

Evgeny Pashukanis

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Marxism**

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# Introductory Note

Pashukanis' place in the history of legal philosophy and legal practice is secure primarily due to his treatise **The General Theory of Law and Marxism**. This small book, first published in 1924, has now been translated into several Western and Eastern languages, but the English translation of the first edition appears for the first time below.

When **General Theory** first appeared it is doubtful that anyone, least of all Pashukanis himself, could have foreseen its immediate success and the meteoric rise of its author within Marxist legal philosophy and the Soviet legal profession. Pashukanis was merely one of a dozen authors in the Soviet Union to publish on the Marxist theory of law and state during the years 1923 to 1925. In fact, he was one of the less well-known authors whose works appeared during this early flowering of Soviet legal philosophy. It was a crowded and distinguished field which included the Marxist philosopher Adoratsky; the pupil of Petrazhitzky, M.A. Reisner; the jurist and civil war hero Nikolai Krylenko; and of course Piotr Stuchka, an Old Bolshevik and the Soviet Russian founder of Marxist legal philosophy. Nonetheless, Pashukanis' **General Theory** was feted by the reviewers and quickly came out in successive editions which included several printings. Few other authors in this period had their books reprinted, let alone issued in a new edition.

No one was more forthcoming in his praise of the young Pashukanis than Stuchka. Stuchka had pioneered the post-Marxian critique of bourgeois jurisprudence, postulating that law is a class concept with an empirical basis in social material interrelationships. With the publication of Pashukanis' critique of bourgeois jurisprudence, Pashukanis recognized him as a comrade-in-arms in the "revolution of the theory of law". Stuchka's praise thrust Pashukanis from academic obscurity to the forefront of the "revolution of the law". Stuchka readily conceded that Pashukanis' commodity exchange theory of law supplemented and generally superseded his own "incomplete and greatly inadequate general doctrine of law".

Nevertheless, in the first edition of **General Theory**, Pashukanis was critical of Stuchka's definition of law, arguing that the effect of Stuchka's perspective was that legal relationships were indistinguishable from social relationships in general. In the second edition of **General Theory**, published in 1926, Pashukanis reiterated this criticism, insisting that "the elements which chiefly provide the material for the development of the legal form can and should be segregated from the system of relationships which are responsive to the dominant class ...".

Pashukanis had resolved the problem of Stuchka's definition by specifying that the fact of equivalence, based on commodity exchange, was the distinctive characteristic of the legal relationship and that it was this which distinguished law from all other social relationships. The second edition of **General Theory** was met by an equally

positive reception. A reviewer in the newspaper **Izvestiia**, in particular, credited Pashukanis with the perfection of Stuchka's initial definition. **Pravda's** reviewer of the second edition essentially subscribed to Pashukanis' theory as well. These favourable reviews, among others, were particularly important, moreover, because they appeared in the political press and therefore implicitly signified formal and authoritative approval of Pashukanis' theory.

The second edition of **General Theory** appeared in a more attractive format reflecting the new prestige that the author and his book had acquired. This was a corrected and supplemented edition which entailed raising some material from footnotes to text, and which generally clarified certain parts of the text through brief emendations. For instance, on the state – an underdeveloped topic in the first edition – Pashukanis added:

Even if legal intercourse can be conceived in terms of pure theory as the reverse side of the exchange relationship, its practical realization nevertheless requires the presence of general patterns more or less firmly established, the elaborate formulation of rules as applied to particular cases, and finally a *special organization* [the state] which would apply these patterns to individual cases and guarantee that the carrying out of the decisions would be compelled.

Elsewhere in the second edition, Pashukanis refined and sharpened his statements on the relationship between law and feudalism declaring, for instance, “explanation of the contradiction between feudal property and bourgeois property must be sought in their different exchange relationships”. The third edition of **General Theory** appeared in 1927. It entailed only marginal changes of the revised second edition, and served as the basis for the first translation into English of Pashukanis' **General Theory**. [\[1\]](#)

The third edition of **General Theory** subsequently encompassed several printings, and eventually foreign translations, whereby its author and his commodity exchange theory of law entered and acquired their place in the history of legal philosophy.

## Note

[1.](#) See J. Hazard (ed.), **Soviet Legal Philosophy** (1951), Harvard University Press, Cambridge, translated by H. Babb, pp.111-225.

## Abbreviations

**LCW:** V.I. Lenin, **Collected Works** (1960-70), Foreign Languages Publishing House, Moscow, 45 volumes.

**MESW:** K. Marx and F. Engels, **Selected Works** (1970), Progress Publishers, Moscow, 3 volumes.

**Sochinenii:** Vladimir Il'ich Lenin, Sobranie **Sochinenii** (1920-1926), Moscow, 20 volumes in 26 books.

# INTRODUCTION

## The Tasks of the General Theory of Law

The general theory of law may be defined as the development of the basic, i.e. the most abstract juridic concepts. The latter include, for example, such definitions as “legal norm”, “legal relation”, “subject of law” etc. Because of their abstract nature, these concepts are equally applicable to any branch of law; their logical and systematic meaning remains the same irrespective of the specific content to which they are applied. No one would deny, for example, that the concepts of a subject of civil law and a subject of international law are subordinate to the more general concept of a subject of law as such and that, therefore, this category may be defined and developed independently of its specific concrete content. On the other hand, if we remain within the limits of any one branch of law, then we may say that these basic legal categories do not depend on the specific content of legal norms, in the sense that they retain their significance whatever the changes in the specific material content. [1]

We therefore conclude that developed juridic thought, whatever the material to which it is applied, cannot do without a certain number of highly abstract and general definitions.

Nor may our Soviet jurisprudence do without them if it is to remain jurisprudence, i.e. if it is to answer to its immediate practical tasks. The basic, i.e. formal, legal concepts continue to be in our codes and in the commentaries corresponding to them. The method of legal thought also remains in operation with its specific approaches.

But does this prove that the scientific theory of law must be occupied with the analysis of these abstractions? A rather widespread view assigns a purely artificial and technical significance to the basic and most general legal concepts. Dogmatic jurisprudence, we are informed, uses these designations for the purpose of convenience and only for convenience. They have no other theoretico-cognitive significance. However, the fact that dogmatic jurisprudence is a practical, and in a certain sense a technical discipline, still does not provide grounds for the conclusion that its concepts may not enter into the structure of the corresponding theoretical discipline. [2] Political economy itself began its development with practical questions primarily of monetary circulation – it originally intended to show “the methods by which governments and nations acquire wealth”. Nevertheless, in these technical suggestions we already find the bases of those concepts which, in deeper and in enriched form, entered the structure of a theoretical discipline political economy.

Is jurisprudence able to develop into a general theory of law without thereby transforming itself either into psychology or into sociology? Is it possible to analyse the basic definitions of the legal form in the way that political economy analyses the

basic and most general definitions of the form of a commodity or of value? These are questions whose solution depends on the possibility of considering a general theory of law as an independent theoretical discipline.

Sociological and psychological theories (sic) of law are distinguished by the fact that they simply ignore this problem. From the very beginning, they operate with concepts of an extra-juridical nature, and if they also examine legal definitions, then it is only for the purpose of declaring them “fictions”, “ideological fantasies”, “projections” and so on. Upon first sight this naturalist or nihilist approach undoubtedly commands a certain sympathy, and particularly so if one contrasts it with the ideological theories of law which are saturated throughout with teleology and moralizing. After lofty phrases on “the eternal idea of law” or “the absolute significance of the individual”, the reader seeking a materialist explanation of law turns with great interest to theories which treat law as the result of a struggle of interests, as a phenomenon of state coercion, or even as a process played out in the real human psyche. Many Marxist comrades have thought it sufficient to introduce the element of class struggle into these theories, to obtain a truly materialist Marxist theory of law. As a result, however, we obtain a history of economic forms with a more or less weak legal colouring, or a history of institutions, but by no means a general theory of law. [3] Moreover, on the one hand bourgeois jurists, Gumpłowicz for example, in trying to present more or less materialist views, consider themselves obliged, so to speak, *ex professo*, to ponder the arsenal of basic legal concepts even if only to declare them artificial and conventional constructs. Marxist authors, on the other hand, as individuals with no responsibilities to jurisprudence, simply and silently have usually avoided formal definitions of the general theory of law, devoting all their attention to the concrete content of legal norms and the historical development of legal institutions. [4]

In refusing to analyse basic legal concepts, however, we obtain only a theory which explains the development of legal regulation by the material needs of society and, consequently, the correspondence of legal norms to the material interests of given social classes; but legal regulation itself, despite the wealth of historical content which we embed in it as a concept, remains analysed as a form. Instead of seeing the completeness of its internal parts and relationships, we will be forced to use poor and approximately observed characterizations of law – so approximate that the borders between the legal and other spheres are entirely erased. [5]

Such an approach can hardly be considered correct. The history of the economy may be described entirely without the finer points and details, say, of the theory of rent or wages. But what could we say about a history of economic forms in which the basic categories of economic theory – value, capital, profit, rent etc. – were diffused in a vague and undifferentiated concept of economy? We are not even speaking of how the attempt to present such history as a theory of political economy would be received. However, in the area of the Marxist theory of law, this is in fact the situation. It is of course possible to console oneself with the fact that even the jurists themselves are still seeking, and cannot find, definitions for their concept of law. However, if most of the textbooks on the general theory of law usually begin with a certain formula, well-

defined and externally exact, in fact even this formula gives us merely a confused, approximate and undifferentiated concept of law in general. It may be affirmed as axiomatic that we understand law least of all from these definitions and that, on the contrary, the relevant scholar will allow us a better understanding of the form of law the less attention he devotes to its definition.

The cause of this is entirely clear: such a complex concept as law cannot be exhausted by defining it according to the rules of the school of logic *per genus et differentia specifica*.

Unfortunately, even those few Marxists who have dealt with the theory of law have not avoided the temptations of scholastic wisdom. Renner, for example, grounds his definition of law in the concept of an imperative addressed by society (as a person) to the individual. [6] This simple construct seems entirely sufficient for him to investigate the past, present and future of legal institutions.

The basic flaw in formulae of this type is their inability to embrace the concept of law in its actual movement, revealing the plenitude of its internal parts and relationships. Instead of displaying the concept of law in its most final and exact form, and thereby showing the significance of this concept for a specific historical period, they present us with purely verbal general propositions about “external authoritarian regulation” – which apply equally well to all periods and stages of development of human societies. A complete analogy to this is provided by those attempts to give a definition of the concept of economy (in political economy) which would include all historical periods. If economic theory consisted in such fruitless scholastic generalizations, it would hardly deserve the title of a science.

Marx, as is well known, begins his research with the analysis of commodities and value, and not with opinions about economy in general. This is because economy, as a particular sphere of relations, is differentiated with the appearance of exchange. So long as the relationships of exchange-value are absent, economic activity may only with difficulty be separated from the remaining totality of life functions with which it constitutes a single synthetic whole. A purely natural economy may not be the object of political economy as an independent science. Only commodity-capitalist relationships comprise, for the first time, the object of political economy as a distinct theoretical discipline which uses its own specific concepts. [7]

Our observations here may be transferred to the general theory of law. The basic juridic abstractions, which are produced by the development of juridic thought, and which are the closest definitions of the legal form, in general reflect specific and very complex social relationships. The attempt to find a definition of law which would correspond not only with these complex relationships, but also with “human nature” or “human relationships” in general, must inevitably lead to scholastic and purely verbal formulae.

When we have to move from these inanimate formulae to the analysis of the legal form – as we meet it in reality – we inevitably encounter a series of difficulties. These

difficulties are only overcome by strategies which are obviously contrived. For example, having been given a general definition of law, we are usually taught that in fact there are two types of law: subjective and objective, *ius agendi* and *norma agendi*. Moreover, the possibility of such a dichotomy is not at all anticipated in the definition itself; it therefore becomes necessary either to deny one of the species, declaring it to be a fiction, a fantasy etc. or to establish a purely external link between the general concept of law and its two species. However, this duality in the nature of law – its dissolution into a norm and a power – has a significance no less essential than the dichotomy of a commodity into exchange-value and use-value.

Law as a form cannot be understood outside of its immediate definitions. It exists only in antitheses: objective law/subjective law, public law/private law etc. These basic limitations must, however, be attached mechanically to the basic formula if the latter is constructed with the intention of it embracing all periods and stages of social development, including those which did not even know such contrasts.

Only bourgeois-capitalist society creates all the conditions necessary for the legal element in social relationships to achieve its full realization. If one leaves aside the culture of primitive peoples where law can only with difficulty be segregated from the general mass of social phenomena of the normative order-then even in medieval Europe, legal forms were distinguished by their extreme underdevelopment. The aforementioned contrasts were combined into a single undifferentiated whole. There was no distinction between law as an objective norm and law as a power. A norm of a general nature was not distinguished from its specific applications; correspondingly, judicial and legislative activities were merged. The contrast between public and private law was entirely hidden both in the organization of the Mark and the organization of feudal power. There was no contradiction, so characteristic of the bourgeois period, between man as a private person and man as a member of a political union. A long process of development was necessary in order for the boundaries of the legal form to crystallize with full distinctiveness. The main arena of this was the city.

The dialectical development of basic juridic concepts therefore gives us not only the form of law, in its most overt and elemental nature, but also reflects the real historical process of development. This is nothing other than the process of the development of bourgeois society.

Objections may be raised that the general theory of law, as we understand it, is a discipline which deals only with formal and contrived definitions and artificial concepts. No one doubts that political economy studies something which really exists, although Marx warned that such objects as value, capital, profit, rent etc. “cannot be discovered with the aid of a microscope and chemical analysis”. The theory of law operates with abstractions which are no less “artificial”; the methods of research in the natural sciences cannot discover a “legal relation” or a “subject of law”; but very real social forces are hidden behind these abstractions.

From the perspective of a man living in a natural economic environment, the economics of value relationships would appear just as artificial a distortion of simple

and natural objects as juridic reasoning appears to the good judgement of the “average” man.

To think that the basic concepts which express the meaning of the legal form are the product of arbitrary thought processes. is to fall into the same mistake which Marx noted among the teachers of the eighteenth century. As the latter, in Marx’s words, were unable to account for the origin and development of the puzzling forms assumed by social relationships, so they sought to denude them of their strange appearance by ascribing them to a conventional origin.

It is impossible to deny that a significant proportion of juridic concepts in fact have a very transient and artificial nature. Such, for example, are most of the concepts of public law. We shall try to explain the causes of this phenomenon below. But now we shall confine ourselves to the observation that the form of value, under conditions of a developed commodity economy, becomes universal; it assumes, along with its original expressions, a series of derivative and ephemeral expressions which emerge as the selling price of objects which are not products of labour (land), and which are completely unrelated to the process of production (e.g. military secrets bought from a spy). This does not prevent value, as an economic category, from being understood from the perspective of the socially necessary labour expenditures required for the production of one product or another. Likewise, the universality of the legal form must not prevent us from searching for the relationships which constitute its real foundation. We will show that those relations which are defined as public law are *not* this foundation.

Another objection to our conception of the tasks of the general theory of law consists in the argument that the abstractions which lie at the basis of the analysis are recognized as essential only to bourgeois law. Proletarian law, we are told, must find other generalizing concepts for itself, and indeed this search should constitute the task of the Marxist theory of law.

At first sight this appears as a serious objection; yet it rests on a misunderstanding. To demand its own new generalizing concepts for proletarian law appears to be a revolutionary direction *par excellence*. But this is to proclaim the immortality of the legal form since it tries to wrench this form away from those definite historical conditions which enable its full fruition, and to declare it capable of constant renewal. The withering away of the categories (but not the injunctions) of bourgeois law does not signify their replacement by new categories of proletarian law. Similarly, the withering away of the categories of value, capital, profit etc. during the transition to socialism, will not mean the appearance of new proletarian categories of value, capital, rent etc.

The withering away of the categories of bourgeois law will under these conditions signify the withering away of law in general, i.e. the gradual disappearance of the juridic element in human relationships.

As Marx pointed out in **The Critique of the Gotha Programme**, the transitional period is characterized by the fact that human relationships will for a time involuntarily be limited by the “narrow horizon of bourgeois law”. It is interesting to analyse what, in Marx’s opinion, constitutes this narrow horizon of bourgeois law. Marx assumes a social order in which the means of production belong to an society, and in which the producers do not exchange their products. He thus takes a stage which is higher than the New Economic Policy in which we live. The market relationship has already been completely replaced by an organizational relationship and, in accordance with this, “the labour expended in products is not reflected in the form of value essential to those products, since here, in contrast to capitalist society, individual labour no longer exists in an indirect way but directly as a component part of collective labour”. [8] But even with the elimination of the market and market exchange, the new communist society, in Marx’s words, must for some time bear “in every respect, economically, morally and intellectually, the clear imprint of the old society from whose womb it appeared”. This is reflected in the principle of distribution, whereby “the individual producer receives (after deductions have been made) from society exactly what he contributes to it”. Marx stresses that despite the radical changes in content and form, “the same principle prevails as that which regulates the exchange of commodities: a definite amount of labour in one form is exchanged for the same amount of labour in another form”. To the extent that the social relationships of the individual producer continue to preserve the form of equivalent exchange, so too they continue to preserve the form of law. “By its very nature, law is merely the application of an equal scale.” But this ignores inherent differences in individual ability, and therefore “by its content this law, like every law, is a law of inequality”. Marx says nothing about the necessity of state power which would forcefully ensure the fulfilment of these norms of “unequal” law preserving its “bourgeois limitations”, but this is necessarily understood. [9] Once the form of the equivalent relationship exists, this means that the form of law exists, that the form of public, i.e. state authority exists, which therefore remains for a period even when classes no longer exist. The complete withering away of state and law will be accomplished, in Marx’s opinion, only when “labour has ceased to be a means of life and has become life’s prime want”, when the productive forces have expanded with the all-round development of the individual, when everyone labours voluntarily in accordance with his own abilities, or, as Lenin says, “when the individual does not calculate with the heartlessness of a Shylock whether he has worked half an hour longer than anyone else”, in a word, *when the form of equivalent relations will be finally overcome*.

Marx therefore envisioned the transition to developed communism, not as a transition to new forms of law, but as the withering away of the legal form in general, as the liberation from this inheritance of the bourgeois age which the bourgeoisie was itself condemned to endure.

At the same time Marx indicates that the basic condition for the existence of the legal form is found in the economy, in the matrix of labour expenditures according to the principle of equivalent exchange, i.e. he revealed the innermost connection between

the form of law and the form of commodities. Depending on the condition of its productive forces, a society which is compelled to preserve equivalent exchange between labour expenditure and compensation in a form even remotely resembling the exchange of commodity values, will be *compelled* also to preserve the form of law. Only proceeding on this basis is it possible to understand why a whole series of other social relationships assume a legal form. But therefore to conclude that courts or laws will always remain, or that even under maximum economic prosperity certain crimes against the person etc. will not disappear, is on the contrary to identify secondary and derivative elements as the main and basic. Indeed, even advanced bourgeois criminology has theoretically concluded that the struggle against crime may be seen as a medical-pedagogical task for whose solution the jurist-with his “categories of crime”, codes, concepts of guilt, “full or diminished responsibility”, with his fine distinctions between participation, abetting and inciting etc.-is perfectly unnecessary. And if this theoretical belief has not yet led to the elimination of criminal codes and judges, then this is because transcending the form of law is related not only to advancing beyond the horizons of bourgeois society, but also to the radical liberation from all remnants of the past.

In criticizing bourgeois jurisprudence, scientific socialism must model itself on the criticism of bourgeois political economy furnished by Marx. For this it must first repair to enemy territory. In other words it must not discard those generalizations and abstractions which were developed by bourgeois jurists who proceeded from the needs of their time and class, but must put them at the basis of its analysis to reveal their true significance, that is, the historical formation of the legal form.

Every ideology disappears with the social relations which produced it. But this final disappearance is preceded by a moment when an ideology, under the blows of criticism levelled at it, loses its ability to mask and surround the social relations from which it arose.

The expose of the roots of an ideology is a true sign of its imminent end. As Lassalle says, “the dawn of a new age always consists in the consciousness of what the previous reality actually was.” [\[10\]](#)

## Notes

[1.](#) Of course these most general and simplest juridic concepts are the result of the logical treatment of the norms of positive law. They represent the latest and highest product of conscious creativity in comparison with the randomly formed legal relationships and the norms which express them.

[2.](#) One may agree with Karner [the pseudonym used by Karl Renner – *eds.*] that the science of law begins where jurisprudence ends. But it does not follow from this that

the science of law must simply discard those basic abstractions which reflect the basic essence of the legal form.

3. Even Comrade Stuchka's **The Revolutionary Role of Law and State** (1921 Moscow), which deals with a series of problems of the general theory of law, does not treat these concepts systematically. His discussion accentuates the class content of the historical development of legal regulation in comparison with the logical and dialectical development of the form itself

4. It should be noted that in discussing juridic concepts Marxist authors commonly and primarily refer to the concrete content of legal regulation inherent in a specific period, i.e. that which people at a specific stage of development consider to be law. However, it is undoubtedly true that Marxist theory must study not only the material content of legal regulation in various historical periods, but that it must also provide a materialist interpretation of legal regulation *per se* as a definite historical form.

