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## The reasons for an absence

I shall treat of a certain discourse: the theoretical discourse of juridical practice. It has never been done before and I shall explain why. This discourse is staked on the claim to say what we are for the law, that is, what are *really* for the juridico-political instance that is the law.

Accordingly, what we must prove is not that general juridic concepts can – and actually do – become integrated into the structure of ideological processes and systems (which is indisputable), but that in them – in these concepts – the social reality which has, in a certain manner, been wrapped up in mystery cannot be disclosed.<sup>1</sup>

The approach is complex and not innocent. In his explanation of the law on fines, Lenin made the subtle distinctions of a jurist in opposing a fine to compensation for damage.<sup>2</sup> *He* who does some damage to *someone* is bound to make it good. That is *compensation*, the courts rule. It is article 1382 in the Civil Code. The *worker* who does some damage to the *employer* is *penalised*. That is a *fine*. The employer is the sole judge. Lenin was doing law, which is to say that he was ‘animating’ the law or, if you prefer, he was giving law its true ‘spirit’. He opposed the general formula of Civil liability [*Responsabilité Civile\**] to class struggle. The ‘he’ of the *Code Napoléon* becomes ‘the worker’ of the June 1886 law; the abstract and general ‘someone’ becomes the employer; compensation becomes fine; and the court becomes the capitalist.

Lenin said that everyone thinks he knows what a fine is. If you

\* *Responsabilité Civile*, or *Responsabilité*, refers to the branch of liability concerned with payment of damages for wrongs which is designated ‘Tort’ in English law.

ask a worker if he knows what a fine is, he will be amazed. How could he not know, when he has to pay fines? That is the *illusion*. For it is in paying a fine that the worker is not a *free* man. He is bruised with pennies.<sup>3</sup> Law replaces the knout. For us, Lenin was doing law. For the jurists, Lenin is doing politics. For the 'politicians', Lenin is doing politics.

The ground on which I place myself is not being concealed from view. It is the ground of 'theoretical struggle'. It is the very ground imposed on me by what I am discussing, even if what I am discussing, the law, must be unaware that that is its ground. I mean that this is precisely the ground that the law circumscribes, and that the frontiers it seeks to mark out are the 'true' frontiers of its ideology. I mean that the law presents the amazing 'paradox' of sanctioning its own ideology by force.

It has been necessary to set about the work of deciphering rulings and sentences. It has been necessary to take seriously the juridical categories, the discrepant reasonings of jurists, the technical formulas of the courts, and the false rigour of doctrine.<sup>4</sup> Taking them seriously did not mean taking them for what they claim to be. It meant taking them for what they were in their *necessary functioning*.

Marxist theory permitted this seriousness, gave us its means, and made us aware of its stake. The law presents the double *necessary function* of, on the one hand, rendering effective the relations of production and, on the other hand, concretely *reflecting* and *sanctioning* the ideas men form of their social relations.

Marxism taught us that. It also taught us that juridical categories state without stating the reality of the relations of which they are the expression. It taught us even more. It taught us the *necessary movement* by means of which these categories becomes *relatively autonomous* and the reason for their being thought – in their functioning, that is – as totally autonomous in their mode. That is to say that Marxism gave us the theory of the concrete content of the anthropological illusion which the law has in its belief that it holds an eternal discourse on eternal man.

In that way, the law took on its true dimensions. It filled the political space, that is it sanctioned political power in order to sanctify private property. *In exchange*, it legitimated 'the essence of man'. I say 'in exchange' because man is the *price*.

I shall not spend long on these established results. They have

been established for us, for all of us who work concretely every day to discover the real in order to transform it. I shall not spend long, either, on the necessity of the 'critique of arms'. The working class has already been sufficiently sliced up by the drawn sword of the law for that to be unnecessary.

But the question I am now posing is a *theoretical* question. It is also *political*. Marxist theory of law is still in its early stages. That might seem an incredible thing to say; it might seem unthinkable. And yet it is, and that is thinkable. I want to be properly understood here. I am not saying that *the theory of law*, for us Marxists, is still in its early stages. I am saying something more modest and perhaps more ambitious too. I am saying that the *Marxist theory of law* is still in its early stages.

The 'enormity' of this proposition must, of course, be demonstrated. Marx left us works on the philosophy of law, but he also left us texts which are more valuable, more valuable for us. These are the texts of a 'jurist', the texts on the theft of wood and on censorship. Above all, he left us a great many indications on *law in general*, from *The Holy Family* to *Capital*. I am thinking of the famous passage in *The German Ideology* where he shows us that the juridical characteristics of private property – *jus utendi et jus abutendi* – explain:

on the one hand the fact that private property has become entirely independent of the community, and on the other the illusion that private property itself is based solely on the private will, the arbitrary disposal of the thing.<sup>5</sup>

Such indications are invaluable. Marx never stops providing us with them. The juridical forms do not determine the content even of what they make effective. But he never stops saying also that the law renders effective this content by means of the constraints of the State Apparatus. And he tells us something even more important, namely, that the relation between the expression of the content and the effectivity of the content is ideological and that it is this relation itself that becomes a mysterious power, 'the true basis of all real property relations.'<sup>6</sup> For, in the end, the relation refers to *free will*, to the illusion that private property itself rests on the individual private will. In law, the 'I will' is an 'I can'. The contract is a Hegelian act, a pure meeting of wills.

This, to repeat, is invaluable. So is Engels's *The Origin of the*

*Family, Private Property and the State*, and so are the innumerable indications in *Capital*. But what is even more invaluable is that that permits the development of a *Marxist theory of law*.

It is now time to explain myself.

We do not have a theory of the internal 'theoretical' practice of law. I mean that if we know – or rather, think we know – what the law is, we do not know how it functions. Further, I mean that the very knowledge of the ideology refers to the production of the effects which that production engenders, that the ideology is effective only through its functioning, and that the concrete knowledge of its functioning is itself the theoretical knowledge of the ideology. More precisely, I mean that to separate the general theory of law from the theoretical practice of the law produces incalculable theoretical and practical effects. It would be to hand over to the law the very ground it claims. *Political* ignorance of its 'theoretical' work in the end leaves the law free to perpetuate itself in its own illusion. And that illusion becomes ours too.

Why the ideologists turn everything upside down. ...

For this ideological subdivision within a class (1) *the occupation assumes an independent existence owing to division of labour*. Everyone believes his craft to be the true one. Illusions regarding the connection between their craft and reality are the more likely to be cherished by them because of the very nature of the craft. In consciousness – in jurisprudence, politics, etc. – relations become concepts; since they do not go beyond these relations, the concepts of the relations also become fixed concepts in their mind. The judge, for example, applies the code, he therefore regards legislation as the real, active driving force. Respect for their goods, because their craft deals with general matters.<sup>7</sup>

We have left the 'ownership' of their order to the jurists; we have left them unpunished. I mean that we have left them their place. This place is also perpetuated in its being, that is, perpetuated in its *innocence*, by *our absence*. The jurist, the 'philosopher of law', has the innocent soul of the good law he legitimates. The *Archives de philosophie du droit* could publish their 1971 annual issue under the title 'Le Droit investi par la politique' but we Marxists take no notice of it because we are busy organising conferences which nobody attends. We Marxists prefer to devote ourselves to the urgent task of assassinating our allies. Pashukanis – whose genius

it is time to recognise – is coldly accused of the *crime* of 'abstraction', abstraction 'which inevitably inscribes him in contradiction with all the givens of the contemporary battle in which ideological analyses have their reference and their very concrete problematics'.<sup>8</sup> Pashukanis's unprecedented project is degraded to the level of an 'infantile illusion'.<sup>9</sup> Here, then, are our contemporary 'theoretical' texts. It may not seem much, but it is significant if it is seen as 'symptomatic'.

This is now my self-imposed task. The consciousness of the jurist is a bad consciousness, his morality an immorality, his public order the order of private property, his 'soul', that is, his illusion of taking juridical relations to be human relations, is the soul of an owner and a shareholder, and his concepts are the necessary expression of capital. And since I have spoken of his soul, I must add that I have spoken of it never to speak of it again:

The fact that 'feeling and conscience' interfere in law is sufficient reason for the 'critic' to speak of feeling and conscience when it is a matter of *law*, and of *theological* dogmatism when it is a matter of *juridical* dogmatism.<sup>10</sup>

Or I shall say rather that it is necessary to return the soul to the law and that its 'soul' is its *practice*.

the theologian ... continually gives a human interpretation to religious conceptions, and by that very fact comes into constant conflict with his basic premise, the superhuman character of religion.<sup>11</sup>

Law comes into constant conflict with its basic premise, private property. The claim of justice becomes the practice of injustice and the claim to describe man becomes the practice of the owner.

What I was proposing earlier can now be more clearly understood. Marxist theory of law is none other than the concrete knowledge of the functioning of the law. Legal practice must make amends.

Now, that making amends, that rendering of accounts, cannot be business-like, properly 'balanced' for us accountants unless we discount the formal procedure of legal practice and unless we discount the analyses of that legal practice that are impossible to dissociate from certain forms of reasoning. And these forms of reasoning themselves cannot be understood outside certain



theoretical and ideological constraints. We shall take account of legal practice only to the precise extent that it necessarily produces certain abstract and constraining forms which permit it its actual practice. This is because the juridical categories, just as much as the categories of bourgeois economy: 'are forms of thought expressing with social validity the conditions and relations of a definite, historically determined mode of production, viz., the production of commodities'.<sup>12</sup>

The practice constitutes their functioning, as their functioning constitutes the practice. That is sufficient for the law. Smith and Ricardo were sufficient for classical political economy. If they fought against private property, it was against private property 'in one or other particular form'.<sup>13</sup>

But what is sufficient for the practice of an ideology – that is, the frontiers which an ideology marks out – constitutes precisely its function and its functioning. Juridical ideology is defined by its frontiers, by its 'taboos'. It surrounds itself with a sanitary cordon. It fears the pollution of the political. Worse than that, it fears the pollution of the economic. Its fear designates its function.

Juridical ideology is the index of its censure, since its censure is itself. It denounces the political in its 'a-politicism',<sup>14</sup> it denounces the economic in the very abstraction of the law, and it denounces the theoretical in its empiricism. Here I am thinking of the form of the subject in law [*sujet de droit*]. We shall come back to that.

Suffice it to state here our ultimate theoretical project: to treat of a scientific discourse on law is also to treat of the discourse of the conditions of the necessary production of juridical categories in the practice of law.

## 2

### The birth certificate of juridical ideology

In Chapter 1, I said that the denegation [of the law] invoked the presence which is denied. I now want to make that central point more precise.

Juridical ideology denounces itself in the drawing up of its birth certificate. And its birth certificate is the postulate that man is naturally a subject in law, that is, a potential owner, since it is of his essence to appropriate nature.

The 'illusion' is universal in speculative philosophy. So, it will be a question of treating of *the discourse of the privative appropriation*<sup>1</sup> of nature in its historico-social combinative. The two 'simple men' described by Engels fix the ideal relation of exchange, law and the political. Robinsonalia are the 'commonplace' of classical political economy and of the theory of law. The only difference is that the jurists still believe in them.

I shall not recite the 'history' of the 'ordinary concept of man' in law, the theory of the transition from Roman law to modern law, that is, the transition from a right which can have the 'quality of the thing', as Jhering said, to a right which is the subject itself. And yet a reprise of this 'history' will be necessary, though somewhere other than in Occam, or Puffendorf, or Kant, or Hegel; again, somewhere other than in Loyseau, in his *Traité des seigneuries*, other than in Dumoulin, and other than in the *Grands Coutumiers*.\*

The reprise will be effected in a 'strange place', the site of *circulation*. It is the site where commodity exchange is deployed and where the exploitation of man by man under the form of the 'free contract' is realised. So, we shall see that the very function of

\* These were the official texts of customary law. Their revision from the sixteenth century onwards permitted the rise of common law in France.

juridical ideology is the necessity of its fiction, which permits it 'a practice in abstracto', as Marx puts it so splendidly. And we shall see that class struggle has shattered the fiction of this function.<sup>2</sup> But the road to theory is long, and it is right that the practice should be examined first, in the hidden elaboration of everyday jurisprudence. It is in this laboratory of practice that we shall see coming to life categories which assume the most banal vestments of contract, will and consent. Above all, we shall see in this practice the evolution of a well known and yet badly known being, the subject in law.

It is with the subject in law that I shall begin, for: '*the category of the subject ... appears ... above all with the rise of legal ideology ... which borrowed the legal category of "subject in law" to make an ideological notion: man is by nature a subject.*'<sup>3</sup> It is through my reading you the subject in law in the practice of jurists that you will better understand what I shall be talking about and how I shall be talking. In this way the road to my most direct purpose will be open.

### The 'doctrinal' life of the subject in law

I shall therefore read you two series of texts. The first series will constitute a juridical introduction to the category of the subject in law. The second series will constitute a juridical explication of that category. This is effectively to establish a category in the first series and to bring it alive in the second. You will witness my attempt at deciphering the category.

#### *The juridical introduction*

For the law, law begins with the person.

the juridical personality of man exists by itself and independently of the possibility for the human being in question of forming a will.<sup>4</sup>

In juridical language, beings capable of having rights and obligations are deemed 'persons'. More briefly, the person is said to be identical with the subject in law. The idea of

personality, necessary for giving support to the rights and obligations ... is indispensable in the traditional conception of law.<sup>5</sup>

After the abolition of slavery, every human being is a person. It is not necessary that he should be fully conscious of himself and be endowed with intelligence and will. Children and madmen are persons, even though they have no conscious will; they are, then, bearers of rights and obligations.<sup>6</sup>

That is my first series of texts, drawn from two major contemporary classics of French civil law. I could have added many others, but they do no more than repeat the one distinctive point that the human person is juridically constituted as subject in law, as 'always-already subject', quite independently of his will. The concrete content of this subject form will be further studied below. Here I just want to decompose the juridical postulate of the subject in law.

*The texts say* that the subject in law is the general and abstract expression of the human person. They also say that what makes this expression effective is the *general capacity* of man to belong to himself and therefore to acquire. Finally, they say that if this capacity is the mode of existence of the subject, it is because the subject can/will/consents/is free to belong to himself and to acquire.

The following proposition can now be advanced in all rigour. Freedom is the juridical capacity to belong to oneself, that is, to be the owner of oneself by virtue of one's essence. This can be made more precise. The freedom to acquire is the juridical consequence of the free ownership of oneself. The slave, 'the object of ownership, can hardly be conceived as a subject in law.'<sup>7</sup> The person, the subject of ownership, can be conceived as a subject in law.

At this point the following question can be posed. What is interpellated in the subject in law by juridical ideology? I leave the question provisionally in suspense.

That, indeed, is the state of this first reading.

#### *The juridical explication*

Here is the second series of texts. They run from Savigny to

Carbonnier, from 1840 to 1972. They study the 'adventures of the will'.

#### Savigny

Subjective right<sup>8</sup> is a power accorded to the individual 'by objective right' so as to guarantee him: 'a domain in which his will reigns independently of all external will, and so that the parallel development of individuals finds independence and security.'<sup>9</sup> The human will can act on things in the external world. This is the right of ownership. And the human will can act on a person who comes under the sway of the will. This is *jus personale* which refers to all rights in the law of obligations.

The mystery of this objective right remains intact. All we know of it is that it gives the person the power to be an owner or an employer. It is this concept of law that, for the law, determines the domain of law. It is the subject that determines the subject. To translate, commerce is proved by commerce. It is a mystifying tautology.

#### Jhering

'Rights in no way exist for the realisation of abstract will; they serve to guarantee the interests of life.'<sup>10</sup> Jhering warns us of a trivial error. It would be wrong to think that the 'interests of life' consist only of material delights. 'Higher than good fortune are ranked goods of a moral nature whose value is great in a different way: personality, freedom, honour, family ties. Without those goods, external and visible wealth would be worthless.'<sup>11</sup> Thank God – what a relief!

To the man who asks, 'Who protects my freedom?' Jhering replies, 'Interest'. To the man who asks, 'What is the origin of my interest?' Jhering replies, 'Your freedom'. To the proletariat, showing its empty purse, Jhering replies, 'You have as much as the wealthy, since the price of wealth is freedom.'

#### Michoux

This author asks himself a serious question. It is not realistic to say that subjective right is a power accorded to a will by objective right, because: 'the juridical order has no object other than the protection of the manifestations of that will.'<sup>12</sup> It is realistic, however, to say that the *will* ought to be protected only on grounds

of its *object*, that is, on grounds of the interest which it aims to satisfy. Like a conjuror taking a rabbit out of his hat, Michoux derives from this profound meditation – which has greatly advanced juridical science – the following definition: 'Subjective right is the interest of a man or a group of men which is juridically protected by the power accorded to a will to represent or defend that interest.'<sup>13</sup> The will has been brought down from the sky of Roman law to the ground of the *Code Napoléon* and, on that ground, the ground of men, it is concretely examined. What does the will will? The will, good girl that she is, replies, 'I will what I am, your interest.' And if anonymous society questions her, she replies equally serenely, 'I will your interest, which is my interest.'

#### Ripert

Subjective right is a power recognised by the objective right of the subject. 'He who has a right over another person has a private power over that person, since the debtor is obliged to give a good or to execute a piece of work for the creditor.'<sup>14</sup> On the ground of the Civil Code the will is humanised. The power of the will is proved by the exploitation of man by man.

#### Carbonnier

I shall finish this section with Carbonnier. He has set himself up as a sociologist of law 'without rigour'.<sup>15</sup> For this sociologist 'without rigour', subjective right is proved by *animals*, by *children*, and in the *viscera*. We learn that 'juridical phenomena, sub-juridical at the very least', are produced 'in animal societies'.<sup>16</sup> We learn that when the lion defends his hunting territory, we humans conceptualise this reaction 'as a subjective right'. It is 'in the depths of these instincts' that our sociologist would not hesitate to look for 'the natural [the 'natural' here means 'animal'] root of subjective right'.<sup>17</sup> Saint Sancho is beaten. The dog has a subjective right over his bones.<sup>18</sup> With the child:

from the second year, there is gradually manifested the instinct to hold an object and to defend it, as with the correlative reaction of annoyance when it has just been taken away. This annoyance, this retractibility, as with a tissue, is surely the biological substance of subjective right.<sup>19</sup>

Make no mistake – the child's rattle is already ground rent. Private



property is inscribed in our cells; it is chromosomic. It is an easy step from the cells to the viscera. The notion of subjective right 'expresses an elementary psycho-sociological and as it were visceral phenomenon'.<sup>20</sup> We have now returned to our starting point.

I shall not take the matter further. At the moment I want only to ask what is said, what is occulted, and what is the relation between what is said and what is occulted in the above texts.

### Ideology and the subject in law

*What is said* in the texts is that man has a power given him by the concept of right, objective right. If we take Althusser's theses for granted, we can already read the functioning of ideology in what is said, that is, in what is explicit.<sup>21</sup>

'Individuals' are interpellated in subjects by the law. This interpellation is constitutive of their very juridical being in the sense that it is the interpellation 'you are a subject in law' that gives them concrete power, that permits them a concrete practice. 'Since you are a subject in law, you are capable of acquiring and selling (yourself).' This interpellation is interpellation by the concept, the law, the subject. In Appendix 1 I show that, in its functioning, juridical ideology postulates the necessary relation between two subjects, and that a relation in law is none other than a relation between 'couples of subjects'. I also show that the rule of law was thought as a relation between the law and subjects in law, and that it is the existence of a subject – the law-maker, that is, the State – that gives coherence and unity to the rule of law, so that law has existence only through the mediation of subjects in law. The subjection of the subject in law to the subject permits it both to legitimate its power outside itself and to operate the return to power. This 'doubly specular structure of ideology',<sup>22</sup> that is, this double mirror-structure assures the functioning of juridical ideology. On the one hand, the subject in law exists in the name of the law, that is, the law gives him his power. Better, law gives right the power to give itself a power. On the other hand, the power law has given right returns to law. The power of right is none other than the power of subjects in law. The subject recognises itself in the subjects. The power, ownership, recognises itself in the power,

the State. Ideologically, the State operates the place that in the Middle Ages devolved on to the Church. The constitution of a State subject in law assures the functioning of juridical ideology.

*What is occulted* in the texts is the actual functioning of juridical ideology. What I mean is that this functioning is self-sufficient, and that this sufficiency is an occultation in the very functioning of its sufficiency. In other words, the functioning of juridical ideology renders 'useless' the question of its functioning. A little like Descartes' God, giving an ideological shove will get the machine going. We ask of a clock only that it tell the time, and we ask of justice only that it be just. It is sufficient to the law to say that man has a power, that this power protects his interest, and that his free will is a will that wills his interest in order to 'start' juridical ideology. The *tautology* is the ultimate process permitting operation on the real without denouncing it.

Besides this meaning in everyday consciousness, these general ideas are further elaborated and given a special significance by the politicians and lawyers who, as a result of the division of labour, are dependent on the cult of these concepts and who see in them, and not in the relations of production, the true basis of all real property relations.<sup>23</sup>

*The relation between what is said and what is occulted* is the very practice designating it. This is what I was proposing above. The law occupies the unique place from where it can sanction its own ideology by force, that is, in an equally direct way it can render effective the relations of production. The fact that these relations of production are rendered juridically effective by the primary category of the subject in law clearly reveals the imaginery relation of individuals to the relations of production; and juridical practice refers back to ideology its own practice – the practice of the Civil Code, the practice of the Penal Code, and the practice of the courts.

So we shall see these categories *coming alive*. We shall see them signing labour contracts, and justifying convictions for illegal strikes. We shall see them applying the necessary rules of the relations of production. I say no more than that I shall try not to bring them alive but to show what brings them alive. The man who makes the puppets dance is always in the wings.



## The commodity form of creation

I have finished with the concept of the subject in law. It was useful to me for opening the way, that is, for the specification of the fundamental concept of juridical practice.

What I am going to talk about now will for the moment seem an insignificant, minuscule question, unrelated to the ambition I have been claiming to have. Actually, it will be a question of *the law of photography and of the cinema*. So it is not a modest little question. That is because it concerns the juridical problems posed, thrown up by the technical and economic irruption of the cinema and photography. Now we shall discover that there is in this 'insignificant' question *the entirety of the law in condensed form*, all the forms, visible and invisible, which govern it. There are also questions of aesthetics, economics and philosophy. But everything we shall be concerned with will be revealed, will be formed, in the juridical concepts. This is to say that we shall be satisfied with making the law treat of the discourse which is its own. Better, we shall try to 'surprise' it in its discourse, the very discourse that has been 'surprised' by photography and the cinema. We shall surprise it in its very formation, in its decomposition/recomposition, in its process of absorption of these new modes of apprehension of the real.

For it will be fundamentally a question of *the juridical production of the real*. This must be clearly understood. From now on I shall be making use of juridical notions. When I write subject, it will have to be understood as subject in law. When I write object or real, the real will have to be understood as designating something that can fall under juridical categories, hence also under the juridical category of the real, that is, the real as object in law, susceptible to appropriation, sale and contracts. Also, when I say that it will be a

question of the juridical production of the real, I mean that it will be a question of the constitution of the real – or of the reconstitution of the real – in the law and for the law. More precisely, it will be a question of the process which will make the real an object in law.

And since I have spoken of the process which constitutes the real as an object in law, it will be a matter of posing the juridical conditions which permit a photographer or a film-maker to treat of his discourse about ownership of a real which is 'always-already' invested with property. For it is an amazing 'paradox' that the 'reality' whose image is reproduced by the negative always belongs to someone. And the paradox of the paradox is that if what I reproduce 'belongs' to everyone, that is, to the national community, if in other words what I reproduce is part of the public domain – streets, rivers, territorial waters – it will become my property only on condition that I reappropriate it.

So if, on the one hand, all juridical production is the production of a subject whose essence is property and whose activity can only be that of a private owner,<sup>1</sup> then, on the other hand, the specific activity of the film-maker or photographer is exercised on a real already invested with property, that is, already constituted as privative common property, in the public domain.<sup>2</sup> The law must therefore accomplish the *'tour de force'* of creating a category which permits the appropriation of what has already been appropriated.

With this in mind, we propose the concept of the *over-appropriation of the real*.

### The over-appropriation of the real

This concept designates the *contradictory content* of literary and artistic property. Literary and artistic property has the strange, unique, original characteristic of being acquired through superposition on an already established property. This concept designates for us our concrete project. The subject must make the real 'his'. The photographer must be able to be the owner of the 'reflection of the real', his photograph, just as the film-maker must be able to make his own the 'fiction of the real' which is 'produced' by his camera, his film.

But, at the same time, what is 'mine' is opposed to what is

'thine'. The subject makes 'his' a real which also belongs to the 'other'. In the very moment they invest the real with their personality, the photographer and the film-maker apprehend the property of the other – his image, his movement, and sometimes 'his private life' – in their 'object-glass', in their lens.

Such is the concrete content of this concept. It constitutes the site where the 'unknown' of the law is elaborated. It designates the creation as a property, it designates the creator as a subject in law, and it designates 'civil society' as a domain of exchanges between owner subjects. And it renders 'true' – that is, it presupposes an unthought truth – a practice which is real, by which I mean a real juridical practice. It is the actual effectivity of the 'belief' that man is a subject in law and it renders that effectivity effective.

Juridical ideology has the material existence of juridical practice.

I shall therefore prove, prejudicially, the validity of this concept by studying, in the texts, the ideological constitution of this over-appropriation.

Two theorems must be demonstrated. The first is that literary and artistic property is a property. Its nature as over-appropriation of the real presupposes that it is the production of a subject in law. [The second concerns the real as the production of the subject.]

*Theorem I. Literary and artistic property is a property*

**Scholium 1. Literary and artistic property is immaterial**

Having got used to seeing property only under a more or less material and yet intangible form, it is with difficulty that we accustom ourselves to recognising it under this new and wholly immaterial form; we are even inclined to deny it, because we no longer recognise its characteristics, its ordinary appearance.<sup>3</sup>

The material of the work is 'an essentially immaterial idea which is always distinct from the matter and which continues to reside in the intelligence of the author.'<sup>4</sup> This allows Balzac to write:

No one, then, can prevent the recognition of the only property that man creates without land and without stone, a property

which is constituted between heaven and earth, with the help of rebuffs, the black smoke from bones, and rags left on the public highway.<sup>5</sup>

The juridical fiction is that property is a concept of law – ‘the railways do not “actually” belong to the shareholders, but to the statutes.’<sup>6</sup> Through its own functioning this fiction permits the transition from the invisible – ‘intelligence’, ‘creation’, ‘genius’ – to the visible – real estate, the ‘tangible’, the ‘true’, the transition from the immaterial to the material. The functioning of the fiction denounces its role. It is a matter of giving to the *invisible* – the thought of man – *the character of the visible* – private property. People knew already, without knowing it, even though it was impossible for them not to know, that the invisible was what is the visible, since it presents itself in the visible. Such, then, is the effectivity of the fiction.

I shall return to this point.

