Law Left Right Behind

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The aim of this paper is to look into the possibility of a distinctive socialist jurisprudence in connection with the recent surge of interest in Marxist ideas on law. Though Marx did not write much on law as such, attention has been paid to what could count as a Marxist theory of law. This, and the rediscovery and re-use of Marxist "classics" on law, has promoted a minor growth area in burgeoning fields of Marxist scholarship, itself a small but increasingly important area of the academic enterprise.

It would be damning with faint praise the progenitor of social revolutions the world over to recall his contribution as being one that has started an academic field. I want to make use of a distinction John Finnis[1] makes when writing of natural law. In discussing the theory of natural law, he says one must be careful to distinguish between the history of natural law theory and a theory of natural law *per se*. This, though it might draw on historical themes and figures, would seek to expound and defend natural law against other opposed theories rather than try to understand various natural law theories in their historical progression. It would be theorizing about what one ought to do in the world rather than constructing a history of all attempts at doing this. In the same way, I do not intend here to look at the history of Marxist scholarship of law, of distinctions missed and not made. Rather, I want to see if there can be a distinctive socialist theory of law and what its objects would be and to see at the same time what the relations are between this and other, opposed understandings of law.

Philosophers up to now, says Marx, have attempted to describe the world. The point is to change it. Marxism, then, denies that there is and ought to be a distinction between evaluation and description. It says that those who claim that they are merely describing the world can be seen as covertly supporting it, while for Marxists, to explain the world must necessarily involve its change. In this sense the act of describing is also that of prescribing. Marxism is thus a normative theory. The central tenet of this sort of tradition of theorizing faces the question of the

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1. J. Finnis, *Natural Law and Natural Rights* (1980).

relation between theory and practice in a rather different form from the empiricist tradition which rests upon a firm fact/value distinction. Practice is guaranteed, not by an internal logic, but by the assumption that, once formulated, theory (knowledge) can be rationally applied. The normative way of looking at things does not accord any special privilege to knowledge as theory, viewing both it and practice as aids in its major project: the creation of a better society. It is this moral judgment that is presupposed in it. In this sense it is an irredeemably political enterprise; emancipatory in that it is about freedom and community and, not seen as logically disconnected, its achievement. We can express its activity well in terms of an image of Nietzsche. We are not to act as those philosophers who look at established values to see that the ideas and theories that have hitherto supported them will not do so. Instead, therefore, of hacking away the last vestiges of these props and transcending the values for constructing new emancipatory ones, they busily scurry about constructing new props to support the old order.[2]

Because of its emancipatory vision it has often seemed to the socialist theorist that, in respect of law, there is not much that can be done but to stay away from it. Any attempt to formulate a politics of law has been dismissed as a distraction from the real business of revolution. The dilemma that mirrors much of thinking here is that of reform versus revolution. Though law might be occasionally a tactical necessity to defend certain advances and progressive gains, its use is by and large counterproductive; so much so that even its tactical use must be looked on with suspicion. Because of this the principal aim of a Marxist jurisprudence must be a programme of demystification — everything else being left well alone. This sort of view, though it has a long and (in Marxist terms) respectable tradition has been castigated by Alan Hunt, in a recent review, as being "a throw-back to the naive radicalism of the conflict theory of the 1960s".[3] What has happened, it seems to me, is that the decline of political hopes after the sixties has meant that many of the 'wild eyed' radicals of that era have become right wing or liberal, with varying degrees of cynicism. Even those who have 'kept the faith' have started talking of legality (albeit of a socialist variety), of 'rights', of 'civil liberties', *etc.* Is this the right way of going about it for socialist theory of law? Is adopting the discourse of rights

2. *Cf.* Nietzsche, *Beyond Good and Evil* (1966).
3. A. Hunt, "Marxist Legal Theory and Legal Positivism" (1983) 46 *Mod. L. Rev.* 236, 243.

a help in explicating and pressing for a socialist vision of society or does it merely transfer that vision into the liberal one it wants to attack? To return to my analogy from Nietzsche: are the rotten props of the established order merely being replaced by new and improved props for that order?

