MARXISM AND THE LAW: PRELIMINARY ANALYSES

INTRODUCTION

(i) Some general considerations

Lord Hailsham has said that "there is a sense in which all law is nothing more nor less than a gigantic confidence trick." Statements such as this readily conjure up images of conspiracy and ideological deception to stand alongside the repressive legal apparatus of the strong state as twin mainstays of bourgeois oppression. The imagery misleads however, for the role of law is complex and not to be reduced to easy phrases and catchwords. Unfortunately it is necessary to labour this point at the outset since E.P. Thompson has said, "some theorists today are unable to see the law except in terms of the 'fuzz' setting about inoffensive demonstrators or cannabis smokers". Thompson is right. Matters are more complex than that. It is not possible to conceive of the complex division of labour of a capitalist order and the totality of its social relations without law. Law is embedded, inextricably, in the organisation and culture of our social existence. And just as that social existence presents a many-sided reality, so too does the law.

In this paper I shall begin to outline the extent to which the values and institutions of private law — the legal person, the contract and private property — are necessarily so buried in the socio-economic order of capitalism. Remote as these legal conceptions may be to immediate experience, I shall argue that they are absolutely central to the articulation of developed capitalist social formations, and that in consequence their analysis is fundamental to more general considerations of the capitalist mode of production. In doing so a whole series of important theoretical problems and debates, not only within Marxism, will be touched on but deliberately glossed over. My intention is not to deny the importance of such debates, but to put forward the elements of an analysis which ultimately must serve to give body to arguments which, at their present level of abstraction, require concretising if they are to be furthered.

The analysis presented here derives much from the work of the soviet theorist E.B. Pashukanis who first published his major work, The General Theory of Law and Marxism in 1924, of which a German translation

[1] The most part of this paper was written during the autumn term of the academic year 1977/78, during which time I was a guest of the Institut für Rechts-und Sozialphilosophie, der Universität des Saarlandes. I would like to express my gratitude to the members of the Institute, and especially to Professor Alessandro Baratta and Dr. Gelinda Smauss, both for their helpful and instructive criticism and for their kindness and hospitality during my stay. I would also like to thank Professor D.N. MacCormick and Mr. Z.K. Bankowski for their comments on later drafts of the paper, for their patience and tolerance.


appeared in 1929, and an English translation in 1951.[4] Both translations are inadequate however, and there have been in consequence considerable difficulties and disagreements as to the interpretation of the work. In part however problems relating to textual irregularities and the precise meaning of particular passages should be reduced by the publication of a new translation from the Russian which is currently in progress, and for these reasons I shall not engage here in a detailed critique of Pashukanis' work.[5] I will say however that the interpretation of the work given by Poulantzas and others as extreme economism seems to me to be exaggerated, and, although in this respect I do not think the work can be treated uncritically, it would be wrong to dismiss it on these grounds.[6] The major importance which I attribute to Pashukanis' work lies in his conception of law as the organisational form which facilitates capitalist commodity circulation, and his consistent and powerful rejection of analyses of law, put forward by contemporary revisionist-marxist theorists such as Karl Renner, in which law in its form is treated as neutral, so that the problem of law is reduced to one of the selection of ends.[7] In Pashukanis' work the form of law, and not merely its content, is subjected to rigorous critique, so that, for example, the very framework of rights and duties is shown to be premised upon a particular and ultimately limiting ontology. As Karl Korsch has pointed out in this dimension Pashukanis' work represented a significant break with the dominant problems of the orthodox Marxism of his time, and therein lies both its strength and its rigour.[8]

On the other hand the major weakness in the work is a tendency to display a rather pedantic formalism and historical insensitivity which leads to a rather uncertain conflation of the legal and the economic and renders aspects of his work open to the criticism of being culture-bound.[9] For Pashukanis, in some ways rather reminiscent of Max Weber, bears to an extent the marks of much European theory. Thus the general abstract normative structure of the historically particular 19th century civilian codes is treated implicitly as the form of bourgeois law in general. There is little


concerted attempt to address the problem of the historical development and mediation of the law, which becomes particularly obvious if the analysis is extended, simpliciter, to the English common law. However, this does not vitiate the fundamental point of Pashukanis’ argument as to the relationship between the form of law and the commodity form. To this end in the paper I try to develop a distinction, which I believe to be implicit in the work, between what I term the juridical relation and the law, the one being a determinate theoretical abstraction necessary to the critique of the capitalist mode of production in general, and the other being a specific, historically mediated expression of that relation in concrete historical social formations.

Bearing this particular qualification in mind, like Pashukanis I start from a conception of the individual in capitalist society as a legal person. The individual is given his social existence at law. Within the complex social division of labour of the capitalist mode of production the individual only has meaning, only exists as a social being in so far as he defined reciprocally — that is, in relation to others. In practical terms this means that in his social existence (that is, as a member of a particular capitalist social formation) the individual is defined in the bearing of legal rights and duties, powers and liabilities etc. Thus the individual is constituted as a (legal) person reciprocally, in relation to others similarly defined in terms of correlative, actual or potential, rights and duties etc. The individual is a legal person, or like the convicted criminal or the insane, deprived of his legal capacity, he is nothing. Living outside the law is an impossibility. Thus, in theoretical terms I shall refer to the individual subject as defined in the juridical relation. This terminology is employed to emphasise the relations of reciprocity which define the independent but interdependent individuals of the complex social division of labour in the capitalist mode of production. The analysis of the social division of labour I must however take as read, as in the paper I shall be concerned primarily to elaborate this notion of the juridical relation.[10]

In what follows it will be evident that I am led to reject certain positions which have been variously attributed to the Marxist theory of law. Firstly, I reject any reduction of law to the status of a mere superstructural force, whether of a voluntarist, economist, or structuralist tendency. Indeed I would reject the base-superstructure metaphor in its entirety. Secondly, I reject any analysis which reduces the problem of law to the problem of coercion and thus to the typification of law as a “repressive apparatus” or as “class rule”. This is not of course to argue that coercion and class relations are in any sense epiphenomenal to capitalist social order, but simply that coercion is at best only a secondary element in the structure of bourgeois legal relations. This perhaps requires brief elucidation. Marx himself consistently argued that the exercise of coercion (discipline) obtained at the point of

production, that is, within the particular conditions of the labour process, whilst:

The sphere of circulation, or rather the exchange of commodities, within the limits of which moves the purchase and sale of labour power, is in reality a veritable garden of Eden of natural rights of man. There reigns only Liberty, Equality, Property and Bentham.[11]

Coercion is particular and concrete, whereas in the sphere of circulation freedom is universal, but abstract. In 20th century capitalist societies, as Melossi and Pavarini have argued, the exercise of the particular function of discipline has been rationalised and extended, and is operative through a series of additional “ancillary institutions” such as the family, the schools and increasingly the agencies of the Welfare State.[12] Although this undoubtedly makes the analysis of control more complex, nonetheless it in no way denies Marx’s basic formulation of the inverse relationship between “liberty and equality” in the social division of labour (the sphere of circulation) and despotism in the manufacturing division of labour (the labour process). Thus Marx wrote that:

It can even be laid down as a general rule that the less authority presides over the division of labour inside society the more the division of labour develops inside the workshop, and the more it is subjected there to the authority of a single person. Thus authority in the workshop and authority in society, in relation to the division of labour, are in inverse ratio to each other.[13]

Thus, in so far as law functions primarily in the sphere of circulation to facilitate commodity exchange, the logic of its form is to be found not in coercion, but elsewhere, namely as a fetishised expression of the value-form.

