of abstract and impersonal laws, elevated by nineteenth-century thinkers and societies. The call now is to "humanize" and "demythologize" law and legal relations, to make law a servant and not a master, to set up over it and against it the values and demands of "man", "society", "the people", or the "rational" pursuit of "rational" goals. Not "law and order", but "steering society", "promoting equality and community", planning for the future, providing scope for creativity, "self-expression" and the natural life, protecting the environment and averting ecological disaster are the popular catch-phrases of today. They represent and bear witness to a remarkable strengthening and increasing popularity of socialist and sociological critiques of law. These, of course, have a long pre-history. Today, they have so much gained in strength and public appeal as to constitute what Professor A.E.S. Tay and I have called a crisis in law and legal ideals.

The crisis is furthered by an unjustified current contempt for the Western tradition and Western achievements. At the same time, an active concern for concrete social equality, for the rights and benefits of the "underprivileged", is leading to a constant demand for more and more lawmaking activity directed to specific ills on a frankly discriminatory basis. We *do* now believe that there should be one law for the poor and another for the rich —substituting benevolent discrimination in law for the hard extralegal inequality of concrete social life.

5. Without question, the new critical attitudes to law and legal ideals have done much to alleviate particular injustices and something to raise the critical standard of legal thinking and legal discussion. Law, in English-speaking countries, is no longer universally seen as an art, or more accurately as a craft or technique that makes no wider intellectual demands on its practitioners. In these countries it is now much more generally recognized, as it has long been on the continent of Europe, that law is a central field in social science, social administration, social thinking. The newer disciplines of anthropology and sociology have measurably deepened our understanding of the nature and functions of law through studying it in a wide range of social settings. Our increasing awareness of the problems and concerns of communist, socialist and developing societies has had the same effect. The proliferation of new legal attitudes and new views of the function and appropriate procedures of law, as well as a new sense of its

limitations. But the current emphasis on seeing law in context is to put all the weight on the context and pay very little attention, if any, to the internal coherence and values of a legal system, of legal institutions, concepts and techniques or to the judiciary and the profession so closely associated with them, except to "expose" them.

Both Marxism and radicalism, at least in England, eschew serious consideration of law as a system or as a social institution. They are more at home with a catalogue of injustices than with a theory of justice, with bias and distortions of the legal process than with the nature and function of law, with the politics of the judiciary than with the role of legal traditions, techniques and values. Thus one of the better Marxist books related to law that has been published in England in recent years, E.P. Thompson's *Whigs and Hunters,* a study of the origins of the 1723 Black Act against poaching, begins with a fundamental mistake —the belief that Act is important in eighteenth-century legal history. It has no such importance whatever; it is illuminating for eighteenth-century *social* and *political* history. It could be repealed without any significant change in the structure of English law, but not in eighteenth-century English class attitudes. An important item in eighteenth-century legal history, by contrast, is the development of genuine or at least better security of title, and of a sophisticated separation of interests in land and the consequent extension and abstraction of mortgageability which helped to revolutionize both law and the economy. One could give an interesting Marxist account of that; so far as I know, R.S. Neale is the only Marxist historian who has sought to do so. If we take such really central items in legal history as the thirteenth-century development of possessory assizes, of *novel disseisin* and *mort d'ancestor,* they stand in the most interesting and fundamental conflict with the feudal authority of the baronial courts and with feudal emphasis on status and title in the competing writ of right, which they ousted in importance. Consideration of this development, and of the role of possession in the Common Law generally, creates a strong presumption *against* the Marxist view of law. Here is an opportunity for Marxist legal historians to do some real thinking. It has not been taken up.

6. Collectivism, A.V. Dicey wrote three-quarters of a century ago, did not come into the world with a theory of law and still has not attained to one. Karl Marx was the son of a lawyer. He began his career as a law student and later made some highly successful appearances on his own behalf in court in Cologne, defending himself against charges of slandering officials and inciting insurrection during the 1848 revolution. Nevertheless, he wrote almost nothing extended

or systematic about law, if we except a few early newspaper articles in which he proclaimed the indissolubility of marriage (at least according to its "principle", if not quite in fact), the impropriety of new laws robbing the poor of old customary rights, and the need for the law-giver to reject the alien intrusions of religion and the demands of sectional interests.

Most of his life from then on Marx spent under the self-imposed duty of wading through "economic filth", seeking to prove that the secret of law, of politics, ideology and the State lay, in each case, in something else —in productive forces and relations of production, in the "material" life of society. In the truly human, self-managed society he worked for and predicted, there would be no law and no State. The conflict of rights and duties, the narrow horizons of bourgeois law and the abstraction and alienation of legal systems would have been totally overcome. Before that happy condition, there was no law, in general, but only slave-owning, feudal, or capitalist law. Of socialist law or a specific legal system he did not conceive.

On all sorts of grounds, then, Marx and Engels refused to take law seriously as a specific or comparatively independent social institution, having some character and history of its own. It reflected, for them, the mode of production, the economic organization of society, the class struggle, the will of the State and through it the will of the ruling class. It sanctified and protected social arrangements. It did not create them and it was not a fundamental social arrangement itself.

