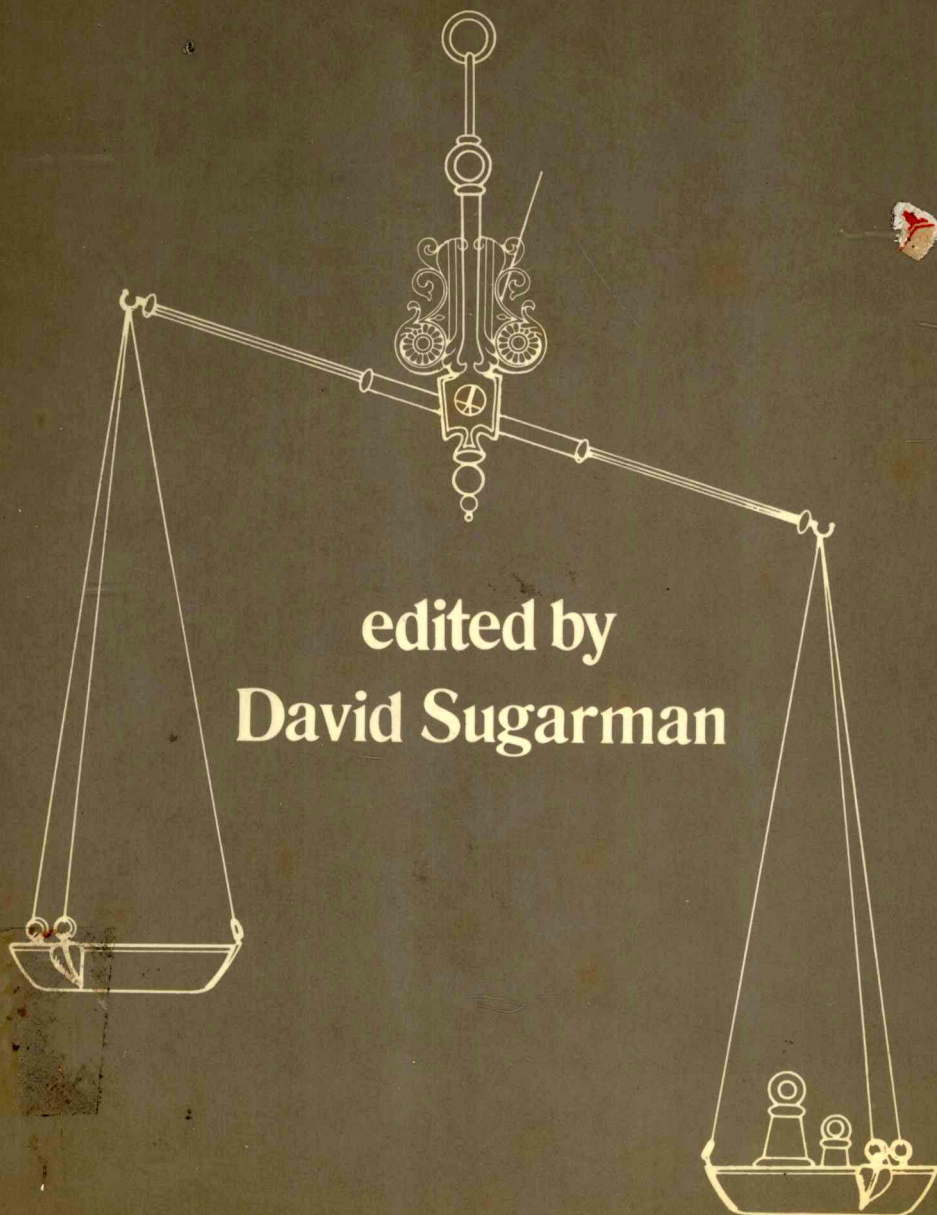


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Legality, Ideology and The State



edited by
David Sugarman

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and
The State*

Edited by

DAVID SUGARMAN

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Preface

It is often asserted that the systematic exploration of the linkages between law, economy and society is a relatively recent phenomenon in Britain. Although such a view is oversimplistic, it is undoubtedly true that until the last decade, with few exceptions, the relation between law and other aspects of the socio-economic order was either ignored or treated in a relatively unproblematic manner.

Since the 1960's, however, the development of critical criminology, law in context, the social history of crime and punishment, and the emergence of the sociology of law as a discrete discipline have all served to emphasize the importance of the inter-relation between law, economy and society within the social sciences and allied areas. This, in turn, has spawned a host of new courses and a rich and diverse literature which to a significant extent cuts across the boundaries separating traditionally defined subject areas.

