

Marxist Legal Theory: The State

Key Concept

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There has been no shortage of debates and controversies within Marxist political and legal thought concerning the state. Part of the difficulty stems from the fragmentary character of Marx's writing on the topic. In his notebooks from the late 1850s, posthumously published as the Grundrisse, he indicates that "the concentration of bourgeois society in the form of the state" would be part of the larger systematic critique of political economy he was pursuing at the time.¹ However, only the first volume of Capital was published in his lifetime, leaving this ambitious project incomplete. Later commentators have thus faced the challenge of recomposing his scattered writings on the topic spanning from the 1840s to the 1880s into a more coherent and systematic theory. An additional challenge to the claim that there is a Marxist theory of the state is that the meaning of this concept for both Marx and later writers was deeply entwined with the political problems of their times. Discussions of the state in the Marxist tradition have generally been

situated amidst specific disputes about the strategies that working-class movements and parties should adopt in the face of organized political power. This political dimension further complicates the claim that there could be a unitary theory of the state, and requires attention to both the historical and ideological context within which attempts to develop such a theory have been made.

A discussion of the state from a Marxist standpoint is thus confronted with at least three obstacles: the incomplete character of Marx's theorization of the state; the question of whether the state is adequately represented by the metaphor of the productive "base" and the juridical and political "superstructure"; and how, and how much, it can justifiably be said that law and the state maintain "relative autonomy" from the forces and relations of production. While this post cannot resolve these challenges, my contention is that any inquiry into the "Marxist theory of the state" is inseparable from the history of Marxist debates about the state, as these debates were conducted on shifting political, strategic, and theoretical terrains over the course of the tradition's development.

Marx on the State

Marx's early writings on the state were formulated as a critique of Hegel's political and social philosophy. Hegel understood the modern state to be the embodiment of rationality and universality as developed over the course of human history. As such, it was the means by which the social fragmentation caused by narrow conceptions of individual

freedom (property rights, commerce) facilitated by the emergence of bourgeois society in England, as well as the radical political egalitarianism of the French Revolution, would be reconciled. By virtue of their membership in the political state, individuals could transcend their personal, familial, and commercial interests, thereby attaining the self-consciousness of their own freedom in the objective laws of the state. Hegel saw constitutional monarchy as the state form that best combined the universal lawmaking power of the legislature (elected by corporate bodies in civil society) and the particular executive power of the civil service, forming a unity represented in the figure of the individual sovereign. The civil service in particular, composed of qualified professionals and open to entrance from all ranks of society, was tasked with upholding the “universal interest of the state”.²

Marx’s critique rested on the claim that by locating universality and equality in the bourgeois constitutional state (Rechtsstaat), Hegel inverted the relationship between the state and civil society. Hegel had correctly recognized that bourgeois claims to the right to private property created social antagonisms that alienated individuals from both their social bonds and the products of their labour. However, the overcoming of this condition would not take place through the state, which was itself merely the objectified form taken by social alienation, but rather through changes in the structures of the family and civil society — those very spheres that Hegel had subsumed to the state.³

Marx traced the growing separation between civil society and the state as part of the transition from the estate and guild societies of the late medieval period to the consolidation of mercantile capitalist society in eighteenth century northwestern Europe. During this time, law took on an increasingly abstract and formal character, replacing estates as the primary way of mediating between individuals in the new “independent” realm of civil society. The claim to equal political rights made during the French Revolution was the apex of the separation that had emerged between the universal political identity of the citizen and the actual social standings of the individual in civil society. The state now came to appear as the realm where individuals’ political equality as citizens could be recognized and expressed.