7. For those interested in the specific contribution of law to society, in a theory of law as a coherent system of concepts, norms and rules, and as the carrier of an abiding concern with justice, fairness and legitimacy, then, even the predigested "Marx and Engels on Law" collections make dispiriting reading. Their interest lies in what they can tell us about Marxism, not in the insights they can give us about law. If Marxist radicals are making some impact on law teachers and students it is not because they or Marx and Engels have a theory of law or deal freshly and significantly with the history of legal thought and the foundations of legal philosophy. It is not even because they take law seriously in its own right. It is rather because they are impatient with law. As an Australian radical law teacher, Andrew Fraser, put it in the Australian Marxist journal *Arena* (no. 44, 1976, pp. 123):

> Any serious examination of the few attempts which have been made in recent years to develop a radical theory of the legal process reveals a disturbingly high level of intellectual poverty and theoretical sterility. How else could

> one evaluate a theoretical project which seems to devote a major portion of its energy to measuring and emphasizing the political distance between itself and its object? Because radical legal theorists seem concerned above all else to establish their own authenticity as militant opponents of the legal system and a mainstream legal theory which is regarded as the servile handmaiden of a repressive state apparatus, the task of actually comprehending the legal process as an important dimension of everyday social experience tends to be relegated to a second level priority, if it is not overlooked altogether. The most obvious manifestation of this tendency to reduce radical legal theory to the level of an elaborate war-cry is the prevalent radical image of the law as an external, repressive force which plays no essential part in our nature as social beings. As an external force imposed on the individual from without, the law need not be incorporated into any theory by which radicals seek to understand their personal needs and the relationship of those to the socio-historical process of which they are a product.

8. The thought of Karl Marx, like that of the founder of Christianity, has many conflicting and competing strains. It has made possible many Marxisms and given rise to an enormous literature of conflicting exegesis, interpretation and commentary. Nevertheless, a central traditional intellectual weakness of Marxism, separate from its past dogmatism, has remained. Marxists have overwhelmingly believed that they hold a special key, and a comparatively simple key at that, which will unlock and lay bare the secret of all significant social phenomena. Marxists as Marxists are never interested in the integrity, specificity and comparative independence of social phenomena, traditions and institutions or in the resultant complexity of problems. "In the final analysis", they believe, the process of production or a mode of production and the class struggle arising out of it, explain everything else. Their characterizations of the key —whether it lies in productive forces, relations of production, or the mode of production, in the process of production, in the process of exchange or in the class struggle of society— vary. They all agree, of course, that these factors are intimately related, only to be understood in connection with each other. Nevertheless, there are significant, indeed important, differences between those who put primacy on the process of production, those who put primacy on the market, and those who put primacy on the struggle between exploiters and exploited. But all of them see society as a functional monolithic whole; all of them think that the law, like literature, morality, and other superstructural or ideological features, "in the last instance" has to be understood in terms of something else. It is in this sense that all Marxists have remained intellectually reductionist —in law perhaps even more than in other areas. The fact that this is no longer true of the URSS, the People's Republic of China, and East European states may be a strong

ground for saying that an unalloyed Marxism is no longer their official ideology.

9. The consideration of law and of problems of legal theory, as we have seen, does not form any significant part of Marx's work. He was significantly influenced, at various stages, by Kant and the rather Kantian-Fichtean philosophy of law of the Young Hegelians, such as Eduard Gans, and by Savigny, the great figure in the historical school of law who taught Marx as an undergraduate. Nevertheless, attempts to ascribe to Marx a complex and coherent theory of law never derive from his own pronouncement on law. They rest, rather, on interpretation of his more general remarks on the relation between productive forces and relations of production (the economic base) and the superstructure, especially ideology, and his remarks on the forms and role of property in various periods of social life.

In Marx's work, in chronological sequence but without the earlier stage ever being repudiated, we find three fundamental approaches to law:

a) Law is either coercion and therefore treats man as an animal, to be determined from without and not by the inner universal and universalizable rules of his being (his human and species essence); *or* it is the systematization of freedom, of the inner rules of human activities, losing any independent or external character or force;
b) Law is a form of human alienation, which tears the juridical subject out of its human and social context, which abstracts and mystifies and rests on illusions made possible by such abstraction —the illusion of free-will and autonomy, the illusion of equality, the illusion of reciprocity;
c) Law is the reflection and the protector of specific modes of production, forms of economic organization and of class domination. Law, in the crudest version to be found in the works of Marx and Engels, is simply the will of the ruling class —though, especially in Marx, that will itself is the product of forms and modes of production.

10. It is almost 100 years since Marx's death. Nevertheless, there are still only two serious Marxist legal theorists who have attempted seriously and with originality to come to grips with what I have called the specificity of law —with that which distinguishes law from other social arrangements or ideologies, which makes it express (if we use Austinian terms) a particular type of command, a particular sort of will, or (in non-Austinian terms) a particular form of rule-

consciousness and rationallity. These two theorists are Karl Renner, twice President of the Austrian Republic, and E.B. Pashukanis, the foremost Soviet legal theoretician of the 1920s, disgraced, imprisoned and murdered in the 1930s. Both men, though they hold very different views, reject completely the view that law is simply the will of the ruling class or that it is nothing but a system of commands. Both also reject the view that law is an ideology, a passive element in the superstructure and hold, as Pashukanis puts it, that law is a material force.

In the 1920s –the only period of genuine "creative Marxism" that the Soviet Union has ever known– Yevgeni Bronislavovich Pashukanis was the foremost and ablest expositor of Marxist jurisprudence. His *General Theory of Law and Marxism*, first published in Moscow in 1924, went through three Russian editions in five years, and the German translation of the third edition, issued in Berlin and Vienna in 1929, attracted international attention. As critical a non-Marxist jurist as Professor Lon Fuller of Harvard, reassessing Pashukanis' chief work more than twenty years later, wrote:

> In this short book, Pashukanis expounds with clarity and coherence an ingenious development of Marxist theory that has been called the "Commodity Exchange Theory of Law." His work is in the best tradition of Marxism. It is the product of thorough scholarship and wide reading. It reaches conclusions that will seem to most readers perverse and bizarre, yet in the process of reaching these conclusions it brings familiar facts of law and government into an unfamiliar and revealing perspective. It is the kind of book that any open-minded scholar can read with real profit, however little he may be convinced by its main thesis.[1]

Certainly, one finds in the book a freshness of style and of thought that was soon to disappear from Soviet intellectual life. Pashukanis combines a genuine and scholarly involvement in jurisprudence and legal history with an equally genuine feeling for Marx's method and concerns. Not only is he sensitive to the achievements of other scholars –of Laband, Jellinek, Duguit, Maine and Maitland– but he rejects the theoretically crude simplification of Engels and Lenin to focus on the subtleties of a Marx that most of his contemporaries had not fully appreciated.