My argument will be that some important efforts to follow Hunt's path in "the development of a socialist theory of rights, of the judicial process and of justice"[4] do just that. That is, rather than having anything distinctively socialist to say, they rework the old liberal ideas. But to say this will not be to deny that there cannot be a distinctive socialist jurisprudence. Nor will I claim that a socialist jurisprudence has no relation to liberal theorizing. For I will argue that there is a common ground for the various jurisprudences if we cast the objects of jurisprudence in general rather more widely than being about law and rights and instead think about them as the construction of morally acceptable societies.

I start then with how attempts to build, following Hunt, a distinctive socialist theory of law and rights fail in that they become either a variation of old liberal theories or trivially true.

For this new "left realism" to work there must be certain preconditions. In the United Kingdom at least, Marxist theorizing has traditionally stood apart from mainstream philosophizing to the extent that both sides have ignored each other, or any attempt at dialogue has simply failed to connect. But in talking of "socialist theory of rights" Hunt implies something more than that the rigorous style of British analytical philosophy be taken up and not hysterically dismissed as bourgeois, but that some of the discourse of liberal theory can be used by radicals without falling into liberal thinking.

Tom Campbell, in a recent book called *The Left and Rights*[5] argues that, though socialists have traditionally eschewed the language of law and rights they can and must use it. For with a slightly different denotation, rights would play an important role both in the ideal society and in the work of bringing it about. Though this sort of theorizing is my target, I do not want to be merely negative and triumphantly proclaim a revolutionary purity. My intention also is to look at what I take to be the core of truth in these theories and point a way forward which, though eschewing the discourse of law as such, can have some common theoretical object with its opponents.

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4. *Ibid.*
5. T. Campbell, *The Left and Rights* (1983).

Campbell starts his argument as follows:

> If the ideals of socialism can be expressed in terms of individual rights then, however different socialist rights may be from those most highly prized by the classical liberals, there is at least a continuity and similarity of thought forms and basic concepts in which major political disagreements can be clarified and debated.[6]

His study aims to examine the grounds upon which some socialists have rejected the concept of rights. Some theories of rights are, he agrees, ideologically tainted with capitalism. Thus socialist attacks on the concept of rights are often only successful because they attack a defective theory of rights which is inadequate even to capture the full range of rights in existing liberal societies. With an adequate theory there need be no inherent contradiction in speaking of socialist rights. The difference between liberal rights and socialist ones is however more than just a matter of content but the change in conceptual formation to make a socialist right analytically possible is a matter of "minor modification". Campbell then, in presenting his variation in the interest theory of rights, attempts not only to save the discourse of rights for socialists, but to make a contribution to the general theory of rights.

Campbell argues that the "socialist revolutionary" opposes rights talk on four main grounds. Firstly, on the grounds that rights are tied to rule-governed behaviour and that "putting ourselves under the governance of rules" is not a way of living in genuine community — "law destroys relationships between autonomous beings". It is a matter, as Tay and Kamenka[7] would put it, of trying to understand society solely as a *gemeinschaft*. Secondly, Campbell claims that rights are seen by the socialist as a juridical concept and, as such, connected with class law and oppression. Thirdly, the revolutionary socialist claims that rights are individualistic; part of a view of society which is asocial and ahistorical. It rests upon an 'atomistic' model of society — men bringing with them pre-existing rights which society is set up to protect. Fourthly and finally, rights, in the opinion of the revolutionary socialist, bring a muddled moral rhetoric instead of revolutionary action. Being the products and not the causes of economic change, attention to them rather than to 'real social action' will be counterproductive. This, he says, involves a denial of the "legalism" argument for it requires us to see rights as primarily moral concepts, ones used in the moral criticism of

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6. *Id.*, 1.
7. E. Kamenka & A. E-S Tay, *Beyond Bourgeois Individualism* (1974); E. Arnold, *Capitalism, Feudalism and Beyond* (1975).

existing social relations in terms of extra legal values, and so, if rights are merely moral claims, the first and second arguments fall. Campbell does not want to do this for, for him, what is distinctive and special in rights talk is best kept if we treat rights in a positivistic manner as those interests which are protected and furthered by law, the question as to what rights people should have being treated as a separate though normative one. To talk of moral rights on this view is to make moral claims for having certain positive rights. All rights then map on to and are the creatures of rules and even those that claim the existence of moral rights map them on to a (suspect) ontology of moral rules or natural law. In this sense then, any socialist who uses "moral rights" talk would be making the same mistake as a liberal and merely using a roundabout way of talking of the principles that are used to justify positive rights. I agree with Campbell when he argues that a socialist need not reject this moralizing discourse. For though Marxists have often rejected this and claimed their theories were "scientific" rather than moral, it seems to me plausible to view Marxism as a theory whose essence is a moral critique of existing social relations. Where I disagree with Campbell is in his claim that, for the socialist, this can be expressed as talk of the rights people have and ought to have in the only place where they analytically can have them; that is, in the positive rules of society.