#### Scholium 2. Which does not prevent its being property

The chorus of owners:

*The legislator:*

Of all properties, the one least susceptible to being contested is unquestionably that of the production of genius.<sup>7</sup>

The most sacred, the most legitimate, the most impregnable and, if I may put it like this, the most personal, of all properties is the work, the fruit of the author’s thought.<sup>8</sup>

The authors:

*Lamartine: the general idea*

Property and society are so identified with each other that ... the philosopher recognises, through definite indications, that the absence, imperfection or decadence of property in a people are everywhere the exact measure of the absence, imperfection or decadence of society.<sup>9</sup>

*Victor Hugo: the sacred alliance of all owners (including himself)*

You feel the importance and necessity of defending property today. Well, begin by recognising the first and most sacred of all properties, the one which is neither a transmission nor an acquisition but a creation, namely, literary property ... reconcile the artists with society by means of property.<sup>10</sup>

*Balzac: the revolutionary threat*

To disinherit the families of authors in the name of the public interest would surely be to prepare the ruin of other properties.<sup>11</sup>

The transition from the invisible to the visible is demonstrated by the legal identification of all human production. *The fiction of legal equality*, which refers in a fundamental way to the juridical concept of property, permits the rigorous demonstration that every ‘fruit’\* of man ripens on the tree of property, freedom.

The juridical identification is at the same time a return to the juridical source of the sacred and the eternal.

#### Scholium 3. For it has the same origin in natural law

The words of sacredness and legitimacy had already been spoken. The Cour de Paris will utter the master word.

Literary and artistic creation constitutes a property in the author’s name, the *foundation* of which is in natural law or in the law of nations but the *exploitation* of which is regulated by civil law.<sup>12</sup>

Here is the bedrock, the original element, the granite on which in the last instance all property is constructed. And if the bedrock is labour, ‘if we look for the origins of property we shall soon discover that the right of the author proceeds from the same source: labour’.<sup>13</sup> That is because labour itself does none other than objectify the essence of man, that is, property.

This first theorem is closed in its perennality. Property has demonstrated property. It now has to be proved that this property

\* *Fruit* is the term in French law used to describe whatever is regularly produced by property without the substance of the property being diminished, for example, rent.



can over-appropriate Property – without damage, for that is its nature.

*Theorem II. On the real as production of the subject*

The law is terrified of an empty space. The land invites me to ownership. It thirsts for a master. Kant and Hegel have shown that the status of the will postulates the privative appropriation of all nature.

**Scholium 1. The public domain is common property**

There can be no contesting:

the right to view which every individual has over everything there is in the street: frontages bordering it, personages and carriages proceeding along it, in short, over all the scenes unfolding there, and, as a result, [there can be no contesting] the right to make a negative of everything the individual sees for reproduction on picture postcards or on cinematographic reels.<sup>14</sup>

the streets of towns, of countries, picturesque places, are a public right as far as their reproduction by the photographic industry is concerned.<sup>15</sup>

The juridical deduction is perfect. I have the right to photograph what I can see, provided, of course, that I recreate what I photograph. The deduction is perfect except that nature is already appropriated.

**Scholium 2. Property can be inscribed [in the public domain] without damage**

This will be in effect a question of 'personal appropriation which harms no one'.<sup>16</sup> This invocation of the public domain\* renders effective the articulation of the creation on the real.

\* Public property, or State property consists of the public domain and the private domain. The public domain consists of properties, such as roads, rivers and cemeteries, which the public at large can use. The private domain consists of properties, such as the estates of people who die without heirs, which are not in the public domain but which are still properties belonging to the State.

**Scholium 3. On condition that it is 'creation' and not 're-production'**

Here is the juridical key to creation. It is that I must be satisfied with reproducing the public domain and that I shall have no right to the protection of the law:

for a natural product which is not stylised (meaning by that that it has not been invested with a personality) belongs to the public domain.<sup>17</sup>

This is effectively to say that 'the reproduction of natural aspects' or, better, the 'reproduction of the work of nature'<sup>18</sup> is the antinomy of an appropriation.

The public domain therefore reveals its true nature as the general abstract expression of property.<sup>19</sup>

Here is the explanation. The law tells us that the streets belong to everyone, in the same way as places and landscapes. In order 'intellectually' to appropriate what belongs to everyone, I must not reproduce it, for then I shall do no more than expose what belongs to everyone, but I must produce it. Portalis has expressed this wonderfully well. In the case of literary and artistic property, he says,

there is not only property by appropriation, as the philosophers say, but there is also property by nature, by essence, by indivision, by the indivisibility of the object and the subject.

I find this formula exemplary: property by 'indivisibility of the object and the subject'. In order to be 'appropriated' the object, the real, must become the subject itself. The real must become the production of the subject in order to be protected by the law.

I have posed everything I wanted to pose. I have entered into the practice through the 'gamble' of taking seriously the concepts of the law. I can now put into practice its most prosaic discourse, the discourse of the courts.

**Man and the machine**

I have already indicated my project, the description of the process that constitutes the real as an object in law. I have already indicated the *contradiction* whereby the photographer and the film-



maker produce the real, but that in that production they encounter a real which already belongs to someone else. The photographer can indeed photograph a face, but that face belongs to someone, the person who is photographed and who owns the face. The production of the subject therefore finds its necessary limitation in the subject himself. This thesis requires *its concept*, the concept of the form of the subject in law. We shall try to construct this concept without losing sight of the movement animating our scene. The subject in law puts at issue what it has necessarily granted to the 'objectivity' of the real – its own negation.

I want to study more closely the juridical 'history' of photographic and cinema creation. *This history is in two acts*. The law recognised only 'manual' art – the paintbrush, the chisel – or 'abstract' art – writing. The irruption of modern techniques of the (re)production of the real – photographic apparatuses, cameras – surprises the law in the quietude of its categories. A photographer who is satisfied with the pressing of a button, a film-maker with the turning of a crank handle – are they creators? Is their (re)production equivalent to the over-appropriation of the real?

The law is surprised by the question and its first answer is in 'resistance'. The man who moves the crank handle or the man who works a hand-lever is not a creator. The law's resistance first passes through the *denegation* of the subject in law. The labour of this individual is a *soulless labour*. *That is the first act*.

*The second act is the transition from soulless labour to the soul of the labour*. The time of the resistance was not *economically neutral*. It was the time of craft production. The fact that industry takes the techniques of cinema and photography into account produces a radical reversal. Photographer and film-maker must become creators, or the industry will lose the benefit of legal protection.

I shall study this 'evolution' in the actual work of the juridical categories, that is, in what is the visible of the law, and I shall summon the aid of the invisible of the law in order to make the plot of our piece comprehensible.

#### *From the man-machine*

What I am going to analyse is therefore a *historical stage*, that of the

*juridical birth of photography and the cinema*. In this birth, there is the form of the relation of man to the machine, the form of the relation of the worker to the machine. This form is given us by the law in that privileged site of the bourgeois soul that we are used to calling creation. As I have already said, this is the time of soulless labour and it is an economically dead time because it is the time of craft production. Though it is not a scandal for the law, the law will reveal the scandal whereby the subject can disappear into the machine, disintegrate into the 'mechanical'. In the same way that by 'serving the machine' the proletarian squanders his freedom through the use of his labour power, so the photographer squanders his creative freedom in putting himself at the 'service' of his apparatus. The photographer of 1860 is the *proletarian of creation*; he and his tool form one body.

*As the curtain rises*, we have the song of the good fairy:

A painter is just just a copyist; he is a creator. In the same way that a musician would not be an artist if with the aid of an orchestra he restricted himself to imitating the noise of a cauldron on the firedog or the noise of a hammer on an anvil, so a painter would not be a creator if he restricted himself to tracing nature without choice, without feeling, without embellishment. It is because of the servility of photography that I am fundamentally contemptuous of this chance invention which will never be an art but which plagiarises nature by means of optics. Is the reflection of a glass on paper an art? No, it is a sunbeam caught in the instant by a *manoeuvre*. But where is the conception of man? Where is the choice? In the crystal, perhaps. But, one thing for sure, it is not in Man.<sup>20</sup>

And Lamartine has this wonderful dictum:

The photographer will never replace the painter; one is a Man, the other a machine. Let us compare them no longer.<sup>21</sup>

Jurists cannot be satisfied with sentiment. They need rigour,<sup>22</sup> even if such rigour demonstrates their sentiment. How is soulless labour proved juridically? Through the analysis of its products: soulless product, soulless labour.

The product, the photographic negative, is *soulless* because only the machine works, and the photographer:

has merely learned to get it working properly ... and to set up chemical operations for reproduction. ... His art reduces to a purely mechanical process in which he can show more or less skill, without his being capable of assimilation to those who profess the fine arts, in which spirit and imagination operate, and sometimes genius formed by the precepts of art.<sup>23</sup>

In fact:

the art of the photographer does not consist in the creation of subjects as its own creation, but in the getting of negatives and subsequently in the making of prints which reproduce the image of objects by mechanical means and in a servile way.<sup>24</sup>

The effort of jurists will be directed towards the actual analysis of the process of creation. What is important is that the subject must always be present in the creation. Once he disappears, then, quick as a flash, his absence will designate his nature – he was ‘mechanical’.

All the intellectual and artistic labour of the photographer is anterior to the material execution. ... When the idea is about to be translated into a product, all assimilation [into art] becomes impossible. ... The light has made his work, a splendid agent but one independent of achievement ... the personality will have been lost to the product at the precise moment when that personality could have given it protection.<sup>25</sup>

The labour of the man is ‘disqualified’ in mechanical labour. Better, since the work [sc. the product] can be realised only through artistic means, the sheer utilisation of a machine cannot convey the thought of the artist.<sup>26</sup> In other words, the *end* (the production of the subject) reverts to the *means* (the production of the subject) and the means to the end. The recursive reasoning is at once a justification and a teleology.

It follows that such ‘mechanical labour cannot therefore give birth to products which can justly be ranked with the production of the human spirit.’<sup>27</sup> The juridical consequence is radical since:

this industry cannot be assimilated to the art of the painter or the sketcher who creates compositions and subjects with the sole resources of the imagination, or again, the artist who, following

his personal feeling, interprets the view-points which nature offers him and which constitute a property in his name.<sup>28</sup>

In contrast, the photographer ‘makes an exposure for purposes of representing public places or monuments’ and ‘constitutes only an *industrial instrument*’ which has no privilege.

We have not seen much of the Beautiful or the True there, but Professor Savatier will not disappoint our expectations. On the one hand, ‘the true is not necessarily confused with art’ and, on the other hand, photography is ‘in itself a mechanical process of reproduction which has no other interest than the exact physical truth of the imprint it takes of real forms’,<sup>29</sup> so that reproduction excludes the subject-creator of the beautiful.

We thought that all men were subjects in law – sacramental texts confirmed it for us and we had its causes explained to us. Juridical practice, in those heroic times, told us in black and white. The activity of a man can be solely the activity of a machine and his very activity transforms him into a machine. To repeat, the law said this only at the moment of birth of photography when it still did not ‘know’ that photography could be an art, when it still did not know that courtesy of industry the cinema would be able to take its place at the *Académie Française*.

For, in the eyes of the courts, *photography and the cinema are of the same nature*. The only difference is that the cinema ‘moves’. But, in a precise way, the very analysis of movement will be referred to the machine, and as a result the cinema will appear as the production of the machine.

If it is correct to claim that the arrangement and composition of pictures can be of an artistic character, the movement with which the actual projections are endowed is not due to the author or to his executive assistants but to the special machine by means of which the movement is obtained, and to the optical illusion occasioned by the uninterrupted succession of pictures in front of the lens and their projection on a screen.<sup>30</sup>

In other words, on the one hand, the cinema is assimilated to a series of photographs, the author being:

the man who has first arranged his subject ... who has planned the setting, that is, made sure that the important part of the scene to be reproduced is well in the centre of the lens<sup>31</sup>

and, on the other hand, the movement with which the photographs are animated is due to nothing but a machine.

The result of this is that the re-production of the real is not in any way an artistic creation – the cinema is juridically assimilated to the category of ‘curiosity shows’ and reels are sold by the yard.<sup>32</sup> The result is also that the reproduction of a production, such as a theatrical representation, is, to the extent that it is realised courtesy of ‘the means of industrial processes, [similarly] included in the definition of curiosity shows.’<sup>33</sup>

The soulless body of the machine and the coldness of the lens reproduced what people wanted them to be and what people were afraid they might be: the crowd, the turf, the people.

What else was there to do but oppose ‘the mechanical to intelligence ... the impersonality of the technician to the personality of the craftsman, anonymity to the individuality of talent.’<sup>34</sup> In a word, what else but oppose ‘matter to spirit’?<sup>35</sup>

‘To tell the truth’, said the Hyères tribunal de police in 1912:

cinema shows ... are not made for the *same public* as the theatres ...; they are presented to excite and sometimes to amaze public *curiosity* rather than to awaken and develop *aesthetic* feeling in the spectators.<sup>36</sup>

And the first censorship decision banned the film of four executions with these words:

There must be an absolute ban on all spectacles of this kind – spectacles liable to provoke demonstrations which disturb the public order and the public peace.<sup>37</sup>

The whole problem of censorship therefore rests on the illusion of reality which is ‘reproduced’, ‘willy-nilly’, by the machine. For his part, the jurist, the sanctioner and ‘theoretician’ of order, discerns in that position only necessity:

On the one hand, indeed, the cinema cannot do without censorship, for it constitutes an exact visual representation of *reality* and it is destined for an *unlimited public*. Now, it is quite clear that there are some realities which cannot be shown to just *anyone* and that there are some realities which cannot be put into *images*. So, an absolute freedom is *technically* inconceivable.<sup>38</sup>

This fear has no limits and stems from the depths of theology.

Such was the amazing process which brought a producer into conflict with a projectionist who refused to project a film on the passion of Christ since he saw in that a crime perpetrated by the order of the prefectorial authorities of the day!<sup>39</sup>

The machine is the battleground between the angel and the beast and, worst of all, it reproduces that same battle. It might be said, then, that there is no solution to the problem of continuity between the reproduction machine and the ‘machine of stupefaction and dissoluteness [which is] no more than a pastime for the illiterate and for wretched creatures abused by their neediness’.<sup>40</sup>

This is the first photograph of the law, the photograph of its resistance, congealed in its eternal pose. But, and this is the second act, I am looking ahead only slightly when I say that industry’s taking account of photography and the cinema will produce the most unexpected juridical effects. The soulless photographer will be set up as artist and the film-maker as creator, *since the relations of production will demand it*.

We will therefore be able to pose in a concrete way the ‘strangest’ question – what is this soul, I mean, what is this creation that depends in the last instance on the relations of production?

#### *To the subject-creator*

The economic importance of photography and the cinema was to lead to a fundamental revision. It is our task to demonstrate and to describe not the economic process as such but both the way *this process is reproduced within the law* and the way *the law makes it effective*.

In 1910 it was already possible to write that photography:

provides millions of people with their livelihood. Professional photographers, manufacturers and workers would be profoundly damaged if the law did not protect them against unscrupulous competition. Finally, and most importantly of all, photography has given birth to a welter of chemical, mechanical and industrial processes and applications which today feed a flourishing industry.<sup>41</sup>

From 1880 a considerable increase, parallel to ‘a considerable extension of the number of amateur or professional

photographers and of the application of photography in different industries<sup>42</sup> was noted. That led to, for example, the wish expressed by the German society for the legal protection of photographers. It said that, 'it is desirable ... 2. that the reproduction of photographs should equally be prohibited when it is used in the work of industry, craft manufacture or manufacture.'

Bulloz was writing in the period leading up to that time. He noted that:

there are more than 50,000 people who live by photography in France and that France exports the products in millions.

He then added, with a naive cunning, that to refuse them the protection of the law would mean 'putting photographers at the mercy of all infringers and justly killing all those of them who have artistic feeling ...'<sup>43</sup>

It can be seen that artistic recognition of photography and, in consequence, recognition of the quality of the photographer's being a creator would become a *necessity* of industry. These new productive forces had to find the means of their effectivity. Even here, this effectivity proceeds through the 'aesthetic'.

In a parallel way, the duration of legal protection (monopoly) was questioned, and the point was made that:

it is for the legislator to ascertain if the duration of privilege of reproduction is sufficient to encourage artists and, at the same time, to ascertain if on the contrary the duration is not too great both in relation to the personal effort of the author and in relation to the trouble which the exorbitant restrictions of common law impose on commerce in general.<sup>44</sup>

We can see how pseudo-aesthetic considerations are subtly mixed with openly commercial considerations. Better, *the aesthetic is subordinated to commerce*.

In other words, 'commerce' imposed its laws under a double title, both at the level of the necessary recognition of *copyright* and at the level of the *necessary limitation* of that recognition.

Indeed, if there is no doubt that it is the capitals committed to the cinema and photographic industries that have brought about this radical reversal, it is no less doubtful that *the juridical reversal* – euphemistically called the 'veering of jurisprudential opinion' –

has given industry the 'means' of its production. These exigencies certainly do not exclude photographic art as such but they do explain the juridical and hence the economic effectivity.

'Suddenly' taking heed of what the law did not define: 'the characteristics which constitute a creation of the spirit or genius in an artistic product'<sup>45</sup> the courts utilised the concept of 'imprint of *personality*' to wrest photography from the machine and to bring it into the domain of the actuating subject.

The emergence of this concept is at a double price. It is both through the substitution of *technique*, the support of the subject's activity, for the machine, and, as a result, through the intervention of the subject as such in the process of reproduction. In this way, in so far as it is the means and no longer an end in itself, *technique* permits the subject's self-affirmation, and in this way the subject can have self-affirmation only through the *mediation of a technique* which permits his investing himself in the real and his making it his private domain. The *subjectivisation of the machine* reverses the relation: means/end. The labour of the machine becomes the labour of the subject, and it is only a means to the creation itself. Creation is no longer subordinated to the 'means' of creation; it is the means that are subordinated to the finality of creation. One might say that the machine loses its 'being' and that it becomes the means of the subject's being. It is on this condition that the machine becomes worthy of protection 'as a utilisable product of labour'.<sup>46</sup> And the unspeakable Lamartine, changing horses, could shamelessly exclaim that photography 'is better than an art; it is a solar phenomenon in which the artist collaborates with the sun.'<sup>47</sup> Too much!

The machine in this way becomes the site of human labour; it is the 'technical' mediation of the subject's production. But it is not the site of just any kind of labour because it has become pure meditation and therefore leaves the subject to 'invest' the real.

In other words, photography benefits from legal protection only on 'condition of bearing the intellectual mark of its author, the imprint necessary to the work's having the characteristic of individuality necessary to its being a creation'.<sup>48</sup> Better, the work must reflect the personality of its author and reveal 'the effort and the personal labour of the person capable of individualising it'.<sup>49</sup>

This is to say that if the photographic apparatus does indeed re-enter the sphere of the actuating subject, it submits to domination



in its turn. Here, in the same way as there, the real belongs to the subject only if the subject invests it.

The process is significant. The machine reverts to the subject only within the *limits* of the fundamental relation: subject/creation of the real. So much so that as soon as the real no longer appears as 'created' by the subject the machine magically rediscovers its first function of reproduction. If I use an aerial photograph of the Cité on a bank note and put it in a new setting, I cannot be taken to task, because there has been only a reproduction of a natural site.<sup>50</sup> If I fancy taking a snap of a lake where, as it happens, there are six sailing boats, that indeed is a happy choice but one which belongs more in the province of the benevolence of chance than of artistic creation.<sup>51</sup> In sum, even the photographic reproduction of an attractive girl is in no way sufficient for the characterisation of the appropriation as intellectual, for 'the mere features of a face ... are not susceptible to appropriation'.<sup>52</sup>

The advance of capitalist productive forces is concretely realised in the site of the subject in law. And that realisation takes the very form of a subject. All production is the production of a subject, meaning by subject the category in which labour designates all man's production as production of private property.

The will of man is the soul of external nature, and this soul is private property, for it is the intended purpose of man, *qua* subject in law 'to take possession of this nature and make it his private property'.<sup>53</sup>

From the moment that, for their good functioning, the productive forces demand that these products be protected by copyright law, it is sufficient for the law to say that the machine transmits the soul of the subject. That is to say that it is sufficient for the law to permutate the terms in the same structure. The soulless machine becomes the soul of the machine.

These are the 'imperceptible social processes which ... always underlie [the processes of the Palais de Justice] and which constitute bourgeois practice'.<sup>54</sup>

### The process of capital and the process of creation

The photographer is a solitary man; his production is production

of a subject. Certainly the photographic industry has taken his creation into account, and that has already been sufficient for it to be said that the photographer is a creator, but it has left him his instrument of labour, the photographic apparatus. *The photographer is a craftsman.*

What I am going to study now are the quite extraordinary effects of an industrialised artistic production, that is, a production in which the socialisation of production, exchange and consumption are realised all at the same time. What I am going to study, in the prodigious process of an *artistic product* which is from beginning to end and through and through subject to *the law of capital*, where the process of capital becomes the very process of intellectual creation and where the commodity form of this product becomes the production of this very product – what I am going to study is the destiny of our eternal category of the subject (in law). And, at the same time, I shall also study the destiny of our real (in law). This double destiny is prodigious. It is the double destiny of the economy and the cinema. Here, indeed, my project becomes ambitious, and I must present my proof. It rests on the *fundamental thesis* that the socialisation of the cinema industry produces the socialisation of the subject-creator, a *collective subject*. That socialisation produces a socialisation of the real – the unfolding of the event.

To repeat, my avowed purpose is juridical. But that vow was born in a place other than the law; it was born in the relations of production.

I shall begin there.

### *Economy and cinema*

Because it had an industrialisable technical base, the cinema 'afforded businessmen what the theatre had always refused them, an industry of spectacle, and because it was technically possible there was no reason why production and the market should not be concentrated'.<sup>55</sup>

### The United States

Industrialists and bankers gained control of the growing industry in three stages: control by competitive small business, from 1896

to 1908; conflict between trusts, each enterprise seeking to acquire absolute control, from 1909 to 1929; and from 1929 to the present day, 'thanks to the patent of sound which it controls, high finance takes over the situation'.<sup>56</sup>

Capitalism had to adapt its methods of production/distribution/consumption to the 'intellectual' product, the film. The adaptation had to take account of the specificity of consumption, and that meant taking big risks. The jurists had already taken cognisance of that. Here are two examples, one French, one German.

#### France

The juridical problems born of the fact of 'cinema' are new problems the solution to which must take account of the modern exigencies of business life, the need to move fast and to simplify, owing to the fact that the cinema is a powerful industry employing tens of thousands of employees. Juridical subtleties must give way to practical considerations of the flexibility of institutions, of the simplicity of rules, of the convenience of processes and methods ...<sup>57</sup>

#### Germany

The author of the film manufactures a large quantity of merchandise which has to be dispersed throughout the world. Because of this, and because of the fact of commercial risk engendered in this way, a greater economic weight bears heavily on him ... the slant of his production is entirely on the manufacture of merchandise which has to be dispersed ... he must forecast his reserves. He is much more dependent on the times, on the tastes of the public, on the up-to-dateness of the subject and on world competition than is a theatre producer in his own town.<sup>58</sup>

The restraint of industrial and financial capital over the *material means of production* (equipment, machinery ...) is necessarily accompanied by a *monopolisation of the 'human material'* in so far as it is an original element in cinema production. As far as the American cinema is concerned, it has gone in two directions: monopolisation of the *intellectual primary material* – the purchase of

books, news and bestsellers – and, fundamentally, monopolisation of *intellectual man-power by contract*. 'The companies constituted a veritable pool of talent and lent each other stars, directors, script writers, and technicians.'<sup>59</sup> The contract appears as the privileged instrument of capitalist domination. It designates the commercialisation of man as object in law. The star system is a perfect illustration. Contracts are Draconian. The star under contract loses a large part of his freedom. The organisation not only of his public life but also of his private life is laid down in the contract. Breach of contract means his name being put on a blacklist. ...<sup>60</sup> As for the extravagant salaries, they are nothing but an ideological part of the system.

Briefly, the film is a commodity subject to the 'law of profit' and all those participating in it are subject to the monopolist structure of the cinema.

The film is not a product for itself; it is not a means of artistic expression. Its production allows the financiers a useful placement for their capitals, it is as industrial as can be, and the standardisation of the product shows that a commercial criterion operates at all levels of the industry.<sup>61</sup>

For my particular purpose, what I want to retrieve from this analysis is the fundamental process whereby the monopolist structure of finance and industrial capital involves the monopolisation of intellectual primary material. I want to go further and disengage the relation between this monopolist structure and the category of the collective subject-creator. First, however, I must deal quickly with a certain controversy.

In his book *Cinéma et idéologie*, Lebel claims that:

the production of cinema is no more than a production of spectacle, and, in spite of the material it puts to work and the material on which it is inscribed, this production does not enter into a process of material appropriation of the world by men.<sup>62</sup>

According to Lebel, in fact, 'the complex infrastructure of the cinema' belongs to 'the sphere of superstructures'.<sup>63</sup> If Marx had read this text, his eyes would have popped out of his head. What is this infrastructure that forms part of the superstructure? Ideology plays havoc with people who take its denunciation to heart. But let's be serious. The *monopolisation* of the means of cinema

(technical and intellectual) production puts in play a new juridical form expressing relations of production at the level of imperialism – the form of a collective subject.

The working class made no mistake about the monopolist character of cinema protection. In 1937 the *Confédération Générale du Travail* mounted a plan for the nationalisation of the means of cinema (laboratories and studios) production and of the large distributors.<sup>64</sup>

#### *The capital-author*

To return to my stated purpose, there are two propositions which reflect the dialectic of the process of socialisation of the subject-creator. From the start the courts recognised the producer as the sole author of the film, taking account of the financial responsibilities incumbent on him. But the struggle waged by the authors for their 'rights' as intellectual creators brought into the open the *combination of intellectual production and industrial production*. It brought about the 'appearance' of a collective subject caught up 'in the process of technique, considered as a process of commodity production',<sup>65</sup> and whose moral interests are in the last instance subordinated to the maximum profit of the film product. This appearance/revelation brought the script-writer, the dialogue writer, the director, etc. into the 'sphere of creation' and produced for the law a revolutionary *aesthetic effect*. It had to take into account the 'social essence' of the cinema.

I know that the circuits I am describing go deep. But these circuits are the very ones the law has borrowed, and they are significant. They prove the perpetual contradiction between the ideological representations conveyed by juridical discourse and the practice of this discourse itself. And they prove the very functioning of juridical ideology brilliantly described by Brecht: 'What is amusing is that they – yes, they! – could no longer exercise their practice, neither if they abandoned their ideology nor if they made it concrete.'<sup>66</sup>

#### **Capital, the damned soul of the cinema**

In the thirty years in question, the courts take legal cognisance: 'Cinema productions cannot be denied the character of literary

artistic and scientific productions.'<sup>67</sup> The material conditions of this creation designate the *author*, that is the person who realises the capitalist process in the film. The author/producer forms part of the apparatus of production, he participates in the process of production in his very capacity as author. 'The producer is, in a way, an intellectual production machine in which each wheel has a brain and a particular talent but in which everything is confused in the product as a whole.'<sup>68</sup> This jurist text is a materialist text, indubitably. The metaphorical description is at the same time a description of the real process of cinema creation.

The process of production is the (bourgeois) essence of the film. Art is both 'product' and 'moment' of capital. 'The film is not a product for itself; it is not a means of artistic expression. Its production allows the financiers a useful placement for their capitals.'<sup>69</sup>

Indeed, the producer 'directs all the successive elements from which stems the complete production of a cinema work for which he has responsibility.'<sup>70</sup> By 'responsibility' we must here understand the entire financial responsibility. Juridical categories become the *receiver* of the process of capital, since capital is realised in them too, whether in the category of the subject or in that of the creation. The cinema work has its 'author', *even if the author is not a subject but a process*. The documents are irrefutable and they are extraordinarily important. The law will state what we would never have hoped it could state – *the true creative subject is capital*. This statement will be incarnated in the very ideology of the subject. Capital becomes the very person it interpellates. Capital assumes the mask of the subject, it is animated, it speaks and it signs contracts. Capital cannot do without its beloved subject in law, since the subject in law is its subject.