The third implication of the analysis put forward here is the rejection of any analysis which reduces law to the status of a “mere” ideology, a confidence-trick, the “civil liberties lie”. [14] And, fourthly, to reiterate the point made earlier I reject the exaggerated formalism and the ahistorical dimension to the work of Pashukanis.

In this paper I am primarily concerned to argue that the analysis of the juridical relation be derived from the analysis of commodity exchange, and that law must be understood in terms of the facilitation and organisation of commodity circulation rather than as a technique of repression or coercion.


In addition however I have chosen to encounter some of the fundamental problems of jurisprudence, and I include preliminary comments on the relation between law and morality, on the nature of legal equality, as well as a discussion in the last section of the general and abstract nature of legal norms. These are large areas of dispute, and I have made no attempt to locate what I have to say within the wider debates of jurisprudence. My intention is rather to develop an alternative theoretical language within which to encounter and reformulate those problems. It is sometimes argued that such problems should be rejected as the “pseudo-problems” of “bourgeois science”, and more generally that the coming of “sociology of law” has somehow displaced the problem of jurisprudence altogether.

In answer to such criticisms, should they make themselves heard, I would quote the following passage from Pashukanis’ criticism of Karl Renner’s sociology of law:

We may agree . . . that legal science begins where jurisprudence ends; but it by no means follows that legal science must simply cast overboard the fundamental abstractions expressing the essence of the principles underlying the legal form. For political economy, too, began its development from practical problems pre-eminently concerned with the circulation of money and of course it too originally set itself the task of pointing out “means of making governments and peoples wealthy”. Nonetheless we already find in these technical counsels the foundations of the concepts which — in a form deepened and generalised — become integrated into the structure of the theoretical discipline: political economy.[15]

(ii) The base-superstructure metaphor

In the course of this paper I argue that legal relations are intrinsic to the social-economic order of contemporary capitalism. This entails abandoning the traditional Marxist conception of legal relations as superstructural phenomena. Indeed I shall assert a priority to the law which within the terms of Marxist orthodoxy requires elaboration.

In 1859 Marx wrote:

At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production, or — this merely expresses the same thing in legal terms — with the property relations within the framework of which they have operated hitherto.[16]

The implication is clear: any separation of the legal expression and the social-economic relation is wholly artificial. The legal expression provides the ideological boundaries, or the definitions of social economic practices; hence the difficulties experienced in Marxist theory of defining relations of the so-called “base” without reference to legal, and hence “ideological” conceptions of private property, ownership possession etc. The base-superstructure metaphor has resulted in the theoretical separation of the legal and the economic in a manner which presents a false object of enquiry.

It is essential to my argument that the metaphor is rejected. Marx wrote as follows:

In the social production of their existence men inevitably enter into definite relations which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitute the economic structure of society, the real foundation on which rises a legal and political superstructure and to which corresponds definite forms of social consciousness.[17]

In this passage Marx summarised his own complex method and theoretical development in a few innocent words which have lent to Marxism an armoury of metaphor and language of which the consequences and implications have been immeasurable. This language of construction and foundation has served to unite a plurality of diverse theories and practices, but more than this it has built into theory unnecessary preoccupations and assumptions.[18] Nowhere is this more clear than in the analysis of law.

In his theoretical studies of law Poulantzas has argued that the "deformations" of Marxist theory, and legal theory in particular, can be seen as variations upon the voluntarist-economist theme.[19] The economist interpretation puts forward the law as a simple and immediate reflection of economic relations. There is a direct correspondence between the needs of capital and the content of the law — law is merely "appended" to the economic order. The voluntarist tendency, on the other hand, treats law as norms issuing from the state, embodying the will of the dominant class. Both tendencies, Poulantzas argues, rest upon a misconception of the relation between base and superstructure, denying specific effectivity of, and the dialectic between, the various "levels" of this "decentred unity". In the one the study of law is reduced to the pure "science of the economic" and law is denied any status as "a theoretically constructed and specific object of scientific investigation" in its own right. In the second "the economic base, conceived in a mechanistic manner, consists in an inert field 'energised' by the will and human consciousness (conscience)". Thus in the second, law is theoretically constructed as an object of study only in so far as it is attached to a creative historical subject, that is, the ruling class. According to this perspective law is thus inextricably linked to the history of

[17] Ibid., p. 20.
[18] For a general analysis, see L. Colletti, From Rousseau to Lenin (1972) 45-111.
a class and can only be studied in relation to it, as a class instrument, a "tool of oppression".[20]

These objections are to the point; however Poulantzas' contention that law can be studied "as a scientific object in its own right" is itself a further "deformation" consequent upon the theoretical separation allowed by the base-superstructure metaphor. For, just as the economist and voluntarist interpretations in different ways move away from the idea of legal relations being intrinsically bound to economic through the value-relation (see infra) — in the one by stipulating law as a separate "effect" of the economic and, in the other by identifying law and class will — so too Poulantzas reproduces the separation by introducing a highly dubious and indeed Weberian conception of legal structure. Thus for example in Nature des Choses et Droit, although he is careful to emphasise the historical specificity of law and to deny the existence of "universal and eternal structures of law", Poulantzas works with an ideal-typification of occidental law and speaks of the characteristic qualities of this (relatively) autonomous object of science:

La plupart des juristes tombent d'accord pour considérer comme tels leur abstraction, leur généralité, leur formalisme, et leur fixation en règles juridiques présentant un fort degré de systématisation. Or, ces traits fondamentaux des structures internes spécifiques — présentant une autonomie relative à l'égard de l'infrastructure — des droits occidentaux actuels sont engendrés en définitive eux-mêmes à partir de l'infrastructure, à partir des besoins et intérêts que l'activité pratique des hommes revêt dans le structures sociales et économiques correspondantes.[21]

Again, in his criticism of the voluntarist position Poulantzas locates the problem in terms of the importation into the base-superstructure model of the Hegelian historical subject; rather than in the metaphor itself. It is more plausible to see the importation of this notion as consequent upon the metaphor itself: the language of construction inevitably leads to the problem of the "constructors".

[20] Thus, for example, Tumanov argued at the 1930 Georgian Conference on law.

We Marxists assert that law is carried out in practice by means of coercion and violence, because all law is a class law, and the law of a class without coercion is not a law.

Tumanov continues with the chilling and historically pregnant words:

. . . understand that in our country of proletarian dictatorship, in the epoch of an intensified class struggle . . . a calm academic presentation of the view of our enemies is unsuitable . . .

Cited in D. Lloyd Introduction to Jurisprudence (1972) 670.

