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Challenging the Rule of Law Universalism: Why Marxist Legal Thought Still Matters

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Abstract

The primary aim of this article is to present the rule of law universalism as a relevant theoretical and socio-political issue that critical legal thought needs to contend with. In order to do so, this issue is described through a Marxist theoretical framework, which aids in identifying the consequences of this universalism. Furthermore, the Marxist theoretical framework is suggested as a countermeasure that allows for going beyond it. The rule of law universalism is analysed as a process connected to establishing hegemony and status quo that affects both the way the law is thought of and practiced. The post-communist context serves in fleshing out some of these consequences. Although the transition is not the main subject of inquiry, it is a starting point to a set of philosophical questions directed towards the rule of law universalism, mainly regarding historical embeddedness and socio-political dependency of the rule of law. The transitional context illustrates the tension between the rule of law treated as a generalized blueprint and the reality it is introduced to. The method of approach to this tension argued for in this paper is Marxian theorization of concept as an interplay between concrete and abstract that underlies historical materialism. This movement within concept is juxtaposed to the universalism. The philosophical investigations are followed by findings from Marxist legal theory that pinpoint the importance of concrete interventions into the legal theory that abate its ever-growing abstractness. In particular, the import of knowledges and practices divorced from the capitalist system is brought into focus. The paper concludes with a brief assessment of the possibility of overturning the rule of law universalism and a discussion on the emancipatory potential of law.

Keywords The rule of law · Marxist legal theory · Historical materialism · Universalism · Post-communist transition

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Introduction

From a Marxist perspective, the rule of law is a difficult matter to deal with. The rule of law ideal functions, in the first place, as a key concept of the well-established, more traditionally and liberally inclined legal theory. At the same time, it is nowadays a subject of intense debates as to its nature and possible imports that extend far beyond the legal thought. It also heavily affects not only the very existence and operations of the legal sphere, but also our perceptions of the democracy and the state. This multi-layered effects of the rule of law, involving legal, social, political, and economical spheres, result in a theoretical confusion—as Peerenboom indicates in reference to the possibility of a consolidation of the 'rule of law studies': 'It is time to give up the quest for a consensus definition or conception of rule of law and to accept that it is used by many different actors in different ways for different purposes' (2009, p. 7).

Thus, approaching Marxist perspective on the rule of law is both well-justified because of the scope of its effects and somehow muddled by the trajectory of the Marxist legal thought. Ever since the reception of Pashukanis' seminal work *The General Theory of Law and Marxism* (2002), the discussion has been dominated by the ideology approach to law (Knox 2009; Parfitt 2019). Current debates and scholarship however tend towards further explorations of the ideological function of law and of other functions of the legal structure. The Marxist legal thinking is a dynamically developing and diverse field that draws both on scant Marxian theorizations of the law and engagement with hegemonic as well as critical modes of thinking about the law. The present article is an effort at supplementing these debates on the ideological function of the law by analysing a specific problem: the rule of law universalism.

Fortunately for the aim of this article, the rule of law and its theoretical and practical importance has been a subject to critical inquiries from both within and without legal theory. A cursory recapitulation of these debates is a necessary starting point since as the aforementioned Peerenboom and other legal theorists point out the term became vague and associated with other key concepts, such as democracy and constitutionalism (Krygier 2016; May 2019), even going so far as to deem it a 'logo-*cliché*'. This process involves however more than theoretical discussions as it affects the practical reality of policy making and international relations to an extent that the rule of law permeates that area of practice (Mattei and Nader 2008). It is no small matter as the practical reality constitutes a necessary counterpart to the theoretical one within Marxist framework. These processes—of establishing theoretical and practical prominence of the rule of law in a global context—are what is referred to here by the term the rule of law universalism.

The particular context, against which investigations in this article are set, is the Central European or the post-communist context. For it is the transitional justice processes that are partially responsible for the form that the growing importance of the rule of law assumed (Czarnota et al. 2005). Within the transitional justice, the rule of law became part and parcel of this process's conceptualization,

which is especially visible in a definition provided by Ruti Teitel (2000) in one the works foundational for the transitional justice research field. To an extent, an orthodox understanding of the transitional justice is inconceivable without the rule of law. Despite of the seemingly obvious connection between the two, juxtaposing transition and the rule of law introduces into the latter questions about the spatial and temporal dependencies and socio-political, historical embeddedness (McAuliffe 2015; Palombella 2009). The gravity of these questions is attested to by both the importance and precariousness of the rule of law in the post-communist legal structures[1] and leads as to a wider issue—is universalistic ideal of the rule of law even feasible?

