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Law, Values and State: The Fundaments of Derivation Theories

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This paper aims to discuss the material determinations of systems of law and values in contemporary societies. Sustained upon a combined analysis of Pashukanis and Althusser, we criticise the positivist theories of Kelsen and Hart due to the emptiness of what these latter postulate as the bedrock of legal systems. Norms are argued, contrarily to what positivist authors defended, to be a secondary aspect of law, essentially characterized by the relations it comprehends between legal subjects, that take place in an economy of production and exchange of value between formally free and equal subjects. Thus, legal subjectivity-form mirrors commodity form, for it is logically necessary for contracts to be celebrated from the will of the parties. Otherwise, the situation would be only of imposition by force. In the last section of the paper, the ideological origin of the will and the values shared among the people is discussed.

Keywords: Marxist theory of law, moral values, state derivation debate, legal subjectivity, ideology

There is no such thing as a neutral system of norms to be understood as a juridical order. Instead, we argue that law is necessarily determined by a material basis on its social and concrete origin. The same premise applies to what we call

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moral values: their meaning can be most profoundly understood by apprehending their derivation from economic structure, constituting the concept of ideology.

First, it must be pointed out that all positivist theories of law, i. e., the legal theory approaches that emphasise the norm as the central (and sometimes, such as in Kelsen, the sole) element of legal systems, lack the fundamental acquaintance of the central constitutive factor of law, which is legal subjectivity. According to Pashukanis, for trade to be possible, it is necessary for its agents, the legal subjects, to be formally free and equal to each other. This artifice, which is brought upon by abstract values such as autonomy, liberty and rights over the self, makes it possible to formally eliminate any disparities of force, power or wealth, conceiving a scenario where a thorough system of equivalence prevails. This standard of interchangeability of things such as items, workforce, time, and ideas—in sum, virtually everything—is called the commodity-form. As it requires the equality of the parts of all trades, as well as the protection of private property and freedom to make the contracts whence the transactions originate, from the commodity-form derives the legal form, the means by which this system gains viability and stability.

Far from it being irrelevant, it is easy to perceive that, when it comes to law and its execution by the State, it is not simply a general fear of sanctions that makes individuals obey the law. Contracts are usually fulfilled and private property is normally respected not as a consequence of the threat of punishment, but due to certain moral consciousness and observance of general principles of conduct. These shared values within capitalist societies are what Althusser called *legal ideology*.

In the Althusserian view, ideology is not a negative mystification of reality that obnubilates the proletariat's worldview, hindering the development of class consciousness. It is rather a positive form, both conscious and unconscious, of the constitution of subjectivity that composes the individual's representation of their relation to social reality. Of course, this notion of positiveness and negativeness is not any sort of moral judgement, but instead a relation with reality itself. Ideology in the classical sense means the inversion of truth, while in the Althusserian vocabulary it means construction of a regimen of truth. Therefore, values posited by ideology are not necessarily lies, and even their truthfullness is not an essential focus of analysis for the social sciences. In lieu, for they are representations, they take place in the field of the collective imaginary of a society and constitute the immaterial means of reproduction of the material mode of production.

Reproduction can be understood as the maintenance of social structure in its essential terms, that is, its economical axioms. Accordingly, ideology—and especially legal ideology—functions as the determinant of a particular kind of human behaviour which allows the system of exchange of commodities to operate in its most fluid possible way, without requiring the active imposition of the law by the State in the majority of cases.

These general statements can be briefly summarised by the idea that under Capitalism, both law and moral values serve the reproduction of mode of production, by implementing a solid and sustainable social order that suits the paradigm of valorization of value, the fundamental rule, the *Grundnorm* of contemporary, Western societies. In the next sections, it shall be made clear how legal positivism lacks a truly scientific understanding of society, due to its refusal to analyse the real determinations of law.

Research Methods

In order to present the starting points for the elaboration of a comprehensive critique, this paper aims to provide a structural, comparative reading of the study of law and morals first made by Pashukanis and Althusser, seen as an important basis for what has been called the State Derivation Debate.

Research and Results

1. The Emptiness of Legal Positivism

In this chapter, we start to discuss the limitations of legal positivism (or, in Romance-speaking countries, *juspositivism*). As shall be clear, the vacuity of a theoretical view whose object is the legal rule results in different attempts to find a groundwork for the normative system, even recurring to elements other than rules themselves. Although the analysis of these authors can be worth more than the ones of the "pure" positivists, we shall demonstrate that they still lack a structural and complete understanding of the complex social relations that result in the legal phenomenon. First, the *Pure Theory of Law* will be the object of our analysis.

