its own needs and pressures. The state derives from private property, but it also becomes an alien form in opposition to private property, since it assumes unto itself the rights associated with private property. The state becomes the real abstraction of the power of capital: an object of greed and ambition in its own right. Private property and the state are complementary poles: dependent on each other for their mutual survival, but antithetical to each other not merely as competitors for the lion's share of surplus value but as embodiments of private right and socialized power respectively. The state represents the socialization of power in an alien, capitalist form; consequently its relation both to capital and to labour is inherently contradictory. Workers need the social power of the state against the private rights of capital, but they do not need the state's alienated form. Capitalists need the state's alienated form as its guarantee against labour, but live in apprehension of its social power. If the contradictory character of the relation between state and capital is missed, then all is missed. The state does not transcend the contradictions inherent in capital; rather, in its own particular way, it necessarily embodies them.

7. Twentieth-century theories

The withering away of law and the state: Evgeni Pashukanis

One of the most serious attempts to collate and to develop Marx's theory of law was made by the Russian legal theorist Evgeni Pashukanis. His most important text, *Law and Marxism*, was written in 1924 as one contribution to the extremely rich theoretical discussions on law and the state which were held in the early years of the Bolshevik revolution. The particular strength of Pashukanis's work was that he sought to derive a Marxist theory of law not merely from this or that occasion on which Marx happened to comment about the law, but from the method which Marx developed in his critique of political economy. He developed both the analogy between and the common derivation of commodity fetishism and legal fetishism, of the theory of value and the theory of right. Thus he analysed law as a historical form of regulation expressing the emergence of definite social relations between individuals, just as Marx analysed value and capital as the expression of definite social relations. Pashukanis demonstrated that the category of 'law' is not a generic category that can be applied to the authority relations of any and every society, but rather a specific category valid only as a representation of a particular kind of authority relation. This constituted a great advance over theories of law which either ignored the form of law and equated law with authority in general, or idealized the form of law, dissociated it from social relations and presented it as the natural and eternal condition of any and every social order. Pashukanis's brief critiques of 'vulgar materialism', i.e. theories of law which subordinate the form of law to its content, and of 'formalism', i.e. theories of law which subordinate the content of law to its form, still stand today as a valid and important starting point for Marxist theories of law.

The political significance of Pashukanis's theory lay in his rejection of economism, in the sense that he saw the transition to communism as signifying not only a transformation of economic relations but, alongside that, also a transformation of authority relations between individuals. His great strength lay in the clarity with which he saw that legal forms of authority have characteristics which make them unsuitable as a basis on which communist society should be regulated, however necessary they may be in the course of the transition to communism.

Pashukanis brought out the fetishism of legal relations, that is, the abstraction of legal subjects from their real qualities as natural and social individuals; the formal character of legal equality and freedom which abstract from rather than overcome the real inequalities and dependencies which mark relations between individuals in society; the manner in which legal relations express and reproduce social relations based on the conflict of private interests, mutual indifference and all-round competitiveness rather than relations based on mutual co-operation, love, comradeship, the collective pursuit of a common goal. Imagine, he said, what a marriage would look like if it were based purely on the defence of private rights and the putting forward of legal claims; such a 'marriage' might be necessary in bourgeois society but could not possibly be the goal of how individuals should relate to one another under communism. A legal relation is a definite kind of relation, which first of all has to be distinguished from other kinds and then has to be criticized from the perspective of the co-operative, communal ways in which individuals should relate to each other under communism, where the atomistic pursuit by individuals of their private interests gives way to the collective pursuit by individuals of their common interests. In private law, Pashukanis writes,

> The a priori assumptions of legal thought are clothed in the flesh and blood of two disputing parties defending their own rights . . . the dogma of private law is nothing more than an endless chain of arguments pro and contra imaginary claims . . . The basic assumption of legal regulation is thus the opposition of private interests. At the same time, the latter is the logical premise of the legal form.[1]

Pashukanis showed how, in the course of their development, legal

relations take on the objective form of a third party representing the law, who acts as a mediator between the conflicting claims of rival parties. The fetishism of law is thereby increased, as a social relation of domination between one individual and another appears in the mystified form of mutual subordination to an impersonal authority; authority, in other words, is abstracted from the relations between people of which it is in fact an expression. The 'law' appears as a subject in its own right divorced from individuals; at the same time, it appears as neutral arbitrator between rival claimants, whereas it in fact puts its social weight behind one claimant or another and so 'resolves' disputes by virtue of its power rather than its impartiality. In this role the law represents itself as the public interest, whereas in reality it is one private interest among others. The emergence of the state takes this fetishism to its highest point, since class relations take the form not of direct domination of one class by another but of indirect domination, mediated by the state. This mediation, Pashukanis argued, on the one hand mystifies power, since class domination no longer appears as what it is, and on the other creates a mighty apparatus that crushes society beneath its weight. This was not, Pashukanis concluded, the form of power suitable for communist society. Pashukanis's abstract language may easily obscure the nub of a fine argument, which has its roots deep within Marxism.

At the same time, however, Pashukanis did not simply reflect Marx, he also gave his theory of law his own mark and character, which diverged significantly from that of Marx and in my view signified a regression from Marx and not an advance over him. This divergence was both theoretical and political.

Whereas Marx derived law from relations of commodity production, Pashukanis derived it from commodity exchange. This was the essence of their difference. Marx wrote that 'the relationship of rulers and ruled' is determined by the specific economic form in which unpaid surplus labour is pumped out of direct producers', that is:

> It is always the direct relationship of the owners of the conditions of production to the direct producers – a relation always naturally corresponding to a definite stage in the development of the methods of labour and thereby its social

> productivity – which reveals the innermost secret, the hidden basis of the entire social structure.[2]

Pashukanis, by contrast, argued that the elementary legal category from which all other legal categories arise, that of 'juridic subject', emerges out of relations of exchange between what he alternatively calls 'guardians of commodities' or 'owners of private property'. Theoretically, Pashukanis's confusion stemmed from the fact that Marx first wrote about the emergence of juridic forms in *Capital* at the beginning of his chapter on 'The Process of Exchange' and this led Pashukanis – and many others since – to believe that Marx derived juridic forms from exchange, which was not the case and which belied the method he created for analysing economic forms. Pashukanis argued that in exchange, just as the product takes on the form of value, so too the owner takes on the form of juridic subject. But the analogue should not be between produce and owner, but rather between product and producer. It is the producers of commodities who appear in exchange relations as no more than owners of private property, regardless of how they acquired that property, or of what that property comprises, or of what they need to reproduce that property. If one looks only at the surface of society, then – as we have traced in our review of Marx – exchange appears not as what it is, a moment in the cycle of production, but in abstraction from productive relations.

This was the view taken by bourgeois jurisprudence when it idealized the freedom, equality, security and independence of exchangers, but it was also the perspective of Pashukanis when he revealed the dark side – competitiveness, mutual indifference, egoism – of the exchange relation. Marx's analysis – and this is particularly clear in the *Grundrisse* – focused on both these aspects of exchange: it is as erroneous to give privilege to the freedom and equality of exchange relations as their only truth as it is to give privilege to private interest and disregard for others, which they also express. For Marx, the point was to grasp that the form of exchange possesses both these characteristics (i.e. of equality, freedom, etc., and of egoism, mutual indifference, etc.); it was as one-sided of Pashukanis to subordinate equality and freedom to egoism and mutual indifference as it was of bourgeois jurisprudence to do the reverse. Pashukanis offered a 'negative' critique of forms of law which ignored its egalitarian and democratic aspects, in

contrast to bourgeois jurisprudence, which offered a 'positive' idealization of forms of law which ignored what have been called its 'effects of isolation and individuation'. Both Pashukanis and bourgeois jurisprudence thereby miss the contradictory nature of legal forms; Pashukanis offered an abstract negation of bourgeois jurisprudence, simply reversing its portrayal of law, highlighting its dark side over its light side, without yet seeing law in, as Marx called it, its 'multi-facetedness'.

