

Democracy against Law: A Marxian Standpoint

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While contemporary political thought seems to undertake a consensual agenda regarding the relations between law and democracy, reactivating the old Marx and bringing him back to the fore might sound like a challenge. In this moment in which law seems to be increasingly taken as the solution to the enigma of democracy, it is at least tempting to revive Marx's early notion of 'true democracy'.

A democracy against law, that is for sure. The antagonism between State and civil society that is at the basis of Marx's critique of modern thought arises out of a legal metaphor: the social contract. A contract of divorce between the political and the social, between man and citizen, this legal foundation of modernity turns out to be a permanent target of Marx's critique, showing itself to be, since his early writings, one of the main impediments to the achievement of a true democracy.

The true democracy (*wahre Demokratie*) demands a non-legal foundation for society. For Marx, the truth of democracy lies in the antagonism that define its relation to the modern State and asks for the overcoming of the latter in order to find its place in a human association that rejects any form of mediations between man and his freedom. Reversing the universalistic trends that seem to be hegemonic in contemporary political thought, Marx can still open our imaginary to a new socio-political form, the real community (*wirkliche Gemeinschaft*), which may be described not by sovereignty but by self-determination, and not by representation but by self-organization. Based on these two ideas, true democracy reconciles the universal and the particular, and the formal and the material principles of law. Reuniting man and citizen in the same subject true democracy allows for human emancipation, a form of emancipation that does not make man depend on rights in order to be human.

Hence, differently from some widely acclaimed approaches to contemporary thought, Marx places democracy as a condition to the establishment of law and rights. Taking this path implies reversing the direction of the current agenda on political theory which takes law – or the system of rights – as a condition to democracy. What traditions as diverse as the political liberalism that has followed Rawls' neo-kantism and the pseudo post-Marxism of those who see themselves as a new generation of the Frankfurt School have in common seems precisely to be the assumption that a minimum set of

basic rights is a requisite for democracy to be implemented or legitimated. This point reveals the liberal commitment of both traditions, since if liberalism has a distinctive feature this is the priority of law over democracy.

For Marx, law acquires meaning through true democracy. Law is thus a practice, a human activity (*Tätigkeit*) that converts forms into substance, and the result of a process of political subjectivation through which men recover their generic essence (*Gattungswesen*) and become finally ready to be emancipated. As an expression of the rational State, as a founding institution of political modernity, law does not suit democracy since the latter finds human experience as its sole foundation.

Bearing this in mind I hope in this paper to make the following claims: i) Marx's critique of political modernity departs from the separation between State and society which results from a legal metaphor, the social contract, and legal institutions, such as representation and sovereignty; ii) The separation between State and society can only be overcome through the true democracy, a communal form of political organization which accepts no mediations such as representation and sovereignty; iii) While modern democracy is founded over sovereignty and representation, true democracy is based on self-determination and self-organization; iv) Once true democracy is accomplished law arises as a practice resulting from the process of political subjectivation; v) Democracy is thus a condition for the development of the legal system, including rights, and not the other way round. Altogether these claims lead to the underlying argument of this paper: political theory still has a lot to gain from Marx in order to account for the role of law in contemporary democracy and the proper relation that should exist among them.

Overcoming the separation between State and Civil Society

In his *Critique of Hegel's Philosophy of Law*, Marx says that "democracy is the solution to the riddle of every constitution" (Marx, 1992a [1843], p. 87). Marx does more than conceiving democracy as an enigma, he conceives it as a 'solved enigma' (*aufgelöste Rätsel*). A solved enigma is one that knows itself to be the solution for itself. It is a concept that contains simultaneously in itself an enigma and the solution to decipher it. As the solved enigma of every constitution, Marxian democracy presents itself as the answer to the problems arisen by the modern political forms. The main of these problems is, accordingly to Marx, the contradiction between State and civil society. This is, after all, the enigma of political modernity, which the most brilliant of

Hegel's disciples was very early able to identify. Breaking up with his master and refusing any forms of mediations for the political, Marx turns his concept of true democracy into the solution of the enigma posed by the modern State.

That explains why "in a democracy the abstract State has ceased to be the dominant moment" (Marx, 1992a [1843], p. 89). When democracy reaches its truth, it overcomes itself finding its real expression in the withering away of the State and civil society – the only possible dialectical solution for two real extremes (*wirkliche Extreme*) which do not admit any kind of mediation between them. With the sublation (*Aufhebung*) of the State and civil society no more relations of subordinations or dependence is possible between the political and the socio-economical sphere. The result of this dialectical operation is a real political community (*wirklich Gemeinschaft*) which is simultaneously both State and civil society precisely because it is in fact neither of them.