5. An example of how richness of historical exposition can co-exist with the most incomplete outline of the legal form is found in M. Pokrovsky, **Essays on the History of Russian Culture** (1923), Moscow, 2nd edition, vol.1, p.16.

6. Law is also defined as coercive norms issued by state authority in Bukharin's **Historical Materialism** ... All these definitions stress the connection between the concrete content of legal regulation and economics. At the same time, however, they attempt to exhaust the legal form by defining it as state-organized coercion. In essence, this goes no deeper than the crude empirical applications of the most pragmatic or dogmatic jurisprudence-whose defeat must constitute the task of Marxism.

7. "Political economy begins with *commodities*, begins from the moment when products are exchanged for one another – whether by individuals or by primitive communities." F. Engels, *Review of Marx's Contribution to the Critique of Political Economy* (1859), MESW, vol.1, p.514.

8. K. Marx, **Critique of the Gotha Programme** (1875), MESW, vol.3, p.19.

9. Lenin concludes in **State and Revolution**: "With respect to the distribution of products for *consumption*, bourgeois law of course inevitably presupposes a *bourgeois state*, because bourgeois law is nothing without a *coercive* apparatus capable of *enforcing* adherence to the norms of law. It follows that for a certain time bourgeois law is effective under communism, but that so also is the bourgeois state without the bourgeoisie!" V.I. Lenin, **State and Revolution** (1917), LCW, vol.25, p.471.

# CHAPTER I

## Methods of Constructing the Concrete in the Abstract Sciences

Every generalizing science, in studying its subject matter, turns to one and the same reality. One observation, for example the observation of the movement of heavenly bodies across the meridian, may provide conclusions for both astronomy and psychology. And one fact, ground rent for example, may be the object of political economy or law. The difference between various sciences depends, therefore, essentially on their respective methodological and ontological approaches. Every science has its particular method, and by this method it seeks to reproduce reality. Moreover, each science constructs a concrete reality with all its wealth of forms, relations and dependencies, as the result of the combination of the most simple elements and abstractions. Psychology seeks to reduce consciousness to its simplest elements. Chemistry solves the same task with respect to substances. When in fact we cannot reduce reality into simpler elements, abstractions come to our aid. The role of abstractions is extremely important in the social sciences. The greater or lesser the perfection of abstraction is determined by the maturity of a given social science. Marx brilliantly explains this with the example of economic science.

It would seem entirely natural, says Marx, to begin research with the concrete totality, with the population living and producing in specific geographical conditions; but this population is but an empty abstraction without the classes which constitute it; in their turn, the latter are nothing without the conditions of their existence, conditions which are wages, profit and rent. The analysis of these assumes the simplest categories of price, value and, finally, commodities. Proceeding from these simplest definitions, the political economist reconstructs the concrete totality not as a chaotic, diffused whole, but as a unity replete with internal dependencies and relationships. Marx adds, moreover, that the historical development of science regressed; the seventeenth-century economists began with the concrete – with the nation, state and population – in order to arrive at rent, profit, wages, price and value. However, that which was historically inevitable is by no means methodologically correct. [\[11\]](#)

These observations are most applicable to the general theory of law. In this case, too, the concrete totality of society, population and the state, must be the result and the final stage of our conclusions, but not their starting point. For in moving from the simple to the more complex, from a process in pure form to its more concrete forms, we can follow a methodologically well-defined – and therefore more correct – path, than when we hesitantly move with only the diffused and undissected form of the concrete whole before us.

The second methodological observation, which must be made here, concerns one peculiarity of the social sciences. More correctly, it concerns their concepts. If we take some natural science concepts, for example the concept of energy, then we may of course establish precisely the chronological moment when it appeared. However, this date is significant only for the history of science and culture. In natural science research, as such, the application of this concept is not associated with temporal limits. The law of the transformation of energy was in effect before the appearance of Man and will continue after the cessation of all life on earth. It is extra-temporal; it is an eternal law. It is possible to ask when was the law of the transformation of energy discovered, but it is futile to concern oneself with the question of establishing the moment when these relations were reflected in that law.

Let us now turn to the social sciences, or only to political economy, and take one of its basic concepts, such as value. The real history of value is at once glaringly obvious – historically, both in the concept as a component of our thought, and also of the history of the concept as it constitutes part of the history of economic theory. The development of social relationships, therefore, gradually transforms this concept into historical reality. We know exactly what material relationships were necessary in order for the “Ideal”, “imaginary” quality of the object to assume “real” and therefore decisive significance. In comparison with the natural qualities which transform the product of labour from a natural phenomenon into a social phenomenon, we thus know the real historical substratum of our cognitive abstractions. At the same time we are convinced that the limits within which the application of this abstraction makes sense, correspond with the limits of the real development of history and are determined by it. Another example, adduced by Marx, shows this most clearly. Labour, as the simplest relationship of man to nature, is encountered at all stages of development, but as an economic abstraction it appears relatively late (compare the succession of schools: mercantilist, physiocrat, classical). But the development of the concept corresponded to the real development of economic relationships, obfuscating the distinction between different types of human labour and substituting labour in general for it. So, conceptual development corresponds to the real dialectic of the historical process. [12] Let us take another example, external to political economy—the state. Here we can observe both how the concept of the state gradually obtains definitional rigour and finality, developing the full scope of its definitions, and also how in reality the state develops and how it is “abstracted” from patrimony and feudalism, and how it is converted into a self-sufficient force which “penetrates all social interstices”.

Thus even law, most generally defined, exists as a form not just in the minds and theories of learned jurists. It parallels a real history which unfolds itself not as a system of thought, but as a special system of social relationships. People enter these relationships not because they have consciously chosen to do so, but because the conditions of production necessitate it. Man is transformed into a legal subject in the same way that a natural product is transformed into a commodity with its mysterious quality of value.

This is a natural necessity which is confined to the framework of bourgeois conditions of existence. Therefore, natural law doctrine consciously or unconsciously lies at the basis of bourgeois theories of law. The natural law school was not only the clearest expression of bourgeois ideology in the period when the bourgeoisie, acting as a revolutionary class, formulated its demands openly and consistently; it also provided a model for the most profound and distinct understanding of the legal form. It is no accident that the flourishing influence of the doctrine of natural law closely coincided with the appearance of the great classical writings of bourgeois political economy. Both schools set themselves the task of formulating, in the most general and therefore in the most abstract form, the basic conditions of existence of bourgeois society. Bourgeois society appeared to them as the natural condition of existence of all societies.

Rather than dwelling in more detail on the changing schools of legal philosophy, we may note some evolutionary parallels between legal and economic thought. Thus, their historical direction may in both cases be regarded as a phenomenon of the feudal aristocracy, and partly also of the petit bourgeois reaction. When their revolutionary ardour was finally dissipated in the second half of the nineteenth century, the bourgeoisie ceased to be attracted by the purity and clarity of classical doctrines. Bourgeois society now sought stability and strong authority. The central focus of legal theory became not the analysis of the legal form, but the problem of justifying the coercive power of legal rules. A unique blend of historicism and legal positivism was created which led to the denial of all law other than law emanating from the state.

The psychological school of law may be categorized alongside the psychological school of political economy. Both try to transfer the object of analysis to the realm of the subjective conditions of consciousness (“evaluations”, “imperative-attributive emotion”), failing to see that the corresponding abstract categories express social relationships in the regularity of their logical structure, social relationships which are hidden from individuals and which extend beyond the limits of their consciousness.

Finally, the extreme formalism of the normative school (Kelsen) undoubtedly expresses the most recent general decadence of bourgeois scientific thought. This is accomplished by its exhaustion in the fruitless subtleties of method and formal logic, and the tendency to divorce itself from reality. In economic theory a similar position is occupied by representatives of the mathematical school.

The legal relationship is, in Marx’s phrase, an abstract and one-sided relationship; but in this it appears not as the result of the product of the mind of a conscious subject, but as the product of social development.

“In any historical and social science, and also in the development of economic categories, it is always necessary to remember that in reality, and therefore in the mind, the subject is already given-here, bourgeois society. Categories therefore express only the forms of being and the characteristics of existence – often only of individual aspects of this specific society, this subject.” [\[13\]](#)

What Marx says here about economic categories is fully applicable to legal categories. The latter, in their false universality, in fact express particular aspects of a specific historical subject – of bourgeois commodity production.

In the same Introduction, which we have repeatedly cited, we find still another profound methodological observation by Marx. This concerns the possibility of clarifying the meaning of preceding formations in terms of the analysis of subsequent and more developed formations. Marx explains that only having understood rent can we understand tribute, the tithe and the feudal corvée. The more developed form explains the previous stages in which it existed only embryonically. Evolution, as it were, reveals those intimations which were hidden in the distant past.

Bourgeois society is the most developed and perfected historical organization of production. The categories which reflect its relationships and its organizations, simultaneously enable comprehension of the structure of the production relationships of all obsolete social forms—from whose fragments and elements this society is erected, partly continuing to bear its legacy, which it has not succeeded in overcoming, and partly articulating, that which formally was there only by implication. [\[14\]](#)

Applying the above mentioned methodological consideration to the theory of law, we must begin with the analysis of the legal form in its most abstract and simple aspect, moving gradually by way of complexity to the historically concrete. In so doing we must not forget that the dialectical development of concepts corresponds to the dialectical development of the historical process itself. Historical evolution produces not only successive changes in the content of norms and legal institutions, but also the development of the legal form itself. The legal form appeared at a certain cultural level in a long embryonic stage, internally unstructured and barely distinguishable from neighbouring spheres, e.g. mores, religion. Then, gradually developing, it achieves maximum maturity, differentiation and precision. This higher stage of development corresponds to specific economic and social relationships. At the same time this stage is characterized by the appearance of a system of general concepts theoretically reflecting the legal system as a distinct whole.

Accordingly, we can achieve a clear and exhaustive definition only if we base our analysis on the fully developed legal form of law which interprets its antecedent forms as its embryos.

Only then can we perceive law, not as a characteristic of abstract human society, but as an historical category which responds to specific social *environs* and which is constructed on the contradictions of private interests.

## Notes

[11.](#) See K. Marx, **Introduction to the Critique of Political Economy** (1857), in **The Grundrisse** (1973), translation and foreword by M. Nicolaus, Random House, New

York, p.100.

[12.](#) **ibid.**, pp.104-105.

[13.](#) **ibid.**, p.106.

[14.](#) **ibid.**, p.105.

# CHAPTER II

## Ideology and Law

In the recent polemic between Comrade Stuchka and Professor Reisner, an important role was played by the question of the ideological nature of law. [1\*] Relying upon a handsome collection of citations, Reisner tried to show that Marx and Engels considered law as one of the “ideological forms”, and that the same view was held by many other Marxist theorists. Of course it is not necessary to dispute these statements and citations. Likewise, it is impossible to deny the fact that law is experienced by people psychologically, in particular in the form of general principles of rules or norms. However, the task is by no means to recognize or deny the existence of legal ideology (or psychology), but rather to show that legal categories have no other significance than the ideological. Only in the latter case do we recognize Reisner’s conclusion as “necessary”, namely, “that a Marxist may study law only as one of the subtypes of the general type ideology”. In this little word “only” lies the whole essence of the matter. We will explain this with an example from political economy. The categories of commodity, value and exchange-value are undoubtedly ideologically produced distortions, mystifying (in Marx’s expression) forms of ideas, in which exchange society imagines a labour bond between individual producers. The ideological nature of these forms is proved by the fact that if one goes to other economic structures, the categories (of commodity, value etc.) lose all significance. Therefore, with complete justification we may speak of a commodity ideology, or as Marx called it, a “commodity fetishism” and categorize it in the list of psychological phenomena. This by no means signifies that the categories of political economy have *exclusively* psychological significance, that they relate *only* to experiences, impressions and other subjective processes. We know very well that, for instance, the category of commodity, despite its clear ideological nature, reflects an objective social relationship. We know that whatever degree this relationship has developed, its greater or lesser universality, are material factors subject to inquiry as such, and that it exists not merely in the form of ideological-psychological processes. Thus, the general concepts of political economy are not only an element of ideology, but they are also a type of abstraction, from which we may scientifically, i.e. theoretically, construct objective economic reality. In Marx’s words: “These are socially significant, and thus objective, forms of thought within the limits of the productive relationships of a specific, historically determined, social form of production – commodity production.” [15]

We must, therefore, demonstrate both that general juridic concepts may enter and actually do enter into the structure of ideological processes and ideological systems—this is not subject to any dispute—and that in them, in these concepts, it is possible to discover social reality which has, in a certain way, become mystified. In other words, we must determine whether or not legal categories are such objective forms of thought

(objective for an historically specific society) which correspond to objective social relationships. Consequently, our question is: *is it possible to understand law as a social relationship in the same sense in which Marx termed capital a social relationship?*

Such a statement of the question pre-empts reference to the ideological nature of law, and all our consideration is transferred to an entirely different level.

Recognition of the ideological nature of concepts by no means frees us from the work of searching for objectively existing reality, i.e. in the reality of the external world, and not simply in consciousness. In the opposite case we would be compelled to erase any boundary between the world beyond the grave-which also exists in the conceptions of some people-and, say, the state. Professor Reisner, incidentally, does just this. Relying on the well-known quotation from Engels concerning the state as the “primary ideological force”, dominating people, Reisner quickly equates the state with state ideology. “The psychological nature of the phenomena of authority is so obvious, and state authority itself – existing *only in the psyche of people* (our italics, *E.P.*) – is so deprived of material features, that it would seem no one considers state authority in any way other than as an idea. It is real only to the extent that people make it a principle of their action.” [16] This means that finances, the military, and administration, are all entirely “deprived of material features”, that all this exists “only in the psyche of the people”. And what can be done, in the words of Professor Reisner himself with that “huge” mass of the population which lives “outside state consciousness”? It must obviously be excluded. These masses have no significance for “the real” existing state.

And what about the state from the perspective of economic unity? Or customs or the boundaries of custom, are these also ideological and psychological processes? Many such questions can be posed, but all with the same meaning. The state is an ideological form, but simultaneously it is a form of social existence. The ideological nature of a concept does not eliminate the reality and materiality which the concept reflects.

The formal completeness of the concepts of state, territory, population and authority, reflect not only a specific ideology but also the objective fact of the formation of a real sphere of domination, bound to one centre, and, accordingly, even more important, they reflect the creation of real administrative, financial and military organizations with corresponding human and material apparatuses. The state is nothing without methods of communication, without the possibility of giving orders and decrees, of moving armed forces etc. Does Professor Reisner think that the Roman military roads, or modern methods of communications, relate to phenomena of the human psyche? Or does he suppose that these material elements must be entirely ignored as a factor in the formation of the state? Then of course nothing else will remain for us but to equate the reality of the state with the reality of “literature, philosophy, and other spiritual productions of man”. It is regrettable that the practice of political struggle, of the struggle for authority, radically contradicts this

psychological concept of the state, for at each step we are confronted by objective and material factors.

However, one cannot but note that an inevitable result of the psychological perspective (on which Professor Reiser depends) is subjectivism and solipsism. “As the creation of as many psychologies as there are individuals, and of as many different types as there are groups and social classes, state authority will appear inherently different in the consciousness and conduct of a cabinet minister and that of a peasant who has not yet contemplated the idea of a state; in the psyche of a political activist and in the principles of an anarchist – in one word in the consciousness of people with very different social positions, professional activity, upbringing etc.” [17] From this it is clearly obvious that if we remain on a psychological level we quite simply lose every basis to speak of the state as some objective unity. Only by considering the state as a real organization of class authority, i.e. taking into account all (including not only psychological but material) elements, and the latter first of all, do we obtain firm ground under our feet, i.e. we may study the state itself as it is in reality, and not just the innumerable and varied subjective forms in which it is reflected and experienced.

But if abstract definitions of the legal form indicate not simply certain psychological or ideological processes, but if they are concepts which express the very essence of an objective social relation, then in what sense do we say that law- regulates social relationships? Do we not want to say by this that social relationships therefore regulate themselves? Or when we say that a social relationship assumes a legal form, then does this not imply a simple tautology: law adopts the form of law? [18]

At first glance this objection is most convincing, and would seem to leave no other alternative than to recognize law as ideology and only ideology. However, let us try to disentangle these difficulties. In order to lighten our task let us again resort to comparison. Marxist political economy teaches, of course, that capital is a social relationship. It may not as Marx says, be discovered under a microscope, but nevertheless it by no means is exhausted by experiences, ideologies and other subjective processes which occur in the human psyche. It is an objective social relationship. Further, when we observe, for example, in the sphere of small-scale production, the gradual transition from working for a customer to labouring for a monopolist, we postulate that the corresponding relations have assumed a capitalist form. Does this mean that we have fallen into a tautology?

By no means; we have merely said that the social relation which is called capital began to colour or gave its form to another social relation. Thus we may consider all that occurred purely objectively, as a material process, entirely eliminating the psychology or ideology of its participants. Cannot this be done in exactly the same way with law? Being itself a social relationship, it is capable to a greater or a lesser extent, of colouring or giving its form to other social relationships. Of course, we may never approach a problem from this perspective if we are guided by a confused impression of law as a form in general-similar to the way in which vulgar political economy cannot glean the essence of capitalist relationships by beginning with the concept of capital as “accumulated labour in general”.

Thus, we can escape from this apparent contradiction, if by way of analysis of the basic definitions of law, we succeed in showing that it is a mystified form of some *specific* social relationship. In this case it will not be meaningless to say that this relationship in one or another instance gives its form to another social relationship, or even to the totality of social relationships.

The situation is no different with the second apparent tautology: law regulates social relationships. For if we exclude a certain anthropomorphism inherent in this formula, then it is reduced to the following proposition: under certain conditions the *regulation* of social relationships *assumes a legal character*. Such a formulation is undoubtedly more correct and, most importantly, more historical. We may not deny that collective life exists even among animals, nor that life there is regulated in one way or another. But it never occurs to us to affirm that the relationships of bees or ants is regulated by *law*. If we turn to primitive tribes, then although we may observe the origins of law, nevertheless a significant part of the relationships are regulated by a means external to law, e.g. by the prescriptions of religion. Finally, even in bourgeois society such things as the organization of postal and railroad services, military affairs etc. may be assigned entirely to legal regulation only upon a very superficial view which allows itself to be deceived by the external form of laws, charters and decrees. A railroad schedule regulates the movement of trains in a very different sense than, say, the law on the liability of railroads regulates the relationship of the latter with freight shippers. Regulation of the first type is primarily technical; the second primarily legal. The same relationship exists between the mobilization plan and the law on compulsory military service, between the instructions on the investigation of criminals and the Code of Criminal Procedure.

We will return to the difference between legal and technical norms later. For the moment we merely note that the regulation of social relationships assumes a legal nature correlative with the development of the specific and basic legal relationship.

The regulation of norms, or the creation of norms for social relationships are in principle homogeneous and thoroughly legal only upon a very superficial or purely formal view of the matter. Actually, there is an obvious difference in this regard between the various fields of human relationships. Gumplowicz sharply distinguishes between private law and state norms, and only agreed to recognize the former as the domain of jurisprudence. In fact the most consolidated nucleus of legal obscurity (if it is permissible to use such a phrase) lies precisely in this area of the relations of private law. It is here that the legal subject, “persona”, finds a fully adequate embodiment in the concrete individuality of the subject engaged in egoistic economic activity, as an owner and bearer of private interests. It is in private law that legal thought moves most freely and confidently; its constructs assume the most finished and structured form. It is here that the classical shades of Aulus Agerius and Numerius Negidius – those personages of the Roman procedural formula – constantly soar above the jurists, and it is from them that the latter draw their inspiration. In private law the *a priori* assumptions of legal thought are clothed in the flesh and blood of two disputing parties, defending “their own rights”, with *vindicta* in their hands. Here, the jurist’s

role as a theorist is directly merged with his practical social function. The dogma of private law is nothing more than an endless chain of arguments *pro* and *contra* imaginary claims and potential suits. Behind each paragraph of this systematic guide stands an unseen abstract client ready to use the relevant propositions as advice. The scholarly legal arguments on the significance of a mistake, or on the distribution of the burden of proof, do not differ from the same disputes before a judge. The difference here is no greater than that between knightly tournaments and feudal wars. The first, as is well known, were conducted sometimes with even greater fierceness, and demanded no less expenditure of energy and sacrifice, than real skirmishes. Only the replacement of individual enterprise with planned social production and distribution will end this unproductive expenditure of the forces of the human mind.

The basic assumption of legal regulation is thus the opposition of private interests. At the same time the latter is the logical premise of the legal form and the real cause of the development of the legal superstructure. The conduct of people may be regulated by the most complex rules but the legal element in this regulation begins where the individualization and opposition of interests begins. “Controversy”, says Gumplowicz, “is the basic element of everything legal”. Unity of purpose is, on the contrary, the premise of technical regulation. Therefore the legal norms concerning the liability of railroads presume private claims, private individualized interests; the technical norms of railroad movement suppose a single purpose, e.g. the achievement of maximum freight capacity. Let us take another example: the curing of a sick person presupposes a series of rules both for the sick person himself and for the medical personnel; but to the extent that these rules are established from the perspective of a single purpose, the restoration of the patient’s health, they are of a technical nature. The application of these rules may be accompanied by coercion with respect to the patient. But so long as this coercion is considered from the perspective of the same single purpose (both for the rulers and the ruled), it remains solely a technically expedient act. Within these limits the content of the rules is established by medical science and is altered with its progress. There is nothing here for the lawyer to do. His role begins where we leave the basis of unity of purpose and move to the consideration of the perspective of individualized and antagonistic subjects, each of whom is the bearer of his own private interest. The physician and the patient are now transformed into subjects of rights and duties, and the rules which connect them are legal rules. At the same time, coercion is now considered not just from the perspective of expediency, but from the perspective of formal, i.e. legal, permissibility.

