

THE CHANGING FACE OF LAW: A MARXIST PERSPECTIVE

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I remember our lecturer of philosophy of law telling us in our first year, that "... law goes no further than the word itself." Thus having been imbued with Kelsenian positivism, we constantly find ourselves between harsh social reality and legal codifications which have remained unaffected by social change. This means that, by adhering to the positivist school of thought, the most human of natural sciences is ethically stripped of its human content. This is what one may call the cult of "the pure theory of Law"¹ so vehemently denounced by the German philosopher G. Radbruch after the Second World War. Positivism acquires particular importance when coupled with the other belief that "ubi societas ibi ius". This may be termed as the philosophy of "essentiality", in that we are made to believe that the existence of a normative order is a "sine qua non" for the preservation of an ordered society. However, we tend to confound the word "society" with the other word "state". What we must understand is that the present form of the law emerged with the creation of the modern state. If we regard the state "as old as man himself", society is older still and the present form of law was not a natural consequence of society but a political appendage to state mechanism. Indeed one may affirm that the present systems of law are relatively recent phenomena in the history of political thought. The logical outcome has been that, in the mind of students, law has become synonymous with the state. Law, instead of being viewed as the product of a living society, is still considered to be the will of the state ("quod principis plaquit legem habet vigorem").²

Considering the present "cadre" of legal philosophy in Malta, it becomes very difficult to talk of what Marxism has to say about law. Indeed, writing about this subject in our country is treading on thorny ground due to the accumulation of preconceived ideas against Marxism throughout the years. Marxism tends to be associated with an iconoclastic creed which underrates the importance of law in society.

To put it succinctly, what Marxism talks about is Change, a word which carries "revolutionary" implications for those who have comfortably consolidated their positions in society and are happy with the present state of affairs. Life being dynamic, all things are in a state of metamorphosis. To borrow the Heraclitean axiom, the Marxist belief that

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1. For example, we were once told in purely Kelsenian language that section 66 of the Maltese Constitution constitutes the "grundnorm" of the Maltese legal system.

2. See a very interesting article by N. Bobbio in the "American Journal of Comparative Law" No.3, 1959 p.332.

human relations in society are constantly in a state of flux, inevitably leads to the result that socio-political institutions, which have their roots in socio-economic factors (these being the sum total of human relations within a particular system of production) are equally in a state of flux. Therefore, a legal system, being such an institution, necessarily changes with the flowing magma of human relations underlying it.³

In the history of philosophy of law Marx acquires a marked importance for several reasons. The first lies in the chronological fact that he appeared on the scene at a time when after the total philosophy of Hegel, the young Hegelians of the time were in much the same position as the Greeks after Aristotle. What is more, he arrived at a very ripe moment which enabled him to absorb the flow of three major sources of human understanding, these mainly being, English classical philosophy, French socialism and German classical philosophy. All three sources led Marx to recognise that "... legal regulations as well as forms of state are to be understood neither in themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life. . .".⁴

Marx broke away from the contemporary philosophical tradition in two major respects. From the time of the pre-socratic philosophers up to the time of the "total philosophy" of Hegel, only the Greek atomists had endeavoured to explain the real, material essence of life, albeit from a physical perspective. More than trying to answer the question of "What is the purpose of things?" they tried to answer the other more important question: "What causes things to come into being?" In other words, the atomists, unlike Socrates, Plato and Aristotle, sought to understand the world without introducing the notion of **purpose**, that is, without trying to give a theological explanation.⁵ It was only with the advent of Marx that interest was again kindled in the philosophy of the cause of things rather than in their purpose. His theory of historical materialism, which I purport to discuss later on, aims at providing us, not with an explanation of **why** socio-political institutions exist but rather with an insight into **what causes them** and how they come into being.

Secondly, Marx managed to detach himself from the German idealist philosophy of his time. In Marx's opinion, all inherited conceptions of law represent idealist embellishments of existing conditions, and in order to edify them, one is forced to reject that deep sense of social justice.⁶ It is for this reason that Marx, even from his student days, always strove to explain the law as a reflection of actual reality. He always considered law, not as a being in itself, (i.e. a closed universe of norms) but as a system highly sensitive to the socio-economic changes within the bosom of society

3. Marx's attachment to movement and change had always been manifest in him. In 1839 he chose as a subject for his doctoral thesis the epicurean and democritean philosophy of atomism – David Mclellan: "**Karl Marx – His Life and Thought**". Paladin. p.38.