As I said, the documents are irrefutable.

On 16 March 1939 the Cour de Paris ruled as follows:

Considering that legal protection of artistic property can, in the quite special and still new category of cinema creation, be fully assured for the producers, since the work would not exist without its intellectual labour..., considering that the *producer*, that is the physical or moral person whose profession is the realisation of cinema works, incontestably manifests himself through *creative activity* in the order of the intellect consistent

with that required of every author; considering that he imagines and expresses the ideas that will constitute the canvas, that he exercises a *determinant influence* over the entire direction and execution, and that it is under his *creative direction*, whether personal or delegated, that he exercises his influence over hundreds of specialist *assistants* who are duly remunerated at a fixed rate or according to contract, who are in any case interchangeable with other employees with the same specialist skills, and who will proceed to the *more or less intellectual or mechanical task* assigned to them; considering that the *distribution* by the producer of the intellectual labour ... could not have the consequence of all those who contribute to the sequence of the work's successive stages being given a personal right over the exploitation of the film. ...<sup>71</sup>

The producer is the owner of the 'creation' he produces. The subject-capital is rigged out in the mask of the creation at all industrial stages. The *determinant influence of capital* becomes, for the law, the *creative influence*; *financial direction* becomes *creative direction*; the *authors* become *proletarians* who are paid for the job which accomplishes a 'task' work and not a creative activity, halfway between the man and the machine, and who can be shown the door if they do not give satisfaction. Capital takes on the face of Art but retains the necessary methods of capital: the methods of buyers of labour power, the methods of slave-drivers, the methods of privileged contractors.

The authors of the film are the people who, in their participation in the elaboration of the cinema work, manifest a *creative activity*, provided, however, that they are not subordinated to the producer by means of hire contracts of employment or of service.<sup>72</sup>

This is an amazing revelation. Creative activity, that is, the expression of the 'personality of man', can be subject to a contract. In other words, contractual clauses are sufficient for the transformation of creative activity into the pure and simple costs of labour power. The *contract* is no longer a pure and simple act of will. In its functioning it permits the extraordinary mutation which *turns an artist into a proletarian*. The author is the 'authorised agent of society [engaged] to direct the production and not to

create it ... he is the executive [on a par with] the conductor directing the execution of the libretto or the artists interpreting it on the stage. ...<sup>73</sup>

This is capital's great score, under the baton of the capitalist. And if, for the German Supreme Court, the director can play a certain part with regard to the public, this part 'is translated into the importance and reputation of the society which has given the director fixed employment and which is assured of his intellectual capacities'.<sup>74</sup> Capital provides the name so that the name relates back to capital. The juridical subordination of the 'assistants' to mortgaged capitals, the travesty of capital as subject-creator, and the necessary 'interchangeability' of film workers are translated into a necessary aesthetic formulation. The labour of the assistants is not essential to the cinema's artistic process.

In the event of absence or breach of his obligations, the assistant remains essentially replaceable without the work being in any way modified.<sup>75</sup>

It is capital that becomes the essential element of the work.

It is necessary to accord to the producer the right of representation; it would lead to absurd consequences if he had to be deprived of that right in favour of the authors of the film, each of whom could then claim to be justified in disposing of his own part in the communal work, which is, in any case, *indivisible*, and each of whom could unite to dispose of the work independently of the producer. ...<sup>76</sup>

The thing which is *indivisible*, that is, which constitutes the essence of the cinema work, is *capital itself*, whose representative – the producer – is the sole author. And the danger foreseen by the courts – the collectivisation of the artistic product – is real. Let the 'others' declare themselves authors, and one would very quickly see them 'expelling' the producer. Let the workers have the legal means of appropriating the means of production, and they will see that they can dispose of the production 'independently of us' – to translate, independently of capital.

#### Rhetoric and private property

The producer and the jurist will fight *on this ground*. They will act as if the cinema were a sort of filmed theatre where it is the 'literary'



that takes precedence. It would therefore be possible to expel the assistants 'aesthetically'. 'If the director is changed, neither the subject, nor the scene sequence, nor the dialogue will have been changed ...; the essence of the work will not have been modified.'<sup>77</sup> The director, says the Paris cour d'appel, cannot be an author because he remains 'essentially replaceable without the essence of the work being modified'.<sup>78</sup> *The aesthetic category of the theatre*, that is, *the ideology of the spoken word, will work against the assistants. Capital will become the Word*. The basic thing is language. 'The word before the image, and the dialogue writer can cast the director into oblivion.'<sup>79</sup>

It is important to remember the *capital economic fact* that it is thanks to the patent of sound that high finance has taken over in the cinema industry. That means that if the cinema was compared with mime in the theatre in the days of the silent film, in the time of the talkies it is compared with the spoken word in the theatre. By that I mean that, even if the spoken word were silent, the ideology of the spoken word obsessed the cinema, and that this obsession became flesh when it embodied the evolution of the productive forces.

This aesthetic 'obsession', this rhetorical obsession, is articulated on the 'obsession' of the producer. The cinema word is the property of the banks. The process of capital closes in on itself in its own spoken word, the talking Subject. Capital has become its own rhetorician, the herald of its own process.<sup>80</sup>

#### *Creation and the collective subject*

But the victory of the 'commoner's condition', a condition which coloured the nobleness of the Word, designated the time of the cinema. The growth of the productive forces in the cinema industry was socialising the subject-creator. *And the capitalist collective subject designated what the cinema was*. I do not mean that the producer will be evacuated from this dialectic, for that would be to evacuate capital. I mean that the struggle for the recognition of a subject-creator unveils the dialectical truth of the cinema process – the forced coexistence of art and industry which can exist only under the form of the subject. And I might add that the necessary consciousness of that coexistence is none other than the objective

unveiling of the objective socialisation of the productive forces.

The capitalist mode of production perpetually destroys bourgeois ideology. What destroys the 'bourgeois' cinema is, at one and the same time, the category of the subject-creator in law by means of the arrival of the collective subject and the aesthetic broadening of that category by means of the arrival of the 'essence' of the cinema.

The industrial phase of cinema production produces its contradiction, *the (ostensible) collective work*. The subject-creator in law is pulverised into subject-creators in law of an artistic process, the film. The French law of 11 March 1957 takes legal cognisance of this subject. If, in Article 14, it does indeed allow that the physical person or persons who realise the intellectual creation of the work have 'the quality of being author of a cinema work' and that '1. the script writer, 2. the adapter, 3. the dialogue writer, 4. the composer, ... 5. the director ... are presumed, unless there is proof to the contrary, to be coauthors of a cinema work realised in collaboration', there is a double subordination of the authors to the production. The place of this subordination designates the essential articulation of the process. On the one hand, '... the authors of the work ... are tied to the producers by a contract which, unless there is a clause to the contrary, carries the assignment to the producer of the exclusive right of cinema exploitation ...' (Article 17). On the other hand, 'if one of the authors refuses to complete his contribution to the cinema work ... he will not be able to object to the utilisation of that part of his contribution already realised in order that the work can be completed ...' (Article 15).

This is the language – *noblesse oblige* – of an *avocat général*.\*

The cinema work calls for labour, imagination, and artistic sense in great quantity, at the same time as it calls for science, and finally for financial power. It is the 'economic factor' that of necessity exercises an influence of which the legislator cannot be unaware. Investment, profitability, settlement by mutual concession, these are the words that crop up in the language of the commentators. ...<sup>81</sup>

\* *Avocat général* is the equivalent of Deputy Director of Public Prosecutions in a court of appeal.

And the Paris cour d'appel specified the role of industry in the cinema with an important statement:

*The producer is not an author ... but he and the director participate directly in the elaboration of the film, through the contribution of the material means necessary for that elaboration; it is his [the producer's] responsibility, furthermore, to guarantee the commercialisation of the work and the profitability of the funds invested. ...*<sup>82</sup>

I said that the statement was important. It is so because it is a *dialectical statement* of the contradiction between an artistic ideology which measures the 'value of a personality by the manner in which it is expressed in a work and the success of a work by the amount of personality expressed in it'<sup>83</sup> and a production which is threatened by this very ideology. The statement is important, *for if the producer is no longer an author, he is the author par excellence of the film as commodity*. We shall see how far the *moral right* of the author goes.

A court can annul the following clause of a contract between producer and director:

We reserve the right to make any modification or excision which we shall judge necessary ... except where it is impossible, you will be consulted on the subject of these modifications; none the less, if a dispute of whatever nature were to persist before, during or after the production, we remain sole judge of the final decision. In such a case we always undertake to remove your name from the credit list and from the publicity should you demand it.

According to its logic, the court can sentence the producer to pay damages to the director for 'moral' injury; but according to its logic, which is to assure the good functioning of the production, the court can hand over the exploitation of his film to the producer. The moral right disappears at the very moment it can impede production. And when the matter comes before the court of appeal in its turn, the court has to deal with the distressing question of whether the director or the producer, art or industry, should prevail. The court does not shrink from resolving the problem in the absolute contradiction of the denial of justice when it instructed the parties 'to come to an agreement'<sup>84</sup> Refusal to pronounce judgment must be analysed as a resignation

from the very functions of justice.

If the contradiction between material interests and immaterial interests received a solution ... this whole apparatus, unified and rationalised with so much art, would itself have moral and immaterial interests. In short, if everything did not revert exclusively to the protection of profit, we for our part would have very little to put before [that apparatus].<sup>85</sup>

The category of the subject – and of the creation – is safeguarded to exactly the same extent as the production, but the development of the productive forces has created the collective subject that bespeaks 'the ideological inconsistency' of the relations of production.

This is the human age

this dissolution of the dramatic process into so many individual images resulting ... from the fact that everything is collected together in short scenes filmed independently. ... The labour of the *director* is not just to set the scene in a formal way but to transpose into reality all the things that are necessary.<sup>86</sup>

The director gives 'life in the mode of the cinema'<sup>87</sup> he brings about 'the essential act of creation, the transformation of a text into images',<sup>88</sup> he 'watches over the succession of scenes, as over choice in the shooting; he participates essentially in the artistic creation of the film'.<sup>89</sup> Further, he 'creates the movement and the images which are the very essence of cinema art.'<sup>90</sup>

And, just as the producer is no longer the artistic author, in a striking reversal the essence of the cinema is analysed as the ideological 'reproduction' of the real.

#### **Ideology as subject in law**

Even here ideology comes to the rescue of production. The camera reproduces the structure of the subject, and the effect of this reproduction is to turn the ideology of the subject back into the subject of ideology.

I am not exaggerating. 'The cinematographic apparatus is a purely ideological apparatus. It produces a directly inherited code of perspective which is constructed on the model of the scientific perspective of the quattrocento.'<sup>91</sup>

The cinema cannot be discussed 'without the deconstruction of

the ideological production of the apparatus (the camera), for which, because of its structure, there is no possibility of maintaining any objective relation with the real.<sup>92</sup>

So the cinema is in debt from the very first ... through this fatal fact of the reproduction not of things in their concrete reality but as refracted by ideology ...; accordingly, ideology is itself represented by the cinema. It shows itself, speaks to itself and teaches itself in the very representation of itself.<sup>93</sup>

'Rectifying' his position, Pleynet adds:

The questions posed by the code of perspective of the 'monocular camera' provided us with a decisive proof of the fundamental complicity existing between the basic appliance of the cinema and an important aspect of bourgeois ideology, the metaphysical centring on the Subject. ... To say that the camera is an ideological apparatus does not mean that it is accorded an ideological essence (nor that it is being confused with an ideological state apparatus!). It means that through being an apparatus committed to the representation of space it is part of the material basis of an ideological practice: cinema practice. ...<sup>94</sup>

In other words, we are witnessing a *return of the camera/subject*. It is no longer the subject that is absorbed by the machine but the machine that is made subject. It has become the very site of creation. It has become a creator in itself. The machine/subject can do nothing but reproduce the subject because it 'holds' the subject in a space which 'redoubles the Hegelian closure ... [sic]'.<sup>95</sup>

What is at issue here, latently, is – for once – explained unambiguously by Pleynet. Since the humanist code of perspective is 'institutionally guaranteed' by the Ideological (class) State Apparatus, if a class can provisionally make use of this type of representation which 'fundamentally serves another class ...', the action of the class struggle on this point concerns not so much representation in the last instance as the State apparatuses which guarantee representation as alone valid and outside which representation does not exist'.<sup>96</sup>

In other words, bourgeois ideology sanctions the camera *qua* apparatus since the camera reproduces its very essence! And, if a film is made of a workers' strike, then, to the extent that the strike

would be reproduced within the 'humanist code of perspective', to the extent that it would redouble the 'Hegelian closure', the strike would be guaranteed by the ideological State apparatuses, unless its aim is to criticise these same State apparatuses! How? We do not know.

This pretentious and pseudo-scientific gibberish, which dares to cite Marxism as its authority, reveals a *symptom*, the imperialism of the subject in the writings of people who claim to liquidate it in the name of Marxism. The issue here is the *ideological reprise of Marxism*.

But what is at stake is more serious – *the elimination of the class struggle on the ground of ideology*, the 'mechanical' impossibility of the hold of consciousness. Since ideology (the subject) imprints its necessary reproduction on the laws of optics, *capital is acquitted* in the fatality of its process.

*Ideological fatalism* is the last aesthetic rehash; it presents the political advantage of the 'natural' elimination of political struggle. It is no longer ideology that is reproduced by the machine. Rather it is ideology that produces the machine. So, ideology itself becomes the subject, and the real becomes the predicate. Ideology has achieved the 'aesthetic' *tour de force* of appearing as the subject-creator of the film.

### History and creation

Our subject has performed all the figures and assumed all the poses. It remains for it to become 'owner' of the happening, to over-appropriate history.

That, in a very precise way, is the stake. It consists in the contradiction that for the 'facts' to become the property of an author they must be 'created' by him. Now, how is it possible to 'create' or to 'produce' something which develops in truth? If that is not a problem for the 'artistic' film, it is a problem for direct 'shooting'.

The juridical 'set to partners' will be prodigious. For if 'the visual creation must express the author's original thought through the reflection of its author's personality and through the choice and composition of the images'<sup>97</sup> then the creation (spirit) will be opposed to 'historical chance' (matter). Reality will be pursued into its most obscure corners. It will be argued that there is reality and that there is the 'heart' of reality. 'It is when it is



carried into the very heart of reality that televisual art flourishes in a domain which it alone can perfectly explore.<sup>98</sup> It will be argued that to show reality as it is is still to 'create' it. The Tribunal de grand instance had bitter and ingenuous experience of this debate. The court was obliged to rule whether a television broadcast could be legally protected by legislation governing copyright. It expressed itself in this way:

To watch a few scenes of mountains, taken in evocative and well chosen landscapes, with peasants in their chalet or at a cheese market exchanging their cheeses for money with a typical retailer, living scenes taken from life, is enough to be convinced that this is indeed a question of creation.<sup>99</sup>

Everything which is convincing looks true!

But I want to give an even more amazing example of juridical practice. This example will permit me to articulate the concept of over-appropriation of a thing that would seem to be the least susceptible to over-appropriation: history.

The concrete problem was posed in these terms. An amateur film-maker had, by chance, shot the assassination of Kennedy, an 8mm film of 480 frames which he hastened to sell to the editor of *Life Magazine*. Later on, a book was written about that event – *Six Seconds in Dallas* by Joshua Thompson – which illicitly reproduced 22 frames of the film. An action was brought, and Thompson put forward three forms of argument for his defence. First, he argued, it was a question of an actual event; second, in respect of which no creation had been effected; and third, which could not be appropriated as such, under pain of creating a veritable 'oligopoly' of information.<sup>100</sup>

On that line of argument it can be said that to the extent that, on the one hand, the event formed part of the public domain and, on the other hand, that it was reproduced as such, the event could not be appropriated since the subject had done nothing but follow the objective course [of events].

Now, Judge Wyatt rejected this defence by making use of a structure of the real which makes a distinction between the *foundation* and the *form* [of the real]. If it is true, he observed, that 'an event in actuality cannot be protected by copyright', it none the less remains [the case] that: '*Life* claimed no copyright in respect of the actuality element of the event but only in respect of

the *particular form of the recording*'. As for the charge of oligopoly, he confined himself to the remark that *Life* did not claim copyright over the events in Dallas but over the particular form of expression materialised by the film. 'If that is oligopoly, it is an oligopoly specifically conferred by copyright law, and any appeal on this subject must be presented to Congress.'<sup>101</sup> And on creativity, he advanced the proposition that each photograph reflects 'the personal influence of the author and that there are never two identical photographs'.

The American judge's dialectic is amazing. History is the foundation, the public domain, the abstract expression of all property, and the author gives it form, which is to say that he gives the form of private property to a foundation considered to be private property. The over-appropriation of the real is constituted by the simple recording of the real. It is impossible to go further than this.<sup>102</sup>

I have 'mobilised' the contradiction 'at the heart of things and happenings' and I have kept 'the events themselves moving throughout the duration of the inquiry'.<sup>103</sup> In order to witness its bankruptcy, I have taken the ideology of the subject at its word. But it is an 'ambiguous' bankruptcy. I mean that it is *this very bankruptcy that causes it to live*. For, far from being afraid of the contradiction, the subject makes it his daily bread. By turning the subject's own weapons against him, we must see that the weapons will perish with him.



## 4

## The commodity form of the subject

I have finished with the subject-creator, and I can now propose what will permit the closure of the process of creation, or, to be more precise, what will complete the dialectic of the juridical real. The subject that reproduces will produce its own competition, namely, the subject which is produced. Let us say, for simplicity, that *the right of the photographer over his photo produces the right of the photographed over his image*.

When I say that the process must be closed, I mean simply that man, in his description of man, is confronted with none other than a privative essence which refers him to himself, and that the private property of the photographer is confronted with none other than the private property of the photographed. I mean that, in the real, which is pre-constituted in private property, private property is incorporated 'in man himself'. Further, I mean that the reproduction of the real re-produces private property as the 'essence' of man, and that the historical objectivity of the property is radically suppressed.

The juridicity of the real is accomplished as the production of the real in the determination of property itself.

I said that the creator process is the process of private property itself. I want to make that more precise. This process becomes *total* only by producing its *competition*. Taking this further, this competition is the actual condition of its movement. This has the effect of the process closing itself. And if one studies the movement of the movement, it is a question of a movement which wishes to be immobile, which turns on itself. In other words, the competitor of the reproducing subject in law is the reproduced subject in law, that is, a *commodity decomposition of the category of the subject in law*, or, if you like, a commodity decomposition of the

'essence' of man. The commodity form of creation produces the commodity form of the subject in law and vice versa.

Our first moment described the *commodity form of creation*. The concept of over-appropriation has taken account of that. It designated the juridical vocation of the real as capable of being *over-decomposed* in private property. Our second moment, which I am coming to now, signifies the *mode of the reappropriation of the real by the subject in law*, the moment of the reprise by the subject in law of his 'essence' as owner. This second moment is the postulate of an always-already private real, that is, the real which designates man as owner of his production.

This moment demands its concept. We propose the concept of the form of the subject in law. In proposing that concept, I am continuing the work roughed out by Pashukanis:

I merely assert that it is only as freedom of disposition in the market that property becomes the basis of the development of the legal form, and the category 'subject' serves as the best expression of that freedom.<sup>1</sup>

My scheme needs to be made more precise. What I want to show is that in its very structure the subject in law is constituted on the concept of free ownership of itself. It is that this form, which is the commodity form of the person – the concrete content of the ideological interpellation of the person in the subject in law – presents the extraordinary characteristic of producing in itself, that is, in its very form, the relation of the person to itself, the relation of the subject which takes itself as object. This quite amazing characteristic designates the juridical relation of self to self. It designates that man invests his own will in the object which he constitutes, that he is to himself a product of social relations. What I shall describe, in short, then, is the necessity for the human person to take the form of the subject in law, that is, in the last instance, to take the general form of a commodity.<sup>2</sup>

*Qua* jurist, I shall apply myself to the juridical conditions of this form and, indeed, to the contradictions which develop within it. For if the discourse of the subject in law on history such as it has been able to be 'produced' – and by that I mean the juridical conditions of historical discourse – is recognised as the discourse of the process of private property too, then it is unfolded in the most crucial *contradiction*. In a single proposition I might say that at the

same time as man is the owner of his history, the history of man completes and goes beyond private property. Juridical practice registers the contradiction. We shall see how it resolves it.

### The form of the subject in law

The form of the subject in law is an aporia, which is to say that it poses a problem it cannot resolve. If man is to himself his own capital, the *circulation* of this capital assumes that he is able to dispose of himself in the name (and at the price) of himself, that is, in the name of the very capital which constitutes him. This aporia can be summed up as follows. At one and the same time man must be subject in law and object in law. The subject has to be realised in the object and the object in the subject. The structure of the form of the subject in law is then analysed as the *commodity decomposition of man into subject/essential characteristics*. I shall explain this. With man recognised as 'the essence' of property,<sup>3</sup> all his production is the production of an owner. Better, it is the production of a property which is fruitful and produces rent and profit. The development [*mise en valeur*] of himself constitutes his capital – not a vulgar money-capital but a capital worthy of the human essence, a 'moral' capital.

In law, there is no longer any question but that every expression of a personality – whether in private life or in the image of that personality – 'belongs to the moral patrimony\* of every physical person, and constitutes the moral extension of its person'.<sup>4</sup> There is no longer any question but that: 'the photographed possesses over his image and over the use made of it an absolute right of ownership which no one can dispose of without his consent'.<sup>5</sup>

In short, there is no question but that this is a fundamental fact: *the subject is the owner of himself*, and if his reflection or his 'life' is 'stolen', a part of him is stolen for which he must be recompensed. In fact, the law tells us that the subject exists *only by virtue of being the representative of the commodity* he possesses, that is, by virtue of being the representative of himself *qua* commodity.<sup>6</sup>

Through the constitution of a moral patrimony whereby man is to himself his own object, the history of the subject defines its

\* *Patrimoine* is the concept of a person's total assets and liabilities assessed in money. Cf. n.6.

ground: 'a very Eden of the innate rights [*droits naturels*] of man'<sup>7</sup> and of the citizen, the site of a true circulation of commodities.

In order that these objects may enter into relation to one another as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in those 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, mutually recognise in each other the rights of private proprietors.<sup>8</sup>

There once more is the stake. The subject in law must place himself in relation with himself. He must sell himself in his 'conscience', which is also his own market. He must be both tradesman and commodity in the catch-as-catch-can of freedom. In a word, the subject must be able to take his essential characteristics to market.

The subject-capital is in this way constituted by the 'essential characteristics' of his personality, that is, by the things that give the subject in law social existence – his name, his moral right, his honour, his image, his private life. And in the same moment that this *capital is formed it produces the conditions of its circulation*. The human person is the owner of himself and hence of his essential characteristics. Also, when one of those characteristics is snatched from him without his consent, that is, when a third person takes possession of it as an object, the subject is found to be dispossessed of the utilisation made of himself. He has been 'stolen'. And if he has been 'stolen' it is because he has the freedom of himself, his freedom permitting him both to alienate his essential characteristics and to reclaim them.

But I want to make the concept more precise here. It [sc. the subject-capital] has its real effectivity only when it also puts the *freedom of man into commodity circulation*. And we must introduce the ideological exigency which doubles and closes the form of the subject in law. The subject is object in law to himself whilst retaining 'freedom' of himself. Freedom is demonstrated through the alienation of the self and the alienation of the self through freedom. I mean by that that the ideological exigency of man's freedom is developed in the structure of the subject in law constituted as object in law, or again, that it is developed in the

essence of man 'who is brought within the orbit [*détermination*] of property'.<sup>9</sup> It is precisely because *property* appears in the law as the *essence* of man that man, the object of contract, will take the juridical form of the contract itself which he is supposed to produce freely.<sup>10</sup> In other words, by patrimonialising himself, by presenting himself in the form of subject/essential characteristics, man, far from claiming to be a slave to his patrimonialisation, finds his veritable juridical freedom in it, his capacity.\* This point can be made more exact. Man is truly free only in his selling activity – his freedom is to sell himself, and selling himself realises his freedom.<sup>11</sup>

*Freedom is articulated on the will.* The explanation of this point is that if someone 'steals' my reflection or private life, he does none other than 'steal' my consent to the divulging of my reflection or my private life. He has stolen my will to wish to sell myself, or, which comes to the same thing, my consent to wishing to sell myself. This articulation is crucial. The relation subject/essential characteristics is juridically subsumed under the concept of will. The law can then say, in an abstract and humanist language, that the subject in law is a willing subject.<sup>12</sup>

And the concept is sewn up. Since freedom has been made the will – willing whether or not to divulge my private life or my image – and since the will is nothing more than the will to contract over and with myself, I must appear as owner of myself in my relations with others. If I were not so, then for others I would be incapable, that is, I would be only an object in law in the same way that I would be unable to make myself the owner of that object.

The continuance of this relation demands that the owner of the labour-power should sell it only for a definite period, for if he were to sell it rump and stump, once for all, he would be selling himself, converting himself from a free man into a slave, from an owner of a commodity into a commodity.<sup>13</sup>

To return to this point for a minute, my capacity resides in my freedom to produce myself as object in law. He who is incapable – the slave – is an object in law. The subject in law permits the

\* In French law, persons are either natural or fictitious. Natural persons are either normal persons with unrestricted legal *capacité* or persons with restricted legal *capacité*. The second category – *les incapables* – includes aliens, married women, infants and lunatics. See Appendix 2, pp. 166–7.

amazing revelation that the juridical production of freedom is the *production of oneself as slave*. The subject in law is alienated in his own freedom. And I would add that the form of the subject realises, in its concept, the 'two forms' of the social relation [*lien*] which Pashukanis discussed and which are simultaneously presented 'as the value of goods, and as the capacity of man to be the subject of rights [*sujet de droit*]'.<sup>14</sup> The subject in law realises the ideological interpellation of the law in its very form of the subject in law.

To conclude, the free exchange of property in oneself postulates a reproduction of the freedom of oneself and a free purchase of this production.<sup>15</sup> It is in this way that freedom finds its juridical effectivity only with respect to the capacity for self-alienation, a capacity which itself rests on freedom. A remarkable ruling posed the fundamental relation will/freedom. The court in question considered that it is impossible to derive possessory actions for the right to the image

either from the right of ownership which everyone has over his person, or from the notion of individual or human freedom ... that in this matter it is not possible to invoke a *right of ownership* under the terms of Article 544 in the Civil Code, since the person is not a business concern and cannot constitute the object of a real right. It is impossible, furthermore, to rely on the *notion of individual or human freedom*, which, briefly, is only the correct expression of the same idea of property and only tends effectively to confirm that the individual is master of his body and his image.<sup>16</sup>

In the last analysis, the form of the subject in its constitution as subject-object (of itself) refers to a mode of production which determines the very form of a subject capable of selling itself and whose freedom is produced only in the determination of property. This theoretical analysis of the subject in law permits the concrete and complete description of the real. The real is at one and the same time the creation of a subject and lived by a subject.

### The crusade of the knights of the law, or the history of a juridical doctrine

It is time 'to do a bit of law'. Together we shall penetrate the

arcana – I was going to say the entrails – of doctrine. I want to show you how reasoning is done in the ‘pure theory of law’. I want to show you how *reasoning is not done* in the *university space* that is also the *political space* of a certain knowledge. And you will see displayed the extraordinary and ‘ineffective’ subtlety of the jurists who take their reasonings ... for gospel truth!