[21] N. Poulantzas, Nature des Choses et Droit (1965) 256. It should be noted here that in later work Poulantzas has rejected aspects of this work as being "influenced by the humanist historicism of the young Marx". This perhaps makes it all the more remarkable that in the later "Althusserian" work his conception of legal science and the law remains the same. Thus in "A propos de la Theorie Marxiste du Droit", op.cit., (1967), p. 160, Poulantzas writes.

J'ai essayé de montrer ailleurs, et je ne reviendrai pas ici, à partir du concept du mode capitaliste 'pur' de production, ou peut construire ainsi le concept théorique du droit moderne comme système à normes générales, abstraites, formelles et strictement réglementariisées en ce sens qu'elles possèdent une réversibilité complète . . .
In his article "Base and Superstructure in Marxist Cultural Theory" Raymond Williams has pointed to the numerous qualifications which have had to be made to avoid some of the more ludicrous distortions consequent upon the rigid use of the metaphor. [22] Positivist and economist notions of "reflection" very soon were found to be unsupportable, thus:

Since in many real cultural activities this relationship cannot be found, or cannot be found without effort or even violence to the material or practice being studied the notion was introduced of delays in time, the famous lags; of various technical complications, and of indirectness, in which certain kinds of activity in the cultural sphere — philosophy for example — were situated at a greater distance from the primary economic activities. [23]

In the area of law, as early as 1890 Engels was already invoking such qualifications, and indeed providing the cue for Poulantzas' later development of the idea of the relative autonomy of law:

It would be difficult to prove for instance that the absolute liberty of the testator in England, and the severe limitations in every detail imposed upon him in France are due to economic causes alone. Both react back however upon the economic sphere to a very considerable extent because they influence the distribution of property. [24]

The problem in the use of the metaphor runs much more deeply than simply an empirical lack of fit, however. It lies in the very separation and differentiation between levels which are entailed in this "Marxist topography", which has tended in Marxist analysis of law especially to treat the legal and economic as empirically as well as analytically separable. Whether economist or voluntarist, structuralist or historicist, the language of base and superstructure requires its problems to be posed and thought in a specific manner. The language has "hegemonised" theory. Take for example the following passage from Althusser:

"The great theoretical advantage of the Marxist topography i.e. of the spatial metaphor of edifice (base and superstructure) is simultaneously that it reveals that questions of determination . . . . are crucial; that it reveals that it is the base which in the last instance determines the whole edifice; and that, as a consequence, it obliges us to pose the theoretical problems of the types of "derivatory effectivity" peculiar to the superstructure, i.e. it obliges us to think what the Marxist tradition calls conjointly the relative autonomy of the superstructure, and the reciprocal action of the superstructure on the base." [25]

The power of this linguistic hegemony is such that any demand to collapse the distinction appears tantamount to an heretical rejection of theoretical tradition. Indeed the heresy seems to require the "scientifically" — because architecturally — impossible. Williams however presents us with a more limited objective:


[23] Ibid., p. 5.


We have to revalue "determination" toward the setting of limits and the exertion of pressure, and away from a predicted, prefigured and controlled content. We have to revalue "superstructure" towards a related range of cultural practices, and away from a reflected, reproduced or specifically dependent content. And, crucially, we have to revalue "the base" away from the notion of a fixed economic or technological abstraction, and towards the specific activities of men in real social and economic relationships, containing fundamental contradictions and variations and therefore always in a state of dynamic process.[26]

The combination of the social and the economic, and the emphasis upon the dynamic of process is necessary and well placed. But even within this prescription, the analysis of law requires further revision, if not outright rejection, of the metaphor. Firstly, as we saw above, Engels quite rightly pointed out that laws amount to material social conditions which do actually limit the economic. Laws circumscribe and define the available means and forces of production so that, although at one level "ideal", laws must be counted amongst the concrete conditions of social existence. Secondly, and more importantly, laws and the principles of organisation they embody, actually make possible capitalist production for exchange, in that the relations of private property and contract, define the very act of capitalist exchange: the commodity, "free" wage labour, etc. Not simply however as Weber maintained, in providing a rational-calculable frame of reference within which to plan and effect exchange, but in providing the categories through which production in general and the relations between individuals in particular obtain. Thus Thompson argued in relation to 18th century:

If we look closely into [the] agrarian context the distinction between law on the one hand . . . and the actualities of productive forces and relations on the other becomes more and more untenable. For law was often a definition of actual agrarian practice as it had been pursued "time out of mind". How can we distinguish between the activity of farming or of quarrying and the rights to this strip of land or that quarry? The farmer or forester in his daily occupation was moving within visible or invisible structures of law.[27]

How those structures of law are articulated or expressed in a particular social formation is largely a problem of historical analysis. The specific content of laws will vary as Engels correctly realised; and indeed, as we shall see later, a developed system of law is not even necessary to the capitalist mode of production. What however is invariable and necessary to the mode of production is that the juridical relation is expressed through abstract and general norms — such as those of the laws of contract and private property — which in turn are premised upon the juridical relation being established as a concrete practice. These problems provide the subject matter of the remainder of this paper.

**LAW AND THE ALIENATION OF COMMODITIES**

In this part of the paper I shall argue that Marx's analysis of capitalist commodity exchange presupposes an analytic distinction between exchange-value and the juridical relation, but that in the value-relation — through which the social order of the capitalist mode of production is expressed — these two dimensions of the exchange relation are mutually dependent.

*(i) Exchange-value and the juridical relation*

In the first chapter of *Capital* Marx makes the following fundamental comments:

Exchange-value generally is only the mode of expression, the phenomenal form of something contained in it, yet distinguishable from it.[28]

That something is human labour in the abstract, the magnitude of that value being measured in terms of the quantity of socially necessary labour-time embodied in it, that is, the labour-time which would have to be consumed on the average, in the production of the commodity. Exchange-value is the *phenomenal form* of abstract labour.

We need not be delayed here with the problem of the derivation of price from value however, for the full implication of Marx's analysis of exchange-value is only to be grasped through the wider context of his analysis of the value-relation or "commodity-fetishism", which provides the basis to Marx's sociology of order.[29] Through the analysis of the exchange of the social product in the form of the commodity, Marx demonstrates the logic of social order within the capitalist mode of production, where commodities — the product of autonomous *private* labours — are produced *for exchange* within an anarchic social division of labour, and become the *objectified* medium of *social* connexion and interdependence within that anarchy. It is in this respect that Marx refers to social relations as taking on the "fantastic" but taken-for-granted appearance of relations between things.[30] This Marx terms "the fetishism of commodities".

In the analysis of the commodity form of the product Marx provides a sociology which is specific to capitalist social order. Colletti has written as follows:

If this social division of labour were a conscious or planned distribution . . . the products of individual labour would not take the form of commodities . . . [I]n conditions of commodity production, the work of individual producers is not labour


[29] On Marxism as a sociology, see Colletti, *op.cit.*, pp. 3-45.

