

‘Exploring Legal Theory – Postgraduate Projects in the Making’

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Juridification and Social Transformation: Law as Sword, as Shield and as Fetter

The question “can law be emancipatory?” is poorly constructed insofar as it is suggestive of legal mechanisms acting as an externality upon a discrete social object. In reality, the legal is such a fundamental and intrinsic mode of operation and appearance of contemporary capitalist society that it is an error to conceive of the legal system in abstraction. Capitalist society can no more operate without law than a combustion engine can without oil, while to ask a contemporary person to abandon their legalistic illusions is to demand them to give up a condition which requires illusions. However, this is completely different from imagining that *society* cannot operate without law. Such a contention can only be founded on an analysis which fails to ground itself in the historical context of law’s material development and which will, as a result, produce little more than empty scholastic generalisations.

There are further problems with our question regarding the emancipatory or progressive character of law, not least in that answering it requires the specification of a particular temporal and subjective frame of reference. In other words, we must ask two further questions: progressive for whom, and; progressive in relation to what? The legal system might only be said to be emancipatory *as such* if its operation facilitated the progressive liberation of the entirety of the social spectrum, something that in capitalist society, where the population is severed into opposing classes acting in egoistic self-interest, would be a considerable feat. Moreover, the idea that the rule of law is inherently progressive makes little sense when severed from historically grounded processes of social development and transformation. For instance, while it may be argued that law had a progressive role to play in facilitating the transition from feudal to capitalist society and thereby unleashing the productive potential latent in the social body, the legal form might equally become an impediment to progress in the event of a transition from the capitalist mode of production to a socialist form of economic and political organisation. Law cannot be understood in abstraction from the state of development of the relations of production in a given society. The balance of class forces and the resultant orientation of the state’s ideological and coercive apparatuses is also of central importance, such that in different social and historical contexts the legal system might operate (or be operationalised) in a manner that is thoroughly progressive (indeed, even revolutionary), or rather deeply reactionary. In light of these preliminary remarks, this paper will attempt to thematise the relationship of the legal form to broader processes of social transformation through the invocation of three figures, those of the *sword*, the *shield* and the *fetter*. It is essential to note in this connexion that the functions represented by these figures are neither clearly delineated nor mutually exclusive – rather, they presuppose and interpenetrate one another. All three figures are always present in the operation of the legal system, though at different social and historical conjunctures one or other is brought more sharply into focus and tends to predominate.

This paper aims to contribute to a broader project on the relationship between law and legal machinery and the strategic action of a revolutionary political agent – under capitalism, the working class. Two questions are pressing in this regard: how law can be used as a strategic resource as part of a broader project of social and political emancipation, and; whether and to what extent law helps to create and valorise subjectivities which cut across and disable the formation of effective agency founded upon economically determined communities of interest. Developing a firm conceptual grasp upon the relationship between the legal system and the underlying social relations of production is an essential prerequisite to progress in this course of investigation.