4. Law, state and capital

Political economy and jurisprudence: questions of method

Capital represents the maturation of Marx's critique of the economic forms of civil society and of his analysis of the social relations which lie concealed behind, and give rise to, these forms. His thesis was that economic categories can be understood only as the expression of a definite historical organization of labour. In the course of this critique the gulf which existed in his early writings between the surface economic forms of civil society (value, price, money, capital, wage-labour, etc.) was overcome, as he addressed the "dialectical" question of why alienated labour should express itself in these forms. Marx offered a critique of political economy not only in the sense of replacing erroneous economic theories with better ones, but also in the sense of disclosing what kind of society provides the foundation for the emergence of an independent economic sphere of life. In other words, he offered a social critique of economics in general, and not just an internal critique of one economic theory by another. The theoretical hypothesis which he defended was that the key to understanding economic categories lay in an exposition of the social relations according to which men and women organize the labour of society. It is thus misleading to call the economic sphere the 'base' of society on which legal, political and ideological superstructures rest; rather, the message which runs through Capital is that social relations of production constitute the base of society and that economic categories represent an expression of the base. The imagery which forms Capital, however, is not that of base and superstructure but rather that of 'form' and 'content': economies expressing the 'surface forms' of capitalist society, the 'inner content' or 'substance' of which comprises social relations of production.
The perspective from which Marx approached Capital was that of starting with economic forms, e.g. value, price, money, capital, interest, profit, etc. - analysing the specific relations of production which lie hidden beneath these forms, and then explaining 'synthetically' why these relations of production necessarily express themselves in this economic way. This method has given rise to the impression that the economic expression of relations of production is their only expression, as if there is an exclusive association between economics and social relations of production which is not shared by other forms of social life. The result is that law, politics and ideology are in some way or another dissociated from relations of production 'determined' by them perhaps, or 'relatively autonomous' of them, or only 'determined in the last instance', but not themselves a direct expression of relations of production in the same way as economics. Economics becomes a privileged sphere while law, politics and ideology appear as subordinate spheres. The basis of this privilege and subordination, however, is often quite arbitrary, appeals being made to supposedly self-evident truths that economics is more fundamental for the development of society than, say, the state. It seems to me that Marx at times identified 'economics' with relations of production and at times saw 'economics' as an expression of the surface forms assumed by certain definite relations of production. In the former case, he treats economics as a universal sphere in the sense that relations of production in all societies are assumed to determine the general organization of society; in the latter, he treats the emergence of the economic sphere as a historical event, in that it is only under particular conditions that relations of production assume the economic forms of value, money, capital, etc. The important point is not the verbal definition of 'economics' but the theoretical differentiation between the content of capitalist society - i.e. social relations of production - and its forms of appearance, i.e. value, money, capital, etc. In order to gain consistency, I believe that it would be most useful if the term 'economics' were reserved for the latter and thus clearly distinguished from its social content.

The theme which appears on the edges of Capital is that the social relations of capitalist production do not manifest themselves only in economic forms but also in juridical forms. In other words, it should be possible to do what Marx intended in his earlier years but then lost sight of as he delved deeper into his economic studies; that is, to complement his critique of political economy with a critique of jurisprudence: to start with juridical categories, analyse the social relations of production which lie hidden beneath them, and then explain 'synthetically' why these relations of production necessarily express themselves in juridical forms. Indeed, Marx outlined just such a programme of study in his preface to the Economical Philosophical Manuscripts:

I shall therefore publish the critique of law, morals, politics, etc. in a series of separate independent pamphlets and finally attempt, in a special work, to present them once again as a connected whole, to show the relationship between the parts and to try to provide a critique of the speculative treatment of the material. That is why the present work only touches on the interconnection of political economy and the state, law, morals, civil life, etc. in so far as political economy itself particularly touches on these subjects.¹

The traces of such an analysis in Capital point to a hypothesis that was not present in Marx's earlier writings - that the self-same relations of production which gave rise to the economic forms of capitalist society also gave rise to its juridical forms; that not only are economic and juridical categories both expressions of historical relations of production but that they are expressions of the same historical relations of production. But all this was only on the sidelines of Marx's critique of political economy: it appeared to many Marxists that social relations between people could only take the form of material relations between things (i.e. economics), ignoring the pressing fact that they also take the form of legal relations between persons, as owners of private property. Capital caught one side of the fetishism of capitalist society: that the economic forms assumed by the products of labour under definite relations of production - value, capital, wage-labour, etc. - appear as natural qualities of the products of labour themselves, as if it were the case that, as political economy thought, value is a natural property of anything produced by human hands, or that capital is a natural characteristic of the means of production as such, or that wage-labour is the natural form assumed by all labour. But it only touched on another side of the fetishism of capitalist society: that the legal forms assumed by producers under definite relations of
production – ownership of private property, free will, equal right, law, state authority – appear as natural qualities of people, as if they were the case that, as jurisprudence assumed, they are attributes of human nature or human reason as such. The tangential influence of such a critique in Marx's work has led most interpreters to neglect this side of the question.

The practical result of this neglect has been most unfortunate: the idea that social relations between people have been reduced by capitalism to material relations between things will rightly be unconvincing to those who can see before their very eyes that capitalism also brings with it the idea of the integrity of the human personality, free will, equality before the law, rights of the individual and so forth. The critique of the materialist, i.e. economic, aspect of capitalist society will necessarily be one-sided and vulnerable, if it is not accompanied by a critique of its humanist (i.e. juridic) aspect. The critique of political economy has to be integrated with the critique of jurisprudence.