In this article, I follow the definition of universalism provided in Massimiliano Tomba's, Marxist legal scholar, recent work focusing on the hegemonic and alternative legacies of the legal structure. Universalism there is assigned a particular meaning—it is more than a level of analysis or conceptualization as it gains ideological overtones. It entails an encapsulation of a dominant mode of thinking about the law (Tomba 2019) and simultaneously extends far beyond the legal structure itself, imposing this dominant mode on the functioning of the state, the political, and the social relations that the law regulates. This concept of universalism is in further parts counterposed to universality and particularity or concrete and abstract as two tenets of the Marxist thinking. As such they are two moments of the conceptual movement, the very points of constant motion within the concept itself.

This step of analysis follows first, Hegelian and second, Marxian mode of thinking about concepts that provides a theoretical basis for the historical materialism. The first one argued that the logic of concept because of constant shifting of self-knowledge must follow the pattern of constant interplay between universality and particularity. From the outset a concept is universal, as it aims to encapsulate through thought some universal element of reality. It is, however, necessary for the thought to come back to the particular, to refine and reshape the concept. In another case, the concept runs the risk of becoming a hotbed of dogmatism (Hegel et al. 2013, pp. 1–46). In Marx, the concept as an abstract, to retain its force and potential to affect the material reality, must constantly clash with the level of concrete. Introducing these two philosophical positions, aids in understanding the rule of law universalism and in identifying ways of its critique and going beyond it.

These philosophical arguments, grounded in the analysis of the concept and its relation to the material reality, are followed by a reconstruction of relevant arguments from Marxist legal theory debates. This discussion states the problem of the law ideological function, reconceptualizes the rule of law universalism on the basis of prior arguments and reconsiders the initial problem of approaching the hegemonic legal theory from Marxist positions. Of primary importance here is the ongoing debate on the resiliency of the legal structure, and the potential to reclaim

[1] The rule of law is one of the key terms evoked in both theoretical and socio-political discussions. The mode of its evocation proves it to be an ideal foundational for thinking about the shape, functioning, and the condition of the post-communist, liberal democratic states (see e.g. Bugarič 2015; Czarnota et al. 2005; Drinóczi and Bień-Kacała 2021).

this structure for emancipatory goals. Of primary relevancy here is the distinction between petrification of a concept characteristic for universalism and constant movement *within* the concept that historical materialism advocates. As such, the article outlines a mode of thinking directed at critique and change of the legal structure, breaking through the limitations of the *status quo*.

The Rule of Law Universalism: a Quest for General Validity

The main concept—the rule of law—that this article focuses on has gained increasing notoriety in legal theory in general. Within this field the efforts to define it and redefine it continue and are usually introduced by a remark on vagueness and expansiveness of the term. That this key concept poses an increasing challenge in theoretical terms comes as no surprise. Its importance extends far beyond the legal thought into politics, economics, and international relations, to name a few.[2] The growing prominence of the rule of law finds its counterpart in its conceptual expansion. In consequence, the concept becomes increasingly nebulous and all-encompassing (Krygier 2016, p. 200). The grandiosity of some versions of the rule of law contribute to a way, in which the rule of law universalism is construed and maintained.

The proposed rule of law universalism—a term that encapsulates the aforementied processes—follows the definition of the universalism proposed by Massimiliano Tomba:

> The concept of universalism, not unlike other 'isms' such as nationalism, liberalism, and even socialism, operates as a temporalized and temporalizing arrow concept. *Modern political concepts* are presented as universal, operating as temporal vectors that, as bearers of a unifying need, produce historical-temporal differentiations and gradations of historical time that become stages along the arrow of unilinear historical time. (Tomba 2019, p. 8; emphasis added)

Hence, universalism is more than a type of theoretical perspective on the universality: it posits a *singular* trajectory of the universality as the proper one simultaneously granting the modern political concepts to which it refers universal validity. In consequence, the hegemonic form of the concepts becomes the model one, whilst the other understandings and practices to which the concept may refer are subservient in relation to the model one. Such is the case of the rule of law as an ideal. By the very definition, there is only one ideal and iterations of it that vary in adequacy. If so, past iterations, knowledges and practices that connect to the substance of the ideal are only points alongside the line which leads to the current, state-of-the-art form of the ideal, inextricably linked to the hegemonic understanding shaped by its liberal and neoliberal hotbed (Mattei and Nader 2008; Golder and McLoughlin 2017; Bowring 1994).

[2] For a critical appraisal of its importance see Mattei and Nader 2008 that point to it as a crucial mechanism of the international capital. On the other hand, Richard A. Epstein (2011) argues for the rule of law as a foundation of modern liberal democracy and free market, alongside private property, and public administration as the elements of the titular 'design for liberty'.