What doctrine says defines what doctrine is – the professorial appendix of capital. This sick body must be operated on for its own indigence.

In justifying the subject in law, doctrine is looking after number one. The fact that the whole operation stinks doesn’t matter because doctrine thrives on the smell. What doctrine wants to do is to legitimate a subject which has freedom both over its soul and over its body, that is, which is able to sell its body whilst preserving its soul. It is not difficult to see that doctrine itself is also at issue here.

Once again we find our Du Guesclin of the Law nicely in position, our ‘sociologist without rigour’, our Knight Carbonnier, without fear and without reproach, clad in the shining armour of Dogmatics. Without batting an eyelid and without giving an inch, the Knight writes that our Law has for a long time rejected the idea that a human being was the owner of his body because this idea implied an absurd confusion between the object in law and the subject in law.<sup>17</sup> This rigour within his non-rigour might have come as a surprise to a less seasoned soldier than our Du Guesclin. If I am not the owner of my ‘essential characteristics’, how can I go into business with them? Du Guesclin doesn’t care! But let’s be honest – he used not to care, until slicing up the enemy on the battlefield taught him that subjective right is in our viscera.

Another knight has entered the lists. He has endorsed the following serious formula:

Even in the case of the right of ‘dematerialised’ ownership, the value on which the right rests is patrimonial and external to the subject, when the defence of the personality concerns ‘human values’ which are not distinct from the subject in law.<sup>18</sup>

This is a serious controversy and I shall attempt to unscramble this rigmarole. What are they telling us? There are two types of values – patrimonial values and moral values. What they do not tell us is that ‘human values’ are sold. In other words, they have divided

values into ‘human’ and ‘patrimonial’ values and they have then ‘deduced’ from that moralistic division that the soul is not sold. That is because, for our soldiers, the soul is the last place to give the game away.

This was discovered latterly by a jurist who ‘does philosophy’. In a lyrical flight, and in fifteen lines, our philosopher traces the idea of the Person from Plato to ... Mounier. Here are the last lines: ‘Liberalism itself, with its primarily individualistic tendencies, has done much to develop the idea of the Person.’ Wait for it – ‘This notion poses great philosophical problems.’ Look at his references – *Metaphysique*, by Huisman and Vergez. To continue: ‘Personalism, however, the true founder of which is Mounier, synthesises all the Ideas that have been put forward [all the ideas!] and sees in the person a freedom which is tied in with the world and with other men, so that it embodies eternal values in particular situations.’<sup>19</sup> Etcetera! And all that terminal delirium just to come out with the inspired ‘ideological’ deduction that to be unaware of the ‘intimate sphere’ of private life ‘is to render useless, humanly speaking, the said rights of patrimony’.<sup>20</sup> Here is the old anthem, all the better for being chewed over again. Proletarians of all countries, your exploitation proves that you have a soul. And everyone knows that that soul is ‘an absolute before which all should bow’.<sup>21</sup> The rest is vulgarity, for, in one way or another [the absolute] ‘in some quarter or other touches on matter’.<sup>22</sup> And our *vicarius dei* adds this happy formula: ‘What is the substitution of an amalgam of individuals without constraints for a reunion of spiritually free persons but the replacement of society by the flock?’ Saint Panurge, deliver us!

It is true that Saint Panurge does not completely lose his head when he refers to another ‘great jurist’. With the soul of a banker anxious not to confuse the two, Géný advocated ‘the substitution of thoughtful consideration of serious interests for the deceptive suggestions of a dangerous sentimentalism’.<sup>23</sup>

I shall now bring this crusade to an end. It could finish only at the Holy Sepulchre of Roman Law. One professor has opportunely recalled the *Digeste*, which, as everyone knows, said everything and which, more importantly, foresaw what it might have been able to say. *Dominus membrorum suorum nemo videtur*.<sup>24</sup> By doing this, by moving from the Latin of the Lower Empire to the French of the lower storey, Kaysér reveals his thought to us. We



must resolve the question 'by according to the power of man over his body the character of a right of personality with a view to guaranteeing the protection of the man's moral and material interests in relation to his body.'<sup>25</sup> In plain words, this means that man can sell himself on condition that he does it in the name ... of a right of personality! The mountain has given birth to a mouse.

I shall not take this further, for the reader must be exhausted by all these exhumations, and I shall leave all other others – a vast number – to the 'gnawing critique of mice'. I shall just add two things.

The would-be theoretical positions that have been taken up here are *contradicted by the most vulgar practice of the law*. Suppose someone 'steals' my image. Then I have the right to claim it back since he is using me without my consent. The wrong I suffer is juridically analysed as a violation of my consent. In this way the law establishes a necessary relation: consent/wrong. For if man is not the owner of himself, in the name of what could he suffer a wrong which harms him in his own representation of himself? Practice leads to the juridical bulls-eye of an analysis that all the 'essential characteristics' of the person are contractually protected rights.

As for the 'evil consciousness' of Doctrine, it can be located in its latent discourse, which poses the *adéquation*\* of the 'natural right' of the human person and of the subject in law. The ideological interpellation – every person is a subject in law – plunges doctrine into fearful trouble. For if the subject form is indeed the necessary form of man as exchanger and as producer, it is in another respect the form in which freedom and equality must also be realised. And for 'them', the dilemma becomes that the subject in law realises his freedom through the sale of himself. These professors have not understood that the category of the subject in law is a product of history and that through it the evolution of the capitalist process realises all the determinations. The subject in law becomes its ultimate product, the object in law. It follows that all legal science becomes 'impossible' for them. I shall return to this point.

\* *Adéquation* = lit. the process of making adequate or equivalent.

## The figures of the subject in law

The form of the subject in law will produce, if I can put it this way, its own history. At this precise point I am speaking of a subject form which is a product of history but which at the same time claims to produce its own history. This claim is the ultimate claim of all ideology, namely, to treat of an anthropological discourse, that is, to treat of the discourse of eternal man *qua* individual. It is, in other words, to make the claim that the process of history is none other than its own process and that history is the finished and closed history of private property.

It is in this privileged site of the 'historical autoproduction' of the subject form that juridical ideology assumes its ultimate function. Here I can pick up what I have already extracted from the birth certificate of juridical ideology. The essence – and here I add the 'historical' essence – of man is to be the private owner of his history. The 'essence' is redoubled. History is the private property of subjects in law. Here again we find the 'redoubled specular structure of ideology' but this time we find it in its ontological claim.

History legitimates the existence of the subject to the exact extent that it reverts to the subject. The subject is the self-historicising private property that is distributed among the subjects in history. And if I give the concrete content of this process I can then say that, to the extent that the subject in law is the owner of his history, history is necessarily the property of subjects in law. Through this very process the law both sanctions the relations of production within the individual – and here again is the commodity form of the subject – and reveals the imagined relation of individuals to the relations of production. Private property is 'really' the 'historical essence' of man. But this imagined relation in its turn becomes effective in practice itself. The individual lives and acts really as if private property were his 'historical essence', and the courts 'demonstrate' to him that he is right, since he has 'the right' [of private ownership].

What I shall tackle now is the historical claim of the subject form. I shall unveil it in three ways, that is, in the three figures in which I have been able to take it by surprise. The first figure of the ballet is a military tattoo, the tattoo of the Amicale des Cadets de

Saumur.\* It will designate the amazing fact of the private appropriation of a historical event. The second figure is more sinister, a dance of death in Haiti. It will designate the even more amazing fact of a subject which is the owner of its politics. The third figure parades under a mystical veil to hide its nudity. It is the dance of the veils, but there lies its very contradiction. For if man is the owner of history, the history of man realises and overtakes private property. We shall see that the mystical veil modestly and juridically adorning the subject was precisely the veil of morality. This will be the final act of 'our drama', the ultimate metamorphosis of our form. And to bring the process to a definitive close, we will have to demonstrate that in the last instance it is no longer man who signifies property but property that signifies man.

#### The military tattoo

The Amicale des Cadets de Saumur demanded the banning of a television broadcast on the battles fought by the officers and the non-commissioned officers of the Saumur military college. It was necessary, it said, to make radical alterations to the script so as not to mislead the public. It was necessary that the French people should know that this episode had been a 'brave show of arms' and that there had been killing on the spot; that the officers had been exemplary, that is, they had been neither philosophers, nor lovers nor perverts, and that as a result it was inadmissible to describe one of them as wielding a riding-whip on a young student officer as well as showing this same student apparently preferring his love to his glorious uniform. It was necessary, finally, that the French people should know that the commanding officer was a first officer whose profile no one had the right to alter. In short, France, that is, the Amicale des Cadets de Saumur, had to protect her history.

The tribunal de Paris which sits in judgment 'in the name of the French people', awarded the case to French history, revised and corrected by its Amicale. The court wrote a page of history for our elementary schools which is also a 'brave show of arms'. As I have already said, it is a tattoo where we don't know if it is the horses that ride the men or the men the horses.

\* Association of students at the Saumur military college.

The scene of the wielding of the riding whip is inadmissible and ought to be suppressed ... the attitude of young Patrice, who in the first part of the film made various philosophico-political remarks and appeared to prefer his love to his uniform, to the point of giving the impression of being ready to desert, would in the absence of appropriate precautions run the risk of giving the audience a false and pernicious impression; furthermore the combatants of June 1940 bear witness to the absolute and unanimous pre-eminence among all the *Cadets* of the spirit of sacrifice to the exclusion of all frivolity or inclination to desert; as to the profile of the commanding officer of the College ... the character remains heroic and most exemplary, his physical difficulties or verbal excesses serving only to put in relief the worth of the important deeds he performed ...

And after this, the court ruled that the credit list should be preceded with a notice expressed as follows:

The film you are about to see is a mixture of truth and fiction. Within the framework of an exceptional and authentic brave show of arms, the authors have introduced a purely imaginary amorous adventure and they have created various characters whose physical or intellectual features do not reproduce those of living or dead combatants who took part in the event. This is particularly so in the case of the commanding officer of the College who resembles the real commanding officer only through the role's retention of the qualities of courage, authority, decision, lucidity and competence in military art which were the qualities of the officer in 1940.<sup>26</sup>

Private life, the 'essential characteristic' of the subject, finds the amazing practice of a *court sitting in judgment on history* whilst signifying history as private property. Since the subject is the owner of his history, he is consequently the *owner of the event* in which he took part. Such is the *redoubling* of the subject form. To the extent that, for the good functioning of ideology, history is this subject distributed among subjects, the very movement of history is none other than the perpetual 'coming and going' of subjects to the subject and of the subject to subjects. Let us take this further. This specular 'coming and going' is also that of the 'essence' of man, that is, of private property. In other words, what is

functioning here is the movement of private property into the sphere of ideology. And we shall say more than that. If we pose, and this will be demonstrated below, that juridical ideology is none other than the eternalisation of the sphere of circulation, we can deduce that by making history the site of the circulation of commodities (private appropriation of events), the law constitutes history in the teleology of private property.

Here ends the first figure of the subject.

#### The dance of death

A film made about Haiti described the conditions of life there, and the film-maker made a specific issue of Duvalier's police regime. Duvalier took offence at these attacks, in particular at certain lines such as 'Papa Doc is real and the horror is real too', 'Papa Doc and his gangsters', etc. Virtuously, he also took offence at a sequence in the film where simple young girls were seen singing choral songs of praise to the glory of the president on their way to the cemetery to watch capital executions.

The courts seized on the count of *délit d'offense aux chefs d'Etat étrangers*,\* Article 36 of the law of 29 July 1881. They decided in Duvalier's favour, deeming that the 'scenes summarised above and the aforementioned lines not only made an issue of acts of the head of State but also cast aspersions on his very person'.<sup>27</sup>

The subject in law directly discloses its *political dimension*. The subject in history is directly embodied in the political, that is, in the head of State, that is, in the State itself. The Cour de cassation provides us with the principle.

If it is in accord with the Constitution to extend the exercise of public freedom of discussion to the discussion of the political acts of the President of the Republic, that freedom ceases where offence against the head of State begins.<sup>28</sup>

And this same court specifies this magnificently Sybilline formula: 'An offence which was intended with respect to political acts necessarily has a bearing on the person.'<sup>29</sup>

Political critique is transformed into a critique of the person, and the critique of the person into censorship of the political critique. The State is the owner of its politics since its supreme representative is the owner of his private life. The State has

\* Misdemeanor of offence against foreign heads of State.

become the very subject of the political and at the same time private owner of the political.

In other words, the adequation private life of the head of State/political acts permits the evacuation of the critique of political acts in the name of violation of private life.

That is the second figure.

#### The dance of the veils

In its third figure the subject is decked out in a mystical veil; it subsumes itself under its double, *the moral subject*. And immediately we pose the question: what is the *ideological meaning* of this subsumption? The debate which for us would be none other than the theoretical and practical debate of the theoretical conditions of ideological struggle, that is, the reprise of the *Engelsian reflection of the idea of equality*, cannot be conducted in great depth here, so I want to restrict myself to the precise and detailed study of the moral subject as the justification and unveiling of the subject in law. To put the point even more tightly, I want to study the ideological utilisation of the moral as justification of the subject in law, that is, the universal claim of the moral to render service and assistance to a certain bankruptcy of the subject in law. And it is not an innocent thing, of course, that this assistance should be brought to the subject in law, in the site of historical discourse, in the very site which contradicts the existence of that moral. This verifies Engels's statement that: 'men, consciously or otherwise, derive their ethical ideas in the last resort from the practical relations on which their class position is based. ...'<sup>30</sup>

We can therefore pose that the subject in law is subsumed under the moral subject and, better, that the *subject of the subject in law is the moral*. And we can then say that the moral is the god of the jurists. And this is a god which also conveys the other name, the name of the State, into the Kantian 'starlit sky', into the Hegelian realised morality, and into the intrusion of the 'high' finance of business into politics.

Now, what we want to prove, documents in hand, is the transfer that permits the right hand to give what the left hand takes away.

Lambrakis's wife has a writ brought against Costa Gavras, the director of the film *Z* and against Vassilikos, the author of the novel from which the film was taken. She maintains that the two works made a specific issue of her private life and violated it. This

is the juridical site. It is also a historical site. Is it possible to prohibit a historical discourse in the name of a right of ownership? We present you with the grounds of the ruling given by the tribunal de Paris and we will then provide you with a commentary.

The grounds of the ruling are of two orders. In the first series, *the court sings the death of the subject in law*: 'The life and death of Lambrakis belong to the political history of Greece ... it is a question of events which henceforth belong to history and the narration of which no one has the right to prohibit.'<sup>31</sup>

To translate, at the same time as man belongs to himself *qua* subject, he belongs to the 'public patrimony', that is, to history. This belonging is not constructed on the concept of property but on the concept of objective history. History is no longer the process of private property, that is, the process of an individual who is no more than the representative of his commodity, but, quite on the contrary, it is the contradictory process of the commodity form of the subject.

Here is the second series of grounds.

The hero of the film in reality shows a profound and lasting love for his wife; her image follows him in his travels and in the moments preceding his death his thoughts are of her, while Lambrakis's wife, as projected by the Greek actress, Irène Papas, commands admiration and respect. ... In any case, not only is the character of Z, inspired by Lambrakis, evoked with sympathy, respect and admiration, but also his female companion is described as a model of tenderness and dignity.

And the court tells us that the nature of the genre 'necessarily admits of an element of subjective interpretation.'

We shall try to 'sketch from life' the transition from the subject in law to the moral on the very ground where it is produced. The court tells us that since man belongs to history, his life can be utilised and his consent, or the consent of those who have been involved in his life, can be dispensed with. But, in the same movement, it tells us that this consent can be dispensed with on condition that the things are presented in a dignified, respectful way ... otherwise the book, just as much as the film, would have been hit by prohibition.

In other words, the court reserves itself a right in the name of morality.

*Morality becomes the source of the law*, but the law of which it claims to be the source is the law of morality itself. The commodity form of the subject is double-headed. The first head wears a white hat, the second a black one. And when one has its hat on, the other takes its hat off. The supreme order of the subject is morality, but this morality reverts to man constituted as object in law, that is, in the last instance morality sanctions the commodity form of the subject. At the same time as morality denies man, in this universal site of the moral, morality justifies him in his subject form. The freedom of man, posed as product and producer of history, rediscovers the ground it claimed to make us forget, the ground of the relations of production.

What a terrible illusion it is to have to recognise and sanction in the *rights of man* modern bourgeois society, the society of industry, of universal competition, of private interest freely pursuing its aim, of anarchy, of self-estranged natural and spiritual individuality.<sup>32</sup>

So exclaims Marx, and nothing more can be said, except that this 'terrible illusion' is not an illusion for everyone but that it is a necessary illusion.

Our three figures, of course, make up only one, the history of the 'essence' of the subject. This essence imposes and realises all apprehension of the real. For the law, the constitution of the real is split into two poles which correspond to each other. On the one hand, over-appropriation permits ownership of matter 'through the spirit', and on the other hand, this human or natural matter possesses the same structure as the over-appropriation. It is in this way a question of a bi-polarisation of a real constituted as object in law in which each term is the condition of the other.

To conclude, and this is an ending which will take us back to the [legal] sources, we want you to witness the last avatar of our personality. We knew that man signified property but we shall learn, in black and white, that property signifies man, that the 'essential characteristics' of man, his 'emanations', can be an estate, a house, and walls. Concretely that would mean not only that man re-presents himself in the thing but also that the thing is concretely the essence of man.



**Property leads the dance**

A painter reproduces a chateau classified as a historical monument. The owner demands that the work be seized. The painter replies that his picture 'is presented as his personal vision'. That meant that his creation was analysed as an over-appropriation. At a first sitting, in summary procedure, the cour de Paris decides in his favour.<sup>33</sup> At a second sitting, it revises its position.

Now look at the court's line of argument.

The owner first invokes a weighty argument. He says he has carried out repairs, better, that he has restored his chateau, and that this restoration constitutes a creation. The consequence of this would be radical. The thing, already invested with creation, could not be re-produced, under pain of the re-production of an artistic creation. That is forgery. The court rejects this argument. Only rebuilding has taken place.

The owner invokes a second means, and it will win him the case. The chateau is his private property; he can use it, enjoy it, 'abuse' it. In consequence he can close it and refuse entry. He who can do more can do less, a juridical adage tells us. If he can do more – refuse entry – he can do less – surround visits to the chateau with conditions.

Now those conditions exist; they are materialised on the ticket of admission. Let's read them. 'Photographs of the estate, as well as sketches and paintings with the estate as *subject*' done with a view to commercial use of the products obtained are forbidden.

The painter thinks he has won the case. If the term 'reproductions' is used, it cannot concern 'a painting where the estate is merely the subject transformed by artistic inspiration'. And if the term 'commercial use' is used, that could not apply to the 'sale of works of art'.

The court's reply is amazing. The owner has restricted 'permission [to make use of] the image of the chateau to third parties'.<sup>34</sup> That means, in good juridical French, that in the same way as a painter or a photographer cannot re-produce the features of a person without his permission, so they cannot re-produce the image of a property. In other words, the thing is treated as a person. There is a [form of] consent [on the part] of the thing, for the thing has its modesty and its honour.

As for commercial use, the court replies sharply, in the purest

common-lawyer style, that the words 'commercial use'

can only be understood in their common meaning, namely, the use of documents created from the image of the chateau with a view to obtaining, by their sale, by their placement, or by any other contract subject to certain liabilities, financial counterpart, and, in particular, the payment of a sum of money.

In short, one must not play the innocent. The painting is an object of commerce.

**Love leads the dance**

*The thing has become the person*, and the structure of the subject has become the structure of the thing. Property remits to the owner his own reflection. The signifier and the signified are permuted in the abstract sphere of eternal property.

We shall see this even more clearly [in the following case].

A professor at the Institut Notre-Dame, the mayor of a village and an educator of young people, was surprised to find that her property had been used as the background for a 'photo-novel' pleasantly titled *Love Leads the Dance*. Virtuously indignant, she demanded that the work be banned. The decision was given in her favour, for:

there is no doubt that neighbouring lecturers could hardly fail to identify the places [in the film] and to view with surprise the fact that Mme Lemoiner had given permission for her property to be used as background for the shooting of a novel in the form of a film, the spirit of which is difficult to reconcile with her character.<sup>35</sup>

Even so, the jurists in Mme Lemoiner's case are disturbed.

Subject to the rights proceeding from the notion of property, is not what is in the view of each and every one in some sense in the public domain?<sup>36</sup>

There is no fault attaching to the photographing of a private house which is there for all to see, and there is no more fault attaching to the publication of that photo, at least if there is no current possessory action to stop it and if there is no copyright in question.<sup>37</sup>

After the first two, a third jurist was more profound but equally mystified:

In truth, here is the right to the image making new and exceptional conquests! Recognised and defended as a right of personality, here is the right to the image insinuating itself into the prerogatives of the right to property and coming to the defence of things, not just of people.<sup>38</sup>

It is seen clearly enough, but the jurists are decidedly incorrigible. 'Holding fast' to the juridical justification, our author then appealed to the notion of abusive exercise of a right of reproduction which would discredit the owner. It is therefore possible to abuse a house as one would abuse ... a woman!

In a word, the adequation man/thing has been posed in such a way that the thing just as much signifies the 'essence' of man as the 'essence' of man signifies the thing.

We have come to the end of our 'juridical' analysis. It now seems to us necessary to review the results in order to take them further, that is, in order to situate them in their true site.

The introduction of modern techniques of reproduction of the real has allowed us to mark out the functioning of the law *on a virgin ground*, that is, to describe how a new continent came under juridical sway. We have tried to demonstrate that the constitution of this new object in law, the real, has been effected in the predetermined category of the subject. In other words, the process that has been described has 'appeared' as the process of a subject (in law). It is certain that, if we have brought the economic necessity of such a process to the surface, this surfacing is in some way dissolved in the juridical categories. It was necessary to exhibit that *dissolution*, for it also signified the role of the functioning of juridical ideology. It was necessary to show that everything happened 'always-already', and that this 'always-already', which in a certain manner is also a 'coming-and-going', is the 'always-already' of the subject, that is, of private property. In this way a teleology of the subject is outlined, and the law is 'self'-functioning as the realisation of the determination of the subject. We see here the thesis developed in Hegel's *Philosophy of Right*.

But this first work was necessary for me in another connection too. It provided me with the concrete base of a more ambitious analysis, the concrete articulation of the juridico-political on the

infrastructure. It provided me with the 'immanent laws of the law', and I shall return to this shortly. By the 'immanent laws' I mean here the necessary forms by means of which the real, as object in law, has been put into circulation.

Now, in the course of an objective analysis of jurisprudence and doctrine, it has 'appeared' that the putting into circulation of this new object in law revealed the fundamental law that, for the law, every economic process is the process of a subject. And this 'immanent' law has seemed to be self-sufficient. I mean that in the same way as it is sufficient for the law to regulate the wage-labour contract with the help of the categories of the 'free' employer, the 'free' worker, and 'free' wages 'freely' arranged, in order to 'judge' labour, so it has been sufficient for the law, in order to 'produce' a law of the cinema and photography, to put to work the categories of (literary) property and the essential characteristics of personality, categories which in the last analysis refer to the category of the subject in law.

This juridical 'continuity' *had to be made to function on its own ground in order to abstract the laws of its functioning*. But it is not enough to state these laws themselves; it is still necessary to explicate *the last instance of their functioning*. It is necessary to leave that explication in order to return to it. So, I finish here by indicating the ground of my reprise, the theory of value.

From the start of the game, I am specifying that on this new ground I shall both refer and not refer to my juridical demonstration, or rather, I shall refer to it 'in silence'. I shall not resume my analysis as such but I shall presuppose its presence throughout the discourse indicated here. I ask of the reader this effort, and it will be the last.

As I have indicated, for me it is a question of placing my demonstration in the theoretical field that has made it possible. Concretely, it is a question of the articulation of the functioning of juridical categories in the whole process of Capital.

When Marx explained that: '[Moneybags'] development into a full-grown capitalist must take place both within the sphere of circulation and without it,<sup>1</sup> he provided us with our starting point, the sphere of circulation. And he adds in the same paragraph that: 'The conversion of money into capital has to be explained on the basis of the laws [*les lois immanentes*] that regulate the exchange of commodities, in such a way that the starting point is the exchange of equivalents.'<sup>2</sup> With this he provides us with scientific method. The study of the immanent laws of circulation both hides and reveals the sphere of production, that is, the global process of capital.

Now in my description it has 'appeared' that everything happened in the law and yet that everything did not happen there. There precisely lies the 'mystery' of our law, a mystery which, other things being equal, is of the same 'nature' as the 'mystery' of money.

In fixing the totality of the social relations as they appear in the sphere of circulation, the law at the same time makes production possible.

Production appears and does not appear in the law, in the same way as it appears and does not appear in circulation. And in the same way as circulation 'is in all its aspects a realisation of individual freedom'<sup>3</sup>, so the law, through the realisation of property, claims to realise freedom and equality. For a fundamental distinction must be made here to which I shall have

occasion to return. Fixing the forms of functioning of the totality of social relations, the law in the same moment makes effective the juridical ideology which is the imagined relation of individuals to social relations in general.

It is in this way that the law assumes the double function of concretely and 'imaginedly' [*imaginaiement*] fixing – and it would be better to say that the juridical concrete fixing is at the same time ideological – that totality of social relations. If this had to be made more precise, it could be said that in the law production appears under a double title. On the one hand, it appears in the necessary forms by means of which social relations are fixed, and its very functioning, in the very thing for which they function. only for production. Accordingly, production does not appear also under a double title, on the one hand, because these necessary forms can formally claim self-sufficiency, and, on the other hand, because their functioning is occulted, if I may use that word, in their very functioning, in the very thing for which they function.

And if I quickly 'concretise' these determinations, I shall say, on the one hand, that it is the form of the subject in law that fixes social relations and allows the real to be put into circulation as an object in law, and, on the other hand, that this form 'appears' as an autonomous category, independently of all 'history'.

That leads me to pose two theses. First, the law fixes and assures the realisation as a natural given of the sphere of circulation, and second, in the same moment it makes production possible. The law lives off this contradiction. In making capitalist production possible, in the name of the determinations of property – freedom and equality – property develops its own contradictions and states its nature. Property is the product of the exploitation of man by man.

## 5

## Law and circulation

**Theses I. The law fixes and assures the realisation, as a natural given, of the sphere of circulation**

The sphere of circulation constitutes the site where the dominant social relation is manifested. All individuals are (producers and) exchangers of commodities. It is the site where exchange value rules; better, this site is in itself 'the movement of exchange value.'<sup>1</sup> Here individuals, agents of exchange, are all private owners, that is, free beings who bring the commodity they possess on to the market.

For the market is no longer a slave market. On the contrary, it is the site where man realises his threefold nature. He is confirmed as owner, hence free, hence equal to all other owners. And this triple affirmation is noisily admitted and organised by the sphere of circulation which sets it in motion. The product of labour belongs to the labourer. Further, personal labour is the title of original property. This product is universally exchangeable with another product. More simply, when the product of labour has become a commodity – that is, of exchange value, and then of money – it is universally capable of being exchanged with another commodity.