1.1. Kelsen's Phantasmagorical *Grundnorm*

The Czech-Austrian legal philosopher Hans Kelsen proposed an original analysis of legal systems, intending to construct a purely scientific theory of law. As he says:

> As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question of what and how the law is, not how it ought to be. It is a science of law (jurisprudence), not legal politics. It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.[1]

This is not, however, an attempt to demean the importance of fields of study such as sociology, history or philosophy of law. They are not undeserving of attention, but simply not the object of a general and pure theory of law which intends to describe objectively and precisely, that is, scientifically, the characteristics of law that can be determined independently from any sources from what *is* (or *ist*, from the verb *sein* (to be)). Instead, Kelsen[2] intended to discuss the dimensions of *ought* (*sollen*) related to the plan of validity of norms.

In short, the validity (different from the effectiveness, which is a *de facto* situation) of a norm depends on the legal competence of its promulgators and the valid form of the promulgation, both given by a superior norm. The immediate reasoning would be an inquiry about the legal nature of the end (or the beginning) of the logical chain. In other words, a simple question would have to be put: which norm confers legitimacy to the whole system? The Kelsenian solution, which might sound disappointing, is that there is no such rule. Actually, the basic norm (*Grundnorm*) must be presupposed by the interpreter, as some sort of legal noumenon. As put by Kelsen:

> The basic norm, therefore, is not the product of free invention. It is not presupposed arbitrarily in the sense that there is a choice between different basic norms when the subjective meaning of a constitution-creating act and the acts created according to

[1] Hans Kelsen, *Pure Theory of Law*, transl. Max Knight (Berkeley; Los Angeles: University of California Press, 1967), 1.

[2] Ibidem, 5–6.

> this constitution are interpreted as their objective meaning. Only if this basic norm, referring to a specific constitution, is presupposed, that is, only if it is presupposed that one ought to behave according to this specific constitution—only then can the subjective meaning of a constitution-creating act and of the acts created according to this constitution be interpreted as their objective meaning, that is, as objectively valid legal norms, and the relationships established by these norms as legal relations.[3]

Even in the cited second edition of his work, in which Kelsen recognizes the fictional character of the basic norm, he does not give up on the Kantian idea of the differentiation between *sein* and *sollen*.[4] Thus, his conceptualization of the pure normative sphere still lacks a connection to reality. The idea of a presupposed norm says nothing about its concrete origins and applicability, whose description would demand a realistic theory of law, of its *sein*, not of its *sollen*. As Solon states: "If [Kelsen] were faithful to [Kant], by removing law from the domain determined by Kant himself of the metaphysics [...], it is possible that he would be even more faithful to Kant by dislocating the theory of law from the domain of 'ought' to that of 'is.' That, he did not have the time to do."[5]

We argue that the transition from *sollen* to *sein* in Western, contemporary theories of law, was first made in a thorough way by Herbert Hart, in his oeuvre *The Concept of Law*. This work shall be discussed in the following session.

1.2. The Hartian Social Rule of Recognition

Subsequently to the publication of the *Pure Theory* by Kelsen, in 1961 the British philosopher Herbert Hart published his main work, *The Concept of Law*. In this book, Hart discusses many of the perplexities yet to be solved by legal theory. We will not be able to address all of the complex issues tackled by him in

[3] Ibidem, 201.

[4] Alysson Leandro Mascaro, *Filosofia do Direito* (Barueri: Atlas, 2022), 300.

[5] Ari Marcelo Solon, *Teoria da soberania como problema da norma jurídica e da decisão* (Porto Alegre: Sergio Fabris, 1997), 118. Our translation.

this paper, for they would take an entire book.[6] Instead, we shall discuss the merits and limitations of his solution to Kelsen's imaginary basic norm.

In order to establish the idea of a basic norm, whose existence does not depend upon an abstract presupposition, but on concrete facts, Hart *presupposes* that, in every legal system, there is a rule of recognition. This is a secondary rule, which means that it refers to other rules, not (at least, not directly) to human behaviours. It solves the uncertainty problem from which the regimes only composed by primary rules suffer, for it offers criteria to determine the validity of all norms in a legal system. In other words, "a 'rule of recognition' [...] will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[7]

The existence of the rule of recognition is, then, what gives an authoritative form of reasoning to distinguish the valid norms of the system. From what we exposed so far, it is in no logical sense different from the Kelsenian *Grundnorm* previously discussed. However, distinguishably from that sort of basic norm, "the existence of such a complex rule of recognition with this hierarchical ordering of distinct criteria is manifested in the general practice of identifying the rules by such criteria."[8] It is, then, an empirical matter of fact, not abstract reasoning, which implies that "no question concerning the validity or invalidity of the generally accepted rule of recognition as distinct from the factual question of its existence can arise."[9]

