
Problems of the State:

Law, State and Class Struggle

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I. INTRODUCTION

This article sets out to examine the way in which law operates to maintain class domination. The argument that is developed shows that law should not simply be regarded as part of the coercive armoury of the state; but also must be understood as making a major contribution to what will be called 'ideological domination'. Ideological domination consists of those processes which produce and reaffirm the existing social order and thereby legitimise class domination. The processes involved in creating and reproducing ideological domination play a major part in ensuring the continuation of capitalist social relations.

There has been relatively little attention paid by Marxists to law. This absence of discussion has resulted in a tendency for the more obvious repressive characteristics to be stressed; and as a consequence the more pervasive contribution of law to the maintenance of capitalist society has not been sufficiently explored. The analysis of law in this wider context is of considerable political importance. Marxists are increasingly being forced to come to grips with the fact that modern capitalism has exhibited very considerable 'staying power'. In the period since the Second World War capitalism in Western Europe has shown what may be best described as relative stability; that is to suggest that despite the occurrence of very deep economic, social and political crises the capitalist social order in the major Western European states has survived substantially intact. This article is concerned to examine the extent and the manner in which legal systems contribute to the perpetuation of capitalist systems.

II. STATE AND LAW

In class societies the economic and social dominance of an exploiting class does not sustain itself automatically. The exploiting class always strives to turn itself into a ruling class by means of an institutional structure, the state, which operates to sustain and to reproduce that position. While the state is a product of class antagonism it takes on the appearance of being an entity which stands above society and which embodies the interests of the community as a whole. This apparently *universal* quality is especially significant with reference to legal systems:

"Right, law, etc. are merely the symptom, the expression of *other* relations upon which State power rests. . . . These actual relations are in no way created by the State power; on the contrary they are the power creating it. The individuals who rule in these conditions, besides having to constitute their power in the form of the *State*, have to give their will, which is determined by these definite conditions, a universal expression as the will of the State, as law."¹

The distinctive feature then of legal systems of class societies is the fact that they embody the material interests of the ruling class in a universal form, and thus present law as the embodiment of the interests of the community as a whole:

"In a modern state, law must not only correspond to the general economic condition and be its expression, but must also be an *internally coherent* expression which does not owing to inner contradictions, reduce itself to nought. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class—this in itself would offend the 'conception of right'."²

This striving for 'internal coherence', in which law comes to be seen as the embodiment of universal notions of 'justice' and 'right' needs to be explored. At the hands of bourgeois legal and political theorists it has been used to provide an ideological dogma, important in bourgeois political and legal theory, of the doctrine of the 'separation of powers'. The essence of this view is that the character of the democratic state is defined as one in which there exists a separation between the major components of the state. Specifically it is argued that not only is there, but also that there ought to be, a separation between the legislature, which makes the laws, and the judiciary, which apply those laws.

¹ Marx & Engels, *The German Ideology*, p. 366 (Moscow 1968).

² Engels, *Letter to C. Schmidt*, October 27, 1890. Marx/Engels *Selected Correspondence*, p. 504 (Moscow 1960).

The Separation of Powers

The doctrine of the separation of powers has played, and continues to play a central part in bourgeois theory of the law and the state. There has been a tendency for Marxists in seeking to expose the ideological character of this doctrine to react against it by asserting the identity of the state and law. Thus the legal system has been presented simply as the direct and totally subservient agent of the state. Such a position is too simple, but more importantly it obscures the real class character of the legal system as a mechanism whereby the existing form of class domination is perpetuated and reproduced.

We need to start by asking, how does it come about that a separation appears to exist between law and state? Engels provides a useful starting point:

“But once the state has become an independent power vis-a-vis society, it produces forthwith a further ideology. It is indeed among professional politicians, theorists of public law and jurists of private law that the connection with economic facts gets lost for fair (sic). Since in each particular case the economic facts must assume the form of juristic motives in order to receive legal sanction; and since, in so doing, consideration of course has to be given to the whole legal system already in operation, the juristic form is, in consequence, made everything and the economic content nothing.”³

If these ideological functions are to be fulfilled they cannot operate exclusively as ideological forces, they must find some expression in the actual practice embodied within the legal system. As a consequence the legal system operates in a manner which cannot be explained exclusively by reference to the dictates of the state as a whole.

Contradictions within the State

The doctrine of the separation of powers appeals to the independence of the judiciary. Yet this independence is clearly very restricted. Judicial appointments are made by the highest representatives of the political apparatus of the state.⁴

But what does need to be stressed is that even the relative degree of autonomy sets up stresses and contradictions within the state as a whole. Decisions by courts do not always please the holders of state power. The protracted struggle between the courts and Nixon throughout the ‘Watergate affair’ is perhaps the most important recent example of such

a tension in operation, in which the conflict between court and state contributed in no small measure to the downfall of Nixon.

But the tension between courts and state may also have advantages for the holders of state power. The institutional complexity of the English legal system allowed the government to brush the cobwebs off the Official solicitor whose intervention facilitated the release of the ‘Pentonville 5’ in 1972 when faced with the prospect of a General Strike. Frequently it serves as a convenient smoke-screen behind which to hide; Roy Jenkins, as Home Secretary, has consistently used the excuse of separation between government and courts to refuse to intervene and secure the release of the Shrewsbury pickets.