[30] Thus Marx writes:

The labour of the individual asserts itself as part of the labour of society, only by means of the relations which the act of exchange establishes directly between the products, and indirectly, through them, between the producers. To the latter, therefore, the relations connecting the labour of one individual with that of the rest appear, not as direct social relations between individuals at work, but as what they really are, material relations between persons and social relations between things.

carried out at the command or on behalf of society: rather it is private autonomous labour, carried out by each producer independently of the next. Hence lacking any conscious assignment or distribution on the part of society, individual labour is not immediately an articulation of social labour, it acquires its character as a part or aliquot of aggregate labour only through the medium of exchange relations or the market. [31]

In short, in so far as both the distribution of the social product and the articulation of social relations, occurs through the medium commodity-exchange, commodity production is specific to the capitalist order. [32]

However, in order that the many, materially diverse products of labour may be exchanged they must both be rendered commensurable and also be of utility (a use-value). [33] In that commodity production is production for exchange, the product does not have use-value for the producer except and in so far as it can be exchanged. To be exchanged the product must be useful for others, but this presupposes criteria of exchangeability. For, as Marx argued:

All commodities are non-use-values for their owners and use-values for their non-owners. Consequently they must all change hands. But this change of hands is what constitutes their exchange, and the latter puts them in relation with each other as values and realises them as values. Hence commodities must be realised as values before they can be realised as use-values. [34]

Thus in exchange commodities must be realised as exchange-values, that is, rendered commensurable according to some common property. As we have seen, Marx argues that this common property is the (socially necessary) labour time embodied in commodities. In exchange, particular private labours are transformed into and have significance only as a quotient of aggregate socially necessary labour, so that particular private labours are treated solely in terms of average or "abstract" labour, thus negating the particular conditions of that labour. This I shall refer to as the appropriation of subjectivity in production through exchange. [35]

Thus it is that Marx argues that within the complex social division of labour of capitalist production the social interdependence of autonomous (independent), private labours is expressed in, or thought within, the fetishised idea of exchange value as the phenomenal form of abstract labour. The social order of the capitalist mode of production is articulated in the value-relation.

The process of the negation of the particular and the objectification of the abstract (or universal) form is the key to Marx's sociology. I shall return to this later in relation to the "fetishistic" appearance of law in the last part

[31] Colletti, op. cit., p. 83.
[32] Of course commodity production and exchange may be present in non-capitalist social formations, for example in Roman slave society, but not as the articulation of social relations in general.
[34] Ibid., p. 34.
[35] This terminology is derived from Colletti, op.cit., pp. 82-92.
of this paper. For the present however it is essential to the argument of the previous section to note that the phenomenal form exchange-value only represents one aspect of the value-relation as the total social-economic relation. For exchange-value is an incomplete expression of the value-relation, in that the value-relation entails not only the representation of private labour as abstract labour and thus the appropriation of subjectivity, it also entails the relation of interdependence obtaining in the exchange of that abstract labour.

In the capitalist mode of production, the act of alienation of the commodity must be an intentional and voluntary act, between "free and equal" parties. As such, this requires the re-ascription of subjectivity in the exercise of autonomous will. The subjectivity thus ascribed, I shall argue presently, is to be conceived of as a juridical subjectivity of an equal and abstract personality. In the meantime let us note that exchange-value is incomplete in that, for its realisation as a concrete social relation, it requires the complementary juridical relation between "equalised" subjects — equalised that is in the act of alienation. Thus in the value-relation subjectivity is at once denied in the abstraction/equalisation of labour and ascribed, though transformed, in the abstraction/equalisation of subjects in exchange. Both exchange value and the juridical relation are thus intrinsic to the value-relation, and in this respect the juridical relation cannot be treated as epiphenomenal to the social-economic structure of the capitalist mode of production, that is as superstructure.

[36] This point is crucial to Marx's analysis of the appropriation of surplus labour in the capitalist mode of production. Under capitalism profit (or rather, all surplus value) is derived not from exploitation in the market, but as a function of the use-value of the commodity labour power. In the labour market the exchange value of labour power is determined according to socially necessary labour time embodied in it, that is in terms of the average labour necessary for its reproduction. On the labour market the owner of labour-power and the owner of money "meet... and deal with each other as on the basis of equal rights, with this difference alone that one is buyer and one is seller, therefore equal in the eyes of the law" (Capital (1970) Vol. 1 165.) What the buyer of labour power obtains is a unique commodity, in that unlike any other commodity, it has "the specific use-value... of being a source not only of value, but of more value than it itself has" (Capital (1970) Vol. 1 188.) The buyer of labour power thus pays the full price of a day's labour (i.e. the cost of its reproduction) but for that price obtains the capacity to produce a surplus-value, i.e. the value produced over and above the value of the products necessary for the reproduction of the labour power consumed. Thus "The seller of labour-power like the seller of any other commodity, relays its exchange-value and parts with its use-value. He cannot take the one without giving the other. The use-value of labour-power, or in other words, labour, belongs just as little to its seller, as the use-value of oil after it has been sold belongs to the dealer who has sold it. The owner of money has paid the value of a day's labour-power; his therefore is the use of it for a day; a day's labour belongs to him. The circumstances that on the one hand the daily sustenance of labour-power costs (for example) only half a day's labour, while on the other hand the very same labour-power can work during a whole day, that consequently that the value which its use during one day creates, is double what he pays for that use, this circumstance is, without doubt a piece of good luck for the buyer, but by no means an injury to the seller." (Capital (1970) Vol. 1 188, emphasis added.) Exchange on the market is thus equal exchange, between parties who are "equal in the eyes of the law".
(ii) A methodological note: the abstract is determinate

At this point it is convenient and necessary to elaborate a distinction between what I have termed the juridical relation and the law. The law, or “legal relations” I propose to treat as the historically specific mediation or expression of the juridical relation, in a manner analogous to Marx’s treatment of exchange-value as the phenomenal form of abstract labour. The juridical relation is thus an abstract but determinate theoretical construct appropriate to the analysis of the capitalist mode of production, whilst the law is one historically specific mode of expression of that relation. The mediation and realisation of the juridical relation as law occurs in the material practices of its administration — primarily through the courts, sometimes through administrative and executive agencies, QUANGOS etc., but also in customary, conventional and private legal systems such as, for example, Macaulay has pointed to in the practices of certain American business communities.[37] This implies that the study of law will take place through the study of the history of its conventions and of the apparatuses which administer it.