If so, how is it possible to specify the rule of recognition in various societies? Hart says that the accepted rule of this kind has different shapes in diverse legal systems, not being possible to reduce it into one universal and permanent content. Since it is a concrete social practice which consists of a convergence of patterns of obedience and legal reasoning among the citizens, its content ultimately depends on shared values and beliefs—at least the ones regarding obedience to the rule of recognition. It is unlikely that, in modern societies, there would be no form of confluence of thought about which criteria should be used in order to precise the

[6] For that sake, I recommend Neil MacCormick, *H. L. A. Hart* (Stanford: Stanford University Press, 2008).

[7] Herbert L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 94.

[8] Ibidem, 101.

[9] Ibidem, 293.

validity of norms, and yet that criteria be unconsciously used. And this is where the most concrete (since it is structural) form of *jusphilosophical* reasoning takes place to explain the very foundations of modern legal systems.

2. Legal Structure and Subjectivity: Law and State Derivation

Prior to our analysis of the convergence of values that compose the inter-subjective founding of the rule of recognition, it is necessary to define precisely, far from the abstract plane of validity, the material determinations of legal systems, for they also determine the values which sustain them. The moment is thus come to discuss the concrete social relations that construct law, not the other way around.

The emptiness of the *Grundnorm* and the indeterminateness of the recognition rule lead us to the endeavour of discovering what is the ultimate determination of law. This can be found, as it was by Pashukanis, in the material relations which compose the concrete aspect of contracts. Pachukanis can be considered the most important predecessor of what is nowadays called the State derivation debate (*Staatsableitungsdebatte*). The purpose of the following analysis is to emphasise the theoretical roots of the theories emerging from that debate as coming from that Soviet author.

As we have seen, the legal positivist theories, especially Kelsen and his followers emphasise the norms as being the central aspect of legal systems. In opposition, Pashukanis describes his project as follows: "as a Marxist, I did not set myself the task of constructing a theory of pure jurisprudence, nor could I set myself such a task". In lieu, he intended "to present a sociological interpretation of the legal form and of the specific categories which express it."[10] He argues that it is a normative formalist fetishism to try to affirm the law, whose existence *a priori* is only literary, over the concrete manifestation of social relations guaranteed by the norms.[11] Instead, the "state authority introduces clarity and stability into the structure of law, but does not create the premises for it, which

[10] Evgeny B. Pashukanis, *The general theory of law & Marxism*, transl. Barbara Einhorn (New Brunswick, NJ: Transaction Publishers, 2002), 107.

[11] Ibidem, 87.

are rooted in the material relations of production,"[12] for the organisation of law in abstract norms is a posterior historical moment to the lawsuit, that is, the resolution of conflicts of interest deriving from material relations. At that moment, it was impossible even to "discern the purely legal factor, let alone to express it in a system of general concept."[13]

Thus, social relations are historically preexistent to law and norms. There is also a logical preexistence, in the sense that the material relations themselves enact the creation of law, taking the form of permission given to private autonomy. Therefore "by starting out from the concept of the norm, [the theory] can produce no result other than lifeless formal constructs with ineradicable internal contradictions. Law as a function ceases to be law, while legal [permission] without the supporting private interest becomes something intangible and abstract which can easily turn into its own opposite, that is, into obligation."[14]

Within the field of possibilities determined by private autonomy, the juridical relations of exchange take place between subjects able to acquire private property. "The subject is the atom of legal theory, its simplest, irreducible element,"[15] such as the commodity is the atom of capitalism, defined by Marx[16] as a gigantic collection of commodities. Under capitalism, the legal form not only mirrors, but also *derives* from the commodity-form. It is logically necessary, in the system of exchange of items, for there to be a subject to operate those commercial interactions. In the same way, for a complex system of trade to develop, a system of protection for private property and of guarantee of observance of contracts must be introduced, providing predictability, that is, reducing the risk of business operations. Both are conducted by law, now in an abstract and universal form. The abstraction of man as a legal subject and of law as a general norm are both results of the fully developed bourgeois relations.[17]

With the emergence of legal dispositions that determine subjective rights, the abstraction of *legal subjectivity*. The legal subject is the individual "raised to the

[12] Ibidem, 94.

[13] Ibidem, 95.

[14] Ibidem, 106.

[15] Ibidem, 109.

[16] Karl Marx, *O Capital: Crítica da economia política: Livro I: O processo de produção do capital*, transl. Rubens Enderle (São Paulo: Boitempo, 2017), 113.