This discussion points towards the general conclusion that the relationship between the state and the legal system must always be a matter for concrete examination. While the general dependence of the law upon the state as a whole is an important proposition within Marxist theory, this must not be treated as if it suggested a complete identity between law and state.

III. DOMINATION AND HEGEMONY

Domination is a universal feature of class society. It consists in the subjection of one or more classes to another class (or grouping of classes) in such a way that exploitative relations are perpetuated. But the form that domination takes varies with the form of the exploitative class relations; thus the domination of slave by slaveholder differs from the employer’s domination of the factory worker. Domination must be viewed not as a single act but as a process that reproduces the conditions for exploitative social relations.

Domination can only be based for very short periods of time upon direct physical coercion. Even the most barbarous and coercive systems do not rely exclusively upon coercive violence. Direct coercion will often play a major part in the establishment of a new system of class power, but, however much it continues to depend on physical repression, it will strive to promote other means of consolidating its domination.

An extremely fruitful approach to the discussion of domination is provided by the early leader of the Italian Communist Party, Antonio Gramsci, who made use of the concept of ‘hegemony’. He used it to identify the processes which create:

“the ‘spontaneous’ consent given by the great mass of the population to the general direction imposed on social life by the dominant fundamental group (i.e. the ruling class)”.⁵

³ Engels, *Ludwig Feuerbach and the End of Classical German Philosophy in Marx and Engels: Selected Works*, Vol. II, pp. 396-97 (Moscow 1958).

⁴ In Britain on the initiative of the Lord Chancellor, himself a member of the Cabinet and as such a directly ‘political’ appointment. In the United States the political character of judicial appointments is even more apparent.

⁵ Gramsci, A. *Prison Notebooks*, p. 12 (Lawrence & Wishart 1971).

The vital characteristic of 'hegemony' is that it is an active process; it is concerned not merely with the *fact* of consent, but focuses upon the creation and the mobilisation of that consent. One major facet of the class struggle that takes place within capitalist societies is the continual struggle for influence over the ideas, perceptions and values of members of the different classes. In Britain the maintenance of capitalism would be impossible unless the capitalist class was able to decisively influence the ideas, attitudes and consciousness of the working class.

It is important to stress that the ideological struggle is not simply concerned with the conflict between general theories of society. It is concerned with every aspect of the way in which people think about, react to, and interpret their position in class society.

IV. COERCIVE AND IDEOLOGICAL DOMINATION

In examining the part that is played by law in the class struggle it is useful to distinguish between two different aspects. Law plays an important role in sustaining the domination of the ruling class because it operates both as a form of *coercive domination* and of *ideological domination*. It will also be necessary to stress that they are not simple alternatives. I hope to show the way in which these two elements are closely bound together and as such contribute to the special effectiveness of law as a mechanism of social order.

Law as Coercion

Let us first consider the coercive character of law. The legal system is able to call upon the organised power of the state. This repression operates both through specific institutions, which range from the courts themselves to the prison system, probation service, etc. In addition it also operates more generally through the police system which operates with wide-ranging powers, sanctioned by law, but able to act with a very considerable degree of autonomy.

Legal coercion operates at a number of different levels. Of greatest importance is the application of coercion to protect the *general conditions* of the capitalist order. First and foremost coercion is applied to protect and reinforce the property relations of capitalist society. There exists an increasingly complex body of 'offences against property' which are concerned with the defence of private property. Firstly they are important in demarcating the 'lawful' from the 'unlawful'; they differentiate between the unlawful appropriation of property, the acts of the 'criminals', and the lawful forms of appropriation that are the hallmark of the

capitalist system. Just how close is the dividing line between lawful and unlawful appropriation has been clearly revealed by recent bribery and corruption cases. But secondly, it is not only the offender that is coerced, but all members of society because the coercion of the offender reinforces the values, attitudes and behaviour associated with the existence of private property. It is for this reason that it was stressed above that the coercive and ideological functions of law are closely related.

While the criminal law protects the property interests of the capitalist class it operates more generally to protect the 'private property' of all members of society. Indeed it is important to recognise that the vast majority of 'property offences' are committed, not against the property of the capitalist class, but rather against the property of non-capitalists. Property offences are usually directed against the privately owned consumption goods of working people.

Another way in which legal coercion is applied to defend the *general conditions* of capitalist society is with respect to 'offences against the person'. Again this area of the criminal law does not merely act against offences against members of the capitalist class. The significance of this type of legal coercion is that some level of general social order is a necessary precondition for the maintenance of its specifically capitalist content.

Examples of Legal Coercion

One of the most important manifestations of legal coercion is the application of law for the direct protection of the state itself. The state has at its disposal a veritable armoury of measures that are ready to be invoked to defend the existing political order. These range from a number of traditional offences such as treason, treachery and sedition (which have been invoked fairly infrequently in the recent past), through such legislation as the *Official Secrets Acts* of 1911 and 1920 and the *Incitement to Disaffection Act* 1934, to the wide ranging emergency powers which the ruling class has gradually accumulated. The *Emergency Powers Acts* of 1920 and 1964 give very extensive powers to the civil and military authorities to intervene in the class struggle. These powers have been used on no less than eight occasions since the War; on four of these occasions by the Heath government against dockers, power supply workers and the miners; Labour Governments have not shrunk from invoking them.