On the other hand, Marx revealed that the content of exchange is determined by relations of production and that quite different relations of production (e.g. simple commodity production, capitalist production, state capitalist production, socialist production, etc.) will be expressed and mediated in exchange. Pashukanis and bourgeois jurisprudence have in common their abstraction of exchange from relations of production. The consequence of Pashukanis's abstraction of exchange from production was to give his approach to law an entirely different coloration from that of Marx's (one which lost sight of the dialectic). Instead of seeing both the content and forms of law as determined by and changing with the development of productive relations, Pashukanis isolated law from its content and reduced quite different forms of law, expressing qualitatively different social relations, to a single, static and illusory 'legal form'. Marx expressed the contradictory aspects of the form of law when he wrote that 'the real point' about exchange

> is not that each individual's pursuit of his private interest promotes the totality of private interests, the general interest. One could just as well deduce from this abstract phrase that each individual reciprocally blocks the assertion of others' interests, so that, instead of a general affirmation, this war of all against all produces a general negation.

The real point, he immediately added, is to break from this abstract way of posing the issue and instead relate form to content:

> The point is rather that the private interest is already a socially determined interest . . . its content as well as the form and means of its realization, is given by social conditions independent of all.[3]

Thus, as Marx adds in the *Critique of the Gotha Programme*, both

the form and the content of exchange are changed with the transition from capitalist to socialist relations of production, even though exchange itself persists until the communist principle of 'to each according to their needs, from each according to their abilities' finally breaks exchange relations down in their entirety. This whole process, going on beneath the surface of exchange, was made invisible by Pashukanis's theory of law.

Pashukanis derived the legal category of 'juridic subject' from the 'owner of private property' or 'guardian of commodities'. In so doing, he thought he was moving from the juridic form to its social content; in fact, however, the idea of owning private property is itself a juridic form. Instead of moving from a juridic form to its social content, he was in reality moving from one juridic form to another. In other words, Pashukanis never escaped the realm of juridic forms; in spite of his awareness of the pitfalls of formalism, this was precisely what he ended up offering. The problem stemmed from his often-stated conviction that the category of 'abstract juridic subject' is the elementary category of law, whereas it is in fact a developed legal category which depends on the generalization of legal relations. Pashukanis recognized this at one point in his discussion when he observed that in the early stages of legal relations, reflected in feudal custom,

> every right is thought of merely as an attribute of a specific concrete subject . . . Each right was a privilege . . . Each city, each estate, each guild lived according to its law which followed a man wherever he was. The idea of a formal legal status, common to all citizens, general for all people, was absent in this period . . . To the extent that in the Middle Ages the *abstract concept of legal subject was absent*, so also the idea of an objective norm was mixed and merged in the establishment of concrete privileges and liberties.*

The elementary legal category is that of 'owner of private property', one in which the individual is still attached to particular possessions and not yet abstracted as a juridic subject in general. While Pashukanis thought that in moving from 'the juridic subject' to the 'owner of commodity' he was moving from the juridic form to its social content, in fact he was moving from a developed legal form to the elementary legal form.

Pashukanis's abstraction of exchange from production led him

to offer an entirely abstract critique of law. While he learnt from Marx that equality before the law necessarily entails inequality in fact, he did not appear to learn either that equality before the law provides a measure – albeit limited and formal, but not illusory – of equality, or that the inequalities which it entails are of an entirely different order depending on whether they derive from commodity, capitalist or socialist relations of production. Opposition to inequality in general should not blind us to the distinctions between one kind of inequality and another. At the same time, while he learnt from Marx that exchange gives rise to the legal form, he did not learn that, depending on the nature of productive relations in which it is inserted, exchange gives rise to different legal forms. Opposition to the legal form in general should not blind us to the distinctions between one legal form and another. Pashukanis explained the development of legal forms – from subjective rights to objective law to the state – entirely in terms of the extension, deepening and generalization of exchange relations. Thus, as far as its effects on juridic forms was concerned, Pashukanis saw the transition from petty commodity production to capitalist production and then from capitalist production to socialist production purely in terms of the generalization and restriction of exchange respectively, and not in terms of the transformation of productive relations. Different legal forms seemed to Pashukanis to represent merely the quantitative extent to which exchange was present in society, rather than any qualitative difference in productive relations. Thus all legal forms appeared to him to express the same basic relation of exchange. While Pashukanis's strength was to see the common origins of right, law and state as the three fundamental juridic forms, he failed to perceive the distinctions between them. It was as if an economist were to equate money and capital simply because they both derived from value. This is why class relations appeared to Pashukanis as external and unrelated to the form of the state; in his eyes, the state derived from the generalization of exchange relations and not from the development of capitalist relations of production. Class domination in Pashukanis's theory was therefore reflected in external intrusions into the state – in the buying up of the state by the banks, in the corruption of the state or in the abandonment of the state in favour of direct, naked force; it was concealed by the state-form, but it was not expressed in the state-

form. Such were the theoretical limitations of Pashukanis's formalism.

Pashukanis's *Law and Marxism* was not merely an abstract theoretical critique of law but was intended and served as a political intervention into the politics of the transition period. The strength of his intervention lay in his attempt to grasp the transitory function of law in the transition to socialism against those who, on the one hand, wished to abolish law immediately on the grounds that it was a bourgeois form of regulation which had no place in socialist society, and against those who, on the other, uncritically accepted legal forms of regulation as appropriate for communist society and who thus wished merely to substitute proletarian for bourgeois law. To Pashukanis law appeared unequivocally as a bourgeois form of regulation, but also as one which was temporarily necessary under socialism until conditions were such that 'the narrow horizon of bourgeois right' could be transcended in its entirety.

The timeliness of Pashukanis's intervention – *Law and Marxism* appeared in 1924 – was this. In the first period of Bolshevik rule, that known as 'war communism', the erosion of legal forms under the exigencies of civil war gave rise to utopian dreams of moving immediately (as Lenin put it, 'by direct assault') to a society in which law and state would no longer exist, just as the financial breakdown characteristic of this period also gave rise to utopian illusions about the immediate withering away of money. In the second period of Bolshevik rule, that known as 'The New Economic Policy', the restoration of legality, along with that of exchange relations, the market, currency stability, etc., gave rise to conservative ideas of 'proletarian law' and 'proletarian state' which subordinated the Marxist critique of the bourgeois character of law and the state. Against the first tendency Pashukanis argued that 'law could never be higher than the economic conditions of society' and that the Soviet Union was not yet ripe for its abolition; against the second he argued that the concept of 'proletarian law' is a contradiction in terms, given the bourgeois nature of the form of law itself. The long-term goal should remain the withering away of law in its entirety; the immediate prospect, on the other hand, was the gradual withering away of the legal form. It was the strength of this dual critique of legal theory which undoubtedly won for Pashukanis his enormous reputation in the Soviet Union.

Pashukanis traced the logic of the connection between commodity exchange and legal regulation, and on this basis argued for the twofold nature of the transition to communism: it was to be both an economic process involving the replacement of market relations by planned production and distribution, and a juridic process involving the replacement of legal regulation by what Pashukanis called 'technical' forms of regulation. In this respect, the charge that Pashukanis was 'economistic' is not strong, since he conceived of the transition as comprising not only a transformation of economic relations but also a self-conscious and planned transformation of authority relations.

The real problem, however, in Pashukanis's intervention lay in its abstractness. The principal issues which divided left, centre and right in the Soviet Union (personified respectively by Trotsky, Stalin and Bukharin) was not over whether or not there was a connection between exchange and law, but rather over the extent to which and forms in which exchange and legal relations should be reinstituted. The New Economic Policy, and with it the new legal policy, both reflected and brought about a massive proliferation of exchange relations. The key questions concerned, first, the *content* of exchange: to what extent private property rights should be upheld, what were to be the limits of inheritance, to what degree was private employment of labour to be permitted, on what terms was the 'city' to exchange with the 'country', were state companies to have the right to dismiss workers, were workers to have the right to criticize and dismiss their managers, what rights of appeal against the decision of the bureaucracy were to be granted to citizens, what level of wages were workers to receive, were private entrepreneurs to have the right to foreign exchange with external capitalists? etc. But Pashukanis's formalism led him to ignore, or at least relegate, questions of juridic content. This saved him from taking political sides, but it also divorced his analysis from many of the concrete issues of the day. The other key question concerned the *forms* of exchange: how, for instance, were the courts to be organized, were judges to be elected and revocable and if so on what basis, how far would the independence of the judiciary from the bureaucracy be upheld, what rights of working-class organization independently of the state would be upheld, to what extent would the bureaucracy be subordinated to popular representative assemblies, would inner party democracy be

restored, what forms would punishment of criminals take? etc. Pashukanis subordinated analysis of the forms of law and state appropriate to socialist transition to the single question of the quantitative reduction of legal regulations. It seemed to him that the transition was marked merely by the gradual restriction of commodity exchange rather than by a transformation of relations of production, and by the gradual restriction of legal relations rather than by their transformation. The struggle for qualitatively new forms of law and state – forms that would be more democratic than any that were possible in bourgeois society – was subordinated by Pashukanis to a struggle simply for *less* law. This abstract perspective was directly associated with a theory of law which derived its development solely from the generalization of exchange and its withering away solely from the restriction of exchange.