A careful study of the Marxist classics leaves us with two competing tendencies. One, represented by Engels, takes an Austinian view of the law as a body of commands, and hence as primarily puni-

1 L. Fuller, "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory", *Michigan Law Review* (Ann Arbor), Vol. 47, 1949, p. 1159.

tive in nature, enforcing the will of the state, or whatever will the state represents. The other, represented by Marx in his subtler mood, thinks of law as a system of adjudication and judgment in terms of abstract concepts linked to conflicts in civil society, and therefore takes civil law and its categories as the model in terms of which law is to be understood.

Lenin, though himself a lawyer by training and early profession, was interested in law only as a vehicle and expression of political power; for him, it represented the will of the ruling class backed by physical sanctions. After the 1917 Revolution and the creation of the dictatorship of the proletariat, the law became the will of the working class, to be used both as an instrument of coercion against the enemies of the working class and as a form of propaganda within its own ranks defining the aims of the revolutionary movement. Once the proletariat had completely triumphed and all men had become workers, law would disappear because there would be no particular class to impose its will on other classes. Men would live as a cooperative community, settling disputes informally and on the spot. This was the line followed in the more popular forms of Communist propaganda and ideological writing even in the 1920's. In sum, the law was seen as the instrument by which a section of society imposed its will on the rest, and the law of each historical stage of society simply represented the will of its ruling class.

In line with this view, the People's Commissariat of Justice in 1919 defined law as "a system (set of rules) for social relationships which corresponds to the interests of the dominant class and is safeguarded by the organized force of that class.[2] The serious Marxist academic lawyers in Russia, trained in the traditions of 19th-century Continental jurisprudence with its emphasis on the categories of Roman private law, were in the main not Austinians and tended to see law not merely as a set of commands or decrees but rather as a system. On the whole, however, they stressed its normative and ideological character. M.A. Reisner, drawing on the famous psychological view of law espoused by the non-Marxist Russian-Polish legal theorist L.I. Petrazhitsky, argued that law was the expression of predominantly internalized norms varying from class to class, so that Russia after the Revolution had competing systems of proletarian and bourgeois

[2] *Sobranie uzakonenii* RSFSR (Collected Laws of the RSFSR), 1919, No. 66, p. 590. Also cited in P.I. Stuchka, *Izbrannie proizvedeniia po marksistskoleninskoi teorii prava* (Selected Works on the Marxist-Leninist Theory of Law), Riga, Latvian State Publishing House, 1964, p. 58.

law along with remmants of feudal law, each expressing the interests and attitudes of the appropriate class. The new Soviet state, according to Reisner and a number of other legal writers, was sanctioning and enforcing a particular system of class-law —*i.e.*, proletarian law— against other systems. When classes disappeared, the need for a formal system of sanctions would disappear, and law could dissolve into morality.

Pashukanis went farther and deeper in his analysis. His *General Theory of law and Marxism* is essentially a radical and thoroughgoing critique of any attempt to treat law as mere class ideology or to speak of a proletarian system of law replacing a bourgeois system. The point on which any analysis of *law* must concentrate, he argues, is that not all rules or norms are *legal* relationships. Although most Marxists before him had taken the element of state compulsion to be the characteristic or defining element of law, Pashukanis rejects this view. Army regulations, rules binding the members of an order or priesthood, or the authoritarian prescriptions of a family head or elder, for example, do not constitute or become *law* if or because they are sanctioned by authority —be it even the authority of the state. They are not law and do not have the form of law because they are based on relations of domination and submission, because they involve obedience to rules rather than the determination of rights.

What is characteristic of *law* and constitutes the "essence" or formal quality of law, according to Pashukanis, is the conception of a juridical subject confronting other juridical subjects on the basis of equality and "equivalence". "The specific fact distinguishing the legal order form every other social order... is that it is based upon private, isolated subjects. A norm of law acquires its *differentia specifica*... by the fact that it presupposes a person endowed with a right and moreover actively asserting a claim". Law is thus characteristically adjudicative and is thereby distinguished from administration, its "essence" as Pashukanis puts it, is involved and revealed in the conception of *contract* rather than of decree. The categories and principles characteristic of law presuppose the legal subject as an individual acting "freely" in his relations with other "free" individuals and having rights as well as duties. Such legal subjects must, in law, be abstracted from their social context and reduced to legal individuality and abstract equality, so that even the state can appear in litigation only as another individual subject having rights and duties vis-à-vis the citizen in the same way that the citizen has rights and duties vis-à-vis it.

In line with this, Pashukanis attempts to show how the contractual model in fact dominates all areas of law —public law, with its concep-

tion of the social contract and the rights of the citizen; criminal law, which makes the wrongdoer "pay" for his crime according to a scale of fixed penalties; matrimonial and family law, which dissolves familial relationships into a system of reciprocal rights and duties. Here Pashukanis is much closer than Lenin or Reisner– or Vyshinsky and the contemporary Soviet legal theorists –to Marx's fundamental critique of "abstract" law and "abstract" bourgeois justice as proclaiming a formal equality which, in the concrete social situation of class societies, amounts to real inequality. "The 'Republic of the Market'," Pashukanis writes in the preface to the second Russian edition of his *General Theory of Law and Marxism*, conceals the "Despotism of the Factory".

