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Editorial Perspective

Jurisdiction, Legal Form, and the Transition to Capitalism Debate: Recovering Agency and Discontinuity

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Abstract

The increased interest in law and capitalism has not translated into an engagement in legal scholarship with the transition-to-capitalism debate. This article contributes a critique of commercialisation approaches to the history of capitalism and law from a Political Marxist perspective. It argues that combining jurisdiction and legal form provides a more flexible conceptual architecture to account for early-modern juridical practices. Conceptually, this enables an encounter between the structural and subject-centred commodity-form theory of law (CFTL) and the more granular, agentic, and class-centred Political Marxist approach. Empirically, exploring two key institutions – property and sovereignty – provides an opportunity to focus on their jurisdictional dimensions driven by specific class struggles and agencies. These reflect, through the concept of jurisdiction, the ruptures and discontinuities of the transition, while form analysis accounts for the more continuous and structural processes of key institutions shaping the apparent linearity of law.

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Keywords

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> The character of a thing is a product of understanding. Each thing must isolate itself and become isolated in order to be something. By confining each of the contents of the world in a stable definiteness and as it were solidifying the fluid essence of this content, understanding brings out the manifold diversity of the world, for the world would not be many-sided without the many one-sidednesses.
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> KARL MARX, *Rheinische Zeitung*, 1842[1]

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Introduction: The Specificities and Stakes of Law in the Transition

Studies addressing the relationship between law and capitalism have significantly increased in recent decades.[2] Broadly speaking, the literature is split into two camps: neo-Weberians arguing that law enables capitalism, and Marxists arguing that law is a product of capitalism.[3] A wide range of scholarship is more and more concerned with the various ways in which legal practices are key to capitalist accumulation, and it generally agrees that these phenomena are deeply imbricated. More problematically, law is often assumed and physically seen as retaining significant non-capitalist elements or 'remnants and vestiges of those prior incarnations', for example through the enduring influence of Roman law and of medieval institutions and mechanisms, or props such as England's characteristic wigs.[4] More bluntly, its rituals are 'deeply weird'.[5] These dimensions help neo-Weberians historicise law as a transhistorical and mysteriously enduring set of 'curiosities' and 'oddities'. They situate law

1 Marx 1842b.
2 For example: Desan 2014; Pistor 2019; Buckel 2020; Tzouvala 2020; Alter 2021; Benkler 2023.
3 Krever 2018, p. 191.
4 Tomlins 2016, p. 65.
5 Rudden 1994, p. 81.

somewhere beneath or prior to capitalism, enabling it and as a potential solution to its ills.[6] Marxist scholarship tends to see the law as totally conditioned and subsumed by capitalism. Law and capitalism are too deeply enmeshed to be dissociated, 'continuously at work either getting rid of – "reforming" – those remnants and vestiges, or, alternatively, at rendering them cognitively (and operatively) open to the type of society in which they find themselves'.[7]

This article theoretically explores the difficult relationship between the law and the remnants of its precapitalist past and finds a way somewhere in between the two positions above. It assesses the need to better 'understand the determining influence that law has had on the way in which the past has, at least since the collapse of feudalism, unfolded along a very specific, self-reinforcing set of lines'.[8] In other words, law has enabled or reinforced an apparent linearity *of* and *about* capitalism. Materially in terms of specific institutions and mechanisms (for example, private property, jurisdictional subjectivity, and public authority) and ideologically in terms of historiography or meanings of the past. Reflecting on the ontological problems of thinking about law *and* capitalism, and arguing instead for law *as* capitalism, Tomlins notes that 'history supplies a substantial archive of precapitalist (hence non-capitalist) law, thus a distinct pedigree for law, an "origin" story of its own, a record confirming a separate existence, and a distinct goal'.[9] Tomlins may not be drawing sufficient consequences from this pertinent observation, though. While it is important not to draw neo-Weberian consequences from the remnants, vestiges, and archive of non-capitalist law, we nevertheless need to further explore what those consequences are and dig beneath the linearity of law as capitalism. This is evidently a very broad project that cannot be fully addressed in this article. The following continues and hopefully moves forward a theoretical conversation so as to address the juridical dimensions of the transition-to-capitalism debate and understand the transitional relationship between law and capitalism.

A survey of current transition debates in Marxist historiography notes the presence of an 'analytical juncture' that needs to be bridged.[10] Two approaches are 'on offer': one focusing on 'overseas trade and war', 'capital circulation', and 'merchants and maritime commerce', the commercialisation model; and the other on 'commodification of social relations in the English countryside',

6 Ibid.
7 Tomlins 2016, p. 65.
8 Edelman 1973, cited in Parfitt 2019, p. 35.
9 Tomlins 2016, p. 64.
10 Campling and Colás 2021, pp. 59–60.

'production of surplus value', and 'commodified agriculture', known as Political Marxism.[11] The commercialisation model and related critiques of Political Marxism and the Brenner thesis have become very influential; however, they continue to raise many questions and render any bridging of the analytical juncture rather unlikely.[12]

In spite of the seeming contradictions and impasse, there is significant common ground, especially when discussed by legal scholars who tend to distinguish the 'analytical juncture' more empirically as one between local and international perspectives.[13] Yet Marks argues that the spectrum along which the transition debate has mostly been drawn, whether capitalism emerged locally or universally, hides a tendency to meet again and 'touch' as the extremities come full circle.[14] In other words, the empirical context behind the debate is much more compatible and less at odds with itself than is the scholarship, which engages in the debate as an exercise in conceptual definition and analytical competition.[15] Local and international approaches to the transition are often discussing the same processes, but with different categorical and theoretical outcomes for questions of agency, structure, and teleology. Before historicising complex concepts such as capitalism or human rights, defining 'whose' origins one is searching for is essential. There is a 'self-otherness' at play in these so-called transhistorical concepts, where 'their meanings differ from themselves' depending on the period in which they are placed.[16] The various modifiers of capitalism (agrarian, commercial, industrial, Fordist, or more recently, digital) do not reflect a spatio-temporally linear or smooth transition from one modifier to the other, but complex and messy interactions and ruptures. Similarly, feudalism did not simply usher in capitalism.[17] These periodisations create conceptual issues, such as those Marks finds in debates on the origins of human rights. Crucially, these issues reveal significant strategic and political stakes. In effect, the theoretical question of continuity and discontinuity in these debates determines what is more politically strategic to emphasise when historicising a specific contemporary issue, and is a more important marker of what a theory achieves than, in the case of the transition, the

11 Ibid.

12 Banaji 2018, 2020; Anievas and Nişancıoğlu 2015; Rutar 2018; Teschke 2023.

13 Marks 2019, p. 13; Kochi 2020, p. 80; Tzouvala 2020, p. 29; Tzouvala 2021, p. 433; Baars 2019; Neocleous 2012.

14 Marks 2019, p. 13.

15 Marks 2019, p. 16. See also Campling and Colás 2021, pp. 24–5; Pal 2021, p. 42, and Pal 2020, p. 286, n. 9.

16 Marks 2019, pp. 5, 16.

17 Holton 1985, p. 28, cited in Cutler 2003, p. 111.

empirical local/international distinction. We see this in the Commodity-Form Theory of Law (hereafter, CFTL), especially in its recent applications, which favour the strategic goal of revealing capitalism's continuity in its approach to the transition.[18]

In sum, understanding the juridical dimensions of the transition is both a historical and a theoretical problem. Historically, the commercialisation model, present in the broader Marxist and Weberian literature, needs to be assessed according to its debate with Political Marxism. Theoretically, the CFTL needs to be assessed according to its focus on the continuously abstract and individual legal subject as commodity owner. This angle is essential yet it also limits the theory's potential to capture other dimensions of the transition that were key but did not continue or survive, either at all or in the same form. Obscuring or simplifying these practices can be particularly problematic if they return to justify a liberal narrative of capitalism as natural, inevitable, and thus less subject to change; or a Weberian narrative in which law is given too much structural power underlying capitalism, reproducing illusions about law's potential to autonomously transcend or regulate capitalism.

I argue that a more elaborate meta-theoretical framework combining jurisdiction and legal form provides an alternative to the dominant commercialisation models and to the theoretical implications of the CFTL. Existing literature fails to sufficiently account for the granular instances of jurisdiction and jurisdictional subjectivities, as practices that constitute and help explain the international dimensions of, for example, property and sovereignty. Through this combination and its application to debates on the origins of capitalism, the linearity that law provides for capitalism is broken down by a multiplicity of jurisdictional practices. The dialectical binary between legal form and jurisdiction allows for the possibility of thinking of structure while recovering agency and discontinuity, illustrated through the institutions of property and sovereignty.