One consequence of this neglect among Marxists of juridic forms of capitalist relations of production has been to reduce them to the status of illusions or mirages. Such an approach is in complete contravention of the method Marx employed in his critique of political economy. When Marx used the term 'form' and contrasted it with 'content', he did not mean that the form is illusory and the content is real. When, for example, he discussed the value-form of commodities, his object was, first, to show the limitations of political economy which attempted to explain magnitudes of value (i.e. why products have one price rather than another) but ignored the form of value (i.e. why products bear prices at all); second, to show that the value-form is a social form, which presupposes the existence of definite social relations of production; third, to show that although the value-form is social, it appears either as a natural quality of material objects (vulgar political economy) or as a natural result of human labour (classical political economy); fourth, to show why social relations of commodity production must necessarily express themselves in the form of the value of things. The imagery of form and content is quite different from that of illusion and reality: the surface form of an object is not less real than its inner content, but it can be explained only by reference to its inner content. Similarly, the inner content of an object cannot be envisaged independently of its surface form, as if the one can be separated from the other. Once the value-form is established, it acts as a real constraint on human behaviour and as a real mediation between human beings. The Russian Marxist economist Rubin, for instance, writing in the 1920s, has a useful discussion of the complementarity between the hidden process of 'reification', by means of which production relations between people give to products their specific economic form, and the overt process of 'personification', by means of which the value-form of product determines and mediates relations between people. Juridic forms of capitalist production relations are every bit as real as their economic forms. Just as Marx in no way meant that, because value, money, capital and wage-labour are forms of appearance of capitalist relations of production, they are not also real social forces that mediate relations between people and kick back at the people who create them; so too juridic forms of capitalist relations of production are also real social forces – there is nothing illusory about the law courts, the police and the prisons – which also mediate relations between people and constrain those who create them. The fact that Marx focused, in his theoretical writings, on the economic forms of capitalist productive relations and not on their juridic forms should not lead one to suppose that juridic forms are any less substantial than their economic counterparts.

The other major consequence of the neglect among Marxists of juridic forms has been not to discount them as fictions but to idealize them as eternal truths. The connections linking ideas of justice, law, rights and so forth to capitalist relations of production are lost from sight, with the result that these ideas, instead of appearing as what they are (that is, the ideas of real men and women in society), are abstracted from their human origins and acquire a life of their own. Such was the case with Proudhon, who saw 'justice' as an 'eternal idea' with which to attack aspects of capitalist society like usury or exploitation. Although this provided a critical standpoint from which to expose the hypocrisy associated with private property, Proudhon failed to see that his conception of justice reflected the self-same relations of production the economic forms of which he rejected. Thus, while the idea of 'free and equal exchange' which informs his concept of justice allowed him to be critical of capital and of usury, it also led him to be equally critical of the combination of workers into trade unions, on the grounds that:
Each worker individually should dispose freely of his person and his hands, this can be tolerated; but that workers should undertake by combination to do violence to monopoly is something society cannot permit.²

It was precisely Proudhon's abstraction of juridic forms from capitalist relations of production which took Marx away from being an admirer of Proudhon into being his critic:

Proudhon creates his ideal of justice, of justice éternelle, from the juridical relations that correspond to the production of commodities: he thereby proves, to the consolation of all good petty bourgeois, that the production of commodities is a form as eternal as justice... Do we really know any more about 'usury', when we say it contradicts justice éternelle, équité éternelle, mutualité éternelle, and other vérités éternelles... ?²²

Proudhon serves here as an exemplar of an approach to law which has adherents within contemporary Marxism.

On the idea of private property

Marx's critique of jurisprudence was - to the extent that he developed it - like his critique of political economy, not just an internal critique of one legal theory by another but an uncovering of the social foundation of legal thought in its entirety. It was a critique aimed at the fetishized character of law in which social relations between people appear in the form of private relations between people and things (rights of property) and thence in the form of personal subordination to an impersonal embodiment of those rights (government of laws rather than people). Just as it was necessary for Marx to complement his critique of religion with a critique of those social relations which gave rise to religion, so too his critique of law was complemented by a critique of relations that clothe themselves in legal mysteries.

The starting point for Marx's critique of law was private property, just as value was the starting point for his critique of political economy. Thus in his contribution to the Critique of Political Economy, he wrote that 'Hegel correctly takes ownership, the simplest legal relation of the subject, as the point of departure for the philosophy of law.' He regarded private property not as something separate from law - as if their connections were purely contingent - but rather as the elementary 'cell' of legal thought. The supercession of private property was therefore at once the supercession of law; the idealization of law, conversely, was the idealization of private property.

In the 1844 Manuscripts Marx contrasted the human way in which men and women relate to the natural world around them to the alienated appropriation of things in the form of private property. In the first case, people relate to the world through all their senses - seeing, hearing, tasting, smelling, etc. - and by so doing turn all objects into 'human objects, objectifications of themselves', which develop, realize and confirm their individuality. In the case of private property, sensual appropriation of objects is subordinated to possessing, owning, things; appropriation of nature in the form of private property becomes a 'means of life' rather than a realization of one's individuality: 'private property has made us so stupid and one-sided that an object is only ours when we have it.' The more people become what they own the less they are themselves, until even their personal qualities appear as possessions that can be bought and sold on the market place: 'the less you are, the less you give expression to your life, the more you have, the greater is your alienated life.'²⁴ From the perspective of jurisprudence, private property appears as the external embodiment of individual will in things; in fact it signifies the alienation of the individual, who is reduced to no more than an owner of things and whose identity is reduced to the things he or she owns. Thus private property was analysed by Marx in the Manuscripts as the alienation of 'human existence' and of a 'human way' of inhabiting nature.