The most unfortunate aspect of Pashukanis's approach lay in his conception of the relation between law and state. His emphasis on the 'withering away' of law in anticipation of the 'withering away' of the state meant in effect the subordination of legal forms of the state to the state's other forms, and especially to the bureaucracy. Thus Pashukanis reversed Marx's doctrine of the independence of the judiciary from the executive. In the context of Pashukanis's silence on the question of political democracy, his intervention could only lend support for precisely what Marx saw as the very mark of the alienation of the state from society, namely the uninhibited power of the bureaucracy. This dimension of his work was reinforced by his entirely uncritical embrace of 'technical' forms of regulation as the 'socialist' alternative to law.

He argued that while the opposition of private interests is the premiss of law, 'unity of purpose' is the premiss of 'technical regulation'. In bourgeois society, he believed, both forms coexist, with technical regulation being embodied in the organization of postal and railroad services, military affairs, doctor-patient relationships, the education of criminals, and most important of all – though Pashukanis was not consistent on this one – in the internal organization of the capitalist enterprise. He believed that under socialism, as the state sector gradually won predominance over the private sector, so technical forms of authority would predominate over legal forms. What gave rise to Pashukanis's naively uncritical view of authority relations within the state bureaucracy and enterprises was his blindness to productive

relations and his conviction that bourgeois society left its mark only in the form of exchange. For Marx, by contrast, capitalist relations of production determined not only legal forms but also the bureaucratic forms of authority which are instituted within the workplace and within the state. Pashukanis's inability to follow this side of Marx's critique of capitalism led to an uncritical view of the internal relations which characterized the state sector in the Soviet Union. Law is not the only form of regulation assumed by capitalist productive relations, and thus the elimination of law does not entail the elimination of bourgeois forms of regulation *in toto*.

The theoretical source of Pashukanis's concept of 'technical regulation' derived, I believe, from his misunderstanding of Marx's category of the 'technical division of labour'. Marx differentiated in *Capital* between the division of labour in society among independent units of production based on the exchange of commodities, which he called 'social', and the division of labour within the workplace among related units of production based on planned allocation of labour and distribution of products, which he called 'technical'. But by the concept of 'technical division of labour' he did not mean that the division of labour did not take a socially determinate, capitalist form. Every form of co-operative labour, Marx argued, requires that there be instituted some form of regulation in order to accomplish the purely technical task of co-ordinating the various elements within the co-operative labour process. But what form of regulation depends on the social character of co-operation? Marx distinguished between the technical characteristics of co-operation in general (those of increasing the productivity of labour, of socializing individuals, etc.) and the social characteristics of capitalist co-operation (the prime purpose of which is the production and expropriation of surplus value). The problem of imposing discipline under these circumstances is that of imposing capitalist discipline, i.e the regulation by capital of alienated labour.

Since it is only the capitalist who can bring together labourers so as to allow them to co-operate in the labour process, it is the capitalist who appears as the personification of the conditions of social production:

> Through the co-operation of numerous wage labourers, the

> command of capital develops into a requirement for carrying on the labour process itself, into a real condition of production. That a capitalist should command in the field of production is now as indispensable as that a general should command in the field of battle.[5]

In manufacture, co-operation on the basis of handicraft leaves the independence of the producer partially intact; the task of grinding down this independence gives rise to a special supervisory force. The capitalist

> hands over the work of direct and constant supervision of the individual workers and groups of workers to a special kind of wage-labourer. An industrial army under the command of a capitalist requires, like a real army, officers (managers) and NCOs (foreman, overseers) who command during the labour process in the name of capital.[6]

Since handicraft skill is still the basis of manufacture and 'since the mechanism of manufacture as a whole possesses no objective framework which would be independent of the workers themselves, capital is constantly compelled to wrestle with the insubordination of the workers.'

The battles that were fought out between labour and capital moved to a new terrain, however, as capital turned to the introduction of machinery as the basis for meeting the contradictions unleashed between the narrow technical basis of manufacture and the productive forces which it generated. It is always the case formally, in capitalist production, that it is the conditions of production which employ the worker rather than the worker employing the conditions of production. However, 'it is only with the coming of machinery that the inversion first acquires a technical and palpable reality.' The authority of the capitalist was now technically integrated with the very machinery of production, a fusion premissed no longer on the appendage of the tool to the craftsperson but rather on the appendage of the worker to the machine. Thus were born all the illusions about 'technical' control which Pashukanis inherited. Technical forms of regulation were accompanied by the establishment of authoritarian hierarchies of control within the workplace, but these hierarchies appeared as the technical conditions of production:

> On the basis of capitalist production, the mass of direct producers is confronted by the social character of production in the form of strictly regulating authority and a social mechanism of the labour-process organized on a complete hierarchy – this authority reaching its bearers, however, only as the personification of the conditions of labour in contrast to labour and not as political or theocratic rulers as under earlier modes of production.[7]

Pashukanis cited this passage but failed to integrate it into his analysis.

Marx's analysis revealed the dual nature of the authority of the capitalist: he is in charge of the technical tasks of co-ordination which belong to any form of large-scale productive enterprise, and at the same time he is in charge of the process of extracting surplus value out of the labour of workers, a task which exists only under certain definite conditions of production. Thus the technical and capitalist functions of the capitalist's control of the workplace coexist, but they assume the appearance of representing the conditions of production alone. The class nature of authority appears as if it were a purely technical authority, even when this authority is imposed in the most arbitrary of ways. What we in fact see here is not technical control but a definite class form of control emerging out of capitalist production relations.

Pashukanis transposed his technicist conception of capitalist productive relations on to productive relations within the state sector of the Soviet economy; he could then pass off bureaucratic forms of control within this sector as merely technical. The theoretical ground was thus cleared for an uncritical view of social relations of production within the arena of state-planned production. Pashukanis – like many other Marxists of the time – conceived of the transition from capitalism to socialism simply in terms of the replacement of commodity exchange by planned production, which he equated with the replacement of bourgeois (i.e. legal) forms of regulation by socialist (i.e technical) forms:

> Until the task of the construction of a single, planned economy is realized, so long as the market bond between individuals and groups of enterprises remains, the form of law will also remain in force this long . . . The form of private

> property remains almost unchanged in the transitional period in small scale peasantry and crafts economy . . . To the extent that state enterprises are subordinated to the conditions of circulation, so the bond between them is shaped not in the form of technical subordination but in the form of exchange . . . Thus a purely legal procedure for regulating relations becomes possible and necessary; however, along with this there has been preserved and with the passage of time undoubtedly will be strengthened direct, that is, technical management . . . in the form of programmes, production and distribution plans etc . . . Its gradual victory will mean the gradual withering away of the legal form in general.[8]

Every co-operative labour process assumes some social form in which technical tasks are fulfilled. There is no way by which the 'technical' can somehow replace the social; no higher form of society is possible in which social forms of control can metamorphose themselves into purely technical forms. What always has to be considered is the interaction of technical and social factors. This is true of capitalist production, but is also true of planned production under socialism. Failure to see this led Pashukanis to accompany his negative critique of legal fetishism with an uncritical adoption of technical fetishism.