The article proposes to explain this dialectic through the distinction between ideational and material articulations of law. This binary abstraction raises many questions and problems and remains a proposal with important caveats and limitations. A broader metatheoretical framework that tries to capture this binary in both dimensions reconfigures a conceptual space for certain struggles as transformative, whether emancipatory or not, and whether capitalist or not. In other words, it has a limited use as it depoliticises aspects of social change and can therefore be problematic from a political standpoint. At

18 Pashukanis 1978; Miéville 2005; Baars 2019; Taylor 2019; Buckel 2020; Dimmick 2021; Knox 2022.

the same time, it helps to capture the lived experience of a range of practices (as processes of real abstraction). By abstractly connecting and differentiating the legal form (the ideational) and jurisdiction (the material) as respectively structural and agentic, formal and content-based, we can recover dimensions of the imbricated relationship between law and capitalism. The binary is also justified here to break down the assumed linearity of legal institutions and practices, which provides an additional layer of historical abstraction and erasure of the past, and which needs further conceptual disruption. As Marx wrote in the above epigraph, we need to understand the one-sidednesses to see the world as many-sided.

The first section presents the commercialisation model dominating the transition debate. It analyses a short selection of key recent texts historicising law and capitalism outside Marxism followed by some key Marxist texts that also adopt a commercialisation model or share some of its assumptions. It then uses Political Marxism to develop a critique of this approach. The section argues that commercialisation assumptions about the global expansion of capitalism are problematic because they provide a limited and quantitative definition of capitalism, and mostly fail to theorise the relation between law and capitalism.

The second section develops the Political Marxist analysis from section one to theorise law and capitalism through a dialectic of legal form and jurisdiction, bearing in mind the important caveats regarding abstraction. The section delves into the relationship between jurisdiction and law, then discusses how the CFTL has engaged with the transition debate. It responds to its limitations by conceptualising jurisdiction in dialectical relation to the legal form as respectively ideational and material articulations of law that help trace the different historiographical strategies of continuity and discontinuity used respectively by both approaches.

The third section applies this framework to examples of jurisdictional subjectivities that challenge, first, the ambiguity of the concept of property, and second, the myth of modern sovereign equality in the early modern period. These cases are key to the shared historical narratives of international relations and international law. Challenges to dominant commercialisation narratives consist in diverging imperial strategies of expansion in Western Europe and its colonies, and through various actors and processes such as consuls, dynastic geopolitics, and mercantilism. These jurisdictional struggles require a framework able to combine the dispossession and reconstitution of property rights beyond the classic English private-property case; the development of alternative sovereign and quasi-sovereign forms such as dynastic and mercantilist networks, semi-public trading companies, and various diplomatic prerogatives,

especially consular; or the configuration of merchants as quasi-bourgeois or proto-capitalist subjects.

These cases provide a more complex, non-transitional, and discontinuous picture of the early modern period of transition that recovers the agency of legal practices and institutions otherwise assumed as transitional to capitalism in dominant commercialisation models. Recovering these processes enables an empirically and conceptually richer theory of the relationship between law and capitalism, or more precisely, of law as (not) capitalism.

1 The Commercialisation Model in Histories of Law and Capitalism: A Critique

This first section presents a critique of commercialisation models shaping current debates in emerging studies on law and capitalism, in both neo-Weberian institutionalism and Marxism. This critique, grounded in Political Marxism, is followed by the development in section two of a theoretical framework to help resolve some of the gaps in both the commercialisation model and Political Marxist approach.

1.1 *From Neo-Weberian Institutionalism to Anti-Eurocentric Marxism*

The broad recent literature concerned with historicising law and capitalism brings together scholars from different disciplines (legal history, international law, International Relations, political economy, imperial history, and business history) and diverse theoretical approaches (Marxism, neo-Weberian Institutionalism, Global History, Historical Sociology). Their use of the term capitalism can be explicit or implicit, and in the latter case, most often associated or interchanged with imperialism, colonialism, and the growth of international trade. In other words, this literature is dominated by the 'commercialisation model'. This refers to the *quantitative* expansion of trade, coupled with colonialism and imperialism. This model is often deemed sufficient to explain the emergence of capitalism and it has become influential in non-Marxist histories of law and capitalism, where capitalism is understood more broadly through commercial institutions and imperial expansion.[19]

The commercialisation model has been influential through the works of Marxists such as Immanuel Wallerstein, Fernand Braudel, Giovanni Arrighi,

19 See, for example: Alter 2021; Calafat 2019; Benton and Ford 2016; Stern 2016; Fusaro 2015; Koskenniemi 2014; Miles 2013; Benton 2002.

and, more recently, Jairus Banaji.[20] There are significant differences between these scholars and their approaches to the transition.[21] I cannot do full justice to them here, as the aim is not to review the transition debate in Marxism, but to show the broader influence of commercialisation models on legal scholarship. Briefly, Wallerstein's world-systems theory focuses on the expansion of trade and exchange and the rise of a world market through processes of colonisation.[22] Braudel's definition of capitalism is also based on a long-term (*longue durée*) geographical approach based on commerce in the Mediterranean, but one that arguably puts cultural and economic factors in a somewhat inverted relation compared to traditional Marxism.[23] Arrighi's approach is closer to Wallerstein's but focuses on the Genoese, Dutch, and then British processes of accumulation based on financial mechanisms.[24] Banaji's approach is focused on the category of merchant capital and defends a pluralist account of commercial capitalism that goes back to Ancient Islamic history, and emphasises small-scale and patchy examples of putting out systems, international money markets, plantation businesses, and the produce trades through semi- or quasi-sovereign trading companies.[25] These are seen as examples of capitalist activity sufficient to signal the existence of a global and multiple transition to capitalism. From a different transnational or intersocietal perspective, Anievas and Nişancıoğlu develop an uneven and combined development (UCD) approach looking at the specific military role of the Mongolian and Ottoman Empires in shaping Western Europe and the transition to a modern capitalist international order.[26] Their analysis is more complex than a commercialisation approach, but it has been influential in terms of its critique of Political Marxism and in terms of providing a transnational or inter-societal perspective.[27]

An important legal source for the commercialisation view charts the development of the bourgeois class from its struggle in the middle ages to emerge out of feudalism to its subsequent role in shaping capitalism.[28] Such an analy-

20 Other proponents of this commercialisation-centred approach are Jean Batou and Alain Bihr (cf. Batou 2022; Bihr 2018).

21 See Paikin and Salour (forthcoming) for a review and intellectual history of the original transition debates.

22 Wallerstein 1974.

23 Braudel 1979, 1982, 1984; Wallerstein 1991.

24 Arrighi 2002.

25 Banaji 2010, 2020.

26 Anievas and Nişancioğlu 2015.

27 For critiques of their work, see: Pal 2018; Teschke 2023.

28 Tigar and Levy 1977.

sis constitutes an obvious basis for a broader international focus on commercialisation, for which capitalism is assumed to have evolved in partnership with a variety of commercially-driven actors linked to colonial and imperial mechanisms and institutions.[29] The most commonly referred to are trading companies and associated merchants, but also colonial settlers, governors, investors, and 'capital-exporting states'.[30] These actors engaged in processes of resource plunder, dispossession, appropriation, and exploitative labour and settlement for their own benefit and that of their imperial centre.

The commercialisation and institutionalist model of the development of capitalism is dominant in global history, in the New Historians of Capitalism approach, in economic history (or what is also known as capitalism studies today), and in the Varieties of Capitalism literature.[31] The volumes of the *Cambridge History of Capitalism* are a prime example of a collection of these mainstream approaches, which reproduce a conception of capitalism based on notions of commercial profit and credit, and trace it, for some authors, as far back as ancient history.[32] The influence of Max Weber's work on the role of legal rationality and the institutions it required looms large in this literature.[33] Specifically, the development of banks and finance in the early modern period is emphasised in relation to other key modern European institutions, as in the work of neo-Weberian and institutionalist historian Douglass North as representative of the New Institutionalist Economists.[34] Benton, a key reference for international legal history, attempts to strike a balance – or remains indecisive – between Marxists, who favour the causal role of the economy, and institutionalists, who place the burden of growth on Western or in some cases non-Western rational institutions.[35] Benton raises the example discussed below of property and makes a nuanced claim for the role of specific legal practices and their significance for certain institutional or economic shifts:

29 Desan's work on money (Desan 2014, pp. 5–6) and Rosenberg's work on contracts (Rosenberg 2018) are possible exceptions to the overall trend, since they specifically locate the beginning of capitalism in early-modern – specifically late seventeenth-century – England. However, Desan remains focused on a specific commodity to trace the expansion of this process through time. Another key text by Pistor appears agnostic and raises the two options of 'agricultural or commercial capitalism' as the first historical instantiations of capitalism (Pistor 2019, p. 10).