Nevertheless, the achievement of democracy has been modernly conceived in the form of a 'democratic State': an impertinent alliance between two irreconcilable concepts in Marx's vocabulary. For him, it goes without saying that "all forms of State have democracy for their truth and that they are untrue to the extent that they are not democracy" (Marx, 1992a [1843], p. 89). The State that withers away in true democracy is the illusory form of that which should be the real political community, in other words it is the product of political alienation. The 'false democracies', those democracies that are not true, necessarily coincide with a form of State, be it an aristocratic, monarchic or republican form of State. The true democracy does not identify itself with any of these forms; au contraire, it arises as an opposition to them.

Therefore Marx envisages a democracy beyond the State (Avineri, 1968, p. 38) and against the State (Abensour, 1998 [1997]) and thus it opposes any of the political forms that come along with the modern idea of State. One can thus say that the main premise of Marx's political thought is precisely the overcoming of the contradiction between State and civil society in such a way that the true meaning of democracy can be found. What result from that is a demand that a new form of political organization takes place so democracy can have a space to spread. That must be the space of a real political community founded over a free association of free human beings.

How true is democracy?

Marx designs a concept of democracy that collides with conventional formulations and traditional understandings of the subject. The meaning that the idea of democracy finds in Marx clashes with a great deal of what we nowadays take as meaning the practice of democracy and of a democratic State. Marx's main assumption regarding this theme implies that one must supersede the modern notion of politics and particularly the modern concept of State in order to achieve the actual meaning of democracy. In other words, it is necessary to overcome liberal democracy to allow space for true democracy.

The term 'true democracy' (*wahre Demokratie*), continuously employed by Marx in the *Critique of Hegel's Philosophy of Law*, was certainly taken from his studies of French socialism and the history of the French Revolution.¹ The basic insight that Marx have tried to keep from such influence is the impossibility of the achievement of democracy within the borders of the modern concept of State. Hence, the true democracy engenders a tension between democracy and State as if these two concepts were incompatible.

While contrasting State and democracy, Marx is in fact searching for the nature of the political. Hence, the actual essence of the political cannot and will not be found in the State. Quite the contrary; Marx claims that is precisely the overcoming of the State that leads to true democracy. The challenge is to realize how democracy can be theorized disregarding the dogmatic assumption that, in order to be achieved, democracy would require a particular territory, the State. After all, we have all been always used to think the fulfillment of democracy in the form of a 'democratic State'.

The search for democracy outside the State does not imply a denial of politics. Au contraire, the democracy searched by Marx is precisely "the truth of all political organizations" (Henry, 1976: 47), "the blossoming, the apotheosis of the political principle" (Abensour, 1997: 72). In other words, while criticizing modern political thought, Marx allows for a concept of the political which overcomes the usual way of

¹ The choice of the term 'true democracy' was certainly influenced especially by two texts: *Destinée Sociale*, by Victor Considérant and *Manifeste de la démocratie au XIXe siècle*, which supposedly have been written in that same year. Indeed, as we will see afterwards, Marx reveals his source, however indirectly, when he states that: "(...) The modern French have conceived it thus: In true democracy the political state disappears [*der politische Staat untergehe*]." (Marx, 1843: 88)

conceiving politics; while criticizing the modern concept of State, he allows for a contemporary concept of democracy.

Therefore, Marx's concept of true democracy implies a non-institutional and non-formal understanding of the political. It deals with politics outside of the State, outside of modern institutions such as representation and sovereignty, outside of any sort of form. As Avineri points out: "any radical, institutional conception of democracy will be inadequate to express the meaning Marx read into his version of 'true democracy' (...) it does not mean formal, political democracy" (Avineri, 1968: 35 e 38). One should thus notice that while claiming for 'true democracy' against 'political democracy' Marx is not denying politics nor democracy.

This approach has led some authors to vindicate that Marx maintains a conception of democracy that is "radical" (Rubel, 1974: 254), "direct" (Balibar, 1993: 125) and "participative" (Hunt, 1974: xiii). Indeed, while opposing the ideas of sovereignty and representation, true democracy presupposes the notions of self-government and self-determination.

By criticizing sovereignty and representation, Marx seeks to recover the people as the only source of constituent power. The people cannot be held prisoner of forms or institutions, nor even of the constitution itself or the law. As Marx points out "the constitution does not make the people, but the people make the constitution" (Marx, 1843: 87). Hence, "Man does not exist for the sake of the law, but the law exists for the sake of man; democracy is *human existence*" (Marx, 1843: 88).

When the people no longer have to conform itself to the constitution but, on the contrary, the constitution is modeled accordingly to the people, this is when we take the path to true democracy. In other words, for Marx a political system in which the people must guide its conduct based on a previously arranged legal order does not constitute a democratic system. Therefore, the substance of true democracy is the people itself, and not a legal codification of it. The people do not just create the constitution, the people *is* itself the constitution.