The advance which Smith made over the mercantilists was that the latter treated private property 'as a purely objective being for man'²⁵ whereas Smith recognized that labour in the 'subjective essence' or 'principle' or private property. He translated Locke's natural law imperative that people have a right to the product of their own labour into the scientific doctrine that labour is the substance of private property. Smith never, however, once asked the question why this content has assumed this particular form, that is to say, why labour is expressed in private property. While all human labour produces material objects (i.e. use-values), the
question which Marx posed was what specific kind of labour produces use-values in the alien form of private property. By ignoring the form of property Smith 'transfers private property into the very essence of man'; this illusion can be broken only by seeing private property as the product of a specific kind of labour, alienated labour, in which the objects of labour appear as something 'alien' to their producers: 'this realization of labour appears as a loss of reality for the worker.'

In the Manuscripts Marx based his critique of private property on a contrast between human and inhuman ways of appropriating nature: private property represents the dominance of the material world over 'the human element', while communism represents the triumph of the human element over the material world. Capitalist reality is condemned in the name of a communist ideal, the world of what is in the name of the world as it should be. The error of classical jurisprudence was to presuppose private property, while the strength of Proudhon was to expose it to critical examination. Marx's transition from utopian to scientific socialism, that is, from a radicalized natural law theory to historical materialism, led him to explore the juridic form of private property and the contradictory character of productive relations which express themselves in this form.

In his Critique of Political Economy, Grundrisse and Capital, the vast bulk of Marx's work was centred on a critique of the economic forms assumed by capitalist relations of production. No comparable critique of the fetish of private property, law and the state was written by Marx. We have, however, a basis for such a critique in Marx's own sporadic comments on jurisprudence, in his substantive analysis of capitalist relations of production and in the method he developed for his critique of political economy. In the section which follows, I shall just be skimming the surface of what is required for a critique of jurisprudence, in order to bring to light the dialectical view of bourgeois freedom and equality which informed Marx's later writings and the contradictory relation he saw between juridic forms and their substantive content.

Why, Marx asked, should private property, that is, a definite form of property, whose historical emergence classical jurisprudence had itself traced, none the less appear as a natural and rational institution valid for all times and places? Classical jurisprudence had squashed this circle by treating all previous forms of property as distortions of private property by political and moral constraints; that is, private property appeared as a natural relation between people and things corrupted in all pre-capitalist societies by the imposition of external obligations. It seemed, in other words, as though private property was a starting point for analysis, even though its realization only came at the end of history with what was seen as the lifting of constraints upon it. The root of this mystique was that private property appeared as a relation between individuals and things constructed in private rather than as the expression of a definite social relation between people. In all societies, Marx argued, there must exist some form of property: 'production is always appropriation of nature by an individual within and with the help of a definite social organization. In this context, it is quite tautological to say that property (appropriation) is a condition of production' or that 'where no form of property exists there can be no production and no society either. Appropriation which appropriates nothing is a contradiction in terms.' However, Marx adds, 'it is quite ridiculous to make a leap from this to a distinct form of property, e.g. private property.' Different forms of property express different relations of production; it is the nature of social relations between people that determines the form in which the natural world is appropriated by them.

In the Grundrisse Marx traces some of the characteristics of pre-capitalist forms of property which distinguished them from bourgeois forms of private property.

The key to these earlier forms was that appropriation of the objective conditions of labour (land, tools, etc.) took place not through labour but rather on the basis of the individual's existence as a member of the community. Ownership of land and of other instruments of labour was presupposed by productive activity and not the result of it. It was only as a member of a community that an individual could possess property, and the property that individuals possessed derived from their membership of a community. The notion that all individuals equally have a right to the product of their own labour was entirely alien to such societies.

For example, in 'clan communities' (of which oriental despotism was one example) the

communality of blood, languages, customs ... is the first
presupposition for the appropriation of the objective condition of their life... They relate to the earth naïvely as the property of the community... Each individual conducts himself only as a link, as a member of this community, as... possessor. The real appropriation through the labour process happens under these presuppositions, which are not themselves the product of labour but appear as its natural or divine presuppositions.¹⁰

In the classical community of antiquity, communal property is separated from private property; on the one hand, individuals may become private proprietors of land; but on the other communal property is their bond and safeguard against internal and external foes.

Membership of the commune remains a presupposition for appropriation of land and soil, but as a member of the commune the individual is a private proprietor... The individual is placed in such conditions of earning his living as to make not the acquiring of wealth his object... but his own reproduction as a member of the community... The survival of the commune is the reproduction of all of its members as self-sustaining peasants, whose surplus time belongs precisely to the commune.¹¹

Among German tribes, as a third example, the commune exists only 'as a periodic gathering-together of the community members', settled not in cities but long distances apart in the country. The commune, in other words, comes into being only when the landed proprietors - whose economic existence is centred on the individual household - hold a meeting. Public land is merely a complement to individual property - land, that is, reserved for hunting, grazing, timber, etc., that cannot be divided if it is to serve these productive functions. Apart from this communal land, which is really no more than the common property of the individuals, 'the commune exists only in the interrelation among these individual landed proprietors as such';¹² nevertheless membership of this commune remains a presupposition for the appropriation of land as property.

