

Capitalism and problems of law:

A Marxist critique of social rights

Andrew Munro

Liverpool John Moores University

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Abstract

The legal human rights project that began in the aftermath of World War II remains incomplete today, especially where economic/social rights (as opposed to civil/political rights) are concerned. Economic/social rights continue to generally be treated as lesser human rights. Cold War-era tensions between the US-led West and the Soviet Union are often blamed for this. This narrative would have it that this differentiation between categories of rights has been resolved by the conclusion of the Cold War, that human rights can now be enjoyed by all at the 'End of History' through liberal democracy and capitalism.

This thesis will completely reject this narrative, arguing that social rights are incompatible with capitalism, and that a meaningful conception of those rights cannot be advanced solely through law. For one, capitalist society is defined by delineation between the public sphere of the State and the private sphere of civil society, which tends to separate public political struggle from private economic affairs. The law is not well suited to crossing these illusory divides, confining legal struggles within acceptable limits. Capitalist society is also defined by these private economic affairs conducted between individual legal subjects, meaning that the law tends to take a narrow, individualised form that limits its radical potential.

International legal argument is also too structurally defined by imperial capitalism to accommodate anti-capitalist challenges. The containment of legal principles like sovereignty, rights, democracy, and self-determination has allowed them to be disconnected from each other and defined by those nation-states with the political/economic power to actualise

their legal interpretations of those principles. Failing to understand this will undermine any attempt to challenge capitalism's hegemony through law.

Finally, this thesis will attempt to reconceptualise social rights, arguing that mainstream social rights discourse has tended to take a social-democratic approach in the sense that it attempts to work within the confines of capitalism where it should be challenging them. It will be accepted that social rights are a lesser form of rights, although only in a capitalist society; they relate to processes and goods that are essential for any society. Overlooking the need to challenge capitalism's confines will mean that these goods and processes remain subject to the power of capital.

Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Dedication

To Jerry, Phil, Bob, Bill, Mickey, Keith, Donna Jean, Brent, Hunter, and Pigpen. *What a long, strange trip it's been.*

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I have been convinced that this is not the place for 'denouncements', so I'll leave it there.

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Introduction

Conventional approaches to human rights law, especially where economic and social rights are concerned, have not been effective. In light of the overlapping crises facing the world today in the form of environmental damage, geopolitical instability, pandemics, etc, there seems to be ample opportunity to rethink the theoretical justifications for human rights and their legal expression.

The Universal Declaration of Human Rights,¹ passed in 1948 after the second World War, contained broad references to a wide range of human rights, but since then, human rights have been divided into two categories or ‘generations’:² civil and political rights, which include freedoms of expression and fair trials, and economic and social rights, which include rights to food and housing. The distinction has not been merely ornamental: economic and social rights are widely recognised as lesser rights,³ and they have been far less likely to be legally implemented in domestic jurisdictions.⁴ Economic and social rights will be referred to as ‘social rights’ throughout for the sake of brevity, and civil and political rights will be referred to as

¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR)

² Karel Vasak, ‘A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights’ (1977) 11 UNESCO Courier 29

³ Henry J Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context* (3rd edition, Oxford University Press 2008), 263-264

⁴ Wade M. Cole, ‘Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices’ (2013) 92(1) Social Forces 165, 182

‘civil rights’, leaving aside that there may be good reasons to distinguish civil from political rights.⁵

Liberal democracy, meanwhile, has (arguably) crystalised into a norm of international law⁶ and, along with capitalism, has become predominant across the world after the Cold War at the ‘End of History’,⁷ when liberal democracy and capitalism had seemingly outlasted all alternatives. Liberal democracy supposedly will lead to human rights to be fulfilled due to democracy’s enhancement of society,⁸ with democracy itself striking a balance between social and civil rights.⁹ To put this another way, political rights, realised through democratic institutions, will supposedly make the (legal) social rights project redundant. This is a highly dubious idea,¹⁰ largely due to the abstraction of liberal democracy from its historically contingent relationship with capitalism, which has also spread across the world. The development of capitalism, especially the establishment of private property, has created a distinction between the public sphere of the State and the private sphere of civil society.¹¹ As democracy tends to remain confined to the public sphere, this means that the private sphere, where economic exchange takes place, remains mostly untouched by democratic pressure.

⁵ Karolina Miriam Januszewski and Manfred Nowak, 'Poverty and political rights: an exercise in recovery from oblivion' in Martha F Davis, Morten Kjaerum, Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Elgar 2021), 73-75

⁶ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46

⁷ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992)

⁸ Amartya Sen, 'Democracy as a Universal Value' (1999) 10(3) *Journal of Democracy* 3, 10-11

⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cambridge University Press 2013), 233

¹⁰ Tony Evans, 'If democracy, then human rights?' (2001) 22(4) *Third World Quarterly* 623, 639-640

¹¹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 125

This project began out of a Masters' dissertation that broadly argued that social rights had been wrongly subordinated to civil rights. It was inspired principally by two reports from Philip Alston in his capacity as the United Nations Special Rapporteur for Extreme Poverty and Human Rights. The first of these reports aimed to challenge a narrative of continual progress and improvement on poverty. Alston pointed out that despite decades of triumphant pronouncements, progress on poverty alleviation had flatlined for decades.¹² The prevalence of poverty seems to suggest failings of social rights provision,¹³ and universal social rights surely preclude the continued existence of poverty. The second reported on a visit to the United Kingdom in 2018 and detailed the decline in social conditions (which were effectively mass violations of social rights) following nearly a decade of austerity.¹⁴

It appeared inconceivable that these mass violations could occur in an established democracy, albeit a capitalist democracy. This seemed to point towards some sort of failure of modern liberal democratic government. That poverty alleviation could have flatlined during the past few decades, a period in which liberal democracy itself had become the world's primary system of government, also seemed to suggest democratic failures. Alston's UK report also referred to the replacement of the 'glue' of post-war British society being replaced by a 'harsh...uncaring ethos',¹⁵ which seemed to locate the problems in neoliberal capitalism's

¹² UNGA (Human Rights Council) 'The parlous state of poverty eradication: Report of the Special Rapporteur on extreme poverty and human rights' 44th Session (2020) UN Doc A/HRC/44/4

¹³ United Nations Economic and Social Council (Committee on Economic, Social, and Cultural Rights), 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social, and Cultural Rights' 25th Session (2001) UN Doc E/C.12/2001/10, [1]

¹⁴ UNGA (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1

¹⁵ UNGA (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, [4]

continued assault on the post-war Western welfare state. This seemed to accord with the time period in which poverty alleviation had plateaued. This suggested that what was needed was a critique of neoliberalism from the prospective of social rights, one that argued for the revival of the welfare state and the establishment of stronger democratic institutions. This could accomplish the universal realisation of social rights envisaged by the UN's International Covenant on Economic, Social, and Cultural Rights.¹⁶

However, this would have overlooked the continuities between the era of the post-war welfare state and the neoliberal order that replaced it. It is rather a critique of capitalism that is necessary. To argue for democratic renewal without considering if capitalism may have something to do with the challenges faced by liberal democracy would also be erroneous. Having political institutions that genuinely respond to the will of the people would be disastrous for capitalism, something that liberal and liberal democratic theory has always understood.

Mainstream legal discourse often overlooks the pervasive effects that capitalism has had upon modern societies; capitalism is hegemonic both within modern societies and in the international world order where these societies interact as nation-states. Capitalism shapes, conditions, and dominates modern societies. Mainstream legal theory tends towards 'legal formalism',¹⁷ which is based upon treating law as a separate, distinct sphere unconnected with

¹⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, article 2(1)

¹⁷ Ntina Tzouvala, 'International Law and (the Critique of) Political Economy' (2022) 121(2) South Atlantic Quarterly 297, 299-300

society.¹⁸ Formalism will be rejected in this thesis, which will instead attempt to make connections between capitalism and law, and legal rights, especially social rights.

Essentially, the argument that will be advanced is that social rights (as legal rights) are incompatible with capitalism and therefore largely unrealisable through law in a capitalist society. This is both due to the power of capitalism and to the effects that capitalism has on the law. The principal objective of this thesis will therefore be to explore the connections between capitalism and social rights. This will involve answering several questions about these connections. First, it will seek to answer whether the dynamics of modern capitalism have had an adverse effect upon social rights. Second, in light of the decline of the post-war welfare state in the face of neoliberalism, whether social rights were ever likely to be realised as originally envisaged.

The second objective will be to problematise and analyse the connection between law and capitalism. The thesis will ask whether there is necessarily a positive relationship between law and rights, bearing in mind that international human rights law is based upon rights being implemented legally. It will question whether implementing social rights in law is likely to be fruitful is pushing back against capitalist social power. The final objective of the thesis will be to connect rights to democratic arrangements and to what this thesis will treat as the international corollary of democracy: self-determination. This thesis will ask whether there is a relationship between the difficulty of ensuring social rights in a capitalist society, the

¹⁸ Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 126

increasing malaise of modern democracy, and the struggles of Third-World self-determination that came to a head in the 1970s.

There are several broad forms of objection to the argument advanced here. It may first be objected that social rights are something of a moot point in modern liberal capitalist societies; that opportunities to participate in market exchange and consumption, as well as to vote in democratic elections, will provide the 'freedom' that allows individuals to attain the goods associated with social (and civil) rights.¹⁹ This viewpoint is generally opposed to State intervention in capitalist production and exchange. Whilst there is a willingness to acknowledge that capitalist societies are unequal,²⁰ attempts to impose equality on these systems are portrayed as totalitarianism;²¹ intervention should be limited to the prevention of absolute immiseration.²²

Another form of objection may be issued from a social democratic position, one that rejects the status quo but sees social rights as realisable within a capitalist society. Some of these perspectives do not recognise any incompatibility between social rights and capitalism, so long as capitalism is 'regulated properly'.²³ Often, this will include a belief that (liberal) democratic governance will help to support this regulation and ensure that the benefits of

¹⁹ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 112-116

²⁰ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 64-65

²¹ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 82-85

²² F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 87

²³ David Beetham, *Democracy and Human Rights* (Polity Press, 1999), 101

capitalism are felt by all.²⁴ Others do recognise some degree of incompatibility but simply believe that social rights can play a role in that regulation, perhaps operating as part of a 'framework' for policymaking²⁵ or allowing vulnerable people to challenge government policy that threatens their social rights.²⁶

These two broad positions have two crucial similarities. First, they both prefer for social rights to operate at the margins of society, to make provision for the vulnerable and deprived in order to prevent outright destitution. As will be explained, mainstream social rights discourse has mostly adopted the second (social democratic) position, abandoning the universality of social rights in favour of satisfying basic needs. Ensuring that the basic needs of the most vulnerable are met is laudable, but attempting to do so within capitalism's confines is paradoxically unambitious and unlikely to be sustained in the long term, especially when capitalism runs into crisis.

Second, both positions accept (or fail to reject) the premises of liberal capitalism without question. These premises include the interrelated conditions of private property, the free exchange of said property, and freedom of contract, but also extend to the rule of law (which also guarantees these rights of property, exchange, and contract; this will be referred to as 'capitalist legality'). There is broadly no theory of law within the social democratic mainstream

²⁴ Robert Dahl, *On Political Equality* (Yale University Press 2006), 66-67

²⁵ Aoife Nolan & Juan Pablo Bohoslavsky, 'Human rights and economic policy reforms' (2020) 24(9) *International Journal of Human Rights* 1247, 1252

²⁶ Magdalena Sepúlveda Carmona, 'Alternatives to austerity: a human rights framework for economic recovery' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 51-52

of social rights discourse; law is accepted as perfectly capable of realising these rights.²⁷ Nor is there a theory of the relationship between capitalism, law, and wider society.

Although the social democratic outlook on social rights will be critiqued, the primary target of critique will be capitalism itself. This thesis will be premised upon the belief that social rights require an anti-capitalist approach. This anti-capitalism refers more to challenging capitalism than necessarily ending it. It will be suggested that regardless of the level of acceptance of social rights as human rights, realising social rights through law in a capitalist society offers potentially insurmountable challenges.

As mentioned with regard to liberal democracy, capitalism tends to present society in a fragmented form: the public sphere of the State is presented as separate from the private sphere of market exchange and economic affairs. Law is also presented in a fragmented form, with distinctions between public and private law, distinctions within private law between the likes of contract, tort, and commercial law, etc. However, many of the goods (like housing), processes (like providing health services) related to social rights are subject to commodification and are therefore part of private economic affairs, whilst human rights tend to target government policy and State provision, which are public affairs. The law as it exists in a capitalist society is ill-suited to addressing these distinctions.

²⁷ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [2]-[6]

Capitalism and liberal democracy are based upon shared premises of formal equality and individualised liberty, both of which derive from the production and exchange of commodities as individualised private property. This is reflected in the law, which tends to treat individuals as abstract, formally equal subjects,²⁸ rendering it unable to reckon with underlying economic inequalities that give rise to the need social rights. The prioritisation of private property has long shaped liberal fears about public power being captured by those who have little or no property.²⁹ Social rights challenge private property's centrality by attempting to strike at, or at least alter, the pre-existing distribution of property and are thus antagonistic to private property in a way that civil rights are not. This prevents social rights from being more than a secondary form of rights, at least in a capitalist society. Social rights relate to goods and processes that are absolutely essential to society's functioning, but the law is unable to reflect this.

An anti-capitalist critique of law from a social rights perspective that failed to move beyond domestic law would be far from complete. Social rights are, first and foremost, international human rights and have been elaborated in international legal treaties, and capitalism has long been an international project. Human rights have, on some readings, opened up new avenues to challenge nation-state sovereignty,³⁰ changing the fabric of international law, an evolution that coincided with a supposed decline of the centrality of the nation-state.³¹ This view ignores

²⁸ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 113

²⁹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 148-149

³⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 95

³¹ Robert McCorquodale and Richard Fairbrother, 'Globalization and Human Rights' (1999) 21 Human Rights Quarterly 735, 737-738

the deep historic connections between international law, capitalism and imperialism. Capitalism and imperialism have shaped modern international law from its onset, setting the terms of inclusion in its scope and the rights and duties enjoyed by international legal subjects³² and shaping its abstract form that allows international law to obscure the political struggle behind international legal argumentation.³³ Capitalism and imperialism therefore place structural constraints upon international law that constrain arguments over legal principles and oppose challenges to its own premises.

It should instead be clarified that the emergence of international legal principles does not necessarily change the nature of international legal argument. These principles, like human rights themselves, often emerge from extra-legal political struggles or ruptures, but it does not necessarily follow that this will lead to an international legal rupture. International law is indeterminate, and its legal principles therefore have no 'essential' content. The formation of this content, defined by the 'actualisation' of a legal position, may not be progressive and in fact may even be regressive. Because of the connection between capitalism and international law, the latter tendency is more prevalent.

Therefore, a further, concluding argument will be made: that questions about rights (of all categories), democracy, and related legal concepts like self-determination have all been both carefully defined and limited by international legal argument and also abstracted both from

³² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 45

³³ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 176

each other and from capitalism. Rethinking them in a way that attempts to bring them together and directly confront capitalism therefore becomes necessary. It will ultimately be accepted that advancing new legal principles and alternative theoretical legal justifications will accomplish little in the absence of concrete societal changes, but questioning existing doctrines and premises will nonetheless be advanced as a worthwhile endeavour.

A radical interpretation of self-determination, one that incorporated economic self-determination, could potentially offer a way to overcome the imperatives of capitalism. Ideally, this would effectively incorporate human rights, allowing people to take control of the processes of producing, distributing, and sharing their means of production and reproduction and working together to protect their autonomy, preferably collectively rather than individually. This project should be based upon giving social power, not just a modicum of political power, directly to the people, a radical strengthening of democracy. This thesis will implicitly make the case for thinking along these lines rather than outline this project in any detail.

Methodology

This thesis is a theoretical project and primarily a critical project.

The thesis situates itself within and alongside a series of critical legal methodologies, including Law and Political Economy (LPE), Third World Approaches to International Law (TWAIL) and

especially Marxist legal theory. It does so for the purpose of tracing the influence of capitalism on law in Western societies especially and of examining these societies as a whole. It does so due to dissatisfaction with and hostility to formalistic approaches to law, as well as idealistic legal arguments that see the law as an unqualified human good.

LPE is a broad field of critical legal theory that seeks to examine the connections between the law and political and economic affairs, to subject law to a political-economy critique³⁴ and is closely related to Marxism. TWAIL refers (broadly) to the investigation of international law's role in the 'creation and perpetuation' of the subordination of the Third World to the West in the international legal order, to attempts to present alternatives to that order, and to overturn the 'underdevelopment' of the Third World relative to the West.³⁵ The Third World perspective is adopted due to the perception of a unique relationship between the Third World and social rights. The Third World were broadly supportive of social rights during the Cold war-era tussles between the West and the Soviet Union over their importance as rights,³⁶ but were also cited as a reason that social rights could not be universal (i.e., that the Third World lacked the resources to fulfil binding obligations).³⁷ When the Third World began to organise itself after decolonisation, beginning with the Bandung Conference and culminating in the Group of 77 (G-77) at the UN,³⁸ their demands were framed not around rights but

³⁴ Ntina Tzouvala, 'International Law and (the Critique of) Political Economy' (2022) 121(2) South Atlantic Quarterly 297, 308

³⁵ Makau Mutua and Antony Anghie, 'What is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law), APRIL 5-8, 2000 31, 31

³⁶ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 352

³⁷ Alex Kirkup and Tony Evans, 'The Myth of Western Opposition to Economic, Social, and Cultural Rights?: A Reply to Whelan and Donnelly' (2009) 31(1) Human Rights Quarterly 221, 226

³⁸ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 89

around a radical interpretation of self-determination that extended to economic sovereignty. As Chapter 6 will explain, the concerted counter-offensive against Third World self-determination was instrumental in creating a global economy that is as unfriendly to social rights as ever. The Third World would eventually accept the framing of rights, but by this time, their radical potential had been limited.

The term 'Third World' is adopted here rather than other similar terms like 'developing nations' and 'the Global South' to align with TWAIL's language, and it will broadly be used to distinguish these nations from the West. No attempt will be made to demarcate the exact limits of the Third World; for example, for reasons of brevity, no position will be taken on whether China or India are still part of the Third World, although it will be taken as given that Japan is to be considered part of the West. The countries that make up the G-77 and those that were affected by the Third World debt crisis in the 1980s may reasonably be assumed to be the 'Third World' for the purposes of this thesis (the G-77 itself seems to recognise that China is not really a member, sometimes issuing statements on behalf of 'the G-77 and China'.³⁹

³⁹ Group of 77, 'Statement on Behalf of the Group of 77 and China by H.E. Mr. Horacio Sevilla Borja, Permanent Representative of the Republic of Ecuador to the United Nations, at the Opening Session of the 4th Prepcom Established by General Assembly Resolution 69/292: Development of an International Legally Binding Instrument under Unclos on the Conservation and Sustainable use of Marine Biological Diversity of areas beyond National Jurisdiction (New York, 10 July 2017)' (*Group of 77*, 10 July 2017) <<http://g77.org/statement/getstatement.php?id=170710>> accessed 10 March 2025

Marxist legal methodology is necessarily not restricted to the work of Karl Marx himself, as Marx never completed a 'systematic' analysis of law⁴⁰. Marxist legal theory tends to be broadly based upon some variant of historical materialism, the idea that analysis of any historical period should begin with the prevailing mode of production.⁴¹ Historical materialism began as a project of analysis of the world in order to 'change it'⁴², of identifying opportunities for political intervention. It remains useful in rearticulating the social, political, and legal implications of capitalism⁴³ and in recognising that the mode of production is a 'social phenomenon',⁴⁴ meaning that the social relations of the mode of production tend to be reproduced throughout society, taking social, political, and legal forms.⁴⁵

The most complete Marxist theory of law was articulated by Soviet jurist Evgeny Pashukanis, who was the Soviet Union's preeminent legal theorist in the period immediately following the Bolshevik Revolution.⁴⁶ Pashukanis, as will be explained in Chapter 3, set out a historical materialist analysis of law that connected capitalist property relations to modern legal relations.⁴⁷ He similarly saw the relations between nation-states of international law as

⁴⁰ Robert Knox, 'Law' in Beverley Skeggs, Sara R. Farris, Alberto Toscano - Goldsmiths, and Svenja Bromberg (eds) *The SAGE Handbook of Marxism* (SAGE Publications Ltd 2021)

⁴¹ Friedrich Engels and Karl Marx, *The German Ideology* (first published 1932, Electric Book Company, 2000), 73

⁴² Karl Marx, 'Theses on Feuerbach' in Karl Marx and Friedrich Engels, *Selected Works: Volume I* (Progress Publishers 1969), 15

⁴³ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 19

⁴⁴ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 25

⁴⁵ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 25-26

⁴⁶ Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism' (2004) 17(2) Canadian Journal of Law and Jurisprudence 269, 269

⁴⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003)

mirroring property relations.⁴⁸ Pashukanis' 'commodity form' theory will be accepted and will, at times implicitly and at times explicitly, underpin Chapters 3-6. This thesis, however, will seek to add to Pashukanis' theoretic approach to law. More specifically, it will seek to integrate Pashukanis' internal critique of law with other forms of political, legal, and economic critique, Marxist or otherwise. This will involve bringing political and economic theory into conversation with Marxist/critical jurisprudence. To borrow Balakrishnan Rajagopal's words, it will take an 'eclectic mixture' of an 'internal critique' that analyses the doctrine of social rights, and an 'external critique' that brings 'insights' from 'outside' law.⁴⁹ Underpinning this entire thesis, therefore, will be a comprehensive Marxist theory of law that, in historical materialist fashion, attempts to trace the effects of the socio-political forces of capitalism on law, believing that law cannot be analysed in isolation and that legal developments, to some extent, merely reflect these forces and are shaped by them. The subordination of social rights was brought about not by law but by capitalist and imperialist social power.

Structure

The first chapter will cover social rights, detailing the background of their post-war emergence and subordination to social rights, some aspects of social rights theory and practice, and the broad context in which they have operated. More specifically, it will be explained that they were essentially provided, if only in the West, through the post-war welfare state, but that

⁴⁸ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980)

⁴⁹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 3

this provision has come undone when the welfare state order was replaced by neoliberalism. Recognising the continuities between the post-war period and the neoliberal turn, some basic incompatibilities between social rights and capitalism will be pointed out, before arriving at the chapter's crucial argument: that social rights theory and discourse has a social democratic slant, attempting to work within capitalism's confines, leading to the horizons of social rights being narrowed to what will be described as an unambitious 'basic needs' approach.

Chapter 2 will consist of a critique of liberal democracy, the existence of which is sometimes suggested to support the realisation of social rights. Again, historical background and some basic theory will be outlined. Liberal democracy's basic premises and justifications will be challenged and reinterpreted, situating its development within the history of the development of the capitalist mode of production and private property, suggesting a more than incidental relationship between liberal democracy and capitalism. It will be argued not only that liberal democracy is not well suited to addressing the economic exploitation at the heart of capitalism, but that this is a feature rather than a bug.

Chapter 3 will advance a critique of law in capitalist society. The first half of the chapter will, with reference to the fragmentary appearance of capitalist society, cover more what the law does not address than what it does. This will involve explanation of the social power of capital and the powerful imperatives it places on society, and of the way that technocratic economic processes are both protected from and protected by law. The second half of the chapter will advance a Marxist critique of law, making the connection between modern law and the production and exchange of private property, a central premises of capitalist society. It will

also cover mainstream theories of the rule of law and legal rights, arguing that they mostly fail to address the legal protection of commodity exchange, or 'capitalist legality'.

Chapter 4 will turn to international law, and will identify a Marxist critique of international law that conceives it not only as an indeterminate process of legal argument, but one that is structurally constrained by imperialism. This leads it to impose and legitimise capitalism's premises. Turning to social rights as international human rights, this theory of international law will be used to explain that legal implementation is highly dependent upon the 'actualisation' of a legal argument. This makes it difficult to articulate anti-imperialist legal positions without implicitly or explicitly accepting the premises of capitalism. A similar line of argument will be applied to the international law of democracy thesis, the idea that democratic governance has become an international legal norm. This chapter will broadly conclude that the actualisation of legal principles, like rights and democracy, are often confined within limits acceptable to capitalism.

Chapter 5 will articulate the beginnings of a Marxist/political economy critique of human rights. It will explain the role of social rights in a capitalist society in more detail, arguing that whilst they represent processes absolutely fundamental to society, they are also heavily constrained by the logic of capital accumulation. Taking up Bill Bowring's 'materialist' theory of rights, which posits human rights as inherently emancipatory, an alternative materialist theory will be advanced. It will instead be argued that due to law's indeterminacy, rights may just as easily be counter-revolutionary as revolutionary. This renders them limited as a discourse of 'resistance' to capitalism. The limits of advancing social rights through law will be

explained, and it will be argued that advancing social rights must connect to questions of the 'form' of society. This will suggest a relationship between rights, democracy, and self-determination, radical interpretations of which could challenge capitalism.

This will lead into the final chapter, which will cover self-determination, its emergence as a legal principle from the theory and practice of the Soviet Union and its ultimate confinement as the Third World began to articulate new conceptions of self-determination and sovereignty. More specifically, it will be argued that self-determination has been limited so as to not interfere with private property; in other words, it has been confined within limits acceptable to capitalism.

A brief epilogue will consider legal theory and/or argument that did begin to challenge the premises of capitalism and articulate radical legal principles. This will refer to Marxist and Bolshevik theory around the future of law beyond capitalism, the 'We Charge Genocide' petition to the United Nations, and a fragment of argument deployed in the 1966 *South West Africa* case before the International Court of Justice.

Chapter 1: Social rights: background, practice, and context

Modern international human rights law was born after the Second World War. The United Nations (UN) was formed in October 1945 and the UN Charter contained references to social progress, high living standards⁵⁰ and equal rights.⁵¹ The Universal Declaration of Human Rights⁵² (UDHR) was passed by the UN General Assembly in 1948, declaring support for a broad range of human rights ranging from civil rights like the right to equality⁵³ and fair trials⁵⁴ to social rights like the right to an adequate standard of living (including food, shelter, and healthcare) and social security.⁵⁵

However, international human rights law would soon diverge from this approach and begin to maintain a sharp divide between civil rights and social rights. This is evident in the UN system, in most regional human rights bodies, and in the domestic law of States. Although it is often maintained that there are legitimate reasons for this, the effect has been that social rights enjoy a reduced status and are at times not seen as proper human rights.⁵⁶ Social rights implementation and fulfilment has suffered as a result.

⁵⁰ United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI

⁵¹ United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI, Article 1(2)

⁵² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III))

⁵³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III), article 1

⁵⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III), article 10

⁵⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III), Article 25

⁵⁶ Katarina Tomaševski, 'Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson' (2005) 27(2) Human Rights Quarterly 709, 717

These questions, however, almost became irrelevant in the decades following the war, at least in the West. Western nations built welfare states that made social rights almost irrelevant. The 'golden age' of these welfare states has since ended as the global economy and capitalist societies have shifted to neoliberalism. Although this period (beginning in the 1970s) was characterised by the birth of what might be called human rights institutional advocacy, exemplified by the formation of Amnesty International and Médecins Sans Frontières,⁵⁷ questions about the full implementation and relative importance of social rights did not really return. Although social rights theoretically came to enjoy better legal protection and elaboration, in practice the ambition of social rights has been restricted. There has been little attempt to push them beyond the confines of capitalism.

This chapter will begin with a brief history of international human rights, exploring first the drafting of the UDHR, and the two UN treaties drafted to impose legally binding human rights obligations on States and briefly explaining the effects that separating social rights and civil rights into separate treaties has had. The second section will examine social rights practice, covering social rights enforcement, several key principles, and the possibility of their justiciability. The third section will cover the decline of the welfare state and the rise of neoliberalism, considering the effect this had on social rights. The fourth section will, after looking at the interaction between capitalism and social rights, attempt to sketch out the theoretical underpinnings of modern social rights discourse, suggesting that it has essentially

⁵⁷ Jessica Whyte, 'Human Rights and the Collateral Damage of Neoliberalism' (2017) 20(1) Theory and Event 137, 140

taken on a social democratic approach that attempts to work within capitalism rather than against it.

1.1 Background: The International Human Rights treaties

1.1.1 The International Bill of Rights

The inclusion of social rights in the UDHR, despite the prevalent view that issues of 'welfarism' commanded general agreement⁵⁸ after the war, was controversial. China, the Soviet Union, and the Latin American countries were proponents of social rights, whilst the West was broadly resistant. The UK submitted a draft declaration that contained no reference to social rights, and Eleanor Roosevelt, the US representative on the Commission on Human Rights, sought to water down social rights by reframing them as 'standards of living'.⁵⁹

As Jessica Whyte has noted, this conflict is reflected in article 25, which provides for an 'standard of living adequate' for health and well-being, reflecting Roosevelt's framing to some extent, but also included reference to food, clothing, housing, medical care, and social security as a result of successful lobbying by the USSR and China.⁶⁰ Whyte also suggests that Article

⁵⁸ Jessica Whyte, 'Human Rights and the Collateral Damage of Neoliberalism' (2017) 20(1) Theory and Event 137, 141

⁵⁹ Jessica Whyte, 'Human Rights and the Collateral Damage of Neoliberalism' (2017) 20(1) Theory and Event 137, 141-142

⁶⁰ Jessica Whyte, 'Human Rights and the Collateral Damage of Neoliberalism' (2017) 20(1) Theory and Event 137, 142

22, which provided an entitlement to realisation ‘through national effort and international co-operation’, of social rights, was also controversial, with the reference to ‘international co-operation’ prompting fears from the Western representatives about economic redistribution in a world still dominated by colonialism.⁶¹

The UDHR is not legally binding,⁶² although it may have normative value in international customary law.⁶³ Legally enforceable treaties were to follow. It seemed that those States advocating for social rights had won the argument when the UDHR was adopted in 1948, but by 1950, the Commission on Human Rights, which had also drafted the UDHR,⁶⁴ had started to differentiate between social rights and civil rights.⁶⁵ Although the UN General Assembly, which contains representatives from each member state,⁶⁶ had asked the Commission on Human Rights to base the treaty it was in the process of drafting on the UDHR,⁶⁷ the General Assembly would eventually relent to the Commission.⁶⁸

⁶¹ Jessica Whyte, ‘Human Rights and the Collateral Damage of Neoliberalism’ (2017) 20(1) *Theory and Event* 137, 142

⁶² Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 28

⁶³ Henry J Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context* (3rd edition, Oxford University Press 2008), 518; Antony J.M. Zuijdewijk, ‘The International Court and South West Africa: Latest Phase’ (1973) 3 *Georgia Journal of International and Comparative Law* 323, 336

⁶⁴ United Nations, ‘Drafters of the Declaration’ (*United Nations*) <<https://www.un.org/en/about-us/udhr/drafters-of-the-declaration>> accessed 20 April 2022

⁶⁵ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 18

⁶⁶ United Nations, ‘General Assembly of the United Nations’ (*United Nations*) <<https://www.un.org/en/ga/>> Accessed 12 July 2020

⁶⁷ United Nations General Assembly Resolution, ‘Draft International Covenant on Human Rights and Measures to Implementation: Future Work of the Commission of Human Rights’ (4 December 1950) UN Doc. A/RES/421 (V), [6]

⁶⁸ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 19

Civil rights were enshrined in the International Covenant on Civil and Political Rights (ICCPR)⁶⁹ and social rights in the International Covenant on Cultural, Economic, and Social Rights (ICESCR).⁷⁰ This differentiation mirrored the approach of the Council of Europe⁷¹, who placed civil rights in the European Convention on Human Rights (ECHR)⁷² and social rights in the European Social Charter (ESC).⁷³ The UN treaties were eventually completed in 1966⁷⁴ and entered into force in 1976.⁷⁵ Together, the UDHR, ICESCR, and ICCPR are known as the International Bill of Rights.⁷⁶

The geopolitical divide that caused friction during the drafting of the UDHR and would hamper international cooperation for the next four decades in the Cold War seems to have been at the heart of the categorisation of human rights. A US-led coalition attempted to downplay the

⁶⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

⁷⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171

⁷¹ Renate Kicker and Markus Möstl, *Standard-setting through monitoring? the role of Council of Europe expert bodies in the development of human rights* (Council of Europe Publications 2012), 68

⁷² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

⁷³ Council of Europe, *European Social Charter*, 18 October 1961, ETS 35 (ESC)

⁷⁴ Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014), 6

⁷⁵ Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014), 7

⁷⁶ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 139-140

social rights more readily associated with communism, which were supported by the USSR-led Eastern states and most Third World countries,⁷⁷ in favour of civil rights that are more compatible with Western liberal democracy⁷⁸ (and more importantly, with capitalism). As will be returned to throughout, civil rights mesh with capitalism's principal premises of private property and contract.⁷⁹ The US is one of the few countries that has joined the ICCPR but not the ICESCR.⁸⁰

In the period leading up to the creation of the Optional Protocol to the ICESCR in 2008, the US lobbied against the drafting,⁸¹ mounted persistent opposition,⁸² attempted to elongate the negotiations on drafting,⁸³ and tried to water down the provisions of the protocol.⁸⁴ These

⁷⁷ Wade M. Cole, 'Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices' (2013) 92(1) *Social Forces* 165, 168

⁷⁸ Tony Evans, *The Politics of Human Rights: A Global Perspective* (2nd Edition, Pluto Press 2005), 20

⁷⁹ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 *Buffalo Human Rights Law Review* 107, 122

⁸⁰ Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014), 8

⁸¹ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 *Hum Rts Q* 144, 155

⁸² Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 *Hum Rts Q* 144, 159, 162

⁸³ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 *Hum Rts Q* 144, 164

⁸⁴ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 *Hum Rts Q* 144, 167

efforts were carried out despite the fact that the US was not even an ICESCR member and surely had no intention of ratifying the Optional Protocol.

1.1.2 The ICESCR

The ICESCR is a weaker treaty than the ICCPR; a 'poor relation' per Matthew Craven.⁸⁵ One of the major differences between the two is the nature of obligations imposed on signatory nation-states, found in Article 2(1) in each covenant. The ICCPR obliges nation-states to 'to adopt...laws...necessary to give effect' in domestic law to ICCPR rights. These rights are to be provided by states to 'all individuals'.⁸⁶ Article 2(1) ICESCR, merely asks signatories to 'take steps...to the maximum of...available resources' to achieve 'progressively the full realisation' of ICESCR rights,⁸⁷ a noticeably weaker duty.⁸⁸ The discrepancy between the wording of the state obligations between the two treaties may have contributed to the idea that social rights should be treated as aspirations rather than binding legal obligations.

Accounts of the drafting process suggest that the duty of progressive realisation of social rights subject to resource availability was watered down from a proposed obligation to 'promote'

⁸⁵ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 352

⁸⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2(1)

⁸⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 2(1)

⁸⁸ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 114

social rights.⁸⁹ The impact of this amendment seems to have been recognised. Hungary submitted that its weakness in comparison with the ICCPR's corresponding duty would permit states to effectively postpone obligations indefinitely;⁹⁰ the representative from the USSR contended that it made the ICESCR a 'dead letter'.⁹¹ Costa Rica suggested adding 'and at an accelerated rate' to the duty of progressive realisation,⁹² but this was rejected.

The suggestion that civil rights can be immediately realised whilst social rights cannot is not entirely convincing; protection of civil rights may require significant action. Many of the rights found in the ICCPR, like Article 14, which guarantees the likes of fair trials and a presumption of innocence until proven guilty, may not require positive action in fulfilment, but they seem to presume the existence of functioning legal institutions. Despite this, the 'progressive' realisation of social rights is referred to in virtually all relevant treaties, apart from the African Charter.⁹³

⁸⁹ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 165

⁹⁰ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 172

⁹¹ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 176

⁹² Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 177

⁹³ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 29-30

Social rights may generally require more positive action but the difference, as Alston and Quinn have recognised, is more one of degree⁹⁴ and will be dependent on the current conditions in each state; a country with constitutional guarantees to various social rights and low levels of wealth inequality may not need to undertake much positive action. An unsuccessful Israeli submission during the drafting stage suggested that if human rights were to be divided into two categories, they should be divided into those that can be immediately implemented and those that cannot,⁹⁵ a decidedly more practical distinction. In addition, the CESCR has long maintained that numerous ICESCR rights are capable of being implemented immediately,⁹⁶ like the right to join a union.⁹⁷

The explicit qualification of progressive realisation being contingent upon the availability of resources⁹⁸ is another way the ICESCR has been undermined. This also is not entirely justifiable; all rights imply some degree of costs. The right to free speech, for example, requires the existence and the continued funding of a justice system.⁹⁹ The USSR argued that it provided an excuse for governments unwilling to provide social rights¹⁰⁰ rather than those

⁹⁴ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 184

⁹⁵ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 173

⁹⁶ UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 3 (1990) on the Nature of States Parties Obligations (Article 2(1) of the Covenant)' (14 December 1990) UN Doc E/1991/23, [5]

⁹⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 8

⁹⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, article 2(1)

⁹⁹ Cass Sunstein, *Designing democracy: what constitutions do* (Oxford University Press 2001), 234

¹⁰⁰ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 179

were unable to, noting that it was mainly wealthier Western countries that were pushing for a duty of progressive realisation.¹⁰¹ Article 2(3) of the ICESCR affords developing countries discretion to refrain from guaranteeing social rights to non-nationals out of recognition of their economic resources;¹⁰² a similar provision could have ensured that the 'available resources' justification did not apply to developed countries.

It is also not clear to what extent a nation-state must go to exhaust 'available' resources. Lebanon was in favour of clarifying that a gap between budget allocation and actually available resources was not justifiable,¹⁰³ but there was no chance of any consensus being arrived at; the US proposed adding 'for this purpose' to the qualification of available resources which, as a number of nation-states argued, would have given an effectively unlimited scope for nation-states to claim that resources were not available, that any amount allocated to the provision of social rights was all that was available.¹⁰⁴ Nation-states still have considerable scope to claim that they have exhausted all available resources.¹⁰⁵

¹⁰¹ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 176

¹⁰² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 2(3)

¹⁰³ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 178

¹⁰⁴ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 179

¹⁰⁵ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 31

The ICESCR suffers generally from some deficiencies in language, at least when compared to the ICCPR. Philip Alston and Gerard Quinn have noted that UN treaty rights use certain language in a way that alters some obligations, creating a hierarchy of types of obligation, ranging from obligations to 'respect' certain aspects of rights¹⁰⁶ and to 'recognise'¹⁰⁷ others, up to the obligation to 'ensure' or 'guarantee'.¹⁰⁸ The obligations to ensure or guarantee are generally those that can be implemented quickly and with little expenditure like the obligation to prevent discrimination, the only obligation found in both covenants. The most common obligation in the ICESCR is to 'recognise', the level of obligation most consistent with progressive realisation.¹⁰⁹

This 'hierarchy' of obligations could have allowed the drafters of the ICESCR to dispense with the diminished Article 2(1) obligation of progressive realisation and simply specify that certain obligations should be respected or recognised whilst others would require states to ensure or guarantee a right. This language is not, however, used consistently¹¹⁰ and it remains unclear whether this was intentional.¹¹¹ The right to social security found in Article 9 merely instructs

¹⁰⁶ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 184

¹⁰⁷ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 185

¹⁰⁸ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 185-186

¹⁰⁹ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 185

¹¹⁰ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 26

¹¹¹ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 63

states to 'recognise' the right of everyone to social security; on a purely textual analysis, this renders it almost worthless. The Article 11 right to an adequate standard of living is only slightly more ambitious, asking states to recognise this right and take steps to ensure its realisation. Comparison with Article 18 of the ICCPR is telling. Like many ICCPR articles, Article 18 is framed with little reference to the obligations themselves, instead emphasising its content, providing that everyone 'shall' have freedom of thought, conscience, and religion and that 'no one' be subject to coercion regarding beliefs or religion. Article 18(4) contains the only reference to state obligations; states are required to 'respect' choices made by parents regarding their children.

If Article 9 of the ICESCR had been drafted in a similar way, it would have been far more useful. Article 9 could have instead affirmed that 'everyone' shall be entitled to social security at an adequate level without discrimination. As the CESCR has suggested, immediate action can be taken in regard to discrimination and equality¹¹² and to respect the right to social security where a scheme already exists¹¹³ and prevent retrogression. States could then have been asked to take steps towards full realisation, and qualifications could be added allowing derogation in times of emergency or economic hardship. This would still have afforded recognition to the realities of social rights in term of resources and time needed for full realisation. It would also have avoided the blanket duty of progressive realisation that allows even developed states that are perfectly capable of providing for their inhabitants to delay

¹¹² United Nations Economic and Social Council 'General Comment No 19: The Right to Social Security (art 9)' (23 November 2007) UN Doc E/C.12/GC/19, [40]

¹¹³ United Nations Economic and Social Council 'General Comment No 19: The Right to Social Security (art 9)' (23 November 2007) UN Doc E/C.12/GC/19, [44]

their efforts or present minimal action as exhaustive of their obligations. The ICESCR is a weaker treaty than the ICCPR, by design.

1.1.3 Effects of the Difference Between the ICESCR and the ICCPR

Modern human rights documents tend to suggest that human rights are ‘indivisible and interdependent’.¹¹⁴ It is also often suggested that social rights are now recognised as fundamental,¹¹⁵ with an increasing number of states having signed the ICESCR held up as evidence. However, social rights are essentially ‘invisible’ in the law and constitutions of most States,¹¹⁶ which has allowed them to be abrogated without the censure that would accompany similar violations of civil rights.¹¹⁷ A study conducted in 2015 by the WORLD Policy Analysis Centre indicated that membership of the ICESCR also had a positive effect on the adoption of social rights in domestic law.¹¹⁸ However, this study mostly focused on the presence of domestic laws or government programmes covering ICESCR rights; for example, the analysis on the right to social security judged a state favourably if it was provided to

¹¹⁴ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights in Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights : A Legal Resource Guide* (University of Pennsylvania Press 2006), 452

¹¹⁵ ‘Vienna Declaration and Plan of Action’ in Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 411

¹¹⁶ United Nations General Assembly (Human Rights Council) ‘Report of the Special Rapporteur on extreme poverty and human rights’ 32nd Session (2016) UN Doc A/HRC/32/31, [4]

¹¹⁷ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 10

¹¹⁸ Jody Heymann and Kristen McNeill and Amy Raub, ‘Rights Monitoring and Assessment Using Quantitative Indicators of Law and Policy: International Covenant on Economic, Social and Cultural Rights’ (2015) 37 Human Rights Quarterly 1071, 1099

disabled people rather than whether it was readily available, accessible, or, most importantly, adequate.¹¹⁹

Judicial remedies are more likely to be available for civil rights.¹²⁰ A study investigating implementation of the ICESCR with the aim of ascertaining whether ICESCR membership had led to actual justiciable rights or simply rhetorical support for social rights found that ICESCR membership made social rights more likely to be adopted domestically, but that these rights are usually framed in aspirational terms.¹²¹ The rights in the South African Constitution, for example, one of very few nations to protect social rights constitutionally, are drafted in a similarly vague manner¹²² to the ICESCR. The Article 2(1) duty of progressive realisation was found to be main reason for this.¹²³ Having a weaker monitoring and enforcement system has probably contributed as well; Sandra Liebenberg argues that the initial lack of a complaints system has contributed to a reluctance for domestic courts to get involved with social rights.¹²⁴ This will be returned to shortly.

¹¹⁹ Jody Heymann and Kristen McNeill and Amy Raub, 'Rights Monitoring and Assessment Using Quantitative Indicators of Law and Policy: International Covenant on Economic, Social and Cultural Rights' (2015) 37 Hum Rts Q 1071, 1088-1089

¹²⁰ United Nations Committee on Economic, Social, and Cultural Rights 'General Comment No 9: The domestic application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, [10]

¹²¹ Wade M. Cole, 'Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices' (2013) 92(1) Social Forces 165, 182

¹²² Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2008), 138

¹²³ Wade M. Cole, 'Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices' (2013) 92(1) Social Forces 165, 170

¹²⁴ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 50

The Committee on Economic, Social, and Cultural Rights (CESCR), created in 1985 to become the ICESCR's treaty body,¹²⁵ noted in 1992 that 'States and the international community as a whole' were far more willing to tolerate breaches of social rights than equivalent breaches of civil rights; that 'despite the rhetoric' about both categories of rights being equal, civil rights violations are treated as 'far more serious' and 'patently intolerable', than 'massive' social rights violations.¹²⁶ The idea that social rights are of a different legal 'nature' to civil rights¹²⁷ and should be regarded more as aspirational policy goals than as enforceable legal rights¹²⁸ remains prevalent. This view is evident in state practice. State practice (and opinion) is especially important because the primary means of enforcing the ICESCR is state reporting,¹²⁹ although a complaints procedure was belatedly established in 2008.¹³⁰

This is all the more serious as full realisation of social rights remain as vital as ever. Global hunger appears to be trending upwards since 2020.¹³¹ Over 1.5 billion people have inadequate

¹²⁵ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 Hum Rts Q 144, 148

¹²⁶ UN Committee on Economic, Social, and Cultural Rights (Economic and Social Council), 'Report on the Seventh Session' (23 November-11 December 1992) UN Doc E/C.12/1992/2, 83

¹²⁷ Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014), 7

¹²⁸ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 159

¹²⁹ Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014), 7

¹³⁰ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 Hum Rts Q 144, 176

¹³¹ World Food Programme, 'HungerMap Live' (*World Food Programme*, 17 April 2022) <<https://static.hungermapdata.org/insight-reports/latest/global-summary.pdf>> accessed 19 April 2022

housing situations, a number that seems to be rapidly increasing.¹³² Poverty, despite rhetoric to the contrary,¹³³ remains largely unaddressed over the past few decades¹³⁴ and that it will almost certainly increase due to the Covid-19 pandemic and climate change, among other things.¹³⁵ Even where there seem to have improvements to extreme poverty, these are normally offset by increases in relative poverty, often reflecting workers in the Third World moving from rural subsistence farming to urban low-wage employment.¹³⁶ During the pandemic, economic inequality increased by all measures, within and between countries, and the world's ten richest billionaires consequently increased their wealth by \$319bn in 2020.¹³⁷

1.2. Social rights practice

1.1.2 Enforcement

There was initially a broad disparity between the ICESCR and ICCPR enforcement regimes. A new body, the Commission on Human Rights (now the Human Rights Council¹³⁸), was created

¹³² UN Economic and Social Council, 'Follow-up to the World Summit for Social Development and the twenty-fourth special session of the General Assembly: priority theme: affordable housing and social protection systems for all to address homelessness' UN Doc E/CN.5/2020/L.5 (2020)

¹³³ UNGA (Human Rights Council) 'The parlous state of poverty eradication: Report of the Special Rapporteur on extreme poverty and human rights' 44th Session (2020) UN Doc A/HRC/44/4, [5]

¹³⁴ UNGA (Human Rights Council) 'The parlous state of poverty eradication: Report of the Special Rapporteur on extreme poverty and human rights' 44th Session (2020) UN Doc A/HRC/44/4, [28]

¹³⁵ UNGA (Human Rights Council) 'The parlous state of poverty eradication: Report of the Special Rapporteur on extreme poverty and human rights' 44th Session (2020) UN Doc A/HRC/44/4, [30]-[31]

¹³⁶ Ayse Bugra, 'Current perspectives on global poverty: rights, capabilities and social exclusion' in Martha F Davis, Morten Kjaerum, Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Elgar 2021), 50

¹³⁷ Valentina Romei, 'How the pandemic is worsening inequality' *Financial Times* (London, 31 December 2020)

¹³⁸ United Nations General Assembly Resolution 60/251 (15 March 2006) UN Doc A/RES/60/251

for the ICCPR, whilst the monitoring of the ICESCR was left to the UN Economic and Social Council (ECOSOC), a subsidiary of the General Assembly.¹³⁹ The ICESCR only received its own treaty body, the CESCR, in 1985.¹⁴⁰ The ICCPR was initially given three enforcement mechanisms: state reporting, individual complaints and interstate complaints.¹⁴¹ The ICESCR, as mentioned was to be monitored solely by state reporting,¹⁴² under which states would simply mark their own homework every five years,¹⁴³ which was never likely to result in serious condemnation.¹⁴⁴ States viewed merely submitting a report as exhaustive of their obligations¹⁴⁵ submitted reports of varying quality,¹⁴⁶ and were generally evasive and disengaged.¹⁴⁷

¹³⁹ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 Hum Rts Q 144, 147

¹⁴⁰ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 Hum Rts Q 144, 148

¹⁴¹ Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014), 7

¹⁴² Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014), 7

¹⁴³ Sandy Ghandi 'The International Bill of Rights and the European Convention on Human Rights' (2006) 6 Legal Information Management 282, 287

¹⁴⁴ Scott Leckie, 'The Committee on Economic, Social, and Cultural Rights: Catalyst for Change in a System Needing Reform' in Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty Monitoring* (Cambridge University Press 2009), 130

¹⁴⁵ Scott Leckie, 'The Committee on Economic, Social, and Cultural Rights: Catalyst for Change in a System Needing Reform' in Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty Monitoring* (Cambridge University Press 2009), 131

¹⁴⁶ Scott Leckie, 'The Committee on Economic, Social, and Cultural Rights: Catalyst for Change in a System Needing Reform' in Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty Monitoring* (Cambridge University Press 2009), 131

¹⁴⁷ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 68

The creation of the CESCR was at least a step forward. The ICESCR's Optional Protocol, adopted in 2008,¹⁴⁸ has introduced an individual complaints system, permitting complaints to be sent to the CESCR itself, which acts as a quasi-judicial body.¹⁴⁹ However, only 24 of 171 ICESCR members have joined the Optional Protocol.¹⁵⁰ The CESCR's complaints mechanism also has mostly taken a deferential approach to social rights complaints,¹⁵¹ preferring to avoid issuing condemnation unless a state has committed serious failings,¹⁵² presumably as the CESCR seems to prefer 'constructive and mutually rewarding dialogue'¹⁵³ to an adversarial relationship with States. A margin of appreciation, (popular in human rights judicial protection¹⁵⁴) affords States discretion to balance nation-state sovereignty with

¹⁴⁸ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 Hum Rts Q 144, 177

¹⁴⁹ Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - The Missing Piece of the International Bill of Human Rights' (2010) 32 Hum Rts Q 144, 176

¹⁵⁰ United Nations Treaty Collection, 'Chapter IV: Human Rights 3. a Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (*United Nations*, 29 August 2020) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en> Accessed 29 August 2020

¹⁵¹ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 82

¹⁵² Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 84

¹⁵³ UN Committee on Economic, Social, and Cultural Rights (Economic and Social Council), 'Report on the Seventh Session' (23 November-11 December 1992) UN Doc E/C.12/1992/2, 14

¹⁵⁴ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008, HL 165-1, HC 150-1), [56]

accountability.¹⁵⁵ The CESCR declares most complaints inadmissible,¹⁵⁶ but is fairly likely to find a violation when a case is considered admissible.¹⁵⁷ Almost all complaints concern evictions in two signatory nation-states (Spain and Italy¹⁵⁸). The CESCR also has limited enforcement powers (states are obliged merely to respond within six months¹⁵⁹) and is generally deferential,¹⁶⁰ meaning that domestic implementation or adjudication is necessary.

This does not mean that the complaints procedure is useless. The lack of a complaints system has hindered the normative development of social rights,¹⁶¹ especially regarding state practice, a key component of customary law.¹⁶² More international judicial reasoning on social

¹⁵⁵ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 83

¹⁵⁶ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 58

¹⁵⁷ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 59

¹⁵⁸ United Nations Office of the High Commissioner, 'Individual communications: Committee of Economic, Social, and Cultural Rights' (*United Nations*) < <https://www.ohchr.org/en/treaty-bodies/cescr/individual-communications> > accessed 23 July 2024

¹⁵⁹ Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/RES/63/117, article 9(2)

¹⁶⁰ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 82

¹⁶¹ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 43-44

¹⁶² Michael Byers, *Custom, power and the power of rules: International relations and customary international law* (Cambridge University Press 1999), 130

rights may encourage domestic courts to do the same¹⁶³ and can offer recommendations that all states can consider in decision-making even if not actually follow.¹⁶⁴ A case study conducted on domestic rights implementation in northern European states that seemed to indicate that the ECHR and the work of the European Court on Human Rights had convinced domestic courts that civil rights have legal implications;¹⁶⁵ the CESCR may in theory eventually be able to follow that example.

1.2.2 Principles

Whilst the CESCR has not made much progress with the reporting or complaints systems, its General Comments, which are regarded as authoritative interpretations of the ICESCR,¹⁶⁶ have helped to establish several key principles of social rights. First, The CESCR has clarified some examples of clear violations of ICESCR rights. For example, 'denial of access to food to particular individuals or groups' violates Article 11 ICESCR.¹⁶⁷ Similarly, 'failure to reform or

¹⁶³ Fons Coomans, 'The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights' (2002) 35(2) *Law and Politics in Africa, Asia and Latin America* 182, 196

¹⁶⁴ Andreas Follesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory' (2013) 14 *Theoretical Inquiries in Law* 339, 342

¹⁶⁵ Martin Scheinin, 'Domestic Implementation of International Human Rights Treaties: Nordic and Baltic Experiences' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2009), 232

¹⁶⁶ Fons Cooman, 'The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights' (2002) 35(2) *Law and Politics in Africa, Asia and Latin America* 182, 188

¹⁶⁷ United Nations Committee on Economic, Social, and Cultural Rights 'General Comment 12: The right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, [19]

repeal legislation which is manifestly inconsistent with the right to social security' will violate the article 9 right to social security.¹⁶⁸

The CESCR has also established minimum obligations, which at least can address these clear violations. The Committee has long held (established in 1992 by General Comment No.3) that parties to the ICESCR have a 'minimum core' obligation to 'ensure the satisfaction of, at the very least, minimum essential levels' of ICESCR rights.¹⁶⁹ Whilst the assessment of the minimum core obligation is still qualified by the availability of resources,¹⁷⁰ a lack of resources alone will not justify a failure to ensure minimum levels of social rights,¹⁷¹ and particular attention is to be paid to the most vulnerable members of society.¹⁷² A minimum standard in measuring social rights can be useful in placing the burden of proof on the State when it has failed to provide a certain level of the right or takes retrogressive action that will fall below that level.¹⁷³ As mentioned, there are relatively few jurisdictions in which social rights are justiciable, but of those few, only Colombia uses the minimum core.¹⁷⁴

¹⁶⁸ United Nations Economic and Social Council 'General Comment No 19: The Right to Social Security (art 9)' (23 November 2007) UN Doc E/C.12/GC/19, [65]

¹⁶⁹ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [10]

¹⁷⁰ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [10]

¹⁷¹ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [11]

¹⁷² United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [12]

¹⁷³ Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113, 159

¹⁷⁴ David Landau, 'The promise of a minimum core approach: the Colombian model for judicial review of austerity measures' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 270

The CESCR has also taken a strong line against ‘retrogressive’ action. Deliberate retrogressive action (i.e., action that worsens provision or enjoyment of rights) will trigger a presumption that the right has been violated and requires States to displace a significant burden of justification.¹⁷⁵ However, such measures are to be justified ‘with reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’,¹⁷⁶ which, as Craven suggests, may legitimise ‘trade-offs’¹⁷⁷ (i.e., cuts to housing provision being offset by increased social security benefits). This possibly opens the door for a State party to claim that cuts to Article 9 ICESCR social security rights can be justified by actions taken with regard to the Article 6 right to work, even where the benefits of the latter do not necessarily flow to those harmed by the former, which may be impossible to determine.

Retrogression is a rare area in which the CESCR declares violations in spite of state justification. In a Spanish submission,¹⁷⁸ a couple and their young children were evicted and left effectively homeless after being unable to pay their rent and unsuccessful in applying for social

¹⁷⁵ United Nations Committee on Economic, Social, and Cultural Rights ‘General comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ (14 December 1990) UN Doc E/1991/23, [9]

¹⁷⁶ United Nations Committee on Economic, Social, and Cultural Rights ‘General comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ (14 December 1990) UN Doc E/1991/23, [9]

¹⁷⁷ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995), 132

¹⁷⁸ United Nations Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015’ (20 June 2017) UN Doc E/C.12/61/D/5/2015

housing.¹⁷⁹ The CESCR accepted that evictions could be justified, especially in the case of non-payment of rent,¹⁸⁰ but added that the state must all use ‘all available resources’ to provide alternative accommodation.¹⁸¹ The state had claimed a lack of resources but had also recently sold significant quantities of its housing stock,¹⁸² which the CESCR identified as a retrogressive measure.¹⁸³ Spain’s attempt to justify the article 11 violation was therefore unjustified.¹⁸⁴ There was no need for the CESCR to define the content of the right to housing; action clearly adverse to progressive realisation will almost always be a violation.

Finally, in accordance with Article 2(2) of the ICESCR¹⁸⁵ (and the preamble to the ESC¹⁸⁶), it is expected that nation-states will not discriminate where social rights are concerned. General Comment 3 suggests that ICCPR membership means that nation-states have obligations to

¹⁷⁹ United Nations Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015’ (20 June 2017) UN Doc E/C.12/61/D/5/2015, [2.19]

¹⁸⁰ United Nations Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015’ (20 June 2017) UN Doc E/C.12/61/D/5/2015, [15.1]

¹⁸¹ United Nations Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015’ (20 June 2017) UN Doc E/C.12/61/D/5/2015, [15.5]

¹⁸² United Nations Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015’ (20 June 2017) UN Doc E/C.12/61/D/5/2015, [17.5]

¹⁸³ United Nations Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015’ (20 June 2017) UN Doc E/C.12/61/D/5/2015, [17.6]

¹⁸⁴ United Nations Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015’ (20 June 2017) UN Doc E/C.12/61/D/5/2015, [17.8]

¹⁸⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 2(2)

¹⁸⁶ Council of Europe, *European Social Charter*, 18 October 1961, ETS 35

ensure remedies are available on an equal basis, and that progressive realisation of this obligation will be unnecessary.¹⁸⁷ In connection with this, General Comment 19 suggests that non-discrimination is an obligation that nation-states should implement immediately.¹⁸⁸ In addition, General Comment 12 on the right to food confirms that any discrimination in access to food will be a prima facie violation.¹⁸⁹ Discriminatory social rights provision, it appears, will not be tolerated.

Non-discrimination, a prohibition of retrogression, and the minimum core doctrine appear to be the most important principles of social rights jurisprudence.

...

1.2.3 Justiciability of social rights

There are several forms of arguments against justiciability of social rights. One form of argument opposes social rights adjudication on the basis that it is undemocratic. Jeremy Waldron argues that political deliberation in democratic institutions is preferable;¹⁹⁰ by this logic, if people want social rights, they can simply vote for representatives offering them. He disputes the legitimacy of a practice that relies upon decisions made by unelected judges

¹⁸⁷ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [5]

¹⁸⁸ United Nations Economic and Social Council 'General Comment No 19: The Right to Social Security (art 9)' (23 November 2007) UN Doc E/C.12/GC/19, [40]

¹⁸⁹ United Nations Committee on Economic, Social, and Cultural Rights 'General Comment 12: The right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, [18]

¹⁹⁰ Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) Yale Law Journal 1346, 1349

overruling those made by a democratically elected government.¹⁹¹ Aryeh Neier, a co-founder of Human Rights Watch, also believes that the political process is the best way to ensure social rights due to the compromise needed.¹⁹² Neier further argued that public expenditure must be kept within the democratic process¹⁹³ and that therefore, social rights must not be entrusted to courts.¹⁹⁴ Jonathan Sumption thinks that all human rights adjudication is illegitimate, because he believes that judicial review lacks the democratic legitimacy enjoyed by government decisions,¹⁹⁵ due to the lack of judicial elections and an absence of political accountability for judicial decisions.¹⁹⁶

The other broad form of argument is the more practical separation of powers argument, the idea that the judiciary is not well suited to engaging with social rights. James Nickel believes that it would violate the separation of powers, pointing out that a judge that found a violation of the right to education could not create a school system,¹⁹⁷ and that judicial enforcement only works where there is a decision or action to overturn or nullify.¹⁹⁸ Sumption believes that courts are not well placed to conduct review of political matters due to their inability to

¹⁹¹ Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) Yale Law Journal 1346, 1353

¹⁹² Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1, 2

¹⁹³ Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1, 1-2

¹⁹⁴ Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1, 1

¹⁹⁵ Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books Ltd 2019), 40

¹⁹⁶ Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books Ltd 2019), 41

¹⁹⁷ James W Nickel, *Making Sense of Human Rights* (2nd edition, Blackwell Publishing 2007), 142-143

¹⁹⁸ James W Nickel, *Making Sense of Human Rights* (2nd edition, Blackwell Publishing 2007), 142

resolve conflict in a way that accommodates multiple interests and opinions, law being a 'zero-sum game'¹⁹⁹ in which one party must lose.

These arguments often create a false dichotomy between complete judicial deference and usurpation; it ignores that judicial review may evaluate a measure affecting a right to education without building schools or curriculums, the same way a judge could evaluate freedom of expression without establishing a newspaper. Arguing that rights should be subject to judicial scrutiny and protection does not side-line the possibility of the democratic process being used to fulfil them; it simply recognises that where the democratic process fails to secure social rights, or if an elected government decides to reduce its social right contribution, judicial review can be used to complement parliamentary scrutiny,²⁰⁰ especially as a last resort. Such ideas are rarely advanced against civil and political rights. The right to life, for example, is not protected solely by courts; it is protected by police, by safety measures, and only by courts as a last resort.

There are several ways in which courts can protect social rights without controversy. As mentioned, some ICESCR rights are capable of being realised immediately; it would not be difficult for a court to determine whether the article 8 right to join a trade union had been violated. Discrimination is another way that courts can conduct rights review without

¹⁹⁹ Andreas Follesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory' (2013) 14 Theoretical Inq L 339, 354

²⁰⁰ Sandra Fredman, 'New horizons: incorporating socio-economic rights in a British Bill of Rights' (2010) Public Law 297, 305

assuming the role of a legislator or government minister. Many of the rights mentioned that are capable of being implemented immediately relate to discrimination, like the right to equal pay for equal work, especially for women, in Article 7(a)(i).

There are several other uncontroversial methods that are already used by courts or the CESCR, like retrogression, which as mentioned earlier, is one of the few ways that the CESCR's complaints process establishes ICESCR violations. Legality is another method. The UK Court of Appeal in *R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants*²⁰¹ quashed a change to government regulations made under statutory powers to rescind social security from asylum seekers who did not immediately claim upon arriving in the UK on the grounds that the change abrogated rights conferred by legislation.²⁰² Finally, procedural failings may justify judicial interference. In a recent CESCR's complaint,²⁰³ dealing with a Spanish woman who was forcibly evicted from her (privately rented) home and not offered suitable alternative accommodation, having been unable to obtain social housing due to her co-owning a property with her abusive husband,²⁰⁴ the CESCR decided that Spain not having a domestic legal framework through which tenants facing eviction could apply against

²⁰¹ *R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants*, [1997] 1 W.L.R. 275

²⁰² *R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants*, [1997] 1 W.L.R. 275, 293

²⁰³ United Nations Committee on Economic, Social, and Cultural Rights 'Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 52/2018' (14 April 2020) UN Doc E/C.12/67/D/52/2018

²⁰⁴ United Nations Committee on Economic, Social, and Cultural Rights 'Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 52/2018' (14 April 2020) UN Doc E/C.12/67/D/52/2018, [5.4]

the violation of their article 11 right to adequate housing²⁰⁵ was in itself a violation²⁰⁶ without having to address the more controversial questions surrounding the eviction itself.

There are even some ways in which courts have been able to engage in substantive review without frustrating the will of a democratic government. The Colombian Constitutional Court, which was originally only permitted to review civil and political rights,²⁰⁷ has gradually derived a minimum core, known as the ‘vital minimum’, from the principle of dignity, prevention of poverty, and the right to life,²⁰⁸ linking social rights with more universally accepted concepts. This was noted by David Landau to allow the court to protect a certain level of social rights for the vulnerable,²⁰⁹ prioritising poverty,²¹⁰ and refusing to accept financial sustainability as an excuse for retrogression.²¹¹ Minimum levels of sanitation, healthcare, and the means of subsistence have been protected.²¹²

²⁰⁵ United Nations Committee on Economic, Social, and Cultural Rights ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 52/2018’ (14 April 2020) UN Doc E/C.12/67/D/52/2018, [9.5]

²⁰⁶ United Nations Committee on Economic, Social, and Cultural Rights ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 52/2018’ (14 April 2020) UN Doc E/C.12/67/D/52/2018, [11]

²⁰⁷ David Bilchitz, ‘Constitutionalism, The Global South, and Economic Justice’ in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of South Africa, India, and Colombia* (Cambridge University Press 2013), 65

²⁰⁸ David Landau, ‘The promise of a minimum core approach: the Colombian model for judicial review of austerity measures’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 270

²⁰⁹ David Landau, ‘The promise of a minimum core approach: the Colombian model for judicial review of austerity measures’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 295

²¹⁰ David Landau, ‘The promise of a minimum core approach: the Colombian model for judicial review of austerity measures’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 295

²¹¹ David Landau, ‘The promise of a minimum core approach: the Colombian model for judicial review of austerity measures’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 274

²¹² David Bilchitz, ‘Constitutionalism, The Global South, and Economic Justice’ in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of South Africa, India, and Colombia* (Cambridge University Press 2013), 67

Reasonableness/Proportionality also allow courts to supervise governments without interfering. Review of ECHR rights, including that conducted by UK courts under the Human Rights Act 1998 that incorporated the ECHR, is conducted to the standard of proportionality,²¹³ which broadly asks whether the interference with a right could be justified with reference to the aim of the measure.²¹⁴ The CESCR also evaluates individual complaints by proportionality.²¹⁵ The South African Court uses reasonableness,²¹⁶ presumably in the interests of avoiding violation of the separation of powers.²¹⁷

In South Africa, reasonableness has worked well in cases like *Khosa v Minister of Social Development*²¹⁸ in which the court found a statute aimed at reforming social security that excluded permanent residents who were not citizens to be unreasonable.²¹⁹ It was not particularly useful²²⁰ in cases like *Mazibuko v City of Johannesburg*.²²¹ *Mazibuko* concerned an unsuccessful challenge to Johannesburg's water supply policy, under which only 6 kilolitres of

²¹³ Paul Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265, 293

²¹⁴ Paul Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265, 270

²¹⁵ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 82

²¹⁶ Evadné Grant, 'Human Dignity and Socio-Economic Rights' (2012) 33 Liverpool Law Review 235, 245

²¹⁷ Evadné Grant, 'Human Dignity and Socio-Economic Rights' (2012) 33 Liverpool Law Review 235, 245

²¹⁸ *Khosa v Minister of Social Development*, 2004(6) BCLR 569 (CC)

²¹⁹ *Khosa v Minister of Social Development*, 2004(6) BCLR 569 (CC), [82]

²²⁰ Evadné Grant, 'Human Dignity and Socio-Economic Rights' (2012) 33 Liverpool Law Review 235, 252-253

²²¹ *Mazibuko v City of Johannesburg*, [2009] ZACC 28 (*Mazibuko*)

water would be provided to each household per month,²²² after which citizens needed to install a prepaid meter or use a shared tap.²²³ The Constitutional Court refused to consider whether the amount of water supplied was consistent with the right to water²²⁴; the Court's view was that the content of the right to water was for the legislature to decide,²²⁵ and that the judiciary should merely ensure that the policy chosen to progressively realise the right is reasonable.²²⁶

Cass Sunstein, a one-time ardent opponent of judicial/constitutional protection of social rights,²²⁷ seems to have been convinced by the work of the South African Constitutional Court to embrace a nuanced position. He suggests that whilst 'conventional' rights (i.e., civil rights) can be protected by courts at the individual level, that individual method is inappropriate for social rights.²²⁸ Where these rights are concerned, he prefers that courts adopt, following the lead of the South African Constitutional Court, what he calls an 'administrative law model' of social rights.²²⁹ In his view, this form of judicial review will strengthen government deliberation accordingly rather than pre-empt it.²³⁰ Sunstein also believes that courts can protect 'minimal'

²²² *Mazibuko v City of Johannesburg*, [2009] ZACC 28, [6]

²²³ Evadné Grant, 'Human Dignity and Socio-Economic Rights' (2012) 33 *Liverpool Law Review* 235, 252

²²⁴ *Mazibuko v City of Johannesburg*, [2009] ZACC 28, [60]

²²⁵ *Mazibuko v City of Johannesburg*, [2009] ZACC 28, [61]

²²⁶ *Mazibuko v City of Johannesburg*, [2009] ZACC 28, [162]

²²⁷ Cass R. Sunstein, 'Against Positive Rights' (1993) 2 *East European Constitutional Review* 35

²²⁸ Cass Sunstein, *Designing democracy: what constitutions do* (Oxford University Press 2001), 234

²²⁹ Cass Sunstein, *Designing democracy: what constitutions do* (Oxford University Press 2001), 234-235

²³⁰ Cass Sunstein, *Designing democracy: what constitutions do* (Oxford University Press 2001), 235

guarantees to prevent destitution²³¹ (i.e., the minimum core), but that courts going further may place an 'strain on judicial capacities'.²³²

Whilst this seems to fall short of progressive realization towards full implementation, courts are capable of considering social rights. Complete usurpation of the functions of government is not the only level of review available; arguments that social rights review lacks democratic legitimacy or violates the separation of powers can all be accommodated by courts.

1.3 Social rights, the welfare state, and the neoliberal turn

1.3.1 Social rights and the welfare state

In the period between the passing of the UDHR and the creation of the CESC, it was perhaps less important, at least in the West, that social rights were not legally enforceable. Most Western nations established strong welfare states after the war, which consisted of public ownership of resources,²³³ utilities, redistributive taxation,²³⁴ and the expansion of State provision on a universal basis (social housing, universal healthcare, etc).²³⁵ It involved protecting these sectors from market forces, on the grounds that access to 'basic human

²³¹ Cass Sunstein, *Designing democracy: what constitutions do* (Oxford University Press 2001), 235

²³² Cass Sunstein, *Designing democracy: what constitutions do* (Oxford University Press 2001), 237

²³³ Asbjørn Wahl, *The Rise and Fall of the Welfare State* (Pluto Press 2011), 36

²³⁴ Asbjørn Wahl, *The Rise and Fall of the Welfare State* (Pluto Press 2011), 38

²³⁵ Asbjørn Wahl, *The Rise and Fall of the Welfare State* (Pluto Press 2011), 41

needs' should not be subject to capitalist imperatives.²³⁶ This meant that the State was taking a direct hand in providing social rights, like the right to housing, social security, health, and an adequate standard of living. Welfare states created in most Western liberal democracies are held up as evidence of their contributions to and support for social rights,²³⁷ as almost a fusion²³⁸ between social rights and civil rights that strikes a balance between the two.²³⁹ The existence of these welfare states effectively temporarily side-lined the Cold-War era arguments about social rights.²⁴⁰

In the UK, the post-war settlement included enhanced social security, social housebuilding, the creation of the National Health Service, and the nationalisation of several industries, including rail, mail, steel, energy, and water. In the US this began after the Great Depression, with Franklin Roosevelt's New Deal which consisted of a package of business regulations, labour reforms, infrastructure programmes, and social security benefits. With the Marshall Plan that followed the war, the hegemonic US effectively extended the New Deal (and American production methods²⁴¹) to allies in Europe (also Japan), assisting the creation of welfare states in those countries.²⁴² The Marshall Plan was more than an economic project; it

²³⁶ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 71

²³⁷ Daniel J Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908, 920-922

²³⁸ Daniel J Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908, 922

²³⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013), 233

²⁴⁰ Ida Elisabeth Koch and Jens Vedsted-Hansen, 'International Human Rights and National Legislatures - Conflict or Balance?' (2006) 75 *Nordic Journal of International Law* 3, 16

²⁴¹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 268

²⁴² Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 256

was a programme based on the creation of a cross-Atlantic economy²⁴³ through the export of the US 'model' to Europe²⁴⁴ as a 'bulwark' against Soviet communism,²⁴⁵ which offered a plausible alternative to liberal capitalism.²⁴⁶ The welfare state was probably unthinkable without the emergence of the Soviet Union,²⁴⁷ which will be covered in later chapters. It would also provide markets for US exports.²⁴⁸ The welfare state was thus partially driven by political and economic factors, along with the then-prevalent Keynesian idea that government spending was necessary to maintain aggregate demand.²⁴⁹ It was therefore a thoroughly capitalist project, one that responded to specifically capitalist demands.

The post-war period was a 'Golden Age' for both the welfare state and capitalism.²⁵⁰ Sometimes lazily associated with socialism, it is also known as 'embedded liberalism'.²⁵¹ Post-war industrialisation was accompanied by the integration of workers into capitalist production through consumerism; those relatively high wages ensured consumer spending power, aided by the growth of credit. The middle class and working classes were integrated into capitalist society through consumerism and employment, which stabilised the post-war settlement.²⁵² Employment was nearly full across the liberal democratic capitalist world, populations

²⁴³ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 255

²⁴⁴ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 256

²⁴⁵ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 255

²⁴⁶ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 15

²⁴⁷ Herbert Obinger and Carina Schmitt, 'Guns and Butter? Regime Competition and the Welfare State during the Cold War' (2011) 63(2) *World Politics* 246, 262

²⁴⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 269

²⁴⁹ Mark Skousen, *The Big Three in Economics: Adam Smith, Karl Marx, and John Maynard Keynes* (Taylor and Francis 2007), 137

²⁵⁰ Ha-Joon Chang, *Economics: The User's Guide* (Penguin Books 2014), 83

²⁵¹ John Gerard Ruggie, 'International regimes, transactions, and change: embedded liberalism in the postwar economic order' (1982) 36(2) *International Organization* 379, 392

²⁵² Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 270

enjoyed effective public services, trade unions and other institutional arrangements improved pay and conditions for labour, and for two decades, the global economy, especially the capitalist West, experienced record levels of economic growth.²⁵³

This phase, which Robert Brenner calls the 'Long Upturn', was largely driven by increased capital accumulation, made possible by the achievement of enormous rates of profit, especially in manufacturing.²⁵⁴ However, embedded liberalism began to break down in the 1970s.²⁵⁵ The Long Upturn ended, and a 'Long Downturn' began²⁵⁶, and inflation and unemployment skyrocketed in the West.²⁵⁷ At this point, the global economy would turn to 'neoliberalism' (the distinction between neoliberalism and ordoliberalism²⁵⁸ will not be addressed in this thesis). Neoliberalism can be defined as a 'theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets, and free trade'.²⁵⁹

Whilst the rise of neoliberalism is often backdated to the foundation of the Mont Pelerin Society in 1945, neoliberal theory can be traced back to 1920s Vienna, specifically to the

²⁵³ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 43

²⁵⁴ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 46

²⁵⁵ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 12

²⁵⁶ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 39

²⁵⁷ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 14

²⁵⁸ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 11-12

²⁵⁹ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 2

Vienna Chamber of Commerce,²⁶⁰ where figures like Friedrich Hayek and Ludwig von Mises worked. Neoliberal theorists conceived embedded liberalism as a step towards socialism, which they associated dimly with an intolerable infringement on individual liberty by government. Embedded liberalism was a turn away from the principle of 'laissez faire', ('let things be'),²⁶¹ that had characterised the period between 1870 and the wars in which capitalism became entrenched in Europe,²⁶² a period cherished by neoliberals. In their view, the State had become unacceptably powerful over market forces.²⁶³

The World Wars had normalised State economic intervention.²⁶⁴ Neoliberals began to frame their opposition around what British economist Lionel Robbins called the 'grand panacea of our age':²⁶⁵ planning. Quinn Slobodian notes that neoliberals, with their focus on planning, essentially foresaw the post-war welfare state and had begun planning their opposition to it before it had even emerged.²⁶⁶ For neoliberals, planning blurred the lines between the public sphere of government and the private sphere of the economy characteristic of liberal capitalist society and even violated the 'sacred' nature of private property rights where appropriation of foreign corporate property was strategically necessary.²⁶⁷ This will be returned to in Chapter

²⁶⁰ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 31

²⁶¹ Ha-Joon Chang, *Economics: The User's Guide* (Penguin Books 2014), 53

²⁶² Ha-Joon Chang, *Economics: The User's Guide* (Penguin Books 2014), 50

²⁶³ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 29

²⁶⁴ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 97

²⁶⁵ Lionel Robbins, *Economic Planning and International Order* (Macmillan and Co 1937), 3

²⁶⁶ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 104

²⁶⁷ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 28-29

6, where neoliberalism will be situated within the intertwined history of imperialism and international law.

1.3.2 Neoliberalism in practice

Neoliberal theory was legitimised when the Nobel Memorial Prize in Economic Sciences was awarded to Hayek in 1974 and to Milton Friedman in 1976,²⁶⁸ major figures in neoliberal theory, but it was made possible in practice by the UK and (especially) the US.²⁶⁹ The US, which had emerged as the hegemon of the post-war order,²⁷⁰ was capable of exerting considerable economic (and military) power. Margaret Thatcher took office in Britain in 1979, hoping to destroy the post-war settlement and remake British society through Hayek's prescriptions.²⁷¹ After experiencing waves of strikes in response to high inflation in her first term, Thatcher was able to weaponise the Falklands War to enter and win a battle with the strikers. This would serve as a 'turning point' for Thatcher and neoliberalism in the UK; she would go on to significantly curtail the power of trade unions and impose neoliberalism.²⁷²

Ronald Reagan would play a similar role in the US. His attack on US workers was accompanied by the actions of Chairman of the Federal Reserve Paul Volcker. In response to high levels of

²⁶⁸ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 22

²⁶⁹ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 88

²⁷⁰ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 45

²⁷¹ Michael Cross, 'Tories should be the natural party of justice' (*Law Gazette*, 4 October 2017) <<https://www.lawgazette.co.uk/commentary-and-opinion/tories-should-be-the-natural-party-of-justice/5062958.article>> accessed 22 February 2023

²⁷² Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2007), 125-140

inflation, Volcker carried out a sharp shift from Keynesianism to monetarism (an economic theory that prioritises price stability/inflation control over full employment²⁷³), raising interest rates to 20%, which predictably led to high levels of unemployment. The UK had largely already abandoned Keynesianism in the early 1970s,²⁷⁴ but the aggressive turn to monetarism and neoliberalism in the US would force much of the world to follow²⁷⁵ (due to the centrality of the US in the global economy). Neoliberalism was consolidated in the UK and US by Tony Blair's Labour government and Bill Clinton's Democratic Party.²⁷⁶

As part of the US' Cold War-era fight against communism,²⁷⁷ which had overthrown governments in Iran in 1953 and Guatemala in 1954,²⁷⁸ Chile had earlier become the birthplace of (actually existing) neoliberalism when Salvador Allende's social democratic government was overthrown by a CIA-backed coup d'état. Under Friedman's advice, and against fierce resistance in Chile, government spending was cut by 27% in 1975 and was half the level of Allende's government by 1980. Hundreds of companies were privatised, trade barriers were removed, the economy shrank considerably,²⁷⁹ and unemployment hit 30% (previously 3%) by 1982. None of this prevented Chile being referred to as a 'free-market miracle' in the US.²⁸⁰

²⁷³ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the Capitalist State* (Edward Elgar Publishing 1988), 1

²⁷⁴ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 307

²⁷⁵ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 170

²⁷⁶ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 93

²⁷⁷ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2007), 76

²⁷⁸ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2007), 59

²⁷⁹ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2007), 82-83

²⁸⁰ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2007), 85

The Chilean economy would rebound in the late 80s, but a much larger proportion of Chileans lived in poverty, and the richest 10% had increased their income by 83%.²⁸¹ As will be described in Chapter 6, this process would soon come to be carried out through international institutions like the World Bank and International Monetary Fund (IMF), through structural adjustment programmes based upon the ‘neoliberal trinity’ of austerity, privatisation, and deregulation,²⁸² but it almost always led to disastrous social conditions. Although it is now recognised that neoliberal policy is at cross-purposes with social rights,²⁸³ mainstream human rights discourse, especially as propagated by the likes of Amnesty International,²⁸⁴ tended to carefully separate punishing economic reform from physical violence.²⁸⁵

1.3.3 Neoliberalism and social rights

Neoliberalism itself makes it quite difficult for nations to provide social rights. It often calls for austerity,²⁸⁶ large-scale cuts to public spending that often restrict the capability of the state to

²⁸¹ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2007), 86

²⁸² Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2007), 77

²⁸³ United Nations General Assembly, ‘Guiding principles on human rights impact assessments of economic reforms’ (28 February 2019) UN Doc A/HRC/40/57, [1.1]

²⁸⁴ Amnesty International, ‘Annual Report 1974/75’ (*Amnesty International*, 1 January 1975) < <https://www.amnesty.org/en/documents/pol10/001/1975/en/> > accessed 31 March 2022

²⁸⁵ Jessica Whyte, ‘Human Rights and the Collateral Damage of Neoliberalism’ (2017) 20(1) *Theory and Event* 137, 141

²⁸⁶ Magdalena Sepúlveda Carmona, ‘Alternatives to austerity: a human rights framework for economic recovery’ in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014), 30-31

provide rights.²⁸⁷ It also strongly encourages competition²⁸⁸ and personal responsibility.²⁸⁹ It places strong emphasis on the privatisation of State functions, such as the provision of housing.²⁹⁰ This leads to the 'commodification' of many aspects of society, through which 'social' relations and activities are transformed into economic relations, 'privileging' of the market and profits²⁹¹ over rights. Housing is a good example of this; in the UK, an average of over 125,000 social homes were built between 1945 and 1980. In 1980, just over 94,000 were built. Between 2018 and 2019, only 6,287 were built.²⁹² Meanwhile, large property developers raked in massive profits.²⁹³ Housing had gone from a social good (and a human right) to a source of private profit.