4. Karl Marx "**Preface To A Critique Of Political Economy**". MESW.1.362.

5. Bertrand Russel: "**History Of Western Philosophy**". Unwin Paperbacks p.84.

6. Paul Philips: "**Marx And Engels On Law And Laws**". p.5.

as a whole. Law cannot be considered independent from that which gives it meaning and existence. In purely Marxist language this is known as the fetishism⁷ of law. Law was no longer the fruit of the Kantian "a priori" nor the Hegelian "Idea" or "Spirit" outside man (though in earlier stages of his life he had once contended both views). Nor did he find the essence of laws in past history of people (Volksgeist) as the Historical school, headed by Von Savigny, contended. Marx's main interest was in the struggle of man bound together against nature, in the first instance, with the economics of society, which according to him, revealed the "anatomy of society", at least of the modern European society under a capitalist system of production.

Marx's rejection of German idealist philosophy brings us to the discussion of the theory of historical materialism. As a socio-economic concept, the theory of historical materialism tries to give an explanation of how social systems work and what causes social transformations.

7. In his social theory Marx used the word fetish in a late 18th century sense that was derived from the early anthropological study of Charles De Brosses. A fetish was an inanimate object worshipped because of its alleged magical powers. Marx adopts this concept to the nature of commodities under a capitalist mode of production. Thus, Marx argued that the fetish character of commodities is derived from the peculiar social character of the labour which produces it. His view was that useful objects become commodities only because they are products of private labours carried on independently of one another, rather than labours carried on in a consciously social fashion by means of a plan. In a capitalist, commodity-producing society, in Marx's view, relations based on the exchange value of commodities (or social relations of things) came to control the distribution of labour products and the distribution of labourers themselves within the production process. Since, according to Marx, producers and their products are manipulated by the workings of a fetish (the commodity), socio-economic relations in a capitalist society are and appear to be, material relations between persons and social relations between things, though this does not in itself constitute a full understanding of the situation. Now the question arises of how this concept of fetishism is connected with law.

Marx and Engels did not expressly make a direct link, but they often hit upon themes containing similar arguments (eg. Karl Marx "**The Trial Of The Rhineland District Committee Of Democrats**" or in "**The Revolutions of 1848**"). Some Marxists have, however, explicitly used the term fetishism to refer to attitudes towards the legal form. Whenever law is raised to the position of being the foundation stone of social transformation, or being the cause of social transformation, marxists perceive the fetishism of law at work. The fetishism of law is the converse belief that law is vital. This fetishism arises because of the manner in which law touches upon every aspect of social life. It defines, analyses and regulates all manners of relations, and ordinary citizens learn to interpret social phenomena according to legal categories. Yet, the key point to historical materialism is, that the law is not basic to social structures and that to believe that all these social relations are created and depend on law is to mistake the appearance of legal omniscience for the reality of material determinism. As the most authoritative Marxist scholar on the subject put it "social relations are not commanded by Law" (Pasukanis E.B. "**Law and Marxism: A General Theory**". chap.111). Pasukanis contended that because the relation between debtor and creditor is generally only understood within a legal framework, this suggests that law is the basis of social life and commercial intercourse. According to Marxism however the legal relation is determined by deeper elements in the social formation. — See further an interesting study on this problem written by Balbus I.D. "**Commodity Form And Legal Form**" in "**Reasons**". See also C.E. and Rich R.M. "**The Sociology Of Law**" (Butterworths. Toronto, 1978) esp. pp.83 – 85.

8. In the "Preface" to "**A Contribution To The Critique Of Political Economy**" Marx writes: "I was taking up law, which discipline, however, I only pursued as a subordinate subject along with philosophy and history." MESW.1.361.

We may commence by stating that when one studies the evolution of human societies, the role of conscious action in the determination of events presents a central theoretical problem. Thus our query hinges on the answer to the question of whether we are free to determine and create our own history or whether we are conditioned by our environment from early stages of existence to follow evolutionary patterns. Therefore, it would be appropriate to ask the following question: How far is the feeling of choice inherent in human existence when participating in historical events?

It is possible to make a general division of social theories into those that attribute to the human mind the capability of overcoming all circumstances of existence in such a manner as to determine the course of history and those other theories which consider human action under the light of specific modes of social activity, determined by external factors. The first of these approaches may be termed as "idealism" while the second may be called "materialism".

In the history of social thought seldom do we come across a theorist who remained blindly faithful to one extreme or another. Marx was no exception. Though it is true to say that in formulating the theory of historical materialism he rejected the philosophy of the German idealist philosophers of his time, he nonetheless remained unaffected by a total endorsement of materialism.⁹ However, when it comes to interpret his ideas, the crux of the problem lies in the attempt to find how he endeavoured to reconcile a fundamental orientation towards materialism while at the same time admitting a margin of freedom to the individual by consciously acting to change and transform the environment and consequently society.