30 Miles 2013, p. 23.

31 For example: Edwards, Hill and Neves-Sarriegui 2020; Beckert 2014; Levy 2017; Fusaro 2020.

32 Neal and Williamson (eds.) 2014.

33 Trubek 1972.

34 North 1990; Beck 2012. See also Ibbetson 1992 and Fredona and Reinert 2020. For a critical discussion of the neo-Weberian tradition and of North's influence, see Krever 2018.

35 Benton 2002, p. 25; Benton 1996.

> Without making claims that the politics of legal pluralism determined shifts in political economy (a claim I do not want to make), we can grasp through its study the intersection between major reorganizations of the plural legal order and significant changes in the distribution and definition of property rights. The fluidity of jurisdictions in the plural legal order of the early modern world helped to structure the division of resources and constituted a framework for the 'articulation' of different ways of organizing labor and property. This legal regime was fundamental to the expansion of long-distance trade, which was organized by communities of traders with distinctive legal identities.[36]

Benton cautions against turning her observations 'into a simple formulation about the unifying forces of global capitalism', showing her reluctance to theorise her work on a diverse and global set of jurisdictional disputes and more specifically how these significantly changed and created new property regimes.[37] Her overall analysis is rich, and she engages with historical-sociology debates that many legal historians are not aware of, but she implicitly defines capitalism vaguely as a set of global economic forces shaped by the expansion of trade and the distribution of property in terms of labour and land. This is a good starting point but remains schematic. Her reluctance to define or theorise the concept of capitalism more sharply is confirmed in her more recent work. For example, the conception of capitalism in Benton and Ford's *Rage for Order* remains superficial, stating that capitalism is 'locked in an intimate embrace with both empire and the law'.[38] Their book is surely a noteworthy and useful addition to the literature that wants to understand the relationship between capitalism and law, especially by tracing commercial disputes, the protection of merchants, and the application of, in this case British, commercial norms.[39] But their interest does not lie in naming the processes as such or in better understanding what is law's structural or contingent relationship to capitalist processes. They do not go beyond the classic notions of trade or companies. In fact, they even imply that enough is said about capitalism, understood as 'transformative market forces' which have 'stolen scene after scene from the empire's less glamorous legal transformations'.[40]

36 Benton 2002, p. 22.
37 Benton 2002, pp. 261–2.
38 Benton and Ford 2016, p. 25.
39 Benton and Ford 2016, p. 26.
40 Benton and Ford 2016, pp. 24–5.

More recently, and as a key example of the new trend in legal studies discussing capitalism and law more explicitly,[41] Alter writes that 'global capitalism was built and structured as an alliance between Western economic free-agents living and working abroad and their metropole protectors'.[42] She identifies pre-colonial merchants between 1400 and 1600 as 'capitalist traders'.[43] But what makes them capitalist? What does it mean or change to the notion of 'trader' that they be 'capitalist'? These questions are somewhat answered by referring to Fernand Braudel and Sven Beckert's work – the latter as leading figure of the New Historians of Capitalism approach. These are key examples of a commercialisation, culturally-driven, and atheoretical approach to global history.[44] However, they reflect a superficial notion of capitalism as driven mostly by profit and trade, which has been widely enriched – or contested – in Marxist scholarship.[45] The links between these traders and legal mechanisms are fascinating, but they do not explain how particularly high profits led to mass changes of production practices in the countryside and then in factories. This literature assumes that historically there is no debate or empirical specificity worth exploring.

Capitalism remains very poorly defined in key non-Marxist texts discussing the history of law and capitalism: capitalism is ubiquitous, but insufficiently defined and historicised.[46] Crucially, Alter does not differentiate between different logics of profit-seeking and how these logics were or were not 'integrated vertically' with changes in relations of production, for example the development of wage-labour, changes in agricultural techniques, in class composition, and in various forms of land ownership, lease, and political rights. Her article relies heavily on the agency of certain actors to act – as in rational-choice theory and neoclassical economics – according to their economic interests.[47] We are left with a limited liberal notion of capitalism as profit-seeking, where transformations in production and the role of class struggle are largely absent, and where economic variables are separated from their political and more broadly social institutions and conditions.

This commercialisation model is also manifested, albeit in more intricate and indirect ways, in Marxist legal studies. We will discuss the CFTL more specifically in the following section, but more generally, studies are today inspired

41 For example, LPE Project 2023.
42 Alter 2021, p. 815.
43 Alter 2021, p. 816.
44 Alter 2021, pp. 815–20.
45 Wallerstein 1991.
46 For example, Alter 2021, p. 859.
47 Commons 1924. For a critique, see Tzouvala 2022.

by more totalising or structurally determined and *longue durée* analyses. These centre the experience of postcolonial societies to avoid Eurocentrism, and can be associated with commercialisation models of the transition to capitalism through the rejection of internalist models.[48] Brophy focuses on labour compulsion as an approach into the specific question of law and the transition, which raises the perennial question of free and unfree labour, and of how one is to conceptualise this category in spite of its intrinsically historically-contingent character.[49] Brophy is more explicitly and categorically distrustful of any internalism in approaches to the transition. Her take is a critique of the classic transition debate's account of law and of Marxist approaches to law and legal history, though she never qualifies whom exactly she includes in this latter field.[50] She argues that law has been conceptualised as an artifice, not in the constructive 'real' sense hinted at by Marx, but in an unnatural, external, or derivative sense that leads in her view to a programmatic developmentalism and to a false relation between force and labour.[51] Her critique builds from Zeleke's work on transitions and Ethiopia, as an example of an alternative approach to law and capitalism.[52] Brophy focuses on the need for historical contingency but rejects Political Marxism as developmentalist, which seems contradictory and possibly unfair to Political Marxism's critique of consequentialism discussed below.

Some also assume a co-genesis between the emergence of the logic of territorial sovereignty and the logic of capital. We see this in Chimni's analysis of the imperialist logic of the international legal order.[53] Chimni argues that capitalism significantly shaped the 'creation of the modern state (and concomitant rules of jurisdiction)' through 'an emergent bourgeoisie' and 'merchant class' that provided the impulse to harmonise, unify, and consolidate legal rules.[54] This territorial sovereign model was then extended to 'non-capitalist

48 For example, Chimni 2022. Tzouvala does not discuss the transition, but her work focuses on how the debate on the origins of Western capitalism is problematic in terms of its Eurocentrism, with the potential implication that there is a problem with local or internalist conceptions of the transition (Tzouvala 2021, p. 424). Tzouvala focuses on both local specificity and international structure, while also maintaining that the history of capitalism is tied to that of imperialism and international law (Tzouvala 2020, p. 29).

49 The question of violence and power is also the angle adopted by Gerstenberger to understand law but these debates are beyond the remit of this article (cf. Gerstenberger 2022).

50 Brophy 2017, p. 167; Brophy 2022, p. 13.

51 Brophy 2022, p. 15.

52 Zeleke 2020.

53 Chimni 2022.

54 Chimni 2022, pp. 38–9. Tzouvala also takes Pashukanis, Miéville and other TWAIL scholars such as Arrighi to task for not adequately understanding the role of the state 'in the organisation of capitalism' (Tzouvala 2016, p. 75).

spaces through the colonial project'.[55] Building on Teschke's arguments about the specificity of absolutist European geopolitics and also stressing the existence of many other factors, Chimni nevertheless argues that the history of capitalism and the modern sovereign state can be understood as a combined 'critical impulse' shaped by 'the emerging bourgeoisie in Europe which needed to overcome the hurdles to its growth posed by excessively fragmented territories and laws'.[56] In other words, 'mercantile capitalism … encouraged consolidation of legal spaces'.[57] This enables the conceptualisation of structural interdependency between state sovereignty and capitalism as a jurisdictional model exported overseas by imperialism, and made possible by extraterritoriality as the balancing mechanism between the logic of capital and the logic of territory.[58]

I have argued elsewhere for the many benefits of Chimni's conceptualisation of jurisdiction and extraterritoriality.[59] However, this historical narrative about the relation between capitalism and sovereignty comes at a cost: the adoption of a commercialisation model that subsumes different jurisdictional processes into the uneven and combined but ultimately homogeneous force of the logics of capital and territory. It leaves us with a consequentialist conception of historical development that loses sight of how sovereignty did not emerge as a capitalist process. By reacting to mainstream and neo-Weberian approaches that separate sovereignty and capitalism ('MILS', i.e. Mainstream International Law Scholarship), and thus provide an 'ahistorical and asocial explanation', Chimni adopts the alternative extreme of providing a structurally determined, totalising, and thus causally indeterminate analysis that subsumes sovereignty into capitalism.[60]

1.2 *Political Marxism and the Critique of Consequentialism*

In contrast, Political Marxism was shaped by the Brenner Debate, which refers to a Marxist controversy in the 1970s and 1980s about the transition from feudalism to capitalism in Europe.[61] Brenner's influential thesis is based on the concept of social-property relations, as an alternative to relations of production, for better understanding agrarian capitalism as a process specific to England in the sixteenth and seventeenth centuries. It emphasises vertical *and* horizontal

55 Chimni 2022, p. 41.
56 Chimni 2022, p. 31.
57 Ibid.
58 Ibid.
59 Pal (forthcoming).
60 Chimni 2022, p. 29.
61 Aston and Philpin (eds.) 1985.

class struggle as the driving factor for changes in these social relations.[62] Wood, another key founder of this approach, stresses the legal dimension as constitutive of the mode of production, rather than the crude superstructural analysis that dominated Marxist approaches to law for a period in the twentieth century.[63] Methodologically, Political Marxism implies a focus on careful and specific comparative historical analysis in contrast to a more structural and theoretically driven Marxism.

