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The rule of law and the rise of capitalism

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The collapse of the Soviet Union in the late 1980s saw Western economists rush eastwards to implement a new market economy and introduce capitalism to the former Soviet Bloc states. Many advocated what came to be known as 'shock therapy' or 'Big Bang' reforms; the rapid liberalisation of the economy, deregulation of prices and mass privatisation. In Russia alone, between December 1991 and July 1994, some 70 per cent of Russian industry was privatised.¹ The reformers shared a faith that in the wake of rapid reform, a functioning market economy would develop quite naturally.² Instead, hyperinflation, mass shortages, political instability, a collapsing currency, and social stratification on an unprecedented level followed. The problem, shock therapy's advocates quickly insisted, was due not to any failing in the neoliberal policies of privatisation and liberalisation, but rather to the absence of a secure institutional environment and the rule of law.

In identifying the rule of law as a necessary prerequisite for the rise of capitalism, neoliberal reformers could draw on a longstanding tradition with its roots in the social theory of Max Weber. Weber argued that the operation of a capitalist market requires a high level of predictability and calculability for economic actors, the product of what Weber called 'legal rationality'. Subsequent writers have identified in Weber's notion of legal rationality the kernel of the later economic reformers' idea of the rule of law.

Weber was not the only theorist to reflect on the relationship between law and the rise of capitalism. Karl Marx also offered some insights in the context of his wider-ranging theorisation of capitalism and its historical origins, although in his view, the rule of law was not the basis on which capitalism developed but instead a product of the latter. Like Weber, though, Marx also contributed the basis for a diverse tradition which continued to expand upon his incipient theorisation of law and capitalism.

While these two traditions invite juxtaposition with one another, neither is itself monolithic or without internal contradiction. The Marxist variation, in particular, is fractious and has historically been marked by numerous splits and disagreements. But any attempt to offer a theoretical résumé of the relationship between the rule of law and the rise of capitalism faces a further complication. Although both make important contributions to understanding this relationship, neither Weber nor Marx wrote specifically of the *rule of law*, concerned instead with law and the legal system more generally.

Those scholars who do write specifically of the rule of law often invoke markedly different ideas, institutions, and arrangements with this epithet. Danilo Zolo has written that 'it would

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¹ Karla Hoff and Joseph E. Stiglitz, 'After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies' (2002) 94(3) *The American Economic Review* 753.

² Jeffrey Sachs argued, for instance, that 'markets spring up as soon as the central planning bureaucrats vacate the field'. Jeffrey Sachs, *Poland's Jump to the Market Economy* (MIT Press 1993) xiii.

be naïve to seek a semantically univocal and ideologically neutral definition of the “rule of law”.”³ A quick glance at the other contributions in this volume is enough to reveal the plasticity of the epithet. A plurality of meaning also characterises debates about capitalism, understood by some as merely a system of competitive markets and by others as, say, a distinct mode of production based on the extraction of surplus value through the exploitation of wage labour.

With such caveats in mind, this chapter attempts to chart a course across this complex and contradictory terrain. It offers a brief mapping, necessarily abbreviated, of the two most prominent theoretical traditions which have sought to understand the relationship between the rule of law and the rise of capitalism. It begins with a discussion of Weber’s contribution before tracing the contours of a genealogy of what I call the neo-Weberian tradition, an arc which passes through the modernisation theories of Talcott Parsons and the Law and Development movement and ends at contemporary theories of ‘good governance’ now dominant in the major international financial institutions (IFIs). The chapter then turns to an alternate tradition of thought. It sketches an outline of Marx’s insights on law and its origins in capitalism before discussing two prominent approaches to this relationship which build on Marx’s own lapidary remarks. The first emphasises class struggle in the shaping of a capitalist rule of law, while the second traces the very legal form itself to the rise of capitalism. The chapter concludes with a brief discussion of the political stakes involved in these debates.

MAX WEBER AND THE ORIGINS OF CAPITALISM

Max Weber is one of the most influential theorists to explore the relationship between law and capitalism. His ruminations on law emerged from his broader interest in explaining the emergence of industrial capitalism in Europe. Why, he asked, had capitalism developed in the West but not other parts of the world? What was unique about European society that was conducive to capitalism’s development?

One answer for which he is particularly well known was religion: the Protestant ethic, with its encouragement of work in the secular world and a concomitant ‘impulse to acquisition, pursuit of gain, of money, of the greatest possible amount of money’, left its stamp on the developing political economies of northern Europe.⁴ But Weber also placed great emphasis on the role of law. Specifically, he argued, European law was more conducive to the development of a capitalist economy than the systems of social regulation found in other parts of the world.

On Weber’s view, capitalism, that ‘most fateful force in our modern life’, was identified with ‘the pursuit of profit, and forever *renewed* profit, by means of continuous, rational, capitalistic enterprise’.⁵ Trade and exchange might be found throughout history, but a *rational* and *systematic* approach to economic activity, Weber argued, was a much more recent development. Moreover, it was a development that required a particular institutional basis, one which provided the high degree of calculability needed for a system of rational and continuous accumulation. Only in Europe, Weber maintained, could one find the requisite ‘legal rationality’ offered by a system of formal law and the predictable and rational administration of justice. ‘Modern rational capitalism’, he explained, ‘has need, not only of the technical means of production, but of a calculable legal system and of administration in terms of formal

³ Danilo Zolo, ‘The Rule of Law: A Critical Reappraisal’ in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer 2007) 3, 5.

⁴ Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons tr, first published 1930, Routledge 2001) xxxi–xxxii (emphasis in original).