"In all states distinct from democracy the state, the law, the constitution is dominant without really governing, that is, materially permeating the content of the remaining non-political spheres. In democracy the constitution, the law, the state, so far as it is political constitution, is itself only a self-determination of the people, and a determinate content of the people. (Marx, 1843: 88-89).

The people receive a triple role in true democracy: it is at the same time the principle, the subject and the end of democracy (Abensour, 1997: 83). Marx not only raises the people to a sovereign position that cannot be renounced or alienated but also allows all other remaining elements of sovereignty, such as representation, to be determined by the people itself. Since the people determine the constitution, and therefore democracy, one can claim that democracy is the actual self-determination of the people. The key concept for Marx is self-determination, and not sovereignty.

If on the one hand Marx refuses the idea of sovereignty, except if it is taken as such pure manifestation of popular potency that implies self-determination, on the other hand he does not refuse the idea of law. On the contrary, Marx brings law in its material dimension to the fore when he maintains that the idea of true democracy turns the expression of the sovereignty of the people in something more than a legislative function: it is constitutive and constitutional at the same time; it produces and applies the law simultaneously. What is at stake here is a materialistic conception of the law and of the constitution which I will comment on later.

When sovereignty, constitution and law *are* the people themselves, when they are identified with each other in such a way that no mediation between them remains, one can cease to conceive such concepts as formal institutions. When those political and legal concepts are identified with the figure of the people itself, absorbed in the material sense of democracy, they are at once constitutive and constituent. One can thus understand why Marx maintains that:

“In immediate monarchy, democracy, aristocracy there is yet no political constitution in distinction from the actual material state or from the remaining content of popular life. The political state does not yet appear as the form of the material state.” (Marx, 1843: 90).

As Marx puts it, the institutionalization of the political substance, its imprisonment in forms, is a creation of modern political thought – a creation from which we must free ourselves. Classical political thought has left us mainly a concern with the political systems, or the search for the best type of government. It did not create political forms and concepts, such as the very idea of constitution, in order to separate them from their real content as expressed in the actual existence of the people.

Notice that in the sentence quoted above Marx has only placed democracy, monarchy and aristocracy side by side in order to show that before the consolidation of

what we call modern political thought there was no separation between substance and form, that is, between the content of popular life and the institutions that expresses it. The contractarian mode of conceiving the political which arose in the seventeenth century enforces this separation that, accordingly to Marx, is irremediably deepened with the French Revolution. Political modernity thus implies that political systems develop themselves based on that separation. It was, after all, the French Revolution that deepened the separation between State and civil society to a point of no return.

Marx goes on saying that this is a problem bound to happen not only in monarchies and aristocracies, but also in the republic and in the so called ‘political democracy’, that is, the liberal form that democracy has taken in modern times – a form which is very far from its true content, the true democracy.

“Democracy is the truth of monarchy, monarchy is not the truth of democracy. Monarchy is necessarily democracy in contradiction with itself, whereas the monarchial moment is no contradiction within democracy. Monarchy cannot, while democracy can be understood in terms of itself. In democracy none of the moments obtains significance other than what befits it. Each is really only a moment of the whole *Demos*. In monarchy one part determines the character of the whole; the entire constitution must be modified according to the immutable head. Democracy is the generic constitution; monarchy is a species, and indeed a poor one. Democracy is content and form; monarchy *should* be only form, but it adulterates the content.” (Marx, 1843: 87)

It is clear in this fragment that Marx means by democracy the true democracy. So he continues:

“In monarchy the whole, the people, is subsumed under one of its modes of existence, the political constitution; in democracy the constitution itself appears only as one determination, and indeed as the self-determination of the people. In monarchy we have the people of the constitution, in democracy the constitution of the people.” (Marx, 1843: 87)

Let’s try and substitute in those fragments the word monarchy for any other form of government, including ‘political democracy’, that is, modern democracy, or the democracy that is not true. The above passages could then be read as an opposition between democracy and democracy itself. In other words, that would be a contrast between the notion of modern democracy that Marx rejects and the concept of democracy that he seeks to normatively develop for a future that does not yet exist.

Claiming for a reform of the modern political imaginary, the concept of true democracy also presupposes a redefinition of what one understands nowadays by political participation and political action. This seems to be what Marx means in his explicit theoretical struggle against Hegel in the following passage:

“The political matters of general concern are the concern of the state, the state as actual concern. Deliberation and decision is the effectuation of the state as actual concern. It seems obvious then that all the members of the state have a relationship to the state as being their actual concern. The very notion of member of the state implies their being a member of the state, a part of it, and the state having them as its part. But if they are an integral part of the state, then it is obvious that their social existence is already their actual participation in it. They are not only integral parts of the state, but the state is their integral part. To be consciously an integral part of something is to participate consciously in it, to be consciously integral to it. Without this consciousness the member of the state would be an animal.” (Marx, 1843: 187)

Leaving aside the use of Hegelian concepts with the clear intention of inverting their internal logic, we can identify in the critique of Hegel a critique of modern political thought and in the latter lies a critique of the contemporary notions of political participation and participative democracy.