Political Marxism adopts a sharper definition of the concept of capitalism, anchored in specific social-property relations – the capital relation between abstract and dispossessed labour and owners of the means of production. The historical origins of capitalist social-property relations – or the capital relation – are associated with differential outcomes of class conflict subsequent to the crisis of the fourteenth century. Since these outcomes diverged radically within Europe, capitalism is first identified in the regionally specific transition to agrarian capitalism in late medieval and early modern England, rather than in Western Europe at large.

The Political Marxist critique of commercialisation is linked to the problem of consequentialism. In its most traditional form, this is the approach that assumes that capitalism has always existed in some embryonic form as essential to 'human nature and human rationality', and most importantly that capitalism follows a pre-determined path, which is the problem most commonly found in the literature discussed above.[64] Consequentialism also means focusing on the outcome of capitalism or on its form, rather than on the specificity of its origins as a social process. Commercialisation models tend to be consequentialist and refer to the way in which classical liberal political economy understood the development of capitalism as emerging 'when the market was liberated from age-old constraints and when, for one reason or another, opportunities for trade expanded'.[65]

For Wood, commercialisation models are present in the work of neoclassical economists but also in the work of scholars such as Max Weber, Immanuel Wallerstein, Fernand Braudel, and others focusing more on the quantitative (rather than qualitative) development of capitalism. For example, the expansion of commerce through urbanisation, growing trade, cyclical patterns of demographic growth, and the universal and transhistorical laws of the

62 Brenner 1976, 1977; Comninel 2000; Teschke 2003; Dimmock 2014.

63 Wood 1992, 1995, 2002a. For reviews of Marxism and law, see: Knox 2016; O'Connell and Özsu (eds.) 2021.

64 Wood 2002a, pp. 15–16.

65 Wood 2002a, p. 13.

market.[66] These phenomena are broadly located in the 'long sixteenth century' and are widely regarded as pan-European, associated with the Discoveries and the development of long-distance trade. Commercialisation is further distinguished from capitalism as the set of conditions under which individuals have market opportunities, but not market imperatives. The imperative of market dependence is one of the main qualitative changes that signifies the shift to capitalist social-property relations.[67]

Brenner developed a thorough critique of commercialisation models found in mainstream histories but also in Marxist approaches such as Sweezy's value theory of development or Wallerstein's World-Systems Theory, which he dubbed as 'Neo-Smithian'.[68] He argued that capitalism only emerged from the English context because of a specific set of largely unintended social processes that led to more systematic and large-scale change, such as the shift to relative surplus labour, in contrast to the expansion of trade and mercantile activity. Focusing on trade and mercantile practices led scholars, he argued, to over-emphasise the importance of 'methods of increasing absolute surplus labour which dominated pre-capitalist modes – for example the extension of the working day, the intensification of work, and the decrease in the standard of living of the labour force'.[69] In other words, the quantitative was favoured over the qualitative. Brenner never denied the importance of merchants for the early modern period, especially in the English case, as he dedicated significant work to understanding their roles in the development of trading companies and imperial projects.[70] However, he argued against the view of overall and general transition brought about by mercantile activity and its demise of feudalism, supposedly unleashing the inevitable force of global market expansion.

Instead, other factors – a highly organised ruling class focused on the centralised monarchy that was able to force producers to produce more for the market, leading to largescale wage labour and market dependence – coalesced into specific transformations in the agrarian context between peasant/tenant/lord relations in England. This process is illustrated most famously by the enclosures, which eventually led the way to industrial capitalism in the nineteenth century. Since people were not able to feed themselves, or to work in small cottage industries on their own or on local farms, they had to look for work elsewhere. Here we have the development of urban and industrial

66 Wood 2002a, pp. 13–20.
67 Wood 2002b, p. 77.
68 Brenner 1977.
69 Brenner 1977, p. 30.
70 Brenner 2003.

centres as destinations for a new class of poor people. Brenner opened the controversial box of Marxist historiography to a broader approach to social history, basing his research on detailed comparative work examining differences in agrarian development in Eastern and Western Europe. This work was further developed by Wood and Comninel, who focused more specifically on the differing roles of France and England's legal institutions in showcasing the distinct class relations that contributed to the specificity of England's original transition to capitalism, in particular the English Crown-in-Parliament vs. the jurisdictional autonomy of France's regional parliaments.[71]

Despite this influential critique, capitalism is increasingly today cursorily defined by the expansion of commerce and trade (either through rational institutions or through imperialism) in the early modern period, a broad commercialisation model influenced by the works of Weber, North, Braudel, and Wallerstein. This section has raised several issues with this model when applied to the history of law and capitalism: capitalism is poorly defined, most definitions rely too heavily on the quantitative expansion of trade, and the literature is reluctant to theorise the relation between law and capitalism. The narratives provided are not necessarily empirically incorrect. What is questioned is the subsumption of all these actors, practices and processes under a quantitative conception of capitalism as the expansion of international trade, how this leads to a simplification of the qualitative nature of capitalism, and which important historical processes – like, for example, jurisdictional practices – remain thus analytically elided from this blunt perspective.

2 The Jurisdiction and Legal Form Dialectic: Historicising the Bourgeois Legal Subject and Commodity Form

This section develops the premises of a Political Marxist approach to legal transition while addressing its gaps in terms of theorising and accounting for the legal form.[72] The legal form is a concept best developed by Pashukanis's CFTL and revived by recent legal Marxists. First, the section defines jurisdiction from a critical and historical perspective before discussing the legal form and its limitations through key texts in CFTL and their implications for the transition debate. It argues that we need to develop a metatheoretical framework combining legal form and jurisdiction. This means accounting for juridical

71 Wood 1992; Comninel 2000.

72 For a discussion on why and how Political Marxism should engage with form analysis through a dialogue with Open Marxism, see Dönmez, Pal and Sutton (under review).

practices in terms of their structure and agency, their ideal and material forms and content, and their linearity and ruptures.

2.1 *Historicising Jurisdiction*

Distinguishing jurisdiction from law is necessary to understand the early-modern period of transition. The multiplicity of jurisdictional processes and actors plays a significant role in the political, economic, and legal landscape in which early modern polities operated. By definition, a jurisdictional process implies a constitutive or even pre-constitutive process of law creation or legal behaviour which has not yet been fully institutionalised. Critical approaches to jurisdiction focus on its transformative and declarative potential, and aim to go beyond the technical, modern (and Weberian) definitions as the exercise of the right to justice. For Pahuja, 'sovereignty is a practice of jurisdiction', rather than the conventional assumption that 'jurisdiction is an exercise of sovereignty'.[73] Similarly, for Jones, jurisdiction is a central and preliminary process, which he defines as the articulation of law.[74] Chimni laments the lack of social and political analysis in the mainstream's conception of jurisdiction.[75] He reconceptualises jurisdiction from the Third World approaches to international law (TWAIL) perspective as the prerogative of strong states to advance their own interests and as structurally integrating processes of capitalism and imperialism.[76]

In addition, I suggest here that jurisdiction is spatio-temporally specific, and that 'early modern jurisdictions' is a categorically different concept from 'modern jurisdiction'. Crucially, developing Jones's argument, jurisdiction can be understood as the *material* articulation of law, while legal form represents its *ideational* articulation.[77] Thus, to think of legal form and jurisdiction as

73 Pahuja 2013, pp. 69–70.

74 Jones 2019, p. 203.

75 Chimni 2022.

76 Ibid.

77 The term 'articulation' is loosely taken here from Bhandar and her application of Stuart Hall's definition and discussion of Althusser (Bhandar 2018, pp. 11–13). Bhandar defines articulation as a new concept 'that facilitates analysis of how political, economic, and, I would add, juridical practices are "condensed" into forms of domination over particular social groups and classes' (Bhandar 2018, p. 12). The concept mainly allows for more historical and conceptual flexibility, i.e. 'there are no guarantees that a given articulation of race and property ownership will appear in the same configuration across time or jurisdictions' (Bhandar 2018, p. 13). A full discussion of this concept and of its relation to the Althusserian notion of encounter is beyond the remit of this article. The implications for historiography are crucial though, as the encounter 'points to how different elements, each with their own singular temporality, were articulated in a non-teleological manner,

articulations of law (or of the juridical) enables a different abstraction of the juridical, otherwise neatly defined as 'the fabrication of legal techniques that define legality and illegality, produce legal subjects, operate as a form of governance, and in all of these guises function as a form of disciplinary power'.[78] This definition combines technique and subjects (jurisdiction) on the one hand, and forms of governance and power on the other (legal form). The legal form/jurisdiction dialectic provides a different way of simplifying the juridical for the purposes of integrating an analysis of the transition to capitalism that accounts for both continuity and discontinuity. Illustrating this distinction through the two cases developed in the final section, property and sovereignty, we will see how capitalist society consolidates the distinction between a public system of law and command with sovereignty on the one hand, and property as private, exclusive, and individual on the other.[79] These 'ideal' forms are the outcome of specific jurisdictional processes. The struggle by the class of owners of the means of production to maintain the illusion of the separation of law as form and jurisdiction eventually became a key mechanism of both modern and capitalist society, similarly to the separation between the political and economic.[80] The ideal forms remain illusory, never to be fully realised as such, yet the jurisdictional efforts to maintain, resist and disrupt them continue in practice or as a potentiality.