To grasp the consequences of the rule of law universalism, it is important to investigate both theoretical and practical dimensions of this concept. Within theoretical discussions, the rule of law is often considered alongside constitutionalism and democracy, including global democracy (Costa et al. 2007, pp. 42–43), as fundamental standards of modernity. Hence, it becomes almost intuitively associated with the latter two. This assigns an important role and positive value to the rule of law: it is considered an inextricable part of the universal effort towards building global democracy, a staple of the end of history narrations (Mańko et al. 2016). As Gianluigi Palombella (2009) suggest, granting global importance to the rule of law is not a simple issue of applying a singular, one-size-fits-all mould; it entails a much more processual approach, including negotiating with existing rights and institutions, forms of power, and consensual working out of the rule of law practices. Contrary to what the rule of law universalism would have us believe, the rule of law is not a ready-made product to be exported and recognizing its possible universal import is only a first step of universalisation process if it is achievable at all.

Its postulated influences extend however beyond the legal sphere as it is regarded as a foundation for market economy, just society and order (Mattei and Nader 2008; Upham 2015; Sarsfield 2020). In summary, this legal concept gained traction that influences structures of life world other than the legal one itself, and as result came to have socio-political, economic, and even ethical implications. This impact of the rule of law is exemplified by a theoretical division between 'thick' and 'thin' concepts of the rule of law (Møller and Skaaning 2014; Rijpkema 2013). This division's aim was precisely to provide a distinction that allows for a clearer, more law-related definition—'thin'—as opposed to a 'thick' definition that encompasses possible results and influences ascribed to the rule of law. Nevertheless, within various fields it became a buzzword with positive connotations, especially due to the practices of international organizations (Mattei Nader 2008; Krygier 2016; 2017). And even the thick/thin division, proposed for a concept, in the case of the rule of law posits that minimalist conception retains its validity regardless of context (Sadurski 2005).

Allocating the universal in the concept is not sufficient to speak of universalism. As Tomba points out, what is constitutive is also the way in which concepts operate—by equating universalism to other 'isms', he points to the ideological potential of the universalism. Through the practice of the relevant actors, especially international ones, what once was posited as universal attains singular form with a hegemonic position when set against alternative universalities. Although the rule of law practice on the global scale is many-faceted, Nader and Mattei bring our attention to a less-than-favourable aspect: the rule of law plays a role as an international device that operates outside of boarders delineated by nation-state and state power and consequently is taken advantage of by the increasingly global forces of capital. As authors declare, their investigations focus on:

> the mechanisms through which the transnational rule of law, as a deeply Western idea, has led incrementally to patterns of global plunder, a process initiated by the expansion of Euro-American society worldwide, and now continued by nations, in particular the USA, and multinational corporate entities independent of explicit political or military colonialism. (Mattei and Nader 2008, p. 2)

That authors use the term 'transnational' is no accident, as the rule of law universalism presupposes annulment of the national boarders as analytic category. When a specific form of the rule of law becomes *the ideal*, it is the task of the material reality to live up to it.

An epitome of such juxtaposition between the ideal and the reality are the efforts to establish measurements for the rule of law, evidenced most recently in Europe by European Commission's '2020 Rule of Law Report' (EU 2020). In this approach, a prototype of the rule of law is defined by a set of relevant measures that then serve in an assessment of the rule of law in various countries. This approach results in a maximization of the comparative potential. However, it provides a one-sided picture, where what comes to the fore is the lack of the rule of law, whilst historical and socio-political preconditions and variations fade into the background. As Møller and Skaanig (2014) point out, one of the questionable elements of the measurement approach is the genealogy of the measure itself. The genealogy poses a question of the relation between the universal(istic) and the abstract, necessary for establishing the measure, and the particular and the concrete, which both eventuates and is assessed by the measure.

This is a crucial contention point when it comes to the rule of law as a global, positive ideal. Since the ideal originates from the crossroads of theory and practice, in both its conceptualization and usage it carries over traces of the hegemony it originates from. Because of it, critical theorists identify Western liberalism and Enlightenment as the point of origin of the hegemonic rule of law in its varied iteration—of the rule of law proper, the *Rechtsstaat*, and the *État de droit* (Costa et al. 2007, pp. 7–18). This point of origin constitutes the particular out of which the rule of law universalism is born out of. This particular is historically, socio-politically, and economically determined and, in result, it gives form to the rule of law universalism. This universalism reproduces the extant hegemony and power relations, simultaneously upholding this hegemony and providing it with legitimacy. As critiques of the global rule of law point out the rule of law as both a concept and a practical device is posited as a sort of golden middle way between primitivism and oriental despotism (Hussain 1999, p. 102); as a point of difference from the inferior otherness, from the West's exterior; as a peak achievement of the legal theory superior to other modes of thinking about the law and the political (de Sousa Santos 2005; 2020). It is this tension that provides the Western paradigm of thinking about rule of law, characterized by scientism and formalism (Bauzon 2021), with its potency and endows the particular with universalistic properties, presenting it as the endpoint of the 'unilinear historical time'.