Since in all these societies it was only as a member of a community that an individual could possess property, it followed that 'an isolated individual could no more have property in land and soil than he could speak... the individual can never appear here in the dot-like isolation in which he appears as mere free worker.'¹³ Marx's purpose in these passages was not only to show - as classical jurisprudence has already perceived in its own way - that private property is a historical accomplishment, but also to demonstrate that all forms of property depend on social relations between people. If private property appears as a private relation between individuals and things, then this must be the mystified consequence of a particular organization of productive relations and not a transubstantiation of the nature of property. Historically, what needs to be explained is not the 'unity of living and active humanity with the natural, inorganic conditions of their metabolic exchange with nature' - since originally human beings' relation to their natural conditions of production was presupposed, along with their own being as members of a community - but rather the 'separation between these inorganic conditions of human existence and his active existence.'¹⁴ In other words, the idea that ownership of property could be an attribute of the abstract individual, taken in isolation from other people, is the juridical fetish of the modern age. The question is, where does this fetish derive from?

Before tracing Marx's answer to this, it should be noted that Marx no longer romanticized pre-bourgeois property relations as in any sense 'superior' to those of private property. If Marx's critique of the fetish of the abstract individual is taken as his sole yardstick for assessing different modes of production, it would be easy to conclude that bourgeois private property represents a regression from these older forms. Those commentaries which compare on the one side bourgeois private property, and on the other all other forms of property (primitive communist, ancient Greek, feudal, patriarchal, socialist, etc.) tend to obscure the particular restrictions associated with earlier forms of property which bourgeois private property broke asunder. Within traditional forms of property, although the individual was seen as a member of a community, relations within the community itself appeared to derive from divine or natural origins (as reflected in traditional natural law theory) and the origins of property in human labour were more or less completely obscured. Those who were not members of the community were deemed incapable of owning property (as was expressly articulated in Roman law); consequently slavery and
serfdom - in which labour itself appeared among the objective conditions of production - emerged as necessary developments of these relations. Under slavery, as Marx put it, 'the worker is distinguishable only as instrumentum vocale from an animal which is instrumentum semi-vocale and from a lifeless implement, which is instrumentum mutum.' Such forms of property founded on the labour of slaves, serfs, retainers, servant, etc., had as their natural basis the inequality of human beings and of their labour. Further, the classical view, according to which good citizens and human beings rather than wealth were the aim of production, 'seems to be very lofty when contrasted to the modern world where production appears as the aim of mankind and wealth as the aim of production.' But what is wealth, Marx asks, rejecting this classicist critique of modernity, 'other than the universality of individual needs, capacities, pleasures, productive forces ... the full development of human mastery over the forces of nature, those of so-called nature as well as humanity's own nature?' The mark of traditional property relations was restricted development of the forces of production, of society and of the individual. The fault of private property was not that it broke through these restrictions, nor that it aimed at the unlimited production of wealth, nor that it was premised on 'the equality and equivalence of all kinds of labour in so far as they are human labour in general', nor that it posited property as a human institution predicated on human labour - these were, as Marx learnt from Smith and Hegel, its great strengths. Rather, its defect lay in the alienated form in which these achievements were secured. The separation of property from its presuppositions in the community represented a twofold process: on the one hand the cutting of the real ties which bind individuals to the community of which they are part, the rise of the mythology of property as a private attribute, the pursuit of private interest without regard for the interests of others, the treatment of others as means to one's own private ends; on the other the breaking of the real chains which subordinated the development of the individual and the forces of production to reproducing the limited, one-sided aims of the natural community. Marx thus abandoned his earlier conception of civil society as the worst possible slavery in favour of a dialectical view of its historical progressiveness. This new position was reflected politically in his attacks on 'Feudal Socialism', whose protagonists were anti-capitalist from the perspective of the old order without being pro-socialist.

**Freedom, equality and commodity production**

From where then does private property, as a determinate form of property, actually emerge? The society which gives rise to it is one that is based on private production by isolated producers whose contact with each other is mediated entirely through the exchange of their products on the market. In such a society, producers are free to produce what and how much they wish; they are equal in that no one producer can force any other to produce against his or her will, nor expropriate the means of production or the products of other producers against their will. They are independent in that they are all entitled to pursue their own private interests regardless of what others think or do. Their contact with other producers is a matter left to their own desires and needs, and contact with each other takes the form of a free and equal exchange in which one individual alienates his or her own private property in return for the private property that belongs to another. In so doing they give up unneeded things in return for useful things for the mutual benefit of each party. In short, a society based on petty commodity production provided the historical foundation for private property.