⁵ Weber (2001) xxxi.

rules.’ This system alone could support ‘rational enterprise under individual initiative, with fixed capital and certainty of calculations’ and it had existed ‘in a comparative state of legal and formalistic perfection *only* in the Occident’.⁶

How did rational law differ from other forms of law, such as those found in extra-European civilisations? Rules and commands regulate all societies; what set Europe apart was the source of those rules’ legitimacy. Weber identified three sources of authority: the legitimacy of law might rest on the perceived sanctity of immutable tradition; on the ‘sanctity, heroism or exemplary character’ of an extraordinary, charismatic leader; or on ‘a belief in the legality of enacted rules’.⁷ As David Trubek observes, each form of authority is associated with an attendant form of judicial process, but under the first two, law is legitimised ‘by something, as it were, outside itself’. Law, in a generic sense, becomes ‘rational law’ only when it becomes ‘its own legitimising principle, and the basis of all legitimate domination’.⁸ Rules are obeyed because they are believed to be rationally enacted, not simply a ‘received corpus of unvarying tradition’.⁹

More specifically, legal rationality is identified with a system of established norms of general application.¹⁰ A body of law consists in ‘a consistent system of abstract rules’ with authority figures subjected to ‘an impersonal order’ and enjoying obedience by virtue of that order alone and the ‘rationally delimited jurisdiction’ thereunder established.¹¹ These characteristics set the European legal tradition apart. Surveying various extra-European systems of social regulation, Weber concluded that none had ‘the strictly systematic forms of thought, so essential to a rational jurisprudence’ found in the West.¹² Only in the latter, he insisted, had a ‘primitive legal procedure’ rooted in irrationalism and revelation given way to a ‘specialised juridical and logical rationality and systematisation’.¹³

If the rise of capitalism in the West rested on a rational rule of law, from where did that legal base come? Importantly, Weber’s arguments about the relationship between law and capitalist development were not mere theoretical abstractions but were rooted in a close study of history. A rational legal system, no less than capitalism, was the product of a long process of historical development and contingent forces and conditions. Already in the formal reasoning of early Roman law Weber located the rational kernel of Western legal systems. Later, the Catholic Church’s bureaucratisation promoted legal formalisation, encouraging a more rational canon law than found in other theocratic legal traditions.¹⁴ And still later, the continued rationalisation of Western law went hand in hand with the emergence of the modern bureaucratic state and the separation of secular law and religion it entailed.

⁶ Ibid., xxxviii (emphasis added).

⁷ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich eds, first published 1922, University of California Press 1978) vol 1, 215.

⁸ David M. Trubek, ‘Max Weber on Law and the Rise of Capitalism’ (1972) *Wisconsin Law Review* 720, 732. Weber further distinguished between two types of legal rationality, *substantively* rational law and *formal* rational law. See Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Clarendon Press 1997) 143.

⁹ Trubek (1972) 724.

¹⁰ Trubek has argued that ‘Weber’s notion of legal rationality really measures the degree to which a legal system is capable of formulating, promulgating, and applying universal rules.’ Trubek (1972) 727.

¹¹ Weber (1978) vol 1, 217–18.

¹² Weber (2001) xxix.

¹³ Weber (1978) vol 2, 882.

¹⁴ The importance of these developments for Weber is discussed in greater detail by both Trubek (1972) 738 and Cotterrell (1997) 145–6.

Uncoupled from other sources of normative ordering, law could operate ‘like a technically rational machine’,¹⁵ applied through formal procedures with legal decisions determined with reference to universally applied general rules, not arbitrary or politically or religiously influenced ad hoc reasoning. Such features, today associated with a rule of law, rendered the legal system predictable, its impress on economic life easily calculable and economic uncertainty minimised. Moreover, Weber insisted, only this modern, rational legal system could provide the necessary calculability for industrial capitalism to emerge. The rationalisation and systematisation of the law, allowing for greater calculability of legal processes, constituted, Weber wrote, ‘one of the most important conditions for the existence of economic enterprise ... and, especially, capitalistic enterprise, which cannot do without legal security.’¹⁶

THE NEO-WEBERIAN TRADITION

When Weber died in 1920, his scholarly reputation remained rather limited, even within Weimar Germany. Both major works for which he is today best known—*Economy and Society* and *The Protestant Ethic and the Spirit of Capitalism*—remained in manuscript form, edited and published only posthumously by his wife Marianne. International recognition came only with Talcott Parsons’s translation of *The Protestant Ethic* into English in 1930. Parsons, one of the most influential US sociologists of the twentieth century, did much to disseminate Weber’s ideas making Weber a universal point of reference in today’s academy. ‘Less a distinct tendency or school than an ether in which the social sciences are bathed’, writes Peter Thomas, Weber’s ‘generic concepts—“the Protestant ethic”, “charismatic leadership”, “rationalisation”, “disenchantment” and “ideal types”—have entered the lexicon of modern intellectual life’.¹⁷ Yet in the hands of Parsons and subsequent interpreters, many of Weber’s ideas became stripped of their formative contexts and historical nuance.

Modernisation Theory and the Law and Development Movement

Among the ideas taken up by Parsons, the purported relationship between law and capitalism was central. Building on Weber, Parsons sought to generalise and systematise the former’s theory of social change.¹⁸ A generalised and rational legal order, Parsons suggested, was the marker of modernity, distinguishing it from earlier social formations. ‘[T]he institutionalisation of [law] marks the transition from intermediate to modern societies’, Parsons wrote. ‘Its organisation must be generalised according to universalistic principles. This requirement precludes such imposing systems as the Talmudic law or that of traditional Islam from being classed as modern law. They lack the generality which Weber called formal rationality.’¹⁹

Here, though, was precisely the type of general theory of social development which Weber had refused. As Chantal Thomas observes, Parsons ‘transposes Weber’s historical, heuristic analysis onto the prescriptive frame of modernisation theory’.²⁰ Modernity, and capitalism, here are identified with societies that develop autonomous, rational legal orders. Parsons thus takes Weber’s insights on rational law but generalises from Weber’s historically specific

¹⁵ Weber (1978) vol 2, 811.

¹⁶ Weber (1978) vol 2, 884.

¹⁷ Peter Thomas, ‘Being Max Weber’ (2006) 41 *New Left Review* 147.