An example of how this plays out can be seen not so much in terms of what jurisdiction is, but of who is allowed to be a jurisdictional actor.[81] Marx's discussions of the parliamentary debates on the theft of wood in 1842 in the *Rheinische Zeitung* are a good illustration of this struggle.[82] In 1820s–40s Prussia, Parliament – the Rhine *Landtag* – imposed a precondition of ownership of land 'in business' for several years for members to be involved in parliamentary decisions ('deputies of the knightly estate'). Landless capitalists and the rural/urban proletariat ('urban deputies') were thus excluded from this legal process. The issue at stake in the parliamentary debate raised by Marx

with the danger that the encounter might not "hold" always present' (I am grateful to a reviewer for this comment). In other words, the question of transition is also necessarily a question of teleology, and of the need to accept that questions of origins and emergence remain always on some level hermeneutical, conditioned by questions of interpretation and conceptual flexibility, i.e. they hold the potential for articulation.

78 Bhandar 2018, p. 12.

79 Wood 2012, p. 5.

80 Wood 1981.

81 I am very grateful to an anonymous reviewer for suggesting this point and example, and for their thoughts on its implications.

82 Marx 1842a; Marx 1842b.

was that of customs in the forest commons, through which the Prussian state redefined what is (legitimate) property and (illegitimate) theft. The state thus shaped the legal form by retaining old relations of domination and eventually uniting them with exclusive ownership represented by an increasingly powerful and jurisdictionally challenging new bourgeois class.[83] 'The customary rights of the aristocracy conflict by their *content* with the form of universal law.'[84] Marx was writing in defence of the poor people stuck in the midst of this conflict between form and content, who owned nothing and who were now accused of theft for picking up wood and berries. This example illustrates how the form/ideational and jurisdiction/material distinction operates, as well as the need to understand the historical making of the legal form and its conflict with class relations; not as the abstract and universal emergence of the bourgeois legal subject, but as a specific historical practice of jurisdictional class struggle.

Both sovereignty and property are rights established after the exercise of a jurisdiction to do so, shaped by specific class relations and institutional structures. Those rights are thereafter used to derive and 'naturally' justify the jurisdiction that succeeded in its struggle (usually but not necessarily by owners of means of production and their allies) by becoming its source, at the individual private level, and at the international/state public level. This naturalisation erases the struggles and conditions for the emergence of the right in question. We need to be able to recover and account for the many jurisdictional struggles that shaped these institutions regardless of whether or not they were shaped by capitalist interests, or whether they were successful or not.

If jurisdiction is a generative and concrete concept that covers a wide range and fundamental set of practices, aside from a few exceptions, its historicisation has been neglected by Marxist scholarship.[85] It allows for more flexibility and diversity than the legal form, to capture a) the quantitative and divergent outcomes of practices that did not lead to the emergence of capitalism (yet which are deemed transitional by commercialisation approaches, such as mercantilism) *and* b) the specific qualitative moments of transition (emphasised by Political Marxism). Fully grounding the transition debate in a radically historicist and materialist analysis, as does Political Marxism, reveals that the early modern period in Europe and its colonies was not exclusively or even predominantly a passage to a clear and homogeneous path to a form of bourgeois commodity exchange relations, neither at the individual nor at the state level,

83 Liedman 2018, p. 86.

84 Marx 1842b.

85 For example: Chimni 2022; Tomlins 2010.

as can be implied by the CFTL. European empires developed different jurisdictional strategies of appropriation and dispossession while England developed new capitalist processes of private property, at home and in its colonies. This history matters for how we theorise the legal form and what it can do to help understand transitions, in the past and hopefully in the future. Otherwise, the commercialisation model can obscure or simplify many of the local and transnational ways in which states and ruling classes (and even merchants) did *not* behave according to the rules of capitalist commodity exchange.

2.2 *Historicising the Legal Form*

The CFTL is a critical approach to law as a structurally and historically determined process. This approach is focused on the abstract and individual legal subject as commodity owner, and hence focuses on the structural and formal dimension of transitional change. To recapture jurisdictional practices as well as their apparent formalisation, the article proposes a theoretical framework that finds unexpected synergies between Political Marxism and the CFTL, in spite of their important methodological and epistemological differences. There are two movements to this analytical proposition. First, Political Marxism helps to historicise and concretely separate jurisdiction from law, and locate it as an essential dimension of the social-property relations necessary to analyse the concrete and material emergence of capitalism. Second, the form analysis of the CFTL enables the second movement of the dialectic to bring law and jurisdiction back together and understand their ideational entanglement, and the structural determinacy they produce, yet never fully achieve, even within a global capitalist order. Combining the CFTL with a Political Marxist approach enables a conceptualisation of social change that also incorporates agents and practices of non-transitional social change in terms of individual agency (such as consuls) and institutional practices (for example, dynastic sovereignties), i.e. jurisdictional subjectivities that get otherwise erased from histories of law and capitalism or subsumed as capitalist, and which we discuss further below.

One of the key contributions of Pashukanis's CFTL is to historicise the relationship between law and capitalism, and hence make law historically determined by the legal form and the emergence of a bourgeois legal subject based on the conflict between private interests. However, Pashukanis does not ground this specific form in a historical narrative that adequately reflects the actual emergence of capitalism. Instead, he relies on an abstracted and primitive set of social transformations as defining the shift from medieval or feudal social relations to capitalist or bourgeois social relations.[86] He himself admitted in

86 Pashukanis 1978, pp. 110, 119, 123.

an 1930 article that in his major work, *The General Theory of Law and Marxism*, 'the problem of the transition from one socio-economic formation to another – and particularly the transition from feudalism to capitalism ... was not posed therein with historical concreteness'.[87] It is indeed coherent for the CFTL to not take a position on the transition, in the sense that its purpose is separate from that of the question of capitalist origins. The CFTL presents law and capitalism as a specific spatio-temporal nexus, and this is its crucial contribution to the literature of showing that law is a product of capitalism. However, this parsimonious and synchronic contribution slices and abstracts a particular set of mechanisms and misses the messier, transitional, and non-transitional processes that characterised the shift to the capitalist legal form.

Applying Pashukanis's CFTL without a conceptualisation of jurisdiction as a way to capture these other processes can lead to a view of the transition overly tilted towards the transformative role of 'the development of trade, and of the money economy' as the factor that makes 'the juridical, or rationalistic, interpretation of the phenomenon of power possible'.[88] Moreover, this is set in a conception of historical development that is arguably consequentialist, which traces the evolution of concepts immanently from the perspective of their material outcome. Pashukanis's analysis can be interpreted as consequentialist by the use of the term 'embryo' and 'embryonic' to describe proto-international law, inter-society legal relations, or the law before the legal form as commodity form.[89] Pashukanis's theory is based on an evolutionist conception of development in which bourgeois society 'emerges from and destroys' feudal society, and in which the legal form reaches its 'peak'.[90] Proponents of the CFTL might respond that the questions of jurisdiction and of specific material conditions discussed in this article are questions of content, and that for Pashukanis, the point is that Marxist theory has tended to focus only on content and ignore the legal form.[91] The question of content is separate, and 'the legal form can be filled with any content whatsoever'.[92] As long as the content or material conditions are insufficiently transformative or revolutionary to bring about the 'withering away' of law, then they do not displace the centrality of the legal form and legal subject of capitalist social relations. But this can only be the case under capitalism once it has been fully universalised. The idea that 'And

87 Pashukanis made this comment 'in a later article ("The Situation on the Legal Theory Front", *Sovetskoe gosudarstvo i revoliutsiia prava*, 1930, № 11–12, pp. 16–49)'; in Beirne and Sharlet (eds.) 1980, p. 187.
88 Pashukanis 1978, p. 136.
89 Pashukanis 1978, pp. 58, 70–1.
90 Pashukanis 1978, pp. 40–1.
91 Pashukanis 1978, p. 54.
92 Dimmick 2021, p. 123.

one day there was the legal form…' or 'the legal form has risen' is prophetic – in some sense the CFTL's abstract method and purpose unintentionally creates an origin story that reduces a long and messy process to a key variable of social change.