It is worth emphasising however that the distinction between the juridical relation and the law as social practice is not a replication of the idealist distinction between a universal and timeless form of law and its content. The conception of the juridical relation is derived from that series of culturally dominant conceptualisations and practices which serve to provide the frame of reference within which exchange actually occurs and indeed is made possible. For, as Marx and Engels said, a mode of production:

must not be considered simply as being the reproduction of the physical existence of individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite mode of life on their part.[38]

Thus, although the relation entailed in the act of alienation is theoretically expressed in the abstract as the juridical relation, the concreteness of this abstract relation must not be in doubt. This apparently paradoxical point can be clarified by further reference to Marx’s analysis of abstract labour. For Marx, methodological use of the “concrete concept” abstract labour is not merely a methodological category or “ideal type” through which arbitrary sense can be read into social reality, but rather it both specifies and is present in the concrete act of alienation itself. As Colletti has argued, the equalisation/abstraction of human labour actually occurs in the determinate act of exchange, not merely in the mind of the theoretician. Thus Marx wrote:

When we bring the products of our labour into relation with each other as values it is not because we see in these articles the material receptacles of homogenous human labour-power. Quite the contrary, whenever by exchange we equate as values our different products, by that very act we also equate as human labour the different kinds of labour we expend on them. We are not aware of this nevertheless we do it.[39]

Precisely because the relation between private labours becomes in practice the abstraction "abstract labour" it can be posed theoretically as such. Nonetheless it is a lived relation. Equally, the juridical relation between men in alienation as abstract wills can be posed theoretically as such, precisely because it is a determinate relation of commodity exchange. Not only therefore is the juridical relation a methodological abstraction, it is also a determinate and necessary relation obtaining within the capitalist mode of production — hence it is a determined abstraction.[40] As such, for Marx, as is demonstrated in the passage quoted below, such an abstraction can never be treated as an abstract universal separable from the production process, that is, its history:

[The] distinctive social character [of buyer and seller] are by no means due to individual human nature as such but to the exchange relations of persons who produce their goods in the specific form of commodities . . . It is . . . as absurd to regard buyer and seller, these bourgeois economic types, as eternal social forms of human individuality as it is preposterous to weep over them as signifying the abolition of individuality. They are an essential expression of individuality arising at a particular stage of the social process of production.[41]

In this passage Marx points to the abstraction/equalisation of individual wills in alienation — the ascription of subjectivity which he refers to as the "essential expression of individuality" — as necessary moments of commodity exchange, in which the social character of alienation is also realised. It is this relation which is expressed in the concrete concept of the juridical relation, and which as a theoretical concept is derived by abstraction from the determinate social relation.

Obviously the epistemology entailed here warrants detailed examination. For the present the following comments must suffice.[42] It would seem necessary that "determined abstraction" can claim the status of a scientific proposition only within the conditions of its historical production: to state this in another way, if the "is" is always in the process of "becoming", that is, of its negation, so science is always incomplete. The theoretical concept can never be treated as if it were unrelated to its history, that is, universally true, except in a very limited sense:

The example of labour strikingly demonstrates how even the most abstract categories, despite their validity in all epochs — precisely because they are abstractions — are equally a product of historical conditions even in the specific form of abstractions and retain their full validity only for and within the framework of these conditions.[43]

Thus the determined abstraction is both derived from and retains its validity in terms of its present history; such "objective understanding" however, says Marx, can occur "only rarely and under quite special conditions", that

[40] For a more detailed discussion of this position and its significance for the theory of value see Colletti, op.cit., pp. 76-92.
is only when "concrete development is most profuse, so that a specific quality is seen to be common to many phenomena or common to all. Then, it is no longer perceived in a particular form."[44] Thus for example Marx argues the theoretical development of the concept of value of classical economics was only possible once "the notion of human equality acquired the fixity of popular prejudice" which occurs only within commodity structure.[45] In the same way, the question "what is law?" is posed fully and for the first time in bourgeois "legal science". Obviously the question was asked in earlier epochs, but the answers necessarily remained incomplete — for example classical natural law — in so far as the grounds of the question remained invisible.

In summary of a complex position it can be said that the theoretical concept (determined abstraction) once derived can be of methodological use in the reconstruction of its present history, that it, its own genesis.[46] Such concepts "provide an insight into the structure and relation of production of all formerly existing social formations" in so far as the relations of pre-capitalist modes of production, "the rules and component elements of which were used in the creation of bourgeois society", are reproduced in their transformation in the historical present. Thus the juridical relation as a theoretical concept is appropriate to the analysis of pre-capitalist legal relations; however it is only present in its full development in bourgeois society only for which and within which it retains its full validity. It is this latter problem which is the present concern.

(iii) The juridical relation and alienation

I have argued that the juridical relation cannot be treated as merely epiphenomenal to the "economic", as a mere element of superstructure. Equally, legal relations must be regarded as intrinsic to any developed capitalist social formation.

Marx himself showed how the generic form of order under the capitalist mode of production — "the anatomy of bourgeois society" — lies within the commodity structure. Whereas under the feudal mode of production the extraction of surplus labour remains direct, coercive and consequently transparent, in so far as the producer still has actual possession of his means of production, under the capitalist mode of production the worker "freely" disposes of his own labour-power as an abstraction, as a commodity bearing exchange-value. At this point Pashukanis has quite rightly insisted that the necessary ideal (ideal in the same sense as Marx refers to "value" as an "ideal" relation) counterpart to the order inherent in commodity exchange is to be located in the legal expression of the juridical relation, that is, in the conception of the legal person, as bearer of abstract rights and

[44] Id. (emphasis added).
duties upon which rise the institutions of the contract and property. It is in this connexion that Pashukanis takes the following, very important passage from *Capital*:

It is plain that commodities cannot go to market and make exchange of their own account. We must therefore have recourse to their guardians who are also their owners. Commodities are things and therefore without the power of resistance against men. If they are wanting in docility, he can use force. In other words he can take possession of them. In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to each other as persons whose will resides in these objects and must behave in such a way that each does not appropriate the commodity of the other, and part with his own except by means of an act done by mutual consent. They must therefore recognize in each other the rights of private proprietors. This juridical relation, which expresses itself in a contract, whether such a contract be part of a developed legal system or not, is a relation between two wills, and is but a reflex of the real economic relation between the two.[47]

In this passage there are three points crucial to the analysis of law. Firstly, as we have seen, commodity exchange in general requires a relation between wills, that is, a juridical relation, which by extrapolation is thus essential to the structure of capitalist production for exchange and the appropriation of surplus value. Secondly, for commodity exchange to occur the rights of private proprietors must be at least recognized by consent. Thirdly, the juridical relation thus established need not be expressed through the institutions of a developed legal system (although it seems reasonable to argue that in a developed capitalist social economic formation, with a high social division of labour it becomes functionally necessary to guarantee the rights of private proprietors through the mechanism of private law).

In short, the social-economic relation of commodity exchange can only obtain in so far as the juridical relation is expressed through “informal” means of “consent” or morality, or through the formal mechanism of private law. Either way, as Pashukanis said:

At the very same time that the product of labour is taking on the quality of goods and becoming a bearer of value, man acquires the quality of a juridic subject and becomes the bearer of a right.[48]

These points, especially in relation to the legal person, will be developed further. In conclusion to this section I will only add that so far as the commodity structure “penetrates society in all its aspects and remoulds it in its own image” so the juridical relation obtaining between separate and abstract, right and duty bearing subjects, expresses that economic relation in all its aspects either through legal institutions such as property and contract, or through what may be termed positive morality.[49] In that sense, the civil society of a capitalist social formation is a juridical society; this is the full meaning of the rule of law (cf. Tonnis: “gesellschaft”).


Weber: "rational-legal", and so on). Bourgeois society is ruled by law. I shall return to this problem in the final section of the paper.