It is not difficult to see that the possibility of taking a legal perspective derives from the fact that the most diverse relationships in commodity-producing societies are organized on the model of relationships of commercial circulation, and inscribed in the form of law. Likewise, it is natural for bourgeois jurists to deduce the universality of the legal form from the external and absolute qualities of human nature, or from the fact that the orders of the authorities may extend to any subject. It is not necessary to provide any particular proof of this. An article in Volume Ten obliged a husband “to love his wife as his very own body”. However, even the most daring jurists would

hardly try to construct a corresponding legal relationship involving the possibility of libidinization etc.

On the contrary, however artificial and unreal a specific juridic construct may seem, nevertheless, so long as it remains within the bounds of private law, and primarily property law, it has a firm basis. Otherwise, it would have been impossible to explain the fact that the basic lines of thought of Roman jurists retained their significance up to the present time as the *ratio scripta* of every type of commodity-producing society.

We have to a certain extent now anticipated the answer to the question posed at the outset: where shall we look for that unique social relationship whose inevitable expression is the form of law? We will try to show in more detail that this relationship is the relationship of possessors of commodities. [19] The usual analysis, which we find in any philosophy of law, identifies the legal relationship as a will relationship, as a voluntary relationship between people in general. The reasoning here proceeds from the “existing results of the process of development”, from the “ongoing forms of thought”, but it ignores their historical origin; whereas in reality, in proportion to the development of a commodity economy, the natural premises of exchange become the natural premises of every form of human relationship and stamp their imprint upon them; in the heads of philosophers, on the contrary, the circulation of commodities is represented as merely a partial instance of a general form which for them assumes an eternal nature. [20]

Comrade Stuchka, from our point of view, correctly identified the problem of law as a problem of a social relationship. But instead of beginning to search for the specific social objectivity of the relationship, he returned to the usual and formal definition—although a definition now influenced by class characteristics. In the general formula given by Stuchka, law figures not as a *specific* social relationship but, as with *all* relationships *in general*, as a *system of relations which corresponds to the interests of the ruling class and which protects it with organized force*. Accordingly, within these class boundaries, law as a relationship is indistinguishable from social relations in general, and Comrade Stuchka is therefore not in a position to answer Professor Reisner’s venomous question: how do social relationships become legal institutions, or how is law converted into itself?.

Stuchka’s definition, perhaps because it emerged from the depths of the People’s Commissariat of justice, was tuned to the needs of the practising lawyer. It shows the empirical limit which history always places upon legal logic, but it does not reveal the deep roots of this logic itself. This definition reveals the class content included in legal forms, but it does not explain to us why this content adopts such a form.

For the bourgeois philosophy of law, which considers relationships as an eternal and natural form of all human relationships, such a question does not arise in general. For Marxist theory, which tries to penetrate the secrets of social forms and to reduce “all social relationships to man himself”, this task must occupy the first place.

## Notes

[15.](#) K. Marx, **Capital** (1867), International Publishers, New York, 1967, vol.1, p.76.

[16.](#) M. Reisner, **The State** (1911), Moscow, 2nd edition, vol.1, p.xxxv.

[17.](#) **ibid.**

[18.](#) See the review of Stuchka's **The Revolutionary Role of Law and State** (1921), by Professor Reisner, **Herald of the Socialist Academy**, no.1, p.176.

[19.](#) cf. V.V. Adoratsky, **On the State** (1923), Moscow, p.41: "The tremendous influence of legal ideology on the entire system of thinking of law-abiding members of bourgeois society is explained by the significant role of ideology in the life of this society ... A person living in bourgeois society is constantly regarded as a subject of rights and obligations. Every day he effects an endless number of legal actions involving the most diverse legal consequences. No society has such a need, therefore, of the idea of law (in its practical, everyday use), nor develops this idea in such detail, nor transforms it into such an essential instrument of daily exchange, as does bourgeois society."

[20.](#) K. Marx, **Capital** (1867), **op. cit.**, vol.1, p.81.

## Editorial Footnotes

[1\\*](#). This debate is found in M.A. Reisner's critical review of P.I. Stuchka's **The Revolutionary Role of Law and State** (1921); Stuchka's reply appeared in **Vestnik sotsialisticheskoi akademii**, no.3, 1923 [*eds.*]

# CHAPTER III

## Relationship and the Norm

As the wealth of capitalist society assumes the form of an enormous accumulation of commodities, society presents itself as an endless chain of legal relationships.

The exchange of commodities assumes an atomized economy. A connection is maintained between private and isolated economies from transaction to transaction. The legal relationship between subjects is only the other side of the relation between the products of labour which have become commodities. The legal relationship is the primary cell of the legal tissue through which law accomplishes its only real movement. In contrast, law as a totality of norms is no more than a lifeless abstraction.

Nonetheless, the standard view posits objective law or a norm as the base of the legal relationship both logically and in reality. According to this conception, a legal relationship is *generated* by an objective norm:

The norm of the right to demand repayment of a debt does not exist because creditors usually demand repayment, but on the contrary creditors demand repayment because the norm exists; law is not established inductively from observed instances, but by deduction from a rule established by someone. [\[21\]](#)

The expression, “the *norm generates the* legal relationship”, can be understood both in the real and logical sense.

Let us turn to the first of these. Above all it should be noted that the totality of norms, written and unwritten, belongs *per se* more to the sphere of literary creativity, a situation acknowledged frequently among the jurists themselves.

This aggregate of norms obtains real significance only because of those relationships which are conceived of as having arisen and, in fact, have arisen according to these rules. Even the most consistent advocate of the pure normative method, Hans Kelsen, had to recognize that somehow a slice of real life, i.e. of the actual conduct of people, had to be harmonized with the ideal normative order. In this sense, to consider the statutes of tsarist Russia as law currently in effect is possible only in an insane asylum. The formal juridical method, which is concerned only with norms which are “considered as law”, can assert its independence only within very narrow limits, only so long as the tension between fact and norm does not exceed a definite limit. In material reality a relationship has primacy over a norm. If not a single debtor repaid a debt, then the corresponding rule would have to be regarded as actually non-existent and if we wanted nevertheless to affirm its existence we would have to fetishize this

norm in some way. Indeed a great many theories of law are concerned with such fetishism, justifying the preoccupation on very slender methodological grounds.

Law as an objective social phenomenon cannot be exhausted by a norm or a rule, whether written or unwritten. A norm as such, i.e. in its logical content, either is directly derived from existing relationships already or, if it is published as statutory law, then it presents itself only as a symptom by which one may assess, with some degree of probability, the likely emergence of the corresponding relationships in the near future. It is not sufficient to know the normative content of law in order to confirm its objective existence. It is necessary to know if this normative content is realized in practice, that is in social relationships. A common source of confusion is the dogmatic jurist's method of thought according to which the concept of operative law and operative norm does not conform to what the sociologist or historian understands as objectively substantive law.

When a dogmatic jurist decides the question of whether a given norm of law is operative or not, he usually does not have in mind the question of the presence or absence of a particular objective social phenomenon. Instead, he is concerned only with the presence or absence of a logical connection between the given normative provision and a more general normative premise. [22]

Thus, the norm is the only thing that exists for the dogmatic jurist who, confined to the narrow framework of his purely technical task, may serenely equate law and norm. In the case of customary law he must turn to reality regardless. But when statutory law is the jurist's only normative assumption (expressed in his technical language, the source of law), then the jurist's conclusions, and his dogma about "operative" law, are by no means obligatory for the historian who wants to study the law actually existing. Scientific, i.e. theoretical, study can deal only with facts. If certain relationships are actually formed this means that the corresponding law has been created. If a statute or decree was merely published, but the corresponding relationships did not in fact arise, this means there was an attempt to create law but the attempt failed. [23]

It is possible moreover to modify this thesis and make its cornerstone the objective social regulatory forces or, as jurists express it, the objective legal order, instead of norms. [24] But even in this new formulation, the thesis can be subjected to further criticism. If social regulatory forces are understood to be the same relationships in their regularity and constancy, then we have a simple tautology. If instead they are understood as a special, consciously organized order ensuring and guaranteeing the given relationships, then the logical error will be entirely clear. It is impossible to say that the relationship between creditor and debtor is generated by a coercive order which exists in a given state for recovering debts. This objectively existing order ensures, but certainly does not generate the relationship. This is not mere scholasticism – that is best shown by the fact that we can conceive of, as well as find, a tremendous variety of historical examples of the ideal functioning of this externally coercive and regulatory social apparatus, and consequently the most diverse degrees in which relationships are guaranteed. Moreover these relationships themselves do not undergo any structural changes. We can imagine so extreme a situation as when

except for the two parties entering the relationship no other third force exists capable of establishing a norm and guaranteeing its observance (for instance some contract between the Varangians and the Greeks): the relationship remains even here. But one merely needs to imagine the disappearance of a party, i.e. of the subject as the bearer of a distinct autonomous interest, and the very possibility of a relationship also disappears.

In this respect one may argue that if one departs from the objective norm, then the very concepts of legal relationship and legal subject are in abeyance, lacking definition. In general, this objection reveals the very practical and empirical spirit of modern jurisprudence. It knows but one truth; that any lawsuit is lost if the party cannot rely on an appropriate paragraph of some statute. However, the belief that a legal subject and a legal relationship do not exist and are not definable external to an objective norm, are just as theoretically mistaken as the belief that value does not exist and is not definable outside the framework of supply and demand (because empirically it is reflected precisely in price fluctuations).

The prevalent style of legal thought which initially posits the norm as the authoritatively established rule or conduct, is distinguished by that same incisive empiricism which-also seen in economic theories-goes hand in hand with extreme and lifeless formalism.

Supply and demand can exist for any objects including those which are by no means the product of labour. The conclusion can be drawn from this that value may be defined without any reference to the socially necessary labour time required for the production of a specific commodity. The empirical fact of an individualized value serves as the basis for a formal-logical theory of marginal utility.

Similarly, norms issued by the state may deal with the most varied objects that have very different qualities. From this the inference can be made that the essence of law is exhausted by the form of command or order which proceeds from higher authority, and that the very substance of social relationships contains no elements which could generate the legal form. The empirical fact that relationships protected by the state are better secured is placed at the foundation of the formal-logical theory of legal positivism.

Our question, expressed in the Marxist terms of historical materialism, is reduced to the problem of the relationship between the legal and political superstructures. If a norm is recognized as the dominant element in all relationships then, before seeking the legal superstructure, we must assume the presence of a norm-establishing authority, i.e. in other words a political organization. Thus we would have to conclude that the legal superstructure derives from the political superstructure.

However, Marx himself emphasizes the fact that the basic and most deeply set stratum of the legal superstructure – property relationships – is so closely contiguous with the base that they are “the same relationships of production expressed in legal language”. The state, i.e. the organization of political class domination, develops from definite

relationships of production and property. Production relationships, logically expressed, comprise what Marx, following Hegel, called civil society. The political superstructure, and in particular the state apparatus, is a secondary, derivative element.

The way in which Marx envisioned the relationship between civil society and the state is apparent from the following quotation:

The egoistic individual of bourgeois society may in his insular imagination, in his lifeless abstraction, depict himself as an atom, i.e. a coherent and self-sufficient being, without needs or embellishments. The harsh reality is that our sensory perceptions are not concerned with his fantasies. His feelings compel him to believe in the reality of the external world and also of other individuals; every day he is reminded that the external world is not empty, but that it is the external world which fills his stomach. Each of his natural activities, each of his qualities, and each incentive to five becomes a requirement, a need which transforms his egoism into a hunger for the objects and people of the external world. But since the need of one individual has no inherent meaning for another egoistic individual (who has the means for satisfying this need), and since accordingly the need is not directly linked with its satisfaction, then each individual is compelled to make this bond in order to become in his turn the intermediary between another's need and the object of that need. Thus, natural necessity is the characteristic of the human condition, However alien they may seem to one another, the members of civil society are united through self-interest. Civil, *not political life, this is the real bond*. It is not the state that binds the atoms of civil society, but the fact that they are atoms only in imagination and transcendental fantasy. In reality they are very unlike atoms-they are not divine egoists, but egoistic human beings. *Only political superstition forces us to believe that civil society is the creation of the state; on the contrary, the state is the creation of civil society.* [25]

Marx returns to the same question in another article, *Moralising Criticism and Critical Morality*, where, in a polemic with the representative of true socialism, Heinzen, he writes:

If in general the bourgeoisie politically, i.e. with the help of state power, “supports unjust property relationships” [Marx puts Heinzen's words in quotation marks here], then *it does not create them*. “Unjust property relationships” aided by the modern division of labour, the modern forms of exchange, competition, concentration, etc., do not flow *from the political domination of the bourgeois class*, but, on the contrary, the political domination of the bourgeois class derives from these modern relationships of production – which bourgeois economists proclaim as inevitable and eternal laws.

Thus, the path from production relationships to legal or property relationships is shorter than imagined by so-called positivist jurisprudence, which cannot function without an intermediate link-state power and its norms. Man as a social producer is the assumption from which economic theory proceeds. The general theory of law must proceed from this same basic assumption. Thus, for instance, the economic relationship of exchange must be present for the legal relationship of the contract of purchase and sale to arise. In its real movement, the economic relationship becomes

the source of the legal relationship, which first emerges at the moment of a controversy. A dispute, a conflict of interest, elicits the form of law, the legal superstructure. In a dispute, i.e. in a lawsuit, the parties engaged in economic activity already appear as parties, i.e. as participants in the legal superstructure; the court in its most primitive form – this is the legal superstructure *par excellence*. Through the judicial process the legal is abstracted from the economic, and appears as an independent element. Law historically emerged from controversy, i.e. from a claim, and only thereafter did it overlap with the earlier (purely economic or factual) relationship. From the very beginning it thus assumed a dual nature economic and legal. Dogmatic jurisprudence ignores this sequence and at once begins with the end result-with abstract norms through which the state, so to speak, juridicizes its actions and infuses all social spaces. The basic defining element (from the simplistic perspective of relationships of purchase and sale, credit, loans etc.) is not the actual material economic content of these relationships but the imperative directed to the individual in the name of the state. This point of departure is useless to the legal practitioner both for the study and explanation of the concrete legal structure, and particularly for the analysis of the legal form in its most general definitions. State power injects clarity and stability into the legal structure but it does not create its preconditions which are rooted in the material relationships of production.

Gumpłowicz, in his **Rechtsstaat und Sozialismus**, of course comes to the directly opposite conclusion proclaiming the primacy of the state, i.e. of political domination. Turning to the history of Roman law, he thinks that he has succeeded in proving that „call private law was once public law”. In his opinion this was because all the most important institutes of Roman civil law, for example, emerged as privileges of the ruling class, as public law advantages in the hands of the victorious group for the purpose of consolidating its power.

It cannot be denied that this theory is convincing, to the extent that it emphasizes the element of class struggle and ends the idyllic view of the emergence of private property and power. But Gumpłowicz makes two major errors. First, he gives coercion such a constructive role, and loses sight of the fact that every social order, including those which were formed on the basis of conquest, is determined by the specific conditions of the social forces of production. Second, in speaking of the state he erases any difference between primitive relations of domination and “public power” in the modern, i.e. bourgeois sense of the word. He therefore infers that private law is generated by public law. But from the fact that the most important institutes of the ancient Roman *ius civile* (ownership, the family, the procedure for inheritance) were created by the ruling class to support their domination, it is also possible to draw the diametrically opposed conclusion-that “all public law was once private law”. This will be just as true, or rather just as false, because the antithesis between private and public law corresponds to much more developed relationships and loses its meaning and application in the primitive era. If the institutes of the *ius civile* really were a mixture of features of public law and private law (using modern terminology), then they equally included religious and, in a broad sense, ritualistic

elements. Consequently, at this level of development the purely legal element was inseparable from its reflection in the general conceptual system.

The development of law as a system was evoked not by the requirements of the state, but by the necessary conditions for commercial relations between those tribes which were not under a single sphere of authority. This is recognized, incidentally, by Gumpłowicz himself. Commercial relations with foreign tribes, with nomads, and plebeians, and in general with those not participant in the union of public law (in Gumpłowicz's terminology), ushered in the *ius gentium*, which was the prototype of the legal superstructure in its pure form. In contrast to the *ius civile*, with its undeviating and ponderous forms, the *ius gentium* discards all that is not connected with the goal – with the natural basis of the economic relation. Public law embodies the nature of this relationship and therefore appears as “natural” law; it strives to reduce this relationship to the minimal number of assumptions, and therefore develops easily into a logically structured system. Gumpłowicz undoubtedly is right when he equates legal logic with the logic of the civilian, but he is mistaken in thinking that the system of private law could have developed, so to speak, in a derivative fashion from public power. His train of thought is approximately as follows: because private disputes did not directly or materially touch upon the interests of authority, then the latter gave the corpus of jurists full freedom to refine their mental abilities in this sphere. In the field of public law, conversely, reality resisted the jurists' efforts, because authority tolerates no interference in its own affairs and does not recognize the omnipotence of juridic logic.

It is most obvious that the logic of juridic concepts corresponds with the logic of the social relationship of commodity production, and that the history of the system of private law should be sought in these relationships and not in the dispensation of the authorities. On the contrary, the logical relationships of domination and subordination are only partially included in the system of juridic concepts. Therefore, the juridic concept of the state may never become a theory but will always appear as an ideological distortion of the facts.

Wherever the first layer of the legal superstructure exists, we find that the legal relationship is generated directly by the existing material production relationships of people.

From this it follows that for the analysis of the legal relationship, in its simplest form, there is no need to proceed from the concept of a norm as an external authoritative command. It is sufficient to take as a basis a legal relationship “the content of which originates in the economic relation itself” (Marx), and to study the “legal” form of this juridic relationship as one of its partial aspects.

The question of whether a norm should be considered a prerequisite of a legal relationship in historical reality, led us to the problem of the relationship between the legal and political superstructures. On logical and systematic grounds, the problem seems to be the relation between objective and subjective law.

In his text on constitutional law, Duguit called attention to the fact that the word “*droit*” signified “things which are undoubtedly deeply intermingled, but which are extremely different from one another”. Here, he means law in the objective and subjective senses. In fact we come here to one of the darkest and most disputed areas of the general theory of law. Before us is some sort of strange dual concept; although both aspects are located at different levels, they nevertheless undoubtedly condition each other. Law is simultaneously a form of external authoritative regulation and a form of subjective private autonomy. The basic and essential characteristic of the former is unconditional obligation and external coercion, while freedom is ensured and recognized within definite boundaries. Law appears both as the basis of social organization and as the means for individuals “to be disassociated, yet integrated in society”. On the one hand, law completely merges with external authority, and on the other it completely opposes every external authority not recognized by it. The duality of law as the synonym of official state power, and as the slogan of revolutionary struggle, is the arena for unlimited controversy and the most impossible confusion.

Consciousness of this deep and hidden contradiction produced mighty efforts somehow to eliminate this troublesome conceptual dichotomy. For this purpose no small number of attempts were made to adopt one of the “meanings” at the sacrifice of the other. Thus, for instance, the same Duguit, who in his treatise declares the expressions-objective and subjective law-”successful, dear, and exact”, in another of his works refines the proof that subjective law is “simply a misunderstanding, a *metaphysical conception* untenable in an era of realism and positivism such as ours”.

The opposite trend, whose German representative is Bierling, and among us the psychologists headed by Petrazhitzky, are inclined to declare objective law “a fantasy”, deprived of real significance “an emotional projection”, a product of the objectification of internal i.e. psychological, processes etc.

Discarding for now the psychological school and trends related to it, let us consider the view whereby law should be understood exclusively as an objective norm. Proceeding from this concept we have, on the one hand, an authoritative prescription of the necessary (or the norm), and on the other the subjective obligation corresponding to, and generated by it.

Dualism is apparently uprooted, but this is merely a temporary victory, because as soon as we move to the practical application of this formula, immediate attempts are made by circuitous and indirect routes to introduce those contours necessary for the conceptual creation of subjective law. We now return to the same dichotomy, with the only difference that one part of it, subjective law, is artificially depicted as some species of ghost; no combination of imperatives and obligations can provide us with subjective law, in the independent and real sense in which any proprietor of bourgeois society embodies it. In fact, it suffices to exemplify property alone to be convinced of this. If the attempt to reduce the law of property to *prohibitions* directed to third parties is no more than a logical confusion, an ugly and inverted concept, then the depiction of the bourgeois law of property as a social obligation is also a mystification. [26]

Every owner and everyone around. him, understands clearly that the *right belonging to him* as an owner has only this in common with an obligation: they are polar opposites. Subjective law has primacy for it is ultimately based on a material interest which exists independently of external, i.e. conscious, regulation of social life.

