

HISTORY, LABOUR, AND FREEDOM

Themes from Marx

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BASE AND SUPERSTRUCTURE

1. The Marxian claim that the economic structure of society constitutes its 'real basis, on which a legal and political superstructure arises' generates many problems, and in this section I offer a brief overview of my approach to three of them.

The three problems concern the relationship between the economic structure and the legal superstructure only, although analogues of the second and third problems could also be posed with respect to the political superstructure. The solution to the first problem gives rise to the second, and the solution to the second problem gives rise to the third.

To say that the legal superstructure *rises on* the economic base is, I have always presumed, a vivid way of saying that the character of the former is explained by the character of the latter. But a number of critics of Marxism, and notably John Plamenatz,¹ have argued that the Marxist pretension that relations of production (which constitute the economic base) explain superstructural relations of law is necessarily false, since a searching explication of what must be meant, and of what Marx himself meant, by relations of production reveals that, being essentially relations of ownership, they are themselves legal in character. They may therefore not be regarded as non-legal phenomena distinct from and explanatory of legal relations.

We can call that *the problem of legality*. As I have indicated elsewhere,² the problem is that the following four statements generate a logical contradiction, yet each of the first three seems to be asserted by the theory, and the fourth is manifestly true:

1. The economic structure is the sum total of production relations.
2. Production relations are relations of ownership.
3. The economic structure is (explanatory of and therefore)³ distinct from the legal superstructure.

¹ See his *German Marxism*, ch. 2, sect. 1, and *Man and Society*, 279–282.

² 'On Some Criticisms', 127–8, *KMTH* 218.

³ I parenthesize this phrase because its occurrence is not required to generate inconsistency in the quartet of statements.

4. Ownership is a legal relationship.

My solution to the problem of legality is to reject (2), by interpreting 'ownership', 'property' (etc.) in their relevant Marxian uses as denoting not relationships of legal ownership proper, but relationships of *de facto* power. Consider Marx's description of instruments of production which were 'transformed . . . into the property of the direct producers, first of all simply in practice but later also in law'⁴. His formulation implies that, at the first stage, the producer had property in a non-legal sense: Marx must have meant that he first enjoyed over his instruments an effective control structurally analogous to, but unaccompanied by, legal ownership. In the usage I adopted,⁵ the said producer first had the powers which *match* (that is, have the same content as) the relevant legal rights of ownership, but not yet those rights themselves. My solution to the problem of legality was to represent production relations, which are commonly described in the language of ownership and rights, as, in fact, relations of effective control, or powers. That a capitalist owns a particular factory is, strictly speaking, a superstructural fact. That he has effective control over it is the matching economic structural fact. His possession of effective control over it is his ability to dispose of it thus and so, *whatever it may be that confers that ability on him*.

But now the theory of base and superstructure faces a second problem. For in the standard case (when, that is, society, being non-transitional, is law-abiding), it is people's (e.g., the capitalist's) superstructural rights that confer on them their economic powers. And if that is so, then how can the economic structure be said to explain the legal superstructure? The explanation seems to go in the wrong direction, from rights to powers. This second problem, which I shall call *the problem of explanatory direction*, is the apparent inconsistency between these statements:

3. The economic structure is explanatory of (and therefore distinct from)⁶ the legal superstructure.
5. In the standard case, people have the economic-structural powers they do because they have the legal rights they do.

⁴ *Capital*, 933.

⁵ See *KMTH* 219 ff., and also sect. 3 below.

⁶ This phrase appears in parentheses because it is not required to generate the apparent inconsistency between (3) and (5).

My solution to the problem of explanatory direction was given in Chapter 1 above.⁷ The solution denies that there is inconsistency between (3) and (5). It says that, despite (5), (3) may be true, since (5) does not contradict the contention (which, indeed, entails (5)) that, in the standard case, people have the rights they do *because* when they have such rights they consequently have powers matching them. In short, (3) is reconciled with (5) when the explanation ventured in (3) is interpreted as a functional explanation.

But if (3) is interpreted as a functional explanation, then a new problem arises. The new problem is that not all law has pertinent economic effects, from which it seems to follow that the contemplated functional explanation cannot be applied to the whole of the legal superstructure. This third problem, which can be called *the problem of the inapplicability of the explanation*, is the apparent inconsistency between (3) and (6) when (3) is interpreted, as it must be to solve the second problem, as a functional explanation:

6. Not all law serves a function for something economic, so, *a fortiori*⁸, not all law is functionally explained in terms of the economy.