¹⁸ See Talcott Parsons, *The Structure of Social Action* (Free Press 1967).

¹⁹ Talcott Parsons, *Societies: Evolutionary and Comparative Perspectives* (Prentice-Hall 1966) 27.

²⁰ Chantal Thomas, ‘Re-Reading Weber in Law and Development: A Critical Intellectual History of “Good Governance” Reform’ (2008) Cornell Legal Studies Research Paper No. 08-034, 87.

insights on European development to all societies, to make the development of formal rationality and a rational rule of law the ‘criterion of modernity’.²¹

Highly influenced by Parsons, the ‘Modernisation’ theorist Walt Rostow took Parsons’ systematisation further. In Rostow’s hands, Weber’s historical analysis became further hollowed out, reproducing Parson’s elisions in sketching a simplistic universalism in which Rostow reduced social change—including the emergence of capitalism—to a series of five stages of economic growth: traditional society, ‘preconditions for take-off’, ‘take-off’, the ‘drive to maturity’, and an ‘age of high mass consumption’.²²

Rostow’s modernisation theory also retained the Weberian centrality of a stable legal order, but further reduced it to a ‘one-size-fits-all’ theory of capitalist modernity. As Thomas remarks of Rostow’s work, ‘[w]ith respect to economic development, such a stable legal system is necessary particularly because it enables the predictable and effective enforcement of “background” rules necessary for capitalist economic growth, especially contract and property rights’.²³

The sociology of Parsons and Rostow directly influenced the (primarily US) Law and Development movement of the 1960s and 1970s. Weber, via Parsons and Rostow, had argued that capitalism required a rational, rule-oriented legal system to provide security and predictability for market actors in economic exchange. It followed that law—and legal reform—could in turn contribute to, and be harnessed for, capitalist development. Law reform—the promotion of a Weberian, rational rule of law—became a central plank of US foreign policy which sought to ‘harness [...] American knowledge and resources to the developmental task’.²⁴ Drawing on modernisation theory’s deterministic model of development, Law and Development scholars believed that Western capitalist laws and legal institutions could be transplanted into less developed countries, accelerating capitalist development. ‘American legal missionaries’ rushed to Latin America and Africa with ideas of ‘modernising’ judiciaries and law schools,²⁵ convinced that ‘if exported to the developing world’, a ‘Westernised “rule of law”’ and US legal culture ‘would hasten progress towards modernity’.²⁶

The Law and Development movement proved short-lived. By the mid-1970s, many of the movement’s leading figures had become disillusioned, in particular with the universalising assumptions the movement had inherited from the modernisation theorists. As two of the movement’s protagonists, David Trubek and Marc Galanter, would later write, the Weberian model of ‘liberal legalism’ assumed, in the hands of the Law and Development theorists, ‘social and political pluralism’ where instead in much of the Third World ‘social stratification and class cleavage’ was the norm. Legal rules, rather than reflecting general interests, were often ‘imposed on the many by the few and are frequently honoured much more in the breach than in the observance’. In fact, the model appeared not to even hold for the United States. Rather

²¹ Trubek (1972) 737.

²² W.W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (2nd ed, Cambridge University Press 1971).

²³ Thomas (2008) 85.

²⁴ David M. Trubek and Marc Galanter, ‘Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States’ (1974) *Wisconsin Law Review* 1062, 1067.

²⁵ James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (University of Wisconsin Press 1980) 11.

²⁶ David Trubek, ‘Law and Development’, in N.J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences* (Pergamon 2001) 8443.

than the ‘general rules’ of Weber’s ideal typical rational legal system, closer scrutiny of the United States found that many laws ‘originate from, and primarily serve, specific groups’ and that ‘those who apply rules have substantial discretion ... to favour certain groups and viewpoints’.²⁷

The New Institutional Economics of Douglas North and ‘Good Governance’

If the Law and Development movement lost traction, Weber’s influence did not. The Weberian view that law, and in particular *rational* law, could explain the emergence and reproduction of capitalism continued to exert an influence on social and economic theorists. From the late 1980s, the New Institutional Economics (NIE) of Douglass North and his colleagues began to gain increasing popularity.²⁸ The NIE was greatly influenced by Ronald Coase, whose work on the ‘nature of the firm’ and the ‘problem of social cost’ had highlighted the importance of transaction costs for economic analysis.²⁹ The costs of exchange, Coase had shown, were dependent on various institutions in society—a ‘complicated set of interrelationships’ overlooked by neoclassical economic theory with its model of individuals engaging in free exchange under a system of *laissez faire* markets.³⁰ Like Coase, North argued that the neoclassical model of economics in fact rested on institutional foundations. To understand economic change and, ultimately, capitalist development, one could not ignore the role of institutions, ‘the humanly devised constraints that structure political, economic and social interaction’.³¹

Institutions, North argued, include both ‘informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)’.³² It was the latter, in particular the legal protection of property rights, that were most important to North’s explanation of economic and social change. A rule of law protecting property rights establishes individual and group incentives of economic behaviour and exchange. By providing, for instance, credible and efficient contract enforcement, legal institutions establish a ‘stable . . . structure to human interaction’, reducing transaction costs and creating incentives for rational economic actors to engage in exchange.³³ Historically, the legal enforcement of contracts has ‘altered the pay-off to cooperative activity’, while patent laws have ‘increased the incentive to invent and innovate’ and the development of a professional judicial system reduced transaction costs in markets.³⁴ An absence of modern legal institutions with clearly defined and consistently enforced property rights, by way of contrast, leads to high transaction costs and inhibits economic growth and the development of increasingly complex modes of exchange associated with modern capitalism.³⁵

In the 1990s, with efforts to transplant capitalism to the former Soviet Bloc, as well as a continuing project to promote its development in the global South, North’s NIE was

²⁷ Trubek and Galanter (1974) 1081.