This sphere reveals its immanent laws to us in this way. Each individual is an owner (of the fruit of his labour or of his labour power) and his labour is a social labour, even though isolated, that is, a labour which, whilst particular, participates in the universal. 'Hence by producing for society, in which each labours in his turn for me in another sphere, I produce only for myself.'<sup>2</sup> Hegel says nothing different. In spite of individual egoism, the system of needs realises the *universality* of civil society.\*

\* Cf. Hegel's *Philosophy of Right*, §40.



Now, in the ideology of the law it is possible to affirm that everything takes place within this sphere; that the essential thing is exchanges and that exchanges realise man; that the juridical forms imposed by circulation are the same forms of freedom and equality; that the subject form deploys the reality of its determinations in a concrete practice, the contract; and that circulation is a process between subjects.

Deliberately leaving aside what happens in an 'other place', in the 'secret laboratory of production', what I propose to demonstrate is that the law takes the sphere of circulation as a natural given; that this sphere, taken in itself as absolute, is none other than the ideological notion which takes the Hobbesian, Rousseauian, Kantian or Hegelian name of civil society; that by fixing circulation the law is doing none other than promulgate the decrees of the rights of man and of the citizen; and that the law puts the marks of property, freedom, and equality on the face of exchange value, but that in the secret 'other place' these marks are read as exploitation, slavery, inequality, and sacred egoism.

It is therefore the determinations of the sphere of circulation, that is, the concrete/ideological 'status' of property, freedom and equality that I shall now tackle. And we shall see that the law fixes this status in a concrete/ideological realisation. I shall take advantage of that to remind the reader of the effort I asked of him to take care not to forget the outcome of our little legal question.

In the sphere of circulation, individuals 'confront each other as subjectivised exchange values, that is, living equivalents, equal values'.<sup>3</sup> In other words, they embody and reproduce the same movement as exchange value. Exchange value represents them and they represent exchange value.

But, at the same time as the individual, the agent of circulation, takes on the same characteristics of the exchange value that he represents, at the same time as his 'will', inhabiting things, takes on the same characteristics of the things he inhabits, that is, at the same time as the individual is envisaged as an owner who is free and equal to other owners, he envisages himself as an owner who is free and equal to other owners. In other words, he takes as 'gospel truth' the fact that value, the social expression of the value of his labour, truly realises freedom and equality, in the site where exchange value rules, at the 'surface' of the process, and where this 'surface' is unaware of the marine depths it conceals.

Here I want to cite what seems to me a fundamental text for the theory of ideology. I believe that a commentary on this text will allow me adequately to locate the relation between the theory of value and the theory of ideology, so that I can go further and contemplate tackling the law directly.

In 'The Chapter on Capital' in the *Grundrisse*, Marx studies the manifestations of the law of appropriation in simple circulation and, more precisely, the determinations of freedom and equality. He makes the following basic remark:

Equality and freedom are thus not only respected in exchange based on exchange values but, also, the exchange of exchange values is the productive, real basis of all *equality* and *freedom*. As pure ideas they are merely the idealised expressions of this basis; as developed in juridical, political, social relations, they are merely this basis to a higher power.<sup>4</sup>

And further on Marx adds:

exchange value or, more precisely, the money system is in fact the system of equality and freedom, and ... the disturbances which they encounter in the further development of the system are disturbances inherent in it, are merely the *realisation of equality and freedom*, which prove to be inequality and unfreedom.<sup>5</sup>

In other words, the affirmation of the determinations of property – freedom and equality – in the sphere of circulation is posed at the same time as is posed their being necessarily unknown in the sphere of production where man is concretely exploited by man, where in the very midst of production capital extorts surplus value from the worker.

By creating freedom and equality, the process of exchange value in this way produces in the same movement the necessary illusion that freedom and equality are effective really. That is, this 'illusion' is none other than the reflection of the real contradictions of the system of exchange value. It cannot produce really a true freedom, nor a true equality.

The fact that value is the expression of the social labour contained in the privately produced products itself creates the possibility of a difference arising between this social labour and the private labour contained in these same products. If

therefore a private producer continues to produce in the old way, while the social mode of production develops, this difference will become palpably evident to him. The same result follows when the aggregate of private producers of a particular class of goods produces a quantity of them which exceeds the requirements of society. The fact that the value of a commodity is expressed only in terms of another commodity, and can only be realised in exchange for it, admits of the possibility that the exchange may never take place altogether, or at least may not realise the correct value. Finally, when the specific commodity labour-power appears on the market, its value is determined, like that of any other commodity, by the labour-time socially necessary for its production. The value form of products therefore already contains in embryo the whole capitalist form of production, the antagonism between capitalists and wage-workers, the industrial reserve army, crises. To seek to abolish the capitalist form of production by establishing 'true value' is therefore tantamount to attempting to abolish catholicism by establishing the 'true' Pope, or to set up a society in which at last the producers control their products, by consistently carrying into life an economic category which is the most comprehensive expression of the enslavement of the producers by their own product.<sup>6</sup>

The setting in motion of private property does indeed create a freedom and an equality, but this freedom and this equality are the same as the freedom and equality of private property. In the last instance, all bourgeois ideology consists in the occultation of the immanent contradiction of the freedom and the equality that are stripped to reveal their contrary, slavery and exploitation.<sup>7</sup> The circulation of exchange value is none other than the circulation of freedom and equality as determinations of property, and all bourgeois ideology is an idealisation of those determinations.

It can be said, therefore, that the ultimate function of bourgeois ideology consists in the idealisation of the determinations of property – freedom and equality – that is, the objective determinations of exchange value. The concrete base of all ideology is exchange value. What did Hegel do when he developed the idea of law if not give the pure expression of the movement of

value? And what is the 'dialectics' of Hegel's *Philosophy of Right* if not the ever more abstract expression of value? For at the final count, the Hegelian idea of law – or, rather the spirit in the Law – is self-fulfilling value [*valeur en attente d'elle-même*].

Since the process of exchange value is the very process of freedom and equality, since individuals are no more than 'living equivalents', the process of exchange value becomes the process of the subject, and the process of the subject becomes the process of exchange value. In other words, in the sphere of circulation everything takes place (and does not take place) between subjects, who are also the subjects of capital, the great subject. And, furthermore, as circulation conjures away production (while revealing it), it can be said that all production is manifested as the production of a subject.

I can therefore reply to the question opened up by Althusser.\* If it is true that all bourgeois ideology interpellates individuals as subjects, the concrete/ideological content of the bourgeois interpellation is that the individual is interpellated as the embodiment of the determinations of exchange value. And I can add that the subject in law constitutes the privileged form of this interpellation to the exact extent that the law assures and assumes the effectivity of circulation.

But since, furthermore, circulation can aspire to its reproduction only through subjects, exchange value and its most developed form in capital are posed as the absolute subject which assures itself and legitimates itself in the name of its own redistribution among subjects.

This must be made more precise. I am discussing circulation and its ideology, and the concrete/ideological manifestation of capital in this sphere. It is in this perspective that I can propose that it matters little to circulation that capital, in its process, poses labour, this 'real non-capital',<sup>8</sup> this use value which constitutes 'the opposite and the complement of money in its character as capital'.<sup>9</sup> What appears in this sphere and what is important to it is that capital, the value which develops itself, seems not only to

\* In 'Ideology and Ideological State Apparatuses', in *Lenin and Philosophy, and Other Essays*, translated by Ben Brewster, London, New Left Books 1971, pp. 160f.

valorise\* itself but also to valorise its own process.<sup>10</sup>

In order to characterise this self-valorisation, Marx uses a metaphor which is not innocent.

[Value] differentiates itself as original value from itself as surplus-value; as the father differentiates himself from himself *qua* the son, yet both are one and of one age: for only by the surplus-value of £10 does the £100 originally advanced become capital, and so soon as this takes place, so soon as the son, and by the son, the father, is begotten, so soon does their difference vanish, and they again become one, £110.<sup>11</sup>

God duplicates himself and sends his Son to the Earth, as a mere subject 'forsaken' by him ... subject but subject, man but God, to do what prepares the way for the final redemption, the Resurrection of Christ. God thus needs to 'make himself' a man, the subject needs to become a subject.<sup>12</sup>

The last judgment, where the subject returns to the heart of the subject, is the £110 sterling – the M of "the formula M-C-M". The son of capital is surplus value contemplating itself in capital. It is the subject redoubling itself in subjects. The individuals, the agents of circulation, are the subjects that assure the functioning of the Subject.

At this point, it is convenient to regroup these different statements in order to make the concrete/ideological base of my demonstration.

1 Bourgeois ideology idealises (pure ideas) the determinations of property (freedom and equality).

As a result we can pose:

- (i) that society (= 'civil society' as the totality of social relations) manifests the totality of the social process in its immanent laws;
- (ii) that the members of this society are *free and equal* among themselves;
- (iii) that all production is the production of a free subject;
- (iv) that the *laws* which allow the functioning of this society

\* The equivalent of the term *engendrer* in Marx, *Capital* (vol. I, Penguin, 1976 Appendix, p. 1060), is 'to valorise'. The equivalent of the term *auto-engendrement* in Marx, *Grundrisse*, ed. cit., p. 254, is 'self-renewal'. In the interests of consistency I have translated these terms as 'valorise' and 'self-valorisation' respectively.

(democracy) to be assured are the natural laws of freedom and equality, that is, the laws of a process which closes in on itself.

2 The law assures the forms of circulation and fixes circulation as a natural giver.

As a result we can pose:

- (i) that the juridical interpellation of the individual, the agent of circulation (= member of 'civil society'), constitutes him as *subject of property law*, that is, as a person capable of buying and selling;
- (ii) that equivalent *exchange* between two subjects in laws is the fundamental *juridical relation*;
- (iii) that all *social production* of man is the production of a subject in law;
- (iv) that the law manifests the 'natural' laws of freedom and equality as *constraining*, that is, therefore, it manifests the laws of a process which closes in on itself in the functioning of its categories.

This list requires commentary. What I have tried to signify is the relation between bourgeois ideology in general and juridical ideology. Now, it appears that the ground on which they meet is none other than the ground of circulation, that is, the ground of the realisation of exchange value and of its determinations.

If bourgeois ideology in general thinks the entirety of the social process through the notion 'political and economic democracy', which is only a rehash of the old notion of civil society, it is over this very notion that juridical ideology does battle.

We now understand the whole value that the definition of the place of this notion can have in the itinerary of Marx himself. In the Preface to *A Contribution to a Critique of Political Economy*, Marx recalls his journey:

my investigation led to the result that legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life, the sum total of which Hegel, following the example of the Englishmen and Frenchmen of the eighteenth century, combines under the name of 'civil society', that, however, the anatomy of civil society is to be sought in political economy.<sup>13</sup>



In *The German Ideology* Marx gave this definition:

Civil society embraces the whole material intercourse of individuals within a definite stage of development of productive forces. It embraces the whole commercial and industrial life of a given stage and, in so far, transcends the state and nation, though, on the other hand again, it must assert itself in its external relations as nationality and internally must organise itself as state. The term 'civil society' ... emerged in the eighteenth century, when property relations had already extricated themselves from the ancient and medieval community. Civil society as such only develops with the bourgeoisie; the social organisation evolving directly out of production and intercourse, which in all ages forms the basis of the state and of the rest of the idealistic superstructure has, however, always been designated by the same name.<sup>14</sup>

These two texts permit the specification of the notion of civil society which, contrary to first appearance, designates none other than the sphere of circulation.

From *The German Ideology* onwards, Marx describes 'civil society' as an *ideological notion*. Indeed, on the one hand, the term 'embraces the whole material intercourse of individuals within a definite state of development of productive forces'; on the other hand, it also covers 'the social organisation evolving directly out of production and intercourse'. In other words, production and circulation are reunited *under a single category*.

But, at the same time – and Marx takes account of this in the Preface to *A Contribution to a Critique of Political Economy* – this notion is a 'progression'. The notion poses that juridical relations and the State take root 'in the material conditions of life'.

The notion of 'civil society' is at once true and false. It is true in its cash-register conception of the social process but it is false to the extent that it reduces the social process to appearance, to circulation.

Indeed, civil society is itself the surface of the relation of capital. To take the surface of the relation – civil society in its immanent laws – for the totality of the social (economic, juridical, political) process reduces to posing that civil society, as it 'appears', is the reality of the social process itself. The best illustration of this is still the 'system of needs' as developed by Hegel in his *Philosophy of Right*.

As an ideological notion which therefore claims to take account of the totality of the social process, 'civil society' constitutes the site of the meeting between bourgeois ideology in general and juridical ideology. But the site of this meeting is at the same time a site of transition.

Indeed, all the categories which are the foundation of the notion of 'civil society' – private property, subject, will, freedom, equality – are 'specified' by juridical ideology. The subject is specified as subject in law, production of the subject as production of a subject in law, and freedom and equality as freedom and equality of every subject in law. But, in the same moment this specification is a constraint. That means that if juridical ideology does nothing but specify bourgeois ideology 'juridically', this specification is in the same movement concretely realised by the constraint of the State apparatus.

It is in this way that, by imposing the 'juridical' – as the real manifestation of juridical ideology – by constraint, the State apparatus imposes juridical ideology and it is in this way that juridical ideology justifies the constraint in turn.

The regrouping of these statements permits the specification of the function of the law. By means of the constraint of the State apparatus, the law manifests really/ideologically the determinations of exchange value (property/freedom-equality). We call the real manifestation the juridical, the ideological manifestations juridical ideology, and the whole process the law.

Now, what appeared in my juridical demonstration is that the 'construction' of a new object in law – the 'real' – is entirely effected in the predetermined categories of circulation; that the putting into juridical circulation of new industries – the photographic and cinema industries – is produced in the determinations of value, that is, in the determinations of property; and that these determinations themselves have appeared as determinations of the subject in law. In a reciprocal way, the putting into circulation of the real through the necessary mediation of the subject in law constitutes the subject in law itself. As the condition and the result of the process of circulation, the subject in law has taken the very form of the process it has manifested. In taking this form the subject in law renders effective the process itself.

It is in this way that all production (of the real) has appeared as production of a subject (the concept of 'over-appropriation')



which is the embodiment of exchange value (subject form). And if the form of the subject in law, this commodity which sets itself in movement, which takes itself on to the market, this commodity in which the worker is fundamentally embodied, if this form of the subject in law is re-examined, it appears constituted as two poles: on the one hand, the subject pole (consent, will), and on the other hand, the object in law pole (itself *qua* commodity). The subject form, this abstract form which is produced really by circulation, like the value form of products: 'therefore already contains in embryo the whole capitalist form of production'.<sup>15</sup>

For in the last analysis the worker is a specific entity taking himself on to the market, in a juridical form which allows him to sell himself in the name of freedom and equality. In this way the form realises property 'on the ground'. For, from the moment that the individual is juridically constituted as subject of the process of exchange, he is free, because he possesses the products, and better, his labour power 'in all propriety' [*propriété\**] and because he can exchange them as he pleases. ('In Roman law, the *servus* is therefore correctly defined as one who may not enter into exchange for the purpose of acquiring anything for himself ...'<sup>16</sup>)

Not only that, he is also the equal of every subject in law since a subject is the equal, socially, of another subject. The buyer becomes the seller and the seller the buyer, and this permutation is the very meaning of exchange.

Out of the act of exchange itself, the individual, each one of them, is reflected in himself as its exclusive and dominant (determinant) subject. With that, then, the complete freedom of the individual is posited: voluntary transaction; no force on either side; positing of the self as means, or as serving, only as means, in order to posit the self as end in itself, as dominant and primary [*übergreifend*]; finally, the self-seeking interest which brings nothing of a higher order to realization.<sup>17</sup>

I have spent enough time on this, but I can add that the form of the subject in law, *qua* the most developed and the most abstract juridical form, develops the immanent laws of the Law.

It is therefore possible for me now to expound my second thesis.

\* The play on the three meanings of *propriété* – property, property *qua* characteristic, and propriety – can be only partially reproduced in English.

## 6

### Law, circulation and production

**Thesis II. By assuring and fixing the sphere of circulation as a natural given, the law makes production possible**

It now remains for me to demonstrate how the (juridical) fixing of the laws of circulation make production possible. In other words, what is the relation which holds between circulation and production in the process of capital?

A revolution has been produced in the capitalist relations. Labour power appears on the market as a specific commodity. Circulation is no longer the relatively autonomous region where individuals bring the surplus of their production on to the market. Rather it is the place where the capitalist in person comes to buy what will enable him to increase his capital, namely human labour.

I want to make a few comments on this point.\*

The problem of the role of the law in a determinate mode of production relates to the relation circulation/production. Here is my explanation. Historically, exchange value first appeared only in the sphere of circulation, and to the extent that it does not become the real basis of production it appears as a relatively autonomous and relatively developed sphere. In other words, it appears 'in advance' of the relations of production. The law fixes the determinations of exchange value and so takes on a 'relative autonomy' in relation to the real basis of production. Here already is an explanation of the 'miracle' of Roman law:

The various phases of simple circulation are developed in

\* The next eight paragraphs appeared in the original as Note 1.

antiquity between more or less free men. This explains why in Rome and in particular in imperial Rome, the history of which is precisely that of the dissolution of the community in antiquity, it was possible to develop the determinations of the juridical person, the subject of the exchange process. That explains why there developed there the right of bourgeois society and why it had to be defended, especially against medieval society, as the right of the rising industrial society.<sup>1</sup>

This 'advance' of circulation permits the analysis both of the political philosophy of the sixteenth, seventeenth and eighteenth centuries and of the role played by the law in a determinate mode of production. Those philosophers of law postulate two natural presuppositions: on the one hand, that circulation is the total process, that is, that law fixes the total process, and on the other hand, that exchange is governed by the 'natural laws' of property, freedom and equality. These two presuppositions in the last instance reduce to one: 'For the *philosophers relationship* – *idea*. They only know the relation of "Man" to himself and hence for them all real relations become ideas.'<sup>2</sup>

Indeed, it is because Roman law had already developed the determinations of the person, the juridical subject, that the rising bourgeoisie was able to take it over. But this 'reprise' of Roman law was necessarily accompanied by an ideology of the subject. Indeed, at the same time as the bourgeoisie were making use of it, the philosophers were asking the question of the 'meaning' of that use, and they answered that in all civilised eternity there had been private property, there had been contract, and there had been the subject in law. The reprise of the categories of Roman law theoretically justified the category of the subject which accordingly appeared as an eternal category.

We see how the ideology of a necessary practice – the reprise of Roman law in its categories – is 'transformed' into the theoretical basis of this practice. The reprise of Roman law proves the status of the subject. We see too *in respect of what* Roman law was able to become the site of the theoretical justification of a necessary practice.

Consider Hegel. He abstracts the essential determinations of the subject from the practice of Roman law and turns them back against Roman law. This turning back is worked from the point of

view of the 'free will', that is, the most abstract point of view of the subject. Against Kant, Hegel poses this fundamental principle: there is no *jus reale* and no *jus personale*; there are only rights of the subject. For Hegel, Roman law became the nascent rationale of the subject which can always be overridden but which is always conserved, and which is perpetuated even into the State, that subject which relates the subject to itself. Legal practice becomes a pure idea, that is, the relation of the subject to the subject. The claim to prove the existence of the subject in the 'absolute' practice (the law, the political, the State) transforms that practice into 'the relation of "Man" to himself'. The subject is proved by the practice of the subject.

The process of exchange value therefore appears transfigured – in the perennality of its juridical forms – into the perennality of the subject. The 'advance' of circulation is manifested, then, as the natural/eternal law of the subject.

That brings me to the concrete/ideological role played by the law. Its principal role today relates, as I have said, to the relation circulation/production. In the process of capital, circulation is no more than an essential mediation. Marx states this repeatedly. Circulation is the appearance of the relation, the appearance of the total process. I am not saying, of course, that the law creates the path of the total process but that the process produces the law of its process. It is in this way that when it comes on the market labour is governed by the common law of contracts.

The exchange between capital and labour at first presents itself to the mind in the same guise as the buying and selling of all other commodities. The buyer gives a certain sum of money, the seller an article of a nature different from money. The jurist's consciousness recognises in this, at most a material difference, expressed in the juridically equivalent formulae: 'Do ut des, do ut facias, facio ut des, facio ut facias'.<sup>3</sup>

And in the same chapter Marx shows how, to the exact extent that they take the form of the money relation, wages make 'the actual relation [between labour and capital] invisible, and, indeed, ... [shows] the direct opposite of that relation'.<sup>4</sup>

To the extent that exchange value has become the real basis of production, the law can play this primeval role of sanctioning the economic relations of the process itself. The role of the law in a

determinate mode of production relates, therefore, to the relation circulation/production, that is, in the last instance to the relation between exchange value and the real basis of production.

[To resume the question of the revolution in the capitalist relation,] circulation accordingly not only appears as the meeting place of capital and labour but has become the essential mediation of the reproduction of capital.

This destroys the last vestiges of the *illusion*, so typical of the relationship when considered superficially, that in the circulation process, in the market-place, two equally matched *commodity owners* confront each other, and that they, like all other *commodity owners*, are distinguishable only by the material content of their goods ... Or in other words, the *original* relation remains intact, but survives only as the *illusory* reflection of the *capitalist* relation underlying it.<sup>5</sup>

Living labour is no more than the means of maintaining and increasing the *objective* labour and making it independent of him. This form of mediation is intrinsic to this mode of production. It perpetuates the relation between capital as the buyer and the worker as the seller of labour. It is a form, however, which can be distinguished only formally from other more direct forms of the enslavement of labour and the *ownership of it* as perpetuated by the owners of the means of production.<sup>6</sup>

In other words, as far as circulation is concerned, the process of capital has only brought it one more commodity, namely labour power, but this new commodity still makes no change to the laws of circulation. Here as before, what matters for circulation is the movement of exchange value, that is, the abstract movement of property. Circulation appears in no way affected, since for circulation it continues to be a question of establishing the relation between a buyer and a seller each of whom owns his commodity.

The laws of commodity circulation can in this way make a claim to freedom and equality. What does it matter if the labourer is the owner only of his labour power? He is the owner. What does it matter if he is obliged to sell it? He is a buyer and a seller ... of the subsistence goods necessary for the reproduction of his labour

power. What does it matter, finally, if this sale and purchase are the result of capital itself? It is freedom that is at stake.

Circulation abolishes differences. Every subject in law is the equal of every other subject in law. If one contracts, it is because the other has wished to contract too. The ultimate cause of the contract is the very will to contract. The subject in law possesses himself as object in law. He therefore realises the most developed form of the subject, namely, self-ownership. He realises his freedom in the very power to sell himself that is accorded him.

I have returned to my starting point, the form of the subject in law, but the return is now the richer. This most abstract category of the law can now reveal its truth – the putting into circulation of man. For us Marxists that means the putting into circulation of labour power. And that putting into circulation is made in the name of property and its determinations, freedom and equality. The contract will permit the exploitation of man by man in the name of these determinations. The contract is the mode of existence of the law, the means by which it exists. Need I repeat it? The subject in law 'allowed' the 'real' itself to enter into exchange; it has 'allowed' the photographic and cinema industries to exploit artistic workers in the name of their very contracts; it has 'allowed' man to be the object of contracts.

I can now reach a conclusion on this ground, that is, on the ground of the limits beyond which bourgeois theory of law will not go. This is the same limit as the limit which the category of the subject in law, as the most developed juridical form of property, marks out for itself. This limit is the closed field of private property where nothing but the process of private property ever takes place. Man's appropriation of nature is an appropriation by a subject in law. So, in Hegel, the humanisation of nature necessarily takes place through the determinations of property. In this way, the totality of the form of the subject can state its determinations, and they will never be anything more than the realisation of private property.

The starting point of bourgeois legal science is man, that is, man constituted as subject in law. The point of arrival of bourgeois legal science is immobile. The subject is left behind so as to permit the rediscovery of the subject. The method of exegesis is also like that. The law is left behind so as to permit its rediscovery. The teleology of the subject is the teleology of private



property and that produces the teleology of the method.

In the last instance, nothing ever takes place within the law, that is, nothing ever takes place outside the subject. The 'other place' (production) is abolished by the very form of the subject. And this abolition finds its perfect expression in legal technique. The word is that things are so that they shall be.

So be it.

## Conclusion

### Law, and ideological struggle

I do not want to end without posing the possibilities of ideological struggle here.

When Engels tells us the 'true history' of equality, he writes as follows:

The demand for equality in the mouth of the proletariat has therefore a double meaning. It is either – as was the case especially at the very start, for example in the Peasant War – the spontaneous reaction against the crying social inequalities, against the contrast between rich and poor, the feudal lords and their serfs, the surfeiters and the starving; as such it is simply an expression of the revolutionary instinct, and finds its justification in that, and in that only. Or, on the other hand, this demand has arisen as a reaction against the bourgeois demand for equality, drawing more or less correct and more far-reaching demands from this bourgeois demand, and serving as an agitational means in order to stir up the workers against the capitalists with the aid of the capitalists' own assertions; and in this case it stands or falls with bourgeois equality itself. In both cases the real content of the proletarian demand for equality is the demand for the *abolition of classes*. Any demand for equality which goes beyond that, of necessity passes into absurdity.<sup>1</sup>

And we must not forget that Engels is talking to us about equality with respect to the 'moral' inequality of Dühring. Now what exactly does Engels mean by 'more or less correct and more far-reaching demands' and, in particular, what does he mean by 'the real content' of the proletarian demand? In this text I see the relation between the ideological struggle and class struggle, the relation between the functioning of ideological struggle and class



struggle, the meaning of the strategy which consists in taking the bourgeoisie at its word, that is, trapping it in its own ideology. For it is this 'taking it at its word' that will be 'more far-reaching' and that reveals the contradiction of bourgeois ideology.

This taking it at its word – which is also a 'calling to account' – had a meaning, a 'real content', an 'other' content which did not appear at first sight and which was lurking in the shadows, the abolition of classes.

There was, then, in ideological struggle an explicit content and a latent content. There was, then, an explicit content which existed only through its latent content and which expressed it without being acquainted with it. Better, there was an explicit content – bourgeois ideology turning against itself, 'taken at its word' – which was truly revolutionary only because this turning against itself was necessarily going further than a simple turning against itself, even if it still did not know it. And this knowledge in the midst of non-knowledge existed only because it derived from 'the practical relations on which their class position is based – from the economic relations in which they carry on production and exchange'.<sup>2</sup>

But in the same moment as Engels gives us the meaning of ideological struggle, he gives us the theory of it, its 'real content': the abolition of classes. Every proletarian demand for the bourgeois idea of equality aims in the last instance at the abolition of classes.

And it is here that I finally come to the failure of 'bourgeois legal science' and to the theory of the theoretical practice of the law. The law, turning against itself, delivers to us the contradictions of its practice and, conjointly, the limits of its 'science'.

In his study of the 'history' of classical bourgeois economy, Marx traces its *double frontier*: the 'scientific' frontier and the 'ideological' frontier. With respect to the first, Marx writes:

In so far as Political Economy remains within [the bourgeois] horizon, in so far, *i.e.*, as the capitalist régime is looked upon as the absolutely final form of social production, instead of as a passing historical phase of its evolution, Political Economy can remain a science only so long as the class-struggle is latent or manifests itself only in isolated and sporadic phenomena.<sup>3</sup>

With respect to the second, he writes:

In France and in England the bourgeoisie had conquered political power. Thenceforth, the class-struggle, practically as well as theoretically, took on more and more outspoken and threatening forms. It sounded the knell of scientific bourgeois economy. It was thenceforth no longer a question, whether this theorem or that was true, but whether it was useful to capital or harmful, expedient or inexpedient, politically dangerous or not. In place of disinterested inquirers, there were hired prize-fighters; in place of genuine scientific research, the bad conscience and the evil intent of apologetic.<sup>4</sup>

If bourgeois legal science fills the entire legal space, this political space is the space of class struggle. The law itself reproduces this space in the permanently troubled serenity of its categories. Bourgeois legal science has been a live thing, but with Kant and Hegel it is philosophically dead. Every day it is buried in the coffin of its practice, for 'practice watches at the bedside of all ideologies, at the foot of their cradle and their coffin'.<sup>5</sup>

I want to finish on the lesson Brecht learned from his experience in the courts.