One aspect of the recent renaissance in the sociology of law has been an understandable concern to excavate the sociology of law that has developed in a variety of directions since the eighteenth century. In particular, the work of Marx, Weber and, to a lesser extent, Durkheim on law, economy and society have been afforded increasing attention. Useful summaries of or extracts from many of the classic texts now exist. Moreover, considerable energy has been expended on the grounding of analysis in classic writers or texts.

This collection seeks to provide students and teachers with a *different* set of resources. It explores the relationship between law, economy, ideology and the state both historically and theoretically from a variety of perspectives. Each essay provides an introduction and guide to the work of a major twentieth century theorist or a body of literature which, whilst important in furthering our understanding of the linkages between law, economy, ideology and the state, has been relatively neglected until very recently.

In addition to this expository aim, each essay includes a re-appraisal of a

particular literature or an aspect of a theorist's work. Indeed, the development of new theories, the conceptual clarification of major questions, arguments for different priorities and attempts to provide new answers are also to be found in this collection. As a whole, then, the collection is Janus-like. On the one hand, it looks back and re-appraises the intellectual products of earlier analyses. On the other hand, it looks forward and seeks to introduce new questions and to formulate new arguments, theories or priorities.

A brief explanation concerning the use of the term 'legality' in the title of this collection may be in order. 'Legality' rather than 'law' appears in the title because a major theme underlying several of the essays is the complex co-existence of a variety of systems for ordering and organizing in society of which the state legal order is but one instance. Now we are not the first to emphasize that the state has no monopoly over ordering and organization in society. In preparing this book, however, we have tried to pay greater attention to the consequences of this thesis for both historical and theoretical work than perhaps has tended to be the case to-date. Thus as a whole, the focus of the collection is wider than the state law order; it also examines the place of ordering and organization in the analysis of social networks and Third World or socialist contexts.

It is hoped that this book will contribute towards the growing body of work which seeks to transcend 'left idealism' and to foster a lively and richer history and sociology of law.

It is also hoped that it will prove of value to students and teachers in schools of social science, law, history, and social work, and will be of interest to all those concerned about the relationship between law, economy and society. In order to aid further reading, each chapter is appended by an annotated bibliography.

May 1983

David Sugarman

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1 *Introduction and Overview*

David Sugarman

The essays in this collection cover a wide range of historical and theoretical material. As a whole, the collection is concerned with the theme of legality, ideology, and the state. The majority of papers were written especially for this collection and are here published for the first time. Whilst they may seem superficially disparate and are not the work of a specific 'group' or 'school', there are linkages between and convergencies within them.

Much Marxist and other socialist writing on legality, ideology and the state has traditionally tended to succumb to what has been called 'left idealism'. By 'left idealism', following Young (1979), I mean the tendency of the left not to take liberal and conservative theory seriously. Law is reduced to a wholly dependent variable, a superstructure merely reflecting a capitalist-economic base; a brutalizing coercive injunction from above; simply an ideology in the sense of 'a trick' or false consciousness. Real political advance is equated with the withering away of law and the state. In its most extreme form left idealism subscribes to the "... wholesale dismissal of *all* laws and *all* police and sometimes . . . the soppy notion that all crime is some kind of displaced revolutionary activity". In this latter form it "... is unable to distinguish the factory from the prison, education from brainwashing, the anti-social from the social, fascism from democracy" (Young, 1979, pp. 12-13 and 16).

In recent years there has been an increasing awareness on the left that left idealism must be transcended and that the role of law and state in capitalist societies is both complex and contradictory. In one sense the essays in this anthology spring from this new sensitivity, and seek to build upon some of the important work that it has fostered. Not surprisingly, economic and political events have played an important part in the left's repudiation of overly-functional accounts of law, state and society. The ruthless tenacity of fascist

regimes and the horrors of Stalinism and other Eastern bloc oppression have heightened the need to limit the exercise of ordering and organization in society by means of the law and processes of democratic accountability. Less visibly, hard won rights and practices are being eroded by increasingly powerful corporate organizations (private and public) and the growth of new technologies sanctioned in the name of progress and cost-effectiveness. However, the need to treat the problems of ordering and organization more seriously has taken on an immediate urgency in view of the run down of vital public services and the right-wing authoritarianism of the Thatcher and Reagan administrations in Britain and the United States. The rapid deterioration of the world economic climate has made it impossible for governments to hide the fact that economic growth, the *sine qua non* of post-war Western governments, can no longer be guaranteed.