²⁸ The prefix distinguished the school from an earlier current of economic thought associated with thinkers such as Thorstein Veblen, Gunnar Myrdal and John R. Commons.

²⁹ Ronald Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; Ronald Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law and Economics* 1.

³⁰ Ronald Coase, ‘The New Institutional Economics’ (1998) 88(2) *The American Economic Review* 72.

³¹ Douglas C. North, ‘Institutions’ (1991) 5 *Journal of Economic Perspectives* 97, 97.

³² *Ibid.*

³³ Douglas C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 6.

³⁴ Douglas C. North, *Understanding the Process of Economic Change* (Princeton University Press 2010) 18.

³⁵ See North (1990) 33 and Douglas C. North and Robert P. Thomas, *The Rise of the Western World: A New Economic History* (Cambridge University Press 1973).

championed by many development institutions. The IFIs, such as the World Bank and IMF, faced increasing criticism of their structural adjustment programmes and shock therapy, and sought to explain their failures with an appeal to institutions. The problem with neoliberal development policy was not due to any failing in the policies of privatisation and liberalisation but the absence of a facilitating institutional environment and a lack of ‘good governance’.³⁶ Capitalism promoted economic growth, the new orthodoxy maintained, but its development required good governance: ‘a predictable and transparent framework of rules and institutions for the conduct of private and public business’.³⁷ Neo-Weberian language featured heavily in this new discourse. In a 1994 report, the World Bank explained that:

Good governance is epitomised by predictable, open, and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law.³⁸

Central to the good governance agenda is the rule of law which, like governance, is understood in Weberian terms. The rule of law exists, on the Bank’s view, where the government is bound by law, where all individuals are treated equally under the law, where the law is transparent and its enforcement predictable’.³⁹ More recently, the Bank has opined that ‘[t]here is no substitute for a clear law. A predictable law promotes stability in commercial transactions, fosters lending and investment at lower risk premiums, and promotes consensual resolutions of disputes’.⁴⁰ The World Bank’s Legal Vice Presidency explains similarly that legal institutions ‘engender investment and jobs’ by providing an ‘environment conducive to economic activities’. For instance, secure property rights and enforceable contracts enable individuals to ‘take opportunities in business, commerce and other activities’. The rule of law thus ‘empower[s] private individuals to contribute to economic development by confidently engaging in business, investments and other transactions’.⁴¹

If the focus on predictability recalls Weber, in other respects the new rule of law discourse represents a banalisation of his thinking. In the hands of the IFIs, Weber’s prescription for calculable law loses its historical richness. Increasingly, the rule of law is equated narrowly with the protection of private property rights and the predictable enforcement of contract. Already in 1997, World Bank Vice President Wolfensohn had explained that ‘[w]here private property rights are not protected and where contracts are not enforced predictably, or where judicial enforcement is unreliable, the private sector does not believe that the state will enforce the rules of the game’. Economic actors will not pursue market activity or ‘commit resources in highly uncertain and volatile environments’.⁴²

³⁶ See, e.g., World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (World Bank 1989) 60; World Bank, *Governance and Development* (World Bank 1992) 1.

³⁷ World Bank, *Governance: The World Bank’s Experience* (1994) vii.

³⁸ *Ibid.*

³⁹ World Bank, *Initiatives in Legal and Judicial Reform* (World Bank 2004) 2–3.

⁴⁰ World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (World Bank, 2001).

⁴¹ World Bank, *Legal and Judicial Reform: Observations, Experiences and Approach of the Legal Vice Presidency* (World Bank 2002) 2–3.

⁴² James D. Wolfensohn, Foreword to World Bank, *World Development Report 1997: The State in a Changing World* (World Bank 1997) 36.

The same view can also be found in the work of Hernando de Soto, the writer who has perhaps done most to popularise this narrow understanding of the rule of law and its relationship with capitalism. Like the Bank, to which he has served as an adviser, de Soto argues that capitalist development rests on and requires a predictable legal system. In the absence of secure property rights, a ‘teeming mass’ of ‘extra-legal small entrepreneurs’ struggles to secure credit to grow its businesses and expand its economic activities. Confronted with business conflicts, these economic actors likewise have difficult accessing legal remedies in courts.⁴³ Development cannot occur, de Soto argues, so long as a flawed legal system stops individuals and their assets from participating in the market. De Soto’s prescription is the issuance of formal title—land-titling for slum dwellers, for instance.⁴⁴ By giving the poor formal title to their property, de Soto insists, they can turn their previously unrecognised capital into liquid capital, creating equity for entrepreneurs in need of credit. ‘In the midst of [the Third World’s] poorest neighbourhoods and shanty towns’, de Soto writes, there are ‘trillions of dollars, all ready to be put to use if only we can unravel the mystery of how assets are transformed into live capital’.⁴⁵

This approach, like that of the IFIs which draw heavily on de Soto’s work, elides much of the nuance of Weber’s own account of capitalist development. Where Weber offered a holistic theory of the relationship between a rational legal system or rule of law and capitalism, today’s legal reformers advocate a universal, one-size-fits-all approach undergirded by an *a priori* belief in a single evolutionary path to capitalist modernity. Weber’s notion of legal rationality has today become an ahistorical abstraction. Private property and contract constitute the foundation stone of the rule of law, the causal mechanisms for the development of capitalism.

MARX AND ENGELS ON THE ORIGINS OF LAW

If Weber’s theorisation of the relationship between the rule of law and the rise of capitalism remains the dominant influence in contemporary legal and developmental thought, his is not the only approach to have attracted a following. The origins of capitalism and capitalist development were also of central concern for Karl Marx. Like Weber, Marx (and Friedrich Engels, with whom he often wrote) sought to offer a wide-ranging theorisation of capitalism and its origins rooted in a rich historical study of social formations. Where the two differed was in the role awarded law in capitalist development. In sharp contrast with Weber, Marx saw the rule of law not as the basis on which capitalism developed but rather the product *of* its development.