Pashukanis further contends that many Marxist writers, in treating law as ideology and emphasizing the elements of state compulsion and hypocritically-concealed class interest, fail to notice the much more direct connection between law and the economic structure of society. The fundamental presupposition of law, *i.e.*, the principle of the juridical subject (involving the formal principle of freedom and equality, autonomy of the person, etc.), is not, he argues, merely a hypocritical tool used by the bourgeoisie to enslave the proletariat; it is a real, active principle embodied in bourgeois society once it breaks free from the feudal-patriarchal order. Further, the victory of law is not merely an ideological process, but a real, material one –a "judicializing" of human relationships which accompanies the development of a commodity and money economy (in Europe, of capitalism), and which involves the overthrow of serfdom and the separation of political power from society as a particular, *partial* power. Thus, law is not just the "ideology" of the bourgeoisie, but a reflection of the assumptions of commodity exchange: it reflects and secures the conditions necessary for the barter and exchange of products on which the commodity production (*i.e.*, production for a market) is built. The possessor of goods confronts other goods-possessors in a market on the basis of autonomy and equality. His other pursuits and concerns are irrelevant.

Legal categories, Pashukanis goes on to argue, are a precise parallel to the similarly "abstract" economic categories of commodity-producing societies –value, capital, labor, rent– which are fundamental to bourgeois economics and economies (and to all commodity-producing economies), but which lose their medium of existence in societies not oriented to exchange, where, for example, production is for use. Just as the bourgeois economy is the most highly-developed and most abstract form of commodity production, so bourgeois law

is the most highly developed and abstract form of law and legal relations. The juridical subject is abstract goods-possessor elevated to the heavens; the legal relations he enters into correspond to his commercial relations in the market place, express them, and safeguard the conditions of their existence. Thus, according to Pashukanis, law in the proper sense develops around the activities of barter and trade, finds its initial strongholds in cities, comes into conflict with patriarchal relations and all other relations of formal domination and submission, and finally reaches its apogee in bourgeois society. Pashukanis accepted the Marxist view of the state as a form of class domination, but regarded the state in this aspect as not capable of legal interpretation.

In socialist society, where production is no longer for exchange, Pashukanis believe that the categories of law will become as irrelevant, and are as fatally undermined, as the categories of market economics. Policy, economic planning, and administration replace law. The concept of the juridical subject will become as inapposite as it would be in a primitive commune, in army, or a work-team. It will give way to the socio-economic norm.

On the basis of this analysis, Pashukanis took the position that the Soviet codes of the 1920's were in no sense "socialist law" —in itself a contradiction in terms— but bourgeois law necessitated by the fact that exchange relations had not yet been eliminated in the Soviet Union. Even in criminal law, he argued, these codes were still bourgeois in that they were permeated through and through with the principle of equivalence of retribution. The systematic development of a genuine socialist principle based on the protection of society, he declared,

> would require not a tabulation of the separate constituents of crime (with which the measure of punishment. . . is logically associated) but an exact description of the symptoms characterizing a condition which is socially dangerous, and an elaboration of the methods which must be applied in each given case in order to make society secure.[3]

With the abolition of the new Economic Policy and the introduction of the first Five-Year Plan, Pashukanis saw the elimination of the juridicial element in human affairs beginning in earnest. In line

[3] E. Pashukanis, *Obshchaia teoriia prava i Marksizm (The General Theory of Law and Marxism)*, Moscow, The Socialist Academy, 1924, pp. 157-58; English translation by Hugh c. Babb, in Babb and Hazard (eds.) *Soviet Legal Philosophy* Cambridge, Mass., Harvard University Press, 1951, p. 223.

with his theories, the institute he headed was named the Institute of Socialist Construction and Law –soon, he thought, the word "law" could be dropped. Courses in civil law, under Pashukanis' influence, were replaced by courses in "economic administrative policy and law" dealing with the regulation of relations between the state and enterprises, which were seen as becoming increasingly non-juridical. Individual rights were relegated to a few hours at the end of these courses, and their status was regarded as merely temporary and linked with the hangovers of bourgeois relations.

By the mid-1930's, Pashukanis had become the acknowledged leader of a school of jurists who were developing and applying his theories in various specific areas of law. (Pashukanis himself did a good deal of work in international law, where he began by denying that there could be a concept of proletarian international law to be distinguished from bourgeois international law.) Nevertheless, even in the 1920's there were critics of his views. The subtlety of his analysis of bourgeois law did not much appeal to Communist propagandists, who preferred to see that law as simply a hypocritical cloak for bourgeois interests; and his insistence that the new Soviet codes, because they still embodied bourgeois attitudes and provisions, did not constitute a creative "socialist" contribution to law conflicted sharply with the growing Soviet penchant for vainglory. Many of his critics felt, more sincerely, that he minimized the normative element in law and ignored the ideological interests enshrined in specific legislation, which –they contend– were precisely what distinguished socialist from bourgeois law.

E.B. Pashukanis was concerned with a problem not tackled by Marx or Engels, or by most Marxists: What are the *differentia specifica* of law, what *distinguished* law from other social manifestations, particularly from *other* bodies of rules and commands. The difference, according to Pashukanis, does not lie in the source or function of law, but in its *form*, its formal presupposition of an underlying juridical subject as the bearer of rights and asserter of claims, seen for the purposes of the legal form as autonomous and free, equal and equivalent to all other juridical subjects. Pashukanis sees law not as a command, but as a system of norms and concepts determining claims. In elaborating this view of the "formal quality" or presuppositions and implied structure and values of law, Pashukanis had captured an important and central moment in the Western legal tradition that might be said to characterize it. I would not want to say that Pashukanis had correctly grasped the "essence" of law –though he himself uses such terminology– or that his account exhausted everything that was

important or fundamental about law. I do not believe that these are "essences", "true" definitions or exhaustive descriptions. Institutions are complex, torn by competing trends and traditions, inconsistent, changeable, and part of many histories. There is no central character of an historical institution from which all its other characteristics can be derived or explained. It is for these reasons that 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 actual legal system will be a mixture of all of these: but they pull in different directions, elevate different presuppositions, conflict with each other –especially sharply and self-consciously in modern societies, whether socialist or non-socialist, though the character of the mix varies, and changes within one system.

