an explicit reference that that phrase about the 'danger threatening jurisprudence' is an allusion to the lament of a bourgeois legal philosopher. This lament relates, not to the Marxist critique (which had not yet ruffled the minds of the 'pure jurists' in those days), but to the attempts of bourgeois jurisprudence itself to mask the limitations of its own method by borrowing from sociology and psychology. So far was it from my mind to imagine that I could be seen as a 'pure jurist', whose heart grieves for jurisprudence threatened by the Marxist critique, that I did not take such precautionary measures.

E. Pashukanis
LAW + MARXISM

4. *Commodity and Subject*

Every legal relation is a relation between subjects. The subject is the atom of legal theory, its simplest, irreducible element. Consequently we begin our analysis with the subject.

Razumovsky does not agree with me that the analysis of the concept 'subject' is basic to the investigation of the legal form. This category of developed bourgeois society seems to him firstly, too complicated, and secondly, not characteristic of preceding historical epochs. In his opinion, 'the development of the relation which is fundamental to all class society' should be the point of departure',[1] and this, as Marx says in his *Introduction*, is 'property, which develops from actual appropriation into legal property'.[2] In laying bare the course of this development, Razumovsky too concludes that it is only in the process of development that private property in the modern sense takes shape as such, and then only to the extent that it goes hand in hand, not only with the 'possibility of unimpeded possession thereof', but also with the 'possibility of its alienation'.[3] In effect, this also means that the legal form in its developed state corresponds to bourgeois-capitalist social relations. It is clear that particular forms of social relations do not invalidate either these relations in themselves, or the laws upon which they are founded. Thus the appropriation of a product within a given social formation and thanks to the forces at work within it is a basic fact or, if you like, a basic law. But this relation of private property assumes legal form only at a certain stage of develop-

[1] Isaak Petrovich Razumovsky, *Problems of the Marxist Theory of Law* (*Problemy marksistskoy teorii prava*), Moscow, 1925, p. 18.
[2] Cf. Marx, *Grundrisse: Introduction to the Critique of Political Economy*, 1973 ed., p. 102. [Ed.]
[3] Razumovsky, *Problems* . . . , op. cit., p. 114.

ment of the productive forces and of the corresponding division of labour. Razumovsky thinks that by basing my analysis on the concept of the subject, I am eliminating the relationship of dominance and subservience from my investigation, whereas, of course, possession and property are inextricably bound up with this relationship. It would not occur to me to dispute this link. I merely maintain that property becomes the basis of the legal form only when it becomes something which can be freely disposed of in the market. The category of the subject serves precisely as the most general expression of this freedom. What, for example, is the significance of legal ownership of land and soil? 'Simply', says Marx, 'that the landowner can do with his land what every owner of commodities can do with his commodities'.[4] Yet it is precisely by completely liberating land-ownership from the relation of dominance and subservience that capitalism transforms feudal land-ownership into modern landed property. The slave is totally subservient to his master. This is exactly why this exploitative relationship requires no specifically legal formulation. The wage worker, on the contrary, enters the market as a free vendor of his labour power, which is why the relation of capitalist exploitation is mediated through the form of the contract. I think these examples suffice to demonstrate the decisive importance of the subject for any analysis of the legal form.

Idealist theories of law develop the concept of the subject from this or that general idea, that is, by purely speculative means.

> The fundamental concept of law is freedom . . . The abstract concept of freedom is the possibility of self-determination . . . Man is the subject of rights for the reason that he has this possibility, and that he has free-will.[5]

Compare Hegel:

> Personality essentially involves the capacity for rights and constitutes the concept and the basis (itself abstract) of the system of abstract and therefore formal right. Hence the imperative of right is: 'Be a person and respect others as persons'.[6]

And further:

> What is immediately different from free mind is that which, both for mind and in itself, is the external pure and simple, a thing, something not free, not personal, without rights.[7]

In what follows, we shall see in what sense this contradistinction between thing and subject provides the key to an understanding of the form of law. In contrast, dogmatic jurisprudence employs this concept from the formal aspect. In its eyes, the subject is nothing more than a 'means of juridical qualification of a phenomenon from the point of view of its fitness or unfitness for participation in legal intercourse'.[8] Hence dogmatic jurisprudence avoids altogther putting the question of how man was transformed from a zoological individual into a legal subject, since it proceeds from the legal process as from a finished form, given *a priori*.