Marx and Engels themselves engaged little with specific legal questions and certainly in no systematic fashion.⁴⁶ In his ‘Preface to the Critique of Political Economy’, Marx argued that ‘legal relations as well as forms of state are to be grasped neither from themselves nor from the

⁴³ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000) 229.

⁴⁴ De Soto’s policy prescriptions for slums are critiqued in Mike Davis, *Planet of Slums* (Verso 2006).

⁴⁵ De Soto (2000) 35.

⁴⁶ A recent overview can be found in Robert Knox, ‘Marxist Theories of International Law’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), on which I draw in this section. An earlier engagement with Marx and law can be found in Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (Routledge 1993).

... general development of the human mind'. Rather, their roots are to be found in 'the material conditions of life.'⁴⁷

In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political, and intellectual life process in general.⁴⁸

Marx's invocation of a foundation (or base) and superstructure metaphor has led to great controversy and much confusion. The incautious have drawn on Marx's description to posit a strict determinism in which society's superstructure—the state, but also legal relations, the family, ideology, and so on—lacks any autonomy, and is determined mechanistically by the economic base. Karl Kautsky, for instance, argued that social development (and any changes in the superstructure) is determined solely by the 'needs of production'.⁴⁹

Such crude determinism, however, was not a feature of Marx's own writing. As Chris Harman has observed, '[t]he distinction between base and superstructure is not one between one set of institutions and another, with economic institutions on one side and political, judicial, ideological etc. institutions on the other'. Rather, it is a distinction between 'relations that are directly connected with production and those that are not. Many particular institutions include both'.⁵⁰ The development of the productive forces leads societies to particular stages of historical development—ancient society, feudal society, bourgeois society—and 'give[s] rise to specific configurations of the superstructure'. But this is far from arguing that the economic base will always be 'the visible, most important element in any society'.⁵¹ The economic structure rather explains 'why specific social forms (be they law, politics or religion) "played the chief part" in particular modes of production'.⁵²

Marx, in other words, argued that different modes of production throw up distinctive social arrangements. Just as one mode of production gives way to another, so too will social arrangements evolve, including the shape and role of law. The capitalist mode of production, Marx understood, was based upon the private ownership of the means of production, its crystallisation coeval with the development of private property and the new legal forms it called forth. Both private property and law, Marx and Engels argued in *The German Ideology*, emerged 'out of the disintegration of the natural community' that accompanied the passing of early modes of production based on communal ownership.⁵³ New forms of property were thrown up by changing productive relations: 'feudal landed property, corporative movable property, capital invested in manufacture' and ultimately 'pure private property, which has cast off all semblance of a communal institution'.⁵⁴ As communal ownership gave way to individual

⁴⁷ Karl Marx, 'Preface to a Contribution to the Critique of Political Economy' in Robert C. Tucker (ed.), *The Marx-Engels Reader* (2nd ed, WW Norton and Company 1978) 3, 4.

⁴⁸ Marx, 'Preface to a Contribution to the Critique of Political Economy' (1978) 4.

⁴⁹ Chris Harman, *Marxism and History* (Bookmarks 1998) 7 quoting Karl Kautsky.

⁵⁰ Harman (1998) 28–9.

⁵¹ Knox (2016) 308.

⁵² Ibid.

⁵³ Karl Marx and Friedrich Engels, 'The German Ideology', in Tucker (ed) (1978) 146, 187.

⁵⁴ Ibid., 186.

ownership, Robert Knox observes, ‘it was necessary to regulate such property relations between individuals—such regulation took the form of law’.⁵⁵

The development of new property relations and attendant legal forms was initially of limited consequence. In the ancient world, ‘the development of private property and civil law had no further industrial and commercial consequences, because [the Romans’] whole mode of production did not alter’.⁵⁶ Private property and law remained similarly undeveloped in feudal society. It was only with the emergence of a capitalist mode of production and bourgeois society, ‘where the feudal community was disintegrated by industry and trade’, that ‘private property and civil law . . . [were] capable of further development’.⁵⁷

In short, Marx and Engels argued that the ‘real development of law’ could occur only with the ‘rise, extension and systematisation of private property’ which accompanied the emergence of capitalism.⁵⁸ If legal relations—as opposed to other relations of domination—had existed in earlier periods, they were not widespread, confined to small pockets of social life. Only with the crystallisation of capitalist relations of property could law and legal relations enjoy dominance. In sharp contrast with Weber, then, who would later argue that law was the midwife of capitalism, Marx and Engels were adamant that the causal relationship was reversed: the rule of law was the *result* of capitalism, indeed was made possible only by the rise of capitalist property relations.

THE MARXIST TRADITION

Class Struggle and the Origins of Bourgeois Law

While Marx and Engels touched on law only in passing, within a broader study and theorisation of the state and capitalism, subsequent theorists in the Marxist tradition have considered law and its relationship to capitalism in much greater detail. Many have observed that while the emergence of law was determined by the rise of capitalism and private property, the particular institutional arrangements which constitute the rule of law were not static. In the Marxist view, legal relations, like the social relations of production on which they rested, were a site of contestation. The organisation of production—not only under capitalism but also earlier modes of production—is marked by a division between classes: ‘those engaged in producing social wealth and those who are able to appropriate it’:⁵⁹ slave and slave owners in ancient society; peasants, feudal lords, and a nascent bourgeoisie in feudal society; and workers and capitalists in capitalist society. These classes are constantly engaged in struggle and it is from out of that struggle that changes in the mode of production emerge. As Marx and Engels famously put it, ‘[t]he history of all hitherto existing society is the history of class struggles’.⁶⁰

The class struggle under capitalism takes the particular form of conflict between workers and capitalists, the latter appropriating the surplus value produced by workers engaging in labour. Indeed, for Marxists, capitalism is not, as in the neo-Weberian tradition, simply a system of free market exchange and (complex) competitive market activity, but rather a mode of production established *specifically* on the basis of ‘free’ wage labour. Whereas exploitation

⁵⁵ Knox (2016) 309.