By trying to defend our 'rights' in a real and quite precise matter, we have *taken at its word* a quite precise bourgeois ideology and we have allowed the bourgeois practice of the courts to catch it out. We have conducted a lawsuit by noisily making use of representations which are not our representations but which we had to suppose were the representations of the courts. It is in losing this lawsuit that we have discovered in these courts representations of a new type which are not in contradiction with bourgeois practice in general. They are in contradiction only with the old representations, precisely those representations the totality of which constitute the great classical bourgeois ideology.<sup>6</sup>

And he specifies that we must understand that the reference to classical bourgeois ideology is 'the ideological construction that is called man'.<sup>7</sup>

Theoretical practice gives us the very historicity of our combat. The critique of the ideological notions of the law carries within itself the death of bourgeois legal science. For the time which is to

come and which proclaims itself today, militant intellectuals:

real initiates, armed with the most authentic scientific and theoretical culture, forewarned of the crushing reality and manifold mechanisms of all forms of the ruling ideology and constantly on the watch for them, and able in their theoretical practice to borrow – against the stream of all ‘accepted truths’ – the fertile paths opened up by Marx but bolted and barred by all the reigning prejudices

armed with ‘an unshakable and lucid confidence in the working class’ and powerful ‘in direct participation in its struggles’<sup>8</sup> must be in the front line, each in his domain, each in his discipline.

They must denounce the poverty of the apologetics of the system that makes man a commodity whilst making him believe that he is free.

Freedom is the price.

## Appendices

## Appendix 2

### Transitions in Kant's *The Metaphysical Elements of Justice*

If I am not mistaken, this is the first time a jurist has come to the rue d'Ulm to give a complete course of lectures.<sup>1</sup> The question you are asking yourselves is why a jurist should come here to talk about the law.

The reason why you ask that question is that people are happy for the law to exist, so long as it exists in another place. But if you ask me where this 'other place' is, I shall reply that it is everywhere. It is in the factory, in workers' strikes, in labour contracts, in your family, in your constitution of yourselves as persons, as students, as officials, and as future workers. It is also in the Faculté de Droit, in the courts and in the prisons.

You cannot leave this 'other place' out of account, because if you do, it will take account of you.

That is the first point – a very simple and very obvious point. The negation of the law is the negation of what rules us socially. But we must take care. You may well deny the law but you cannot prevent it from existing. Close the door and it will come in the window.

As a preliminary, we must ask why the law does not have 'rightful access'. We must be clear about this. I am not saying that the law has no rightful access into your concrete life. I am saying that your concrete life is ignorant of the law, even though it is the law that constitutes this life as concrete.

And we can indeed ask these questions. What is this system that makes us ignorant of the law and that has an interest in making us ignorant of the law? What is this system that produces this double ignorance: ignorance of the juridical system in general and ignorance of what the law is really for those familiar with the

'technique'?\* And this double ignorance is sustained under the same sign: ignorance of its own laws. Already it is possible for me to say to you that the real answer to those questions is to be found in the role that the law plays in our system, that is, *in the relation that the law maintains with a determinate mode of production.*

But if I pursue this line of reasoning to its source, I find that I have no illusions about you. You know nothing of the law, and this ignorance is, as always, veiled by contempt. Why should we know something we are ignorant of, since the very fact that we are ignorant of it proves to us that we ought to be ignorant of it? But, if you know nothing of the law, the law does not merely get by – it thrives on that ignorance.

Do you know what labour law is? Or social security law, penal law, civil law, public law, or international law? Do you know only that you are born subjects in law and that you die subjects in law? And that your marriage will be between subjects in law, and that you will have little subjects in law who in turn will ...? Do you also know that your freedom and equality are already pre-determined? And that you are free only within the limits of a law that you are ignorant of? Do you know that the State itself is a juridical person operating only through subjects in law? And that the immense and prodigious work of magistrates, legislative bodies, offices and ministries functions logically and imperturbably according to the laws of their functioning?

I am talking to you about this ignorance only in order to discover the reasons for it. What makes it a problem is that most of you are philosophers, that is, you are supposed to be equipped with a theory of knowledge which will allow you to discover the laws of the production of man. But what you may know of Hobbes, Locke, Rousseau, Kant or Hegel does not permit you knowledge of the fundamental instance represented by the juridico-political instance, knowledge in the sense of knowing the laws of its functioning.

That is a problem, and it is a double one because it reverts to the philosophers. Let us be clear about this. If the problem reverts to the philosophers it is because it derives from the 'other place' of their philosophies, even though it also constitutes those philosophies.

This 'derivation-reversion' is effected in the very heart of

\* See p. 192 for Edelman's note on *Doctrine* and *technique*.

political philosophy at the end of the eighteenth century and the start of the nineteenth, or, quite simply, in the philosophy of Kant and Hegel. To explain that, we must pose the relation speculation/political/economic. This relation is expressed in two propositions. The first is that *speculative philosophies elaborate their juridico-political system on the ideology of law*. The second, however, is that *the concrete content of the juridico-political, the last instance of which is the economic, irrupts without their knowledge on the philosophical scene*.

Let us take the first proposition. The red thread running through juridical ideology is freedom and equality. Every man is a subject (in law), that is, free and equal with respect to all other subjects (in law). In this way the juridical process is a relation between subjects, and the subject, in Pashukanis's words, 'is the atom of the juridic theory: the simplest element, incapable of being reduced further'.<sup>2</sup> It follows that the laws which permit and assure the 'democratic' functioning of the juridico-political are the natural laws of freedom and equality. To find an example we only need to look at Article 1134 of the Civil Code. It provides that 'arguments legally arrived at are subject to the law governing the contracting parties'. That means that in the legal structure not only is every man a contractant but also he is the equal of every other. Article 1134 appeals to a theory of will and consent, and although much more might be said about the psychology of the subject in law – remember the importance of 'political psychology' in Hobbes, Hume and even Rousseau – I shall not put great emphasis on the Article. The point to hold on to here is the relation between the *juridico-political system* of speculative philosophy where law and the political are elaborated on reason, that is, on freedom and equality, the relation between that system and the *ideology of the juridical* in which a system of positive laws legally puts freedom and equality to work.

At this first level a perfect concordance can be seen. But this is to move on to the second proposition. At the same time as it takes freedom and equality as natural givens, the juridico-political conveys the concrete content of that freedom and equality and permits their realisation in the market. More simply, law formalises the *laws of exchange*.

This dialectic must be penetrated if we want truly to understand the 'mystery' of the law. In the same moment as law regulates the circulation of commodities – buying and selling – it designates

that circulation as the realisation of freedom and equality. In other words, it is only as buyer or seller that I prove, on the one hand, that I am free, and, on the other, that I am equal to every other buyer or seller. In law, therefore, exchange appears not only as the circulation of private property but also as the circulation of the freedom and equality of every owner.

It follows that, at the same time as it elaborates juridical determinations in pure ideas, speculative philosophy conveys its concrete content – property itself. It follows again that if the juridico-political is the mirror in which it contemplates itself then the mirror returns its own deformed image, its own politics. Such is the ruse of the specularia.

So, when Kant or Hegel develop their science of law, they are confronted by a concrete content not reducible to any process of abstraction. Kant borrows from Roman law and Adam Smith, Hegel from the *Code Napoléon*, Say and Ricardo. Speculative virtuosity, the 'speculative joy' which Marx discusses in *The Holy Family* and which consists in discovering the real not in the land but in the 'ether of the mind', cannot remove the concrete content of the law – laws, rulings, sentences – and that content 'contaminates' speculation itself. Read the declarations of intent in Kant and then pursue them in their concrete demonstrations. They shatter into tiny pieces. Read Hegel's *Philosophy of Right* with 'the eye of the concept' as Hegel himself recommends and you will very quickly get myopic. In that work you will find that the Objective Spirit is a landlord and that the 'system of needs' is a pure description of the market economy.

Consider Marx's profound reflection: 'This real development *within* the speculative development misleads the reader into considering the speculative development as real and the real as speculative.'<sup>3</sup> It can be seen that this reflection is realised in the site of the juridico-political in a privileged way. It is there that the break is principally effected. It is no longer the speculative apparatus that is the support of the juridico-political but the juridico-political that is the support of the speculative. That is why speculative discourse on the political constitutes in a particular way the very reality of its discourse. That is why discourse on the political passes judgment on the politics of discourse.

Small wonder, then, that the university is not very worried – that would be much too worrying – by the real content of juridico-



political discourse. Small wonder that *The Metaphysical Elements of Justice* is so little read, nor that people are restricted to Second Part: Morality in Hegel's *Philosophy of Right*. Small wonder, finally, that philosophers concerned with law get scorched by the dizzy evolution of the juridico-political as it gradually fills up all ideological space nor that they deliberately cut themselves off from its practice. On the one side you have pure theory, on the other you have impure practice. We must celebrate, because it is the symptom of a crisis. If you have the time, study Kelsen's positivism, Amsalek's phenomenology, Villey's Thomist Aristotelianism, or Poulantzas's pseudo-Marxism. You will see them crash into the window pane of legal practice. Too much evidence has made it 'transparent' but toughened it all the more. They talk of everything and often they talk of the law but you never see them prick up their ears at the mention of a law, a decision of the Conseil d'Etat or of the Cour de Cassation.

What I want to show is that this impotence is political.

But it is a difficult task and requires long detours. For example, what do we know of the law when we have read Hegel? In one way, nothing, in another, something.

Hegel tells us nothing of the law because he does not allow us to read the documents of juridical practice in their practical effects. There are a number of examples of this. Study all these: the criminal irresponsibility of capital; the juridical theories of wages; the juridical status of aesthetic creation; the way the EEC court rules on the categories of the market, of competition, or of monopoly; the public domain or civil servants' right to strike; the criminal law of business practice; the right to work; literary and artistic copyright; European law; public law. Hegel is no use at all here, precisely on the ground of legal practice where the *relation* between the functioning of juridical categories and their articulation in the total process of capital is made firm.

But in another way Hegel does tell us something. He tells us that the law, or right, *qua* the determination of the spirit, is punctuated with history. For Hegel: 'Right in this positive form acquires a positive element in its content ... through the particular national character of a people, its stage of historical development, and the whole complex of relations connected with the necessities of nature.'<sup>4</sup> So, it is right that realises the concept of man, that is, freedom. Simplified in the extreme, Hegel tells us that the idea of

right is realised eminently in the diversity of juridical matter, that man and his freedom are the stake, and that in a quite precise way right puts man and his freedom in question. Better, Hegel teaches us how right achieves this freedom, that is, he teaches us which juridical determinations are the means by which man can call himself free. And when I tackle Hegel more directly, you will see the relation that he establishes between right and freedom. You will see which philosophical categories he puts to work to justify the 'immanent laws' of right, and you will see, finally, that these categories are the very same as the ones ideology continues to feed off.

We can see already the way the relation between juridical practice and the philosophy of law takes shape. Better, we can see the site of that relation – ideology.

### Kant and Hegel on the rights of parents and children

We have very quickly determined two sites, and we have done it from the point of view of practice. We have determined the site of idealist philosophy of law and the site of juridical practice. They do not seem to correspond. They are indeed two sites: two voices, like different tunes, and two roads, like different perspectives; two monologues in isolation.

It is now time to demonstrate concretely all that has been proposed, and it will be done by means of an example. But it is more than just an example, for two reasons: first, because of the way the question will be taken further and second, because of the project in hand.

The example I have chosen is drawn from family law, or more particularly, it concerns the relation between parents and children. It was not chosen at random. In the first place, I was influenced by the pertinence of the question. We have all been children, and most of us are or will be parents. In the second place, the problem obsesses Western philosophical thought. In the eighteenth century, people are still dosed up with Roman and feudal law and they ask if the child is really a human person. They ask how this virtual being will *by means of education* give birth to the future citizen. In the nineteenth century the child has indisputably become a juridical person. Profits are made from children by

putting them to work in factories from the age of seven. The twentieth century's obsession comes from another place, psychoanalysis, but it remains possible to pose the relation between this 'other place' and what makes it possible, namely, the recognition of the child as a juridical subject. In the third place, finally, I was influenced by the fact that the relation parent/child is one which is torn between a morality which, if not feudal, is at least archaic and the relations of production which make a minor an effective worker and producer.

To say all this is to say that the ground appeared very simple but that it is not so easy to reclaim. It is even less easy to reclaim in that I intend to pursue a project which is in one sense a gamble. I want to show that the relation parents/children puts in play – 'paradoxically' – the relation of subject to property. I also want to show – and show it as a consequence – that the concepts that Kant and Hegel, to take only those two authors, disengage appear to designate this relation. I say 'appear' because in the third stage of this demonstration I want to show, from the point of view of practice, that the concepts themselves are 'designated' by practice. That is why we are concerned with more than just an illustration. It is a question of a definite break: the break from philosophical discourse by means of juridical practice, and, further, the 'internal' break from philosophical discourse by means of the practice which constitutes it.

That does not speak for itself, so our procedure needs to be explained. I am going to cite two philosophical texts, one from Kant and the other from Hegel. We shall read them in order to locate them in the specific site of their theoretical production, but we will not rely on the description of this production which is afforded by the concepts that the production has itself produced. A description of an act of theoretical production which is effected in terms of the very concepts produced by it is, of course, no more than a theoretico-rhetorical teleology.

The grounds for our refusal to rely on such concepts is *practice*, irrefutable practice. It is irrefutable because it exists in a real way in laws, rulings, decisions, because it is put to work in a real way by means of the constraints of the State apparatus, with the aid of police officers and commanders of the armed forces who, in the words of the proud decree of the 'executive formula', must 'lend a hand'. It is irrefutable practice, then, that permits a revolutionary

reading of these texts.

But, as a preliminary, that is, before moving on to the ground of this contemporary practice, I want to make the real, and mystic, meaning of these philosophical texts, taken by themselves, appear before you. Indeed, we shall attempt a materialist reading of these texts. We shall apply ourselves to the discovery of, on the one hand, what they legitimate, then, on the other hand, the theoretical process by means of which they produce this legitimation, and, finally, the *relation* between what is legitimated and the necessary forms taken by that legitimation.

Kant will appear as a philosopher obsessed by the decomposition of a world – the feudal world – and terrorised by the birth of a new one – the bourgeois world. Accordingly, Hegel will be the philosopher of the triumphant contradiction, resolved *in abstracto*.

In short, I shall return to these texts the things they do not think, the things they suppress, that is, their political project. I do this in order to make it appear that this political project is what constitutes them in the last instance and that their process of abstraction – Kantian reason, Hegelian spirit – in the last analysis reduces to the justification of a politics.

In this way, by putting these texts (dare I say it) back on their feet, by referring the abstraction back to its point of departure, their functioning will be revealed through their political silence. By this means, it will be proved that the process of abstraction in speculative philosophy is ideological, ideological to the exact extent that its presuppositions are contained in the politics which it is its task to legitimate.

In Part I, Private Law, Of Proprietary Rights in General in External Things, chapter 2, Of the Mode of Acquiring Something External, Section 3, Rights *in rem* over Persons, 2nd Title, Kant deals with parental rights. He has just defended the strange idea that 'sexual community (*commercium sexuelle*) is the reciprocal use a man can make of another person's sexual organs and faculties (*usus membrorum et facultatem sexualium alterius*)'.<sup>5</sup> He has just defended the strange idea that marriage is nothing but the mutual acquisition of persons. I said 'strange idea' but there is nothing very strange about it when you think that our Cour de Cassation awarded damages against an adulterous husband who no longer wished to perform his 'conjugal duties'. In § 29 Kant deals

with 'parental right'. Look at this extract:

It follows from the fact of the personality of children that they can never be considered the property of parents. This is in spite of the fact that they belong to parents' mine and thine, since they are like things in parents' possession and they can be returned from the possession of any other person to the possession of their parents against their will. It also follows that parental right is not a pure *jus reale*, that it is a right that cannot be alienated (*jus personalissimum*), and, furthermore, that it is in no way a pure *jus personale*. Rather, parental right is *jus realiter personale*.<sup>6</sup>

The second text is taken from Hegel's *Philosophy of Right*. In § 175 Hegel deals with objective morality and its first moment, the family *qua* natural objective moral spirit:

Children are potentially free and their life directly embodies nothing save potential freedom. Consequently they are not things and cannot be the property either of their parents or others.<sup>7</sup>

This text reminds us of another text. At the point where Hegel asks what is susceptible of appropriation and where he poses that the person can embody his will only in the thing, he examines the right of *paterfamilias*:

It was an unjustifiable and unethical proviso of Roman law that children were from their father's point of view 'things'. Hence he was legally the owner of his children, although, of course, he still also stood to them in the ethical relation of love (though this relation must have been much weakened by the injustice of his legal position). Here, then, the two qualities 'being a thing' and 'not being a thing' were united, though quite wrongly.<sup>8\*</sup>

I shall show in these texts the practical stake within the theoretical stake and to that extent I shall be able to return to the texts the things they do not think, their politics.

And then, but only then, with this painful extraction duly performed, we shall be able to work on concrete juridical practice.

\* For Edelman's discussion of this notion of wrongness, cf. p. 188.

## Kant and *jura realiter personalia*

### *Kant's classification of rights*

Kant's theoretical project is to construct '... a system derived from reason. Such a system might be called "the metaphysics of justice"'.<sup>9</sup> From the start Kant is confronted with practice but he resolves the problem in these terms:

the discussion of justice so far as it belongs to the outline of an a priori system will appear in the main text, whereas the discussion of those rights that are related to particular cases arising in experience will appear in the annotations.<sup>10</sup>

This admission of impotence, the admission that laws cannot constitute the text in which the system of law is to be read in its entirety, should not be emphasised. Rather we must specify Kant's concern. For Kant the problem is to demonstrate, in the determination of property, how property is acquired and as a consequence how rights over children are acquired.

For Kant there exists three objects of property and therefore three property rights:

#### *Jus reale*

The right to make private use of a thing which I possess, either originally or arising out of a contractual agreement, in common with other people.<sup>11</sup>

#### *Jus personale*

Possession of the will of another person as the power to determine him through my will to an action according to the laws of freedom.<sup>12</sup>

#### *Jus realiter personale*

Right of possession of an external object as a thing and to make use of it as a person.<sup>13</sup>

Accordingly, it is possible to acquire three types of object: a thing, a promise (obligation), and a person. That is the first point to note. The second thing is that the nature of the right alters with the object acquired. There is a correspondence between the object/thing in law and *jus reale*, between the object/promise in

law and *jus personale*, and between the object/man in law and *jus realiter personale*. The object (in law) determines the mode of the right and the mode of the right the object. The dogmatic distinction in Roman law between thing and obligation is reproduced exactly.

But, at this level, two points must be made. First, Kant innovates in a single domain: *jus realiter personale*. In spite of being aberrant, this category is 'modern' in that, within Romano-feudal dogma, it takes account of a new object in law – man. In *Anti-Dühring* Engels admirably sketches this absence in the ancient world:

Among the Greeks and Romans the inequalities of men were of much greater importance than their equality in any respect. It would necessarily have seemed insanity to the ancients that Greeks and barbarians, freemen and slaves, citizens and peregrines, Roman citizens and Roman subjects (to use a comprehensive term) should have a claim to equal political status. Under the Roman empire all these distinctions gradually disappeared, except the distinction between freemen and slaves, and in this way there arose, for the freemen at least, that equality as between private individuals on the basis of which Roman law developed – the completest elaboration of law based on private property which we know.<sup>14</sup>

The great thing absent from Roman law is man *qua* object in law. And it is on this absence, of course, that the whole of modern law is constructed: the equality of all private persons, that is, the appearance of the free worker, even if this is, as Marx says, a 'free for all'.

Kant therefore constructs his category of *jus realiter personale* on this absence. This is tantamount to saying that he includes in it the right to work, even if he includes it under the archaic heading Rights of a Master over his Servant. In passing, note that our Civil Code calls the first section of the chapter on the hiring of work and skills 'On the Hire of Domestics and Workers'.

Although it is not necessary for the moment to emphasise this point, one cannot help noting that the category *jus realiter personale* is no more than a vulgar combination of the two other large categories: *jus reale* and *jus personale*. The effects of this combination will be examined below.

The second point to be made is that with Kant we are in a juridical structure where the object signifies the subject. In other words, laws, in their mode of existence, derive not from the subject but from the object itself. As I have already said, it is the object (in law) that determines the mode of the right. And remember that in feudalism it is the juridical status of the land that determines the juridical status of the possessor.\*

In short, the Kantian subject in law appears as a pure form without efficacy, waiting for a content. The relation of man and property can accordingly be defined as 'a purely *de jure* union of the Will of the subject with that object'.<sup>15</sup> In a reciprocal way, this pure and empty form is at the same time its mode of existence, that is, it allows it to be invested by objects in law.

Property is not under the jurisdiction of the subject. And property is not the essence of the subject in that it constitutes it not internally but externally, this for the very good reason that property proceeds from the subject only by a decree of reason: 'Consequently, it is an a priori assumption of practical reason that any and every object of my will be viewed and treated as something that has the objective possibility of being yours or mine.'<sup>16</sup>

If the subject is free of his possession and influence, he is at the same time bound by the immobility of the relation to the thing.

### *The problem of transition*

At this point I want to make a specific study of the strange category of *jus realiter personale*. Remember the definition: 'Right of possession of an external object as a thing and to make use of it as a person.' If we analyse it in terms of relations, the definition produces two types of relations or, if you like, couples. The first couple stays at the level of description and the second designates what that description hides. The first couple relates the juridical category to the object. From that we get the relations possession/thing and use/person. It appears that a juridical distinction can be made, possession being different from use, and that that distinction has its true basis in the object referred to, the thing being different from the person. The second couple designates the

\* Cf. 'The Subject in Law in Hegel's *Philosophy of Right*', p. 171.



relation of the juridical categories to each other and designates the relation of the objects in law to each other, possession/use and thing/person respectively.

Possession is opposed to use, as the thing is opposed to the person. Better, the opposition possession/use justifies the opposition thing/person.

What have we learned so far? We have learned that the juridical distinction possession/use justifies the distinction of reason thing/man. Possession reverts to the thing, as use reverts to the man. The very fact that one can acquire either a thing or a person justifies the juridical distinction. The distinction working in the mode of acquisition in the last analysis justifies the distinction of the acquired object, and vice versa. In other words, we are faced with a reciprocal justification of law by the object and of the object by the law.

To continue, we find that if we examine the distinction possession/use, Kant himself gives us this definition:

An object is mine *de jure* (*meum juris*) if I am so bound to it that anyone else who uses it without my consent thereby injures me. The subjective condition of the possibility of the use of an object is [called] *possession*. [*Besitz*]<sup>17</sup>

What this means, when it is spelled out, is that use is the necessary mode of existence of possession, that proof being that if someone does no more than use a thing I possess – without seizing my property – that still harms me in a definite way. It also means that one possesses something only in order to use it.

Well, we have known that for ages. But what does possession without use mean? Strictly speaking, nothing. It is true that I can hire out a thing of which I am the owner, but the very possibility of the hire implies property. I cannot hire out what I do not own. These are banal and daily concerns. If I possess some land, it will be either to work it myself or to lease it; if I possess real estate, it will be either to occupy it in person or to hire it. The realisation of possession is use.

Here we have the same evidence as before. Article 544 of the Civil Code provides that: 'Property is the right to enjoy and dispose of things in the most absolute manner, provided one does not make a use of it which is prohibited by the laws and regulations.'

And yet the result obtained by Kant is entirely surprising. In the name of a juridical distinction empty of meaning – the distinction possession/use – he justifies a 'natural' distinction – the distinction man/thing. Rigorous analysis of the second couple in its juridical part has no pertinence if not to permit the elaboration of the distinction man/thing.

But this juridical non-pertinence possesses a meaning. It is the meaning of the first couple and it can be resumed as: I possess the thing, I use the person.

In other words, if I dismember this juridical distinction with a view to combining it in the relation between possession/thing and use/person, we shall find that it has a quite different value. It permits a transfer – without transferring – from the thing to the man. For if I dissociate possession from use I thereby dissociate the thing from the man. Or, to be more precise, if I prove that I can use without possessing, I have proved that I can use man while leaving him his freedom, that is, while leaving him the freedom of himself. At the final count, this handling of the juridical categories permits the resolution of the problem of *how to make use of a free man*.

At this point it looks as though the trick has worked. I say 'looks as though' because in fact, as we shall see, it has not worked at all. That is for the very good reason that the economic process transmitted by the juridical categories is resistant to hocus-pocus, even Kantian hocus-pocus.

We had arrived at the result that the radical opposition possession/use is the justification of the opposition thing/person. But it is at this point that the very objection which had been made void is raised, namely, how use without possession is possible. Note the transition from the theoretical to the practical position. Theoretically the problem is solved but practically it reappears. Here are the two positions. The *theoretical position* is that use without possession is use of a man while leaving him his freedom. The *practical position* asks how it is possible to use a man without possessing him.

We shall observe a genuinely astonishing reversal. At the very moment of his serene administration of his theoretical propositions Kant puts them back on the terrain of practice, at issue again. The opposition possession/use was thought to have been definitively put in its place, but it was only with a view to

giving it a better location. The accounts have been settled in theory but in practice the cards are being dealt again.

It is clear that Kant is rediscovering the problem he thought he had liquidated, the problem of the fact that in order to use a thing it is necessary to possess it. Even the law of contract is no help, since on Kant's own admission:

A contract by which one party renounces all his freedom to another person, hence ceasing to be a person, and consequently no longer bound to abide by a contract, only bound to recognise force, would be a self-contradictory contract, that is, null and void.<sup>18</sup>

The *theoretical stake* is therefore the reconciliation of domination and freedom. The *practical stake* is about how a servant – a worker – can be subordinated at the same time as respecting his freedom. And the issue is a crucial one if you think of the dissolution of feudal relations founded on personal relations and if you think of the rise of the free worker. It is worth remembering that *The Metaphysical Elements of Justice* was published in 1797.

We must therefore study the way Kant begins to resolve the relation theory/practice. We shall see that in a curious way his resolution is a judgment on his theoretical discourse from the point of view of practice. The concrete content that Kant studies – rights of women, children and servants – rebounds on his declarations of intent and reduces them to nothing.

The Kantian resolution is doubly surprising, first with respect to the solution itself and second with respect to the practical objective the resolution aimed to realise. And we shall see, even there, that in the final analysis it is the objective pursued that conditions the solution and that the objective is itself the justification of a particular economic order.

We shall begin with the solution itself. The category of *jus realiter personale* comprises three sorts of acquisition: women, children and servants. Note, as well, that this is a sort of nostalgic resurrection of Roman and even of feudal law. Note, too, that in Hegel the notion of servant disappears and is replaced by the notion of worker. A reference should be made here to the 'system of needs' and to the organisation of corporations.

What is Kant's justification of the mode of *jus realiter personale* for each of the above three objects in law?