Post-communist Transition and the Rule of Blueprint

Putting the broadly outlined consequences of the rule of law universalism aside for now, let us focus on the operations that perpetuate it. Delimiting the relevant elements and patterns within the measurement framework lends itself to creating what Palombella calls a universality as a closed order, which 'translates the rule of law into a kind of parochial concept and, as such, is allowed to be blind toward external

confrontations and learning' (2009, p. 454). This translation into a universal concept entails closedness that precludes evolution of the concept. The posited universality needs to satisfy unifying need, one that imposes pre-established order onto the material reality. In consequence, the closed order serves an ideological function as it legitimizes the hegemonic rule of law in opposition to its exterior.

The post-communist transition and subsequent fates of Central European countries provide a context in which subsumption of the material reality to the rule of law ideal may be observed. I introduce here the term Central Europe in the meaning presented by the authors of *Law and Critique in Central Europe*—I understand it not only as a region constituted by common elements, but also space of exploration for the critical legal scholarship (Mańko et al. 2016, pp. 1–15). As Bill Bowring points out, the specificity of this space calls for a re-examination of hitherto established theoretical assumptions and frameworks. One of the crucial elements of post-communist legal sphere is a tension between the rule of law as a tenet of nation-bulding and the political, social, and economic problems that Central Europe faced in the wake of transformation.

The rule of law was one of the banners that organized thinking about transition in legal terms to such an extent that the transition in Hungary was deemed 'a rule of law revolution' (Kuti 2009, p. 11). It needs to be stressed that the term post-communist transition is an umbrella term which refers to a plethora of various changes that have taken place in very different socio-political realities. Nevertheless, when we define the political and legal changes through their end goals, the rule of law is almost universally recognized as a key stone of the transition. As such, it became an element of a conceptual constellation associated with the thesis on the end of history and ultimate triumph of democracy (Quinn 2017). As a staple of establishing democracy, the rule of law gained universal validity and recognition.

This however was not a process, in which a predefined form of the rule of law was entirely imposed upon the countries undergoing transition. The political desires and visions themselves of the societies undergoing transition assumed form of a Western blueprint or, in Leszek Koczanowicz's terms, 'the rule of law became […] an object of desire' (2016, p. 220). As Monica Ciobanu puts it, a conception of a liberal western democracy gained a normative character that determined the trajectory of the transition (Ciobanu 2010, p. 96). Krygier, in turn, expresses it in more radical terms—he speaks of 'approaches that have regarded people as a passive adjunct to the blueprints imported wholesale from first world law libraries' (Krygier and Mason 2011). The term blueprint gives an apt image to the treatment of the rule of law. It is regarded as a combination of essential elements, derived by means of abstraction from a reality that is treated as exemplary. To put in philosophical terms, the concrete, perceived as a model, is transformed into an ideal that is to mould the transitional reality.

This view of the rule of law is described by Krygier as an anatomical one—it consists of 'a list of characteristics of laws and legal institutions supposedly necessary, if not sufficient, for the rule of law to exist'. (Krygier 2009a, b). Researchers, however, raise doubts about the self-evidence of the link between this anatomically described prototype and the rule of law as an element of socio-political and legal reality, indicating that the latter requires a deep social, institutional, and political

grounding (Czarnota et al. 2005; McAuliffe 2015; Skąpska 2009). This grounding necessitates another layer of the transitional process—one that includes the concrete workings of the reality influencing the desired rule of law ideal and questioning of its *raison d'être*. A gap between the ideal and the concrete turns into a tension that raises questions as to the workings of the ideal itself.

To recapitulate the argument thus far: the rule of law universalism is identified as a specific conceptualization that not only posits universality of the concept, achieved through an abstraction, but also establishes its hegemony as the singular and proper model for the concrete in its variety. The closedness of the concept is what changes the variance into a gradual or hierarchical order, in which the dominant concept stands at the top and determines the shape of material reality. This universalism runs a risk of simultaneously maintaining power granted by the ostensible objectivity and enforcing mechanisms, knowledges, and practices alien to the realities it affects. The ensuing depolitization and dehistorization of the universalistic ideal causes the rule of law to become 'a cold technology' (Mattei and Nader 2008, p. 5) that lacks grounding and connection to the life world it seizes control of.