Nor do I wish to claim that the *Gemeinschaft-Gesellschaft* bureaucratic administrative trichotomy[4] and the relation of domination-submission to authority that lies behind it exhaust the important general things that can be said about law. One important, many would say central, aspect of sophisticated legal systems that this trichotomy does not single out at all, but takes for granted as part of the *systematic* character of systems of rules is the existence of power-conferring rules, rules of recognition. These define when power and decision is legitimate, *intra vires,* and when it is not though I would argue that precise and specific separation of powers is a *Gesellschaft* phenomenon. But the concept of legitimacy is not.

11. The second great Marxist theoretician of law, the Austrian Social Democrat Karl Renner, devoted himself to a totally different question about law. He was trying to explain not the *differentia specifica* of law what distinguished legal rules from other state –society–, or group-sanctioned rules, but the remarkable persistence of certain basic legal norms and institutions over time through fundamental social and economic change. How was it that the categories of Roman private law, developed in what Marxists considered a slave-owning mode of production, could persist, with so little change in their basic character, through feudal and capitalist society? And

4 See, for fuller elaboration of this trichotomy, Eugene Kamenka and A.E.-S. Tay, "Social Traditions, Legal Traditions", in Kamenka and Tay (eds.), *Law and Social Control,* London, Edward Arnold, 1980, pp. 3-26.

would they also persist into a socialist mode of production? Renner's concern is frankly sociological and based on a sharp distinction between law and its social function, between legal analysis and sociological analysis. But his treatment of his topic has important implications for the philosophy as well as for the sociology of law, and certainly for what I prefer to call the theory of law, a theory that relates the philosophical and the historical, sociological features of law, that draws its philosophy from legal realities.

Karl Renner was a distinguished Austrian Social Democrat. Born in 1870, he became a Social Democratic member of Parliament in 1907 and was Chancellor of the Austrian Republic from 1918-20, President of the *Nationalrat* from 1931-33, and then an inmate of various goals under Chancellor Dolfuss. In 1945, after the defeat of Germany, Renner formed the first post-war Austrian Republic until his death in 1950. A member of the Austro-Marxist School, he wrote on many Marxist and socialist question —on labour and capital, on the economy, on fundamental principles of sociology, on current problems of socialism and Marxism. But the work that earned him a deserved place as one of the two only significantly original Marxist theoreticians of law is *The Institutions of Private Law and their Social Function.* It was first published in 1904 under the title *The Social, Function of Legal Institutions, Especially of Property* in a collection entitled *Marx-Studien* together with essays by Rudolf Hilferding and Max Adler. Renner, then 34, was working as a librarian in the Austrian Parliament; since he was a public servant he used the pseudonym Dr. I. Karner. A new self-standing edition under the present title, substantially revised and issued under his own name, was published in 1929. Karl Mannheim and Otto Kahn-Freund, by then émigrés living in London, arranged for its translation into English and publication in London in 1949.

Renner's *Institutions of Private Law and their Social Function* is primarily a study in the sociology rather than the philosophy of law; its central concern is with the relationship between economic life and economic change on the one hand and legal norms and institutions and their functioning on the other. It is thus a specific contribution to working out, in the legal sphere, the truth or falsity, or the most plausible interpretation, of Marx's materialist conception of history. Renner's method is to examine, over time, the character and the legal, economic and social function of certain central institutions of private law —ownership in land and chattels, contracts of various types, mortgage and lease, marriage and succession. He leaves public law outside the purview of his analysis.

"Every legal institution", Renner argues, "is to a conceptual approach a composite of norms, a total of imperatives. In the case of property, the most important imperatives convey that no-one shall withdraw from A's factual power of dealing with a thing which belongs to A, and no-one shall disturb his quiet possession of the thing, etc. The lawyer sees the same institution of property wherever the same composite of norms applies. It does not matter to him whether the object is land, a retriever, a loaf of bread or a family portrait without intrinsic value. Legal analysis confines itself to collating the totality of norms, the systematic understanding, logical exposition and practical application thereof. Legal analysis is of necessity determined by history like its arsenal of concepts, its terminology. It is of necessity empirical; by the same token the *corpus juris civilis,* the *'Sachsenspiegel'* and the German Civil Code are all empirical".

Unlike Pashukanis, Renner is not concerned to give an economic or sociological or social account of the *origin* of legal norms and institutions. *He assumes* the stability and relative immutability of central legal institutions such as property or contract, and he asks, as Kahn-Freund puts it, "how is it possible that given unchanged norms, unchanged conceptions of ownership and sale, contract and debt, mortgage and inheritance, their social function can nevertheless undergo a profound transformation?" How is it possible that the legal institutions can remain the same imperative, be defined in the same way, in 1750 and 1900 and yet produce in the latter period effects diametrically opposed to those it produced in the former? The stability and comparative abstraction of private law norms —their compatibility with different types of social organization (denied by Pashukanis) has nevertheless struck most theoreticians of law, who see the legal genius of the Romans as lying in the ability to create a system of norms that has so long survived them. As Geoffrey Sawer has put it, the three great original characteristics of Roman law as a living up to the time of Justinian, were firstly, a complexity which enabled it to cover the main social relationships of human life; secondly, a degree of abstraction enabling many of its principles to apply to a wide range of social relationships and over long periods of time without major change; thirdly, an autonomy of structure and development which gave law and independent role in the development of society as a whole.