THE REALISATION OF THE JURIDICAL RELATION AS A CONCRETE HISTORICAL PROCESS

(i) Morality and Legality

In so far as the commodity structure (the value relation) provides the generic order of the capitalist mode of production, I shall assume that the juridical relation permeates every dimension of capitalist social relations. In the last section we saw that juridical relation is realised or expressed in two major cultural practices: in the dominant conceptions of morality on the one hand, in tacit notions of responsibility and self-control, and of legality, on the other hand, in formalised or institutionalised notions of reciprocity and equality. The two are typically intertwined in the idea of the "moral obligation to obey the law", but this is not a necessary combination. It may be that a "juridical morality" is a sufficient expression of the juridical relation to facilitate capitalist production. Where however legality operates to formalise, guarantee and thereby regulate capitalist production any disjuncture between morality and legality will only be momentary.

As all undergraduate law students are told, in everyday life individuals make and break contracts and enter all manner of legal relations without knowing or indeed having to know it. Thus Pashukanis pointed out:

It must be noted that the legal [juridische] viewpoint is incomparably more remote from the consciousness of the ordinary man than is the economic viewpoint, for the reason that when the economic relationship is carried into effect simultaneously as a legal relationship too, it is nevertheless the economic side of that relationship which has reality for the participants therein in the vast majority of cases, whilst the legal element remains in the background, and emerges in all its definiteness only in special and exceptional cases (legal proceedings, a controversy concerning the law).[50]

Here we have what Thompson calls "the visible and invisible structures of the law". What is important here however is not so much the invisibility of the legal relation, but its possibility. That is, the possibility of the concretisation in legal relations of all social relations of commodity production and exchange, a possibility which is essential and specific to the commodity structure of the capitalist mode of production. It is this potential for the extension of legal relations to include and define all social relations which marks the full and mature development of law in the bourgeois epoch and displays the inherently bourgeois character of law as a lived relation, as a definition of subjectivity.

The structure of law, then, is such that legal norms and definitions can be infinitely extended to assimilate all social economic relations within its own terms. This however is not solely a property of the formal structure of the law, but speaks of the structure of the social economic relations to which the law applies. What this means is not simply that those social

[50] Babb and Hazard, op.cit., p. 121.
economic relations are limited or constrained by the system of laws (Engels, supra), nor, in the least, that the system of laws generates those social-economic relations (Weber). Rather, it must be understood that those relations occur, and are thought and practised within a world view (a mode of production) which, by its very nature and genesis in commodity exchange and the social division of labour, is compatible and isomorphic with the structure of law. That is, within an ideology which is intrinsic to commodity production for exchange. There is thus a fit between the “intuitive knowledge” or “taken-for-granted morality” and the specific laws and institutions of the particular capitalist social formation. The “form” of morality and that of legality must be identical, and are precisely because each are different mediations or expressions of the juridical relation.\[51\]

As such it is necessary not to conflate morality and legality. As we have seen the individual, in practice, need have no knowledge of the specific legal norms which regulate his social activity. Indeed the “ordinary” man cannot know the law in all its detail, for then he would be no ordinary man at all but a “lawyer”. On the other hand however the law must know the ordinary man and the conditions of his (moral) existence. The law constitutes the ordinary man in the abstract as “the reasonable man”, the “man on the Clapham omnibus”. It is in that sense that the law and juridical/positive morality together specify historically the mode in which the juridical relation is realised in a particular social formation.

It was, I think, precisely with this in mind that Gramsci wrote:

the revolution that the bourgeoisie class has brought into the conception of law and hence into the function of the state consists especially in the will to conform (hence the ethic of the law and the state).\[52\]

What Gramsci points to here is the logic of control in bourgeois society, whereby consent is secured to domination as a moral necessity rather than externally imposed in relations of superordination — subordination (a relation which would be a denial of the basis premise of the commodity structure, that is, equivalence in exchange).

This can be clarified through consideration of the “free” contract for the sale of labour-power. No law can enforce the sale of labour-power for to do so is not only impossible in practice, but more importantly would be

\[51\] It has been pointed out to me in criticism that I do not show how, sociologically, the process of mediation occurs. I argue in the body of the text that the juridical relation is particularised historically. To trace this out in any detail requires careful analysis of the particular constellation of the institutions and ideas and their so-called “uneven development” which constitute the particular social formation in question. Any analysis of English legality would of course have to account for what Thompson has described as the "peculiarly English" transformation of English society. Thus the non-revolutionary transformation of the "Property norm" the absence of Natural Law thinking as the cre-de-coeur of a revolutionary bourgeoisie and the impact of utilitarianism in the generation of 19th century moral economy and more, would have to be considered alongside the unique development of the common law and the legal profession in England.

to deny the very ideological basis of free wage labour and commodity exchange between free and equal individuals. The worker must voluntarily and "freely" sell his labour-power; in so doing he controls himself, acts with responsibility and consents to his own domination. As we shall see, the free exchange of all commodities presupposes that in the social relation of exchange the actors be treated as formally equivalent — in the abstract as legal persons. This equivalence is expressed both in the broad generalities of bourgeois morality and in the specificity of legal relations.

Thus, it is, I think, possible to argue that a "juridical morality" must prefigure in its development — that is as particular mediation of the juridical relation — the articulation of the juridical relation as law. For law, just as Marx argued was the case with the idea of value, is in its fullest development only realised as a practice in a society in which formal equivalence and equality of its members has already "acquired the fixity of a popular prejudice". The quality of the infinite extension of norms is the mark of fully developed, bourgeois legality. As such it corresponds clearly to notions of individual autonomy and freedom; and serves to mask off the fully developed form from law in feudal or slave societies, where relations of domination and subordination, legal privilege and immunity serve to deny the universality of legal personality and hence negate the form of law in its fullest extension.

(ii) Law and history

If law is taken as one particular historical mediation or realisation of the juridical relation the problems of "simple reflection" and "super-politicisation" of the economist and voluntarist positions are avoided. I have said that a materialist analysis of law will emphasise a conception of law as a dynamic historical process, through which juridical freedom and equality — the necessary complement to equivalence in "free" exchange — is established and maintained. As such I am opposing in particular those voluntarist analyses of law in which coercion and class power dominate. To such analyses I would counterpose a conception of law which takes as its starting point the idea of legal personality — that is the "average" or abstract person who is constructed in the act of commodity exchange — on the basis of which I counterpose a further elaboration of the conception of law as a mode of organisation and facilitation of capitalist production and commodity circulation. For the command of capital is not established through simple political relations between classes, but in the structure and expansion of commodity production for exchange itself, that is, in the appropriation of subjectivity and the self-expropriation of the free wage labourer in the value relation.

In the Critique of the Gotha Programme Marx argued that equal rights at law are in effect no more than equal rights to economic inequality, and that freedom at law is no more than a formal or illusory freedom.[53] This

is not to argue however that law is a simple “ideology” merely appended to the “real” workings of political economy. We have seen in principle at least that in so far as the capitalist mode of production requires the generalised “self-control” of the individual in free exchange as an autonomous commodity owner, the freedom and equivalence of the legal person is necessary to the circulation of commodities as a guarantee of that autonomy. This formal or “abstract” equality is nonetheless a concrete practice, and as such a real equality, but it is an equality which is contained within the limits of the value form and expansion of the commodity structure itself. Any negation of that equality — by reproducing in law relations of social or economic superordination/subordination — of course is a denial of equality in exchange.