Another significant implication of the CFTL is the individual-state analogy, which is also observed in the method of focusing on shared characteristics or external similarities.[93] Pashukanis universalises an ideal case of the bourgeois individual as a free and equal commodity owner. The legal form is the appearance of equality that law supposedly provides, and it mirrors the relationship between individuals and the commodity form in a capitalist social relation. The CFTL is specifically aimed at revealing the false abstract relation of equality produced by and embodied by law under capitalism. In its formal and abstract sense, the commodity form and the legal form are tied to a fundamental and general transformation from a feudal system – of a personal or bonded relationship between producers/peasants and lords – to a capitalist system – of a 'free' and 'equal' relationship to the state and to (wage-)labour. For Pashukanis, the key process through which law under capitalism can be understood is the commodity, and so we begin with the realm of commodity circulation, as well as the ideational conception of individuals – and by analogy, states – as bearers of commodities and rights.[94] For example, Knox makes the leap to the international sphere in his account of the transition, by looking for these tendencies at a different level of abstraction, reproducing Pashukanis's analogy from the individual subject to the state as commodity owner.

> The networks composing the European feudal order were supra-national in nature, originating from the power of the Church and extending across the European nobility. The transition from feudalism to capitalism was initially consolidated in the shape of the absolute monarchies and an attendant 'nation-state' form. Such states, organised around a mercantile capitalism, engaged in extensive trade, becoming – in essence – commodity owners. In this way, an international order of sovereign equality emerged to fill the vacuum left by feudal relations.[95]

According to this narrative, the state follows a model of relations that is first experienced by individuals or, more precisely, by bourgeois legal subjects. We start with an explanation by Marx of the breakdown of feudalism as an

93 Miéville 2005, p. 202.
94 McConnell 2022, pp. 43–6.
95 Knox 2022, pp. 38–9.

institutional system of common values, which is eventually replaced by a logic of juridical equality based on the commodity form 'shared' with the nature of exchange in capitalist social relations. This replacement is evidenced by the state, which reproduces the individual form of capitalist social relations, by adopting sovereign equality. We start from an abstract individual and move to specific states such as France, England and the United Provinces of the Netherlands.[96]

But why are states adopting this form? Is the state driven by specific individuals such as newly appointed officials or by the bourgeois class reproducing capitalist social relations? It remains unclear what the causal chain is and who the main drivers of the chain are. As with Miéville, there is a focus on external similarities that obscures the more internal, messier, and non-transitional processes. These processes are essential to grasp the *discontinuity* and potential fragility of historical determinations where developmental paths are always up for contest. We need different levels of analysis of capitalism and law to avoid causal indeterminacy.[97]

A detailed and nuanced historical account of the CFTL is found in Baars, who links the transition to capitalism with international law by tracing the development of the corporation, from the English institutions of the guilds and boroughs, as the key manifestation of the legal form as commodity form.[98] Baars claims that their emergence is gradual but interlinked, and that 'the creation of trading corporations was profoundly implicated in the spread/export (and eventual *universalisation*) of capitalism, the state form, and the content and institutions of international law'.[99] This implies some chronological process whereby the corporation, capitalist processes of accumulation located in the English countryside (following Wood), and proto-international law developed simultaneously.[100] In spite of listing a range of factors explaining the transition to capitalism, Baars concludes that the rest of the political and legal institutions necessary for modern international law to develop (from the seventeenth to the eighteenth centuries onwards) remain tied to the legal form

96 Knox 2022, p. 44.

97 Buckel has developed an elaborate theory of the legal form that addresses this issue, by incorporating the subjective (or individualist) and cohesive (or structurally hegemonic) dimensions of its impact on social and political forms. She also stresses the co-constitutive relation between legal form and political form, but her work remains focused on deconstructing the specific mechanisms of capitalist society, rather than any transitional phase (cf. Buckel 2020, pp. 228–59).

98 Baars 2019.

99 Baars 2019, p. 81.

100 Baars 2019, p. 82.

of the corporation. Baars relies on a Political Marxist reading of the transition in terms of England, and uses this case in detail to build her argument on the origin of the corporation or corporate legal form by going through a detailed history of the links between boroughs and guilds, and how they provide early elements of corporate forms. However, Baars does not draw the conclusions that Political Marxists draw from the specificity of these historical developments in contrast to other Western European states and what these differences may mean geopolitically. Moreover, the discussion remains historical and does not reveal any further clues as to how this combination of Political Marxism and the CFTL translates theoretically.

In summary, the CFTL centres its analysis of law and capitalism around the emergence of the bourgeois legal subject as the commodity form emerges for capital. Various studies that apply the CFTL to the history of capitalism and international law transpose that logic to the international level – going from the individual to the state – through processes of commercialisation, mercantilism, and colonial imperialism. These studies tend to follow a similar empirical narrative to the general commercialisation model albeit with significant nuances and a clear theoretical purpose based on strategic considerations.

In response, I propose to theoretically build on Jones's definition of jurisdiction as the articulation of law, by adding that jurisdiction represents the *material and concrete* – or practical, *de facto*, declarative, and constitutive – articulation of law, whereas the legal form reflects law's *ideational and abstract* articulation.[101] In other words, we need to integrate both to understand transitional historical periods and in order to account for the specificities of early-modern practices of jurisdiction.

3 The Jurisdictional and Formal Instances of Property and Sovereignty

The present section focuses on property and sovereignty. These fundamental concepts and institutions have shaped modern conceptions of the international order. If property operates more at the legal, private, and individual level, sovereignty belongs to the more political, public, and state/international level. Property tends to be understood as pre-capitalist without sufficient exploration of how capitalism has transformed its various manifestations or

101 Jones 2019, p. 203.

what consequences that relation entails.[102] It is thereby left in an ambiguous relationship to capitalism. Sovereignty tends to be subsumed as part of a spatially and temporally broad, and thus causally indeterminate, commercialisation model of transition. This erases the diversity and variable causes of its manifold manifestations and reproduces a presentist and false Westphalian account of the emergence of the modern sovereign state.

Both the legal form and jurisdiction can be seen as two separate articulations of the law. This is illustrated by the different articulations of the emergence of private property, helping to explain its role as both a key determinant of the transition and definition of the bourgeois legal subject on the one hand, and as one of the fundamental tensions within capital accumulation through the rentier logics of rent extraction. Similarly, for the concept of external sovereignty, the CFTL would understand it as the object of international legal subjectivity (for example, equal and independent state through analogy between state and bourgeois individual), whereas for Political Marxism, external sovereignty is the object of class struggle (for example between aristocratic, bourgeois and peasant property rights, or over the aristocratisation of diplomacy in the eighteenth century).

What jurisdiction adds to the analysis of the legal form is the realisation that labour and capital went through a range of transformations and alternatives in the early modern period. These took on and reflected various juridical forms that do not correspond to the bourgeois legal subject as 'free' and 'equal' that constitutes the basis to the legal form.[103] Commercialisation models tend to assimilate bourgeois and capitalist actors.[104] Instead, the 'bourgeois' legal subject needs to be further historically traced. For example, some argue that the juridical or legal subject emerged specifically in the late eighteenth century, based on specific changes in commercial practices.[105] Thus, it is important for histories of law and capitalism not to limit themselves, as some argue Pashukanis does, 'to the analysis of the exchange relation'.[106] The following

102 Pistor 2019, p. 10; p. 5, quoting Rudden 1994, argues that if the 'manifestations of capital and capitalism have changed dramatically, [...] capital's source code has remained unchanged throughout', i.e. the institutions such as property used to code capital today were invented during feudalism.

103 Whether they survived the consecration of the legal form of labour as 'free' and 'equal' is a different question, and one that requires a separate analysis linked to the discussion of how to conceptualise capitalist and non-capitalist social relations or institutions.

104 Wood 2002a, p. 14.

105 Cutler 2003, p. 153.

106 Cutler 2003, p. 155, n. 13; Cutler 2014, p. 49, n. 4.

historicises the individual and international legal subjects in terms of the respective development of property rights and sovereignty.