In the recent past Northern Ireland has been a fertile source of emergency regulations. The *Northern Ireland (Emergency Provisions) Act* 1973 and the *Prevention of Terrorism (Emergency Powers) Act* 1974 have aided the British government's struggle

against the Irish people and their scope has been extended to the mainland.⁶

The ruling class also has at its disposal a wide range of legal devices that can be used against offences against public order. These range through riot, affray, unlawful assembly and breach of the peace. Of particular importance is the *Public Order Act* 1936, supposedly introduced to curb the Fascists, but used systematically against the Left. It is interesting to observe the skill of the police and courts in making use of 'appropriate' legal mechanisms. A good example has been the recent resuscitation of the *Conspiracy and Protection of Property Act* 1875.

In protecting the existing political order the law does not only have at its disposal the wide ranging powers contained in the legislation discussed above. The general principles of criminal law offer not only ample scope, but also special advantage. It is often in the interest of the ruling class to seek to depoliticise the class struggle. One of the means that is frequently invoked is to charge the 'political offender' with ordinary crimes. This can be achieved by using a charge that is incidental to the main social or political issue involved; the most favoured police strategy being to invoke charges involving or implying violence. A very good example of this technique is to be seen in the trial of the Shrewsbury pickets. The use of such charges allows the political issues to be ignored whilst branding the defendants as 'common criminals', a tactic favoured by Roy Jenkins and Frank Chapple in their attacks on the Shrewsbury pickets.

A related prosecution strategy is to use blanket charges; much in favour in the recent past has been the use of conspiracy charges. These are not only significant in that they allow the prosecution to evade some of the restrictions with regard to evidence and procedure that normally apply. But in addition, through the orchestration by the mass media, to create impressions of the existence of an unspecified 'threat to law and order'.

Authoritarianism and Legitimacy

The legal order has at its disposal this powerful armoury of techniques of legal coercion that enable it to directly intervene in the class struggle to defend the interests of the existing order. This direct intervention in the class struggle stands out most sharply in the case of industrial and trade union law.⁷ The history of trade union law, from the

Combination Act 1800 to the *Industrial Relations Act* 1971, is testimony to the attempt to provide a legal framework favourable to the interests of capital as opposed to those of labour. Yet it is also testimony to the extent of the resistance which over the period as a whole has not only forced tactical retreats, but has also witnessed significant advances in the legal positions of trade unions. I will return later to take up this question of law as an arena of class struggle.

What stands out in sharp relief is the extent to which the ruling class utilise a legal framework for sustaining and buttressing their class interests. But a certain degree of care is needed in drawing conclusions from this common ground. The argument is frequently advanced that in periods of crisis the capitalist class resort to an increasingly repressive strategy and embark upon major attacks upon civil liberties. This type of analysis is very clearly presented in John Hostettler's article *Trends to Authoritarian Rule in Britain*.⁸ This line of argument is sometimes presented in such a way that it obscures important contradictory dimensions, which if correctly considered throw much light on the specific role of law within capitalist society.

Resort to Fascism not Automatic

The lurch to legal authoritarianism is checked by an equally strong need on the part of the ruling class to maintain the legitimacy of their class rule. This contradiction is not an interaction between two equal forces which smoothly balance each other out; hence there are periods in which there are major shifts towards authoritarianism, but equally there are periods of movement towards more liberal and less coercive forms. The particular result at any point in time is a complex result of the level of class struggle itself.

There is a more general, and possibly more fundamental, political point that underlies this discussion that needs to be more fully discussed. Lenin was correct when he argued that:

"bourgeois states are most varied in form, but their essence is the same; all these states, whatever their form in the final analysis are inevitably the dictatorship of the bourgeoisie."⁹

Yet there has been a tendency (which is present in Lenin as well as in others) to regard bourgeois democracy as simply a sham or fraud designed to conceal the class character of the rule of the bour-

⁶ For details on the use of law in Northern Ireland see Boyle, Hadden and Hillyard *Law and State: The Case of Northern Ireland* (Martin Robertson 1975).

⁷ For a concise history of trade union law see K. W. Wedderburn, *The Worker and the Law* (Penguin 1965).

⁸ *Marxism Today*, December 1973.

⁹ Lenin, *State and Revolution, Collected Works*, Vol. 25, p. 413.

geoisie. Capitalism has been in existence long enough to demonstrate that its most persistent, stable and 'successful' form has proved to be the *bourgeois democratic* political form. Thus for the bourgeoisie whatever pressures manifest themselves towards the 'authoritarian solution' there is at the same time a profound concern to sustain the legitimacy of the capitalist order.

This analysis does not lead to the conclusion that the resort by the ruling class to fascism or to military coup is impossible. The tragic example of Chile is too urgent to allow such a naïve conclusion. But this analysis does insist that the resort to fascism is not the automatic response of a capitalist class in crisis. We should have no illusions about the fact that the capitalist class has been prepared, in the final analysis, to abandon bourgeois democracy. But we should be equally insistent that the interests of the bourgeoisie have been best served where they have been able to sustain their class rule within the bourgeois democratic form and that the ruling class itself has an interest in the preservation of bourgeois democracy.