[17] Pashukanis, *The general theory*, 120–121.

heavens"[18] by an abstraction posited by the immaterial force of a juridical subjective field of rights. Its concrete existence takes place at the moment the subject operates the exchange of commodities, where the capacities are exercised within the material field of economic interactions. "The act of exchange concentrates, as in a focal point, the elements most crucial both to political economy and to law."[19]

Thus, in the same sense that value of use becomes value of exchange, individual persons become legal subjects. Both are materially derived from the commercial circulation of items, which logically requires—and then, to become concrete, determines—both free and autonomous subjects of rights that can potentially own and dispose of the private property of commodities.[20] For the contracts not to be a mere imposition of force, such as in other modes of production, it is thus necessary to have the subjects involved in exchange relations being free and equal to each other.

Of course, this possibility of owning property is merely formal. In fact, the concrete acquisition of property and capital depends on the existence of "propertyless individuals," whose labour's surplus is exploited in order to generate profit. It is not impossible to sustain this contradiction: "The legal form of property is not at all incompatible with the fact of the expropriation of a large number of citizens, for the capacity to be a legal subject is a purely formal capacity. It qualifies all people as being equally 'eligible for property', but in no way makes property-owners of them."[21]

The system of exchange and class oppression, though not executed by it, is still guaranteed by a centralised instance of coercion, that is, the modern State. Its existence comes from the necessity of a third, independent entity from the private interests in commodity commerce. Differently from what a narrow reading of Marx and Engels would suggest, the State is therefore not simply a platform of execution of the bourgeois interests, but instead an apparatus of reproduction of the capitalist mode of production itself.[22] "There arises, besides direct, un-

[18] Ibidem, 121.

[19] Ibidem.

[20] Ibidem, 125.

[21] Ibidem, 127.

[22] Alexandre de Lima Castro Tranjan, "O Estado como forma política da esquizofrenia capitalista: Uma leitura de Mascaro a partir de Deleuze e Guattari," in: *Res Severa Verum Gaudium* 6, no. 2 (2022): 84.

mediated class rule, indirect, reflected rule in the shape of official state power as a distinct authority, detached from society."[23] Under the ideological cover of neutrality, it works for the bourgeoisie, not in the sense that it necessarily operates directly for its benefit in every single sense and public action (although it is a common situation), but by keeping the system of class domination and exploitation working well. This process benefits the bourgeoisie as a class, although it can indeed go against particular bourgeois interests, especially those that could, in short or long term, oppose the perfect reproduction of the relations of production. As Pashukanis states, this process

> [C]an be traced back to a single principle, according to which neither of two people exchanging in the market can regulate the exchange relation unilaterally; rather this requires a third party who personifies the reciprocal guarantees which the owners of commodities mutually agree to as proprietors, and hence promulgates the regulations governing transactions between commodity owners.[24]

The clearest example of coordinated reproduction of capitalism is also a central aspect of its characterization as a mode of production distinct from all the preceding ones—such as feudalism and slavery, in Europe. It is the exploitation of a free and waged workforce. By constituting every person as a legal subject, it is possible to exploit labour power through formally equanimous contracts, not direct physical coercion, such as a slave. This operation brings some advantages related to the risk reduction of productive endeavours: the labour power becomes easily and cheaply replaceable, as it is not acquired but hired. Also, the ideological constitution of the subject, brought in legal subjectivity in itself, supplemented by what we shall describe in advance as the ideological State apparatus, makes the system more stable and less prone to rebellions, as the exploited and oppressed workers see themselves as free agents that work for a fair wage.[25] That is the reason why the working class is "free" in two different senses: (i) the labour relations are not directly coercive and (ii) they are freed by the means of production, since detached, deterritorialized from them as the "so-called primitive accumulation"

[23] Pashukanis, *The general theory*, 138.

[24] Ibidem, 149.

[25] Alysson Leandro Mascaro, *Estado e forma política* (São Paulo: Boitempo, 2013), 18–21.

took place in very concrete historical circumstances[26]—and, as we can state, it continues to happen. Think about the continuous expansion of capitalism towards new lands, new markets, even new planets as the bourgeoisie is now trying to launch space missions. Deleuze and Guattari affirm on this topic that the axiomatic of capitalism is directly related to the movement of deterritorialization[27], as in the geographical expansion in search of new markets and assets. We should not, therefore, think that the "primitive accumulation" was a determinable historical event, but instead that it has been the continuous global dynamic of capitalism since its origins.