Now the only way that I know how to reconcile (3) and (6) is to deny that all law counts as part of the legal superstructure. It is not plausible to reconcile them by changing the interpretation of (3) and attempting non-functional economic explanations for *all* of the law for which no functional explanation could be ventured. My own preferred solution is to restrict the legal superstructure to those legal ensembles which have an extensive effect on the economy: see Chapter 9 below. The Marxian contention will then be the not at all truistic (and, no doubt, at most only on the whole true) one that, wherever law indeed has such an extensive effect, it is functionally explained with reference to that effect.

The rest of this chapter answers a critic of my treatment of the problem of legality. But my reply to him also affords me an opportunity to clarify my approach to the problem of explanatory direction, since the two problems are closely related.

⁷ See pp. 9–10 above, and see *KMTH*, ch. 8, sects. 3, 4 for further elaboration.

⁸ This is true *a fortiori* because not all function-serving things are explained by the functions they serve: see p. 13 above.

2. In an article entitled 'Can the Base be Distinguished from the Superstructure?' Steven Lukes purports to refute my solution to the problem of legality, and he returns a negative answer to the question he poses. Some people think that his refutation succeeds,⁹ but I think that it fails, and I here offer my reasons for saying so.

In my response to the problem of legality, I undertook a two fold task: first, to present a plausible characterization of relations of production from which legal terms are expunged, and then to argue that relations of production, in the recommended *rechtsfrei* characterization, might reasonably be thought to explain superstructural ownership relations. Lukes is concerned to challenge only the first and relatively 'narrow'¹⁰ part of that exercise, my attempt simply to distinguish between base and superstructure. Accordingly, my obligation here is to defend that distinction and not, except *en passant*, the functional explanation of property law by economics which presupposes it. If that explanation is defensible, then so is the distinction it presupposes, but the converse is not true.

3. The chief instrument of my defence of the distinction between base and superstructure was a distinction between *rights*, in the usual legal sense,¹¹ and *powers*, which were defined as follows:

a man has the power to ϕ if and only if he is able to ϕ , where 'able' is non-normative. 'Able' is used normatively when 'He is not able to ϕ may be true even though he is ϕ -ing, a logical feature of legal and moral uses of 'able'. Where 'able' is non-normative, 'He is ϕ -ing' entails 'He is able to ϕ '.¹²

Notice that to say that a person has a power, in the defined sense, is to say nothing about what confers the power on him, or sustains his exercise of it. The answer to that question could involve brute force, or ideology, or, of course, the law. And in law-abiding society the law will figure prominently in the answer, since 'in law-abiding society men have the powers they do because they have the rights they do'.¹³ But rights and powers even then remain distinct, and one way of seeing the distinction between them is to note that

⁹ See, e.g., John Dunn's review of Miller and Siedentop (eds.), 535.

¹⁰ 'Can the Base be Distinguished?', 104.

¹¹ See *KMTH* 62.

¹² *Ibid.* 220.

¹³ *Ibid.* 232.

the power to ϕ is what you have *in addition* to the right to ϕ when your right to ϕ is effective, and . . . the right to ϕ is what you have *in addition* to the power to ϕ when your power to ϕ is legitimate.¹⁴

Now relations of production involve what people are effectively able to do, legitimately or otherwise. Hence, while to have a right over some productive force is to stand in a superstructural relation of law, to have a power over some productive force is to stand in a basic relation of production. And the claim that base and superstructure are conceptually distinct now resolves itself into the claims that it is logically possible to have a right without the power you have when the right is effective, and to have a power without the right that would make the power legitimate. Thus ineffective rights and illegitimate powers are proofs of the conceptual distinctness of base and superstructure. And though, as I acknowledged, rights are usually effective and powers are usually legitimated, that truth does not erode the conceptual distinction historical materialism requires. The distinction would be intact even if, what is false, there never existed an ineffective right or an illegitimate power.

Powers are usually legitimate because, as I unequivocally said—this was the title of section 4 of chapter 8 of *KMTH*—‘bases need superstructures’: legal protection, a covering of legal norm, is generally indispensable to the enjoyment of economic power. I therefore asserted both the conceptual distinctness of norms and powers and the indispensability, in general, of norms to powers. It follows that I did not regard the proposition that powers generally need norms as a suitable premiss for denying that the two are conceptually distinct. Perhaps I was wrong, and the distinction I defend can indeed be impugned on the basis of the premiss I grant, but to show that one must do more than state and reiterate the said premiss. *My main objection to Lukes’s critique is that it is largely an emphatic statement of what I already amply acknowledged.* He insists on what I grant, and insist on myself, that powers generally need the support of norms, and he does not spell out why I am not entitled to assert that.

Lukes focusses largely on moral norms,¹⁵ rather than on the legal

¹⁴ Ibid. 219.