In such cases the creation of the rule of law follows the logic that might be described with a concept of imposition. Boaventura de Sousa Santos speaks of an imposition in the context of the relation between global North and South where colonial relations of power enable introduction of foreign, disconnected organizational structures (de Sousa Santos 2012). These structures, however, reshape the reality in various ways—the reality adheres to them, opposes them, subverts, and adjusts them. I propose to extend this concept to the post-communist transition, where the Western rule of law, both as an imposition created by international organizations' practice and expert, delocalized knowledge, *and* as an object of desire of mainly post-communist elites—and to an extent, the society as whole—defined the transitional process itself.

Another useful theoretical tool is to be found in Maïa Pal's analysis of the early modern international relations. She proposes the concept of the transplant to describe one of the modes of jurisdictional accumulation: '*Transplants* of authority consist in conquests of people and territory, by a sovereign and its representatives, through the creation and development of jurisdictional institutions that organically develop (as hybrid social property relations) in their colonial setting' (Pal 2020, pp. 7–8). Although the processes involved in the post-communist transition are more subtle than the ones described by Pal, the term transplant captures the dynamic that follows an intervention of the alien structure. The organic development implies activity on *both* sides, which adapt to each other. So, even though the rule of law universalism presupposes a closed, solid ideal, the reality does not embody it in accurate fashion, but distorts, questions, and reshapes it.

The case of modern-day Poland is a proof of the liveliness of this mutual influence. Although Poland was championed as one of the main advocates of the modern, liberal democracy and the rule of law, the Rule of Law Report 2020 points to a dire crisis of the latter. The chosen indicators provide only a diagnosis, not representing the full scope of the problem. The trajectory of post-communist transition reintroduced the question of political into the heart of the rule of law. Whilst the meaning and import of the rule of law has become a stake in a political conflict,

in which various sides try to identify its essence in an understanding aligning with their political agenda, the depth of this conflict evidences the continual friction between seemingly well-established and clear ideal and the socio-political and historical conditions of the material reality even decades after the transitional moment itself (Matczak 2019; Krygier 2009a, b, p. 195).

The tension hinges on the connection between the concept of the rule of law and the reality – whether the rule of law factually grows into power relations[3] or entails pre-conditioned, hegemonic implications that encompass the political, social, and economic spheres. Although Lóránt Csink considers the question of the ideological dimension in reference to the current rise of illiberalism in Hungary, it is still worthwhile to bring up the point made: 'The mainstream ideological view finds it impossible that a state under the Rule of Law, or a democracy could be based on anything other than the liberty of the individuals' and because of it 'the system is less tolerant of those whose ideology differs; those who challenge the mainstream ideology of the 1970s–1980s West and of the 1990s East: liberalism' (Csnik 2021, p. 157) This quote pinpoints the effects of the rule of law universalism when considered from the ideological point of view: the singularity and unifying drive spell implications that may come into conflict with the concrete reality, hence putting into question the possibility of the rule of law beyond the hegemonic mode of thinking.

Marxian Method: Putting the Concrete Back in Place

Although this article heavily relies on the finding of the critical legal theory and legal theory, the proposed framework is moulded by Hegelian and Marxian philosophy. This philosophy is foundational for the way in which the universalism, set against universality and particularity, as well as abstract and concrete, is conceptualized. I argue for this framework as a pivotal theoretical tool for approaching legal concepts in a critical manner as it provides a necessary safeguard against the universalism as a petrification of a hegemonic form of concept. This section begins with an examination of the mode of operation of the legal theory and progresses to an argument for the conceptual framework employed to engage with this theory.

Embracing the critical legal studies with its varied assumptions and findings necessitates going beyond a separation of the legal theory and philosophy from other modes and fields of investigations. This separation was initiated by a positivist turn, which postulated for the legal studies to develop its own, specialized epistemic presuppositions and categories (Somek 2017; Cern 2014). It followed the Kelsenian postulate of cleansing the legal thought from the influences considered external: economic, social, political, and even ethical. Although legal positivism was contested from the outset, it still constitutes an important reference point for thinking about law. The crucial elements are the assumptions that create the conditions of possibility for legal positivism, i.e., series of epistemic

[3] For this reason Martin Krygier (2016, 2017) argues for an understanding of the rule of law as a practical ideal of tempering power, deeply entrenched in the extant, particular legal and socio-political structure.

and ontological assumptions that delimit or rather construct the object of legal science.