Under these circumstances, the exchange relation appears as a self-sufficient relation, divorced from any particular mode of production, between free and equal property owners who enter a voluntary contract in pursuit of their own self-interest. The exchange relation itself makes no reference to the circumstances in which individuals seek to exchange, nor to the characteristics of the commodities offered for exchange. In exchange, Marx argues, all inherent contradictions of bourgeois society appear extinguished ... and bourgeois democracy even more than the bourgeois economists [i.e. jurisprudence more than political economy] takes refuge in this aspect. In so far as the commodity is conceived of only as exchange value [or in juridic terms as private property] and the relation ... as the exchange of these exchange values [i.e. of private property] ... then the individuals, the subjects between whom this process goes on are simply and only conceived of as exchangers [i.e. as
of owners of private property. As far as their formal character is concerned, there is no distinction between them ... As subjects of exchange, their relation is therefore that of equality. It is impossible to find any trace of distinction, not to speak of contradiction between them, not even a difference. Furthermore, the commodities which they exchange are as exchange values [i.e. as private property] equivalent ... The content of the exchange, which lies altogether outside its economic [and juridic] character, far from endangering the equality of individuals, rather makes their natural difference into the basis of their social equality ... Only the difference between their needs and between their products gives rise to exchange and to their social equation in exchange; these natural differences are therefore the preconditions of their social equality in the act of exchange.19

Exchange appears not only as a relation of equality between property owners but also as one of freedom and mutual respect for the freedom of others:

each confronts the other as owner of the object of the other's need, this proves that each of them reaches beyond his own particular need ... as a human being and that they relate to each other as human beings ... [Thus] there enters in addition to the quality of equality, that of freedom. Although individual A feels a need for the commodity of individual B, he does not appropriate it by force, nor vice versa, but rather they recognize one another reciprocally as proprietors, as persons whose will penetrates their commodities. Accordingly, the juridical moment of the Person enters here.20

Out of this relation there appears to emerge, behind the backs of the parties to the exchange, a common interest, one that is not counterposed to the particular interests of individuals but rather based precisely on the reciprocal development of self-interest. In other words, it is not an alien 'common interest' which arises but one that cannot be separated from the autonomous development of each individual. The only compulsion which enters the relation is one that stems not from an alien force but only from my own needs, drives and nature. The exchange relation appears as natural and rational because it respects and embodies these human

qualities of equality, freedom, mutual respect and mutual need. To the extent that exchange relations comprise the means of association between owners of private property, it would therefore seem that they represent a truly human form of social contact based on the integrity, as well as the needs, of the private individual. In exchange relations, owners of private property

must place themselves in relation to one another as persons whose will resides in those objects and must behave in such a way that each does not appropriate the commodity of the other and alienate his own except through an act to which both parties consent ... This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation.21

While it appears that the eternal human qualities of freedom and equality are respected in exchange relations, in fact exchange relations are their material basis:

as pure ideas they are merely the idealized expression of this basis, as developed in juridical, political, social relations, they are merely this basis to a higher power ... Equality and freedom developed to this extent are exactly the opposite of the freedom and equality in the world of antiquity, where developed exchange value (and thus private property) was not their basis but where, rather, the development of that basis destroyed them. Equality and freedom presuppose relations of production as yet unrealized in the ancient world and in the middle ages.22

Marx saw the development of juridic freedom and equality as a great advance. No longer did they appear to him as an ideal, when applied to the state, or as an empty form or illusion when applied to civil society. Rather than rest his analysis on the forced abstraction of the state from civil society and of civil society from the state, he now viewed juridic relations between free and equal owners of private property — alongside economic relations between commodities bearing value — as antithetical social forms, the secret to whose riddles lay in the unravelling of the social relations of commodity production. He was now in a position to explore the contradictory character of the formal freedoms and equalities
traversing state and civil society alike.

The myth of private property as a private relation between individuals and things is dissolved once the abstraction of exchange from production is abandoned. The presupposition of exchange is a definite organization of production: one which forces producers to exchange their products— for they cannot survive nor reproduce except by exchanging their products—and which determines socially the form and content of their private interests: 'the private interest is itself a socially determined interest, which can be achieved only within the conditions laid down by society and with the means provided by society.' 23 The real point of departure is not the private individual as he or she appears at the moment of exchange but rather 'individuals producing in society'—hence socially determined individuals. 24

The presuppositions of commodity production are, first, an extended division of labour (though Marx now clearly saw what he and Engels had confused in their earlier writings, namely that although

the division of labour is a necessary condition for commodity production... the converse does not hold; commodity production is not a necessary condition for the social division of labour... Only the products of mutually independent acts of labour, performed in isolation, can confront each other as commodities. 25

Second, the dissolution of all relations of personal dependence, such as those that characterized feudal relations between serfs and lords, vassals and suzerains, laypersons and clerics, and of all community restraints on the ownership and use of property; third, 'the all-sized dependence of the producers on one another', 26 since the individual act of private production presupposes that individuals will find available in the market the things necessary to satisfy their needs. In short, commodity exchange is premised on the reciprocal and all-sized dependence of commodity producers which compels them to exchange. The positive aspect of this development was that for the first time objective social connections were made not only between all producers within a community but, as the world market inexorably grows, between all producers in the world: 'this objective social connection is certainly preferable to the lack of any connection or to a merely local connection...'