Such was Pashukanis's logic in *Law and Marxism*. As the years went by, so the logic was played out. For example, in 1929 Pashukanis accepted Stalin's view that communism was being achieved with the introduction of the First Five-Year Plan, and he drew the conclusion that 'the role of the pure juridical superstructure, the role of law, is now diminishing and from this one can infer the general rule that technical regulation becomes more effective as the role of law becomes weaker and less significant.' This was written at the time when bureaucratic terror and the suppression of independent organization of workers and peasants were reaching a crescendo. Trotsky offered the wry observation, in *Revolution Betrayed*, that when in 1931 Stalin declared that 'the last relics of capitalist elements in our economy have been liquidated', certain 'incautious Moscow theoreticians' took this on faith and inferred the withering way of law and state. Pashukanis, more cautiously, hedged his bets and saved his skin for a few years (until 1937) by positing the abolition of law without

the abolition of state. Thus the bureaucratic form of the state was to survive as the embodiment of technical regulation, while the legal form was to wither away as the embodiment of bourgeois fetishism. Not only did Pashukanis invert the relationship between law and bureaucracy envisaged by Marx, he lost all sight of the democratic nature of Marx's critique of the state, according to which its withering away was to be the result of its ever more radical democratization. Pashukanis's over-critical view of law, combined with his uncritical view of bureaucracy, formed an unfortunate mixture, especially in the context of a regime which increasingly identified the bureaucracy with the state and the state with the people.

Rule of law and class struggle: Edward Thompson

Appreciation

One of the great strengths of Edward Thompson's recent contributions to Marxist theory of law and the state lies in the close ties he draws between theory and politics. In a period in which theories of law and the state have often been confined to academe and dissociated from class struggle, Thompson's passionately polemical concerns come as a welcome antidote to the dangers of academicism and sterility facing contemporary Marxism.

Thompson's polemic was directed against threats to civil liberties and democratic rights emanating from the modern state. In the terms of his own preferred imagery, the branches of the 'liberty tree' are being lopped off one by one by the state, and the 'free-born Englishman' is in danger of becoming a chattel to state power. Thompson's list of attacks on liberty is a long one. It includes

> the management of news, the blackmailing of politicians, the political vetting of civil servants, the clipping of the coinage of civil liberties, the enlargement of police powers, the dissemination of calumny against dissenters, the corruption of the jury system, the surveillance and intimidation of radicals, the management of state trials, the orchestration through the media of a 'law and order' *grande peur* and the cry of 'national interest',[1]

not to speak of the rapid erosion of trade union rights to strike in

sympathy with fellow-workers, to picket or even, under some cicumstances, to belong to a union. The principal 'muggers of the constitution', to employ Thompson's vivid phrase, are not the 'criminals, terrorists and subversives' upon whom blame is heaped by the right; they come rather from the state itself – not from below but from above.

In the context of this drift toward an authoritarian state it is essential, Thompson argued, that modern Marxism put its own house in order: its ambivalence about civil liberties and its tendency to dismiss all law as merely an instrument of or camouflage for class rule must be abandoned. If civil liberties are merely an illusion obscuring the harsh realities of class rule, then the only significance of their loss is that it clarifies the class struggle. If law is merely an instrument of capital, then attacks on democratic rights initiated by the state present no danger to the working class. If all states are 'inherently profoundly authoritarian' and if all inhibitions on their power are 'masks or disguises or tricks to provide it with ideological legitimation', then the move from one form of state to another will appear to make no essential difference, and the erosion of inhibitions on state power will merely clarify its repressive nature. Such a rhetoric, Thompson argued, reduces Marx's democratic critique of the state to no more than a cynicism; it has nothing in common with genuine Marxism and is bankrupt historically, theoretically and politically.

Politically, cynicism leads to a dulling of 'the nerve of outrage' when liberties are removed. If rights are just an illusion covering up exploitation and oppression, then they are not worth fighting for. Historically, cynicism leads Marxists to devalue popular struggles against wealth and power for the achievement of political liberty. On the basis of twentieth-century experience, 'even the most exalted thinker' ought to be able to note the difference between a state based on the rule of law and one based on 'the exercise of arbitrary, extra-legal authority'. If the only significant distinction observed is that between different 'modes of production' – feudal, capitalist and socialist – then distinctions which are equally important, between one form of bourgeois rule and another, are lost from sight. Political liberty under bourgeois rule is not just a device of capital but represents the tangible achievement of struggles from below, and can be secured only through the continued pursuit of such struggles.

Theoretically, Thompson polemicized against an 'essentialism' according to which 'a platonic notion of the true, ideal capitalist state' is substituted for analysis and critique of actual capitalist states in all their diversity. He attacked the base-superstructure model which presents law as merely 'part of the superstructure of productive forces and relations'. He rejected the 'reductionism' in which the law appears to define 'what shall be property and what shall be crime' in ways necessarily 'confirming and consolidating class power'. Law, Thompson argues, should be seen not just as an instrument of class domination, nor just as a force that functions for the reproduction of class relations, but also as a 'form of mediation' between and within the classes. Its function is not just to serve power and wealth but also to impose 'effective inhibitions upon power' and to subject 'the ruling class to its own rules'. It acts not just as a means of repression but also as 'a defence of the citizen from power's all-inclusive claims'. It not only throws a veil over the class struggle, it also shapes it. If law is to be effective as a form of legitimation for the rulers, then the rulers must to some degree live up to its own universal and egalitarian standards.

Thompson rejects the major theoretical premiss which underwrites these tendencies within Marxism: that is, the isolation of the law as a distinctive part of the 'superstructure' separate from its 'base'; or, in structuralist language, the conception of law as a determinate 'level' separate from that of 'economics' (the determining level), politics and ideology. These abstractions, he argues, afford a Marxist legitimation for 'carrying on with age-old academic procedures of isolation which are abjectly disintegrative of the enterprise of historical materialism, the understanding of the full historical process'.[2] It is not possible to understand law in isolation from productive relations, just as it is not possible to understand productive relations in isolation from law. They intermingle so intimately that the isolation of one from the other can be done only by means of a forced abstraction. Thus he writes of his studies of the eighteenth century:

> I found that law did not keep politely to a 'level' but was at *every* bloody level; it was imbricated within the mode of production and productive relations themselves (as property rights, definitions of agrarian practice) and was simultaneously present in the philosophy of Locke; it intruded brusquely

> within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralizing over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.[3]

In other words, productive relations are meaningful only in terms of their definition at law: 'men enjoyed petty property rights or agrarian use rights whose definition was inconceivable without the forms of law.' What unites these different 'levels' or 'instances' – or rather what makes problematic their initial separation – is the fact that they reflect the unitary experience of real historical actors:

> We are talking about men and women, in their material life, in their determinate relationships, in their experience of these and in their self-consciousness of this experience . . . class experience will find simultaneous expression in all these 'instances', 'levels', institutions and activities. It is the 'same unitary experience' which gives rise to fear of the crowd in 'politics' reappearing as contempt for manual labour among the genteel reappearing as Black Acts in the 'law' reappearing as doctrines of subordination in 'religion'.[4]

Productive relations, in other words, are themselves legal, political and cultural as well as economic; the relation between capital and labour is one whose class character appears only via its multiple forms of expression. Law is not a servant of economics, even in the last instance; they both reflect, rather, the same 'unitary' class experience. Indeed,

> the very category of economics – the notion that it is possible to isolate economic phenomena from non-economic social relations, that all human obligations can be dissolved except the cash-nexus – was the product of a particular phase of capitalist development.

Capitalist society is founded upon 'forms of exploitation which are simultaneously economic, moral and cultural'; social and cultural phenomena, like the law, do not 'trail after the economic at some remote remove' but are, rather, 'immersed in the same nexus of relationship'. If we accept the metaphor of base-superstructure, the base should be seen as 'not just economic but human – a characteristic human relationship entered into involuntarily in the productive process'. Law is as immediate an aspect of this human relationship as is economics. Just as Marx submitted economic categories to 'the test of history', so too, Thompson argues, legal categories must be submitted to the same test: not reified as a self-sufficient and eternal sphere of social life but grasped as the historical expression of definite productive relations.

The reverse side of the coin of cynicism towards law and the state, Thompson argues, is an equally dangerous doctrine which identifies Marxism with the 'bureaucratic statism' both of the official labour and social-democratic parties in the West and of Stalinism and its heirs in the East. This doctrine portrays the state 'in *all* its aspects' as a 'public good, a defence of working people or of the little man against private vested interests'. A distinction must be made, Thompson maintains, between the different elements of the state. While the legal and representative institution of the state constitutes its democratic element, the bureaucracy constitutes the omnipresent danger to democracy. Despotism, Thompson concludes, means the subordination of the state as a whole to bureaucracy; liberty means the subordination of the bureaucracy to control by parliament and the law. The consequence of the bureaucratic statism of the official left is that 'the dividing line between the welfare state and the police state became obscure and bureaucracy in every form waxed fat in this obscurity.' The welfare state is not the same as the police state, but the elevation of the state executive in the former paves the way for the emergence of the latter.