The subject as the bearer and addressee of all possible demands, and the chain of subjects bound by demands addressed to one another, is the basic juridic fabric corresponding to the economic fabric, i.e. to the social relations of production which depend on the division of labour and exchange.

Social organization, including the instruments of coercion, is the concrete totality to which we must turn, having previously understood the legal relationship in its pure and simplest form. Thus, obligation as the result of an imperative or order, is now the actualizing and complicating element in the consideration of the legal form. In its most abstract and simple form, a legal obligation must be considered as an expression and correlation of a subjective legal claim. In the analysis of a legal relationship we clearly see that an obligation does not exhaust the logical content of the legal form. It is not even an independent element of it. An obligation always appears as an expression or correlation of an appropriate legal right. The obligation of one party is what is owed to and therefore what belongs to another. What appears as a right for the creditor appears as an obligation for the debtor. The category of legal right becomes logically complete only when it includes a bearer and an owner of rights, whose rights are neither more nor less than the obligations of others to him.

Thus, the legal relationship not only gives us law in its real movement, but also reveals the most characteristic peculiarities of law as a logical category. Conversely, the norm itself, as a prescription of what is required, constitutes the elements of morality, aesthetics and technology as much as of law.

The legal order is distinguished from every other social order in that it comprises isolated, private subjects. A norm of law acquires its *differentia specifica*, distinguishing it from the general mass of regulatory rules – moral, aesthetic, utilitarian etc. – because it presupposes a person endowed with a right and actively asserting it.

The attempt to make the notion of external regulation the basic logical element in law leads to the equation of law with the authoritatively established social order. This current of legal thought truly reflects the spirit of that period when large-scale capitalist monopolies and imperialist policy replaced the Manchester School and free competition.

It is not difficult to show that the idea of unconditional obedience to an external norm-establishing authority has nothing in common with the legal form. It is sufficient to take examples which have been marked out with extreme rigour and which are therefore clearest examples of such a structure. One example could be the military unit, where the majority of persons are subordinated in their movements to general orders whose single, active and autonomous origin is the will of the commander.

Another example is the Jesuit order. Here, all members blindly and uncomplainingly fulfil the will of the leader. It is sufficient to think of these examples to conclude that the more consistently the basis of authoritarian regulation is applied, thereby excluding any suggestion of a separate and autonomous will, the less will be the opportunity for the application of the category of law. This is particularly sharply felt in the field of so-called public law. Here, legal philosophy faces the greatest difficulties. At the same time as civil law, operating at the primary legal level, broadly and confidently uses the concept of subjective rights, the application of this concept in the theory of public law steadily creates misunderstanding and contradictions. The system of civil law is therefore characterized by simplicity, clarity and completeness, while the theories of public law are replete with constructs that are rigid, artificial and grotesquely one-sided. The legal form, with its aspect of subjective legal authority, is born in a society consisting of atomized bearers of private, egoistic interest. When all economic life is constructed on the principle of accord between independent wills, then every social function, in one or another explicit way, assumes a legal nature, i.e. becomes not merely a social function but also the legal right of the person who fulfils this function. However, since private interests cannot inherently achieve such full development and overwhelming significance in the political organization as they can in the economy of bourgeois society, therefore even subjective public rights act as something ephemeral, deprived of real roots, and are constantly in doubt. At the same time the state is not a legal superstructure-it can merely be *imagined* as such.

Legal theory cannot equate “the rights of parliament”, “the rights of executive authority” etc., for example, with the creditor’s right to repayment of a debt. This would be to place a distinct private interest where bourgeois ideology presumes the authority of a general impersonal state interest. But at the same time every jurist knows that he cannot invest these rights with any other basic content without the legal form escaping him. Public law can exist only as the reflection of the form of private law in the sphere of political organization, or else it ceases to be law. Attempts to depict a social function as it really is, i.e. simply a social function, and a norm merely as an organizing rule, mean the extinction of the legal form. However, the real premise for the transcendence of the legal form and legal ideology is that social condition in which the very conflict between individual social interests has become superfluous.

A characteristic feature of bourgeois society is the fact that general interests are alienated from private ones, and are opposed to them. But in this opposition they unwillingly adopt the form of private interests, i.e. the form of law. Thus, as should be expected, the legal elements of state organization are primarily those which harmonize with the system of antagonistic, isolated, private interests.

Thus, the very concept of public law may be developed only in that process in which, figuratively, it constantly diverges from private law, trying to define itself as the latter’s antithesis, and then turns to it as if it were its centre of attraction.

The attempt to proceed in the reverse direction, i.e. to find the basic definitions of private law (which are nothing other than the definitions of law in general) by using a

norm as the conceptual platform, can produce nothing except lifeless formal concepts, fraught with internal contradiction. Law as a function ceases to be law, and power without the private interests supporting it becomes elusive and abstract, easily becoming its antithesis, i.e. an obligation (every public right is at the same time an obligation) [27]. just as the legal “right” of the creditor to receive repayment is elementary, clear and “natural”, so the legal “right” of parliament to approve the budget is tenuous and problematic. If, in civil law, scholastic arguments are conducted on the level of what Jhering called legal symptomatics, then the very basis of jurisprudence is placed in jeopardy. This is the source of methodological distortion and hesitation. It is this which threatens to turn jurisprudence into a hybrid of sociology and psychology.

## Notes

[21.](#) G. Shershenevich, **The General Theory of Law** (1910), Moscow, p.274.

[22.](#) The Russian language, incidentally, derives the designations “law in effect” and “law in force” from the same root. In German, the logical distinction is facilitated by the use of two very different verbs: *wirken* (in the sense of in effect, or being realized) and *gelten* (in the sense of being significant, i.e. logically related to a more general normative proposition).

[23.](#) The point of view expressed here by no means signifies a denial of class will as a factor of development, an abjuration of planned interference in the course of social development, “economism”, fatalism and other terrible things. A revolutionary political action may accomplish a great deal; it can realize for tomorrow that which does not exist today, but it can not cause that which did not in fact exist in the past. On the other hand, if we affirm that the intention to construct a building – and even the plan of the building – is still not the actual building, then it does not follow from this that neither the intention nor the plan are essential for the construction of the building. But when the matter has gone no further than the plan we cannot affirm that the building has been constructed.

[24.](#) However, it is necessary to declare that social-regulatory activity can operate without previously fixed norms. The fact of so-called judicial lawmaking convinces us of this. Its significance is particularly clear in those periods when the centralized enactment of laws was generally unknown. For the ancient German judges, therefore, the concept of a norm given externally was entirely alien. Collections of rules of every type were, for the *Schoffengericht*, not binding laws, but were a heuristic device by which they formed their own opinion. See J. Stintzing, **Geschichte der Deutschen Rechtswissenschaft** (1880), vol. I, p.39.

[25.](#) K. Marx and F. Engels, **The Holy Family, or a Critique of Critical Criticism** (1844), in **Marx and Engels Collected Works** (1975), Progress Publishers, Moscow, vol.4, pp.120-121.

26. In his commentary on the Civil Code of the RSFSR, Goikhbarg stresses that advanced bourgeois jurists still refuse to consider private property as arbitrary subjective law, but that they see it both as rights accruing to the individual and as positive obligations with respect to the whole. In particular, Goikhbarg relies upon Duguit. Duguit affirms that an owner of capital must be defended by the law only because and to the extent that he fulfils a socially useful function in providing a correct application for his capital.

27. Duguit's statement – that an owner will be protected only when he fulfils a social obligation – is meaningless in such a general form. For the bourgeois state it is hypocritical; for the proletarian state it is a concealment of the facts. For if the proletarian state could directly assign to each owner his social function, it would have done so, taking from the owner the right to dispose of his property. And once it cannot do this *economically*, this means it is compelled to protect private interests as such, – and that it can only set certain quantitative limits to them. It would be illusory to affirm that every X who has accumulated a certain quantity of money is protected by our laws and courts simply because he provided, or will provide, a socially useful application for money accumulated. But Comrade Goikhbarg forgets about capitalist property in this, its most abstract (i.e. monetary) form, and he argues as if capital only exists in the concrete material form of productive capital. The anti-social aspects of private property may be paralysed only *de facto*, i.e. by the development of a socialist planned economy at the expense of the market. But no formula, even though derived from the most advanced Western jurists, can transform all transactions concluded on the basis of our Civil Code into socially useful ones, and every owner into a person fulfilling social functions. Such a verbal transcendence of the private economy and private law will only obscure the conditions for their real transcendence.

# CHAPTER IV

## Commodity and the Subject

Every legal relation is a relationship between subjects. A subject is the atom of legal theory, the simplest and irreducible element. And with it we begin our analysis.

At the same time as idealist theories of law start with some general idea and develop the concept of the subject, i.e. in a purely speculative way, dogmatic jurisprudence uses this concept in a formal manner. For it, the subject is nothing more than “a means for the legal qualification of phenomena from the perspective of their suitability or unsuitability for participation in legal relations”. It therefore does not ask itself why man turned from an animal environment into a legal subject, since it proceeds from the legal relation as an antecedent form.

Marx’s theory, on the contrary, considers every social form as historical, and therefore sets its task as the explanation of those historical, material conditions which make one category or another real. The material premises of legal relationships, or the relationships of legal subjects, are explained by Marx himself in the first volume of *Capital*. It is true that he did this obliquely, and in the form of the most general allusions. However, these allusions provide much more for the understanding of the legal element in the relationships between people than the multi-volume treatises on the general theory of law. For Marx the analysis of the form of the subject flows directly from the analysis of the form of commodities.

Capitalist society is above all a society of commodity owners. This means that in the process of production the social relationships of people assume an objectified form in the products of labour and are related to each other as values. Commodities are objects whose concrete multiplicity of useful qualities becomes merely a simple physical covering of the abstract quality of value, and which appears as the ability to be exchanged for other commodities in a definite ratio. This quality appears as something inherent in the objects themselves, by force of a type of natural law which acts behind people’s backs entirely independent of their will.

But if a commodity acquires value independently of the will of the subject producing it, then the realization of value in the process of exchange assumes a conscious volitional act on the part of the owner of the commodity. Or, as Marx says, “commodities cannot send themselves to a market and exchange themselves with one another. Accordingly, we must turn to their custodian, to the commodity owner. Commodities are objects and therefore defenceless before man. If they do not go of their own will, he will use force, i.e., appropriate them”. [\[28\]](#)

Thus, in the process of production, the social relationships of people realized in the products of labour and assuming the form of an elemental law, require for their

realization a particular relationship of people as managers of products, and subjects “whose will rules objects”.

Therefore, simultaneously with the product of labour assuming the quality of a commodity and becoming the bearer of value, man assumes the quality of a legal subject and becomes the bearer of a legal right. “A person whose will is declared decisive is the subject of a legal right.” [29]

Simultaneously, social life is reduced on the one hand to the totality of elemental objectified relationships in which people appear to us as objects (such are all economic relations: the level of prices, surplus value, profit etc.) and, on the other hand, those relationships which define man only by reference to an object, i.e. as a subject, or in legal relationships. These two basic forms are different in principle, but at the same time are very closely connected and mutually dependent. The social, productive relationship appears simultaneously in two incongruous forms: as the value of a commodity and as the ability of man to be the subject of rights.

In the same way that the natural multiplicity of the useful qualities of a product is in a commodity a simple mask of its value, while the concrete species of human labour are dissolved into abstract human labour as the creator of value so the concrete multiplicity of man’s relationship to an object appears as the abstract will of the owner, while all the concrete peculiarities, which distinguish one representative of the species *Homo sapiens* from another, are dissolved into the abstraction of man in general as a legal subject.

If economically an object dominates man, since as a commodity it embodies in itself a social relationship not under the authority of man, then man legally dominates the object because as its possessor and owner he himself becomes merely the embodiment of the abstract, the impersonal subject of rights, the pure product of social relationships. Expressing this in the words of Marx, we say:

In order that these objects may relate to one another as commodities, their guardians must relate 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 recognize in each other the rights of private proprietors. [30]

Having fallen into servile dependence upon economic relations surreptitiously created in the form of the laws of value, the economic subject – as if in compensation – receives a rare gift in his capacity as a legal subject: a legally presumed will, making him absolutely free and equal among other owners of commodities. “All must be free and no one may violate the freedom of another ... each person possesses his own body as a free instrument of his own will.” [31] This is the axiom from which the theory of natural law proceeds. And this idea of separation, the inherent proximity of human individuality, this “natural condition”, from which “the infinite contradiction of freedom” flows, entirely corresponds to the method of commodity production in which the producers are formally independent of one another and are bound by

nothing other than the artificially created legal order, by this very legal condition or, speaking in the words of the same author, “the joint existence of many free beings, where all must be free and the freedom of one must not prevent the freedom of another”. This is nothing other than an ideologized philosophical abstraction transferred to heavenly heights, freed from its crude empiricism; independent producers meet in this market because, as another philosopher teaches us, “in the market transaction both parties do that which they want and do not claim greater freedom than they themselves grant the others”.

The increasing division of labour, the expanding social relationships and the development of exchange deriving therefrom, make exchange-value an economic category, i.e. the embodiment of social production relationships which stand above the individual. For this it is necessary that separate and random acts of exchange turn into a broad systematic circulation of commodities. At this stage of development, value is torn from arbitrary assessment, loses its character as a phenomenon of the individual psyche and assumes an objective economic significance. Similarly, real conditions are necessary for man to be transformed from a zoological being into an abstract and impersonal subject of law, into a juridic person. These real conditions consist in the condensation of social relations and the growing power of social, i.e. class organization, which achieves its maximum intensity in the “well organized” bourgeois state. Here, the ability to be a subject of rights is finally torn from the living concrete personality, ceases to be a function of its active conscious will, and becomes a purely social quality. Legal capacity is abstracted from the ability to have rights. The legal subject receives his *alter ego* in the form of a representative while he himself assumes the significance of a mathematical point, a centre in which a certain sum of rights is concentrated.

Accordingly, bourgeois capitalist property ceases to be a weak, unstable and purely factual possession, which at any moment may be disputed and must be defended *vi et armis*. It turns into an absolute, immovable right which follows the object everywhere that chance carried it and which from the time that bourgeois civilization affirmed its authority over the whole globe, is protected in its every corner by laws, police, courts. [\[32\]](#)

At this stage of development the so-called will theory of subjective rights begins to seem incongruent with reality. It is now preferable to define a right in the subjective sense as “the sum of benefits which the general will recognizes as belonging to a specific person”. Moreover, this latter does not require a person to have the ability to will and to act. Of course, Dernburg’s definition is better suited to that view of the modern jurist. which must deal with the legal capacity and rights of idiots, infants, juridic persons etc. In its extreme conclusions the will theory was equated with the exclusion of these categories from the subjects of rights. Dernburg is certainly nearer the truth in understanding the subject of rights as a purely social phenomenon. But on the other hand it is very clear to us why the element of will played such an essential role in the construction of the concept of the subject. Dernburg himself sees this in part when he affirms that:

rights in the subjective sense existed long before a conscious state order was created; they were based upon the personality of the individual man and upon the respect which he could win and compel with respect to himself and his property. Only gradually, by abstraction from the concept of existing subjective rights, was the concept of the legal order formed. The view that rights, in the subjective sense, are merely the result of objective law is ahistorical and untrue. [33]

“To win and to compel” is obviously possible only for someone who enjoys both the will and also a significant amount of power. On the other hand, Dernburg forgets that the concept of the subject arose and developed from its contrast with an object or thing. A commodity is an object; a man is a subject who disposes of the commodity in acts of acquisition and alienation. It is in the exchange transaction that the subject first appears in the full totality of its definitions. A formally and perfected concept of the subject, which would simply be left with legal capacity, further diverts us from the living real historical sense of this legal category. This is why it is difficult for jurists completely to surrender the active, volitional element in the concepts of the subject and subjective legal right.

The sphere of domination, which has assumed the form of a subjective right, is a social phenomenon which is attributed to the individual on the same basis as which value, also a social phenomenon, is attributed to an object, to a product of labour. Commodity fetishism is complemented by legal fetishism.

Thus, at a certain stage of development, the relationships between people in the process of production assume a doubly perplexing form. On the one hand, they appear as a relation of objects, commodities, and on the other as will relationships of individuals independent and equal to one another – legal subjects. Along with the mystical quality of value something appears no less perplexing – a legal right. Simultaneously a single whole relationship assumes two basic abstract aspects – economic and legal.

In the development of legal categories, the ability to execute exchange transactions is only one of the concrete phenomena of the general quality of the capacity to have legal rights and to conduct transactions. However, it is historically mainly the exchange transaction which furnished the idea of a subject as the abstract bearer of all possible legal claims. Only in the conditions of a commodity economy is the abstract form of a right created, i.e. the capacity to have a right in general is separated from specific legal claims. Only the constant transfer of rights taking place in the market creates the idea of their immobile bearer. The person receiving an obligation in the market undertakes an obligation himself at the same time. The position of a creditor is transferred to that of a debtor. Thus, the possibility is created of abstracting from the concrete differences between these subjects of legal rights, and of putting them under one generic concept. [34]

Similar to the way in which the exchange transactions of developed commodity production were preceded by random exchange acts and such forms of exchange as mutual gifts, the legal subject with the sphere of legal domination expanding around

him was morphologically preceded by the armed individual or, more often, group of people, clan, horde, tribe, capable in a dispute or a battle of defending that which was the condition of their existence. This close morphological tie dearly unites the court with the duel, and the parties and the proceedings with the parties in armed struggle. With the growth of social regulatory forces, the subject proportionally loses his material tangibility. His personal energy is replaced by social power, i.e. class power, organization, which finds its highest expression in the state. This impersonal and abstract subject corresponds, as his expression, to the impersonal abstract state authority which acts in ideal equilibrium and continuity in space and time.

But before enjoying the services of the state mechanism, the subject relies upon the organic continuity of relationships. Similar to the way in which the regular repetition of acts of exchange constitutes value, as a general category raised above subjective evaluations and random exchange ratios, likewise a regular repetition of one and the same relationship – custom – gives a new meaning to the subjective sphere of domination, justifying its existence by an external norm.

Custom or tradition, as a higher basis than the individual for legal claims, corresponds to the feudal system with its limitations and stagnation. Tradition or custom is in essence something included in notoriously rather narrow geographic boundaries. Therefore, every right is thought of merely as an attribute of a specific concrete subject or of a group of subjects. In the feudal world, “each right was a privilege” (Marx). Each city, each estate, each guild lived according to its law which followed a man wherever he was. The idea of a formal legal status, common to all citizens, general for all people, was absent in this period. Corresponding to this in the economic field were self-sufficient closed economies, prohibitions of import and export etc.

“The content of individuality was not one and the same. The estate, property position, profession, belief, age, sex and physical strength led to deep inequality in legal capacity.” [35] Equality between subjects was assumed only for closed relationships in a definite narrow sphere; thus, members of one and the same estate were equal to one another in the sphere of estate rights, members of one and the same guild were equal in the sphere of guild rights etc. At this stage the legal subject, as the general abstract bearer of all conceivable claims to rights, appears only in the role of the possessor of specific privileges.

At this stage “legal consciousness sees that the same or equal rights were attributed to individual persons or collectives, but it does not conclude that these persons and collectives were one and the same in their attribute of having rights.” [36]

To the extent that in the Middle Ages the abstract concept of a legal subject was absent, so also the idea of an objective norm, directed to an imprecise and broad circle of persons, was mixed and merged in the establishment of concrete privileges and “liberties”. As late as the thirteenth century we find traces of some clear impressions of the difference between objective law and subjective legal rights or powers. In certificates of privileges and dues, which were given to cities by emperors and

princes, the mixture of these two concepts is encountered at each step. The usual form of establishing some general rules or norms was the recognition of a definite territorial unit, or of the population in a collective sense as having specific legal qualities. Such a character was borne by even the famous formula *Stadtluft macht frei*. The abolition of judicial battles was conducted in the same form; along with these decrees, and as something entirely of the same type were included the rights of city dwellers, for instance in the use of the prince's or emperor's forest.

The same mixture of objective and subjective elements was at first: observed in municipal law itself. Municipal statutes were in part provisions with a general character and in part a list of individual rights or privileges which were enjoyed by some group of citizens.

Only with the full development of bourgeois relationships did law obtain an abstract character. Each man became a man in general, all labour was equated with socially useful labour in general, every subject became an abstract legal subject. Simultaneously, the norm also assumed the logically perfected form of the abstract general law.