Individuals cannot gain mastery over their own social connections before they have created them. 27 The alien character of the bond between commodity producers consists, therefore, not in the fact of their mutual interdependence but in its mode. Both the form of their interconnections—a contract between two private parties based on the exchange of their property—and their content—the terms on which such contracts for the exchange of goods are made— are entirely out of the control of the producers and thus become an alien force above them:

Ties of personal dependence are exploded... Individuals seem independent but they appear thus only for someone who abstracts from these conditions [of production]... The definedness of individuals, which in the former case appears as the personal restriction of the individual by another, appears in the latter case as developed into an objective restriction of the individual by relations independent of him... These external relations are very far from being an abolition of 'relations of dependence'; they are rather the dissolution of these relations in a general form... Individuals are now ruled by abstractions, whereas earlier they depended upon one another. The abstraction is nothing more than the theoretical expression of those material relations which are their lord and master. 28

Since commodity producers labour privately, in isolation from one another,

the social character of [their] activity appears as something alien and objective, confronting the individuals not as their relation to one another but as their subordination to relations which subsist independently of them and which arise out of collisions between mutually indifferent individuals. 29

Equality before the law is a formal property of exchange relations between private property owners. In general, this appearance of equality is dissolved once one explores the content of exchange. In a famous passage in his Critique of the Gotha Programme, Marx wrote that the equal rights of parties to an exchange necessarily entail as their consequences substantive inequality:
Equal right... is a right of inequality in its content like every right. Right by its nature can only consist in the application of an equal standard in so far as they are brought under an equal point of view, are taken from one definite side only... To avoid all these defects, right instead of being equal would have to be unequal. 26

In other words, equal treatment of unequal individuals – and individuals would not be individuals if they were not unequal – leads to inequality. In Anatole France's famous example, a law forbidding the rich and the poor equally from sleeping under the bridges of Paris would be most unequal in its effects. While, however, a tension between equal rights and substantive inequality is a tension in all exchange relations and reveals the folly of those who would idealize the mediation of social relations by law, the nature and degree of that inequality are determined by productive relations. It is an entirely abstract critique of law that leaves the matter at that and fails to investigate how 'the form and content of equal right' are changed 33 as productive relations themselves change. While equality before the law always means inequality in fact, it is compatible with entirely different levels and forms of inequality. In Capital, Marx analysed how the content of equal right changed with the development of capitalist relations of production, changes which reveal a dynamic relation between juridic forms of equality and their social content. It should be noted here that Marx did not analyse how forms of equal right changed with the development of capitalist relations of production – this was beyond his scope in a critique of political economy – and it is a question to which I return later.

Freedom, equality and capitalist relations of production

Where commodity production is sporadic or peripheral, exchange takes the form of occasional barter between isolated individuals or groups (in the first instance, usually one tribe exchanging surplus goods with another). The terms of the exchange are determined by the producers themselves and each producer has to defend his or her rights of private property by force of arms: even club law, as Marx put it, is law. 32 With the generalization of commodity production, one commodity becomes the embodiment of human labour in the abstract and assumes the economic form of money. Competition between producers will ensure that commodities exchange at their values, that is, according to the socially necessary labour time that enters their production. There is no guarantee that the actual labour-time of the individual will correspond with the labour-time that is socially necessary. For instance, a peasant farmer on good land will, other things being equal, be more productive than a peasant on bad land. Equal right in these circumstances entails that some producers exchange their commodities for more than their actual labour-time and some for less; that is, a particular mode of inequality which will lead to the impoverishment of some and enrichment of others (as illustrated, for example, in the differentiation of the peasantry in pre-capitalist societies): 'if one grows impoverished and the other grows wealthier then this is of their own free will... even inheritance does not prejudice this natural freedom and equality.' 33 Under these circumstances producers may have to be forced to be free, since a good deal of coercion will be required to ensure that proprietors' rights to free exchange are guaranteed against those who are impoverished as a consequence. For free and equal exchange to be sustained under the pressure of these substantive inequalities, a force is required – over and beyond that exercised by the producers themselves – to protect property rights. From where is this force to arise? We shall see that the problem and its solution arose simultaneously with the emergence of law as the independent and objective form assumed by property right. I shall reserve exploration of this formal aspect of the question, which Marx did not pursue, till later.

With the means of production becoming the property of some and the non-property of the vast majority, the economic forms of capital and wage-labour emerge. The relation between them still takes the form of free and equal exchange between commodity producers, but the particular form and content of this exchange have changed:

The sphere of circulation of commodity exchange, within whose boundaries the sale and purchase of labour power goes on, is in fact a very Eden of the innate rights of man. It is the exclusive realm of Freedom, Equality, Property and Bentham.

Freedom because both buyer and seller of a commodity, let us
say labour-power, are determined only by their own free will. They contract as free persons, who are equal before the law. Equality because each enters into relations with the other as with a simple owner of commodities and they exchange equivalent with equivalent. Property because each disposes only what is his own. And Bentham because each looks only to his own advantage. The only force bringing them together is the selfishness, the gain and the private interest of each.  

On the surface of capitalist society the relation between capitalist and worker is a simple exchange, each obtaining an equivalent from the other: the one obtaining money (in the form of a wage) and the other a use-value, labour-power. In the movement which proceeds on the surface of the bourgeois world,

- a worker who buys a loaf of bread and a millionaire who does the same appear in this act as simple buyers... all other aspects are extinguished... the content of these purchases appears as completely irrelevant compared with the formal aspect.  

So too the exchange between capitalist and worker appears just like any other exchange and each appears as an equal; in fact the exchange between capitalist and worker expresses a completely different social relation from that between two commodity producers. Nobody enters exchange as an abstract individual but rather as an individual rooted in definite social relations: not relations between individual and individual, but between worker and capitalist, between farmer and landlord, etc. Wipe out these relations and you annihilate all society.  