In contrast to this, Marxist theory considers every social form historically. Consequently, it sets itself the task of elucidating those historically given material conditions which brought this or that category into being. The material preconditions for the community of law or for transactions between legal subjects are specified by Marx himself in volume one of *Capital*, albeit only in passing, in the form of fairly general allusions. Nonetheless, these hints contribute far more to the understanding of the juridical element in human relations than any of those bulky treatises on the general theory of law. In Marx, the analysis of the form of the subject follows directly from the analysis of the commodity form. Capitalism is a society of commodity-owners first and foremost. This means that social relations in the production process assume a reified form in that the products of labour are related to each other as values. The commodity is a thing in which the concrete multi-

[4] Marx, *Capital*, vol. III, 1962 ed., p. 602.
[5] Georg Friedrich Puchta, *Kursus der Institutionen*, 3 vols., Leipzig, vol. I, 1850, pp. 4-9. [Vol. I has a second title page reading: *Einleitung in die Rechtswissenschaft und Geschichte des Rechts bey dem römischen Volk*. Transl.]
[6] Hegel, *Philosophy of Right*, translated by T. M. Knox, Oxford: Oxford University Press, 1957, section 36.
[7] Ibid., section 42.
[8] Cf. Rozhdestvensky, *Theory of Subjective Public Rights* (*Teoriya sub'yektivnykh publichnykh prav*), p. 6.

plicity of use-values becomes simply the material shell of the abstract property of value, which manifests itself as the capacity to be exchanged with other commodities in a specific relation.

This property appears as an intrinsic natural property of objects themselves, according to a sort of natural law which operates behind people's back, quite independently of their will.

Whereas the commodity acquires its value independently of the will of the producing subject, the realisation of its value in the process of exchange presupposes a conscious act of will on the part of the owner of the commodity, or as Marx says:

> Commodities cannot themselves go to market and perform exchange in their own right. We must, therefore, have recourse to their guardians, who are the possessors of commodities. Commodities are things, and therefore lack the power to resist man. If they are unwilling, he can use force; in other words, he can take possession of them.[9]

It follows that the necessary condition for the realisation of the social link between people in the production process – reified in the products of labour and disguised as an elementary category (*Gesetzmässigkeit*) – is a particular relationship between people with products at their disposal, or subjects whose 'will resides in those objects'.[10]

> . . . That goods contain labour is one of their intrinsic qualities; that they are exchangeable is a distinct quality, one solely dependent on the will of the possessor, and one which presupposes that they are owned and alienable.[11]

At the same time, therefore, that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights.[12]

[9] Marx, *Capital*, vol. I, 1976 ed., p. 178.
[10] Ibid.
[11] Rudolf Hilferding, *Böhm-Bawerk's Criticism of Marx*, edited with an introduction by P. M. Sweezy, London: Merlin Press, 1975, pp. 187-188.
[12] Man as a commodity, in other words the slave, becomes a reflected subject as soon as he acts as someone disposing over commodities (objects) and participates in circulation. (On the rights of slaves to conclude legal transactions under Roman law, see Yosif Alekseyevich Pokrovsky, *History of Roman Law, Istoriya rimskogo prava*, 2nd ed., Petrograd, 1915, vol. II, p. 294.) In contrast to this, in modern society, the free man, that is to say the proletarian, when seeking in this role a market for the sale of his labour power, is treated as an object and is subject to the same prohibitions and quota allocations under the immigration laws as are other commodities imported across national boundaries.
[13] Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 9th ed., 3 vols., Frankfurt a.M., 1906, vol. I, section 49.

> The person whose will is declared as decisive is the legal subject.[13]

Simultaneously with this, social life disintegrates, on the one hand into a totality of spontaneously arising reified relations (including all economic relations: price level, rate of surplus value, profit rates and so forth) – in other words, the kind of relations in which people have no greater significance than objects – and, on the other hand, into relations of a kind where man is defined only by contrast with an object, that is, as a subject. The latter exactly describes the legal relation. These are the two basic forms, which differ from one another in principle, but are at the same time interdependent and extremely closely linked. The social relation which is rooted in production presents itself simultaneously in two absurd forms: as the value of commodities, and as man's capacity to be the subject of rights.