The legal order plays a central role within bourgeois democracy. Thus while the coercive role of the legal order has been emphasised in the first half of this article it is now necessary to draw attention to and to examine the contribution made by the legal system to sustaining the legitimacy of the bourgeois democratic order. In other words it is necessary to discuss law as a method of ideological domination.

VI. LAW AS IDEOLOGICAL DOMINATION

Repressive and ideological domination are in no sense alternatives. On the contrary they are interdependent; they interact and reinforce each other. While the coercion of the criminal law is directed against those it punishes, its ideological effects are directed much wider. For example the jailing of the Shrewsbury pickets was legal violence against the accused which was concerned with more than 'detering' others; it was an ideological offence against the strategy of the 'flying picket' developed by the miners and applied so effectively by building workers.

Ideological domination describes those activities and processes whereby the assent to the existing social order is produced and mobilised. The notion of assent embraces both the idea of legitimacy as active assent and also acceptance as the passive form. The means by which assent is produced are ideological in that it involves the production and dissemination of ideas which affect social practice through the determination of the social consciousness of individuals, groups and classes. This process is one of domination in that it involves two elements; firstly, a differential ability of groups and classes in society to produce, communicate and disseminate

ideas and, secondly, these ideas, directly or indirectly, have consequences for the maintenance of the existing social order.

Law is ideological in that it conveys or transmits a complex set of attitudes, values and theories about aspects of society. Its ideological content forms part of the dominant ideology because these attitudes, values, etc. are ones which reinforce and legitimise the existing social order.

Legal Rules and Social Relations

The most pervasive ideological effect of law is to be found in the fact that legal rules and their application give effect to existing social relations. The rules of law affirm the social and economic relations that exist within capitalist society. Thus the law of property is not only based upon the inequality of property ownership but it reinforces it by allowing and facilitating the owners of property to make use of that property as capital. The complex of legal rules relating to mortgages, trusts, leases etc. not only allows but also enables property to be used as capital. The law relating to contracts and commercial activity gives effect to the mechanisms of the market.

Similarly labour law facilitates the capitalist form of the relationships between labour and capital; it gives effect to the economic fact of the dependence of the majority upon the sale of their labour power. It embodies the economic power of capital over labour by granting to the employer rights regarding not only the control of labour but also over the hiring and firing of labour.

Rules of law impinge on almost every form of social relations. For example, family law, despite the reforms of the past decades, incorporates the fact of the dominant role of the husband over the wife, of the parents over the children, Likewise the law of landlord and tenant underlines the power of landlords over tenants in regard to the supply of housing. It is important to stress that the legal rules do not *create* the social relations that make up capitalist society. But by stating them as principles and by enforcing them the law operates not only to reinforce these relations but also to legitimise them in their existing form. This function is further advanced by the role of law in conferring authority upon officials such as the police, magistrates, etc.

The rules of law not only define social relations but confer rights and powers upon certain categories of individuals. Thus, for example, landlord and tenant law not only incorporates the economic fact of the monopolisation of housing by private interests, but it also legitimises that economic power by granting rights to landlords to extract rent, to impose conditions and to evict tenants. The legal system not only reinforces existing social and

economic relations, but in addition it confers authority upon dominant social interests.

Mutual Interests of the Bourgeoisie

One important aspect which should not be overlooked is the extent to which law operates to regulate the mutual interests of the bourgeoisie. It provides a mechanism for the resolution of disputes and conflicts that arise *between* capitalist interests:

“The administration of . . . civil justice is concerned almost exclusively with conflicts over property and hence affects almost exclusively the possessing classes.”¹⁰

Company law, for example, is concerned in the main with the respective interests of shareholders and directors. Much commercial law is likewise concerned with the interests of merchants, middlemen and dealers.

The law regulating the interests of the propertied classes is detailed and complex, but it has a significant common core. The operation of capitalistic functions is facilitated where the law provides a degree of certainty and predictability. What bourgeois legal theory fails to recognise is that it is only that element of law which regulates the mutual interests of the bourgeoisie, and not the whole of law in a capitalist society that exhibits this quest for certainty.

Legal Rules and Appearance of Social Relations

It is necessary to consider more closely the nature of the correspondence between legal rules and the social relations to which they relate. Legal rules do not simply ‘reflect’ social relations. The rules of law have an added ideological dimension. In order to explain this it is important to recall that a central feature of capitalist society is that its essential features are obscured or concealed by the very nature of the operation of the capitalist economy. Marx insisted on the need to distinguish between how things appear (the ‘appearance’ or ‘phenomenal form’) and how they really are (‘real substratum’ or ‘essence’).

The ‘real’ relations that exist find themselves expressed in legal rules in a distorted or truncated form because the law gives effect to only the appearance (‘phenomenal form’) of social relations. This theoretical point could be taken further by applying the argument developed by Marx in the famous section on ‘the fetishism of commodities’ in *Capital* Vol. I in which he shows how our comprehension of commodities embodies not the real

social relations of production which create them, but simply as things; and as a result what are relations between people come to be seen as relations between things.

So legal rules appear abstracted from social relations, and are therefore a ‘fetishistic’ expression of social relations. Legal rules are further divorced from the social relations to which they refer because they (like the state itself) appear separated, independent of society; they seem to have an independent origin and life of their own. Thus as ideological forms of social relations legal rules are doubly removed from the real world.