⁵⁶ Marx and Engels, ‘The German Ideology’ (1978) 187.

⁵⁷ Ibid.

⁵⁸ Knox (2016) 309.

⁵⁹ Ibid., 308.

⁶⁰ Karl Marx and Friedrich Engels, ‘Manifesto of the Communist Party’ in Tucker (ed.) (1978) 469, 473.

and the appropriation of surplus labour in feudal societies was compelled through formal relations of direct servitude and domination, under capitalism it is economic need—the ‘dull compulsion of economic relations’⁶¹—which compels the wage earner to sell her labour.

A system of free wage labour, however, required the overthrow of feudal institutions and power structures. Peasants had to be shorn of access to the means of production (and subsistence) through the creation of new property rights—epitomised by the enclosure of the commons—and power centralised but also depersonalised, absolutist sovereignties tempered; constitutionalist struggles waged by the bourgeoisie for the rule of law. Sol Picciotto describes this process as a nascent capitalism in which ‘[s]ocial relations [were] not yet dominated by the “equal exchange” characteristic of the “dull compulsion of economic relations”, but by the extensive use of direct compulsion, systematic privilege or bribery, coercive creation of property rights and labour forces, etc’. To counter this, Picciotto observes, the bourgeoisie fought for ‘the establishment of the legal subject as bearer of rights and duties, the establishment of reified property rights and abstract judicial processes’ and ‘the spectacular demonstration of the supremacy of abstract law’.⁶²

Michael Tigar and Madeleine Levy develop a similar, if much richer, historical analysis which also foregrounds class conflict in the emergence and crystallisation of a bourgeois rule of law. Legal change, they argue, ‘is the product of conflict between social classes seeking to turn the institutions of social control to their purposes’.⁶³ In *Law and the Rise of Capitalism*, they trace the emergence of the contemporary trade- and commerce-facilitating rule of law to the bourgeoisie’s historical struggle, across eight centuries of European legal history, against feudal institutions. The nascent bourgeoisie of Europe faced a hostile climate in the feudal world: the merchant was ‘an object of derision, scorn, and even hatred’ and profit was ‘considered dishonourable’.⁶⁴ The ‘legal system’ under feudalism—the system which issued orders backed up by institutional force—‘was either silent about trade or hostile to it’.⁶⁵ As the bourgeoisie grew and created new commercial institutions—cities, ports, harbours, banks—they increasingly came into collision with the economic and political interests of feudal powerholders and the laws and customs that protected those interests.⁶⁶

Chafing against a hostile system, this early merchant class sought to establish the institutional conditions which would permit their trading activities, ‘a system which guaranteed physical security and made possible credit, insurance, and the transmission of funds’.⁶⁷ They fashioned rules and a nascent legal system which could serve their interests, creating tribunals for the settlement of disputes among merchants, while also ‘wrest[ing] concessions from spiritual and temporal princes in order to establish zones of free commerce’.⁶⁸ New rules about contract and property were promulgated, accompanied by a new ‘legal ideology which identified freedom of action for businessmen with natural law and natural reason’.⁶⁹

⁶¹ Karl Marx, *Capital: A Critique of Political Economy, Volume One* (Ben Fowkes tr, Penguin Books 1976) 899.

⁶² Sol Picciotto, ‘The Theory of the State, Class Struggle and the Rule of Law’, in Bob Fine et al. (eds), *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (Hutchinson 1979) 173.

⁶³ Michael E. Tigar and Madeleine R. Levy, *Law and the Rise of Capitalism* (Monthly Review Press 1977) xiii.

⁶⁴ *Ibid.*, 4.

⁶⁵ *Ibid.*, 5.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, 4.

⁶⁸ *Ibid.*, 5–6.

⁶⁹ *Ibid.*, 6.

Common to these analyses is an argument that the rule of law and legal system reflect particular class interests. With the consolidation of capitalism, on this view, the legal order and rule of law comes to reflect and serve the interests of the ruling class, now the bourgeoisie. Marx himself remarked that ‘the individuals who rule . . . give their will . . . a universal expression as the will of the state, as law, an expression whose content is always determined by the relations of the class.’⁷⁰

Of course, as Robert Fine has argued, ‘the bourgeoisie does not exist in a vacuum but rather in a definite relation to the other classes of civil society’. The struggle between classes is not static but in fact ‘depends on the level of development, organisation and consciousness of each and on the alliances which each is able to forge with other classes’.⁷¹ The ways and extent to which class interests are reflected in the law may vary across time, and are the outcome of a continuous struggle, initially between bourgeois and feudal interests; later between the working class and bourgeoisie.

Such an understanding was central to the Marxist historian E.P. Thompson’s analysis of the rule of law and its relation to capitalism. Against those who would see law as *merely* a truncheon wielded by the ruling class, Thompson insisted the law was ‘an arena for class struggle, within which alternative notions of law were fought out’.⁷² In *Whigs and Hunters*, Thompson’s voluminous historical study of the Black Act of 1723, Thompson showed how the law often did indeed serve the interests of the propertied class. With the Black Act, he observed, Parliament extended the death penalty to ‘rebellious acts such as deer stealing, tree cutting, and burning by agrarian rebels, whose traditional legal rights to hunt and forage on common lands had been curtailed . . . by enclosure laws’.⁷³ Yet at the same time, Thompson insisted, the rule of law also imposed ‘effective inhibitions upon power’.⁷⁴ Not merely a tool of class domination or a mirror image of class relations, the rule of law served power but also subjected ‘the ruling class to its own rules’.⁷⁵

Thompson is not alone in arguing for the (potentially) progressive content of the law. If law is a site of contestation, then it can come to reflect a new constellation of class relations. Just as a bourgeois rule of law emerged with the rise of capitalism, so too can a socialist rule of law emerge with a post-capitalist social formation—as labour consolidates its power vis-à-vis capital and the bourgeoisie, the class content of law can be emptied, the bourgeois rule of law replaced by a socialist rule of law.⁷⁶ Such a conclusion rests, of course, on the prior historical understanding that it is the *content* of the law which is shaped by the rise of capitalism. But that analysis is not shared by all in the Marxist tradition. A quite different understanding of law’s relationship with capitalism can be found in the work of the Bolshevik jurist Evgeny Pashukanis.