Just as in the commodity, the multiplicity of use-values natural to a product appears simply as the shell of value, and the concrete types of human labour are dissolved into abstract human labour as the creator of value, so also the concrete multiplicity of the relations between man and objects manifests itself as the abstract will of the owner. All concrete peculiarities which distinguish one representative of the *genus homo sapiens* from another dissolve into the abstraction of man in general, man as a legal subject.

If objects dominate man economically because, as commodities, they embody a social relation which is not subordinate to man, then man rules over things legally, because, in his capacity as possessor and proprietor, he is simply the personification of the abstract, impersonal, legal subject, the pure product of social relations; in Marx's words:

> In order that these objects may enter into relations with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognise each other as owners of private property.[14]

Obviously the historical evolution of property as an institution of law, with the many and varied methods of appropriating and protecting it, with all its modifications in relation to different objects and so on, took place in a far less well-ordered and consistent manner than the logical deduction set out above might suggest. Yet this deduction alone reveals the universal significance of the historical process.

After he has become slavishly dependent on economic relations, which arise behind his back in the shape of the law of value, the economically active subject – now as a legal subject – acquires, in compensation as it were, a rare gift: a will, juridically constituted, which makes him absolutely free and equal to other owners of commodities like himself. 'Everyone shall be free, and shall respect the freedom of others . . . Everyone possesses *his own* body as the free tool of his will'.[16]

This is the premise from which the natural-law theoreticians start. The idea of the isolated and self-contained nature of the human personality, this 'natural state' from which the 'conflict of freedom to infinity' follows, corresponds exactly to commodity production, where the producers are formally autonomous, linked only by the artificially created legal system. This legal condition itself or, to quote Fichte again, 'the coexistence of many free beings, who shall all be free, the freedom of one not interfering with the freedom of others', is nothing but the idealised market, transported to the nebulous heights of philosophical abstraction, liberated from crude empiricism. This idealised market is where the autonomous producers come together; for, as another philosopher tells us:

[14] Marx, *Capital*, vol. I, ed. cit., p. 178.
[16] Johann Gottfried Fichte, *Rechtslehre*, Leipzig, 1912, p. 10; [cf. English translation, *The Science of Rights*, translated by A. E. Kroeger, Philadelphia: J. B. Lippincott & Co., 1869, pp. 19, 94 and 178.—Ed.]

> in commercial transactions, both parties do as they wish, taking no greater liberty than they themselves grant others.[16]

The increasing division of labour, improvements in communications, and the resulting development of exchange, made value an economic category, that is to say, the embodiment of supra-individual social relations of production. For this to occur, separate casual acts of exchange must be transformed into expanded, systematic commodity circulation. At this stage of development, value ceases to be casual appraisal, loses the quality of a phenomenon of the individual psyche, and acquires objective economic significance. In the same way, there are real conditions necessary for man to be transformed from a zoological individual into an abstract, impersonal legal subject, into the legal person. These real conditions are the consolidation of social ties and the growing force of social organisation, that is, of organisation into classes, which culminates in the 'well-ordered' bourgeois state. At this point the capacity to be a legal subject is definitively separated from the living concrete personality, ceasing to be a function of its effective conscious will and becoming a purely social function. The capacity to act is itself abstracted from the capacity to possess rights. The legal subject acquires a double in the shape of a representative, and himself attains the significance of a mathematical point, a centre in which a certain number of rights is concentrated.

As a result, bourgeois-capitalist property ceases to be unstable, precarious, purely factual property which may at any moment be contested and have to be defended, weapon in hand. It is transformed into an absolute, fixed right which follows the object wherever chance may take it, and which, ever since bourgeois civilisation extended its rule to encompass the whole globe, has been protected the world over by laws, police and lawcourts.[17]

[16] Herbert Spencer, *Social Statics*, 1850, Chapter 13.
[17] The development of so-called rules of warfare is nothing but a gradual consolidation of the inviolability of bourgeois property. Until the French Revolution, populations were plundered by their own as well as by enemy soldiers, without hindrance or prohibition. Benjamin Franklin was the first to proclaim as a political principle, in 1785, that in future wars: 'peasants, labourers and merchants should be able to follow their occupations peacefully, under the protection of both warring parties'. In his *Contrat Social*, Rousseau posits the rule that war would