The problem acquires particular importance and significance in the analysis of law, for legal institutions and rules are constantly considered to be the fruits of purposive human actions. In modern society where the predominant form of law is a complex regulatory code, this purposive, artificial aspect of the law is particularly manifest. It is precisely here, that the theory of historical materialism makes its major contribution. It provides us with the scientific explanation of how these consciously created laws are in the last analysis conditioned and determined by material circumstances.

9. It should be observed that Marx seldom referred to himself as materialist. In the **Thesis On Feuerbach** he alluded, in any case, to his presupposition as a "new" materialism, to be distinguished from materialism as previously understood. Traditionally materialism is the philosophical doctrine that reality is ultimately material and so it follows that immaterial phenomena do not exist (for example, God) or are manifestations of some essentially material process which we do not as yet understand fully (for example thought). Marx rejected this, not because he could claim to refute it, but because it posed questions irrelevant to his investigations of social phenomena. So when he claimed to be a new materialist we can from his comment infer two things: (a) he was not an idealist who takes the ultimate constituent of reality to be ideas, thought, mind, or something similar and (b) that to be a materialist on the Marxian model one need only make his triune supposition i.e. individuals, their activities and material conditions.

In this sense economic relations acquire vital importance for the proper interpretation of law from a Marxist perspective. Indeed law is presented as dependent upon the level of economic development or form of property relations. Law is “the official recognition of facts”.¹⁰ Here Marx rejects the speculative philosophy of German idealism and makes his own the transformative method of Ludwig Feuerbach. He reverses the “nature” of things and Man no longer remains the predicate of his studies but is reinstated as the subject. In other words, he uses philosophy to transform the world rather than to interpret it.¹¹ In the eyes of Marx, therefore, law is no longer conceived as an autonomous principle playing a causal role in the historical process, as some still want us to believe up to this day. On the contrary it is specifically against this tradition that Marx stresses that “revolutions are not made by law.”¹²

The theory of historical materialism is not uniformly endorsed by all Marxists. Various interpretations have been advanced as to what this theory imports. Orthodoxy, as in other branches of thought, has claimed those who have embraced this theory without reservations. Others, unable to receive it in its unrevised form, have given it a pliable interpretation in accordance with the exigencies of modern society.¹³ In spite of this lack of uniformity among Marxist scholars, there is one work which has been considered as definitive. This is Marx’s “Preface” to an essay entitled “A Contribution to a Critique of Political Economy”.¹⁴

Given the close relationship between the relations of production and the material world, Marx suggests in the “Preface”, that all social institutions of a community, including its structures of political authority and its laws, **arise from** and adapt themselves to the nature of relations of production. Thus, laws are determined in their form and content by the relations of production, that is to say by the material base or what is interchangeably called the **substratum**. Indeed if a conflict develops between the political and legal **superstructure** and the requirements of the relations of production, i.e. the substratum, then severe dislocation will result which calls for a change in the latter.¹⁵

10. Karl Marx: “**The Poverty Of Philosophy**”. MECW.VI.50.

11. See Marx’s “**Thesis on Feuerbach**”.

12. Karl Marx “**Kapital**”. Vol.1.p.750.

13. The author of this article adheres to the latter school of thought.

14. Karl Marx: “**Preface To A Contribution To The Critique Of Political Economy**”. In “**Early Writings**”. ed. L.Colletti. (Penguin NLR, 1975) p.424.

15. The traditional Marxist school conceive the economic relations as the sub-structure and the legal institutions as the superstructure. Sub-structure (base) and superstructure are metaphors borrowed from architecture. It is obvious that they only serve to illustrate the connection, not to define it in exact terms. This superstructure, according to Marx’s well-known formula (vide “**Preface**”), comprises not only law but also ethics and culture. See Karl Renner “**The Institutions Of Private Law And Their Social Functions**”. Ed. O. Khan-Freund (Routledge & Keegan Paul 1949. repr 1976) pp.106 – 108. See for a valuable general discussion of base superstructure Williams. R. (1973) “**Base And Superstructure**” New Left Review 82 3 – 16; Hall S. “**Rethinking The ‘Base And Superstructure’ Metaphor**” in “**Class, Hegemony And Party**” ed. Bloomfield J. (Lawrence and Wishart London).