Legal rules express the appearance of social relations:

“This phenomenal form, which makes the actual relations invisible . . . forms the basis of all the juridical (legal) notions of both labourer and capitalist, of all the mystifications of the capitalist mode of production, of all its illusions as to liberty.”¹¹

Marx showed how our initial perception of the capitalist economy focuses upon the process of circulation and exchange, and thus ignores the production process itself. It is significant to note that legal rules follow this pattern and reduce social relations to a system of exchanges. The key legal concept of bourgeois law is that of *contract*. All the most important relations within capitalist society are moulded into the form of contractual relations.

Principles of Contract

By treating social relations as ‘contracts’ bourgeois law strips them of their most important characteristics. Perhaps the most important example is in the labour relationship between employers and workers. At law the labour relation is a contract between individual employer and individual employee; they are therefore presumed to bargain over the terms of the contract. This individualising of the contract of employment by focusing on it as an individual exchange excludes the social character of the relation between capital and labour. It is incapable of embracing the increasingly collective determination of labour relations through negotiations between trade unions and employers’ federations. English law has reduced itself to great confusion in attempting to preserve the ‘individual contract’ whilst taking some note of the real ‘collective contract’.

It is not only economic relations that are reduced to contractual form. A wide range of other social

¹⁰ Marx, *Critique of the Gotha Programme* in Marx & Engels *Selected Works*, Vol. II, p. 34 (Moscow 1958).

¹¹ Marx, K., *Capital*, Vol. I, p. 540 (Moscow 1961); my addition in brackets.

relations are similarly treated. Thus, for example, the social institution of marriage is enshrined in law as a contract within which the 'parties' have obligations which derive from the contract, and the 'breach' of which can result in the contract being terminated, i.e. in divorce. Yet by expressing the marriage relationship in contractual form the law inadvertently exposes something of the real economic basis upon which the bourgeois marriage is based, founded upon the economic dependence of women.

The principles of contract have been so pervasive that they have been developed into a contractual ideology which continues to have wider ranging influences. Contractual ideology leans heavily upon the notions of freedom and equality. But the 'freedom' and 'equality' to which it refers is purely *formal*; that is individuals are regarded as free if there is no legal bar to them entering into a contract, and are therefore deemed to be equal. It is a notion of equality brilliantly captured by Anatole France:

"The law in its majestic impartiality forbids rich and poor alike to sleep under bridges, to beg in the streets and steal bread."¹²

These formal notions of freedom and equality are characteristic of bourgeois legal and political theory. They do violence to social reality because they are incapable of grasping the real inequality and lack of freedom which results from the dependence of all workers upon the sale of their labour.

Depoliticisation

This discussion has focused on the way in which the rules of law, far from being pure or independent creations, are but a distorted expression of the existing social relations which are thereby reinforced and legitimised. This ideological character of legal rules is extended by two further considerations.

One of the difficulties in penetrating the ideological form of bourgeois law stems from the fact that it operates by abstracting the cases that come before the courts from their social and class context. They are thereby reduced to the status of being purely *technical* issues, apparently divorced from any political or ideological overtones. If, for example, a householder inquires why it is that tax relief is granted upon mortgage payments but not upon rent, the law replies that it is not a question of relief upon mortgage or rent, but upon interest repayments. By focusing upon a technical distinction the law thereby obscures the social and economic reality.

Secondly, the law further depoliticises social issues through the universal form of many legal

rules. The fact that rules of criminal law protect the person and property of *all* members of society not only hides the fundamental class differences, but it also treats the capital of the employer and the personal belongings of the worker as if they were the same. The ideological significance is that it induces the view that all classes in society have a common interest in the protection of private property. Thereby the legal system is aided in fulfilling the ideological function of asserting the unity of interests of all classes. The ideology of the 'rule of law' operates to assert and reinforce, and even seeks to celebrate, a social unity and cohesion in the face of the manifest class differentiation of capitalist society.

Bourgeois Legal Ideology

There is one further facet of the ideological character of law. It is directly ideological in the sense that the legal system propagates a range of views about the nature of the social and political system. This general ideological character of law is contained in what I will call 'bourgeois legal ideology'.

Bourgeois legal ideology is the fundamental component of the justification of the bourgeois democratic state; many of its elements directly enter into the consciousness of wide sections of the population. The central element of this ideology is the doctrine of 'the rule of law'. Its classic expression is to be found in Dicey:

"When we speak of the 'rule of law' as a characteristic of our country we mean, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm. . . . With us every official, from the Prime Minister down to a constable . . . is under the same responsibility for every act done without legal justification as any other citizen."¹³

The fundamental tenet is that both the ruled and the rulers are equally subject to a common system of law. The 'law' itself is thus viewed as something separate from the interests of classes. As such it plays a central role in the legitimisation of the bourgeois democratic political order.

One particularly interesting feature of bourgeois legal ideology in the context of English law is the way in which it holds itself out as the protector of the individual against the incursions of the state. This antithesis between individual and state has a lengthy history in bourgeois legal thought. Its roots were in the historical alliance between the common

¹² Exact source not known.