Amongst other, it necessitates construing the legal structure as a separate entity that operates according to its own principles and creates a reality onto itself. In result, 'the law is […] deemed to be neutral, ahistorical, in short, an aseptic medium that can serve as a stable symbolic structure in approaching historical injustice' (Cercel 2017, p. 4). Thus, the legal theory provides a self-referential system, where the only relevant way for the legal concepts to evolve is through developments *within* this system. Such evolution, however, relegates the task of conceptualization primarily to the agents that are constitutive of this system: legal professionals. Inadvertently, separating the legal theory from its wider life world context entails negating its influence upon the agents.

This separation therefore lends itself to the rule of law universalism as it constitutes a perception of concepts in which they first are divorced and abstracted from reality, and second encased in a larger theoretical constellation delineated by positivistic assumptions.

The analysis of transitional context presented in this paper showcases the myopia present in this separation. For better or worse, history finds its way back in the ways concepts operate and are understood. And as Cercel points out '[o]nce law is analysed as a historically embedded reality, it is certainly no longer a necessary category, an ahistorical form embodying transcendent values, or easily reducible to a stable interpretative framework' (Cercel 2017, p. 5). In short, the concepts become mired in the particularities of the life world and their general validity becomes a point of contention.

One might argue that the solution lies simply with a continual work of abstraction, that reintegrates the concrete on a conceptual level. There is, however, a lesson to be learned in the friction between the legal structure in its socio-political, historical setting and its theorization. The analysis of this friction runs contrarywise to the positivistic turn towards a scientific approach since it begins with the historicity of the law. Moreover, the historical is perceived not as a homogenous, clear-cut path towards the present, which is an assumption inherent to 'the expectation that law evolves in a linear purposive way, from an imperfect to an improved state through *a rational process of law reform [that] is deeply entrenched within the discipline of law*' (Charlesworth 2010, p. 6). Going beyond this linear vision requires acknowledgement of the complexity and inner diversification of history.

Within legal philosophy this presence of history is expressed in different terms: of 'critical legal histories' (Siegel 2018) with an emphasis on the multiplicities that influence the legal structure; genealogy (Delacroix 2006), following the definition proposed by Foucault according to which the entity is not determined in a linear way, but rather by raptures, conjunctures, and aleatory encounters; or geological multi-layeredness, where 'centuries and millenia exist contemporaneously' and 'the past is as present as the most pressing issues of the contemporary age' (Tomba 2013, p. 7). What reinstates the historical in the conceptual is the moment of crisis, when the concept becomes increasingly nebulous and simultaneously inadequate to capture the material reality.

In the case of Hegelian dialectics that are one of the footholds of proposed framework this reinstation is an unavoidable stage of concept's life. In *Science of Logic* Hegel (2010) describes the concept as a product of a generalized (via the medium of language) reflection that by referring to particularity finds its universal, intellectual truth in a concept. This movement, from particular to universal, is what makes up the content of a concept that strips the particular of contingencies and raises it to the level of the universal. It is worth stressing that this movement is not a one-time act that results in a final consolidation of the concept. This would lead to a fossilization of a concept, through which it maintains it validity, yet loses the tie to reality that grants its truth, hence deeming us to dogmatism. The concept described in this way constitutes a pattern that self-understanding follows in reflecting upon itself—a confrontation with reality, or externality, leads to an essential alienation and questioning of the internal truth, followed by a return to itself enriched by the reflection and experience stemming from alienation.

The moment of alienation assumes a different form in the case of Marxian concepts. As Jameson describes it:

> Traditional philosophy was indeed the conquest of the abstract as such, the emergence of universal concepts from the 'blooming buzzing confusion' […]. The Marxian concrete is not then some third term or Hegelian 'returning back into itself' of the abstract, but rather […] the discovery of totality as universal interrelationship: in this instance the discovery that the very abstraction called alienation (*Entfremdung*, *Entdusserung*) is itself a sign and symptom of the dynamics of alienation at work in reality itself and in the totalization of society by capitalism as an emergent system. (Jameson 2014, p. 131)

The totality defined as universal interrelationship implies that the movement within a concept is more important that the truth it encapsulates in the present moment. Moreover, universality itself is described through the back-and-forth between abstract and concrete (Moseley and Smith 2014). Philosophy, tasked with active engagement with reality by Marx, is undeniably work of abstraction. It names problems in general terms, identifying conjunctures and repetitions. The concrete is, however, the horizon which endows concepts with their meaning, significance, and actuality. So, the movement follows thusly: concrete—abstract—concrete.

Here of particular significance is the place of concrete: Marx conceives concepts as products of ceaseless, intellectual labour that constantly needs to open itself up to this very friction identified earlier as a challenge to the concept. Lack of friction signals the disengagement of philosophy, its retreat to a domain of abstraction separated from the material reality. In fact, then, the concepts are a response to alienation only if they retain a measure of conflict and tension within as their clarity and solidity signals a closure to the intervention of the external, of the life world. This requires a constant work of critique that brings back the concrete to challenge the universality of concept, relations of power that produce it, and its social, economic, and political underpinnings.