Thus, the legal subject is the abstract commodity owner elevated to the heavens. His will – will understood in a legal sense – has its real basis in the wish to alienate in acquisition and to acquire in alienation. For this desire to be realized it is necessary that the desires of commodity owners be directed to one another. Legally, this relationship is expressed as a contract or an agreement of independent wills. Therefore, contract is one of the central concepts of law. In haughty language, it becomes a component part in the idea of law. In the logical system of legal concepts the contract is only one of the forms of transaction in general, i.e. one of the methods of concrete expression of the will with whose aid the subject acts upon the legal sphere around him. Historically and in reality, on the contrary, the concept of transaction grew from contract. Outside contract, the very concepts of subject and will exist only as lifeless abstractions in the legal sense. In contract these concepts obtain their full movement, and simultaneously the legal form, in its simplest purest aspect, receives its material basis in the act of exchange. The act of exchange thus concentrates, in its focus, all the essential elements of political economy and law. In exchange, in Marx's words, "a volitional or legal relation is produced by economic relationships themselves". Once it has arisen, the idea of contract strives to assume universal significance. Before possessors of commodities "recognized" each other as owners, they were of course already such but in a different, organic and extra-judicial sense. "Mutual recognition" signifies nothing other than an attempt to interpret, with the help of the abstract formula of contract, those organic forms of appropriation which depend on labour, conquest etc., which a society of commodity producers finds ready at its inception. By itself the relationship of man to an object is deprived of all legal significance. This is felt by jurists when they try to make sense of the institution of private property as a relation between subjects, i.e. between people. But they construe this purely formally and negatively, as a universal prohibition which excludes everyone except the owner from the use and disposition of the object; this

conception, while suitable for the practical purposes of dogmatic jurisprudence, is most unsuitable for theoretical analysis. In its abstract prohibitions the concept of property loses all actual meaning, and renounces its own pre-legal history.

But if the organic, “natural” relation of a man to an object, i.e. its appropriation, genetically constitutes the starting point of development, then the transformation of this relationship into a legal one took place under the influence of those requirements which were invoked by the circulation of boons, i.e. primarily purchases and sales. Hauriou calls attention to the fact that even maritime exchange and caravan exchange did not initially create a requirement for the guarantee of property. The distance which separated those engaging in exchange gave a better guarantee against any claims whatsoever. The formation of a stable market invoked the necessity of regulating the question of the right to dispose of commodities, and accordingly, of the right of ownership. [37] The title of ownership in ancient Roman law, *mancipatio per aes et libram*, shows that it was born simultaneously with the phenomenon of internal exchange. Likewise, transfer by inheritance began to be fixed as a title of ownership only from the times when civil transactions showed an interest in this transmission. [38]

In exchange, speaking in Marx’s words, “one commodity possessor only by the will of another ... may acquire for himself another’s commodities, alienating them as his own”, It is precisely this thought which representatives of the natural law school also strive to express, trying to base property on some initial contract. They were right, of course, not in the sense that such a contract ever occurred historically, but in that natural or organic forms of appropriation obtain a legal character and begin to display their legal “intelligence” in mutual acts of appropriation and alienation. Here it is necessary to look for explanations of the contradiction between feudal and bourgeois property. The greatest shortcoming of feudal property in the eyes of the bourgeois world, lies not in its origin (conquest, force) but in its immobility, in the fact that it is incapable of becoming an object of mutual guarantees, moving from one hand to another in acts of alienation and appropriation. Feudal or estate property violates the basic principle of bourgeois society – “the equal possibility of obtaining inequality”. Hauriou, one of the keenest bourgeois jurists, correctly emphasizes mutuality as the most effective guarantee of property, and thus achievable with the least amount of external compulsion. Thus mutuality, insured by the laws of the market, assumes its own nature as an “eternal” institution. In contrast to this, a purely political guarantee, given by the apparatus of state compulsion, is simply for the defence of the specific proprietary group, i.e. it is an element which has no principled significance. Class struggle frequently led in history to a new distribution of property, to the expropriation of money lenders and owners of latifundia. But these upheavals, however unpleasant they were for the classes and groups that suffered, did not disturb the basic foundations of private property – the economic fact of economic transactions by exchange. Those people who rose up against property, on the next day had to affirm it, meeting in the market place as independent producers. This is the path of all non-proletarian revolutions. Such is the logical conclusion from the ideal of anarchists

who, discarding the external signs of bourgeois law – state compulsion and statutes – maintain its internal essence: free contract between independent producers. [39]

Thus, only the development of the market initially makes possible and necessary the transformation of man, who appropriates objects by means of labour (or theft), into a legal owner.

Karner offers another conception of property. According to his definition:

*de jure* property is nothing other than that the power of person A over object N, the simple relation of the individual to an object of nature, which involves no *other individual* (our italics – *E.P.*) and no other object; an object is a private object, the individual a private person; the right a private right. This is the way the matter is in fact in the period of simple commodity production. [40]

This whole citation is one broad misunderstanding. Karner reproduces here his favourite Robinson Crusoe world. But how meaningfully can the two Robinson Crusoes, neither of whom knows of the existence of the other, imagine legally their relationship to objects when that relationship is fully exhausted by the factual relation? This right of an isolated man deserves to be placed next to the famous value “of a glass of water in the desert”. Both exchange-value and the law of property are generated by one and the same phenomenon: the circulation of products which have become commodities. Property in the legal sense appeared not because people decided to assign this legal quality, but because they could exchange commodities only having donned the personality of an owner. “Unlimited authority over a thing” is merely a reflection of the unlimited circulation of commodities.

Karner states “an owner decides to cultivate a legal relationship of property by way of alienation”. [41] Does Karner not think that “the legal” begins from this “cultivation”, and until its acquisition does not go beyond the bounds of the natural or organic?

Karner agrees that “purchase, sale, loan and rental existed earlier but with a minimal objective and subjective sphere of action”. Yet these legal forms of the circulation of economic boons existed so much earlier that we find a clear formulation of the relationships of rental, loan and deposit before the very formula of property was developed. This alone already provides the key to the proper understanding of the legal nature of property.

On the contrary, it seems to Karner that people were independent owners before they pledged, bought and sold objects. These relationships seem to him merely “auxiliary and secondary institutions filling the gaps of petit bourgeois property”. In other words, he proceeds from the idea of entirely isolated individuals who (it is unclear for what purpose) decided to create a “general will”, and in the name of this general will to order each one to refrain from infringements upon an object belonging to another. Then considering that the owner could not be treated as a universalist, either in terms of his labour power or as a consumer, these isolated Robinson Crusoes decide to

supplement ownership with the institutions of purchase and sale, loans, rental etc. This artificial scheme puts the true development of objects and concepts on its head.

The bond between a man and an object which he produced or won himself, or which figuratively (as arms, or decoration) constitutes part of his personality, undoubtedly emerges historically as one of the elements in the development of the institution of private property. It represents its initial crude and limited form. Private property obtains its perfected and universal character only with the transformation to a commodity or, rather, to a commodity-capitalist economy. It becomes indifferent to the object and severs all connection with any organic union of people (kinship-group, family, commune). It appears in the most general meaning as “an external sphere of freedom” (Hegel), i.e. as the practical realization of the abstract ability to be the subject of rights.

In this purely legal form, property has logically little in common with the organic or everyday principle of private appropriation, either as a result of personal efforts or as a condition of personal consumption and use. To the extent that the bond between man and the product of his labour, or, for instance, between man and a parcel of land which he has cultivated with his personal labour, is in itself something elementary, accessible to the most primitive thinking [42]; to that extent the relationship of the owner to property is abstract, formal, artificial and rational from the time when all economic reality began to be reduced to the sphere of the market. If, morphologically, these two institutions – private appropriation, as the condition of unimpeded personal use, and private appropriation as the condition of subsequent alienation and acts of exchange – have a direct connection with one another, nevertheless logically these are two separate categories, and the word property which covers them both introduces more confusion than clarity. Capitalist ownership of land does not assume any organic connection between the land and its owner; on the contrary, it is possible only on the condition of full freedom of transfer of land from hand to hand, and freedom of transactions with land.

Capitalist property is essentially the freedom to transform capital from one form to another, and to move it from one sphere to another to receive the maximum unearned income. This freedom to dispose capitalist property is impossible with the presence of individuals deprived of property, i.e. of proletarians. The legal form of property does not contradict the fact of expropriation of property from a significant number of citizens. For the quality of being a subject of rights is a purely formal quality. It qualifies all persons as equally worthy of property, but by no means makes them property owners. The dialectic of capitalist property is marvellously depicted in Marx’s **Capital**, both where it penetrates the “immobile” forms of law, and where it disrupts them by direct coercion (the period of primitive accumulation). In this sense Karner’s study provides very little new in comparison with the first volume of **Capital**. When Karner tries to be independent he introduces confusion. We already noted this with respect to his attempts to abstract property from the element which legally constitutes it, i.e. from exchange. This purely formal concept entails another mistake. Having considered the transfer from petit bourgeois property to capitalist

property, Karner states: “The institution of property achieved broad development, experienced full transformation, without having changed its legal nature”, and in the same place he concludes “the social function of legal institutions changes but their legal nature does not change”. [43] It may be asked: what institution does Karner have in mind? If he is discussing the abstract formula of Roman law then of course nothing in it can change. But this formula regulated small-scale ownership only in the period of the development of bourgeois-capitalist relationships. If we turn to guild crafts or to peasant economy in the age of the attachment of peasants to land, then we find a whole series of norms limiting the right to property. Of course it may be objected that all these limitations have a public law character and do not affect the institution of property as such. But even in this instance the whole situation is that a certain abstract formula is equivalent to itself. On the other hand the feudal guilds, i.e. organic forms of property, had already revealed their functions the extraction of another’s unpaid labour. [44] We can therefore come to a conclusion opposite to Karner, that “norms change and their social function remains unchanged”.

In proportion to the development of the capitalist mode of production the owner is gradually freed from technical production functions, but at the same time he loses the totality of legal domination over capital. In a stock corporation the individual capitalist is merely the bearer of title to a certain share of the unearned income. His economic and legal activity, as owner, is limited exclusively to the sphere of non-productive consumption. The basic mass of capital becomes a fully impersonal class force. To the extent that they participate in market circulation, which supposes the autonomy of its separate parts, these parts appear as the property of legal persons. In fact the comparatively small circle of the largest capitalists can dispose of it acting through their hired representatives or agents. The legally distinct form of private property does not now reflect the actual position of objects, for with the assistance of methods of participation and control actual domination goes far beyond purely legal bounds. Here we come to the moment when capitalist society is already sufficiently mature to transform into its antithesis. The necessary political prerequisite for this is the class revolution of the proletariat.

However, as experience has shown, planned and organized production and distribution may not replace market circulation, and the market bond between individual economies on the day after the revolution. If this were possible, then the legal form of property would at that moment be historically finally exhausted. It would have completed the cycle of its development having returned to the starting point, to objects of direct individual use, i.e. have become again an elementary living relationship. And with it the form of law in general would be condemned to death. [45] Until the task of the construction of a single planned economy is realized, so long as the market bond between individual enterprises and groups of enterprises remains, the form of law will also remain in force this long. We are not now speaking of the fact that the form of private property remains almost unchanged in the transitional period in the context of the means and instruments of production of the small-scale peasantry and crafts economy. But in the relationships of large nationalized industry, the application of the principle of economic accountability signifies the formation of

autonomous units whose connection with other economies is established through the market.

To the extent that state enterprises are subordinated to the conditions of circulation, so the bond between them is shaped not in the form of technical subordination, but in the form of exchange. Thus, a purely legal, i.e. judicial procedure, for regulating relationships becomes possible and necessary; however, along with this there has been preserved, and with the passage of time undoubtedly will be strengthened, direct, i.e. administrative-technical management by the procedure of subordination to the general economic plan. Thus, on the one hand we have economic life flowing into natural categories, and the social bonds between production units represented in its rational, unmasked (non-commodity) form – to this corresponds the method of direct, i.e. technical-content instructions in the form of programmes, production and distribution plans etc., specific instructions constantly changing depending upon the change in conditions. On the other hand, we have the bond between economic units expressed in the form of the value of circulating commodities, and therefore in the legal form of exchange. To this, in its turn, corresponds the creation of more or less firm and constant formal boundaries and the rules of the legal relationships between autonomous subjects (civil and possibly also commercial codes), and of agencies implementing this commerce in practice by means of decisions of disputes (courts, arbitration commissions etc.). It is obvious that the first tendency does not include any possibility for the legal art to flourish. Its gradual victory will mean the gradual withering away of the legal form in general. It is possible, of course, to object that the production programme, for example, is also a public legal norm since it proceeds from state authority, enjoys coercive force, creates rights and duties etc. Of course, until the time when the new society will be built from the elements of the old, i.e. by people who understand social relationships only as “a means for their private purposes”, even the simple technically rational instructions will adopt the form of a power alienated from man and standing above him. Political man will still be, expressed in Marx’s words, “an abstract artificial man”. But the more radically the former relationships, and the earlier psychology in this sphere of production, are outgrown, the faster the hour of that final emancipation will strike, which Marx discusses in his article *On the Jewish Question*.

Only when the real individual man will perceive in himself the abstract citizen, and as individual man shall become a universal being in his empirical life, in his individual work, in his individual relations, then when man recognizes and organizes his *forces propres* (personal efforts) as social forces, and therefore, when he no longer separates social forces in the form of political force from himself, only then *will* human emancipation be completed. [46]

Such are the perspectives of the unbounded future. With respect to our transitional period, the following should be noted. If, in the age of domination of impersonal finance capital, the real opposition of the interests of individual capitalist groups (disposing of their own and other’s capital) continue to be preserved, nevertheless proletarian state capitalism eliminates the real opposition of interests with

nationalized industry and preserves the separation of autonomy of individual economic organizations (similar to private business) only as a *method*. Thus, those quasi-private economic relationships which are formed between state and industry and the small labour economy, and also between individual enterprises and combinations of enterprises within state industry itself, are placed in strict bounds, which at any specific moment are defined by the successes achieved in the sphere of planned construction. Therefore during our transitional period the form of law as such does not conceal those unlimited possibilities which were opened up for it by bourgeois capitalist society at the dawn of its birth. On the contrary, it temporarily binds us to its narrow horizons. It exists only so as finally to exhaust itself.

The task of Marxist theory consists in verifying this general conclusion, and researching it in concrete historical material. Development may not proceed equally in various areas of social life. Therefore, painstaking work of observation, comparison and analysis is necessary. But only then, when we study the tempo and forms of outmoded value relationships in economics and, together with it, the withering away of private law elements and the legal superstructure, and finally the gradual expulsion of the legal superstructure itself, only then can we say to ourselves that we have explained at least one aspect of the process of creating the classless culture of the future.

## Notes

[28.](#) K. Marx, **Capital** (1867), *op. cit.*, vol.1, p.84.

[29.](#) Man is a commodity (i.e. a slave) only when he adopts the role of a distributor of commodities – of objects-and when in becoming a fellow participant in exchange he attains the effective status of a subject. On the rights of slaves to conduct transactions under Roman law, see I.A. Pokrovsky, **History of Roman Law** (1915), Petrograd, vol.2, p.294. Conversely, when a free man (i.e. a proletarian) seeks a market for the sale of his labour power in modern society, he is treated as an object and falls under the law on emigration with the same prohibitions, quotas etc., as other commodities transported across the state border.

[30.](#) K. Marx, **Capital** (1867), *op. cit.*, vol.1, p.84.

[31.](#) J. Fichte, **Rechtslehre** (1812), Leipzig, p.10.

[32.](#) The development of the law of war is nothing other than the gradual consolidation of the principle of the inviolability of bourgeois property. Until the era of the French Revolution the population was robbed without hindrance or restriction, both by its own soldiers and by the enemy. Benjamin Franklin first proclaimed (1785) as a political principle that in future wars “peasants, craftsmen and merchants must peacefully continue their occupations under the protection of both warring parties”. Rousseau, in his **Social Contract**, asserts the rule that war is conducted between states but not between people. The legislation of Covenant strictly punished thefts by,

soldiers both in their own and in an enemy's country. Only at the Hague, in 1899, were the principles of the French Revolution elevated to the rank of international law. Moreover, justice requires that it be noted that Napoleon, in declaring a continental blockade, felt a certain embarrassment and considered it necessary, in his address to the Senate, to justify this measure "affecting the interests of private people because of a dispute between states" and "recalling the barbarity of olden times"; in the last world war the bourgeois states, without any embarrassment, violated the property rights of the citizens of the warring countries.

[33.](#) H. Dernburg, **Pandekten** (1906), Moscow, vol.1, p.39.

[34.](#) In Germany this occurred only when Roman law was received, which is proved, *inter alia*, by the absence of a German word for the expression of the concepts of "person" (*persona*) and "subject of rights". See O. Gierke, **Geschichte des deutschen Korperschaftsbegriffs** (1873), Berlin, p.30.

[35.](#) *ibid.*, p.35.

[36.](#) *ibid.*, p.34.

[37.](#) A. Hauriou, **Principes du droit public** (1910), Paris, p.286.

[38.](#) *ibid.*, p.287.

[39.](#) For example, Proudhon declares: "I want a contract and no laws. For me to be free we must reconstruct the whole social order on the basis of mutual contract." However, he adds later: "The norms by which the contract must be fulfilled will not depend exclusively on justice, but also on the common will of people who participate in life together, a will which must compel the fulfilment of the contract even with coercion." See P.J. Proudhon, **Idée générale de la révolution** (1851), Paris, X, pp.138, 293.

[40.](#) K. Renner, **The Institutions of Private Law and their Social Functions** (1949), Routledge and Kegan Paul, London, pp.266-267.

[41.](#) *ibid.*, p.268.

[42.](#) The defenders of private property therefore eagerly appeal to this elementary relationship because they know that its ideological power exceeds many times its economic significance for modern society.

[43.](#) K. Renner (1949), **op. cit.**, p.252.

[44.](#) Property under simple commodity production, which Karner contrasts with the capitalist form of property, is just as pure an abstraction as simple commodity production itself. The transformation of even part of the products into commodities, and the appearance of money, constitute a sufficient condition for the appearance of usurer's capital-in Marx's expression, that "antediluvian form of capital" which, together with its twin (mercantile capital), "long precedes the capitalist mode of

production and can be observed in various socio-economic formations”. See K. Marx, **Capital** (1967), **op. cit.**, vol.3.

[45.](#) The intensification of the transcendence of the legal form would be reduced to the gradual transition from the equivalent method of distribution – definite quantities of products for definite quantities of labour – to the realization of the formula of developed communism: “from each according to his abilities, to each according to his needs”.

[46.](#) K. Marx, *On the Jewish Question* (1843), in Karl Marx: **Early Writings** (1975), introduced by L. Colletti, Penguin and New Left Review, p.234.

# CHAPTER V

## Law and the State

Legal relations by their “nature” do not assume a condition of peace just as exchange initially did not exclude armed robbery, but went hand in hand with it. Law and violence – apparently opposed concepts – in fact are connected with one another in the closest manner. This is true not only for the ancient ages of Roman law, but also for the later eras. Modern international law includes a very solid dose of self-help, repression, reprisals, war etc. Even within the limits of the “developed” bourgeois state the realization of a right is conducted in the opinion of such a capable jurist as Hauriou, by each citizen “at his responsibility and risk”. Marx expressed himself even more sharply: “club law is nevertheless law”. In this there is nothing paradoxical because law, like exchange, is a method of relating atomized social elements. The degree of this separation may historically be more or less, but it is never equal to zero. Thus, for instance, the enterprises belonging to the Soviet state in fact fulfil one general task; but working by the methods of the market they each have their own distinct interest, oppose one another as buyers and sellers, act at their responsibility and risk, and therefore necessarily must be in a *legal relationship*. The final victory of the planned economy will place them exclusively in a technical-expediency relationship with one another which will destroy their “legal personality”. Accordingly, if the legal relationship is depicted to us as an organized and ordered relationship – thus equating law with the legal order – then in so doing it is forgotten that in fact the legal order is merely a tendency and a final result (and moreover far from perfected), but never the starting point and assumption of a legal relationship. The very condition of peace which appears universal and homogeneous to abstract legal thinking was far from this at the initial stages of legal development. Ancient German law knew various degrees of peace: peace under the roof of a house, peace within the boundaries of a fence, and the limits of a settlement etc. A greater or lesser degree of pacification found its expression in a greater or lesser harshness of punishment provided for the violation of peace.

A condition of peace becomes necessary where exchange assumes the nature of a regular phenomenon. In those cases when there were too few prerequisites for the preservation of peace, the parties engaging in exchange preferred not to meet with one another but to view the commodities in each other’s absence. But, in general, exchange requires that not only commodities but also people meet. In the age of clan life, every outsider was considered as an enemy and was as defenceless as a wild beast. Only the custom of hospitality made possible relationships with other tribes. In feudal Europe the Church tried to limit the uninterrupted private wars, by proclaiming a so-called peace of god (for specific times). At the same time fairs and local markets began to enjoy special privileges in this respect. Tradesmen going to the market received special safe passage, their property was guaranteed from arbitrary

appropriation; at the same time the performance of contracts was safeguarded by special judges. Thus, a special *ius mercatorum* or *ius fori* was created which then lay at the basis of city law.

Initially, the markets and fairs constituted a part of feudal holdings and were simply profitable, productive items. The gift of the peace of a fair somewhere had the purpose of filling the treasury of some feudal owner and accordingly was intended to effect the private interest of the latter. However, because feudal authority acted as the guarantor of the peace necessary for exchange transactions, it took on a new trait previously uncharacteristic of it, that of a public *nature*. The authority of a feudal or patriarch type knows borders between the private and the public. The public laws of the feudal lord, with respect to the villain were at the same time his rights as a private owner. On the contrary, his private rights could be interpreted upon desire as political, i.e. public rights. Thus, the *ius civile* of ancient Rome was interpreted by many, for instance Gumpłowicz, as public law since its basic source belonged to a clan organization. In fact, in this case we encounter a legal form being born which still had not developed the internally opposed and correlated definitions of private and public. Authority therefore, bearing the traces of patriarchal or feudal relationships, is characterized at the same time by the predomination of the technical element over the legal. The legal, i.e. rational interpretation of the phenomenon of authority, becomes possible only with the development of exchange and the money economy. These economic forms bring with them an antagonism which with time takes on the nature of something eternal and natural and becomes the basis of every legal teaching about authority.