With respect to *conjugal right*, Kant says:

That this *jus personale* is nevertheless presented at the same time in a real mode is the foundation for the fact that if one spouse runs away or is put in the possession of another person, then that spouse can always and incontestably be brought under the power of the second spouse as if the first were a thing.<sup>19</sup>

To this point I would add that, of course, only the wife can run away since her husband is her master:

Consequently, that domination has the sole objective of asserting, in the realisation of the common interest of the family, the natural superiority of the husband over the wife and the right to command that has its foundation in that superiority.<sup>20</sup>

But that is another story.

Here is the text dealing with children:

It is clear, then, that in theory of justice the title of *jus realiter personale* must of necessity be added to the titles of *jus reale* and *jus personale*. And it is clear that the division which until now has been a received division is not complete, because when parental right over children as part of their house is the issue, parents are not restricted to a mere appeal to children's duty to return when they run away. Instead they are entitled to seize them as if they were things, as if they were escaped domestic animals, and they are entitled to keep them locked up.<sup>21</sup>

Finally, Kant justifies the right of the master of the house as follows:

Consequently, servants belong to the *meum* of the master of the house. With respect to form, the state of possession, this is on a par with *jus reale*, in that if the servant escapes the master of the house can bring him into his *potestas* again simply through his will. But with respect to the content, that is, the use he can make of his servants, he does not have the right to behave as if he owned them (*dominus servi*), because they are in his *potestas* only as a result of a contract.<sup>22</sup>

The perfect justification for the relation man/thing is no longer provided by the juridical opposition possession/use but by the

innocent, seemingly insignificant but essentially significant little words 'as if'. All that weighty juridico-metaphysical construction reduces to the fact that woman, child and servant can be brought under the power of the owner as if they were a thing. The 'as if' recalls the relation *essence/appearance*. The essence is the freedom of man while the appearance is that he can be treated as a thing. The essence is that man is free in himself and cannot be appropriated as object while the appearance – meaning 'practice' – is that he can nevertheless be treated as an object. Note, in passing, that as far as the right of the master of the house over his servants is concerned, his right does indeed rest on a contract – the ancestor of our labour contract – but is *realiter personae*. That is to say that the contract becomes in substance the juridical category permitting the worker's being placed under his power *realiter*.

So, the relation man/thing is dealt with in terms of comparison with the innocent little words 'as if', but it is not resolved. Rather it is subjected to a phantom resolution in which the antinomy is exactly reproduced.

I want to spend a little time on the content of this antinomy. It designates the transition from the feudal mode of production to the capitalist mode of production. For the sake of completeness it would be necessary to define the articulation of the juridical on the political in Kant himself, that is, to describe how that transition is signified in Kant's political discourse, but there is no time for such a diversion. I must emphasise, however, that for Kant political right is founded in private right. Among the juridical attributes connected with the nature of citizenship is:

third, the attribute of civil independence that requires that he [the citizen] owe his existence and support, not to the arbitrary will of another person in the society, but rather to his own rights and powers as a member of the commonwealth ...<sup>23</sup>

And Kant adds:

an apprentice of a merchant or artisan; a servant (not in the service of the state); a minor (*naturaliter vel civiliter*); all women; and generally anyone who must depend for his support (subsistence and protection), not on his own industry, but on arrangements by others (with the exception of the state) – all such people lack civil personality, and their existence is only in the mode of inherence.<sup>24</sup>

You will recognise all the people subject to the category of *jus realiter personae*. The result is that the Kantian foundation of private law – the combination, in the determination of private property, of the different modes of acquisition of property – determines the foundation of a political discourse, that is, a discourse on power. Political power accordingly appears as the actual guarantee of the structures of private right or, if you like, private property. The right of ownership is determined in political right. I cannot spend any more time on this fundamental articulation, however, so we must return to the antinomy.

The decomposition of the feudal mode of production is worked by means of the following contradiction. On the one hand, the development of the productive forces requires the freedom and equality of rights, requires, that is, the appearance of a worker who owns his labour power. On the other hand, the political regime remains largely feudal. Engels has shown how the demand for bourgeois equality permeated a peasantry dominated by the German petty squirearchy that formed Kant's natural milieu:

The demand for liberation from feudal fetters and the establishment of equality of rights by the abolition of feudal inequalities was bound soon to assume wider dimensions, once the economic advance of society had placed it on the order of the day. If it was raised in the interests of industry and trade, it was also necessary to demand the same rights for the great mass of the peasantry who, in every degree of bondage, from total serfdom onwards, were compelled to give the greater part of their labour-time to their gracious feudal lord without compensation and in addition to render other dues to him and to the state. On the other hand, it was inevitable that a demand should also be made for the abolition of the feudal privileges, of the freedom from taxation of the nobility, of the political privileges of the separate estates.<sup>25</sup>

Now we see how the Kantian 'as if' seeks to resolve in the imagination the contradiction between productive forces and relations of production. And we see how it is only in the imagination that it could resolve the contradiction of a rhetoric satisfactory to the rising bourgeoisie but which none the less allows dying feudalism to survive.

And when we examine the *concrete objective* which Kant wishes to

realise with the category of *jus realiter personale* we will find it possible to see the true dislocation of theoretical equality from political inequality even more clearly. If we turn our attention to the end in view, we find an obsession: evasion. And it is this obsession that in the last instance conditions the regime of *jus realiter personale*. This is tantamount to saying that its content merits profound examination. The evasion has a double meaning. On the one hand, it is flight from a closed space, and on the other hand, it is flight from reality specifically constituted in that closed space designating a dissolving world and a subject foundering in its own contradictions.

The dissolving world is the world of the petty German squirearchy: 'who lived a life of which even the most modest English squire or French gentilhomme de province would have been ashamed'.<sup>26</sup> The shabby and parochial petty bourgeois exploited an agrarian structure characterised by:

neither parcellation nor large-scale production, and which, despite the preservation of feudal dependence and corvées, never drove the peasants to seek emancipation, both because this method of farming did not allow the emergence of any active revolutionary class and because of the absence of the revolutionary bourgeoisie corresponding to such a peasant class.<sup>27</sup>

This dissolution is the Kantian obsession – the wife can run away, the child can escape, and the servant can leave. Kant may well admit that it is a matter of persons, free beings, but he admits that only in 'pure idea', not in the practice of their freedom. As soon as freedom is postulated it is denied. Women, children, servants, they are all free except in the exercise of their freedom.

Look again at the texts we have quoted. The basis of *jus realiter personale* is that the wife can run away. The legal category of *jus realiter personale* is necessary because children can escape and because the master must be able to bring servants back under his control. Kant leads the struggle of the German petty bourgeois at the end of the eighteenth century, and he pays the price – the collapse of the pure self-determination of the spirit, the collapse of 'free will'.

Marx and Engels again give us the key to this obsession:

With the beginning of manufactures there was a period of vagabondage caused by the abolition of the feudal bodies of retainers, and the disbanding of the armies consisting of a motley crowd that served the king against the vassals, the improvement of agriculture, and the transformation of large strips of tillage into pasture land. From this alone it is clear that this vagabondage is strictly connected with the disintegration of the feudal system.<sup>28</sup>

Accordingly, what is at work in a real mode in the 'dogmatic' legal category of *jus realiter personale* is the struggle between opposites: on the one hand the decomposition of feudalism and, on the other, the rise of the free worker. The struggle takes shape in the contradiction in the juridical category: a right which is both *jus personale* and *jus reale*. But, if that category contains in itself those opposites, it does so in immobility. The category fixes the contradiction and immobilises it in an eternal space. So, the servant is at the same time a worker, the patriarchal relation of master and journeyman is at the same time the money relation of the worker and the capitalist, the naturally inferior woman is at the same time a human being, and children are at the same time free beings.

This fixed contradiction is also the expression of terror in the political mode: immobilism. When I spoke of evasion as flight into dream, I was thinking specifically of the political dream of immobilism. If Kant designates a lacerated subject, it is an immobile laceration that he designates. 'To be Stoic is to set one's face like the beautiful eyes of Narcissus.'<sup>29</sup>

The flight into the impossibility of a category which miraculously unites opposites 'once and for all', the flight into the constitution of a subject half-man, half-thing, a centaur of a subject, half-feudal, half-bourgeois, is realised in the magic of rhetoric, an alchemy of opposites.

We can now return to the relation essence/appearance. The contradiction of the Kantian category of *jus realiter personale* relates to the following problematic. If essence is unknowable and appearance is all that can be known of essence, freedom as essence can be given only in the 'paradoxical' manifestation of use of a non-freedom. It is in this way that in the last instance freedom is the foundation of non-freedom, in the same way that man is the



foundation of the servant, or, to be more precise, in the same way that freedom of labour is the foundation of the exploitation of man, and possession the foundation of use.

In the discussion so far we have encountered an absence – the universal *subject* in law – and a presence – the category of *jus realiter personale*. The absence plays the essential role of designating the function of the category of *jus realiter personale*. In other words, it is in the analysis of what constituted the mask of the category, or, rather, what produced the form of the category, that we have been able to determine its function.

I want to explain this briefly before closing the analysis of *The Metaphysical Elements of Justice* with a specific study of the relation parent/child.

### On method

It is the absence of a universal subject in law that permits the specification of the category of *jus realiter personale*. It is in Hegel that such a subject appears. Indeed, from Hegel's *Philosophy of Right* onwards Hegel is critical of Kantian doctrine.

Accordingly, to the extent that the form of the subject in law is the most developed form of the juridical relation, it makes possible the writing of the history of all previous theoretical-practical juridical forms. In the same way, Marx's value form as the most developed form of private property makes possible the analysis of all other forms of value in turn. 'I merely assert that it is only as freedom of disposition in the market that property becomes the basis of the development of the legal form, and the category "subject" serves as the best expression of that freedom.'<sup>30</sup>

This is the scientific point of view according to which the form of the subject in law is the most developed expression of bourgeois law. As such, on the one hand it postulates that every man is a private owner, if only of his labour power, and, on the other hand, as a result, it postulates that every subject is the equal of every other subject. Starting from this scientific point of view, an analysis is given of the relation between the absence in *The Metaphysical Elements of Justice* and the presence which made the absence incarnate.

Stating from that point, we can delimit the juridico-political

expression of the transition from the feudal mode of production to the capitalist mode of production. More than that, in the specific analysis of the category of *jus realiter personale*, we have been able to exhibit the political expression of that transition itself as the immobile struggle between opposites. Remember that the juridico-political expression of that struggle was developed on the very ground of the universalisation of the subject in law. Indeed, that universalisation is also none other than the Kantian theoretical postulate of Freedom. The Kantian conflict between theory and practice also revealed the conflict between the localised subject in law and the universal subject in law. To clarify that conflict and put it in due proportion, the best thing is to cite two passages from the *Grundrisse*:

Equality and freedom as developed to this extent are exactly the opposite of the freedom and equality in the world of antiquity, where developed exchange value was not their basis, but where, rather, the development of that basis destroyed them. Equality and freedom presuppose relations of production as yet unrealised in the ancient world and in the Middle Ages.

... although this legal system [sc. Roman law] corresponds to a social state in which exchange was by no means developed, nevertheless, in so far as it was developed in a limited sphere, it was able to develop the attributes of the juridical person, precisely of the individual engaged in exchange.<sup>31</sup>

The conflict between the localised subject in law and the universal subject in law is the same as that between the feudal mode of production, where exchange value is no longer the basis of production, even though it has already developed its determinations in the sphere of circulation, and the capitalist mode of production, where the value form has developed all its determinations, including the form of the subject in law. But we must get back to the point. Remember that 'civil independence', the essential attribute of the citizen, was the directly political expression of the theoretical and practical form of the Kantian subject in law. Theoretical recognition justified practical denegation. In order to get back to the content of morality we can begin with the revealing analysis Pashukanis gives:

Moral pathos is indissolubly connected with – and is nourished

by – the immorality of social practice. Ethical doctrines assume to change and to correct the world, whereas in reality they are a distorted reflection of only one side of that real world: that side where the relations of human beings are subject to the law of value. ... A measure [*action*] – being the genuine and only real embodiment of the ethical principle – comprises within itself a negation of that principle. The big capitalist ‘in good faith’ ruins the small capitalist without for a moment encroaching upon the absolute value of his personality. The personality of the proletarian is ‘in point of principle equivalent’ to the personality of the capitalist: this finds expression in the fact of the ‘free’ contract of hiring. Out of this materialized freedom itself, however, flows the possibility of a quiet death by starvation, for the proletarian.

This ambiguity of the ethical form is not something fortuitous – it is no defect for which the specific shortcomings of capitalism are responsible: on the contrary it is an essential indicium of the ethical form as such.<sup>32</sup>

At this stage in the enquiry, a question is posed about the production of a presence, the category of *jus realiter personale*, by means of an absence, the universal subject in law, and a question is posed about the necessary forms it must take. It is therefore a question of the *ideological production* of the category and a question of posing the relation between the visible and the invisible.

I do not want to spend long on this, but we are already in a position to suggest that this relation has its source in the ideological notion of ‘civil society’. Make no mistake, the notion of ‘civil society’ is not about to restock the shop with antiques. On the contrary, it has always produced its wares in different guises: free competition, economic democracy, and, closer to us in time, ‘new society’, and even closer, in the statement of a Minister in an ORTF programme called ‘*Face à face*’, ‘society of participation’.

This question, furthermore, is the expression of another, more fundamental, relation, that of the complex dialectic between the infrastructure and the juridico-political. It is the analysis of the juridico-political in Kant that permits the description of what he occults: the transition. It enables Kant to treat of a discourse which he does not know he treats of, namely, the discourse of feudalism dying in the throes of giving birth to a new world. And, finally, it permitted the situation of the discourse in the discourse

of the small landed property owner defending the interests of his class.

The privileged site constituted by the law now appears much more clearly in the way philosophical discourse is ‘surprised’. For philosophical discourse is indeed surprised by the openness of the categories it thought were immutable and which history passes over. It is indeed here that the importance of these categories appears. It concerns nothing less than the political in that it justifies the power of one class over another. And it is in that way that the juridico-political takes on its efficacy – in its constraining function. Briefly, ‘constraint’ traces the great Kantian boundary between the moral and the law and manifests the ‘natural’ laws of freedom and equality ‘in a juridical way’, that is, with the assistance of the State apparatus – police, courts, prisons.

It is against this back-drop that we can now turn to the relation parent/child.

### The relation parent/child in *The Metaphysical Elements of Justice*

Remember that the category of *jus realiter personale* fixes the whole of *The Metaphysical Elements of Justice* at a crucial point, namely, the juridical relation pertaining to a person theoretically free but practically ‘used’.

There are three categories of ‘not free’ persons, but the reason for the lack of freedom is specific to each. First, there is the wife, who is structurally not free in essence since she is subject to the ‘natural superiority’ of the husband. Second, there is the servant, who is economically not free. If ‘civil personality’ is absent in this case, it is because the servant does not own his means of production. To explain this, Kant poses an instructive comparison. ‘... the smith in India who goes with his hammer, anvil and bellows into houses to work on iron’ is not free ‘in contrast to the European carpenter or smith, who can offer the products of his labor for public sale’<sup>33</sup> and who is citizen in full. Finally, there is the child, who is conjuncturally unfree. I refer here to the male child since the female child will become a woman, that is, structurally unfree. A passage from Kant clarifies the ‘paradoxical’ situation of the child. After dealing with the case

of a servant who has committed a crime, he considers the case of the children of both master and servant:

Children, however, and even the children of a man who becomes a slave as a result of a crime, are always born free. It is because every man is born free in that he has not as yet committed a crime, and the costs of his education up to his majority cannot be treated as a debt to be repaid. Indeed, if he can, the slave must also educate his children without claiming the costs from them. Given the slave's lack of power, the owner of the slave therefore inherits that obligation from him.<sup>34</sup>

The child is always born free, then, and his non-freedom can only be consequent on his being a minor. What this means in concrete terms is that loss of freedom is 'acquired', if I may put it like that, only in two cases – if the child is female or if the child is to become a servant in the broadest sense.

We have seen that the category of *jus realiter personale* which seemed so homogeneous is in fact heterogeneous. The status of women, children and servants appeared to rest on a common essence, but it then became clear that for each of those persons the cause of their incapacity is different. In short, the homogeneity of this category is outlined in a different site, the site of *exploitation*. And if we only know how to read them, the texts make that perfectly clear.

Strictly speaking, there is no relation between a structural-conjunctural incapacity on the one hand and an economic incapacity on the other, nor does the opposition structural-conjunctural sustain a relation. With respect to the first opposition, the first term, *structural/conjunctural*, concerns 'nature' and the second term, *economic*, concerns 'culture'. In other words, the real opposition is one of nature to culture, when by 'culture' is meant the material conditions of existence, that is, the very notion of civil society. *Homo oeconomicus* is the producer of commodities, and he alone is the active member of civil society.

There remains, of course, the hypothesis about the official who is in the privileged position of being a servant of the State and who is thereby an active citizen. But, in a precise way, that merely reveals the class nature of the Kantian State.

With respect to the second opposition, on the one hand, the incapacity of existence – women are incapable for all time – and,

on the other hand, the conjunctural incapacity, depend on time (the period of minority), sex, and economics (the minor becoming either an owner or a servant/worker) all at the same time.

Now this disparity finds its unity only in the objective of exploitation. It is the index of the problem posed in this way: if we know the instance which justifies the exploitation of the servant by the master – the instance of the economic – we know nothing of the instance which justifies the relations husband/wife and parent/child. When Kant enquires into the basis of parental right, he writes as follows:

Just as the duty of man to himself, that is, to the humanity in his own person, gave birth to a right (*jus personale*) of the two sexes to acquire *jus realiter personale* over each other through marriage, so procreation in that community gave birth to a duty both to maintain and to take care of its fruits. They [parents] cannot destroy their child as they might their property or as if the child were, so to speak ... the work of their hands, for such a work can in no way be a free being, nor can they abandon the child to chance, for they have not merely produced an object in this state but also a citizen of the world. ... From this duty, there necessarily results the right of parents to take the child in hand ... as much from a pragmatic point of view, so that the child can sustain life and limb, as from a moral point of view, because if they do not do so, they will be blamed for having neglected their child.<sup>35</sup>

And when he poses the question of the contradiction that can exist between the juridical inequality of the married couple and their equality as individuals, he discusses juridical law in this way:

[juridical law] cannot be considered as contradicting the equality of the couple. Consequently, that domination has the sole objective of asserting, in the realisation of the common interest of the family, the natural superiority of the husband over the wife and the right to command that has its foundation in that superiority, a right which can in any case be derived from the duty relating to the unity and equality of the family from the point of view of its goal.<sup>36</sup>

The foundation of the right of the father is the duty he assumes towards all humanity in the child as citizen of the world. Which



world? *The ethical world*. In that the child and the woman owe their status to morality, it is their theoretico-practical status that is pertinent.

Their theoretical status is pertinent, for it is in morality that they must be subjects – the Kantian theoretical freedom is indeed resolved in an ethic – and in the same way their practical status is pertinent, for it is also in the name of compulsion that they are subordinated to father or husband.

It is in this way that the general opposition woman or child/servant takes on an entirely new sense. It is changed into an opposition between the ethical and economic. But we must be careful to remember that this opposition is internal to the category of *jus realiter personale* and that the object of this category is to justify subordination to the master. In other words, if I consider this category *only from the point of view of its practice*, the realised concrete objective, some important effects emerge. The Kantian ethic possesses the same class content as its, shall we say, 'economic' objective. As Engels wrote:

men, consciously or unconsciously, derive their ethical ideas in the last resort from the practical relations on which their class position is based – from the economic relations in which they carry on production and exchange.<sup>37</sup>

But we must take this further. A justification in terms of morality of the subordination of woman and child poses a problem. Why should the economic justify the relation master/servant in the one case but the ethical justify the family relation in the other case?

The briefest of answers can be given, especially if we make use of Marx. In the semi-feudal economy which was Kant's natural milieu, women and children were not engaged in the process of production. In his analysis of mechanisation, large-scale industry and, in particular, factory legislation, Marx writes:

So long as Factory legislation is confined to regulating the labour in factories, manufactories, etc., it is regarded as a mere interference with the exploiting rights of capital. But when it comes to regulating the so-called 'home labour', it is immediately viewed as a direct attack on the patria potestas, on parental authority. ... The force of facts, however, compelled it at last to acknowledge that modern industry, in overturning the

economic foundations on which was based the traditional family, and the family labour corresponding to it, had also loosened all traditional family ties.<sup>38</sup>

The ethical justification is a symptom of the functioning of the ethical. Kantian morality justifies, in law, the subordination of women and children, but the duplicity of this is already admitted in its practice, in its objective, even if that practice is that of a dying feudalism incarnate in the trinity of the father, husband and master, the trinity to be unleashed in capitalism.

In short, in that very site, Kantian morality makes a bridge between the absence of a universal subject in law – a concept which will make women and children the reserve army of capitalism in the nineteenth century – and the development of the productive forces even then heralding the arrival of that subject.



## Appendix 3

### The subject in law in Hegel's *Philosophy of Right*

#### On a break and its effects

In the course of the article on Kant, I posed as a preliminary that the relation parent/child put into play the relation of the subject to property. That meant that family relations are determined in the last instance by relations of production. And we have seen that Kant brought the right of parents under the category of *jus realiter personale*, the category which is directly born of the decomposition of the feudal world. So, it appeared that the relation of the subject to property determined the relation of the subject to the subject. That was the *true point of departure*.

Now in Kant this point of departure is inscribed only in a dotted outline. In Hegel it will become fully outlined.

Indeed, when Kant began the main part of *The Metaphysical Elements of Justice*, he gave his exposition this title:

The General Theory of Justice

*first part*

Private Law

Of Proprietary Rights in General

[*Du mien et du tien en général*]

in External Things

first chapter

of the mode of having something

external as one's property<sup>1</sup>

In other words, he posed as irreducibly different the myself and the mine. The Kantian point of departure is *that difference*, and I have analysed at length the way that difference is rooted in

material conditions of existence at the close of the eighteenth century.

If we take this further, we can say that the Kantian difference between the myself and the mine is elaborated on the difference between the *I* and the *thing*. Kant gave us the 'juridical' translation. There is, he said, '*sensible* possession and *intelligible* possession', that is, 'physical possession' and 'purely *de jure* possession'.<sup>2</sup> This means that the thing possesses a reality which is external to the subject and that the subject is able to appropriate it only in the name of a decree of reason. So: 'Consequently, it is an a priori assumption of practical reason that any and every object of my will be viewed and treated as something that has the objective possibility of being yours or mine.'<sup>3</sup>

The thing [the estate] 'appears as the inorganic body of its lord'.<sup>4</sup> At the speculative level the status of the thing determines the status of the subject, although it is necessary to specify the meaning of this domination. If, then, the subject is in the last instance identified with the thing, it follows that in that identification the thing is the subject and the subject is its predicate.

The domination of the land as an alien power over men is already inherent in feudal landed property. The serf is the adjunct of the land. Likewise, the lord of an entailed estate, the first-born son, belongs to the land. It inherits him. ... The state is individualised with the lord: it has his rank, is baronial or ducal with him, has his privileges, his jurisdiction, his political position, etc.<sup>5</sup>

We now see why the Hegelian break has its site in the very structure of the subject, because the development of the forces of production demanded both that man be liberated from the land and the land from man, both that man become for himself his own owner and that the land become the commodity that can circulate freely.

So, when we say that the Hegelian break has its site *in the very structure of the subject*, that does not mean that the subject is the objective site of the break but, quite simply, that at the speculative level it could have its site only there.

That deserves some explanation.

*On the Hegelian point of departure*

As I have already had occasion to point out, bourgeois ideology in general designates the totality of the social (economic, juridical, political) process under the notion of 'civil society'. Now this notion covers none other than the *sphere of circulation*, that is, the sphere in which commodity relations are produced. This is the sphere, remember, that is the site of the reign of exchange value, that is, the site where individuals, the agents of exchange, are all private owners, free beings who bring on to the market the commodity they own. And it is precisely in this sphere that the subject can deploy its concept: freedom. Better, this sphere appears as a 'creation' of the subject, in the sense that all creation can be only the creation of a private owner.

The Hegelian break could appear only in the imperialism of the subject, a member of 'civil society'. But that break overlapped with another, the transition from feudalism to capitalism.

It is now possible to expose that break in Hegel himself. But what has to be emphasised and what seems to me fundamental is that the break is in some way anterior to Hegel's *Philosophy of Right* and that at the very moment Hegel begins his exposition the break has already been produced. So, what Hegel will demonstrate is in no way what leads up to the break – its *genesis* – but the *effects* of a break already consummated. That is the main point, for it is possible to see in that the recognition of a latent impotence, the impotence of the theorisation of the transition.<sup>6</sup> I shall return to this point.

The reading of the very first paragraphs of the First Part, Abstract Right, gives us the key not to the break but to its effects. Indeed, the whole of the extraordinary Hegelian enterprise is resolved in the very simple given that *property is a determination of the subject*. But this position, this postulate, reopens the Kantian problematic of the difference between the I and the thing. Hegel loosens the immobilism of Kantian categories locked in the struggle between *jus ad personam* and *jus ad rem*, arguing that all right derives from the person. And that unsettles two relations – the relation subject/thing and the relation subject/subject.

I have just said that that would unsettle two relations, but the unsettling is in fact even more radical. The postulate that all production is production of a subject encloses that double relation

in itself. Indeed, since all production is production of a subject, then on the one hand the thing is produced, humanised by the subject, and on the other hand man encounters none other than the production of man. In other words, this postulate produces principally the practical effect that every (juridical) encounter of two individuals is the encounter of two private owners who are the owners of commodities.

The result is that, in posing *ab origine* the category of the subject (or, to be more precise, the category of person), Hegel poses all its determinations. Better, the category of person, given as origin, already contains all the determinations in itself to the extent that it is indeed original. Whereas with Kant we have been the audience of hard conceptual labour in order to 'do the trick' of making use of a person without possessing him, with Hegel the trick has already been done as a curtain raiser.

And now that the curtain has gone up and we have had the three traditional knocks, it is time to enter the philosophical scene. Hegel gets into position for his first appearance. He does it in his very own style, that is, with brilliance and obscurity. I now cite this debut without, I hope, surrendering to the obscure but dazzling performance:

The absolutely free will, at the stage when its concept is abstract, has the determinate character of immediacy. Accordingly this stage is its negative actuality, an actuality contrasted with the real world, only an abstractly self-related actuality – the inherently single will of a subject.<sup>7</sup>

That means that the first concrete determination of and for the objective spirit is the will of the subject. That means, then, that the idea of right is none other than the development of the concrete content which the category of the subject already conceals in itself.

Once again we must pause here, and it will be in no way a waste of time. What I have just stated, namely, that the idea of right is none other than the development of the concrete content of the category of the subject, poses a problem. How can that category, which conceals in itself its entire ultimate development, be posed as the origin of a process? To put in another way, how can a category which is the result of a process be posed as the debut of that same process? Here we are putting our finger on the question of *the speculative process itself*.

Indeed, one can perhaps pose the following question. I said before that the form of the subject in law permitted the explanation of all the earlier theoretical/practical juridical forms, and I say now that to pose this same subject (in law) as the origin of the whole dialectic of Hegel's *Philosophy of Right* reveals its speculative character. Now in a precise way this question very exactly covers the distinction Marx makes between 'concrete thought' and 'abstract determination' in the Introduction to *A Contribution to the Critique of Political Economy*. We need not spend long on this question because when the point has been elucidated the rest of the demonstration will follow of itself. So, what appears to be a detour will be recognised as a short cut.