The truly essential characteristic of capitalism, in its deterritorializing axiomatic, is the commodity-form, as already discussed here and many other authors. What is not always perceived, however, is that the commodity-form is not merely the determination of items by a value of exchange, but the characterization of the workers themselves as owners of their bodies defined as commodities, that they sell under no direct coercion. This is the core of the material determination of legal subjectivity in general, as it is needed to make this process of sale of workforce possible.

The intention of this functionalist analysis of capitalism is to provide a conceptual framework of the structural form of its operation. Empirical historical research is indeed its necessary supplement,[28] and it shows that the derivation of law and the State form functioned in a varied, contradictory way: at the same time, in a dialectical movement, capitalism imposed changes in the structure and the content of the political form, for the States depended of the material;[29] and States and legal systems offered the conditions of stability and predictability, protecting private property and the contracts,[30] as well as insti-

[26] Karl Marx, *O Capital*, chapter XXIV.

[27] Gilles Deleuze, Félix Guattari, *O Anti-Édipo: Capitalismo e esquizofrenia I*, transl. Luiz B. Orlandi (São Paulo: Editora 34, 2011), 51–66.

[28] Camilo Onoda Caldas, *A teoria da derivação do Estado e do direito* (São Paulo: Contracorrente, 2021), 162–167.

[29] Ibidem, 244–245.

[30] Heide Gerstenberger, *Die subjektlose Gewalt: Theorie der Entstehung bürgerlicher Staatsgewalt* (Münster: Westfälisches Dampfboot, 2006), 520–521; Max Weber, *Economia e sociedade: Volume 2: Fundamentos da sociologia compreensiva*, transl. Regis Barbosa, Karen Elsabe Barbosa (Brasília: Editora Universidade de Brasília, 1999), 70.

tutionalised the required legal subjectivity, the State itself being a legal subject,[31] for the exchange to function.[32]

Having understood the determination of law by the described process, it is now our task to explore how legal subjectivity is also a mode of subjectivity in *stricto sensu*, that is, a mode of thinking and being that constitutes individuals as subjects, in the domain of their representation of the relations they develop with the social structure where they live. It is time to discuss legal ideology.

3. Legal Ideology and Moral Values

Legal systems, as we perceived, cannot be understood in a fetishised way, which would mean its consideration as a purely normative, independent instance.[33] The same occurs with moral values: they only have meaning within a social structure that specifies the object of that pattern of evaluation of actions.

The most consolidated metaethical theory in western capitalist societies is the Kantian categorical imperative, which reflects no more than an elegant theoretical framework attending to the necessity of a moral supplement to consolidate legal subjectivity into a value. Its function is to determine a moral obligation strictly limited to rational and individualistic interests, not organic or emotional, for they blur the limits of the subject as a legal atom.[34]

Ethics, under capitalism, is therefore a field where the participants in commodity exchange society recognize each other as legal subjects, for it is a prerequisite to exchange.[35] Its function, imbricated with the roles of the law and the State, is to serve superstructural means of reproduction of capitalism. "One must, therefore, bear in mind that morality, law and the state are forms of bourgeois society."[36]

It would be naive, however, to think about morals as simply determined by material relations, without understanding how they are produced. If it is easy to

[31] Ibidem, 49.
[32] Caldas, *A teoria da derivação*, 172–175.
[33] Pashukanis, *The general theory*, 154–155.
[34] Ibidem, 155.
[35] Ibidem, 161–162.
[36] Ibidem, 160.

determine the historical facticity of the construction of the modern State around the reproduction of the growing capitalism, the task of explaining how moral values are ideologically constructed requires a specific analysis.

Louis Althusser was the thinker that conceived ideological production in concrete terms. As opposed to a simplistic view of ideology as a mystification of the masses, the Algerian author conceptualised it as a positive mode of constitution of subjectivity.

According to him, ideology can be understood as a system of representations of the relations between the subjects and the social structure where they conduct their lives.[37] It is not, however, simply a way that individuals represent, each one in their own way, their ideas about society. Instead, ideology is a mode of composition of subjectivity that is materially and structurally determined. From the left to the far right, different modes of conceiving social reality are all consolidated on the terms of the dominant ideology. The political struggle practically never escapes from these material determinations: militants from all over the political spectrum debate tirelessly about giving more or fewer labour rights, more or less individual liberties, public insurance, gay marriage, and so on. Although we shall not disregard the immediate positive impacts of individual and social rights, we must point that what is never mainstream, for it is not propagated in the means of communication and impregnated in the unconscious by the ideological institutions, is the discussion about the roots of different systems of oppression that determine, through varied cleavages, a general pattern of class oppression, that is, capitalism. As we might conclude from the preceding section, subjective rights, being contents that fill the form of legal subjectivity, are no more than a quantitative increase in quality of life within capitalism, not reaching a qualitative difference made possible by overcoming the productive relations.