The “modern” state (in the bourgeois sense) is born at that moment when the group or class organization of authority includes in its bounds a sufficiently broad market relationship. Thus in Rome exchange with foreigners, travellers and others required the recognition of civil legal capacity for persons not belonging to the kin-group union. This already supposed the differentiation between public and private law.

Factual exercise of authority obtains a clear legal nature of public authority when along with it, and independent of it, appear relationships connected with exchange acts, i.e. private relationships *par excellence*. Acting as a guarantor of these relationships, authority becomes social, public authority, authority pursuing the impersonal interest or order.

The state as an organization of class domination, and as an organization for the conduct of external wars, does not require legal interpretation and in essence does not allow it. This is where so-called *raison d'état* (the principle of naked expediency) rules. On the contrary, authority as the guarantor of market exchange not only may be expressed in terms of law, but itself appears as law and only law, and is merged entirely with the abstract objective norm. Therefore, every juridic theory of the state which wishes to embrace all the functions of the latter, necessarily appears inadequate. It may be a true reflection of all facts of state life, but gives only an ideological, i.e. distorted reflection of reality.

Class domination, both in its organized and unorganized form, is much broader than the area which can be designated as the official authority of state power. The domination of the bourgeoisie is expressed in the dependence of the government upon the banks and capitalist groupings, in the dependence of each individual worker upon his employer, and in the fact that the staff of the state apparatus is personally connected with the ruling class. All these facts, and the number of them may be multiplied without limit, do not have any official legal expression. But in a mysterious manner they correspond in their significance with the facts which find their official legal expression, and represent themselves as the subordination of the same workers to the laws of the bourgeois state, to the orders and decrees of its agencies, to the verdicts of its courts etc. Along with the direct and indirect class denomination, there grows an indirect reflected denomination in the form of official state authority as a special force separated from society. With this the problem of the state arises, which presents no fewer difficulties for analysis than the problem of commodities.

Engels considers the state as an expression of the fact that society is hopelessly enmeshed in class contradictions; “so that these opposed classes with antagonistic economic interests”, he says, “did not devour one another and society in hopeless struggle, for this a power became necessary, a power seemingly standing above society, a power which moderated the conflict, and held it within the limits of ‘order’”. And this power arising from society but placing itself above it, and more and more alienating itself from it, is the state.” [46] In this explanation there is one passage which is not entirely clear, and it is revealed later when Engels speaks of the fact that state power naturally evolves in the hands of the strongest class, “which, with the help of the state, becomes the politically dominant class”. This phrase provides a reason for thinking that state power is generated not as class power, but as something standing above classes and saving society from dissolution, and that only after its emergence does state power become the object of usurpation. Of course, such an understanding would contradict the historical facts; we know that political apparatuses were created everywhere by the forces of the ruling class, and were the work of that class. We think that Engels himself also proposed such an interpretation, but however that may be his formula has remained unclear. The state arises because otherwise the classes would have mutually exterminated themselves in an intensified struggle, and thus society itself would have perished. Accordingly, the state arises when none of the struggling classes can seize decisive victory. This means one of two things: either the state strengthens this relationship – then it is the force above classes, and this we cannot recognize – or it is a result of the victory of one class, but in this case the necessity for a state disappears from society since, with the decisive victory of a class, equilibrium is established and ‘society’ is saved. Behind all these controversies one basic question is hidden: why does the dominance of a class not become that which it is, i.e. the actual subordination of one part of the population to another, but instead assumes the form of official state authority? Or, what is the same, why is the apparatus of state coercion created not as a private apparatus of the ruling class, but distinct from the latter in the form of an impersonal apparatus of public power distinct from society? [48] We cannot limit ourselves to a reference to the fact that for the ruling class it is *expedient* to employ an ideological mask and hide its class domination behind the

screen of the state. Although this reference is entirely indisputable, nevertheless it does not explain why this ideology may be created, and, accordingly why a ruling class may use it. The conscious use of ideological forms is not the same as their origin, which usually does not depend upon the will of people. But if we wish to explain the roots of some ideology we must search out those actual relationships which it expresses. Here, incidentally, we strike upon the fundamental difference between the theological and legal interpretation of state authority. To the extent that in the first instance – the deification of authority – we are dealing with unbridled fetishism and, accordingly, with corresponding impressions and concepts, we do not succeed in revealing anything other than the ideological duplication of reality, i.e. of those actual relationships of authority and subordination. To such an extent the legal conception is merely a biased conception, and its abstractions express one of the aspects of actually existing society, i.e. of commodity-producing society.

Opinion holds that the basis of the competition dominant in the bourgeois-capitalist world does not provide the possibility of connecting political power with the individual enterprise in the way that under feudalism this power was connected with large landholdings. “The freedom of competition, the freedom of private property, ‘equality’ in the market and the guarantee of existence for one class, create a new form of state power-democracy, which places in power the class as a collective.” [\[49\]](#) Although it is most true that “equality” in the market creates a specific form of authority, however, this connection between these phenomena is not entirely how Comrade Podvolotsky sees it. First, authority may be unconnected with an individual enterprise but nevertheless remain the private affair of capitalist organizations. Associations of industrialists, with their war coffers, blacklists, boycotts and strike-breaking patrols, are undoubtedly agencies of authority existing along with the public, i.e. state authority. Second, authority within the enterprise remains the private affair of each individual capitalist. The establishment of the rules of internal order is an act of private legislation, i.e. a true piece of feudalism, however bourgeois jurists may have tried to clothe it in modern dress. Introducing the fiction of the so-called contract of adhesion (*contrat d’adhesion* for the extraordinary authorization which the capitalist owner receives, reportedly, from the agencies of public authority for the “successful fulfilment of the functions of the enterprise necessary and expedient from this social point of view”.

However, the analogy with feudal relationships is not unconditionally exact here, for as Marx indicates:

the authority which the capitalist enjoys as the personification of capital in the direct process of production, and the social function with which he is invested as manager and master of production, are essentially different from the authority which emerges on the basis of slave, serf, etc. production. On the basis of capitalist production the mass of direct producers is confronted by the social nature of their production in the form of the strictest regulating authority, as the social mechanism of their labour process developed in a complete hierarchy; however, the bearers of this authority use

it only as personification of the conditions of labour, in contrast to labour itself, and not as political or theocratic masters as happened in earlier forms of production. [50]

Thus, under the capitalist means of production, relationships of subordination and authority may exist unalienated from the concrete form in which they appear as the domination of the conditions of production over the producers. But the very fact that they do not act in masked form, as under slavery and serfdom, makes them elusive for the jurists.

The state apparatus actually realizes itself as an impersonal “general will”, as “the authority of law” etc., to the extent that society appears as a market. In the market each seller and buyer is, as we saw, a legal subject *par excellence*. For the categories of value and exchange-value to appear on the stage, the prerequisite is the autonomous will of those engaging in exchange. Exchange-value would cease to be exchange-value, and a commodity would cease to be a commodity, if the exchange ratio is determined by an authority situated above the inherent laws of the market. Coercion, as the command of one person directed to another and supported by force, contradicts the basic assumption of exchange between commodity owners. Therefore, in a society of commodity owners the function of coercion may not appear as a social function, because it is neither abstract nor impersonal. Subordination to the person as such, to man as a concrete individual, signifies for commodity-producing society subordination to arbitrary power, because it corresponds to the subordination of one commodity owner by another. Even coercion, therefore, cannot appear here in its unmasked form as an act of expediency. It must appear as coercion proceeding from some abstract, general person, as coercion exercised not in the interest of the individual from whom it proceeds – for each person in commodity society is an egoist – but in the interest of all the participants in legal transactions. The authority of one person over another is exercised as the authority of law itself, i.e. as the authority of an objective impartial norm.

Bourgeois thought, for which the framework of commodity production is the eternal and natural framework of all societies, therefore declares abstract state authority to be an attribute of every society.

This was more naively expressed by the theorists of natural law, who, basing their teaching on authority in the idea of intercourse between independent and equal personalities, proposed that it proceeds from the principles of social intercourse as such. In fact, they merely developed the different ways in which the idea of authority bound independent commodity owners to each other. This explains the basic features of the doctrine which appears clearly in Grotius. In the market the primary factors are commodity owners participating in exchange. The system of domination is something derivative, secondary, something imposed externally on the existing commodity owners. Therefore, the theorists of natural law consider authority not as a phenomenon which has arisen historically and which is connected with the forces active in a given society, but as abstract and rational. In the exchange between commodity owners the necessity for authoritative coercion arises when the peace has been broken, or when a contract has not been performed voluntarily. Natural law

doctrine therefore reduces the functions of authority to the maintenance of the peace, and declares the exclusive purpose of a state to be an instrument of the law. Finally, in the market place a man is a commodity owner by the will of other men, and all are commodity owners by their common will. The theory of natural law thus derives the state from the contract between individual and isolated personalities. This is the skeleton of the doctrine which admits many concrete variations, depending on the historical situation, political sympathies and dialectical abilities of one author or another. This theory admits republican and monarchical tendencies and diverse degrees of democratism and revolutionism.

In general and in its entirety, however, this theory was the revolutionary banner under which the bourgeoisie conducted its revolutionary battle with feudal society. And this determined the fate of the theory. From the time when the bourgeoisie became the ruling class the revolutionary past of natural law began to be troublesome for it, and as quickly as possible the ruling theories hastened to relegate the past to the archives of history. It goes without saying that the theory of natural law cannot stand the least historical or sociological criticism, for it gives an entirely inadequate picture of reality. But the main curiosity consists in the fact that the juridic theory of the state, which took its place in the name of positivism, distorts reality to no less a degree. It is forced to do this for every *juridic* theory of the state must necessarily proceed from the state as an independent force distinct from society. This is in what *its juridic* nature consists.

Therefore, although in fact the activity of the state organization occurs in the form of orders and decrees proceeding from individual persons, the juridic theory presumes in the first place that the state, not persons, gives orders and, second, that its orders are subordinates to general norms of law which also express the will of the state.

On this point natural law doctrine does not differ by one iota in its fiction than any of the most positivist of the juridic theories of the state. For the doctrine of natural law the basic argument was that along with all the types of real dependency of one man upon another (this doctrine was exempt from such dependence), there was still one further type of dependence upon the impersonal general will, namely, the will of the state.

But it is just this construction which constitutes the basis of the juridic theory of the state as a person. The natural law elements in the juridic theories of the state lie much deeper than it seemed to the critics of natural law doctrine. They are rooted in the very concept of public authority, i.e. of authority placed above *all* and addressed to *all*. Adjusting itself to this concept, the juridic theory inevitably loses its connection with reality. The difference between the doctrine of natural law and the most recent legal positivism is merely that the former much more clearly felt the logical bond between abstract state authority and the abstract subject. It took these mystified relationships of a commodity-producing society, in their necessary context, and therefore produced a model of the classical clarity of constructs. On the contrary, so-called legal positivism does not even take account of its own logical premises.

The *Rechtsstaat* is a mirage, but a very useful mirage for the bourgeoisie because it replaces the disappearing religious ideology. It hides from the masses the fact of the rule of the bourgeoisie. The ideology of the *Rechtsstaat* is also more useful than religious ideology because, not reflecting the totality of objective reality, it nevertheless depends on it. Authority as “the general will”, as “the authority of law”, is realized in bourgeois society to the extent that the latter is a market. From this point of view even a police statute may appear to us as embodying Kant’s ideas on a freedom which is limited by the freedom of another.

Free and equal commodity owners meeting in the market are free and equal only in the abstract relationship between buyer and seller. In actual life they are tied to each other by many relationships of dependence. These are the shopkeepers and the large wholesaler, the peasant and the estate owner, the ruined debtor and his creditor, the proletarian and the capitalist. These countless relations of real dependence constitute the true basis of state organization. However, for the juridic theory of the state it is as if they do not exist. Further, the life of the state is based upon the struggle between various political forces, i.e. of classes, parties and all possible groupings; here are hidden the real mainsprings of the state machinery; for juridic theory they are equally inaccessible. Of course, a jurist may show a greater or lesser flexibility in his adaptation to the facts, for example by taking into account written law in addition to those unwritten rules which have been formed in state practice, but this does not change his fundamental position in relation to reality. There is an inevitable divergence between legal proof and that proof which constitutes the goal of historical and social research. It is not merely that the dynamics of social life overturn the rigid legal form, and that therefore the jurist is condemned to be somewhat late in his analysis; even limiting himself to the very day of a fact, the jurist communicates his analysis differently than the sociologist. For the jurist, remaining a jurist, proceeds from the concept of the state as an independent force distinct from all other individual and social forces. From the historical and political points of view the decisions of an influential class, or party organization, have the same and sometimes even greater significance than the decisions of parliament or some other state institution. From the legal point of view, facts of the first type are seemingly non-existent. Conversely, in any decree of parliament, once the legal point of view is abandoned, it is possible to see not an act of the state, but a decision adopted by a particular group, a clique of persons moved by the same individual egoistic or class motives as any other collective. The extreme normativist Kelsen concludes from this that the state in general exists only as an imaginary object—a closed system of norms or obligations. But of course, such barrenness in the subject of the theory of state law must deter practising lawyers. For if not by intelligence, then by instinct, they feel the undoubted practical significance of their concepts in this sinful world and not merely in the kingdom of pure logic. The “state” of jurists, despite all this “ideologizing”, relates to some objective reality much as the most fantastic dream nevertheless depends on reality.

This reality is pre-eminently the state apparatus itself, with its material and personal elements. Before creating completed theories, the bourgeoisie began to construct the

state in practice. In Western Europe this process began in city communes. At a time when the feudal world knew no difference between the assets of the feudal lord and the assets of the political union, the public city treasury first appeared in cities, originally as a sporadic and then as a permanent institution; “the spirit of statism” received, so to speak, its material foundation.

The appearance of state forms makes possible the appearance of people who live off these forms, officials and bureaucrats. In the feudal age the functions of administration and the court were fulfilled by the servants of the feudal lord. In the city communes they appeared for the first time in public offices; in the full sense of the word, the public nature of authority found its material embodiment. The absolute monarchy had merely to adopt the public form which had taken shape in the cities and to realize it within a broader territory. All further improvements to the bourgeois state—which proceeded both by revolutionary explosions and by peaceful adaptation to monarchic-feudal elements – can be summed up in one principle: neither of two persons exchanging in the market may appear as an authoritative regulator of the exchange relationship; for this, some third person is required who embodies the mutual guarantee which the commodity owners as owners give to one another, and who is accordingly the personified rule of exchange between commodity owners.

The bourgeoisie put this juridic concept of the state at the basis of its theory, and attempted to realize it in practice. It certainly did the latter, guided by this elementary principle. [\[51\]](#)

For the sake of theoretical purity the bourgeoisie never forgot the other side of the matter, namely that class society is not only a market where independent commodity owners meet, but also an arena of intensified class war in which the state apparatus is one of the most powerful weapons. And in this arena the relationships formed are far from being in the spirit of the Kantian definition of law as the limitation of the freedom of the individual and the minimum limit necessary for common life. Here Gumpłowicz is profoundly right when he asserts that “law of this type never existed, for the amount of freedom is determined only by the amount of authority of another, the norm of common existence is dictated not by the possibility of common existence but by the possibility of authority”. The state as an element of force in internal and external policy—this is the correction which the bourgeoisie had to make in its theory and practice of the *Rechtsstaat*. The more unstable the authority of the bourgeoisie became, the more compromising its corrections became, the more the *Rechtsstaat* turned into an incorporeal shadow, until finally the extreme intensification of the class struggle forced the bourgeoisie completely to discard the mask of the *Rechtsstaat* and to reveal the essence of authority as the organized force of one class against another.

## Notes

[47.](#) F. Engels, **The Origin of the Family, Private Property and the State** (1884), **MESW**, vol.3, p.327.

[48.](#) In our time of intensified revolutionary struggle we can observe how the official apparatus of the bourgeois state recedes into the background in comparison with the “voluntary guards” of the fascists and their ilk. This once more shows that when social equilibrium is disrupted it then “seeks salvation”, not by creation of “an authority standing above classes”, but by the maximum pressure of the forces of the struggling classes.

[49.](#) I. Podvolotsky, **The Marxist Theory of Law** (1923), Moscow, p.33.

[50.](#) K. Marx, **Capital** (1867), **op. cit.**, vol.3, p.881.

[51.](#) The English bourgeoisie, which earlier than others won for itself the domination of world markets, and which felt invulnerable because of its insular position, could go further than others in the practice of the *Rechtsstaat*. The most consistent actions based on law in the mutual relationships between authority and the isolated subject, and the most effective guarantee that the bearers of authority did not transgress their role as the personification of an objective norm, was the subordination of state agencies to the jurisdiction of an independent (not of the bourgeoisie, of course) court. The Anglo-Saxon system is, in its own way, the apotheosis of bourgeois democracy. But, so to speak, if worse comes to worse in other historical conditions, the bourgeoisie will make peace with a system which could be baptised as a system of “separation of property from the state”, or a system of Caesarism. In this case the ruling clique, by its unlimited despotic arbitrariness (having two directions: internal, against the proletariat, and external, expressed in an imperialist policy), creates the background for the “free self-determination of the individual” in civil exchange.

# CHAPTER VI

## Law and Morality

People must relate to each other as independent and equal personalities in order for the products of human labour to be related to each other as values.

If one person is under the domination of another, i.e. is a slave, his labour ceases to be the creator and substance of value. The labour power of a slave, like the labour power of a domestic animal, merely transforms a definite part of the cost of its production, and reproduction, into a product.

On this basis Tugan-Baranovsky concludes that political economy can be understood by starting from the guiding ethical idea of absolute value and, therefore, of equivalence between human personalities. Marx, of course, arrives at the opposite conclusion, in that he connects the ethical idea of the equal value of human personalities with the form of a commodity, i.e. he derives it from the practical equivalence of all forms of human labour.

In fact, man as a moral subject, i.e. as an equal personality, is nothing more than a prerequisite of exchange according to the law of value. Man as the subject of rights is such a prerequisite, i.e. as a property owner. Finally, both these definitions are closely connected with a third man as an egoistic economic subject.

All three definitions are not reducible to each other, and are even contradictory as it were. They reflect the totality of conditions necessary for the realization of the value relationship, i.e. a relationship in which the bonds between people in the labour process appear as the material nature of the products being exchanged.

If one abstracts these definitions from the real social relationships which they reflect, and attempts to develop them as independent categories, i.e. by pure reason, then as a result one obtains a tangle of contradictions and propositions which are mutually exclusive. But in the real relationship of exchange these contradictions are dialectically united in a totality.

The party to the exchange must be an egoist, i.e. be guided by naked economic calculation, otherwise the value relationship cannot appear as a socially necessary relationship. The exchanging party must be the bearer of a right, i.e. have the possibility of making an autonomous decision, for his will must "be embedded in objects". Finally, the exchanging party must embody the basic principle of the equality of all human personalities, because in exchange all types of labour are equalized and are reduced to abstract human labour.

Thus, these three elements (or, as it was earlier preferable to term them, three bases): egoism, freedom and the supreme value of the personality, are inextricably bound up with each other, appearing as a totality to be the rational expression of one and the same social relationship. The egoistic subject, the subject of a right and the moral personality are the three basic masks under which man appears in commodity production. The key to the understanding of legal and moral structures is provided by the economics of value relationships, not only in the sense of their real content but also in the sense of their form itself. The idea of the principle of value and the equality of the human personality has a long history: through Stoic philosophy it entered into the use of Roman jurists and into the teaching of the Christian Church, and then into the doctrine of natural law. But whatever clothed this idea one could discover nothing in it other than an expression of the fact that the different concrete types of socially useful labour were reduced to labour in general, insofar as the products of labour began to be exchanged as commodities. In all other relationships, social inequality (sexual, class etc.) is so conspicuous in history that one must wonder not at the abundance of arguments against the doctrine of the natural law of social equality, but that until Marx no one posed the question of the historical origins of this prejudice against natural law. If in the course of centuries human thought returned with such emphasis to the thesis of social equality, and developed it in a thousand ways, then it is clear that some objective relationship must be hidden behind this thesis. There is no doubt that the concept of the moral or equal personality is an ideological formation, and as such does not adequately describe reality. The egoistic, economic subject is no less an ideological distortion of reality. Nevertheless, both these definitions are adequate for only one specific social relationship, and reflect it only abstractly and therefore one-sidedly. We have already had occasion to declare that the concept or word “ideology” must not restrain us from further analysis. To be satisfied with the fact that one man is equal to another is the offspring of an ideology intended to oversimplify the problem. “Down” and “up” are nothing more than concepts expressing our “earthly” ideology. However, the earth’s gravity is their factual basis. When man understood the real reason which made him distinguish “down from up” – i.e. the force of gravity directed toward the centre of the earth – then he reached the limits of these definitions, and their inadequacy as applied to all cosmic reality. Thus, the discovery that these concepts were ideological was another aspect of the process of discovering that they were true.