The key concept Thompson invokes in his critique is that of 'the rule of law': its presence or lack of presence marks, in his view, the difference between liberty and despotism. The importance of Thompson's approach is that it restores the classic liberal usage of the concept of 'the rule of law' against its corruption in contemporary conservative thought. According to the latter, whatever the state dictates is law and the doctrine of the 'rule of law' means an unconditional obligation to obey the state's laws, regardless of their form or content. From this point of view, according to which law is defined only in terms of its origin, any

measure enacted by the state – even the most draconian police measure – is law. The state cannot, by this account, violate the rule of law, because it appears as its embodiment. The classical liberal conception of the rule of law, by contrast, was based on what Thompson called a 'bloody-minded' distrust of the state. The state's commands were legitimate only if they accorded with definite formal standards of conduct. The state could not do anything it wished and declare it to be law; rather the state remained a bona fide state – and not a mere private force – only if it followed dictates associated with the rule of law. Thus a doctrine which started off as offering an ideal against which existing states should be measured, as an inhibition on state power and as a precaution against despotism, has been turned by modern conservatism – in the name of liberalism, Adam Smith, etc. – into a travesty of its former self. It has become little more than an apology for state power. Thompson has performed a great service in returning to the liberal ideal of the rule of law in order to expose the poverty of present-day conservatism. This usage of the concept of 'rule of law' also reveals the shortcomings of a Marxism which either reduces law to class dictatorship or elevates the state as a whole as a human good.

Thompson's depiction both of 'statist' and 'nihilistic' currents within contemporary Marxism is somewhat caricatured; there are few Marxists or Marxist movements which fit neatly and four-square into either of these images. His target is often broad and he tends to conflate diverse currents; for example, a dismissive attitude to law affects some kinds of 'libertarian' Marxism which reject all forms of authority equally, including law, and some kinds of 'authoritarian' Marxism which reject all forms of inhibition on working-class power, including legal inhibitions. Their common position on law should not obscure their distinct starting points, even though it may facilitate a movement from one to the other. Sometimes Thompson's target is misplaced, as when his offhand dismissal of 'Leninism' cuts a swathe through the historical record of Lenin's firm commitment to struggles for political liberty. However, the general thrust of Thompson's critique of statist and nihilistic currents within Marxist theory of law and the state is in my view pertinent, correct and in accord with Marx's own writings.

The problem lies not in Thompson's critique as such, but in the

alternative he puts forward. In rejecting 'economism' and the 'vulgar Marxist' conceptions of law and the state with which it is associated, Thompson comes close to abandoning Marxist criticism of the rule of law in its entirety in favour of a resuscitated liberalism. In itself this is, of course, no fault; we should not adhere to Marxism dogmatically. I wish to show, however, the contradictions inherent in Thompson's alternative, not in order to return to economism but rather to deepen and extend a Marxist critique of it.

Critique

Thompson's repeated comment that the rule of law is 'an unqualified human good' is not only a case of his bending the stick too far away from legal nihilism and from bureaucratic statism. After all, the rule of law does not have to be an unqualified human good for its superiority over authoritarianism to be recognized and acted upon. There is no doubt but that liberal forms of bourgeois rule are preferable, from the point of view of democracy and the working class, to authoritarian forms, even though both remain forms of bourgeois state based on class exploitation. The liberal state does not have to be abstracted from its class content for its value to be recognized and its institutions to be defended against forces of reaction. That Thompson's defence of the rule of law was unqualified reveals the shortcomings of his general method.

Thompson's initial rejection of reductionism turns into its opposite when he too reduces the multiple functions of law to one essential function: that of inhibiting power. From an initial position which held that law is not only a means of domination and obfuscation but also a restraint upon the state and a defence against repression, Thompson concludes that the defining characteristic of the rule of law lies in the one function of inhibition. His objections to monolithic views of the function of law do not prevent him from replacing one monolith by another. He recognizes other functions but sees inhibition as essential. A critical understanding of the rule of law requires that we comprehend the many functions of law and the conflicts between them; not that we give privilege to one function of law as law's essence.

So, too, Thompson's original argument that the law should be

seen not just as an instrument of one class or another, nor simply in terms of its functions or for reproducing class relations, but also in terms of its form of mediation gives way to Thompson himself reducing the form of law to its function. In his view, the form of law is defined by its function of inhibition, with the result that the specific characteristics of legal inhibitions on state sovereignty are lost from sight. Law is not the only form of inhibition on state power; there are also the political institutions of representative democracy, not to speak of the independent organization of the working class on one side and the interests of capital and of other states on the other. The law possesses definite social characteristics as a means of inhibition on the power of the executive – and definite limits. It tends to work through individual cases, thus bringing with it the danger that it might 'individuate' the collective struggles of the working class. It imposes formal standards of comparability which might neglect the unequal class consequences of executive policy and practice. It imposes sanctions only after the event, that is, after a specific abuse of power by the executive has taken place. It functions through the mediation of courts, the judiciary, and the legal profession, who have their own specific class characteristics. For instance, the law serves as a vital inhibition on the power of the police: it requires the police to bring detainees to court; it allows for civil suits and criminal prosecutions against the police; it permits the judiciary, under certain (ever more restricted) circumstances, to exclude evidence improperly obtained by the police; it provides a public forum in which the police may be interrogated. But it is not the only form of inhibition on the police; there are also political restraints in the shape of local authority police committees and parliament, and unofficial restraints in the shape of trade-union picket lines, self-defence groups and, on the other side, those arising from the organized pressure of capital. In this context legal inhibitions on police power, while remaining a vital means of defending individual liberty and working-class democracy, possess limitations that derive from the form of law itself and which therefore naturally lead working-class organizations to weigh up, in any given situation, the strengths and weaknesses of the various means, including, but not restricted to, legal means by which police powers may be inhibited. Such considerations are ruled out theoretically when the form of law and its function of inhibiting

state power are fused together as one.

The definition of law as an inhibition of power presupposes the existence of a power alienated from the people, which needs to be inhibited. In the early stages of liberal thought the idea of the rule of law was invoked to inhibit the authority of the absolute sovereign, but not to transform the nature of the state itself. In later stages the idea of the rule of law was tied to the transformation of the state itself from absolutism to liberalism and thence to democracy. By picking up on the 'inhibitory' rather than the 'transformative' side of this liberal concept, Thompson presupposes the presence of the alien power of the state. To see the rule of law as an unqualified good, then, means accepting the presence of the bourgeois state as given and immutable. This 'pessimistic determinism', to use Thompson's own term, appears in his projections of the socialist future, where Thompson surmises that even the rise of working-class power, based on egalitarian productive relations, will require 'the negative restriction of bourgeois legalism', and concludes that any belief to the contrary is a 'utopian projection' without historical warrant. While this position reflects a well-justified rejection of the claims of various socialist states to have overcome their alienation from the people – the very idea of the state, according to Marx, socialist or otherwise, implies an alienation from the people – it explicitly surrenders the vista offered by Marx of the democratization of the state to the point of its dissolution. While Marx saw a place for legal inhibitions on state power as long as the state existed, he also saw, as the final goal of communism, the dissolution of the state, and with it the need for inhibitions on its power. The more immediate significance, however, of this theory of 'inhibition' can be again seen in the example of the police: far from challenging the institution of the police itself, Thompson justifies its existence by reference to its legitimate functions of internal regulation without asking in what ways these functions could be performed other than through the hierarchical bureaucracy of the police, and seeks only to inhibit its powers through legal controls. The perspective of transforming the police from a corporate entity above society to a function democratically controlled by society gives way to the more limited perspective of inhibiting police power.