Renner belongs, as I to some extent do, to the conceptual school of jurisprudence in the sense that he sees legal concepts as having their own character and implications and life in the law. He is, of course, a positivist in the sense that he sees such concepts as arising

within human history and society, as I also do. He is not at all interested, in the work under discussion, in precisely how such concepts arise. He takes their existence *i.e.* the existence of a conceptually structured legal system for granted. He argues indeed that any society must allocate labour tasks, allocate goods or things and have a command structure to organize the hierarchical exercise of power or even to organize cooperation. These three general administrative imperatives Renner calls the order of labour, the order of goods and the order of power. But such central legal institutions as property, contract and succession by inheritance in themselves are for Renner "neutral", "colourless", "empty frames"; as in themselves they are not feudal, nor capitalist, nor socialist, but legal. They do not "reflect" an order of labour, power or goods, but help to create it and they have a conceptual integrity independent of such orders. A simple example —Soviet law of inheritance, which is different from continental only in *what* can be inherited, not how it can be. The aim of Renner's work, indeed, is to show that the central institutions of private law do not change but that they undergo a functional transformation *i.e.* come to play a different social and economic role. Here Renner elaborates a theory —and largely I would think a correct theory— of the role of legal norms and institutions in social life. If we take a complex economy like the "modern" (*i.e.* late nineteenth-century) capitalist one, it is not true that the organization of modern industry can be effected simply through the itself neutral norm of property. The legal concept of property can only serve as a basis for organizing a fundamental economic process of capitalism —industrial production by being combined with a number of complementary institutions— company law and patent law, the contract of sale and the contract of employment. An apparently simple economic process thus requires not one legal category but a whole group of them, brought together by the requirements of the economic process. This is what Renner calls the economic function of legal institutions. When such complex sets of legal norms become dysfunctional, lose real connection with the character and needs of the economic substratum, they are rearranged or fall into disuse, though usually with a time-lag.

Economic processes are themselves part and parcel of the social process that Marx called production and reproduction, concerned with the maintenance of the human species at a given level of material activity. Legal institutions can and must be understood as tools used by society in achieving this ultimate aim. They are cogs in the whole mechanism of the production, consumption and distribution of social product —they are part of a total, though for Renner dialectical, so-

cial process. As Kahn-Freund puts it, legal institutions and norms, for Renner, are bricks which may be used to build a manor house in one age, a factory in another, a railway station in a third. But the number of bricks is limited– we may have to pull down the manor house to have the bricks for the factory. The brick, the legal institution, is a rigid abstract, a congeries of crystallized imperatives, in the Marxist sense a "fetish" like "commodity" is in economics. The lawyer as a lawyer is concerned with the internal structure and actual and possible logical relationships of these legal bricks. Their function, including the way they are brought together in the law at various times for various purposes, has to be understood through wider economic and social processes.

Although, or perhaps because, Renner insisted that legal norms were abstract and neutral, he did not see the norms themselves as epiphenomenal, as reflections of economic or social demands and requirements, as having no independent history or logic of their own. He rejected, in its crude form, the conception of an active, independent economic base and of a passive dependent legal super-structure, though he saw the dialectic of legal development as lying in the correspondence of infra-jural economic facts and the laws that regulate them. The norms of law were part of the fundamental organization and description of economic and social processes, not something to be derived from them. In contrast with Pashukanis, Renner does not see law as carrying an ideology, or view of the world; he has rather a tradesman's view of law as being necessary for any complex social organization and as being capable of a great variety of uses. He has also a sense, to which I shall return, of the inescapability of certain fundamental legal conceptions. Even in a society that has abolished private property in the means of production, distribution and exchange, the property norm will remain, for it is necessary to establish some nexus between man and things that will make someone responsible for dealing with them, that will thus determine the basis of responsibility for the thing (or process) and the harm it causes. For property in law is not only an advantage; it is also a disvantage, the basis of a duty of care and control, the basis of responsibility. There are norms, however, in the past and there will be in the future, that fall into *desuetude*, disuse.

Renner is often accused by contemporary Marxists of sharing in the vulgar economic reductionism of the Second International. It is true that like many of the leading and sensible figures of the Second International, he put primacy on the cumulative effect of gradual economic change and not on dialectical breaks, class struggles and

the directly political. But he did not reduce law to economics —on the contrary, he saw the description and the reality of economic processes as involving legal concepts and legal powers. He was interested in the relation between a legal norm and its substratum— the empirical economic and social reality, the process, to which it refers. But Renner's substratum was not a *cause* of the legal norm. It was rather what Kocourek refers to as an infra-jural fact, without the existence of which the norm would have no empirical reference. Renner did take over from Marx and develop very strongly the development of law, or rather the lack of development of law, could be out of step with material and social changes in the substratum to which legal norms refer. Thus the definition of property does not change, at least in continental law (where it has a rigid formal definition, unlike that of Common Law) between 1600 and 1900 or even between 400 and 1900. Yet the nature of things owned, the kind of control exercised over them, changes and law can and does lag behind in recognizing these changes. But in the end, as part of economic or social processes and as a social tool making them possible, it changes its character not by changing its norms but by rearranging their connections within the legal system, bringing subsidiary norms into play. It is the legal order —the complex of legal norms, concepts and institutions— that changes, not the fundamental legal norms or institutions themselves.

Law, for Renner, I have said, is a system of imperatives, a relationship of wills. Law therefore never deals with the relationships of men to things in themselves. It is a relationship between man and other men. Property, legally, is the power to exclude *others* from control over a thing or process.