At this stage of development, the so-called 'will-theory' of subjective rights begins to seem out of touch with reality.[18] People prefer to define law in the subjective sense, as the 'share of earthly possessions which the general will guarantees one person as his acknowledged due'. This entirely precludes the necessity for the person to exercise his will, or to have the capacity to act. Dernburg's definition is indeed better suited to the mental framework of the modern jurist who deals with the legal capacity of idiots, babes in arms, legal persons, and so forth. In contrast to this, the ultimate consequences of the will-theory are synonymous with the exclusion of the categories cited from the ranks of legal subjects.[19] There is no doubt that Dernburg comes closer to the truth when he conceives of the legal subject as an exclusively social phenomenon. Yet it is perfectly clear to us why the element of will plays such a decisive role in constructing the concept of the legal subject. Dernburg does concede this in part, when he asserts:

> Rights in the subjective sense existed historically long before the formation of a political system conscious of itself. They were based in the personality of the individual and the respect for his person and property which he was able to exact and enforce. Only by abstraction from the contemplation of existing subjective rights did the concept of the legal system gradually take shape. To hold that rights in the subjective sense merely emanate from law in the objective sense is therefore ahistorical and incorrect.[20]

be waged between states, but not between the citizens of those states. The legislation of the [Geneva] Convention punished soldiers very harshly for plundering, whether in their own or in a foreign country. It was not until 1899, in the Hague, that the principles of the French Revolution were given the status of statutes of international law. (Moreover, justice demands reference here to the fact that, whereas Napoleon felt some embarrassment when imposing the Continental blockade, and saw fit to justify this measure in his message to the Senate as a measure 'which affects the interests of private persons as a result of the conflicts of rulers' and 'is reminiscent of the barbarity of long-gone centuries'; yet, in the last World War, the bourgeois governments injured the property rights of the citizens of both warring parties openly and without a trace of embarrassment).

[18] Cf. Heinrich Dernburg, *Pandekten*, 7th ed., 3 vols., Berlin, 1902, vol. I, section 39.

[19] In relation to legal persons, see Alois von Brinz, *Lehrbuch der Pandekten* (2 parts, Erlangen, 1857-71; 2nd ed., 4 vols., Erlangen, 1873-95), vol. II, p. 984.

Obviously only someone who had not merely a will at his disposal, but also wielded a considerable degree of power, was able to 'exact and enforce'. Like the majority of jurists, Dernburg tends to treat the legal subject as 'personality in general', that is to say, as an eternal category beyond particular historical conditions. From this point of view, being a legal subject is a quality inherent in man as an animate being graced with a rational will. In reality, of course, the category of the legal subject is abstracted from the act of exchange taking place in the market. It is precisely in the act of exchange that man puts into practice the formal freedom of self-determination. The market relation provides a specifically legal illustration of the contradiction between subject and object. The object is the commodity, the subject is the owner of the commodity, who disposes of it in the acts of appropriation and alienation. It is in the exchange transaction in particular that the subject figures for the first time in all the fullness of its definitions. The formally more perfected concept of the subject, which retains only legal capacity, tends rather to distance us from the true historical significance of this juridical category. That is why the jurists find it so difficult to do without the element of active will in the concepts of 'subject' and 'subjective law'.

The sphere of dominance which has taken on the form of subjective law is a social phenomenon attributed to the individual in the same way that value – likewise a social phenomenon – is attributed to the object as a product of labour. Legal fetishism complements commodity fetishism.

Hence, at a particular stage of development, the social relations of production assume a doubly mysterious form. On the one hand they appear as relations between things (commodities), and on the other, as relations between the wills of autonomous entities equal to each other – of legal subjects. In addition to the mystical quality of value, there appears a no less enigmatic phenomenon: law. A homogeneously integrated relation assumes two fundamental abstract aspects at the same time: an economic and a legal aspect.

[20] Dernburg, *Pandekten*, op. cit., vol. I, section 39.