Together, the essays in this collection posit a variety of ways by which the theory and politics of the left may be advanced beyond the traditional left idealist conceptions of legality, ideology and the state. Two common themes can be detected in the essays as a whole. Firstly, it is recognized that, both theoretically and politically, law and state in capitalist societies are complex, double-edged and deeply fissured institutions. Law, society, economy, state and ideology cannot be treated as static, undifferentiated monoliths. Instead, they constitute heterogeneous entities, whose external and internal relations are characterized by continuity *and* discontinuity, function *and* disfunction, mediation, refraction and reinforcement. This renders problematic the relation between law, state, economy and society. Thus the essays by Bankowski, Fitzpatrick, Ignatieff, Sugarman and Warrington all, in different ways, demonstrate the plurality of ordering and organization in society; that the state and the state legal order has no monopoly over ordering and organization; and the complex semi-autonomous co-existence of sometimes competing, sometimes complementing, state law, semi-state law and indigenous norms.

A second common theme grounds several of the papers in this collection. A signal error of left idealism is its failure to take seriously the form and content of the law both during and after the transition to a socialist society. This is part of a wider absence in the theory and politics of the left. The actual properties of a socialist society and the nature, form and scope of ordering and organization in that society has tended to be given short shrift. Not surprisingly therefore, it could be argued that: "... at the very centre of Marxist theory there is, indeed, a void: the nature of the 'classless' society ... What is missing is any developed analytical treatment of the distribution of power and the division of labour that could match the attainment of 'classlessness' in an advanced industrial society." (Downes and Rock, 1979, p. 15)

Notions about the withering away of law and state have done much to foreclose important avenues, sustain political impotence and the pessimism of legal nihilism. Most dangerously of all, perhaps, socialist society and its

institutions are equated with consensus. The essays by Bankowski, Cain and Kinsey in this anthology begin, albeit in different ways, to prepare for what Kinsey calls “. . . a jurisprudence of the ends, uses and limits of legal intervention . . .” both during and after the transition to socialism. They recognize that socialist society requires ordering and organization; and, therefore, the analysis of socialist legality is vital in order to evaluate norms, practices and institutions, now and in the future.

It is important to stress that this position accepts both the importance of the Rule of Law in capitalist societies *and* the need to think about the nature, form and content of socialist law, ordering and organization and the politics of their construction, that is to go beyond defending the Rule of Law and posit a more just and practical alternative form of ordering and organization. A brief consideration of some of the major arguments in each essay will clarify the ways these and other related themes are handled.

There was a time when Karl Renner's major work, *The Institutions of Private Law and their Social Function* was regarded by some as the exemplar of a materialist analysis of law. Yet Renner's work on the politics of law and socialism has received scant attention. In recent years it has been passed over, perhaps, in favour of the work of Pashukanis. Indeed, Pashukanis's stress on the relation between the form of law and the economic form of capitalist society could be read as discrediting Renner and as exposing his 'revisionism'. In the first essay in this collection, Richard Kinsey presents a spirited defence of Renner's enterprise. Usually Renner's contribution to a materialist analysis of law has been assessed solely in terms of the efficacy or otherwise of his examination of the changing functions of the legal institution of private property. The novelty of Kinsey's essay derives in part from his claim that Renner's principal virtue was that, unlike Pashukanis, he took the form of socialist law seriously. Kinsey locates Renner's work in the general context of Austro-Marxist theory and politics and describes the relation between this context and Renner's particular conception of socialist legality and the uses of law in the transition to socialism. Renner's views on socialism and the nature of socialist society and the transition between capitalism and socialism are contrasted with those of Marx and the political and theoretical implications of their differences are described and evaluated. Kinsey argues that Renner's work constitutes both a seminal Marxist analysis of law and is of great contemporary relevance. This is because almost alone within an identifiably Marxist tradition, Renner grappled with the role and function of law, ordering and organization in the transition to socialism and the problems of socialism legality. Although Renner failed in his efforts, his importance, argues Kinsey, lies in his attempt to explicate the material possibilities and the desired alternatives to the present. Kinsey criticizes those within conventional social science and on the left who refuse to speculate about possible and alternative forms of ordering and organization. Kinsey's arguments closely accord with other recent valuable work

which underlines the importance of "... creating a set of demands for alternative and socialist arrangements in every area in which the state imposes itself on the citizens of our ... society." (Taylor, 1981, pp. xviii-xix)