Thompson's defence of the rule of law as an unqualified good does not mean that he is blind to the class nature of the actual

deployment of law, but he conceived of class domination as an intrusion of 'class-bound procedures' into law and not as an essential characteristic of law itself. Thus he has himself demonstrated how, when considered as an institution ('the courts with their class rhetoric and class procedures') or as personnel ('the judges, the lawyers, the justices of the peace'), the law may be assimilated to the needs and interests of the ruling class:

> But all that is entailed in 'the law' is not subsumed in these institutions. The law may be seen as ideology or as particular rules and sanctions which stand in a definite and active relationship (often in a field of conflict) to social norms; and finally it may be seen simply in terms of its own logic, rules and procedures, that is, simply *as law*.[5]

In other words, although Thompson is well aware of the class forces which affect the actual administration of law, he argues that the rule of law contains at its core a 'logic of equity' that is above class determination, and held that his own historical studies support his case. This is at first sight surprising, since they relate for the most part to the ways in which the ruling class and the state have turned the law into little more than an instrument of their own private interests and how economic forces

> actually grabbed hold of the law, throttled it and forced it to change its language and to will into existence forms appropriate to the mode of production, such as enclosure acts and new case-law excluding customary common rights.[6]

But for Thompson the determination of law by its economic base reflects not the essence of law but its distortion. Concerning his study of the bloody Black Acts of the eighteenth century, Thompson comments that it was 'centred upon a bad law, drawn by bad legislators and enlarged by the interpretation of bad judges'. Far from being an indictment of the rule of law itself, it was rather an indictment of the 'corruption' of law: 'We feel contempt not because we are contemptuous of the notion of a just and equitable law but because this notion has been betrayed by its own professors.'[7] It is the idea of law which stands, for Thompson, as the standard against which to measure the actual corruption of law:

> If I judge the Black Act to be atrocious, this is not only from some standpoint in natural justice and not only from the standpoint of those whom the Act oppressed, but also according to some ideal notion of the standards to which the 'law', as a regulator of human conflicts of interest, must always seek to transcend the inequalities of class power which, instrumentally, it is harnessed to serve.[8]

In other words there exists, according to Thompson, a core component in the idea of law, which is not locatable in a base-superstructure model and which is not reducible to the logic of a class-based functionalism or instrumentalism.

In these passages Thompson comes close to reproducing the 'essentialism' which in his theoretical programme he sought to exorcize. The 'idea' of law is abstracted from its actual deployment in bourgeois society, so that its external manifestations appear as a corruption of its essence. The key question,then, is to identify the rational kernel of law apart from its mystical and class-ridden shell. If we transfer vegetable metaphors, as Thompson peels away the corrupted outer layers of the onion he may find that it is an arbitrary decision where its rational heart begins. Thompson himself is not very helpful in identifying what he means by the idea of law. At times he refers to the principle of equality embodied in law, which provides a minimum guarantee of liberty in spite of the limitations of its formal character. At times he refers to the principle of 'equity', which in legal terms refers to the use of discretionary powers by the courts to compensate for unfair decisions emanating from the rigid application of formal rules. In one passage he defines the rule of law as 'the regulation of conflicts according to rules of law which are exactly defined and have palpable and material evidence – which rules attain towards consensual consent and are subject to interrogation and reform'. At other times he seems to include in his idea of the rule of law more substantive notions about parliamentary democracy, individual liberty and labour movement rights of organization. In his essays on the state of the nation, he presents the libertarians of the left as the protectors of the 'institutions of this country': 'not the law-and-order brigade but the defenders of civil liberties are attempting to uphold the constitution and the rule of law.' In this version, the rule of law would appear to refer to the judicial wing of the bourgeois state that existed up to the recent wave of attacks on

traditional liberties. The fact that 'the rule of law' is for Thompson an elastic concept does not mean that it is purely rhetorical. But it does allow him to slip from a position that correctly asserts the significance of formal equality and freedom before the law as a minimum guarantee of liberty to one that depicts twentieth-century British justice as the incarnation of the rule of law. Thompson rightly rejects the dangerous conclusion that, because equality before the law is merely formal or negative, it should be discarded in favour of substantive justice. This is a view which has historically been adopted by the right (see, for example, Franz Neumann's account of Nazi 'legal theory' in *Behemoth*) even though the grounds for it have sometimes been laid by the left. But he draws the equally untenable conclusion that the principal institutions of the liberal bourgeois state – parliament, jury trial, 'independent judiciary', 'impartial' police, etc. – are not only preferable to authoritarianism but are the last word in a free society.

The historical record

Thompson claims to draw his theoretical conclusions about the rule of law from his historical studies; however, the main theme which runs through his historical writings on the eighteenth century is a different one: that of a struggle between laws representing absolute and exclusive rights of bourgeois private property and popular movements – falsely defined as criminal by the upper classes and by subsequent orthodox historians – holding on to the use-rights of the traditional moral economy. Thus in *The Making of the English Working Class* (1963) he writes that the food riots were 'a last desperate effort of the people to reimpose the older moral economy as against the economy of the free market . . . a last desperate attempt to enforce the old paternalist consumer-protection'. In *Peculiarities of the English* (1965) he argues that until the late eighteenth century

> the common people adhered to a deeply felt 'moral economy' in which the very notion of an 'economic price' for corn (that is, a dissociation between economic values on the one hand and social and moral obligation on the other) was an outrage to their culture . . . The very category of economics – the notion that it is possible to isolate economic from non-economic social relations, that all human obligations can be dissolved except the cash-nexus – was the product of a particular phase of capitalist evolution.

Plebeian movements in the eighteenth century and working class movements during the industrial revolution should by this account be read as 'a movement of resistance to the annunciation of economic man' and to the laws which heralded it. The 'Marxist humanism' which Thompson represents thus looks back to these struggles with particular favour, since they were valiant attempts, analogous to modern struggles to attain humane welfare services, to hold on to human values in the context of economic dehumanization.

In *Whigs and Hunters* (1975) Thompson pursues this theme in his account of the Black Act, which 'signalled the onset of the flood-tide of eighteenth century retributive justice'. He argues that the Act represented the culmination of a social and economic struggle through which a 'customary' economy of forest-dwellers was destroyed and replaced by a market-oriented regime based on 'capitalist property rights'. In Thompson's view, 'the forest conflict was in origin a conflict between users and exploiters.' During the eighteenth century 'one legal decision after another signalled that the lawyers had become converted to notions of absolute property ownership and that . . . the law abhorred the messy complexities of coincident use-right.' The traditional rights of the poor either received 'perfunctory compensation' or were simply redefined as crimes. Thus the Blacks (the poachers and forest-dwellers against whom the Black Act was directed) shared something of the character of Hobsbawm's social bandits: they enforced the definition of rights to which the country people were habituated and resisted the development of laws protecting the rights of absolute and exclusive private property. The dominant motif of *Eighteenth Century British Society* is that 'plebeian culture is rebellious in defence of custom':

> capitalist logic and 'non-economic' customary behaviour are in active and conscious conflict as in resistance to new patterns of consumption . . . of time-discipline and to technical innovation or work rationalization which threaten to disrupt customary usage . . . Hence we can read eighteenth

> century social history as a succession of confrontations between an innovative market economy and the customary moral economy of the plebs.[9]

Thompson does at times modify this version of events. In '*The Making* . . .' he shows how this appeal to the past was sometimes no more than a cloth in which thoroughly new rights were dressed. 'All reformers before Paine', he commented, 'commenced with the "the corruption of the constitution" ', the constitution in question being imaginary versions of the Revolution of 1688 or even of old Saxon law. Such antiquarian arguments were even used to justify the modern demand for manhood suffrage. So too in '*Eighteenth Century* . . .' Thompson distinguished between the form and content of popular rebellious culture: 'this is a conservative culture in its forms; these appeal to custom and seek to reinforce traditional usage . . . But the content of this culture cannot so easily be described as conservative.' However, the general picture he painted about food-rioters, poachers, Blacks, smugglers, wreckers, writers of anonymous threatening letters and the like was one of plebeian rebellion in defence of traditional use-rights against laws representing unequivocally the requirements of the newly emergent capitalist economy.

Two questions arise: first, how well does this account fit the facts, and second, how much support does it offer to Thompson's defence of the rule of law? On both counts, there are problems.

It is an oversimplification – and ultimately wrong – to reduce all these eighteenth-century struggles to a conflict between traditional use-rights and legally enforced private property rights. 'Plebeian' rebellion crossed class lines and many of its participants were advocates of, and not rebels against, absolute property rights. Although I am not qualified as a historian of the eighteen century, on the basis of Thompson's own historical evidence the picture seems to be more mixed than he allows and less easily fitted into the mould of 'primitive rebellion'.