When Marx deals with the method of political economy in the Introduction he opposes the methods of the seventeenth-century economists who began with 'the living organism, the population, the nation, the State, several States'<sup>8</sup> to those of the eighteenth-century economists who isolated 'a few decisive abstract, general relations, such as division of labour, money and value' and 'advanced to categories like State, international exchange and world market'.<sup>9</sup>

Marx writes:

The concrete concept is concrete because it is a synthesis of many definitions, thus representing the unity of diverse aspects. It appears therefore in reasoning as a summing-up, a result, and not as the starting point, although it is the real point of origin, and thus also the point of origin of perception and imagination. The first procedure alternates meaningful images to abstract definitions, the second leads from abstract definitions by way of reasoning to the reproduction of the concrete situation.<sup>10</sup>

And Marx adds the crucial thing which will permit the resolution of our problem, a resolution made out of fragments:

Hegel accordingly conceived the illusory idea that the real world is the result of thinking which causes its own synthesis, its own deepening and its own movement; whereas the method of advancing from the abstract to the concrete is simply the way in which thinking assimilates the concrete and reproduces it as a concrete mental category. This is, however, by no means the process of evolution of the concrete world itself.<sup>11</sup>

Now it is precisely that 'illusion' that I would like to pursue, to track in Hegel's *Philosophy of Right*.

When Hegel begins with the category of subject, it is indeed a question of a category constituting 'the synthesis of many definitions'. Hegel is therefore not in the position of the seventeenth-century economists who began, remember, with a 'living organism'. In a very exact way he is concerned with the correct scientific method. It consists in starting with the most simple element in order to take account of the concrete itself. I said 'he is concerned with' but it would be more exact to say 'it is tempting to believe that the Hegelian point of departure is the true point of departure'. It is tempting to say that his point of departure is scientifically correct. It is therefore precisely the *status of this point of departure* that is in question, that is, the status of the category of subject in the *treatment* it undergoes. Indeed, in Hegel that category – the result of a process of thought – is given as the origin of the real process. The Hegelian 'confusion' is the confusion of idealism itself: taking the result of a process of thought for the 'process of evolution of the concrete itself'. This last process accordingly appears as the development of the process of thought. Concretely, property in this way becomes a production of the subject rather than the subject's being the concrete/ideological reflection of the evolution of property. The result is that all the dialectic deployed in Hegel's *Philosophy of Right* can be presented as a dialectic having consciousness of its own concept, that is, of its freedom, and that the concrete determinations of the subject can be taken for the development of the will.

We can make this more precise. When we proposed before that the form of the subject in law gave us the key to all earlier forms of the law, we meant that, *qua* ultimate concrete/ideological expression of the juridical relations of bourgeois society, *qua* 'the most advanced and complex historical organisation of production',<sup>12</sup> the form of the subject in law permitted the comprehension of the historical genesis of juridical forms. That comprehension does not, however, consist in an identification. On the contrary, it consists in a specification of the different forms that juridical forms have been able to take in history. Better, it consists in the theoretical definition of the site of the law, through the concrete/ideological expression of the form of the subject in

law. And by 'site' I mean the place and the role which the law occupies in a given mode of production.

In this way it can be seen that the Hegelian debut is big with consequences.

*Subject in law and thing-in-itself*

The structure of the Hegelian subject (in law) is astonishingly simple. It is summed up in three givens which, in a way, comprise only two.

- (1) Personality essentially involves the capacity for rights and constitutes the concept and the basis (itself abstract) of the system of abstract and therefore formal right. Hence the imperative of right is: 'Be a person and respect others as persons'.<sup>13</sup>
- (2) The unconditional commands of abstract right are restricted, once again because of its abstractedness, to the negative: 'Do not infringe personality and what personality entails'.<sup>14</sup>
- (3) As immediate individuality, a person in making decisions is related to a world of nature directly confronting him, and thus the personality of the will stands over against this world as something subjective. For personality, however, as inherently infinite and universal, the restriction of being only subjective is a contradiction and a nullity. Personality is that which struggles to lift itself above this restriction and to give itself reality, or in other words to claim that external world as its own.<sup>15</sup>

The internal constitution of the subject determines the two relations subject/nature and subject/subject. But those two relations are already realised by the very constitution of the subject. Indeed, Hegel is merely deducing the consequences of his postulate. On the one hand, the posing of personality necessarily implies the means of this personality – its capacity – and the means of personality have no other utility than the posing of personality. The right of the subject is resolved in the subject in law. On the other hand, the subject enters into a relation with the thing, the non-subject, and in order to assume a real existence it

invests it with personality. In other words, the thing has a real existence only through the subject which conquers it; it is defined only through the existence of the subject itself.

I want to emphasise that in its Hegelian demonstration the relation subject/nature appears as a consequence of the formation of personality; it is deduced from its capacity. It is not that the relation to the thing makes the subject conscious of itself. It is consciousness of self that will pose the specific relation to the thing. In setting the relation 'on its feet' Marx and Engels could write:

The first premise of all human history is, of course, the existence of living human individuals. Thus the first fact to be established is the physical organisation of these individuals and their consequent relation to the rest of nature. ... Men ... begin to distinguish themselves from animals as soon as they begin to *produce* their means of subsistence, a step which is conditioned by their physical organisation. ...<sup>16</sup>

In this way we see how the conquest of nature is related to the activity of the subject. And when Hegel criticises the notion of the thing-in-itself in Kant, he does so in the name of *the activity of the subject*:

The so-called 'philosophy' which attributes reality in the sense of self-subsistence and genuine independent self-enclosed existence to unmediated single things, to the non-personal, is directly contradicted by the free will's attitude to these things.<sup>17</sup>

This is quite extraordinary – the postulate of an owning subject which is in essence private and which shatters the famous Kantian thing-in-itself!

For what does 'the free will's attitude to these things' mean? In a very exact way it means that:

A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'.<sup>18</sup>

In other words, the comportment of the free will is a comportment of an owner, and it is in the name of this



comportment that Hegel can state that there is no thing-in-itself. Again, this means that the 'mystery' of the thing-in-itself is resolved – by means of the right of ownership! This in turn throws astonishing light on the *thing-in-itself*. Indeed, if the demonstration is pushed further, the thing-in-itself is elaborated on the difference between the I and the thing, a difference which was itself 'juridically' given by the distinction between the myself and the mine, that is, by a feudal property which dominated man. In the last instance, the thing-in-itself was even here none other than the expression of a property which was immobile, fettered, and congealed in archaic relations of production. At the first attempt Hegel has put his finger on the right question. If the subject produces private property and at the same time is produced by it, there is no longer a thing-in-itself. There is only the activity of an owning subject.

### Hegel and *jura realiter personalia*

In the passage I am going to deal with now, Hegel directly criticises the Kantian category of *jus realiter personale*. Before dealing directly with the relation parent/child, I want to show how the Hegelian point of departure, the subject, is proved in action. This is a key text in that we shall witness the transition from the localised subject in law to the universal subject in law.

In Paragraph 40 Hegel treats of the immediate forms by means of which freedom is given in its immediacy. It is necessary to stress, though, the 'formality' in the Hegelian sense of the term of this immediacy. For what is meant by the immediacy of a concept – the subject – which is in itself already the 'synthesis of many determinations'? And this positing of the immediate permits the elaboration of the dialectic of consciousness; the immediate is an immediate of a process of thinking.

Further, when Hegel claims to give us the immediate forms of freedom, he also gives us the actual determinations of the subject in law: '... possession, which is *property*-ownership. Freedom is here the freedom of the abstract will in general or, *eo ipso*, the freedom of a single person related only to himself.'<sup>19</sup>

It is in this text, then, that Hegel criticises the division *jus ad personam/jus ad rem*. What is the key to this critique? It aims

rationally to prove that all right derives from the person, to prove that there is not a right deriving from the thing and a right deriving from the person but that all right is a determination of the subject. In a later paragraph Hegel further specifies his project in this extraordinary formula: 'Since property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite.'<sup>20</sup> The formula is amazing because it shows that possession itself is a determination of property. It is property that creates possession.

Now this free owning *subject structure* contradicts the Roman/Kantian distinction *jus ad personam/jus ad rem* [and *jus personale/jus reale*]. It must also be added that this emergence of the universal subject in law carries with it the appearance of the free worker and, in a correlative way, the liberation of property.

In this way, then, Hegel takes the critique just where it is needed. There is, he tells us, an extraordinary confusion in the above distinctions. Everything gets mixed up. Rights relating only to 'abstract personality as such' are mixed up with rights which 'presuppose substantial ties, e.g. those of family and political life'. And he goes on to say:

Here this much at least is clear: it is personality alone which can confer a right to things and therefore *jus ad personam* in its essence in *jus ad rem*, *rem* being taken here in its general sense as anything external to my freedom, including even my body and my life. In this sense, *jus ad rem* is the right of personality as such.<sup>21</sup>

This is the first level of the critique. There is a second. Hegel will re-establish the truth of the Roman *jus ad personam* and allow the specification of the nature of the right of the person [*droit de la personne*]. So:

Hence in Roman law, even personality itself is only a certain standing or status contrasted with slavery. ... The Roman *jus ad personam* is therefore not the right of the person as person but at most the right of a person in his particular capacity.<sup>22</sup>

And Hegel draws the following conclusion:

rights of whatever sort belong to a person alone. Objectively

considered, a right arising from a contract is never a right over a person, but only a right over something external to a person or something which he can alienate, always a right over a thing.<sup>23</sup>

This text must be analysed at two levels. First, I want to show you the dissolution of the category *jus ad personam/jus ad rem* in favour of the new category 'right of personality' [*droit de personnalité*]. Second, I want to show how Hegel thinks this extract. Then it will be possible to deal directly with the relation parent/child.

### *Right of personality*

That there should be a *jus ad rem* and a *jus ad personam* imposed two necessary types of contradiction: first, that the thing could be opposed to the subject and, second, that the person could be reified.

Take the two Hegelian conclusions: first, that *jus ad personam* is in essence *jus ad rem*, so that *jus ad rem* is right of personality as such, and, second, that rights of whatever sort relate to a person, so that right arising from a contract is right over something external to a person.

The above two conclusions can be understood as follows. There is no right that exists over a person as such. There is only right that exists over the production of the subject. In other words, only the thing can be juridically apprehended, where the thing is understood as the production of the subject.

Hence the revolutionary definition of the thing as the materialisation of the activity of the subject. I say 'revolutionary definition' advisedly because, to the exact extent that the activity is defined by labour, labour itself becomes the source of wealth.

Think of what Marx said when he opposed the mercantilist and physiocrat theories to the theory of Adam Smith: 'The abstract universality which creates wealth implies also the universality of the objects defined as wealth: they are products as such, or once more labour as such, but in this case past, materialised labour.'<sup>24</sup> And relate that to the Hegelian theory of use, the essential negative act by means of which man destroys the immediacy of the object so as to elevate it, through labour, to the rank of general

equivalent. Here is the fundamental fact. It is through labour that the thing acquires its mark, its value. And even if this value merely gives the abstract relation between need and satisfaction, it is none the less true that it is value that renders the thing universally definable.

Indeed, by 'value' Hegel means:

the quantitative terms into which that qualitative feature has been translated. One piece of property is thus made comparable with another, and may be made equivalent to a thing which is (in quality) wholly homogeneous. It is thus treated in general as an abstract, universal thing or commodity.<sup>25</sup>

It is in his departure from the bourgeois category of the subject, therefore, that Hegel begins to close in on the notion of value as the representation of human labour in general.

Remember Kant and his paralysis in the face of the thing. Remember his inordinate and sterile efforts at the liberation of human activity, the liberation of labour. Remember the servant, the half-thing, half-man hybrid. The land – understand here the historic mode of production, feudalism, that is based on a certain type of landed property – is a burden to man. And look at Hegel. The thing has undergone an absolutely fantastic mutation. It has become the objectification of the activity of the subject.

Everything can be sold, except the subject-in-itself. Man is free. He is free ... from everything, Marx will say, though we are not yet in that state.

The practical effects are considerable. They contain in embryo the entire theory of the free worker, that is, of the individual that owns his labour power. So, when Hegel deals with the alienation of personality, the example he gives us is slavery, corporeal property, the inability to become an owner or freely to dispose of one's property.<sup>26</sup> And so he writes:

Single products of my particular physical and mental skill and of my power to act I can alienate to someone else and I can give him the use of my abilities for a restricted period, because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being. By alienating the whole of my time, as crystallized in my work, and everything I produced, I would be making into another's

property the substance of my being, my universal activity and actuality, my personality.<sup>27</sup>

In other words, at the same time as the thing is none other than the materialisation of the activity of the subject, the subject is fulfilled only in the actual exercise of its production.

We are a very long way from the Kantian 'as if' and its fantastical resolution. Here we are at the immovable theoretical positing of the Hegelian point of departure, the subject. It is the very status of the subject – and that point of departure was at the same time a revolutionary break – that demands its own conservation as personality, that is, as capable of ownership.

And we must specify that the external status of human activity also contains in embryo the entire theory of alienation, the reprise of which the young Marx was able to effect.

In short, the right of personality dissolves both the opposition subject/thing and the opposition subject/subject. In their activity individuals continue to work only on the activity of the other.

*Hegel and the transition from the Roman jus ad personam to right of the person*

We must now understand how Hegel thinks the transition from the Roman *jus ad personam* to the right of the person. The understanding of this transition is important since it is a matter of theorising the displacement of a category – the category of the subject – from the ancient mode of production to the capitalist mode of production. I make no claim here to give an exhaustive account of this displacement. It is enough to make explicit the Hegelian transition in the way that he was necessarily led to pose it. Finally, we shall try to provide the real perspectives which might permit the scientific treatment of the question.

Hegel tells us that in Roman law man must be considered to have a certain *status* in order to be considered a person. Personality is itself a rank. That means that, in Roman law, property, freedom and equality are reserved for only a small number – free men. Better, Hegel tells us: 'The Roman *jus ad personam* is therefore not the right of the person as person but at most the right of a person in his particular capacity.'<sup>28</sup> It is therefore because of its

'localisation' that Roman law was unable to achieve completeness, to liberate its principle.

Personality accordingly appears as a state, a social rank, which is defined through the juridico-political framework. To be more precise, since personality is a state in virtue of its being opposed to slavery, it is slavery that constitutes personality as a state, and only the suppression of slavery will permit personality to achieve universalisation. Concretely, that means that only the constitution of men as subjects permits the true establishment of the right of the person.

For a better understanding of the transition, here is another of Hegel's texts. It is the one relating to the distinction use/ownership. In this text Hegel devotes himself to a veritable indictment of the consequences of feudalism. Through his writing we are able to see *by virtue of what* Hegel launches this attack and the actual *interplay* of which it is the expression.

My merely partial or temporary use of a thing ... is therefore to be distinguished from ownership of the thing itself. If the whole and entire use of a thing were mine, while the abstract ownership was supposed to be someone else's, then the thing as mine would be penetrated through and through by my will ... and at the same time there would remain in the thing something impenetrable by me, namely the will, the empty will, of another. As a positive will, I would be at one and the same time objective and not objective to myself in the thing – an absolute contradiction. Ownership therefore is in essence free and complete.<sup>29</sup>

This exordium is brilliant in its reference to the struggle against feudality: 'not in the restricted sense of the right of feudalists but as the notion of economic and social history defined by a historic mode of production based on landed property.'<sup>30</sup>

And in 1776, in his pamphlet on the disadvantages of feudal rights, Boncerf was already writing: 'You ask for the source of such barbaric laws and rights and you ask why each owner of a fund does not have complete ownership of it, however burdened he may be?'<sup>31</sup>

Hegel places himself in the direct line of the *liberation of the land*. A thing cannot both be mine and belong to another. A thing cannot be subject to a perpetual life interest, to hereditary dues, on pain

of contradicting the very principle of property. The red line of this claim is the abolition of all feudal privileges.

All this is quite clear, and I shall economise on Hegel's arid discussion of the distinction between *dominium directum* and *dominium utile*, a distinction which leads to the demonstration that the essence of property is income. It is enough to read the final justification of his fight, or, rather, the legitimization. This is fascinating:

It is about a millennium and a half since the freedom of personality began throughout the spread of Christianity to blossom and gain recognition as a universal principle from a part, though still a small part, of the human race. But it was only yesterday, we might say, that the principle of freedom of property became recognized in some places. This example from history may serve to rebuke the impatience of opinion and to show the length of time that mind requires for progress in its self-consciousness.<sup>32</sup>

In other words, the liberation of property, condition of freedom of the person, is accomplished by the actual progression of the spirit. So, if 'the true subject of history is indeed movement', that is, 'the transition from the particular to the universal in each epoch',<sup>33</sup> then this movement is the very movement of the freedom of property.

That conclusion is explained by the double movement of the spirit:

It is because the Principle is transformed that reality must be transformed (transition from one epoch to another), but it is also because reality is transformed under the action of men that the taking of consciousness becomes possible. In this way the study of objective conditions enables Hegel to make unacknowledged concessions to materialism.<sup>34</sup>

It is therefore in starting from the subject (in law) as a modern category that, by restricting himself to setting out its determinations (property/freedom-equality), Hegel 'rediscovers' the reality of the transition from Roman law to the person. But, in a precise way, he rediscovers it in the very postulate of the subject, in this predetermined bourgeois category in which neither break nor revolution is ever produced but only that concretely

ineffective dialectic of consciousness. The 'need' of the spirit in this way becomes the actual pertinence of the transition.

In short, the *displacement* of the category of the subject is given as the transition from a lesser to a greater subject, a transition effected in the actual consciousness of the subject.

Marx and Engels have dealt with the problem of the 'reprise' of Roman law by the bourgeoisie in many texts. From *The German Ideology* onwards they were arguing:

With the Romans the development of private property and civil law had no further industrial and commercial consequences, because their whole mode of production did not alter ... first in Italy and later in other countries, the highly developed Roman civil law was immediately adopted again and raised to authority.<sup>35</sup>

And Marx makes the point in a more specific way in 'The Chapter on Capital' in the *Grundrisse*:

Equality and freedom are thus not only respected in exchange based on exchange values but, also, the exchange of exchange values is the productive real basis of all *equality* and *freedom*. As pure ideas they are merely the idealized expressions of this basis; as developed in juridical, political, social relations, they are merely this basis to a higher power. Equality and freedom as developed to this extent are exactly the opposite of the freedom and equality in the world of antiquity, where developed exchange value was not their basis, but where, rather, the development of that basis destroyed them. Equality and freedom presuppose relations of production as yet unrealized in the ancient world and in the Middle Ages. ... It is, consequently, equally clear that although this legal system [*sc.* Roman law] corresponds to a social state in which exchange was by no means developed, nevertheless, in so far as it was developed in a limited sphere, it was able to develop the *attributes of the juridical person, precisely in the individual* engaged in exchange, and thus anticipate (in its basic aspects) the legal relations of industrial society, and in particular the right which rising bourgeois society had necessarily to assert against medieval society. But the development of this right itself coincides completely with the dissolution of the Roman community.<sup>36</sup>



In other words, in Rome the category of the subject is, if one may use the expression, 'ahead of' the mode of production. That explains both the fact that the category had a 'local' character and that it had a content opposed to the basis of production. In addition, when the rising bourgeoisie effects a 'reprise' of Roman law it does so in a different respect and in a different way: in a different respect because it is in a mode of production which tends to make exchange value the basis of production, and in a different way in that it is as a dominant category. In Rome the subject (the person, the citizen) is subordinate to an all whereas in the rising bourgeoisie the subject expresses dominant relations of a less-developed all. The subject, the subordinate category, becomes the dominant category. I can only quote Marx:

One may, nevertheless, conclude that the simple categories represent relations or conditions which may reflect the immature concrete situation without as yet positing the more complex relation or condition which is conceptually expressed in the more concrete category.<sup>37</sup>

What this amounts to is that the reprise of Roman law by the bourgeoisie is a reprise which develops in the subject what was already there in embryo, namely, the determinations of exchange value: property/freedom-equality. And this is precisely the evolution of the productive forces operating this qualitative leap. It is the exigency of the birth of the free worker separate from the means of production.

So the Hegelian 'transition' is both true and false. It is true in that it poses the subject as determinant, false in that what appears as determinant is none other than a category which is itself the expression of a mode of production.

No doubt I have said too much or not enough on this question. But it is certain that the problems raised by the displacement of the categories are on today's philosophical agenda. With Hegel we have arrived at the *revolutionary result* that every man is a subject in law. We shall study the effects of that on the relation parent/child.

A preliminary word – to tackle the relation parent/child is to depart from any obviously simple statements made by Kant and Hegel. For in the course of my study it has emerged gradually that the issue relates to a whole juridico-political system. To simplify, I am saying that it has been necessary to elucidate the *status of the*

*subject*. Now, that is problematic. Why should an examination of the family put the entire juridical edifice at issue? Why should this entirely privileged site be constituted?

In answer to those questions, I propose a theoretical indication, and for the moment the reader is not obliged to 'believe' it. I suggest that the bourgeois family is constituted, *in the last instance, on the transmission of patrimony*, and that the transmission of patrimony is none other than *the juridico-political form of capital*.

Again, it is in the family that there is developed the 'always-already' ideological subject represented by the child. Now this double function of the bourgeois family – hereditary transmission and constitution of the subject – would permit the opening of new and rich perspectives on psychoanalysis, even if we are not well enough equipped today to explore them scientifically.

After that brief word we can now pursue the study of Hegel's text.

### *The family in Hegel's Philosophy of Right*

For Hegel the family constitutes the first substantial position of the Spirit. For the first time the individual person lives in an all which goes beyond him. For the first time the subjective is united with the objective. We know the other two moments of this union: civil society and the State.

Right from the start I would like to denounce the truly delirious character of this construction.

Indeed, from First Part: Abstract Right onwards, all the determinations of the subject are posed, and we now know in what way this is done. Hegel will take up these determinations again at another level, namely, the social conditions of the concrete life of the subject: the family, civil society, and the State. But not only are these determinations the same as those of bourgeois society but also they are deduced from man's acquisition of consciousness of his concept. It is because the person has consciousness of his pure existence and then of the ineffective absoluteness of himself in the good and in moral certainty that man decides to live 'concretely', that is, 'socially', that is, again, 'in a bourgeois way'. Objective or realised morality is in this way presented as a *social enrichment of the subject*, or, if you

prefer, as a hallucinated re-distribution of the juridico-political by means of the concept. In other words, the concept which has played us the nasty trick of disorganising the social all now plays us the nasty trick of re-organising it around itself. And the concept, here, is the subject of market society.

This gives us the line of force of family relations. It is a matter of describing the bourgeois family. The child has finally become a subject in law. 'Children are potentially free and their life directly embodies nothing save potential freedom. Consequently they are not things and cannot be the property either of their parents or others.'<sup>38</sup> From the start children are beings destined for ownership, that is, destined for 'self-subsistence and freedom of personality' and destined for 'the level on which they have power to leave the natural unity of the family'.<sup>39</sup>

The child, the subject in law, is the *subject of exchange*. It is with this conception as his starting point that Hegel can pass judgment on Roman law. What was the effect of that? Well, in Roman law, children were 'from their father's point of view "things"'. Hence he was legally the owner of his children, although, of course, he still also stood to them in the ethical relation of love.<sup>40</sup> In this way, Hegel tells us, 'the two qualities "being a thing" and "not being a thing" were united, though wrongly.' This wrongness [*anti-juridique*] is differently characterised by Hegel. For him it is a question of 'an unjustifiable and unethical proviso', a 'gangrene of the ethical order at the tenderest point of its innermost life'.<sup>41</sup> And later Hegel tells us of 'the harsh and unethical legal system of Rome'.<sup>42</sup>

But to have the final word on the matter, look at the text where Hegel treats of the evolution of Roman law. He reminds us of how the son passed out of his father's *potestas* after three manumissions and three sales and, in particular, of how the daughter could inherit from her father. In two words he shows how the Roman rights of succession passed from the agnatic family to the cognatic family, that is, from descent in the male line, which could extend to members of the gens, to natural kinship resting on consanguinity. And Hegel qualifies this transition when he says: 'Later, with the growing feeling for rationality, the unethical provisions of laws such as these and others were evaded in the course of their administration.'<sup>43</sup> And in the very same text Hegel attacks the consequences of feudal rights of succession: exclusion

of daughters from inheriting, right of the eldest child, *substitutiones*, and *fideicommissa*. (Cf. Article 896, Civil Code: 'Substitutions are prohibited. Any disposition by means of which the donee, the appointed heir or the legatee, will be charged with holding for or rendering to a third party will be null.') He justifies his struggle in this way: 'The institution ... is an infringement of the principle of the freedom of property. ... And besides, such an institution depends on an arbitrariness which in and by itself has no right to recognition. ...'<sup>44</sup>

So, we now know what is at issue – freedom of ownership. The family relations of Rome are 'unethical' and feudal family relations are 'arbitrary' and irrational because they are obstacles to the mobility of landed property. *Liberation of property is the correlate of family freedom*.

In their study of the division of labour, Marx and Engels said that the division of labour:

was originally nothing but the division of labour in the sexual act, then the division of labour which develops spontaneously or 'naturally' by virtue of natural predisposition (e.g. physical strength), needs, accidents, etc.etc.<sup>45</sup>

Following this they argue:

The division of labour in which all these contradictions are implicit, and which in its turn is based on the natural division of labour in the family and the separation of society into individual families opposed to one another simultaneously implies the *distribution*, and indeed the unequal distribution ... of labour and its products, hence property ... the first form of which lies in the family, where wife and children are the slaves of the husband. This latent slavery in the family, though still very crude, is the first form of property, but even at this stage it corresponds perfectly to the definition of modern economists, who call it the power of disposing of the labour-power of others.<sup>46</sup>

This gives us the true key to Hegelian 'rationality'. It gives us the political significance of his attack. The category of the subject in law determines family equality, as it does the equality of all labour. I apologise for quoting at length from famous texts, but,

as Hegel himself used to say, what is well known is not well known precisely because it is well known.

In opposing the capitalist mode of production to other modes of production, Marx and Engels write:

From the first point, there follows the premise of a highly developed division of labour and an extensive commerce; from the second, the locality. In the first case the individuals must have been brought together, in the second they are instruments of production alongside the given instrument of production. ... In the first case, that of the natural instrument of production, individuals are subservient to nature; in the second, to a product of labour. In the first case, therefore, property (landed property) appears as direct natural domination, in the second, as domination of labour, particularly of accumulated labour, capital. The first case presupposes that the individuals are united by some bond: family, tribe, the land itself, etc.; the second, that they are independent of one another and are only held together by exchange. In the first case, what is involved is chiefly an exchange between men and nature in which the labour of the former is exchanged for the products of the latter; in the second, it is predominantly an exchange of men among themselves.<sup>347</sup>

There is an extraordinary richness in this text and we see once more all the Hegelian couples, all the relations which were fixed by Kant but which are now liberated:

- universal/local
- man-thing/separation of the worker from the means of production (subject)
- subordination of man to nature/subordination to the product of labour
- domination of landed property/domination of accumulated labour
- union of the individual in the family, the tribe, the earth/independence of individuals
- man-nature exchange/exchange between men

The shattering of the family through the universal subject accordingly appears to us as the necessary expression of capitalist relations of production. It would only remain to show how rising

capitalism has made of the family one of the privileged sites of the reproduction of relations of production and to take up again the ruthless analysis Marx and Engels engaged in, ruthless because scientific.