¹³ A. V. Dicey *Introduction to the Study of the Law of the Constitution* (1885) (Macmillan 1967) p. 193.

law judges and the bourgeois interests against the absolutism of the Stuarts. It became more fully elaborated during the nineteenth century as the legal reflex of laissez-faire ideology. And in the twentieth century it has been used as the basis of anti-state attitudes which characterise one element of the conservative reaction to the growth of the Welfare State.

Bourgeois Assumptions

In addition to explicit constitutional principles bourgeois legal ideology consists of a range of important background or implicit assumptions. The intention is only to roughly sketch some of these assumptions, but at the same time to argue that the more the 'law and order' debate moves into the centre of the political stage the more important it becomes to develop a systematic critique of bourgeois legal ideology.

Almost all discussion about law is based upon the assumption that the existence of law is an inevitable or natural feature of social life. Hence law becomes identified with 'civilisation'; the absence of law is seen as synonymous with the absence of civilisation. The classic expression of this assumption is the equation of the absence of law with anarchy; in its classical form in the political philosophy of Hobbes the absence of law implies a condition of 'the war of all against all.' The whole of society is presumed to have an interest in the existence of law, and is therefore closely connected with the 'universalism' of law discussed above.

A closely associated assumption insists upon the inherent rationality of law. The existence of rules of social life brought together or codified as law is presented as socially desirable in that it makes social life more certain and predictable. Social life is viewed as if it were a game or a sport in which it is essential that all the 'players' adhere to the same rules; without this common set of rules social life would revert to anarchy. Such an attitude places stress on the desirability of rules *as such*, and hence leaves unquestioned the content of those rules and any questions concerning the social and economic interests that are embodied in the rules.

Flowing directly from the insistence upon the naturalness and rationality of law is the insistence that adherence to law is natural, and as a corollary, that non-adherence to law is unnatural or deviant. The very existence of a state is treated as a sufficient condition to make obedience to law obligatory for all citizens. The assumption is made that the offender who violates the law is a deviant whose deviation stems from some pathological condition. While the nature of the pathology appealed to has varied, from the genetic inferiority of the 'lower orders' to deficiencies in 'socialisation', the same assumption of the naturalness of obedience to law

persists. It is interesting to note that in the recent past this essentially conservative tradition has come under increasing attack from criminologists, and that radical theories of crime are being developed which draw upon Marxism.¹⁴

These interrelated attitudes and assumptions about law are not usually expressed in a coherent form; they are a cluster of ideas, but they add up to an assertion of the 'sanctity of law' which forms the heart of the pervasive and powerful 'law and order' ideology. This ideology finds expression not only in the moralising editorials of the *Times*, but also forms an important part of widespread and diffuse social attitudes. The essential substance of these views is that they appeal to the sanctity of law, elevated above social life itself, and thereby ignore the class content of law and its role in legitimising the existing forms of class domination.

Jurisprudence

There is one final aspect of the ideological character of law that needs to be mentioned. The most formal and systematic expression of legal ideology is provided by jurisprudence or legal theory. The history of jurisprudence consists in successive attempts to provide a justification for obedience to law. The central concern has been to provide a socially persuasive account of the legitimacy of the existing legal order, and through that of the social order itself. However, a very interesting development has occurred within jurisprudence which is worth noting. Increasingly a number of liberal academics have been afflicted with growing self-doubt and disillusionment with the whole edifice of law, and are increasingly aware of a very real decline in the legitimacy of the existing legal order.¹⁵

The operation of law is, therefore, not confined to simply giving effect to the direct and immediate interests of the ruling class. It must be understood as having an ideological function of an extensive character. Within capitalist society the legal system not only provides substantial ideological underpinnings to the existing capitalist organisation of society. It also provides a consistent and coherent legitimisation of a multitude of key institutions and principles that are central to the smooth operation of a system of capitalist social relations.

It is this ability to integrate two critical functions, on the one hand to give practical effect to the interests of the dominant class, and, at the same time,

¹⁴ See, for example, Taylor, Walton and Young—*Critical Criminology* (Routledge & Kegan Paul 1975).

¹⁵ This anxiety is explicitly found in such books as Eugene Rostow—*Is Law Dead?* (New York 1970), and Robert Wolff—*The Rule of Law* (New York 1971).

to provide a justification or legitimation for these interests in terms of some higher and apparently universal interest of all classes that demonstrates the real power and influence of law in capitalist society.

VII. LAW AND CLASS STRUGGLE

Our attention has been focused on the part that law plays in the process of reproducing capitalist social order. Yet law is not simply an instrument which can be wielded at will by an omnipotent ruling class. Precisely because it is an active element in the class struggle, it is at the same time affected by and involved in the class struggle. The law and the legal system form part of the context within which the class struggle takes place, and it is itself an arena in which that struggle occurs. To recognise that class struggle occurs *within* the legal system is not to suggest that the legal system is some neutral territory over which the class struggle wrestles for control. As a major component of the state law is necessarily part of the process through which the ruling class seeks to preserve its domination.