Neoliberal theory on social rights is exemplified by the thought of Hayek. Governments, in Hayek's view, should refrain from attempting to satisfy any 'particular needs' of individuals, but instead secure favourable conditions for individuals to provide for their own needs. The role of government was instead to ensure the conditions for a free market-based 'spontaneous order' which would enable individuals to provide for their own needs²⁹⁴. Any

²⁸⁷ Magdalena Sepúlveda Carmona, 'Alternatives to austerity: a human rights framework for economic recovery' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 33-40

²⁸⁸ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 65

²⁸⁹ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 65-66

²⁹⁰ Raquel Rolnik and Lidia Rabinovich, 'Late-neoliberalism: the financialisation of homeownership and the housing rights of the poor' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 61

²⁹¹ Paul O'Connell, 'The Death of Socioeconomic Rights' (2011) 74(4) *Modern Law Review* 532, 535

²⁹² Shelter England, 'The story of social housing' (*Shelter England*) <
https://england.shelter.org.uk/support_us/campaigns/story_of_social_housing> accessed 20 April 2022

²⁹³ Calum Muirhead, 'Britain's biggest housebuilders rake in more than £7bn of profits in two years as coronavirus pandemic boosts property demand' (*This is Money*, 2 January 2022) <
<https://www.thisismoney.co.uk/money/markets/article-10362863/Britains-biggest-housebuilders-make-7bn-profit-pandemic.html>> accessed 22 April 2022

²⁹⁴ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 2

attempts to rectify resulting inequalities would interfere with market functions and infringe upon freedoms to pursue opportunities.²⁹⁵ Hayek was strongly opposed to any idea of social or economic 'justice'; regarding it as an attempt to interfere with 'impersonal process' of the market-based order.²⁹⁶ It was 'absurd' to argue that this impersonal process could be unjust.²⁹⁷

Neoliberalism has been a stunning failure in economic terms. Harvey notes that it's record in stimulating capital accumulation has been 'dismal'; aggregate global growth rates were 3.5% in the 1960s, 2.4% in the 1970s, 1.4% in the 1980s and 1.1% in the 1990s. Most regions performed poorly, with only East and Southeast Asia proving the exception, and little of that was directly attributable to neoliberalism.²⁹⁸ The levels of profitability that sustained the post-war 'long upturn' were never recovered, and the global economy entered into a 'long downturn' out of which it has never really recovered.²⁹⁹ Most social indicators, like life expectancy and infant mortality, have worsened since the 1960s.³⁰⁰ Philip Alston noted in 2020 that despite positive rhetoric, there had been virtually no progress on global poverty during the neoliberal period;³⁰¹ reductions in global poverty levels are almost entirely due to China and (to a lesser extent) India.³⁰² Some regions, like post-Soviet Union Russia, where per capita

²⁹⁵ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 9-10

²⁹⁶ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 62-63

²⁹⁷ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 64-65

²⁹⁸ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 154

²⁹⁹ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 145

³⁰⁰ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 154

³⁰¹ UNGA (Human Rights Council) 'The parlous state of poverty eradication: Report of the Special Rapporteur on extreme poverty and human rights' 44th Session (2020) UN Doc A/HRC/44/4, [5]

³⁰² David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 154-155

income declined by 3.5% per year in the 1990s³⁰³ and life expectancy fell off a cliff,³⁰⁴ and much of Latin America, which generally experienced a 'lost decade' in the 1980s,³⁰⁵ performed particularly poorly.

Neoliberalism has thus not only made it more difficult for nations to ensure the social rights of their populations, as Chapter 5 will also consider, but it has destroyed the underlying conditions that social rights target (housing, healthcare, standards of living, etc), especially when compared with embedded liberalism, a period more conducive to social rights. It is important, however, not to essentialise neoliberalism. Neoliberalism only reversed some of the ultimately temporary measures associated with embedded liberalism that served as (slight) limits upon the power of capital and private property. As the next section will explain, it is capitalism, not just neoliberalism, that limits the impact of social rights, and human rights discourse has been shaped by these limits.

1.4 Social rights and capitalism: basic needs and a lack of ambition

1.4.1 Capitalism

³⁰³ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 154

³⁰⁴ William C. Cockerham, 'The Social Determinants of the Decline of Life Expectancy in Russia and Eastern Europe: A Lifestyle Explanation' (1997) 38(2) *Journal of Health and Social Behaviour* 117, 118

³⁰⁵ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 154

Capitalism has come to dominate liberal capitalist society. The capitalist mode of production can be broadly defined by three things. First, private ownership of the means of production (or private property) in the hands of a capitalist class. Owners of capital use that ownership to compel those without private property (the working class) to labour for them and appropriate any surplus-value on the basis of their private economic power.³⁰⁶

This means that capitalism is inherently unequal. One of the preconditions of capitalism is the availability of labourers that are compelled to sell their labour to capitalists, who own the means of production, in order to realise their own subsistence and reproduction.³⁰⁷ This means that capitalism requires that most of the population is not in control of its own subsistence and reproduction,³⁰⁸ meaning that capitalism also relies upon inequality. These labourers must also be able to ‘freely’ sell their own labour, to meet capitalists in the labour market as equals ‘in the eyes of law’³⁰⁹ (an idea that will be discussed at length in Chapter 3).

Capitalists then extract surplus-value/profits by paying labourers an amount that is sufficient to cover their subsistence and reproduction rather than the amount of value they produce³¹⁰. This is the ‘labour theory of value’; if capitalists paid their workers what they were worth, there would, in theory, be no profits (in practice profits may be made by other means, like market power). Because capitalists retain the surplus-value produced (profits), capitalism

³⁰⁶ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 113

³⁰⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 113

³⁰⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 99

³⁰⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 113

³¹⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 134

inherently creates inequality. This is recognised by proponents of capitalism,³¹¹ and these inequalities can of course be addressed through redistribution, but it is important to clarify that all arguments for retaining capitalism are advocating a degree of trickle-down economics.

Second, capitalist production is defined by the production of value; capitalists advance capital (i.e., money) to produce commodities for the sole purpose of ending up with a larger amount of money and using this money to restart the process.³¹² Capitalists are uninterested in using the commodities they produce, being solely focused on what they can exchange them for. Capitalist production is less about producing a particular product and is more about the production of value; capitalists produce commodities for the sole purpose of selling those commodities. This subordinates all production to the production of surplus-value/profit, which becomes the means by which this process starts again. Embedded liberalism seemed to protect some targets of social rights, like housing, from commodification, but neoliberalism has mostly reversed this.

Finally, capitalism produces purely economic imperatives that compels capitalists to compete by increasing labour productivity and reducing costs.³¹³ Capitalism places considerable power in the hands of a relative few. Capitalists control the production process by virtue of their ownership of private property, but they are just as subject to the power of money as labourers

³¹¹ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 290

³¹² Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 104

³¹³ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 149

are. Capitalist competition (embodied by markets³¹⁴) means capitalists (generally) must attempt to keep all costs, including wages, as low as possible³¹⁵ in order to maximise value (i.e., make profits). Because there is only so far capitalists can go in driving down costs/wages, they will eventually have to use some of their profits to invest in revolutionising the production process (e.g., with new technological advances),³¹⁶ which will increase productivity whilst also reducing the necessary number of labourers.³¹⁷ This will be covered in more detail in Chapter 3. The point, for now, is that capitalism tends to create unequal societies and worsening social conditions related to social rights.

1.4.2 Basic needs

In the post-war period, as will be picked up much later in this thesis, international law is often said to have undergone a ‘renewal’, in which international law acquired both a new ‘social’ character and a more individual-centred complexion at the expense of its traditional nation-state centrality. This supposedly elevated new doctrines like human rights at the expense of classical doctrines of sovereignty and non-intervention,³¹⁸ which are said to be receding.³¹⁹ James Thuo Gathii explains that several different streams of discourse emerged between the end of the war and the 1970s-80s, one of which was based upon social rights advocacy (the

³¹⁴ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 123

³¹⁵ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 100

³¹⁶ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 100

³¹⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 433

³¹⁸ James Thuo Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107, 113-114

³¹⁹ James Thuo Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107, 140

other being based upon civil rights).³²⁰ The creation of the ICESCR, ESC, and eventually the CESCER could be framed as part of this stream.

A 'basic needs' approach to social rights emerged as a critique of 'development' and its prioritisation of economic growth³²¹ out of that stream. Development is based upon assisting Third World countries to develop their productive capacities in a way that will allow their economies to 'catch up' to advanced economies.³²² Development will be returned to in Chapter 5. The International Labour Organisation (ILO) defines this approach as being based upon the idea that 'national development plans and policies, should include explicitly as a priority objective the promotion of employment and the satisfaction of the basic needs of each country's population'.³²³ Gathii identified two variants, a 'weak' and 'strong' variant, within this approach, both of which are essentially committed to prioritising and ensuring that the most vulnerable members of societies are protected from absolute deprivation and poverty, and to the use of social welfare programmes to mitigate the 'vagaries' of markets³²⁴ (i.e., to clean up the mess made by capitalism).

³²⁰ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 114

³²¹ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 122-124

³²² Ha-Joon Chang, *Economics: The User's Guide* (Penguin Books 2014), 134

³²³ International Labour Organisation, 'Follow-up of the World Employment Conference: Basic Needs. Report VII, International Labour Conference 65th Session' (*International Labour Organisation*, 1979) <https://webapps.ilo.org/public/libdoc/ilo/1979/79B09_240_engl.pdf> accessed 24 June 2024

³²⁴ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 128

The 'weak' variant of the basic needs approach is entirely consistent with capitalism, aligning with the use of welfare provision to prevent outright destitution, ensure capitalism a supply of workers (and customers), and manage resistance to capitalist exploitation.³²⁵ It does not question the power of capital or the inequality it generates³²⁶ The 'strong' version was decidedly more radical, injecting class analysis and questions of the distribution of material resources at the level of production (thus suggesting a critique of capitalism itself). This strong version questioned the role of markets in capitalist societies and the logic of 'trickle-down' economics.³²⁷ Gathii suggests that development discourse (i.e., both development institutions and its critics) mostly adopted the weaker version, allowing development institutions to sidestep inequality and push the logic of economic growth and trickle-down economics, as well as the prevalent idea that providing employment is the best way to meet needs,³²⁸ ignoring the exploitative nature of capitalist employment.

1.4.3 Social rights, capitalism, and basic needs

Human rights discourse also seems to have essentially adopted a weak basic needs approach to social rights, seeking to translate these needs into legal entitlements.³²⁹ This has led to a

³²⁵ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 129-130

³²⁶ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 130-131

³²⁷ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 130

³²⁸ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 132-133

³²⁹ James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 135

trend based upon advocating for rights to be respected in various situations: in development,³³⁰ in poverty ‘alleviation’ activities, during economic crises, and in responses to crises,³³¹ etc, aiming to use rights as a corrective to these activities³³² and to measure their success.³³³ Such work sometimes goes slightly further to encourage the participation of those deprived of their basic needs (i.e., those in poverty)³³⁴ and emphasise the need for government intervention in the economy in order to ensure that needs are met.³³⁵ What such thought misses out is that these deprivations of needs are a natural consequence of capitalism. Rights, including social rights, were not being ignored or accidentally disregarded due to a lack of information. The evolving dynamics of capital accumulation often involve the deprivation of basic needs.

The minimum core doctrine, which, along with non-discrimination and non-retrogression, make up the main legal and judicial principles of social rights, seems especially aligned with the ‘basic needs’ approach. In other words, it seems to point towards a conception of social rights that focuses upon relatively minimal State provision to prevent destitution. The minimum core is a valuable tool in this sense, but it is profoundly unambitious. The minimum

³³⁰ James Thuo Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107, 136

³³¹ Magdalena Sepúlveda Carmona, ‘Alternatives to austerity: a human rights framework for economic recovery’ in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014), 43-55

³³² James Thuo Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107, 136

³³³ Olivier de Schutter, ‘A human rights-based approach to measuring poverty’ in Martha F Davis, Morten Kjaerum, Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Elgar 2021), 12-18

³³⁴ Ayse Bugra, ‘Current perspectives on global poverty: rights, capabilities and social exclusion’ in Martha F Davis, Morten Kjaerum, Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Elgar 2021), 46-47

³³⁵ Leilani Farha and Kaitlin Schwan, ‘The human right to housing in the age of financialisation’ in Martha F Davis, Morten Kjaerum, Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Elgar 2021), 396-397

core may entrench the status quo to an extent if the level is established through compromise, as this will presumably result in a 'lowest-common denominator' approach.³³⁶ Along with retrogression, it may focus attention upon protecting current levels of social rights rather than progressive realisation.³³⁷ Whilst the minimum core (along with retrogression) has advantages, ideally social rights implementation should go much further. These major principles of social rights jurisprudence envisage a limited role for social rights that is difficult to square with the Article 2(1) ICESCR obligation of progressive realisation towards full implementation, the 'raison d'être' of the ICESCR.³³⁸

Such a limited conception of social rights may not even offend Hayek, who was fine with social rights provision so long as it would be subject to the same legal rules as other private interests.³³⁹ He was also not opposed to the provision of an 'assured minimum income' as 'an insurance against extreme misfortune', so long as this income is provided only to those who 'are unable to earn...an adequate maintenance'.³⁴⁰

This minimal conception of social rights seems to align with the social democratic 'Third Way' theory that guided political projects across the West in the 1990s-2000s, based upon an

³³⁶ Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113, 147-148

³³⁷ Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113, 163

³³⁸ UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 3 (1990) on the Nature of States Parties Obligations (Article 2(1) of the Covenant)' (14 December 1990) UN Doc E/1991/23, [10]

³³⁹ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 7

³⁴⁰ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 87

(apparent) rejection of both socialism and neoliberalism (although in practice it was really a way to justify rejecting the former for the latter³⁴¹). This approach, based upon a ‘supply-side’ variant of Keynesianism,³⁴² led to a ‘social investment paradigm’ under which the State has a ‘fundamental role in generating long-run growth...by investing in human and physical capital and by providing public goods that markets do not deliver’.³⁴³ This was a shift from the traditional goals of social democracy, which was to protect the interests and minimise the cost of capitalism for the working classes through welfare provision ‘within the confines’ of liberal capitalism.³⁴⁴ Social democracy is essentially based upon the belief that socialist principles can coexist with these confines.³⁴⁵

This shift in social democratic theory from embedded liberalism to neoliberalism effectively tracks the shift from the language of the ICESCR, based upon progressive realisation towards full implementation, to the language of the CESCR and social rights jurisprudence, based upon a minimum core, non-retrogression, and equality. It therefore seems that this ‘weak basic needs’ approach to social rights is an essentially social democratic position, one seeking to work within the (changing) confines of capitalism. Rather than work towards full implementation, the plan is instead to prevent destitution through relatively minimal

³⁴¹ Bjorn Bremer, and Sean McDaniel, ‘The ideational foundations of social democratic austerity in the context of the great recession’ (2020) 18(2) *Socio-Economic Review* 439, 452-453

³⁴² Bjorn Bremer, and Sean McDaniel, ‘The ideational foundations of social democratic austerity in the context of the great recession’ (2020) 18(2) *Socio-Economic Review* 439, 445

³⁴³ Bjorn Bremer, and Sean McDaniel, ‘The ideational foundations of social democratic austerity in the context of the great recession’ (2020) 18(2) *Socio-Economic Review* 439, 446

³⁴⁴ Stuart Hall, ‘The Great Moving Right Show’ in Stuart Hall and David Morley (ed), *Essential Essays: Volume I* (Duke University Press 2019), 380-381

³⁴⁵ James Thuo Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 *Buffalo Human Rights Law Review* 107, 170

provision and instead hope that economic growth (or capital accumulation), will provide employment, allowing for the majority to have their social rights provided indirectly.

This can be substantiated by looking at the CESCR's interpretation of the right to work. Its General Comment 18, establishing the interpretation and content of that right, does not attempt to challenge capitalist production. In fact, the Comment could be read as an approval of its indirect provision of social rights through work; the comment begins by asserting that the right to work is 'essential' for realising other human rights'.³⁴⁶ Although the Committee clarifies that workers must have the opportunity to freely choose and accept work, which 'implies not being forced in any way whatsoever' to enter employment, it explicitly accepts that 'dependent wage-paid work' is consistent with the right.³⁴⁷ As mentioned, that there are workers who must sell their labour for their subsistence (and are thus not genuinely free to choose) is a precondition of capitalism.

In its analysis of State legal obligations, the Committee specifies that employment policy should be formulated around 'stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment'.³⁴⁸ This accepts that economic growth and the expanded reproduction of capital should be encouraged despite this being an exploitative process that may or may not

³⁴⁶ United Nations Committee on Economic, Social, and Cultural Rights 'General Comment 18: The right to work (art. 6)' (24 February 2005) UN Doc E/C.12/GC/186, [1]

³⁴⁷ United Nations Committee on Economic, Social, and Cultural Rights 'General Comment 18: The right to work (art. 6)' (24 February 2005) UN Doc E/C.12/GC/186, [6]

³⁴⁸ United Nations Committee on Economic, Social, and Cultural Rights 'General Comment 18: The right to work (art. 6)' (24 February 2005) UN Doc E/C.12/GC/186, [26]

benefit society (indirectly, of course; this is an endorsement of trickle-down economics). It also seems to suggest that States should play a part in the social reproduction of workers (human and physical capital in social democratic language), ensuring a steady supply of wage-labourers. As will be explained later in the thesis, wage labour is also intimately connected to social rights discourse; along with the basic-needs approach, an indirect provision of social rights through employment forms a dual aspect social-democratic approach to these rights. Where services like healthcare and education, that relate more to social reproduction than subsistence, are concerned, a third 'basic services' element could be added, but this distinction will not be discussed further.

Some may not have a problem with this; they may see capitalism, regulated and tamed by a (liberal) democratic system, with welfare programmes to account for its shortcomings, as the ideal way to organise society. This system may be viewed, as Jack Donnelly suggests, as a perfect balance between civil and social rights,³⁴⁹ or as the best way to manifest freedom.³⁵⁰ However, capitalism is chaotic and often runs into crisis. These crises will lead to struggles over resources that will put the State's minimal direct provision of social rights and its indirect provision through employment in doubt, at least temporarily. When such crises recur, the arbitrary line between the State and 'civil society' is discarded and the State is usually required to intervene, but the State's subordination to capital means that these interventions do not

³⁴⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cambridge University Press 2013), 233

³⁵⁰ Jan Narveson, 'Democracy and Economic Rights' (1992) 9(1) *Social Philosophy and Policy* 29, 42

protect workers from the erosion of their living standards through redistribution and often even accomplish the opposite. This will be explained in further detail in Chapter 3.

The consequences and difficulties of accepting the premises of capitalism will be a major theme of this thesis and will be returned to throughout. Capitalism is entirely hegemonic today, hegemonic in the sense that it ‘neither rules nor governs’³⁵¹ but still exercises decisive influence. Therefore, whilst institutional social rights discourse was just chastised for its lack of ambition, it is not altogether clear that the law can go further, that it can work within the confines of capitalism whilst avoiding the pressures applied by capital’s hegemony. Whilst it has been established that fears about judicial protection of social rights are probably overblown, and that there are ways that courts can engage with these rights in a generally inoffensive manner. It must be questioned whether this will ever be enough.

Returning to Cass Sunstein’s suggestion that courts should go no further than reviewing for the minimum core of social rights and that they lack the capacity to do so, it should be conceded that he is probably right. Perhaps, as Neier suggested, decisions about social rights and the expenditure involved should involve the political process, ideally a democratic process. These democratic processes, particularly the most prevalent of these, liberal democracy, will be the subject of the next chapter.

³⁵¹ Antonio Gramsci, *Selections from the Prison Notebooks* (first published 1971, Lawrence and Wishart 1992), 253

1.5 Conclusion

Social rights have become a lesser form of (legal) human right. This was the result of a deliberate process, conducted mainly by Western nations. The relative weakness of the ICESCR is only the most glaring manifestation of this process. As explained, there have been practical consequences of the degradation of social rights, including limited enforcement in international law, sparse implementation in domestic law, and reduced censure for violations.

However, as will become clear as this thesis progresses, the argument being advanced here is not so much that social rights need a new international treaty, need a stronger international judicial body, or more comprehensive implementation into domestic legal systems, although this would be welcomed. This thesis is more interested in problematising the idea of doing these things within the 'confines' of capitalism. Capitalism exercises a pervasive influence upon modern liberal societies that cannot be ignored. Not only will a 'weak' 'basic rights' approach to social rights be likely to fail, there are also significant difficulties with attempting to go further without engaging with wider questions of law and political economy, including the liberal democratic system, the role of law in capitalist societies, and the influence of capitalism in international law.

The overtaking of the post-war welfare state settlement by neoliberalism was detrimental to social rights implementation, but it is important to put the transition to neoliberalism in the proper context. The argument that we need to end neoliberalism and return to a welfare state

settlement is also not being advanced here, as much as it may be welcomed. This chapter has attempted to (begin to) substantiate the suggestion that civil rights are more compatible with liberal capitalism than social rights.

Chapter 2: A Critique of Liberal Democracy

The end of the previous chapter raised the question of social rights being ensured through democracy. Amartya Sen has made this connection, highlighting the ‘instrumental role’ of democracy in enhancing the ‘hearing’ that people get in advancing their claims, including claims of ‘economic needs’.³⁵² The CESCR seems to go further in suggesting that rights require democracy; it claims that the ICESCR is compatible with all types of economic and political systems, ‘provided only that it is democratic and that all human rights are thereby respected’.³⁵³ It is noteworthy that both of these opinions came from the 1990s, when the Soviet Union had collapsed, and liberal democratic capitalism lost its only genuine competitor.

This rhetoric was odd considering that it was the efforts of the Western liberal democracies that had been largely responsible for the marginalisation of social rights. It may be that they believe their system will ensure social rights almost incidentally. It is worth considering, however, whether it is true that ‘all human rights’ are necessarily respected just because the system is ‘democratic’. There is something lacking in arguments that (as Neier suggested) the ‘democratic process’ is the best way to ensure social rights. It says nothing about the extent of the ‘democratic process’ itself. David Held suggests that whilst democracy is used to denote a system of government in which, in ‘contradistinction’ to earlier systems, the people essentially rule themselves,³⁵⁴ there is and has always been conflicting conceptions of who

³⁵² Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 148

³⁵³ United Nations Committee on Economic, Social, and Cultural Rights ‘General comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ (14 December 1990) UN Doc E/1991/23, [8]

³⁵⁴ David Held, *Models of Democracy* (first published 1987, 3rd Edition Stanford University Press 2006), 1

those 'people' are and what is actually meant by 'rule'.³⁵⁵ This has changed over the centuries that have passed since democracy was first used in Ancient Greece.

It is possible, based upon the above, to construct a claim that ensuring a very basic form of political participation through the institutions of liberal democracy will help to ensure the goals of social rights via an alternative avenue. It will therefore be necessary to investigate and unpick this claim, which is dubious due to the relationship between liberal democracy and capitalism. This will provide an opportunity to consider some of the political aspects of capitalism and begin to explain the established hegemony of capitalism in modern society. It will also begin to explain the centrality of private property in these societies, which are a significant obstacle to the social rights project. Liberal democratic theory tends to either ignore or essentially welcome its historical connection with capitalism. Capitalism, as the previous chapter explained, is a system that thrives on and creates inequality, by design, giving it an uncomfortable relationship to the political liberty and equality at the heart of liberal democracy.

This chapter will critique liberal democracy, which for the past few decades at least has been the world's predominant system of government, based upon its relationship to and coexistence with the premises of capitalism. The first section will explore liberal democracy itself, briefly exploring its historical background, attempting to offer a definition, and listing justifications for it as a political system. The second section will offer an alternative reading of

³⁵⁵ David Held, *Models of Democracy* (first published 1987, 3rd Edition Stanford University Press 2006), 1-2

its history by placing it in the context of the history of capitalism and the specifically private conception of property through the thought of John Locke. The third section will, after recounting the modern experience with liberal democracy, examine the doctrine of liberal democracy, reinterpreting its key tenets with reference to capitalism and Karl Marx's historical materialism. It will be argued that liberal democracy as a mode of governance has a very specific, historically contingent relationship to capitalism and its premises that makes it ideal for managing capitalism. It will argue that the hegemony of capitalism curtails the popular aspects of democracy, insulating economic questions from democratic control, and that the institutional arrangements of liberal democracy insulate the existing distribution of private property. The implications of this for social rights will be made clearer in subsequent chapters.

2.1 Liberal Democracy

2.1.1 Historical Background: From inception to the 'End of History'

The origins of democratic government can be traced back to Ancient Greece, where it was used in a number of Greek city-states, most prominently Athens.³⁵⁶ Athenian democracy was based strongly upon the principle of 'direct participation',³⁵⁷ public deliberation,³⁵⁸ liberty, and equality.³⁵⁹ Liberal democracy gradually emerged much later, in response to the decline of the

³⁵⁶ David Held, *Models of Democracy* (originally published 1987, 3rd Edition Stanford University Press 2006), 12

³⁵⁷ David Held, *Models of Democracy* (originally published 1987, 3rd Edition Stanford University Press 2006), 14

³⁵⁸ David Held, *Models of Democracy* (originally published 1987, 3rd Edition Stanford University Press 2006), 14-15

³⁵⁹ David Held, *Models of Democracy* (originally published 1987, 3rd Edition Stanford University Press 2006), 16-17

absolutist monarchical states in Europe.³⁶⁰ The governments installed after the American Revolution in 1776 and French Revolution of 1789-1799 are sometimes identified as the first proto-liberal democratic governments,³⁶¹ soon to be joined by Western European nations like Britain, Belgium, and the Netherlands.³⁶² These new governments are said to have resulted in a shift of power from the sovereign to the people, but this transfer was initially restricted largely to an essentially 'bourgeois' section of the people.³⁶³

Several important changes took place over the course of the next 150 years that helped to define liberal democracy. One of these was the formation of political parties, which were generally formalised around 1850. For better or for worse, as David van Reybrouck points out, it resulted in elections becoming 'arenas for candidates who fought each other fiercely'.³⁶⁴ The other was a gradual expansion of suffrage, eventually culminating in universal suffrage. Suffrage expanded gradually: in the United Kingdom, three electoral reform statutes were passed in 1832, 1867, and 1884, expanding the franchise from 366,000 to almost 8 million. Suffrage was eventually extended to all men and women over 30 in 1918³⁶⁵ and to all women in 1928.³⁶⁶ Post-war liberal democracy, buoyed by the welfare state, appeared stable. Voters were loyal, and elections were predictable.³⁶⁷ This relative stability was largely restricted to

³⁶⁰ David Held, *Models of Democracy* (first published 1987, 3rd Edition Stanford University Press 2006), 56-57

³⁶¹ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 42

³⁶² Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 42-44

³⁶³ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 46

³⁶⁴ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 48

³⁶⁵ National Archives, 'The struggle for democracy: Getting the vote' (*National Archives*) <https://www.nationalarchives.gov.uk/pathways/citizenship/struggle_democracy/getting_vote.htm> accessed 8 June 2022

³⁶⁶ Representation of the People (Equal Franchise) Act 1928

³⁶⁷ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 49

the West, as the conflict between the US-led West and the Eastern bloc would define geopolitics for the next few decades. The Third World decolonised only gradually.

After the collapse of the Soviet Union, Francis Fukuyama famously declared an ‘unabashed victory’ for economic and political liberalism and a triumph for the West³⁶⁸ that signalled the ‘end of history’: the ‘end point’ of ‘mankind’s ideological evolution’ and the universalisation of Western liberal democracy as the ‘final form of human government’,³⁶⁹ with all potential alternatives³⁷⁰ having fallen away.³⁷¹ A similar mode of thinking had actually emerged in the 19th century, when ‘the idea that progress ceased with the conquest of political power by the bourgeoisie’ took hold. This idea remained dominant until working class agitation began to grow in Europe,³⁷² culminating eventually in the Bolshevik Revolution in 1917. As will be returned to in Chapter 4, (liberal) democracy has since become an international legal norm,³⁷³ a principle of international law.³⁷⁴

2.1.2 Defining Liberal Democracy

³⁶⁸ Francis Fukuyama, ‘The End of History?’ (1989) 16 *The National Interest* 3, 3

³⁶⁹ Francis Fukuyama, ‘The End of History?’ (1989) 16 *The National Interest* 3, 4

³⁷⁰ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 211

³⁷¹ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 42

³⁷² A.G. Goikhbarg, ‘Justice, the Ideology of Law, and Revolution’ in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 127

³⁷³ Thomas M Franck, ‘The Emerging Right to Democratic Government’ (1992) 86(1) *American Journal of International Law* 46

³⁷⁴ Sofia Cavandoli, ‘An Analysis and Critique of Democracy as a Principle of International Law’ (Doctoral Thesis, Prifysgol Aberystwyth University 2017), 17

Defining liberal democracy is not necessarily straightforward. As its name suggests, liberal democracy represents a combination between democracy as rule by the people and political liberalism, a 'rule of law that recognises certain individual rights or freedoms from government control'.³⁷⁵ Democracy could therefore be said to combine a popular element with an institutional framework.

Fukuyama advanced a purely 'formal' conception of democracy, defining democracies as countries that granted the people that 'right to choose their own government through periodic, secret-ballot, multi-party elections, on the basis of universal and equal adult suffrage'.³⁷⁶ Elections and popular legislatures were thus a major component. David Beetham, on the other hand, advanced a more substantive conception. He conceives of democracy as a method of decision-making based upon direct popular control by all members of society on an equal basis.³⁷⁷ Most liberal democracies fall beneath Beetham's conception, with varying degrees of popular control (usually reduced by representative government³⁷⁸) and vagaries about the exact consequences of equality, as will be returned to throughout this thesis, especially vis-à-vis capitalism.

³⁷⁵ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 42

³⁷⁶ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 43

³⁷⁷ David Beetham, *Democracy and Human Rights* (Polity Press 1999), 33

³⁷⁸ David Beetham, *Democracy and Human Rights* (Polity Press 1999), 38

The 1831 Belgian constitution after, like in France and the US, a revolution that would take on a distinctly bourgeois character,³⁷⁹ is sometimes held up as a prototypical liberal democratic constitution.³⁸⁰ The Belgian Constitution has served as a model for many other European constitutions³⁸¹ and A.V. Dicey suggests that this Belgian constitution is essentially a 'written reproduction' of the uncoded English liberal democratic constitution,³⁸² which is itself an archetypal liberal democracy. Belgium's constitution divided power between the King, the House of Representatives, and the Senate.³⁸³

This is the separation of powers, under which the branches of government (legislative, judicial, executive) will share state power to ensure that no one branch become too powerful.³⁸⁴ It bears resemblance to the 'mixed' governments of the civic republican tradition.³⁸⁵ The separation of powers can create conflict between branches of government, as was the case in the *Miller*³⁸⁶ litigation ensuing from the UK's exit from the European Union, but this conflict is

³⁷⁹ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 99-100

³⁸⁰ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 100

³⁸¹ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 101-102

³⁸² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund Inc 1982), 38

³⁸³ Constitute Project, 'Belgium's Constitution of 1831' (*Constitute Project*) <https://www.constituteproject.org/constitution/Belgium_1831.pdf?lang=en> accessed 27 April 2022, Article 26-30

³⁸⁴ N.W. Barber, 'Prelude to the Separation of Powers' (2001) 60(1) Cambridge Law Journal 59, 60

³⁸⁵ David Held, *Models of Democracy* (originally published 1987, 3rd Edition Stanford University Press 2006), 41

³⁸⁶ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

often framed as an advantage; former US Supreme Court Justice Antonin Scalia believed the 'gridlock' created by the separation of powers to be an essential feature of US government.³⁸⁷

Montesquieu, writing before liberal democracy and in opposition to absolute monarchy³⁸⁸ argued that there 'could be no liberty' where the executive, judicial, and legislative powers of the State were held in the same hands,³⁸⁹ that tyrannical and arbitrary governments would otherwise prevail and imperil liberty.³⁹⁰ Montesquieu was not actually advocating that these powers be held by separate entities, preferring a moderate monarchy, but simply that they not be vested in a single person.³⁹¹ Modern liberal democracies generally divide these powers to some degree between separate institutions, conforming either to a 'pure' or a 'partial' separation.³⁹²

The Belgian constitution offered protection to a series of individual rights like the right to liberty³⁹³ and freedom of religion³⁹⁴ (i.e., civil rights). As mentioned in the previous chapter, liberal democracy enjoys a strong relationship with civil rights, especially in contrast with

³⁸⁷ Bob Cohn, 'Scalia: Our Political System Is 'Designed for' Gridlock' (*The Atlantic*, 6 October 2011) < <https://www.theatlantic.com/national/archive/2011/10/scalia-our-political-system-is-designed-for-gridlock/246257/>> accessed 20 June 2022

³⁸⁸ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 177

³⁸⁹ Baron de Montesquieu, *The Spirit of the Laws, Volume I* (first published 1748, Colonial Press 1900), 151-152

³⁹⁰ Baron de Montesquieu, *The Spirit of the Laws, Volume I* (first published 1748, Colonial Press 1900), 152

³⁹¹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 182-183

³⁹² N.W. Barber, 'Prelude to the Separation of Powers' (2001) 60(1) *Cambridge Law Journal* 59, 60

³⁹³ Constitute Project, 'Belgium's Constitution of 1831' (*Constitute Project*) < https://www.constituteproject.org/constitution/Belgium_1831.pdf?lang=en> accessed 27 April 2022, Article 7

³⁹⁴ Constitute Project, 'Belgium's Constitution of 1831' (*Constitute Project*) < https://www.constituteproject.org/constitution/Belgium_1831.pdf?lang=en> accessed 27 April 2022, Article 14

social rights. The UN's position on democracy and human rights is that they are 'mutually reinforcing'.³⁹⁵ This position can be found in numerous human rights treaties and instruments.³⁹⁶ Again, this idea seems more relevant to civil rights, some of which, like the right to 'part in the conduct of public affairs'³⁹⁷ or the right to 'freedom of expression',³⁹⁸ share common values with that of liberal democracy. The connection to social rights is less obvious. As Henry Steiner notes, social rights, unlike civil rights, can be provided by undemocratic states, perhaps even with more effectiveness.³⁹⁹ When a connection is made, it is often around the impossibility of exercising democratic rights without social rights⁴⁰⁰ rather than the reverse.

Some of the complications arise from liberal democracy's relationship to State power; elections are fought over State power. Human rights enjoy a complex and at times contradictory relationship with the State, stemming from the State, per Max Weber, having a 'monopoly' on (legitimate) force/violence.⁴⁰¹ Human rights are sometimes conceived as the 'limits of government power over the individual';⁴⁰² the 'counterweight' to the power of State

³⁹⁵ United Nations General Assembly 'Resolution adopted by the General Assembly on 16 September 2005' 60th session (2005) UN Doc A/RES/60/1, [135]

³⁹⁶ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969; Preamble to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Concluded at Rome, 4 November 1950, Entered into Force, 3 September 1953

³⁹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 25(a)

³⁹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 19(2)

³⁹⁹ Henry Steiner, 'Two Sides of the Same Coin? Democracy and International Human Rights' (2008) 41(3) *Israel Law Review* 445, 462,

⁴⁰⁰ James W Nickel, *Making Sense of Human Rights* (2nd edition, Blackwell Publishing 2007), 144-145

⁴⁰¹ Max Weber, 'Politics as a Vocation' in H.H. Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Taylor and Francis 2013), 78

⁴⁰² Sir Nigel Rodley, 'International Human Rights Law' in Malcolm Evans (ed), *International Law* (5th edition, OUP 2018), 781

and the 'boundary' of the autonomy enjoyed by individuals in society,⁴⁰³ making the State the 'raison d'être'⁴⁰⁴ of human rights. However, the idea of human rights demarcating the limits of State intervention upon individual autonomy pertains much more to civil rights than social rights. As mentioned, civil rights generally impose 'negative' obligations that are satisfied by refraining from acting, whilst social rights impose 'positive obligations' that require action.⁴⁰⁵

States/nation-states are also the primary legal obligation-holders in international human rights law. As mentioned, the two main treaties in the UN system, the ICCPR and the ICESCR, are the principal sources of international human rights, and the signatories, like with all human rights treaties, are solely States.⁴⁰⁶ There is a significant contradiction in the State being the reason for, the guardian of, and the means of fulfilment of human rights, especially as they are 'frequent violators'.⁴⁰⁷ The idea of fulfilling social rights seems to suggest that a proactive state would be most conducive to enjoying human rights. Respecting civil rights, on the other hand, may suggest that the state should be slightly less proactive (or at least do not require the state to be proactive).

⁴⁰³ Sir Nigel Rodley, 'International Human Rights Law' in Malcolm Evans (ed), *International Law* (5th edition, OUP 2018), 775

⁴⁰⁴ Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2008), 127

⁴⁰⁵ Sandra Fredman, 'New horizons: incorporating socio-economic rights in a British Bill of Rights' [2010] PL 297, 301

⁴⁰⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 6

⁴⁰⁷ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, (OUP 2000), 107

Finally, the Belgian Constitution provided for elections of the House of Representatives⁴⁰⁸ and Senate,⁴⁰⁹ on a representative basis, a key feature of liberal democracy. Proponents of liberal democracy generally agree that the people should not themselves rule but that elected representatives should rule in their place.⁴¹⁰ David Held argued that democratic systems can broadly be defined as direct/participatory or as liberal/representative,⁴¹¹ suggesting that representative democracy is synonymous with liberal democracy.

The use of representatives is usually justified on practical and protective grounds. Jeremy Bentham believed that representative democracy was the only form of government capable of ensuring the freedom of the citizenry from the 'oppression and depredation' of State functionaries.⁴¹² Montesquieu recognised that whilst legislative power should be held by the totality of the citizenry, this was unrealistic in large countries, making representatives a practical solution.⁴¹³ Similarly, John Stuart Mill believed that the best form of government will be that in which sovereignty is 'vested' in the people; one in which the people 'at least occasionally' preform some public function.⁴¹⁴ However, as he did not believe it would be practical for people to participate directly, he concluded that a representative government

⁴⁰⁸ Constitute Project, 'Belgium's Constitution of 1831' (*Constitute Project*) <
https://www.constituteproject.org/constitution/Belgium_1831.pdf?lang=en> accessed 27 April 2022, Article 47

⁴⁰⁹ Constitute Project, 'Belgium's Constitution of 1831' (*Constitute Project*) <
https://www.constituteproject.org/constitution/Belgium_1831.pdf?lang=en> accessed 27 April 2022, Article 53

⁴¹⁰ Frank Cunningham, *Theories of Democracy: A Critical Introduction* (Taylor and Francis 2001), 45

⁴¹¹ David Held, *Models of Democracy* (first published 1987, 3rd Edition Stanford University Press 2006)

⁴¹² Jeremy Bentham, 'Constitutional Code' in John Bowring (ed), *The Works of Jeremy Bentham: Volume IX* (Simpkin, Marshall and Co 1843), 47

⁴¹³ Baron de Montesquieu, *The Spirit of the Laws, Volume I* (first published 1748, Colonial Press 1900), 154

⁴¹⁴ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 69

was the 'ideal form'.⁴¹⁵ Mill's views on representation will be returned to in the final subsection of this chapter.

2.1.3 Justifications

Numerous justifications have been advanced for liberal democracy. Fukuyama, a believer in a 'Universal', non-cyclical historical process,⁴¹⁶ argued that it was an inevitable result of human nature and history. He thought that liberal democracy (and capitalism) would inevitably triumph over its ideological competitors as the culmination of the twin human struggles for 'recognition' and 'rational desire'.⁴¹⁷ Liberal democracy was thus inevitable. Fukuyama noted that there had been a long-term trend towards liberal democracy across most of the world,⁴¹⁸ and compared to the nations of the world to 'wagons' all heading along different roads to the same liberal destination.⁴¹⁹

It is sometimes justified by its supposed educative functions. Mill was a strong believer in the role that involving people in the affairs of government could have on their empowerment and on providing the 'invigorating effect of freedom'.⁴²⁰ He also believed that participation in

⁴¹⁵ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 87

⁴¹⁶ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 130

⁴¹⁷ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 211-212

⁴¹⁸ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 45-46

⁴¹⁹ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 338-339

⁴²⁰ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 84

government could have educative effects, or at least provide an incentive to become educated,⁴²¹ especially as this participation would broaden the horizons of individuals.⁴²²

However, the two main justifications for liberal democracy are equality and liberty.⁴²³ This refers to political equality and individual liberty. As Fukuyama notes, there is an irreconcilable tension in modern societies between liberty and equality due to the presence of 'major social inequalities'. In his view, every action taken to satisfy equality, like money spent upon a national health service or welfare programme, will reduce individual liberty⁴²⁴. This tension can be expressed another way as an irreconcilable tension between individual liberty and the need for a social order to protect that liberty, often referred as liberalism's fundamental contradiction.⁴²⁵

Alexis de Tocqueville believed that equality would inevitably triumph over liberty; he argued that people were animated by a 'passion' for equality and would thus prefer it to liberty⁴²⁶. He had found what he believed to be an 'equality of conditions'⁴²⁷ in his visit to the US in 1831⁴²⁸ and thought that democracy would soon become widespread in the rest of the West,

⁴²¹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 84-85

⁴²² John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 86

⁴²³ Chantal Mouffe, *The Return of the Political* (first published 1993, Verso 2020), 114

⁴²⁴ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 292-293

⁴²⁵ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 87

⁴²⁶ Alexis de Tocqueville, *Democracy in America: Volumes I and II* (first published 1835, Floating Press 2009), 115

⁴²⁷ Alexis de Tocqueville, *Democracy in America: Volumes I and II* (first published 1835, Floating Press 2009), 37

⁴²⁸ Alexis de Tocqueville, *Democracy in America: Volumes I and II* (first published 1835, Floating Press 2009), 31

bringing a similar equality of conditions to those societies.⁴²⁹ As Chapter 1 explained, it certainly has not brought economic equality, and it did not initially even bring political equality. This political equality will be returned to in the third section.

It is perhaps natural, given that liberalism emerged in 16th century Europe as a response to the 'supreme jurisdiction' of the 'absolutist' State⁴³⁰ and its feudal hierarchies,⁴³¹ that individual liberty is the foundational principal of liberalism.⁴³² The proto-liberal democratic US⁴³³ and French⁴³⁴ revolutions considered liberty to be a founding principle of their new societies. As will be explained further later, this was a specifically individualist conception of liberty, one that accords with Mill's famous conception of 'civil' liberty. Mill saw liberty as concerning 'the nature and limits of power which can be legitimately exercised by society over the individual'.⁴³⁵ He was principally concerned with State interference in private life, arguing that the 'only purpose' for which power can be rightfully exercised over an individual is to 'prevent harm to others', even in situations in which that power might be exercised for one's own good.⁴³⁶ He believed that the only freedom that 'deserves the name' is that of 'pursuing

⁴²⁹ Alexis de Tocqueville, *Democracy in America: Volumes I and II* (first published 1835, Floating Press 2009), 37

⁴³⁰ David Held, *Models of Democracy* (first published 1987, 3rd Edition Stanford University Press 2006), 58-59

⁴³¹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 165-166

⁴³² David Held, *Models of Democracy* (first published 1987, 3rd Edition Stanford University Press 2006), 59

⁴³³ National Archives, 'Declaration of Independence: A Transcription' (*National Archives*, 1 November 2015) <<https://www.archives.gov/founding-docs/declaration-transcript>> accessed 1 July 2022

⁴³⁴ Avalon Project, 'Declaration of the Rights of Man' (*Yale Law School*) <https://avalon.law.yale.edu/18th_century/rightsof.asp> accessed 1 July 2022

⁴³⁵ John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 59

⁴³⁶ John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 68

our own good in our own way'.⁴³⁷ For Mill, the sovereignty exercised by government could only override individual sovereignty to prevent harm to others.⁴³⁸

Mill attempted to justify his civil liberty on the grounds of 'individual and social progress', arguing that the 'free development of individuality' is its 'chief ingredient',⁴³⁹ and suggested that allowing individuals to pursue this 'development' would benefit both that individual and others.⁴⁴⁰ He argued that 'persons of genius' ought to be encouraged to use their individuality and liberty;⁴⁴¹ without such individual efforts, democracy could not function, and would be drowned by 'collective mediocrity'.⁴⁴²

Individual liberty became the justification for the popular sovereignty offered by liberal democracy. John Locke argued that to enjoy liberty in a society was to be 'be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it'.⁴⁴³ Mill argued that it was only in a 'completely popular government' that individual interests and rights would be best ensured due to the opportunities for

⁴³⁷ John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 72

⁴³⁸ John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 69

⁴³⁹ John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 120

⁴⁴⁰ John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 127-128

⁴⁴¹ John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 129

⁴⁴² John Stuart Mill, *On Liberty* (first published 1859, Penguin Books 1976), 131

⁴⁴³ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 109-110

participation and engagement, and additionally that such a society will be both more prosperous and will 'more widely' distribute that prosperity.⁴⁴⁴

However, liberal thought was concerned with liberty in two different directions: above and below. It was concerned with the State interfering with 'liberty', but just as concerned with ensuring that said liberty did not flow unconditionally to the masses. This is evident in 'protective' conceptions of liberal democracy, associated with Bentham and Mill's father, James.⁴⁴⁵ Liberal democracy, in the protective conception, was chosen as a response to a 'double problem': the need to protect citizens from 'rapacious governments', which fits with the conceptions of liberty advanced above, and the need to 'establish and nurture' free market capitalism.⁴⁴⁶ This will be returned to in the final section.

Ellen Meiksins Wood argues that in the transition from absolutism to liberal democracy, democracy has been 'overtaken' by liberalism.⁴⁴⁷ She suggests that 'essentially feudal' principles associated with the 'aristocratic' idea of checks on monarchical rule were 'appropriated' for nominally democratic purposes, substituting liberalism for democracy as part of a 'counterrevolutionary' project, rather than an attempt to empower the masses at

⁴⁴⁴ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 70

⁴⁴⁵ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 24

⁴⁴⁶ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 34

⁴⁴⁷ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso Books 2016), 229

the expense of their rulers.⁴⁴⁸ Wood has also argued elsewhere that mainstream liberal thought emanating from the Enlightenment was gradually overtaken by a 'capitalist culture', meaning that freedom, equality, democracy, and even rights were redefined according to the needs of the capitalist/bourgeoisie class that was replacing the monarchical ruling class.⁴⁴⁹ This position makes it necessary to recast the history of liberal democracy in the context of the transition from absolutism and feudalism to capitalism and the emergence of private property.

2.2 Liberal Democracy, capitalism, and private property

2.2.1 Capitalism and private property

Liberal Democracy is often associated with capitalist economics, both by its proponents and its critics.⁴⁵⁰ Modern China, following the reforms implemented by Deng Xiaoping in 1978, shows that capitalism is capable of existing without democracy.⁴⁵¹ Social democracy is predicated on the idea that democracy can coexist with socialist principles, although in practice these supposedly socialist principles, as mentioned in the previous chapter, work within capitalism's confines rather than replace them,⁴⁵² thus revealing social democracy to

⁴⁴⁸ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso Books 2016), 230

⁴⁴⁹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 315

⁴⁵⁰ Frank Cunningham, *Theories of Democracy: A Critical Introduction* (Taylor and Francis 2001), 46

⁴⁵¹ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 122

⁴⁵² Frank Cunningham, *Theories of Democracy: A Critical Introduction* (Taylor and Francis 2001), 46-47

be a variant of liberal democracy. In practice, liberal democracy has never existed without capitalist economics.

It was explained in the previous chapter that capitalism is defined by private ownership of the means of production, purely economic competition (i.e., not political or military competition), and production being entirely geared towards the realisation of exchange value/money. It was mentioned in the previous chapter that capitalism relies upon owners of the means of production being able to find free labourers to work for them in exchange for wages, and that this must be a free exchange between equals 'in the eyes of the law' of commodities (labour-power and money being those commodities).

This presupposes that both capitalists and labourers are both private owners of those commodities; Marx noted that as commodities could not exchange themselves, commodity exchange required that individuals exchange them by mutually recognising others as owners of private property and entering in 'juridical' (i.e., contractual) relations with them⁴⁵³. These 'juridical' relations will be returned to in Chapter 3. This places private property and contract, which defines the relationship between these owners of property, at the heart of capitalism as its essential premises. The role and consequences of private property in modern societies will be returned to throughout this thesis.

⁴⁵³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 55-56, 113

This private (individual) conception of property was central to the political thought of John Locke⁴⁵⁴, often considered the ‘father of liberalism’.⁴⁵⁵ Locke suggested that property was created by ‘mixing’ one’s labour with something existing in nature, by removing it from the ‘state that nature hath provided’⁴⁵⁶. Applying this to land, anyone could appropriate land by ‘improving’ it,⁴⁵⁷ but this principle could be applied to other commodities; property does not refer strictly to land. Locke’s use of ‘improvement’, as Wood notes, when applied to property refers to using it for profit;⁴⁵⁸ he saw more value in ten acres of land that had been cultivated than in a thousand acres that was not being put to profitable use.⁴⁵⁹ Locke was here referring to labour in an abstract manner, as the appropriation of nature ‘in a form adapted’ to human wants by the labourer’s actions.⁴⁶⁰ By exercising his labour upon the natural world, anyone could turn nature into his own private property.

The connection between improvement and property was not new; Hugo Grotius (often identified as a founding figure of international law) articulated a right in the ‘law of nations’ to acquire property that ‘belongs to no one’ (i.e., is not being improved)⁴⁶¹, a right that he saw as potentially applicable to foreigners (therefore overriding nation-state sovereignty) and

⁴⁵⁴ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 284

⁴⁵⁵ Nancy J. Hirschmann, *Gender, Class, and Freedom in Modern Political Theory* (Princeton University Press 2008), 79

⁴⁵⁶ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 112

⁴⁵⁷ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 113

⁴⁵⁸ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 274

⁴⁵⁹ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 116

⁴⁶⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 120

⁴⁶¹ Hugo Grotius, *The Law of War and Peace* (first published 1625, Walter J Black Inc, 1949), 120

punishable by 'war' if such rights were obstructed.⁴⁶² Context explains this idea: Grotius' work was largely animated by the need to adapt the early legal doctrine of 'just war' to justify Dutch imperial activities.⁴⁶³ This right has links to the Roman principle of *res nullius* and the modern international legal principle of *terra nullius*⁴⁶⁴ and 'improvement' has long served as a justification for colonisation. Failing to use property for profit could justify taking it away.

However, improvement had renewed importance in the context of a transition to capitalism. Under pre-capitalist modes of production, competition took place as a contest over political power or jurisdiction; in pre-revolution France or in the Dutch Republic, for example, as mentioned, elites competed with each other and the monarchy for access to public office; economic power was still directly linked to political power. On the international stage, competition between pre-capitalist nation-states (or private actors like the Dutch East Indian Company) was more defined by military⁴⁶⁵ than economic advantages. The idea that property should be improved and used profitably hints at purely economic capitalist competition, which compels capitalists to accumulate profitably or risk losing market position. If competition is solely based upon political power, there is no need to accumulate profitably.⁴⁶⁶

⁴⁶² Hugo Grotius, *The Law of War and Peace* (first published 1625, Walter J Black Inc, 1949), 126

⁴⁶³ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 122

⁴⁶⁴ Camilla Boisen, 'The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise' (2013) 39(3) *History of European Ideas* 335, 338-339

⁴⁶⁵ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 114

⁴⁶⁶ Robert Brenner, 'Agrarian Class Structure and Economic Development in Pre-Industrial Europe' (1976) 70 *Past and Present* 30, 48

2.2.2 Locke, property, and capitalist exchange

Locke argued that this individual appropriation based upon labour and improvement was beneficial for society: private appropriation of nature would contribute to the 'common stock' of society. The productive use of nature/property would provide value rather than enclosing it from others.⁴⁶⁷ Such an argument is the predecessor of modern wealthy capitalists framing themselves as 'wealth creators'⁴⁶⁸ and of trickle-down economics. Locke attempted to preempt such arguments, noting that his law of property, which permits individuals to appropriate nature for their own use/enrichment, contains its own limits: individuals can only appropriate in proportion with their labour.⁴⁶⁹ Where land was concerned, he reasoned that there was more than enough land to go around.⁴⁷⁰

Locke is therefore sometimes presented as being opposed to unlimited accumulation or hoarding of property.⁴⁷¹ To the above, his suggestion that anyone who enclosed more property than he could use before it spoiled 'took more than his share, and robbed others'⁴⁷² could be added. However, he identified a way that individuals could avoid this robbery: by

⁴⁶⁷ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 116

⁴⁶⁸ Martin Sandbu, 'Norway's exodus of billionaires' *Financial Times* (London, 26 January 2023)

⁴⁶⁹ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 113

⁴⁷⁰ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 114-115

⁴⁷¹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 268

⁴⁷² John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 120

exchanging some of their excess property for some other commodity.⁴⁷³ Whilst commodity exchange is not necessarily capitalist, Locke is evidently not discussing the historical origins of property; the original form taken by property, in both the Ancient and medieval worlds, was tribal property, which was a form of 'landed' property vested in the tribe. 'Real private property' developed out of 'movable' property, no longer being attached to 'communal' institutions or States.⁴⁷⁴ This is significant as Locke framed his work around an ahistorical 'state' of 'nature'⁴⁷⁵ that predates the formation of society,⁴⁷⁶ seeming to suggest inherent connections between private property and society.

Locke was (probably) writing his *Two Treatises of Government* (which these references to property) during the Exclusion Crisis⁴⁷⁷ that followed the post-civil war restoration of the Stuart monarchy and preceded the Glorious Revolution in 1688. The Civil War had been fought against the Stuarts' attempt to assert absolutism against the long-established mixed government of the Crown in Parliament.⁴⁷⁸ At this time, England was the only European country with established internal markets for commodity exchange, a fact Locke would have known.⁴⁷⁹

⁴⁷³ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 120

⁴⁷⁴ Friedrich Engels and Karl Marx, *The German Ideology* (first published 1932, Electric Book Company 2000), 113

⁴⁷⁵ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 101

⁴⁷⁶ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 106

⁴⁷⁷ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 258

⁴⁷⁸ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 221

⁴⁷⁹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 25

He was also aware that money could play the role of a universal equivalent commodity and thus as a means of exchange; this, he acknowledges, could lead to some individuals accumulating far more than they would ever need, to a 'a disproportionate and unequal possession of the earth'.⁴⁸⁰ As will be returned to in Chapter 3, the distribution of private property in England was already disproportionate. As he believed that property accumulation would benefit society (by contributing to the common stock), Locke saw the ability to accumulate without limits using money as a good thing; it would provide the incentive to accumulate and 'improve' property.⁴⁸¹ Locke, therefore, was not describing the historical origins of private property but was describing and justifying capitalist private property.

2.2.3 Private property and capitalist exploitation

As mentioned, Locke's references to labour seemed to be describing it in its abstract form. He also recognised that the unequal distribution of property described above would mean that some would have no property; these propertyless would have to sell their labour as 'servants' (a term that applied to wage-labourers at the time⁴⁸²) to owners of property. He was not referring to slavery; the propertyless would sell their labour only for a specified amount of

⁴⁸⁰ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 120-121

⁴⁸¹ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 120-121

⁴⁸² Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 268

time, fixed by private contract, and would receive wages in return.⁴⁸³ In other words, they would meet each other in the market as equals and exchange their respective commodities (labour-power and money/wages); as described above, this is an explicitly capitalist description of labour.

This presents an entirely different picture of both property and labour. Rather than portraying property as the product of one's individual labour, making labour the means by which property is created, Locke emphasised that an individual would be entitled to appropriate products of nature as property that were 'bit' by that individual's horse or to turf that was 'cut' by his servant as if they were his own labour.⁴⁸⁴ This conflated the productive use of land with the appropriation of the labour of another. In *Capital Volume I*, Marx had distinguished between capitalist private property based upon exploitation of labour and a primitive, 'classical' form of private property in which the individual labourer controlled his means and product of labour.⁴⁸⁵ Locke deviously conflated the two, appearing to describe the latter whilst in reality he was advocating for the former, making a necessarily exploitative process appear relatively benign.

It is this specific use of property that makes up the Marxist critique of private property and capital accumulation. Classical Marxist theory (notably the work of Marx and frequent

⁴⁸³ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 136

⁴⁸⁴ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 112

⁴⁸⁵ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 533-534

collaborator Friedrich Engels), saw capitalist conceptions of private property, as well as the unequal division of labour mentioned above, as the drivers of class division and advocated for their abolition on this basis.⁴⁸⁶ Marxists are not against private possessions; their critique was limited to 'vendible' or 'marketable' property, that which would 'enable' the owner to 'command any... amount of other people's labour'.⁴⁸⁷ Locke did not invent this notion of property but was describing an already existing phenomenon. The origins of property and its relation to law will be returned to in Chapter 3.

2.2.4 Property, society, and liberal democracy

As mentioned, Locke was writing in opposition to absolutist government and was thus concerned with asserting 'limited, constitutional, parliamentary government and the rule of law'.⁴⁸⁸ This was in opposition to the views of Thomas Hobbes, who was also considering the formation of society out of state of nature in the context of the English Civil War. Both Locke⁴⁸⁹ and Hobbes saw the state of nature as chaotic and dangerous, justifying the creation of society. Hobbes believed that a social contract should be formed under which individuals would confer all their duties and responsibilities upon a central authority (i.e., a ruler or a

⁴⁸⁶ Friedrich Engels and Karl Marx, *The German Ideology* (first published 1932, Electric Book Company 2000), 118-119

⁴⁸⁷ Friedrich Engels and Karl Marx, *The German Ideology* (first published 1932, Electric Book Company 2000), 142

⁴⁸⁸ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 258

⁴⁸⁹ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 107-108

government), who would combine all individual interests into a 'Common Power' that would defend them⁴⁹⁰ and exercise sovereignty with virtually no restrictions.⁴⁹¹

Locke also saw society as a 'contract' out of which a group of individuals would be removed from the state of nature.⁴⁹² More specifically, individuals would relinquish the rights they enjoyed in the state of nature to protect their own property, liberty, etc into the 'hands of the community',⁴⁹³ one body with a 'common established law and judicature to appeal to'. This contract was also presented as the origin of legislative and executive power.⁴⁹⁴ Liberal governance was thus presented as the origin of society. Whilst these legislative powers should be vested in the commonwealth itself (and separated), he differed from Hobbes in suggesting that sovereignty ultimately lay with the people⁴⁹⁵ and placing 'consent' at the heart of government.⁴⁹⁶

⁴⁹⁰ Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, Lerner Publishing Group 2018), 160

⁴⁹¹ Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, Lerner Publishing Group 2018), 165-171

⁴⁹² John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 136

⁴⁹³ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 136-137

⁴⁹⁴ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 137

⁴⁹⁵ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 166-167

⁴⁹⁶ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 142

However, Locke strongly linked the preservation of property to the purpose of forming societies, calling it the 'chief end' of society.⁴⁹⁷ Along with making and executing laws and defending the commonwealth, the regulation and protection of property was the fundamental meaning of political power,⁴⁹⁸ and legislative power could not extend to taking away private property due to its fundamental importance to society.⁴⁹⁹ Forming a society required that all individuals give up these rights for the purpose of protecting 'property'.⁵⁰⁰

Locke was not actively advocating liberal democracy, but he was making the case against absolutism⁵⁰¹ and seemed to be describing liberal democracy's foundations. Property formed part of these foundations. Under an absolutist 'prince', individuals would not only have no right to appeal in the case of an incursion on their property by the monarch but would also have no means to defend their rights.⁵⁰² Property would only be safe when legislative power is entrusted to a Parliament and all individual members of society are subject to a unified system of law on an equal basis (i.e., the rule of law).⁵⁰³ These arrangements (a sovereign legislature and the rule of law) reflected the constitutional arrangements previously in place

⁴⁹⁷ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 136

⁴⁹⁸ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 101

⁴⁹⁹ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 161-162

⁵⁰⁰ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 137

⁵⁰¹ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 138

⁵⁰² John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 139

⁵⁰³ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 141

before the Stuart turn to absolutism and would return after the Glorious Revolution.⁵⁰⁴ The Crown in Parliament was not exactly a separation of powers as it is understood in modern terms, but it was not absolutism.

The relationship between property and democracy, however, was not straightforward. The conflict between monarchy and parliament had led to increased popular resistance and demands for the franchise⁵⁰⁵ that would accelerate⁵⁰⁶ during the Civil War and Interregnum, articulated by the Levellers, the radical Diggers, and Oliver Cromwell's popular New Model Army. Locke therefore also needed to reconcile in his work an unequal distribution of capitalist property with democratic demands based around government by consent⁵⁰⁷. Consent to authority, the idea that government/political society originates from a transfer of power from the people to the monarch, implying some form of (original) consent, had long been established in Western political thought⁵⁰⁸ before Locke and Hobbes. The Levellers especially connected it to their demands for voting rights.⁵⁰⁹ Government by consent for the purposes of protecting certain inalienable individual rights as a basis of legitimate government is emblematic of liberal democracy.⁵¹⁰

⁵⁰⁴ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 13

⁵⁰⁵ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 222

⁵⁰⁶ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 231

⁵⁰⁷ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 239-240

⁵⁰⁸ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 100

⁵⁰⁹ Ellen Meiksins Wood, 'Locke Against Democracy: Consent, Representation, and Suffrage in the "Two Treatises"' (1992) 13(4) *History of Political Thought* 657, 665

⁵¹⁰ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 117

Locke therefore adapted the Levellers' claim that all men had a natural right to 'self-propriety', which they attempted to use to demand political/voting rights.⁵¹¹ Locke is sometimes interpreted as agreeing with and supporting the Levellers.⁵¹² However, Locke was able to use the Leveller doctrine of consent not just against absolutism and in favour of liberalism, but also to justify (temporarily) denying the demands of the English working classes for political rights and to justify the unequal distribution of private property and the exploitative relations it created. He accomplished this by, as Wood noted elsewhere,⁵¹³ introducing a conception of consent that was separate from that given in the formation of society/sovereignty.⁵¹⁴ Distinguishing between 'tacit' and express consent,⁵¹⁵ Locke suggested that any individual that had owned any possessions or enjoyed any part of the territory covered by a particular government had tacitly consented to be bound by its law; this tacit consent seemingly applied to residents and even to foreign visitors.⁵¹⁶ This notion of consent was capable of severing the connection between consent to be governed and suffrage; by merely existing in society meant consenting to governmental arrangements.

⁵¹¹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 237

⁵¹² Ellen Meiksins Wood, 'Locke Against Democracy: Consent, Representation, and Suffrage in the "Two Treatises"' (1992) 13(4) *History of Political Thought* 657, 665

⁵¹³ Ellen Meiksins Wood, 'Locke Against Democracy: Consent, Representation, and Suffrage in the "Two Treatises"' (1992) 13(4) *History of Political Thought* 657, 667

⁵¹⁴ Ellen Meiksins Wood, 'Locke Against Democracy: Consent, Representation, and Suffrage in the "Two Treatises"' (1992) 13(4) *History of Political Thought* 657, 666

⁵¹⁵ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 152

⁵¹⁶ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 154

Locke also linked private property and its profitable use to consent; he argued that by inventing money and assigning an agreed-upon value to it, it followed that unequal accumulation of property had society's (presumably tacit) consent.⁵¹⁷ Consenting to the use of money, which facilitated the accumulation of property, in Locke's view, meant consenting to private property itself; it seems to follow that this meant that all individuals had consented to the exploitative use of capitalist private property.

Finally, he vaguely defined property as 'life, liberty, and estate', conflating capitalist property, individual liberty, and residential property, providing capitalism with a powerful ideological tool: that property was a condition rather than a restriction on freedom. He also acknowledged that everyone has 'property in his own person', which includes a capacity to labour.⁵¹⁸ This, Wood notes, both connects private property to natural rights⁵¹⁹ and links the productive and profitable use of property to liberty.

As mentioned, there is no suggestion that Locke invented private property or this nascent form of liberal democracy, but his elaboration of it is interesting for his justification of a system of government that must balance liberty, equality, and exploitation by private property against both absolutism on one hand and more radical demands on the other.

⁵¹⁷ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 112

⁵¹⁸ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 111-112

⁵¹⁹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 267

2.3 Critique of Liberal Democracy

2.3.1 The actual experience of liberal democracy

Despite its promise of liberty and equality, liberal democracy seems to be in crisis. van Reybrouck noted in 2016 that enthusiasm about democracy was declining⁵²⁰ to the point that 'healthy scepticism' had become 'outright aversion'. This was evidenced by falling voting turnout,⁵²¹ increasingly 'volatile' election results,⁵²² and distrust of politicians. Peter Mair was similarly concerned about citizen 'disengagement',⁵²³ declining electoral participation,⁵²⁴ electoral volatility,⁵²⁵ declining party loyalty,⁵²⁶ and reduced party membership.⁵²⁷ In van Reybrouck's view, democratic governments had also become weak and inefficient in power due to a 'fear of being punished by voters'.⁵²⁸ They increasingly seemed lack the capability to accomplish significant reforms or large infrastructure projects.⁵²⁹

⁵²⁰ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 2

⁵²¹ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 7-8

⁵²² David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 8

⁵²³ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books 2013), 20-22

⁵²⁴ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books 2013), 22

⁵²⁵ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books 2013), 33

⁵²⁶ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books 2013), 35

⁵²⁷ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books 2013), 41

⁵²⁸ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 10-11

⁵²⁹ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 12

van Reybrouck believed that the cause was the emphasis on elections and representation in liberal democracy,⁵³⁰ that democracy had become almost synonymous with electing representatives.⁵³¹ This resulted in the creation of a near-permanent ‘election fever’, aided by the ‘collective hysteria’ of mass media, social media, and political parties. Accordingly, government ‘efficiency’ was sacrificed for ‘electoral calculus’ and ‘legitimacy’ for the ‘continual need to distinguish oneself’, with the long-term and common interest overlooked for short-term party interests.⁵³² Martin Rees, a member of the UK House of Lords, has argued that election fever incentivises politicians to ignore crises as they don’t always coincide with election cycles.⁵³³

In Mair’s view, the ‘hollowing’ of Western liberal democracy was to blame, especially since the end of the Cold War.⁵³⁴ He highlighted that the dividing lines between political parties had become markedly reduced at two levels. The first was a reduction in ‘ideological polarisation’, in the sense that ‘anti-system’ parties committed to wholesale change had either moderated or drastically declined in support,⁵³⁵ especially communist parties after the USSR collapsed.⁵³⁶ The other level was a change inside the ‘boundaries’ of electoral politics,⁵³⁷ for Mair, the politics of ‘depoliticisation’, a ‘governing strategy’ under which decision-making is outsourced

⁵³⁰ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 37-38

⁵³¹ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 38

⁵³² David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 54

⁵³³ Martin Rees, ‘After Covid, Britain must plan properly for extreme risk’ *Financial Times* (London, 22 February 2022)

⁵³⁴ Peter Mair, ‘Ruling the Void: The Hollowing of Western Democracy (2006) 42 *New Left Review* 25, 25

⁵³⁵ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 45

⁵³⁶ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 46

⁵³⁷ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 49

to 'non-partisan' bodies and government discretion is bound by rules⁵³⁸ had become a 'centrist consensus' that replaced oppositional politics.⁵³⁹

As Mair has alluded to, this consensus is embodied in Tony Blair, who believed strongly in the depoliticisation of 'key decision-making' and saw the role of politics less as solving problems through government action than as the use of the 'directive hand' of government to bring together markets and communities to offer 'opportunity'.⁵⁴⁰ Blair also famously believed that the job of his Labour government was to 'build on' rather than reverse the neoliberal policies of Thatcher's Conservative government;⁵⁴¹ oppositional politics would have required him to wholeheartedly oppose them, especially in light of the class implications of neoliberalism.

Noting that the shift from embedded liberalism had reduced the influence of government in economic policy,⁵⁴² Mair believed that parties in office had become increasingly constrained in terms of policy choices, especially in light of the economic liberalisation involved with neoliberalism.⁵⁴³ Fukuyama actually conceded this point, suggesting that the 'big issues concerning governance of the community' have been settled, resulting in the 'steady narrowing' of the differences between parties.⁵⁴⁴ Mair suggested that this meant that

⁵³⁸ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 51

⁵³⁹ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 51

⁵⁴⁰ Peter Mair, 'Ruling the Void: The Hollowing of Western Democracy' (2006) 42 *New Left Review* 25, 26

⁵⁴¹ BBC News, 'Tony Blair: 'My job was to build on some Thatcher policies' (*BBC*, 8 April 2013) <<https://www.bbc.co.uk/news/av/uk-politics-22073434>> accessed 20 February 2023

⁵⁴² Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 55

⁵⁴³ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 54-55

⁵⁴⁴ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 317

capitalist Western democracies no longer met his conditions for party government,⁵⁴⁵ which included the control of the executive being determined electorally, parties offering clear policy alternatives, and policy being determined by an executive accountable to the party,⁵⁴⁶ the lack of policy alternatives being particularly evident.⁵⁴⁷ This left little space for the voice of the people.

Joseph Schumpeter would have approved of these circumstances. In his view, the role of the people in a liberal democracy was to produce government, whilst politicians engage in a 'competitive struggle' to secure votes rather than respond to the demands of the people.⁵⁴⁸ He believed that the only real control that the people exercised over that government was in installing the government by 'accepting' a leader and their party, or by withdrawing that acceptance by not re-electing the party or leader.⁵⁴⁹ Citizens needed to respect this 'division of labour' between themselves and their elected representatives, leaving representatives to make political decisions.⁵⁵⁰ He further argued that the democracy could only work should the 'effective range of political decision' not be extended 'too far'.⁵⁵¹ Over certain issues, legislatures (the only elected branch of government) should play no more than a

⁵⁴⁵ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 65

⁵⁴⁶ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 65

⁵⁴⁷ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), 68

⁵⁴⁸ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (first published 1942, Unwin University Books 1970), 269

⁵⁴⁹ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (first published 1942, Unwin University Books 1970), 272

⁵⁵⁰ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (first published 1942, Unwin University Books 1970), 295

⁵⁵¹ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (first published 1942, Unwin University Books 1970), 291

‘supervisory’ role, deferring to experts and imposing limits upon itself⁵⁵² (acceptance of this condition can regularly be found in mainstream media⁵⁵³).

2.3.2 Capitalism and Democracy

Capitalism’s relationship to democracy needs to be explained further in order to make sense of the crisis of liberal democracy. Free market economics and private property rights are sometimes presented as a necessary element of liberal democracy.⁵⁵⁴ A free-market economy is not necessarily a capitalist economy,⁵⁵⁵ but they are often treated as such and their connection will not be disputed here. Liberalism and liberal democracy developed alongside and enjoyed a strong relationship with ‘laissez-faire’ economics, which aimed to enlarge the role of the individual by reducing the role of the State,⁵⁵⁶ based upon a conception of liberty similar to Mill’s.

Capitalism and free-market economics have previously been cited as preconditions for democracy by the likes of Seymour Lipset,⁵⁵⁷ David Beetham,⁵⁵⁸ and Jan Narveson.⁵⁵⁹ Joseph

⁵⁵² Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (first published 1942, Unwin University Books 1970), 292

⁵⁵³ David Pilling, ‘How to Create a City’ *Financial Times* (London, 18 January 2023)

⁵⁵⁴ **David Held, *Models of Democracy* (originally published 1987, 3rd Edition Stanford University Press 2006), 75-76**

⁵⁵⁵ Ho-Fung Chang, *The China Boom: Why China will not rule the world* (Columbia University Press 2016), 35

⁵⁵⁶ Milton Friedman, *Capitalism and Democracy* (first published 1962, University of Chicago Press 2002), 5

⁵⁵⁷ Seymour Martin Lipset, ‘Some Social Requisites of Democracy: Economic Development and Political Legitimacy’ (1959) 53(1) *American Political Science Review* 69, 85

⁵⁵⁸ David Beetham, ‘Conditions for Democratic Consolidation’ (1994) 21(60) *Review of African Political Economy* 157, 165

⁵⁵⁹ Jan Narveson, ‘Democracy and Economic Rights’ (1992) 9(1) *Social Philosophy and Policy* 29, 42

Schumpeter even suggested that there can be ‘no more democratic’ institutions than markets due to the freedom of choice offered.⁵⁶⁰ Friedman similarly argued that the economic freedom of capitalism would help to promote political freedom.⁵⁶¹ Sen argued that the freedom enjoyed in a market economy made markets ‘indispensable’.⁵⁶² He believed freedom of employment to be especially important; he saw labour markets as a potential ‘liberator’⁵⁶³ from slavery,⁵⁶⁴ totalitarianism,⁵⁶⁵ forced/child labour⁵⁶⁶ and patriarchy,⁵⁶⁷ evidently not recognising that capitalist employment is still exploitative.

The strong relationship between liberal democracy and free-market capitalism sometimes leads to the two being conflated. The European Bank for Reconstruction and Development, a multilateral ‘development’ investment bank, for example, considers its purpose to be to ‘foster the transition towards open market-oriented economies’ and ‘promote private and entrepreneurial initiative’ whilst ‘applying the principles of multiparty democracy, pluralism and market economics’,⁵⁶⁸ evidently regarding those principles as part of the same project.

⁵⁶⁰ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (first published 1942, Unwin University Books 1970), 198

⁵⁶¹ Milton Friedman, *Capitalism and Freedom* (first published 1962, University of Chicago Press 2002), 8

⁵⁶² Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 111-112

⁵⁶³ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 116

⁵⁶⁴ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 113

⁵⁶⁵ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 114

⁵⁶⁶ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 114-115

⁵⁶⁷ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 115-116

⁵⁶⁸ European Bank for Reconstruction and Development, ‘Political Aspects of the Mandate of the European Bank for Reconstruction and Development’ (*European Bank for Reconstruction and Development*) < <https://www.ebrd.com/downloads/about/aspects.pdf> > accessed 30 January 2022

This can obscure the negative effects of capitalism.⁵⁶⁹ Naomi Klein highlighted the ‘dissonance’ between praise for Bolivia’s democratic transition in the 1980s and the reality.⁵⁷⁰ The newly-installed government, under the advice of American economist Jeffrey Sachs and the IMF immediately installed a wide range of punishing neoliberal reforms, drawn up in secret to avoid scrutiny from the legislature and most of the cabinet.⁵⁷¹ These disastrous reforms engendered protests and strikes, which were met with lockdowns, mass arrests, and the effective end of oppositional politics.⁵⁷² Sachs later hailed the transition as an example of political and economic liberalisation reinforcing each other,⁵⁷³ despite actually being an example of economic liberalisation trampling over political liberty.

For Fukuyama, capitalism was as much part of his End of History thesis as liberal democracy. This was not only due to there no longer being a ‘viable’ alternative to capitalism.⁵⁷⁴ He believed that capitalism and democracy would reinforce each other due to the nature of human societies. He highlighted that there was a strong correlation between modernised (i.e., educated, urbanised, and industrialised) middle-class societies and liberal democracy⁵⁷⁵ and that this would lead these middle classes to demand democracy.⁵⁷⁶ He argued that economic activity’ would provide a healthy outlet for ambitious individuals,⁵⁷⁷ who would enter the

⁵⁶⁹ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 156

⁵⁷⁰ Naomi Klein, *The Shock Doctrine* (Penguin Books 2007), 154

⁵⁷¹ Naomi Klein, *The Shock Doctrine* (Penguin Books 2007), 144-146

⁵⁷² Naomi Klein, *The Shock Doctrine* (Penguin Books 2007), 152-153

⁵⁷³ Naomi Klein, *The Shock Doctrine* (Penguin Books 2007), 151

⁵⁷⁴ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 97

⁵⁷⁵ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 110-112

⁵⁷⁶ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 205

⁵⁷⁷ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 315-316

business world rather than politics or the military,⁵⁷⁸ thus guarding against dictatorship. He conceded that some aspects of capitalism, namely the division of labour and the 'ruthless' market operations, create inequality, but believes that this is necessary for the 'productivity' of the economy.⁵⁷⁹ His historical process that had now ended rested upon the 'twin pillars' desire and recognition, and only the combination of liberal democracy and capitalism realised both simultaneously.⁵⁸⁰

Whilst attractive, it is not clear that it is true. Fukuyama believed that the universal recognition found in a liberal democracy resolved and abolished the 'internal contradiction' found in aristocratic societies between masters and 'slaves'/servants⁵⁸¹ with their mutual recognition.⁵⁸² He believed that due to universal recognition, liberal democratic society would be a 'classless' society.⁵⁸³ However, liberal democracy did not abolish class distinctions, and because of its relationship to capitalism, it could not have done so. Capitalist society replaced the class distinctions of feudalism with its own, most significantly that between the capitalist class and the working class⁵⁸⁴ (or the bourgeoisie and proletariat⁵⁸⁵).

⁵⁷⁸ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 316

⁵⁷⁹ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 290

⁵⁸⁰ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 204

⁵⁸¹ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 200

⁵⁸² Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 201

⁵⁸³ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 202

⁵⁸⁴ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso Books 2016), 187

⁵⁸⁵ Karl Marx and Friedrich Engels, *The Communist Manifesto* (first published 1848, New York Monthly Review Press 1964), 58-59

2.3.3 Historical Materialism, the State, and liberal democracy

Karl Marx's historical materialism offers a more comprehensive analysis of capitalist/liberal societies. Marx believed that any society should be analysed according to its economic base or its mode of production.⁵⁸⁶ Capitalism is the predominant mode of production today. Under historical materialism, the social relations and logic of the mode of production are reproduced in all aspects of society, shaping the legal, political (i.e., State), and cultural/ideological spheres.⁵⁸⁷

Historical Materialism is sometimes presented through the metaphor of the 'base' and 'superstructure'; the economic 'base' of society, its production processes and the ensuing social relations, would then provide the foundation of the legal and political 'superstructures', and changes to this economic base would then cause changes to the superstructure that rested on the base.⁵⁸⁸ However, the reproduction of capitalist social relations is best viewed as a process in which the mode of production interacts with and puts pressure on the other spheres to reproduce its social relations,⁵⁸⁹ rather than a deterministic relationship between the economic base and rest of society.

⁵⁸⁶ Friedrich Engels and Karl Marx, *The German Ideology* (first published 1932, Electric Book Company, 2000), 73

⁵⁸⁷ Evgeny Bronislavovich Pashukanis, 'Economics and Legal Regulation' in Evgeny Bronislavovich Pashukanis, Piers Beirne, and Robert Sharlet(eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 244

⁵⁸⁸ Karl Marx, *A Contribution to the Critique of Political Economy* (originally published 1859, Project Gutenberg 2014), 11

⁵⁸⁹ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 60-61

Marx presented the prevailing mode of production as a 'general illumination in which all other colours are plunged, and which modifies their specific tonalities',⁵⁹⁰ whilst E.P. Thompson suggested that Marx's 'profound intuition' of historical materialism was that the 'logic of capitalist process has found expression within all the activities of a society' and 'exerted a determining pressure upon its development and form'.⁵⁹¹ As Wood puts it, describing Marx's approach, he understands that a mode of production is made up of 'specific social relations, modes of property and domination, legal and political forms', that the 'productive base itself exists in...social, juridical, and political forms'.⁵⁹²

The implications of historical materialism on law will be returned to in Chapter 3. For democracy, its political implications are more pertinent. This allows us to make sense of the class distinctions of capitalist society that liberal democracy has supposedly overcome. Marxist theory holds that the development of the class struggle is the driver of historical change within and beyond a mode of production; it is the 'great law of motion of history', in the words of Marx's frequent collaborator Friedrich Engels.⁵⁹³ This view of the class struggle means that any shift in the balance of power between classes is going to put pressure on the

⁵⁹⁰ Karl Marx, *The Grundrisse. Foundations of the critique of political economy* (first published 1939, Vintage Books 1973), 106-107

⁵⁹¹ E.P. Thompson, 'The Poverty of Theory or an Orrery of Errors' in E.P. Thompson, *The poverty of theory & other essays* (Monthly Review Press 1978), 62

⁵⁹² Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 22

⁵⁹³ Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (first published 1852, George Allen and Unwin 1943), 3

entire system to change accordingly, and a complete victory of one class over the other would inevitably spell the end of the prevailing mode of production.⁵⁹⁴

As mentioned, in liberal society, the class struggle is primarily contested between the owners of capitalist private property and workers. Capitalists use their property ownership to extract 'surplus-value', which represents the difference between the initial investment advanced and the value of the final product of labour.⁵⁹⁵ The modern class struggle is often complicated by unhelpful distinctions based upon status, income, profession (e.g., managerial class), but a Marxist conception of class (generally) sees class as being based upon objective capitalist social relations.⁵⁹⁶ These social relations become ubiquitous in capitalist society.