3.1 *Historicising the Individual Legal Subject of Property Rights*

Property is a key concept that both Political Marxism and CFTL share as a central and determining factor for the emergence of capitalism, whether in terms of, for the former, the object of class struggle (enclosures), or, for the latter, as the object of legal subjectivity (the bourgeois as owner of commodities). Cutler and Jones's works are particularly useful examples in terms of how to engage with the transition debate from both a local and international perspective, focused on the development of property rights, and for how to combine their jurisdictional and formal dimensions. Cutler combines a local and international analysis of the emergence of capitalism through her study of the development of merchant law and of the global political economy from the medieval to the contemporary era.[107] Her analysis distinguishes between the 'rise of capitalism' and other processes better associated with the doctrine of mercantilism, the expansion of trade through colonisation, the ideology of liberal political economy, and crucially, the development of different types of state authority.[108] She also separates feudalism from the medieval merchant order, arguing that the autonomous merchant order contained 'hints' of the future capitalist order.[109] These contributed to developing specific practices of making commerce capitalist rather than feudal or merchant-based, and England and the common law are, unsurprisingly, responsible for developing commercial practices (like pricing and contract theory) that will shape later configurations of capitalism.

Cutler's analysis provides a complex picture of various developments that separate merchants' practices through legal and commercial mechanisms, shifts in property relations, the juridification of commercial relations and legal disciplines, the emergence of individual legal subjectivity, and state practices of disembedding markets and creating public/private spheres. These contributed to rendering 'states more willing and more able to regulate international trade' and so fix the relationship between capitalism and international law.[110] Although Cutler relies on Political Marxist arguments regarding its definition of historical materialism based on social-property relations, she also develops

107 Cutler 2003.
108 Cutler 2003, pp. 142–79.
109 Cutler 2003, pp. 111–12; p. 133.
110 Cutler 2003, p. 143.

the CFTL and makes a critical contribution to its approach.[111] What is important to the argument here is the effort to disentangle the geographical expansion of trade, commercial practices and institutions, from state authority and the emergence of capitalism; an effort to account for capitalist transition as a qualitative process.

Similarly, Jones interweaves an analysis of the emergence of capitalism in England from a Brenner–Wood perspective with an analysis of colonial enclosures as a necessary yet distinct and parallel process to the one occurring in England. If his argument emphasises the role of colonialism and imperialism, it also provides a solid, empirical account of how this 'co-constitution' between capitalism and colonialism manifested itself specifically in the England case.[112] Jones provides a careful analysis of legal history's approach to the transition, based on shifts in property rights and land tenure. Building on this history of property and enclosure, Jones argues that enclosure and settler-colonialism both illustrate how law transforms property as a key process of capitalist transition.

Since Marx (and even John Locke and Adam Smith), we know that the establishment of private property required expropriation and dispossession through processes of enclosures and ideologies of waste and improvement. This is understood as one of the key conditions for capital accumulation.[113] Moreno Zacarés, via the case of Spain, goes further into the specificities of the various articulations of property across a broader historical spectrum.[114] He shows that we need to be more precise about the ways in which property and other key determinants of capitalism, such as money, or profit-making, are never fully 'capitalist' from their origins or through transformations from past lives. The history of property is the story of the articulation of various pre-capitalist regimes of property into a capitalist system of social-property relations and societal reproduction driven by class, and – I would add – jurisdictional, interests.[115] Property relations display several tensions between different historical moments of the evolution of property rights, like for example the spectrum between absolute private property and communal or communitarian property rights (or ownership of things vs. bundles of rights or things vs.

111 Cutler 2002; Cutler 2014.

112 Jones 2019, p. 189. However, see Evans 2021 and Post 2011 for analyses that contest this co-constitution in terms of rejecting the capitalist imperative logic of settler-colonialism in Canada and the USA.

113 Neocleous 2012.

114 Moreno Zacarés 2024. I am grateful to the author for his clarifications on these issues.

115 Moreno Zacarés 2024, pp. 13–15.

wealth).[116] If, for Moreno Zacarés, capitalism presupposes the existence of private property, it only does so in the same way that it presupposes the existence of money. There is a critical hybridity at play in these processes, which mean that however much rentier logics are pre-capitalist, today 'rent extraction is an intrinsic feature of capitalism' because it operates according to capitalist relations of production, as '[p]rivate property is a knife that cuts both ways'.[117]

Similarly, Cutler argues that key aspects of capitalist property rights today have their origins in medieval merchant law, especially in terms of the transmissibility of property.[118] She shows that these commercial and merchant-driven practices went counter to feudal practices of property. She also distinguishes between feudal property as bundles of rights ('contingent, conditional, fragmented, and based upon diffuse and overlapping claims to authority') and capitalist property as ownership of things ('absolute and exclusive').[119] These competing conceptions 'reflect the dialectical relationship between capital and labour and the tension between national and transnational productive relations' as the conception of 'bundles of rights' has re-emerged in the late twentieth century to shape globalisation.[120]

In the early modern period, jurisdiction was also referred to as *dominium* and encapsulated at least two notions, that of judicial authority and that of property or ownership.[121] Cases of imperial expansion illustrate the ways in which different jurisdictional practices were developed to justify colonial plunder and appropriation, and specifically showcase the emergence of new practices of jurisdiction through different approaches to expansion and settlement. In effect, the Castilian approach retained the early-modern notion of dominium by fully 'transplanting' their authority over land, resources, and people in the Americas.[122] Moreover, these practices restricted *jus gentium* (early international law) to colonial concepts of ownership and judicial jurisdiction (colonial forms of dominium).

In contrast, English imperial expansion and colonisation in the seventeenth century already exhibited a preliminary distinction between property and jurisdiction, by restricting dominium to private property, which reflected also a balance between its desires and practices of dominium and imperium.

116 Moreno Zacarés 2024, p. 19; Cutler 2002; Rudden 1994.
117 Moreno Zacarés 2024, p. 19.
118 Cutler 2003, p. 133; pp. 111–12.
119 Cutler 2002, pp. 237, 240.
120 Cutler 2002, p. 232.
121 Koskenniemi 2014, p. 9.
122 Pal 2020, pp. 239–48; pp. 277–81.

England colonised as a 'transport of authority' and with a jurisdictional distance, as compared to Castile.[123] This is illustrated by the famous *Calvin's Case* and by the development of agrarian capitalism and the process of enclosures, in England and in the colonies, which remains at the forefront of the development of private property. [124] Returning to Jones, his analysis similarly shows how England in effect developed a specific process of colonisation based on its internal characteristics and the specific development of agrarian capitalism experimented by a certain class – landowners, yeomen, and colonial settlers. In other words, the emergence of private property and its influence on international relations, international law, and the global political economy is specific to practices of imperial expansion that were not universally present in the early modern period and which refer specifically to England's expansion. Scholars discussed above may disagree on which processes were capitalist, but they nevertheless agree on the need to historicise them as historically contingent. The form/jurisdiction distinction is key, since the emergence of private property (as with the emergence of any key legal institution) can be seen as a more jurisdictional process – or, more precisely, a result of a clash of jurisdictions through enclosures and, in some cases, settler colonialism.[125]

We need a conceptual framework that makes sense of these practices that transition and de-transition, or jurisdictionally challenge, the structurally linear narrative of consequentialist approaches. The institution and concept of property is a set of practices and ideas that retains significant pre-capitalist logics, and thus tensions with capitalism. It also enables, through historically contingent processes of social-property relations (like those of England), the emergence of capitalism. The concept of jurisdiction offers some additional dimensions to understand the complex lives of property and to disentangle and conceptualise the two – or many – lives of property, as both capitalist and non-capitalist in their various articulations.

3.2 *Jurisdictional Subjectivities and the Myth of Sovereign Equality*

The other case discussed in this section is the institution of state sovereignty. How did the transitions to capitalism affect the evolution of the institution of modern state sovereignty? For Teschke, this is a complex processual, rather than structural, story, in which pre-modern and pre-capitalist institutions co-existed with emerging capitalist geopolitics, the latter powered by Britain's

123 Pal 2020, pp. 282–6.

124 Neocleous 2012; Tomlins 2010. *Calvin's Case* 1608.

125 Jones 2019, p. 203.

'offensive navalism' in the eighteenth century.[126] The historical relationship between capitalism and modern state sovereignty is one of 'co-development', 'not co-genesis'.[127] A radically historicist approach shows that a range of jurisdictional agents and processes did not behave according to an abstractly defined rule of commodity exchange. They represented de facto, practical, and ad hoc opportunities and mechanisms developed by sub-sovereign or intermediary actors – for example, men 'on-the-spot' – who creatively made the most of prerogatives to assert themselves and/or profit politically, juridically, or economically.[128]

Pre-nineteenth-century overseas consuls, especially in the Mediterranean, are a prime example of this multi-layered jurisdictional behaviour.[129] They developed significant jurisdictional rights as judges, diplomats, solicitors, customs and police officers, and merchants in their assigned colonies over the foreign populations in trading ports where they were assigned or elected. They often were in conflict with the imperial centres they represented, local sovereigns, or with local merchant populations. They mostly defended their own interests, or those of their communities, but increasingly came to defend their sovereigns' interests as the status and office developed and modernised following the innovative French model in the eighteenth century. In other words, similarly in some cases to trading companies, colonial governors and settlers, or privateers, consuls developed quasi-sovereign powers and complex networks of jurisdiction and commercial activity, which do not fit neatly into the categories of feudal, commercial, or capitalist legal subjectivities.[130]

Another example of alternatives to capitalist legal subjectivity includes the various struggles by European aristocrats and military actors to defend dynastic interests against those of the bourgeoisie in the seventeenth and especially eighteenth centuries, and which we discussed briefly above even in the case of 1820s Prussia.[131] These set diplomacy and so-called 'embryos' of public

126 Teschke 2020.

127 Teschke 2003, p. 40.

128 For example: Ebben and Sicking (eds.) 2020; Benton, Clulow and Attwood 2017; Benton and Ross (eds.) 2013; Belmessous (ed.) 2012; Dorsett and McVeigh 2012.