However, Marx argued this was an illusory freedom, for the state merely reinforced their political alienation from their material existence as producing and consuming beings. Bourgeois rights were thus a vehicle for political emancipation, but the granting of formal equality under the law was not enough to overcome the individual’s estrangement from social existence so long as civil society remained fractured by property rights.⁴ In contrast, true emancipation could not occur through the “merely political state” but by the democratic re-appropriation of the power that had been alienated in bourgeois society. Writing that “the state is an abstraction”, and that “[o]nly the people is a concrete reality”, Marx counterposed Hegel’s constitutional monarchy with a defense of

democracy.⁵ Democracy was the “essence of all political constitutions”, because it took socialized human beings as its starting point.⁶ Under a democratic constitution, the alienated and mystified universality of the political state would disappear, for the constitution and the law would rest on the unalienated and direct “self-determination of the people”.⁷ Although he retained the basic idea of the overcoming of the state, beginning in the late 1840s Marx largely shifted from examining the state’s philosophical underpinnings to historical and political analysis, as well as its specific role in relation to class struggles. In *The German Ideology*, he and Engels maintained that the modern state had emerged from the social division of labour until it separated itself from civil society to become “the form in which the individuals of a ruling class assert their common interests”.⁸ Two years later, writing with the goal of articulating the principles of the communist movement, the *Manifesto* referred to the executive of the “modern representative state” as the “committee for managing the common affairs of the whole bourgeoisie”.⁹ Although less a definition than a device of political rhetoric, when taken together with other references, it suggests a relationship where the economically dominant class directly controls and exploits state institutions for its own benefit.

However, in the *Eighteenth Brumaire of Louis Bonaparte*, Marx sketched a picture of an exceptional form of the state that superimposed itself over society to arrest the sharpening antagonisms between different

class fractions. Marx described this state as a “parasitic body” composed of a bureaucratic and military organization that “enmeshes, controls, regulates, supervises and regiments civil society”.¹⁰ Yet though the Bonapartist state was the result of the equilibrium of class forces, it only appeared to be autonomous — while it was not directly controlled by the bourgeoisie nor acted in its immediate interests, it nevertheless preserved the political and social order under which capital accumulation could continue to take place.

Marx’s analysis of the state thus spanned two related but nevertheless distinct standpoints: the philosophical perspective of his earlier writing, where the state is a juridical fiction that masks the class interests openly expressed in civil society, and a historical-political perspective where it is a social relation that reproduces a specific balance of forces in society. Although this has been explained as the gap between the young and the mature Marx, there are also certain continuities.¹¹ Namely, the overcoming of political alienation by the eventual reabsorption of the state into society — what Engels later called the “withering away”¹² or dying out the state — reappears in later writings such as *The Civil War in France*.

Nevertheless, following his concerted critique of Hegel’s political philosophy, Marx’s writings on the state remain fragmentary and their form and tone was largely affected by political context. Later interpreters of Marx have had to grapple with this gap and its

implications. It has been suggested that Marx's critique of the bureaucracy in the earlier writings captured the essence of his thoughts on the state, making it less of a priority than the critique of political economy.¹³ However, this interpretation should be questioned given that Marx did at least plan to write about the state as part of the larger project of Capital. Others have pointed to at least two different understandings of the relationship between the economically dominant class and the state, which left unresolved the question of what under what conditions it could be claimed that the state acted in its interests.¹⁴ A second unresolved tension was the relationship between the economic-productive base and the political, legal, and ideological superstructure through which these social relations were mediated and expressed.¹⁵ In both cases, the question concerned the degree of autonomy that the state and law had from the means and relations of production.

State and Law as Superstructure

Following Marx's death in 1883, the systematization of his writings by Engels and Karl Kautsky into a coherent body of thought dovetailed with the rise of the Social Democratic Party in Germany. The predominant approach to law and the state therein was the topological metaphor of the productive "base" consisting of the forces and relations of production, and the corresponding "superstructure" of the political and juridical forms through which it would be expressed. In prioritizing

the historical and technological development of the material productive forces of society and the corresponding relations of production, “orthodox” Marxism has been seen as reducing the political and juridical domains to secondary ideological expressions of these primary social forces.