In the development of juridical categories, the ability to perform exchange transactions is only one of various concrete manifestations of the general capacity to act and of legal capacity. Historically, however, it was precisely the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim. Only in commodity production does the abstract legal form see the light; in other words, only there does the general capacity to possess a right become distinguished from concrete legal claims. Only the continual reshuffling of values in the market creates the idea of a fixed bearer of such rights. In the market, the person imposing liabilities simultaneously becomes himself liable. He changes roles instantaneously from claimant to debtor. Thus it is possible to abstract from the concrete differences between legal subjects and to accommodate them within one generic concept.[21]

Just as chance acts of exchange and primitive forms of exchange, such as the exchange of gifts, preceded the exchange transactions of developed commodity production, so too the armed individual, (or, more often, group of people, a family group, a clan, a tribe, capable of defending their conditions of existence in armed struggle), is the morphological precursor of the legal subject with his sphere of legal power extending around him. This close morphological link establishes a clear connection between the lawcourt and the duel, between the parties to a lawsuit and the combatants in an armed conflict. But as socially regulative forces become more powerful, so the subject loses material tangibility. His personal energy is supplanted by the power of social, that is, of class organisation, whose highest form of expression is the state.[22]

[21] This did not occur in Germany until the time when Roman law was adopted, which is, moreover, proven by the fact that there are no German words for the concepts 'person' and 'legal subject'. (Cf. Otto Friedrich von Gierke, *Das deutsche Genossenschaftsrecht*, 4 vols., Berlin, 1873; vol. II: *Geschichte des deutschen Körperschaftsbegriffs*, p. 30.)

[22] From this moment on, the figure of the legal subject begins to appear as something different from what it really is, that is to say not as the reflection of a relation arising behind people's back, but rather as an artificial creation of the human intellect. Yet the relations themselves become so habitual that they appear as indispensable conditions for every community. The idea that the legal subject is a purely artificial construct is as much a step in the direction of a scientific theory of law as the idea of the artificiality of money would be for economics.

In this form, the impersonal abstraction of state power functioning with ideal stability and continuity in time and space is the equivalent of the impersonal, abstract subject.

This power in the abstract has a perfectly real basis in the organisation of the bureaucratic machine, the standing army, the treasury, the means of communication, and so on. All of this presupposes the appropriate level of development of the productive forces.

Yet before calling on the machinery of the state, the subject depends on the stability of organically-based relationships. Just as the regular repetition of the act of exchange constitutes value as a universal category beyond subjective appraisal and arbitrary exchange ratios, so too the regular repetition of the same relations – custom – lends new significance to the sphere of subjective dominance by providing a basis for its existence in the form of an external norm.

Custom or tradition, as the supra-individual basis for legal claims, corresponds to the restrictive nature and inertia of the feudal social structure. Tradition, or custom, is by nature something confined to a particular, fairly narrow geographical area. Consequently, all rights were considered as appertaining exclusively to a given concrete subject or limited group of subjects. Marx says that in the feudal world, every right was a privilege. Every town, every estate, every guild lived according to its own law, which pursued the person wherever he went. This epoch completely lacked any notion of a formal legal status common to all citizens, to all men. This situation had its parallel in the economic sphere, in the self-supporting closed economies, the bans on import and export, and so on.

> Personality never had the same content universally. Originally rank, property, occupation, religious denomination, age, sex, physical strength, and so on generated such extensive inequality of legal rights that people could not see past the concrete differences to the constant elements of personality.[23]

Equality between subjects was assumed only for relations which were confined to a particular narrow sphere. Thus the members of one and the same estate were equal in the realm

[23] Gierke, *Genossenschaftsrecht*, op. cit., vol. II, p. 35.

of the law of that estate, members of one guild were equal in the realm of guild law. At this stage, the legal subject as the universal abstract bearer of every conceivable legal claim is in evidence only as a bearer of concrete privileges.

> Basically, however, even today the Roman dictum that the personality is inherently equal and that inequality is merely the outcome of an exceptional precept of positive law, has permeated neither legal life nor legal consciousness.[24]

Since there was no abstract concept of the legal subject in the Middle Ages, the concept of the objective norm, applicable to a wide, indeterminate circle of people, was also connected with the establishment of concrete privileges and freedoms.