For example, the popular struggles of poachers and foresters against the Black Act were supported by a cross-class alliance of some small gentry, peasants, capitalist farmers who rented land, labourers, merchants and craftspeople. This broad support arose from the particular class character of poaching laws which declared that, to be eligible to hunt game, one had to be a

freeholder earning a minimum of £100 a year. This included the large gentry landowners and excluded all others. Thus capitalist farmers were opposed to these laws because they were excluded from a privilege reserved for the large gentry, because they were deprived of valuable rights to the use of land reserved for the pleasures of the hunt, and because the hunt caused damage to their farms.

It is not surprising, therefore, to find 'middling men' among the foremost in protest against these laws as an 'unconstitutional oppression'. Further, as the commercial exploitation of game by innkeepers, poulterers and victuallers became more viable, so too their resentment against game laws, which prohibited the selling of game, joined up with the resentment of the farmers. Game was important, as Doug Hay put it, because it symbolized 'land' against commerce:

> Game laws were the only enforceable remnant of the mass of statutes that once fixed status among Englishmen . . . Game could not be legally bought and sold because it was meant to symbolize prerogatives, to show that its owner held power and prestige in landed society.[10]

It was, in short, a traditional form of property right that the game laws expressed. The large gentry were – if we are to believe Christopher Hill's account – less concerned with the setting in motion of productive forces characteristic of productive capital than with the appropriation of a finished product:

> Landlords sought prestige through conspicuous investment rather than conspicuous consumption – buildings, parks, paintings. But such investment, though it created some employment, stimulated the economy far less than a planned programme of investment in the capital goods sector and in improving communications would have done. [11]

The form of the game laws was itself archaic. They set up the right to hunt game as an exclusive privilege of the landed gentry, and achieved this through property qualifications. Such laws were first established in 1389, when the qualification for hunting 'gentlemen's game' was set at owning a freehold worth at least £40 a year and lasting 99 years. Wealth itself, unconnected with the land, was excluded from such privileges. In other words, the law

recognized privileges based on property qualification; it embodied differential rights and duties based on rank and status. The bourgeois conception of the rule of law that accompanied the development of bourgeois private property, by contrast, was based on the abolition of legal privileges.

The administration and implementation of the law was equally imbued with traditional elements. The basis of law enforcement was the 'manor'. The lord of the manor had the power to appoint a gamekeeper who served public and private functions at once: his public function was to enforce the law, his private function was to serve as servant of the landowner. The sharp division between public and private functions established within liberal legal thought was not yet present.

The same interpenetration of the public and the private was present in the judicial system. Thompson demonstrated the direct links between landowners and the judiciary, with little evidence of that separation of powers advocated by liberalism and established only in the nineteenth century. Doug Hay has demonstrated how the extensive use of discretionary 'crown pardons' by the judiciary was given on the basis of personal pleas of mercy by the local gentry. It held the victim in a position of personal debt to the landlord and expressed the explicit employment of mechanisms of social control based on personal dependence. Terror and obligation were the two sides of this relation of direct domination. Even the execution of the penalty displayed this traditional class character. The public hanging was a military ceremony which manifested the coercive power of the monarch over his people. Punishment was not applied in the name of the 'people', as became the case in the bourgeois epoch, but was imposed over the people as a show of superior might. It was a ceremony which was intended to manifest the direct domination of the rulers over the ruled or, as Hay put the matter, an exercise in 'terror'. The execution was done in public and the penalty was painful (the victim was choked to death by the hangman's noose rather than having his neck 'painlessly' broken) so that the people might witness the power of the ruling class at work and even see the personal prerogative of the king or the landowner in the case of a last-minute pardon. If offenders were not hanged, they might be transported to the colonies in privately-owned boats, and on arrival would be subjected to forced labour on behalf of private property. If, by chance, offenders went to prison, they would find the prisons run for profit by their keepers, and explicit divisions based on rank and wealth practised within them.

The game laws, in short, cannot be seen simply as the embodiment of bourgeois private property, nor can opposition to them be simply fitted into the category of defence of a traditional moral economy. The rebels were as much concerned with the emancipation of private property from traditional fetters as with the defence of use-rights. This side of the question slipped into Thompson's own account in *Whigs and Hunters*, when he commented on the 'archaic' character of the crown's claims and of the laws which declared that land, whether or not privately owned, 'might not be fenced so high that the deer could not pass through them to their customary feeding grounds'; that 'no timber could be felled without licence from the forest officers'; and that deer 'might not be killed on any pretence whatsoever'. In these instances the forest struggles might equally be real as a popular defence of absolute private property over traditional use-rights claimed by the crown.

The case of excise laws raises similar problems. Widespread popular opposition to them arose from the narrow class interests which these laws expressed. They articulated an alliance between monopoly trading companies – like the East India Company – and the state. For the former, a royal charter meant monopoly rights as well as the protection of the British navy over their trading routes. For the latter it meant a lucrative source of income. It represented the supremacy of merchant capital and a mercantile state.

Opposition to the excise laws came from merchants and 'middling men' desirous of gaining some share in the lucrative international trade in tea and other reserved commodities; from the middle classes eager to see lower prices for tea – both for their own sakes and to lower the value of labour-power – and from the 'poor', for whom smuggling meant, for some, work on ships or the opportunity to get a foot in the door of commodity exchange, or at least access to what had been luxury commodities on the popular market.

It would appear inadequate to present smuggling as a 'plebeian' activity based on the defence of an 'older moral economy'. In the earlier years of the eighteenth century smuggling was predominantly the business of small entrepreneurs who acquired the capital

necessary for the pursuit of this trade through one-off ventures like theft; however, as the scale of trade widened, the initial capital necessary to enter the market became increasingly substantial. Smuggling was not only a 'plebeian' but also a bourgeois movement which drew behind it popular support from sections of the population who opposed the vestiges of class privilege and the restrictions on trade represented by the excise laws. This is why bourgeois thinkers like Adam Smith were at the forefront of criticism of the excise laws (just as he was of the game laws). There was no way by which the right to free international trade could legitimately be translated into a traditional custom. Indeed, Smith pointed out that the very term 'customs' – as in 'customs duty' – derived from the fact that they were 'customary payments which had been in use for time immemorial': 'They appear to have been originally considered as taxes upon the profits of merchants . . . originating in the barbarous times of feudal anarchy.'[12] Tradition was in favour of the 'customs'; it was in the name of 'natural law', i.e. modernity, that opposition to it was waged. Smith developed an elaborate critique of the excise laws and campaigned for their repeal, for the lowering of excise duties and for the end of royal prerogatives to trade. This was not the stuff of primitive rebellion.

It is remarkable how the idea of primitive rebellion against laws expressing the development of private property and capitalist economic relations has taken root in Thompson's work, in spite of the contradictory elements which also ran through his accounts. It is as if the particular moral he drew from his study of struggles around the price of grain is unproblematically extendable to all other areas of eighteenth-century struggle. The reason behind this, I believe, is that there lay an untested prejudice running through his historical work, resistant to empirical refutation: a romanticism which sees in pre-bourgeois property relations a 'human' state of affairs which the mass of the people wished to hold on to, and which sees in the development of capitalist property an unmitigated evil which the mass of the people more or less consciously resist. Both in form and content, however, the laws concerning excise and game were becoming, in the eighteenth century, increasingly archaic. In Marx's language, the legal and political superstructure was becoming a block on the development of productive forces. Popular forms of rebellion were as much attempts to break through these blocks as attempts to hold on to a past idyll.

Thompson's conclusions reflected precisely the instrumentalist view of law as a protector of bourgeois private property which he now rightly rejects, for it would appear that this view fails to fit the historical facts as he presents them. The final chapter on the 'rule of law', in *Whigs and Hunters*, which presents the rule of law as 'an unqualified human good' seems to me, therefore, to be in part a self-criticism: Thompson's attempt to break from his own past perspective. His alternative, however, does not solve the problem either.

Thompson's history reveals not so much the 'corruption' of the rule of law in the eighteenth century but the fact that this rule of law was in large measure still an image in the eye of classical jurisprudence and not yet a fully accomplished reality. It was still in possession of all kinds of traditional characteristics – unequal privileges, the fusion of public and private functions, a scarcely existent base in 'consensual assent' – which were later to be superseded. Thompson can turn this period into one of the 'corruption' of law only by turning the law itself into a timeless ideal rather than a specific social form of regulation coming into being in this period.