In its pure form, the theory of historical materialism argues that legal phenomena are essentially superstructural, in that they are determined by the economic basis of society. This metaphor of base and superstructure has usually been taken as “il punto di partenza” in explaining the nature of law from a Marxist perspective. We come across this metaphor for the first time in the “Preface”, wherein it is said that the economic structure or base constitutes “the foundation on which rises a legal and political superstructure”. In this and other passages therefore, the superstructure is conceived as an “expression” or a “reflection” of the material base.

How is one to proceed so that we may distinguish between the substratum and those rules which are essentially superstructural? By what method is one to determine that certain rules are superstructural “sic et simpliciter”? In recent years the distinction between the two has been bridged by critics of Marxist philosophy.¹⁶ What is more, Marxists themselves have noticeably modified their enthusiasm for a strict adherence to the base and superstructure model.¹⁷

The theory of historical materialism suggests that law or rather, a system of law, besides being an instrument of class oppression, also provides the rules by which the relations of production are constituted. For instance in a society of hunters, one may identify the relations of production as those arrangements set up for the trapping of prey and the distributing of food. Let us suppose that this arrangement is substantiated by a conventional rule which requires every able-bodied man to participate in the hunt. In order to obtain the respect of the members of the tribe to such a rule, it may be enforced or implemented by means of sanctions such as ostracism, removal of privileges etc. A question to be asked is whether this rule forms part of the relations of production or whether it is superstructural in form.

Looking at the rule from a practical angle, it seems to be a constituent part of the arrangement, and as such cannot be detached from the relations of production by simply regarding it as superstructural. Without such a rule or custom, food supplies would be endangered by a small group of men reluctant to participate in the hunt. This rule, therefore, appears to be at the heart of the productive process since it is an essential ingredient of the relations of production. Yet, looking at this rule from the social angle, it is closely analogous to law or morality, which according to the theory of historical materialism, is located within the superstructure. This shows that in practice, it becomes difficult to maintain a net distinction between base and superstructure unless it is insisted that such rules are incorporated in the superstructure.

16. See Acton H.B. “**The Illusion Of The Epoch – Marxism-Lennism as a Philosophical Creed**”. (Cohen and West Ltd. London 1955) at pp. 137, 164 – 168, 172 – 179, and 270. See also Popper K.R. “**The Open Society And Its Enemies**” Vol.11 (London 1952).

17. Williams R. “**Marxism And Literature**” pp.75 – 82; Cain M. and Allen Hunt “**Marx And Engels On Law**”. Law, State and Society Series (Academic Press 1979) pp.48 – 51. See also Thompson E.P. “**The Poverty of Theory**” (Merlin Press London 1978) p.288.

The problem of defining the relations of production becomes more complicated in a technologically advanced society. For instance, in a society such as ours, based on the exchange of commodities, it is virtually impossible to make an analysis of the relations of production without falling on the basic legal framework of contracts and the protection of private ownership afforded both by civil and criminal law. Consequently though the Maltese Civil Code is part of the Maltese legal system, and as such may be generally described as superstructural, particular sections regulating the law of contract play an important role in the material base. Similarly those wanting to acquire the ownership of a thing are encouraged to do so in the Civil Code section 357 of Civil Code which gives the right to dispose of the thing duly acquired by any of the modes foreseen by the law in the **most absolute manner**. This means that the proprietary rights emanating from the general right of ownership, contain within themselves, before anything else, an economic significance for the holder of that right. Nor would the crucial process of extraction of surplus value from labour occur were it not for a reliable framework of rules similar to the contract of employment. Again therefore, there is the problem of defining the relations of production so that they do not include significant elements of the superstructure. To this extent it is impossible to maintain that the material base determines the form and content of the legal superstructure when the material base itself is composed of law.¹⁸

In order to steer ourselves out of this antinomy, we may resort to the distinction between law and other kinds of normative or semi-normative rules. Innumerable norms exist within a particular society under the form of customs, morals, rules of etiquette and law. Sense can be made out of the base/superstructure metaphor by arguing that only those norms which have not as yet crystallised into legal rules, form the relations of production. These may be termed as informal customary rules in contrast to legal or formally recognised rules. The crystallisation of informal customary rules begins by some social force challenging them. This challenge may consist in a controversial issue or when any behaviour which tends to depart from their dictates is either energetically defended or suppressed. This in turn, creates a disputable area, the confines or legal existence of which are determined or resolved, by some authoritative body, such as a court of law, or until it is officially recognised as a legal rule by an act of Parliament. Either the ruling of the Court or the act of Parliament will lay down definitively the standard of behaviour required. It is the "iter" through which informal customary rules are transformed into formal legal norms. Thus tension in the relations of production transfer these informal customary rules through the mechanism of state from the material base to the superstructure.