As late as the thirteenth century we find no trace of any clear conception of the difference between objective law and subjective rights or legal powers (*Berechtigungen*). Wherever one looks, one finds that these two concepts are confused in the patents and charters given the towns by emperors and princes. The usual procedure for establishing any sort of universal regulation or norm was to furnish a particular part of the country or a section of the population with certain kinds of legal qualities. The well-known formula: '*Stadtluft macht frei*' ('City air is liberating') has this character too. Judicial duels were abolished in the same manner. Town dwellers' rights to the usufruct of princely or imperial forests are a further example of rights conferred in this manner and regarded as being of an identical nature.

The same mixture of subjective and objective elements is evident in early municipal law. The municipal statutes were in part general charters, and in part an enumeration of isolated rights or privileges belonging to particular groups of citizens.

Only when bourgeois relations are fully developed does law become abstract in character. Every person becomes man in the abstract, all labour becomes socially useful labour in the

[24] Ibid., p. 34. [This quotation from Gierke in the German edition replaces the following in the 3rd Russian edition, although the same page reference is given: 'Legal consciousness sees, at this stage, that the same or analogous rights are appropriated by individual personalities or collectives, but it does not produce the inference that therefore these personalities and collectives are one and the same in their attributes of rights.'—Ed.]

abstract,[25] every subject becomes an abstract legal subject. At the same time, the norm takes on the logically perfected form of abstract universal law.

The legal subject is thus an abstract owner of commodities raised to the heavens. His will in the legal sense has its real basis in the desire to alienate through acquisition and to profit through alienating. For this desire to be fulfilled, it is absolutely essential that the wishes of commodity owners meet each other halfway. This relationship is expressed in legal terms as a contract or an agreement concluded between autonomous wills. Hence the contract is a concept central to law. To put it in a more high-flown way: the contract is an integral part of the idea of law. In the logical system of juridical concepts, the contract is merely a form of legal transaction in the abstract, that is, merely one of the will's concrete means of expression which enable the subject to affect the legal sphere surrounding him. Historically speaking, and in real terms, the concept of the legal transaction arose in quite the opposite way, namely from the contract. Outside of the contract, the concepts of the subject and of will only exist, in the legal sense, as lifeless abstractions. These concepts first come to life in the contract. At the same time, the legal form too, in its purest and simplest form, acquires a material basis in the act of exchange. Consequently the act of exchange concentrates, as in a focal point, the elements most crucial both to political economy and to law. In exchange, Marx says, 'the content of this juridical relation (or relation of two wills) is itself determined by the economic relation.'[26] Once arisen, the idea of the contract strives to attain universal validity. The owners of commodities were of course proprietors even before they acknowledged one another as such, but in a different, organic, non-legal sense. 'Mutual recognition' is nothing more than an attempt to rationalise,

[25] 'For a society of commodity producers, whose general social relation of production consists in the fact that they treat their products as commodities, hence as values, and in this material (*sachlich*) form bring their individual, private labours into relation with each other as homogeneous human labour, Christianity with its religious cult of man in the abstract, more particularly in its bourgeois development, i.e. in Protestantism, Deism, etc., is the most fitting form of religion'. (Marx, *Capital*, vol. I, ed. cit., p. 172.)

[26] Ibid., p. 178. [Ed.]

with the aid of the abstract formula of the contract, the organic forms of appropriation based on labour, occupation and so on, which the society of commodity producers finds in existence at its inception. Considered in the abstract, the relationship of a person to a thing is totally devoid of legal significance. The jurists sense this when they try to construe the institution of private property as a relationship between subjects, in other words, between people. Yet they conceive of this relationship in a purely formal and, moreover, in a negative way, as a universal prohibition, which excludes everybody but the owner from using and disposing of the object.[27] This interpretation may be adequate for the practical purposes of dogmatic jurisprudence, but it is quite useless for theoretical analysis. In these abstract prohibitions, the concept of property loses any living meaning and renounces its own pre-juridical history.

If, then, development began from appropriation, as the organic, 'natural' relationship between people and things, this relation was transformed into a legal one as a result of needs created by the circulation of goods, primarily, that is, by buying and selling. Hauriou points out that, at first, trade by sea and by caravan did not create the need for property to be safeguarded. The distance separating the people involved in exchange from each other was the best protection against any claims. The establishment of permanent markets created the necessity for settling the question of right of disposal over commodities, and hence for property law.[28] The property title *mancipatio per aes et libram* in ancient Roman law shows that it arose simultaneously with the phenomenon of domestic ex-

[27] Thus, for example, Windscheid (*Lehrbuch des Pandektenrechts*, op. cit., vol. I, section 38), starting from the fact that law can exist only between persons, but not between a person and a thing, concludes that: 'The law of objects knows only vetoes . . . the content of the will power constituting this law, however, is a negative content: those opposed to the person with rights shall . . . refrain from affecting the object and shall not, by their attitude to the object, prevent that person from affecting the object.'