The distinctive feature of the exchange between capitalist and worker, which differentiates it from exchange between buyers and sellers in general, lies in its content. A new commodity has entered the market which did not previously exist as a commodity: namely labour-power. Its historical presupposition lay in the double freedom of the worker: freedom, on the one hand, from relations of personal dependence, bondage, servitude, etc., and on the other from ownership of the means of production and subsistence. Similarly, the buyer of this new commodity, labour-power, is no longer a simple buyer who seeks to use it as an object of personal consumption (as in the case of a householder employing a servant), but rather one who uses it specifically for the production of surplus value.

The wage-form obscures this relation. It appears that workers exchange not their labour-power, but rather their labour in return for a wage. Since workers are employed by the day, the week, the year, the piece, etc., it appears as though they are paid for the entire labour. The only question then becomes whether workers receive a fair day's wage for a fair day's work, i.e. whether the exchange of equivalents is in fact being upheld. In fact the wage-form constitutes only the surface of a relation inherently based on exploitation, but it is this form which above all generates bourgeois ideas of justice, freedom and equality:  

The wage-form thus extinguishes every trace of the division of the working day into necessary labour and surplus labour, into paid labour and unpaid labour. All labour appears as paid labour... We may therefore understand the decisive importance of the transformation of the value and price of labour-power into the form of wages or into the value and price of labour itself. *All the notions of justice* held by both the worker and the capitalist, all the mystifications of the capitalist mode of production, *all capitalism's illusions about freedom*, all the apologetic tricks of vulgar economics, have as their basis the form of appearance discussed above, which makes the actual relations invisible and indeed presents to the eye the precise opposite to that relation.  

Marx's recognition that workers sell their labour-power and not their labour was of crucial significance for his analysis of the substantive inequality which lies behind equal exchange between capitalist and labourer. The hidden secret behind the exchange between capital and labour is that workers receive in the form of wages a value equivalent to the value of their labour-power and not of their 'labour', and the value of their labour-power is less than the value which their labour - put to use by the capitalist - is able to generate. Part of the value so created is expropriated without return by the capitalist as surplus value. In this case, unlike that of petty commodity production, unpaid surplus labour and dependence on capital provide the content of equal right. The inequalities characteristic of petty commodity production do not disappear. They persist in the wage-form. Unequal individuals
receiving the same wage will derive unequal benefits from it. But over and above these persisting inequalities, there are further inequalities of a new order.

When we turn to the reproduction of capitalist society, we see that the real content of the exchange between capital and labour has changed once more. Previously the exchange between capital and labour consisted of the expropriation of part of the workers' labour. But Marx then asked, what is the nature of the capital which the capitalist exchanges with labour-power? The capitalist says that he worked hard for it, or that it is the product of his own labour. Even if this view of primitive accumulation were true (it ignores primitive accumulation based on robbery and international pillage), after several periods of production the entire capital owned by the capitalist will consist of capitalized surplus value, that is, the product of the labour of workers expropriated by the capitalist and turned into capital. It is now revealed that the exchange between capital and labour is in content no exchange at all, since the capital which exchanges for labour is but the expropriated labour of workers from a previous period in transmuted form:

The capitalist, it is true, pays him the value of the commodity [labour-power] in money, but this money is merely the transmuted form of the product of his labour... The capitalist class is constantly giving to the working class drafts in the form of money on a portion of the product produced by the latter and appropriated by the former.

Under these circumstances the content of the exchange relation, that Eden of innate rights, is utterly transformed. Beneath the surface of equal exchange we now find, when we view the matter from the perspective of capital as a whole and labour as a whole, an inversion of the exchange of equivalents; the appropriation of the product of one 'owner' by another without equivalent:

Each individual transaction continues to conform to the laws of commodity exchange with the capitalist always buying labour-power and the workers always selling it at what we shall assume is its real value. It is quite evident from this that the laws of appropriation of private property laws, based on the production and circulation of commodities, become changed into their direct opposite through their own internal and inexorable dialectic. The exchange of equivalents, the original operation with which we started, is now turned round in such a way that there is only an apparent exchange, since firstly the capital which is exchanged for labour power is itself merely a portion of the product of others which has been appropriated without equivalent; and secondly this capital must not only be replaced by its producer, the worker, but replaced with an added surplus. The relation of exchange between capitalist and worker becomes a mere semblance belonging only to the process of circulation, it becomes a mere form which is alien to the content of the transaction itself and merely mystifies it. The constant sale and purchase of labour-power is the form; the content is the constant appropriation by the capitalist without equivalent of a portion of the labour of others. Originally, the rights of property seemed to us to be grounded in man's own labour. Some such assumption was at least necessary since only commodity owners with equal rights confronted each other and the sole means of appropriating the commodities of others was the alienation of a man's own commodities, commodities which however could only be produced by labour. Now, however, property turns out to be the right on the part of the capitalist to appropriate the unpaid labour of others or its product and the impossibility of the worker of appropriating his own product.

The separation of property from labour thus becomes the necessary consequence of a law that apparently originated in their identity.

Under these new relations of production, in which the content of equal right has undergone such enormous change, so too does its form. Just as capital represents means of production alienated from their producers, so the function of enforcing equal rights between capital and wage-labour gives rise to a new form of legal authority, the state, that is, a public power alienated from the people, an independent force distinct from society which acquires its own institutions and its own personnel. But this aspect of capitalist relations of production is not pursued in Capital. These passages show how the content of inequality is transformed with the reproduction of capitalist relations of production: while on the
surface a free and equal exchange of equivalents proceeds apace, beneath the surface the law which presupposed ownership of the products of one's own labour 'turns into ... through a necessary dialectic an absolute divorce of property and appropriation of alien labour without exchange.' Thus, while equal right always means inequality, it does not always mean the same inequality: differences between one form of inequality and another are a matter of great significance for the individuals involved.