To argue that class struggle occurs within law is only the first step in examining the way in which class struggle makes itself evident within law. It has been argued above that law plays a central part in bourgeois democratic society, not only in theory but also in practice. The form taken by the class struggle has its boundaries broadly defined by the existing law. Thus, for example, trade union activity in Britain is pursued by forms of struggle that are recognised as being lawful. Some of the most important stages in the history of British trade unionism have been periods when struggle has occurred around attempts by the ruling class to narrow or restrict this lawful sphere of operations. The struggle against the Industrial Relations Act was a classic example of this type of struggle.

While law plays this important part of defining the parameters of class struggle, it also needs to be recognised that it does not necessarily stay confined within this framework. Indeed a change in this boundary or its breach will normally mark a critical phase in the class struggle. For example, a very important stage of the struggle against the Industrial Relations Act occurred in the months after it had been put on the statute book. The right-wing inside the Labour Movement argued that despite the objection they had to the Act it was now 'law' and had to be accepted. The critical phase was the decisions made in the individual unions and within the TUC (Croydon and Blackpool Congresses 1971) as to whether they would 'register' under the Act, and thus come within 'the law', or whether to remain unregistered and to conduct trade union activity without the forms of protection that had been established since the beginning of the century.

Struggle for Legislative Reforms

Not only does law play an important part in defining the parameters of the class struggle, but many important stages in the class struggle take place around demands for legislative reforms. Marx himself gave considerable attention to one very important example of such struggles, the early Factory Acts (in particular the *Factories Regulation Act* of 1833). His chapter in *Capital*, Volume I, on 'The Working-Day' is a classic study of the interrelation and interaction of class forces in a struggle for legislative control of working hours.¹⁶

"The creation of a normal working-day is, therefore, the product of a protracted civil war, more or less dissembled, between the capitalist class and the working-class."¹⁷

Elsewhere he summarises the significance of the victory underlying the Act in the following terms:

"it was the first time that in broad daylight the political economy of the middle class succumbed to the political economy of the working class."¹⁸

His analysis makes clear that the Factory Acts were not simply the direct result of class struggle between the capitalist and working classes. Two particular features of the analysis are worth drawing attention to. The first concerns the relationship between the state and the capitalist class. The advent of machinery and industrial production in the textile industry gives rise to a veritable orgy of exploitation, in which the working-day is extended to such lengths that a real threat is posed to the survival of the work force. At this stage the state represents the collective interests of capital, as distinct from the interests of individual capitalists.

Secondly, he stresses the divisions between the various sections of the capitalist class. Not only is there the division between the landed and industrial capitalists, which led the Tories as representatives of landed capital, to support factory legislation. But more important are the divisions between the more advanced sections of industrial capital and the smaller, more traditional employers. The passage of the factory acts not only represented a victory for the working class, but also for the more advanced sections of capital, who triumphed over their less efficient rivals. The overall analysis therefore brings out with great sharpness the way in which the

¹⁶ Marx, *Capital* I, Chapter 10, pp. 231-302 (Moscow 1961).

¹⁷ Marx, *ibid*, p. 299.

¹⁸ Marx, *Inaugural Address to the Workingmen's International Association* in Marx & Engels *Selected Works*, Vol. I, p. 383 (Moscow 1958).

development of the productive forces, in association with the more or less conscious struggle of various classes, finds its expression in legislation.

In his discussion of factory legislation Marx showed clearly how each legislative victory was only partial; whilst each was a major practical and ideological victory, the employers, with the direct complicity of the magistrates and judges, impeded the effective enforcement of the provisions of the statutes.

VIII. CONCLUSION

In this article I have stressed the importance of law in capitalist society, and as a consequence to argue that it is a question which requires a more thorough analysis by Marxists. While this article does not complete that task, it has sought to raise a number of questions, and to stress a number of areas for discussion. Some of these have been of a general nature which revolve around an assertion of law as an important agency in the maintenance of capitalist social relations. In particular I have argued the need to understand the significance of law as a system of ideological-coercive domination. It is through this emphasis on this combined process, rather than as two distinct or separate processes, that we can achieve a better understanding of the specific functioning of law within capitalist society, and is also of assistance in achieving a fuller theoretical treatment of the capitalist state.

The legal system within the bourgeois democratic state operates in such a way as to legitimise the class rule of the bourgeoisie. This legitimisation involves not only the recognition and reinforcement of the social and economic relations of capitalism. It also encompasses the reification of law (through which law appears to be a power above and outside society) in which the social and political relations of capitalist society are presented as natural and universal. Law then operates to provide ideological reinforcement to those processes which make the reality of class and class power less visible.

The really difficult question is posed by the fact that bourgeois democratic society is not entirely a facade and a fraud. It it were its veils and deceptions would have been stripped away long ago. Its strength and persistence result from the fact that in varying degrees it has successfully combined the continued social, political and economic dominance of the capitalist class with, at the same time, a significant level of involvement of the exploited classes sufficient to ensure a relatively high level of acceptance of, and even commitment to, the existing order.

Within the bourgeois democratic state law provides, alongside those aspects which reinforce the domination of the ruling class, an important set of rights, protections and powers which in

varying degrees incorporate certain class interests of the non-ruling classes. The most obvious examples of these are such things as the right to vote, to form trade unions, to take strike action, etc.