“Participation in political matters of general concern and participation in the state are, therefore, identical. It is a tautology [to say] that a member of the state, a part of the state, participates in the state, and that this participation can appear only as deliberation or decision, or related forms, and thus that every member of the state shares in deliberating and deciding (if these functions are taken to be the functions of actual participation in the state) the political matters of general concern. If we are talking about actual members of the state, then this participation cannot be regarded as a 'should'; otherwise we would be talking about subjects who should be and want to be members of the state, but actually are not.” (Marx, 1843: 187-188)

Yet another political form that falls apart: the modern idea of citizenship. When men are considered at the same time as a constituent and constitutive part of democracy, when they are identified with democracy itself, they do not need to be called ‘citizens’, as something different than simply ‘men’. While man is the substance, citizen is only the form.

The separation between man and citizen is seen by Marx as one of the worse consequences of modern political thought and one of the main traps of the legal

discourse post French Revolution. As it is known, this point will be resumed by Marx in *The Jewish Question* with further details. When a legal document as the constitution formally turns men into citizens by supposedly granting them rights, such as the right of participation, something must be wrong. The logic of the political was reversed: men become a creation of law, when it was supposed to work the other way round. Men ceases to be themselves the content of law, they cease to directly make it dynamically through their own activity. When true democracy is achieved, participation becomes something immanent to self-organization. It does not demand to be guaranteed in a legal document nor take the form of a right. When men do not merely take part but *are* a part – or, better, are the whole – political participation turns out to be a matter of self-organization.

Apart from showing that active participation is an inherent feature of true democracy, Marx also demonstrates that it involves more than deliberation and decision. Political participation means the actual constitution of democracy, its permanent creation and re-creation in the space where it shall develop itself – a space which is to be created with the overcoming of the contradiction between the State and civil society.

“...The question whether all as individuals should share in deliberating and deciding on political matters of general concern is a question that arises from the separation of the political state and civil society” (Marx, 1843: 188).

One of the main critiques that Marx directs to the Hegelian idea of State is precisely the critique of the mediations. The separation between State and civil society takes many forms in Hegel. Apart from the notions of sovereignty and representation, Marx also emphatically rejects Hegel’s views on the estates as an intermediate term between the people and the sovereign, or the civil society and the executive. Hence Marx’s critique of the crown, the executive and the legislature as presented in the *Critique of Hegel’s Philosophy of Right* (§ 275 onward) can be taken as a general critique of mediations.

“(...) it is nonsense to make a claim which has resulted precisely from a notion of the political state as an existent separated from civil society, from the theological notion of the political state. In this situation, legislative power altogether loses the meaning of representative power. Here, the legislature

is a representation in the same sense in which every function is representative.” (Marx, 1843: 189)

Therefore, true democracy has as one of its main features the refusal of mediations. This refusal goes beyond Marx’s critique of sovereignty and representation. To reject mediations means to reject any type of scissions of spheres that should never be separated for not losing their real meaning. The critique of mediations implies a claim to undermine all the political dualisms that have been conceived by political modernity.

“In democracy the formal principle is simultaneously the material principle. For that reason it is the first true unity of the universal and the particular.” (Marx, 1843: 88).

When true democracy reigns, there is also no need for thinking of the ‘social’ and the ‘political’ as two separate entities. Just like the formal can only be the material itself, and the universal the particular, also the political *is* the social. None of these concepts can be thought of separately, not in a true democracy. Materiality is constantly renovating itself; it incessantly actualizes its form. The particular is constituted through its own universalization. The political only constitutes itself as political while it is social, and vice-versa. Marx’s political thought is a philosophy of immanence. Marx definitely learned his lessons on democracy from Spinoza.

“In democracy the state as particular is only particular, and as universal it is the real universal, i.e., it is nothing definite in distinction from the other content. The modern French have conceived it thus: In true democracy the *political state disappears* [*der politische Staat untergehe*]. This is correct inasmuch as *qua* political state, *qua* constitution it is no longer equivalent to the whole.” (Marx, 1843: 88)

When mediations reach an end, the State comes to an end, and with the latter civil society also finds a term. It is from this event on, the ‘*Aufhebung*’, that true democracy finally emerges. The State and the civil society cannot exist as two separate concepts. True democracy is both State and society at once, and at the same time it is neither of them. It constitutes itself through the existent antagonism between State and society, and consequently through the simultaneous abolition of both. Now one can understand why true democracy implies both a democracy beyond the State and a democracy against the State.