The reason for the ubiquity of the terms of capitalism in political public discourse is the fact that dominant ideology is unconsciously impregnated in our reasoning. Moreover, it is what determines the scope of thought itself, for it is what constitutes the unconscious from the very first moments of life. Althusser says that individuals are interpellated by ideology even before their birth, since they often have already a name to be called by, a gender in the patterns of which

[37] Louis Althusser, *Por Marx*, transl. Maria Leonor F. R. Loureiro (Campinas: Editora Unicamp, 2015), 192.

to fit in, a family to teach their manners, and so on. Ideology can thus be called eternal, for it is a necessary superstructural aspect of the constituency of individuals, in the same sense as the Freudian unconscious, existing in every kind of social structure, but in the same sense being a social form with no history. This "historylessness" is characteristic of it since it derives, through different social instances, from material relations of power and wealth.[38]

About those instances, the context of familial relations we mentioned already offers us a glimpse of the ways that ideology is disseminated and consolidated. The platforms on which the ideological system of representation is reproduced are multiple institutions, such as in the microphysical dynamic of power. But, contrary to what Foucault described as power, ideology has a material, *policentralized* instance of reproduction, which is the State —in a broader sense than simply public legal persons, it is the nexus of devices of maintenance and expansion of capitalism.[39] This multiplicity of organised institutions is denominated by Althusser as the *Ideological State Apparatuses*. These include, but are not limited to, the school system, families, religion, politics, news and media, publishing, culture,[40] and, as we may think in the 21st century, the internet, the social networks and their algorithms.

Althusser notices that in spite of ideas being usually called 'immaterial,' the existence of ideology is necessarily material, due to its reproduction within those apparatuses. As he states:

> [I]deas' by no means have, as the ideology of ideas tends to suggest, an ideal, idea-dependent [ideal, ideelle], or spiritual existence; they have a material existence. It would take too long to provide a general demonstration of that here. We can, however, verify it in the case of the Ideological State Apparatuses, if we are granted the following proposition, which is itself very general. Ideology does not exist in the 'world of ideas' conceived as a 'spiritual world.' Ideology exists in institutions and the practices specific to them.[41]

[38] Louis Althusser, *On the Reproduction of Capitalism: Three Reading Strategies*, transl. G. M. Goshgarian (London: Verso Books, 2014), 255.

[39] Mascaro, *Filosofia do Direito*, 494.

[40] Althusser, *On the Reproduction of Capitalism*, 75–76.

[41] Ibidem, 156.

By describing the non-exhaustive list of those ideological instances, it can be made clear what their function is. They act to reproduce capitalism, in the sense that they forge individuals into legal subjects, law-abiding and commodity-desiring workers. The ideological apparatus complements the repressive one, and this is understood as the potentially violent, classically understood organisation of the State (in a strict sense) and its police, army and so on. The understanding of the repressive apparatus is relatively simple: "Constraint implies sanction; sanction implies repression, and therefore, necessarily, an apparatus of repression. This apparatus exists in the Repressive State Apparatus in the narrow sense. It is called courts, fines, prisons, and the various detachments [corps] of the police. It is by virtue of this that law is inseparably bound up with the state [fait corps avec l'Etat]."[42]

Repression, as Pashukanis elucidated by explaining the function of the State, works to guarantee the supreme legal values of capitalism, which can in short be described as private property and contracts. It is easy to perceive, however, that the presence of the repressive apparatus is not always necessary to ensure the observance of the terms of the contracts. 'Decent people,' one might say, do not need a policeman watching for them to be 'decent'. Althusser finds the cause of this in a new concept he creates:

> It is legal ideology, and also moral ideology, which serves legal ideology as a 'supplement.' The vast majority of legal persons observe the terms of the contracts they sign, and they do indeed do so without the intervention of, and even without preventive threats from, the specialized repressive state apparatus. They do so because they are 'steeped' in 'the decency' of 'legal ideology,' which inscribes itself in their behaviour of respect for law and, in the proper sense, enables law to 'function'— enables, that is, legal practice to 'go all by itself,' without the help of repression or threats.[43]

This conceptualization of legal ideology is not a mystification, a process of making people believe in immaterial values that are not traced in material reality. Instead, legal ideology means strictly the same thing as "legal principles," now seen under a critical light. Legal ideology constitutes legal systems, functioning as a basis (*Grund*) at the same time of justification and effectuation, since it

[42] Ibidem, 65–66.