In so far as this is so, it would seem at least plausible to argue that as the commodity structure of the capitalist mode of production permeates a particular social formation so the tendency in legal development will be towards established juridical equality and formal freedom at law. Historically this process can be identified in English law throughout the period of political and legal reform in the 19th century, and which stretches well into the 20th century.[54]

The significance of such developments should not be overlooked, for, as Engels in one of his brighter moments noted:

In the industrial world . . . the specific character of economic oppression that weighs down the proletariat stands out in all its sharpness only after all the special legal privileges of the capitalist class have been set aside and the complete juridical equality of both classes is established.[55]

The realisation of juridical equality is thus necessary in so far as the functional requirements and expansion of commodity production and

[54] With the expansion of capitalist commodity production for exchange and the concurrent extension of the value relation as the articulation of social order, we can speak of the historical tendency toward juridical equality. However in so far as this must occur within the history of socially given institutions — the family, the workshop, the state etc. — the juridical relation may be expressed — and this is especially true of England — through extremely contradictory forms. Basically this means, to far as the English law is concerned, through the archaic and outmoded institutions of the absolutist state, which, together with its Hobbesian justifications, have hung over and distorted the contemporary history both of the practice and of theory of the English law. Hence the domination in English legal thought — especially in the 19th century — of notions of command, sanction, the absolute power of the sovereign etc. as typifying legality. If I had more time I would want to argue that the modern history of the development of English law, spanning the 19th century, bears witness to the struggle to rid law of the constraints of the political institutions of the old order, and to assert the new basis of legality: freedom, reciprocity and consent, i.e. the organisational structure of generalised commodity exchange. Thus we see the strictures of Austin on “judicial arbitrariness” and of Dicey on discretion, and on the other hand the emphasis in the work of J.S. Mill and Matthew Arnold upon education and culture, self-control, responsibility and “inner-morality”. In so far as the ideas of an epoch speak to its history the movement is from Austin to Hart.

exchange — and the operation of the law of value — demand it. That this ultimately makes visible in the law the disparity between the universal juridical equality of the sphere of circulation, and the social economic inequality of the particular level of the labour process, is the condition which dictates, within the particular history of the institutional and political development of the legal system in question, the subsequent development of the law in response to crises in legitimacy. Thus Gramsci noted the singular vulnerability of the law at such moments, and pointed out:

... how lapses in the administration of justice make an especially disastrous impression on the public: the hegemonic apparatus is more sensitive in this sector, to which arbitrary actions on the part of the police and political administration may also be referred.[56]

Arbitrary and particular acts thus negate the abstract and general form of the law, a negation which goes to the root of both bourgeois morality and legality. The crisis over the Industrial Relations Act might be a case in point.

(iii) Legal Authority

During periods of crisis the expansion of legality and morality through the ethical state is limited, so that:

the conception of the state as pure force is returned to, the bourgeois class is saturated; it does not only expand, it starts to disintegrate; it does not only not assimilate new elements, it loses part of itself.[57]

At such moments the juridical order of bourgeois society is in crisis, in need of reconstruction; the “legal authority” of the state is questioned if not abandoned, in so far as the implementation of pure force (arbitrary coercion) is the denial of “legality”. In this section we shall be concerned to untangle the theoretical determinations of the notion of “legal authority” or “legality” as external to the individual and which in England is particularised in the idea of “the rule of law”. To that end this section will seek to establish the theoretical connections between, on the one hand, the forms of bourgeois law — as the concretisation of the juridical relation defining the abstract right and duty bearing juridical subject of civil society — and, on the other, “legal” or “public authority” for which Weber’s terms “the legitimate monopoly of coercion” is quite appropriate for the developed capitalist mode of production. For just as the juridical relation in its fullest development is contingent upon the expansion of the commodity structure and in that contingency alone displays its full character, that is, as facilitating the inter-dependencies of independent individuals, so too it will be argued the notion of “legal authority” in its fullest extension rests upon a further mediation of that same juridical relation. To understand this it is necessary to work out some further implications of what has gone before.

We have seen that the juridical relation is crucial to the realisation of
generalised commodity exchange within a complex social division of labour.
As such it is a relation of juridical subjects — between the "autonomous"
individuals of civil society. Such juridical subjects however must be and can
only be defined in relation to each other.

The juridical subject as bearer of rights expresses the autonomy of will
of the "free" individual in the desire to "alienate as it acquires and acquire
as it alienates". The juridical relation is a relation of wills, expressing the
formal freedom of commodity exchange. If this were not so the products of
individual labour could not be exchanged as commodities (see supra).

We therefore take the formal freedom of the legal person as the starting
point for the analysis of the forms of bourgeois law (contract, property and
so on). This however would seem to run against common sense which would
be more likely to emphasise objective "duty" and "obligation" imposed by
"external" coercion and constraint, rather than the exercise of subjective
will and individual autonomy. Obviously it is the case that the law does
constrain and in its application may involve the use of coercion, but to
declare therefore that law is coercive, to equate law and political domina-
tion, is to confuse the functions of law, which may be multiple, with its
form, and is to be guilty of the empiricism of both vulgar Marxism and the
more sophisticated revisionism of for example Karl Renner. Thus Renner,
who derives his analysis of law from the labour process, sees domination in
a political relation of superordination and subordination, and, by directing
attention away from the social relation of the value-form as it is reproduced
in and through the juridical relation, manages to "neutralise" the form of
law and render it mere technique. It is on the contrary, however, precisely
the "objectivity" and "externality" of the legal obligation which when
unravelled displays the fetishism of the legal form, wherein the social
relation of generalised commodity exchange appears in the "fantastic"
form of an external obligation between legal persons.

That a legal duty is the correlative of a legal right is a jurisprudential
truism. The real problem then lies in the transformation of the rights of the
legal person to appear as the generalised imperative, "authoritative" and
external to the individual. The explication of that transformation is to be
found as a necessary condition of commodity exchange itself.

We have seen that the magnitude of exchange-value of the commodity is
determined according to the quantity of socially necessary labour-time
embodied in it, but that it is only in the actual act of exchange that labour is
so averaged or equalised to become abstract labour. Equalisation of labour
can however only occur where the subjects of the exchange appear equal;
they must be seen to hold an equivalent position. If on the other hand a
relation of domination and subordination is apparent in the exchange
relation, the presupposition of equivalence, that is, the exchange relation as
a relation of wills between free and equal autonomous subjects, is denied.
In commodity exchange however, as that which is being exchanged is
equated only as an average (that is, a quantity of abstract labour) the
material conditions in which the actual production occurred and the particular inequalities in the magnitude of labour-time embodied in the commodity are irrelevant in establishing its exchange-value. By the same token the equivalence ascribed to subjects in the exchange is also merely an abstract equivalence which must equally deny any substantive inequality of the individuals concerned. Thus the appropriation of subjectivity equally requires for its realisation the abstraction/equalisation of the subjects in the act of exchange; this equalisation being expressed, in the abstract as the formal equality of abstract juridical subjects and in practice in the ascription of legal personality. Thus Pashukanis wrote:

Only with the complete development of bourgeois relationships does the law acquire an abstract character. Each man becomes a man in general, labour of every sort is reduced to socially beneficial labour in general and every subject becomes an abstract juridic subject.[58]

The abstract form of the juridical subject is reproduced in the maxim, “equality before the law”, in the representation of parties to disputes through depersonalised advocacy, in certain jurisdictions in the anonymity of the parties and so on.