¹⁵ He thereby fails to ‘focus exclusively’, as he says (‘Can the Base be Distinguished?’ 104) he will, on the base–superstructure relationship, since moral norms are not, so I think, superstructural (see *KMTH* 216), but among the ‘forms of

ones with which chapter 8 of *KMTH* was concerned, but this does not alter the essence of our dispute. Suppose that he is right that moral norms are generally indispensable to basic relations of power. And suppose, too, that the moral norms observed in economic life are less plausibly explained as functional 'for the economy than ownership law is. The conjunction of these claims—and Lukes's case rests on them—does not show that moral norms are conceptually implicated in relations of power. The indispensability of *A* to *B*, and the fact that *A* is not explained by *B*, do not in combination show that *B* cannot be described in *A*-free terms.

I need not differ with Lukes when he says that a

stable system of enablements and constraints, to be effective, requires that I and relevant others are generally motivated by certain kinds of shared (teleological) reasons for acting and not acting,¹⁶

for that is just a version of the indispensability claim. But does it follow that, as Lukes adds, 'these [the reasons] give such enablements and constraints [a] distinctively normative character'? Only, at most, in a trivial and uncontroversial sense. For one might, with a pinch of infelicity, say of an *A* which requires a *B* to be stable that it therefore has a *B*-ish character: a dictatorship to which the support of the Church is indispensable *might* be said to have a religious character (though I would prefer not to say such a thing on merely that basis). But that which the religion stabilizes can certainly be described in religion-free terms. And, similarly, even if powers sustained by norms have in *that* good or bad sense a normative character, we can still separately conceive, in norm-free terms, what the norms are stabilizing, and I need not and do not assert anything stronger.

To achieve clarity in this matter, one must distinguish between a non-normative concept of power, and a concept of non-normative, or non-normatively based, power. I recommend the first concept, not the second, and much of Lukes's critique depends on his having confused the two.

'social consciousness' which Marx mentions in distinction from the superstructure at p. 20 of the Preface to *The Critique of Political Economy*. (Note, moreover, that Marx does not, as Lukes reports (*op. cit.* 103-4), say that forms of social consciousness correspond to the superstructure. That is a (polemically irrelevant) misinterpretation which rests on a misreading of the syntax of the Preface sentences Lukes there quotes.)

¹⁶ 'Can the Base be Distinguished?', 113.

To see that he is subject to this charge, consider pages 115–16 of his article. He there distinguishes between a ‘pure, non-normative relationship of power—say, of simple coercion’, and one which is in some way normatively freighted, because it depends, for example, on the belief that it is morally right to honour agreements: and he then proceeds as though I am committed to the falsehood that all relationships of power are non-normative in his sense. But constructing a non-normative concept of power carries no such commitment. The concept is constructed to cover what Lukesian non-normative and Lukesian normative relationships of power have in common—their being relationships of power. What I call ‘powers’ are not essentially non-normative (in Lukes’s sense of not being supported by norms) but simply not essentially normative, and I have no difficulty in admitting that, in the standard case, ‘norms . . . are what enables’ people to exercise powers.¹⁷ My claim is just that what norms enable are not themselves norms.

In illustration of the point that powers, as I define them, are what mere coercers and benefitters from norms have in common, I said that it is true both of an illegal squatter (whose tenure is secured by, for example, savage dogs whom the legitimate authorities cannot overcome) and a legal landowner that they have the power to use their land and exclude others from it.¹⁸ Lukes objects that, unlike the squatter, the legal landowner can, by virtue of an environment of legal and other norms, do such things as bequeath his property to others. Now it is true that the squatter cannot precisely *bequeath* his land, since bequeathing is an essentially legal activity. But it does not follow, and it is false, that he cannot achieve the effect of bequeathal, by the brute means he favours: he can bring it about that another has over his land the same power he now has over it. And his power to do that complex thing is also enjoyed by the legal landowner, so that Lukes is wrong to conclude that ‘one cannot identify powers . . . embodied in norm-governed economic relationships independently of the norms which . . . govern them’.¹⁹

¹⁷ Ibid. 116.

¹⁸ See *KMTH* 223–4.

¹⁹ ‘Can the Base be Distinguished?’, 116. For further response to Lukes’s criticism see sects. 11, 12 of my ‘Reply to Four Critics’: the foregoing sect. reproduces sect. 10 of that article. And, for a response to a partly Lukes-like criticism of my views on base and superstructure offered by Hugh Collins in his *Marxism and Law*, see my ‘Collins on Base and Superstructure’, *Oxford Journal of Legal Studies* (forthcoming).