Marxism generally advocates for a communist society free of class distinctions. Marxism and communism were not a rejection of democracy but rather of bourgeois democracy under capitalism. If anything, Marxism as a political project aims to radically deepen democracy. In his famous work on the Paris Commune, the working-class government that ruled Paris briefly in 1871,⁵⁹⁷ Marx hailed that government as a potential model for governmental affairs to be governed locally by assemblies of delegates⁵⁹⁸ chosen by universal suffrage⁵⁹⁹

⁵⁹⁴ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 99

⁵⁹⁵ Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (first published 1852, George Allen and Unwin 1943), 100

⁵⁹⁶ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 93

⁵⁹⁷ Karl Marx, *The Civil War in France* (Originally published 1871, Electric Book Company 2000), 13

⁵⁹⁸ Karl Marx, *The Civil War in France* (Originally published 1871, Electric Book Company 2000), 80

⁵⁹⁹ Karl Marx, *The Civil War in France* (Originally published 1871, Electric Book Company 2000), 79

and removable 'at any moment'.⁶⁰⁰ The separation of powers was abolished, uniting legislative and executive power in the people themselves and removing the 'sham' independence of the judiciary; judges, and indeed all public servants, were to be 'elective, responsible, and revocable' and paid 'workman's wage(s)'.⁶⁰¹ State power would be destroyed and replaced by a Communal Constitution.⁶⁰² The institutional aspect of liberal democracy was rejected entirely in favour of the popular aspect.

Marxists did not believe that communist society could be created through liberal democratic means. Bolshevik leader Vladimir Ilyich Ulyanov, better known as Lenin, believed that it would require revolution,⁶⁰³ having led the Bolsheviks to power in what became the Soviet Union in the October Revolution of 1917. He argued that the resistance of the ruling class cannot be broken by the expansion of democracy. In his view, they must be 'suppressed' first to free 'humanity from wage slavery', as there can be 'no democracy' whilst there is 'suppression'.⁶⁰⁴ Marx similarly did not believe that democratic reforms like expanded suffrage or civil rights would be sufficient⁶⁰⁵ within the established form of the state, which he believed to be a 'police-guarded military despotism, embellished with parliamentary forms' that was not genuinely beholden to the will of the people.⁶⁰⁶

⁶⁰⁰ Karl Marx, *The Civil War in France* (Originally published 1871, Electric Book Company 2000), 20

⁶⁰¹ Karl Marx, *The Civil War in France* (Originally published 1871, Electric Book Company 2000), 79-80

⁶⁰² Karl Marx, *The Civil War in France* (Originally published 1871, Electric Book Company 2000), 80-82

⁶⁰³ V I Lenin, *State and Revolution: The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (First edition 1918, Haymarket Books 2014), 56-57

⁶⁰⁴ V I Lenin, *State and Revolution: The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (First edition 1918, Haymarket Books 2014), 126

⁶⁰⁵ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Books Company 2000), 32-33

⁶⁰⁶ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Books Company 2000), 33

Marx/Marxists believed that the 'bourgeois' State's upholding of class divisions via suppression undermines democracy; Lenin suggested that democracy under capitalist exploitation would always be a democracy of the minority.⁶⁰⁷ Marx argued that 'the working class cannot simply lay hold of the ready-made state machinery' and 'wield it for its own purposes'.⁶⁰⁸ In other words, he did not believe that attaining control of the institutions of the State would allow the working classes to rule in their own interests but rather that the interests of the capitalist class would remain influential. Social democracy is essentially based upon the opposite of this position.

Historical materialism suggests that the modern State form is a product of capitalism. Capitalism is distinct from other modes of production in that surplus-value is extracted from the labourer on the basis of private property. A 'third party' is needed to regulate this exchange, providing 'reciprocal guarantees' to the parties to a contract of exchange.⁶⁰⁹ This is the role played by the capitalist State.

As mentioned, the liberal conception of liberty (i.e., Mill's) and the idea of civil rights are pitched (partially) in opposition to State power. The liberal democratic system is based upon

⁶⁰⁷ V I Lenin, *State and Revolution: The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (First edition 1918, Haymarket Books 2014), 124-125

⁶⁰⁸ Karl Marx, *The Civil War in France* (Originally published 1871, Electric Book Company 2000), 75

⁶⁰⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 149

the idea that elections will be contested over the control of State power, but that the danger associated with the use of State power means that arrangements must be made to constrain that power, like the separation of powers, the rule of law, suffrage, and rights. These liberal conceptions of human rights and democracy mostly seem to correspond to Hegel's conceptualisation of the State as an impersonal power that stands outside of and above civil society⁶¹⁰ and exists to protect individual security and private property,⁶¹¹ whilst civil society acts as a sphere of individual freedom.⁶¹² Hegel found there to be a clear distinction between the State as impersonal power and civil society as an 'intermediate' between family and State.⁶¹³

Historical materialism clarifies that separation between the public sphere of the State and the private sphere of civil society in liberal capitalist society is illusory.⁶¹⁴ It obscures the political nature of capitalist exploitation.⁶¹⁵ Liberal civil society is not a sphere of freedom from the tyranny of the State but instead a sphere that embraces 'the whole commercial and industrial life of a given stage' of history.⁶¹⁶ Whilst States can be oppressive and coercive, the primary form of oppression and domination in liberal capitalist society is carried out by private owners of capital: surplus value, and thus profits, are extracted through private means, based upon ownership of the means of production, not State appropriation. This is the primary difference

⁶¹⁰ Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (first published 1820, Batoche Books 2000), 198

⁶¹¹ Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (first published 1820, Batoche Books 2000), 183-184

⁶¹² Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (first published 1820, Batoche Books 2000), 161

⁶¹³ Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (first published 1820, Batoche Books 2000), 194-195

⁶¹⁴ Friedrich Engels and Karl Marx, *The German Ideology* (Electric Book Company, 2000), 82-83

⁶¹⁵ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 20-21

⁶¹⁶ Friedrich Engels and Karl Marx, *The German Ideology* (Electric Book Company, 2000), 82

between liberal capitalist society and earlier (or future) types of society;⁶¹⁷ in feudal society, surpluses were extracted based upon political status (e.g., lordship).

This is not to argue that State power is irrelevant, but that the State's position in capitalist societies and its separation from civil society is a capitalist phenomenon. Historical materialism does not argue that capitalism has determined the form taken by the State or society but that it puts pressure on these aspects of society to change in accordance with the need to reproduce capitalist social relations throughout society. Accordingly, not all capitalist States are the same; the English State, for example, still includes monarchical elements. The liberal State form itself, however, with its 'radical' separation from civil society,⁶¹⁸ should be presented as a product capitalism's development.⁶¹⁹

Although there may be overlap between the capitalist class and the State, historical materialism also does not suggest that the State serves the needs of members of the capitalist class but instead that it serves capital 'in general',⁶²⁰ representing instead the 'organised' power of one class over the others.⁶²¹ The State enforces the power of capital not (necessarily) by serving individual capitalists but by enforcing the law and upholding private property,⁶²²

⁶¹⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 151

⁶¹⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 125

⁶¹⁹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 130

⁶²⁰ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 122

⁶²¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 150

⁶²² Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 126-127

creating 'favourable conditions' for its 'maximum expansion'.⁶²³ Enforcing formal equality provides the foundation on which capitalists exploit workers in what appears to be a free exchange of commodities (labour and wages).⁶²⁴ The capitalist class therefore does come to dominate both the State and civil society through hegemony, but it does so on the basis of its class power and the separation from the State.⁶²⁵

The illusory separation of the public and private spheres is created by the concrete separation of the political sphere from the economic sphere in the sense that economic appropriation is separate from political coercion.⁶²⁶ The economic sphere of the market, in which capitalists and labourers meet as supposed equals, where capitalists purchase the labour power sold by those labourers and extract surpluses based upon property relations, is part of private civil society, but it is no haven of freedom for workers. It was the market that Marx sarcastically derided as an 'Eden' of the 'rights of man', where 'Freedom, Equality, Property, and Bentham' (i.e., liberal political values) ruled,⁶²⁷ obscuring the exploitation of capitalist production.

This separation is a crucial aspect of liberal democracy. The equality of political status associated with universal suffrage would have been transformative in earlier forms of society (feudal, aristocratic, etc) but the separation of the economic and political spheres in capitalist

⁶²³ Antonio Gramsci, *Selections from the Prison Notebooks* (first published 1971, Lawrence and Wishart 1992), 182

⁶²⁴ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 127-128

⁶²⁵ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 128

⁶²⁶ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 29-30

⁶²⁷ Karl Marx, *Capital: A Critical Analysis of Capitalist Production* (originally published 1867, Wordsworth Editions Limited 2013), 119

society means that political status has lost much of its meaning.⁶²⁸ This means that all individuals can be guaranteed political equality without threatening the private economic sphere and the class structure. Wood argues that this was by design: that the protection of the private economic sphere is a 'condition' of liberal democracy.⁶²⁹ The sharp separation of the political sphere from the economic sphere made the extension of suffrage to the working class possible; economic power no longer relied upon political status.⁶³⁰ Liberal democracy enhances the power of capital against earlier forms of class power (e.g., lordship) rather than freedom of the people from domination and alienation.⁶³¹ Therefore, capitalism was to some extent responsible for the emergence of liberal democracy, making it 'possible'⁶³² and palatable to those with economic power.

The separation of the political and economic also presents the idea that change is best accomplished through political means rather than building class power. Margaret Thatcher, in a parliamentary speech on the 300th anniversary of the 1688 'Glorious Revolution' highlighted that that (bourgeois) revolution established the tradition that political change should be 'sought and achieved through Parliament', which she considered to be the first step of the establishment of liberal democracy.⁶³³ Given that the obvious alternative to seeking political

⁶²⁸ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 233

⁶²⁹ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 235

⁶³⁰ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 139

⁶³¹ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 236

⁶³² Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso Books 2016), 234

⁶³³ HC Deb 07 July 1988, vol 136, col 1233

change through Parliament would be revolution, this can be read as an attempt to guard against the class struggle.

The liberal State has also long attempted to confine the collective economic demands of the organised working class within political constitutional channels, for example, by establishing institutional industrial relations⁶³⁴ or the provision of some social services,⁶³⁵ so as to not disturb capital accumulation or risk attacks upon State legitimacy, presumably with the class struggle in mind. The extension of the franchise also came to represent such a channel in a way that undermined the unity of the working class, including them as abstract individual voters rather than as members of the working class.⁶³⁶ This combination of repression and concession reconciled the working class to the wage form and to the State form.⁶³⁷ This does not end the class struggle⁶³⁸ but has periodically tamed it.

2.3.4 Democracy, Property, and Class

Although liberal capitalist societies are divided by 'sectional, religious, ethnic' and other 'cross-currents', class is the most prominent division.⁶³⁹ As mentioned above, the class relations of liberal societies derive from the social relations of capitalism. Many liberal theorists had no

⁶³⁴ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 137

⁶³⁵ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 138

⁶³⁶ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 141

⁶³⁷ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 141

⁶³⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 141-142

⁶³⁹ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 66

interest in rectifying capitalist class distinctions. Bentham was steadfastly opposed to any attempts to redistribute property, arguing that maintaining the existing distribution was the 'first duty' of a legislator. Although he acknowledged that the distribution of property varied significantly across different societies, the 'supreme principle of security' should, in his view, override all other considerations, including equality.⁶⁴⁰

Mill defined the 'institution of property', as the 'recognition' of an individual 'right to the exclusive disposal' of the product of their own labour, or that which they have legitimately obtained from the producer.⁶⁴¹ However, he also recognised that the capitalist 'institution' of private property meant that the 'produce of labour' was apportioned 'in an inverse ratio to the labour' with the largest portions 'to those who have never worked at all' (i.e., capitalists).⁶⁴² Mill, however, did not see this as unfair; he saw the 'freedom' of acquiring property produced by someone else to be legitimate as it is 'obtained by their free consent'.⁶⁴³ This was again a warped definition of consent. Mill also did not believe that the capitalist conception of private property was to blame for the unfair imbalance between owners of capital and labourers; instead, he blamed this on the more primitive social arrangements of feudal society that preceded capitalist society.⁶⁴⁴

⁶⁴⁰ Jeremy Bentham, *The Works of Jeremy Bentham* (Tait 1838), 311

⁶⁴¹ John Stuart Mill, *Principles of Political Economy* (first published 1848, Savil and Edwards 1916), 133

⁶⁴² John Stuart Mill, *Principles of Political Economy* (first published 1848, Savil and Edwards 1916), 128

⁶⁴³ John Stuart Mill, *Principles of Political Economy* (first published 1848, Savil and Edwards 1916), 134

⁶⁴⁴ John Stuart Mill, *Principles of Political Economy* (first published 1848, Savil and Edwards 1916), 128

Liberalism has long been preoccupied by class conflict, although this is largely out of fear of the subordinate classes. American founding father James Madison thought that society becoming divided into factions can create 'animosity' between these groups that prevents action in the interests of the 'common good',⁶⁴⁵ acknowledging that property would be the most prevalent cause of such divisions. Madison believed that the 'most powerful faction', or the 'most numerous party', would inevitably prevail, and their interests will therefore be protected even where 'impartiality' may be needed.⁶⁴⁶

This idea is often called the 'tyranny of the majority'. Mill had noted that the 'will of the people' was really only the 'will of the majority', and that said will could give rise to a form of tyranny 'more formidable than many kinds of political oppression'. This justified his principle of individual liberty; individuals needed to be protected from the organised masses.⁶⁴⁷ Madison thought that as the 'causes' of faction were inevitable, the only 'relief' available would be in controlling the 'effects' of factions. If that faction is a majority, this would require either preventing the 'existence' of the 'passion or interest' shared by this majority, or by rendering them 'unable' to carry out their 'schemes of oppression'.⁶⁴⁸ His solution to this problem was to install a 'Republic' rather than a 'pure democracy' that used representatives who would 'discern' the 'true' public interest.⁶⁴⁹

⁶⁴⁵ James Madison, 'The Federalist No.10', in Alexander Hamilton, James Madison, and John Jay, *The Federalist: With letters of brutus* (Cambridge University Press 2003), 2-3

⁶⁴⁶ James Madison, 'The Federalist No.10', in Alexander Hamilton, James Madison, and John Jay, *The Federalist: With letters of brutus* (Cambridge University Press 2003), 3

⁶⁴⁷ John Stuart Mill, *On Liberty* (originally published 1859, Penguin Books 1976), 62

⁶⁴⁸ James Madison, 'The Federalist No.10', in Alexander Hamilton, James Madison, and John Jay, *The Federalist: With letters of brutus* (Cambridge University Press 2003), 4

⁶⁴⁹ James Madison, 'The Federalist No.10', in Alexander Hamilton, James Madison, and John Jay, *The Federalist: With letters of brutus* (Cambridge University Press 2003), 5

It could be argued that this is what essentially happened; that liberal democracy adapted representation (from the republican tradition) to guard against class/factional conflict. The use of representatives ensures that the people do not literally rule, although they have a hand in choosing those representatives. The separation of powers also ensures that some of the powers of the State are exercised by bodies that are not necessarily democratic. It was mentioned earlier that liberals believe strongly in protecting liberty both from above (State) and below; it is this protection from below, from the masses, that seems just as central to liberal democratic theory. Private property and material inequality also needed to be protected both from the working classes that were increasingly exploited by it and from the State. Liberal democracy is therefore marked by a tension between its commitment to the expansion of suffrage and fears of a tyranny of the majority.

This tension underpinned Mill's *Considerations on Representative Government*, in which Mill advocated strongly for representative democracy based upon elections with (nearly) universal suffrage (i.e., liberal democracy). However, Mill worried that this system had two fatal flaws. First, he believed that its 'controlling body' may lack the required competence for ruling, pointing out that government by bureaucracy had certain advantages over democracy in this respect and that these advantages needed to be maintained.⁶⁵⁰

⁶⁵⁰ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 141

This was to be solved by maintaining a strict separation of powers between the executive branch of government and the elected legislative branch.⁶⁵¹ Although Mill believed that the representative body (ie the legislature) should have the 'ultimate controlling power' in the constitution,⁶⁵² he did not envisage it playing a significant role. He thought it should go no further than to 'watch and control' the executive,⁶⁵³ that its role should be kept separate from the 'actual conduct of affairs' that are left to 'the acquired knowledge and practiced intelligence of a specially trained and experienced Few'.⁶⁵⁴ This is arguably more suggestive of an aristocratic rather than democratic regime. It also accords with Mair's suggestion that government decision making has been outsourced to non-political bodies, providing an additional layer of protection, beyond representation itself, from the public.

The second danger was that representative government may fall under the influence of 'sinister'⁶⁵⁵ interests 'not identical to the general welfare'.⁶⁵⁶ That there may be a misalignment of interests between ruling body and populace was obvious in a monarchy or aristocracy,⁶⁵⁷ but Mill noted that in a democracy, which operates through 'rule' by the

⁶⁵¹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 144-145

⁶⁵² John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 107

⁶⁵³ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 128

⁶⁵⁴ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 132

⁶⁵⁵ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 145

⁶⁵⁶ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 136

⁶⁵⁷ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 145-146

‘numerical majority, the ‘ruling power’ may end up in ‘dominion’ of ‘class interests’.⁶⁵⁸ He believed the possibility of ‘class legislation’, that would be enacted for ‘the immediate benefit of the dominant class’, to be a great danger of democracy⁶⁵⁹ and thought it to be important that no class be able to exercise ‘preponderant influence’ on government.⁶⁶⁰ If this problem could not be overcome, he did not believe that democracy would be the best form of government.⁶⁶¹

However, his concerns seemed to be more based upon the working classes gaining power, highlighting that the interests of the poor, who make up the majority in ‘all countries’, and the minority rich, were completely opposed.⁶⁶² He therefore worried that the majority poor would use their numerical advantage to advance their own causes, that the working classes may use the power of government and State to redress inequalities of wealth and income, raise wages, impose redistributive taxation, and even encroach upon private property.⁶⁶³

This led him to advocate for a balance in voting power of the working classes. Mill is often incorrectly praised as a proponent of universal and equal suffrage, largely due to him being an

⁶⁵⁸ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 147

⁶⁵⁹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 156-157

⁶⁶⁰ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 157

⁶⁶¹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 189

⁶⁶² John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 148

⁶⁶³ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 148-149

early advocate of extending the franchise to women.⁶⁶⁴ However, he argued for the removal of voting power for the illiterate/innumerate,⁶⁶⁵ those who pay no tax,⁶⁶⁶ and those in receipt of parish relief (ie social security).⁶⁶⁷ This, however, did not go far enough for Mill. Suggesting that it would be reasonable for those with 'greater capacity' to manage affairs to have 'greater weight' placed upon their opinions,⁶⁶⁸ and that employers of labour will be more intelligent than their employees, on the grounds that they perform a 'superior' function successfully,⁶⁶⁹ he suggests that additional votes may be allotted to those performing those superior functions, along with those practicing the 'liberal' professions and university graduates.⁶⁷⁰ This added a further layer of insulation between the people and democratic government. These ideas reveal an anti-democratic, pro-capital liberal impulse. Mill was concerned about preserving 'intelligence' and 'knowledge' in the sense that those he found intelligent or knowledgeable would not 'set aside law' to bring about 'equal justice'. He believed that State power needed to be insulated from the more numerous working classes to preserve private property.⁶⁷¹

⁶⁶⁴ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 212-213

⁶⁶⁵ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 194

⁶⁶⁶ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 196

⁶⁶⁷ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 198

⁶⁶⁸ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 201

⁶⁶⁹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 203-204

⁶⁷⁰ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 204

⁶⁷¹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 148

The most extreme of these positions were ultimately unnecessary. Liberal democracy has ultimately been able to accommodate a gradual expansion of suffrage and eventually universal suffrage. C.B. Macpherson has identified a further insultation: the creation of political parties, which he argues has managed to 'tame' liberal democracy.⁶⁷² The party system, he believes, aims to maintain a certain 'kind of equilibrium', one in which seeks to protect private property and free-market capitalism from class-motivated attack.⁶⁷³ He notes that political parties, whatever their political inclination or origin, were inevitably drawn towards occupying a 'middle' position, presenting themselves as national parties acting for the 'common good'.⁶⁷⁴

Therefore, Macpherson suggests that the expansion of suffrage itself actually made leaders of parties less responsive to the people. Where suffrage was relatively limited, the 'relatively small' pool of voters was able to put significant pressure on their elected representatives but shifting to appealing to a wider range of people made centralisation of party control necessary,⁶⁷⁵ empowering central party leadership and the executive branch of government. The expansion of franchise shifted the role of representative government from responding to the needs of voters to arranging compromise between the competing classes.⁶⁷⁶ He therefore

⁶⁷² C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 64

⁶⁷³ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 65-66

⁶⁷⁴ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 66

⁶⁷⁵ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 67-68

⁶⁷⁶ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 68

concludes that a party system helped to reconcile universal suffrage with the 'maintenance of an unequal society'.⁶⁷⁷

As mentioned in the previous subsection, liberal democracy's relationship with capitalism is ultimately what made universal suffrage compatible with anti-democratic impulses. The separation of the State and civil society, and the sharp separation of the political sphere from the economic sphere that it created, created a distinctive, purely economic form of power that no longer relied upon political status.⁶⁷⁸ Liberal democracy's institutional features have contributed to this. This idea, as Wood argues, allows democracy, in its liberal conception as the political counterpart of capitalism, to be set against democracy in its 'literal meaning', as 'popular power'.⁶⁷⁹ In her view, ancient (i.e., pre-liberal) conceptions of democracy were deeply connected to the freedom of the people from domination and alienation. Liberal democracy on the other hand is more concerned with protecting the freedom to dominate and alienate the people, so long as those people are themselves (theoretically) free.⁶⁸⁰ This is perfectly in accordance with historical materialism; capitalism is a system based upon individual liberty and private property, so it follows that liberal democracy will be as well. Capitalism is compatible with other forms of government, but its historical connection to liberal democracy is no coincidence.

⁶⁷⁷ C.B. Macpherson, *The Life and Times of Liberal Democracy* (first published 1977, Oxford University Press 2021), 69

⁶⁷⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 139

⁶⁷⁹ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 235

⁶⁸⁰ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 236

The liberal modification of democracy seems to consist of a curtailment of democracy's popular aspect (i.e., democracy as rule by the people) in favour of its institutional aspect and liberal values like (individualised) civil liberties, the rule of law,⁶⁸¹ and of course private property, for the purpose of insulating capitalism. This explains the 'crisis' of liberal democracy; it is not designed to allow the people to rule themselves but to keep them at arm's length. Separating capitalism from liberal democracy is therefore ahistorical and disingenuous. No attempt will be made to analyse them as separate entities.

Conclusion:

Fukuyama believed that the 'End' of human history would only be reached if there were no 'contradictions' in the 'liberal democratic social order' that would eventually bring that order to the end. He emphasises that such contradictions were not to be confused with 'problems' like 'budget deficits, inflation, crime, etc'. He thought that at the End of History, social and political organisation will be 'completely satisfying' to human beings.⁶⁸²

It is no longer tenable to suggest that social and political organisation is completely satisfying. Liberal democracy, which, it has been argued, was from the start, a counter-revolutionary political project that emerged as a compromise between the need to expand the reach of

⁶⁸¹ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 231

⁶⁸² Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 136

liberty, maintain free-market capitalism, and moderate class relations. These class relations, however, deriving from capitalism, remain a significant contradiction. Despite universal political equality, it remains the case that the distribution of the essentials of life, which social rights seek to address, are significantly controlled by a relative minority, the capitalist classes. Tyranny of the majority never came to fruition; instead, capitalist democracy is a tyranny of the minority.

Liberal democracy provides significant insulation to capitalism and private property, keeping them separate from the sphere of political equality and protecting them by its institutional arrangements. This should be treated as a feature of liberal democracy: to borrow a line from the cybernetic theory of Stafford Beer: 'the purpose of a system is what it does'.⁶⁸³ The need to protect private property from the working classes, and to frame this protection as conducive to freedom, was especially central to the works of Locke and Mill, arguably the two most important intellectual figures in liberal democracy and even liberalism itself.

The implications of this for social rights, which did not arise in this chapter, will be made clear in further chapters; the purpose of this chapter was, instead, to raise doubts about the possibility of liberal democratic channels to effect significant changes in private economic activity, as social rights envisage.

⁶⁸³ Stafford Beer, 'What is cybernetics?' (2002) 31(2) *Kybernetes* 209, 217

It was argued in this chapter that not only does liberal democracy enjoy a historically contingent relationship to capitalism, but that this relationship has placed certain (i.e., economic) issues out of democracy's reach and curtailed the popular aspect of democracy in favour of (civil) rights, stability, institutional action, the protection of property, and the rule of law. This rule of law, however, is one element of the liberal democratic framework that has not been addressed yet, beyond a few mentions. This will be rectified in the next chapter.

Chapter 3: The Confines of Capitalism and the Rule of Law

The ICESCR envisages that its rights be adopted through legal measures⁶⁸⁴ and the ESC asks Council of Europe members to implement ESC rights through law.⁶⁸⁵ The UDHR's preamble suggested that 'human rights should be protected by the rule of law' and Article 8 calls for domestic legal remedies for rights violations.⁶⁸⁶ It is central to certain conceptions of the rule of law that human rights should be incorporated into law.⁶⁸⁷ Each of these sources seems to suggest that there is a positive relationship between human rights, including social rights, and law.

However, as the first chapter explained, there has been hardly any judicial treatment of social rights. This led the second chapter to investigate whether democratic methods may be a better way to facilitate and protect social rights, which led to the insight that there is a significant impediment to social rights existing in modern liberal societies: capitalism. In accordance with Marx's historical materialism, capitalism is deeply embedded to the point of being hegemonic in modern societies and exercises a pervasive influence over all aspects of society.

⁶⁸⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 2(1)

⁶⁸⁵ Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, article I 1(a)

⁶⁸⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), article 8

⁶⁸⁷ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 102

Mainstream legal theory rarely seems to understand that this includes law; legal formalism is ripe in mainstream approaches to law (not to be confused with the formal conception of the rule of law). They are formalist in the sense that their analysis treats law as a separate, distinct sphere unconnected with society.⁶⁸⁸ Formalism therefore either ignores that the law may not be able to accomplish certain societal goals and can even be used to provide a 'cloak' for certain 'tricks' played by actors in other sections of society.⁶⁸⁹ This chapter will therefore investigate the interaction between capitalism and domestic legal systems, with social rights in mind if not necessarily central to this chapter.

The first half of this chapter will cover more what the law does not cover than the actual role law plays in capitalist society. It was mentioned in Chapter 1 that social rights, as currently conceived, must attempt to work within the 'confines' of capitalism. Those confines that are external to law will be covered here. The second half will cover the origins, the role, and ultimately the limitations of law in capitalist society.

The first section will continue the narrative, evident in each of the first two chapters, that capitalism is hegemonic in liberal societies. It will first examine this hegemony through the social power of capital, with reference to the commodity-form and the role of money and markets. It will then explain the implications of this for law, arguing that law has at times

⁶⁸⁸ Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 126

⁶⁸⁹ Ntina Tzouvala, 'International Law and (the Critique of) Political Economy' (2022) 121(2) *South Atlantic Quarterly* 297, 301

been used to protect the separation of economic issues from political interference referenced in Chapter 2.

The second section will set out to show that the separation of political from economic issues is exposed as a sham when capitalism runs into crisis: at this stage, the State crosses the public-private divide to intervene in capital's interests, to the indirect detriment of social rights.

The third section will advance a Marxist critique of law, based largely on the work of Soviet jurist Evgeny Pashukanis. This will move on to consider the connection between law and property, specifically private property, and will then return to Locke's views on property being the 'chief end' of society, suggesting that he was describing not the origin of society but of the legal framework of capitalist society.

The final section will explicitly consider the rule of law, subjecting mainstream conceptions to the aforementioned Marxist critique, explaining that their relative failure to connect law to (capitalist) economics leave most of these theories inadequate. These theories generally fail to conceptualise the relationship between public law and the legal framework of capitalist society based upon private economic relations. Finally, it will briefly consider the relationship between law and rights, suggesting that social rights are an awkward fit as legal rights, justifying, to some degree, the reluctance to integrate them in domestic law. This will lay the groundwork for a materialist account of rights in Chapter 5.

3.1. Capitalism and Capitalist Society

3.1.1 Historical materialism and the commodity form

As explained at the end of Chapter 2, analysis of liberal society must not solely focus upon its liberal democratic element but must also include its economic system. Historical materialism, as explained, becomes a useful analytical tool. Again, historical materialism is based upon the idea that the mode of production is the foundation of and the most influential factor in any form of society. This is because, as Marx and Engels suggested, producing their means of subsistence is one of the main things distinguishing humans from animals.⁶⁹⁰

The mode of production will put pressure on all aspects of that society to reproduce its social relations and internal logic, shaping the political sphere, the legal system, etc.⁶⁹¹ Although historical materialism is a critical project of the analysis of history, that the economic base influences the corresponding social form is not a criticism; it would make little sense to have a feudal legal system and a capitalist economic system, for example. A primary advantage of historical materialism is its ability to uncover the ways in which the separation of the economic sphere from other spheres of society obscures their deep connections. Historical materialism clarifies that the economic base or mode of production reproduces itself in different forms

⁶⁹⁰ Friedrich Engels and Karl Marx, *The German Ideology* (Electric Book Company 2000), 61

⁶⁹¹ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 58

(social, political, legal, etc).⁶⁹² As Wood suggests, historical materialism does not mean focusing upon the economic aspects of liberal society above all others, nor does it mean abandoning the economic sphere in favour of the corresponding legal and political forms; but that liberal capitalist society must be analysed as a whole.⁶⁹³

In liberal society, the dominant mode of production is capitalism. Again, the capitalist mode of production can be broadly defined by three things. First is the private ownership of the means of production (private property) in the hands of a capitalist class, who appropriate surplus-value through their private economic power.⁶⁹⁴ Second, capitalist production is defined by the production of value; capitalists produce commodities solely to realise surplus-value and use it as capital to restart the process.⁶⁹⁵ This makes capitalists indifferent as to what they produce. Finally, capitalism is based upon purely economic competition, rather than political or military power. This doesn't mean that economic power cannot lead to political power, simply that capitalists must compete to produce profitably.

Marx's 'commodity form' theory is a good example of the way that capitalism obscures its social and political aspects. As mentioned, capitalists use labour⁶⁹⁶ for the sole purpose of producing commodities and therefore creating value. Marx recognised that all commodities

⁶⁹² Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 22

⁶⁹³ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 24

⁶⁹⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 113

⁶⁹⁵ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 104

⁶⁹⁶ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 46

had a two-fold character, containing both a physical form, in which its value is recognised through its use ('use value'), and a 'value form', which relates to its exchange value, measured by the abstract 'socially necessary' labour time involved in its production and realisable through exchange.⁶⁹⁷ In practice, exchange value essentially corresponds to a commodity's price. As capitalist produce solely for the purpose of realising exchange value, commodities therefore appear in their 'value form'.

Marx noted that measuring commodities by their exchange value tended to obscure the role played by human labour, presenting labour as an abstract, quantitative category (labour-time)⁶⁹⁸ that exists only to create value.⁶⁹⁹ As this form of value realises itself only through commodity-exchange, all individual labour is reduced to the value of its product, and that value comes to be presented as an attribute of the commodity rather than the worker.⁷⁰⁰ Since the form of value by which commodities are measured is expressed in terms of abstract labour, the role played by the individual labourer, as well as the type of labour exerted, is generalised, meaning that all types of labour (and labourer) are presented as comparable.⁷⁰¹

This commodity 'fetishism',⁷⁰² also obscures the 'social character' of labour,⁷⁰³ abstracting from the conditions under which labour is carried out in a capitalist society. Commodity

⁶⁹⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 26-27

⁶⁹⁸ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 47

⁶⁹⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 48-49

⁷⁰⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 55

⁷⁰¹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 19

⁷⁰² Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 47-48

⁷⁰³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 49

fetishism, production solely for the purpose of realising commodities, turns value into a purely economic 'category'.⁷⁰⁴ This separates production from the social function of producing through labour to satisfy human needs and turns it into an economic activity conducted to extract surplus-value.

3.1.2 The power of capital: money and markets

Capitalism has, over time, become dominant; it developed for centuries and became hegemonic in England around the mid-19th century, when the reforms to the British State gave it its modern form.⁷⁰⁵ Other Western nations would soon follow.⁷⁰⁶ In contrast to the equality promised by liberal democracy, capitalist society is, as mentioned in Chapter 1, inherently unequal. This inequality reveals itself in several ways. First, one of the preconditions of capitalism is the availability of labourers that are compelled to sell their labour to capitalists to realise their own subsistence and reproduction.⁷⁰⁷ This is why previous modes of production, and their associated rights, need to be eradicated before capitalism can be established, as will be discussed shortly. Capitalism also requires that most the population is not in control of its own subsistence and reproduction and that labourers are free to sell their own labour, to and be seen as equals for legal purposes.⁷⁰⁸ In practice, of course, the need to earn the means of subsistence undermines the extent to which they are genuinely free, but it

⁷⁰⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 115

⁷⁰⁵ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 76-77

⁷⁰⁶ Vladimir Ilyich Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 45

⁷⁰⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 113

⁷⁰⁸ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 113

would be dishonest to conflate wage-labour with slavery or serfdom. This contrast between legal equality and substantial inequality will be revisited in the third section.

Capitalist production process is also necessarily unequal; this was also explained in Chapter 1. Capitalists hire wage-labourers to produce value (i.e., commodities) in exchange for wages. This general formulation does not necessarily describe all types of work under capitalism (e.g., care work, or the service sector, which may not produce a tangible product) but it is the foundation of the capitalist mode of production. Capitalists extract surplus-value (or profits) by paying labourers wages less than they produce.⁷⁰⁹ Capitalists control the production process by virtue of their ownership of private property. Capitalism therefore concentrates considerable private power in the hands of a relative few.

Finally, capitalism is a highly coercive system, although capitalism's unique methods of coercion obscure this. Compared with the more direct coercion of feudalism or absolutism, capitalism operates through what Marx called 'dull compulsion'. When capitalism has reached a certain point of development, having become widespread, capitalism is able to sustain and reproduce itself, and violent coercion will only be needed in exceptional circumstances.⁷¹⁰ Over time, capitalism's 'dull' coercion resembles a law of 'nature'⁷¹¹ and the social power of capital becomes an 'alien social power'⁷¹² that can only be combatted by overcoming

⁷⁰⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 134

⁷¹⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 516

⁷¹¹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 516

⁷¹² Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (first published 1939, Vintage Books 1973), 197

capitalism. Labourers freely submit to selling their labour and capitalists hire labourers to exploit without being ordered to do so once this relation of exploitation has been established.

Capitalism's social relations and compulsions have expanded beyond human control through a process that Jack Copley and Alex Moraitis call 'objective alienation'.⁷¹³ Money and markets are the clearest examples of this. Although money existed long before capitalism,⁷¹⁴ it has reached a new level of development under capitalism. Money has two important roles in capitalist society, both facilitating exchange by acting as the universal equivalent commodity⁷¹⁵ and serving as an independent form of 'value', capable of representing the value of all commodities, including labour, the commodity labourers 'sell' when they engage in wage-labour.⁷¹⁶ The commodity-form requires that all commodities be commensurable. The 'value' through which all commodities are expressed and generalised in the commodity form, as explained, is expressed through money.⁷¹⁷ Subordinating all production to the production of commodities/value means subordinating all production to money,⁷¹⁸ which is unique to capitalism.⁷¹⁹

⁷¹³ Jack Copley and Alexis Moraitis, 'Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation' (2021) 26(3) *New Political Economy* 490, 495

⁷¹⁴ Jack Copley and Alexis Moraitis, 'Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation' (2021) 26(3) *New Political Economy* 490, 495-496

⁷¹⁵ Jack Copley and Alexis Moraitis, 'Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation' (2021) 26(3) *New Political Economy* 490, 496

⁷¹⁶ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 94

⁷¹⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 45

⁷¹⁸ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 104

⁷¹⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 115

The subordination of all production to money/value is the ‘basis’ of the social power of the capitalist class⁷²⁰ and by acting as that independent form of value, money comes to represent the social power of private property,⁷²¹ the primary form of power in capitalist society. References to the protection of private property can therefore extend to the protection of the status of money in a given society; by protecting this status, State power upholds private property (and its exchange as commodities). Labourers must work for money, but capitalists are just as subject to the power of money as labourers are. Capitalists (generally) must attempt to reduce costs (including wages) and/or use some of their profits to invest in revolutionising the production process (e.g., technological advances),⁷²² which will increase labour productivity whilst also reducing the necessary number of labourers, to make profits. Capitalist competition makes the need to increase productivity and reduce labour time into a law of nature,⁷²³ a ‘market norm’ that capitalists must follow in order to survive.⁷²⁴ Capitalists must compete to use their capital/labour productively to make profits, or else fail.

This need to maximise labour productivity has led to the emergence of the modern principle of marginal productivity, which rests upon the idea that workers should be paid according to their ‘individual contribution’ to their employer’s output,⁷²⁵ meaning that pay rises need to be accompanied by advances in productivity. A worker’s ‘contribution’ is evidently here not to be understood with reference to the labour theory of value. Rather, it seems to correspond

⁷²⁰ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 89

⁷²¹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 90

⁷²² Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 100

⁷²³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 50

⁷²⁴ Jack Copley and Alexis Moraitis, ‘Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation’ (2021) 26(3) *New Political Economy* 490, 496

⁷²⁵ Thomas Piketty, *Capital in the 21st Century* (Belknap Press of Harvard University Press 2014), 304-305

more to Adam Smith's model of exchange according to which workers and capitalists bring their labour and capital to the production process and 'share' the product of labour as wages and profits respectively.⁷²⁶ Marginal productivity leads to the absurd formulation, often referred to in the business press, that improvements to productivity are the sole means of driving advances in living standards,⁷²⁷ mostly by justifying wages increases.⁷²⁸ This is a problem because even though workers created the surpluses that eventually are used to increase productivity, it leaves improvements in living standards not only outside their control but in the control of the capitalist class. Marginal productivity has been explicitly invoked by UK government ministers during the 2022-23 wave of industrial action; train drivers were told that pay rises required productivity gains⁷²⁹ and then-health minister Steve Barclay told nurses and ambulance drivers that only improving productivity and 'efficiency' would eventually drive pay rises.⁷³⁰

Making living standards contingent upon capitalist investment in technology, education, training, etc subordinates the subsistence of much of the citizenry to the demands of capital.⁷³¹ The theory of marginal productivity dies when levels of wages with respect to productivity are subject to comparison between different countries,⁷³² and it fails to explain

⁷²⁶ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations: Volume I* (first published 1776, G. Bell and Sons 1912), 66

⁷²⁷ Valentina Romei, 'Stagflation cloud looms as figures signal economy grinding to a halt' *Financial Times* (London, 13 May 2022), Delphine Strauss, 'Will anything revive UK productivity?' *Financial Times* (London, 7 May 2023)

⁷²⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 294

⁷²⁹ Philip Georgiadis, 'Are train drivers going to prolong the UK rail strikes' *Financial Times* (London, 22 January 2023)

⁷³⁰ George Parker, Delphine Strauss, and Jasmine Cameron-Chileshe, 'Union talks with UK ministers fail to avert strikes' *Financial Times* (London, 9 January 2023)

⁷³¹ Thomas Piketty, *Capital in the 21st Century* (Belknap Press of Harvard University Press 2014), 308

⁷³² Thomas Piketty, *Capital in the 21st Century* (Belknap Press of Harvard University Press 2014), 308-309

the increasing wage disparity of the past few decades (especially in the Anglosphere), driven both by the regression of real wages and the inflated salaries of executives whose individual contributions are (to be generous) unquantifiable.⁷³³ This reveals it to be an ideological and political tool, but the dominance of capital ensures that it remains a powerful tool.

The generalisation of commodities, embodied in money, also generalises the labour-power of workers (the worker's only commodity), presenting it as an equivalent of the wages he receives for selling his labour-power to the capitalist, giving this the illusion of fairness. This presents labour to the capitalist as a cost, rather than the means of subsistence/reproduction of an individual. The subordination of production to the power of money requires workers to sell their labour for the wages/money needed to buy their means of subsistence. These labourers, as well their subsistence and reproduction, also become subordinated to the power of money and to the 'wage form',⁷³⁴ which leads them to frame their demands around higher wages rather than control over their subsistence, as the idea that one should sell their labour for wages comes to seem natural. As noted in chapter 1, the CESCR fully endorsed the selling of labour for wages in its interpretation of the right to work.

Markets also internationalise the pressure on capitalists to increase profitability, allowing capitalist competition to be extended across the world.⁷³⁵ Markets extend the productivity standards and the competition over profitability they engender that face capitalists to the

⁷³³ Thomas Piketty, *Capital in the 21st Century* (Belknap Press of Harvard University Press 2014), 330-331

⁷³⁴ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 156

⁷³⁵ Jack Copley and Alexis Moraitis, 'Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation' (2021) 26(3) *New Political Economy* 490, 497

world market,⁷³⁶ subjecting capitalist to global competition, to the ‘tyranny of global productivity averages’.⁷³⁷ Markets also subject States to the power of money/capital, putting pressure on States to protect the value of currency, prevent capital flight (or attract foreign investment), and address balance of payment deficits/surpluses, etc, occasionally forcing them to cause harm to their citizens through austerity or high interest rates. Markets, the embodiment of the global capitalist class, are able to inflict significant damage upon a government enacting policies unfavourable to capital.⁷³⁸

Because profit comes from either reducing labour costs or increases in productivity, which means using less labour, capitalist production inherently pits the interests of capitalists and workers against each other. The power of capital also puts incredible pressure on both State and society to keep capital accumulation and the profitable use of capital on track, and advancing social rights will have to reckon upon the power of capital and its prioritisation in liberal society. This will become clearer as this thesis unfolds. These are the ‘confines’ of capitalism that the social democratic and basic needs approach identified in Chapter 1 will have to work within to realise and protect social rights. Capitalism’s hegemony imposes those confines.

⁷³⁶ Jack Copley and Alexis Moraitis, ‘Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation’ (2021) 26(3) *New Political Economy* 490, 497-498

⁷³⁷ Jack Copley and Alexis Moraitis, ‘Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation’ (2021) 26(3) *New Political Economy* 490, 497

⁷³⁸ Jack Copley and Alexis Moraitis, ‘Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation’ (2021) 26(3) *New Political Economy* 490, 497

3.1.3 *Law and the separation of the economic and political*

Capitalism's tendency to separate economic issues from politics, linked to the separation of capitalist society's public and private spheres, was introduced in the previous chapter. These separations also have effects on the legal sphere. On one hand, the law is used to depoliticise economic issues; the economic becomes legal to prevent it from becoming political. However, this process is complicated by the separation of the public and private spheres; sometimes, in a similar fashion, certain processes are transferred from public to private spheres to prevent them from becoming public legal issues.

In capitalist society, there are many issues that are not covered by law, whilst others merely escape the reach of public law, which the liberal conception of the 'rule of law' tends to overly focus upon (as will be covered later). This is a problem for human rights because, as mentioned, treaties generally obligate only their nation-state signatories, not private actors; the Human Rights Act 1998, which implemented the ECHR into UK law, only applies to 'public authorities'.⁷³⁹ Private actors are explicitly excluded.⁷⁴⁰

Therefore, on the other hand, it tends to arbitrarily remove certain issues from being considered within law's purview on the grounds that they are either political or economic issues. In capitalist society, these different spheres are closely guarded. This is especially a

⁷³⁹ Human Rights Act 1998, s6(1-3)

⁷⁴⁰ Human Rights Act 1998, s6(5)

problem for social rights, which cross the boundaries between public and private law and between the political, legal and economic. The separation of the legal, political, and economic is a complex process that obscures that all legal and economic issues are simultaneously political.

It was mentioned in Chapter 2 that there has been an increasing depoliticisation of government action and an outsourcing of that action to non-partisan bodies. A fetishisation of ‘independent’ institutions has at least partially contributed to a growing tendency towards technocracy in liberal societies. In recent decades this has shifted towards private economic bodies rather than public political bodies. This includes regulators, like the Financial Conduct Authority, which regulates banks and financial markets in Britain, and central banks, some of which were nationalised in the mid-20th century but are now predominantly independent. The purpose of this technocracy is to turn economic affairs into matters of ‘civic engineering’ and ‘problem-management’⁷⁴¹ (i.e., not political wrangling).

As mentioned, the law is sometimes involved in the separation of the economic and political spheres, dragging certain economic issues out of the political sphere and into the legal sphere for the purposes of depoliticisation. The European Union (EU)’s Fiscal Compact is a good example of this; it subordinates the fiscal policy of its members to the demands for stability. Member nation-states must not allow their government debt-GDP ratio to exceed

⁷⁴¹ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 21

60%⁷⁴² or face action from the European Commission and Council.⁷⁴³ The latest example is Britain's Budget Responsibility Bill, the latest in a long line of measures that tie the hands of British governments on economic policy.⁷⁴⁴ The bill proposes to subject 'fiscally significant measures' to the scrutiny of the Office for Budget Responsibility.⁷⁴⁵ The purpose of the bill is to strengthen the powers of an 'independent' (therefore undemocratic) body for the purposes of instituting a 'lock' on fiscal policy.⁷⁴⁶ Here, the law turns the political into economic technocracy.

Technocracy in economic policy is not new; it was legitimated at international economic conferences in Brussels and Genoa in the aftermath of the First World War,⁷⁴⁷ after which Fascist Italy appointed recognised economists to its finance ministry to legitimate an aggressive austerity programme.⁷⁴⁸ The use of technocracy in economic policy returned strongly in the neoliberal era,⁷⁴⁹ and has moved to the international stage, where the emergence of the IMF, World Bank, World Trade Organisation (WTO), etc have had significant effects on economic policy, as the final chapter will explain further. In the case of

⁷⁴² Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [2012] T/SCG/en 1, Article 4

⁷⁴³ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [2012] T/SCG/en 1, Article 5; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 126

⁷⁴⁴ Robert Knox, 'Legalising the Violence of Austerity' in Vickie Cooper and David Whyte (eds), *The Violence of Austerity* (Pluto Press 2017), 184

⁷⁴⁵ Budget Responsibility HC Bill (2024-25), s1(3)

⁷⁴⁶ Sam Fleming and Lucy Fisher, 'Rachel Reeves to outline law aimed at preventing another Liz Truss-style Budget' *Financial Times* (London, 18 July 2024)

⁷⁴⁷ Clara E Mattei, 'The Guardians of Capitalism: International Consensus and the Technocratic Implementation of Austerity' (2017) 44(1) *Journal of Law and Society* 10, 14-15

⁷⁴⁸ Clara E Mattei, 'The Guardians of Capitalism: International Consensus and the Technocratic Implementation of Austerity' (2017) 44(1) *Journal of Law and Society* 10, 21

⁷⁴⁹ David van Reybrouck, *Against Elections: The Case for Democracy* (first published 2013, Bodley Head 2016), 22

the WTO especially, this involved subordinating government decision-making over numerous trade issues to a legal framework.⁷⁵⁰

The depoliticisation of economic policy, the guarding against 'democratic' pressures, the legitimisation of pro-capital economic policy, and the protection of the economic sphere from the political sphere essentially serve as a solution to the problem of class legislation. The separation of powers does not capture these institutions, being razor-focused upon the political sphere, and it is an indictment of liberal democracy as 'democracy' that it is able to accommodate such a transfer away from the democratic control.

Although the interaction between the economic, political, and legal spheres is complex, it is important to remember that the separation is a capitalist phenomenon, a tendency of capitalism and its hegemony. These separations are exposed as a sham when capitalism, as it always does, runs into crisis, and the State is forced to break the public-private divide and intervene. These interventions are always shaped by the needs of capital, as the next section will cover.

⁷⁵⁰ A Claire Cutler, 'Toward a radical political economy critique of transnational economic law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008), 215

3.2 Capitalism, crisis, the State

3.2.1 *Primitive accumulation*

Capitalist crises tend to recur in the form of overproduction and overaccumulation of capital, which results from hard constraints on further capital accumulation in a given location and time period. Capitalism's inherent tendency to continuously accumulate surplus value/capital, which requires the continuous intensification of labour and revolutionising of production methods, leads to higher production levels, and eventually overproduction. Tight competition, insufficient demand, inadequate supply of labour or raw materials are among factors that may prevent further (profitable) accumulation.⁷⁵¹

The resolution of these crises generally depends upon State action. Despite the privatisation of social and economic power involved with capitalism, the State has always played an important role in capital accumulation. This was recognised by Marx, who referred to State action to establish the dull compulsion of capitalist imperatives, private property, and the separation of labourers from that property as 'primitive accumulation'.⁷⁵²

Marx identified several methods of primitive accumulation that enabled capitalist production to become embedded as it had by 1870. Among these was the national debt, which turned 'barren' money into public bonds and therefore into capital, making the

⁷⁵¹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 101

⁷⁵² Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 502-503

banking and finance industries possible.⁷⁵³ The national debt made another method necessary: the modern mode of taxation,⁷⁵⁴ which, as Marx explained, was used to 'expropriate' the lower-middle classes⁷⁵⁵ (i.e., make them reliant upon wage labour). The third was the protectionist system, also necessary to expropriate independent labourers, concentrating property in the hands of capitalists.⁷⁵⁶ The fourth was imperialism itself, the plunder conducted by European countries in colonies across the world⁷⁵⁷ that established trade links and opened markets.⁷⁵⁸ All primitive accumulation (and therefore all capital accumulation) relied upon 'conquest, slavery, robbery, murder', i.e., 'force',⁷⁵⁹ exerted by the State.⁷⁶⁰

When overaccumulation is concentrated in a particular region it may be resolved by opening new markets for capital elsewhere⁷⁶¹ in order to avoid the devaluation or redistribution of capital.⁷⁶² This has (exceptionally) led to radical changes in the global economy; a significant crisis in late-19th century Europe drove an intensification of imperialism.⁷⁶³ More recently the global shift away from the post-war embedded liberalism and its replacement with neoliberalism was a response to a crisis of overaccumulation in manufacturing in the

⁷⁵³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 528

⁷⁵⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 529

⁷⁵⁵ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 530

⁷⁵⁶ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 530

⁷⁵⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 526-527

⁷⁵⁸ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 527

⁷⁵⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 502

⁷⁶⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 526

⁷⁶¹ David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 64

⁷⁶² David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 66

⁷⁶³ David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 69

1970s.⁷⁶⁴ Such radical restructuring of the global economy needed the support of the world's hegemonic power (Britain in the first example, US in the second).

If the crisis becomes widespread, other solutions may be needed. Depending on the exact conditions causing and flowing from the crisis, the State will usually have two broad options: deflationary policy can be implemented to restrict the pace of (domestic) accumulation, or the economy can be stimulated by the expansion of credit (and/or State spending), both of which can lead to disaster if they fail to resolve overaccumulation⁷⁶⁵. Following the Great Depression, economic orthodoxy generally coalesced around State intervention aimed at stimulating the economy,⁷⁶⁶ a response associated with John Maynard Keynes,⁷⁶⁷ whose influence enabled the welfare state.⁷⁶⁸

Keynesian policies tended to stabilise demand during economic slowdown, 'smoothing out' the business cycle, and maintained very high levels of employment in the West after the war.⁷⁶⁹ Keynesianism stopped working when the global crisis of overaccumulation ramped up in the 1970s, and, as mentioned, it was replaced by monetarism, which targeted 'price stability' rather than full employment in order to prevent wage rises through fiscal and

⁷⁶⁴ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 38

⁷⁶⁵ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 119

⁷⁶⁶ Mark Skousen, *The Big Three in Economics: Adam Smith, Karl Marx, and John Maynard Keynes* (Taylor and Francis 2007), 136

⁷⁶⁷ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 20-21

⁷⁶⁸ Mark Skousen, *The Big Three in Economics: Adam Smith, Karl Marx, and John Maynard Keynes* (Taylor and Francis 2007), 137

⁷⁶⁹ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 17

monetary policy.⁷⁷⁰ Deflationary policy has become the norm in the past few decades, apart from the Covid-19 pandemic, which now looks like an aberration; the IMF expects fiscal consolidation (i.e., austerity) to result from the pandemic, and for growth to suffer as a result.⁷⁷¹

David Harvey developed primitive accumulation into his own theory of 'accumulation by dispossession',⁷⁷² intending it as a corrective, suggesting that the term 'primitive accumulation' obscures that such practices have continued throughout the history of capitalism.⁷⁷³ On the contrary, accumulation by dispossession can be found in most historical periods but always during crises of overaccumulation.⁷⁷⁴ The actions taken by the US in shifting the global economy to neoliberalism were a modern example.⁷⁷⁵

The ongoing class struggle means that crises of overproduction are going to become distributional struggles. Overaccumulation often pressures the State to implement some sort of deflationary policy in order to bring domestic accumulation back within reasonable limits (and to attract capital). With capitalism enjoying hegemony both domestically and internationally,⁷⁷⁶ capital can simply move to another country in search of more profitable

⁷⁷⁰ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the Capitalist State* (Edward Elgar Publishing 1988), 330

⁷⁷¹ International Monetary Fund, 'World Economic Outlook: Steady but Slow: Resilience amid Divergence' (*International Monetary Fund*, April 2024) <<https://www.imf.org/en/Publications/WEO/Issues/2024/04/16/world-economic-outlook-april-2024>> accessed 3 August 2024

⁷⁷² David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 73

⁷⁷³ David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 74

⁷⁷⁴ David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 76

⁷⁷⁵ David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 78

⁷⁷⁶ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 92

conditions (like cheaper labour).⁷⁷⁷ This will intensify the class struggle through unemployment.

3.2.2 Inflation and Monetary Policy

Inflationary crises will generally result in a struggle between capital and labour. Although inflation is sometimes presented by the economic mainstream as a quasi-scientific phenomenon,⁷⁷⁸ it often results from attempts from capitalists to maintain their profit levels in the face of increased competition associated with overaccumulation,⁷⁷⁹ or increased costs due to a crisis in a related sector, leading to broader inflation. Inflation will erode wages⁷⁸⁰ in the absence of pay rises that match the inflation rate, but monetarism's 'cure' for inflation is often worse than the disease.

Clinging literally to Milton Friedman's belief that inflation is 'always and everywhere a monetary phenomenon'⁷⁸¹ (i.e., because of too much money circulating), the prescribed medicine is an increase of interest rates. Making borrowing more expensive will supposedly slow the economy and thus reduce inflation, but in reality, these rate rises act as a blunt tool to increase unemployment, weakening the bargaining power of workers and thus reducing wage growth, restoring profitability.⁷⁸² These practices have returned today;

⁷⁷⁷ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 106

⁷⁷⁸ Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 *New Left Review* 5, 8

⁷⁷⁹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 103

⁷⁸⁰ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 108

⁷⁸¹ Tim Harford, 'What we keep getting wrong about inflation' *Financial Times* (London, 16 September 2022)

⁷⁸² Robert Brenner, 'The Boom, the Bubble, and the Future' (2002) 45(4) *Challenge* 6, 8

governments and central banks are uniting against worker demands for inflation-matching wage rises, leading to a variety of headlines in the business press presenting suppression of wages as ‘good news’ for the economy.⁷⁸³

Deliberately increasing unemployment is directly contrary to social rights; it is a retrogressive measure regarding the right to work, therefore likely to be found to be a violation of the ICESCR right to work. The ESC’s right to work is also accompanied by a commitment to maintaining full employment.⁷⁸⁴ Although theoretically subject to judicial review, including on rights grounds,⁷⁸⁵ central bank activity is generally seen as an economic issue that requires judicial deference.⁷⁸⁶ Even more importantly, as will be returned to in Chapter 6, employment has become the conduit through which most social rights are provided (i.e., the indirect approach to social rights).

3.2.3 Austerity

A capitalist crisis may require the State to run up debts; this will be the case if the crisis requires governments bailouts, in which private corporate debt is essentially transformed into government debt.⁷⁸⁷ This will often lead to demands for fiscal tightening, also known

⁷⁸³ Colby Smith and Kate Duguid, ‘US adds 311,000 jobs in February but wages cool’ *Financial Times* (London, 10 March 2023)

⁷⁸⁴ Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, Art 1(1)

⁷⁸⁵ Banking Act 2009, s244

⁷⁸⁶ Rosa M Lastra, ‘Accountability Mechanisms of the Bank of England and of the European Central Bank’ (*European Parliament*, September 2020) < https://www.europarl.europa.eu/cmsdata/211387/1_LASTRA-final.pdf > accessed 4 July 2024

⁷⁸⁷ Wolfgang Streeck, ‘The Crises of Democratic Capitalism’ (2011) 71 *New Left Review* 5, 17

austerity. In economic terms, austerity is associated with reductions in government spending or increases in taxation. This commitment often does not translate into practice; the consequences of social spending cuts, like those implemented by the UK government after the 2010 election, often cost more than maintaining existing social spending levels, undermining their effect⁷⁸⁸ and the UK's debt-GDP ratio has been increasing since 2010.⁷⁸⁹ However, austerity is best thought of as a political commitment to implement harsh spending cuts (or tax rises) to service the national debt,⁷⁹⁰ more in the hopes of appeasing markets than reducing debt.

Because of the power of markets, global loss of faith in a particular currency can lead to attacks on that currency through speculation.⁷⁹¹ Similarly, a loss of faith in a State's public bonds can push up borrowing costs, exacerbating a debt problem.⁷⁹² This puts the State in an awkward position due to the tension between the State's (theoretical) commitment to the citizenry and the international nature of capital accumulation. The pressure to maintain a sound currency and to sustain the faith of markets genuinely does force the liberal State into difficult decisions.

⁷⁸⁸ United Nations General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, [12]

⁷⁸⁹ Statista, 'Public sector net debt expressed as a percentage of GDP in the United Kingdom from 1900/01 to 2027/28' (*Statista*, March 2023) <<https://www.statista.com/statistics/282841/debt-as-gdp-uk/>> accessed 17 May 2023

⁷⁹⁰ Rebecca Bramall, Jeremy Gilbert, and James Meadway, 'What is Austerity?' (2016) 87 *New Formations* 119, 120

⁷⁹¹ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 160

⁷⁹² Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 *New Left Review* 5, 22

Unlike inflationary crises, modern austerity results from a distributional conflict between global financial investors and nation-states;⁷⁹³ citizens are only later drawn into the conflict by spending cuts or tax rises. In that case, it could be said that capital uses the State to resolve its crisis and then demands austerity in return, which may benefit capital (relative to labour).⁷⁹⁴ The distributional implications of austerity are slightly more complicated than contractionary monetary policy; on the one hand, the middle-classes of liberal societies are often invested in public bonds, including through their pensions.⁷⁹⁵ Devaluation of the currency will also make imports relatively more expensive, which may affect food or energy prices. On the other hand, austerity itself usually causes widespread misery for citizens. Like monetary contraction, it often forces wages down, especially as States often include wage restriction for (at least) public sector workers as part of austerity measures.⁷⁹⁶

Austerity is also more likely to disproportionately affect the poor/workers relative to the wealthy. A report into health equity in England suggested that changes to the tax and social security systems during the austerity period negatively impacted the bottom 50% of earners, especially the bottom 20%.⁷⁹⁷ A causal relationship between austerity and a stagnation in life expectancy gains was also found, and one study has even suggested that it may have caused

⁷⁹³ Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 New Left Review 5, 21

⁷⁹⁴ Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 New Left Review 5, 21

⁷⁹⁵ Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 New Left Review 5, 22

⁷⁹⁶ Organisation for Economic Co-operation and Development, *Public Sector Compensation in Times of Austerity* (OECD Publishing 2012), 24-26

⁷⁹⁷ Michael Marmot and others, 'Health Equity in England: The Marmot Review 10 Years On' (*Institute for Health Inequality*, February 2020) < https://www.health.org.uk/publications/reports/the-marmot-review-10-years-on?gclid=EAlalQobChMI5duX-vnx_glVmO7tCh2ymQSxEAAAYASAAEglq3_D_BwE > accessed 3 March 2022

as many as 335,000 excess deaths.⁷⁹⁸ The UK's post-2010 austerity programme reversed previous progress on poverty, leaving 14 million people in poverty,⁷⁹⁹ and rough sleeping skyrocketed.⁸⁰⁰ Whilst there was record low unemployment,⁸⁰¹ in-work poverty rose.⁸⁰² A significant increase in food bank use was also noted.⁸⁰³

Where social rights are concerned, austerity generally erodes the minimal provision that liberal States still make, as austerity is often carried out through cuts to social spending.⁸⁰⁴ This makes the social democratic/basic needs mainstream conception of social rights difficult. This does not match the general obligation found in Article 2(1) ICESCR of progressive realisation, nor the progressive language of the ESC (although States would surely point to the qualification of 'available resources' found in article 2(1)) and would

⁷⁹⁸ David Walsh and others, 'Bearing the burden of austerity: how do changing mortality rates in the UK compare between men and women?' (2022) 76 *Journal of Epidemiology and Community Health* 1027, 1030-1031

⁷⁹⁹ United Nations General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, 4

⁸⁰⁰ United Nations General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, 6

⁸⁰¹ United Nations General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1

⁸⁰² United Nations General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, 8

⁸⁰³ United Nations General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, 7

⁸⁰⁴ Colm O'Cinneide, 'Austerity and the faded dream of a 'social Europe' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 186

surely amount to retrogressive measures.⁸⁰⁵ Increases in poverty, hunger, homelessness, etc. suggest that the minimum core of various rights is often not respected.

The separation of the economic from the political returns sharply in times of capitalist crisis, even as the separation of the State from society is discarded. Monetary policy and austerity are posited as economic issues that should be kept separate from politics regardless of its political implications. The law, except to the extent that it supports this separation, does not get a look in.

3.3 Law, Historical Materialism, and Private Property

3.3.1 Marxist legal theory and Evgeny Pashukanis

Having critiqued what the law does not do in a capitalist society, this critique will now turn to what it does do. Marx himself did not produce a comprehensive theory of law, although, as Paul O'Connell suggests, an inkling of such a theory can be sketched from his work on politics and political economy.⁸⁰⁶ Marx believed that every mode of production has its own legal relations,⁸⁰⁷ in accordance with historical materialism. Since the legal system emerges from

⁸⁰⁵ United Nations General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, 8

⁸⁰⁶ Paul O'Connell, 'Law, Marxism, and Method' (2018) 16(2) *tripleC* 647, 648

⁸⁰⁷ Karl Marx, *Grundrisse: Foundations of the critique of political economy* (first published 1939, Vintage Books 1973), 87-88

the ever-changing relations of production, it too should be regarded in terms of dynamic 'processes and relationships' rather than as a 'thing'.⁸⁰⁸ A change in the forces of production that brings them into conflict with the existing legal (or political) relations will cause a 'social revolution'.⁸⁰⁹ A Marxist theory of law, therefore, needs to engage with law as a historically specific phenomenon.

The most prominent Marxist critique of law came from Evgeny Pashukanis, the 'pre-eminent' legal theorist of the early Soviet Union⁸¹⁰ especially in his *General Theory of Law and Marxism*.⁸¹¹ Pashukanis developed his 'commodity form' theory of law out of historical materialism⁸¹² to explain and critique modern law, building upon Marx's work.⁸¹³ This theory recognised that any society that preserves the 'relationship of equivalency' between commodities, i.e., the commodity form, would be 'forced' to preserve a similar form for law.⁸¹⁴ Dissatisfied with 'formal' conceptions of how individuals had been transformed into legal subjects in modern liberal societies, Pashukanis turned to the commodity form,⁸¹⁵ with its tendency to generalise commodities based upon their value, obscure the social relations

⁸⁰⁸ Paul O'Connell, 'Law, Marxism, and Method' (2018) 16(2) *tripleC* 647, 649

⁸⁰⁹ Karl Marx, *A Contribution to the Critique of Political Economy* (first published 1859, Progress Publishers 1977), 21

⁸¹⁰ Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism' (2004) 17 *Canadian Journal of Law & Jurisprudence* 269, 269

⁸¹¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003)

⁸¹² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 55

⁸¹³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 39

⁸¹⁴ Evgeny Bronislavovich Pashukanis, 'The Narrow Horizon of Bourgeois Law' in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 136

⁸¹⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 111

involved in their creation, and alienate labourers.⁸¹⁶ The legal form, in his view, accomplished the same.

Pashukanis argued that just as commodities are generalised in the commodity form as things rather than products of social relations, all 'concrete' individuals are turned into abstract, legal subjects by the legal form.⁸¹⁷ Individuals receive this legal personality as 'compensation' for being subjected to economic relations and for the purposes of entering relations with other commodity owners,⁸¹⁸ and receive legal rights (of private property) rather than customary privileges.⁸¹⁹ This was a direct implication of commodities being unable to exchange themselves; as noted in Chapter 2, commodity exchange requires individuals to recognise each other as equal owners of property as commodities cannot 'take themselves' to market. Just as the commodity form subordinated the significance of people involved in its creation to the significance of the thing (i.e., commodity) they produced or owned, the legal form defines them as an owner of an abstract commodity, as an individual capable of owning such a commodity and having the associated rights of ownership.⁸²⁰ Engels had also recognised that commodity exchange relied on those taking part recognising each other as free owners with

⁸¹⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 112

⁸¹⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 112-113

⁸¹⁸ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 114

⁸¹⁹ C.J. Arthur, 'Towards a Materialist Theory of Law' (1977) 7(1) *Journal of Socialist Theory* 31, 35

⁸²⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 112-113

equal rights in his *Anti-Duhring*,⁸²¹ as Pashukanis himself pointed out,⁸²² and Pashukanis saw his thesis as an elaboration of the work of Marx and Engels.⁸²³

Pashukanis' theory amounts to an argument that modern law is a natural development of capitalism. Only in capitalist society, composed of commodity owners nominally free but in practice compelled to either produce commodities or sell their labour as a commodity,⁸²⁴ did a private legal form become necessary to give meaning to the private property exchanged and the contract consequently formed.⁸²⁵ This placed economic relations and private property at the centre of modern law. Pashukanis believed the purpose of law (not just property law) was to facilitate the 'unfettered process of social production and reproduction' through 'individual private legal transactions'.⁸²⁶ The 'only end' for the 'legal system', he argued, is 'commodity circulation'.⁸²⁷

Pashukanis was not arguing, as Petr Stucha, the first Commissariat of Justice of the Soviet Union did, that law was merely a 'system of social relations corresponding to the interests of

⁸²¹ Friedrich Engels, *Anti-Duhring: Herr Eugen Duhring's Revolution in Science* (first published 1878, Progress Publishers 1947), 64

⁸²² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 38

⁸²³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 39

⁸²⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 113

⁸²⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 110

⁸²⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 44

⁸²⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 100

the ruling class'.⁸²⁸ This, Pashukanis argued,⁸²⁹ does not explain what makes law 'distinct'.⁸³⁰ Nor was he merely arguing that property law, or contract law, expressed the class relations of capitalism.⁸³¹ In accordance with historical materialism, it is important to acknowledge the 'relative autonomy' of the law; the law in capitalist society faces pressure to reflect the social relations of capital, but this does not mean that it serves ruling-class interests in a straightforward process.⁸³² He was instead arguing that the legal form treats all individuals as abstract subjects just as the commodity form treats all commodities as commensurable products of abstract labour.⁸³³ In capitalist society, the defence of capitalist class interests is carried out through the 'defence of the abstract principles of legal subjectivity'.⁸³⁴

As mentioned, Pashukanis' theory was grounded in Marx's own works, and direct links can be made with works like *On the Jewish Question*,⁸³⁵ and essay he wrote about the possibility of Jewish 'emancipation' in German society. In fact, some Marxist legal theorists, like Isaac Balbus, managed to work out a theory similar to that of Pashukanis on the basis of Marx's own

⁸²⁸ People's Commissariat of Justice, 'Guiding Principles of Criminal Law in the RSFSR. December 12 1919' (*Seventeen Moments in Soviet History*) < <https://soviethistory.msu.edu/1917-2/state-security/state-security-texts/guiding-principles-of-criminal-law-in-the-rsfsr/> > accessed 15 July 2024

⁸²⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 84

⁸³⁰ Robert Knox, 'Law' in Beverley Skeggs, Sara R. Farris, Alberto Toscano - Goldsmiths, and Svenja Bromberg (eds) *The SAGE Handbook of Marxism* (SAGE Publications Ltd 2021), 884

⁸³¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 39-40

⁸³² Paul O'Connell, 'Law, Marxism, and Method' (2018) 16(2) *tripleC* 647, 649-650

⁸³³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 60

⁸³⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 45

⁸³⁵ Karl Marx, 'On the Jewish Question' in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010)

works in ignorance of the *General Theory*.⁸³⁶ *On the Jewish Question* is notable for its expression of scepticism of rights. Marx considered the ‘universal Rights of Man’ that had emerged from the French revolution and became part of the American Revolution⁸³⁷ and noticed that rights were beginning to take different forms due to the capitalist separation of State and private affairs: the rights of man (liberty, property, equality, and security) were rights of ‘civil society’, not the State.⁸³⁸ Rights had accordingly taken a negative, individualistic character.⁸³⁹ This was especially true of property, the ‘basis’ of civil society. He had also noted that private property had been (or would be) politically ‘abolish(ed)’ in the sense that property qualifications for voting or standing for office were abolished, but that this not only did not abolish property in fact but ‘presupposed’ their continued ‘existence’ in ‘civil society’.⁸⁴⁰

The creation of this new, private form of property and a corresponding separate private sphere was distinct from pre-capitalist society, where property relations were mediated by privilege and political status. In capitalist society, Marx recognised law had replaced privilege in mediating these property relations, which now take place between individuals.⁸⁴¹ This aligns with Pashukanis’ view that the origin of (modern) law could be located in the material emergence of private property rights, with individuals receiving these legal rights as

⁸³⁶ Isaac D. Balbus, ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’ (1977) 11(3) *Law and Society Review* 571, 577

⁸³⁷ Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 161

⁸³⁸ Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 162

⁸³⁹ Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 164

⁸⁴⁰ Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 153

⁸⁴¹ Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 167

‘compensation’ for having their lives being subjected to these property relations rather than political privilege. In capitalist society, the modern legal form and the legal contract mediates these relations. Recognising that the creation of a private sphere of property exchange had created a somewhat artificial separation of the public and the private spheres (as covered earlier in this chapter), Marx also seemed to locate the modern State in the development of capitalism, a State that is modern in the sense that it (supposedly) concerns itself with the ‘general interest’ rather than the ‘particular’ interests of private exchange.⁸⁴² Along similar lines, Pashukanis referred to the State becoming useful in a society premised upon class antagonisms based upon private property, acting as a neutral arbiter to regulate property exchange and provide ‘reciprocal guarantees’ to contracting parties.⁸⁴³

Finally, Marx’s identification of a contradiction between the political equality offered by the State and the inequality of civil society⁸⁴⁴ is mirrored in Pashukanis’ views on legal equality. Marx noted that the public private separation had created a contradiction between the ‘public’ and ‘private’ man⁸⁴⁵ or the man and the citizen.⁸⁴⁶ Just as Pashukanis saw individuals receiving legal subjectivity as ‘compensation’ as part of the social contract of market exchange, Marx saw individuals receiving citizenship/political equality solely in order to

⁸⁴² Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 166

⁸⁴³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (2003), 149

⁸⁴⁴ Igor Shoikhetbrod, *Revisiting Marx’s Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 61

⁸⁴⁵ Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 157

⁸⁴⁶ Karl Marx, ‘On the Jewish Question’ in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 160-161

maintain their egoistic private interests.⁸⁴⁷ Marx was sceptical therefore about the limits of 'political' emancipation, which resulted in the subjugation of political status to private relations; he believed in the need for 'human' emancipation, the reuniting of the man and the citizen, and the unification of political power and 'social' power.⁸⁴⁸ Similarly, as will be returned to, Pashukanis was critical of the equality offered by legal subjectivity and the inequality of capitalist social relations.

3.3.2 Law: Ideology or Material Fact?

Pashukanis was also not arguing that law was solely ideology,⁸⁴⁹ a 'mystificatory form of consciousness' which has to be 'swept aside' in order to 'get at the real relations'. It was rather, per Chris Arthur, an 'ideological form', the 'distorted and misleading form of a certain reality...which structures, not only consciousness, but human relations', reproducing the 'material basis of society' while simultaneously 'obscuring its true shape'.⁸⁵⁰ In other words, analysing law as an ideological form means analysing it as something that actually affects material social relations, albeit in an obtuse way, rather than as an ideology, as something that exists only in ideas. Law is undoubtedly a powerful ideological tool. As Pashukanis explained in the preface to the second edition of his book, the insight that exploitation can 'take place in the form of the free contract' in an economy 'based on the commodity' is the 'basis' for the

⁸⁴⁷ Karl Marx, 'On the Jewish Question' in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 164

⁸⁴⁸ Karl Marx, 'On the Jewish Question' in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 168

⁸⁴⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 78

⁸⁵⁰ C.J. Arthur, 'Towards a Materialist Theory of Law' (1977) 7(1) *Journal of Socialist Theory* 31, 32

Marxist critique of liberal conceptions of freedom, equality, and democracy. It was analysis of the legal form and legal (contractual) relations that reveals that the 'republic' of the market masks the 'despotism' of the factory,⁸⁵¹ or the 'Eden' of liberty and equality in exchange masked the oppression in the hidden abode of production in Marx's terms. Even more than the political equality offered by universal suffrage, it is the equal rights offered by the law that most blatantly obscures capitalism's exploitation.

Crucially, this insight exposes the gap between the political and legal equality offered by law (and democracy) and the inequality of capitalist social relations. The 'relation of exploitation' through which surplus-value is extracted, which, Pashukanis recognised, did not historically correspond to the commodity form, only becomes mediated through law in capitalist society.⁸⁵² Under earlier systems that featured feudalism and/or slavery, it was unnecessary for these relations to take legal form as the exploitation relation was carried out through direct coercion and/or political power. It would have been disadvantageous to the powerful for those more direct methods of exploitation to be carried out through law. This was not true of capitalist society.⁸⁵³

Pashukanis' legal form theory is often criticised on the ground that that the relations between commodity/property owners that is reproduced in the legal form are not production relations

⁸⁵¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 39

⁸⁵² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 45; C.J. Arthur, 'Editors Introduction' in Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 30

⁸⁵³ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 262

but exchange relations.⁸⁵⁴ This seems to locate the legal form not so much in the historical specificity of capitalist production (in accordance with historical materialism) but in commodity exchange, committing Pashukanis to an ‘ahistorical’ and ‘static’ view of law.⁸⁵⁵ Both commodity exchange and law (as Pashukanis recognised⁸⁵⁶) predated capitalist society (both could be traced back to the Roman Empire).⁸⁵⁷ This was a criticism levelled at Pashukanis by Igor Shoikhedbrod, who called this Pashukanis’ most significant departure from Marx.⁸⁵⁸

The insight that only under capitalism is the relation of exploitation expressed through law helps counter these criticisms. Just as capitalists must legally recognise other commodity-owners as juridical equals, capitalists must do the same with the labourers they exploit, who trade their labour as a commodity. This exchange of commodities must be a formally free exchange between owners of private property; only under capitalism does such exchange become normalised.⁸⁵⁹ This is an essential component of capitalist production. In addition, whilst commodity exchange predates capitalism, capitalism is unique in subordinating all production to commodity exchange; therefore, it is only in capitalist/liberal society that the corresponding legal form becomes universal.⁸⁶⁰ Capitalist exchange is therefore inseparable from capitalist production. This establishes a link between capitalist relations of exploitation

⁸⁵⁴ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 22

⁸⁵⁵ Igor Shoikhedbrod, *Revisiting Marx’s Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 109

⁸⁵⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 82

⁸⁵⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 30

⁸⁵⁸ Igor Shoikhedbrod, *Revisiting Marx’s Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 107

⁸⁵⁹ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 78

⁸⁶⁰ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 93-94

and the exchange relations that are reproduced in the legal form. Whilst commodity exchange predated capitalism, in no other form of society is it so essential.

Despite being powerful ideologically, law has material effects as well. Pashukanis also argued that legal subjectivity was an 'actual process' of making human relations 'legal' as the commodity form became universalised in capitalist society.⁸⁶¹ The changing of all things into commodities makes all people (potential) commodity owners; therefore, both commodity and legal fetishism reach their 'peak' under capitalism.⁸⁶² Law, he further explains, does not exist merely in the 'theories of learned jurists' (as an ideology would); it has a material existence as the specific set of relations necessary to exchange commodities as a private property owner through the medium of contract.⁸⁶³

Just as the commodity has an 'ideological character' whilst also expressing an objective social relation, and that its development towards universalisation is a 'material fact',⁸⁶⁴ law was also capable of expressing a 'specific social relation' in a 'mystified' form,⁸⁶⁵ meaning that under 'certain conditions', the 'regulation' of social relations 'assumes a legal character'.⁸⁶⁶

⁸⁶¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 40

⁸⁶² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 41

⁸⁶³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 68

⁸⁶⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 74

⁸⁶⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 78-79

⁸⁶⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 79

Contractual relations, for example, exist as an 'objective economic fact'⁸⁶⁷ expressed in legal form. As law does not create social relations (its 'objective content', he argued, is defined by existing or soon to exist social relations⁸⁶⁸), it instead takes the social relations of commodity exchange and turns them into legal relations 'at the moment of dispute' or conflict of interest whilst appearing distinct from those economic relations.⁸⁶⁹ It is through exchange that the legal form acquires a 'material basis'.⁸⁷⁰ This has practical legal consequences, meaning that law is not merely liberal capitalist ideology.

The commodity form/legal form theory is also sometimes criticised for being outdated⁸⁷¹ and thus unable to explain the recognition of collective actors like corporations, trade unions, and other associations,⁸⁷² which play a much larger role today than they did in earlier stages of capitalism and have thus undermined a legal theory based upon individualistic exchange. However, China Mieville notes that such developments can be accommodated within Pashukanis' legal form.

Although labour contracts no longer take place between individual capitalists and workers, instead mostly taking place between businesses/corporations and workers (sometimes

⁸⁶⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 44

⁸⁶⁸ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 87

⁸⁶⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 93

⁸⁷⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 121

⁸⁷¹ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 101

⁸⁷² China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 103

negotiating as a union of workers), they still contract as abstract individuals;⁸⁷³ corporations⁸⁷⁴ and unions⁸⁷⁵ enjoy individual legal personality. This individualisation of the legal subject can be seen in other areas of law as well: for example, Article 34 of the European Convention on Human Rights refers to 'individual applications', which includes 'any person, non-governmental organisation or group of individuals'.⁸⁷⁶ These changes are therefore not an invalidation but a 'vindication' of Pashukanis.⁸⁷⁷ Besides, as fellow Soviet jurist A.G. Goikhbarg noted, private law being based upon private property and freedom of contract is merely a tendency. This tendency can change over evolve in accordance with the dynamics of capitalism.⁸⁷⁸ The existence of administrative law, for example, does not mean that the essence of law cannot be located in private relations.