Marxian approach to concepts presupposes therefore a heterogeneity of knowledge. Following Jameson's definition of totality as universal relationship, it no longer can be maintained that the universal can be determined by a single act of

abstraction or of integrating particularity to the universal by a single agent. In a relation of mutual influence, the concept and practices constantly refer to each other, however, the result is not as concrete and solid as Hegelian dialectics would imply. Discovering the varied layers (of history, geopolitics etc.) in their interrelations that underlie the concept is a necessary task of cognitive justice (de Sousa Santos 2016, pp. 118–136) and philosophy truly engaged with disproportions of power and wealth that persist despite the dissemination of the rule of law and global democracy.

Reclaiming of the Rule of Law?

Presented mode of thinking about concepts based in the Marxian philosophy has a potential to provide a theoretical basis to an engagement with key concepts of legal theory and philosophy. The goal of this section is to underline what such an approach changes in the perception of legal concepts and how does it relate to the Marxist legal theory. As the main problem in this paper is the rule of law universalism, first the question of critical treatment of the universality and abstraction, inherent to legal concepts is elaborated upon. Second, this problem is presented in terms of recent developments in Marxist legal theory with focus on the import of heterogenous historicity for the legal structure.

The trajectory of Marxian philosophy of concept outlined in the previous section heavily influences the way in which Marx's critique of law has developed. Shoikhedbrod in his analysis highlights that from the onset Marxian critique of law took issue with the relation between universal and particular: he accused Hegel of granting the crown of the universal, objective truth to particularity of Prussian civil society and state. He argued, instead, for a reversal, in which abstraction takes second place to an investigation into civil society and material conditions which shape the law. Still, the departure point of the critique was the objective law, which provided a point of scrutiny for the real-existing law. In later writings, however, this point is abandoned on behalf of inquiry into interplay between the law and unfolding of modern civil society. This move brings into focus the bourgeois law and its role in perpetuating capitalist relations (Shoikhedbrod 2019).

The universalism of this law is an element of its critique: Marx ascertains that the abstract and formal equality granted universally, i.e., to all its addressees, by the law, is in fact a form of equality borne out of and subservient to a concrete system—capitalism (Marx 1981). Hence, it favours the dominating class, whilst the very form of this equality constitutes a disadvantage to the position of the dominated. This assessment of bourgeois legal form inspired Pashukanis's (2002) rejection of legal form altogether as marred by an inherent vice originating from capitalist influence upon law.[4]

This criticism, however, is only half of the story. The intrinsic tie between material reality of social practices, experiences and heterogenous knowledges remains in power not only in the case of dominating class. While describing the struggle

[4] For currrent debates on Pashukanis, see (Knox 2009; Parfitt 2019).

over the length of working day, Marx speaks of a small victory that working class has achieved with legal regulations limiting this length which he deems 'a modest Magna Carta' (1981, p. 416). Of course, this influence of the dominated on the law is not to be overestimated and be put on par with the influence of the dominating. It however provides a foothold for a critique of existing law and reinventing its elements against the grain.

In theoretical terms, this foothold opens a possibility for theorizing a different kind of legal structure and legality. As Redhead (1978) noticed, not including these different positions on the law was a point of regret for Pashukanis as he reflected on his general theory of law. Similarly to other modes of production, which Marx mentions as counter-parts that put into question the universality of capitalism and political economy as a science, different realities of law cause dissonance within universal legal concepts and legal theory. Juxtaposition of the universal legal framework with these different realities poses a challenge to the universalism:

> the dominant modernity characterized by the nation-state, the capitalist mode of production, and private property […] has elevated these concepts to its own principles and enclosed them in the shell of the abstract subject of law. But freedom and equality are, above all, political practices that have emerged in the countless insurgencies that have undermined the existing order, opening it up to different outcomes. (Tomba 2019, p. 15)

Inclusion of these political practices and the knowledges that animate them poses a challenge to universalism which establishes a closed, dominant concept as the end point of universal histories. In doing so, it initiates what Parfitt, after Bakhtin, deems a dialogical discourse. This discourse embodies the interplay between theoretical abstraction and generalization, and other types of thematization that legal theory excludes by the grace of its initial assumptions. This way of questioning universalism does not lead to an incorporation of the particular into the universality, as dialectics would have it. As Balibar remarks, this type of intervention 'derive[s] […] from a *conflict of universalities*', which clash as co-existing and contradictory products of material reality, and, in consequence, 'the universal becomes (or rather becomes anew) a political figure' (2017, p. 282). If only in theoretical terms, including other ways of thinking and practicing law decouples the universal from the dominant, hence exposing the capitalistic or bourgeois foundations of law as universal and singularly valid.