At one moment Thompson presents the conflict between traditional use-rights and private property rights as one between two 'alternative' notions of the rule of law. In this view Thompson recognizes that the form of law changes from one period to the next (e.g. from natural law to positive law); that its content changes (e.g. from the defence of use-rights to that of absolute property rights); that its institution changes (e.g. from forest to magistrates' courts). But the rule of law itself appears in Thompson's eyes to transcend these historical transformations; 'it is not possible to conceive of any complex society without law.' However, traditional natural law conceptions of property did not possess the egalitarian, universal and humanistic properties Thompson associates with the 'rule of law'. It is not possible to marry traditional natural law theory – rooted in privilege, inequality, dependence, obligation and immutable laws – with any of Thompson's definitions of 'the rule of law'.

At other times, he treats the rule of law as an ideal which emerged out of 'the work of sixteenth and seventeenth century jurists, supported by the practical struggles of such men as Hampden and Lilburne'; which was passed down 'as a legacy' to the eighteenth century but violated systematically in practice; to

which the bourgeoisie finally succumbed in the nineteenth century after a period of direct repression, as exemplified by the Peterloo massacre; and which is now being threatened by an increasingly authoritarian state. As an expression of bourgeois ascendancy, however, the rule of law was directly connected with the emergence of absolute private property right. Private property and the rule of law cannot be dissociated from one another. Thompson's over-critical view of private property makes a poor partner for his under-critical view of the rule of law. The same Adam Smith who is the arch-villain in the saga of private property is at once the hero in the saga of the rule of law. Just as private property is not an unqualified human bad, so too the rule of law is not an unqualified human good; they both reflect the limited character of bourgeois emancipation. The final contradiction in Thompson's theorizing about law is that his idealization of the rule of law violates his own humanistic belief in the 'unitary' character of law, economics, politics and culture. Under the rule of law, as Trotsky put it, 'the landlord, the labourer, the capitalist, the proletarian, the minister, the bootblack are equal as "citizens" and as "legislators" '; the abstraction of juridic subjects from their experience as producers is completed. The rule of law expresses the very fetish of law as a force remote from productive relations that Thompson so powerfully criticizes.

Conclusion

That Marxism must ally with liberalism in defence of civil liberties and democratic rights against their erosion by the state is beyond question. One way of reading Thompson is to see him as offering a critique of a sterile, sectarian Marxism that abstains from this joint struggle. The important question, however, is not whether an alliance between Marxism and liberalism is necessary, but rather on what terms it should be forged. By presenting the liberal idea of the 'rule of law' as an unqualified human good, and by excluding a Marxist critique of its limitations, Thompson advocates an alliance based in effect on the subordination of Marxism to liberalism. With the nightmare of Stalinist and authoritarian right-wing states before his eyes, Thompson perceives that workers prefer the 'rule of law' to both and are right to do so; but he thereby surrenders the vista of a far more radical democracy than that envisaged in liberal constitutions, put forward by Marx. In a

context in which the right wing is successfully exploiting the contradictions inherent in the old 'rule of law' and the dissatisfactions of many workers with its failures in practice – as witnessed by the level of popular support mobilized behind 'law and order' campaigns – Thompson's recipe for a purely defensive struggle in support of traditional, liberal constitutions is unlikely to stem the tide. Just as the defence of welfare requires also the democratization of its bureaucracy and the self-activity of recipients and workers, so too defence of the rule of law, if it is to require popular support, requires a level of democratization – of the courts, the judiciary, the legal profession, the police, prisons, etc. – and a level of self-activity by ordinary people which the old liberal constitution did not envisage in its appeal to the rule of law, but which was the ABC of Marx's critique. In this context it is vital that Marxists retain the independence of their critique of the limitations of liberalism, even as they join hands with liberals in a common struggle against a right-wing authoritarianism that falsely seeks to appropriate for itself the title of defender of 'the rule of law'.

Power without people: Michel Foucault

While Pashukanis and Thompson offer critiques of private property, law and the state within the Marxist tradition, the French historian and philisopher Michel Foucault has purported to represent views that are an advance over Marxism. His approach, which rejects the categories of private property, law and the state in favour of that of power, has gained wide influence – even among Marxists – and has undoubtedly made a stimulating contribution to the modern debate. The adequacy of Foucault's critique, not only of Marxism but also of liberalism, is my focus.

Foucault describes his own critique of power as having been made possible by the May 1968 revolt in France. In his view this revolt opened the way towards a perspective on power which demands new historical concepts, new ways of theorizing and new strategic options for resistance. Foucault argued that the revolt of May 1968 made possible and necessary a radical break from all traditional theories of power and traditional conceptions of struggle, including those of Marxism.

The question posed by 1968, as he put it, was 'how can

revolutionary movements free themselves from the "Marx effect" '. Foucault presented himself as a 'post-Marxist', one who, in the words of his admirer, Gilles Deleuze, 'achieved a theoretical revolution directed not only at bourgeois theories of the state but at the Marxist conception of power and the state'. In the eyes of his followers, Foucault appears to have transcended divisions between left and right, materialism and idealism, socialism and capitalism. In reality Foucault expressed many of the themes embraced by the New Left, including many Marxists, but he was to give to them his own particular twist.

The strength of the spirit of anti-authoritarianism which invested the struggles of 1968 was that it attempted to break through the grip of Stalinism on the one hand and reformism on the other, both of which tended to idealize existing forms of power, or else to ignore them altogether by concentrating exclusively on the realm of economics. The anti-authoritarianism of 1968 represented, in its youthful way, a head-on attack against this consensus: practically every aspect of the operation of power was subjected to critical scrutiny – the state, the family, the hospital, the asylum and the prison appeared as symbols of a 'despotic' power which continues to be exercised both in the East and the West, and also as signs of the failure of the left to come to grips with the question of power. In socialist theoretical work such issues had been largely ignored and, on the practical side, the coming to power of socialist movements left these institutions solidly intact. In Foucault's eyes, a radical politics worth its salt would have to overthrow such monuments to despotism.

Equally important, he thought, was the need for a new theoretical approach capable of understanding the exercise of power in modern 'disciplinary society'. History has shown that new classes may seize control of power without altering its mode of operation. A politics exclusively oriented to the seizure of power neglects the revolutionary task of securing a transition from one form of power to another: to a form of power in which neither prisons nor asylums would have a place. Power is not centralized exclusively in the state, nor is it exclusively the property of one class; rather it is exercised in multiple centres, each with its own distinctive characteristics. It is not adequate to reduce the question of power in the asylum, the prison, the factory, the family, etc., to that of the state or ruling class; nor to assume that the despotism

within these institutions will automatically disappear with the overthrow of a particular state or class.

Just as there are multiple centres of power, so too there are multiple sources of resistance: from schoolchildren, students, prisoners, psychiatric inmates, women, factory workers and so forth – each engaging in particular localized struggles; resistance does not stem from one single source, whether that source be the working class conceived as a uniform entity or the Party; but each of these struggles has its own distinctive integrity. Since power is not the exclusive possession of a particular class, it cannot be a purely rational means of securing class relations. Power is never simply 'functional' for capital; but the contradictions in its exercise inevitably lead to the constant regeneration of resistance. Nor is power something purely 'negative' or 'repressive'; it does not merely deny freedom, it also plays a 'positive' role in creating atomized servile, docile, or at least manageable individuals. The form of 'disciplinary' power emboded in prisons, asylums, factories and families is not simply given in nature, nor is it a property of every social order, but is rather a definite historical relation whose beginnings one can trace and whose end one can foresee.

Finally, the privileged position of science should not be automatically jutified; rather, knowledge and power are inextricably linked, as the close connections between 'sciences' like psychiatry and criminology and institutions like asylums and prisons clearly show. This understanding of the link between knowledge and power must be incorporated in critical theory lest it should itself become a new kind of elitism, monopolizing knowledge of the 'truth' and dismissing all other beliefs as 'false consciousness'. Foucault was not wrong to take off from themes which represented a revival of left criticism about power and the state. However, around the kernel of truth contained in these observations he built an elaborate mystical shell.

Foucault's anti-Marxism stemmed in part from a mistaken identification of some kinds of vulgar Marxism (e.g. the French Communist Party) with Marxism in general; it does not need reiterating at this stage that Marx saw revolution not merely as a transfer of power from one class to another but also as a transition from one form of power to another (in which the transformation of the asylum and the prison should be one element). He did not see seizure of the state as the solution to all oppression. Foucault's