The important takeaway from this section is the role that commodity exchange, and therefore the legal form, plays in both reproducing and obscuring the inequality inherent in capitalist production. As mentioned, this formal legal equality obscures substantive inequality; individuals do not become legal subjects until society has already been organised by exploitative class relations.⁸⁷⁹ As both O'Connell⁸⁸⁰ and Wood have pointed out, the formal,

⁸⁷³ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 108

⁸⁷⁴ Companies Act 2006, s790(c)

⁸⁷⁵ Trade Union and Labour Relations (Consolidation) Act 1992, s10(1) and s10(2)

⁸⁷⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), article 34

⁸⁷⁷ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 109

⁸⁷⁸ A.G. Goikhbarg, 'The Goals and Methods of the Proletarian Revolution' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 65

⁸⁷⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 115

⁸⁸⁰ Paul O'Connell, 'Law, Marxism, and Method' (2018) 16(2) *tripleC* 647, 652-653

abstract equality offered by the law obscures exploitative class relations by 'denying their existence'.⁸⁸¹ Whilst, as Thompson argued, legal equality is an advance upon arbitrariness, it is important not to overstate its value. As Anatole France once wrote, the 'majestic' equality of the law 'forbid(s) rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread'.⁸⁸²

3.3.3 Law and Property

It may be worth investigating further the insight that law in a capitalist society is based upon (lends its form to) commodity exchange relations, or private property relations. Marx had linked the existence of property to the act of producing and to society itself, suggesting it to be tautologous to suggest that production and society require property⁸⁸³ (i.e., any mode of production and corresponding social form requires some type of property). This meant that each mode of production would have a corresponding property regime, although historically speaking, there was no need for this to have taken private form; 'common', communal property is the 'original' form in primitive societies.⁸⁸⁴

⁸⁸¹ Ellen Meiksins Wood, 'Capitalism and Human Emancipation' (1988) 167 New Left Review 3, 14

⁸⁸² Anatole France, *The Red Lily* (first published 1894, Modern Library 1917), 75

⁸⁸³ Karl Marx, *Grundrisse: Foundations of the critique of political economy* (first published 1939, Vintage Books 1973), 87

⁸⁸⁴ Karl Marx, *Grundrisse: Foundations of the critique of political economy* (first published 1939, Vintage Books 1973), 88

The dominant property regime will have corresponding legal and/or political arrangements.⁸⁸⁵ Accordingly, as feudal property began to give way to private property in modern Europe,⁸⁸⁶ the law began to reflect these changes.⁸⁸⁷ Nowhere was this process starker than in England, where absolutist government never really replaced feudalism and where capitalism (arguably⁸⁸⁸) first emerged.⁸⁸⁹ As mentioned, the establishment of private property needed to be achieved by eradicating existing forms of property. This did not begin through legal means. Establishing the private, concentrated ownership of the means of production (property) that capitalism relies upon, as well the creation as a mass of propertyless workers and the implementation of 'dull compulsion' in place of feudal hierarchy, was a violent process that involved enclosing the common lands and extinguishing the common rights that peasant farmers had established over time.⁸⁹⁰

Agriculture was the base of the European feudal (and early-modern) economy. Lords used their political status to appropriate surplus-value from those who farmed their land. Throughout the 15th century, serfdom was overthrown in England,⁸⁹¹ leaving mostly peasant farmers. Peasants were not wage-labourers; they owned and controlled their means of production (i.e., agricultural land) and paid a portion of their produce to lords.⁸⁹² The relation

⁸⁸⁵ Karl Marx, *Grundrisse: Foundations of the critique of political economy* (first published 1939, Vintage Books 1973), 88

⁸⁸⁶ Friedrich Engels and Karl Marx, *The German Ideology* (Electric Book Company, 2000), 114

⁸⁸⁷ Friedrich Engels and Karl Marx, *The German Ideology* (Electric Book Company, 2000), 115

⁸⁸⁸ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 86-87, 115

⁸⁸⁹ Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View* (first published 1999, Verso 2002), 103

⁸⁹⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 501-502

⁸⁹¹ Robert Brenner, 'Agrarian Class Structure and Economic Development in Pre-Industrial Europe' (1976) 70 *Past and Present* 30, 61

⁸⁹² Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 209

of exploitation was tied directly to political status. Introducing capitalism required that peasants be physically removed from those lands, for their homes and towns to be destroyed, and for common land to be enclosed as private property.⁸⁹³ Small farms were then concentrated into much larger farms.⁸⁹⁴ Once these lands were cleared of the peasantry, capitalists were able to assert and establish private property rights,⁸⁹⁵ having forcibly extinguished customary and common rights of the peasantry, and hire wage labourers to exploit.⁸⁹⁶

The peasantry had enjoyed customary rights to common lands that they used for cattle grazing and sources of raw materials and were in some cases able to develop village 'institutions' and other forms of 'common' rights⁸⁹⁷ that could be wielded against feudal landlords. Marx referred to these rights as the 'feudal constitution',⁸⁹⁸ although they did not take legal form. These common rights periodically prevented or overturned the imposition of serfdom,⁸⁹⁹ and slowed the transformation of feudal property into capitalist property.

Once they were eradicated, law began to reflect (and protect) private property. The State now enforces capitalist private property rights largely by enforcing the rule of money, property, and

⁸⁹³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 505

⁸⁹⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 509

⁸⁹⁵ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 507

⁸⁹⁶ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 307

⁸⁹⁷ Robert Brenner, 'Agrarian Class Structure and Economic Development in Pre-Industrial Europe' (1976) 70 Past and Present 30, 56-57

⁸⁹⁸ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 525

⁸⁹⁹ Robert Brenner, 'Agrarian Class Structure and Economic Development in Pre-Industrial Europe' (1976) 70 Past and Present 30, 59

contract, all of which fall under the category of private law, but the State does not create them. They emerged from private relations between emerging capitalists and peasants and were thus created in 'civil society'. The State merely gave them 'juridical form'⁹⁰⁰ (in dispute) after they had already taken their material capitalist form,⁹⁰¹ first as hoarded land and later as money.

One example is the Prussian law criminalising the gathering of fallen wood in forests that Marx railed against. Marx notes that feudal-era customary rights, like the right to gather fallen wood, were 'contrary' to modern law, meaning that when those forests became the private (rather than feudal) property of various estates and took legal form, those customary rights, now criminalised, came into 'direct' conflict with the law.⁹⁰² These customary rights were not individual private rights created for the purposes of exchange and so did not become legal rights through dispute; instead, they were extinguished by the establishment of legal property rights.

As alluded to, the same was true in England. Marx noted that prior to the Glorious Revolution in 1688, English legislation mostly attempted to check the advance of capitalist property, but that after 1688, it came to support and advance it. Legislation in the 15th-16th centuries had, with little effect, attempted to limit the consolidation of private property,⁹⁰³ but when

⁹⁰⁰ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 127

⁹⁰¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 110

⁹⁰² Karl Marx, 'Debates on the Law on Thefts of Wood' (*Marxists Internet Archive*)

<<https://marxists.architexturez.net/archive/marx/works/1842/10/25.htm>> accessed 4 November 2023

⁹⁰³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 506

enclosure of common land into private property accelerated, legislation began to protect this property.⁹⁰⁴

9 George I c.22, better known as the 'Waltham Black Act', of 1723 was the most egregious example of this. The Black Act (and the series of acts that renewed it⁹⁰⁵), which established a new criminal code in England⁹⁰⁶ based heavily upon capital punishment,⁹⁰⁷ emerged in the context of a struggle between private property of landowners and the communal property of peasants. That a new criminal code needed to be established shows that the conflict had moved past the violent removal of the peasantry from their lands and on to their attempts to reclaim it; private property could be protected by law only because it had become an established fact. Private property is now fully embedded in capitalist society, but it is important to note that it emerged through the violent overhaul of existing society, a project not accomplished but consolidated by law.

Thompson, whose views on law will be returned to in section 4, based his legal theory on a study of the Black Act.⁹⁰⁸ The Act, and subsequent judgements based upon it, created a new criminal code to tackle a supposed 'crime wave'⁹⁰⁹ carried out by masked marauders known

⁹⁰⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 508

⁹⁰⁵ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 206

⁹⁰⁶ Leon Radzinowicz, 'The Waltham Black Act: A Study of the Legislative Attitude Towards Crime in the Eighteenth Century' (1945) 9(1) Cambridge Law Journal 56, 72

⁹⁰⁷ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 23

⁹⁰⁸ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 21

⁹⁰⁹ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 196

as the 'Blacks'⁹¹⁰ (due to their disguising their faces with black marks⁹¹¹). In reality, the Black Act aimed to punish retaliatory incursions on property, which was increasingly taking the form of private property and becoming linked more generally with 'justice itself'.⁹¹²

Thompson recognised a strong connection between law and capitalism;⁹¹³ he took issue with any analysis that treated law separately from the rest of society.⁹¹⁴ He clarified that he did not simply mean legal institutions, which may be vulnerable to elite capture, or legal personnel, who have long been attacked for their overlap with the ruling classes,⁹¹⁵ but also the internal 'logic' of the law and its ideological function.⁹¹⁶ He noted that, with reference to the Black Act, the increasingly dominant Whig party (strongly linked to the emerging capitalist class) were able to create law and adapt existing legal 'forms' in order to institutionalise its own property rights; in other words, they did this not by capturing institutions or assimilating with the judiciary but through the use of the law's logic and its ideological function.⁹¹⁷

Most importantly, Thompson observed that this evolving use of law was strongly linked to economic changes, changes to the relations of production, leading to long-established customs coming into direct conflict with the law itself (as mentioned with regard to customary

⁹¹⁰ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 270

⁹¹¹ Leon Radzinowicz, 'The Waltham Black Act: A Study of the Legislative Attitude Towards Crime in the Eighteenth Century' (1945) 9(1) Cambridge Law Journal 56, 56

⁹¹² E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 197

⁹¹³ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 259

⁹¹⁴ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 260

⁹¹⁵ J.A.G. Griffith, *The Politics of the Judiciary* (first published 1977, Fontana Press 1985), 25-28

⁹¹⁶ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 260

⁹¹⁷ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 260-261

rights of Prussian peasants). The law also came to legitimate these changes as they became established, and therefore also legitimate ruling class power⁹¹⁸. Law did not do this, however, by serving as a 'pliant medium' for ruling class power, as modern 'structural' Marxism may suggest;⁹¹⁹ it expressed (capitalist) social relations through its own logic, through the 'forms' of law,⁹²⁰ allowing law to maintain the appearance of being universal and equitable, without which its ideological function would be useless.⁹²¹

For this purpose, it was also important for the ascendant ruling class to present itself as bound by the rule of law,⁹²² both for to placate the masses and consolidate their victory over aristocratic rule.⁹²³ This produces 'hegemonic effects' that all of society is subject to, capitalists, labourers, and the other classes alike.⁹²⁴ Thompson's work on the Black Act provides concrete evidence for the material and ideological support that law's logic lends to the capitalist class.

3.3.4 Law, Property, and Society: Locke reconsidered.

⁹¹⁸ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 261

⁹¹⁹ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 259

⁹²⁰ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 262

⁹²¹ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 262-263

⁹²² E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 263

⁹²³ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 264

⁹²⁴ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 23

It may be worth remembering Locke's views on the origins of both private property and liberal capitalist society; he saw an intimate connection between the two, seeing the protection of property as the 'chief end' of escaping the state of nature through a social contract that created a public power to protect property (and liberty). Locke's version painted this as a far more peaceful transition than it actually was, but the invocation of the state of nature also obscured the historical specificity of private property.⁹²⁵

Locke had linked the law to property, seeing political power as the right to make laws 'for the regulating and preserving' of property and employing force to do so 'for the public good'.⁹²⁶ He believed that as individuals 'give up the 'freedom and equality' of the state of nature and enter society only because their property is 'uncertain' and 'unsafe',⁹²⁷ legislative power is governed by the 'fundamental natural law' of the 'preservation of society'.⁹²⁸ This would require the use of 'promulgated, standing laws, and known authorised judges'.⁹²⁹ This suggests a link between property, law, and the very foundation of society.

⁹²⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 123-124

⁹²⁶ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 101

⁹²⁷ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 154

⁹²⁸ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 158

⁹²⁹ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 160

Pashukanis recognised that mainstream 'jurists' conceive private property in a specific, 'negative' way, as a universal 'prohibition' directed towards everyone except the one who,⁹³⁰ in Locke's terms, has 'mixed' his labour with it. This does not explain why property rights would become legal rights; it was only when domestic exchange began that this would become necessary,⁹³¹ as it is in exchange that property rights materialise.⁹³² Pashukanis thus recognised the 'dialectical' aspect of private property, that private property does not merely atomise people as individual owners protecting their appropriation from others but also unites them in exchange.⁹³³ Being able to be recognised as a property right-holder⁹³⁴ is the other important aspect of private property.⁹³⁵

Presenting property as the chief end of society takes on a different character when presented in this dialectical fashion, appearing less as a primitive and rational transition and more as a specific legal process. As Pashukanis points out, a legal relationship will not emerge between a person and an item from nature that he has mixed his labour with; the relationship of a 'person' to a 'thing' is 'totally devoid of legal significance'.⁹³⁶ Locke's premise of a 'natural state' with 'freedom to infinity', Pashukanis pointed out, corresponds 'exactly' to commodity

⁹³⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 122

⁹³¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 122-123

⁹³² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 123

⁹³³ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 134

⁹³⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 125

⁹³⁵ C.J. Arthur, 'Towards a Materialist Theory of Law' (1977) 7(1) *Journal of Socialist Theory* 31, 37

⁹³⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 122

production and exchange.⁹³⁷ Locke was therefore not describing the origin of society from the state of nature but the establishment of the legal protection of private property and commodity exchange (i.e., 'capitalist legality'). Locke's social contract was not to establish a democratic political society but the legal and political framework for a market society.

As alluded to in the previous chapter, liberalism has an inherent contradiction between the emphasis upon individual autonomy and the need to counterbalance said autonomy against the need to maintain order for the common good.⁹³⁸ Locke's formulation places the protection of property at the centre of that contradiction; maintaining order means maintaining property as the basis of law, which will allow individuals to engage in the free exchange of that property. As Pashukanis further noted, as commodity exchange is universalised, the conditions for legal subjectivity also emerged. Those conditions are 'social organisation', a society organised into classes, 'culminating' in the 'well-ordered bourgeois state'.⁹³⁹ This, then, explains the necessity of State power to maintain that order. He called the State the 'highest form of expression' of class organisation,⁹⁴⁰ but clarifies that the State only enforces the law once the necessary 'organically-based' relations have been established.⁹⁴¹ In other words, as explained earlier, the law (enforced by the State) only protects property once it has become a reality.

⁹³⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 114

⁹³⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 87

⁹³⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 115

⁹⁴⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 118

⁹⁴¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 119

Before ending this section, a brief clarification is needed. Although this may seem obvious, the commodity-form theory of law does not argue that property law is the basis of law, that the law of property enjoys pre-eminence over contract, tort, etc. It also does not argue that the law mechanistically protects private property over all competing interests. Rather, it is that private property, and crucially its free exchange, lays the basis for legal subjectivity and civil law, the basis of modern law. When, throughout this thesis, private property is referred to as a premise of capitalism, this does not refer to private property in the sense Locke attempted to present it; it is not being argued that capitalism requires the law to protect each individual's property from others and the State/government. Instead, it means that the law is based upon recognising each legal subject as a potential holder of property rights and therefore as an abstract individual. References to the protection of private property can therefore extend to the mere upholding of the law itself and the protection of the status of money. By upholding law and money, State power upholds private property (and its exchange as commodities).

3.4 The Rule of Law

3.4.1 The rule of law: an unqualified human good?

It should now be asked how this Marxist critique of law relates to mainstream theories of law. The idea of the rule of law is central to liberalism. The Constitutional Reform Act 2005⁹⁴²

⁹⁴² Constitutional Reform Act 2005, Article 1

that codified that rule of law in Britain indicates that it is a long-established principle.⁹⁴³

Brian Tamanaha suggests that the rule of law in the modern sense is a specifically liberal phenomenon; it is typically used to denote democracy, individual human rights, and formal legality, which 'cluster together' in liberal democracies as a 'unified complementary package'.⁹⁴⁴ As Tamanaha points out, the Conference of Security and Cooperation in Europe essentially confirmed this view in 1990 (i.e., after the Cold War) when it suggested that the rule of law did not merely mean formal legality, or rule by law, but individual legal 'justice' (i.e., legal rights) and democracy.⁹⁴⁵

Tamanaha himself gave a comprehensive definition of the rule of law. Along with 'formal legality',⁹⁴⁶ it included two other 'cluster(s)'; legal limits on government power,⁹⁴⁷ and the rule of law, not man.⁹⁴⁸ British constitutional theorist A.V. Dicey's conception of rule of law, or the 'supremacy' of the law,⁹⁴⁹ was similar to Tamanaha's. He argued that it consisted of three principles. First, that no 'man' is punishable except due to a 'breach' of the law, contrasted to arbitrary systems of government⁹⁵⁰ (i.e., formal legality). Second, that no one is above the law

⁹⁴³ Constitutional Reform Act 2005, Article 1(a)

⁹⁴⁴ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 110

⁹⁴⁵ Ernest S Easterly, 'The Rule of Law and the New World Order' (1995) 22 Southern University Law Review 161, 165-166

⁹⁴⁶ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 139

⁹⁴⁷ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 137

⁹⁴⁸ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 140

⁹⁴⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund Inc 1982), 107

⁹⁵⁰ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund Inc 1982), 110

and that everyone is subject to the law⁹⁵¹ (i.e., legal 'equality'); and that constitutional principles should be derived from the common law and not vice-versa⁹⁵² (similar if not identical to the rule of law, not man).

Thomas Bingham defined the 'core' of the rule of law as the idea that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect...in the future and publicly administered by courts'.⁹⁵³ Again, legal equality is evident in this definition, as is formal legality. Lon Fuller slightly departs from these definitions by insisting that the rule of law be viewed as a 'purposive enterprise'⁹⁵⁴ of subjecting human conduct to the guidance and control of general rules,⁹⁵⁵ but as will be seen in the final subsection, his belief that law be subject to requirements of internal morality takes him closer to these other definitions.⁹⁵⁶ Mainstream definitions of the rule of law tend to coalesce around some combination of the overlapping principles of formal legality, legal equality, rule by law, and legal limitations of government discretion.

⁹⁵¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund Inc 1982), 114

⁹⁵² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund Inc 1982), 115

⁹⁵³ Thomas Bingham, 'Human Rights' in Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 47

⁹⁵⁴ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 145

⁹⁵⁵ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 146

⁹⁵⁶ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 209-210

Rule by law in contradistinction to arbitrary governance has long enjoyed widespread acceptance. Aristotle suggested that the rule of law was preferable to that of an individual, and that even where individuals govern, they should be mere ‘guardians’ of the law⁹⁵⁷ (this is also suggestive of legal limits on government). Bingham adopted it as the second of his eight ‘subrules’ within the rule of law’.⁹⁵⁸ As alluded to in Chapter 2, legal limits upon government are fundamental to liberal democracy and liberalism, in accordance with the political limits set by the separation of powers, human rights, etc. The power to uphold the rule of law lies with the judiciary.⁹⁵⁹ who generally exercise judicial review to examine the actions of public bodies on the grounds of illegality, irrationality, procedural impropriety, or proportionality.⁹⁶⁰ The closely-related requirements of rule by law and limited government continue to enjoy high levels of acceptance.

Legal equality also enjoys high levels of acceptance: that laws should apply equally to all was Bingham’s third principle.⁹⁶¹ Hayek, who explicitly advocated for a society ruled as a ‘nomocracy’, a government ruled by law,⁹⁶² rather than a democracy, also believed it to be important that the law apply equally to everyone.⁹⁶³ Marxists of course had a markedly different take on legal equality. Thompson noted that it was an ‘essential precondition’ that law at least ‘display’ legal equality⁹⁶⁴ despite his recognition of law’s relationship to capitalist

⁹⁵⁷ Aristotle, *Politics* (first published 350 BCE, Informotions 2000), 55

⁹⁵⁸ Thomas Bingham, ‘Human Rights’ in Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 51

⁹⁵⁹ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 123

⁹⁶⁰ Council of Civil Service Unions and Others v Minister for the Civil Service, [1985] AC 374, 410

⁹⁶¹ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 58

⁹⁶² F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 29

⁹⁶³ F.A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Taylor and Francis 1982), 82

⁹⁶⁴ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 263

class dynamics. Pashukanis presumably would have agreed with this position; it was, after all, the formal equality of the property owner that made legal fetishism possible in capitalist society. Legal equality was both a necessity but also a severe limitation in an unequal capitalist society.

Formal legality, as the third subsection of this section will return to, has led to considerable debate. However, this debate has mostly revolved around the sufficiency of formal legality on its own,⁹⁶⁵ largely conducted through the ‘formal’ vs ‘substantive’ theories of the rule of law, rather than legality itself. As mentioned at the start of this section, the rule of law is often assumed to include other substantive goods, like protection of rights. In generally agreeing on the importance of legality, equality, rule by law, and limitations on government, perhaps the most universal convergence in mainstream legal theory is on whether or not law is a good thing.

None of the theorists mentioned seem to even countenance the wisdom of subjecting society to the rule of law. Tamanaha, for example, believed that each of his three clusters was open to abuse but nevertheless remained upbeat about the rule of law in general, referring both to its ‘virtue’ and to his ‘hope’ that it prevail.⁹⁶⁶ Even Thompson was not immune from this; he argued, based on his work on the Black Act, that whilst law does serve to disguise the ‘realities’ of power in liberal society, it does, at least to some extent, curb

⁹⁶⁵ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 102

⁹⁶⁶ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 140-141

that power and should therefore be regarded as a 'true and important achievement' of the 'bourgeoisie' of 'universal significance'.⁹⁶⁷ Although he conceded that the 'equity' of the law was a 'sham', that it was a potential 'instrument of imperialism', it was nevertheless in his view a 'unqualified human good' that was essential to society.⁹⁶⁸

This view is controversial in Marxist circles.⁹⁶⁹ Marxists generally believe that as the State serves the capitalist class, it must be abolished. In the event of the 'socialist' revolution of the working class, the bourgeois State will, per Lenin, no longer be needed and will wither away.⁹⁷⁰ In a similar manner, Pashukanis believed that law would wither away after capitalism was replaced by communism, after having briefly survived in the 'transition period' between capitalism and communism⁹⁷¹ that will be returned to briefly in the epilogue. This was a position he derived from Marx/⁹⁷² There was, in Pashukanis' view, nothing to suggest that 'there must always be laws and courts' and no reason to desire that this be the case; transcending the legal form and all of its 'remnants' was contemporaneous with overcoming bourgeois society.⁹⁷³

⁹⁶⁷ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 265

⁹⁶⁸ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 266

⁹⁶⁹ Robert Knox, 'Law' in Beverley Skeggs, Sara R. Farris, Alberto Toscano - Goldsmiths, and Svenja Bromberg (eds) *The SAGE Handbook of Marxism* (SAGE Publications Ltd 2021), 888

⁹⁷⁰ V I Lenin, *State and Revolution: The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (First edition 1918, Haymarket Books 2014), 52

⁹⁷¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 133

⁹⁷² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 63

⁹⁷³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 64

Legal regulation, in Pashukanis' view, was inherently based upon conflicting private interests;⁹⁷⁴ as mentioned earlier, exchange relations become legal at the moment of dispute between property owners. He therefore contrasted law with technical regulation, which was instead based upon 'unity of purpose'. He explained that rules put in place in a healthcare system to facilitate healing the sick were technical, not legal;⁹⁷⁵ it follows that rules governing disputes between a surgeon and a patient over the standard would therefore be legal regulation. Only in the latter scenario do doctor and patient become subjects with rights and duties,⁹⁷⁶ and the lawyers should have nothing to do with the former scenario.⁹⁷⁷ There would be a degree of coercion involved in both legal and technical regulation, coercion being especially necessary, although not directly, in the recognition of private property,⁹⁷⁸ but it would be of a markedly different character.⁹⁷⁹

There is an uncomfortable relationship between the idea that law is an 'unqualified human good' that is necessary to prevent arbitrary rule and the view that law exists to regulate disputes between owners of property,⁹⁸⁰ presupposing a conflict, rather than unity of interests. This is not to argue that the rule of law is not a human good at all, but it should not

⁹⁷⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 81

⁹⁷⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 81

⁹⁷⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 82

⁹⁷⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 81

⁹⁷⁸ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 126

⁹⁷⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 81-82

⁹⁸⁰ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 264

be accepted out of hand that it is an 'unqualified' good. There appear to be significant limitations to law as an arena of struggle.

3.4.2 *The Rule of Law, liberalism, and capitalism*

There are several significant errors or deficiencies of mainstream conceptions of the rule of law, all of which, as mentioned, relate to a failure to conceive the relationship between law, property, and capitalism. The first of these relates to the origins of law. The origins of law tend to be articulated through the distinction between natural law theory and legal positivism.⁹⁸¹ Natural law theory⁹⁸² makes a distinction between law and 'true law' based on external standards like justice⁹⁸³ or 'reason'.⁹⁸⁴ Legal positivism is a position based upon the idea that law becomes law because it is the product of human activity.⁹⁸⁵ This often leads to the view that its legal status is linked to its being posited by a sovereign, an idea that can be traced back to Hobbes' belief that 'there is no law'⁹⁸⁶ without a sovereign. It is well exemplified by Walter Bagehot's conception of law as 'a rule imposed by human authority, capable of being altered by that authority when it likes, and in fact, so altered habitually.'⁹⁸⁷

⁹⁸¹ Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 22

⁹⁸² John Austin, *The Province of Jurisprudence Determined* (first published 1832, Cambridge University Press 1995), 130-131

⁹⁸³ Thom Brooks, *Hegel's Philosophy of Right* (John Wiley and Sons Inc 2012), 168

⁹⁸⁴ Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, George Routledge and Sons 1887), 66

⁹⁸⁵ Joseph Raz, 'Legal Positivism and the Sources of Law' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 37

⁹⁸⁶ Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, George Routledge and Sons 1887), 65

⁹⁸⁷ Walter Bagehot and Paul Smith (ed), *Bagehot: The English Constitution* (first published 1867, Cambridge University Press 2001), 172

Classical natural law was strongly linked both to God and to imaginary states of nature and so has declined in popularity.⁹⁸⁸ Natural law can also be linked to Hobbes, who identified natural laws, general rules derived from 'reason' that acted as restrictions on natural liberties.⁹⁸⁹ Hugo Grotius had identified a law of nature, a 'dictate of right reason', that was unalterable by either human will or by God,⁹⁹⁰ and had asserted a law of 'nature and of nations'⁹⁹¹ that has been identified as a nascent international law.⁹⁹² Thom Brooks has identified a 'modern natural law' school of thought that is less interested in identifying true law than in the conditions for calling a legal system just.⁹⁹³ Fuller strongly rejected positivism for (among other things) its rejection of a connection between law and morality⁹⁹⁴ in favour of a 'procedural' natural law.⁹⁹⁵ By this he meant that he was more interested in law's 'institutional practices'⁹⁹⁶ conforming to 'internal morality'⁹⁹⁷ than to substantive results.⁹⁹⁸

Positivistic and natural law theory, in practice, tend to collapse into each other.⁹⁹⁹ This is evident in the views of John L. Austin. Although he was a strong proponent of democracy, without

⁹⁸⁸ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 99

⁹⁸⁹ Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civil* (first published 1651, George Routledge and Sons 1887), 66

⁹⁹⁰ Hugo Grotius, *On the Law of War and Peace* (first published 1625, Jazzybee Verlage 2016), 4

⁹⁹¹ Hugo Grotius, *On the Law of War and Peace* (first published 1625, Jazzybee Verlage 2016), 213

⁹⁹² Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 119

⁹⁹³ Thom Brooks, *Hegel's Philosophy of Right* (John Wiley and Sons Inc 2012), 170

⁹⁹⁴ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 193

⁹⁹⁵ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 96

⁹⁹⁶ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 100

⁹⁹⁷ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 96

⁹⁹⁸ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 98

⁹⁹⁹ Eric Engle, 'A Primer on Left Legal Theory: Realism, Marxism, CLS & PoMo' (2010) 3(2) *The Crit* 64, 68

which a government would be an autocracy,¹⁰⁰⁰ he also believed that the principle of democracy (by which he meant merely elections) itself could not be entrusted to government, even a democratic government: it should instead be protected by what he called a 'higher-order' law, one that could not be overturned even by such a democratic government.¹⁰⁰¹ Laws argued that sovereignty lies not with Parliament but with the courts, being 'logically prior' to Parliament;¹⁰⁰² that Parliamentary sovereignty itself is controlled by a higher-order law kept by the courts.¹⁰⁰³ It is difficult to say whether this conception is positivistic or based upon natural law, whether law takes a legal form because it has been posited by courts as such or that law becomes law by conforming to this higher-order law, but the distinction is insignificant. The relationship between positive and natural law is analogous to the chicken and the egg.

Both natural law theory and legal positivism struggle to articulate why law emerged, and from where it derived its status as law. They seem to view law as a historically universal and necessary phenomenon that has gradually seen off challengers to become the 'preeminent legitimating political ideal' today.¹⁰⁰⁴ The ahistoricism of the state of nature has already been covered. If law is linked to being posited by 'authority', as Bagehot suggests, why was law so insignificant in feudal society, why did coercion never take legal form? If law is to be linked to rules with internal morality, per Fuller, what separates those rules from morality? Linking law

¹⁰⁰⁰ John Laws, 'Law and Democracy' (1995) Public Law 72, 85

¹⁰⁰¹ John Laws, 'Law and Democracy' (1995) Public Law 72, 85

¹⁰⁰² John Laws, 'Law and Democracy' (1995) Public Law 72, 86

¹⁰⁰³ John Laws, 'Law and Democracy' (1995) Public Law 72, 87

¹⁰⁰⁴ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 4

to the social relations of commodity exchange and arguing that the law achieves material existence is a more satisfying explanation than most mainstream jurists offer. As Pashukanis suggests, it is 'historically more accurate' to suggest that 'under certain conditions' (that being the free exchange of property) 'the regulation of social relations assumes a legal character'.¹⁰⁰⁵

Mainstream rule of law theory also tends to be overly focused upon public power, upon the State. The ideas that law needed to limit government power and that law, rather than man (i.e., rather than a monarch) should rule, for example, seems to be of a liberal character. Legal equality, especially when formulated as 'no one is above the law' seems as likely to be directed at aristocratic rule than relations between property owners. 'The rule of law has long been linked to liberty, going back to Montesquieu's suggestion that when 'men' form societies out of the (ahistorical) state of nature, they will lose their liberty and equality and only 'recover' it through law.¹⁰⁰⁶

As alluded to in the previous section, Locke's natural law theory was based upon similar principles. He argued that whilst individuals enjoyed 'natural liberty' in the state of nature, they would only enjoy 'liberty of man in society' if they were not subject to any legal restraint other than that established by proper legislative authority.¹⁰⁰⁷ Liberal conceptions of the rule of law tend to focus upon constraining State power, in accordance with

¹⁰⁰⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 79

¹⁰⁰⁶ Baron de Montesquieu, *The spirit of laws* (first published 1748, A Donaldson 1768), 148

¹⁰⁰⁷ John Locke, Ian Shapiro (ed), *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press 2003), 109-110

liberalism's fundamental tension between liberty and public power. Presumably this is why most mainstream theorists don't consider why law was less developed in pre-capitalist feudal (or absolutist) societies; this was presumably, in their eyes, merely a defect of those societies.

Mainstream legal theory also broadly does not articulate a theory of the connection between public or private law, between the State and private legal relations. Bingham famously set out eight principles that make up the rule of law. These included the requirements of rule by law,¹⁰⁰⁸ legal equality,¹⁰⁰⁹ and limited government powers,¹⁰¹⁰ and other requirements of formal legality like 'fair' trials,¹⁰¹¹ accessible and predictable laws, and compliance with international law.¹⁰¹² Along with his belief that the rule of law required protection of 'fundamental' human rights¹⁰¹³ Bingham only articulated one principle that envisaged private law: that means must be provided for resolving civil disputes.¹⁰¹⁴ Even this principal relates to public action regarding private law.

Fuller gets close to envisaging some connection between public and private law, suggesting that the 'very essence' of the rule of law is that government will apply rules 'previously declared as those to be followed' if a citizen is put in jail or a 'deed under which he claims title

¹⁰⁰⁸ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 60

¹⁰⁰⁹ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 68

¹⁰¹⁰ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 73

¹⁰¹¹ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 107

¹⁰¹² Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 130

¹⁰¹³ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 80

¹⁰¹⁴ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 101

to property' is declared invalid.¹⁰¹⁵ Even this, however, is focused upon government action, odd considering his insistence on maintaining a distinction between the 'purposive enterprise' of law rather than a 'fact of social authority or power'.¹⁰¹⁶ Fuller did correctly recognise that 'private economic activity' takes place within a legal framework based upon property and contract.¹⁰¹⁷ He also seemed to approve of Pashukanis' connection between law and exchange relations.¹⁰¹⁸

Fuller believed that law needed to comply with internal moral requirements (the 'internal morality' of law).¹⁰¹⁹ He, however, did not believe that private economic activity should be 'conducted in accordance' with this internal morality,¹⁰²⁰ that it should instead be conducted in accordance with a maximisation of profit.¹⁰²¹ In fairness, this seemed to be written in opposition to government interfering with pricing, wages, etc, or economic regulation related to the mixed post-war economy,¹⁰²² but this again representing a lapse back towards a focus upon government action rather than the economic and legal relations themselves.

These mainstream theories (with the possible exception of Fuller) have broadly underplayed the 'dialectical' aspect of law, the 'dichotomy' by which 'law is simultaneously the form of

¹⁰¹⁵ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 209-210

¹⁰¹⁶ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 145

¹⁰¹⁷ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 171

¹⁰¹⁸ Lon Fuller, 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory (1949) 47 Michigan Law Review 1157, 1164

¹⁰¹⁹ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 64

¹⁰²⁰ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 173

¹⁰²¹ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 171

¹⁰²² Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 171-172

external authoritarian regulation' and the 'form of subjective private autonomy'. This dichotomy can also be described as that between objective norms and subjective legal relations,¹⁰²³ or between objective and subjective law.¹⁰²⁴ The former is based upon 'absolute external coercion' and the other on private liberty.¹⁰²⁵ Mainstream legal theory tends to view the objective norm as the primary form of law but, referring to property, Pashukanis explains that to view property as arising from an obligation (i.e., to respect others property) would be to miss the dialectical aspect of property (as a right to exclude and to be mutually recognised as an owner).¹⁰²⁶ Therefore, it is subjective law that is 'primary law', corresponding to the 'economic fabric' of capitalist society.¹⁰²⁷ Analysing law as being primarily about obligation (and the State as the imposer of obligations) missed that obligation is merely the 'correlate' of the legal right of the subject.¹⁰²⁸ Legal rights and subjectivity are what distinguishes law from other forms of 'social system'.¹⁰²⁹

As Pashukanis further explains, the differentiation between subjective and objective law arises also as one between public and private law. This differentiation, explained by the capitalist separation of State and civil society, is not well understood by mainstream legal

¹⁰²³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 98

¹⁰²⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 102

¹⁰²⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 96-97

¹⁰²⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 98-99

¹⁰²⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 99

¹⁰²⁸ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 99-100

¹⁰²⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 100-101

theory, or what he calls 'dogmatic jurisprudence'. The public-private distinction is just as false in law as in politics (in that they are interdependent),¹⁰³⁰ but this does not mean that public and private law are the same;¹⁰³¹ the public-private divide of capitalist society is, after all, the result of a 'concrete' separation of State and private society. Public law, Pashukanis explains, exists only as a 'reflection' of the 'private-law form' in the form of the State,¹⁰³² only becoming law to the extent that it matches the 'framework of conflicting isolated private interests',¹⁰³³ acting as a 'guarantor' to the independent system of private exchange rights and relations that had already emerged.¹⁰³⁴ This is due to the concrete separation and contradiction of individual and social interests (i.e., the fundamental liberal contradiction between order and liberty) in capitalist society.¹⁰³⁵

The modern distinction between private and public law,¹⁰³⁶ therefore, was created by the emergence of purely private economic relations (of capitalism). This would lead public law to assume its 'juridical, public' character as the guarantor of the system.¹⁰³⁷ There was little need for economic relations to take legal form in earlier modes of production; the relations

¹⁰³⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 102

¹⁰³¹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 105

¹⁰³² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 103-104

¹⁰³³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 104

¹⁰³⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 137

¹⁰³⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 104

¹⁰³⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 136

¹⁰³⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 137

between slaves and masters, for example required no legal 'formulation', the rights of the feudal lord were simultaneously public/political and private/economic, whilst the *jus civile* (civil law) of Ancient Rome was neither entirely a public nor private legal system.¹⁰³⁸

Relations between lords and peasants were governed by common rights and privilege rather than law.¹⁰³⁹

It is therefore inadequate to analyse the rule of law as something that begins (and sometimes ends) with the State and public law. To treat the law as something that primarily concerns relations between the State and the individual, or the State's role in protecting individuals from each other, obscures that those relations only exist in support of the private economic and legal relations that arise from the production and exchange of commodities. To be subject to the rule of law means, on one hand, to be protected from arbitrary abuse of public power, but it also means to be forced into legal relations, including coercive relations, with other individuals. The rule of law, properly conceived, is a system for regulating the social relations linking the isolated holders of individual legal rights residing in a capitalist society. It is therefore a system aimed at upholding capitalist legality.

3.4.3 Law and Rights

¹⁰³⁸ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 136

¹⁰³⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 119

As mentioned, works like *On the Jewish Question* suggest that Marx was sceptical about rights, or at least the form of rights. The 'Rights of Man' disparaged in that essay seem to be the precursor to the modern civil rights that, as mentioned, have been enshrined in law to a far greater extent than social rights. Shoikhedbrod argues that Marx did not, however, wish to dispense with rights: he simply saw them as limited by the individuality of 'bourgeois civil society'.¹⁰⁴⁰ More specifically, it is, Marx noted, limited by the juridical personhood¹⁰⁴¹ of the legal form, derived from the liberty of the private property owner as described. He believed that it would be very difficult to overcome what is ultimately the centrality of the property regime of the mode of production, suggesting that 'right can never be higher than the economic structure of society'.¹⁰⁴² The legal rights protected in a particular society would therefore be influenced by its mode of production and economic relations, in accordance with historical materialism and Pashukanis' theory.

Marx therefore saw a complicated relationship between law and rights. Others, again in what will be referred to as mainstream legal theory, see a necessary connection between law and human rights. As mentioned, the most famous account is that of Bingham. He believed that the law had to protect 'fundamental' human rights in order to conform to the rule of law: he argued that the State that 'savagely represses or persecutes' its people would fall afoul of the rule of law even if the repression were prescribed by properly enacted law.¹⁰⁴³ Bingham

¹⁰⁴⁰ Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 62

¹⁰⁴¹ Karl Marx, *Grundrisse: Foundations of the critique of political economy* (first published 1939, Vintage Books 1973), 464-465

¹⁰⁴² Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 20

¹⁰⁴³ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 70

recognised that there was no 'universal consensus' on which human rights are to be considered fundamental, but perhaps unsurprisingly decided that those considered to be fundamental in Western countries (civil rights) are those that compatibility with the rule of law requires.¹⁰⁴⁴

Perhaps the preeminent modern rule of law debate is based upon whether law has any substantive requirements.¹⁰⁴⁵ Prominent among these is Bingham's distinction between his own 'thick', or substantive, conception of the rule of law and Joseph Raz's 'thin', formal/procedural conception.¹⁰⁴⁶ Formal conceptions of the rule of law (like Raz's) emphasise principles like the requirement that law-making be guided by a framework of 'general rules',¹⁰⁴⁷ an independent judiciary,¹⁰⁴⁸ judicial review of other State institutions for compliance with the rule of law,¹⁰⁴⁹ and that courts be 'easily' and readily accessible.¹⁰⁵⁰ In short, formal conceptions are more concerned with the sources of law¹⁰⁵¹ and the way law is made, is applied, and is used to guide behaviour.¹⁰⁵² Substantive conceptions are not so much

¹⁰⁴⁴ Thomas Bingham, 'Human Rights' in Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 70-71

¹⁰⁴⁵ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 91

¹⁰⁴⁶ Thomas Bingham, *The Rule of Law* (first published 2010, Penguin Books 2011), 69-70

¹⁰⁴⁷ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 215-216

¹⁰⁴⁸ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 216-217

¹⁰⁴⁹ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 217

¹⁰⁵⁰ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 217

¹⁰⁵¹ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 92

¹⁰⁵² Paul Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) 3 Public Law 467, 469

uninterested in formal requirements as seeking to move beyond them, imposing requirements regarding the content of the law,¹⁰⁵³ distinguishing between 'good' and 'bad' law.¹⁰⁵⁴ This leads to the formulation, referenced at the beginning of this section, that conflates the rule of law, rights, and democracy. The position of the International Commission of Jurists in 1959, which suggested that the 'function of the legislature ...under the Rule of Law is to create and maintain the conditions which will uphold...not only ...civil and political rights but also the establishment of the social, economic...conditions'¹⁰⁵⁵ is extremely substantive.

The Bingham-Raz debate closely tracks debates about the relationship between law and morality. John Austin took an extreme position, drawing a sharp distinction between law, laws set by 'men to men' as political superiors or as private persons 'in pursuance of legal rights', and morality, rules that did not fit those criteria.¹⁰⁵⁶ He argued that jurisprudence should only be concerned with the former 'without regard to their goodness or badness'.¹⁰⁵⁷ Law and morality were completely different things in his view. Fuller, as mentioned, advocated for law to conform to an inner morality. By this, he mostly meant that law would be moral if it conformed to various procedural requirements, that law be predictable, clear, discoverable,

¹⁰⁵³ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (first published 2004, Cambridge University Press 2009), 92

¹⁰⁵⁴ Paul Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) 3 Public Law 467, 467

¹⁰⁵⁵ International Commission of Jurists, 'The Rule of Law in a free society: a report on the International Congress of Jurists, New Delhi, India, January 5-10, 1959' (*International Commission of Jurists*, 1 October 1959) < <https://icj2.wpenginepowered.com/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf> > accessed 30 October 2023

¹⁰⁵⁶ John Austin, *The Province of Jurisprudence Determined* (first published 1832, Cambridge University Press 1995), 130-131

¹⁰⁵⁷ John Austin, *The Province of Jurisprudence Determined* (first published 1832, Cambridge University Press 1995), 132

not be retrospective, be capable of being followed, etc.¹⁰⁵⁸ This was therefore a variant of a thin conception.

The connection between thin and thick conceptions, however, becomes clear in Fuller's views on substantive aims of law. He took issue with HLA Hart's belief (another advocate of a thin conception) that legal morality was 'compatible with very great iniquity'.¹⁰⁵⁹ Along similar lines, Raz saw the rule of law as a purely negative value designed to 'minimise' the danger of law,¹⁰⁶⁰ equally capable of serving 'good' and 'bad' purposes.¹⁰⁶¹ This conceived the rule of law as more of an end in itself rather than as a means to some end,¹⁰⁶² like human rights; Raz argued that the rule of law was capable of being compatible with 'gross violations' of human rights.¹⁰⁶³

Fuller similarly did not believe in substantive aims of law,¹⁰⁶⁴ but did not believe that it would be possible to bring about gross violations of rights by legal means; he believed that, using South African apartheid law as an example, that such abuses would necessarily lead to departure from the internal morality of law.¹⁰⁶⁵ This seems to hint that procedural

¹⁰⁵⁸ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 39

¹⁰⁵⁹ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 159

¹⁰⁶⁰ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 224

¹⁰⁶¹ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 225

¹⁰⁶² Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 225-226

¹⁰⁶³ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 216

¹⁰⁶⁴ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 153

¹⁰⁶⁵ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 160

requirements will protect rights almost incidentally. Fuller saw law as a 'precondition for good law' and formal legality as a 'precondition' for law's justice.¹⁰⁶⁶ Compliance with the demands of formal legality would lead to justice.¹⁰⁶⁷

The thin and thick conceptions are brought even closer by John Tasioulas. He suggested that substantive conceptions ask too much of the law, attempting to present one value of legal institutions as constituting the 'totality' of values,¹⁰⁶⁸ expecting the rule of law to conform with democracy, human rights, etc.¹⁰⁶⁹ In support of this, he further argued that formal conceptions were not morally neutral, that suggesting otherwise implied that moral value could be entirely reduced to the 'ends' of law.¹⁰⁷⁰ He believed that formal conceptions are actually more likely to protect individual rights not only because governments that subject themselves to the rule of law are more generally likely to respect human rights,¹⁰⁷¹ but because the thin conception's 'formal and procedural requirements' naturally respected individual 'autonomy' and dignity, therefore respecting rights implicitly.¹⁰⁷² Arguing about whether the rule of law must go beyond formal legality to include protection of rights becomes irrelevant if formal legality itself protects rights.

¹⁰⁶⁶ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 157

¹⁰⁶⁷ Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969), 159

¹⁰⁶⁸ John Tasioulas, 'The Rule of Law' in John Tasioulas (ed) *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020), 118-119

¹⁰⁶⁹ John Tasioulas, 'The Rule of Law' in John Tasioulas (ed) *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020), 121

¹⁰⁷⁰ John Tasioulas, 'The Rule of Law' in John Tasioulas (ed) *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020), 126

¹⁰⁷¹ John Tasioulas, 'The Rule of Law' in John Tasioulas (ed) *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020), 127-128

¹⁰⁷² John Tasioulas, 'The Rule of Law' in John Tasioulas (ed) *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020), 121

The law may be able to, under certain circumstances, protect human rights, but this tells us little about which rights it protects or how and why it may protect rights. Neither ‘conception’ of law necessarily contemplates social rights, which certainly cannot be protected incidentally through formal legality as Fuller and Tasioulas envisage. Both conceptions seem unaware that categories beyond civil rights exist. They also seem unaware about why the law protects certain categories of rights.

Karel Vasak, describing modern human rights in the 1970s, formulated human rights into generations, naming civil rights as the first ‘generation’ and social rights as the second.¹⁰⁷³ It would seem obvious that a proponent of social rights might dispute this categorisation, with the idea of generations of rights themselves, but, on the contrary, they will instead be accepted, at least in a capitalist society. Again, Pashukanis noted the dialectical aspect of law, the distinction between objective and subjective law, or public and private law.¹⁰⁷⁴ The latter, in both cases, is ‘primary’.¹⁰⁷⁵ Therefore, it is subjective private rights that are primary rights, created by commodity exchange.¹⁰⁷⁶ It was mentioned in the third section that property rights only became legal once they were a material fact.

¹⁰⁷³ Karel Vasak, ‘A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights’ (1977) 11 UNESCO Courier 29, 29

¹⁰⁷⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 102

¹⁰⁷⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 99

¹⁰⁷⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 103

Due to this, there are material differences between these primary rights, those of the property owner, and subjective public rights. Public rights will only be effective if they manage to be 'adapted' to the 'framework' of economic exchange.¹⁰⁷⁷ These subjective public rights lack 'genuine roots', attempting to impose rights based upon the common interest into the sphere of individual autonomy.¹⁰⁷⁸ Liberal (capitalist) society is based upon an inherent contradiction between these common and individual interests.

The rights of the private property owner are therefore the primary form of rights. Private property rights themselves, not present in the Universal Declaration of Human Rights¹⁰⁷⁹ and only added to the European Convention on Human Rights in its first protocol,¹⁰⁸⁰ do not need to be protected as human rights as they are the basis of legal right. Civil rights, which essentially correspond to property rights (in their dual sense, both as prohibition and recognition), are therefore easier to protect through law. Social rights, on the other hand, enjoy at worst an ambiguous relationship with private property.¹⁰⁸¹ Property rights (and civil rights) arise from the individual relations of commodity production and exchange that form the basis of law. Social rights, which concern the distribution and provision of things that become private property, instead result from relations between the individual and the State.

¹⁰⁷⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 104

¹⁰⁷⁸ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 103

¹⁰⁷⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

¹⁰⁸⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), First Protocol, article 1

¹⁰⁸¹ David Beetham, *Democracy and Human Rights* (Polity Press 1999), 101

There are no naturally existing relations between the State and individuals with regard to provision of property, making social rights an awkward fit for law.

The generations of rights will be further discussed in Chapter 5, but it is important to recognise that there are material differences in social rights that render their relationship to the legal form ambiguous. This does not mean that social rights can never be implemented through law. However, it must be remembered that, as Pashukanis noted, effective law responds to either existing social relations or to relations that will soon exist. Advancing universal social rights, which implies a shift, if not the outright elimination of existing property relations, will be constrained as a result.

Conclusion:

The arguments advanced here about the limits of modern law in connection with economic and social rights may seem to lead to legal nihilism. It is not clear that significant changes, especially such a significant change as the introduction of an entirely new system of rights, can be accomplished within the (capitalist) confines of law. The shift from feudal-era property to private property was aided and eventually consolidated by law, but it was accomplished through violent political struggle (how much violence exactly varied across countries). Any sort of legal change would most likely have to be accompanied by some underlying social development to be effective. The purpose of this is not to advocate for such development but draw attention to law's limitations.

A persistent theme in this chapter has been the (illusory) separation of liberal society into spheres; the public/political, the private/economic, and especially the legal sphere, which spans the public and private. These separations, as the first half of this chapter covered, cause complications for law, especially human rights law. There are a wide range of economic and political factors, pressures, and imperatives that are rendered invisible by a failure to look at law as something existing within a capitalist society. The law even sometimes participates in the maintenance of the facade of these separations.

However, looking at the law itself, as the second half of this chapter did, reveals further limitations. The legal form originates in commodity exchange, which presupposed legal equality and individual autonomy. As commodity production and exchange become universal only in capitalist society, law becomes more prominent in capitalist society. However, the equality and autonomy offered by the law is not emancipatory but is rather only the formal and abstract equality and autonomy of the private property owner, obscuring genuine inequalities. The rights of the property owner, rights to exclude others and to be recognised as the owner (enabling exchange), are not created by law. Previous forms of property were eradicated, and private property established in their place.

Once private property was established, it was used to produce commodities, which became private property themselves, and exchanged for money, which represents private property. Labourers sold their labour power, their own property, to owners of private property, in return

for money. Once these arrangements became universal, a legal framework emerged to deal with disputes between these private property right holders. Private property is therefore both prior and central to both law and rights. Social rights represent an attempt to interfere with this legal framework but must do so through the form of private property exchange, which is also the legal form. This is not to disparage law; law remains a human 'good' but cannot be accepted as an 'unqualified human good'. The State upholds the class privileges of the capitalist class by upholding this framework, by upholding the rule of law (or enforcing capitalist legality, the legal protection of capitalist production and exchange).

Human rights attempt to impose internationally-formulated standards into domestic legal frameworks using the rule of law. Some of these rights will be easier to impose than others. Little has been said in these first 3 chapters about international law, but it will become the main focus of the thesis from this point forward, not so much because of a prioritisation of international law but more out of recognition of the struggle against capitalism's constraints upon law requiring a broader focus. The next chapter will investigate the connections between international law and capitalism.

Chapter 4: Human Rights, Democracy, and Capitalism: the Structural Indeterminacy of

International Law

The last chapter outlined the challenges with the legal implementation of social rights within a capitalist domestic legal framework, both coming from external political and economic processes and the legal form itself. This chapter will therefore attempt to explain the challenges of legally implementing rights in international law. These rights, after all, have received their most expansive elaboration in international legal documents like the ICESCR, the ESC, and the work of UN bodies like the CESCR and the Human Rights Council. Absent any meaningful domestic implementation, from a legal perspective, economic and social rights are mostly ‘international’ human rights.

This will require explaining the interaction between political and economic factors and international law (and rights) and clarifying a theory of international law itself. International law will be conceptualised not as a body of rules facilitating peaceful relations between nation-states but as a structurally indeterminate argumentative process based upon specific relations between capitalist nation-states. This chapter will partially maintain the focus upon the legal form, drawing upon Pashukanis’ transposition of his commodity form theory to the international legal form. It will also move beyond form to consider international law’s content. International law will be understood as a political process driven and shaped by capitalism and its gradual spread across the world in the past 150 years. The role that the standard of ‘civilisation’ has played in this process will also be explained.

With this in mind, social rights will be located within international law. First, it will be noted that the status of social rights in international law is that they are broadly recognised whilst remaining largely unimplemented (at least in the universal form envisaged by, say, the ICECSR). It will also be suggested that the social-democratic shift from progressive realisation to a combination of the basic-needs and indirect approaches also finds expression in international law. However, it will, perhaps surprisingly reach the conclusion that there is nothing wrong with international social rights legal sources, hard or soft; the problem is implementation, or actualisation.

Next, an analogy will be drawn with the attempt by the Third World to assert new legal principles that may well have served as an alternative approach to social rights. This will draw further attention the gap between the existence of rules of law and their actualisation. Third, it will be argued that the West has been able to actualise the social democratic approach to social rights (or made it difficult to move beyond it). It will be explained that this is a result of social rights emerging from within capitalism and overlapping with a paternalist welfarism towards the Third World that has allowed the West to define social rights. It will be noted that the premises of capitalism are unchallenged by this conception.

Finally, with reference to Thomas Franck's 'international law of democracy' (ILD) thesis,¹⁰⁸² it will be investigated whether the potential emergence of democracy as an international legal

¹⁰⁸² Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46

norm has reshaped modern international law into a progressive force. It will consider what this means for social rights: in short, it will explore whether it has created a political and legal order more conducive to actualising a more radical interpretation of social rights. Perhaps unsurprisingly, given the argument advanced in Chapter 2, it will be doubted that the international entrenchment of democracy will create the conditions for an anti-capitalist concept of social rights and it will instead be suggested that the ILD reproduces the imperialist dynamics of modern international law in a different form.

The first section of this chapter will clarify a few methodological and conceptual points, sketching out and defending the political process-based conception of international law that will be used in contrast to a rules-approach. Other broad doctrinal approaches like realism and idealism will also be distinguished and international law's indeterminacy will be explained. Pashukanis' theory of international law will be outlined and adopted for its convincing explanation of the origins and function of the international legal form.

The second section will continue building a (critical, Marxist) theory of international law, moving on to the structural constraints that constrain the indeterminate legal form. Imperialism will be explained (using Bolshevik theory) and the long, intertwined history of imperialism and international law will briefly be outlined for the purposes of establishing their mutual constitution.

The third section will reintroduce social rights, explaining that the problem with these rights in international law is not their elaboration but instead their actualisation. After explaining the unsuccessful attempt by the Third World to actualise an alternative vision for the international economic order, it will point towards an actualisation of a basic needs and indirect conception social rights by the West that does not challenge capitalism.

The fourth section will analyse of the ILD thesis, which will conclude, both that the ILD does not resolve the structural indeterminacy of international law and that it abstracts from the capitalist mode of production.

4.1 International law and Marxist legal methodology

4.1.1 International law: sovereignty vs human rights, rules vs process

The 'classical' view of international law is that it is a system 'composed solely of rules governing the relations between nation-states'.¹⁰⁸³ There are two aspects of this classical view that will be discussed here: the first of these is the idea that international law 'govern(s) the relations between nation-states'. I. A. Shearer broadened this view slightly, conceptualising it as law 'composed for its greater part' of principles and rules that states 'feel themselves bound to observe and therefore, do commonly observe' in their mutual relations, but which also including rules relating to the relations between international institutions, states, and

¹⁰⁸³ I. A. Shearer, *Starke's international law* (11th edition, Butterworth 1994), 3

individuals, as well as rules relating to individuals and non-state entities that are the 'concern' of the international community.¹⁰⁸⁴ Matthew Craven and Rose Parfitt went as far as to say that the idea that nation-states are the primary subjects of international law is an 'antiquated proposition'.¹⁰⁸⁵ This is an important distinction, if true, for human rights law: the classical view left no room for the individual to bring complaints against their domestic State, to international communities or the broader international community.

The lack of an overarching sovereign has led to the distinction between monism and dualism,¹⁰⁸⁶ the latter being the idea that international and domestic law are entirely separate systems of law. The State/nation-state provides a link between the two, although the State plays a much different role domestically, where it acts as sovereign, overseeing domestic legal relations between subjects. At the international level, it is a legal subject itself.¹⁰⁸⁷ This distinction has real legal effects: in countries operating a strictly dualist system domestic courts are only allowed to take international legal sources into account when authorised to do so by Parliament. In the United Kingdom, for example, ECHR obligations were not enforceable by domestic courts,¹⁰⁸⁸ until the Human Rights Act 1998 came into force and gave the courts this power.¹⁰⁸⁹

¹⁰⁸⁴ I. A. Shearer, *Starke's international law* (11th edition, Butterworth 1994), 3

¹⁰⁸⁵ Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm Evans (ed), *International Law* (5th edition, Oxford University Press 2018), 179-180

¹⁰⁸⁶ I. A. Shearer, *Starke's international law* (11th edition, Butterworth 1994), 64

¹⁰⁸⁷ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 33

¹⁰⁸⁸ *R v Ministry of Defence Ex parte Smith* [1996] Q.B. 517, 558

¹⁰⁸⁹ *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [23]

International legal obligations become directly effective in domestic law in monist States without legislation,¹⁰⁹⁰ but in practice, the distinction is not as wide as it appears. Depending upon the exact constitutional arrangements, the process by which a national government accepts international legal obligations, say by entering a treaty, is similar to the procedure in a dualist system. Many monist countries require treaties to be approved by the legislature and make its provisions publicly accessible.¹⁰⁹¹ Furthermore, nation-states contribute to the creation of international legal agreements, can make reservations and in some cases derogations from their obligations, and may simply refuse to accept certain legal obligations.

Thus, the decline of nation-states as primary legal subjects has probably been overstated. International rights obligations largely concern the relations between States and individuals within its jurisdiction, but only to the extent that the nation-state accepts these obligations. Human rights law concerns the limits of nation-state sovereignty, but it doesn't extend international legal sovereignty to individuals; rather, it brings these rights within the domestic legal system, where individuals instead have scope to use their juridical personhood to claim rights against the State.

¹⁰⁹⁰ European Commission for Democracy through law, 'Comments on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (*Council of Europe*, 30 September 2014) < [¹⁰⁹¹ European Commission for Democracy through law, 'Comments on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' \(*Council of Europe*, 30 September 2014\) < \[229\]\(https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2014\)050-e#:~:text=This%20theory%20starts%20from%20the,France%2C%20Germany%20and%20the%20Netherlands.&text=In%20some%20of%20the%20'monistic,within%20the%20domestic%20legal%20order.> accessed 28 November 2023</p>
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The other aspect of the classical definition of law concerns the ‘rules’ aspect of the definition. Conceiving international law as ‘rules’, what may be called a rule-approach, is the mainstream position on international law’s existence. It tends to see establishing rules to facilitate mutual relations¹⁰⁹² as the purpose of international law.¹⁰⁹³ The traditional view (or ‘classical’ doctrine¹⁰⁹⁴) of the sources of international law, codified by Article 38 of the Statute of the International Court of Justice (ICJ),¹⁰⁹⁵ lists conventions, custom, and (as a ‘subsidiary means’ of legal ‘determination’), judicial decisions and academic opinion, along with ‘general principles of law recognised by civilised nations’¹⁰⁹⁶ as legal sources. Sources of ‘soft’ law are not themselves considered to be sources of binding obligation, but they can develop into ‘hard’ law.¹⁰⁹⁷ A rule-approach to international law consists of evaluating legal arguments based upon their correctness, their conformity to these sources of law, in exclusion of politics. Both these sources and legal arguments based upon them are assumed to be apolitical.

Along with the rule-approach, Martti Koskenniemi identified three additional (broad)¹⁰⁹⁸ variants of modern international legal ‘doctrine’: a process-approach¹⁰⁹⁹, a legal idealist

¹⁰⁹² Michael Barton Akehurst, *A Modern Introduction to International Law* (first published 1970, Routledge 1992), 1

¹⁰⁹³ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 11

¹⁰⁹⁴ Akbar Rasulov, ‘From the Wells of Disappointment’: The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship’ (2021) 32(1) *European Journal of International Law* 17, 27

¹⁰⁹⁵ International Court of Justice, ‘Statute of the International Court of Justice’ (*International Court of Justice*) < <https://www.icj-cij.org/statute> > accessed 27 November 2023, article 38

¹⁰⁹⁶ International Court of Justice, ‘Statute of the International Court of Justice’ (*International Court of Justice*) < <https://www.icj-cij.org/statute> > accessed 27 November 2023, article 38

¹⁰⁹⁷ Gleider Hernandez, *International Law* (first published 2019, Oxford University Press 2022), 58

¹⁰⁹⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005) 185

¹⁰⁹⁹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 184

position, and legal realism (i.e., scepticism).¹¹⁰⁰ These positions tend to differ in their beliefs about the scope and normativity of international law.¹¹⁰¹ Legal idealism refers to the belief that international law will both bind nation-states and eventually conform to developments in 'international practice' as a 'matter of course'.¹¹⁰² It generally leads to an uncritical faith in international law,¹¹⁰³ and joins the rule-approach in seeing politics as external to law. The realist approach, exemplified by Hans Morgenthau, sees international law as weak, vague, and decentralised and therefore liable to be overtaken by power politics.¹¹⁰⁴ It sees law as subordinate to politics.

To these categories, which are a simplified rather than an exhaustive list, could be added deniers of international law. Again, international law differs from domestic law primarily through its lack of an overarching sovereign, which leaves it largely to nation-states (and any institutions they create, like the ICJ) to create, define, and enforce the law. Austin did not believe that law that had not been posited by a sovereign could be called law.¹¹⁰⁵ As international law is not posited by a sovereign in the form of a command to a subject, he did

¹¹⁰⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 185

¹¹⁰¹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005) 185

¹¹⁰² Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, 11

¹¹⁰³ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 25

¹¹⁰⁴ Hans J Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf 1948), 243-244

¹¹⁰⁵ John Austin, *The Province of Jurisprudence Determined* (first published 1832, Cambridge University Press 1995), 130

not believe that international law was law 'so-called', arguing instead that it is 'set by general opinion' and enforced by 'moral' rather than legal sanctions.¹¹⁰⁶

4.1.2 Process-approach and legal indeterminacy

Leaving aside idealism and realism for the time being, taking a rule-approach makes it difficult, notwithstanding the difficulties associated with interpreting rules existing in changing historical contexts,¹¹⁰⁷ to see what exactly makes international law legal in the absence of a universal sovereign. This is why some, like Rosalyn Higgins, prefer to conceive international law as a 'process' of decision-making rather than a set of rules.¹¹⁰⁸ She argued that a process-approach properly conceptualised the role of 'power' in international legal authority, in the sense that they intersect; law, she suggested, is the 'interlocking' of 'authority' and 'power'.¹¹⁰⁹ This also allowed for social and political factors to be considered and dealt with 'openly',¹¹¹⁰ helping to parry the realist insight about the prevalence of power politics in international relations. 'Rule-based' conceptions, Higgins noted, can lead to legal nihilism; being unable to understand the role that (power) politics, play in international law, and can lead to the realist view that power politics will always prevail over international law.¹¹¹¹

¹¹⁰⁶ John Austin, *The Province of Jurisprudence Determined* (first published 1832, Cambridge University Press 1995), 208

¹¹⁰⁷ Anne Orford, 'On international legal method' (2013) 1(1) *London Review of International Law* 166, 175-176

¹¹⁰⁸ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 3

¹¹⁰⁹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 4

¹¹¹⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 4-5

¹¹¹¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 19

This was, in her view, especially important as international law will often throw up choice between 'alternative norms' that may be equally applicable¹¹¹² (i.e., it is indeterminate, as will be returned to shortly) and that choosing between those norms may involve considerations of social and political factors.¹¹¹³ Higgins' process-approach can be contrasted to the traditional and mainstream 'rule-approach' to international law. Traditional approaches (both classical and modern) to international law often attempt to deny the connection between politics and law. In 1966, the ICJ suggested (in passing) that law exists to 'serve a social need' (that supposedly being relations between formally equal nation-states)¹¹¹⁴ but 'precisely for that reason it can do so only through and within the limits of its own discipline'.¹¹¹⁵ In other words, international law must exclude political, social, or other considerations, treating law as entirely distinct from politics and other categories. A process-approach helps to bridge this gap.

Higgins' process-approach will not be adopted unreservedly. As Higgins herself conceded, conceiving international law as a process rather than rules doesn't entirely answer the questions about where its binding force comes from and why nation-states feel compelled to comply with it.¹¹¹⁶ Her interpretation of the implications of a process-approach cannot be

¹¹¹² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 5-6

¹¹¹³ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 7

¹¹¹⁴ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 248

¹¹¹⁵ *South West Africa Cases* [1966] ICJ 6, 34

¹¹¹⁶ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 13

accepted either. Higgins believed that interpreting international law as a process opened up its progressive potential,¹¹¹⁷ allowing for a more decentralised view of international law, capable of taking into account state practice and decisions of 'all authorised decision-makers' rather than just the International Court of Justice (ICJ).¹¹¹⁸ This position left the role of politics insufficiently examined. Whilst the conception of international law as process will be adopted here, the idea that this necessarily leads to it being progressive points to a lack of understanding of how and why politics interacts with international law.

Before moving on to consider the politics-law relationship more clearly, Higgins' suggestion that international law is indeterminate must be unpicked. In the absence of an overarching sovereign that holds a 'monopoly of interpretation',¹¹¹⁹ international law will always be necessarily indeterminate to some extent. Legal indeterminacy refers to the idea that a 'competent adjudicator' will be able to 'square a decision in favour of either side in any given lawsuit with the existing body of legal rules'.¹¹²⁰ In other words, the 'contradictory...nature of legal argument'¹¹²¹ means that there will be an endless range of plausible counter-arguments to every legal argument.

¹¹¹⁷ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 10

¹¹¹⁸ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 10-11

¹¹¹⁹ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 142

¹¹²⁰ Lawrence B Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 *University of Chicago Law Review* 462, 462

¹¹²¹ David Kennedy, 'Theses about International Law Discourse' (1980) 23 *German Yearbook of International Law* 353, 367-368

Adopting this definition of indeterminacy does not mean adopting a definition of legal argumentation based upon courts; as Ntina Tzouvala suggested, as much of international legal argumentation takes place outside of courts, there is little reason to frame arguments as such.¹¹²² The majority of international legal argumentation takes place between nation-states and will be decided by (one of) those nation-states. This renders international legal arguments much different from their domestic counterparts. Domestic law is equally political, in that it reflects the settlement of a political struggle, (i.e., over property relations, as seen in Chapter 3) but it is far more stable due to the existence of the modern State.

Koskenniemi famously highlighted the structural indeterminacy of international law, which he believed made it difficult to separate international law from politics and morality, in his *From Apology to Utopia*.¹¹²³ He argued that the contradiction between nation-state sovereignty and the goal of ensuring world order¹¹²⁴ led to international legal argument oscillating between ‘ascending’ arguments towards sovereignty and ‘descending’ arguments towards order¹¹²⁵ and is thus unable to overcome being either ‘apologist’ for the actions of nation-states or utopian in terms of imposing standards that are too far removed from those nation-state actions.¹¹²⁶ This means that all legal arguments, doctrines, and principles will necessarily fail

¹¹²² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020)

¹¹²³ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005)

¹¹²⁴ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 21

¹¹²⁵ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 59

¹¹²⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 60

to achieve both the concreteness and normativity¹¹²⁷ that international law requires to separate itself from politics.¹¹²⁸ He connected this contradiction to the contradictions of liberalism (alluded to in Chapter 3), namely the contradiction between liberalism's emphasis upon individual autonomy and the need to counterbalance said autonomy against the need to maintain order, in this case a world order.¹¹²⁹ Adopting this view, along with Higgins' process-approach, makes international law an indeterminate process for advancing arguments between nation-states.

Recognising international law as an indeterminate process leaves more room for political analysis. Robert Knox suggests that the indeterminacy of international law breaks legal argumentation into three stages: the 'legal argument', which, owing to indeterminacy, will be inconclusive, the 'real' (i.e., political) reasons, and the actualisation of the decision by one of the parties.¹¹³⁰ The rule-approach, as well as idealism, mostly focuses upon the first of these stages; the second and third stages are either rendered invisible or are taken as a matter of course. Legal realists presumably fixate upon the second and third stages.

4.1.3 The international legal form

¹¹²⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 68

¹¹²⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 58

¹¹²⁹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 87

¹¹³⁰ Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413, 427

The indeterminacy thesis places sovereignty at the heart of international law;¹¹³¹ all legal arguments are either made in defence of sovereignty or in opposition to it in the interests of common goals (those common goals may also be advanced by other nation-states in the interests of world order, or from below, by the domestic class struggle). International law, as mentioned, is less able to provide that order, to define that common interest, due to nation-state sovereignty itself. This centrality of sovereignty is another version of Pashukanis' insight, referred to in Chapter 3, that subjectivity is at the heart of law. Sovereignty and sovereign equality are widely considered to be fundamental to international law¹¹³² (despite the earlier-mentioned suggestions that nation-states are no longer the primary subjects of international law).

Accordingly, Pashukanis extended his commodity-form theory to international law. Again, his theory was based upon the idea that the law and the legal form conceptualised each individual as a formal and abstract property-owner. He argued that it similarly conceptualised the relations between international legal subjects (primarily nation-states) as being analogous to that of formal, abstract, private-property owners that are the subject of domestic law.¹¹³³

¹¹³¹ David Kennedy, 'Theses about International Law Discourse' (1980) 23 *German Yearbook of International Law* 353, 362

¹¹³² Charter of the United Nations, (adopted 24 October 1945), 1 UNTS XV, Article 2(1)

¹¹³³ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 176

Pashukanis rejected not only defining (modern) international law as a system of rules but also the premise that it existed to facilitate peaceful relations between nation-states;¹¹³⁴ instead, he called it the 'legal form' of the struggle between 'capitalist' nation-states. It therefore instead existed to create legal relations between specifically 'capitalist' nation-states. There was nothing specifically 'peaceful' about these relations, as they often took place through war, but he noted that they just as often appeared in a 'concealed form'.¹¹³⁵ As Mieville notes, this meant conceptualising international law not just as a process, as Higgins conceptualised it, but also as a relationship (i.e., between nation-states and other international legal subjects).¹¹³⁶ To the extent that it exists to facilitate the mutual relations of nation-states, it really serves to connect capitalist classes and so became necessary to facilitate the 'spread and development' of capitalism¹¹³⁷ through new rules and institutions based upon emergent private property.¹¹³⁸ In adopting this, international law now becomes an indeterminate process based upon relations between capitalist nation-states.

Like his domestic legal theory, covered at length in Chapter 3, Pashukanis located international law as emerging from the relations of exchange between nation-states as individual legal subjects, as a legal framework for facilitating external exchange. It reflected the 'conditions' of exchange relations, including 'equal rights of owners, the inviolability of ownership and the

¹¹³⁴ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 168-169

¹¹³⁵ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 169

¹¹³⁶ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 151

¹¹³⁷ Vladimir Ilyich Lenin, *Imperialism, the Highest Stage of Capitalism* (first published 1917, Foreign Language Press 2020), 76

¹¹³⁸ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 171-172

consequent compensations for damages' and 'freedom of contract'.¹¹³⁹ International law's origins were therefore also in private law.¹¹⁴⁰ Unlike domestic law, the public/private distinction explained in Chapter 3 is less meaningful or possibly even non-existent in international law,¹¹⁴¹ in the absence of a sovereign, public political relations between nation-states are also exchange relations.¹¹⁴² The separation of the public and private spheres that have been referred to extensively in earlier chapters thus does not apply neatly to international legal arguments.

Noting, as has been mentioned, the centrality of the nation-state in international law,¹¹⁴³ Pashukanis located the nation-state's origin in the development of the specifically capitalist State form that emerged in Europe between the Peace of Westphalia and the latter half of the 19th century¹¹⁴⁴ as a compromise between the emerging capitalist classes and the hierarchal feudal or aristocratic forms that predated capitalism.¹¹⁴⁵ In Pashukanis' view, it was only the bourgeois State, the modern capitalist State, that became the subject of modern international law.¹¹⁴⁶ Pashukanis was not arguing that international law only emerged with the emergence

¹¹³⁹ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 176

¹¹⁴⁰ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 177; Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 95

¹¹⁴¹ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 176

¹¹⁴² China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 137

¹¹⁴³ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 172

¹¹⁴⁴ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 173-174

¹¹⁴⁵ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 62

¹¹⁴⁶ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 174

of capitalism; some international legal ‘institutions’, he noted, like treaties and ambassadors, could be traced to antiquity,¹¹⁴⁷ although he saw these institutions as strongly linked to economic exchange between tribes, societies, etc,¹¹⁴⁸ it being necessary to have universally applicable law in order to regulate exchange relations.¹¹⁴⁹ Just as property relations domestically emerge organically and only take legal form in dispute, in mutual recognition of other owners, international law is a ‘concretisation’ of ‘economic and political relationships’.¹¹⁵⁰ These relations did not originally need to take legal form under colonisation, but as imperialist capitalism had resulted in an ‘unprecedented struggle’ and division of the globe between capitalist nations (as will be returned to in the next section), these relations increasingly became mediated by law.¹¹⁵¹ International law therefore also reached its full development under capitalism.

Pashukanis was careful to distinguish his Marxist theory of international law from legal ‘nihilism’ (i.e., realism), the denial of international law’s legal force and the framing of international law as simply consisting of nation-state power relations.¹¹⁵² He thought this to be a dangerous position: it obscured the fact that international law is, as mentioned above, a ‘continuation’ of political (and economic) relations between nation-states in a ‘special’ and

¹¹⁴⁷ Evgeny Pashukanis, ‘International Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 175

¹¹⁴⁸ Evgeny Pashukanis, ‘International Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 175-176

¹¹⁴⁹ Evgeny Pashukanis, ‘International Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 176-177

¹¹⁵⁰ Evgeny Pashukanis, ‘International Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 181

¹¹⁵¹ Evgeny Pashukanis, ‘International Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 179

¹¹⁵² Evgeny Pashukanis, ‘International Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 180

concrete form,¹¹⁵³ just as law is the particular form taken by economic relations under certain conditions domestically. Pashukanis' position also invalidated conceptions of law as a distinct sphere free of political forces.

Pashukanis identified the same problems with the formal abstract equality extended to nation-states as property owners as that granted to individuals in the domestic legal form. Just as domestic law granted individuals equal juridical personhood despite underlying inequality in property, sovereign equality of nation-states, a fundamental principle of international law,¹¹⁵⁴ abstracts from inequalities of 'power' between nation-states. This creates significant inequality in the means available to nation-states to respond to infringements of international law and/or exercise their legal rights, rendering some nation-states more 'objects' than subjects of international law,¹¹⁵⁵ especially important in the absence of an overarching sovereign.

Due to that absence, Pashukanis suggests that it is only the 'real balance of forces' that maintains the international legal form. This balance of forces will provide the context in which international legal questions are resolved and shifts in the balance may create problems for certain international legal norms. This, he noted, was taken to the extreme during the First

¹¹⁵³ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 180-181

¹¹⁵⁴ Charter of the United Nations, (adopted 24 October 1945), 1 UNTS XV, Article 2(1)

¹¹⁵⁵ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 178

World War, when many international legal norms were explicitly disregarded.¹¹⁵⁶ It was nation-states themselves that ensured that relations are carried out on the 'basis of equivalent exchange' (i.e., through law)¹¹⁵⁷ and therefore ensured its binding force.

As mentioned, Higgins saw a role for 'power' and coercion in international law, seeing law itself as the intersection of authority and power, but did not really problematise the relationship between law and power politics. Mieville, explicitly a follower of Pashukanis, has sought to explain this connection (through Pashukanis' work¹¹⁵⁸). He argues that the seeming 'paradox' between international law as a process and relationship between abstract equals and the 'imposition of power' through the international legal form is resolved by the coercive force of one of the subjects,¹¹⁵⁹ which Pashukanis referred to as 'self-help'.¹¹⁶⁰ Returning to the three stages of indeterminacy, the force, which need not be physical (e.g., sanctions)¹¹⁶¹ of one of the parties will actualise the legal (and political) position of the stronger party in the absence of the domestic State's 'monopoly on violence'.

This may seem to lead back to legal realism and power politics, but it is important to remember that the legal positions adopted and especially the 'real reasons' for the positions

¹¹⁵⁶ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 179

¹¹⁵⁷ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 179

¹¹⁵⁸ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 6

¹¹⁵⁹ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 136

¹¹⁶⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 134

¹¹⁶¹ Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413, 424-425

adopted will result from a complex range of forces. This includes domestic forces and concerns about both domestic and international legitimacy.¹¹⁶² Nation-states, even the most powerful, do not have unlimited ability to advance legal arguments; the next section will provide more detail. In addition, Pashukanis had recognised that custom, treaty,¹¹⁶³ and international legal decisions (i.e., traditional sources of international law) were legitimate sources, and that there were/are some principles of law that are universally accepted,¹¹⁶⁴ meaning that international law sometimes seems to function like a body of rules facilitating peaceful relations.

That being said, the international legal form obscures considerable inequality between nations. Although international law renders all of its subjects abstract equals, they will not be equal in their ability to engage in struggle, exert force, or apply sanction. This will mean that some nation-states will be more able to advance legal positions and punish others for infringements of norms.¹¹⁶⁵ The title of Mieville's book (*Between Equal Rights*) was based upon Marx's quote 'between equal rights, force decides' that will be referred to in Chapter 5. This idea remains applicable to international law¹¹⁶⁶ to some extent.

This raises the question of where exactly the line between legal and political action could be drawn: as Mieville notes, a nation-state could be said to be acting lawfully when it complied

¹¹⁶² Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413, 428

¹¹⁶³ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 181

¹¹⁶⁴ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 182

¹¹⁶⁵ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 140

¹¹⁶⁶ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 142

with a legal principle that enjoys universal acceptance, whereas the disregarding of such norms could be seen as an act of 'pure' politics.¹¹⁶⁷ As he accepted, international law's indeterminacy made such a determination difficult; it is impossible to define where law and politics begin and end.¹¹⁶⁸ This does not invalidate the legal form, although it may invalidate the possibility of talking about international law as a 'purely' legal phenomenon: the presence of political considerations does not mean that relations between nation-states are not legal relations. Per Mieville, as long as the relations in question are premised upon sovereign equality then they can be called legal relations¹¹⁶⁹.

It is not, however, enough to simply say that international law's content is filled by politics. International law is a process defined by the political struggle between nation-states, but as mentioned earlier, it was defined specifically by the struggle between 'capitalist' nation-states. More specifically, international law must be linked strongly to imperialism, by which is meant the uneven international development of capitalism through the competition between nation-states.¹¹⁷⁰ Imperialism and international law are not incidentally connected but are 'mutually constituting,'¹¹⁷¹ as the next section will explain.

4.2 Imperialism and international law: the standard of civilisation

¹¹⁶⁷ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 148

¹¹⁶⁸ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 149

¹¹⁶⁹ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 150

¹¹⁷⁰ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 219

¹¹⁷¹ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 226

4.2.1 The Bolsheviks: Imperialism and Uneven Development

In connecting international law to imperialism, a logical first step is to explain imperialism, which, as just mentioned, refers to the uneven development of capitalism through international competition between formally-equal nation-states. Soviet legal theory demonstrated an understanding that international law and imperialism were intimately linked, especially in the early years of the Union (1917-1924 approximately). Through figures like Lenin and Nikolai Buharkin, imperialism was presented as a 'special stage' of capitalism¹¹⁷² that is a consequence of its ongoing tendency to run into crises of overproduction and overaccumulation, necessitating the search for profitable opportunities in other regions¹¹⁷³ (as mentioned in Chapter 3). They also presented imperialism, as Buharkin recognised, as not merely 'the struggle between "national" states' but rather 'the struggle between the respective groups of the bourgeoisie'.¹¹⁷⁴

In accordance with the concept of primitive accumulation, capitalists relied, at least initially, upon State power to secure the conditions for capital accumulation in these new regions, making war and other less extreme forms of coercion necessary.¹¹⁷⁵ This forced nation-states, specifically capitalist nation-states, into direct competition over parts of the world; for

¹¹⁷² Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 39

¹¹⁷³ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 37-40

¹¹⁷⁴ Nikolai Bukharin, *Imperialism and World Economy* (first published 1917, Martin Lawrence Ltd 1917), 16

¹¹⁷⁵ Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 32

example, it was these competitive forces that drove the 'scramble for Africa' that led to the carving up of the continent by European powers¹¹⁷⁶ through the Berlin Conference of 1884-1885.¹¹⁷⁷ The scramble for Africa created private monopolies in Africa, backed by their respective nation-states.¹¹⁷⁸

It was in this context that Lenin's theory of imperialism was formulated; his theory was in response to two specific developments of capitalism in the late-19th and early-20th centuries: the rise of monopoly capitalism and the associated increasing hegemony of 'finance capital'.¹¹⁷⁹ Lenin recognised that the composition of the capitalist class had changed, that a separation had emerged between the owners of capital and the overseers of production;¹¹⁸⁰ industrial capital had merged with bank capital to create this 'finance capital'.¹¹⁸¹ Marx's analysis of the class conflict under capitalism had focused upon the exploitation of workers by the owners of the means of production in the form of capitalist private property; capitalist production had since become more socialised and 'interlocked' with State power.¹¹⁸²

Second, just as capital was becoming increasingly concentrated with nations, a similar process was occurring between nations. During the time period which he was analysing, about 80% of

¹¹⁷⁶ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 250-251

¹¹⁷⁷ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 252

¹¹⁷⁸ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 251

¹¹⁷⁹ Vladimir Ilyich Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 42

¹¹⁸⁰ Vladimir Ilyich Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 42

¹¹⁸¹ Vladimir Ilyich Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 66

¹¹⁸² Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 129

the world's finance capital was owned by four nations (the US, Britain, France, and Germany).¹¹⁸³ In accordance with uneven development, this had created a divide between these four capital-importing 'creditor' nations and the rest of the world, who were turned into capital-exporting 'debtor' nations.¹¹⁸⁴ This process, the Bolsheviks recognised, would not be a mutually beneficial exchange of capital and labour: this was because the 'logic' of imperialism is linked to a highly unequal global division of labour.¹¹⁸⁵ The requirements of capitalism would mean that some nation-states would export capital abroad, but these capital-importing nation-states needed to remain cheap sources of labour and materials rather than become capital-exporters themselves. Whilst capital accumulation breaks down boundaries between nation-states, it does so unequally and chaotically; this is referred to as 'uneven development'.