The base-superstructure metaphor has some textual warrant in Marx’s writings. Most schematically, it appears in the 1859 Preface of the Contribution to the Critique of Political Economy, where Marx wrote that the “legal and political superstructure” arises from the “sum total” of the relations of production that “constitute the economic structure of society”16 — a framing that he would also later directly repeat in Capital. Similarly, in the unpublished German Ideology, Marx and Engels noted that “the social organization evolving directly out of production and commerce” in all ages forms the “basis of the State and of the rest of the idealistic superstructure”.17

Engels further developed this view in his Origin of the Family, Private Property, and the State, suggesting that the state had emerged from the gradual division of labour in settled civilizations to moderate the resulting class antagonisms. As such, it was “the product of society at a particular stage of development”, having “arisen out of society but placing itself above it and increasingly alienating itself from it”.18 However, important qualifications can also be found in Engels’ letters from that period pointing to the reciprocal effect of the

superstructure upon the base. As the bureaucratic and military organization of the capitalist state allowed it to obtain some independent power from the economic movement of society, the two could find themselves at cross-purposes, in a situation where the economic usually predominated but had to “suffer reactions from the political movement”.¹⁹ Furthermore, constitutions and juridical forms frequently determined the form taken by class struggles.²⁰ In a modern state, Engels wrote, “law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression”, facilitating the growth of jurisprudence as a new “independent sphere” of social practice and preventing the law from being the “blunt, unmitigated, unadulterated expression of the domination of a class”.

Despite these nuances, Second International Marxism (1889–1916) largely saw the political and legal domains as primarily determined by the relationship between the means and relations of production. Within the capitalist mode of production, the political and juridical superstructure was seen as necessarily mirroring and reproducing the conditions for commodity production and the private appropriation of surplus value — namely, that the means of production were held as private property, and labour-power was nominally “free” to be contractually exchanged for a wage. Leading theoreticians like Engels, Kautsky,²¹ Eduard Bernstein,²² and Rosa Luxemburg²³ all saw the

bourgeois constitutional republic as the political form that expressed this advanced stage of industrial capitalism and (with the exception of Bernstein) its inevitable crisis tendency.

Evolutionary and reformist currents in the Second International following Bernstein maintained that the state was a neutral institution that could be progressively taken over through regular electoral participation by working class parties. In contrast, Lenin advanced a critique of social democracy's reliance on trade union activism at the expense of direct political struggles against state power. Whereas reformists saw the state as a neutral apparatus, Lenin emphasized that, because it emerged as the necessary outcome of the irreconcilable class antagonisms, the state remained a "special coercive force" or machine functioning as the "instrument for the oppression of one class by another".²⁴ Lenin's view of the state as a repressive instrument of class power undoubtedly remained the definitive and most influential treatment of the state within the Communist movements and parties of the twentieth century.

Through the 1920s and 1930s, the gradual codification of Marxism-Leninism in legal and state theory in the USSR continued to rely on the separation between base and superstructure. The most noteworthy treatment of the juridical as a reflection of social processes was Pashukanis' commodity-exchange theory.²⁵ Pashukanis theorized law as an expression of the contractual and transactional nature of capitalist

society; consequently, the revolution in the relations of production would lead to the withering away of law and its replacement by administration following the completed transition to communist society. The critique of the base-superstructure metaphor from within the Marxist tradition has been twofold. First, notwithstanding the aforementioned letters by Engels, its social positivist treatment of the base as the “real” space of the relations of production implies a uni-directional model that cannot account for the conditions under which state and law can have a reciprocal causal effect on the forces and relations of production.²⁶ Equally importantly, the metaphor posits the two levels in a relation of external causality, such that, even if one allows for reciprocal influence, the state and law still exist as reflections of an independently-constituted economic and productive sphere. Yet if we allow that ownership of the means of production and relations of wage labour are always already politically and juridically mediated social relationships, then this explanatory primacy of the base cannot be maintained.²⁷

Adventures in Relative Autonomy

The development of Marxist thought on the state following the Russian Revolution, particularly outside the Soviet Union, can be understood as a series of attempts to theoretically ground the possible autonomy of the state and law beyond the “economism” or “scientific socialism” of the Second and Third Internationals. Although these attempts often rested

on very different epistemological premises, they overlapped in wishing to expand the boundaries of the state beyond repression and coercion to examine the reciprocity between the state and civil society, the importance of ideology to subject formation, and the possibility of class consciousness and class struggle under the state-directed capitalism of the twentieth century.