If moral personality is nothing other than the subject of commodity production, then moral law must reveal itself as the rule of exchange between commodity owners. This inevitably produces a duality. On the one hand, this law must have a social character and, as such, stand above the individual personality. On the other hand, the commodity owner is inherently the bearer of freedom (freedom to appropriate and alienate), therefore the rule governing exchange between commodity owners must be stated in the spirit of each of them, and each must internalize this law. The Kantian categorical imperative synthesizes these contradictory requirements. It is above the individual because it has nothing in common with any natural desires – fear, sympathy, pity, feeling of solidarity etc. In Kant’s terms, it does not frighten, does not convince, does not flatter. It is generally external to all empirical, i.e. purely human

motives. At the same time it seems to be independent of all external pressures in the direct and crude sense of the word. It acts exclusively by virtue of realizing its universality. Kantian ethics are the typical ethics of a commodity-producing society, but at the same time they are a pure and perfected form of ethics in general. Kant gave a logically complete tenor to the form which atomized bourgeois society tried to embody in practice, liberating personality from the organic ties of the patriarchal and feudal periods.

The basic concepts of morality are meaningless if we abstract them from commodity production and try to apply them to some other social structure. The categorical imperative is not a social instinct. The basic purpose of the imperative is to act where no natural or organic supra-individual motivation is possible. When individuals have close emotional ties which erase the boundary of the I, then the phenomenon of moral obligation may not occur. To understand this latter category it is necessary to proceed not from the organic connection which exists, for instance, between the cow and the calf, or between the tribe and each of its members, but from the condition of alienation. Moral existence is a necessary supplement to juridic life – both are methods of exchange between commodity producers. All the pathos of the Kantian categorical imperatives is reduced to the fact that man “freely”, i.e. by voluntary persuasion, acts under the coercion of law. The very examples which Kant adduces for the illustration of his thoughts are typical. They are reduced entirely to the manifestation of bourgeois respectability. Heroism and exploits have no place within the Kantian categorical imperative. Personal sacrifice is not required because one demands no sacrifice from others. “Mindless” acts of penance and oblivion, in the name of fulfilling one’s historical calling, or one’s social functions, actions in which the most intense social instinct appear, lie outside ethics in the strict sense of the word.

Schopenhauer, and Vladimir Solov’ev after him, define law as an ethical minimum. It would be more accurate to define ethics as a certain social minimum. Intensified social enthusiasm is external to ethics and is inherited by modern man from the earlier periods of organic, and particularly tribal, existence.

Nevertheless, for a commodity-producing society, ethical reason is the highest possible achievement, and a higher cultural good of which one must speak only in the most exalted tone. It is necessary to remember Kant’s well-known words:

two things fill the spirit with ever new and increasing amazement and satisfaction the more often and deeply we think of them: the starry sky above my head and the moral law within me. [\[52\]](#)

And moreover, when discussion turns to examples of the “voluntary” fulfilment of moral duty, upon the stage appears just the same immutable alms or a refusal to lie when it would have been possible to lie with impunity. Uniquely, ethical reason universally triumphs over powerful and irrational social instincts. It breaks with all the organic and inherently narrow limits (kin-group, tribe, nation) and strives for universality. In this sense it reflects definite social material achievements, and

transforms exchange into world exchange. “There is no Hellas, no Judaea” – this reflected the historical reality of the peoples united under the power of Rome. On the other hand, Kautsky apparently correctly notes that the rule “consider another as an end in himself”, makes sense only when in practice one man may be subjected to another. Moral pathos is indissolubly bound to, and nurtured by, the immorality of social practice. Ethical doctrines pretended to change and correct the world when in fact they were but a distorted reflection of one aspect of it: namely, that in which human relationships were subordinated to the law of value. It must not be forgotten that moral personality is but one of the hypostatic forms of a triad. Man as an end in himself is only another aspect of the egoistic economic subject. An act which is the unique and real embodiment of the ethical principle in itself includes the latter’s negation. The large-scale capitalist *bona fide* ruins the small capitalist, without for a moment encroaching upon the absolute value of his personality. The personality of a proletarian is “in principle equal” to the personality of a capitalist; this finds its expression in the fact of the “free” contract of employment. But for the proletarian this very “material freedom” means the possibility of quietly dying of starvation.

This ambiguity of the ethical form is not accidental, nor is it some external defect caused by the specific inadequacies of capitalism. On the contrary, this is an essential characteristic of the ethical form itself. To eliminate the ambiguity of the ethical form would mean to effect the transition to a planned social economy, and this would mean to realize a system in which people can think and construct their relationships using simple and clear concepts such as harm and benefit. To eliminate the ambiguity of the ethical form in the most essential area (in the area of material social existence) means to destroy this form altogether.

Pure utilitarianism, striving to disperse the metaphysical haze which surrounds ethical doctrines, leads to conceptualizing good and evil from the perspective of harm and benefit. Thereby, of course, it simply destroys ethics, or rather tries to destroy and transcend them. The transcendence of ethical fetishism in fact may be achieved only simultaneously with the transcendence of commodity and legal fetishism. People who are guided in their actions by clear and simple concepts of harm and benefit will require that their social relationships be expressed either in terms of value or of law. Until this level of historical development is attained by mankind, i.e. until the legacy of the capitalist period is transcended, theoretical effort can merely proclaim this pending liberation but not implement it in practice. We must remember Marx’s words on commodity fetishism:

The most recent scientific discovery that the products of labour, to the extent that they contain value, are merely a material reflection of the labour expended in their production, and that this constitutes a period in the historical development of mankind, by no means eliminates the material objectivity of the social nature of labour.

But it is objected that the class morality of the proletariat is already liberated from all fetishes. The morally necessary is that which is beneficial to the class. In such a form, morality includes nothing absolute because what is useful today may not be so

tomorrow. It also includes nothing mystical or supernatural because the utilitarian principle is simple and rational.

There is no doubt that proletarian morality (or more accurately, that of its advanced strata) loses its particularly fetishist character, being liberated from religious elements. But morality, even entirely devoid of the mixture of religious elements, nevertheless remains moral, i.e. it is a form of social relationship in which not everything is yet reduced to man himself. If the conscious link to a class is in fact so powerful that the borders of the "I" are, so to speak, erased, and the advantage of the class actually merges with personal advantage, then there is no sense in speaking of the fulfilment of moral duty. In general, the phenomenon of morality is then absent. When such a merger has not occurred, then inevitably the abstract relationship of moral duty arises with all its attendant consequences. The rule: "act for the greatest advantage of one's class" sounds identical to Kant's formula: "act so that your conduct may serve the principle of universal legislation". The difference is that in the first case we introduce a concrete limitation, and erect class boundaries on ethical logic. [53] But within these boundaries it remains in full force. The class content of ethics by itself does not eliminate its forms. We have in mind not only the logical form, but also the form of the real phenomenon. Embedded in the proletariat (in the class collectivity) we observe formally the same methods of realizing the moral duty, which are comprised of two opposing elements. On the one hand, the collective does not fail to use all possible means of putting pressure upon its fellow members to motivate them in their moral duty. On the other hand, the same collective qualifies conduct as moral only in the absence of externally motivating pressure. Therefore to study morality means, to a certain degree, to study falsehood. Morality, like law and state, is a form of bourgeois society. If the proletariat is compelled to use them, this by no means signifies the possibility of the further development of those forms in the direction of filling them with a socialist content. They are incapable of retaining this content, and must wither away in the course of their realization. Nevertheless, until the end of the present transitional period, the proletariat necessarily must use these forms inherited from bourgeois society in its class interest, and then exhaust them. For this, it must above all have a very dear understanding, free from ideology, of the historical origin of these forms. The proletariat must critically and soberly relate not only to the bourgeois state and to bourgeois morality, but even to its own state and to its own proletarian morality, i.e. it must recognize the historical necessity of their existence as well as of their disappearance.

In his criticism of Proudhon, Marx among other things notes that the abstract concept of justice is by no means an absolute and eternal criterion by which we might construct an ideal, i.e. a just exchange relationship. This would signify the attempt to measure an object by its own reflection. But the very concept of justice is drawn from the exchange relationship, and expresses nothing outside of it. Essentially speaking, the very concept of justice does not include anything new in comparison with the concept of social equality which we analysed above. Therefore, it is ridiculous to see any independent and absolute criteria in the idea of justice. It is true that in its artful usage it provides greater possibilities for interpreting inequality as equality, and

therefore is particularly useful for obscuring the equivocal ethical form. On the other hand, justice is the step by which ethics descend to law. Moral conduct must be “free”; justice must be compelled. Compulsory moral conduct tends to deny its own existence; justice is openly “applied” to man; it allows external realization and an active egoistic interest in demanding justice. Here are found the main points of contiguity and divergence between the ethical and the legal forms.

Exchange, i.e. the circulation of commodities, assumes that the exchanging parties recognize one another as property owners. This recognition, assuming the form of inner conviction or the categorical imperative, represents the conceivable maximum which a society of commodity producers may achieve. But besides this maximum there exists a certain minimum through which the circulation of commodities can nevertheless flow without hindrance. For the realization of this minimum, it is sufficient that the commodity owners conduct themselves *as if* they recognized each other as property owners. Moral conduct is opposed to legal conduct which is characterized as such irrespective of the motives which produce it. Whether a debt is repaid because “in any event I will be forced to pay it”, or because the debtor considers it his moral obligation to do so, makes no difference from the juridic perspective. It is obvious that the idea of external coercion, both in its idea and organization, constitutes an essential aspect of the legal form. When no coercive mechanism has been organized, and it is not found within the jurisdiction of a special apparatus which stands above the parties, it appears in the form of so-called “inter-dependence”. The principle of inter-dependence, under the conditions of balance of power, represents the single, and it can be said, the most unstable basis of international law.

On the other hand, a legal claim as distinct from a moral claim appears not in the form of an “inner voice”, but as an external demand proceeding from a concrete subject who, as a rule, is at the same time the bearer of a corresponding material interest. Therefore-, the fulfilment of a legal obligation takes on an external and almost material form of *satisfaction of demand* and is finally divorced from all subjective elements on the part of the obligee. The very concept of legal obligation therefore becomes most problematic. If we are fully consistent, it is necessary to say, as Binder does, that an obligation which corresponds to a right has nothing in common with “duty” (*Pflicht*), but exists juridically only as responsibility (*Haftung*); “obliged” means no more than “answers with his property (or in criminal law also with his person) by means of the judicial process and the compulsory execution of the verdict”. Binder’s conclusions are paradoxical for the majority of jurists, and are expressed in the short formula: *Das Recht verpflichtet rechtlich zu nichts* (law legally does not impose any duty). In fact this represents only the consequence of following the conceptual dichotomy already established by Kant. But it is precisely this clarity in the demarcation of the moral and legal spheres, which provides the source of the most insoluble contradictions for the bourgeois philosophy of law. If legal obligation has nothing in common with an “inner” moral duty, then subordination to law cannot be distinguished from subordination to force per se. If, on the other hand, one accepts that an essential characteristic of law is the element of obligation, of even the weakest

subjective kind, then the meaning of law as a socially necessary minimum slowly loses its meaning. Bourgeois philosophy of law exhausts itself in this basic contradiction, in this endless struggle with its own assumptions.

Moreover, it is interesting that one and the same contradiction essentially appears in two different forms, depending on whether one speaks of the relationship between law and morality or the relationship between the state and law. In the former case, when the independence of law was affirmed with respect to morality, law is merged with the state because of the increased emphasis upon the element of external authoritative coercion. In the latter case, when law is contrasted with the state, the element of obligation (in the sense of the German *gelten*, not *müssen*) – actual domination – inevitably appears on the scene, and we have before us, so to speak, a united front of morality and law.

Here, as always, the contradiction of the system reflects the contradiction of real life, i.e. that social environment which created within itself the forms of morality and law. The contradiction between the individual and the social, between the part and the whole can never be reconciled by the bourgeois philosophy of law. This contradiction constitutes the conscious basis of bourgeois society as a society of commodity producers. This is embodied in the real relationships of human subjects who can regard their own private struggles as social struggles only in the incongruous and mystifying form of the value of commodities.

## Notes

[52.](#) I. Kant, **Kritik der praktischen Vernunft** (1914), German edition, p.96.

[53.](#) It goes without saying that in a society torn by class struggle, classless ethics may exist only in the imagination, but by no means in practice. A worker, having decided to take part in a strike – despite those deprivations with which this participation is associated for him – may formulate this decision as a moral duty to subordinate his personal interests to the general interests. But it is dear that this concept of general interests may not also include the interests of the capitalist *against* whom the struggle is waged.

# CHAPTER VII

## Law and Violation of Law

**Russkaya Pravda** – that most ancient historical monument of the Kievan period of our history – consists of 43 articles (the so-called academic register). Only two articles do not relate to violations of criminal or civil law. The remaining articles either determine a sanction, or else contain the procedural rules applicable when a law has been violated. Accordingly, deviation from a norm always constitutes their premise. The same picture is presented by the so-called barbarian laws of German tribes. For example, in the Salic Law only 65 of 408 articles do not have a punitive nature. The oldest monument of Roman law – the laws of the Twelve Tables – begins with rules defining the procedure for initiating litigation: “*Si in ius vocat, ni it, antestamino. Igitur im capito*”. (If a man is called to court and he does not go, this should be attested, and he should be taken there.)

According to the observation of the well-known legal historian Maine, “it is necessary to recognize as a rule that the more ancient the code, the fuller and more detailed will be its statement of the criminal section”. [54]

Non-observance of a norm, or violation of it, the disruption of normal intercourse and ensuing conflict: this is the starting point of the most important content of ancient legislation. Conversely, what is normal is not fixed in the beginning as such – it merely exists. The requirement that the scope and content of mutual rights and obligations be fixed and exactly established, appears when calm and peaceful existence is violated. From this perspective Bentham is right when he asserts that a statute creates rights as it creates crimes. Historically, the legal relationship assumes its specific character pre-eminently in the facts of violations of law. The concept of theft was defined earlier than the concept of private property. The relationships attending a loan were fixed when the borrower did not want to repay it: “if one tries to recover a debt and the debtor refuses etc.” (**Russkaya Pravda**, Academic Register, Art. 14). The original significance of the word *pactum* was not that of contract, but *pax*, peace, i.e. an amicable conclusion to hostility, “peaceful” (*Vertrag*) supposes the end of “unpeaceful” (*Unvertraglichkeit*).

Thus, if private law directly reflects the most general conditions of existence of the legal form as such, then criminal law is the sphere where the legal relationship achieves its maximum intensity. Here, above all and most clearly the legal element is isolated from everyday life and obtains full independence. The transformation of the actions of the concrete person into the action of a party, i.e. into a legal subject, takes place particularly clearly in the judicial process. In order to emphasize the difference between everyday activities and expressions of will on the one hand, and juridic expressions of will on the other, ancient law used special ceremonial formulae and

rituals. The drama of the judicial process noticeably created a separate juridic life contiguous with the real world.

Of all types of law it is criminal law that has the ability, by its own direct and crude manner, to assume a separate personality. This law has always, therefore, attracted the most ardent and practical interest, and punishments for its violation are usually closely associated with each other – thus, criminal law, so to speak, assumes the role of the representative of law in general. It is the part which replaces the whole.

The origin of criminal law is historically linked with the custom of the blood feud. It is certain that these phenomena are genetically close to one another but a feud becomes fully a *feud* only when fines and punishment follow it, i.e. even these later stages of development, as is often observed in the history of mankind, explain the intimations included in the preceding forms. If one approaches the same phenomena from the opposite direction, we see nothing but a struggle for existence, i.e. a truly biological fact. For the theorists of criminal law viewing the later period, blood feud corresponds with *ius talionis*, i.e. with the basis of equal retribution, under which the avenging of an insult by the insulted (or by his tribe) eliminated the possibility of further feuding. In fact, as Kovalevsky correctly points out, the most ancient blood feuds did not have this nature. Internecine wars are transmitted from generation to generation. An insult, although committed in retribution, itself becomes the basis for a new feud. The insulted and his relatives become – insultors – and so on from one generation to another, sometimes until the entire struggling kin-groups are liquidated.

[55]

Feud begins to be regulated by custom and is turned into retribution by the Talic rule “an eye for an eye and a tooth for a tooth”. Only then does a system of composition or a monetary fine begin to be established alongside it. The notion of equivalence, this first purely juridic idea, always has its source in the form of a commodity. A crime may be considered as a particular aspect of exchange, in which the exchange (contractual relationship) is established *post factum*, that is, after the intentional act of one of the parties. The ratio between the crime and the punishment is reduced to an exchange ratio. Therefore Aristotle, in discussing equivalent exchange as a type of justice, divides it into two aspects: equivalence in voluntary and in involuntary actions. Economic relationships such as purchase and sale, loan etc. are classified as voluntary actions; these include various types of crime invoking punishment as an equivalent. The definition of crime as a contract concluded against one’s will, also belongs to Aristotle. Punishment emerges as an equivalent mediating the harm done to the victim.

This notion was adopted, as is well known, by Hugo Grotius. However naive these constructs may seem at first glance, they latently contain much more sensitivity to the form of law than do the eclectic theories of modern jurists.

In the example of blood feud and punishment we can observe, with extraordinary clarity, the imperceptible stages through which the organic or biological is connected with the legal. This merger is intensified by the fact that man is not capable of

renouncing that to which he is accustomed, i.e. the legal (or ethical) interpretation of this phenomenon of animal life. He involuntarily finds in the actions of animals that which is placed in them, factually speaking, by later development, i.e. by the historical development of man.

In fact the act of self-defence is one of the most natural phenomena of animal life. It makes no difference whether we encounter it as the individual reaction of a particular animal or as a collective exercise in self-defence. According to the testimony of scholars who observe the life of bees, if a bee tries to penetrate a strange hive to steal honey, then the bees protecting the entrance at once attack it and begin to sacrifice it; if it actually penetrates the hive then they kill it immediately. There are similar cases in the animal world when the reaction is separated by a certain interval of time from the circumstance which instigated it. The animal does not respond to the attack immediately, but puts it off to a more suitable time. Self-defence here becomes a feud in the true sense of the word. Since for modern man feud is inseparably tied to the idea of equal retribution, it is not surprising that Ferri, for example, is ready to recognize the presence of the “juridic instinct” among animals. [56]

In fact the juridic idea, i.e. the idea of an equivalent, becomes fully clarified and objectified only at that stage of economic development when it becomes the standard form of equivalent exchange, i.e. not in the world of animals but in human society. For this it is by no means necessary that feud was entirely forced out by blood money.

And even when blood money is refused as something shameful-and such a view was dominant for a long time among primitive peoples – the realization of a personal feud was recognized as a sacred obligation. The very act of feud assumed a new form which it did not have when there was not yet an alternative. Specifically, it now included an image of the only adequate method: retribution. The refusal of blood-money in monetary form emphasized that blood-money was the only equivalent for blood spilled earlier. The feud is transformed from a purely biological phenomenon into a legal institution to the extent that it is linked with the form of equivalent exchange, with exchange-value.

The criminal law of antiquity emphasizes this bond with particular clarity and immediacy, because damage to property and personal injury are directly equated with a naivety that later eras abandoned in shame. From the perspective of ancient Roman law there was nothing surprising in the fact that an insolvent debtor paid with parts of his body (*in partes secae*), and one guilty of mutilation answered with his property. The idea of equivalent exchange appears here in all its starkness – uncomplicated and not obscured by any related circumstances. Accordingly, criminal procedure also assumes the character of a commercial transaction. “We must”, says Jhering, “imagine a market in which too much money is asked by one side and too little is offered by the other, until a bargain is reached. An expression of this was *pacere*, and for the price agreement itself – *pactum*.” “The duty of an intermediary selected by both parties”, adds Jhering, “finds its beginning here. In ancient Scandinavian law an intermediary determined the amount to be paid for reconciliation (*arbiter* in the original Roman sense).” [57]

With regard to so-called public punishments, there is no doubt that they were originally introduced mainly for fiscal reasons, and that they served as a means of filling the treasury of the representatives of authority. “The state”, says Henry Maine, “has not taken a fine from the defendant for the harm which he is supposed to have done to the state, but has commanded for itself only a certain share of the compensation made to the plaintiff in the form of just retribution for the loss of his time and peace.” [58] From Russian history we know that “Just retribution for loss of time” was so eagerly collected by princes that, according to chronicled testimony, “the Russian land was impoverished by fines and sales”. Moreover, this phenomenon of judicial theft was observed not only in ancient Russia, but also in the empire of Charlemagne. In the eyes of the ancient Russian princes, judicial revenues were no different from other patronage bestowed on their servants etc. It was possible to buy one’s way out of a prince’s court by paying a certain sum (the barbarian *wer* or fine of **Russkaya Pravda**).

However, in addition to public punishment as a source of income, punishment appeared rather early as a method of ensuring discipline and as a major safeguard of the authority of priestly and military power. It is well known that in ancient Rome the majority of serious crimes were at the same time crimes against the gods. For instance, one of the most important violations, for the landowner, was the wilful moving of boundary markers. From ancient times this was considered a religious crime, and the head of the guilty party was condemned to the gods. The priestly caste, acting as the guardians of order, pursued not some ideal but a most essential material interest, because the property of the guilty party was confiscated for its use. On the other hand, the punishment which the priestly organization inflicted on those who tried to appropriate its incomes – in the form of deviations from established ceremonies and gifts, attempts to introduce new religious teachings etc. – bore the same public character.