It is important to recognise that most of these have been secured as the result of class struggle. But these facts should not lead us to view them simply as concessions wrung from the capitalist. Once granted they become woven into the fabric of bourgeois democracy. It should also be noted that we need to recognise that the range of legal rights which may be used to the advantage of the working class extends beyond the range of the more obvious 'political' rights mentioned. The law confers rights and protections upon all classes as 'citizens' in bourgeois democracy. It is of course important to stress the inequality of their application and the inequality of access to legal redress. Yet this does not negate their political and ideological importance. Their very existence plays a significant part in securing the acceptance of, and allegiance to, the existing capitalist social order.

Concluded from page 200

and excused people like himself that such was the prestige of Stalin that they could do nothing about it.

That such a man could become the General Secretary of the great Bolshevik Party is almost beyond belief. His removal, I would estimate, marked a most healthy development and correction.

Our Problem

Just as I would object to anyone outside the British Communist Party telling us what or what not to do, so would I not be impudent and expect other parties to do what we British Communists would like them to do.

But no one can dismiss lightly the comradely criticism that the failure of the Soviet comrades to give a full and comprehensive historical survey of their party and the difficulties that arose does give free rein to anti-Soviet elements most marked in countries like Britain. Faced with such difficulties and in the absence of a Soviet analysis long-standing and well proven friends of the Soviet Union are forced to make their own analysis. Such an analysis cannot be other than one-sided. How could it be otherwise without the full facts. And only the Soviet Union has these.

Leaders come and leaders go and irrespective of what happens elsewhere the revolutionary struggle of our working class goes on. And the problem for our Communist Party and the only one for which we have a main responsibility is how best to give leadership and unity to the powerful working class movement in Britain and win socialism for our people.

Brecht and the Emotions

Nick Jacobs

This article is the emended transcript of a paper given at the Brecht Weekend held on February 19/20, 1976 at NUFTO Hall, Jockey's Fields, London, organised by the Communist Party Literature Group.

Introduction—Epic Theatre and Estrangement

Despite the comparative dearth, until recently, of productions of his plays in British theatres, Brecht's name has become a household one, and the word 'Brechtian' is widely used to mean a cool, dry, aseptic, even slightly cynical approach. Now, with the rise since the late sixties of agit-prop and other politically conscious drama groups, Brecht's ideas about theatre have gained widespread understanding and recognition.

These ideas have often been made to sound unnecessarily complicated, whereas they are in fact quite simple. They propose, namely, that in the modern theatre the stimulation in the audience of psychological and emotional identification with individual *character* should be replaced or subordinated to the provocation of intellectual and social curiosity and concern about historical *situation*.

The difficulties surrounding Brecht's theories have arisen mainly for two reasons. First, because he called his theatre *epic*, and this word has mystified people. In fact, Brecht used it merely in opposition to *dramatic*, to describe his theatre's focus on human history and social processes rather than on impersonal fate and psychological tension. Second, because Brecht realised that although what he wanted of theatre was quite simple, it was difficult to break his audiences and actors away from their long traditions. He therefore devoted much of his time to working out and refining an acting and production technique which would achieve this. This was the famous technique of *estrangement*—'Verfremdung'—also unfortunately translated as 'alienation' (with which, in its Marxist sense, it has nothing to do). Estrangement is a way of making the audience, consciously or unconsciously, see apparently normal behaviour in a new light, and therefore to question both the behaviour, and perhaps 'the old light'. Thus, Brecht says:

For a man to see his mother as a man's wife the effect of estrangement is needed; this occurs, for instance, if he acquires a step-father.¹

¹ *Schriften zum Theater*, vol. III, Frankfurt, 1963, p. 175.

It is easy to see how such estrangement helps to break audiences away from the usual way of seeing, and identifying with, what happens on the stage. To take a modern example: in Trevor Griffiths's play *The Comedians*, some amateur club entertainers are about to rehearse their acts in an evening class. A Pakistani joins the class by mistake and stays to watch. His presence has an estranging effect because it introduces a new, or *strange*, element which immediately throws new light on the possibly racist jokes we anticipate from the entertainers.

So much for this brief discussion of Brecht's theories and the difficulties associated with them. But a problem remains. This is that, just as Marx and Engels had initially to overemphasise the role of the economic factor, in the narrow sense, when working out historical materialism—and were as a result misunderstood by antagonists and even some protagonists—so Brecht had initially to overstress certain aspects of his theories when working out and fighting through the idea of epic theatre, and was in his turn similarly misunderstood.

In no area is this truer or more important than in that of his attitude to the emotions, where he has been misrepresented and misunderstood in a particularly drastic form, especially in this country. It is therefore the primary aim of this paper to correct the widespread misunderstanding of Brecht on this issue, and specifically to respond to the charge that he had a negative or scornful attitude to the emotions.

In order to do this, it is necessary first to try and place Brecht's decisive early development, with special reference—for reasons which should become clear later—to his attitude to Expressionist theatre, in its proper literary historical context.

Background—Naturalism and Expressionism

Brecht's life and work can be divided into four parts, though they should not be regarded as totally separate. The first is primarily a reactive, pre-Marxist, albeit rebellious and even revolutionary period, up to about 1927-28—from *Baal* to *Man is Man*. The second is the period when he developed as a Marxist and didactic playwright—from 1928 to about 1933—from *The Threepenny Opera* to *The Seven Deadly Sins*. The third period, from 1933 to 1937, included the beginning of the period of the