Which Law?

Marx's critique of law naturally follows his critique of politics. The critique of modern law is necessarily a part of his overall critique of the modern State. To begin with, it is very important to distinguish here Marx's approach to law from that which has been put forward by the Marxist tradition. Conceived by the latter as the expression of the relation among men allowed by the construction of the modern State and the consequent dissolution of civil society into independent individuals, the law has been commonly taken by Marxism as responsible for the atomism and the desegregation of men in modern civil society. From what follows that law is then conceived as an instrument of class domination, and thus as the expression of the interests of the bourgeoisie.

The traditional Marxist interpretations become more sophisticated when, with Althusser, law begins to be also conceived as one of the ideological State apparatus, even though its permanent role of superstructure subordinated to the economic infrastructure does not yet contemplate its conceptual worth in full. A significant part of this theoretical evolution that has been achieved by the Marxists accounts of law in the last decades of the twentieth century pays tribute to that which remains as one of the most compelling interpretations of the subject: Pashukanis' account of the withering away of the law. The shortcoming of Pashukanis' interesting insights lie in the fact that he, following Marxism's rule, bases his interpretation of law on political economy, and is thus prevented from realizing that the critique of law should be faced a part of the overall critique of the political.

The interpretation I would like to advance in this paper is not aligned with the traditional Marxist approach to law. Not even Althusser or Pashukanis' views could be used in my support. Although the idea of law could be seen as one of the mediations that are supposed to be overcome through true democracy this argument should be made very carefully. It is thus necessary to read Marx closely in this regard, leaving Marxism aside for a moment.

The idea that Marx has predicted the end of law along with the *Aufhebung* is as wrong as the idea that he has predicted an end to the political along with the end of the State. Just like Marx wants to substitute the modern State form for a communal form of political association, he wants to substitute the formal law for a material one. Actually,

for Marx, as I have already argued, there should be no separation between the formal and the material principles of law – i.e. between that which is written and codified in norms and that which is experienced and lived in the factual reality.

Marx has a materialistic conception of material law. What does it mean? First, it means that he does not only support a material conception of law that is opposed to the formal one. That is to say, Marx does not accept any separation between law's production and application, nor between its legislation and execution, nor between norms and facts. But Marx does more than this. He turns law into a result of true democracy as long as it is linked to the notions of self-determination and self-government. The human activity which is at the basis of these two notions allows for an understanding of law as a *practice*: a practice that results from the self-constitution of the subjects that determine and govern themselves.

It is important to note that the law is not itself the practice through which the subjects constitute themselves politically; law is rather a practice that results from the constitutive activity of the subjects that is undertaken in their process of self-determination and self-government. Taken as a practice, law should be an effect and not a cause of human socialization. The critique of law that can be made with the aid of Marx is directed precisely against those approaches that take law as a postulate for social relations. Marx seeks to reverse this logic. For him, the law should not work as an assumption but as a consequence of social relations.

There are thus two claims involved here: First, law should not be taken as a premise of the individuals' constitutive activity (that is, their socialization) but as one of its results. Second, law should be conceived as a practice, and not as a set of norms and institutions. Law should thus be understood as a practice that results from men's activity – an activity which is linked to the constituting process of the subjects and of the community that surrounds them.

Marx allows for a different kind of normativity – a normativity that asserts how things should be, though it is tied not to law itself but to the activity of the subjects. It is a law that asserts a *becoming*, and is bounded not to the norms but to the human practice that constitutes the everyday reality. Hence says Marx:

“This means that the constitution *is* according to law (in illusion), but that it *becomes* according to reality (in truth)”
(1843: 118).

The constitution that *is* according to law is nothing but an illusion; in order to be true, the constitution shall be a *become*, and become according to the reality. In the fragment above, Marx opposes the law as illusion to the law as truth, and the constitution as law to the constitution as reality. In other words, Marx opposes the law as it is to the law as it may come to be.

Before conceptualizing this ‘law of becoming’ or ‘law as it may come to be’ that I call the ‘law as practice’ or a ‘materialistic conception of material law’, let me give a word on some interpretations of Marx’s critique of law. As Althusser reminds us “since on speak of law, one speak of the State” (1994:505). Naturally, Marx’s overall critique of political modernity turns his critique of the State into a critique of the law. One can identify in Marx an effective critical theory of modern law. This theory goes far beyond that which Marxism has explored, that is a mere refusal of bourgeois law, or a mere reflect of capitalist relations or even a simple artifact manipulated by the dominant class. In Marx’s refusal of modern law lies the refusal of the enlightenment principles, and in the refusal of the latter lies an anti-legalism which is evident since his first writings. One shall not forget that in the beginning of his intellectual activity Marx had focused on “the speculative philosophy of law, this abstract and high-flown thought of the modern state” (1844a: 250).