[43] Ibidem, 67.

determines the behaviour of the individuals through the coinage of their unconscious. This determination, as Althusser states, occur in the sense that:

> Law says: individuals are legal persons, legally free, equal and bound to honour their obligations as legal persons. In other words, law does not leave the domain of law: it brings everything back to law, 'honestly.' It should not be reproached for this: it honestly plies its 'trade' as law. Legal ideology, for its part, utters a discourse that is apparently similar, but in fact altogether different. It says: men are free and equal by nature. Thus, in legal ideology, it is 'nature,' not law, which 'founds' the freedom and equality of 'men' (not of legal persons). That is a little different... There remains, obviously, obligation. Legal ideology does not say that men are bound to honour their obligations by 'nature.' It needs a little supplement on this point— very precisely, a little moral supplement. This means that legal ideology can stand upright only if it leans on the moral ideology of 'Conscience' and 'Duty' for support.[44]

With those statements, Althusser brought up that the juridical form is intertwined with an ideological, moral form, which constitutes subjectivities in a specific way, that is, the respect for the most important social values, those being the respect for private autonomy and property. We do not say that they are the most important ones for any intrinsic worth. Of course, it is possible for more noble values to be nourished in the minds and the theories of some thinkers. But they only can be so described as they transcend the ideological substrate in which all of us are raised, and it can only be made by putting into question and critiquing the entire structure of social life, in order to transform it fully. As Althusser says, "until humanity has reached this level of historical development. Until the heritage of the capitalist epoch has been transcended, the efforts of theoretical elaboration will only anticipate this coming liberation, but cannot embody it in practice."[45]

Back into the discussion of legal ideology, it is noticeable that the two modes of domination and guaranteeing the capitalist order are bio- and psychopolitical. The first, by disciplining the bodies of the individuals into repressive and patterning social rituals of imposition of discipline. The latter, by constituting modes of representation of social relations, and by consolidating values that

[44] Althusser, *On the Reproduction of Capitalism*, 67–68.

[45] Ibidem, 158.

reinforce those relations. In the same sense as Pashukanis, the Algerian author states that "the fundamental concepts of ethics lose their significance if considered in isolation from commodity-producing society, and if one attempts to apply them to any other social structure."[46] In the case of capitalist societies, the core of moral values can be nowhere else than in the exchange of property of commodities between formally free and equal subjects:

> If the moral personality is nothing but the subject in commodity-producing society, then the moral law must be manifested in the regulation of intercourse between commodity owners. This inevitably endows the moral law with a dualistic character. On the one hand this law must be a social law and must therefore stand above the individual personality; on the other hand, the owner of commodities is by nature the bearer of a freedom (of the freedom, that is, to appropriate and to alienate), which is why the rule governing transactions between commodity owners must penetrate the soul of every commodity owner, must be his inner law.[47]

This must be enough for establishing an outline for a comprehensive critique of capitalist morals.

IV. Discussion and Conclusions

In this paper, we discussed the material determinations of legal and moral systems in capitalist societies. We conclude our analysis by recapitulating the terms of Pashukanis, that the State, morals and law are forms of capitalism. They are not simply a direct imposition of the immediate necessities of the bourgeoisie, but derived instances that serve to guarantee the reproduction of the system as a whole. Law does not consistently enact the demands of some rich people that control the parliament, and the State is not merely a platform of business for the owners of modes of production. Also, morals are not simply the will of the bourgeoisie. They all are semi-independent instances that serve to assure a stable and profitable mode of production, in order to ensure its continuity, in a dialectical, complex dynamic permeated by the constant possibility of crisis.

[46] Ibidem, 155.
[47] Ibidem, 154.

The rule of law and the State cannot be understood without bearing in mind the function of reproduction of capitalism, but the theory should not, however, be carried out in a formalist, *a priori* sense. What many authors in the State Derivation Debate pointed out is exactly the necessity of conducting this analysis in empirical, contingent and specific terms. It does not mean, however, that historically contingent facts have more importance than the global outline of the forms of capitalism. They are mutually complementary, for the former are the contents that fill the shape of the latter.

Bibliography

Althusser, Louis. *On the Reproduction of Capitalism: Three Reading Strategies*. Transl. G. M. Goshgarian. London: Verso Books, 2014.

Althusser, Louis. *Por Marx*. Transl. Maria Leonor F. R. Loureiro. Campinas: Editora Unicamp, 2015.

Caldas, Camilo Onoda. *A teoria da derivação do Estado e do direito*. São Paulo: Contracorrente, 2021.