The concept of uneven development can be traced back to Bolshevik revolutionary Leon Trotsky's insight that the national 'peculiarities' of the development of capitalism should not be viewed in a vacuum but as a product of capitalism's global development.¹¹⁸⁶ In other words, no individual nation-state should be viewed or assessed in isolation from its position in the international (capitalist) system as capitalism develops in chaotic and unpredictable ways. Certain nations (or regions) are enriched at the expense of others and vice-versa as capitalist competition evolves. Capitalism's chaotic expansion also tends to take different forms in

¹¹⁸³ Vladimir Ilyich Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 43-44

¹¹⁸⁴ Vladimir Ilyich Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 76

¹¹⁸⁵ Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 39

¹¹⁸⁶ Leon Trotsky, *The Permanent Revolution* (first published 1930, Progress Publishers 1931)

different regions based upon local and transnational class dynamics and other particularities.¹¹⁸⁷

The Bolshevik theory of imperialism recognised that imperialism may allow a 'section' of the working class in the Western capitalist countries to benefit from the activity of their national capitalist class abroad. This 'wedded' those classes to imperialist capitalism and legitimated support given to national capitalist classes by democratic governments.¹¹⁸⁸ This commits these governments to pursuing economic growth as an imperative, an imperative that continues to operate today.¹¹⁸⁹ Importantly, this provided a link between capitalism domestically and imperialism abroad. and connected it to a political alliance between the European working classes and oppressed peoples in the colonies.¹¹⁹⁰ The Bolsheviks recognition of the connection between their own movement of colonialism will be returned to with regard to self-determination in Chapter 6.

The Bolshevik theories of imperialism and uneven development suggests an internationalist perspective to law (and to politics). Internationalism is exemplified by the Socialist International's Resolution adopted at the Seventh International Socialist Congress at Stuttgart

¹¹⁸⁷ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 29

¹¹⁸⁸ Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 39

¹¹⁸⁹ Sam Fleming, 'Labour's Rachel Reeves prepares for pitch to business in Davos' *Financial Times* (London, 16 January 2024)

¹¹⁹⁰ Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 35-36

in 1907, which sought to connect the proletarian class struggle to anti-militarism.¹¹⁹¹ Struggles for, say, social rights in one country need to be connected to the dynamics of global capitalism; winning the legal implementation of social rights in one country is a hollow victory if it is fuelled by exploitation abroad. Internationalism and imperialism justify viewing the international legal system as directly connected to the domestic legal system (and each legal system to the political and economic context).

There is a tendency to view international law as ‘antithetical’ to imperialism.¹¹⁹² An idealist perspective may view international law as frustrated in its attempts to facilitate peaceful relations between nations, whilst a rules-approach may call for more laws to be passed in an attempt to move beyond the imperialist legacy of international law.¹¹⁹³ However, imperialism has always been a ‘major governing principle’ of international law.¹¹⁹⁴ As will become clear later in this section, imperialism is not to be confused with colonialism; although international law enjoyed a connection with colonialism,¹¹⁹⁵ it found a way to be equally compatible with decolonisation.¹¹⁹⁶ Imperialism is just as much a legal project as it is political and economic.

¹¹⁹¹ The Socialist International, ‘Resolution adopted at the Seventh International Socialist Congress at Stuttgart’ in Sam Marcy, *The Bolsheviks and War: Lessons for today’s anti-war movement* (first published 1985, Marxists Internet Archive)

¹¹⁹² China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 268

¹¹⁹³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 76-77

¹¹⁹⁴ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 273

¹¹⁹⁵ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 268

¹¹⁹⁶ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 269-270

4.2.2 International Law, Imperialism, and the Standard of Civilisation

It has so far been established that international law is an indeterminate process based upon relations between formally-equal nation-states. It has also now been established that imperialism consists of the spread of capitalism through the competition of those nation-states. The form of economic relations conditions the indeterminate legal relations between nation-states. However, the structural constraints that imperialism places upon international law run slightly deeper than this. International law is not entirely reducible to the exchange of commodities; to suggest as such would be to obscure the historical contingency and specificity of capitalism.¹¹⁹⁷

International legal indeterminacy, linked by Koskenniemi to liberalism, can be located more specifically in capitalism/imperialism and its dominance of international law. Ntina Tzouvala has argued that the contradictory argumentative pattern of the standard of 'civilisation', which tends to oscillate between a 'logic of biology' and a 'logic of improvement', contributes heavily to international law's structural indeterminacy.¹¹⁹⁸ This argumentative pattern shapes and conditions indeterminate legal arguments.

The standard of civilisation operates, more specifically, as an argumentative structure and a 'juridical mechanism' for the '(asymmetrical) distribution of rights and duties' in international

¹¹⁹⁷ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 25

¹¹⁹⁸ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020)

law.¹¹⁹⁹ In other words, it serves to condition sovereignty and sovereign equality. This thesis is dependent upon a process-approach to international law, or, in Tzouvala's words, one that views it as an essentially indeterminate 'type of specialised language' for advancing arguments.¹²⁰⁰ International legal arguments, she argues, tend to share this argumentative structure based upon civilisation.¹²⁰¹ Although she accepted that it is not the only international legal argumentative structure, she argued that it was a dominant one.¹²⁰²

The standard of 'civilisation' has long been part of international law; as mentioned, Article 38 of the ICJ Statute listed legal principles of 'civilised' nations as sources of law. Although it is often thought to be a 'relic of a bygone era', Tzouvala argues that not only is it still a prevalent argumentative structure in international law, but that it results from international law itself being unable to overcome the contradictions of imperialism and capitalism. More specifically, these contradictions arise from global capitalism's tendency towards unlimited capital expansion¹²⁰³ and uneven development tends to alternatively create 'homogenisation' as well as 'deeply situated differentiation',¹²⁰⁴ which she links to the contradictory logics of

¹¹⁹⁹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 45

¹²⁰⁰ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 212

¹²⁰¹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 210

¹²⁰² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 220

¹²⁰³ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 20

¹²⁰⁴ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 168

improvement and biology.¹²⁰⁵ Capitalism, as Chapter 6 will examine in more detail, tends to universalise nation-state sovereignty but sets unequal terms on sovereignty.

By the logic of improvement, Tzouvala means that inclusion as a subject of international law (i.e., a sovereign) and the use of that subjectivity/sovereignty is made conditional upon nation-states adopting reforms strongly linked to 'capitalist modernity'.¹²⁰⁶ The promise of the logic of improvement is tempered by the logic of biology, which postpones the equal inclusion of nation-states (especially in the Third World) often based upon 'unchangeable characteristics' like race and culture,¹²⁰⁷ although biology should not, in this case, be read too narrowly. The standard of civilisation forces international legal argument to oscillate between the seemingly opposed poles¹²⁰⁸ of 'improvement' and biology', which map onto imperialism's contradictory tendencies to include and exclude, which coexist and even 'collapse into' each other without ever resolving.¹²⁰⁹

The concept of primitive accumulation, the pre-capitalist (State) action aiming to create the conditions required by capital, clarifies that changes to capital accumulation often produce violence and chaos across the world. This violence has historically tended to be perpetrated

¹²⁰⁵ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 45

¹²⁰⁶ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 45

¹²⁰⁷ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 45

¹²⁰⁸ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 210

¹²⁰⁹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 211

by the West at the expense of the Third World in the modern era of international law. This makes it very difficult for nations in the Third World to ever actually catch up with the West.

Capitalism homogenises in the demands it makes upon the form of the national State; as Pashukanis explained, the nation-state of modern international law is a capitalist State. Along similar lines, it also demands the existence of a private economic sphere (implying separation from a State), the prioritisation of capitalist private property, and the imperatives of capitalist competition. However, capitalism not only obscures underlying inequalities (i.e., through the legal form) but relies upon and perpetuates inequalities between nation-states just as it does between individuals domestically. It is thus linked both to the formation of legal content and the (gradual) universalisation of the legal form. This is an important addition to the indeterminacy of the legal form: international law's content is indeterminate, but this does not, as Higgins argued, necessarily decentralise international law.¹²¹⁰

4.2.3 Sovereignty, Property, and the Standard of Civilisation

By analysing civilisation as an argumentative structure rather than a 'legal' concept, it is possible to locate civilisation in international law long after it ceased to be referred to explicitly, rejecting the traditional narrative that it has been replaced by a more inclusive international legal order.¹²¹¹ As Tzouvala explains, civilisation was used to advance arguments

¹²¹⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 10-11

¹²¹¹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 84

about the bundles of rights, duties, privileges, and immunities, and the juridical relations that consequently ensued, which has implications for sovereignty and legal personality,¹²¹² which are central to international law.

The way that sovereignty has evolved alongside property in international law is a good example of the way that the standard of civilisation as a legal argumentative structure both includes and excludes in accordance with imperialism. Whilst the distinction between property and sovereignty, dates back to Ancient Rome (as *dominium* and *imperium*),¹²¹³ pre-capitalist, medieval international law was based upon the concept of ‘*res publica Christiana*’, which recognised the sovereignty only of Christian European nations,¹²¹⁴ making international law the preserve of ‘civilised and Christian’ nations,¹²¹⁵ and affording certain rights (like Grotius’ ‘just war’) exclusively to those sovereigns.¹²¹⁶ Sovereign equality played no part in this period,¹²¹⁷ which was defined not by capitalism and private property but mercantilism. Being based upon nation-state power rather than capitalist competition, there was little need to establish legal relations outside of the mercantilist nations.¹²¹⁸

¹²¹² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 74

¹²¹³ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 128

¹²¹⁴ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 173

¹²¹⁵ Henry Wheaton, *Elements of International Law* (first published 1836, Clarendon Press 1936), 11-12

¹²¹⁶ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 175

¹²¹⁷ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 189

¹²¹⁸ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 198-199

As capitalism became the dominant mode of production in Europe in the mid-to-late 19th century, 'civilisation' became the standard by which sovereignty was granted, including the civilised whilst excluding the uncivilised. The US was included in the international system after 1776 in recognition of its 'civilisation'.¹²¹⁹ The nation-state as the primary subject of international law also began to be universalised in the 19th century¹²²⁰ (in accordance with capitalism's consolidation), but initially remained the preserve of Western nations. Writing at this time period, Mill accordingly argued that uncivilised nations were not 'capable of' having their own nation-state,¹²²¹ and should be governed instead by a 'mother' country as part of an empire.¹²²²

The standard of civilisation could be located in the 19th century system of extraterritoriality, through which Western countries set up their own legal systems within the borders of other nation-states to protect their interests and nationals from having local law applied to them. The argumentative structure of civilisation was evident in debates around extraterritoriality: supposed differences between the imposing nation and the host nation justified its imposition, and its abolition was linked to the completion of (supposed) improvements that established the conditions for capitalism,¹²²³ namely the establishment of a centralised State structure, a private economic sphere, and the protection of (private) property rights (capitalist

¹²¹⁹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 51

¹²²⁰ Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century' (2004) 15(4) *Journal of World History* 445, 475

¹²²¹ John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 378

¹²²² John Stuart Mill, *Considerations on Representative Government* (First published 1861, Floating Press 2009), 384

¹²²³ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 54-55

legality). The relationship between property and sovereignty will be made much clearer in Chapter 6.

Private property was central to the redefinition of sovereignty. In the medieval and early-modern periods, marked by feudalism and absolutism domestically and later mercantilism abroad, sovereignty/jurisdiction and property were, broadly speaking, unified concepts.¹²²⁴ Economic power was linked to political power.¹²²⁵ As feudal property gradually gave way to private property, property became disconnected from political power.¹²²⁶ This led sovereignty to take a juridical/legal form (of an abstract and formally equal property-owner, per Pashukanis) rather than the explicitly political form of feudal sovereignty.¹²²⁷ This formally equal juridical sovereignty, of course, obscured genuine political, economic, etc, inequalities between nation-states.¹²²⁸

The standard of civilisation was thus explicitly used in the 19th century to differentiate between countries with an established State and legal system and were therefore entitled to the rights and duties associated with sovereignty.¹²²⁹ More specifically, sovereign nation-states needed centralised domestic State apparatuses that were separate from (civil) 'society', monopolised the legitimate use of force, and could reproduce capitalist relations through the

¹²²⁴ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 95-96

¹²²⁵ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 191

¹²²⁶ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 191

¹²²⁷ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 192

¹²²⁸ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 194-195

¹²²⁹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 61

application of law to all individuals (the upholding of private property through the rule of law, as explained in Chapter 3).¹²³⁰ The implementation of Western-influenced legal codes and the protection of free trade were therefore explicitly made justifications for extraterritoriality.¹²³¹

Those in semi-civilised Asian nations, including both State officials and lawyers, who sought to overthrow extraterritoriality were unwittingly forced to adopt the argumentative pattern of civilisation; Tzouvala notes that the logic of improvement in particular was invoked against extraterritoriality, implicitly accepting that implementing Western capitalist State and legal reforms was an 'improvement' (or inevitability), arguing alternatively at various times that the necessary 'improvements' had already been made and that further improvements relied upon the cessation of extraterritoriality.¹²³² The ending of extraterritoriality was constantly postponed, and its eventual decline came about more due to geopolitical events (especially the First World War) rather than the achievement of 'civilisation',¹²³³ even though those these nations broadly adopted the required reforms.¹²³⁴

As Tzouvala further points out, it was never clear how under international law, in the absence of an overarching, universal sovereign, how, and more importantly, by whom, the

¹²³⁰ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 63

¹²³¹ Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century' (2004) 15(4) *Journal of World History* 445, 465

¹²³² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 79-80

¹²³³ Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century' (2004) 15(4) *Journal of World History* 445, 465-466

¹²³⁴ Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century' (2004) 15(4) *Journal of World History* 445, 468

determination of the necessary reforms was to be made.¹²³⁵ She notes that the Western countries imposing extraterritoriality believed themselves to be the proper arbiters, noting that the UK Foreign Office had argued in 1899 that extraterritoriality should be maintained until Japanese law could be evaluated for compliance with Western standards.¹²³⁶ They would also adopt the logic of biology, 'challenging their place' within it rather than its premises: Japan justified the 1894 Sino-Japanese war on its superior level of civilisation to China.¹²³⁷

Semi-civilised nations like Japan, China, the Ottoman Empire, Siam/Thailand and Persia/Iran would gradually join the international system by the 1899 Conference at the Hague,¹²³⁸ but international law otherwise operated as a 'closed community', refusing to extend statehood beyond the 'civilised', by which, Mohammed Bedjaoui suggests, simply meant that other nations did not conform to European/Western 'canons and models' of statehood,¹²³⁹ enabling formal colonialism.¹²⁴⁰

Civilisation appeared in a different form (explicitly and implicitly) after the First World War, notably in the Mandate system established by Article 22 of the League of Nations Charter.¹²⁴¹

¹²³⁵ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 80-81

¹²³⁶ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 81

¹²³⁷ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 82

¹²³⁸ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 56; Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 56

¹²³⁹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 53

¹²⁴⁰ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 53-54

¹²⁴¹ United Nations Office at Geneva, 'The Covenant of the League of Nations' (*United Nations*) <<https://www.ungeneva.org/en/about/league-of-nations/covenant>> accessed 2 January 2024, Article 22

Article 22 supposedly created a ‘sacred trust of civilisation’ to support the ‘well-being and development’ of the people living in territories formerly occupied by Germany and the Ottoman Empire,¹²⁴² a responsibility that was to be entrusted to ‘advanced nations’ as ‘Mandatories’. The Western nations were apparently to guide these territories on behalf of civilisation. Those territories were divided according to their level of development: those who could be ‘provisionally’ recognised as nation-states (‘A’ mandates), those who needed to be administered by a Mandatory power (‘B’ mandates), and those that should be ruled under the law of a Mandatory as part of that Mandatory’s territory (‘C’ mandates).¹²⁴³ The League of Nations mandate system reproduced 19th century international lawyer James Lorimer’s (racist¹²⁴⁴) division of the peoples the world into the categories of the civilised, the barbarian (or semi-civilised) and the savage/uncivilised.¹²⁴⁵

After decolonisation began following the Second World War and the founding of the United Nations, sovereignty has gradually been expanded to (almost) all nations, civilised and ‘uncivilised’.¹²⁴⁶ The UN had 51 founding members in 1945, and there are currently 193 members.¹²⁴⁷ However, private property is now just as well established in international law as

¹²⁴² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 91

¹²⁴³ United Nations Office at Geneva, ‘The Covenant of the League of Nations’ (*United Nations*) < <https://www.un Geneva.org/en/about/league-of-nations/covenant> > accessed 2 January 2024, Article 22

¹²⁴⁴ Martti Koskenniemi, ‘Race, Hierarchy and International Law: Lorimer’s Legal Science’ (2016) 27(2) *European Journal of International Law* 415, 416

¹²⁴⁵ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 51

¹²⁴⁶ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 57

¹²⁴⁷ United Nations, ‘Growth in United Nations membership’ (*United Nations*) < <https://www.un.org/en/about-us/growth-in-un-membership> > accessed 29 November 2023

it is in domestic law, and its 'sanctity' has also been respected to a much greater degree than any human right,¹²⁴⁸ as will be returned to in Chapter 6.

The standard of civilisation structures international legal arguments around legal sovereignty and the associated rights and duties. This places limits on the indeterminacy of international legal argument, limiting and conditioning the range of available arguments. The standard was and still is constantly wielded against non-Western nations in order to alternatively dangle the carrot of (conditional) sovereignty, or more specifically the rights and duties associated with sovereignty, whilst constantly postponing its granting in accordance with imperialism's development. This, as noted, mostly locked those excluded nations into legal arguments based upon their inclusion in this system rather than challenging its premises and pressured them to adopt the prerequisites of capitalist modernity in order to do so. This makes sovereignty, its limits, the associated rights and duties, and its implications even more central to international law.

The first half of this chapter has attempted to clarify and advance a theory of international law. This theory, first of all, prefers the process-approach to a rule-approach. Although Koskeniemi has largely stepped away from the conclusions of his thesis,¹²⁴⁹ it will be accepted not only that international law is indeterminate but that it is impossible to separate it entirely from politics. Embracing this allows both utopianism and apologism to be escaped

¹²⁴⁸ L. Benjamin Ederington, 'Property as a Natural Institution: The Separation of Property from Sovereignty in International Law' (1997) 13(2) *American University International Law Review* 263, 264

¹²⁴⁹ Ntina Tzouvala, 'International Law and (the Critique of) Political Economy' (2022) 121(2) *South Atlantic Quarterly* 297, 299-300

from. Politics and political struggle between nation-states are at the centre of international law as a process. Political (and economic) 'coercion' is 'intrinsic' to law and international law is not only 'predicated' upon coercion but serves as an 'ideological obfuscation' of it,¹²⁵⁰ a continuation of it, as Pashukanis wrote, in a special form.

Pashukanis' belief that international law arises from economic relations between nation-states¹²⁵¹ will be accepted as well. The primary subjects of law remain these nation-states, although it must be clarified that these nation-states do not exist in a vacuum and will be subject to political and economic pressures related to capitalist competition, which can come from the working classes, from powerful corporations, or from markets. Sovereignty is central to international law. Finally, it will be accepted that international law's indeterminacy is a structured process that takes place within the confines of imperialism. The standard of civilisation's argumentative structure is the most prevalent of these structures. International law is, therefore, an indeterminate yet structured argumentative process taking place between formally equal capitalist nation-states, one that is primarily concerned with the rights, duties, and privileges of subjectivity/sovereignty.

4.3 Social Rights as International Human Rights

4.3.1 Social rights in international law: recognition and non-implementation

¹²⁵⁰ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 194

¹²⁵¹ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 176

As alluded to in Chapter 1, social rights became matters of international concern when they were implicitly referred to in Article 55 of the UN Charter, which referred to the UN's commitment to promoting 'higher standards of living, full employment' and 'conditions of economic and social progress', 'solutions' for economic, social, and health problems, and universal respect for human rights.¹²⁵² They were then included alongside civil rights in the UDHR and were given legal effect in the ICESCR after the politically charged division of human rights between the ICCPR and ICESCR.

In the meantime, they were also included in the ESC that had belatedly followed the ECHR. It was also explained that they, unlike ICCPR and ECHR rights, initially lacked a complaints system, relying mostly upon State reporting until the ESC's Additional Protocol was adopted in 1995¹²⁵³ and the ICESCR's Optional Protocol¹²⁵⁴ entered into force in 2013. In addition, it was noted that treaties on social rights, particularly the ICESCR, are weaker treaties than their counterparts covering civil rights. The distinction between the two categories of rights was supposedly rectified at the World Conference on Human Rights and the resulting Vienna Convention and Plan of Action, which stressed the indivisibility of human rights.¹²⁵⁵

¹²⁵² Charter of the United Nations, (adopted 24 October 1945), 1 UNTS XV, article 55

¹²⁵³ Council of Europe, 'The Charter's Treaty System' (*Council of Europe*) <<https://www.coe.int/en/web/european-social-charter/overview>> accessed 24 November 2023

¹²⁵⁴ Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/RES/63/117

¹²⁵⁵ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 409

This, led to social rights receiving legal recognition in international law (and in domestic law in rare cases) but nations have broadly rejected the idea of implementation. O'Connell sums this up as 'official recognition coupled with non-implementation'.¹²⁵⁶ As nation-states are so central to international law, it is the case that realising international rights of all types relies heavily upon domestic legal implementation of rights standards and remedies.¹²⁵⁷ This justifies an internationalist perspective on social rights; viewing international law in isolation from domestic law makes little sense. International human rights must receive domestic support to be effective.

There have been several attempts to articulate international social rights standards, building upon the hard law of the ICESCR, ESC, etc. One of such attempts was the Limburg Principles on the Implementation of the ICESCR, formulated by UN-based experts¹²⁵⁸ in 1986 that sought to 'emphasise' and formulate the 'rightful place' of such rights in international law.¹²⁵⁹ The Limburg Principles elaborated several principles that would later be adopted by the CESCR.¹²⁶⁰ This included the observation that the Article 2(1) obligation of progressive realisation did not mean that some rights could not be implemented immediately,¹²⁶¹ as mentioned in Chapter

¹²⁵⁶ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 23

¹²⁵⁷ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 23

¹²⁵⁸ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 451

¹²⁵⁹ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 32

¹²⁶⁰ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 32

¹²⁶¹ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 452

1, and the suggestion that progressive realisation did not justify delays to implementation.¹²⁶²

Finally, State parties were implored to ‘ensure respect for minimum subsistence rights’ for their populations¹²⁶³ i.e., the minimum core. No examples of what this might look like were given.

As mentioned in Chapter 1, the instructions on progressive realisation have mostly not been taken up, and non-retrogression, minimum core, and non-discrimination, have instead become the fundamental principles of international social rights law, leading to a basic-needs approach becoming predominant. Whilst they are good starting points, they do not make for a particularly ambitious conception of these rights. As was alluded to in the first chapter, and will be returned to in the third section, they make for a rights conception that capitalism can accommodate.

Ten years later, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, sought to ‘restate’ established principles,¹²⁶⁴ and clarify the violations of social rights in light of ‘alarming rates’ of decline in economic and social conditions.¹²⁶⁵ Also noted was a ‘trend’ towards a ‘reduction in the role’ of the State and an increased reliance upon markets

¹²⁶² Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 453

¹²⁶³ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 454

¹²⁶⁴ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012), 39

¹²⁶⁵ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 464

to increase these conditions.¹²⁶⁶ The underlying context, the transition from embedded liberalism to neoliberalism, was not mentioned.

A distinction was correctly made between States that are 'unwilling' and those that are unable to fulfil social rights obligations; as mentioned in Chapter 1, the ICESCR should have engaged with this further. However, whilst a number of potential violations are listed, including the adoption of legislation that is 'incompatible' with 'pre-existing' rights obligations and the failure to 'take into account' international legal obligations when entering international agreements/treaties,¹²⁶⁷ these seem to ignore that States that are unwilling have themselves ignored such obligations and therefore mostly act with little if any regard for them. More specifically, their societies run counter to (universal) social rights (as capital accumulation is prioritised over such rights.)

Social rights discourse seems to have forgotten about the debate about social rights at the UN and the opposition from the capitalist West. These sources of social rights standards often repeat that human rights are indivisible,¹²⁶⁸ ignoring the politically charged bifurcation of human rights, the social power of capital, and the forces of imperialism. A proper analysis would recognise violations as resulting from the constraints capital put upon the State's role

¹²⁶⁶ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 464-465

¹²⁶⁷ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 468-469

¹²⁶⁸ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 452; United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [8]

in providing rights rather than a simple failure to understand and act upon rights obligations that have never really been accepted.

The latest elaboration of social rights is the UN's Guiding Principles on Human Rights Impact Assessments of Economic Reforms. The primary thrust behind the principles was the idea that States ('and other creditors, including international financial institutions') carry out Human Rights Impact Assessments for economic reforms¹²⁶⁹ to 'review alternative policy options and analyse the impacts of proposed measures on human rights', in order to inform 'evidence-based policymaking'.¹²⁷⁰ The idea that economic reforms may negatively impact rights seems to recognise to some extent that these reforms are based more upon neoliberalism than embedded liberalism, albeit not consistently.

Principle 9, covering progressive realisation subject to available resources, asked States to consider targeting economic policies towards economic and social rights, and choose rights-friendly policies.¹²⁷¹ Principle 5 of the Guiding Principles suggested that in taking economic action, States should follow 'existing' international human rights law, including treaties, decisions and recommendations of treaty bodies, and any other interpretative tools.¹²⁷² The implication here is that nations accept universal social rights obligations and simply need

¹²⁶⁹ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [3.1]

¹²⁷⁰ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [17.1]

¹²⁷¹ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [9.1]

¹²⁷² United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [5.1]

instruction or reminder for their implementation. There didn't appear to be any recognition as to why a State may choose a rights-unfriendly policy, for example. There also doesn't seem to be any recognition that the neoliberal response to crisis is usually necessarily harsh on the citizenry (e.g., austerity).

Principle 17 covered the 'basis and purposes' of impact assessments, that being the possibility of economic crisis adversely affecting human rights and the need to consider whether economic policy is being implemented in accordance with rights. Principle 17 asked States to consider how policy decisions like budget cuts (i.e., austerity) and monetary policy would affect the population,¹²⁷³ and to balance human rights considerations against 'competing priorities'.¹²⁷⁴ Whilst this demonstrates some understanding of neoliberalism, the naivety of such principles is startling. As was explained in Chapter 3, the responses to economic crises are shaped and confined by the hegemony of capital. Asking nation-states, for example, to consider how monetary policy will affect the population is asinine; the entire point, as explained, of using monetary policy to resolve a crisis is to 'affect the population', through higher unemployment and wage restraint.

International legal discourse on social rights still seems to be maintaining progressive realisation towards full implementation as an effective duty. Whilst the shift from embedded liberalism to neoliberalism seems to have received some (belated) recognition, the

¹²⁷³ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [17.4]

¹²⁷⁴ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [17.6]

implications of this do not appear to be well understood. Article 2(1) of the ICESCR, imposing the obligation of progressive realisation subject to available resources, must be read in line with the (evolving) context. Whilst the Vienna Convention on the Law of Treaties suggests that treaties be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose',¹²⁷⁵ it is always a bit of a fallacy that the object and purpose will be simple. International legal texts and principles emerge in a particular context, regardless of the words in the text and the intentions of any drafters.¹²⁷⁶

Reading it in line with the evolution of capitalism, the shift from embedded liberalism and the decline of the Soviet Union means reading it as imposing a lesser burden on nation-states, and this seems to be how nation-states have interpreted it. Britain's official position is that these rights are 'statements of principle' which 'do not lend themselves to specific incorporation into legislation or to justiciable processes'.¹²⁷⁷ Canada argues slightly less provocatively that their rights obligations cannot be implemented quickly due to resource

¹²⁷⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 31

¹²⁷⁶ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 13

¹²⁷⁷ United Kingdom Joint Committee on Human Rights, '21st report: The Status of Economic, Social and Cultural Rights' (*UK Parliament*, 20 October 2004) <<https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/18302.htm>> accessed 7 October 2021, [81]

requirements and ‘technological constraints’.¹²⁷⁸ At the time of writing, Britain and Canada are the sixth and ninth largest economies in the world, respectively.¹²⁷⁹

Although the CESCR suggests that the ICESCR’s ‘raison d’être’ is to impose obligations of full realisation of rights,¹²⁸⁰ only a strictly textual analysis of social rights would lead to the conclusion that this is an obligation that enjoys settled international legal status. At best, nation-states accept obligations that are closer to the social-democratic basic-needs and indirect approach outlined in Chapter 1. Social rights do not suffer from a lack of legal ‘recognition’; there is nothing preventing nation-states from following the ICESCR, ESC, Guiding Principles, etc. The problem is implementation, which has been mostly rejected. Continued attempts to recognise and elaborate social rights through the traditional sources of international law, through a rule-approach, will probably not, on its own, be effective.

4.3.2 International Law and the NIEO

The idea that attempting to assert legal norms through rulemaking, through the traditional sources of international law needs further consideration to substantiate the conclusion reached at the end of the previous subsection. An analogy will be drawn with the Third World’s

¹²⁷⁸ Government of Canada, ‘Canada’s appearance at the United Nations committee on Economic, Social and Cultural Rights’ (*Government of Canada*, 2017) <<https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties/commitments-economic-social-cultural-rights/canada-appearance.html>> accessed 15 October 2021

¹²⁷⁹ Worldometer, ‘GDP by Country’ (*Worldometer*, 2023) <https://www.worldometers.info/gdp/gdp-by-country/#google_vignette> accessed 8 August 2024

¹²⁸⁰ United Nations Committee on Economic, Social, and Cultural Rights ‘General comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ (14 December 1990) UN Doc E/1991/23, [9]

attempt to bring about a New International Economic Order (NIEO). The NIEO was not necessarily being advanced in an attempt to advance social rights. What makes the NIEO a useful analogy, however, is its use of an alternative approach to norm creation that nonetheless followed a rule-approach.

As Algerian jurist Mohammed Bedjaoui explained, the 'Third World' expected to be included in international law,¹²⁸¹ but had little interest in being bound by rules to which they had not contributed. They therefore wished to use international law to advance their own rules and principles.¹²⁸² Organised as the G-77,¹²⁸³ they used their new majority in the UN General Assembly to advance resolutions¹²⁸⁴ like the 'Declaration on the Establishment of' the NIEO¹²⁸⁵ and the Charter of Economic Rights and Duties of States.¹²⁸⁶ The resolution announcing the NIEO recognised that the (relatively) newfound independence of countries in the Third World had not closed the gap with the West and so aimed to replace the existing international order with one that allowed for international cooperation on economic development that would benefit all nations.¹²⁸⁷ This project was mostly unsuccessful.¹²⁸⁸

¹²⁸¹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 133

¹²⁸² Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 134

¹²⁸³ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 74

¹²⁸⁴ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 219

¹²⁸⁵ United Nations General Assembly Resolution 3201 (S-VI) (1 May 1974) UN Doc A/RES/S-6/3201

¹²⁸⁶ United Nations General Assembly Resolution 3281 (XXIX) (12 December 1974) UN Doc A/RES/3281(XXIX)

¹²⁸⁷ United Nations General Assembly Resolution 3201 (S-VI) (1 May 1974) UN Doc A/RES/S-6/3201

¹²⁸⁸ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 236; c.f. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 81

This order was to be based upon principles including sovereign equality, self-determination, cooperation on the basis of equality, the right of each country to choose its economic system, sovereignty over natural resources, equitable terms of trade, reform of the international monetary system, and transfer of financial resources to the Global South under 'favourable' conditions, all in the hopes of 'accelerating the development of developing countries'.¹²⁸⁹ The G-77 would also create the Charter, hoping to establish norms governing economic relations between states that offered suitable protection for developing countries to facilitate the cooperation envisaged by the NIEO,¹²⁹⁰ and formulated many of the above-listed principles into rights and corresponding responsibilities. Rather than using purely hard law sources, like conventions, the Third World attempted to use soft law to establish new norms.¹²⁹¹

Bedjaoui justified the use of soft law (presumably in the hopes of gradually establishing binding norms) rather than treaty or custom. Although he referred to treaties as the 'pre-eminent method' for international legal norm creation, aside from being 'unwieldy' and time-consuming¹²⁹² and inequitable (in the sense that wealthier nations could devote more resources to treaty negotiation¹²⁹³), he also doubted whether treaties could ever be truly based upon consent or consensus of the entire international community.¹²⁹⁴ He believed that the use of consensus to indicate consent in the formation of custom was a 'major' 'concession'

¹²⁸⁹ United Nations General Assembly Resolution 3201 (S-VI) (1 May 1974) UN Doc A/RES/S-6/3201

¹²⁹⁰ UNGA Resolution 3281 (XXIX) (12 December 1974) UN Doc A/RES/3281(XXIX)

¹²⁹¹ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 118

¹²⁹² Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 138

¹²⁹³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 160-161

¹²⁹⁴ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 139

on the part of the Global South (as opposed to majority voting),¹²⁹⁵ as it would give an effective 'veto' to a 'recalcitrant minority',¹²⁹⁶ allowing certain nation-states to refuse to accept popular decisions¹²⁹⁷ and leave the articulation of new legal principles subject to effective defeat by reservations¹²⁹⁸ or contrary state practice. Nation-states hoping to advance new principles would either have to 'water down' their arguments or else be defeated by a lack of consent or consensus.¹²⁹⁹

The (traditional) sources of international law, as mentioned, includes international conventions like the ICESCR as well as norms that conform to nation-state custom. Mainstream international legal theory holds that legal norms attain binding force through *opinio juris* and practice¹³⁰⁰ and conventions and treaties can be evidence of both. Treaties and conventions are binding upon signatories by virtue of their having accepted legal obligations by signing,¹³⁰¹ although parts of them theoretically can bind non-signatories if they either codify existing customary law or its provisions become norms themselves through practice.¹³⁰²

¹²⁹⁵ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 167--168

¹²⁹⁶ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 172

¹²⁹⁷ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 171

¹²⁹⁸ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 171-172

¹²⁹⁹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 173

¹³⁰⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 34

¹³⁰¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 33

¹³⁰² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 31

One major issue with customary law is that international law was until relatively recently a closed community. This began to change after the Bolshevik October revolution in 1917. The Soviet Union, which in its previous (Tsarist) form had been an imperial power itself, was unwilling to comply with customary law on the assumption of treaty obligations and debts, having played no part in the formation of those rules, it having been (and still is¹³⁰³) custom for such obligations to continue in cases of State succession.¹³⁰⁴ More will be said about the Soviet Union and international law in Chapter 6. It faced a larger challenge during decolonisation. Therefore, Bedjaoui put considerable emphasis upon General Assembly resolutions. Again, this was presumably more in the interests of contributing to customary law by first asserting soft law: the General Assembly has no legislative authority,¹³⁰⁵ and its resolutions are not in themselves binding.¹³⁰⁶

Bedjaoui, and perhaps the G-77 more broadly, recognised correctly that the West was going to respond to the inclusion of the rest of the world in the international community, that simply constituting a majority in the General Assembly would not in itself be sufficient, but failed to move beyond simply changing the 'rules' of international law rather than the whole system. Bedjaoui thought that the use of the resolution would allow the Third World¹³⁰⁷ avoid the

¹³⁰³ Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1978) UN Doc A/CONF.117/15, article 34(1)(a)

¹³⁰⁴ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 58

¹³⁰⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 24

¹³⁰⁶ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 25

¹³⁰⁷ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 178

problems already identified with customary international law¹³⁰⁸ and the formation of consensus.¹³⁰⁹

However, Bedjaoui also recognised the limits of this approach. He noted a gap between the compulsory quality of UN resolutions and the role played by ‘political will’ of nation-states in the ‘enforceable value’ of such resolutions, sanction and obligation being two separate things.¹³¹⁰ He (and the G-77) was ultimately unable to decide whether the decolonised Third World wanted to become subjects of international law on an equal basis with the West, or whether they wanted preferential treatment. Some of the demands of the NIEO, like sovereignty over natural resources, were premised upon sovereign equality, the extension of the legal form in other words, but others, like ‘restitution and...compensation’ for colonisation, and ‘favourable conditions’ for the transfer of financial and technological resources to Third World countries¹³¹¹ suggested preferential treatment.

Bedjaoui was aware of international law’s structural constraints: he saw the gap between the ‘existence’ of a legal obligation and its enforcement (or actualisation), but he saw the latter as an ‘essentially political’, not a legal problem.¹³¹² He also saw that law was a reflection of some underlying ‘reality’,¹³¹³ an expression and a ‘reinforcement’ of a set of relations that may be

¹³⁰⁸ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 182-184

¹³⁰⁹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 186-187

¹³¹⁰ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 179

¹³¹¹ United Nations General Assembly Resolution 3201 (S-VI) (1 May 1974) UN Doc A/RES/S-6/3201

¹³¹² Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 179-180

¹³¹³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 108-109

unequal or exploitative; in other words, a continuation of imperialist political struggle by other means as Pashukanis had suggested. He recognised a distinction between the 'theoretical possession of a right' and its 'actual exercise',¹³¹⁴ and that wealthy Western countries were in a better position to exercise their rights, and actualise their positions, than those in the Global South.¹³¹⁵

In light of the profoundly unequal nature of the global economy,¹³¹⁶ he saw that recognising the North and South as equals would 'advantage' the North,¹³¹⁷ meaning that sovereign equality (based upon the modern legal form) was therefore a 'fiction' to some extent,¹³¹⁸ possibly justifying positive discrimination between nation-states.¹³¹⁹ Despite this, Bedjaoui rejected the idea of a 'double standard' of international law, a set of rules 'specifically designed to favour the reduction of economic inequality between States', preferring for this reduction of inequality to take place within the 'framework' of traditional international law (subject to changes, as mentioned¹³²⁰) with nation-states included 'on the basis of real and tangible equality'.¹³²¹ This international law, he thought, would no longer express 'relations of domination' but be based largely upon 'equity and solidarity'.¹³²² He located the gap between

¹³¹⁴ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 160

¹³¹⁵ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 160-161

¹³¹⁶ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 40-41

¹³¹⁷ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 61

¹³¹⁸ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 254

¹³¹⁹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 235-236

¹³²⁰ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 252

¹³²¹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 248

¹³²² Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 249

the possession and ability to exercise a right with regard to the Global South in its 'underdevelopment'.¹³²³

Bedjaoui therefore became trapped by the dominant argumentative structure of the standard of civilisation, which makes it difficult for international legal argument to escape from imperialism's trappings. Third World nations are effectively forced to adopt the logic of improvement as an argument, based upon the idea that all they need is to meet the standards necessary to be included within the formerly exclusive club of international law in order to reap the benefits enjoyed by those wealthier nation-states. Meanwhile, the logic of biology, now based not literally on biology but upon recognition of the distinction between developed and developing nations, ensures that they do not enter on a level playing field and reap the rights associated with sovereignty. The Third World were putting forward their own interpretation of legal concepts like sovereignty and self-determination and the associated rights and duties but had no way to actualise these concepts. This will also be returned to in Chapter 6.

To return to the three stages of international legal argument, Bedjaoui recognised the distinction between the legal argument and the actualisation of the decision by one of the parties. The Third World had their legal argument, based upon the principles of the NIEO. They also had their 'real reasons'; to create a drastically improved global economy. They sorely lacked a means of actualising their decision, however, which placed severe limits on the NIEO's

¹³²³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 160

potential. Putting forward new legal principles, whether through hard or soft law, really only engages the first stage of the indeterminate argument. There was insufficient focus on how newly formed legal norms would be actualised and enforced against the West.

4.3.3, Capitalism, International Law, and social rights

As explained, the same could be said about social rights. No matter how clearly it is articulated that rights are indivisible, that States need to be aware of their obligations, etc., there is never any thought of actualising this position, and no recognition of the underlying (capitalist and imperialist) context that was present after the war and continues to this day. Believing that social rights could be implemented and advanced simply by adopting treaties and conventions and supplementing with soft law is probably (on its own) no more likely to be successful than the NIEO.

It was explained in the first chapter that the dominant conception of social rights is an essentially social-democratic basic-needs combined with an indirect approach. The duty of progressive realisation towards full implementation has been cast aside in favour of an implicit duty to protect the minimum core of rights, to ensure that social rights are not provided in a discriminatory manner, and to prevent retrogression on rights provision. This cannot be explicitly found in the limited jurisprudence of the CESCR, in the case law of the South African Constitutional Court, or in any rights treaties or declarations. This basic-needs approach has been actualised by the very imposition of the premises of capitalism. Social rights bodies, like

the CESCR, the UN Economic and Social Council, and the ESC's European Committee of Social Rights do not challenge these premises of capitalism and therefore end up accepting them to some extent.

Although it was mentioned that social rights were first referenced in the UN Charter and then included in the UDHR, the idea that State provision for the subsistence needs of the population was not new. As explained in Chapter 3, private property was established in England by violently overturning existing arrangements and extinguishing the common rights of peasant farmers. This led to masses of newly free and unemployed labourers available for hire who now had to earn their means of subsistence by working for others.¹³²⁴ Although this may have been a more efficient use of societal labour, the benefits of this were not felt by these labourers; wages generally were insufficient for subsistence¹³²⁵ and the resulting 'pauperism' forced the British State to reform the Poor Law to provide relief¹³²⁶ (the Poor Act 1562¹³²⁷ is an example of this). The idea of State provision for ensuring the means of subsistence of the population is essentially the idea behind modern conceptions of social rights. Capitalism was already making the case for these rights even in its relative infancy.

In the post-war period, as already mentioned, Western nations established welfare states, allowing them to shift the focus away from how rights were to be conceived as their liberal capitalist system seemed to respond to both categories. The welfare state, as mentioned in

¹³²⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 509-510

¹³²⁵ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 510

¹³²⁶ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 507

¹³²⁷ 5 Eliz. 1. c. 3

Chapter 1, responded to the class struggle¹³²⁸ and the presence of the USSR as a viable alternative¹³²⁹, and also reconciled workers to capitalist production¹³³⁰ and post-war consumerism¹³³¹, acting as a compromise between workers and capitalists.¹³³² It thus played a crucial role in both protecting and legitimating capitalism and was therefore far from an anti-capitalist project; the British welfare state had been substantially designed by a Liberal politician (William Beveridge).¹³³³

Meanwhile, during the inter-war period, a mode of thinking known as welfarism had emerged in Western official discourse. Welfarism does not refer specifically to a welfare-state, but to ‘political interventionist tendencies’¹³³⁴ (supposedly) based upon ensuring ‘well-being’ and the ‘flourishing of individuals and peoples’, fighting against ‘disease, ignorance, and poverty’, and protecting human rights.¹³³⁵ To the extent that international law does any of these things, this project has been directed by the imperialist West.

¹³²⁸ Madeleine Johansson, ‘Sweden’s welfare state; myths and realities: a Marxist analysis of the ‘Nordic Model’’ (2012) 1(3) Irish Marxist Review 47, 49

¹³²⁹ Herbert Obinger and Carina Schmitt, ‘Guns and Butter? Regime Competition and the Welfare States during the Cold War’ (2011) 63(2) World Politics 246, 264

¹³³⁰ Madeleine Johansson, ‘Sweden’s welfare state; myths and realities: a Marxist analysis of the ‘Nordic Model’’ (2012) 1(3) Irish Marxist Review 47, 50

¹³³¹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 247-248

¹³³² Asbjørn Wahl, *The Rise and Fall of the Welfare State* (Pluto Press 2011), 20

¹³³³ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 247-248

¹³³⁴ Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (Cambridge University Press 2012), 5

¹³³⁵ Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (Cambridge University Press 2012), 5

It began officially with the League of Nations Mandate system (and, as Chapter 6 will explain, the International Labour Organisation (ILO)). Tzouvala argues that, especially through the Mandate system, arguments along the lines of a logic of improvement came to include welfarism in the standard of civilisation,¹³³⁶ an about-face from formal colonialism, where there was no concern for the well-being of local populations.¹³³⁷ Article 23 of the League of Nations Covenant obliged League members to 'endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend'.¹³³⁸ Having disregarded their well-being during colonialism, the 'civilised' States were now arguing that only they could ensure this well-being. Even such rhetoric was not entirely new: Article 6 of the General Act of the Berlin Conference had contained reference to signatories being obligated to 'watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being'¹³³⁹ despite resulting in a brutal period of Western imperialism.¹³⁴⁰

Legitimisation of the interwar project led by the US as the new hegemonic power was part of this welfarist trend.¹³⁴¹ As with the post-war welfare state, the social reproduction of labour

¹³³⁶ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 113

¹³³⁷ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 114

¹³³⁸ United Nations Office at Geneva, 'The Covenant of the League of Nations' (*United Nations*) <<https://www.un Geneva.org/en/about/league-of-nations/covenant>> accessed 2 January 2024, Article 23(a)

¹³³⁹ General Act of the Berlin Conference on West Africa, 26 February 1885, Article 6. Found at <<https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf>> accessed 5 January 2024

¹³⁴⁰ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 55

¹³⁴¹ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 140

was also a key consideration. Balakrishnan Rajagopal explains that the newfound concern with the 'well-being' and 'development' of the people in the colonies was partly driven by the need to ensure sufficient labour-power (quantitatively and qualitatively).¹³⁴² This had the added benefit of also managing local resistance.¹³⁴³ Welfarism can thus be linked to limitations (or remediations) of capitalist exploitation. Having nothing to counteract the exploitative and relentless forces of capitalist reproduction will destroy populations across the world and even undermine capitalism itself, a point made by Schumpeter in defence of capitalism¹³⁴⁴ and Wolfgang Streeck from the opposing perspective.¹³⁴⁵ This also became important for the legitimacy of capitalism and international law.¹³⁴⁶

As explained in Chapter 1, this type of thinking declined as the world transitioned to neoliberalism, when the Global South was attempting to advance their NIEO and the Cold War was waning. The West used structural adjustment (and the aforementioned 'neoliberal trinity' of privatisation, deregulation, and austerity) to both include the decolonised world in the capitalist global economy and to ensure that their newfound sovereignty was confined within capitalism's limits, in accordance with the logics of biology and improvement. However, welfarist thought did survive through the language of development, as will be covered in

¹³⁴² Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 56-57

¹³⁴³ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 58

¹³⁴⁴ Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (first published 1942, Wilder Publications 2018), 73-74

¹³⁴⁵ Wolfgang Streeck, 'How Will Capitalism End?' (2014) 87 *New Left Review* 35, 54

¹³⁴⁶ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 117

Chapter 6, where it will be situated within the actualisation of Third World self-determination. Social rights emerged alongside and overlapped with this paternalistic welfarism.

Social rights discourse, however, has not been able to move beyond the social-democratic basic-needs and indirect approach. The West has therefore been able to actualise the dominant conception of social rights, which, fails to move beyond limitation and remediation of exploitation, by advancing its centralised State form, capitalist (property-based) legality, and, as the next section will show, its liberal democratic political system. More specifically, this makes it difficult to move beyond a social-democratic approach; nation-states are open to do less in terms of rights provision, and often do when implementing austerity. Social rights emerged within capitalism, because of capitalism, and have therefore not been able to move beyond capitalism. Social rights thus reflect social democratic theory, attempting to work within the confines of capitalism.

For decades, it was rarely questioned within social rights discourse, at least directly, whether social rights are consistent with capitalism. The CESCR considers the ICESCR to be 'politically neutral' and that no 'type' of economy is required of members.¹³⁴⁷ The Limburg Principles suggest that those rights are compatible with 'market and non-market economies'.¹³⁴⁸ As mentioned, social rights discourse has belatedly begun to recognise that social rights and

¹³⁴⁷ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [8]

¹³⁴⁸ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 452

(capitalist) 'economic policy' may enjoy a difficult relationship with the aforementioned Guiding Principles on Human Rights Impact Assessments of Economic Reforms.

Principle 14 of the Guiding Principles, covering 'external influence and policy space', asks States, international financial institutions, and other 'non-state' actors not to engage in 'undue external influence' on other States that will 'undermine' their ability to implement rights.¹³⁴⁹ It is not questioned, however, why States and private economic actors might undermine the ability of other nation-states to implement rights, which would involve an analysis of imperialism. The Principles accept that economic 'policy' can 'adversely' affect human rights¹³⁵⁰ and so asks States implementing policy programmes to respect, protect, and fulfil human rights,¹³⁵¹ but the context (capitalist imperatives) in which said policy is formulated and implemented is not recognised. Social rights discourse must push against the imperatives and pressures of capitalist competition or risk remaining within its confines, although, as mentioned, this will be difficult within capitalism's confines.

As mentioned earlier, Tzouvala called attention to the importance of who defines the standard of 'civilisation'.¹³⁵² Conceiving international law as a structurally indeterminate political process that is constitutive of imperialism means that it will be those holding superior political

¹³⁴⁹ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [14.1]

¹³⁵⁰ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [1.1]

¹³⁵¹ United Nations General Assembly, 'Guiding principles on human rights impact assessments of economic reforms' (28 February 2019) UN Doc A/HRC/40/57, [2.3]

¹³⁵² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 161

and economic power that will be able to define it. The influence of politics on international law does not allow for nation-states to independently determine their favoured conception of social rights. The legal form and its abstraction of nation-state sovereignty obscures this. The more imperialism is able to draw nation-states into the global economy, through legal subjectivity, the less nation-states are able to determine their own conceptions of rights. Imperialism and capitalism have ultimately been able to accommodate social rights in a form compatible with capitalism.

4.4 Human rights, and democracy: capitalism as international law

4.4.1 The Democratic Norm Thesis

It has been established that social rights have developed in a certain context, namely the expansion of imperialism across the globe. This justifies a closer look at how other legal concepts are shaped by imperialism. As imperialism has shaped social rights largely through international law's structural constraints itself, it will be explained more broadly how those structural constraints tend to not only restrict other related ideas, like democracy, but seek to isolate them. The idea that democracy is a preferable alternative to the legal actualisation of social rights, examined in Chapter 2, will now be returned to in a different context. As will be explained, democracy as elaborated in international law is supposedly based upon human rights on the basis that democracy and rights enjoy a symbiotic relationship.¹³⁵³

¹³⁵³ Henry Steiner, 'Two Sides of the Same Coin? Democracy and International Human Rights' (2008) 41(3) *Israel Law Review* 445, 446

Democracy has been explicitly connected to international law by Thomas Franck's ILD thesis.. Pointing to the failure of the August coup in post-Soviet Union Russia and the military takeover of Haiti in 1991, and the international response to these events,¹³⁵⁴ he suggested that this demonstrated that consensus had formed around the idea that democracy had become a legal norm.¹³⁵⁵ Franck asserted the legitimacy of this emerging right through an assessment of its 'pedigree, determinacy, coherence and adherence'¹³⁵⁶, and more broadly the legitimacy of the emerging legal framework behind it with reference to the 'related' 'democratic' norms of self-determination, freedom of expression, and free and fair elections.¹³⁵⁷

He believed that custom and a 'collective interpretation' of treaties¹³⁵⁸ (presumably the likes of the UN Charter, the ICCPR, and foundational documents of various regional bodies like the Organisation of American States or EU) had transformed democratic governance into an 'international legal obligation'.¹³⁵⁹ He also pointed (as Fukuyama had) to the 'collapse' of

¹³⁵⁴ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 46-47

¹³⁵⁵ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 47

¹³⁵⁶ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 51

¹³⁵⁷ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 52

¹³⁵⁸ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 47

¹³⁵⁹ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 47

alternatives to democracy, notably the 'dictatorship of the proletariat',¹³⁶⁰ by which he meant the USSR rather than a dictatorship of the proletariat at all.

The ILD thesis seemed to challenge assumptions about the connection between human rights and forms of government,¹³⁶¹ including the aforementioned assumption that social rights do not require a particular form of government.¹³⁶² The ILD thesis seemed to assert a counter-assumption that rights do indeed require a particular form of government, that being a democracy. As mentioned in Chapter 2, this position was taken by the CESCR in its 3rd General Comment. It is beyond question, given the emphasis upon elections, that the democracy in the ILD thesis could be anything but liberal democracy.

There are several obvious critiques of Franck's thesis. Franck argued that people around the world had demanded the 'western-style parliamentary...democratic process', that they had 'rejected' both socialism and the idea that 'parliamentary democracy is a western illusion and a neocolonialist trap'.¹³⁶³ This is an overstatement. This chapter has already traced the ways in which first formal colonialism and later Western imperialism has long sought to shape and police governance over its current and former colonial possessions. It would be difficult to

¹³⁶⁰ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 48-49

¹³⁶¹ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 38

¹³⁶² United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [8]

¹³⁶³ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 49

identify the point at which this supposed rejection happened. To say that the Third World acquiesced may even be too strong.

As mentioned, Franck's thesis relied heavily upon free and fair elections,¹³⁶⁴ perhaps overstated the extent of democratisation (e.g., in the Middle East),¹³⁶⁵ and it seemed to subscribe to Fukuyama's conception of both history and democracy, framing the ILD thesis as a historical drive towards liberalism and democracy that is both unquestionably desirable and inevitable. Despite these criticisms, it will broadly be accepted that the ILD thesis is correct to some extent and that there is a norm based upon democracy in international law.¹³⁶⁶ This is still based upon a definition of democracy that is far more procedural¹³⁶⁷ than substantive.¹³⁶⁸ This is to some extent a result of international law's indeterminacy. As Susan Marks has suggested, the question of the enforcement of this norm remains unclear and is even potentially problematic.¹³⁶⁹ That being said, the idea that nation-states should at minimum not move away from democracy seems to be relatively entrenched.¹³⁷⁰

¹³⁶⁴ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 40

¹³⁶⁵ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 46

¹³⁶⁶ Sofia Cavandoli, 'An Analysis and Critique of Democracy as a Principle of International Law' (Doctoral Thesis, Prifysgol Aberystwyth University 2017), 304

¹³⁶⁷ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) *The European Journal of International Law* 507, 511

¹³⁶⁸ Sofia Cavandoli, 'An Analysis and Critique of Democracy as a Principle of International Law' (Doctoral Thesis, Prifysgol Aberystwyth University 2017), 109

¹³⁶⁹ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) *The European Journal of International Law* 507, 512-513

¹³⁷⁰ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) *The European Journal of International Law* 507, 512

The ILD thesis is rife with idealism, idealism being used here in the manner it was used by Koskenniemi, who saw it as describing a belief that international law would soon come to correspond with new societal ‘developments’, and that all that needed to happen for those new developments to be actualised was for ‘existing structures of international dominance’ to be transcended.¹³⁷¹ Neither the source of these new developments or those ‘existing structures’ were ever interrogated: idealists simply wondered why international law was failing to reflect the world they wanted to see. Advocates of the ILD seemed to employ this sort of idealism.

Idealism was noticeable in Franck’s work: he identified a ‘sea change’ that was underway in international law that would both mutually benefit ‘citizens’ and governments, empowering the former and lending legitimacy to the latter.¹³⁷² Whilst sovereignty (particularly outside the West) had once been a barrier to the emergence of the ILD,¹³⁷³ a ‘tide’ was ‘turning’ in favour of democracy (along with rights and elections), and all that needed to be done was for the ILD to become ‘uncoupled’ from neo-colonialism and unilateral interventions renounced¹³⁷⁴ for the right to democracy to become a right to ‘peace’.¹³⁷⁵ This seemed to suggest that democracy was replacing sovereignty’s role at the heart of international law. As explained

¹³⁷¹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 210-211

¹³⁷² Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46, 50

¹³⁷³ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46, 82

¹³⁷⁴ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46, 84-85

¹³⁷⁵ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46, 87

earlier, that (Third World) sovereignty was continually under scrutiny was no 'sea change' at all.

4.4.2 Low-intensity democracy

The problem, ultimately, is that Franck got this backwards. The uncoupling of the ILD from neo-colonialism was not a mere technical issue to be addressed: they were intimately linked as part of the same project. Joel Rocamora and Barry Gills had recognised a concurrent conceptual shift in US foreign policy, an evolution of the 'low-intensity conflict intervention' that had been used during the Cold War, largely allowing the US to intervene in 'authoritarian' countries to offer a 'half-way house' between military dictatorship and socialism.¹³⁷⁶

Rocamora and Gills called this shift the 'low intensity democracy', which was itself a development on the US' Cold War anti-communism.¹³⁷⁷ The low-intensity democracy tends to confine democracy to an elected legislature, the separation of powers, a civilian military, and broad objectives like 'respect for' rights and social justice.¹³⁷⁸ In other words, it is also a rigidly procedural conception of democracy and is thus broadly based upon, if not quite synonymous with, liberal democracy, as will be returned to. Meanwhile, Franck blamed the 'sovereignty'

¹³⁷⁶ Barry Gills and Joel Rocamora, 'Low intensity democracy' (1992) 13(3) *Third World Quarterly* 501, 504-505

¹³⁷⁷ Barry Gills and Joel Rocamora, 'Low intensity democracy' (1992) 13(3) *Third World Quarterly* 501, 505-506

¹³⁷⁸ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 53

of Global South nation-states for failing to accept the gift of democracy that the West and international law itself was trying to bestow upon them.¹³⁷⁹

For Susan Marks, low-intensity democracy (and therefore the ILD itself) had ideological functions. These included legitimising¹³⁸⁰ and naturalising¹³⁸¹ in formal, institutional, and liberal terms rather than as a political process.¹³⁸² It reduced and channelled challenges to the status quo, reducing 'impetus' for 'structural transformation'.¹³⁸³ It presented the ILD as a natural development from self-determination and human rights¹³⁸⁴ reifying democracy,¹³⁸⁵ and making it appear as a destination, the 'town' in Fukuyama's metaphor towards which nations as 'wagons' were all travelling,¹³⁸⁶ and substituting the ideals of political equality for socio-economic and other inequalities.¹³⁸⁷

¹³⁷⁹ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46, 82

¹³⁸⁰ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 62-63

¹³⁸¹ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 66

¹³⁸² Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 71

¹³⁸³ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 52

¹³⁸⁴ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 63

¹³⁸⁵ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 66

¹³⁸⁶ Francis Fukuyama, *The End of History and the Last Man* (Hamish Hamilton 1992), 338-339

¹³⁸⁷ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 64

By presenting the ILD as a development of rights and self-determination, the ILD has also served to universalise a conception of rights that prioritises civil rights,¹³⁸⁸ especially the rights that are most closely associated with liberal democracy and its institutions (i.e., the right to vote, freedom of expression, freedom of assembly, etc). Political transition (elections and the rule of law) was presented as ‘prior’ to economic changes and civil rights (‘first generation’ rights) ‘prior’ to social rights.¹³⁸⁹ Whilst this can, Chapter 3 explained, be justified in legal terms, maintaining this hierarchy in political terms for ideological purposes is a deliberate choice. It was rarely questioned whether the conditions exist for these rights to be enjoyed on an essentially equal basis.¹³⁹⁰

In addition, the ILD thesis portrays a democratic society as an (artificially) unified society, presenting voting rights as something that will magically obviate the class struggle and related struggles, creating an ‘illusory wholeness’.¹³⁹¹ This illusory unification, Marks suggests, ‘closes the gap’ between ‘popular’ (i.e., liberal) democracy and the low-intensity version associated with the ILD. If democracy is to be defined solely by institutions, the rule of law, and broad commitments to individualised civil rights, the distinction seems to disappear entirely.

¹³⁸⁸ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 65

¹³⁸⁹ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 71-72

¹³⁹⁰ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 64

¹³⁹¹ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 65

As was covered in the previous chapter, the prioritisation of civil rights is not purely ideological. Making sense of the connection between the ideological and practical/legal function of civil rights requires going beyond conceiving these relations as liberal democratic relations and instead as capitalist social relations. In other words, the equality of one-person, one-vote should, in accordance with historical materialism, be seen as the equality of the private property owner. It is these relations, based upon capitalist production, that define liberal society. Civil rights also, as mentioned, do not conflict with private property rights in the sense that they are less likely to generate concrete and antagonistic struggles over resources than social rights and can theoretically be enjoyed by everyone without (re)igniting the class struggle.

Franck showed little awareness of liberal democracy's connection with capitalism. Whilst he hailed the 'triumph of the 'democratic notions' of the likes of Locke and Madison, the ILD is far more attributable to the triumph of capitalism and the private property-based legal regime articulated by Locke. This runs counter to Franck's ahistorical narrative, in which leaders in Western democracies surrendered power to the citizenry through a Lockean social contract in order to achieve legitimacy,¹³⁹² a narrative that abstracts completely from the separate private power of capital that was already well established when anything approaching universal suffrage was granted in Western countries.

¹³⁹² Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 50

Rather than being seen as a destination towards which all nations should orient themselves, liberal democracy should be linked to a historically contingent and specific set of social relations, a 'moment' of the historical class struggle.¹³⁹³ More specifically, this refers to the establishment of capitalist social relations as capitalism overtook feudalism and absolutism. Liberal democracy does not, however, express these relations, preferring to obscure them in the name of abstract equality, and unity. It is important to be aware of why this has come about, and the role that democracy and abstract equality have played in legitimising the rule of the emergent capitalist classes.

Just as low-intensity democracy aimed to maintain the status quo domestically, it could also be linked to imperialism, or more specifically the contradictory process of conditional inclusion and exclusion that has been transposed to international law, serving to maintain inequalities in 'power and resources' between nation-states¹³⁹⁴ and preserve the capitalist global economy more generally.¹³⁹⁵ This will be explained further in the chapter's final subsection.

4.4.2 Democracy as the Standard of Civilisation

¹³⁹³ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 66

¹³⁹⁴ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 56

¹³⁹⁵ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 56-57

Although she was sceptical of the motives behind it, Marks believed that the ILD thesis was novel in that it meant that questions of 'forms of government' had now become a question of international law.¹³⁹⁶ As has been made clear throughout this chapter, this is absolutely untrue: throughout the history of international law, through the standard of civilisation, form of government has been not only a question but a condition of inclusion. More importantly, it has been a question only for certain countries: the standard of civilisation has always been determined by the most powerful Western nations. The distinction between the civilised and uncivilised has been replaced by the distinction between liberal and non-liberal nations¹³⁹⁷ (although the developed/developing distinction also remains).

As Marks noted,¹³⁹⁸ David Kennedy, writing in the context of the (then) European Community (precursor to the EU)'s engagement with the former Soviet bloc in Eastern Europe,¹³⁹⁹ suggested that this engagement was based upon the idea that Eastern countries were 'catching up'¹⁴⁰⁰ and returning to 'normalcy' by adopting liberal capitalism and democracy.¹⁴⁰¹ He identified a 'two track' approach to international law and the global economy here; there was a 'sophisticated track' for the Western European countries and a 'less sophisticated' track

¹³⁹⁶ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 31

¹³⁹⁷ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000), 46

¹³⁹⁸ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000),

¹³⁹⁹ David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 Harvard International Law Journal 373, 378

¹⁴⁰⁰ David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 Harvard International Law Journal 373, 375

¹⁴⁰¹ David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 Harvard International Law Journal 373, 385-386

that outsider nation-states must take to be included within the West.¹⁴⁰² In the absence of plausible alternatives, sovereignty was now to be made subject to democracy and (civil) rights compliance.

Marks connected the spread of democracy with the transition to neoliberal capitalism,¹⁴⁰³ a natural conclusion considering that the transition to neoliberalism and the spread of democracy both took place during the waning years of the Cold War. By considering the case of Haiti, Franck having based his ILD thesis, on the restoration of 'democracy' in Haiti in 1994 following a military coup d'état in 1991, Marks was able to make strong links between democracy and neoliberalism. As mentioned, part of the impetus to Franck's paper had been the international response to a military coup in Haiti in 1991 that ousted the elected Haitian president Jean-Bertrand Aristide.¹⁴⁰⁴ Aristide had been restored as president in 1994 and re-elected in 2000. However, Marks noted, Aristide was later removed in another 'pro-democratic intervention' in 2004, after which the UN assistance and Western-led military intervention took charge in order to restore and rebuild democratic institutions and the rule of law whilst protecting human rights.¹⁴⁰⁵ For Marks, the 'obvious conclusion' seemed to be that the Franck's ideals had been actualised by the international community.¹⁴⁰⁶

¹⁴⁰² David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 Harvard International Law Journal 373, 395-396

¹⁴⁰³ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) The European Journal of International Law 507, 519

¹⁴⁰⁴ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) American Journal of International Law 46, 47

¹⁴⁰⁵ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) The European Journal of International Law 507, 520

¹⁴⁰⁶ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) The European Journal of International Law 507, 521

However, Marks noted¹⁴⁰⁷ that the UN Secretary-General had in 2004 welcomed domestic and international efforts to restore democracy (i.e., elections) in Haiti along with a ‘new social contract’ that would ‘address extreme poverty and deep-rooted disparities of wealth’.¹⁴⁰⁸ As Marks suggested, there was no consideration of why there was such endemic poverty and inequality. The answer was that along with the ‘restoration’ of democracy in 1994, a punishing IMF-led structural adjustment programme had been imposed upon Haiti. This had resulted in the familiar neoliberal policies of privatisation, austerity, and deregulation, as well as the halting of domestic rice production, all for the purposes of facilitating foreign (i.e., US) capital in Haiti.¹⁴⁰⁹ Any international aid provided served only to (attempt to) mitigate the harm caused by structural adjustment.¹⁴¹⁰

As Marks noted,¹⁴¹¹ in authorising military intervention in 2004, the UN Security Council had called attention to the need to create an ‘environment’ that ‘enables respect for human rights’ and asked domestic actors to ‘respect international law’ and human rights.¹⁴¹² These vague references to human rights and international law obscured both that the international community had created the environment in which these supposed failings of international law

¹⁴⁰⁷ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) The European Journal of International Law 507, 521

¹⁴⁰⁸ Prevention Web, 'Ban Ki-moon: 'Renewal, not restoration should be the goal for Haiti' (*Prevention Web*, 29 March 2010 < <https://preventionweb.net/news/ban-ki-moon-renewal-not-restoration-should-be-goal-haiti> > accessed 26 January 2024

¹⁴⁰⁹ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) The European Journal of International Law 507, 521

¹⁴¹⁰ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) The European Journal of International Law 507, 521-522

¹⁴¹¹ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) The European Journal of International Law 507, 522

¹⁴¹² UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529

and human rights had taken place and, all in the name of democracy. More importantly, the role of imperialism and capitalism is completely obscured by these vague invocations of human rights and international law.

It is preferable, however, to situate these developments not with neoliberalism but as part of the centuries-long process of imperialism. Rocamora and Gills themselves argued that the democracy-based 'New World Order' of the ILD was really just the old one repackaged, an alternative approach to established practice of destroying regimes, socialist or otherwise, that were more 'responsive to popular demands for...improvements in standards of living' and therefore threatening to capitalism. These practices had overturned regimes in Guatemala, Iran, Indonesia, and (as explained in Chapter 1) Chile between the 1950's and 1970s¹⁴¹³ and had been part of the policing of sovereignty throughout modern international law's history. It should be recognised and acknowledged that democracy is possibly the most positive of those developments (compared to, say, extraterritoriality), but to fail to link these developments is to fail to understand how they have come about and to think about how they might be transcended.

Haiti is an example of the dangers of abstracting human rights and democracy from each other and from imperialism. Once again, the Western liberal nations have been able to (acting through transnational institutions) put forward their authoritative interpretations of these legal concepts. Rights are conceived as separate from the socio-economic context, relating

¹⁴¹³ Barry Gills and Joel Rocamora, 'Low intensity democracy' (1992) 13(3) Third World Quarterly 501, 511

mainly to physical acts of violence (i.e., civil) by domestic actors rather than the dynamics of imperialism. Democracy relates (mostly) only to elections. A genuine enhancement of democracy, both with nation-states and in the international order, could create opportunities to challenge the hegemony of capitalism domestically and internationally in a way that would create opportunities for more radical conceptions of social rights. Western liberal democracy does not represent such an enhancement, and the entrenchment of it through the ILD thesis reproduces rather than overturns the imperialist power dynamics of the international order. The prospects for a radical conception of social rights appears no brighter as a result of the ILD.

If an alternative conception of rights (social or otherwise) or democracy is to be advanced in international law, it will be important that it confronts the premises of capitalism and the logic of imperialism head on, questioning rather than attempting to fit within these premises. Otherwise, it will fail to move beyond their confines. These related concepts (rights and democracy) must also be brought together and advanced in conjunction with each other. This is, essentially, an argument against the fragmentation of international law, the 'expansion of international law and the creation of specialized branches in the discipline'¹⁴¹⁴ that leads to doctrinal overlap and thus either conflict or 'loss of...control' of legal actors.¹⁴¹⁵ A conception of social rights that is not democratic will be easy to defeat. A conception of democracy that

¹⁴¹⁴ Martti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 554

¹⁴¹⁵ Martti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 554-555

does not allow citizens to provide their social needs will be little more than a low-intensity democracy. This will be returned to later in the thesis.

Conclusion

This chapter has attempted to do several things. First, it has highlighted the limits and structural constraints of international law, bearing in mind that it is a structured process of indeterminate argument between capitalist nation-states, and more importantly has linked those constraints to capitalism and the ongoing process of imperialism and uneven development. Second, it has sought to cast doubt on the possibilities of social rights, as currently constituted, to be able to overcome those constraints. Rejecting international law as a body of rules suggests that the deficiencies of social rights do not so much come from their (lesser) legal recognition but from their actualisation. The form of social rights that has effectively been actualised is not threatening to capitalism and has emerged from both capitalism and imperialism.

Third, it has highlighted the difficulties of advancing alternative conceptions of legal principles like human rights or democracy that run against capital's logic, considering the role that (Western) political power plays in advancing and actualising such principles. Finally, it has made the argument that human rights (of all categories), democracy, having been shaped and constrained by imperialism, need to be brought together rather than analysed in the abstract, and, most importantly, considered in connection with capitalism. This is a version of an

argument against the fragmentation of international law. This will be briefly returned to in Chapter 6 and the thesis' epilogue, but first, the next chapter must clarify several points about rights themselves.

Chapter 5: Towards a critical analysis of human rights

Although this thesis is specifically about social rights, they have been almost incidental to the past three chapters. It has been put forward that social rights discourse has been predominantly based upon a social-democratic approach based upon basic needs and indirect provision through capitalist employment. It has been explained that these rights have a difficult relationship with capitalist society and with the role of law both domestically and internationally. A critique of these rights themselves may be evident in these explanations, but a coherent critical theory of social rights will now be put forward.

There will be slight repetition in this chapter in the interests of coherence and clarity. It was entertained in the first chapter that social rights may lack the completeness of civil rights, that they are vague, expensive, and better thought of as policy goals. However, social rights represent goods and processes that are fundamental to human societies. Most legal discourse on social rights, with its social democratic outlook, does not reject this but also does not challenge capitalism's control of these goods and processes. Rather than offer people a way to wrest back control, social rights discourse allows for the goods and processes to be owned, distributed, provided, and performed in accordance with capital accumulation, and calls for State provision to ameliorate any shortcomings. This is the basic-needs (and services) and indirect approach to social rights.

Crisis is a persistent feature of capitalism. These crises will lead to struggles over resources that will put both the indirect provision of social rights and the State's minimal direct provision

in doubt, at least temporarily. When such crises occur, the State is often forced to intervene, but this is generally going to be in the interests of capital, not labour. In such situations, there may be demands for increases in State provision for basic needs from the population, but these demands may be subordinated to the demands of capitalist markets for austerity, wage suppression, tight monetary policy, etc. This justifies attempts to think about social rights going beyond a social democratic approach, as something that may offer emancipation from capitalism.

Although social rights represent fundamental things, whether they therefore serve as a radical discourse of resistance to capitalism, as a potential tool of anti-capitalist emancipatory struggle is a different question. To resist capitalism, rights ideally would be capable of protecting against capitalism's imperatives and challenging its social power or rejecting its premises. However, as has been made clear throughout this thesis, the relationship between rights and capitalism has placed limits upon the emancipatory potential of human rights.

It was explained in Chapter 3 that Pashukanis argued that rights emerge from existing production and exchange relations. As this does not entirely explain the emergence of social rights, a theory of how rights do emerge will be advanced in this chapter, building upon Pashukanis' insights and Bill Bowring's materialist theory of rights. This will involve clarifying the relationship between rights and struggle, revolution, and emancipation. It will be argued, contrary to Bowring, that rights are not inherently emancipatory. After reformulating Bowring's theory, which will help to reformulate Vasak's theory of the 'generations' of rights,

it will be suggested that this helps to explain the disconnect between the importance of social rights and their legal status.

This insight will be used as a jumping-off point to a discussion of the broad limits of rights as a discourse of anti-capitalist resistance. It will be argued that rights accept many of capitalism's premises and imperatives, potentially turning them into a double-edged sword, and that they lack the specificity as a discourse to challenge capitalism, being unable to reckon with its complexity.

After having discussed legal rights somewhat abstractly as a tool of emancipation from capitalism, this discussion will take more concrete form, suggesting some of the limits of social rights adjudication. This will be followed by a brief discussion of the relationship between rights and broader societal questions, with reference to the Soviet delegation to the drafting of the UDHR and their belief that rights were inimical to capitalist society.

The first section will discuss the material existence of social rights as representing goods, activities, and processes fundamental to any society. It will then locate these goods and processes in capitalist society, explaining how capitalism challenges their performance, distribution, etc.

The second section will advance a materialist theory of legal rights. It will then elaborate upon the limits of rights discourse due to capitalism. Some of this will apply to rights in general

rather than just social rights. It will also apply to human rights outside of a purely juridical form; it will refer to rights as they are advanced in international legal argument, in academic debate, in treaties, in international relations, i.e., as a form of discourse.

The final section will discuss the limits of rights adjudication and the need to connect them to the prevalent social form. This chapter aims to sketch out the beginnings of a critique of human rights in general to be completed in future study.

5.1 Social rights in capitalist society

5.1.1 Social rights, subsistence, and social reproduction

It was explained in the previous chapter that international social rights law abstracts from the relationship between democracy and rights, but the doctrine also abstracts social rights from each other. Social rights advocacy often breaks down into piecemeal advancement of a particular right, like a right to education or to a minimum level of social security. This can leave these rights vulnerable to the attacks that call them unrealistic policy goals or promises with vague content.

Social rights are often attacked for their unclear content. Onora O'Neill, for example, has opposed these rights on this ground; a right to food does not, in her opinion, tell us enough

about the content of that right or what obligation is imposed.¹⁴¹⁶ Therefore, she believes that social rights are merely aspirations that should not be subject to judicial protection,¹⁴¹⁷ that it is not for judges to resolve ambiguous content of such rights.¹⁴¹⁸ As Beetham noted, social rights have long been framed as enjoying a lower status than civil rights, seen as merely 'aspirational' as they supposedly are not universal, fundamental.¹⁴¹⁹ They are also attacked for being too expensive.¹⁴²⁰

However, social rights have a material existence in society: they are fundamentally about the provision, allocation, and distribution of resources, particularly those necessary for subsistence and the reproduction of society, like food, housing, education and healthcare. As Marx and Engels pointed out, activities related to subsistence are intimately connected to the existence of human life.¹⁴²¹ Ensuring the subsistence and reproduction of society is not unrealistic, unimportant, or vague; it is essential for society to continue.

Subsistence should not be read too narrowly; what is being referred to here is not a bare minimum level of goods/resources needed to survive but the 'actual material life' of humanity,¹⁴²² a standard adopted here to think beyond basic needs and towards high

¹⁴¹⁶ Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81(2) *International Affairs* 427, 429

¹⁴¹⁷ Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81(2) *International Affairs* 427, 434

¹⁴¹⁸ Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1, 1-2

¹⁴¹⁹ David Beetham, *Democracy and Human Rights* (Polity Press, 1999), 117

¹⁴²⁰ Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1, 1

¹⁴²¹ Friedrich Engels and Karl Marx, *The German Ideology* (Electric Book Company, 2000), 61-62

¹⁴²² Friedrich Engels and Karl Marx, *The German Ideology* (Electric Book Company, 2000), 61

standards of living. Many elements of subsistence are covered by individual social rights, like housing and food. Article 11 ICESCR, on the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions, seems to envision that social rights should be connected to each other,¹⁴²³ but this is not replicated anywhere else and the CESCR has analysed article 11 as if it contains separate articles/rights (i.e., a right to food,¹⁴²⁴ to housing¹⁴²⁵).

Subsistence is challenged by capitalism, as many elements of subsistence have been commodified¹⁴²⁶ and subject to capitalist social relations and market imperatives. As was made clear in Chapter 4 with reference to the English Poor Laws, this has been evident throughout much of the history of capitalism. That capitalism may imperil subsistence seems to have been recognised by US president Franklin D Roosevelt in his famous ‘Four Freedom’ speech in 1941; the third of these freedoms was ‘freedom from want’, which pointed to economic arrangements that would prevent deprivation.¹⁴²⁷ The privatisation and concentration of the means of production that defines capitalism is also the privatisation and concentration of the means of subsistence.¹⁴²⁸ Housing has been commodified and increasingly privatised (especially over the past few decades), leading to significant problems

¹⁴²³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, article 11

¹⁴²⁴ United Nations Committee on Economic, Social, and Cultural Rights 'General Comment 12: The right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5

¹⁴²⁵ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)' (13 December 1991) UN Doc E/1992/23

¹⁴²⁶ Paul O'Connell, 'The Death of Socioeconomic Rights' (2011) 74(4) *Modern Law Review* 532, 535

¹⁴²⁷ Franklin Delano Roosevelt, 'The Four Freedoms Speech' (*US Marine Corp University*) <[https://www.usmcu.edu/Portals/218/Four%20Freedoms%20Speech%2C%20Franklin%20Delano%20Roosevelt%20\(1\).pdf](https://www.usmcu.edu/Portals/218/Four%20Freedoms%20Speech%2C%20Franklin%20Delano%20Roosevelt%20(1).pdf)> accessed 15 February 2025

¹⁴²⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 97

with affordability that continues to cause problems like overcrowding and homelessness.¹⁴²⁹ Food commodification has led to it being subject to financial speculation, which has contributed to food crises¹⁴³⁰ and allows speculators to enrich themselves during price spikes (like the spike in the price of grain during the Russia-Ukraine war)¹⁴³¹ whilst others are pushed into acute hunger.¹⁴³² Workers and employers in sectors related to subsistence will also face the same capitalist imperatives of competition mentioned in Chapter 3; food companies, for example, need to prioritise profitability over providing food, which may, as will be returned to, involve suppressing employee wages.

The reproduction of society, social reproduction, is closely associated with subsistence, and there is overlap between the two concepts. Marx recognised its importance, noting that ‘the form of the process of production’ of society’ must simultaneously be ‘a process of reproduction’.¹⁴³³ Social reproduction relates to activities that ‘support’ and ‘sustain’ life, including preparing food, cleaning clothing, educating, and providing safe communities and healthy bodies, along with intangibles like discipline and knowledge.¹⁴³⁴

¹⁴²⁹ Raquel Rolnik and Lidia Rabinovich, 'Late-neoliberalism: the financialisation of homeownership and the housing rights of the poor' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014), 63

¹⁴³⁰ Olivier De Schutter, 'The role of global governance in supporting human rights: the global food price crisis and the right to food' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014), 94

¹⁴³¹ Alice Ross and Margot Gibbs, 'Top hedge funds made \$1.9bn on grains ahead of the Ukraine war food price spike' (*Unearthed*, 14 April 2023) <<https://unearthed.greenpeace.org/2023/04/14/ukraine-wheat-food-price-crisis-speculation/>> accessed 15 April 2023

¹⁴³² Alice Ross and Margot Gibbs, 'Top hedge funds made \$1.9bn on grains ahead of the Ukraine war food price spike' (*Greenpeace*, 14 April 2023) <<https://unearthed.greenpeace.org/2023/04/14/ukraine-wheat-food-price-crisis-speculation/>> accessed 12 August 2023

¹⁴³³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013),

¹⁴³⁴ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 123

Social reproduction work is unproductive,¹⁴³⁵ in that it does not produce value as a commodity. This is not to denigrate socially reproductive work, which has long been more associated with women.¹⁴³⁶ Just because it does not produce value does not preclude social reproduction from being subject to capitalist imperatives, however,¹⁴³⁷ raising problems as the logic of profit-making does not usually align with providing high standards of education or healthcare, for example,¹⁴³⁸ but this does not prevent attempts to make socially reproductive industries more 'productive' and 'efficient'.¹⁴³⁹ In many cases, capital accumulation and social reproduction point in opposite directions,¹⁴⁴⁰ because capitalist competition requires the prioritisation of profits over societal needs. On the other hand, capitalism relies upon social reproduction to provide it with healthy, educated employees and consumers. That capitalism tends to compromise social reproduction, as referred to in Chapter 4, is, in Nancy Fraser's view, one of its core contradictions.¹⁴⁴¹ This contradiction, as mentioned in Chapter 1, informs the basic needs (and services) element of social-democratic rights thinking.

The purpose of framing social rights as the means of subsistence and reproduction is to frame them as necessary goods and processes. Without diminishing the importance of civil rights,

¹⁴³⁵ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 128

¹⁴³⁶ Nancy Fraser, 'Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism' (2014) 86 *New Left Review* 55, 62

¹⁴³⁷ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 128

¹⁴³⁸ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 128-129

¹⁴³⁹ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 129

¹⁴⁴⁰ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 128-129

¹⁴⁴¹ Nancy Fraser, 'Contradictions of Capital and Care' (2016) 100 *New Left Review* 99, 100

they are specific to liberal society; social rights are not. Although Vasak's classification of social rights as second-generation rights may be correct in a capitalist society, subsistence and reproduction relate to far more fundamental things than civil rights. This allows us to move beyond questions about the content of these rights. Although there may be regional variations as to exactly what, for example, the content of a right to shelter contains, shelter is indispensable. As subsistence and reproduction are essential and will have to be performed in some way, debate about social rights is not genuinely about the value or importance (or cost) of these rights but over the method of provision.