In tracing the development of the character and function of property and ownership as a legal norm and social fact, Renner does, in fact, follow Marx and agree with Pashukanis in making a fundamental distinction between feudal or rather simple commodity-producing society, and bourgeois society, or as I would put it more generally, between *Gemeinschaft* and *Gesellschaft* organization of property. The property of pre-bourgeois society is the household which represents the union of all economic and social processes affecting that household: the owner of the houshold is its head, with responsibility for everything that goes on in the social life of the estate —the order of labour, the order of power and the order of goods, the allocation of resources and things, which are still cosumables or barterable for consumables rather than abstract commodities. The legal conception of property as the power to dispose according to your will and to

exclude others, and the Roman law insistence that what is owned must be a tangible thing, is still near to economic reality. The property norm and the substratum have not parted company, and property is thus still the central institution of private law capable by itself of providing an order of goods, in partan order of power and initially an order of labour. The household organizes production and reproduction, allocates labour and resources, educates, maintains discipline, cares for the sick and the old— all as a unified activity resting on the (Germanic) *potestas* of property owner as head of the household. The household is a microcosm of society, property functions, in law and in reality, as both private and public, serving as an organic concept in social life.

The fundamental change from pre-bourgeois to bourgeois society is that property becomes more abstract and that bourgeois society has no legally-sanctioned order of goods and no order of labour. Anyone may own and work freely, so far as law is concerned. It is the difficulty of providing a continuing and stable order of labour which led to the downfall of feudal society, which came to depend increasingly on independent artisans not regulated by the law of property itself, but by complementary norms, first derived from public guild law and then from the revolutionary law of free employment.

Renner's description of capitalist production and its social and political and legal consequences follows Marx's fairly closely and to that extent coincides with aspects of Pashukanis's analysis of bourgeois society. The capitalist order frees property from feudal restraints and especially from being seen as a continuing fund, as a real and tangible basis of social production and social role, which must pass to appropriate people, etc. Property becomes capital, an intangible thing, a mere exchange value or budle of exchange values, and all social activities are separated from each other, become formally and legally separable and distinct. Property becomes fragmented and no longer holds a social process of production together through being a corporeal object, an item of nature. The abstraction of property, its becoming an aggregate of values, results in the fact that the object, property in the economic sense, acquires many functions while the subject, the *persona* of law who is the property owner, is deprived of all functions. The share has specific economic functions —the owner of the share has none, except as an appendage of the share.

The result of all this for the legal order is that the legal property norm loses its centrality in the law, though it does not change its definition, much as the tangible object, the household, farm or later the factory building and the machine, loses its centrality in the eco-

nomic process. Economic property has become divorced from the owner and its economic function dissociated into partial functions. To assure capitalism of a legal order capable of carrying on as a framework for its social and economic activities, the property norm has to be supplemented by an unforeseen evolution of the contract of sale and purchase, the contract of employment and the loan, without which the property norm cannot perform its economic and social functions in a capitalist system of production. What were formally stopgaps in a legal system become institutions as important as property, and without which its capitalist social function can be understood.

The internal dynamic of capitalism, however, is leading to a certain socialization from within, to a weakening of the central premise of capitalism as a society of "private property". The complementary institutions of private law necessary to make the property norm perform its social function in capitalism have deprived the owners of their technical disposal of their property —the subject has become powerless. Secondly, the ever increasing ramifications of private property, their effect on society and the contradictions they produce, have led to an increasing recognition that economic property is not a private but a social function. "The common will has subjected property to its direct control, at least from the point of view of the law. Elements of a new order have been developed within the framework of an old society", Renner writes. The state plays a greater and greater role since the mid-nineteenth century, abandoning the mace and the scales for much more active intervention in economic life. Public law comes to supplement and displace much of private law. Contemporary property, though *de jure* private, has in fact ceased to be private; the tenement house serves a number of strangers and the railway serves all and sundry.

And so Renner concludes his sociological analysis of legal change triumphantly:

> Property is an individual right to an object, its exclusive subjecting to the individual will of the owner. But is there any individual disposition of his property on the part of the bank customer of a bank, of the share-holder or of the member of an association? Is it not the market which rules the most independent factory owner as well as the isolated peasant who lives alone on his solitary farm? The right of ownership is absolute: this means that it requires all other subjects of the norm to refrain from interference with the object. But the house-owner exercises his absolute right by taking in strangers from the street and setting them up in what is supposed to be his "own"; the landlord, by surrendering his possession completely to a tenant with his army of labourers, for ten or even for 99 years. The urban or agricultural tenant is protected in his possession: he can, with the help of the authorities, send away

the interfering owner who enters uninvited. The owners of a railway even invite all and sundry to roam over their property, the more the merrier. Property establishes complete power of the individual over the object; but an economic object, the substratum of the right, is not an aggregate of objects, not an independent microcosm, it is merely a particle of the whole of society's working order, admitting of one special manner of disposal only. Even the number of revolutions performed by a spinning wheel is prescribed by the requirements of industrial technique. The universal power of disposal given by the law is confronted, in economic reality, by a most limited scope for the exercise of this power. Property is universal with regard to subject and object, any individual may own any kind of object, and this was actually so in the period of simple commodity production, when every individual of full age had disposal of a microcosm which was made up of objects of every description. Now one part of the population, the great majority, owns nothing but a week's provisions, another part nothing but houses, another part nothing but machines and the raw materials to feed them, and still others nothing but printed paper. Modern possessions no longer form a cosmos, large or small, they are neither microcosm nor macrocosm. They are an amorphous agglomeration of possessions for the purposes of consumption and production, and in part they are mere "paper-possessions". These latter comprise shares in various railway undertakings at home and abroad, and in various manufacturing enterprises, government bonds and so forth: a loose pile of shavings which derives its unity only from its purpose, the purpose of securing average profits. These possessions represented by documents are in no way connected with the individuality of the owner, they can be increased as convenient. The legal character mask of a monarch is compatible with the economic mask of a distiller of spirits, the legal mask of a state minister is compatible with the economic mask of a gambler on the stock exchange, the ecclesiastic mask of an Archbishop is compatible with the economic mask of an employer of sweated labour. Such unity as modern possessions have, is a mere consequence of the legal abstraction which does not require a unitary substratum; their unity is artificial, easily permitting of arithmetical divisions by 2, 3 or 4 in cases of inheritance. Modern possessions form no material whole, only a mathematical sum.