For Campbell then, rights properly so-called are descriptive of the capacities that people have under positive rules. But putting it in this way seems merely to be saying something that is trivially true and the main argument against the revolutionary socialist would have to be, as Campbell indeed thinks is the case, that law is acceptable in a socialist society. The argument would centre on the coerciveness and the withering away of law. But on this view something very important is missed out from rights discourse as it appears in modern liberal democratic societies. In what follows I shall argue this case and then go on to claim that because Campbell does not want to lose this feature of rights talk, he has to construct a notion of law unacceptable to some socialists.

Rights, then, in liberal society are to be viewed, as they are by Ronald Dworkin,[8] as political trumps against certain sorts of rules and policies. They do not have their origin necessarily in rules but in the values, standards and practices of a society from which can be rationally constructed a political theory which describes these rights. This is also known as the side constraint

8. R. Dworkin, *Taking Rights Seriously* (2nd impression 1978).

view of rights; that is, that rights are an absolute bar to certain policies and methods of organizing society. This way of looking at it implies that rights are the building blocks of society, the stepping stones around which the waters of normal organization wash. Rights are incommensurable in that, when they intersect, they are not applied in an all or nothing fashion as are rules, but rather they are balanced. The crucial metaphor to use, according to Dworkin, is that of weight. Rights are anti-utilitarian in the sense that determinations stem from them because of the right and not the consequences. They are essentially individualistic, pertaining to the individual against collectivist policy and therefore contingent rules. On this view one can easily see why a socalist would attack rights. Campbell's rebuttal is as follows:

> In fact, the chronic opposition between rights and utility features only when issues of formal justice arise in the application of right-conferring rules. In the application of rules, including right-conferring rules, the formally just decision is one which takes into account only the relevant rules and is unaffected by considerations of the social consequences of the particular decision being made. In this respect rights are inseparable from formal justice and are opposed to utility as a criterion of judicial decision-making. To this extent 'taking rights seriously' does involve rights overriding utility; anything else would be to abandon the practice of rule-governed organisation. But the idea that utility is in itself necessarily inadequate for the determination of what rights there ought to be, so that rights and utility are at this level fundamentally opposed, is profoundly misleading. The mistaken idea that rights present a veto on purely utilitarian reasoning in the processes of justifying societal rules may have something to do with socalist reservations about rights which sometimes appear to protect the vested interests of favoured individuals and classes to the clear detriment of the welfare of society at large. But when the utilitarian criterion is applied, as it can be, to the choice of material rights then conflict between rights and utility is neither inevitable nor incorrigible.[9]

This quotation illustrates well the two strands of Campbell's argument. Firstly, it ties rights to rules in the way that we noted above so as to make the argument depend upon what sort of rules will be necessary in socialist society (an argument about formal rules and justice). But at the level of justification, rights are not necessarily opposed to utilitarianism and are not instances of selfish self-preservation. This seems to adopt the "utilitarianism of rights" approach in which rights are 'balanced' and adopted in a way that the "side constraint" view would deny; that is, by utilitarian and consequentialist reasons. But where, when everything seems to have been dissolved in a utilitarian stew, does that leave special discourse of rights? It is interesting to note that

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9. Note 5 *supra*, 124-125.

one way in which supporters of the theory get round this fact is to hold that some rights will still be side constraints.[10]

It is because of such considerations that Paul Hirst in "Law and Socialism and Rights"[11] attacks the notion of rights. He argues that the attempt to solve the problem of divergent interest in terms of rights "can only lead to impossible contradictions"[12] because they assume that:

> institutions or laws are conceived as the expression or recognition of certain prior or privileged attributes of subjects...deriving from their nature or essence.[13]