For clarity, the argument being advanced in this subsection is not so much that social rights are more important than civil rights, nor that there is no difference between these rights. In fact, framing social rights as representing material activities necessary for the foundation and continuation of society, if anything, further distinguishes them from civil rights. Civil rights can theoretically be enjoyed by all members of society simultaneously (although this may not correspond to practice). Everyone could theoretically enjoy a right to freedom of expression without interfering with anyone else's right. Like property rights, these rights would only become legal during conflict between rights (or attempts to suppress them). Social rights, however, relating to physical goods and processes, cannot; any society will have an unlimited amount of freedom of expression, but not an unlimited supply of food. Social rights scholarship, especially the basic-needs approach, focuses mainly on those without those things, failing to investigate why this may be.¹⁴⁴²

¹⁴⁴² Susan Marks, 'Human rights and the bottom billion' (2009) 1 *European Human Rights Law Review* 37, 48-49

5.1.2: Market vs state provision (the 'basic-needs' and indirect approach)

According to Streeck, capitalist society theoretically contains two 'regimes' of distributing resources: 'democratic' or market provision.¹⁴⁴³ The former refers to distribution according to need and certified by politics. The latter refers to allocation in accordance with market forces.¹⁴⁴⁴ Governments in capitalist societies are under pressure to honour both principles, creating constant tension.¹⁴⁴⁵ It may be preferable to substitute 'State provision' for 'democratic provision', discarding any suggestion that distribution could be resolved at elections (i.e., 'democratically'). This differentiation between State and market provision maps on to the social-democratic dual approach to social rights, identified in Chapter 1, based upon some combination of basic-needs and an indirect, employment-based approach. State provision responds not to democratic politics but the immiseration of sections of the population by capitalist exploitation and market provision and a recognition that some State intervention may be needed to rectify this.

Social rights law does not stipulate a method for their fulfilment,¹⁴⁴⁶ a choice between basic needs and indirect provision need not be made. Although social rights law doesn't require State provision of resources to comprehensively triumph over indirect provision, the rhetoric

¹⁴⁴³ Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 New Left Review 5, 7

¹⁴⁴⁴ Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 New Left Review 5, 7

¹⁴⁴⁵ Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 New Left Review 5, 8

¹⁴⁴⁶ United Nations Committee on Economic, Social, and Cultural Rights 'General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, [8]

of progressive realisation towards full, universal implementation seems more suggestive of State provision. States, after all, are the primary obligation-holders of social rights law. However, capitalism's societal demands places limits upon State provision, as covered in Chapter 3. Labour markets are used to indirectly provide for the subsistence and reproduction of the population, and State provision based upon providing 'basic needs' are used to rectify the results of the necessarily exploitative process of capitalist employment.

In accordance with this basic-needs approach, modern liberal States do provide some levels of unemployment and welfare benefits. They may also provide services related to subsistence and reproduction, like healthcare and primary education (basic services). The mode of production, whilst influential, is not 'totalising';¹⁴⁴⁷ there may be elements of society where capitalism is not dominant, the British National Health Service being an example of a section of society that does not mechanistically respond to the mode of production, although it will have to face market imperatives of efficiency and 'productivity', competition on wages with other sectors or countries,¹⁴⁴⁸ etc.

The rise of neoliberalism over the past few decades has shifted capitalist society more toward indirect provision, to be supplemented by basic needs. Capitalist society will always face pressures to make such shifts due to the power of capital and its prioritisation of profit. This makes liberal and social democratic governments at best unreliable providers of the means of

¹⁴⁴⁷ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 129

¹⁴⁴⁸ Anna Gross and Philip Georgiadis, 'NHS consultants in England step up their plans for strikes' *Financial Times* (London, 17 July 2023)

subsistence, as the next subsection will cover. The shift from embedded liberalism to neoliberalism was only one of degree: market provision was the primary form of provision. The ambition of State provision has simply reduced from universal realisation to basic needs/services.

Turning the means of subsistence into private property also turns society's means of subsistence into capital,¹⁴⁴⁹ meaning that workers come to literally depend upon selling their labour to access the means of subsistence,¹⁴⁵⁰ a natural consequence of the separation of workers from their means of production and subsistence.¹⁴⁵¹ Having to work in order to survive is characteristic of all modes of production, but who actually does the work and who benefits from it will vary. Under capitalism, wage labour, is predominant.¹⁴⁵² Feudal peasants, although politically subordinate to lords, were in control of their means of subsistence and production; wage-labourers are not. As all production (and reproduction) in capitalist society is subordinated to the production of value, wage-labourers do not work to survive but instead, per Susan Ferguson, 'survive to work' (for capital).¹⁴⁵³

Just as social rights law does not prescribe a particular method for implementing rights, whether it requires a particular result is not precisely clear (unless, of course, there is discrimination, non-retrogression, etc). A consensus does seem to be forming around the

¹⁴⁴⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 502

¹⁴⁵⁰ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 138

¹⁴⁵¹ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 12

¹⁴⁵² Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 12

¹⁴⁵³ Susan Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (Pluto Press 2020), 13

prevention of poverty being something that States should not ignore. Human Rights and poverty have been linked at least since 1948, when the preamble of the UDHR referred to 'a world in which human beings shall enjoy freedom...from want'.¹⁴⁵⁴ It is the position of the CESCR that poverty constitutes a 'denial of human rights', that poverty is a 'recurring' theme' of the ICESCR and that many of its rights (work, adequate standard of living, housing, food, health, education) have a 'direct and immediate bearing on the eradication of poverty'.¹⁴⁵⁵ The Committee believes that widespread poverty is evidence of 'massive and significant breaches' of the ICESCR.¹⁴⁵⁶ It is good that the State should intervene in order to prevent outright destitution, leaving aside whether liberal States are intervening enough given the persistence of poverty, inequality, homelessness, etc in these societies.

Capitalist society therefore mostly does provide social rights indirectly, through market provision; individuals are forced to enter labour markets and earn their means of subsistence. Both the ICESCR and the ESC contain the right to work alongside rights to things like social security, meaning that it is plausible to argue that social rights could be provided largely through markets provision, and social security could be used to fill any gaps, leaving the State with a minimal role. The issue with this is that it puts capitalists in control of the subsistence of a large proportion of the population. When economic growth is consistent and capital

¹⁴⁵⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

¹⁴⁵⁵ United Nations Economic and Social Council (Committee on Economic, Social, and Cultural Rights), 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social, and Cultural Rights' 25th Session (2001) UN Doc E/C.12/2001/10, [1]

¹⁴⁵⁶ United Nations Economic and Social Council (Committee on Economic, Social, and Cultural Rights), 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social, and Cultural Rights' 25th Session (2001) UN Doc E/C.12/2001/10, [4]

accumulation continues unimpeded, indirect provision may be fine. This was (mostly) the case in the period of ‘embedded liberalism’ meaning that capitalism generally worked well for both capitalists and workers. However, embedded liberalism is gone, and as mentioned in Chapter 3, capitalist production is chaotic and often runs into crisis.¹⁴⁵⁷

5.1.3. *Employment, indirect provision, and capitalist crisis*

Capitalism has long had a complex relationship with unemployment. Capitalism, as explained, requires available workers to exploit. Although capitalism may create employment, it also tends to discard workers.¹⁴⁵⁸ This is born out of its need to introduce more productive production processes.¹⁴⁵⁹ Marx argued that the existence of unemployed workers (whom he called the ‘industrial reserve army’¹⁴⁶⁰) had become a necessary condition of the existence of capitalist production, as the boom-bust nature of capitalism requires that there be workers available to alternatively use and discard.¹⁴⁶¹

As explained, capitalist society provides social rights primarily indirectly. This means that workers must exchange their labour power for wages.¹⁴⁶² Workers will then exchange these wages for the means of subsistence and reproduction as commodities. The wage-form itself is highly ideological; wages cannot match the value produced by the worker, or there would

¹⁴⁵⁷ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 148

¹⁴⁵⁸ Friedrich Engels, *Socialism: Utopian and Scientific* (first published 1880, Electric Book Company 2000), 79

¹⁴⁵⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 438

¹⁴⁶⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 440

¹⁴⁶¹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 440-441

¹⁴⁶² Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 375-376

be no profit¹⁴⁶³ (in accordance with the labour theory of value). Wages correspond to the price of labour rather than value of the worker's capacities, helping to obscure the exploitative nature of this commodity exchange relationship.¹⁴⁶⁴ Receiving social rights in the form of wages is therefore a concession to capitalists.

Adam Smith recognised that capitalists and workers had conflicting interests when it comes to wages; more importantly, he recognised that the capitalists were better placed to win this class struggle over them. This was both because it was easier for the less preponderant capitalist class to organise, and because whilst capitalists can often tide themselves over where they lose employees, workers find it far more difficult to maintain themselves when they lose employment.¹⁴⁶⁵ Wages cannot be too high, or workers would not feel the need to exchange their labour power for wages.¹⁴⁶⁶

They also cannot be too low, or workers will not be able to maintain themselves. Capitalists compete to keep the price of labour as low as possible by attempting to use labour more productively, therefore using less labour. This will reduce the price of commodities but will also reduce wages.¹⁴⁶⁷ As Chapter 3 explained, markets will internationalise this competition, under which capitalists must constantly compete to produce profitably and productively.

¹⁴⁶³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 375

¹⁴⁶⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 378-379

¹⁴⁶⁵ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations: Volume I* (first published 1776, G. Bell and Sons 1912), 67

¹⁴⁶⁶ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 384, 360

¹⁴⁶⁷ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 384

Wages may become inadequate if the prices of the means of subsistence increase relative to wages (i.e., wages decrease in real terms).¹⁴⁶⁸

Marx notes that the industrial reserve army puts pressure on those in work to submit to the subjugation of capital, which puts downward pressure on wages,¹⁴⁶⁹ a phenomenon that economists present as responding to supply and demand.¹⁴⁷⁰ The existence of unemployment benefits may mitigate this to some extent, but those benefits would have to be higher than wages to prevent this downward pressure on wages (lessening the dull compulsion on labourers). This importance of unemployment for capitalists led economist Michal Kalecki to argue that full employment could never be achieved due to political opposition from capital, which may even prefer unemployment to higher profits¹⁴⁷¹ due to its disciplinary effect.

There have been instances when capitalism (indirect provision) has successfully provided for improving the living standards of the majority of citizens. A false but pervasive narrative has emerged¹⁴⁷² that the past few decades¹⁴⁷³ (the neoliberal era) was one of those instances, but this is not true.¹⁴⁷⁴ The post-war period, however, at least in the West, was broadly one of

¹⁴⁶⁸ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 381

¹⁴⁶⁹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 444

¹⁴⁷⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 444-445

¹⁴⁷¹ Michal Kalecki, 'Political Aspects of Full Employment' (1943) 14(4) *Political Quarterly* 322, 326

¹⁴⁷² Martin Wolf, 'The big mistakes of the anti-globalisers' *Financial Times* (London, 21 June 2022)

¹⁴⁷³ United Nations Department of Economic and Social Affairs, 'Rising poverty a 'moral indictment of our times': Guterres' (*United Nations*) <<https://www.un.org/en/desa/rising-poverty-%E2%80%98moral-indictment-of-our-times%E2%80%99-guterres>> accessed 8 August 2023

¹⁴⁷⁴ UNGA (Human Rights Council) 'The parlous state of poverty eradication: Report of the Special Rapporteur on extreme poverty and human rights' 44th Session (2020) UN Doc A/HRC/44/4, [5]

those instances. A norm of continuously rising wages emerged¹⁴⁷⁵ and the working classes broadly made genuine gains as a result, reducing material inequality. This boom was supported by significant State/public spending, but it was ultimately driven (and eventually restrained) by a unique boom in profitability¹⁴⁷⁶ and productivity.¹⁴⁷⁷ However, when crisis hits, as explained in Chapter 3, indirect provision falls apart.

This will put governments in a difficult situation, amid demands for austerity, which can affect the basic-needs approach, and the imposition of tighter monetary policy by the central bank, which raises unemployment, suppresses wages, and thus affects the indirect approach. For governing parties of the centre and right, these choices are easier, but even social democratic parties will be challenged. The need for social democratic parties to ‘manage the affairs of the country’ whilst defending the ‘interests of the working-class’ is, in Stuart Hall’s view, the principal contradiction of social democracy.¹⁴⁷⁸ In practice, these parties usually prioritise the former, and have very little choice but to do so. Ralph Miliband suggested that politicians prefer to ignore class implications, preferring to situate themselves ‘above’ class, acting in the ‘national interest’¹⁴⁷⁹ even where their actions betray class bias.¹⁴⁸⁰ Current British Prime Minister Keir Starmer’s suggestion that ‘when business profits, we all do’ in a speech to the Confederation of Business Industry in 2021¹⁴⁸¹ is an example of this type of thinking.

¹⁴⁷⁵ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 272

¹⁴⁷⁶ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 271

¹⁴⁷⁷ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 274

¹⁴⁷⁸ Stuart Hall, ‘The Great Moving Right Show’ in Stuart Hall and David Morley (ed), *Essential Essays: Volume I* (Duke University Press 2019), 380

¹⁴⁷⁹ Ralph Miliband, *The State in Capitalist Society* (first published 1969, Merlin Press Ltd 2009), 52

¹⁴⁸⁰ Ralph Miliband, *The State in Capitalist Society* (first published 1969, Merlin Press Ltd 2009), 52-53

¹⁴⁸¹ Jim Pickard and Daniel Thomas, ‘How Labour’s Starmer and Reeves are ‘wooing’ business chiefs’ *Financial Times* (London, 26 November 2021)

Despite the obvious imbalance between capital and labour in liberal society, the economic mainstream always tries to blame capitalist crises on the power of labour being too strong compared with capital or welfare programmes being too expensive.¹⁴⁸² Capitalism has, since the 2008 crash, been more able to tolerate very low levels of unemployment, but only because this has broadly not led to higher wages and/or constrained profits.¹⁴⁸³ This, for Robert Brenner, raised the question of why liberal capitalism can no longer accommodate any level of improvement in real wages or social programmes without lurching into crisis.¹⁴⁸⁴ This is especially going to be a problem for social rights if they are going to primarily be provided indirectly through employment and the wage form and backstopped by increasingly diminished direct provision based upon basic needs.

Capitalism is increasingly becoming an unreliable provider of the means of subsistence and reproduction. The IMF is forecasting that global growth will be at historically low levels in the medium term, expected to be 3% annually through 2028, compared with an average of 3.7% in 2010-2019).¹⁴⁸⁵ The world is now facing a series of mutually reinforcing crises, referred to by Adam Tooze as a 'polycrisis',¹⁴⁸⁶ including climate change, rising commodity prices,

¹⁴⁸² Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 18

¹⁴⁸³ Rebecca Bramall, Jeremy Gilbert, and James Meadway, 'What is Austerity?' (2016) 87 *New Formations* 119, 131

¹⁴⁸⁴ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 148

¹⁴⁸⁵ International Monetary Fund, 'World Economic Outlook: Countering the Cost-of-Living Crisis' (*International Monetary Fund*, April 2023) <<https://www.imf.org/en/Publications/WEO/Issues/2023/04/11/world-economic-outlook-april-2023>> accessed 4 May 2023

¹⁴⁸⁶ Adam Tooze, 'Chartbook #130 Defining polycrisis - from crisis pictures to the crisis matrix' (*Chartbook*, 24 June 2022) <<https://adamtooze.substack.com/p/chartbook-130-defining-polycrisis>> accessed 8 August 2023

pandemics, and political instability. Some of these crises, like climate change, which is exacerbated by economic growth but may also interrupt its continuation, generally affects the poor (globally and domestically) disproportionately,¹⁴⁸⁷ and is likely to make subsistence more difficult (e.g., by disrupting food production¹⁴⁸⁸). Uninterrupted economic growth may be challenged.

The current mode of providing social rights in capitalist society appears shaky, at least through political or economic means. The real and material processes of producing and providing the means of subsistence and production are highly subject to capitalism's whims. Although it is possible to identify these processes and justify their importance, they have a complicated relationship with capitalist society.

This justifies attempts to move beyond the social democratic thinking behind mainstream social rights discourse. Instead, social rights need to be thought of as a discourse of struggle, of resistance, of (at minimum) a potential avenue to move beyond the confines of capitalist society. Social rights will be thought of in an anti-capitalist context, based upon their likelihood of forming part of a social revolution (as opposed to reform) that can enable the vast majority of people in capitalist societies to emancipate themselves, to produce, obtain, and enjoy their means of subsistence collectively. This will also involve investigating whether law itself is, as

¹⁴⁸⁷ Will Stronge (ed), *The New Economy Starter Pack* (Verso 2019), 58

¹⁴⁸⁸ James Meadway, 'The cost of food will soar — and we are not prepared' *Morning Star* (London, 25 April 2023)

Thompson suggested, simultaneously a mediation of 'existent class relations'¹⁴⁸⁹ and a 'genuine forum within which' class conflict can be conducted.¹⁴⁹⁰

5.2 Social rights and emancipation: human rights as legal form of struggle

5.2.1 Legal rights and 'generations': a materialist conception of legal rights

To briefly recap, Marx was famously sceptical of the individualised and negative 'Rights of Man' of the French Revolution, which seemed to express rights to private property along with a nascent form of civil rights (liberty, property, security, and 'resistance' to oppression).¹⁴⁹¹ He disparaged their individualism, noting that the 'rights of man...are nothing but the rights of... man separated from other men and from the community'.¹⁴⁹² It was such rights that Marx sarcastically derided as rights of 'Freedom, Equality, Property, and Bentham',¹⁴⁹³ discussing the disparity between market exchange and the 'hidden abode of production'. He believed that these rights would be limited by the parameters imposed by capitalism ('right can never be higher than the economic structure of society'¹⁴⁹⁴). This was at least partly because they

¹⁴⁸⁹ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 262

¹⁴⁹⁰ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 263

¹⁴⁹¹ 'Declaration of the Rights of Man – 1789' (*Yale Law School: the Avalon Project*) <
https://avalon.law.yale.edu/18th_century/rightsof.asp> accessed 2 August 2024

¹⁴⁹² Karl Marx, 'On the Jewish Question' in Jack Cohen and others (ed), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 163

¹⁴⁹³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 119

¹⁴⁹⁴ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 20

were not public rights but private rights of 'civil society'. Property, he suggested, was the 'basis' of civil society.¹⁴⁹⁵

It was also the basis of law and capitalist legality. Applying Pashukanis' commodity-form theory to human rights suggests that the equality of rights discourse derives from the abstract equality of commodity ownership, obscuring the inequality underlying disputes between unequal actors (a landlord and a tenant, for example). Private property was also the basis of (individual) legal rights, which only take legal form in dispute when private property has been normalised. More specifically, it is these rights that form the basis of modern law, the entire legal framework based upon the practices of commodity production and exchange. Effective law must respond to existing social relations, and it is these relations based upon private property rights that modern law is based upon.

As mentioned, Vasak divided rights into separate 'generations'. It was also accepted that there was some basis for this from a legal perspective. Pashukanis also identified differences between the subjective private right of a commodity owner and objective public rights imposed in the common interest. The latter will have to adapt themselves to the legal framework established around the former. Social rights adhere more to objective rights rather than private subjective rights and whilst imposing public rights is possible, there are difficulties involved. The chapter's final section will examine this.

¹⁴⁹⁵ Karl Marx, 'On the Jewish Question' in Jack Cohen and others (eds), *Marx and Engels: Collected Works Volume 3* (Lawrence & Wishart 2010), 163

The theory that legal rights emerge organically from underlying economic relations and are given legal expression in dispute does not alone exhaust an analysis of the emergence of rights. It would not explain social rights, which can become legal rights even if they rarely do in practice. This theory may be contrasted to Bill Bowring's 'materialist conception' of human rights, which argues that rights do not emerge from naturalist principles or legal enunciation¹⁴⁹⁶ but from concrete human struggles, from historical developments.¹⁴⁹⁷ There is nothing to disagree with here; the location of rights in historical developments corresponds the idea that they emerge from the social relations of production.

Bowring locates the concreteness of the three 'generations' of human rights, in their emergence from the French Revolution, the Bolshevik Revolution, and the post-war anti-colonial struggles respectively. He argued that social rights had emerged from the aftermath of the 1917 Revolution through the creation of the ILO¹⁴⁹⁸ and that the separation of the first two generations came from the Cold War-era debate on social rights.¹⁴⁹⁹ Rights are therefore not only potential tools of struggle but emerge from struggle.

¹⁴⁹⁶ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 129

¹⁴⁹⁷ Bill Bowring, 'Marx, Lenin and Pashukanis on self-determination: response to Robert Knox' (2011) 19(2) *Historical Materialism* 113, 113

¹⁴⁹⁸ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 118

¹⁴⁹⁹ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 172-173

However, Bowring, a (fair) critic of Pashukanis,¹⁵⁰⁰ took a completely one-sided view of rights that did not allow for them to be connected to prevalent social relations. Whilst he argued that rights acquire ‘political...even revolutionary content’ when they are ‘reappropriated in struggle’,¹⁵⁰¹ Bowring did not believe that rights were capable of being used in a counter-revolutionary fashion; his theory posits that rights are ‘always scandalous’ (and revolutionary), being the product,¹⁵⁰² and embodiment of human struggles.¹⁵⁰³ Rights, he argued, ‘come to life through struggle’ and are transformed into a ‘material force, capable of bringing about social change’¹⁵⁰⁴ and are then made available to ‘succeeding generations’.¹⁵⁰⁵ In other words, they are available to be wielded as tools of emancipation.

Although some differences might be based upon the way that terms like revolution, emancipation, and struggle are defined, Bowring’s belief that rights are inherently ‘scandalous’ and therefore always revolutionary flies in the face of the historical specificity of capitalism and the idea that right forms the basis of law. Leaving aside questions about whether the Rights of Man are modern civil rights,¹⁵⁰⁶ it could plausibly be argued that the

¹⁵⁰⁰ Bill Bowring, ‘Positivism versus self-determination: the contradictions of Soviet international law’ in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 153-158

¹⁵⁰¹ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 143

¹⁵⁰² Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 112

¹⁵⁰³ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 129

¹⁵⁰⁴ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 179

¹⁵⁰⁵ Bill Bowring, ‘Marx, Lenin and Pashukanis on self-determination: response to Robert Knox’ (2011) 19(2) *Historical Materialism* 113, 113-114

¹⁵⁰⁶ Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010), 12; cf Igor Shoikhetbrod, *Revisiting Marx’s Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 59

generations of rights emerging from the French and Bolshevik revolutions were as much counter-revolutionary as they were emancipatory. This argument will be made for self-determination in the next chapter.

Human rights do seem to emerge from struggle, from revolutionary change, but it is important to be specific about this process. As explained in Chapter 3, Capitalist private property as described by Locke became completely embedded in English society as a material reality before taking legal form. This was the result of a struggle, a revolution,¹⁵⁰⁷ conducted by the emerging capitalist class against the peasantry (and the aristocratic propertied classes).¹⁵⁰⁸ By the end of the 18th century, there was settled consensus around capitalist private property against previous forms of property.¹⁵⁰⁹ Locke's political and economic theory would spread accordingly. Locke's appropriation of the Levellers' doctrines of consent and natural individual rights (of self-proprietty, as mentioned in Chapter 2) to make the case for capitalist, private property-based legality (and parliamentary democracy) has become typical of liberalism's relationship with democracy. Locke's rights theory essentially corresponds to the Rights of Man and is often identified as their origin point.¹⁵¹⁰

¹⁵⁰⁷ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 278

¹⁵⁰⁸ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 280

¹⁵⁰⁹ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 287

¹⁵¹⁰ Makau wa Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 589, 629

Rights had already appeared in different contexts. As mentioned, Grotius sought to assert rights to conduct imperialistic activities against the rights of other nation-states. Francisco de Vitoria, another influential figure in international law, also asserted a right of 'just war' to justify Spanish colonisation, but carefully carved out this right to apply only to nation-states,¹⁵¹¹ specifically the Spanish monarchy.¹⁵¹² The doctrine of the 'lesser magistrate', popularised by John Calvin, who wrote about the possibility of such magistrates 'appointed for the...moderation of the power of kings',¹⁵¹³ seemed to imply some sort of rights against government, but this was explicitly not a right available to individuals.¹⁵¹⁴

Capitalism meant a different type of rights. Demands for political rights by the likes of the Levellers were appropriated by Locke to argue for capitalist legality. The emergence of the dialectical rights to private property, rights that created commodity exchange relations, was then in the process of reducing the salience of political rights.¹⁵¹⁵ This created a new sphere of society where economic power was protected and disconnected from political power. These individualistic civil rights were able to correspond to the primary legal form derived from private property rights. This, rather than Cold War political wrangling, explains the separation of civil from social rights.

¹⁵¹¹ Francisco de Vitoria, *De Indis* (first published 1532), 12-13

¹⁵¹² Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 97

¹⁵¹³ John Calvin, *Institutes of the Christian Religion* (first published 1536, Project Gutenberg 2021), 662

¹⁵¹⁴ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 96

¹⁵¹⁵ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (first published 1995, Verso 2016), 208

Civil rights, explicitly connected as they originally were to property in the Rights of Man, were as much expressive of a (bourgeois) revolution as they were revolutionary themselves. Human rights, or at least new conceptions of rights, do seem to emerge from struggle, but perhaps not in the way Bowring thinks. This is not to denigrate civil rights. As Bowring points out, civil rights are now available to 'succeeding generations', and they remain valuable in many struggles within capitalist society, such as those that vulnerable individuals and minorities face in accessing legal justice on the basis of equality.¹⁵¹⁶ They are, however, not automatically emancipatory in that they cannot be used as a basis of a social revolution that will bring an end to capitalist social relations; instead, they are useful because of their correspondence to those relations.

This is also not to argue that rights only emerge from struggle when they support the hegemonic mode of production and corresponding property relations. There is another way that rights can emerge, as a concession to or a rectification of the defects of the dominant system. The early Soviet Union ran into economic trouble (as the next chapter and epilogue will return to) within four years of the Bolshevik Revolution. Goikhbarg explained that the Soviet leadership, which had attempted to establish a new, collective form of property, was forced to grant private property rights, inimical to collective property, to allow capitalists to help build up Russia's productive capabilities.¹⁵¹⁷ Political developments would instead prevent collective property from emerging and capitalist legality from disappearing.¹⁵¹⁸ A

¹⁵¹⁶ Keira Jazmin Barnes and Reem Abdulhakim Taha, 'Litigants in Person – Access to Justice via the Court Process?' (2020) 1 LJMU Student Law Journal 5, 13

¹⁵¹⁷ A.G. Goikhbarg, 'Justice, the Ideology of Law, and Revolution' in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 133

¹⁵¹⁸ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 19

similar point can be made about social rights. As explained in Chapter 4, they represent a rectification of capitalist society, a concession to those workers, but not (necessarily) an emancipatory concession, especially when they do not correspond to property rights. These rights, too, emerged from struggle, but not necessarily in a revolutionary form.

Based upon the above, Bowring's materialist theory of rights can be reformulated. Rights emerge from and respond to historical developments, including social revolutions but are not themselves revolutionary and scandalous. Some types of rights can be located directly in the social relations created by the dominant mode of production (property rights). Others correspond to those social relations and can be used to legitimate those relations but possibly also to struggle for inclusion within them (civil rights). Further categories of rights may be granted through struggle as a concession to the defects of prevailing social relations, but their incompatibility may limit their legal impact (social rights).

Vasak's three generations can be reformulated as well. The first generation of rights could be those intimately connected to existing social relations, private property rights in capitalist society. The second generation is those that correspond to the first generation, civil rights in this case. Social rights therefore belong to a third generation due to their lack of correspondence with capitalist social relations. This will shape and confine their potential as legal rights and limit their effect. This helps to explain the disconnection, therefore, in capitalist society between the fundamental importance of the physical and material existence of the goods, activities, and processes related to social rights and their (non-existent) legal status.

5.2.2 *The limits of rights discourse*

The above suggests the beginnings of a materialist theory of legal rights. In thinking about social rights as potential tools of resistance and emancipation, it may be useful to think about some of the limits of legal rights as discourse. As explained, rights discourse posits citizens as atomised individuals. There is a Western-centric strand within rights theory that tends to portray rights as emerging from the ‘wisdom and benevolence’ of the West¹⁵¹⁹ or the ‘natural rights theory’ of Locke,¹⁵²⁰ i.e., connecting the dominant individualist conception of rights with human nature. Rajagopal accordingly argues that the ‘human’ in human rights is the homo oeconomicus,¹⁵²¹ the rational, self-interested man described by Adam Smith.¹⁵²²

It is possible to be more specific, to argue that there is a strand of social rights discourse emerging from the ILO that posits the human as a wage-labourer. As mentioned, Bowring believed that social rights emerged through the ILO. However, this was at least partially a counterrevolutionary advancing of a social democratic approach to labour relations that has developed, especially in Europe, into the social democratic basic-needs and indirect approach to social rights that is premised upon capitalist social relations.

¹⁵¹⁹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 174

¹⁵²⁰ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 175

¹⁵²¹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 197

¹⁵²² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (originally published 1776, Electric Book Company 2001), 30

The ILO posits a tripartite conception of labour relations; its Governing Body contains representatives of nation-states, employers, and 'workers'.¹⁵²³ The ILO therefore puts forward a (potentially) harmonious relationship between workers and employers, regulated by the State as a vision of an 'immaculate' class society¹⁵²⁴ supposedly free from¹⁵²⁵ or 'above' class relations. The tripartism of the ILO was potentially radical¹⁵²⁶ in that the regulation of labour relations introduced workers (and unions) into the structure of international law.

However, Mai Taha argues, the 'spirit of collaboration rather than confrontation' of the tripartite structure served the purpose of providing a strictly legal process for resolving labour issues, one that relied upon formal legal equality rather than more radical forms of conflict.¹⁵²⁷ It was necessary to ensure that working-classes did not follow the Bolsheviks. This formalised equality of these legal relations could not and would not disrupt these class relations. It also normalised the relations between capitalists and their employees (and the State). As

¹⁵²³ International Labour Organisation, 'ILO Constitution' (*ILO Normlex*) <
https://normlex.ilo.org/dyn/normlex/en/f?p=1000:62:7593781162941::NO:62:P62_LIST_ENTRIE_ID:2453907:NO> accessed 13 August 2024

¹⁵²⁴ Mai Taha, 'Law, Class Struggle, and Nervous Breakdowns' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 117

¹⁵²⁵ Mai Taha, 'Law, Class Struggle, and Nervous Breakdowns' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 118

¹⁵²⁶ Mai Taha, 'Law, Class Struggle, and Nervous Breakdowns' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 116

¹⁵²⁷ Mai Taha, 'Law, Class Struggle, and Nervous Breakdowns' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 117

Rajagopal suggests, this can legitimise the role of the (capitalist) State,¹⁵²⁸ and, especially for social rights, the role of capitalist employment, presenting the indirect provision of rights as the primary way that individuals can secure their subsistence. Rights discourse erases alternatives to the basic-needs and indirect approach, especially where social rights are concerned, normalising the confines of capitalism it attempts to work within.

Therefore, what emerged through the ILO was a social-democratic view of social rights that has, along with the 'welfarism' introduced in the previous chapter, dominated the discipline from its inception. It was explained in the first chapter that the CESC is permissive of capitalist wage-labour. The ILO is positively encouraging, perhaps naturally given that its foundations aimed to prevent alternatives. Many of its early conventions, like the Forced Labour Convention¹⁵²⁹ and the Protection of Wages Convention,¹⁵³⁰ sought to institutionalise wage-labour; the latter, for example, normalised wages as remuneration payable through an employment contract in exchange for labour performed.¹⁵³¹ It may be proper for an organisation committed to labour standards to focus upon current labour conditions. However, examination of the views of the ILO, along with the Council of Europe's European Social Charter (ESC) system, on the relationship between employment and social policy suggests a crystallisation of the social-democratic approach to social rights that lends legitimacy to capitalist social relations.

¹⁵²⁸ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 199

¹⁵²⁹ International Labour Organization, *C029 - Forced Labour Convention, 1930*, No.29, 28 June 1930

¹⁵³⁰ International Labour Organization, *C095 - Protection of Wages Convention, 1949*, No.95, 1949

¹⁵³¹ International Labour Organization, *C095 - Protection of Wages Convention, 1949*, No.95, 1949, Article 1

The ILO's approach to social security has slightly evolved over time. Early conventions tended to frame social security as something of a public good. The Unemployment Provision Convention, which encouraged the use of either contributory insurance schemes or allowances paid for public works programmes for the unemployed.¹⁵³² In other words, social security was not seen as predicated entirely upon returning individuals to wage-labour, although it was premised upon indirect provision being the primary provider. This approach to social security seems to reflect social democratic views prior to and during embedded liberalism, when indirect provision can coexist with high levels of social rights.

The Convention on Employment Promotion and Protection against Unemployment, on the other hand, adopted after the neoliberal turn in 1988, urged nations to 'co-ordinate' social security with employment policy in order to ensure that social security 'contributes' to full employment and importantly does not 'discourage' workers from entering employment.¹⁵³³ The reference to discouraging employment seemingly refers to the level of social security not interfering with indirect provision.

This is more suggestive of a basic-needs approach to social security, one that aims to provide the bare minimum and no more. Again, the difference between these social democratic positions is one of degree, and they both are premised upon capitalist employment. There

¹⁵³² International Labour Organization, *C044 – Unemployment Provision Convention, 1934*, No. 44, 1934, Article 1

¹⁵³³ International Labour Organisation, *C168 -- Employment Promotion and Protection against Unemployment Convention No. 168*, 21 June 1988, Article 2

was not much evidence of a ‘scandalous’ conception of social rights emerging here, one that could be emancipatory, at least for workers. What is instead evident is the maintenance of capitalist social relations through a social democratic view that, however benevolent, has come to resemble the basic-needs and indirect approach.

The discourse of the ILO seems to have become prevalent in Europe, specifically the Council of Europe’s social rights system. The majority of ESC rights relate to work, including the rights to work,¹⁵³⁴ to ‘just conditions’ of work,¹⁵³⁵ to ‘safe’ working conditions,¹⁵³⁶ ‘fair remuneration’,¹⁵³⁷ and ‘equal’ employment opportunities.¹⁵³⁸ Many others are premised upon work; the right of ‘young persons’ to protection relates almost entirely to working restrictions.¹⁵³⁹ Many rights, like freedom of association¹⁵⁴⁰ and social security¹⁵⁴¹ are addressed to workers, and many others, like the right to dignity at work¹⁵⁴² and the right to be consulted during collective redundancy,¹⁵⁴³ are meaningless outside of employment, possibly even outside of capitalist employment for that matter.

¹⁵³⁴ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 1

¹⁵³⁵ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 2

¹⁵³⁶ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 3

¹⁵³⁷ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 4

¹⁵³⁸ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 20

¹⁵³⁹ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 7

¹⁵⁴⁰ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 5

¹⁵⁴¹ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 12

¹⁵⁴² Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 26

¹⁵⁴³ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 29

This is not an attack on the text of the ESC itself. There is little wrong with the text of Article 31, which addresses the right to housing to ‘everyone’.¹⁵⁴⁴ Article 12’s right to social security even suggests the progressive raising of social security¹⁵⁴⁵ (although there is no stated aim to this suggestion). A purely textual reading of the ESC, however, as Chapter 4 explained regarding the ICESCR, tells us little, and as with the ICESCR, nation-states would not necessarily strictly adopt the text. The point is that connecting the dots between the ILO, the Council of Europe, and even the CESCR’s work on social rights has essentially conflated social rights not only with workers’ rights but with capitalist workers’ rights. Given that social rights emerged from capitalism and the need to remediate its exploitative tendencies, this is to be expected, but these rights do not offer people the power to overcome capitalism.

Legitimizing the role of the capitalist State and markets can strengthen the idea that any nation-state not conforming to Western standards must implement reforms. This is linked to the idea that failings in social rights stem from ‘domestic’ factors like institutional failings, government corruption, poor policies, etc.¹⁵⁴⁶ Where these failings take place in Third World countries, the policing of sovereignty through the standard of civilisation can legitimise reforms that will make the situation much worse. In many cases, it is capitalism, rather than poor governance, that creates rights violations.¹⁵⁴⁷ Rights discourse can therefore be a double-edged sword; as Knox points out, ‘expanding the available catalogue of rights’ can expand the

¹⁵⁴⁴ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 31(1-2)

¹⁵⁴⁵ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, CETS 163, Article 12(3)

¹⁵⁴⁶ Susan Marks, ‘Human Rights and the Bottom Billion’ (2009) 1 *European Human Rights Law Review* 37, 42

¹⁵⁴⁷ Susan Marks, ‘Human Rights and the Bottom Billion’ (2009) 1 *European Human Rights Law Review* 37, 43-44

‘domain of acceptable areas for intervention’, causing ‘unintended consequences’.¹⁵⁴⁸ This is why Bowring’s belief that rights are necessarily ‘scandalous’ was doubted above. Chapter 6 will return to this.

5.2.3 Rights as the ‘sole approved discourse of resistance’

That rights can be a double-edged sword, an implication of both the abstract legal form and legal indeterminacy, can lead to problems for rights as tools of emancipation. Rajagopal has argued that, especially for the Third World, rights have come to be the ‘sole approved discourse of resistance’.¹⁵⁴⁹ That it is the ‘sole’ discourse of resistance suggests that it is widely used in practice to challenge power, but that it is an ‘approved’ discourse suggests counter-revolutionary tendencies.

As capitalism is unequal and exploitative, capitalist society requires ‘approved’ channels for resistance. The extension of the franchise in the West to the working classes is an example of this, and liberal democracy itself is the most prominent example of such a channel. Makau Mutua argues that rights themselves are an internationalisation of liberal democracy’s domestic role in managing resistance.¹⁵⁵⁰ Approved channels can strengthen the Western vision of modernity, framing rights violations as failures to conform to Western capitalism.

¹⁵⁴⁸ Robert Knox, ‘The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008’ (2010) 18(1) *Historical Materialism* 193, 204

¹⁵⁴⁹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 165

¹⁵⁵⁰ Makau wa Mutua, ‘The Ideology of Human Rights’ (1996) 36 *Virginia Journal of International Law* 589, 607

Mutua located a trend within the school of ‘conventional doctrinalists’, a field within human rights discourse that largely operates within Western NGOs¹⁵⁵¹ that creates an obsession over measuring rights according to ‘standards’. This raises the same problem as that raised by the standard of civilisation: questions about who gets to create and evaluate the standards in question.

This logic can turn rights into sticks with which to beat nation-states,¹⁵⁵² those attempting to diverge from capitalist modernity. How Western nations view unfriendly nations is instructive here. The UN Human Rights Council’s 2009 Universal Periodic Review on Cuba’s human rights record¹⁵⁵³ provides an example. Cuba is one of the few nations that has long been reluctant to comply with international law’s imperialist conditions.

A stark contrast in the way Cuba was viewed between the Third World and the West was evident. Several nations called attention to the US blockade¹⁵⁵⁴ and the ‘harsh external environment’ in which Cuba found itself.¹⁵⁵⁵ Others acknowledged its ‘strong commitment’ to rights (Bolivia), especially social rights (Ghana),¹⁵⁵⁶ and to democracy; Nicaragua called it the ‘best evidence’ of the ‘popular expression achieved when a democracy is solid and

¹⁵⁵¹ Makau wa Mutua, ‘The Ideology of Human Rights’ (1996) 36 *Virginia Journal of International Law* 589, 596

¹⁵⁵² Makau wa Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201, 239

¹⁵⁵³ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Cuba’ (5 October 2009) UN Doc A/HRC/11/22

¹⁵⁵⁴ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Cuba’ (5 October 2009) UN Doc A/HRC/11/22, [59], [61], [62], [66], [87]

¹⁵⁵⁵ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Cuba’ (5 October 2009) UN Doc A/HRC/11/22, [66]

¹⁵⁵⁶ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Cuba’ (5 October 2009) UN Doc A/HRC/11/22, [57]

participatory'.¹⁵⁵⁷ Other countries, like South Africa,¹⁵⁵⁸ Ukraine,¹⁵⁵⁹ and Sri Lanka,¹⁵⁶⁰ thanked Cuba for its anti-imperialist and humanitarian international efforts. India¹⁵⁶¹ and the Philippines suggested that other countries could learn from Cuba's policies.¹⁵⁶²

Western countries were far less encouraging. Austria and Israel¹⁵⁶³ expressed concern about the independence of Cuba's judiciary,¹⁵⁶⁴ which Israel related to suppression of the 'most fundamental human rights' (seemingly rights to a fair trial and to legal equality).¹⁵⁶⁵ The United Kingdom urged Cuba to allow 'independent' international organisations to visit Cuba.¹⁵⁶⁶ A number of other Western countries urged Cuba to invite 'special' human rights 'procedures',¹⁵⁶⁷ UN Rapporteurs,¹⁵⁶⁸ and other human rights organisations.¹⁵⁶⁹

¹⁵⁵⁷ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [59]

¹⁵⁵⁸ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [67]

¹⁵⁵⁹ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [111]

¹⁵⁶⁰ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [73]

¹⁵⁶¹ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [72]

¹⁵⁶² UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [83]

¹⁵⁶³ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [53]

¹⁵⁶⁴ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [96]

¹⁵⁶⁵ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [53]

¹⁵⁶⁶ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [64]

¹⁵⁶⁷ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [131](7)]

¹⁵⁶⁸ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [131](9)]

¹⁵⁶⁹ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cuba' (5 October 2009) UN Doc A/HRC/11/22, [131](10)]

Cuba was understandably reluctant to accept most of these suggestions, seeing them as an attack on its self-determination and a step towards implementing policy designed by ‘foreign super-Power(s)’.¹⁵⁷⁰ Cuba was not attacked for its (imperfect) rights record. Instead, it was attacked for not complying with Western standards of governance (i.e., judicial independence) and Western conception of rights and democracy. More importantly, it was attacked for being unwilling to subject its sovereignty to inspection, to ‘independent’ foreign intervention. That rights can be used as a pretence for intervention in domestic affairs of nation-states suggests that they are not inherently revolutionary.

Additionally, rights discourse is not specific enough to serve as a discourse of resistance and emancipation. The State-centric tendency of rights obscures that violations may originate in civil society. This is at least partially what Marks meant when she argued that human rights fail to address ‘root causes’.¹⁵⁷¹ Referring to (mainstream) reports on human rights failings, she called attention to their failure to trace the roots of a problem far enough backwards in time,¹⁵⁷² their State/government-centric remedies,¹⁵⁷³ their tendency to treat effects as causes,¹⁵⁷⁴ and their failure to provide recommendations based upon the causes (should those

¹⁵⁷⁰ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Cuba’ (5 October 2009) UN Doc A/HRC/11/22, [132]

¹⁵⁷¹ Susan Marks, ‘Human Rights and Root Causes’ (2011) 74(1) *Modern Law Review* 57

¹⁵⁷² Susan Marks, ‘Human Rights and Root Causes’ (2011) 74(1) *Modern Law Review* 57, 70-71

¹⁵⁷³ Susan Marks, ‘Human Rights and Root Causes’ (2011) 74(1) *Modern Law Review* 57, 71

¹⁵⁷⁴ Susan Marks, ‘Human Rights and Root Causes’ (2011) 74(1) *Modern Law Review* 57, 72

causes be recognised).¹⁵⁷⁵ In many cases, these investigations failed to realise the political/economic ('root') causes behind identified 'effects'.

It was noted in Chapter 1 that this was true of Amnesty International's reporting on violence in Pinochet's Chile, violence that was linked to the imposition of neoliberal capitalist reforms in the country. The violent crackdowns were the effects of resistance to the economic violence rather than the root cause, but Amnesty ignored those root causes. As Marks noted elsewhere, this leads human rights discourse to expend too much effort on shining a 'light' upon violence that results from actions taken in 'broad daylight',¹⁵⁷⁶ i.e., that are linked to the natural functioning of imperialist capitalism. Rights discourse often misses this context.

Rights discourse also overlooks the violence involved in the 'normal operation' of capitalist society. Capitalism is violent and coercive in at least two ways. First, as has been explained, it is often preceded by systemic force aimed at destroying the preceding form of society (i.e., primitive accumulation). The changing dynamics of capital accumulation may require more violence. Capitalism is also violent in its 'dull compulsion', in the exploitation involved in extracting surplus-value. Capitalism therefore involves a good deal of 'systemic' violence, violence that is inherent in capitalist accumulation. Rights language overlooks this violence.

¹⁵⁷⁵ Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) *Modern Law Review* 57, 73

¹⁵⁷⁶ Susan Marks, 'Four Human Rights Myths' (2012) (*LSE Law, Society and Economy Working Papers* 10/2012, 2012) <www.lse.ac.uk/collections/law/wps/wps.htm> accessed 29 March 2022, 13-14

Rajagopal argues that the failure to conceptualise and understand violence stems from the colonial origins of rights discourse. He argues that the prohibition of torture (recognised in the ICCPR¹⁵⁷⁷ and ECHR,¹⁵⁷⁸ in its own UN Covenant,¹⁵⁷⁹ and as a *jus cogens* right¹⁵⁸⁰) is strongly linked to the 'colonial-era' civilising mission.¹⁵⁸¹ He connected this to a distinction between necessary and unnecessary forms of suffering. Unnecessary suffering was applied both to 'private' 'local community practices' like sacrifices and the 'public' 'standard excesses' of the capitalist State, whilst necessary suffering referred to either acts of private individuals against others or public violence inflicted upon colonial subjects in the name of modernity.¹⁵⁸² This necessary/unnecessary distinction was determined by the colonial powers and not the subjects of colonialism.

Unnecessary suffering was framed narrowly¹⁵⁸³ as torture, counterposed to the necessary suffering inflicted by the capitalist State and the power of capital.¹⁵⁸⁴ This adds a level of nuance to the idea that capitalism prioritises civil rights over social rights: violations of civil rights connected to the necessities of capitalist society, which tend to affect those on the

¹⁵⁷⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 7

¹⁵⁷⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Article 3

¹⁵⁷⁹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 85, 10 December 1984

¹⁵⁸⁰ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 183

¹⁵⁸¹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 183

¹⁵⁸² Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 183

¹⁵⁸³ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 185

¹⁵⁸⁴ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 183-184

margins, are just as likely as violations of social rights. Neither should be analysed in isolation. Rajagopal argues more broadly that the distinction between necessary and unnecessary violence, which can be linked to the contradictory role played by the capitalist State where human rights are concerned (i.e., the idea that it is simultaneously the protector, provider, violator, etc), runs through legal rights discourse. This renders human rights law unable to reckon with certain forms of violence, particularly the 'private' violence of the market, as well as public violence related to the maintenance/upholding of private property.¹⁵⁸⁵

Homelessness, an obvious social rights violation, is a good example here; homelessness is caused by economic coercion and/or by eviction, both necessarily involving an exercising of violence (or threat of violence), either by the State or by a private landlord. That some people are made homeless is necessary to uphold private property. Focusing on those who are in poverty and/or homeless, for example, shines no light on why they are in need, on the connection between poverty and the production of wealth elsewhere.¹⁵⁸⁶

Austerity is another example; it nearly always results in significant hardship for sections of the population but is not seen the same way as physical repression. This can be linked to the contradictory tendency of law to present itself as 'other' to violence whilst being linked to the exercising of (legitimate) violence by the State.¹⁵⁸⁷ Austerity is viewed as necessary suffering

¹⁵⁸⁵ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 196

¹⁵⁸⁶ Susan Marks, 'Human Rights and the Bottom Billion' (2009) 1 *European Human Rights Law Review* 37, 47

¹⁵⁸⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 197

to protect the national currency, the nation's reputation, etc. Rights discourse tends to focus upon physical violence over economic coercion, to fail to contextualise even those acts of physical violence, and abstracts from the connections between the victims and the beneficiaries of violence. Rights discourse cannot, on its own, accommodate the complexities of capitalism.

5.3 Social rights and the limits of law

5.3.1 Social rights and the public legal form

As mentioned at the beginning of Chapter 3, social rights legal discourse places considerable emphasis upon adopting these rights in law, even if this rarely occurs in practice. They do, in rare cases, receive legal protection. As mentioned, the CDESCR has performed judicial functions, but signatories have mostly rejected the ICDESCR's Optional Protocol, and the CDESCR declares many complaints inadmissible.¹⁵⁸⁸ The European Committee on Social Rights performs a similar quasi-judicial function for the ESC.

Social rights, as explained, are rarely found in domestic law, with few exceptions (e.g., South Africa and India).¹⁵⁸⁹ Through the ECHR, social rights are sometimes able to be examined

¹⁵⁸⁸ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 58

¹⁵⁸⁹ Jean Drèze, 'Democracy and the Right to Food' in Philip Alston and Mary Robinson (eds), *Human Rights and Development* (Oxford University Press 2005), 60-61

indirectly. In *R (MA and others) v Secretary of State for Work and Pensions*,¹⁵⁹⁰ for example, reforms to UK housing benefit were challenged for discriminating against families with disabled members, violating the Article 14 ECHR prohibition of discrimination.¹⁵⁹¹ The changes did not account for the needs of families with disabled members regarding number of bedrooms.¹⁵⁹² The change in policy was found to be (indirectly) discriminatory,¹⁵⁹³ although this discrimination was ultimately justified.¹⁵⁹⁴ Along similar lines, as explained, the Colombian Constitutional Court has gradually derived a 'vital minimum' level of social rights from more accepted concepts like the principle of dignity and the right to life.¹⁵⁹⁵ In other words, it is possible in some cases to protect social rights through civil rights or other similar values. The CESCR has offered judicial scrutiny towards procedural failings¹⁵⁹⁶ and retrogressive measures.¹⁵⁹⁷

However, such adjudication is not emancipatory. It does not challenge the existing distribution of power or of resources in society and does not appear to offer a route to challenge and oppose the premises and imperatives of capitalism, let alone to transcend them. It is not suggestive of legal rights as a terrain of emancipatory struggle. As explained, even the basic-

¹⁵⁹⁰ *R (MA and others) v Secretary of State for Work and Pensions*, [2014] P.T.S.R. 584

¹⁵⁹¹ *R (MA and others) v Secretary of State for Work and Pensions*, [2014] P.T.S.R. 584, 589

¹⁵⁹² *R (MA and others) v Secretary of State for Work and Pensions*, [2014] P.T.S.R. 584, 589

¹⁵⁹³ *R (MA and others) v Secretary of State for Work and Pensions*, [2014] P.T.S.R. 584, 600

¹⁵⁹⁴ *R (MA and others) v Secretary of State for Work and Pensions*, [2014] P.T.S.R. 584, 609

¹⁵⁹⁵ David Landau, 'The promise of a minimum core approach: the Colombian model for judicial review of austerity measures' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014), 270

¹⁵⁹⁶ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 68

¹⁵⁹⁷ Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48, 76

needs and indirect approach to social rights faces persistent challenges, so the law needs to offer radical solutions if the socially necessary processes associated with social rights are to be protected from capitalism's hegemony.

Substantive review of social rights, where it is available, is largely predicated upon State provision to provide these rights.¹⁵⁹⁸ Social rights disputes generally consist of claimants using public legal rights to argue that the State is not fulfilling its obligations towards its citizens. This focus upon the State, characteristic of human rights law, does not engage with capital's role in giving rise to the need for social rights. It has been noted that social rights do not naturally correspond to the legal form; this means that they must attempt to conform to the form of individualised legal argument.

As explained, legal rights take their form in dispute (or struggle). Where social rights are concerned, substantive legal disputes tend to take two broad forms; first, the State may be asked to rectify, or challenged for its failure to rectify, a violation of a claimant's rights. This form of substantive review will be covered in the next subsection. Second, claimants advance social rights against a State policy in the common interest rather than as a specific dispute, using them, as suggested in Chapter 1, as an additional layer of scrutiny on government social

¹⁵⁹⁸ Lucy Williams, 'Beyond the state: holding institutions and private entities accountable for poverty alleviation' in Martha F Davis, Morten Kjaerum, Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Elgar 2021), 554

policy.¹⁵⁹⁹ Although substantive review is rarely available for social rights, both forms of substantive review are limited and therefore not emancipatory.

One of the most recent decisions of the European Committee of Social Rights (the ESC's quasi-judicial body) is a good example of the second type, the challenging of State policy through social rights. *Finnish Society of Social Rights v Finland*¹⁶⁰⁰ concerned a challenge to Finland's social security/assistance benefits¹⁶⁰¹ on the basis of Article 12 of the ESC.¹⁶⁰² The dispute concerned whether various benefits amounted to 40% of the 'median equivalised income'¹⁶⁰³ and whether Finland has failed to 'raise progressively the system of social security to a higher level'.¹⁶⁰⁴ Whilst the Committee measures compliance with Article 12 on meeting the threshold of 50% of median income, it will assess the aggregate effect of the welfare system where individual benefits fall in the 40-50% range.¹⁶⁰⁵ This is, presumably, based upon the idea that social security need only provide for basic needs; allowing such a large gap between wages and social security indicates a complete acceptance of indirect provision as the primary method of providing social rights. The Committee, finding that the benefits had fallen below the 40% mark, found a violation of Article 12¹⁶⁰⁶. It did not meaningfully engage with the progressive raising of social security (deciding there was no violation),¹⁶⁰⁷ ignoring the

¹⁵⁹⁹ Sandra Fredman, 'New horizons: incorporating socio-economic rights in a British Bill of Rights' [2010] PL 297, 305

¹⁶⁰⁰ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022)

¹⁶⁰¹ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [2]

¹⁶⁰² *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [27]

¹⁶⁰³ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [28-32]

¹⁶⁰⁴ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [64]

¹⁶⁰⁵ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [50]

¹⁶⁰⁶ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [60]

¹⁶⁰⁷ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [78]

applicants' argument that benefits did not keep up with the rising cost of living¹⁶⁰⁸ as the various benefits had nominally and incrementally increased over several years.¹⁶⁰⁹

On one hand, this decision is a good example of how social rights can be used to evaluate government policy and be used to remediate the inadequacies of indirect provision through capitalist employment. However, there are again limits to such adjudication. First, the basic-needs provision under scrutiny in this decision was a social security programme that was linked to and premised upon employment and not expected to provide a channel to move beyond wage-labour. Left unsaid by the Committee is that social security is not meant to keep people alive but rather to provide basic needs until they can re-enter employment.

Second, such adjudication tends to turn social rights into a technocratic exercise of evaluating compliance with pre-imposed standards. As mentioned, rights discourse can sometimes descend into an obsession over standards, raising problems over who decides these standards. The Committee was here not well placed to decide whether the nominal increases in benefits was sufficient, let alone progressive. It was also not well placed to decide whether 40-50% of the median income was a sufficient level for subsistence, nor, for that matter, whether that median income was itself sufficient for subsistence. The Committee, in fairness, had no power to make such determinations. Whether social security covers 50% rather than

¹⁶⁰⁸ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [62-64]

¹⁶⁰⁹ *Finnish Society of Social Rights v. Finland* Complaint No. 172/2018 (Decision on the Merits, 2022), [74-76]

40% of median income turns social rights adjudication into technocracy rather than a potentially revolutionary method of human emancipation.

Finally, along these lines, this form of public-rights adjudication does not remotely challenge the hegemony of capital. The need for social security programmes stems from the dynamics of capital accumulation. Capitalism's contradictory tendency to create employment and discard workers creates unemployment, its need to keep wages as low as possible puts downward pressure on wages that, directly in this case, puts downward pressure on social security. Social rights in general result from the premises of capitalism, are either provided by capitalism or are provided to mitigate it. For social rights to be 'scandalous', revolutionary, even emancipatory, full implementation of social rights would have to, at the very least, be capable of consisting of a method of moving beyond the social power of capital. Such adjudication, whilst undeniably valuable, does not contain such a method.

5.3.2 Social Rights and the private legal form

Public law litigation based upon a policy, rather than as a dispute between an abstract individual and the State as arbiter of the legal framework, seems to avoid the problem of the narrowness of the legal form. However, it is therefore too abstract to deal with the underlying social relations of capitalism, instead attempting to demand the State to ameliorate the damage caused by these relations. This is also the case where an individual challenges the State for its failure to prevent a rights violation, as in the CESCR decision mentioned in Chapter

1 over Spain's failure to rehouse an evicted family where its provision of social housing had also declined. These forms of adjudication do not strike at the power of capital, the centrality of private property.

An alternative approach may be almost hybrid public-private legal approach that requires the State to balance private property rights against social rights, casting aside the distinction between the 'generations' of rights. This would suggest that rights are potentially emancipatory. As mentioned by both Pashukanis¹⁶¹⁰ and Thompson,¹⁶¹¹ capitalism is unique in that its exploitation is carried out through law. It may be possible to accept Thompson's belief that as the ruling class has subjected itself to law along with the propertyless, it has also created a way to challenge its class power. However, the South African case *City of Johannesburg Metro Municipality v Blue Moonlight Properties and Another*¹⁶¹² is a good example of the ultimate limits of social rights litigation.

The parties to the case were the local authority, the landlord (Blue Moonlight) of a commercial building in which 86 people were unlawfully¹⁶¹³ residing, some for 'many years',¹⁶¹⁴ and those occupiers. This is an essentially tripartite approach to social rights, with South Africa's Constitutional Court overseeing a dispute between a private property owner, victims of a

¹⁶¹⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 45

¹⁶¹¹ E.P. Thompson, *Whigs and Hunters: the origin of the Black Act* (first published 1975, Penguin 1977), 262-263

¹⁶¹² *City of Johannesburg Metro Municipality v Blue Moonlight Properties and Another* [2011] ZACC 33

¹⁶¹³ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [30]

¹⁶¹⁴ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [7]

rights violation, and a State body. The owner had purchased the building and wanted to exercise its property rights to evict the 'occupiers',¹⁶¹⁵ so the Constitutional Court, was asked to rule on the lawfulness of the eviction and whether that eviction should be 'linked' to an order for the local authority to rehouse them.¹⁶¹⁶ Interestingly, both the owner and occupiers both relied upon the right to (legal) equality.¹⁶¹⁷ Although, South Africa is one of the few countries to include legally enforceable social rights in its constitution,¹⁶¹⁸ including a right to 'adequate housing',¹⁶¹⁹ the constitution also enshrines property rights.¹⁶²⁰

The Court is required by the Constitution (and the post-apartheid statutory eviction regime)¹⁶²¹ to balance the rights of the owner and occupiers, considering the potential 'deprivation of property' of the owner resulting from the occupiers not being evicted¹⁶²² against the potential homelessness of the occupiers.¹⁶²³ The Constitutional Court recognised that the owner and the occupiers were not genuinely in the same position, which may justify a temporary limitation to a right to property.¹⁶²⁴ The case, however, did not turn on this issue. The owner's right to property was a capitalist private property right, acquired through economic relations and merely given (private) legal form, whilst the right to housing was a

¹⁶¹⁵ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [1]

¹⁶¹⁶ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [3]

¹⁶¹⁷ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [19]

¹⁶¹⁸ *Constitution of the Republic of South Africa* [South Africa], 10 December 1996, ss 26-29

¹⁶¹⁹ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [18]

¹⁶²⁰ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [17]

¹⁶²¹ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [36]

¹⁶²² *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [31]

¹⁶²³ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [32]

¹⁶²⁴ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [40]

social right that did not arise from economic relations and was instead being imposed by the public legal power of the Constitution.

The case, therefore, instead turned upon whether the local authority (and not the provincial or national government) was required to rehouse the occupiers, and the Court decided that it did have such an obligation.¹⁶²⁵ and that the City's existing policy of denying responsibility for rehousing those evicted by private landlords was unconstitutional.¹⁶²⁶ The municipal government was ordered to provide temporary accommodation to the occupiers upon their eviction from the building.¹⁶²⁷

This was a positive result from the perspective of social rights and could be held up as a perfect example of the role that these rights can play in realising these rights. Capitalist private property exploits, but the State can ameliorate the ensuing suffering. However, as Lucy Williams pointed out, the result of the case was to 'oblige the City to subsidise the private developer',¹⁶²⁸ there was no possibility of engaging with the distribution of resources within capitalist society or the inequities generated by capitalist private property. The modern legal form was not capable of accommodating the class dynamics at play in this case, treating the opposing parties as abstract, formally equal individuals rather a landlord, a collection of individuals without housing, and a public authority.

¹⁶²⁵ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [96]

¹⁶²⁶ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [97]

¹⁶²⁷ *City of Johannesburg Metro. Municipality v Blue Moonlight Properties*, [2011] ZACC 33, [101]

¹⁶²⁸ Lucy Williams, 'Beyond the state: holding institutions and private entities accountable for poverty alleviation' in Martha F Davis, Morten Kjaerum, Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Elgar 2021), 556

As Knox has suggested, the legal form is both 'too abstract' and 'too specific', too abstract in the sense that it ignores the distinction between the parties and the underlying economic relations and too specific in dealing only with the 'actions' of the parties in a particular dispute and not the broader context in which they take those actions.¹⁶²⁹ Applying this to the *Blue Moonlight* case, the court was only able to balance the occupiers' housing rights against the owner's property rights (and the State's corresponding obligations), rather than consider the proper relationship between property rights and rights to housing, not to mention the State's role in overseeing property relations.

This also clarifies the relationship between law, property, and human rights. The legal form contains within it a right to property linked to commodity-ownership. This property right could be linked to a building big enough to house 86 people, or it could be linked to a mere capacity to labour. The legal form is not only unable to make this distinction; it obscures it through its internal logic. As mentioned, both parties had relied upon legal equality, but the parties to this case were far from equal in terms of social power.

No discussion of law, rights, and property would be complete with reference to Marx's discussion about the struggle over the length of the working day and the series of Factory Acts regulating working conditions passed between 1802 and 1867, which eventually led to an imposition of a legal limit of a ten-hour working day. He recognised that this struggle took

¹⁶²⁹ Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413, 430

place between parties holding legal, contractual rights: the capitalist, with his rights 'as a purchaser', attempting to make the working day 'as long as possible', and the labourer attempting to maintain his rights 'as a seller' (of commodified labour) to reduce that day, creating an 'antinomy' of 'right against right'. This was 'the product of a protracted civil war', that being the class struggle, between the 'capitalist class and the working-class'.¹⁶³⁰ He famously suggested that in such conflicts, 'between equal rights, force decides'.¹⁶³¹ Recognising that workers were not genuinely equal with their capitalist bosses, being not simply 'free' to sell their labour but also 'forced' to sell it and so be exploited by capital, he urged workers to unite 'as a class' to 'compel' the passing of laws to protect against such exploitation, replacing the 'inalienable rights of man' with a 'Magna Carta of a legally limited working day'.¹⁶³²

There are several important takeaways from this. First, it reveals that law plausibly can be a site of progressive change, that it does not necessarily mechanistically reflect ruling-class interests. Second, it distinguishes between the legal form, which does seem to conform to the social relations of capital, from the content of law, which does not 'straightforwardly' act 'for or against' a particular class.¹⁶³³ Social rights could, in theory, enjoy better legal protection than they do in most countries. Finally, it suggests limits of using the law for progressive change: Marx, first of all, surely did not see this struggle as remaining confined to the legal sphere; he also wrote that 'revolutions are not made by law'.¹⁶³⁴ Secondly, instructing the

¹⁶³⁰ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 205

¹⁶³¹ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 163

¹⁶³² Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 206-207

¹⁶³³ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 120

¹⁶³⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 525

working class to act 'as a class' is suggestive of a rejection of purely legal struggle. As long as such struggles are conducted between owners of 'equal' rights, they are likely to be constrained by private property and capital. The law, and legal rights, can be emancipatory only to the extent that it challenges rather than accepts capitalism's confines.

5.3.3 Human rights and the 'good social order': rights, society, and moving beyond individualism.

During the drafting of the UDHR, the representatives for the Soviet Union, often (correctly) identified as the driving force behind the inclusion of social rights in the UDHR, were already sceptical about implementation. Legal theory in the Soviet Union had changed significantly from the earlier revolutionary years under Lenin's leadership, during which Pashukanis and Nikolai Bukharin were the most prominent legal theorists; both had been executed by 1938 and Andrei Vyshinsky had taken their place.¹⁶³⁵ The Soviet delegation was supportive of the ideals of social rights; however, they believed that social rights needed to connect to 'questions of social organisation.'¹⁶³⁶ They saw these rights as completely contradictory to capitalist society¹⁶³⁷, and Vyshinsky was doubtful of their implementation.¹⁶³⁸

¹⁶³⁵ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 26

¹⁶³⁶ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 410

¹⁶³⁷ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 410-411

¹⁶³⁸ Andrei Y. Vyshinsky (ed), *The Law of the Soviet State* (The MacMillan Company 1948), 538

The Soviet Union was also more supportive of civil rights than the traditional narrative¹⁶³⁹ suggests. Whilst a formal equality of rights, repudiated in the early years after the Revolution,¹⁶⁴⁰ was still seen as problematic and limiting,¹⁶⁴¹ the Soviet Union saw both formal equality and non-discrimination as essential elements of the UDHR considering the racialised oppression in places like the US and South Africa. This was connected to the Soviet Union's long-standing opposition (in theory and practice) to fascism;¹⁶⁴² the Soviets had long acted as a bulwark against fascism in Europe. It was the preventing acts of racialised violence like the Holocaust (and formal colonialism¹⁶⁴³) that the Soviet Union saw as the UDHR's underlying rationale.¹⁶⁴⁴

Vyshinsky saw fascism as a historical regression (towards feudalism) that would provide an additional hurdle in the proletariat's fight against imperialist capitalism.¹⁶⁴⁵ Fascism would erase all 'fundamental civil rights' and 'bourgeois-democratic freedoms', destroy trade unions, and subject citizens to violence.¹⁶⁴⁶ He believed that even liberal democracy was a progressive

¹⁶³⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (first published 1989, Cornell University Press 2013), 31-32

¹⁶⁴⁰ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 *Canadian Journal of Law & Jurisprudence* 3, 7

¹⁶⁴¹ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 413

¹⁶⁴² Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 421

¹⁶⁴³ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 423

¹⁶⁴⁴ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 422

¹⁶⁴⁵ Andrei Y. Vyshinsky (ed), *The Law of the Soviet State* (The MacMillan Company 1948), 12

¹⁶⁴⁶ Andrei Y. Vyshinsky (ed), *The Law of the Soviet State* (The MacMillan Company 1948), 551

advance on fascism and feudalism,¹⁶⁴⁷ although fascism was itself an essentially bourgeois attack on democracy when it had lost control over its own democratic (and legal¹⁶⁴⁸) institutions.¹⁶⁴⁹

The Commission on Human Rights, which drafted the UDHR, featured debate about the 'conditions' for ensuring that rights would be protected and fulfilled.¹⁶⁵⁰ On one hand, French delegate René Cassin and Czech delegate Vaclav Nosek argued that social rights required a material basis. Unlike civil rights, which could be protected by 'purely legal' mechanisms, social rights needed institutions prepared to intervene against capitalist imperatives. Cassin sought to provide some clarification about this in a (rejected) draft article.¹⁶⁵¹ On the other hand, Lebanese delegate Charles Malik, worried about the anti-capitalist inclination behind such suggestions, argued that the conditions for realising rights should be defined no further than a 'good' social order.¹⁶⁵² The idea of a 'good' social (and international) order being the only necessary condition of realising human rights was strongly opposed by the Soviet Union on the grounds that rights could never be implemented if this social order was a capitalist order. Ironically, the only reason that the 'good social and international order' was deleted

¹⁶⁴⁷ Andrei Y. Vyshinsky (ed), *The Law of the Soviet State* (The MacMillan Company 1948), 71

¹⁶⁴⁸ Andrei Y. Vyshinsky (ed), *The Law of the Soviet State* (The MacMillan Company 1948), 503

¹⁶⁴⁹ Andrei Y. Vyshinsky (ed), *The Law of the Soviet State* (The MacMillan Company 1948), 310, 318

¹⁶⁵⁰ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 405

¹⁶⁵¹ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 406

¹⁶⁵² Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 406-407

from the UDHR was the success of Canadian delegate Ralph Maybank's suggestion that the word 'good' was redundant;¹⁶⁵³ that any order that protected rights was automatically good.

Although the Soviet Union was hardly a good 'social order' itself, Vyshinsky et al were correct that purely legal rights could not in themselves provide a good society.¹⁶⁵⁴ To adopt the words of UN Secretary-General Dag Hammarskjöld (speaking about the UN itself¹⁶⁵⁵), they would be insufficient to bring anyone to 'heaven', to bring about a social order free from capitalist exploitation but could perhaps save the people of the world from the 'hell' of fascism. This belief, along with the idea that questions of rights need to be connected to questions of society itself.

It was mentioned in the previous chapter that questions about rights need to be connected to questions of self-determination, of sovereignty, and of democracy. This, again, is an argument against the fragmentation of law. In Rajagopal's view, legal fragmentation partly resulted from the attempt from the Third World to challenge the sources of international law by doctrine, using UN General Assembly resolutions (opposed to custom) and their numerical majority at the General Assembly (a process covered in Chapter 4).¹⁶⁵⁶ The fragmentation of

¹⁶⁵³ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 426

¹⁶⁵⁴ Jessica Whyte, 'Human Rights, Revolution, and the Good Society' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 425

¹⁶⁵⁵ UN Secretary-General 'Address by Secretary-General Dag Hammarskjöld at University of California Convocation, Berkeley, California, Thursday, May 13, 1954, at 10:00 a.m. (Pacific Coast Time)' UN Doc SG-382

¹⁶⁵⁶ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 82

international law should therefore be connected to the closely linked spread of imperialist capitalism and international law, particularly to the decolonising Third World. It was part of an expansion of legal relations to those decolonising nations, who, as explained in the previous chapter, had previously been excluded from the international legal order.

An idealist view of international law that uncritically accepted that inclusion in international law should be the goal of the Third World may point to the emergence of human rights, self-determination, and (eventually) democracy as international legal principles alongside international law's traditional principles (sovereign equality, territorial integrity, etc) to suggest that there has been a break between the 'old' closed international law of nations and a 'new' pluralist international law of individuals¹⁶⁵⁷ (and peoples). It was suggested in the previous chapter that instead, these principles had successfully been abstracted from each other and from capitalism.

Self-determination, a heavily contested legal principle,¹⁶⁵⁸ and perhaps the legal principle most associated with the Soviet Union, has perhaps not been covered in sufficient depth. Self-determination is potentially emancipatory in its promise to allow peoples (not just individuals) to 'freely determine their political status and freely pursue their economic, social and cultural

¹⁶⁵⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 186

¹⁶⁵⁸ Sofia Cavandoli, 'The unresolved dilemma of self-determination: Crimea, Donetsk and Luhansk' (2016) 20(7) *International Journal of Human Rights* 875, 877

development'.¹⁶⁵⁹ However, it has been interpreted narrowly in practice by imperialist international law. The final substantive chapter will examine this.

5.5 Conclusion

This chapter has marked the beginning of a comprehensive critique of human rights law and of rights discourse. It has attempted several things. First, it has attempted to present the targets of social rights, the needs and the goods and processes related to those needs, as of fundamental societal importance. It has then explained how these things are challenged by the imperatives and premises of capitalist society.

Second, it has attempted to formulate a materialist theory of how rights emerge. The necessary link between rights and struggle, however, does not necessarily mean that they will be useful tools of emancipatory struggle. In fact, they may prove the opposite. This was linked to a discussion about the abstract limits of legal rights.

This chapter has attempted to raise doubts about the wisdom of conducting anti-capitalist struggle purely through legal rights and the legal form. Instead, it has sought to link questions of rights to the form of society. This has led to the argument, first mentioned in Chapter 4, that legal argument should not confine itself to rights doctrine. It should instead

¹⁶⁵⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 1

seek to link with concepts like sovereignty and self-determination and should not accept the confines of capitalism. Even these legal arguments should be linked to broader extra-legal (i.e., social and political) struggles. Failing to do so may even strengthen capitalism.

Chapter 6: Self-determination, sovereignty, and the dilemma of private property

This thesis, especially Chapter 4, has attempted to explain how imperialism influences law and constrains legal principles like rights, democracy, and self-determination. Continuing that narrative, this chapter will draw out the implications of this for self-determination, on the basis that questions of rights need to be connected to broader questions about society and the rights of nations. It will be further explained how indeterminate legal principles like self-determination and rights are actualised and can even come to express the logic of capitalism.

Self-determination is unique in being included not only in the ICCPR¹⁶⁶⁰ but also in the ICESCR.¹⁶⁶¹ A radical conception of self-determination serves almost as an international corollary of democracy, in that could enable a group of people (or even a nation) to express their preferences in the face of the global hegemonic power of capitalism. It could allow for the pressures of commodification, austerity, and private property to be opposed in a way that may be able to reconnect political power and social power and could thus be potentially emancipatory. Bringing radical conceptions of rights, democracy, and self-determination together seems to offer a worthwhile aim for anti-capitalist legal engagement. However, it will be argued that self-determination has instead been confined, having been part of a reform rather than revolution in international law.

¹⁶⁶⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 1

¹⁶⁶¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, Article 1

The emergence of the Soviet Union posed a threat to the existing international legal order, issuing challenges based upon self-determination, anti-imperialism, and private property. The Mexican Revolution posed a lesser but still notable threat. A divide opened between the powerful Western capitalist nations and the Soviet Union, supported by the Third World and some working-class movements in Western nations.¹⁶⁶² The Revolution(s) would help to accelerate the end of formal colonialism, alongside the rise of Third World nationalism,¹⁶⁶³ which began between the wars¹⁶⁶⁴ and accelerated after the Second World War.¹⁶⁶⁵ Decolonisation would also pose a threat, especially when the Third World organised itself politically and began its attempts to advance a NIEO.

More specifically, this threat came in the form of alternative conceptions of self-determination, sovereignty, and private property being advanced. The Bolsheviks attempted to assert Russian sovereignty against the rights of private property for the purpose of bringing about a new, collective form of property. The Third World, through its newfound self-determination and sovereignty, threatened to overturn the inviolability of property vis-à-vis property. This set up implicit legal arguments over the meanings of these terms between the West and Third World, which required the West to actualise its own position on self-determination. This chapter will show how the position that was actualised was the

¹⁶⁶² V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 146

¹⁶⁶³ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 94-95

¹⁶⁶⁴ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 814

¹⁶⁶⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 205

confinement of self-determination to purely political sovereignty, protecting the private sphere of property exchange from the political sphere of sovereignty. It will also argue that this was mostly accomplished through the strict imposition of capitalist legality, thus placing it within the long history of international law's conditioning and policing of sovereignty.

The first section will cover the emergence of self-determination as a legal principle, arguing that it should be traced to Lenin's theory and the Soviet Union's practice in supporting it. It will cover Bowring's belief that Soviet theory and practice led to it emerging as an emancipatory right. It will distinguish between cultural, political, and social/economic self-determination and explain that self-determination has mostly been confined to its political aspect, limiting its effectiveness beyond colonisation.

The second section will briefly examine the historical connection between modern international law and private property, especially with reference to sovereignty, using the 19th century system of extraterritoriality to demonstrate the relationship between private property and the conditioning of sovereignty through the standard of civilisation. It will cover the Bolshevik and Mexican Revolutions and their attempts to reconceptualise property vis-à-vis sovereignty, briefly explaining the legal responses to that attempt and the political developments that restrained it. It will make some general points about the difficulties of advancing anti-capitalist legal argument through the legal form and make the argument that self-determination has not altered that form.

The third section will deal with the problem of the emergence of Third World sovereignty (especially vis-à-vis property) after decolonisation, which led the West to formulate and later actualise its own conceptions of sovereignty and self-determination (and even non-intervention) in order to maintain its conception of property. It will demonstrate that this process began with the League's Mandate system but would receive new impetus from the Third World's advancing of the NIEO. It will suggest that this process of conditioning and confining Third World sovereignty continued through institutions like the IMF and World Bank, which reproduced logic of capital and imposed imperatives related to capitalist legality, in accordance with the standard of civilisation. It will be explained how development practices were used to actualise the Western capitalist position on self-determination, and the effect this would have on (social) rights provision. The chapter will conclude that legal principles like rights and self-determination are not inherently emancipatory, and that legal arguments based upon them in the hopes of opposing capitalism will have to go much further, challenging the capitalist premises of international law rather than attempting to comply with them.

6.1 Self-determination: Lenin, Bowring, and emancipation from capitalism

6.1.1 The emergence of self-determination: the Soviet Union and Lenin

The language of self-determination, as the right of nations to 'freely determine their political status and freely pursue their economic, social, and cultural development'¹⁶⁶⁶ sounds radical.

¹⁶⁶⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 1

More specifically, it sounds potentially emancipatory, even from capitalism: allowing nations to determine their economic, social, and political future seems like it may even allow the abolition of private property and adoption of a democratic system that extends to economic affairs. Although legal development is not mentioned, historical materialism suggests that such radical changes could also abolish capitalist legality. However, examination of self-determination must go beyond purely textual analysis; owing to international law's indeterminacy, actualisation must be the focus.

Marxist engagement with self-determination goes back to Marx himself. Marx referenced the self-determination of Poland in 1865¹⁶⁶⁷ and again in a speech with Engels in 1875, in which he connected Poland's struggle against political oppression and occupation to its 'historic right to national autonomy and self-determination'. He connected that autonomy to the ability of the Polish people to govern themselves as an independent state.¹⁶⁶⁸ Self-determination related to the removal of an obstacle (foreign domination) that both prevented the Polish from contributing to the international struggle against capitalism and directed the efforts of the Polish proletariat to anti-colonial struggle rather than their 'emancipation' (from capitalism).¹⁶⁶⁹

¹⁶⁶⁷ Karl Marx, 'Marx to Hermann Jung in London' in Karl Marx and Friedrich Engels, *Works* (1934)

¹⁶⁶⁸ Karl Marx and Friedrich Engels, 'For Poland' (*Marxists Internet Archive*, 24 March 1875) <<https://www.marxists.org/archive/marx/works/1875/03/24.htm>> accessed 19 April 2024

¹⁶⁶⁹ Karl Marx and Friedrich Engels, 'For Poland' (*Marxists Internet Archive*, 24 March 1875) <<https://www.marxists.org/archive/marx/works/1875/03/24.htm>> accessed 19 April 2024

Analysis of the right self-determination must begin with its emergence from the Soviet Union. The Soviet Union strongly supported self-determination, albeit somewhat inconsistently in light of the fact that the Bolsheviks inherited an empire.¹⁶⁷⁰ Lenin's *The Right of Nations to Self-Determination*, which predated the 1917 Revolution, was animated by similar ideas to Marx. Self-Determination, in the context of increasing imperialism from the late 19th-early 20th century, meant 'the right to existence as a separate State'.¹⁶⁷¹ He, like Marx, saw it as mostly instrumental¹⁶⁷² and reactive, as part of the struggle against formal colonialism. He argued that whilst socialist/communists like himself were more interested in the 'self-determination of the proletariat within a given nation',¹⁶⁷³ at that particular time period, when 'bourgeois-democratic revolutions' (i.e., those that established liberal political systems at the expense of aristocratic orders) were ongoing, communist parties should recognise the right of 'all nations' to self-determination alongside an 'unbreakable alliance' of the workers of all of those nations.¹⁶⁷⁴

The idea that self-determination should be available to 'all nations' can be contrasted to the views of Woodrow Wilson, often incorrectly framed as the 'progenitor' of the principle,¹⁶⁷⁵ who included self-determination as Point 5 of his '14 Points' (an address to the US

¹⁶⁷⁰ Scott Newton, 'Microcosm: Soviet Constitutional Internationality' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 148

¹⁶⁷¹ V.I. Lenin, *The Right of Nations to Self-Determination* (Foreign Language Press 2022), 63

¹⁶⁷² V.I. Lenin, *The Right of Nations to Self-Determination* (Foreign Language Press 2022), 77

¹⁶⁷³ V.I. Lenin, *The Right of Nations to Self-Determination* (Foreign Language Press 2022), 97

¹⁶⁷⁴ V.I. Lenin, *The Right of Nations to Self-Determination* (Foreign Language Press 2022), 104

¹⁶⁷⁵ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 18

Congress)¹⁶⁷⁶ but believed that it should be applied only to the former colonies of the Ottoman, Austro-Hungarian, and Russian empires.¹⁶⁷⁷ Wilson (and British Prime Minister Lloyd George) would to some extent appropriate the term in the 'service of Empire' immediately after WWI.¹⁶⁷⁸ The Bolsheviks, discarding the distinction between civilised and uncivilised nations,¹⁶⁷⁹ believed that the 'right to decide the forms of its state existence' should be available to 'any nation whatsoever'.¹⁶⁸⁰

Lenin saw self-determination in political terms,¹⁶⁸¹ as part of the 'capitalist tendency' towards the nation-state.¹⁶⁸² Lenin believed that the demand for self-determination should be directly connected to secession in cases of colonial subjugation¹⁶⁸³ and that it should be linked to a nation-state and sovereign equality.¹⁶⁸⁴ This was because of the connection between the State/nation-state and capitalism,¹⁶⁸⁵ imperialism having been responsible for both breaking

¹⁶⁷⁶ National WWI Museum and Memorial, 'The Fourteen Points: Woodrow Wilson and the U.S. Rejection of the Treaty of Versailles' (*National WWI Museum and Memorial*) <
<https://www.theworldwar.org/learn/peace/fourteen-points>> accessed 29 May 2024

¹⁶⁷⁷ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 18

¹⁶⁷⁸ Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019), 39-40

¹⁶⁷⁹ Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 144

¹⁶⁸⁰ V.I. Lenin, 'Report on Peace, October 26 (November 8)' in V.I. Lenin and George Hanna (ed), *Collected Works: Volume 26* (first published 1964, Progress Publishers 1977), 249

¹⁶⁸¹ V.I. Lenin, *The Right of Nations to Self-Determination* (Foreign Language Press 2022), 67

¹⁶⁸² V.I. Lenin, *The Right of Nations to Self-Determination* (Foreign Language Press 2022), 66

¹⁶⁸³ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22, December 1915-July 1916* (first published 1964, Progress Publishers 1974), 322

¹⁶⁸⁴ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22, December 1915-July 1916* (first published 1964, Progress Publishers 1974), 322-323

¹⁶⁸⁵ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22, December 1915-July 1916* (first published 1964, Progress Publishers 1974), 323

down old borders (i.e., through annexation) and creating nation-state borders.¹⁶⁸⁶ As mentioned in Chapter 4, the nation-state itself is a capitalist phenomenon.