Here is a first definition: the philosophy of law has a speculative form and as such it presents itself as an abstract thought of the modern State (and it is Hegel who obviously incorporates this thought). The philosophy of law is thus the speculative science of the modern State. In *The German Ideology*, Marx reiterates this idea when he states that “law does not have a history of its own” (1846: 170). Law’s history is the history of the modern State.

From such a statement follows that “the privilege is the political expression of the medieval mode of production; the law *tout court* is the expression of the modern mode of production” (1846: 1231). Modern State and law are identified by Marx as a sole movement which for its turn is identified with the movement of the constitution of capitalism. It is thus natural that the law follows the State in its separation from civil society. This is how modern law will be distinguished by the separation between public and private law. This dualism is a sequel to the separation between the State and civil society.

“The establishment of the political state and the dissolution of civil society into independent individuals – whose relation with one another on *law*, just as the relations of men in the system of estates and guilds depended on *privilege* – is accomplished by one and the same act.” (1844: 372).

Yet, as Althusser reminds, the question of the separation of the State cannot be separated from the question of the law. This is why the natural law tradition would have relied over what he classifies as an ‘imposture’, the imposture of having resolved in terms of private law the questions of public law (1994: 428). However, if the separation of the State and civil society leads law to break into public and private, this does not logically imply that the public law should be the law of the State while the private law is the one that belongs to civil society. Nor does it imply that the formal law corresponds to the State’s law and the material law corresponds to the law of civil society. Although these dualisms concerning the law seem to express themselves in such a way, and although the divorce between State and civil society may indeed explain them, the main separation that political modernity imposes on law is that which occurs among its form and its content.

Public law shall not be merely faced as the law of the State, since the latter is in its origin founded in private law – or, as Marx shows in *The German Ideology*, it is born out of the merchant law. Born metaphorically out of a contract and born historically out of a legal relationship developed around an economic object, the property, the State arises as the locus of the Hegelian universal from a private foundation. This is how the supposed imposture that Althusser identifies in the natural law writers who have always tried to derive public law from private law is explained. Indeed, Marx explains that “private right (*Privatrecht*) develops along with private property out of the dissolution of the natural community” (1846:169-170). Along with the end of primitive community the formation of modern State takes place and, with the latter, the institutionalization of property right, of class domination, of the division of labor and of private law.

“Gradually, the dominant relationship has pronounced as a religious relationship and has been transformed in cult, cult of law, cult of the State, etc. Everywhere it was only a question of dogmas and beliefs in dogmas.” (1846: 1053)

State and law are founded reciprocally in one another. One works as a basis for the other that works as its guarantee. This leads to the juridicization of men and their relations. Law becomes mediation between man and himself as far as it constitutes him

as a legal subject. Law is also a mediation among men themselves since the relationships between men are legally expressed through a contractual form. The contract is the illusion that allows men to interact as free and equal subjects. By rejecting this, Marx's critique goes on conceiving law as a form of socialization of the subjects. In other words, law is perceived as a form through which is organized the social bound of bourgeois society, where the individuals are considered egoistic atoms, independent from one another.

Marx critiques law as a social form that is specific to capitalist society, a mediation which is indispensable to the exchange among private producers who are formally equal. Law acts as an instance of mediation among individuals as far as they interact predominantly in terms of the property they possess and the rights that proceed from this possession. The law sanctions and legitimates the encounter of wills which are supposedly free and formally equal through a contractual relationship. This law that presents itself as egalitarian, and the construction of the individual as a legal subject are inseparable from the formation of the modern State – for the latter it does not suffice to work as an external guarantee, enforcing a legal freedom and a legal equality that are generated by the mercantile exchange. The same is true for the centrality of the property right: law works as a means of inhibition to what a man can make to others, it forces them to treat one another as free and equal subjects – but only through one angle, that of a property over another property. The struggle for rights is then one of the stages where the class struggle takes place. The class struggle does not exist separately from the so called rights struggle; it exists through this conflict, and finds its expression by means of that. This is one of the conclusions reached by Marx in *The German Ideology*:

“As far as law is concerned, we with many others have stressed the opposition of communism to law, both political and private, as also in its most general form as the rights of man. See the *Deutsch-Französische Jahrbücher*, where privilege, the special right, is considered as something corresponding to private property inseparable from social classes, and law as something corresponding to the state of competition, of free private property; equally, the rights of man themselves are considered as privilege, and private property as monopoly.” (1846: 1177)

The Law as Practice

What is left of Marx's critique of law? Is it possible to reconstruct law given all of Marx's denials? Marxism leaves us only with the statement of a critique, no valid reconstructions are seriously undertaken. The most sophisticated account of law in Marxism still seems to be that of Pashukanis. However, though claiming for the withering away of the law may sound like an interesting interpretation to conjugate with Marx's claim for the withering away of the State, the argument for the end of law does not provide an account of law itself. Therefore the question remains: what can be done from Marx's critique of law? Or else, what can *still* be done from Marx's critique of law? How can one re-theorize law given Marx's critique of it? And how does this re-theorization might provide one with useful insights to think democracy today?