The influence of the priestly organization (i.e. the Church) on criminal law was felt in the fact that although punishment preserved its nature of equivalence or *retribution*, this retribution was neither directly linked with harm to the injured party nor based upon the latter’s claim. Indeed, punishment attained a higher abstract meaning as godly punishment. The Church thus tried to combine the material element of compensation or harm with the ideological motive of expiation and cleansing (*expiatio*). It thus tried to construct a more appropriate mechanism for maintaining social discipline (i.e. class domination) than that provided by a criminal law based on private vengeance. Indicative of this were the solicitations of the Byzantine clergy with respect to the introduction of capital punishment in Kievan Russia.

The same goal of maintaining discipline determines the nature of the punitive activity of a military commander. The latter renders justice and reprisal, both over subjugated peoples and over his own troops who had planned a mutiny, treason, or who were simply disobedient. The notorious story about Ludwig – who with his own hands decapitated a disobedient soldier – shows the primitive nature of this reprisal in the formative period of the German barbarian states. In earlier times the task of

maintaining military discipline had been conducted by a popular assembly; with the consolidation and expansion of monarchical authority this function naturally adhered to the monarchs and was naturally identified with the protection of their own privileges. As far as general criminal offences were concerned, the kings of the German tribes (and also the princes of Kievan Russia) for a long time showed only a fiscal interest toward them.

This state of affairs changed with the development and consolidation of class and estate boundaries. A spiritual and temporal hierarchy valued the protection of its privileges, in the struggle with the lower and oppressed classes of the population, as its first priority. The decomposition of the natural economy and the concomitant increase in the exploitation of the peasantry, the development of commerce and the organization of a class state, are different tasks to criminal justice. In this period criminal justice became less a method of raising income for the authorities and more a method of merciless and harsh reprisal against “evil people”, i.e. primarily against peasants who had fled from unbearable exploitation by landlords and the landlords’ state, and against the pauperized population, vagrants, mendicants etc. The police and the investigative apparatus had to play the main role. Punishment became a method of physical elimination or of instilling terror. This was the era of ordeals, corporal punishment and cruel methods of capital punishment.

Gradually, therefore, that complex amalgam was prepared which now constitutes modern criminal law. We can easily discern the composition of its historical strata. In essence (that is, from a purely sociological point of view) bourgeois society supports its class state by its system of criminal law and thereby holds the exploited class in obedience. In this respect, its judges and its private “voluntary” organizations of strike-breakers pursue one and the same goal.

The criminal jurisdiction of the bourgeois state is organized class terror. This differs only in degree from the so-called extraordinary measures applied at times of civil war. Spencer indicated the *full* analogy and even the identity between the defensive reaction directed against external attacks (war), and the reaction directed against violators of the internal order (legal or judicial defence). [59] Measures of the first type (i.e. criminal punishment) are applied primarily against *declassé* social elements, and measures of the second type primarily against active proponents of a new class rebelling against authority. This fact does not change the essence of the matter, nor does the greater or lesser correctness and complexity of the procedure applied. An understanding of the true meaning of the punitive activity of the class state is possible only by perceiving its antagonistic nature. So-called theories of criminal law which derive the principle of punitive policy from the interest of society as a whole are occupied with the conscious or unconscious distortion of reality. “Society as a whole” exists only in the imagination of these jurists. In fact, we are faced with classes with contradictory, conflicting interests. Every historical system of punitive policy bears the imprint of the class interest of that class which realized it. The feudal lord executed disobedient peasants and city dwellers who rose against his power. The unified cities hanged the robber-knights and destroyed their castles. In the Middle

Ages, a man was considered a lawbreaker if he wanted to engage in a trade without joining a guild; the capitalist bourgeoisie, which had barely succeeded in emerging, declared that the desire of workers to join unions was criminal.

Thus, class interest places the imprint of historical concreteness on each given system of punitive policy. Only the *full* disappearance of classes enables the construction of a system of punitive policy in which every element of antagonism will be excluded. But the question remains of whether a punitive system is still necessary in these conditions.

If by its content and nature authoritative punitive activity is a weapon for the maintenance of class domination, then in its form it acts as an element of the legal superstructure, and is included in the legal system as one of its branches. We showed above that the naked struggle for existence adopts a legal form through the introduction of the principle of equivalence. The act of self-defence ceases to be merely an act of self-defence, and becomes a form of exchange, a type of intercourse which takes its place alongside “normal” commercial exchange. Crime and punishment become such (i.e. assume their legal nature) on the basis of the redemption transaction. As long as this form exists, so too will the class struggle be conducted through law. Conversely, the very term criminal will lose all meaning to the extent that the element of the relation of equivalence disappears from it. [60]

Considering the nature of bourgeois society as a society of commodity owners, we would have to suppose a priori that its criminal law was the most juridic in the sense we established above. However, we at once encounter certain difficulties here. The first difficulty is the fact that modern criminal law does not proceed primarily from the harm done to the victim but from the violation of the norm established by the state. Once the victim and his claim recedes to the background then, it is asked, where is the form of equivalence? But in the first place, no matter how far the victim recedes to the background he nevertheless does not disappear, but continues to constitute the setting in which the criminal law action is played out. The abstraction of a violated public interest rests on the fully real figure of the victim, who participates in the process – personally or through representatives – and who gives this process a living significance. Moreover, even when the concrete victim in fact does not exist, when “merely a statute” is assailed, this abstraction implies its real embodiment in the person of the public prosecutor. This division, in which a state authority appears both in the role of a party (the prosecutor) and in the role of a judge, shows that as a legal form the criminal process is indivisible from the figure of the victim demanding “retribution”. It is therefore indistinguishable from the more general form of agreement. The prosecutor, as is expected of a “party”, asks a “high price”, i.e. a strict punishment; the criminal seeks leniency, a “discount”, the judge decrees “according to justice”. Discard this form of agreement, and you will deprive the criminal process of its “Juridic spirit”. Imagine for a minute that the court is actually occupied only with the consideration of how to change the conditions of life of a given person – in order to influence him in the sense of correction, or in order to protect society from him – and the very meaning of the term punishment evaporates. This does not mean that

every criminal court and punitive procedure is entirely deprived of the simple and comprehensible elements mentioned above. But we wish to show that there is a peculiarity in this procedure which is not covered by the clear and simple considerations of social purpose. This is an element that is irrational, mystifying and incoherent, and it is the specifically legal element.

Further difficulty lies in the following fact. Ancient criminal law knew only the concept of harm. Crime and guilt, occupying such an eminent place in modern criminal law, were absent at this stage of development. Conscious, careless and accidental actions were evaluated exclusively by their consequences. The customs of the Salic Franks and the modern Ossetians stand at the same stage of development in this respect. The latter made no distinction between death resulting from a blow with a knife, and death proceeding from the fact that a rock was knocked off a hill kicked by the hoof of another's bull.

From this, as we see, it does not follow that the concept of responsibility was in itself alien to ancient law. It was merely determined by another method. In modern criminal law – in accordance with the radical individualism of bourgeois society – we have the concept of strict personal responsibility. But ancient law was penetrated by the principle of collective responsibility: children were punished for the sins of their parents, and the kin-group answered for each of its members. Bourgeois society dissolves all earlier primitive and organic ties between individuals. It proclaims as its basis: every man for himself, and it implements this most consistently in all areas, including criminal law. In the second place, modern criminal law introduced the psychological element into the concept of responsibility and thus gave it a greater flexibility. It divided it into degrees: responsibility for a result which was foreseen (intent), and responsibility for a result which was unforeseen but which could have been foreseeable (negligence). Finally it constructed the concept of non-imputability, i.e. the complete absence of responsibility. However, this new element, the degree of guilt, by no means excludes the principle of equivalent exchange, but derives from it and creates a new basis for its application. What does this division signify other than a clarification of the conditions of the bourgeois judicial transaction! The gradation of liability is the basis for the gradation of punishment – a new, if you wish, ideal or psychological element, which is combined with the material element (the injury) and the objective element (the act) – in order to provide a joint basis for determining the ratio of punishment. Responsibility is heaviest for an action committed with intent and accordingly, *ceteris paribus*, entails a heavier punishment; if an action is committed negligently the responsibility is less heavy: *ceteris paribus*, the punishment is reduced; finally, if responsibility is absent (criminal intent is non-imputable), there is no punishment. If we replace punishment with *Behandlung* (“method of influence”), i.e. a legally neutral, medical-pedagogical concept, we reach very different results, This is so because primarily we will be interested *not in the proportionality*, but in the *correspondence* of the measures taken to the goals which are placed before it, i.e. to the goals of protecting society from the criminal etc. From this point of view the relationship may appear as the opposite; that is, in the case of

the least responsibility the most intensive and long-lasting measures of influence may seem necessary.

The idea of responsibility is necessary if punishment is to appear as a method of payment. The criminal answers for the crime with his freedom, and he answers with an amount of his freedom which is *proportional* to the gravity of what he has done. This idea of responsibility is unnecessary when punishment is liberated from the character of equivalence; and when no remnant of this remains, punishment ceases to be punishment in the legal sense of the word.

The juridic idea of responsibility is not scientific because it leads directly to the contradictions of indeterminism. From the viewpoint of the causal chain which leads to an event, there is not the slightest basis for preferring one link to the others. The actions of a man who is psychologically abnormal (irresponsible) are just as conditioned by a series of causes, i.e. inheritance, conditions of life, environment etc., as are the actions of a normal (responsible) man. It is interesting to note that punishment applied as a pedagogical measure (i.e. outside the legal idea of equivalence) is entirely unconnected with considerations of imputability, freedom of choice etc., and does not require these ideas. The expediency of punishment in pedagogy – we speak here of course of expediency in the most general sense, independent of the selection of forms, leniency, strictness of punishment etc. – is determined exclusively by the presence of the sufficiently developed ability to understand the connection between one's action and its unpleasant consequences, and the retention of this connection in one's mind. Even persons whom the criminal law does not hold responsible for their actions – children of a very young age, and the psychologically abnormal – are considered responsible in this sense, i.e. they are subject to influence in a definite direction.

Punishment proportionate to guilt chiefly represents the same form as revenge related to damage. Above all, it is characterized by the numerical, mathematical expression for "severity" of the sentence: the number of days, months etc., of deprivation of freedom, the amount of monetary fine, deprivation of various rights.

Deprivation of freedom – for a definite term previously indicated in the judgement of a court – is the specific form in which modern, that is, bourgeois capitalist criminal law, realizes the basis of equivalent retribution. This method is deeply, but unconsciously connected with the concept of the abstract man and of abstract human labour time. It is not accidental that this form of punishment grew strong and eventually seemed natural and expected, in the nineteenth century, i.e. when bourgeois society was fully developed and had consolidated all its particular features. Prisons and dungeons, of course, existed even in ancient times and in the Middle Ages, alongside other means of physical coercion. But at that time prisoners were usually confined until their death or until the payment of a ransom.

A necessary condition for the appearance of the notion that payment for a crime should be by a previously determined amount of abstract freedom, was that all concrete forms of social wealth had to be reduced to the simplest and most abstract

form – to human labour time. Here we undoubtedly observe yet another case affirming the mutual protection of the various aspects of culture. Industrial capitalism, the Declaration of the Rights of Man and the Citizen, Ricardo's political economy, and the system of terms of incarceration in prison-these are phenomena of the same historical period.

Equivalence of punishment – in its crude and overtly material form as the causing of physical harm or the exacting of monetary compensation – specifically because of this crudeness preserves a simple meaning accessible to everyone. But it loses this meaning in its abstract form of the deprivation of freedom for a definite term, although we continue to speak of a measure of punishment proportional to the gravity of the act.

Therefore, it is natural for many criminal law theorists (primarily those who consider themselves the most advanced) to attempt to remove this element of equivalence because it has clearly become inconvenient, and to concentrate attention on the rational goals of punishment. The mistake of these progressive criminologists is that in criticizing so-called absolute theories of punishment, they suppose that they are confronted only by false views and confused thoughts which can be dissolved simply by theoretical criticism. In fact, the inconvenient form of equivalence does not derive from the confusion of individual criminologists, but from the material relationships of commodity production, and it is nurtured by them. The contradiction between the rational goal of the protection of society – or the re-education of the criminal – and the principle of the equivalence of punishment, exists not in books and theories but in life itself in judicial practice, in the social structure itself. Similarly, the contradiction between the fact of the bond of social labour as such, and the inconvenient form of expression of this fact in the value of commodities, exists not in theory, and not in books, but in social practice itself.

Sufficient proof of this is found in various elements. If, in social life, punishment was considered as an *objective*, then the keenest interest would be aroused in the implementation of punishment and, above all, by its result. However, who would deny that the centre of gravity of criminal procedure for the overwhelming majority-is the court room and the moment of pronouncing the verdict and sentence?

The interest which is shown towards enduring methods of influencing the criminal is utterly negligible in comparison with the interest which is aroused in the effective moment of pronouncing the verdict and sentence, and in the determination of the "measure of punishment". Questions of prison reform are a live issue only for a small group of specialists; broadly, the correspondence of the sentence to the gravity of the act occupies the centre of attention. If, according to common sentiment, the equivalence is properly determined by the court, then the matter will be concluded here, and the subsequent fate of the criminal is of no interest. "A study of the execution of punishment," complains Krohne, one of the leading specialists in this area, "is the sore point of the science of criminal law." In other words it is relatively neglected. "And moreover", he continues, "if you have better laws, better judges, and better sentences, and the civil servants carrying out these sentences, are worthless,

then you may freely throw laws into the rubbish bin and burn your sentences.” [61] But the authority of the principle of retributive equivalence is not only discovered in the distribution of social interest. It appears no less clearly in judicial practice itself. In fact, what other bases are there for those sentences which Aschaffenburg cites in his book **Crimes and the Struggle against Them**? Here are just two examples of a long series: a recidivist, convicted 22 times for forgery, theft, extortion etc., was sentenced for the 23rd time to 24 days in prison for slandering an official. Another, who had in all spent 13 years in prison and the penitentiary (*Zuchthaus*), having been convicted 16 times for extortion, theft etc., was sentenced (the 17th time) for extortion to 4 months in prison. [62] In these instances one obviously does not discuss the protective or corrective function of punishment. Here the formal principle of equivalence triumphs: for equal guilt – an equal measure of punishment. And in fact what else could the judge do? He could not hope to correct a confirmed recidivist by 3 weeks’ detention, but he also could not isolate the prisoner for life because of the mere slander of a civil servant. Nothing is left to him but to have the criminal pay in small change (a certain number of weeks of deprivation of freedom) for a minor crime. For the rest, bourgeois jurisprudence ensures that the transaction with the criminal is in accordance with all rules of the art, i.e. that each may be convinced, and may verify that the payment is justly set (public judicial proceedings), that the criminal may bargain freely (adversary process), and that in so doing he may use the services of an experienced judicial expert (admission of the defence) etc. Briefly, the state conducts its relationship to the criminal within the framework of a *bona fide* commercial transaction in which there are, ostensibly, guarantees of criminal procedure.

The criminal must know beforehand why he owes something and *what* is expected of him: *nullum crimen, nulla poene sine lege*. What does this mean? Does it require that each potential criminal be exactly informed of the methods of correction which will be applied to him? No, the matter is much cruder and simpler—he must know how much freedom he will forgo as a result of the judicial transaction. He must know beforehand those conditions under which payment will be demanded of him. Here lies the meaning of criminal codes and criminal procedure codes.

One must not imagine that in the beginning false theories of retribution held sway in criminal law, and then later the correct point of view of social defence triumphed. It is wrong to consider development as having taken place only on the level of ideas. In fact, both before and after the appearance of the sociological and anthropological trends in criminology, punitive policy included a social or, rather, a class element of defence. However, along with this it included, and still includes, elements which do not derive from this *technical* goal and therefore do not permit the punitive procedure itself to be expressed *wholly and with nothing remaining* as a rational, non-mystifying form of socio-technical rules. These elements – whose origins must be sought not in punitive policy itself but much deeper – give real meaning to the legal abstractions of crime and punishment, and ensure their full practical significance regardless of all the forces of theoretical criticism.

We remember Van Hamel's exclamation at the Hamburg congress of criminologists in 1905: the main obstacle for modern criminology are the three concepts "guilt, crime and punishment"; "when we free ourselves from them", he added, "all will be better." We may now reply that the forms of bourgeois consciousness will not be eliminated merely by ideological criticism, because they constitute a unity with those material relationships which they reflect. The transcendence of these relationships in practice – i.e. the revolutionary struggle of the proletariat and the realization of socialism – this is the only way to dispel those mirages which have become reality.

To proclaim that fault and guilt are prejudiced concepts in practice suffices for the transition to a punitive policy which would render them unnecessary. Until the time when the commodity form, and the derivative legal form, cease to place their imprint upon society, the essentially incoherent (from the non-judicial perspective) notion that the severity of each crime can be weighed on a scale and expressed in months or years of imprisonment, will continue to preserve its force and its real significance in judicial practice.

It is possible, of course, to refrain from expressing this notion in such a shockingly crude formulation. But this by no means signifies that therefore we are finally free from its influence in practice. What is the general part of every criminal code (including even ours) with its concepts of abetting, participation, contempt, preparation etc., if it is not a means to define guilt more exactly? What is the distinction between intent and negligence if not a distinction of a degree of guilt? What meaning has the concept of irresponsibility if the concept of guilt does not exist? Finally, why is the special part of the code needed if the matter is merely about measures of social (class) defence?

In fact the consistent execution of the principle of social defence would not require the fixing of individual *sets of elements of crime* (with which *measures of punishment* are largely linked and defined by statute or by the courts). It would require however, a clear description of *symptoms* characterizing a socially dangerous condition and the development of those *methods* which must necessarily be applied in each given case for social defence.

The matter is obviously not only that, as some persons think, a measure of social defence is connected in its application with subjective moments (form and degree of social danger), while punishment rests on an objective moment, i.e. the concrete set of elements of a crime established by the special part of the code. The importance lies in the character of this association. It is difficult to separate punishment from an objective basis, because it cannot discard the form of equivalence without losing its basic character. However, only the concrete structure of a crime provides something like a measurable amount, and accordingly something like an equivalent. One can make a man pay for an action, but it is senseless to make him pay for the fact that society has recognized him (i.e. the given subject) to be dangerous. Therefore, punishment presupposes an exactly fixed set of elements in a crime. A measure of social defence has no need for this. Payment by coercion is legal coercion directed towards a subject placed in the formal framework of a trial, a sentence and its

execution. Coercion, as a measure of defence, is an act of pure expediency and as such may be regulated by technical rules. These rules may be more or less complex depending upon whether the purpose is the mechanical elimination of a dangerous member of society, or his correction; but in any event these rules reflect clearly and simply the objective which society has set itself. Conversely, this social objective appears in masked form in the legal forms determining punishment for certain crimes. A person subjected to coercion is placed in the position of a debtor paying a debt. This is reflected in the term “serving a sentence”. A criminal who has served his sentence returns to his starting point, to an isolated social existence, to the “freedom” to undertake obligations and commit crimes.

Criminal law, like law in general, is a form of the relationships between egoistic and isolated subjects, bearing autonomous private interests as commodity owners. The concepts of crime and punishment-as is clear from the aforesaid-are the necessary definitions of the legal form. Liberation from them will only occur when the general withering away of the legal superstructure begins. And to the extent that in fact, and not merely in declarations, we begin to transcend these concepts and to do without them-this will be the best symptom of the fact that for us, finally, the narrow horizons of bourgeois law are disappearing.

## Notes

[54.](#) H. Maine, **Ancient Law** (1873), Russian edition translated by N. Belozersky, p.288.

[55.](#) cf. M. Kovalevsky, **Modern Custom and Ancient Law** (1886), Petersburg and Moscow, pp. 37-38.

[56.](#) E. Ferri, **Criminal Sociology** (1900), Russian edition translated and with a preface by Dril', vol.2, p.37.

[57.](#) R. Jhering, **The Spirit of Roman Law** (1875), Russian edition, vol.1, p.118.

[58.](#) H. Maine, **Ancient Law** (1873), op. cit. p.269.

[59.](#) H. Spencer, **Principles of Sociology** (1883), Russian edition, p.659.

[60.](#) Thus, criminal law is a constituent part of the legal superstructure to the extent that it embodies one of the varieties of that basic form to which modern society is subordinated: the form of equivalent exchange with all the consequences which derive from it. The realization of this relationship in criminal law is one of the aspects of the *Rechtsstaat* as an ideal form of relationship between independent and equal commodity producers who meet in the market. But since social relationships are not limited to the abstract relationships between abstract commodity owners, the criminal court is therefore not only the embodiment of the abstract legal form, but it is also a weapon of direct class struggle. The sharper and more intense this struggle, the more difficult it is for a class to realize its domination through the legal form. In this case,

the “impartial” court – with its guarantees – is replaced by an organization of direct class violence, and its actions are guided only by considerations of political expediency.

[61.](#) Quoted from G. Aschaffenburg, **Das Verbrechen und seine Bekämpfung** (1905), Heidelberg, p.200.

[62.](#) **ibid.**, pp.205-206.