Conclusions

This reinstatement of the universal as a political figure constitutes a goal of legal theory from critical and—in particular—Marxist position. The universal however is something entirely different from what is universalistic, i.e., intolerant of differences and diversification. When multiplicity of legal realities and understanding of law itself is taken as a starting point, the hegemonic version of universality becomes, paradoxically, one of many universalities, hence contradicting the linearity inherent to the universalism. For if its fundamental presupposition is linear progression

of universal history to the point determined by the current state of the dominant countries, perceived and described by the concepts therein produced. Relating these concepts to the concrete of other material realities, in particular ones guided more by principle of equality than freedom, with their practices and knowledges, alters these very concepts. To make sure—it is not an automatic process, but rather one that requires constant effort of translation and inclusion (de Sousa Santos 2005, p. 440) or opening up and negotiating of the closed order (Palombella 2009). Nevertheless, it provides a way of engaging with dominant mode of thinking about law in critical terms.

One might ask a question if this effort to engage with legal theory is worthwhile and argue for abandoning it all together. In the case of the rule of law universalism two answers may be given. The first one lies with the continually growing importance of the rule of law and its expanding influence. The rule of law is more than a mechanism deployed in favour of global capital, as Mattei and Nader prove, it is also a desirable ideal that is treated as a value in both national and international terms and hence is enshrined within orthodox legal theory. Means of critique that destabilize its self-evidence are therefore an important component to uncovering the ways in which it operates and may favour the capitalist system.

The second answer touches a deeper issue, namely one of the possible relevance(s) of the rule of law. Although the dominant meaning of the rule of law is the one that became coupled with neoliberalism, i.e., its role as a tool delimiting state interventionism and, in result, providing a breeding ground for a free market (Krygier 2017), it is worthwhile to consider Marxist arguments for the rule of law. In his famous defence of the rule of law, Thompson (1990) pointed towards its function as a means of defence against arbitrary, direct power. In similar fashion, a Marxist legal theoretician Otto Kirschheimer argued for *Rechtsstaat* as a yardstick providing scrutiny for the actions of those in power. Although he acknowledged the risks of over-trust in the rule of law, deeming it a magic wall, he still recognized its potential as a weapon against domination, that may be deployed by the subdued.

In both these arguments the import of the rule of law is restricted in comparison to the dominant rule of law discourse (Kirchheimer and Neumann 1996). Nevertheless, these remarks provide a basis for rethinking the importance of such a safeguard beyond capitalism. This importance, from a Marxist perspective, is assessed with a mix of scepticism and faith in the rule of law is perfectly summed up by Shoikhedbrod: 'acknowledging that the rule of law offers a medium of contestation for asymetrically positioned groups […] is not the same as arguing that recourse to legal strategies will result in a revolutionary transformation of existing property relation' (2019, p. 191). As this statement shows, in no way the rule of law itself can substitute for a political engagement. That does not mean, however, that reclaiming now depoliticized legal concepts, relegated to the realm of the legal experts, is not a worthwhile venture (Piekarska and Krzeski 2021).

Mapping out of the relation between universalism and the particular and the universal as well as abstract and concrete shows that universalism halts the dialectical movement that historical materialism poses as necessary for concepts. It is not merely an issue of a theoretical approach as universalism has practical consequences for the legal sphere. It inevitably pushes it towards the hegemonic blueprint. That

blueprint, in turn, triggers changes in the political, social and economic sphere toward conforming to a well-established coupling of liberal democracy and neoliberalism. Value scepticism (Bowring 1994) or a rejection of the rule of law in toto certainly provide a solution, they also mean skipping out on the possible benefits of the rule of law.

Another solution is achievable through reintroducing the movement into a petrified relation between the universal and particular encapsulated by the rule of law universalism. The rule of law necessarily consists of the universal elements—in its 'thicker' iterations it refers to ethical and political values and some concept of justice; in 'thin' iterations it contains postulates of universal relevance to the law itself. On the level of particular, the rule of law confronts these elements to the institutions, relations, regulations, in short, the matter that makes up the legal structure. Reintroducing this movement therefore means first, questioning and subjecting the rule of law as a concept, as a theoretical construct to critique. Second, it entails posing the question of what exactly does the ideal bring over to the reality—an unfulfilled promise of normalcy or a panacea to political and social conflicts, to name two possible scenarios. Third, a question as to the goal behind the rule of law is inevitable—for we need to consider whether it should serve the hegemony of liberalism and neoliberalism or the people and their empowerment.

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