Despite these connections between self-determination and capitalist nation-states, it should still be supported by communists/anti-imperialists because imperialist capitalism was busy eroding the distinction between the 'colonies' and Europe. The colonies were being drawn into capitalist production through the increasing export of capital (due to crises of overproduction in Europe)¹⁶⁸⁷ rather than simply serving as sources of raw materials. As the Third World was becoming embedded in global capitalism, it made sense to argue for their legal subjectivity and sovereign equality through self-determination.¹⁶⁸⁸ Lenin was less interested in the content of self-determination, instead arguing for the instrumental use of the legal form against imperialism.

Lenin's views informed the practice of the Soviet Union, at least in its early years. The Bolshevik project was at its core both 'world-historical' and 'international(ist)';¹⁶⁸⁹ it aimed to oppose capitalism and realise communism across the world.¹⁶⁹⁰ In pursuance of that goal, the

¹⁶⁸⁶ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22*, December 1915-July 1916 (first published 1964, Progress Publishers 1974), 323-324

¹⁶⁸⁷ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22*, December 1915-July 1916 (first published 1964, Progress Publishers 1974), 337-338

¹⁶⁸⁸ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22*, December 1915-July 1916 (first published 1964, Progress Publishers 1974), 344

¹⁶⁸⁹ Scott Newton, 'Microcosm: Soviet Constitutional Internationality' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 134

¹⁶⁹⁰ V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 151

Soviets denounced secret treaties between imperialist powers like the Sykes-Picot agreement that divided the Ottoman Empire between Britain and France and condemned the dominance of 'finance capital'.¹⁶⁹¹ They connected their revolutionary aims to a 'democratic peace' between nations and the 'free self-determination of nations'.¹⁶⁹² Finding themselves 'accidental' owners of an empire,¹⁶⁹³ the Bolsheviks pioneered the concept of internal self-determination through the federal system set up to accommodate the various nations within the borders of the Russian Soviet Federative Socialist Republic (RSFSR).¹⁶⁹⁴ That system offered 'substantial autonomy'¹⁶⁹⁵ to those nations (at least initially). The Soviet Union also granted independence to colonies like Finland¹⁶⁹⁶ (re-invaded much later)¹⁶⁹⁷ and the Baltic nations.¹⁶⁹⁸

¹⁶⁹¹ John Quigley, 'Leon Trotsky and the Prohibition against Secret Treaties' (2017) 19(2) *Journal of the History of International Law* 246, 255-258

¹⁶⁹² V.I. Lenin, 'Declaration of the Rights of the Working and Exploited People' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 423-425

¹⁶⁹³ Scott Newton, 'Microcosm: Soviet Constitutional Internationality' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 136

¹⁶⁹⁴ Scott Newton, 'Microcosm: Soviet Constitutional Internationality' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 146

¹⁶⁹⁵ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 19

¹⁶⁹⁶ V.I. Lenin, 'Declaration of the Rights of the Working and Exploited People' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 425

¹⁶⁹⁷ Alison Duxbury, 'Excluding Revolutionary States: Mexico, Russia, and the League of Nations' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 104

¹⁶⁹⁸ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 19

The Soviet Union also offered material support for national liberation/self-determination struggles in the Third World,¹⁶⁹⁹ even where this was not always in its 'geo-political self-interest'.¹⁷⁰⁰ Although Soviet legal theory changed significantly over time, this practice continued for most of its existence. The Soviet Union was also the driving force behind the inclusion of self-determination in the UN Charter as a 'principle'¹⁷⁰¹ and, having unsuccessfully attempted to enshrine it in the UDHR, its inclusion in the ICCPR and ICESCR as a 'right'.¹⁷⁰² The Soviets also submitted¹⁷⁰³ the draft text of UN General Assembly Resolution 1514 (XV), which contained the 'Declaration on the Granting of Independence to Colonial Countries and Peoples'.¹⁷⁰⁴ Lenin and the Soviet Union should therefore be credited as the originators of the concept in its modern form, in theory and especially in practice, transforming it from a political theory to a legal principle.

6.1.2 Self-determination as the 'revolutionary kernel' of a new international law?

¹⁶⁹⁹ Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 163

¹⁷⁰⁰ Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 168

¹⁷⁰¹ Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 158

¹⁷⁰² Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 160, 161-162

¹⁷⁰³ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 33

¹⁷⁰⁴ UN General Assembly 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960) UN Doc A/Res/1514 (XV)

Accepting that self-determination has become a legal principle, there are still a number of questions surrounding its implications. First, the classification of who can be recognised as a 'people' and is therefore eligible to claim this right remains unclear in international law,¹⁷⁰⁵ although it has been established that it is not available to individuals.¹⁷⁰⁶ Second, the extent to which it is available outside of the colonial context is unsettled; in the UN Declaration on Friendly Relations, it was linked explicitly to the 'speedy end of colonialism' and the 'subjection of peoples to alien domination'.¹⁷⁰⁷ On the other hand, it was couched in broader terms in the Helsinki Final Act,¹⁷⁰⁸ suggesting that the right continues beyond the cessation of colonial rule.¹⁷⁰⁹

These questions relate more to the scope of self-determination, to who is able to enjoy self-determination, rather than its content, which seems even more unclear. This makes it difficult to evaluate how self-determination as a legal principle has been actualised. Colonialism has been almost entirely eradicated, and it seems reasonably clear that peoples living under colonial regimes were not free to determine their political arrangements. If self-determination is solely about ending colonial occupation, then it has been a success, but this says nothing about its content.

¹⁷⁰⁵ Olivia Brennan, 'Questions of Identity; Defining Peoplehood for the Purposes of Internal Self-Determination in Wales' (2024) Faculty of Business and Law Research Day 6th December

¹⁷⁰⁶ *Communication No 167/1984*: Canada 10/05/90, CCPR/C/38D/167/1984, [32.1.]

¹⁷⁰⁷ UN General Assembly, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (17 December 1970) UN Doc A/RES/2625(XXV)

¹⁷⁰⁸ Organisation for Security and Co-operation in Europe, 'Helsinki Final Act' (OSCE, 1 August 1975) <<https://www.osce.org/helsinki-final-act>> accessed 27 June 2024

¹⁷⁰⁹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 117

However, self-determination is often suggested to have been part of a transformation of international law, along with human rights (and later democracy), resulting in the post-war international legal order based around the UN being a new, open, and universal and order in contrast to the closed-off Western-centric order that predated it.¹⁷¹⁰ This aligns with the mainstream narrative of ‘international law as a grand multicultural project, similar to the utopian self-image’ of the UN.¹⁷¹¹ On this view, self-determination’s inclusion in the UN Charter, the anti-colonial resolutions passed by the General Assembly in 1960 (Resolutions 1514(XV) and 1541 (XV)),¹⁷¹² and the legal practice of the UN,¹⁷¹³ meant that these developments had led to international law having been ‘enriched’ by principles like self-determination.¹⁷¹⁴ Old international legal principles, like terra nullius, the colonialist idea that unoccupied territory belonged to no one,¹⁷¹⁵ seemed to have been replaced by new ones like self-determination, which repudiated colonialism.

Bowring accordingly framed the emergence of self-determination in particularly revolutionary terms. He believed that the post-war international legal order that was shaped by the victorious powers of the Second World War¹⁷¹⁶ had been overturned as decolonisation

¹⁷¹⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 196-197

¹⁷¹¹ Owen Taylor, ‘Law and Socialist Revolution: Early Soviet Legal Theory and Practice’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 169

¹⁷¹² Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge University Press 1995), 71

¹⁷¹³ Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge University Press 1995), 72

¹⁷¹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Reports 1971 16, 31-32

¹⁷¹⁵ I.A. Shearer, *Starke’s International Law* (11th edition, Butterworths 1994), 147

¹⁷¹⁶ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 59

proceeded, giving way to a democratic, decentralised international order. He argued that it was self-determination that had accomplished these changes, acting as the 'revolutionary kernel' of that transformation.¹⁷¹⁷ In other words, self-determination had interacted with elements of the pre-existing international order and helped to shape the new order that replaced it. He therefore believed that Lenin's right of self-determination had been instrumental in transforming international law¹⁷¹⁸ and that it had become a *jus cogens* norm,¹⁷¹⁹ suggesting that it continues to exist after decolonisation.

Bowring developed his theory of self-determination as part of his 'materialist' theory of human rights, explained in Chapter 5. The Soviet Union was crucial to Bowring's theory. He argued that the 'dialectical' aspect of Soviet engagement with self-determination has often been overlooked,¹⁷²⁰ the process by which the Soviet Union's existence and its (contradictory) support led to the emergence of a new legal principle. As mentioned, he also saw rights as both 'integral to' and 'products of' struggles.¹⁷²¹ Bowring argued that the struggles out of which the three generations of rights had emerged, especially the decolonial struggles in the 1950s, 60s, and 70s, had transformed international law in giving rise to these rights.¹⁷²²

¹⁷¹⁷ Bill Bowring, 'Marx, Lenin and Pashukanis on self-determination: response to Robert Knox' (2011) 19(2) *Historical Materialism* 113, 114

¹⁷¹⁸ Bill Bowring, 'Marx, Lenin and Pashukanis on self-determination: response to Robert Knox' (2011) 19(2) *Historical Materialism* 113, 115

¹⁷¹⁹ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 90

¹⁷²⁰ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 37

¹⁷²¹ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge Cavendish 2008), 129

¹⁷²² Bill Bowring, 'Marx, Lenin and Pashukanis on self-determination: response to Robert Knox' (2011) 19(2) *Historical Materialism* 113, 115

Bowring pitched his theory explicitly against the work of Pashukanis, along with Pashukanis' modern followers. Bowring broadly believed that in their focus upon the 'form' of law, Pashukanis and his followers have underestimated and downplayed the radical 'content' of Lenin's right to self-determination.¹⁷²³ As Knox pointed out¹⁷²⁴ (and Bowring has accepted),¹⁷²⁵ this was partially based upon Bowring having overlooked one of Pashukanis' most important works, 'Lenin and Problems of Law'. In that work, Pashukanis approved of how Lenin had articulated self-determination, especially in contrast to the beliefs of Rosa Luxemburg and her colleagues, against whom Lenin's theory had been a polemic.¹⁷²⁶

Luxemburg was opposed to Soviet support for self-determination on the basis that it 'could not exist' under capitalism and would not be necessary under socialism.¹⁷²⁷ Pashukanis argued that self-determination, despite being an 'essentially bourgeois...and therefore...formal and abstract' demand could be wielded in opposition to capitalism and be part of the 'victory' of socialism.¹⁷²⁸ Lenin's critics (like Luxemburg) had failed to understand that in certain historical

¹⁷²³ Robert Knox, 'The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008' (2010) 18(1) *Historical Materialism* 193, 196

¹⁷²⁴ Robert Knox, 'The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008' (2010) 18(1) *Historical Materialism* 193, 202-203

¹⁷²⁵ Bill Bowring, 'Marx, Lenin and Pashukanis on self-determination: response to Robert Knox' (2011) 19(2) *Historical Materialism* 113, 118

¹⁷²⁶ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 158

¹⁷²⁷ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 156-157

¹⁷²⁸ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 159

contexts, even a demand for formal, abstract equality/rights could be revolutionary.¹⁷²⁹ This was the case when Lenin wrote much of his work on self-determination, in an era of intensified imperialist competition and formal colonialism. However, both Lenin and Pashukanis recognised that self-determination was not inherently emancipatory and could even be counterrevolutionary. As explained in Chapter 5, this was in opposition to Bowring's belief that rights are inherently revolutionary.

As Pashukanis highlighted,¹⁷³⁰ Lenin's views on self-determination evolved in accordance with historical developments. After the 'bourgeois-democratic stage' had been 'transcended' in Russia, when the Tsarist regime was overthrown in the earlier February Revolution of 1917,¹⁷³¹ the 'formal legal demand for national self-determination' had lost its former significance' (whilst remaining relevant in nations where this stage had not been reached).¹⁷³² It made little sense to advocate for self-determination once pre-capitalist forms had been replaced by 'bourgeois' liberal democracy. Such questions, Lenin argued, should be based upon an 'appraisal of the specific historical situation' and prevailing economic 'conditions'.¹⁷³³

¹⁷²⁹ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 159-160

¹⁷³⁰ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 160-161

¹⁷³¹ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 12

¹⁷³² Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 161

¹⁷³³ V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 145

This framed self-determination as a means to overcome imperialism (not just colonialism), to contribute to the 'joint revolutionary struggle' against the 'landowners and the bourgeoisie'.¹⁷³⁴ Discourse on this 'national question', Lenin argued, should maintain focus upon the struggles both between capital and labour and between the 'dependent' and 'exploiting' nations.¹⁷³⁵ Self-determination should then only be supported to the extent that it contributed to these struggles. In this new context, that formal equality 'of right' (i.e., sovereign equality) was no more than a 'halfway house'.¹⁷³⁶ Addressing the distinction between internal and external self-determination, between 'statehood' or 'autonomy' (i.e., within a nation-state or federal structure like the RSFSR), Lenin argued that 'autonomy' was merely a 'transitional form' necessary to fight imperialism rather than a worthwhile end.¹⁷³⁷ Similarly, he saw statehood and sovereign equality as inadequate; only the victory against the capitalist classes could bring about 'genuine equality of nations'.¹⁷³⁸ Political self-determination was thus only one element of broader autonomy.

As mentioned, both Pashukanis and Lenin recognised that self-determination was not only potentially inadequate but also jeopardous. On this point, Lenin highlighted the 'deception'

¹⁷³⁴ V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 146

¹⁷³⁵ V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 145

¹⁷³⁶ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 160

¹⁷³⁷ V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 146-147

¹⁷³⁸ V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 147-148

under which the 'imperialist powers' granted statehood 'under the guise' of sovereign equality whilst ensuring that those nations remained 'economically, financially, and militarily' dependent upon powerful nations.¹⁷³⁹ Similarly, Pashukanis refers to the 'imperialist bourgeoisie' masking their 'policy of oppression' by 'empty Wilsonian phrases on the equality of peoples, on the equal rights of nations, etc',¹⁷⁴⁰ on self-determination (and rights) in other words. Demands for rights and self-determination are capable of being accommodated and even weaponised by imperialist international law. As covered in Chapter 5, rights can become 'double-edged swords'.

As also explained, rights seem to emerge from struggle, and they are (at least potentially) revolutionary. However, they are equally capable of being wielded in the service of imperialism. Whilst Bowring understands rights in a 'dialectical' sense, he perhaps overlooked the dialectical relationship between reform and revolution. A reformist change is one which leaves intact the foundations of the power of the ruling class and is merely a concession leaving its power unimpaired. A revolutionary change undermines the foundations of power¹⁷⁴¹ and is therefore emancipatory. For self-determination to have revolutionised international law, it would have had to have 'undermined the foundations of power'. As the rest of this chapter will cover, this is doubtful.

¹⁷³⁹ V.I. Lenin, 'Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International' in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 150

¹⁷⁴⁰ Evgeny Pashukanis, 'Lenin and Problems of Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 160

¹⁷⁴¹ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22*, December 1915-July 1916 (first published 1964, Progress Publishers 1974), 344

6.1.3 Political self-determination, the nation-state, and liberal democracy

As mentioned, the modern framing of self-determination defines it as the right to determine political status and to pursue economic, social, and cultural development. It is possible from this to distinguish several different components. First, there is the determination of political status, what might be called political self-determination. Second, there is the economic/social aspect; as with economic and social rights, no attempt will be made to differentiate the social and economic, so this will be referred to as economic self-determination. Finally, there is cultural self-determination.

Cultural self-determination can be dealt with quickly. It will be sufficient to refer to Lenin's views on the 'Bund', the Jewish branch of Russia's Social Democratic movement. Disapproving of the Bund's belief that its equal status within the communist movement contradicted its representation of Jewish workers,¹⁷⁴² he denounced¹⁷⁴³ the Bund's 'bourgeois' demand for 'cultural-national autonomy'.¹⁷⁴⁴ Cultural-national autonomy referred to the 'establishment of institutions that will guarantee the freedom' of nationalities¹⁷⁴⁵ in opposition to the communist demands for self-determination and minority protections.¹⁷⁴⁶ Believing that it

¹⁷⁴² V.I. Lenin, 'The Position of the Bund in the Party' in V.I. Lenin and Clemens Dutt (ed), *Collected Works: Volume 7* (first published 1961, Progress Publishers 1977), 95-96

¹⁷⁴³ Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left : Re-examining Marxist Legacies* (Cambridge University Press 2008), 139

¹⁷⁴⁴ V.I. Lenin, 'Draft Platform for the Fourth Congress of Social-Democrats of the Latvian Area' in V.I. Lenin and Robert Daglish (ed), *Collected Works: Volume 19* (first published 1963, Progress Publishers 1977), 115-116

¹⁷⁴⁵ V.I. Lenin, "'Cultural-National' Autonomy' in V.I. Lenin and Robert Daglish (ed), *Collected Works: Volume 19* (first published 1963, Progress Publishers 1977), 503

¹⁷⁴⁶ V.I. Lenin, 'Draft Platform for the Fourth Congress of Social-Democrats of the Latvian Area' in V.I. Lenin and Robert Daglish (ed), *Collected Works: Volume 19* (first published 1963, Progress Publishers 1977), 116

distracted from the unity of the international working class and the ‘fullest equality of all nationalities’ within working class unity,¹⁷⁴⁷ Lenin argued that culture could not be separated from the ‘economic, legal, and social bonds’ that make up the nation.¹⁷⁴⁸ Along similar lines, cultural self-determination, whilst important, should not be separated from political and economic issues and should not be seen as sufficient on its own.

When Lenin and Marx referred to self-determination, they referred to political self-determination, conceiving it in terms of a nation-state (independent or as part of a federation) in opposition to colonial occupation. It refers to the political arrangements chosen by those exercising self-determination; according to Resolution 1541 (XV), it can be achieved through nation-state sovereignty, association with another nation-state, or ‘integration’ within a nation-state.¹⁷⁴⁹ In other words, it can take an external or internal form. Lenin referred to this distinction as that between self-determination and ‘autonomy’,¹⁷⁵⁰ but the more prevalent modern language will be adopted here for the sake of clarity.

The post-war advancing of self-determination and the subsequent gradual granting of sovereignty to the decolonised nations consisted of political self-determination. International law has essentially set up a hierarchy of self-determination, ranging from immediate state

¹⁷⁴⁷ V.I. Lenin, ‘Draft Platform for the Fourth Congress of Social-Democrats of the Latvian Area’ in V.I. Lenin and Robert Daglish (ed), *Collected Works: Volume 19* (first published 1963, Progress Publishers 1977), 116-117

¹⁷⁴⁸ V.I. Lenin, ‘“Cultural-National” Autonomy’ in V.I. Lenin and Robert Daglish (ed), *Collected Works: Volume 19* (first published 1963, Progress Publishers 1977), 503-504

¹⁷⁴⁹ UN General Assembly Resolution 1541 (XV) (15 December 1960) UN Doc A/RES/1541(XV), Principle VI

¹⁷⁵⁰ V.I. Lenin, ‘Preliminary Draft Theses on the National and the Colonial Questions for the Second Congress of the Communist International’ in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 145

sovereignty to Lenin's hated 'cultural autonomy'.¹⁷⁵¹ Nation-state sovereignty is the best-case scenario for self-determination (under capitalism). The recognition of the self-determination of the Third World as decolonisation unfolded mostly resulted (eventually) in political self-determination in the form of legal sovereignty, in the form of the nation-state.¹⁷⁵² As mentioned, legal sovereignty, the capacity to engage in legal relations and enjoy the associated rights, duties, immunities, and privileges, was before the 20th century limited to the 'civilised' Western nations.

Political self-determination did not escape unscathed from this process. There were attempts to limit its scope, including the oft-cited passage in General Assembly Resolution 2625 that self-determination should not threaten the sovereignty or territorial integrity of existing nation-states.¹⁷⁵³ Having been pressured to adopt capitalism's nation-state form (or be subject to it) through extraterritoriality, the Mandate system, etc, the conditioning of Third World sovereignty has pressured nations to conform to liberal political, economic, and legal arrangements domestically, including, as suggested in Chapter 4, the adoption of liberal democracy. Self-determination enjoys an odd relationship with democracy in international law; as mentioned in Chapter 4, Franck argued that self-determination was the 'historic root' out of which the ILD had 'grown',¹⁷⁵⁴ seemingly because it made the views of formerly

¹⁷⁵¹ Scott Newton, 'Microcosm: Soviet Constitutional Internationality' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 150

¹⁷⁵² Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 803

¹⁷⁵³ UN General Assembly, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (17 December 1970) UN Doc A/RES/2625(XXV)

¹⁷⁵⁴ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46, 52

colonised peoples a matter of international concern.¹⁷⁵⁵ Self-determination, however, seems broader than democracy: democracy is about exercise of power within the State, whilst self-determination is about the ability of the nation-state (or autonomous unit) to exercise power vis-à-vis other nation-states.

Higgins took the odd position that self-determination is not 'available' where democratic arrangements exist.¹⁷⁵⁶ This position, even more oddly, is not based upon the idea that self-determination is equivalent to secession;¹⁷⁵⁷ she argues that so long as 'dependent' peoples are offered some opportunity to 'express their choice' of political arrangements, self-determination is satisfied,¹⁷⁵⁸ suggesting that, for example, the peoples of Gibraltar have exercised their right to self-determination in choosing to remain part of Britain rather than join Spain.¹⁷⁵⁹ In seeking to maintain space between self-determination and sovereignty, Higgins seemingly believed that she was advocating a fairly radical position. She believed that (political) self-determination contains a 'duality' of requirements, extending beyond simply political status to also include 'government'.¹⁷⁶⁰ Although she suggested that this meant a 'free choice' being afforded to peoples 'as to their system of government', she seems to have

¹⁷⁵⁵ Thomas M Franck, 'The Emerging Right to Democratic Government' (1992) 86(1) *American Journal of International Law* 46, 55

¹⁷⁵⁶ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 117

¹⁷⁵⁷ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000) 118

¹⁷⁵⁸ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 118-119

¹⁷⁵⁹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 118

¹⁷⁶⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 119-120

equated this with multiparty elections and liberal democracy, suggesting that a one-party system could never meet the criteria of such a free choice.¹⁷⁶¹

This revealed an extremely limited definition of a free choice: a free choice must include all available options in a particular historical juncture. A free choice must therefore include the (historically speaking) ideal form of self-determination (nation-state sovereignty), the maintenance of the status quo, and everything in between. A choice between several pre-determined options is not a free choice. It is also hard to see how being able to select the party that holds government can be equated to selecting the 'system' of government. Political self-determination seems to require much more than this.

The other problem is that Higgins' position ignored the social/economic aspects of self-determination. Nations have very little scope to advance alternatives to capitalism, lest they become rogue nation-states. Higgins duality of requirements therefore effectively reproduced the historically contingent drive towards political self-determination being shaped as nation-state sovereignty (or internal arrangements subject to nation-state sovereignty), economic self-determination being limited by the existence of liberal political and legal institutions and the prioritisation of private property, and liberal democracy as the preferred internal method of governance. For self-determination to be revolutionary and emancipatory beyond colonialism, it would have to offer, at minimum, nation-state sovereignty and complete economic sovereignty.

¹⁷⁶¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (first published 1994, Oxford University Press 2000), 120

According to Bedjaoui, many NIEO demands centred around a 'modern' reformulation of sovereign equality around the concept of national 'economic' independence,¹⁷⁶² around economic sovereignty/self-determination. In recognising two different phases, the first being 'political independence' and the second 'economic decolonisation',¹⁷⁶³ Bedjaoui seemed to be recognising the distinction between political and economic self-determination. Not only has political self-determination itself not emancipatory, as the rest of this chapter will make clear, the severing of economic from political self-determination has been a counter-revolutionary project, one largely in the service of protecting universal sovereignty from private property.

6.2 Private Property, Revolution, and the legal form

6.2.1 Private property, sovereignty and international law

As has been explained, private property is central to capitalist legality, being an essential precondition of capitalism. As mentioned, capitalism can be distinguished by the private (property) ownership of the means of production in the hands of a capitalist class, the subordination of all production to the production and exchange of private property (i.e., commodities), and the prevalence of purely economic competition (between property owners). It requires the rule of law to be established to protect private property, its production

¹⁷⁶² Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 87

¹⁷⁶³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 88

and exchange through contractual arrangements.¹⁷⁶⁴ In other words, it requires capitalist legality.

Private property has also long been part of international law, particularly in the law on foreign-owned (or alien) property.¹⁷⁶⁵ As mentioned in Chapter 2, Grotius articulated 'just war' doctrine that allowed for violence when rights of commercial activity were violated. The law on diplomatic protection of aliens operated in a similar way, setting minimum standards of treatment of foreigners and justifying intervention by the 'alien's' nation-state when breached.¹⁷⁶⁶ The centrality of property (and its exchange) is, as Kate Miles suggests, a dominant 'pattern' of international law.¹⁷⁶⁷ This is connected to international law's endless imperialistic expansion beyond Europe; inclusion is often linked to the adoption of Western standards, including of capitalist legality, which is premised upon property. Sovereignty was conceptualised as subject to the willingness and capability to protect property.

This was evident in the system of extraterritoriality, used mainly, as explained in Chapter 4, in 'semi-civilised' nations like Japan, China, and the Ottoman Empire, those who engage in a

¹⁷⁶⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 267

¹⁷⁶⁵ Francis J Nicholson, 'The Protection of Foreign Property under Customary International Law' (1965) 6(3) Boston College Industrial and Commercial Law Review 391, 397

¹⁷⁶⁶ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 276

¹⁷⁶⁷ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 271

certain level of ‘foreign relations’ but are not independent either legally or in fact.¹⁷⁶⁸ The civilised/uncivilised distinction justified the use of unequal treaties, mostly imposed by Western/European nation-states upon ‘semi-civilised’ East Asian nations in the 19th century, granting legal sovereignty to those Western powers over their own nationals abroad.¹⁷⁶⁹

The British Supplementary Treaty of the Bogue between Britain and China, building upon the earlier Treaty of Nanking,¹⁷⁷⁰ is a good example of an unequal treaty. It established favourable terms of trade¹⁷⁷¹ and most-favoured nation status for Britain,¹⁷⁷² and prevented the ‘restraint’ of British merchants by Chinese officials.¹⁷⁷³ The treaty also provided for the jurisdiction of the British Consul over British nationals¹⁷⁷⁴ to punish British merchants who failed to comply with certain treaty provisions¹⁷⁷⁵ or British nationals who entered Chinese

¹⁷⁶⁸ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 89

¹⁷⁶⁹ Ingrid Detter, ‘The Problem of Unequal Treaties’ (1966) 15(4) *The International and Comparative Law Quarterly* 1069, 1074

¹⁷⁷⁰ The World and Japan Database, ‘Supplementary Treaty Signed at the Bogue, 8 October 1843’ (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024

¹⁷⁷¹ The World and Japan Database, ‘Supplementary Treaty Signed at the Bogue, 8 October 1843’ (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article I, Article II

¹⁷⁷² The World and Japan Database, ‘Supplementary Treaty Signed at the Bogue, 8 October 1843’ (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article VIII

¹⁷⁷³ The World and Japan Database, ‘Supplementary Treaty Signed at the Bogue, 8 October 1843’ (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article VII

¹⁷⁷⁴ The World and Japan Database, ‘Supplementary Treaty Signed at the Bogue, 8 October 1843’ (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article X

¹⁷⁷⁵ The World and Japan Database, ‘Supplementary Treaty Signed at the Bogue, 8 October 1843’ (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article VI

territory.¹⁷⁷⁶ British courts were empowered to recover debts incurred by Chinese nationals in Hong Kong and British nationals incurred in Chinese ports.¹⁷⁷⁷ British rule was justified with reference to the 'lawless' Natives of China¹⁷⁷⁸ and the inability of Chinese officials to prevent smuggling¹⁷⁷⁹ and piracy.¹⁷⁸⁰

Similar justifications for extraterritoriality can be found in the (then contemporary) work of John Westlake.¹⁷⁸¹ Civilisation was conceived by Westlake to refer not (solely)¹⁷⁸² to the biological supremacy of 'civilised' countries but to government protection, namely for Europeans abroad.¹⁷⁸³ The failure to establish a government that could provide such protections rendered the citizens of those areas 'uncivilised'¹⁷⁸⁴ and imposed a 'duty'¹⁷⁸⁵ on

¹⁷⁷⁶ The World and Japan Database, 'Supplementary Treaty Signed at the Bogue, 8 October 1843' (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article IX

¹⁷⁷⁷ The World and Japan Database, 'Supplementary Treaty Signed at the Bogue, 8 October 1843' (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article XV

¹⁷⁷⁸ The World and Japan Database, 'Supplementary Treaty Signed at the Bogue, 8 October 1843' (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article IX

¹⁷⁷⁹ The World and Japan Database, 'Supplementary Treaty Signed at the Bogue, 8 October 1843' (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article XII

¹⁷⁸⁰ The World and Japan Database, 'Supplementary Treaty Signed at the Bogue, 8 October 1843' (*The World and Japan Database*) <<https://worldjpn.net/documents/texts/pw/18431008.T1E.html>> accessed 8 January 2024, Article XIV

¹⁷⁸¹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 57-58

¹⁷⁸² John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 145

¹⁷⁸³ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 143

¹⁷⁸⁴ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 145

¹⁷⁸⁵ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 152

‘civilised’ European nations to create a separate system to protect those Europeans.¹⁷⁸⁶ This was explicitly linked the establishment of capitalist relations and private property. He referred to matters ‘belonging specially to civilisation’ over which a European government should have ‘immediate authority’, which included trade, manufacture, and ‘property in land’.¹⁷⁸⁷ Sovereignty was thus made conditional upon conformity to Western capitalist legality.

A logic of biology was also evident in such work: Westlake recognised that the duty to establish governments in semi-civilised nations was one that belonged to the ‘white races’. Concepts like private property were ‘beyond the comprehension’ of the uncivilised;¹⁷⁸⁸ therefore, uncivilised peoples, in his view, could not create private property rights¹⁷⁸⁹ nor expand their rights of ‘occupation’¹⁷⁹⁰ into private property.¹⁷⁹¹ Such tasks had to be accomplished by civilised; ‘the inflow of the white race’, he argued ‘cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed’.¹⁷⁹² These semi-civilised nations would only be capable of exercising sovereignty, therefore, when they were ready to protect private property rights.

¹⁷⁸⁶ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 144

¹⁷⁸⁷ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 157

¹⁷⁸⁸ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 154

¹⁷⁸⁹ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 152

¹⁷⁹⁰ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 150

¹⁷⁹¹ John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 151

¹⁷⁹² John Westlake, Lass Oppenheim (ed), *The collected papers of John Westlake on public international law* (Cambridge University Press 1914), 145

Maintaining private property through law, through capitalist legality, was at the centre of the conditioning of Third World sovereignty and self-determination. This self-determination needed to be confined, in accordance with the capitalist separation of the political and economic spheres, to political self-determination, ensuring that Third World nations would not use their newfound legal sovereignty to disrupt capitalist relations. These relations, as mentioned, were threatened by the 1917 Revolutions.

6.2.2 1917, revolution and private property

The challenge to private property issued by the Bolsheviks and the Mexican Revolution was therefore not just a challenge for international property law but for (modern) international law itself. These Revolutions attempted to reject the Western conception of private property¹⁷⁹³ that had conditioned modern international law. Private property refers not just to land but also to natural resources, public utilities (like energy), or any other commodity, and to the free exchange of property. The most significant nationalisation in Mexico was the oil industry,¹⁷⁹⁴ which attacked the private property of the foreign owners of Mexican oil reserves.

¹⁷⁹³ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 275

¹⁷⁹⁴ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 287

Although expropriation of private property had begun at the village level early in the Mexican Revolution,¹⁷⁹⁵ large-scale nationalisation was carried out through Article 27 of the 1917 Mexican Constitution.¹⁷⁹⁶ Article 27 asserted ultimate ownership by the State of all private property in Mexico and allowed for expropriation. It also gave the Mexican State the power to redistribute wealth and to break up agricultural land. The Mexican challenge was initially as much against large foreign holdings of agricultural land than the centrality of property.

The Soviet Union's challenge, on the other hand, was explicitly anti-capitalist. 'Large' landed property was abolished without compensation by decree soon after the Bolsheviks took over,¹⁷⁹⁷ on the basis that this property now belonged to the 'whole people' of Russia,¹⁷⁹⁸ and all private property in land and natural resources was abolished in February of 1918. Private ownership of large residential buildings was also restricted in August, leaving the rights of the 'small house-owner' untouched.¹⁷⁹⁹ Industry was not nationalised immediately out of practical concerns, but dividends and liquidation were restricted in order to make stock ownership unprofitable, and workers' committees were established in the interim. Industry was gradually nationalised without compensation.¹⁸⁰⁰

¹⁷⁹⁵ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 284

¹⁷⁹⁶ Comparative Constitutions Project, 'Mexico 1917 (rev. 2015)' (*Comparative Constitutions Project*) <https://www.constituteproject.org/constitution/Mexico_2015> accessed 14 May 2024, Article 27

¹⁷⁹⁷ John N Hazard, 'Soviet Property Law' (1945) 30 *Cornell Law Review* 466, 468

¹⁷⁹⁸ Vladimir Lenin, 'Report on Land: October 26 (November 8)' (*Marxists Internet Archive*) <<https://www.marxists.org/archive/lenin/works/1917/oct/25-26/26d.htm>> accessed 14 May 2024

¹⁷⁹⁹ John N Hazard, 'Soviet Property Law' (1945) 30 *Cornell Law Review* 466, 469

¹⁸⁰⁰ John N Hazard, 'Soviet Property Law' (1945) 30 *Cornell Law Review* 466, 470

The overturning of private property¹⁸⁰¹ was connected directly to ending capitalist society and its exploitative social relations.¹⁸⁰² No distinction between foreign and domestic investors was made but in practice a significant amount of foreign-owned property was confiscated. Miles clarifies that this was an assertion of a right not of expropriation but ‘nationalisation without compensation’, a rejection not just of alien property-owners but of specifically private property for the specific purpose of ending capitalism in Russia.¹⁸⁰³

There was a major difference between the Soviet and Mexican rejections of property: the Mexican Revolution was targeted at one powerful Western nation-state in particular (the United States) and thus can be situated within a broader history of opposition to US intervention in Latin America. The US has a long history of interference in the region, often justified by the Monroe Doctrine, developed in the 19th century to prevent non-interference by European nations on the grounds that the US was the sole power of the Western Hemisphere.¹⁸⁰⁴

Several legal principles emerged from Latin American opposition to US intervention, most notably the Calvo doctrine, named after scholar Carlos Calvo. This was based upon the

¹⁸⁰¹ V.I. Lenin, ‘Declaration of the Rights of the Working and Exploited People’ in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 423

¹⁸⁰² V.I. Lenin, ‘Declaration of the Rights of the Working and Exploited People’ in V.I. Lenin and Julius Katzer (ed), *Collected Works: Volume 31* (first published 1966, Progress Publishers 1974), 423-424

¹⁸⁰³ Kate Miles, ‘Property, Revolution, and Rejection in International Law’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 280

¹⁸⁰⁴ Juan Pablo Scarfi, ‘Mexican Revolutionary Constituencies and the Latin American Critique of US Intervention’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 226

principle of non-interference, opposition to favourable protection of 'aliens', and the resolution of property disputes in the jurisdiction in which the property was located.¹⁸⁰⁵ The Carranza doctrine, named after Mexican President Venustiano Carranza,¹⁸⁰⁶ emerged after the Revolution. The Carranza Doctrine was based upon a rejection of the Monroe Doctrine as a 'hegemonic' principle of US interventionism,¹⁸⁰⁷ on equality between nations, sovereignty, non-interference, equality between nationals and foreigners in domestic law, and the reorientation of diplomatic efforts away from powerful nations.¹⁸⁰⁸ The reference to equality between nationals and foreigners seemingly incorporated the Calvo doctrine.¹⁸⁰⁹ The Calvo and Carranza doctrines represented more of an attempt to assert sovereign equality against US hegemony than revolutionary principles.

The Mexican rejection of private property at times reflected these doctrines. For example, although the legal capacity to own land was limited to Mexican nationals, foreigners could also acquire property if they agreed to be treated as Mexicans and to refrain from invoking the 'protection of their governments'. It provided for domestic judicial proceedings for carrying out expropriation. However, it also demonstrated a willingness to conform with

¹⁸⁰⁵ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 277

¹⁸⁰⁶ Juan Pablo Scarfi, 'Mexican Revolutionary Constituencies and the Latin American Critique of US Intervention' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 228-229

¹⁸⁰⁷ Juan Pablo Scarfi, 'Mexican Revolutionary Constituencies and the Latin American Critique of US Intervention' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 231-232

¹⁸⁰⁸ Juan Pablo Scarfi, 'Mexican Revolutionary Constituencies and the Latin American Critique of US Intervention' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 232

¹⁸⁰⁹ Juan Pablo Scarfi, 'Mexican Revolutionary Constituencies and the Latin American Critique of US Intervention' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 232

Western private property laws, as the Constitution provided for compensation for expropriated property based upon the valuation of the land registry or the tax collector.¹⁸¹⁰ This seems to suggest that Mexico was not really challenging the centrality of private property but rather implement land reform¹⁸¹¹ in accordance with international law, save for a Calvo-inspired assertion of sovereignty.

However, as Miles points out, Mexico was not always forthcoming in providing compensation,¹⁸¹² and expropriations eventually moved beyond land reform, especially when the oil industry was nationalised in 1938.¹⁸¹³ More importantly, Mexico was attempting to introduce a 'social justice exception' to the law of foreign property;¹⁸¹⁴ expropriation was to be used as a tool for the 'social betterment' of the Mexican people,¹⁸¹⁵ to make an 'equitable distribution' of resources, and to improve living conditions.¹⁸¹⁶ Mexico was thus attempting to

¹⁸¹⁰ Comparative Constitutions Project, 'Mexico 1917 (rev. 2015)' (*Comparative Constitutions Project*) <https://www.constituteproject.org/constitution/Mexico_2015> accessed 14 May 2024, Article 27

¹⁸¹¹ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 285

¹⁸¹² Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 285-286

¹⁸¹³ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 286; 'Correspondence between the United States and Mexico: regarding Mexico's Expropriation of Agrarian Properties Owned by American Citizens' (1938) 19 *International Conciliation* 521, 521

¹⁸¹⁴ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 289

¹⁸¹⁵ 'Correspondence between the United States and Mexico: regarding Mexico's Expropriation of Agrarian Properties Owned by American Citizens' (1938) 19 *International Conciliation* 521, 524

¹⁸¹⁶ Comparative Constitutions Project, 'Mexico 1917 (rev. 2015)' (*Comparative Constitutions Project*) <https://www.constituteproject.org/constitution/Mexico_2015> accessed 14 May 2024, Article 27

directly challenge a central premise of international law in a way that could have been emancipatory.

To different degrees, both the Soviet Union and Mexico posed a challenge to the existing legal system. This challenge engendered a period of 'right-construction',¹⁸¹⁷ a period in which the private property rights favoured by Western capitalist nation-states were contested by socialist rights to nationalise private property.¹⁸¹⁸ If the Soviet Union had been able to use its sovereignty to overturn capitalism, this could have spelt disaster for the existing order, especially once decolonisation began. Replacing private property with the democratic control of the entirety of Russian society would have given rise to a very different form of domestic legal relations (presumably a more collective version). The Soviet challenge to the centrality of property was therefore strongly opposed by the Western powers.¹⁸¹⁹

Although, as mentioned, private property was central to the expansion of international law in the late 19th-early 20th centuries, it was protected by Western political power rather than

¹⁸¹⁷ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 276

¹⁸¹⁸ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 278

¹⁸¹⁹ 'Memorandum handed to the Russian Delegation on the 15th April, 1922, after preliminary conversations between British, French, Italian, and Belgian Delegations' in *Papers relating to International Economic Conference, Genoa, April-May 1922* (His Majesty's Stationary Office, 1922), 25; Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 281-282

specific legal arrangements. There was little positive law that covered property abroad.¹⁸²⁰ It therefore became necessary for international property law to evolve to meet this challenge of sovereignty being used to override property. The legal strategy of Western powers (and mainstream jurists)¹⁸²¹ was to present property laws as established legal norms, presumably based upon (their) nation-state practice. This was a transfer of political dispute to a supposedly 'neutral' venue that would offer 'market' responses to political property disputes.¹⁸²² This would confine these disputes within limits more or less acceptable to capitalism in order to protect its premises of property.

Several prominent principles of modern property (investment) law were established in the years following 1917 as specific 'interventions' against those events¹⁸²³ in the hopes of containing and opposing the conceptions of property they advanced.¹⁸²⁴ The most notable of these is the principle of 'unjust enrichment',¹⁸²⁵ which emerged from the *Lena Goldfields* arbitration, which concerned a contract dispute between a Western mining company and the

¹⁸²⁰ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 281

¹⁸²¹ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 282

¹⁸²² Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 292

¹⁸²³ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 294

¹⁸²⁴ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 295

¹⁸²⁵ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 303

Soviet Union. The arbitration, probably the first internationalised contract dispute¹⁸²⁶ arose from a government revocation of a concession to allow Lena Goldfields to extract minerals.¹⁸²⁷ Rather than deciding the case based upon breach of contract, the tribunal accepted Lena Goldfields' suggestion that the Soviet Union had been 'unjustly enriched' by the seizure,¹⁸²⁸ applying this as a 'general principle of international law'.¹⁸²⁹ The normativity of unjust enrichment was not even clear in the 1970s,¹⁸³⁰ let alone when the case was decided in 1930. The application of a supposedly established legal principle allowed the tribunal to operate outside of the Soviet rejection of private property¹⁸³¹ apply a 'liberal understanding' of property law.¹⁸³²

Another such principle is the 'Hull formula', which prescribes compensation for expropriation.¹⁸³³ It was articulated by US Secretary of State Cordell Hull, in response to the

¹⁸²⁶ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 302-303

¹⁸²⁷ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 303-304

¹⁸²⁸ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 304-305

¹⁸²⁹ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 304

¹⁸³⁰ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 305-306

¹⁸³¹ Andrea Leiter, 'Contestations over Legal Authority: The Lena Goldfields Arbitration 1930' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 326

¹⁸³² Andrea Leiter, 'Contestations over Legal Authority: The Lena Goldfields Arbitration 1930' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 334

¹⁸³³ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 306

Mexican oil nationalisation¹⁸³⁴, who called the principle of compensation for expropriation of property a 'universally recognised principle' and a right 'unquestioned' in international law.¹⁸³⁵ The Hull formula has since become the 'traditional' standard of compensation for modern investment law in response to expropriation,¹⁸³⁶ but there was little if any prior support for the formula.¹⁸³⁷ Again, a political position was advanced as a settled legal principle.

International law thus developed specifically in response to the challenge to its core premises. The emergence of these legal principles can be framed a legacy of the Soviet (and Mexican) challenge.¹⁸³⁸ However, although they make similar actions more difficult, the Soviet repudiation of private property was not defeated by these legal principles. Russia was before 1917 an undeveloped agrarian nation, rather than the 'industrialised state in which Marxists' 'had expected their (revolutionary) opportunity to come'.¹⁸³⁹ The Bolsheviks had to deal with a (Western-backed) civil war which (along with the First World War), inflicted significant

¹⁸³⁴ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 310-311

¹⁸³⁵ Correspondence between the United States and Mexico: regarding Mexico's Expropriation of Agrarian Properties Owned by American Citizens' (1938) 19 *International Conciliation* 521, 522

¹⁸³⁶ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 311

¹⁸³⁷ Daria Davitti, '1917 & Implications for Law of Expropriation' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 311-312

¹⁸³⁸ Kate Miles, 'Property, Revolution, and Rejection in International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 284

¹⁸³⁹ John N Hazard, 'Soviet Property Law' (1945) 30 *Cornell Law Review* 466, 467

economic/social costs,¹⁸⁴⁰ whilst the hoped-for revolutions in other nations, especially those in the West,¹⁸⁴¹ also failed to materialise.

The Bolsheviks had attempted to reformulate Russia and its economy around a radical conception of democracy but as mentioned in the previous chapter, had to backtrack in 1921¹⁸⁴² due to external financial constraints. This led to concessions to capital¹⁸⁴³ and the rise of a 'privileged' bureaucracy,¹⁸⁴⁴ culminating in Joseph Stalin's 'socialism in one country'¹⁸⁴⁵ that strengthened the Russian State.¹⁸⁴⁶ Having sought to dispense with 'formal legality' along with private property,¹⁸⁴⁷ the New Economic Policy reinstalled private property and commodity exchange, including for foreign capitalists.¹⁸⁴⁸ This meant also reestablishing the requisite legal relations¹⁸⁴⁹ and individualised rights,¹⁸⁵⁰ which contributed to Stalin's State-led capitalism replacing Lenin's internationalist anti-capitalism as the USSR's primary

¹⁸⁴⁰ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 15

¹⁸⁴¹ N.V. Krylenko, 'The Conflict between Socialist Theory and Soviet Reality', in Michael Jaworskyj, *Soviet Political Thought: an anthology, selected* (John Hopkins Press 1967), 177-178

¹⁸⁴² Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 27

¹⁸⁴³ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 17

¹⁸⁴⁴ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 18

¹⁸⁴⁵ Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism' (2004) 17 Canadian Journal of Law & Jurisprudence 269, 273

¹⁸⁴⁶ Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism' (2004) 17 Canadian Journal of Law & Jurisprudence 269, 270

¹⁸⁴⁷ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 7

¹⁸⁴⁸ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 15

¹⁸⁴⁹ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 15-16

¹⁸⁵⁰ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 18

policy.¹⁸⁵¹ Contrary to Pashukanis' thesis about the law, like the State, withering away in the absence of capitalist antagonisms, a 'Soviet' law began to emerge in 1927 according to the requirements of private property.¹⁸⁵²

The Mexican and especially the Bolshevik Revolutions offered a systemic challenge to the international legal order and the centrality of private property. Both offered a critique of private property in their respective jurisdictions that was, at minimum, anti-imperialist. This was therefore threatening to the international legal order, where norms like non-intervention seem to be conditional upon acceptance of the centrality of private property. Both challenges were ultimately not sustained, but they did lead to an expansion of legal principles in response.

6.2.3 Revolutionary legal argument

The Soviet Union (and Mexico) were advancing a new conceptualisation of sovereignty and self-determination, one that (implicitly) argued that they were not subject to private property and could in fact be used to override it. This was a counter-argument to the well-established position of the West that directly subjected sovereignty to the prioritisation of property and its free exchange. The rigidity of the legal form and the contradictory nature of legal argument (contradiction between expansion and conditional inclusion/exclusion) places sovereignty at the heart of all legal arguments. Arguments about humanitarian intervention, for example,

¹⁸⁵¹ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 19

¹⁸⁵² Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 27

are about the conditions under which sovereignty may be overridden in the interests of humanity. Lurking in the background of these arguments is private property and its separation from sovereignty. Property has long been a justification for denying sovereignty, but also something that needs to be protected from sovereignty, acting, as Miles suggested, as a dominant 'pattern' of international law. This pattern was challenged in 1917.

These challenges to international law's premises help reveal the difficulties of anti-imperialist legal argument. The Soviet Union was often framed as a deviant when it comes to international law. Its deviations from established practice were viewed an affront to international order. Apart from the deviations on property, the Soviet Union, as mentioned in Chapter 4, also rejected norms around the assumption of debts and obligations incurred by the Tsarist regime. Even when the Soviet Union complied with international law, as it often did, this was seen as self-serving and/or hypocritical, whilst Western violations of international law are presented as exceptional and even acceptable aberrations¹⁸⁵³. This hypocrisy obscured that there was a clear understanding within the Soviet Union of the relationship between capitalism and international law,¹⁸⁵⁴ a belief that international law should not be blindly accepted.

¹⁸⁵³ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 166

¹⁸⁵⁴ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 167

Accusations of Soviet deviancy was not genuinely down to its actual legal practice. It was instead, that, especially in its earlier years, it recognised the connections between law and imperialism.¹⁸⁵⁵ The rejection of private property and the refusal to compensate for expropriated property engendered hostility because it disrupted the capitalist economic system underlying the international legal system.¹⁸⁵⁶ If these foundational principles, both of which are premised upon the prioritisation of private property, were capable of being disregarded, this would produce chaos for the capitalist economy.

The Soviet Union advanced ascending arguments about property (and debt), i.e., arguments based upon its sovereignty. These were met by descending arguments based upon the needs of the capitalist order that attempted to frame the former as deviant. This, of course, did not take place before a court. Having immediately recognised the Provisional government that replaced the Tsarist regime and was shortly replaced by the Bolsheviks,¹⁸⁵⁷ the US refused to recognise the Bolshevik government.¹⁸⁵⁸ The Soviet Union (and Mexico) were initially excluded from the League of Nations,¹⁸⁵⁹ and received general ‘diplomatic mistreatment’. Its exclusion from the Washington Naval Conference in 1921 was justified on the grounds that

¹⁸⁵⁵ Owen Taylor, ‘Law and Socialist Revolution: Early Soviet Legal Theory and Practice’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 171-172

¹⁸⁵⁶ Owen Taylor, ‘Law and Socialist Revolution: Early Soviet Legal Theory and Practice’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 175

¹⁸⁵⁷ Dino Kritsiotis, ‘Scenes of the Mexican and Russian Revolutions’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 207

¹⁸⁵⁸ Dino Kritsiotis, ‘Scenes of the Mexican and Russian Revolutions’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 208-209

¹⁸⁵⁹ Alison Duxbury, ‘Excluding Revolutionary States: Mexico, Russia, and the League of Nations’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 96-97

the (predominantly) Western powers involved would represent Russia on its behalf.¹⁸⁶⁰ As alluded to, the US and Britain would provide financial¹⁸⁶¹ and military support to the opposition forces in the Russian civil war¹⁸⁶² that crippled the nation financially. The US in particular framed its interventions as not infringing the principle of non-intervention,¹⁸⁶³ presumably based upon non-recognition of Russia's sovereignty.

These descending arguments implicitly provided for the overriding and ignoring of Russian sovereignty in the interests of the international order. It was easier for Western nations to make descending arguments in defence of capitalism than for the Soviets to counterpose its sovereignty against capitalism due to their position in the imperialist order.¹⁸⁶⁴ The rigidity of form and structures gives international law a degree of conservatism that accords with its relationship with imperialism's global expansion.

¹⁸⁶⁰ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 164

¹⁸⁶¹ Dino Kritsiotis, 'Scenes of the Mexican and Russian Revolutions' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 210

¹⁸⁶² Liudmila G. Novikova, 'A Province of a Non-Existent State: The White Government in the Russian North and Political Power in the Russian Civil War, 1918-1920' (2005) 18(2) *Revolutionary Russia* 121, 131

¹⁸⁶³ Dino Kritsiotis, 'Scenes of the Mexican and Russian Revolutions' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 213

¹⁸⁶⁴ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 161

Owen Taylor notes that a failure to theorise international law properly overlooks that this is a standard operation of the international legal form¹⁸⁶⁵ and its tendency to obscure the underlying inequality of the (equal) parties and the political considerations underlying legal disputes. This renders law a 'hostile environment' for change,¹⁸⁶⁶ especially anti-capitalist change, its rigid and depoliticising¹⁸⁶⁷ tendency making it ill-suited to revolution.¹⁸⁶⁸ The standard of civilisation as an argumentative structure adds an additional layer to this theory: as suggested in Chapter 4, it tends to push legal arguments towards a focus upon compliance with international law's premises rather than on those premises themselves. A failure to comply with capitalism's laws will therefore give rise to hostility. International legal argument is not so much conservative as it is suited to protecting the capitalist status quo through its rigidity.

Bedjaoui, years later, identified a gap between international law's 'evolutionary' nature and its 'real' 'conservative' function,¹⁸⁶⁹ which led him to the conclusion that the international legal order was defective.¹⁸⁷⁰ He argued that the conservative aspect had become dominant,

¹⁸⁶⁵ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 166

¹⁸⁶⁶ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 171

¹⁸⁶⁷ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 166

¹⁸⁶⁸ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 171

¹⁸⁶⁹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 112

¹⁸⁷⁰ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 111-112

meaning that the solution was to 'liberate' international law¹⁸⁷¹ so it could 'act directly on imperialist structures.'¹⁸⁷² This stemmed at least partially from the belief that law was 'passive' and non-interventionist.¹⁸⁷³

On one hand, Bedjaoui recognised that imperialism and its logic were an impediment to the demands of the Third World, and to its reinterpretations of sovereignty and self-determination in order to prevent the ongoing exploitation of the Third World by the West.¹⁸⁷⁴ He saw that international law was involved in protecting the unequal relations at the heart of imperialism¹⁸⁷⁵ and its tendency to frame attempts by the Third World to use it for their own purposes as 'excesses of sovereignty',¹⁸⁷⁶ just as the Soviets had been framed as deviants. On the other hand, he believed that decolonisation was then (i.e., in the 1970s) providing a new 'impetus' for a 'new' international law more attuned with actual 'political, economic, and social conditions'.¹⁸⁷⁷

It must be remembered that international law is a structured process rather than a body of rules. The availability of new international legal principles like rights and self-determination is not indicative of a new international law so long as the structure and form of legal argument remains unchanged. The replacement of old legal doctrines with new ones like self-

¹⁸⁷¹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 110

¹⁸⁷² Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 114

¹⁸⁷³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 113

¹⁸⁷⁴ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 90-91

¹⁸⁷⁵ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 110

¹⁸⁷⁶ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 103

¹⁸⁷⁷ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 62-63

determination did not represent the transformation of colonial international law into anti-colonial law; there were significant continuities as well,¹⁸⁷⁸ as the third section will explain. In addition, identifying law's indeterminacy is not particularly helpful when it comes to revolutionary legal positions that aim to disrupt the capitalist premises of state sovereignty and/or the imperialist world order itself.

The legal form decontextualises these disputes, framing revolutionary positions as deviant uses of sovereignty. It also frames revolutionary actors as deviant; the success or failure of a legal challenge will ultimately depend upon the ability to actualise a position, which will rely upon other forms (political, economic, etc) of power. As Taylor points out, being 'legally right' is no guarantee of 'safety', and legal victories are 'meaningless' without a broader social and political struggle to create the conditions for that legal victory to be actualised.¹⁸⁷⁹ Anti-imperialist argument is not impossible, but there are significant difficulties involved.

6.2.4 Self-determination, the legal form, and (qualified) indeterminacy

The Soviet Union, already explained to be the driving force behind self-determination, had attempted to use its own sovereignty, its own self-determination, to alter a central pattern of international law. Asserting that private property could be overridden by sovereignty would certainly have been potentially emancipatory. If this had been maintained, it would have had revolutionary implications for decolonisation. This does not, however, mean that the

¹⁸⁷⁸ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 268

¹⁸⁷⁹ Owen Taylor, 'Law and Socialist Revolution: Early Soviet Legal Theory and Practice' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 178

Bolshevik Revolution had no effect. As mentioned, it made explicit invocations of ‘civilisation’ untenable and offered a genuine alternative to liberal capitalism. It was also a significant factor in decolonisation itself.

Bowring referred to this in making what he described as a ‘thoroughly dialectical’ case for his view that self-determination had transformed the international legal order.¹⁸⁸⁰ He referred to the interaction between the use of self-determination for ‘external legitimation’ and ‘ideological self-empowerment’ of decolonial post-war struggles and the USSR’s ‘paradoxical’ support for it.¹⁸⁸¹ Third World nationalism interacted with Soviet encouragement to advance self-determination, in other words. This, he argued, led to the (political) ‘content of self-determination coming into ‘sharp conflict’ with its ‘juridical form’, both altering that content and ‘transforming’ its form.¹⁸⁸² However, Bowring did not really substantiate the claim that the legal form was altered by decolonisation and the political principle of self-determination.

Notwithstanding the internal-external distinction, the eventual result of self-determination for much of the Third World was nation-state sovereignty,¹⁸⁸³ previously only available to

¹⁸⁸⁰ Bill Bowring, ‘Positivism versus self-determination: the contradictions of Soviet international law’ in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 167

¹⁸⁸¹ Bill Bowring, ‘Positivism versus self-determination: the contradictions of Soviet international law’ in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 167-168

¹⁸⁸² Bill Bowring, ‘Positivism versus self-determination: the contradictions of Soviet international law’ in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 168

¹⁸⁸³ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 259

Western capitalist nations.¹⁸⁸⁴ The nation-state is specific to capitalism and international law and exists to regulate relations between capitalist nation-states. Self-determination therefore could be tied to the universalisation of nation-state sovereignty. International legal sovereignty effectively aligns with statehood, referring to the concurrent existence of a permanent population, a defined territory, a government, and the capacity for inter-state relations (this is the 'Montevideo Convention' definition of statehood),¹⁸⁸⁵ as well as other criteria like permanence,¹⁸⁸⁶ ability to observe international legal obligations,¹⁸⁸⁷ recognition,¹⁸⁸⁸ and the rule of law¹⁸⁸⁹ (including capitalist legality). Again, self-determination has therefore emerged in practice as being 'predicated on the ideal-type of a nation-state' and has 'signified the right of a nation to a state', subject to the exceptional form of internal self-determination.¹⁸⁹⁰

Mieville (with whom Bowring disagreed with on the question of legal form)¹⁸⁹¹ saw this universalisation as a strong trend in the history of imperialism if not quite an inevitability.¹⁸⁹²

This can, as mentioned in Chapter 4, be explained by imperialism's strong tendency towards

¹⁸⁸⁴ Evgeny Pashukanis, 'International Law' in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Selected Writings on Marxism and Law* (Academic Press 1980), 174

¹⁸⁸⁵ Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm Evans (ed), *International Law* (5th edition, Oxford University Press 2018), 194-195

¹⁸⁸⁶ James Crawford, *The Creation of State in International Law* (first published 1979, 2nd edition 2007), 90

¹⁸⁸⁷ James Crawford, *The Creation of State in International Law* (first published 1979, 2nd edition 2007), 91

¹⁸⁸⁸ James Crawford, *The Creation of State in International Law* (first published 1979, 2nd edition 2007), 93

¹⁸⁸⁹ James Crawford, *The Creation of State in International Law* (first published 1979, 2nd edition 2007), 93-94

¹⁸⁹⁰ Scott Newton, 'Microcosm: Soviet Constitutional Internationality' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 149-150

¹⁸⁹¹ Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 168

¹⁸⁹² China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 260

endless (uneven) expansion. Mievile referred to this as capitalism's tendency to 'generalise';¹⁸⁹³ this often manifests itself in the creation of a territorial nation-state (as Lenin had recognised).¹⁸⁹⁴ The extension of capitalist social relations was usually followed by the extension of capitalist juridical relations.¹⁸⁹⁵ It was therefore likely (if not inevitable) that the globalisation of capitalism would eventually lead to the universalisation of (nation-state) sovereignty. At the very least, capitalism could accommodate it. This knowledge had given impetus to Lenin and Pashukanis' nuanced view on self-determination discussed earlier.

If the international legal form is based (mostly) upon nation-state sovereignty, it is difficult to see how universalising this form can be equated with a change in form. Accordingly, Mievile argued that the post-WWII process of decolonisation was not a radical change in 'form' of international law but was rather a change in content and a continuation of this 'universalising trend' in form.¹⁸⁹⁶ The transition from the Mandate system to the Trusteeships to the end of formal colonialism¹⁸⁹⁷ and the rise of Third World nationalism¹⁸⁹⁸ took the form of the capitalist nation-state.¹⁸⁹⁹ Self-determination offered nation-state sovereignty to formerly subjugated nations, but this aligned with the nation-state as the standard international legal subject.¹⁹⁰⁰ Whilst there is no reason to underplay the (undoubtedly positive) effects that Third World nationalism had on the expansion of universal sovereignty and the fact that

¹⁸⁹³ China Mievile, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 260

¹⁸⁹⁴ V.I. Lenin, *The Right of Nations to Self-Determination* (Foreign Language Press 2022), 63

¹⁸⁹⁵ China Mievile, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 261-262

¹⁸⁹⁶ China Mievile, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 264

¹⁸⁹⁷ China Mievile, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 264-265

¹⁸⁹⁸ China Mievile, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 265

¹⁸⁹⁹ China Mievile, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 266

¹⁹⁰⁰ Robert Knox, 'The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008' (2010) 18(1) *Historical Materialism* 193, 196

decolonisation was fiercely resisted in much of the West,¹⁹⁰¹ there is also no reason to exaggerate the extent to which international law has changed.

Bowring's conception of rights, including self-determination, as inherently scandalous and revolutionary, also seems to miss the possibility of indeterminacy.¹⁹⁰² It was mentioned earlier that Lenin and Pashukanis had recognised the possibility that self-determination could be used in the service of imperialism. Knox put this argument forward in a response to Bowring, arguing that self-determination was capable of being argued both against imperialism and/or colonialism and to being appropriated in their service.¹⁹⁰³ To support this, he noted whilst the Soviet Union may have been able to justify the material support it offered against colonial occupation across the Third World¹⁹⁰⁴ upon Lenin's right to self-determination, Israel, also justifies its own colonial occupation of Palestine by its own self-determination.¹⁹⁰⁵ Self-determination was thus not even inherently anti-colonialist, let alone anti-imperialist/capitalist, and legal arguments about self-determination tend to take on a similar form, whether they are justifying anti-colonial/imperialist struggle or reinforcing it.¹⁹⁰⁶

¹⁹⁰¹ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 266

¹⁹⁰² Robert Knox, 'The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008' (2010) 18(1) *Historical Materialism* 193, 198

¹⁹⁰³ Robert Knox, 'The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008' (2010) 18(1) *Historical Materialism* 193, 200

¹⁹⁰⁴ Bill Bowring, 'Positivism versus self-determination: the contradictions of Soviet international law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008), 163

¹⁹⁰⁵ Robert Knox, 'The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008' (2010) 18(1) *Historical Materialism* 193, 199

¹⁹⁰⁶ Robert Knox, 'The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008' (2010) 18(1) *Historical Materialism* 193, 200

However, whilst international law's indeterminacy should be accepted, it should also not be overstated. A nihilistic reading of Koskenniemi's indeterminacy thesis¹⁹⁰⁷ points towards a complete abandonment of law, but an idealistic reading leads to the misleading conclusion that new legal arguments are open to anyone, perhaps that it permits Third World nations to advance more substantive conceptions of self-determination, rights, and even democracy. However, as mentioned, it is far easier to advance legal arguments in the service of imperialism, which provides international law's dominant argumentative structure and acts as one of its 'central modalities'.¹⁹⁰⁸ International legal disputes tend to take the form of property disputes between formal and abstract equal sovereigns, but this obscures that these sovereigns may occupy very different positions in the imperialist capitalist order, as mentioned in the previous subsection.

As Siba N'Zatioula Grovogui noted, whilst the relative indeterminacy of international law allowed Third World nations to advance normative interpretations of self-determination¹⁹⁰⁹, the Western powers were in a far more favourable position to advance their own interpretation,¹⁹¹⁰ especially in practice. This argument was made in Chapter 4 regarding social rights. Sovereign equality, as mentioned, is a fundamental principle of the international legal

¹⁹⁰⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge University Press 2005), 59-60

¹⁹⁰⁸ Anastasiya Kotova and Ntina Tzouvala, 'In Defence of Comparisons: Russia and the Transmutations of Imperialism in International Law' (2022) 116(4) *American Journal of International Law* 710, 711

¹⁹⁰⁹ Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 194-195

¹⁹¹⁰ Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 193

order, but sovereign equality is an illusion; the ‘power dynamics’ of imperialism, Mievile suggests, are ‘embedded within the very juridical equality of sovereignty’.¹⁹¹¹

Owing to its indeterminacy, international law does not have any ‘essential content’, leaving open the possibility that it can be used either for or against imperialism.¹⁹¹² Self-determination therefore does not have any essential content either. This does not, however, leave it open to anyone to define that content; in Pashukanis’ words, law is not an ‘empty sack’ to be ‘filled with class content’.¹⁹¹³ As international law is a process, not a body of rules, it will not be accepted that the elaboration of self-determination in legal texts or ICJ cases necessarily reveals its content. The focus will thus be on the actualisation of content. The remainder of this chapter will examine this. As explained in the first section, what has been actualised has been the restriction of the economic aspect of self-determination, a counter-revolutionary position that fails to be emancipatory.

6.3 Sovereignty, Self-determination, and Property

6.3.1 The problem of Third-World sovereignty

¹⁹¹¹ China Mievile, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005), 270

¹⁹¹² Robert Knox, ‘The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics, Bill Bowring, Routledge-Cavendish, 2008’ (2010) 18(1) *Historical Materialism* 193, 200

¹⁹¹³ Evgeny Pashukanis, ‘Lenin and Problems of Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 144

As mentioned in Chapter 4, the universalisation of sovereignty became a threat to the imperialist order when the Third World began to organise itself politically, beginning with the Bandung Conference in 1955.¹⁹¹⁴ This culminated in the NIEO. Decolonisation renewed fears about sovereignty being used to override property. In other words, there were fears about sovereignty and economic self-determination interfering with property and its free exchange. In order to be emancipatory, self-determination would have to at least potentially be capable of asserting sovereignty against property as the Bolsheviks had attempted.

The response to this would go beyond the development of investment and trade law; it would involve political wrangling over the meaning of the fundamental principles of sovereignty and non-intervention vis-à-vis property. As mentioned, these principles are at the heart of all international legal arguments; they were central to the indeterminacy thesis, which pitted sovereignty against the needs of the international community, both of which could plausibly justify intervention. They were also central to the standard of civilisation thesis: sovereignty was made conditional upon adapting to certain standards, and intervention could be justified by a failure to adapt. These standards primarily related to the ability to protect property and its exchange, to keep the public and private spheres separate.

This set up an (implicit) argument between the West, who broadly believed that sovereignty should not interfere with property, and the Third World, who at least wanted not only sovereign equality but the addressing of material inequalities between nation-states through

¹⁹¹⁴ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 89

their own economic development. The Third World interpreted self-determination as capable of extending to economic affairs: Third World academics (including Bedjaoui)¹⁹¹⁵ believed that institutional expansion, like that of the UN Conference on Trade and Development (UNCTAD), could assist the Third World in asserting new norms,¹⁹¹⁶ like the doctrine of Permanent Sovereignty over Natural Resources, which was aimed against protection of foreign private property.¹⁹¹⁷ This would indeed have been revolutionary.

On the other hand, the West would assert a conception of self-determination that, as mentioned, confined it to political sovereignty. Whilst the Third World was attempting to politicise and democratise international institutions (namely the General Assembly)¹⁹¹⁸ and build new ones,¹⁹¹⁹ the West used their own institutional expansion to create new methods to protect property from sovereignty, new methods of intervention. Through these institutions, a conception of self-determination in the Western image was effectively actualised. This process began before decolonisation with the Mandate system, but intensified when the NIEO became a going concern. This would give radical new meaning to (Third World) sovereignty and to intervention, conditioning sovereignty in the Third World and

¹⁹¹⁵ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 204

¹⁹¹⁶ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 82

¹⁹¹⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 73

¹⁹¹⁸ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 85

¹⁹¹⁹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 207-208

subordinating it to capital.¹⁹²⁰ It would also offer protection to property in a broad sense, by enforcing the separation of the political/public and the economic/private spheres.

The Soviet Union gave initial impetus to this project. The creation of the ILO shortly after the October Revolution¹⁹²¹ to regulate labour relations seems to have been a direct response to that event¹⁹²² (as mentioned in the previous chapter) as well as the labour militancy it engendered, including in the West.¹⁹²³ Whilst supposedly progressive in nature,¹⁹²⁴ the ILO can also be conceived as part of the policing of sovereignty through the standard of civilisation, as well as legitimating liberal capitalism whilst co-opting some of the radical language used in opposition to capitalist social relations. As mentioned, the ILO advanced a tripartite structure of harmonious labour relations that normalised private relations between employers and workers overseen by a State power.

It continued with the Mandate system. There was a degree of tension between the nation-state as a necessity for capitalism and Third World nationalism. Western nationalism, which

¹⁹²⁰ Siba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 200

¹⁹²¹ Mai Taha, ‘Law, Class Struggle, and Nervous Breakdowns’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 114

¹⁹²² Mai Taha, ‘Law, Class Struggle, and Nervous Breakdowns’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 112-113

¹⁹²³ Mai Taha, ‘Law, Class Struggle, and Nervous Breakdowns’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 113-114

¹⁹²⁴ Mai Taha, ‘Law, Class Struggle, and Nervous Breakdowns’ in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 114

in the words of Hans Kohn, is a 'rational and universal concept of political liberty', tends to be counterposed against Third World nationalism, seen rather¹⁹²⁵ as backwards and primitive, having been 'founded on history'.¹⁹²⁶ Self-determination and statehood would be enjoyed by all nations, having become almost inevitable, hastened by the Soviet Union's anti-imperialism, but that universalisation would have to be managed.

More specifically, Third World nationalism would have to be both suppressed and co-opted in a way that did not disrupt the imperialist order.¹⁹²⁷ This would then allow the West to actualise its own interpretation of self-determination. Antony Anghie accordingly argues that the modern doctrine of self-determination was 'formulated' as a 'response' to colonialism and decolonisation.¹⁹²⁸ It had to deal with the contradiction between promoting (or permitting) self-government in the former colonies whilst maintaining 'colonial relations',¹⁹²⁹ or more specifically, ensuring the implementation and maintenance of capitalism and capitalist legality to continue imperialist exploitation.

6.3.2 *The Mandate system and (Third-World) self-determination*

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¹⁹²⁵ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 179

¹⁹²⁶ Hans Kohn, *The Idea of Nationalism* (Macmillan Company 1946), 574

¹⁹²⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 25

¹⁹²⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 196

¹⁹²⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 192

The British mandate in Iraq offers a useful lens through which to view this process. As explained in Chapter 4, the Mandate system was premised on the idea that most nations were not able to govern themselves, or more specifically, lacked the ability to uphold capitalist legality. Sovereignty should thus be held on trust until Iraq was ready for sovereignty. British rule had proved unpopular, so a 'flexible regime of control' was installed;¹⁹³⁰ Iraq was to be governed by the newly-installed King Faisal I as a 'puppet king', with British advisers to 'temper' his power.¹⁹³¹

After years of struggle,¹⁹³² Britain agreed to support Iraq joining the League as a member, even though it was nowhere near ready for nation-statehood. However, this was subject to a treaty that maintained British control over oil and access to military bases, and Iraq remained heavily dependent upon Britain.¹⁹³³ Iraqi attempts to replace the puppet government with a popular regime in 1941 was thwarted by British military invasion.¹⁹³⁴ As Anghie argues, the 'transference' of sovereignty to Third World nations like Iraq was 'inseparable from' the maintenance of 'subordination'. This involved the creation or establishment of government maintained colonial hierarchy.¹⁹³⁵ In other words, direct rule was replaced by indirect control.

¹⁹³⁰ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 807-808

¹⁹³¹ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 808

¹⁹³² Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 808-809

¹⁹³³ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 809

¹⁹³⁴ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 810-811

¹⁹³⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 179

Usha Natarajan notes that the exact location of sovereign power was 'ambiguous' during this process,¹⁹³⁶ although Western officials consistently argued that it lay with the Iraqis; British High Commissioner (British mandate representative in the Iraqi government)¹⁹³⁷ Henry Dobbs suggested in 1923 that 'an independent Government of Iraq, friendly to and bound by gratitude and obligation to' Britain was a 'common end'¹⁹³⁸ for both nations. In other words, Iraq would be a sovereign nation, but one still 'bound' by the sovereignty of another nation.

The West therefore had a contradictory approach to Third World sovereignty. The modern designations of certain nation-states as either 'failed' or 'rogue' continues to treat Third World sovereignty as 'precarious' and 'dependent upon' outside perceptions, allowing for the prohibition of interference with domestic jurisdiction found in Article 2(7) of the UN Charter¹⁹³⁹ to be set aside.¹⁹⁴⁰ This 'binary'¹⁹⁴¹ view of Third World sovereignty allows those nations to be blamed for any shortcomings; failed states are seen as immature, and rogue states deviant, abstracting from the conditions under which their sovereignty was created.

¹⁹³⁶ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 811-812

¹⁹³⁷ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 808

¹⁹³⁸ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 809

¹⁹³⁹ United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI, Article 2(7)

¹⁹⁴⁰ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 816

¹⁹⁴¹ Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799, 821

Their supposed deviance or immaturity is always framed in terms of conformity to ‘Western standards’.¹⁹⁴²

South Africa’s Mandate in South West Africa (now Namibia), the Mandate to receive the most extensive judicial attention, offers an example not only of the controlling of Third World sovereignty but the actualisation of the Western conception of self-determination. (Apartheid) South Africa seized Namibia during the First World War¹⁹⁴³ and hoped to annex it.¹⁹⁴⁴ South Africa governed Namibia much as it governed its own territory; in other words, by maintaining a sharp distinction between white Europeans and the native Namibians.

South Africa showed no signs of relinquishing Namibia and was uncooperative with the League of Nations and later the UN regarding supervision of the Mandate, leading to a series of ICJ cases between 1950 and 1971. South Africa attempted to deny the continued existence of and obligations flowing from the mandate after the League’s dissolution, which was challenged by Ethiopia and Liberia. Among other things, the applicants argued that South Africa had broken the ‘sacred trust of civilisation’ and failed to promote the ‘well-being and social progress’ of the peoples of South West Africa.¹⁹⁴⁵

¹⁹⁴² Usha Natarajan, ‘Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty’ (2011) 24 *Leiden Journal of International Law* 799, 816-817

¹⁹⁴³ Gay McDougall, ‘International Law, Human Rights, and Namibian Independence’ (1986) 8(3) *Human Rights Quarterly* 443, 444

¹⁹⁴⁴ Gay McDougall, ‘International Law, Human Rights, and Namibian Independence’ (1986) 8(3) *Human Rights Quarterly* 443, 446

¹⁹⁴⁵ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 104

Namibia was a 'C' mandate,¹⁹⁴⁶ and so subject to rule as part of South Africa's territory (this distinction was explained in Chapter 4). Under Article 22 of the League's Charter, South Africa had obligations with regard to the 'well-being and development' of the peoples of Namibia, and Article 2 of the Mandate added that it must promote 'the material and moral well-being and social progress' of those peoples.¹⁹⁴⁷ Article 76 of the UN Charter, which established the 'trusteeship' system that replaced the mandates, refers to obligations to promote 'political, economic, social, and educational advancement' and 'progressive development towards self-government or independence',¹⁹⁴⁸ to 'encourage respect for human rights'.¹⁹⁴⁹ This almost seemed to suggest that mandatories were obliged to establish self-determination and protect the human rights, including social rights, of the peoples of the mandated territory. The *South West Africa* dispute is perhaps the closest analogy to an attempt to impose social rights obligations upon another nation-state.

This potentially promising legal avenue came nowhere near fulfilling its potential. The 1959 case concerned voting procedure, and the 1962 case¹⁹⁵⁰ confirmed the right of the applicants to challenge the terms of the Mandate as (former) League members. Only the 1966 case concerned a substantive challenge to South Africa's fulfilment of its Namibia Mandate,¹⁹⁵¹

¹⁹⁴⁶ *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Judgement) [1966] ICJ Report 1966 3, 20

¹⁹⁴⁷ Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press 2009), 758

¹⁹⁴⁸ United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI, Article 76(b)

¹⁹⁴⁹ United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI, Article 76(c)

¹⁹⁵⁰ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, (Preliminary Objections) [1962] ICJ Reports 1962 319

¹⁹⁵¹ *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Judgement) [1966] ICJ Report 1966 3, 12

which ended up being a moot point as the ICJ controversially decided that the applicants right to challenge the Mandate did not extend to a substantive challenge.¹⁹⁵² The interesting arguments made in this case will be returned to in the thesis' epilogue.

When the UN Security Council, which is the 'dominant' executive body in the UN system,¹⁹⁵³ and is itself dominated by the presiding role of the 5 permanent members (US, Britain, France, China, and Russia),¹⁹⁵⁴ eventually condemned South Africa's 'continued presence' in Namibia,¹⁹⁵⁵ the ICJ issued a further advisory opinion. In the 1971 opinion, the ICJ took account of international legal developments and decided to adopt an 'evolutionary' approach to interpret the Mandate.¹⁹⁵⁶ Now deciding to consider other sources of international law (the UN Charter and General Assembly resolutions), the ICJ's new approach resulted in finding that self-determination (and independence) should be regarded as the goal of the Mandate system.¹⁹⁵⁷ The ICJ found South Africa to be accountable for any rights violations in Namibia,¹⁹⁵⁸ and that the UN Charter obliged South Africa to respect rights without

¹⁹⁵² *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa (Judgement))* [1966] ICJ Report 1966 3, 29

¹⁹⁵³ Gary Wilson, *The United Nations and collective security* (Routledge 2014), 26

¹⁹⁵⁴ Gary Wilson, *The United Nations and collective security* (Routledge 2014), 27

¹⁹⁵⁵ UNSC Res 264 (20 March 1969) UN Doc S/RES/264

¹⁹⁵⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Reports 1971 16, 31

¹⁹⁵⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Reports 1971 16, 31-32

¹⁹⁵⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Reports 1971 16, 54

discrimination in accordance with Article 76(c) (mentioned earlier).¹⁹⁵⁹ This confirmed that human rights were also now part of the mandate (as contended in 1966).¹⁹⁶⁰

Tzouvala disputes that the 1971 opinion was a 'rectification' of the earlier-discussed judgement.¹⁹⁶¹ This had less to do with the judgement itself than with its actualisation. The General Assembly had attempted to take control of the actualisation of the ICJ's decision, both in supervising South African compliance and administering Namibia through a Council for Namibia.¹⁹⁶² An attempt was made to prevent 'foreign exploitation' of Namibian resources, an attempt to assert Namibian sovereignty against foreign (i.e., Western) private property ownership.¹⁹⁶³

However, the eventual independence of Namibia (in 1990) was carried out under close supervision of the Western Powers.¹⁹⁶⁴ Questioning the legal basis for the General Assembly's actions,¹⁹⁶⁵ the Western Powers established a separate contact group that was 'antagonistic'

¹⁹⁵⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Reports 1971 16, 57

¹⁹⁶⁰ *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Judgement) [1966] ICJ Report 1966 3, 9

¹⁹⁶¹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 160

¹⁹⁶² Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 193

¹⁹⁶³ Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 194

¹⁹⁶⁴ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 162

¹⁹⁶⁵ Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 194

to UN bodies¹⁹⁶⁶ and accused of ‘usurping’ the role of the UN¹⁹⁶⁷ to instead collaborate with South Africa on Namibian independence. This ensured that South African (and Western) interests were not overridden,¹⁹⁶⁸ in contravention of earlier Security Council resolutions,¹⁹⁶⁹ and that the rights of private property would receive legal protection in Namibia.¹⁹⁷⁰

Private property was included within the Namibian constitution as a ‘Fundamental’ human right;¹⁹⁷¹ unsurprisingly, all of the other such rights,¹⁹⁷² bar a right to education,¹⁹⁷³ are civil rights. Article 98 (exempt from judicial review)¹⁹⁷⁴ enshrines a ‘mixed’ economy (i.e., distinct public and private spheres) as a constitutional principle.¹⁹⁷⁵ Article 100 establishes Namibia sovereignty over natural resources if ‘not otherwise lawfully owned’,¹⁹⁷⁶ thus effectively ‘locking-in’ the existing distribution of private property in a capitalist economy.¹⁹⁷⁷

¹⁹⁶⁶ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 162

¹⁹⁶⁷ Gay McDougall, ‘International Law, Human Rights, and Namibian Independence’ (1986) 8(3) Human Rights Quarterly 443, 453

¹⁹⁶⁸ Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996), 195

¹⁹⁶⁹ Gay McDougall, ‘International Law, Human Rights, and Namibian Independence’ (1986) 8(3) Human Rights Quarterly 443, 451

¹⁹⁷⁰ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 162-163

¹⁹⁷¹ Namibian Constitution [Namibia] 21 March 1990, Article 16

¹⁹⁷² Namibian Constitution [Namibia] 21 March 1990, Articles 5-25

¹⁹⁷³ Namibian Constitution [Namibia] 21 March 1990, Article 20

¹⁹⁷⁴ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 163

¹⁹⁷⁵ Namibian Constitution [Namibia] 21 March 1990, Article 98

¹⁹⁷⁶ Namibian Constitution [Namibia] 21 March 1990, Article 100

¹⁹⁷⁷ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 163

Whilst Gay McDougall called these actions ‘breaches’ of the Namibian right to self-determination,¹⁹⁷⁸ it is perhaps better to call it a reconception of it. MacDougall identified numerous human rights violations in Namibia during South Africa’s continued occupation, including extrajudicial killings by the security forces¹⁹⁷⁹ and military,¹⁹⁸⁰ but did not relate such activities to the regime of racial capitalism instituted in the territory. This mirrors Amnesty International’s approach to rights, which tends to focus upon acts of physical violence but refuses to engage in the political and economic context.