If true democracy is yet to be realized in a community whose political form supersedes that of the modern State, law would certainly not manifest itself through sovereignty and representation. How then would self-determination and self-government organize themselves if law is not to be simply rejected? One can say that the modern form of law shall be overcome along with the modern form of the State, but how then the social relations would be processed in such a future political community? Marx certainly did not envisage a formal and positive law to remain in his dreamed communist society. Along with the modern State, the legal-form, the legal relations as the exterior form for the social relations, the legal subjects as disguises for men who are not able to affirm themselves only through their humanity and thus need to accumulate rights provide by the State, all these may no longer remain. Also is not to remain the contractual form as a structure for the relations among men and among them and the political, the rights as concessions made by an external entity as needed so men can constitute and recognize themselves as subjects.

What is thus left? When faced positively, Marx's critique of law allows for a strictly materialistic conception of law, the law as practice. Taking the law as a practice means to conceive law as a practice that simultaneously constitutes the subjects and the community itself. This practice shall be understood with the aid of Marx's concepts of activity (*Tätigkeit*) and self-activity (*Selbstbetätigung*). Both of these concepts are developed in *The German Ideology*, where Marx gives an account of how the multiple daily activities of men manifest their productive forces.

“The conditions under which individuals interact with one another [...] are conditions that belong to their individuality and are not external for them, conditions under which these definite individuals, living in definite relationships, can alone produce their material life and what goes with it; these are therefore conditions of their self-activity (*Selbstbetätigung*) and are produced by this self-activity” (Marx, 1846:175).

The individuals should determinate themselves by determining the interactions they maintain with one another, and thus determining the conditions under which they will live their relationships and hence affirm themselves as individuals. These conditions, that derive only from the individuals themselves and cannot derive from any source which is external to them, are simultaneously cause and affect of the self-activity, that is of that activity that constitute the subjects into themselves through an active participation in the social sphere that is constituted by them. It is worth noting that in the same page of the manuscript of *The German Ideology* where lies the above fragment, precisely where he has written the word self-activity (*Selbstbetätigung*), Marx has left a note in the page’s margin where it reads: “production of the form of interaction itself”. The self-activity is thus a development of self-determination; it implies particularly the production, by the individuals, of their own mode of interaction as well as of the conditions that propitiate it and the relationships which are inaugurated thereby. As one of the distinguishing features of true democracy, self-determination thus plays a crucial role in the definition of law as practice that constitute the political subjectivity of men through their own activity.

During his editorial work at the *Rheinische Zeitung*, the young Marx see himself constrained to write a series of articles on law regarding the proceedings of the Rhine Assembly. Among articles on the freedom of press and the divorce bill, there are a couple of articles on a curious case of the law on theft of woods that is worth recalling. Known as the ‘debates on the law on thefts of wood’, this series of articles presents a first definition by Marx regarding what law *should be* which will become more evident in his later writings: “the legal nature of things cannot be regulated according to the law; on the contrary, the law must be regulated according to the legal nature of things” (MECW 1: 227). In other words, the legal form should conform itself to the material conditions which are present in the object (people, commodities or things itself) that is to be regulated, and not the other way round. The reality should not wait for a norm to be transformed; it is the proper nature of things, i.e. reality itself that should constitute the law.

Bearing that in mind, Marx asks the Rhenish jurists “to devote their main attention to the *content of the law*, so that we should not be left in the end with only an empty mask. The form is of no value if it is not the form of the content.” (MECW 1: 261). However, to devote attention to the content of law is a task that must be properly understood. Just like the materialistic perspective of law which arises from Marx does not simply imply an anti-formalism, it cannot also be understood as a blind and inconsequent materialism. Thinking law materially means to conceive it politically, considering its public role and not only its private value. It is that meaning that Marx has in mind when he directs his anger against the Prussian State *Zeitung* whose “*abject materialism* (...) is an immediate consequence of the doctrine which the *Preussische Staats-Zeitung* preaches to the legislator, namely, that in connection with the law concerning wood he should think only of wood and forest and should solve each material problem *in a non-political way*” (MECW 1: 262).