Thus, to attempt to settle rival claims based on conflicting interests, for instance as between a pregnant woman and her potential child over a putative abortion, is to generate useless ontological arguments about the 'rights' of the two claimants. According to Campbell, this is only the case when looking at moral rights where those ontological problems do occur. It would not, however, be the case when looking at the positive rights that (he) Campbell is looking at. But this only evades the argument. For though it may be the case that positive rules locate the right, this can only be so when the rules are clear and straightforward and there are no "hard cases". Unless this is true you have, if you are to retain some meaning to the concept of rights rather than bury it completely in policy and consequentialist arguments, to have, as Hirst claims, some reference to a prior ontological order. Otherwise the concept is the true but trivial one of capacity under the rules. To give the concept of rights some real meaning you cannot make "minor modifications" that deprive it of any bite and this is what Campbell has done. Alan Hunt shows the difficulties that this leads to.[14] He takes issue with the view of rights as merely capacities given by the law as trivially true and not useful. This is because when using this concept in socialist societies, rights such as the right to opposition would just contingently depend upon positive law and these would not meet the sort of protections that are to be accorded in socialist countries:

> In developing a theory of rights it is necessary to make use of a concept of rights which explicitly spans both their legal form, as specifically created powers and capacities assigned to legal agents, and their character as

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10. See N. MacCormick, *Legal Right and Social Democracy* (1982) Ch.4.
11. P. Hirst, "Law and Socialism and Rights" in P. Carlen and M. Collison (eds), *Radical Issues in Criminology* (1980).
12. *Id.*, 95.
13. *Ibid.*
14. A. Hunt, "The Politics of Law and Justice" (1981) 4 *Politics and Power* 3.

> expressions of particular social policy objectives. Thus we can distinguish between 'legal rights' and 'socio-political rights', but while insisting that this distinction embodies a continuity rather than a stark legal/non-legal boundary. Thus 'legal rights' designate not only the capacities created but also the policy objectives embodied in legislative form....
> Outside the sphere of actual legal regulation 'social rights' express social policy objectives and differentiate rights from mere claims, in that the appeal to rights facilitates the articulation of coherent grounds for the policy objective in terms of related socio-political conceptions. The existence of social rights is therefore not dependent on the content of legal provision; they are advanced as claims on the legal system and/or on other agencies of decision.[15]

But what this is saying is that for rights to 'bite' and have any real meaning they must be put inside that liberal discourse that Campbell, with his "minor modification" appears to reject. The socialist Hunt actually wants liberal rights.

Finally, Campbell's view does not really get away from an ontological individualism. His interest theory, where the criterion is "concern" or "being interested in", gives a systematization of some powerful intuitions to do with membership of the class of possible rights bearers.

> The requirement that right-bearers satisfy the condition of conative consciousness is broad enough to encompass nearly all human beings who are biologically alive and gives us some sort of guideline to apply to such borderline cases as animals (the 'higher' animals clearly being included as potential right-bearers), human 'vegetables' (who may be defined as lacking consciousness and therefore as not having rights, and human foeti at various stages of development).[16]

The ontological difficulties here are well illustrated by Vinit Haksar.[17]

The individualism here being opposed by Campbell is "the greedy selfish" individual of Hobbes. Campbell, however, makes it plain that though his rights will be there to enable the individual to develop and care, they will still pertain to individuals. In this way he implicitly agrees with the liberal individualist position that a state or society is to be seen as the collection of individuals composing it. This can also be seen when he justifies the law's granting of rights to such entities as corporations on the grounds that ultimately they can be analysed as the rights of individual sentient beings.[18]

What I have been arguing so far is that the "minor modifications" that Campbell makes to fit the concept of rights

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15. *Id.*, 16-17.
16. Note 5 *supra*, 99-100.
17. V. Haksar, *Equality Liberty and Perfectionism* (1979).
18. *Id.*, 98.

into a socialist discourse fail. He either makes rights discourse lack the bite that it has in liberal democratic societies and so makes it of no use for socialists like Hunt, who want this bite introduced into socialist society, or he produces a concept of rights that is trivially true and transposes the argument to one concerning the place of rules in socialist society. It is to these arguments that I now turn. In this context I will look at the arguments of Campbell and Hirst who, though he argues against Campbell concerning the possibility of socialist rights discourse, agrees with him about the possibility of a socialist legal discourse.