Renner's great adversary was the Bolshevik jurist, Evgeny Pashukanis. The current renaissance of Marxist analyses of law, the gradual recovery of the heritage of Bolshevik thought repressed during the Stalinist era and the appearance of a readable English translation of Pashukanis's work have encouraged the rediscovery of Pashukanis's jurisprudence. Why have Pashukanis's ideas met with an often enthusiastic response from the left? First, unlike many Marxist analyses of law, he transcended a simplistic reduction of law to the coercion of the dominant economic class, i.e., he stressed the consensual as well as the coercive nature of law in capitalist societies. Second, he drew an important distinction between the *content* and the *form* of law. The content of the law includes particular case law or legislation, facilitating or prohibiting specific behaviour. This may be distinguished from the form of law, that is, its general structure, its categories, methods and procedures. Radical legal, historical and sociological analyses of law and state have been very largely devoted to explaining which historical causes or motives grounded particular legislation or judicial decisions. In other words, they have largely adopted an instrumentalist method by which to de-code the relation between law, state and economy. One of the flaws of an instrumentalist focus is that it concentrates so much on the particular content of the law that the legal form or structure within which that content was constructed tends to be ignored. The legal system embraces a variety of discrete facets and facilities which need to be differentiated. Pashukanis's work sensitizes us to the important role played by the form of law, in shaping the content of the law over long periods of time. Third, and most controversially, perhaps, Pashukanis discerned a strong, intellectual or structural parallel between the form of law and the economic structure of society. In capitalist society, following Marx's stress on the commodity form of capitalist society, the form of law is seen as the product of commodity relations. In this way, Pashukanis could argue that both the content and form of law were decisively shaped by the economy. Ronnie Warrington's essay provides an exhaustive account of the objects and method of Pashukanis's commodity form theory as well as a detailed critique. Warrington argues that it is Pashukanis's overwhelming theoretical commitment to the withering away of law, rather than his commodity form theory, which is the cornerstone of his jurisprudence. The logic of his position caused him both to overstate the influence of the economic structure on law in capitalist societies and to conclude that only commodity production societies had legal systems. Thus, the form and content of ordering and organization in a socialist society was a non-issue. As Pashukanis's tragic death testifies, the road to socialism requires the conscious articulation of the objects, uses and limits of organization and ordering in a socialist society; that is a conception of socialist legality.

It is widely recognized that Weber's sociology of law ". . . is the most important and substantial contribution to the sociological movement of law." (Hunt, 1978, p. 130). The importance that is rightly attached to Weber's sociology of law and the work and debates it has stimulated does not, of course, necessarily imply a whole-hearted acceptance of his substantive analysis of law nor his methodologies. What is clear, however, is that ". . . Weber provides the central point for theoretical encounter within the tradition of the sociological movement in law. It is through engaging with Weberian sociology of law, that advances are possible both theoretically and in the direction of empirical enquiry" (Hunt, 1978, p. 131). Weber's work on legality and political legitimacy cuts across his exploration of the linkages between economy and law, state and law and domination and law. Roger Cotterrell's paper argues that Weber's conceptual framework for the systematic analysis of the role of law in securing political legitimacy constitutes an essential starting point for an analysis of the ideological importance of law. Weber tackled important questions such as: when can law provide political legitimacy; what were the historical conditions which favoured the particular form of law associated with legal domination; what exactly is the nature of the belief that sustains *law* as the basis of legitimacy under legal domination; and what attributes does law possess which enables it to provide ideological support for political legitimacy? Cotterrell places special stress on Weber's ideal-type of legal domination. Weber argued that the system of political rule in modern society obtains its legitimacy from a system of rationally made legal rules. In modern society, therefore, legality and political legitimacy become almost identical. As Cotterrell points out, in this light, legal domination becomes self-sustaining and mechanical; the rational form of law as opposed to its content or morality becomes paramount for the purposes of political legitimacy. Cotterrell goes on to relate Weber's notions of legality and political legitimacy to his conception of the modern state and formal logical legal rationality. Cotterrell describes both the utility and limits of Weber's analysis. In particular, he points to Weber's failure to examine the conditions under which legal domination may become problematic and the impact of changing class relations on legal domination.

In Weber's work, the law's ideological dimensions become exclusively associated with rationalization and the need for order. Human agency, the importance of political choices, and the tension between order and justice are minimized. As a result, argues Cotterrell, Weber's conceptual framework cannot explain the relevance of law's ideological functions for political action and social change. The existence of competing systems of values and beliefs tends to be smothered by the conceptual structure of Weber's sociology and his ideal-type method. The tension between order and justice, formal vs substantive rationality, is treated as abnormal rather than as endemic. These tensions and