Definitely, this is not the kind of materialism that I claim regarding Marx’s account of law. Marx’s critique of law reveals a tension among form and content that can only be overcome, I believe, when the legal form is absorbed by its content. This idea of absorption of the formal by the material is given by the meaning of the German verb ‘*untergehen*’, which Marx employs in order to indicate the dissolution of the State in true democracy. Formal law is absorbed by material law, it dissolves itself once it is submerged, and thus dissipated in the interior of material law. Hence law is no longer a source of transcendence but of immanence. It shall no longer be conferred and guaranteed by the State and shall then be found and affirmed among men themselves as a result of that activity through which they constitute themselves as political subjects. Therefore law is no longer a form but a content whose permanent dynamicity and self-actualization impedes that it become stabilized, institutionalized or formalized. This is how nowadays one can leave the sphere of liberal formal law or the sphere of a formally material law to argue in favor of a *materialistic material law*, i.e. a law which is constituted in the materiality of the practical life of men by means of the affirmation of the conditions for their existence through their daily activity.

One can now understand what Marx means when he says that in true democracy the constitution is constantly conducted to its real fundament: the people. This permanent re-conduction to the political subject – call him the people, the working class or the proletariat – leads to the self-determination and to the material content of law. Therefore, true democracy is not incompatible with law. It may be incompatible with

ideas such as norm, modern State's law, posed and positivized law, formal law or legal form. Though true democracy is not at all incompatible with a materialistic conception of material law, i.e. law conceived as a result of men self-constituting activity. Now it shall be clearer that this is the difference that holds when one understands, in the one hand, that "in all forms of the state other than democracy, the state, the law, the constitution is dominant, but without really dominating, i.e. without materially penetrating the content of all the non-political spheres", and, in the other hand, that "in a democracy the constitution, the law, i.e. the political state, is itself only a self-determination of the people and a determinate content of the people" (1843: 89).

It is in this sense and in this sense only that one can interpret that, in true democracy, along with the State, the law also withers away. It is not by chance that the verb employed by Marx in the Critique of Hegel Philosophy of the State is '*untergehen*' and not '*aufheben*'. That verb means, among other things, to be absorbed, to be swallowed, and to be dissipated. This is thus how one should understand the argument that the constitution and the law, i.e. the political state, are absorbed by the materiality, by the constitutive practice of men, that is the activity that affirms them as subjects. In other words, what is at stake here is not an argument in favor of an abstract conception of materialism that takes law as merely an ideological expression of social relations. Also, this is not simply an argument against legal formalism, one that relies in the critique of the abstraction it does of the material content of law. What is at stake is, in fact, a conception of law which is based in human experience.

To conceive democracy as human experience, to identify it in the singular and ordinary activities of the common man, this means to locate the political in practices and not in institutions. Law is one of these practices, so far as it exists only as a practice resulting from the constitutive activity of men which is at the same time a practice that constitutes the community where they live. The practice that one should call law is expressed in the activity of each singular man in a direct relation to the activity of all men in the community. The logic here is not one that subordinates the individual to the social, but one that expresses the individual *through* the social and affirms the social through the individual. A true synthesis of the universal and the particular could not subordinate the individuals to the State nor to the private interests that permeate civil society.

As Marx puts it, “the point here is not to substitute the *will* for the *law*, but to *discover* and *formulate* the real law” (1843: 190). And which is the real law if not the true democracy’s law? Again,

“In democracy, man does not exist for the sake of the law, but the law exists for the sake of the man, it is human existence, whereas in other political systems man is a legal existence. This is the fundamental distinguishing feature of democracy.” (Marx, 1843: 88).

True democracy discards forms because it has the human experience as its content. Thus one shall not forget that man not only creates the constitution, he is the constitution itself: “the constitution does not make the people, but the people make the constitution” (1843: 87). This is why in order to democracy to be true man should affirm himself as a *human* existence, and not as a legal existence. And this is why democracy should be conceived as human experience, and not as a set of rules and institutions among which a system of rights for which man has to struggle in order to be included and recognized as a subject. Man shall not be politically conceived as a subject only by the possession of rights that might or might not be conferred on him by the State. When the constitution is the people, the law is the practice of men.

“Democracy is the solution to the *riddle* of every constitution. In it we find the constitution founded on its true ground: *real human beings* and the *real people*; not merely *implicitly* and in essence, but in *existence*, and in reality. The constitution is thus posited as the people’s *own* creation. The constitution is in appearance what it is in reality: the free creation of man.” (Marx, 1843: 87)

A constitution that has ceased to be the real expression of the people has become a practical illusion (1843: 120). When Marx maintains that the people *is* the constitution he supersedes the idea of constitution itself, and along with that the constituted institutions. When the people is in fact the constitution, there is no longer a separation between formal and material law. Marx denaturalizes the idea of constitution; it no longer has a legal meaning. The constitution becomes the constitution of the subjects. Now one can understand the claim I have made in the beginning of this paper: for Marx law presupposes democracy, so there can only be law where first there is true democracy.

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