Campbell starts off by looking at the rule of law doctrine that government ought to be through general rules and not by the arbitrary decision of individuals. Because the powers of government can be abused, they are restricted to the laying down of general and universal rules by which they are also bound. It is within this framework that power is exercised:

> But given the stress on the control of the abuse of power by political authorities, presupposing as it does both the existence of political power and the tendency of those holding power to use it for their own ends, the socialist may feel that the safeguards of the rule of law will be unnecessary in a socialist society in which there would be either no government or, if there were a government, one which is in the hands of genuinely altruistic and trustworthy people to whom it would be reasonable to give discretionary powers which they could exercise for the common good in overriding or ignoring any societal rules that there happen to be. We cannot, therefore, take a view on the importance which the socialist would attach to the rule of law until we have determined whether a socialist society would require binding rules and political authority.[19]

Both Campbell and Hirst think that the term law can apply to any set of rules but both, as I shall argue, settle upon a particular set of rules (universal and relatively constant rules which can be seen as, in general, determining all instances) as the paradigm of law. It is here that the problems for a socialist discourse of "law" arise.

For Campbell it has to be these sort of rules because basically he thinks rules are necessary because of a version of the rule of law position. Also, in this way the notion of rights is given some bite in that it applies to this framework of universal rules which govern arbitrary power and contingent choice. But it is here where further problems arise. For, if we do not believe in an essentialist theory of language where each rule contains within it straightforwardly all the instances that may come up, then we must rely on adjudicators who can make rational and universal determinations.

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19. Note 5 *supra*, 38.

If we did not, then the whole point of the system would be lost. The way that this had been standardly done is by adopting some theory of purposive legal reasoning. This, recognising that the meaning of statutes is to an extent conventional, looks to purposes, intentions and consequences in order to arrive at non-arbitrary particular determinations. But this subverts the idea of a prescriptive general rule because it implies that, when deciding upon the application of a rule, one has to determine whether the aims of the rule and the legal order in general will be served by the particular application. This will always be a judgement of instrumental rationality and thus the notion of a prescriptive general rule fails because each act of norm application is also to some extent an act of norm determination. Each general rule is remade each time it is applied. Attempts to get round this by entrenching only push the problem one level further back, if agreement can be reached on what should be entrenched. Arguing that this analysis only applies to hard cases or that the constraints of formal justice — treat like cases alike — provide a solution do not work either. The problem is recreated around what is the definition of a hard case — one man's hard case is another's easy one — or what it is for one event to be "like" another.

Now although all this is logically true, it is quite plain that we do get determinations which seem consistent, rational and universal. How can this be? If we look at accounts of legal reasoning, then the form that both seems to work and be morally satisfactory is, as N. MacCormick admits in his influential book *Legal Reasoning and Legal Theory*,[20] one that closely resembles Popper's scientific method. Here the ultimate guarantee is that hypotheses are acceptable to the scientific community. In like manner, guarantee for legal reasoning is that the hypotheses are acceptable to the community of lawyers. The whole procedure works because there is a legal cohort who work and staff it and who ultimately accept the same very broad value patterns. In this sense "government of law and not men" becomes the rule of some men and the attempt to solve the problem of arbitrary power by general rules fails because it relies on a small group of men for the non-abitrary status of determinations from rules. Thus the problem is recreated. It is in this sense that law is a problem for the socialist, since under the guise of a disinterested rule-bound solution to the problems of order and freedom, it gives us one that necessarily relies on the dominance of a particular caste of

20. N. MacCormick, *Legal Reasoning and Legal Theory* (1978).

people.[21] Campbell's arguments about whether the law is coercive are in my view irrelevant.

I now turn to the arguments of Paul Hirst who, though wanting a socialist legal discourse, wants to distance himself both from the liberal and Campbell's 'revolutionary socialist'. Does he achieve this? For one who is cast as a revolutionary by Campbell, he has remarkable liberal tendencies:

> The 'state' always entails a set of differentiated agencies, with capacities to dispose of resources and make decisions in respect of spheres of activity: it therefore entails a regulatory instance. *Socialist states, by increasing the scope and variety of state agencies and functions, accentuate rather than reduce the need for an effective framework of public law to regulate the 'public' domain and its relations with other agents.*[22]

This seems to recreate the liberal argument for the rule of law. However, there is something different also:

> It is not the *presence* of this framework that is at issue but the forms of its effectivity in defining and regulating agents' capacities. This, as we have seen, cannot be attained by merely promulgating rules; it is a matter of constructing organizations with the appropriate capacities, of practices of inspection and review, and of mass commitment to the decisions following from those practices. This cannot be attained merely by creating a legal instance; it is a question of the whole form of the socialist state and of the organized competence of its members. Equally, without certain specific definitive and regulatory institutions this whole form cannot be designed and fixed. It is not a matter of 'legality' but of the work courts and legislative bodies do.[23]

This begins to sound different from standard liberal arguments. But is it? In the first place, he can be read as saying that mere following of formal rules is not enough and the content is also important. But it is the argument of such liberals as Fuller in *The Morality of Law*[24] not that the formal legality will always produce correct moral systems but that it will be a powerful restraining influence, and adherence to rules of formal legality would rule out some systems. Thus, *pace* Hirst, it is a moot point whether there was formal legality in Nazi Germany. There was regulation, to be sure, but it is not clear whether this added up to legality. The fact that everything was done under some rule does not mean that legality is being adhered to. It is difficult to call something a rule, in the legal sense, if it can change, for example, not publicly but at the private whim of an all-powerful leader.

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21. For a fuller argument see Z. Bankowski and D. Nelken, "Discretion as a Social Problem" in M. Adler and S. Asquith (eds), *Discretion and Welfare* (1981).
22. Note 11 *supra*, 77-78.
23. *Id.*, 88.
24. L.L. Fuller, *The Morality of Law* (1964).

Hirst could also be read as denying that it is formal rules that are being talked about, but rather institutions and institutional practices — "the work courts...do".[25] But how does he define what courts and agencies do? "[They enforce the] rules of procedure and limits to action."[26] In respect of social policy 'the work' is to provide:

> mechanisms whereby persons detained or undergoing treatment can obtain a review of their position according to definite formal grounds and conditions of admission.
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> ...Equally necessary is the need to limit and review the powers and actions of 'mass' or communal organizations; there can be no free range for 'comrade's courts', co-operatives' committees, etc.... Again, access to tribunals on the part of individuals and capacities to oversee communal institutions by review bodies are a condition of protection of opposition and difference.
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> ...Involuntary commitment of individuals to therapy, the taking of children into care, etc., ought to be no less subject to judicial decision than it is in advanced capitalist countries.[27]

We can see, then, that 'what the courts do' is, autonomously from the agencies that they must inhibit, apply general norms in such a way that they achieve the practical purpose of inhibition. It appears that Hirst makes the same sort of mistakes as Campbell does over rights. In defining law in his functional way he seems to encompass all rules and so makes it trivially true that all societies have them. Thus some of his arguments about the framework of public law sound very much like the Hartian argument for the logical necessity for some secondary rules. These agencies are "institutional facts" and the rules that constitute and describe them are logically prior. In the same way, though it is true that legality does not necessarily achieve a true morality, it is a gross misunderstanding to say that because something is done under a rule then that implies legality. It then becomes the trivial but true point that all action can be placed under some universalizable rule even if the rule reads: do your own thing in your own time. This way of looking at it completely misses the bite that the discourse of law has, especially in the rule of law doctrine. But this discourse, which Hirst does stray into, to get the bite he wants, presents an outcome rather different from its aims. Thus, as I showed when discussing Campbell's view of law, the rule of law and not men becomes the rule of a few men.

Hirst, however, also gives signs that he accepts this outcome and that, far from being a problem, this could lead to a socialist

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25. Note 11 *supra*, 88.
26. *Ibid.*
27. *Id.*, 93.

solution. He rightly says that classical Marxism has refused to talk of organization because, to its cost, it has refused this sort of question autonomy, preferring to concentrate on the 'economic instance' and the basic relations of production and class struggle. He goes on to talk of G.D.H. Coles who, in *Guild Socialism Re-stated*,[28] put forward a theory of what he called "functional democracy". This was based on associations where suffrage was based upon activity and members would be assigned to various collaborative bodies to pursue the business of the various associations' mutual collaboration. The problem with this, Hirst points out, is that they are too *ad hoc* and not definitively founded. One way of solving this would be to bring in a set of formal rules but Hirst implies that it is not just a matter of applying formal rules:

> This cannot be received merely by enunciating a doctrine of the 'separation of powers'; legislative bodies may indeed need to inquire more closely into administrative activities than the conventions of such doctrines would envisage. The second condition is that those bodies have the capacity to deal with complex administrative and organizational problems by means of rules in a way that is both practical and directed toward the political objective of securing against abuses. Regulation cannot therefore consist either simply in general 'norms' applicable to all citizens. . . .[29]

Who is to be on these institutions? Hirst attacks what has been the traditional Marxist solution, that is popular democracy. He takes a hard and cogent look at some of the theoretical and conceptual problems associated with ideas of 'democracy'. What is important for our purposes is to note that he does not see democracy as an absolute value but merely as a mechanism for providing personnel for institutions. For him, then, the 'collaborative institutions' that constitute the framework of public law are more than the Colean version in that they are autonomous, independent, fixed institutions which can be seen as constituting the institutional framework of social life. The effectiveness of these institutions comes from both that and their commitment and rationality. They are staffed not just by the criterion of democracy but by fitness and expertise. That expertise seems, in part at least, to be legal as we traditionally know it, for Hirst never gets away from the disinterested handling of social rules. But this ends up where, as we have shown, the liberal theory of "government of law and not men" logically ends up: in the government of a few men who have the expertise. It could be argued that Hirst takes the liberal view to its logical conclusion and does not flinch in accepting it. In a

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28. G.D.H. Coles, *Guild Socialism Re-stated* (1920).
29. Note 11 *supra*, 82.

world, then, where there are all sorts of agencies, experts and people with the possibility of abusing their power, that possibility is controlled by another group of experts, lawyers or their functional equivalents. They become the scientific organisers and guarantors of social life. Freedom and autonomy are to be had with their protection but they are 'off limits'.

What I have done in this paper is to show that law and right discourse is liberal and that any "minor modification" to make it fit into a socialist discourse either loses all the point of right and law talk as it appears in modern liberal democratic societies or makes it, at best, trivially true. Does that mean socialists cannot, as Hunt and others deny, share no common discourse with liberals? My final point is to argue that there is a mutual discourse that can be shared, perhaps with profit. The general object which I think that all sides are touching upon is that of regulation and organization, looking at which ways of living together are morally and practically possible for the socialist, this being seen in the normative context of a free and autonomous society. Put in a general way, the object seems to be the problem of reconciling the seemingly opposed concepts of freedom and order. But is this a true dichotomy? Is it possible to transcend this dichotomy?

Hirst is surely right when he says that too many revolutionaries concentrate upon freedom rather than order. This, as in the case of the egotistical anarchist, can easily lead to the unfreedom of chaos. The classical liberal solution was to concentrate upon order. When that was achieved, democratically or otherwise, freedom was achieved by leaving everything well alone, including the sacrosanct order. This can lead to the unfreedom of full-blown market economy theory. For Hirst, the order is sacrosanct as being the framework of our freedom but freedom at the lower level is not left to take care of itself and libertarian organization at this level is encouraged, all this being ultimately guaranteed by those who are expert in controlling the abuses of others.

What is not countenanced is the freedom to organize the framework of social life. By this I do not mean the freedom to do this once and for all and then leave well alone, but the recognition that the creation of order is not something that we do and then go about the business of living our lives. Rather our lives cannot be separated in this way from the business of organizing them. Our daily activity presupposes and is part of the organization of our lives. In this way the freedom to create a free order is not something that ever ends; rather, it is a continuous and ongoing activity. We do not do it in order to live, that is what living is about.

How is this to be done? Hirst attacks those who view socialism as the self-emancipation of the working class. There is truth in this but self-emancipation must be part of what socialism stands for. In this sense it behoves us to study what people have done when they have struggled for the freedom to create free order. In this way, then, one can view some of the discourse on law as the liberalized version of a revolutionary and emancipatory tradition which has not wholly died out.[30]

Whatever the ways that one goes about this, it seems to be that what people like Hirst have done is put on the agenda for a Marxist jurisprudence what ought to be on the agenda for any jurisprudence, namely how are we to attain community and at the same time dispose of the problems of order and freedom? This involves looking carefully at problems of organization and not leaving them to be solved by the revolution. Our visions of that free community might be different but there is no doubt that we all want to attain it.

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30. Note 14 *supra*.