Pashukanis and the Commodity Form Theory of Law

The Bolshevik jurist Evgeny Pashukanis’ *General Theory of Law and Marxism* remains today the most significant Marxist analysis of law. Following Marx and Engels, Pashukanis suggested that law gained dominance as a mode of social regulation only under capitalism. But

⁷⁰ Marx and Engels, ‘German Ideology’ (1978) 198.

⁷¹ Bob Fine, *Democracy and the Rule of Law* (The Blackburn Press 20002) 93.

⁷² E.P. Thompson, *The Poverty of Theory and Other Essays* (Monthly Review Press 1978) 96.

⁷³ Daniel H. Cole, “‘An Unqualified Human Good’: EP Thompson and the Rule of Law’ *Journal of Law and Society* 28 (2001) 177–203 179.

⁷⁴ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books 1975) 266.

⁷⁵ *Ibid.*, 269.

⁷⁶ See, e.g., Christine Sypnowich, *The Concept of Socialist Law* (Clarendon Press 1990).

Pashukanis opposed those Marxists who ‘assumed that by simply adding in the element of class struggle’ to positivist theories of law, ‘they would attain a genuinely materialist, Marxist theory of law’.⁷⁷ Such an approach, as seen above, focuses on the class content of law and ‘exclude[s] the legal form as such from . . . [the] field of observation’.⁷⁸ On Pashukanis’s view, it was not simply the bourgeois content of legal rules and the rule of law that was unique to capitalism, but the legal *form* itself. Such a form, he insisted was not ‘an inherent or eternal instrument of social regulation’⁷⁹ but was in fact ‘relative and historically limited’.⁸⁰

Social regulation itself was nothing unique to capitalism, but it was only ‘under certain conditions [that] the regulation of social relations assumes a legal character’.⁸¹ These conditions, Pashukanis suggested, were those of commodity exchange, the commodity form being that under capitalism through which material exchanges are mediated. Only with the capitalist mode of production does the product of labour take on the commodity form. Furthermore, for commodities to be exchanged (through the medium of money), they must be brought to market by their owners, each recognising the other likewise as the exclusive owner of her commodities. Each commodity is acknowledged as the private property of its owner, given freely in exchange for another.

The juridical relationship between exchangers of commodities mirrors this economic relationship, with each party recognised as legal subjects: formally equal, if abstract, commodity owners. The juridical relation, as China Miéville puts it, ‘exists in the interface between humans’ relations with their commodities and concomitant relations with each other’.⁸² The legal subject then, Pashukanis observes, is:

<quotation>an abstract owner of commodities raised to the heavens. His will in the legal sense has its real basis in the desire to alienate through acquisition and to profit through alienating. For this desire to be fulfilled, it is absolutely essential that the wishes of commodity owners meet each other halfway. This relationship is expressed in legal terms as a contract or an agreement concluded between autonomous wills. Hence the contract is a concept central to law. To put it in a more high-flown way: the contract is an integral part of the idea of law.⁸³</quotation>

In other words, ‘[e]very legal relation is a relation between subjects’ and that subject, the autonomous, formally equal commodity owner, is ‘the atom of legal theory, its simplest, irreducible element’.⁸⁴

Exchange, of course, invites dispute and contestation which must be regulated. The legal form thus emerges specifically to resolve disputes between legal subjects. Indeed, law for Pashukanis differs from technical regulation precisely in that ‘in the latter singleness of purpose can be assumed, whereas the basic element in legal regulation is contestation; two sides

⁷⁷ Evgeny B. Pashukanis, *The General Theory of Law and Marxism* (first published 1924, Transaction Publishers 2002) 53.

⁷⁸ *Ibid.*

⁷⁹ Michael Head, *Evgeny Pashukanis: A Critical Reappraisal* (Routledge 2008) 170.

⁸⁰ Pashukanis (2002) 34.

⁸¹ *Ibid.*, 79.

⁸² China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Haymarket Books 2006) 87.

⁸³ Pashukanis (2002) 121.

⁸⁴ *Ibid.*, 109.

defending their rights'.⁸⁵ On Pashukanis's view, Chris Arthurs playfully observes, law starts 'paradoxically . . . from a law-suit'.⁸⁶ But it is a form of social regulation premised on disputes between the '*sovereign, formally equal individuals*' implied by commodity exchange—as opposed to the formally unequal individuals implied by the hierarchical command relations of (say) feudalism'.⁸⁷ Law, then, uniquely in the history of social regulation, must resolve disputes 'without diminishing either party's sovereignty or equality',⁸⁸ thus its necessary abstract quality and formal equality of its subjects.

In arguing that the legal form was a peculiarly capitalist institution, the outgrowth of generalised commodity exchange, Pashukanis did not deny its existence in pre-capitalist periods, as is clear from his discussion of Roman law. Commodity exchange clearly predates capitalism and so too law, a function of pre-capitalist markets, but only as 'embryonic legal forms' in 'specific *pockets* of social life, intertwined with custom, status, religion and privilege'.⁸⁹ Only as capitalism came to dominate social relations of production, displacing feudal relations, were market relations, and commodity exchange, generalised, with 'separate casual acts of exchange . . . transformed into expanded, systematic commodity circulation'.⁹⁰ So too with law and the rise of the universal legal subject.