The story of the connection between capitalist relations of production and equal rights does not, of course, end here; rather this is its beginning. The socialization of labour under capital leads to the organization of the working class, who assert their rights as free labourers against the rights of capitalists as free owners of private property. Right is set against right, as Marx put it, and the outcome in law is the result of a struggle of class forces. Marx portrays this process vividly in his account of struggles over the ten-hour day:

The capitalist maintains his rights as a purchaser when he tries to make the working day as long as possible, and where possible, to make two working days out of one. On the other hand, the peculiar nature of the commodity sold implies a limit to its consumption by the purchaser, and the worker maintains his right as a seller when he wishes to reduce the working day to a particular normal length. There is here therefore an antinomy, of right against right, both equally bearing the seal of the law of exchange. Between equal rights, force decides.

Relations of production between capital and labour are not static; they are not once given, forever fixed. Nothing is more stultifying in my view, and less in the spirit of Capital, than to freeze its analysis of the capital-labour relation into a motionless frame. The content of inequality is not static, even though no amount of tinkering with the wages and conditions of work will abolish the exploitative nature of the capital-labour relation itself.

However, Marx's argument that with the reproduction of the capital-labour relation exchange becomes a 'mere semblance', a 'mere form ... alien to the content of the transaction', a mere 'mystification', may give rise to the idea that, however real and important formal equality was in petty commodity production, it loses all substance with the development of capitalism. This theme is present in the Grundrisse and in Capital. It mirrors the view of civil society as 'the worst possible slavery' put forward in The German Ideology. Marx was also, however, developing another, quite different view of the significance of formal freedom and equality, which grasped far more adequately their contradictory character.

The juridic significance of Marx's discovery that workers sell their labour-power and not themselves or their labour was this: it enabled him to see that workers do not, as he previously thought, 'sink to the level of a commodity, the most wretched commodity of all', but remain at all times owners of a commodity that is, labour-power. They are guardians of a commodity rather than being themselves commodities; they are in this sense free workers rather than slaves. Capitalist production, in other words, based on relations of exploitation and domination, was revealed as compatible with - not at odds with - juridic freedom and equality. Thus capitalist reproduction does not imply an 'absolute divorce' between workers and property, since possession of one's own labour-power as private property is the presupposition of wage-labour. At the end of one cycle of production and beginning of the next, the workers themselves are reproduced as workers, still - if we exclude consideration of the state in need of selling their labour-power in order to survive, but still also free and equal possessors of one vital piece of property which remains theirs, their own capacity to labour. Workers are not 'free of all belongings and possessions ... of all property', as Marx continued to state in some passages of the Grundrisse. Their labour-power remained their own, and this differentiation from slavery was a matter of juridic as well as economic importance. Marx was beginning to see, in the Grundrisse, that:

As a slave, the worker has exchange value; as a free wage-worker, he has no value, it is rather his power of disposing of his labour which has value ... The worker is thereby formally posited as a person who is something for himself apart from his labour and who alienates his life-expressions only as a means towards his own life ... [for example], the sphere of his consumption is not qualitatively restricted, only quantitatively. This distinguishes him from the slave.
The fact that workers are owners of their labour-power and only grant temporary disposal of it to capital, is, as Rosdolsky has clearly argued, "of decisive importance, since it counts as one of those features of the relation of wage-labour which raises it historically above earlier modes of exploitation". In slavery, direct producers themselves belong to individual particular owners; in serfdom, direct producers appear "as a moment of property land itself... an appendage of the soil exactly like draught-cattle". The wage-labourer, by contrast, "belongs to himself" and sells his or her property "to a particular capitalist whom he confronts as an independent individual". This grants to workers, as Rosdolsky put it, "a wide field of choice, of arbitrary will, hence of formal freedom, which the producers of other class societies lacked and without which the workers' struggle for liberation would be simply inconceivable."

By exchanging labour-power for money, the worker even becomes "a co-participant in general wealth up to the limit of his equivalent".

Marx never overcame his ambivalence between his conception of bourgeois equality and freedom as "only a semblance and a deceptive semblance" and his realization that "this semblance exists nevertheless as an illusion on his [the worker's] part and to a certain degree on the other side, and thus essentially modifies his relation by comparison to that of workers in other modes of production. If this 'semblance' has such a palpable reality, then it should no longer be called a semblance. At the end of the day, what is important is not how Marx resolved - or failed to resolve - his own ambivalence, but how we resolve the problem which he expressed.

The main point is this. Workers under capitalism are not propertyless. They remain at all times owners of private property, at best in the form of personal possessions (means of subsistence) and at worst in the form of labour-capacity alone. It is this fact which turns ideologies centred around the sanctity of private property into viable means of persuasion rather than alien means of mere oppression. Marxists should relate to this rather than simply denounce private property as something entirely oppressive and bad, from which workers are entirely expropriated and in which they have no interest. Juridic freedom and equality, far from losing their social base with the extended reproduction of capital, are granted a new foundation with the socialization of labour and its collective organization. This is a story beyond the scope of Capital itself, but is one whose interpretation may be greatly informed by reading Capital.