Norm and substratum have become so dissimilar, so incommensurable, that the working of property, the way in which it functions, is no longer explained and made intelligible by the property-norm; to-day we must look to the complementary institutions of property. The lives of most of the people, even of the capitalists, are regulated by the law relating to landlord and tenant, their food is controlled by the law of the market, and their clothing, expenditure and pleasures are controlled by the law of wages. Property remains only in the background as a general legal presupposition for the special law that comes into operation, an institution of which we are dimly aware as the necessary consequence of the regrettable fact that there must be someone who is in the last resort responsible for the disposal of any object. But primarily disposal rests with the labourer in the case of the machine, the tool or the plough, with the tenant in the case of the house, and in general with the non-owner.

The subjective, absolute, and all-embracing power of disposal seems to the casual observer to be completely eliminated; yet it is perpetuated as the subjective, absolute, and all embracing power of the capitalist class to dispose of the whole of society, of man and matter and their annual surplus product.

> But this fact is hidden from a merely legal interpretation, it is not intended, not expressed nor reflected, by the norm. Norm and substratum can scarcely be said to correspond, they are no longer similar, and the present function of the norm is the result of a process in the course of which the relations of production and the relations of the law entered on a disparate development. The conflict between a growing (and partly completed) social working existence, although adapted to a previous system of private enterprise based upon economic microcosms, results in property assuming the function of capital. As the conflict increases, the functions of modern property become more and more distinct and differentiated. An increasing number of complementary institutions is developed, and it becomes more and more obvious that property itself has withdrawn into a position where it is solely concerned with disposal over, and acquisition of, values.[5]

Renner, like Pashukanis, though on the basis of different concerns and examples, sees the conception of private law and the social function of private law reaching its apogee in bourgeois society. But Renner is much more interesting and fruitful in pointing the way to the future –in seeing the law of the future as implicit in the changing law of the present and as resting on the internal contradictions of capitalist production. This contradiction for the purposes of law is the breaking of the nexus between private property and individual will, the growing strength of impersonal forces and arrangements, the conversion of the private into the public, the socialization of capitalism from within– a truth uncongenial to revolutionary Marxists but nevertheless a truth. That aspect of the matter was to be explored, soon after Renner's 1929 edition, by Berle and Means (*Private Property and the Public Corporation*), with their distinction between consumption property where the private property legal norm still has some bite or empirical reality and property for production and investment, which has become increasingly public and divested from individual ownership and control. It is in Berle and Means that the seeds of the theoretical conception of the managerial society and of non-property-owning ruling classes were developed. Renner, among others, pointed the way. Both he and Berle and Means have been proved right in essential respects, in their recognition of the declining, economic importance and legal centrality of private property as truly private –as the reification of individual will and individual control, as selfsufficient and easily demarcatable.

Renner's view of law, in its emphasis on internal rearrangement of the legal order through the complementary institutions is much more pluralistic than Pashukanis's. He sees law much more broadly as a systematic and orderly application of norms governing relations between

[5] Renner (English), pp. 289-291.

people and in respect of things. He puts no weight on one very important aspect of law —the one emphasized by Pashukanis— the resolution of disputes in terms of formal legal presuppositions, rights and duties, bound up with a formal conception of the legal subject. Renner's law is much more a system of social administration, though he and Pashukanis agree in seeing law of the bourgeois period as not successfully doing, and not seeking to do, the job of administration through the principal categories of private law and both see property as being converted, by the logic of the productive process of advanced capitalism, from a private to a public function.

Both Pashukanis and Renner, in my view, draw attention to important features of law and legal development. Both recognize a certain integrity and internal logic of legal norms and concepts; both see that they are not passive reflections but ways of shaping the world. But they are not all-powerful; they break down or lose their relevance before economic or social developments they cannot restrain. Law has to be seen socially and historically, but not as though it were a passive reflection of forces outside itself, as though there were no legal norms or concepts but only disguised non-legal interests and demands.

We do not, however, have to choose between Pashikanis and Renner in the way we have to choose between those who say all A are B and those who say some A are not B. Not only Pashukanis, but even the much more pluralistic Renner, present us with paradigms of law in the one case and legal development in the other —both ignore or minimize countervailing tendencies, developments that do not fit, aspects of law not easily related to the economic process. For law as a social institution is never a coherent totality; it has neither a determining essence from which all its features can be derived nor a single function, purpose or coherent plan. There are therefore many things to be said about law. Some will be more central, more important; others less. Nothing will be central and important for all purposes, for explaining all features of law.

One important merit of Renner's analysis, which Pashukanis's does not share, is that it enables us to recognize both continuity and change in law and to explain conceptually how this is possible. Revolutionary Marxists like the doctrine of the clean break; they have always been uncomfortable with Renner's belief in an evolutionary path to socialism, in the gradual socialization of capitalism from within. But the recognition of legal continuity and even of a certain convergence between law in Marxist-socialist and contemporary non-socialist societies becomes inescapable when we examine the legal systems and legal theories of both groups.