It follows, on this approach, that law was not a set of abstract norms imposed upon social relations—norms which, when arranged appropriately, on the Weberian view, enabled exchange and increasingly complex market relations—but was itself indissolubly linked to and thrown up by concrete, *material* relations. It unfolds, as Pashukanis put it, 'not as a set of ideas, but as a specific set of relations which men enter into not by conscious choice, but because the relations of production compel them to do so'.⁹¹

CONCLUSION

The relationship between the rule of law and the rise of capitalism remains contested, the subject of competing claims and divergent methodologies. This chapter has argued that two primary traditions dominate the field: one influenced by the work of Max Weber and the other drawing on the analyses of Karl Marx. Of course, to group often disparate thinkers like this is to simplify and one should resist the urge to hypostasise any loosely constructed 'tradition'.⁹² And yet clear differences nonetheless divide the two German thinkers, as well as their intellectual heirs, both in general and specifically on the question of law and capitalism.

Marx, born half a century earlier, was an ever-present reference for Weber. As Norman Birnbaum has noted, 'Weber's life work may be understood as a desperate encounter with Marxism, a system of values and explanation from which Weber dissented', albeit one 'which he treated with the utmost seriousness and respect'.⁹³ As outlined above, Marx had insisted that

⁸⁵ Chris Arthur, Editor's Introduction to Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (Ink Links 1978) 9, 15.

⁸⁶ Arthur (1978) 15.

⁸⁷ Miéville (2006) 78–9 (emphasis added).

⁸⁸ Ibid., 79.

⁸⁹ Knox (2016) 316 (emphasis in original).

⁹⁰ Pashukanis (2002) 115.

⁹¹ Ibid., 68.

⁹² Similarly, many thinkers nominally identified with one or the other tradition owe debts to both classical thinkers. Lukács, to take just one example, famously drew on both Marx and Weber for his theory of reification. See György Lukács, *History and Class Consciousness* (first published 1923, Merlin Press 1967).

⁹³ Norman Birnbaum, 'The Demon of the Concrete' (1961) *I/8 New Left Review* 35, 35.

the rule of law, like legal relations and forms of state more generally, should be understood as shaped by and emerging from the material conditions of life. Under capitalism, those material conditions are fundamentally different from those found in earlier social formations: under capitalism alone the organisation of production is based on a system of free wage labour and the class division of society into workers and capitalists. These new material conditions—the social relations of production—both make possible and require corresponding legal relations: a rule of law that can mediate a system of universal commodity exchange and that reflect the interests of a newly dominant capitalist class (or some ever-shifting balance between the competing interests of capital and labour).

Weber, by way of contrast, insisted that causality ran in the opposite direction. The special features of Western legal systems were not the product of capitalism, but rather were a necessary antecedent. If material conditions and concomitant capitalist interests *encouraged* the development of rational law, he insisted, ‘these interests did not themselves *create* that law’.⁹⁴ Christopher May succinctly summarises Weber’s position: ‘Although not standing outside of social relations, the rule of law maintains certain formal elements and practices that are relatively unaffected by socio-economic transformations, indicating that while law may have influenced the development of capitalism, the law itself as a (quasi) rational system pre-dates it.’⁹⁵ From where did this system then come? For Weber, the emergence of rational law was but one part of a broader move in the West from religion to rationalisation, the development of the ‘specific and peculiar rationalism of Western culture’.⁹⁶ To the Marxist, of course, this merely begs the question; the rationalisation that so preoccupied Weber must itself have roots in the changing material conditions of modernity.

While Marx and Weber’s accounts differ markedly, they are nonetheless both deeply historical. Both theorists understood the modern capitalist or European legal system to have emerged under specific (although not necessarily the same) conditions, coeval with and co-constitutive of other social institutions; universal commodity exchange, wage labour, the modern bureaucratic state, a rationalised system of administration. The rule of law, on their analyses, could not be abstracted from its concrete historical (and, for Marx, material) context. While this insistence on historicising legal relations remains true of later Marxist theorists, the same cannot be said of the neo-Weberian tradition. In the hands of today’s liberal legal reformers, Weber’s legal rationality has become an ahistorical abstraction, a one-size-fits-all solution to development undergirded by faith in a single evolutionary path to capitalist modernity. Secure private property and contract, these reformers insist, and capitalist development will follow.

At stake here is not simply a debate about different scholarly methodologies; these competing understandings of the rule of law and its relationship with capitalism carry clear political implications. If less damning than Marx, Weber was hardly sanguine about capitalism. Today, few observers fail to recognise that capitalist development creates not only great wealth but also great inequality, exclusion, dispossession, and disempowerment. These are problems undergirded by systemic forces and social relations of which the capitalist rule of law is one part and to which it contributes.⁹⁷ To address these problems requires a fundamental

⁹⁴ Weber (2001) xxxviii (emphasis added). See also Weber (1978) vol 2, 883: ‘Economic conditions everywhere played an important role, but they have nowhere been decisive alone and by themselves.’

⁹⁵ Christopher May, *The Rule of Law: The Common Sense of Global Politics* (Edward Elgar 2014) 34.

⁹⁶ Weber (2001) xxxviii.

⁹⁷ Recent history shows that attempts in the periphery to rapidly introduce capitalist social and economic modes of organisation and relations of exchange—including a capitalist rule of law—were followed regularly by outbreaks of dramatic violence. See Tor Krever, ‘International Criminal Law: An Ideology Critique’ (2013) 26

transformation of the social order. And yet the contemporary Weberian view that the rule of law simply arises out of the structure of modernity breeds a dangerous fatalism. Capitalist legal relations become reified: static institutions with universal legitimacy, the immutable technical necessities of the modern rational economy. The social relations out of which they arise and which they help sustain and reproduce are mystified or lost from sight altogether. Against such a banalised view of law, emptied of its political and historical content, the Marxist tradition remains an indispensable corrective.

Leiden Journal of International Law 701; Tor Krever 'Ending impunity? Eliding political economy in international criminal law' in Ugo Mattei and John D. Haskell (eds), *Research Handbook on Political Economy and Law* (Edward Elgar 2016) 298.