It is imperative to recall that Marxism regards values, beliefs and motivations for conscious action as the outcome of practical activity.

18. Plamenatz J. "Man And Society". Vol.1 p.282.

As such, law is bound to be inspired by the dominant ideologies which emerge from social practices occurring in the mode of production. Legal regulation inevitably coincides with such norms of behaviour as it is merely a more precise and positive articulation of the requirements of the dominant ideology.

From the moment at which formal legal rules come into existence, they absorb within them all those prevailing customs with which they coincide. To this extent, law is a metanormative process because it overlays and engulfs existing standards of conduct which may have appeared within the relations of production. In this sense this interpretation fares well with Marxism, for while it does not deny that legal rules are superstructural, it also admits that law possesses metanormative qualities. This puts us in the position of locating legal rules in the relations of production, even though in the last analysis, they are institutionally speaking, superstructural.

It would seem that the theory of historical materialism states the obvious: **law changes with society**. However obvious this observation may seem to be, Western legal philosophy has always been alien, save for some insignificant exceptions, to what one may label as “**the philosophy of change**”. Marxism in its purest form, emphasises that the objective conditioning of law by the economic base by no means rules out the voluntary conscious participation of people as a vital constituent element in elaborating and developing the law. Law, although particularly influenced by the economy of a society, nonetheless remains the product of collective and conscious activity.¹⁹ This is what “the withering away of the law” implies.²⁰ Law, as it stands at present times, will wither away in the sense that by a continuous process of evolutive change (which may consist in a revolutionary movement as was the case in the French Revolution), it will in the future metamorphosise into an altogether different normative order.

19. In a letter to J. Bloch Engels writes: “According to the materialist conception of history, the **ultimately** determining factor in history is the production and reproduction of real life. Neither Marx nor I have ever asserted more than this. Hence if somebody twists this into saying that the economic factor is the **only** determining one, he transforms that proposition into a meaningless, abstract, phrase. The economic situation is the basis, but the various elements of the superstructure – political forms of the class struggle and its results, such as constitutions established by the victorious class after a successful battle etc, juridical forms, and especially the reflections of all these real struggles in the brains of the participants, political, legal, philosophical theories, religious views and their further development into dogmas – also exercise their influence upon the course of historical struggles and in many cases determine their **form** in particular. There is an interaction in all these elements in which, amid the endless host of accidents (that is, of things and events whose inner interconnection is so remote or so impossible of proof that we can regard it as nonexistent and neglect it.), the economic movement is finally bound to assert itself. Otherwise the application of the theory to any period of history would be easier than the solution of a simple equation of the first degree.” MESC, 394 – 395.

20. Two misconceptions must be cleared. (i) Whenever western writers on the subject of law accuse marxism of underrating law, they present a very subjective conception of law, so that its withering away appears to be the abolition of human rights and their legal guarantees.

Law is subject to the dialectical rules of life as much as humanity and its activity are. No person can be accused of legal nihilism for believing in the predicament that “law will wither away” in the same manner that a person cannot be accused of misanthropy for stating that man is mortal. “Society does not depend on law.” This is a legal fiction. The law rather depends on society . . . As soon as the code ceases to correspond to social relations, it is no more than a bundle of paper. Social relations cannot make old laws the foundation of the new development of society, nor could these laws have the old social circumstances. These laws emerged from those old circumstances and must perish with them. They must alter in line with the changes in the conditions of life. The defence of old laws against the new needs and claims of social development is fundamentally nothing but a hypocritical defence of outdated particular interest against the contemporary interest of the whole.²¹ You may resist a change in the law and prolong the life of old ones, but change will come. This is an inevitable outcome.

However, they fail to explain or at times consciously disregard the fact, that when speaking about the withering away of the law, Marxism has in mind least of all any annulling of man’s rights and freedoms, but rather the ending of State compulsion as the specific feature of the law. (ii) What is more many attribute this phrase to Marx’s writings, when in reality Marx always refrained from mentioning either the withering away of the State and least of all of the law. The origin of the phrase “withering away” is found in a tract written by Engels entitled “**Anti-Duhring**”. And even here, Engels speaks only of the withering away of the State and not of law. I. Lenin was the first to subscribe explicitly to the thesis that the law will wither away. In his “**The State And The Revolution**” he understood Engels to say, that if the State will wither away law will necessarily also wither away.

21. Articles from the “*Neue Rheinisch Zeitung*” pp.227 – 247. See also Mehering K. “**Karl Marx: The story of his life**”. (Allen and Unwin London) p.183.