Deleuze, Gilles; Guattari, Félix. *O Anti-Édipo: Capitalismo e esquizofrenia I*. Transl. Luiz B. Orlandi. São Paulo: Editora 34, 2011.

Gerstenberger, Heide. *Die subjektlose Gewalt: Theorie der Entstehung bürgerlicher Staatsgewalt*. Münster: Westfälisches Dampfboot, 2006.

Hart, Herbert L. A. *The Concept of Law*. Oxford: Oxford University Press, 1961.

Kelsen, Hans. *Pure Theory of Law*. Transl. Max Knight. Berkeley; Los Angeles: University of California Press, 1967.

Maccormick, Neil. *H. L. A. Hart*. Stanford: Stanford University Press, 2008.

Marx, Karl. *O Capital: Crítica da economia política: Livro I: O processo de produção do capital*. Transl. Rubens Enderle. São Paulo: Boitempo, 2017.

Mascaro, Alysson Leandro. *Estado e forma política*. São Paulo: Boitempo, 2013.

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Mascaro, Alysson Leandro. *Filosofia do Direito*. Barueri: Atlas, 2022.

Pashukanis, Evgeny. *The general theory of law & Marxism*. Transl. Barbara Einhorn. New Brunswick, NJ: Transaction Publishers, 2002.

Solon, Ari Marcelo. *Teoria da soberania como problema da norma jurídica e da decisão*. Porto Alegre: Sergio Fabris, 1997.

Tranjan, Alexandre de Lima Castro. "O Estado como forma política da esquizofrenia capitalista: Uma leitura de Mascaro a partir de Deleuze e Guattari." In: *Res Severa Verum Gaudium* 6, no. 2 (2022): 73–96.

Weber, Max. *Economia e sociedade: Volume 2: Fundamentos da sociologia compreensiva*. Transl. Regis Barbosa, Karen Elsabe Barbosa. Brasília: Editora Universidade de Brasília, 1999.

Streszczenie

Prawo, wartości i państwo: fundamenty teorii derywacyjnych

Celem artykułu jest omówienie materialnych uwarunkowań systemów prawa i wartości we współczesnych społeczeństwach. Opierając się na połączonej analizie Pashukanisa i Althussera, krytykujemy pozytywistyczne teorie Kelsena i Harta ze względu na jałowość tego, co ci ostatni postulują jako podstawę systemów prawnych. Wbrew temu, czego bronili pozytywistyczni autorzy, twierdzimy, że normy są drugorzędnym aspektem prawa, charakteryzującym się przede wszystkim relacjami, jakie zawiera ono między podmiotami prawnymi, które zachodzą w gospodarce produkcji i wymiany wartości między formalnie wolnymi i równymi podmiotami. W ten sposób prawna podmiotowość-forma odzwierciedla formę towarową, ponieważ jest logicznie konieczne, aby umowy były celebrowane z woli stron. W przeciwnym razie sytuacja miałaby charakter jedynie narzucania siłą. W ostatniej części pracy omówiono ideologiczne pochodzenie woli i wartości podzielanych przez ludzi.

Słowa kluczowe: marksistowska teoria prawa, wartości moralne, debata o derywacji państwa, podmiotowość prawna; ideologia

Zusammenfassung

Recht, Werte und Staat: Die Grundlagen der Ableitungstheorien

Ziel des Artikels ist es, die materiellen Bedingungen von Rechtssystemen und Werten in zeitgenössischen Gesellschaften zu diskutieren. Indem ich mich auf die Analysen von Pashukani und Althusser stütze, kritisiere ich die positivistischen Theorien von Kelsen und

Hart wegen der Sterilität dessen, was die letztgenannten Autoren als Grundlagen von Rechtssystemen postulieren. Im Gegensatz zu dem, was die positivistischen Autoren verteidigt haben, behaupte ich, dass Normen ein sekundärer Aspekt des Rechts sind, der vor allem durch die Beziehungen gekennzeichnet ist, die es zwischen Rechtssubjekten herstellt, die in der Ökonomie der Produktion und dem Austausch von Werten zwischen formal freien und gleichen Subjekten entstehen. Auf diese Weise spiegelt die Rechtspersönlichkeit die Form der Waren wider, da es logisch erforderlich ist, dass Verträge nach dem Willen der Parteien geschlossen werden. Andernfalls wäre es nur eine Situation der Auferlegung von Gewalt. Im letzten Teil des Artikels bespreche ich den ideologischen Ursprung des Willens und der von den Menschen anerkannten Werte.

Schlüsselwörter: Marxistische Rechtstheorie, moralische Werte, Debatte um staatliche Herleitung, rechtliche Subjektivität, Ideologie

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