Tzouvala frames this not so much as victories for human rights and self-determination but as the standard of civilisation surviving explicit invocation¹⁹⁸¹ through the ‘vehicle’ of human rights and self-determination. In other words, it helped to normalise self-determination as something that did not have an economic dimension that might interfere with property, and fundamental rights as referring only to civil (and property) rights. In this way, they also became a ‘juridical mechanism’ of capitalism,¹⁹⁸² a ‘delimiting’ of sovereignty and self-determination¹⁹⁸³ and of human rights. Sovereignty could be measured by compliance with these interpretations, again becoming a ‘double-edged’ sword. The Western nations were able to actualise their interpretation of self-determination (and of human rights).

¹⁹⁷⁸ Gay McDougall, ‘International Law, Human Rights, and Namibian Independence’ (1986) 8(3) Human Rights Quarterly 443, 453

¹⁹⁷⁹ Gay McDougall, ‘International Law, Human Rights, and Namibian Independence’ (1986) 8(3) Human Rights Quarterly 443, 464

¹⁹⁸⁰ Gay McDougall, ‘International Law, Human Rights, and Namibian Independence’ (1986) 8(3) Human Rights Quarterly 443, 466

¹⁹⁸¹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 161

¹⁹⁸² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 164

¹⁹⁸³ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 163

6.3.3 The NIEO and the universalisation of (Western) self-determination

Namibia was part of the creation of a model for Third-World self-determination, but different methods would be needed to produce and reproduce this confinement/actualisation of economic sovereignty and self-determination beyond the Mandate system and colonialism. The UN replaced the League of Nations after the Second World War. Post-war embedded liberalism was underpinned economically by the Bretton Woods system, established by the Allied countries in 1944.¹⁹⁸⁴ The Bretton Woods system was defined by World Bank, founded to provide finance for infrastructure investments, and the International Monetary Fund, founded to ensure global economic stability¹⁹⁸⁵ and 'liquidity'¹⁹⁸⁶. The US had a 'stranglehold' on this international economic system.¹⁹⁸⁷ The system was bolstered by the General Agreement on Tariffs and Trade (GATT) in 1947.¹⁹⁸⁸

This institutional expansion coexisted for some time with the emergence of Third World (political) sovereignty. However, decolonisation,¹⁹⁸⁹ mass democracy,¹⁹⁹⁰ and embedded

¹⁹⁸⁴ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 249

¹⁹⁸⁵ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 162

¹⁹⁸⁶ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 250

¹⁹⁸⁷ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 251

¹⁹⁸⁸ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 249

¹⁹⁸⁹ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 18

¹⁹⁹⁰ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 14

liberalism¹⁹⁹¹ would later collide with the neoliberal project of ‘double government’, based upon the need to protect private property from sovereignty. Long a neoliberal preoccupation,¹⁹⁹² double-government would return strongly as the Third World started to advance the NIEO.¹⁹⁹³ Double-government was based upon the Roman legal separation of imperium, of sovereignty, from dominium, or property.¹⁹⁹⁴ Double government aimed to separate national political governance from economic affairs, to separate the private/economic from the public/political. The ‘core’ of neoliberal theory was the creation of global institutions of capitalist legality that could ‘encase’ and protect private market exchange.¹⁹⁹⁵ Neoliberals like Hayek and Wilhelm Röpke claimed to be acting against the politicisation of economic affairs,¹⁹⁹⁶ including by the ‘masses’ through democracy,¹⁹⁹⁷ seemingly an update on the ‘tyranny of the majority’ feared by classical liberals. Hayek’s solution was the creation of an international order,¹⁹⁹⁸ that divided power between international authority and nation-states.¹⁹⁹⁹ In reality, the aim was to impose capitalist legality, protecting property and market exchange from nation-state sovereignty.

¹⁹⁹¹ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 184-185

¹⁹⁹² F.A. Hayek, *The Road to Serfdom* (George Routledge and Sons 1944), 64-65

¹⁹⁹³ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 18-19

¹⁹⁹⁴ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 10

¹⁹⁹⁵ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 2

¹⁹⁹⁶ Wilhelm Röpke, *International Economic Disintegration* (William Hodge and Company 1942), 96; F.A. Hayek, *The Road to Serfdom* (University of Chicago Press 1944), 228

¹⁹⁹⁷ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 251

¹⁹⁹⁸ F.A. Hayek, *The Road to Serfdom* (University of Chicago Press 1944), 228, 233

¹⁹⁹⁹ F.A. Hayek, *The Road to Serfdom* (University of Chicago Press 1944), 234

The neoliberal dream coincided with the hegemonic US forcing neoliberal economics on the rest of the world, especially in response to the G-77 and the NIEO. This project was also animated by the need to restore the levels of profitability enjoyed during the post-war period and restore capitalist class power, especially the financial element of that class that had been dominant before the wars.²⁰⁰⁰ In order to maintain its hegemonic position in the world economy, the US created a 'powerful' financial regime that allowed the US to project 'vast financial power' across the world (rather than its 'unchallengeable' military power).²⁰⁰¹ This order²⁰⁰² had Wall Street, the US Treasury, and the IMF and World Bank at its core.²⁰⁰³

This new system of international governance built around the US and Bretton Woods institutions is a profoundly unequal system, assisting economic growth in the Global North whilst ensuring that inequalities between the North and South remain unaddressed.²⁰⁰⁴ The Third World has about 1/8 of the voting power of the West²⁰⁰⁵ as the weighted voting systems of the IMF and World Bank give the US especially disproportionate influence.²⁰⁰⁶ This is in stark contrast to the one-member, one-vote system in the UN General Assembly, and the regional diversity of UN leadership; rather, this was the point. However, it is not that this system mechanistically serves Western interests but instead that it reproduces the logic of

²⁰⁰⁰ V.I. Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 32

²⁰⁰¹ David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 72

²⁰⁰² David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 77

²⁰⁰³ David Harvey, 'The 'New' Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63, 72

²⁰⁰⁴ Christian Dörninger et al, 'Global patterns of ecologically unequal exchange: Implications for sustainability in the 21st century' (2021) 179 *Ecological Economics* 1, 10

²⁰⁰⁵ Jason Hickel, 'It is time to decolonise the World Bank and the IMF' (*Al Jazeera*, 26 November 2020) <<https://www.aljazeera.com/opinions/2020/11/26/it-is-time-to-decolonise-the-world-bank-and-the-imf/>> accessed 28 November 2020

²⁰⁰⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 259

capitalism, just as the law does not necessarily serve the capitalist class but reinforces its class rule by upholding property.

The 'Volcker Shock', explained in Chapter 1, was instrumental in this project, causing unemployment as intended (up to 11%) and engineering a deep recession in the US.²⁰⁰⁷ It was even more damaging at the international level, setting off a global debt crisis, especially in the developing world. The rising of US interest rates made the US dollar, the reserve currency of the global economy, more attractive to global investors and attracted capital into the US (and away from the Third World), whilst also inflating the value of debt held by Third World countries.²⁰⁰⁸ These crises, especially after capital flows were liberalised in the 1970s, were often followed by currency crises, caused by investors responding to economic turmoil by betting against a country's currency.²⁰⁰⁹ This ability for capital flows to discipline governments coincided with neoliberal theory.²⁰¹⁰ The Volcker Shock, Quinn Slobodian argues, served as the 'death blow' to the NIEO movement.²⁰¹¹

The 1970s-80s debt crisis allowed the IMF to expand and evolve, shifting much of its lending activities to the Third World, taking on the function of encouraging development (which will

²⁰⁰⁷ Robert Brenner, *The Economics of Global Turbulence: The Advanced Capitalist Economies from long Boom to long Downturn, 1945-2005* (Verso 2006), 202

²⁰⁰⁸ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 159

²⁰⁰⁹ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 160

²⁰¹⁰ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 241-242

²⁰¹¹ Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism* (Harvard University Press 2018), 222

be returned to) through economic growth.²⁰¹² The IMF is able to exercise considerable coercion upon nation-states through its 'main policy tool' of conditionality; loans are made conditional upon the adoption of reforms.²⁰¹³ These conditions have arguably become more important to the IMF's operations than the loans themselves.²⁰¹⁴

The use of institutions like the IMF (and World Bank) would offer a seemingly non-violent and apolitical method for policing the sovereignty of the Third World. Whilst the Bank and IMF had always provided policy 'recommendations', in the 1980s, as the debt crisis ramped up, these recommendations turned into 'demands'.²⁰¹⁵ Countries seeking loans from the IMF and World Bank would now only receive relief on the condition that they implement punishing 'structural adjustment programmes'.²⁰¹⁶ Debt was thus used, as mentioned, as a pretence for intervention. The majority of the reforms were in reality linked to establishing or maintaining the conditions for capitalism and free trade,²⁰¹⁷ usually based around the privatisation, deregulation, and austerity.²⁰¹⁸ These reforms entrenched the centrality of private property and reduced the ability of the State to interfere with property.

²⁰¹² Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 130

²⁰¹³ Brian F. Crisp and Michael J. Kelly, 'The Socioeconomic impacts of Structural Adjustment' (1999) 43(3) *International Studies Quarterly* 533, 534

²⁰¹⁴ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 132

²⁰¹⁵ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 163

²⁰¹⁶ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 163-164

²⁰¹⁷ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 164-165

²⁰¹⁸ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 77

In some cases, this institutional expansion coincided with positive legal changes. The European Unions' doctrine of direct effect²⁰¹⁹ created a supranational legal order that overrides national law²⁰²⁰ allowing members political independence whilst permitting a court to disapply national measures. The creation of the WTO replaced the largely diplomatic GATT system²⁰²¹ with an 'almost entirely judicialised system'²⁰²² as it expanded from 23 members to over 100²⁰²³ in the 1970s. The WTO also extended trade rules to services, which, as Claire Cutler notes, legally entrenched the commodification of services like telecommunications, transport, and energy, all typical targets of neoliberal privatisation.²⁰²⁴ In other words, it legally entrenched these things as private property.

However, it mostly took place through (institutional) political and economic developments that (seemed to) take place outside of the law. Through these developments, the West was able to actualise its legal position on self-determination and sovereignty vis-à-vis property. Self-determination was shaped to not allow nations the opportunity to exercise economic sovereignty, or, alternatively, the economic 'development' of the economic aspect of self-determination was to be a specifically Western conception of development. Putting forward their own conception of development allowed the West to both confine Third World sovereignty and to legitimise its own political and economic systems. The methods used, as well as their implications for rights, will be the subject of the thesis' final subsection.

²⁰¹⁹ Case 26-62 *van Gend en Loos v Netherlands Inland Revenue Administration* (1963) ECR 00003

²⁰²⁰ Case 6-64 *Costa v ENEL* (1964) ECR 61964CJ0006, 593

²⁰²¹ Andrew TF Lang, 'World Trade Law After Neo-Liberalism' (2014) 23(3) *Social & Legal Studies* 408, 415-416

²⁰²² Andrew TF Lang, 'World Trade Law After Neo-Liberalism' (2014) 23(3) *Social & Legal Studies* 408, 417

²⁰²³ Andrew TF Lang, 'World Trade Law After Neo-Liberalism' (2014) 23(3) *Social & Legal Studies* 408, 416

²⁰²⁴ A Claire Cutler, 'Toward a radical political economy critique of transnational economic law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008), 212

6.3.4 Self-determination and the developmentalisation of rights

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As mentioned in Chapter 4, a paternalistic trend towards welfarism emerged in the early 20th century. This has been linked²⁰²⁵ to a 'scientific planning' and 'management' of social problems, that emerged in the West in the 19th century²⁰²⁶ which, as suggested in Chapter 5, often leads to obsession with measurable standards. Again, this trend tends to portray social problems as failures of policy and more importantly, for the Third World, as failure to mimic Western policies. When colonialism became discredited as the 'mechanism' governing the relations between the West and Third World, it was replaced by 'development'.²⁰²⁷

The West and Third World were united on the need for development, although they had different positions on causes and solutions of Third-World 'underdevelopment'.²⁰²⁸ Development typically refers to improvements to productive capacities;²⁰²⁹ the Third World, through the NIEO,²⁰³⁰ sought to use such improvements to 'catch up'²⁰³¹ to the West.²⁰³² Underdevelopment, however, does not refer solely to the 'absence of development'²⁰³³ in

²⁰²⁵ Arturo Escobar, 'Planning' in Wolfgang Sachs (ed), *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books 2009), 149

²⁰²⁶ Arturo Escobar, 'Planning' in Wolfgang Sachs (ed), *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books 2009), 146

²⁰²⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 25

²⁰²⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 207

²⁰²⁹ Ha-Joon Chang, *Economics: The User's Guide* (Penguin Books 2014), 134

²⁰³⁰ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 25

²⁰³¹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979), 25

²⁰³² Ha-Joon Chang, *Economics: The User's Guide* (Penguin Books 2014), 134

²⁰³³ Walter Rodney, *How Europe underdeveloped Africa* (first published 1972, Black Classic Press 2011), 13

comparison with developed nations, but also to the exploitation of 'developing' nations.²⁰³⁴ Many Third World nations wanted to pursue development through 'inward-oriented industrial strategy' rather than relying on exporting natural resources to the West.²⁰³⁵ It was important, therefore, for the West to assert its own vision, as its own capitalist development had been intimately linked to the Third World's underdevelopment.²⁰³⁶

International institutions would be used to actualise this Western vision, which meant development through capitalism. The Mandate system provided the 'institutional link' between colonialism and development,²⁰³⁷ where welfarism was accompanied by the 'institutionalisation' of development as a 'technocratic programme' of law and administration.²⁰³⁸ It was the first instance of a 'central institution' being established for the purposes of measuring and evaluating the social conditions of (Third World) nation-states.²⁰³⁹ Rajagopal refers to this as the 'internationalisation of the social',²⁰⁴⁰ the process by which Third World social conditions became matters of international concern.²⁰⁴¹ This would allow for a technocratic 'science' of development to be created,²⁰⁴² leading to a fetishisation of

²⁰³⁴ Walter Rodney, *How Europe underdeveloped Africa* (first published 1972, Black Classic Press 2011), 14

²⁰³⁵ Naomi Klein, *The Shock Doctrine* (Penguin 2007), 55

²⁰³⁶ V.I. Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (first published 1917, Progress Publishers 1963), 76, 93

²⁰³⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 51

²⁰³⁸ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 53

²⁰³⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 264

²⁰⁴⁰ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 108

²⁰⁴¹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 108-109

²⁰⁴² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 264

measurable standards but most importantly, legitimising Western ‘standards’ and practices as aspirations for the Third World,²⁰⁴³ closing off alternatives. This practice was continued by institutions like the WTO, IMF and World Bank,²⁰⁴⁴ who, Anghie argues, have succeeded the Mandate system in policing the sovereignty of Third World (and even Western) nations, representing a ‘universalisation’ of this mechanism.²⁰⁴⁵

The universalisation of this paternalistic measuring of social conditions opened up new avenues for intervention in domestic affairs. In the 1970s, as the World Bank’s role shifted from post-war reconstruction to development, it suddenly became interested in issues of poverty and justice.²⁰⁴⁶ Along similar lines, the role of the IMF also shifted in the 1970s, having until that point been mostly concerned with balance-of-payment issues in the West. The IMF, unlike most development institutions, concerns itself with Western and Third World nations alike.²⁰⁴⁷ The IMF also expanded its activities into ‘political and non-economic’ concerns like poverty alleviation.²⁰⁴⁸ The purpose of these developments was not genuine concern for Third

²⁰⁴³ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 53

²⁰⁴⁴ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 53

²⁰⁴⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 191-192

²⁰⁴⁶ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 100

²⁰⁴⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 127

²⁰⁴⁸ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 128-129

World social conditions but to expand the scope²⁰⁴⁹ and legitimacy of development institutions, using poverty/social conditions as a 'incidental point of entry'.²⁰⁵⁰

This, for Rajagopal, represented a revival of the colonial 'dual mandate', which had to reconcile welfarism with the continuation of exploitation.²⁰⁵¹ Activities like 'poverty alleviation' developed as a method to police the sovereignty of the Third World and legitimise capitalist development without violating the normative principle of non-intervention. This was confirmed by US President Dwight Eisenhower in 1959 who suggested that such activities could hardly be framed as 'interventions'.²⁰⁵² Using development in place of explicit invocations of civilisation allowed for the conditioning of Third World sovereignty to continue beyond the Mandate system. It also helped to maintain legitimacy for Western hegemony, shifting the 'economic violence' of imperialism from the 'inter-state' to 'intra-state',²⁰⁵³ obscuring political motivations. Development discourse rarely questioned whether capitalism may be causing poverty,²⁰⁵⁴ instead framing such social issues as stemming from domestic failings.²⁰⁵⁵ Although supposedly the World Bank has strict obligations to base decision-

²⁰⁴⁹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 111-112

²⁰⁵⁰ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 112

²⁰⁵¹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 100

²⁰⁵² Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 106

²⁰⁵³ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 34

²⁰⁵⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 268

²⁰⁵⁵ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 107

making solely on economic considerations and to avoid political affairs,²⁰⁵⁶ the embracing of poverty allows the Bank to expand its scope without breaching its obligations.²⁰⁵⁷

Development institutions also police economic sovereignty through 'good governance' interventions. Good governance, like development itself, is a theoretically indeterminate term that has many possible meanings.²⁰⁵⁸ Good governance has been prevalent in development discourse since the World Bank's 1997 World Development Report.²⁰⁵⁹ Despite appearing impartial,²⁰⁶⁰ it is often interpreted as referring to specific conceptions of governance, human rights, and the rule of law. It tends to reproduce the logic of the capitalist State and reinforce its separation from the private sphere (of capital),²⁰⁶¹ and from markets.²⁰⁶²

This 'good governance' discourse revolves around the establishment, maintenance, and evaluation of liberal political and social arrangements.²⁰⁶³ The 1997 report referred to a 'crisis of statehood' in terms of 'capability' and legitimacy, especially in Africa, and prescribed

²⁰⁵⁶ Roberto Dañino, 'The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts' in Philip Alston and Mary Robinson (eds), *Human Rights and Development* (Oxford University Press 2005), 512-513

²⁰⁵⁷ Roberto Dañino, 'The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts' in Philip Alston and Mary Robinson (eds), *Human Rights and Development* (Oxford University Press 2005), 515-517

²⁰⁵⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 247

²⁰⁵⁹ Martti Koskeniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 570

²⁰⁶⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 248

²⁰⁶¹ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 *Buffalo Human Rights Law Review* 107, 108-109

²⁰⁶² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 249

²⁰⁶³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 253

reforms around the balancing of State delivery of public services ‘and’ facilitation of private activity, the strengthening the rule of law, and the reinforcement of the executive branch of government and legislative oversight of that branch.²⁰⁶⁴ Good governance therefore is unsurprisingly suggestive of capitalist legality, including protection of (mostly) civil rights,²⁰⁶⁵ and (liberal) democratic governance.

Good governance deploys a logic of ‘improvement’²⁰⁶⁶ against Third World nations, whose underdevelopment is blamed on issues of governance, for the purpose of ‘reproducing’ ‘perfected’ Western economic, political, and legal forms, without which the Third World will never catch up to the West.²⁰⁶⁷ Rather than reviving the distinction between civilised and uncivilised nations, it creates new distinctions between developed and ‘undeveloped’/developing nations,²⁰⁶⁸ in which the logic of improvement presents (capitalist) development as an imperative.

²⁰⁶⁴ World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press 1997), 162

²⁰⁶⁵ James Thuo Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 *Buffalo Human Rights Law Review* 107, 122

²⁰⁶⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 249-250

²⁰⁶⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 249

²⁰⁶⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 267

Although supposedly the World Bank and IMF²⁰⁶⁹ are prevented from ‘mandating’ a form of government or ‘political ideology’,²⁰⁷⁰ good governance interventions allow them to encourage the adoption of capitalist legality (and liberal democracy), obscuring the political nature of that intervention.²⁰⁷¹ As the 1997 World Development Report suggests, the private sector’s functioning ‘will depend crucially’ upon the rule of law and property rights.²⁰⁷² The IMF, interpreting good governance ‘in accordance with’ its mandate (stability and development of the global economy)²⁰⁷³, uses good governance to encourage ‘reforms’ to public sector institutions and to the creation of a ‘stable...regulatory environment’ for ‘efficient’ private sector activities.²⁰⁷⁴ Establishing capitalist legality is a ‘controversial, political’ process,²⁰⁷⁵ but good governance obscures this.

Rajagopal argues that the confinement of economic sovereignty through development has led to (capitalist) development overtaking rights, a ‘developmentalisation’ of human rights.²⁰⁷⁶ This, he argued, was a two-way process, being also the consequence of rights becoming the

²⁰⁶⁹ James Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107, 156

²⁰⁷⁰ Roberto Dañino, ‘The Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development* (Oxford University Press 2005), 518

²⁰⁷¹ James Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107, 156

²⁰⁷² World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press 1997), 32

²⁰⁷³ International Monetary Fund, ‘Articles of Agreement of the International Monetary Fund’ (*International Monetary Fund*) < <https://www.imf.org/external/pubs/ft/aa/index.htm> > accessed 24 June 2024

²⁰⁷⁴ International Monetary Fund, ‘Good Governance: The IMF’s Role’ (*International Monetary Fund*, August 1997) < <https://www.imf.org/external/pubs/ft/exrp/govern/govern.pdf> > accessed 10 July 2024

²⁰⁷⁵ James Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107, 161

²⁰⁷⁶ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 216

dominant form of Third-World resistance after the NIEO's failure,²⁰⁷⁷ as Chapter 5 mentioned. The Third World attempted to use development for their own purposes with the Declaration on the Right to Development in 1986,²⁰⁷⁸ but it has been largely disregarded by the dominant development institutions.²⁰⁷⁹

The developmentalisation of rights has allowed development discourse to both define rights in accordance with development policy²⁰⁸⁰ and adopt rights language to justify policy.²⁰⁸¹ For example, the World Bank argues that development is instrumental in 'creating the conditions' for human rights (and that economic growth is the only way to reduce poverty).²⁰⁸² The Bank also institutionalised a 'weak' version of 'basic-needs' approach to rights supposedly based upon 'redistribution with growth',²⁰⁸³ despite the basic-needs approach having emerged as a critique of development discourse, as mentioned in Chapter 1. This is especially pertinent where social rights are concerned, as capitalist development is essentially presented as a capital-friendly alternative to social rights (or at least direct provision). This reads as an

²⁰⁷⁷ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 216-217

²⁰⁷⁸ Scott Leckie and Anne Gallagher (eds), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (University of Pennsylvania Press 2006), 272

²⁰⁷⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 257

²⁰⁸⁰ Martti Koskeniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 570

²⁰⁸¹ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 *Buffalo Human Rights Law Review* 107, 107-108

²⁰⁸² Anthony Gaeta and Marina Vasilara, 'Development and human rights: the role of the World Bank' (*World Bank*, 30 September 1998) < <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/820031468767358922/development-and-human-rights-the-role-of-the-world-bank> > accessed 26 June 2024

²⁰⁸³ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 *Buffalo Human Rights Law Review* 107, 132

endorsement of an indirect approach to social rights, and of the Bank's policies as the best way to enjoy those rights.

That development is envisaged as an alternative to rights provision is evident in the work of Sen, which has been influential in mainstream development discourse.²⁰⁸⁴ Sen portrayed development as a 'friendly' process,²⁰⁸⁵ and the realisation of human subsistence and reproduction as perfectly capable of being ensured through 'opportunities' to use economic resources through consumption, exchange, and production²⁰⁸⁶ (i.e., through participation in a capitalist economy), with a social safety net to prevent 'abject misery'.²⁰⁸⁷ Sen believed that the best way to enjoy these opportunities was to expand the capabilities²⁰⁸⁸ of individuals to enjoy them as freedoms, rather than as rights.²⁰⁸⁹ This reads as an endorsement of indirect provision backstopped by 'basic-needs' provision.

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The developmentalisation of rights tended to lead to more technocratic practices, like a 'fetishisation' of human rights institutions²⁰⁹⁰ and the use of national rights 'plans', which tend to 'reproduce existing practices' of development in the language of human rights.²⁰⁹¹ The

²⁰⁸⁴ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 152

²⁰⁸⁵ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 35-36

²⁰⁸⁶ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 38-39

²⁰⁸⁷ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 40

²⁰⁸⁸ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 87-88

²⁰⁸⁹ Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 231

²⁰⁹⁰ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 225

²⁰⁹¹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 228

developmentalisation of rights turns development (a political and economic project), into a legal project, attempting to present it as an apolitical and non-ideological process,²⁰⁹² based upon the implicit idea that capitalist legality has a 'built-in logic' and does not involve 'political choices'.²⁰⁹³ Using rights²⁰⁹⁴ also allows development institutions to expand and legitimate their interventions with 'moral credibility'.²⁰⁹⁵

It also tended to present previous failings to ensure rights as failings to establish adequate institutions, collect sufficient information, or implement suitable legal reforms,²⁰⁹⁶ reproducing the language of good governance to keep the blame away from capitalism. James Gathii argued that the good governance agenda was an important tool for the World Bank in directing attention away from its 'socially disastrous' economic programmes, and in 'defusing and appropriating human rights opposition' to policy prescriptions.²⁰⁹⁷ Development activities are often 'inimical' to rights, especially social rights.²⁰⁹⁸ These institutions can then argue that the failure of their development programmes is due to inadequate governance,²⁰⁹⁹ shifting

²⁰⁹² Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 228-229

²⁰⁹³ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 160

²⁰⁹⁴ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 142

²⁰⁹⁵ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 145-146

²⁰⁹⁶ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 227

²⁰⁹⁷ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 155

²⁰⁹⁸ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 162

²⁰⁹⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 261

the blame to the nations themselves,²¹⁰⁰ and making the case for further reforms.²¹⁰¹ Importantly, this also shifts attention away from the powerful Western nations behind them.

This developmentalisation affects rights provision. In making the case for capitalist legality, development discourse limits the space for government intervention in the economy,²¹⁰² constraining direct social provision. According to Anghie, 'good governance' can act as a 'bridging concept' between development and rights²¹⁰³ in the sense that mandated changes to the 'economic, political, and financial' arrangements of nations shapes their provision of rights.²¹⁰⁴ As explained in Chapter 1, institutions like the Bank and IMF control economic policy, especially in the Third World, by imposing structural adjustment programmes as conditions for financial aid, which significantly affect rights provision. They generally lead to a worsening of social conditions, unemployment, food inflation, and disruption to healthcare systems,²¹⁰⁵ often worsening the problems they were supposed to resolve,²¹⁰⁶ and divert resources towards debt servicing that could otherwise be used for social rights provision.²¹⁰⁷

²¹⁰⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 262

²¹⁰¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 268

²¹⁰² James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107, 109

²¹⁰³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 257

²¹⁰⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 258

²¹⁰⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 259

²¹⁰⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 259-260

²¹⁰⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 260

Privatisation tends to lead to an expansion of commodification and rent extraction,²¹⁰⁸ strengthening the power and scope of private property vis-à-vis the State,²¹⁰⁹ reducing capacity for direct rights provision. Deregulation also strengthens the private sphere, allowing the financial sector to carry out its extractive practices in sectors related to social rights like healthcare and social security.²¹¹⁰ Austerity is especially a disaster for social conditions. Austerity and the broader 'framework' of monetarism²¹¹¹ places national policy under significant pressure to adapt to the constraints imposed by money and markets²¹¹² at the expense of the social needs of citizens, as described in Chapter 3.

Economic sovereignty and self-determination were confined by the forces of imperialism through development discourse and the international institutions involved with development. Self-determination ultimately reformed, rather than revolutionised international law during decolonisation. Whilst Lenin did see self-determination as intimately connected to the end of colonialism,²¹¹³ and the international order was clearly reformed to include Third World nation-states, the actualisation of self-determination placed severe limits upon its radical potential. As development overtook and incorporated human rights, the possibility of using economic sovereignty to fight against capitalist imperatives and the centrality of private

²¹⁰⁸ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 160

²¹⁰⁹ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 160-161

²¹¹⁰ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007), 161-162

²¹¹¹ Simon Clarke, *Keynesianism, Monetarism, and the Crisis of the State* (Edward Elgar Publishing 1988), 349

²¹¹² Jack Copley and Alexis Moraitis, 'Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation' (2021) 26(3) *New Political Economy* 490, 498

²¹¹³ V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22, December 1915-July 1916* (first published 1964, Progress Publishers 1974), 337

property and provide for the subsistence and reproduction of the citizenry was significantly reduced. Although this process was forced upon the Third World, these pressures constrain all nations, with the possible exception of the United States as the global hegemon.²¹¹⁴ Several European nations,²¹¹⁵ including Britain,²¹¹⁶ implemented austerity after the 2008 financial crash, with disastrous results.²¹¹⁷

Self-determination as consisting mostly of (at best) political sovereignty and capitalist economic development is the position that was actualised by the West, largely through global governmental and economic institutions. This has, as mentioned, affected rights: without economic sovereignty, it becomes difficult to resist the powerful economic forces that limit the ability of nations to provide for societal subsistence and reproduction. There is thus a crucial link between the hegemonic project of actualising the Western conception of self-determination, the Third World, and social rights. Before decolonisation, Western nations had comparatively strong welfare states and labour rights, made possible by economic growth but also the subjugation of the Third World. When this system reached its limits, the Third World was able to fight off colonialism and began couching their demands not in the form of rights but in terms of complete self-determination. This required the actualisation of a limited conception of self-determination based upon the reinstatement of the strict delineation of

²¹¹⁴ Jack Copley and Alexis Moraitis, 'Beyond the Mutual Constitution of States and Markets: On the Governance of Alienation' (2021) 26(3) *New Political Economy* 490, 498

²¹¹⁵ Sandra Cohen and Others, 'Accounting for austerity: the Troika and the Eurozone' (2015) 28(6) *Accounting, Auditing, and Accountability* 966

²¹¹⁶ UN General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1

²¹¹⁷ UN General Assembly (Human Rights Council) 'Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on extreme poverty and human rights' 41st Session (2019) A/HRC/41/39/Add.1, 3-4

sovereignty and private property, which would rebound upon the West. The imperatives of austerity and the disciplinary effects of capital flight places constraints upon social policy even in the comparatively wealthy west.²¹¹⁸ The institutions involved with the actualisation of modern self-determination would then use the language of human rights, which the Third World would eventually adopt, to confine nation-state sovereignty, as a pretence for intervention. This was especially true for social rights, through the language of development and the imperatives of austerity.

There is therefore great value in attempting to think through how legal arguments (and political struggles) may be able to bring self-determination, democracy, and human rights together in opposition to capitalism, both for the purposes of making advances against capital's hegemony and for transcending capitalism. It could be argued, as the Mexican revolutionaries did, that there should be a 'social justice' exception for the disregarding of private property relations. It could be argued, as the Bolsheviks did, that self-determination needed to offer a form of sovereignty that allows for the overturning of the existing property regime and its legal relations, allowing the population to take control of the processes of producing and distributing the means of subsistence and reproduction. It could be argued that democracy, self-determination, and rights are all incomplete if the peoples of a society are unable to emancipate themselves from the domestic and international social power of capitalism. These arguments cannot be made solely by law, or even solely through specific

²¹¹⁸ Yngve Heiret and Ola Innset, 'Austerity without Deficits: The Global Political Economy of Norway's Fiscal Paradox' (2025) 0(0) *Environment and Planning D: Society and Space* 1, 17

legal principles; they must either aim to challenge the confines of capitalism or else accept them.

6.4 Conclusion

As should be clear, the NIEO and the development of a 'new' international law was largely unsuccessful²¹¹⁹ and the promise offered by (political) self-determination has been unfulfilled. A 'contradiction' has emerged between 'political independence' and 'economic subordination',²¹²⁰ largely due to the expansion of international governmental institutions. Rajagopal blames the inability of the Third World nation-state to actualise the 'democratic aspirations' of the peoples of the Third World at least partially on what he calls the parcelling of sovereignty both upwards to international institutions and downwards to 'market actors and NGOs'.²¹²¹ This could alternatively be framed as the separation of the economic sphere from political power, and the protection of these arrangements by international institutions. The actualisation of the Western position on self-determination vis-à-vis property has reinforced that separation through capitalist legality.

Through the use of the internationalisation of the social, issues of governance, and macroeconomic stability, the international system was able to create new methods for

²¹¹⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 245

²¹²⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 267

²¹²¹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003), 12

policing the sovereignty of nation-states of the Third World. Although there may be a temptation to portray these developments as political rather than legal, this would be a profound misunderstanding of the connection between imperialism and law, the way that the legal form obscures politics, and the necessity of including the dynamics of capitalist political economy in legal analysis. The international system thus protects private property and the logic of capitalism not so much through the use of purely legal mechanisms as it does through the policing and conditioning of sovereignty vis-à-vis property.

Human rights, democracy, and self-determination have all been gradually shaped, contorted, and confined by imperialism. To borrow another Lenin quote, there is 'no democratic demand' that can 'fail to give rise to abuses'.²¹²² Accordingly, each of these principles has been used and abused in service of capitalism. The solution therefore is not to attempt new legal formulations of these principles or advance new legal rights, placing unwavering faith in law as a body of rules. Instead, opportunities must be found for connecting them both to each other (e.g., connecting social rights to the political and legal arrangements necessary to combat private power), and to questions of sovereignty, property, and capitalism itself.

²¹²² V.I. Lenin, 'The Discussion on Self-Determination Summed Up' in V.I. Lenin, *Collected Works: Volume 22*, December 1915-July 1916 (first published 1964, Progress Publishers 1974), 349

7. Epilogue

7.1 Lenin and principled opportunism

Some brief thoughts will be offered on anti-capitalist legal argument. This will not be an attempt to work out a fully-fledged programme of action. Broadly speaking, an essentially Leninist position on law, a position sometimes referred to as ‘principled opportunism’,²¹²³ will be advocated. Anti-capitalist legal argument can attempt to work with the existing structures, doctrines, and methods of law. However, it must do so with specific purposes in mind, both suggesting alternatives to existing practices and question the (capitalist) premises upon which these existing practices were established. In other words, it must use law tactically in the service of a long-term ‘strategy’.²¹²⁴ Arguments for the overthrowing of the minimalist ‘basic needs’ conception of social rights in favour of a conception that looks more like the post-war welfare state, for example, should not be made without thinking about the purpose of the welfare states: is it for the purpose of maintaining capitalism, overcoming it, moving towards a new form of society, etc. It should also consider the relationship between these rights and capitalism, between this welfare state and private property, etc.

Pashukanis praised Lenin shortly after his death for his recognition of the necessity of rejecting both an uncritical faith in and outright denial of law as an emancipatory tool²¹²⁵ despite his

²¹²³ Robert Knox, ‘Marxism, International Law, and Political Strategy’ (2009) 22 *Leiden Journal of International Law* 413, 433

²¹²⁴ Robert Knox, ‘Strategy and Tactics’ (2010) 21 *Finnish Yearbook of International Law* 194, 208

²¹²⁵ Evgeny Pashukanis, ‘Lenin and Problems of Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 138

own belief in the necessary ‘withering away’ of law in communist society. He also praised Lenin for his recognition that engagement with law must consider the historical context and the status of the class struggle. Based upon these factors, Lenin recognised that it was useful to use any ‘legal opportunities’²¹²⁶ that may further a particular cause,²¹²⁷ that it may make sense to dirty the ‘clean clothing of the revolutionary’ by ‘turning to the tsarist court’ during the transition to socialism,²¹²⁸ whilst it made little sense to conduct a struggle on legal grounds in the pre-revolutionary period in the absence of a broader anti-capitalist movement.²¹²⁹

Therefore, anti-capitalist legal argument should not be overly wedded to legal principles and should instead focus upon historical conditions and specific goals. There may be scenarios where it still makes sense to fall back upon formal equality, perhaps when defending the rights of minorities or the positions of weaker nation-states against the more powerful. There is similarly no reason not to refer to human rights in opposition to regressive social security programmes, like Britain’s two-child benefit cap.²¹³⁰ It is important, however, not to fall into completely defensive positions: Stuart Hall’s analysis of the failure of social democrats to oppose neoliberalism when the post-war order entered crisis is instructive.

²¹²⁶ Evgeny Pashukanis, ‘Lenin and Problems of Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 138

²¹²⁷ Evgeny Pashukanis, ‘Lenin and Problems of Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 140

²¹²⁸ Evgeny Pashukanis, ‘Lenin and Problems of Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 141

²¹²⁹ Evgeny Pashukanis, ‘Lenin and Problems of Law’ in Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 142

²¹³⁰ Stephen Bush, ‘Labour row over two-child benefit cap presses on, but rebels may force Starmer’s hand’ *Financial Times* (London, 12 July 2024)

Hall, using Gramscian language, distinguished between ‘organic’ and ‘conjunctural’ aspects of a crisis.²¹³¹ Whilst ‘conjunctural’ aspects are ‘occasional, immediate, almost accidental’, organic aspects are ‘relatively permanent’.²¹³² The defence and opposition of the status quo forms the ‘conjunctural’ ‘terrain’²¹³³ whilst the organic terrain will require going beyond ‘merely defensive’ action.²¹³⁴ Whilst conjunctural crises do not produce ‘fundamental historical events’ but merely ‘terrain more favourable to the dissemination of certain modes of thought’, organic crises will lead to a ‘rupture of the equilibrium’ of society.²¹³⁵ Social democrats could only defend the welfare state, not recognising that the economic crisis of the mid-1970s had become organic. If another such crisis were to come, socialists, social democrats, etc, must not fall reactively into defence of aspects of capitalist society, like the democratic institutions, but must also attempt to provide alternatives.

Applying this to social rights, it may be productive to tactically articulate demands in the form of legal entitlements to subsistence goods from the State in the face of drives towards austerity, increases in inequality, and the like. These tactical demands, however, should be based upon theorisation of the connection between the State and capitalist social power. This is important as the implementation of legal social rights may enhance the social power of capital if it fails to oppose it; as mentioned in Chapter 5, a right that compels that State to

²¹³¹ Stuart Hall, ‘The Great Moving Right Show’ in Stuart Hall and David Morley (ed), *Essential Essays: Volume I* (Duke University Press 2019), 378

²¹³² Antonio Gramsci, *Selections from the Prison Notebooks* (first published 1971, Lawrence and Wishart 1992), 177

²¹³³ Antonio Gramsci, *Selections from the Prison Notebooks* (first published 1971, Lawrence and Wishart 1992), 178

²¹³⁴ Stuart Hall, ‘The Great Moving Right Show’ in Stuart Hall and David Morley (ed), *Essential Essays: Volume I* (Duke University Press 2019), 378

²¹³⁵ Antonio Gramsci, *Selections from the Prison Notebooks* (first published 1971, Lawrence and Wishart 1992), 184

house the homeless that fails to take into account the root causes of homelessness, namely the concentration of private property, can lead to a subsidisation of capital and a consequent entrenchment of private property. Tactical demands should therefore be connected to strategic goals related to overcoming these material social inequalities. A principled opportunist social rights strategy should be one that makes use of the form of social rights only to the extent that it contributes to counter-hegemonic anti-capitalist struggle, which should not be confined to law. To adopt principled opportunism is to seek to advance the content of social rights, that is, the rectification of the concentrated of societal resources, whilst remaining ambivalent about the form that this struggle takes.

Anti-capitalist legal argument should be directed against the 'root causes' of social antagonisms: private property of the means of production, the territorial nation-state, and market inequalities.²¹³⁶ It should also be wedded to broader political and social struggles, using law only to the extent that it assists these struggles. It must refrain from uncritically accepting capitalist society's confines.

7.2 The Bolshevik Revolution: Formal legality and social antagonisms

As mentioned, Pashukanis believed that law would wither away in communist society. However, he, Marx, and Lenin all agreed that this would not be immediate. Explaining that, as capitalism would not automatically lead to communism, Marx suggested that post-capitalist

²¹³⁶ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 9

society would initially bear the ‘birthmarks’ of capitalist society²¹³⁷ in the ‘first phase’ of communism (socialism).²¹³⁸ In this first phase, commodity exchange would still exist, although now based upon the exchange of labour in return for a share of the ‘social stock of means of consumption’²¹³⁹ rather than between labourers and capitalists. This exchange would still be based upon ‘bourgeois equality’ (of the property owner).²¹⁴⁰ The ‘narrow horizon’ of equal rights could only be transcended and society could be organised based upon the fulfilment of material needs and collective wants²¹⁴¹ through collective ownership of the means of producing the associated goods,²¹⁴² rather than through distribution of these goods.

Lenin agreed that in the first phase, some ‘bourgeois law’ would still exist,²¹⁴³ only initially being abolished around private property of the means of production.²¹⁴⁴ The State would also remain necessary in this period.²¹⁴⁵ Only when people observe the ‘fundamental rules of social intercourse’ and when they submit to work ‘according to their ability’ will the State be able to wither away. Pashukanis agreed that law would be maintained beyond the immediate

²¹³⁷ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 18

²¹³⁸ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 20

²¹³⁹ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 18-19

²¹⁴⁰ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 19-20

²¹⁴¹ Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 20

²¹⁴² Karl Marx, *Critique of the Gotha Programme* (originally published 1891, Electric Book Company 2000), 21

²¹⁴³ V I Lenin, *State and Revolution: The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (First edition 1918, Haymarket Books 2014), 132-133

²¹⁴⁴ V I Lenin, *State and Revolution: The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (First edition 1918, Haymarket Books 2014), 132

²¹⁴⁵ V I Lenin, *State and Revolution: The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (First edition 1918, Haymarket Books 2014), 133

victory of the proletariat;²¹⁴⁶ the maintenance of commodity exchange would require this²¹⁴⁷ out of recognition that these forms would not disappear 'overnight'.²¹⁴⁸ This presupposed the continuation of regulations on these relations (i.e., a civil code) and methods for solving any disputes that may arise (i.e., courts).²¹⁴⁹

However, Pashukanis refused to countenance a 'proletarian' or socialist law in the interregnum between capitalism and communism. Pashukanis argued that to suggest that bourgeois legal categories should be replaced by new categories of proletarian law would reinforce the 'immortality' of the legal form. The withering away of bourgeois law meant the withering away of the 'juridical factor from social relations' altogether.²¹⁵⁰ Pashukanis was not alone in this: Anatoly Lunacharskii was strongly against the existing legal system being maintained; for him, discarding the legal system and State apparatus, including the judicial system, was itself the revolution²¹⁵¹ and part of the 'purpose' of revolution.²¹⁵²

²¹⁴⁶ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 61-63

²¹⁴⁷ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 63-64

²¹⁴⁸ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 130-131

²¹⁴⁹ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 131-132

²¹⁵⁰ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 61

²¹⁵¹ Anatoly Lunacharskii, 'The Revolution, Law, and the Courts' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 53

²¹⁵² Anatoly Lunacharskii, 'The Revolution, Law, and the Courts' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 54

Pashukanis did not believe that law was eternal, that there 'must always be law and courts'.²¹⁵³ He argued that technical regulation, based upon 'direct, or technically-determining prescriptions in the form of programmes, plans for production and distribution, and so forth',²¹⁵⁴ would eventually come to replace legal regulation.²¹⁵⁵ Thus, it is not so much regulation of society that withers away; only law as a specific form corresponding to the antagonistic nature of commodity exchange would disappear.

Between the October Revolution in 1917 and the retreat through the NEP in 1921, the Soviet Union attempted to abolish formal legality,²¹⁵⁶ which according to the likes of Pashukanis was due to capitalism. Capitalist activities like commodity exchange and wage-labour were restricted, presumably in the hopes of eliminating them eventually,²¹⁵⁷ and it was hoped that other revolutions would follow in Europe.²¹⁵⁸

²¹⁵³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 64

²¹⁵⁴ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 131

²¹⁵⁵ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 132

²¹⁵⁶ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 7

²¹⁵⁷ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 12

²¹⁵⁸ Leon Trotsky, *The Revolution Betrayed: What is the Soviet Union and where is it going?* (Faber and Faber Ltd 1936), 30

The Soviet Union would restore legality when it retreated from its restriction of capitalistic activity²¹⁵⁹ and restored civil law to regulate property relations,²¹⁶⁰ although the Civil Code of 1922 sought to allow for property rights to be overridden if used 'in contradiction to their socio-economic purpose'.²¹⁶¹ Despite Lenin's struggle against bureaucracy,²¹⁶² these changes brought an increase in bureaucratisation when Lenin died (in 1924)²¹⁶³ and Stalin took over.²¹⁶⁴ E. H. Carr blamed the 'reversal' of 'hostility' towards law as a major 'symptom' of the rise of Stalin's policy programme.²¹⁶⁵ The suggestion that the bourgeois State and legal forms would continue without the bourgeoisie would eventually legitimate Stalin's so-called 'socialism in one country'.²¹⁶⁶ Although the Soviet State was supposedly unlike the capitalist state, which sought to protect property 'forever', in that it sought to ultimately destroy itself,²¹⁶⁷ this never came to pass.

²¹⁵⁹ Leon Trotsky, *The Revolution Betrayed: What is the Soviet Union and where is it going?* (Faber and Faber Ltd 1936), 31-32

²¹⁶⁰ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 16

²¹⁶¹ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 17

²¹⁶² V.I. Lenin, 'Better Fewer, but Better' in V.I. Lenin, David Skvirsky, and George Hanna (eds), *Collected Works: Volume 33* (first published 1965, Progress Publishers 1973), 489-490

²¹⁶³ Evgeny Pashukanis, Piers Beirne, and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980), 132

²¹⁶⁴ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 18-19

²¹⁶⁵ E.H. Carr, *A history of Soviet Russia: Socialism in One Country 1924-1926* (first published 1958, Macmillan Company 1968), 88

²¹⁶⁶ Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism' (2004) 17 Canadian Journal of Law and Jurisprudence 269, 270-271

²¹⁶⁷ D. Magerovskii, 'Law, Socialism, and State Capitalism in the Transition Period' in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 95

The release of Pashukanis' *General Theory* in 1924²¹⁶⁸ was part of a flowering of Soviet legal theory around the transition to communism before Stalin's rule was embedded. Michael Head identified three particularly interesting features of revolutionary Soviet legal theory. Among these were the replacement of formal legality, the suggestion that 'social equality' was the 'only true guarantee of human rights', and a focus upon the underlying social conditions that create the social antagonisms that give rise to law.²¹⁶⁹ These ideas were based upon rejecting the premises and practices of liberal capitalist society and an attempt to envisage an alternative form of society free of such social antagonisms. They recognised the interactions between political, social, economic, and legal aspects of society and rejected that extending the reach of the law was a worthwhile aim in itself.

An attempt was made to do away with formal legality almost immediately after the revolution. Citizens were urged to assume 'all decision-making power...even the power of arrest'.²¹⁷⁰ Recently established Soviet workers' councils became 'official forms of government'.²¹⁷¹ Private property became social ownership. Existing judicial institutions were abolished; according to Lunacharskii, although the creation of a 'new world' would take time,²¹⁷² one of the first tasks of the revolution was to 'destroy' the 'old court – the weapon of our enemy'.²¹⁷³

²¹⁶⁸ Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism' (2004) 17 *Canadian Journal of Law and Jurisprudence* 269, 273

²¹⁶⁹ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 *Canadian Journal of Law & Jurisprudence* 3, 27

²¹⁷⁰ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 *Canadian Journal of Law & Jurisprudence* 3, 11

²¹⁷¹ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 *Canadian Journal of Law & Jurisprudence* 3, 12

²¹⁷² Anatoly Lunacharskii, 'The Revolution, Law, and the Courts' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 53

²¹⁷³ Anatoly Lunacharskii, 'The Revolution, Law, and the Courts' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 54

Those institutions were replaced by courts elected by local Soviet councils, removing the legal profession's 'monopoly on representation', and all laws contrary to the revolution were overturned.²¹⁷⁴ Elected 'revolutionary tribunals' were set up to set up a system to deal specifically with anyone attempting to sabotage the revolution, as was a central People's Court.²¹⁷⁵

Along with the rejection of an independent judiciary, the separation of powers was also jettisoned. In certain, carefully defined circumstances, namely when their actions violated the law, government policy, or exceeded jurisdiction, the People's Commissariat of Justice could invalidate judicial decisions.²¹⁷⁶ Stucha, the first of those People's Commissariats, justified the rejection of the separation of powers on the recognition of its falsity. The RSFSR was to be simultaneously 'legislative, executive, and judicial authority', rejecting the 'hypocritical theory of the independence of one branch from another'.²¹⁷⁷

The re-establishment of some degree of legality led to debates about the nature and future of law. As explained, Pashukanis' never abandoned his 'withering away' thesis that envisaged law disappearing in a communist society, to be replaced by 'administration'. Soviet jurists like Pashukanis are sometimes cruelly mocked for this belief, given that most would eventually be

²¹⁷⁴ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 12-13

²¹⁷⁵ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 13

²¹⁷⁶ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 13

²¹⁷⁷ Petr Stucha, 'Law and Right are Inherited Like an Eternal Disease' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 75

executed²¹⁷⁸ (i.e., on the basis that they ought to have sought to strengthen the law against Stalin's rule). This, however, is to misunderstand the arguments advanced against formal legality.

First, the maintenance of some form of regulation was envisaged; as mentioned, this would be 'technical' regulation. The difference between law and administration was described by Goikhbarg. A communist society would consist of control of the economy by 'organised society' (the populace as a collective)²¹⁷⁹ rather than the 'domination over men by...legal enactment'. Regulation would therefore be based upon the needs of said control of the economy, consisting of plans of work and the goals of society,²¹⁸⁰ rather than specifying any legal limitations upon the activity in question.²¹⁸¹ Goikhbarg also rejected law as an 'eternally existing' phenomenon; he thought that proletarian 'legislation' should instead focus upon 'expediency', to rules that contribute to the 'goals for which they were created'²¹⁸² rather than abstract and universal rules of behaviour.

It would only be law, as an 'organisation of coercion in the sphere of human relationships' that would disappear, as the socialisation of production and exchange would end 'any and all

²¹⁷⁸ Igor Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019), 124

²¹⁷⁹ A.G. Goikhbarg, 'The Goals and Methods of the Proletarian Revolution' in in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 60-61

²¹⁸⁰ A.G. Goikhbarg, 'The Goals and Methods of the Proletarian Revolution' in in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 61-62

²¹⁸¹ A.G. Goikhbarg, 'The Goals and Methods of the Proletarian Revolution' in in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 61

²¹⁸² A.G. Goikhbarg, 'Justice, the Ideology of Law, and Revolution' in Michael Jaworskyj, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 132

struggle between men in the process of acquiring the material means of existence'.²¹⁸³ This suggested that cessation of law was seen as a way of ending coercion, not facilitating it. Under these 'completely changed conditions of...existence', Goikhbarg argued, humanity would no longer need 'guarantees' of freedom²¹⁸⁴ and would besides reject the bourgeois freedom of the property-owner.²¹⁸⁵

Not all such theory centred around the opposition of legal and technical regulation. Lunacharskii instead set up a distinction between positive law and 'intuitive' law²¹⁸⁶, believing that 'bourgeois' positive law needed to be destroyed where it conflicted with this intuitive law, and located this intuitive law in the revolutionary activity, the 'legal creativity', of the people themselves.²¹⁸⁷ This was an interesting appropriation of the spirit of natural law:²¹⁸⁸ rather than assessing law by appealing to higher principles or internal moral requirements, he believed that law depended upon the concrete class interests of the people. This hinted at the replacement of the formal and abstract processes of the law with a democratic expression of the peoples' will.

²¹⁸³ A.G. Goikhbarg, 'The Goals and Methods of the Proletarian Revolution' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 57

²¹⁸⁴ A.G. Goikhbarg, 'The Goals and Methods of the Proletarian Revolution' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 58

²¹⁸⁵ A.G. Goikhbarg, 'The Goals and Methods of the Proletarian Revolution' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 59-60

²¹⁸⁶ Anatoly Lunacharskii, 'The Revolution, Law, and the Courts' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 55

²¹⁸⁷ Anatoly Lunacharskii, 'The Revolution, Law, and the Courts' in Michael Jaworskyj (ed), *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 56

²¹⁸⁸ Michael Head, 'The Passionate Legal Debates of the Early Years of the Russian Revolution' (2001) 14 Canadian Journal of Law & Jurisprudence 3, 20

N.V. Krylenko argued that the idea of a law unconnected to the 'interests of a class' was 'inconceivable', as was the idea of law existing without 'coercion'.²¹⁸⁹ This led him to advance his own 'withering away' thesis²¹⁹⁰. However, he believed that it would be replaced by new 'social relations' (but not legal relations);²¹⁹¹ the law, used to coerce the majority to submit to the minority in capitalist society, would be replaced in communist society by 'habitual activity'.²¹⁹² The removal of the social antagonisms of class society would mean that there would be no need, or at least less of a need, to place legal limits upon the behaviour of individuals living in society.

The Soviets were therefore not simply arguing that the law served the capitalist class, but that it expressed underlying social antagonisms and conflicting interests. The disappearance of conflicting interests would render legal relations superfluous.²¹⁹³ Although Pashukanis' distinction is sometimes attacked for being 'utopian' in the sense that a unity of purpose is impossible, as Michael Head points out, focusing on underlying social conditions may be able to reduce antagonisms and thus reduce reliance upon law.²¹⁹⁴

²¹⁸⁹ N.V. Krylenko, 'The Law and Communism' in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 154

²¹⁹⁰ N.V. Krylenko, 'The Law and Communism' in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 154-155

²¹⁹¹ N.V. Krylenko, 'The Law and Communism' in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 155

²¹⁹² N.V. Krylenko, 'The Conflict between Socialist Theory and Soviet Reality' in Michael Jawroskyi, *Soviet political thought: an anthology, selected* (John Hopkins Press 1967), 172-173

²¹⁹³ Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (first published 1924, Transaction Publishers 2003), 132-133

²¹⁹⁴ Michael Head, 'The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism' (2004) 17 *Canadian Journal of Law and Jurisprudence* 269, 280

By attempting to resolve these social antagonisms, based upon inequality and exploitation in the processes of (capitalist) production and exchange of societal resources, the Bolshevik Revolution was thus trying to bring about genuine equality (in both social/economic and civil/political terms) through their radical restructuring of society. Just as human rights attempt to realise equality and redress power imbalances through formal legality, the Revolution saw placing power in the hands of the people rather than impersonal institutions as a preferable way to achieve these goals. This is not necessarily to argue for law's disappearance. Rather, it is to argue for a genuine strengthening of democracy in areas that will directly disturb the social power of capital and challenge the premises of capitalism. Democracy can, in this way, become something of an economic 'regulator' (as suggested by Wood), replacing the role played by markets in a capitalist society and a central planner in the State 'socialist' societies like the post-Lenin Soviet Union.²¹⁹⁵

7.3 We Charge Genocide: legal equality and racial capitalism

The 'We Charge Genocide' petition is a prime example of 'tactical deployment' of law.²¹⁹⁶ In 1951, the CRC issued a petition to the UN General Assembly against the US, alleging that its harsh treatment of its African American population amounted to violations of the UN Genocide Convention. The petition indicted the US government for being 'primarily

²¹⁹⁵ Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012), 290

²¹⁹⁶ Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 45

responsible' for genocide against people living 'under its sovereignty', being guilty of 'killing members of the group' in question.²¹⁹⁷

Although the petition alleged that the US had violated nearly every provision of the Convention, their discussion of Article III, which referred to conspiracy, and complicity to commit genocide,²¹⁹⁸ clarified that it was not just that the American government was directly committing genocide but that it was involved with conspiracy to commit and complicity with genocide, a violation of Article III(b) of the Convention.²¹⁹⁹ The petition asked the General Assembly to pass a resolution finding the US guilty of genocide.²²⁰⁰

Charging the US government with genocide was a momentous step, but, importantly, the CRC connected the genocide of African Americans to American capitalism, to 'the perpetuation of economic and political power by the few through the destruction of political protest by the many' and to 'the profits and unchallenged control' of the capitalist class.²²⁰¹ They blamed both the 'reactionary interests' of the capitalist class and the three branches of the US

²¹⁹⁷ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 43

²¹⁹⁸ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277, Article III(b)

²¹⁹⁹ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 47-48

²²⁰⁰ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 196

²²⁰¹ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 5

government²²⁰² for the genocide. The petition detailed the deprivation of African Americans of education, healthcare, quality employment, and adequate housing on the same basis as white Americans,²²⁰³ but crucially linked this to the purposes of ‘depressing wages, increasing profit’, and maintaining divisions in society.²²⁰⁴

According to the petition, the ‘prime mover’ of the deliberate conspiracy to commit genocide in the United States was (monopoly) capital. Monopoly capital, they alleged, extracted \$4 billion annually from exploiting African Americans.²²⁰⁵ They also referred to the capitalist class’s long-term aim of maintaining its control of US society, the ‘basic device for keeping wages low and profits high’. This ‘deliberate’ ‘conspiracy’, the petition argued, was carried out through ‘written’ law, wage scales, court decisions, public officials, government policies and legislation, ‘Big Business’ and the police, being both ‘systematic’ and institutionalised genocide for profit. This led to employment discrimination, low wages, poor housing, and negative health outcomes.²²⁰⁶

²²⁰² William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 6

²²⁰³ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 46

²²⁰⁴ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 47

²²⁰⁵ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 132

²²⁰⁶ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 134

They linked the systematic exploitation of the Black working class and the general tendency under capitalism to suppress wages, calling the 'Black Belt plantation system' an 'incubus' on the white working class as well.²²⁰⁷ Although the petition noted that white workers sometimes made twice as much as their Black counterparts, this was connected to the appropriation of additional surplus-value (and therefore profit, the 'substantial motive' of genocide), from Black workers rather than simply wage and employment discrimination.²²⁰⁸ The concentration of African Americans in substandard housing (and exclusion of them from adequate housing) was also linked to profits; it was noted, for example, that the Harlem ghetto in New York City was owned by banks, insurance companies, and real estate speculators.²²⁰⁹

A connection was also made between civil rights and social rights; the petition alleged that denying or restricting the voting rights (by law or by private 'economic sanction')²²¹⁰ of both the African American population and the 'poor' more generally (poll taxes being in operation at the time) was the 'device' by which capitalist 'economic-political' conditions were secured. As W.E.B. Dubois (a signatory of the petition) had suggested, it was the capitalist class that gained from the disenfranchisement of African Americans.²²¹¹ In addition to listing numerous

²²⁰⁷ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 23

²²⁰⁸ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 136-137

²²⁰⁹ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 139-140,

²²¹⁰ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 152

²²¹¹ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 144

instances in which unarmed African Americans had been killed by the police²²¹², civilians²²¹³, and State-approved vigilante groups like the Klu Klux Klan,²²¹⁴ the heavy-handed policing of the Black population was further linked to profit.²²¹⁵

The petition's authors highlighted the role that law played in orchestrating genocide and the 'aphorisms' of 'Anglo-Saxon jurisprudence' through which it was articulated. This genocide was a crime 'embedded in law...hidden by talk of liberty', obscured by 'deadly legal euphenisms',²²¹⁶ and carried out 'legally'.²²¹⁷ The petitioners argued that the Supreme Court especially had aided genocide, having 'decorated oppression with legal pomposity' and 'excused genocide by every legal circumlocution' found in legal language, using the 'righteous tone' of that language to 'authorise' and 'permit' genocide.²²¹⁸ The petition further recognised that the Supreme Court had interpreted the 14th Amendment of the Constitution (legal

²²¹² William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 10-12

²²¹³ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 12-15

²²¹⁴ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 15-18

²²¹⁵ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 23-24

²²¹⁶ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 4

²²¹⁷ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 5

²²¹⁸ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 183

equality) not to protect African Americans and end segregation but to protect corporations as legal individuals;²²¹⁹ this was a natural consequence of the narrowness of the legal form.

They also made a crucial connection between US foreign policy and domestic genocide. The petitioners argued that where the US' 'profitable' genocide was allowed to continue at home, the same forces behind that genocide would carry out similar actions abroad,²²²⁰ connecting American genocide directly to similar treatment of 'the coloured peoples of Asia'²²²¹ (referring to the dropping of atomic weapons on Japan and the then-ongoing Korean War).

Finally, the petitioners argued that although the US government had implemented other international agreements, it was unwilling to implement the Genocide Convention because its genocidal activities were intimately connected to the 'fabric' of US capitalism.²²²² Further, it was highlighted that the American Bar Association had strongly opposed the ratification of the Genocide Convention on the grounds that international legal sanction for genocide would be detrimental to the American 'form of government'.²²²³ The Bar Association had objected

²²¹⁹ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 183-184

²²²⁰ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 196

²²²¹ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 7

²²²² William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 49

²²²³ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 39-40

to the premises of the Genocide Convention, arguing that the crime of genocide could only be satisfied when ‘thousands of people’ were ‘directly’ affected, and that anything short of that should be tried as murder in domestic courts.²²²⁴

This view opposed the linking of the US government’s racist policies, the racist application (or non-application)²²²⁵ of US law, and US capitalist exploitation, replacing it with the application of an individualised form of law that treats these policies, laws, and other actions as mere infringements of individual rights. This obscured the political/economic context entirely, as the legal form is wont to do. It also obscured that, as the petitioners noted, this genocide was systemic.²²²⁶

There are several aspects of the petition worth mentioning. First, the connection between the US government and American capital uncovers the falsity of the public/private divide. On rare occasions, the law recognises this falsity. The *Foster v British Gas* case before the European Court of Justice is an example. The case concerned an attempt to apply Council Directive 76/207/EEC concerning equal employment conditions for men and women²²²⁷ to British Gas, which had been privatised²²²⁸ and was therefore not a public body subject to EU directives.

²²²⁴ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 41

²²²⁵ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 44

²²²⁶ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 41

²²²⁷ C-188/89 *Foster and others v British Gas plc* [1990] I – 3343, [1]

²²²⁸ C-188/89 *Foster and others v British Gas plc* [1990] I – 3343 (*Foster*), [7]

The Court decided that as British Gas was providing a public service, it was subject to the directive.²²²⁹ Similar arguments could be brought against a wide range of supposedly private actors involved with the production of goods associated with socially necessary activities.

Second, the petition did not merely highlight the discrimination between the wages and social conditions of African Americans in comparison with white Americans, nor did it simply link this discrimination to capitalist profits. It went further to link the (lower) wages paid to African Americans to the wage suppression and capitalist exploitation of all workers rather than pitting African Americans against white workers.

Third, it recognised the connection between domestic capitalist exploitation and imperialist competition internationally. Seemingly a deployment of a Leninist/Bolshevik theory of imperialism,²²³⁰ the petitioners argued that continuing to allow genocide within US borders would eventually lead to that exploitation being carried out abroad.²²³¹ Anti-capitalist argument should always therefore be internationalist.

Finally, the petition recognised the limits of the legal form, that its narrowness could render formal legal equality either a dead letter or even a double-edged sword. This included a

²²²⁹ C-188/89 *Foster and others v British Gas plc* [1990] I – 3343, [20]

²²³⁰ Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021), 53

²²³¹ William Patterson (ed) and the Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People* (Civil Rights Congress 1951), 196

recognition that law is not inherently good. This is, again, not to reject formal legal equality, but to highlight its limits.

7.3 South West Africa: rights, self-determination, and democracy

As mentioned in Chapter 6, the *South West Africa* dispute is perhaps the closest analogy to an attempt to impose social rights obligations upon another nation-state. Ultimately, it demonstrates how such legal arguments can become trapped by the international law's structural constraints. It also demonstrates the dangers not only of differentiating human rights but, more importantly not only of abstracting human rights (and self-determination) from questions of political economy but even from each other. However, the unique argument deployed offers lessons for challenging the premises of capitalism and international law.

Against South Africa's claim that the dissolution of the League of Nations had ended the Mandate,²²³² Liberia and Ethiopia argued that South Africa's Mandate in Namibia survived the League's collapse and still imposed obligations upon South Africa. Therefore, South Africa had breached the Mandate and Article 22 by imposing a system of apartheid that impeded the self-determination of the Namibians and their 'material...well-being' and 'social progress'²²³³

²²³² *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Judgement) [1966] ICJ Report 1966 3, 14

²²³³ *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Judgement) [1966] ICJ Report 1966 3, 15

(similar to their social rights). South Africa argued that should these obligations still exist, they had not been breached.²²³⁴

South Africa's arguments used the logic of biology implicitly and explicitly. The policy of not allowing Native Namibians to own land in Namibia was justified by their level of development being insufficient to enjoy the 'benefit(s)' of individual land ownership.²²³⁵ Namibia was divided between the northern territory mostly populated by natives and the 'Police Zone'²²³⁶ in the South that was controlled by white Europeans, and each group enjoyed certain 'rights and privileges' within their respective territories.²²³⁷ Natives were not entitled to acquire private property in White territories, nor was anyone allowed to do so in Native territory,²²³⁸ recalling Westlake's argument that 'uncivilised' peoples cannot create private property rights as they do not understand them. Accordingly, the South African government argued that Natives had not reached the 'stage of development' at which private ownership would 'benefit' them.²²³⁹ The Namibians were not only not allowed to become capitalists in White territory but could not do so in their own territory either.

²²³⁴ *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Judgement) [1966] ICJ Report 1966 3, 16-17

²²³⁵ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 113

²²³⁶ *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Pleadings) [1966] ICJ Volume X, 272

²²³⁷ *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Pleadings) [1966] ICJ Volume X, 270

²²³⁸ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 113-114

²²³⁹ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 116

The logic of biology was implicit in the testimony of one of South Africa's expert witnesses, Johannes Petrus van Schalkwyk Bruwer, an anthropologist who had held political positions in South Africa.²²⁴⁰ Its links to capitalism were also evident. Ernest Gross, counsel for the applicants, referring to the report issued by the Odendaal Commission (of which Bruwer had been a member), noted that that report had referred to the different 'moral and economic principles' between 'modern' economic systems and 'traditional' groups. Modern economic systems were said to be incompatible with traditional groups as the 'individual', rather than the 'group', was the 'focal point' of the modern economic system.²²⁴¹ This seems to link the 'logic of biology' with capitalism: the suggestion seemed to be that the collective culture of the 'natives' of Namibia seemed to constitute an obstacle to capitalist individualism. This justified their exclusion, and therefore apartheid itself.

The link between capitalism and apartheid was further strengthened by Bruwer's testimony. Noting that the Odendaal Commission had referred to a 'White economy' in Namibia, that being located in white European territory, Gross asked Bruwer whether 'non-whites' were involved in that 'White' economy. Describing that 'White economy' as a 'money economy' befitting a 'modern' (i.e., liberal) 'type of society', characterised by White ownership of land, Bruwer answered that non-Whites not only served as employees in that economy but were possibly integral to the operation of the White economy.²²⁴² In fact, the 'white' areas were not so delineated because whites constituted a majority; 'Natives' constituted a majority even in

²²⁴⁰ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 152

²²⁴¹ *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Pleadings) [1966] ICJ Volume X, 267

²²⁴² *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Pleadings) [1966] ICJ Volume X, 277

‘White’ areas.²²⁴³ The distinction was that Whites held private property in those areas.²²⁴⁴ The problem was not the exclusion of Namibians from the capitalist economy, but their manner of inclusion.

As Tzouvala points out, by identifying the ‘intersection’ between South African apartheid and capitalist exploitation,²²⁴⁵ Ethiopia and Liberia were able to challenge the capitalist premises of international law and its tendency to conditionally include and exclude. More importantly, however, the logic of improvement was also able to be resisted, at least to some extent; it was not uncritically accepted that inclusion in capitalist society is necessarily a good thing.

This nuanced form of argument was inconsistent. Other parts of Ethiopia’s 1966 memorial itself seemed uncritically adopt a logic of improvement. It was noted that the Native population was far removed from the ‘principal areas’ of the ‘modern monetary economy’ and left to survive upon subsistence agriculture. Furthermore, it was noted that South Africa had reduced the ‘choice’ of Native labourers in employment.²²⁴⁶ That there is little ‘freedom of choice’ in terms of employment is a natural consequence of confining private power to owners of capital. The logic of biology was not always consistently resisted, as Ethiopia’s arguments occasionally accepted that Namibians were not ready for self-government, that

²²⁴³ *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Pleadings) [1966] ICJ Volume X, 276

²²⁴⁴ *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Pleadings) [1966] ICJ Volume X, 272

²²⁴⁵ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 152

²²⁴⁶ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 131

South Africa had frustrated their 'evolution' towards it²²⁴⁷. These complaints focused upon racial discrimination.²²⁴⁸

Suffrage²²⁴⁹ and government participation²²⁵⁰ were denied to Natives, and considerable power was vested in the 'Administrator' over Native affairs.²²⁵¹ Although Natives were allowed to use tribal law outside of White territory, this was subject to supervision.²²⁵² The applicants therefore argued that South Africa had prevented the 'possibility of progress' towards 'skill' in citizenship or government²²⁵³ on the part of the Natives and failed to 'advance' the 'political maturity' that would allow them to 'ultimately' exercise self-determination.²²⁵⁴

Challenging racial discrimination is laudable, but such arguments can lose sight of the political/economic context; capitalism needs far more labourers than it does capitalists (or managers), and the majority of the population would still have been confined to labour for capital even if a small number of talented Natives were allowed to become capitalists.

²²⁴⁷ *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Judgement) [1966] ICJ Report 1966 3, 11

²²⁴⁸ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 130

²²⁴⁹ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 134

²²⁵⁰ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 135

²²⁵¹ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 140

²²⁵² *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 141

²²⁵³ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 143

²²⁵⁴ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 185

Meanwhile, liberal political structures attempt to channel political power away from the private power of capital (i.e., the public/private separation). Arguing that the Natives are too far removed geographically from capitalist exploitation seems to accept uncritically that moving towards capitalist modernity should be their goal, maybe even that Bruwer was correct to say that their traditional practices are an impediment to progress.

It was therefore accepted that native/tribal government structures, and their economic system were inadequate, and that the solution was the 'improvement' of the population and their inclusion in a Western-style system. As Tzouvala explains, the applicants were therefore unable to overcome the contradictions of civilisation associated with imperialism and ended up trapped between the logics of improvement and biology.²²⁵⁵

Most importantly, Ethiopia adopted rights language in a way that seemed to abstract from the (capitalist) context. Its interpretation of the duty to promote material well-being and social progress included 'economic advancement', recognising that they made up the 'preponderant' segment of industry; it was argued that apartheid meant that South Africa had 'directed to the opposite end' efforts to promote material well-being and social progress excluding Natives except to the extent that they were need as an 'indispensable source' of labour²²⁵⁶. However, Ethiopia also called for 'equal' rights and opportunities and the

²²⁵⁵ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020), 155, 157

²²⁵⁶ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 108-109

protection of 'basic' human rights²²⁵⁷ and lamented that Natives were not able to 'take part' in industry as owners or 'entrepreneurs' or in management posts²²⁵⁸ nor own agricultural land (even in Native territories),²²⁵⁹ confining their role to 'unskilled labour'.²²⁶⁰

It would have been more advantageous for the African applicants to maintain focus upon the type of system being imposed in Namibia rather than the effect upon human rights, which obscured as much as it revealed. This would have allowed for an interrogation the terms of inclusion, in light of the standard of civilisation and imperialism's contradictory tendency to include and exclude, seeing as Namibians were already part of the capitalist economy, whether they liked it or not.

Natives in the Police Zone were subject to stifling restrictions on their movement,²²⁶¹ and under laws like the Vagrancy Proclamation 1920, Natives found without 'lawful means of support' could be arrested 'idle and disorderly' persons and sentenced to hard labour.²²⁶² Rather than view this as a violation of a right to security of person, this should be viewed through the lens of primitive accumulation and capitalism. Similar legislative action needed

²²⁵⁷ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 107-108

²²⁵⁸ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 112-113, 130-131

²²⁵⁹ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 113

²²⁶⁰ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 130-131

²²⁶¹ *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 125-127

²²⁶² *South West Africa Cases* (Ethiopia v South Africa, Liberia v South Africa) (Pleadings, Volume I) [1966] ICJ 32, 127

to be carried out in 15th-18th century England in order to compel labourers to submit to the 'dull compulsion' of capitalist exploitation.²²⁶³ For example, a 1572 law provided for the flogging of 'unlicensed beggars' over 14 years old and the execution of those over 18.²²⁶⁴ This does not necessarily invalidate struggles for equal inclusion in the capitalist White economy, but it does mean that such equality will not be able to rise beyond the abstract and formal equality.

Maintaining focus upon the terms of inclusion within capitalist society and the private production and exchange relations involved with that society could have allowed for a connection to be drawn between the failure to ensure the 'material well-being' (the social conditions related to subsistence and reproduction, or the social rights) of the native Namibians, their denial of self-determination, and their lack of democracy. Having a capitalist economy effectively forced upon them by powerful nations the legal protection of property relations surely does not amount to self-determination in the political, social/economic, and cultural sense. Lacking the ability to oppose the social power of capital domestically amounts to only a limited, institutional form of democracy.

A radical conception of self-determination could allow nations to choose their economic systems, to use their sovereignty to disrupt commodity exchange and capitalist legality (should they wish to), to oppose capitalist imperatives. This is what Lenin's communist internationalism sought to realise. A radical conception of democracy could allow citizens to

²²⁶³ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 514-515

²²⁶⁴ Karl Marx, *Capital* (first published 1867, Wordsworth Editions Limited 2013), 515

demand control over the processes of production and reproduction of the essential goods and services necessary to sustain life. Doing so would allow for the realisation of the equality that human rights target through democracy and national autonomy rather than through individual legal struggles. The main challenge, of course, remains actualisation, and the prospects for these radical alternatives are bleak. This thesis has attempted to expose the underbelly of liberal capitalist society, and of the place of law in those societies, never losing sight that most nations would greatly improve their situation if they were to become successful capitalist democracies, and attempting to make the case for change. To quote Lenin one last time, 'if the writer of these lines has succeeded in providing some material for clarifying these problems, he may regard his labours as not having been fruitless'.²²⁶⁵

²²⁶⁵ V.I. Lenin, 'The Development of Capitalism in Russia' in V.I. Lenin, *Collected Works: Volume 3* (first published 1960, Progress Publishers 1977), 600

Conclusion

The principal argument made in this thesis is that social rights legal discourse has no theory of the way that law operates under capitalism and in capitalist society. It is not recognised that the social relations of capitalism are expressed through the narrow, rigid, and depoliticised legal form. This leads to a failure to recognise that legal rights themselves must either adapt the form of private property ownership or attempt to impose themselves upon this form. There is also seemingly no conception of the role played by law in capitalist society. This fails to account for the separation of both the public and private spheres and the economic, political, and legal spheres of capitalist society and the way it renders some questions, like the distribution of resources, out of reach of the law. Likewise, the structural constraints of international law are not properly understood. This ignores the constitutive relationship between imperialism and international law and the way that capitalism's premises are imposed and policed through the structural, qualified indeterminacy of international legal argument.

There are several important themes, or ideas, that have emerged from this thesis. First, it was argued that social rights legal theory and discourse is (at best, or at its most radical) taken on a social democratic outlook, which has in some cases gradually narrowed its horizons. The prevalent approach to social rights is one that is essentially based upon what has been described as a combination of a basic needs (and services) with an indirect, market employment-based provision of rights. This approach envisages social rights mostly being provided through capitalist employment and is completely accepting of the unequal premises

of capitalist social relations. Like social democracy itself, this approach attempts to mitigate the inequities of capitalism within the confines of capitalism.

Second, the structure of capitalist society, mainly its tendency to present itself in a fragmented form, has been highlighted. The illusory divide between the public sphere of the State and the private sphere of capitalist social relations has been referred to throughout. Capitalist society's structure has implications for democracy, as democracy is largely confined to the public sphere, focusing upon the institutions of government, leaving market relations and imperatives largely untouched. It also has implications for law in at least two ways. Certain areas of society are out of law's reach in the sense that, for example, technocratic processes of monetary policy are protected from legal challenge. Paradoxically, however, the law is involved in protecting such areas from political pressure on the grounds that they are economic in nature. In addition, the public/private distinction is maintained in law, and is evident in most conceptions of the rule of law, which tend to focus upon legal regulation of government rather than of economic relations. This is especially a problem for social rights; human rights are mostly associated with public law, but social rights relate more to private economic affairs.

Third, it was explained, through the work of Pashukanis, that capitalist society is premised upon free and equal exchange of commodities between private property owners as legal subjects. Private property rights are referred to in a dual sense; first, these rights-holders are able to exclude others from enjoying their property, and second, they are capable of being recognised as legal owners by other property owners for the purpose of commodity exchange

and contract. This naturally has implications for law, as law becomes necessary to govern these relations. These relations are only universalised in capitalist society, and, crucially, it is only in capitalist society that exploitation is carried out through law, as labourers exchange their labour for wages with capitalists by mutual recognition of private property. It also has implications for democracy; liberal democratic theory is also premised upon these individual relations, upon the need for exchange relations to coexist with political equality, and the need to protect private property from political interference. The rule of law, including the legal protection of private property exchange (capitalist legality) has become part of liberal democracy. It further has implications for social rights, which do not easily conform to capitalist legal relations and are thus rendered a secondary form of rights.

Fourth, it was suggested that despite being a secondary form of rights in a capitalist society, social rights related to material goods, activities, and processes of subsistence and reproduction that are absolutely fundamental to any form of society. The production and distribution of food, the provision of health services, and the construction, maintenance, and enjoyment of safe and habitable housing are things society cannot exist without. However, each of these goods and processes are constrained, to a greater or lesser extent, by capitalism. This may be because they are turned into commodities, as food and housing are. It also may be because they face international competition on wages for employees, as health services do. Even where some goods, like housing, are provided on a basic-needs basis, like social housing in most countries, this provision will be subject to purchasing materials and hiring labourers through capitalist markets. This can even render basic needs provision vulnerable in the long term.

Fifth, international legal argument, which enjoys a close relationship with imperialism, is structured by imperialism and conditioned by the dynamics of imperialist competition between capitalist nation-states. International law tends to impose, reflect, and legitimise the premises of capitalism, narrowing the range of legal arguments available and pushing nation-states into arguing over their compliance with those premises rather than the premises themselves. The narrow and abstract form of international legal argument, which also derives from economic relations, obscures that nation-states are not equally capable of advancing legal arguments and, more importantly, actualising their positions. This has implications for human rights, for self-determination, and for democracy; the dominant conceptions of each of these doctrines has been actualised in forms that both separate them from each other and ensures that they do not challenge capitalism. Anti-capitalist legal argument would do well to attempt to reverse this fragmentation and use them to question the premises of capitalism.

Sixth, the emergence of particular legal principles is not necessarily to be equated with changes to the form or structure of law or legal argument. Law, per Pashukanis, is not an 'empty sack' that can simply be filled with radical content, nor are new legal principles, like human rights, self-determination, and democracy necessarily emancipatory. The content of these principles is perfectly capable of being counter-revolutionary. Legal principles can, and, in the case of rights, often do emerge from struggle, but the victor of this struggle is not pre-determined. Actualisation of legal principles in a counter-revolutionary fashion may even strengthen the prevailing hegemonic system.

Finally, in connection with legal fragmentation, it has been argued that advocates of social rights, or those attempting to do anything that is anti-capitalist in a capitalist system, must be prepared to work outside and across legal doctrines where necessary, focusing upon the historical conditions and specific goals sought, in accordance with Leninist legal engagement. Such advocates must also be prepared to challenge the premises of capitalism and offer alternatives wherever possible.

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