Between the 1920s and 1940s, among the notable contributions in the German-speaking world were the investigations of the rule of law and the exceptional state by Franz Neumann and Otto Kirchheimer,²⁸ and of nationalism, culture, and constitutionalism by Austro-Marxists such as Max Adler, Otto Bauer, and Karl Renner.²⁹ A second major tributary of thinking about the state came from debates in Italian Marxism following the rise of fascism. Although Gramsci's carceral writings did not receive a wide audience until the 1950s, his innovative treatments of hegemony, the balance of social forces, and revolutionary political strategy were groundbreaking in the postwar context for both Western communist parties and the New Left.³⁰

Beginning in the 1960s, Gramsci's translation into English and Althusser's major retheorization of Marxism further facilitated the critique of base-superstructure models. While Althusser followed Lenin in asserting that the state is a repressive apparatus or machine, he developed the complementary notion of ideological state apparatuses — an interlocking set of institutions through which state ideology is

realized and reproduced through concrete material practices, legal practices included.³¹ Moreover, by focusing on the concept of the mode of production, Althusser and his collaborators³² introduced a model of structural causality in which economic, political, and ideological levels interacted in a way that excluded direct or linear determination by the economic. This counteracted the Stalinist orthodoxy to the effect that changes in the ideological superstructure followed necessarily from a revolution in the base.

The 1970s marked the last major wave of developments in Marxist analyses of the state to date. The famous Miliband-Poulantzas debate³³ revolved around the question of the state's relative autonomy from the capitalist class. However, its reception in the Anglosphere schematically separated them into competing "instrumentalist" and "structuralist" approaches to the capitalist state, in which the capitalist class either controlled the state through the influence of personal networks or the state's independence was structurally guaranteed by its role in the capitalist mode of production.³⁴ In the wake of the debate, scholars in the United States attempted to supplement the perceived shortcomings of Marxist theory with insights from Weberian sociology.³⁵ In Germany two separate but concurrent lines of inquiry unfolded. One involved the second generation of Frankfurt School critical theory, which focused on questions of crisis and state legitimacy.³⁶ The other was the "capital logic" school, which sought to

derive the form of the capitalist state from a starting point with the category of capital.³⁷ Despite this general proliferation of interest in Marxist critiques of pluralist and elitist theories of power, by the mid-1980s, the research framework entered a period of decline alongside the New Left.³⁸

State Theory in the Twenty-First Century

Reevaluations of the legacy of Marxist debates about the state from the 1990s onward have attempted to forge a more coherent account on the basis of existing theories or else to clarify divisions between these theories.³⁹ However, an overarching consensus that reconciles the internal diversity of Marxist positions on the state has remained difficult to achieve, not least because plausible textual evidence in Marx's writings can be found for a variety of theoretical positions.⁴⁰

Today, Marxist state theory is largely an open-ended and intellectually pluralistic research framework. What almost all accounts share, however, is a rejection of the positivist view of the state as a juridical entity circumscribed by its formal constitution. There is agreement that the state has a material existence, as a set of institutions but also as a collection of political, ideological, legal, economic, and social practices. These practices secure the state's claim to legitimacy by reproducing it as the representative of the general social interest while continuing to facilitate capital accumulation, mediating relations between competing

fractions of the capitalist class and integrating these fractions into the global circulation of capital.

In the present, at least four new theoretical frontiers are being opened to supplement previous omissions. First, growing interest in social reproduction⁴¹ has opened up debate about the state's role in reproducing gender roles and the coordination of the non-waged labour necessary for capital accumulation. Second, recent discussions of “authoritarian neoliberalism” have explored how the neoliberal governance of the past several decades has rested on the reconfiguration of state power toward less democratic oversight.⁴² As a corollary, this has also led to increased interest in the role played by the state's coercive apparatuses, especially in relation to incarceration.⁴³ Lastly, the urgency of the climate crisis has drawn the focus of many researchers to the state as a site of struggle over resource extraction and future policies for climate change mitigation.⁴⁴ Together these strands of research continue to revamp and adapt the tradition of Marxist thinking about the state, contributing to its ongoing development as an explanatory theoretical framework.

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