129 Ulbert and Le Bouëdec (eds.) 2006; Leira and Neumann 2013; Bartolomei, Calafat, Grenet and Ulbert (eds.) 2018; Pal 2020, pp. 194–236.

130 Stern 2016; Colás 2016; Games 2008; Jones 2019. For example, in North America, there was a significant difference in types of colonial farms between the family-run farms, more in line with Locke's conception of improvement through agriculture, and farms run by professionals for trading, which emphasises the important qualitative differences between colonial practices (Jones 2019, p. 199).

131 Beik 1985; Parker 1996.

international law (the Westphalian legacy) in contradiction – or at least in contrast – with emerging capitalist enterprise. In effect, France, Spain and the Holy Roman Empire were acting structurally differently to England and the Dutch Republic. In other words, their internal characteristics mattered more than their external similarities for determining key foreign-policy behaviour, especially in terms of diplomatic practices, and how these related to shifts in class composition and ruling elites.[132] The aristocratisation of ambassadors was a key strategy of jurisdictional accumulation in the eighteenth century that resisted the transition to capitalism on the international stage rather than help to establish it, yet it was key to shaping the international system of states.[133] Internal characteristics had an effect on the external shape of international relations and international order.

Similarly, sovereign equality did not emerge to fill the vacuum caused by the breaking down of feudal relations, as in commercialisation and consequentialist models.[134] Instead, sovereign equality, if it ever fully crystallised as such, emerged through separate processes of composite and parcellised sovereignties as the outcome of specific struggles – by ruling elites, old and new nobles, officials, parliamentarians, various types of bourgeois, merchant elites, diplomatic representatives, and even peasants in some regions – over jurisdictional and property rights.[135] Until late in the nineteenth century for some, and even later in the twentieth, the international legal order and the emerging capitalist global political economy existed within a patchwork of sovereignties and para- or quasi-sovereignties. The neat equality and individuality of the sovereign juridical form based on territorial expansion abstracted from personal privileges may have been an ideal from a certain point in the late nineteenth century, but it was far from being put into practice even then, and especially not in the preceding early-modern period.[136]

For Political Marxists, mercantilism is a crucial part of the broader history of capitalism, but it is not sufficient as a condition to explain the development of capitalism.[137] Mercantilism can be defined as 'private ownership and accumulation of state-sponsored titles to wealth for the mutual benefit of king and privileged traders and manufacturers', i.e. as a pre-capitalist process

132 Teschke 2021.

133 Pal 2020, pp. 182–92; Scott 2007; Bély 2007.

134 For example: Knox 2022, pp. 38–9.

135 Sahlins 1991; Wood 1992; Ruggie 1993; Bartelson 1995; Teschke 2003; Wood 2012; Keene 2013; Costa Lopez *et al.* 2018; Wallenius 2019; Costa Lopez 2020; Donnelly 2021, pp. 15–23; Bruneau 2023; Brundage 2023.

136 Tourinho 2021, pp. 271–2; Gerstenberger 2011, p. 69.

137 Pal 2020, pp. 82–5.

based on the internal and external accumulation of surplus by political or coercive means.[138] Moreover, the political and coercive aspects of mercantilism remain more important for determining surplus than the economic networks of merchants and the occasional occurrence of capitalist relations of production or merchant capital.[139] For some Marxists, these occurrences are sufficient evidence to argue for the global or transnational emergence of capitalism.[140] However, they ignore the fact that political – and as argued here, jurisdictional – content blur or complicate the picture of the transition based on mercantile activity. In other words, we need to account for significant political and class-determined strategies that lie behind commercial institutions and their unquestionable role for shaping the future capitalist order.

In sum, a variety of early-modern consular, extraterritorial, dynastic and sovereign practices in Western Europe and its colonies can be understood as jurisdictional prerogatives and subjectivities that do not fit into the commercialisation account of the transition from feudal to capitalist, and which provide a different picture of sovereignty as a complex jurisdictional practice. These practices have had a significant influence on shaping international practices of accumulation and legal ordering. Moreover, the process of transformation of the modern sovereign state and of capitalism is a complex co-developed one rather than a clear linear causal shift from pre-modern feudal sovereignties to modern capitalist sovereignty.[141] In some cases, these practices can be better identified as jurisdictional processes of accumulation, which give actors space to build networks of power and representation in jurisdictional settings; where legal encounters are being (re)shaped, coercively or not, and in ways that are transitionally ambiguous.[142] These practices, such as those deployed by the British Empire in North America, present a more blurred and ambiguous picture of early-modern mercantile and geopolitical practices, in which settler-colonialism was not necessarily shaped by capitalist imperatives, rendering commercialisation models limited in their accounts of a supposedly clear transition.[143] In this way the legal form and jurisdiction framework provides the flexibility required for better understanding the early modern period.

138 Teschke 2003, p. 209.
139 Pal 2020, p. 84.
140 Banaji 2020; Arrighi 1994; Brandon 2015; Chimni 2022.
141 Chimni 2022, pp. 38–42.
142 Pal 2020.
143 Cavanagh 2017; Evans 2021; Post 2011.

Conclusion

This article has explored an emerging but eclectic literature on the history of law and capitalism. In this literature dominated by neo-Weberian Institutionalism, Braudellian approaches, or Marxist approaches which hesitate between local and international angles, it found the limits of a commercialisation model that assumes the expansion of capitalism as essentially driven by a quantitative process of global mercantile activity from at least the fifteenth century onwards.

Rejecting the commercialisation model is not about denying the empirical reality of mercantile activity but about questioning a liberal narrative about capitalism as an inevitable path. This is the consequentialist model, which the quantitative narrative of mercantile activity is insufficient to dislodge. To maintain the structural connections or continuities between law, capitalism, and imperialism, while accounting for historical discontinuities, it is necessary to retrace the messiness of – and alternatives to – capitalist transition, not just its main outcome.

This new approach hopes to help scholarship move beyond the two extremes of the analytical juncture, caricatured as 'it all started in England' and 'it all started with colonial trade'. The analysis shows that commercialisation models lead to one missing the role of specific jurisdictional agents and practices in the development of key legal institutions such as private property and state sovereignty, and their role for shaping the capitalist international order. Addressing key jurisdictional subjectivities is necessary to understand the development of law and capitalism and helps us to move beyond the impasse of the transition debate. This is possible by adopting a Political Marxist approach to the transition while engaging theoretically with the CFTL through a dialectical approach to jurisdiction and the legal form.

The CFTL is an essential approach to the history of law and capitalism. To build on its strengths, the article combines it with Political Marxism to reflect the different articulations of key institutions such as private property or sovereignty. It offers a new formulation of a 'jurisdiction and legal form dialectic', associating jurisdiction with the concrete articulation of law and emphasising its function as a quantitative alternative to commerce and trade. The multi-layered and contested jurisdictional practices of the early modern period provide a better basis for assessing moments of change and discontinuity in the transition to capitalism than the lens of commercial growth and expansion. In complement, the CFTL provides the concept of the legal form to focus on the continuity or structure of the capitalist legal system. Both the local and

international, and the transitional and non-transitional dimensions of the development of law and capitalism are integrated into a theoretical framework.

We need a dialectic of abstract and subject-based legal form *with* concrete and quantitative jurisdictional forces to make sense of the interplay of transitional and non-transitional content as driving the transition to a capitalist legal system. This dialectic provides a more representative historical account while maintaining a strategically critical stance on the failure of the capitalist international legal order as an emancipatory project.[144] Finally, it provides a new theoretical framework for understanding the relationship between capitalism and law. The dialectic developed provides space and flexibility to account for continuous and structural elements of the legal expansion of capitalism (individual ownership of commodities), as well as the messier jurisdictional agencies that constituted the transition to capitalism and its concurring mercantilist and absolutist processes. In summary, this article argued for a renewed dialogue between Political Marxism and form analysis, but at the expense of commercialisation models, which make this dialogue blind to the reality of early-modern social relations and legal practices.

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144 Miéville 2005.

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