We have seen that the act of exchange is at once a private and social act (see supra). It is through the dual character of the act of exchange that the social function of law is revealed, in relation to its form as the concrete expression of the juridical relation.

This twofold character of exchange reveals the double aspect of the legal person, who as an abstract autonomous subject exercises his “private” right of self-determination, but in order to do so however is constrained by the correlative duty — his private rights “being neither more nor less than the obligations of others made secure in his behalf”. [59] The exercise of the legal right must be both private and “free” but also socially guaranteed. This requires that the juridical order is expressed as external legal authority, in that the exercise of will must be constrained precisely because commodity exchange is also a necessary social transaction of general character.

However as we have seen, constraint cannot take the form of domination/subordination:

the more systematic the development of the principle of authoritarian regulation (which excludes any inkling of separate and autonomous will) the less ground there is for the application of the category law . . . [for] exchange value ceases to be exchange value, commodities cease to be commodities if the exchange-ratio is determined by authority situated outside the inherent laws of the market. Constraint as the command of one person addressed to another and confirmed by force contradicts the conditions precedent to the intercourse of commodity possessors.[60]

[58] Babb and Hazard, op. cit., p. 169.
[60] Ibid., p. 154.

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In this case, in so far as constraint is a necessary aspect of commodity exchange itself, it cannot be expressed as a unilateral and particular power of command of either party to the exchange, for this would be to deny the presupposition of equivalence. Constraint is thus necessarily conceived of as the exercise of the abstract will (the general will) of the law making body which in turn appears as universal legal personality (the state) with rights vis-à-vis juridic subjects in general. Such rights are expressed as external obligations, and as imperatives in the general norms of private law. Further, in so far as that universal personality has rights made good in the obligations of others, it may have correlative duties in the norms of public law and limitations of its law-making powers. In that sense the democratic state in which the individual is transformed to become the abstract will is the natural complement to legal authority, the political form of “representation” being a further mediation of the juridical relation — hence the full significance of theories of the social contract. Thus Marx wrote in The German Ideology of the problems faced by theorists of law:

In actual history, those theoreticians who regarded power as the basis of law were in direct contradiction to those who looked on will as the basis of law . . . If power is taken as the basis of law, as Hobbes etc. do, then law, statute etc. are merely the symptom, the expression of other relations upon which the state power rests. The material life of individuals, which by no means merely depends on their “will”, their mode of production and form of intercourse, which mutually determine each other — this is the real basis of the state and remains so at all the stages at which division of labour and private property are still necessary, quite independently of the will of individuals. These actual relations are in no way created by the state power; on the contrary they are the power creating it. The individuals who rule in these conditions, besides having to constitute their power in the form of the state, have to give their will which is determined by these definite conditions, a universal expression as the will of the state, as statute — an expression whose content is always determined by the relation of this class, as the civil and criminal law demonstrate in the clearest possible way. Just as the weight of their bodies does not depend on their idealistic will or their arbitrary decision, so also the fact that they enforce their own will in the form of statute and at the same time make it independent of the personal arbitrariness of each individual among them, does not depend on their idealistic will. Their personal rule must at the same time be constituted as average rule. Their personal power is based on conditions of life which as they develop are common to many individuals, and the continuance of which they, as ruling individuals, have to maintain against others, and at the same time, maintain that they hold good for all. [61]

The universality of the general norm is but the reverse side of commodity fetishism. In Colletti’s words, exchange value, the phenomenal form of abstract labour, presents “subjective human labour . . . in the form of a quality intrinsic in things; these things themselves, endowed with their own subjective social qualities, appear ‘personified’ or ‘animated’ as if they were independent subjects”. It is in this “exchange of the subjective with the objective and vice versa in which the fetishism of commodities exists”.[62]

Just so, in the juridical relation, in equalisation and abstraction, the juridical subject appears as the bearer independently of his will of rights and duties ascribed to him in the objective legal norm. He has become the predicate of a universal subject, which has the power of command over him — a government of laws, not of men”. Thus it is that the mediation of commodity exchange requires the abstraction and generality of norms issued by “authority” outside and above bourgeois society, that is, the state as universal legal person.

Throughout I have emphasised that the extent and particular realisation of the juridical relation is dependent upon the historical development of the economic social formation in question. It is useful here to return to Poulantzas’ typification of law mentioned earlier, in which Poulantzas emphasises not only generality and abstraction, but also formalism and systematisation of norms as witnessing the quality of law. It would seem indisputable in the light of the argument above that abstraction and generality are necessary dimensions of bourgeois law, in so far as abstract and general rules are to be applied to an infinite number of particular cases. Systematisation and formalism however are no more than an historically particular mode of expression of these two necessary elements of bourgeois legality, and not necessary elements in themselves. Indeed it would seem justifiable to argue that the greater the formalisation and systematisation of the law in technique and institutions, the greater will be the apparent contradiction between the formal freedom in the sphere of circulation and the subordination of the labour process. It is no surprise that Max Weber, writing of the highly formalised German law at the beginning of the 20th century, should have pinpointed this contradiction with crystal clarity:

The democratic ethos, where it pervades the masses in connexion with a concrete question, based as it is upon the postulate of substantive justice in concrete cases for concrete individuals, inevitably comes into conflict with the formalism and rule-bound objectives of bureaucratic administration. For this reason it must emotionally reject what is rationally demanded. The propertyless classes in particular are not benefited in the way in which bourgeois are, by “formal” legal equality and calculable adjudication and administration.[63]

It was of course Weber’s error to have identified civilian legal systems as the very apotheosis of bourgeois legality. On the contrary; in the sense that by its very systematisation and formalism law is prevented from fulfilling its social function — that is the facilitation of commodity exchange and production — codification and rational formalism in legal method represents a low point in the development of bourgeois legality. In that sense the English legal system represents a much more highly developed system of bourgeois legal administration precisely because it is not systematically limited in its application. It seems at least arguable that formal limitations placed upon the law-making body, which attribute to it its universality as abstract juridical subject, are displaced in the English system where the universality of the legislature and judiciary is created and recreated through that

“peculiarly English” admixture of ritual symbolism which pervades our legislature and judicial practice. It is precisely the flexibility and pragmatism embodied in the common law of England, which, whilst providing the necessary frame of generality and abstraction, allows the maintenance of the appearance of justice and the belief that law holds good for all. To that extent it is true that “all law is nothing more nor less than a gigantic confidence trick”.

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