Siegmund Schlossmann (*Der Vertrag*, Leipzig, 1876) draws the logical conclusion from this view when he considers the concept of the law of objects as merely a 'terminological aid'. In contrast to this, Dernburg (*Pandekten*, op. cit., vol. I, section 22, note 5) rejects this view, according to which 'even property, apparently the most positive right of all', is supposed to have 'a purely negative content in legal terms'.

[28] Maurice Hauriou, *Principes de droit public*, p. 286.

change. Similarly, inheritance has only been established as a property title since the time when civil intercourse became interested in such a transfer.[29]

Writing of exchange, Marx says that one owner of commodities may appropriate another's commodity in exchange for his own only with the consent of the other commodity-owner.[30] This is exactly the notion which the representatives of the doctrine of natural law tried to express by attempting to give property a basis in the form of a primitive contract. They are right – not, of course, in the sense that such a contractual act did take place at some historical point in time, but in that natural or organic forms of appropriation assume a juridical 'rationale' in the reciprocal transactions of appropriation and alienation. In the act of alienation, abstract property right materialises as a reality. Any other employment of an object is related to some concrete form of its utilisation as a means of production or consumption. If, however, the object has a function as an exchange value, it becomes an impersonal object, a purely legal object, and the subject disposing of it becomes a purely legal subject. The contrast between feudal and bourgeois property can be explained by their different approach to circulation. Feudal property's chief failing in the eyes of the bourgeois world lies not in its origin (plunder, violence), but in its inertia, in the fact that it cannot form the object of a mutual guarantee by changing hands through alienation and acquisition. Feudal property, or property determined by estate, violates the fundamental principle of bourgeois society: 'the equal opportunity to attain inequality'. Hauriou, one of the most astute bourgeois jurists, quite rightly emphasises reciprocity as the most effective security for property, which can be brought about with the minimum use of external force. This mutuality, which is ensured by the laws of the market, lends property the quality of an 'eternal' institution. In contrast to this, the purely political security vouchsafed by the coercive machinery of state amounts to nothing more than the protection of specified personal stocks belonging to the owners – an aspect which has no fundamental significance. In the past, the class struggle has often resulted in a re-allocation of property, the expropriation

[29] Ibid., p. 287.

[30] Marx, *Capital*, vol. I, ed. cit., p. 178. [Ed.]

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of usurers and large landowners.[81] Yet these upheavals, extremely unpleasant though they may have been for those groups and classes who were their victims, did not shake the foundations of private property, the economic framework linking economic units through exchange. The same people who had rebelled against property had no choice but to approve it next day when they met in the market as independent producers. That is the way of all non-proletarian revolutions. It is the logical consequence of the ideals of the anarchists. Whilst they do, of course, reject the external characteristic of bourgeois law – state coercion and the statutes – they preserve its inner essence, the free contract between autonomous producers.[82]

Thus, only the development of the market creates the possibility of – and the necessity for – transforming the person appropriating things by his labour (or by robbery) into a legal owner. There is no clearly defined borderline between these two phases. The 'natural' changes into the juridical imperceptibly, just as armed robbery blends quite directly with trade.

Karner's definition of property differs from this. According to him,

> property is *de jure* nothing but the power of disposal of a person A over an object N, the mere relation between individual and natural object which, according to the law, affects no other object and *no other person* (emphasis mine, E.P.). The object is private property, the individual a private person, and the law is private law. This was in accordance with the facts in the period of simple commodity production . . .[83]

[81] This gives rise to Engels' remark: 'It is thus entirely true that for 2,500 years private property could be protected only by violating property rights.' (Friedrich Engels, 'The Origin of the Family, Private Property and the State', in: Marx and Engels, *Selected Works*, vol. III, 1970, p. 281.)

[82] Thus Proudhon, for example, declares: 'I want the contract, but not laws; for me to be free, the entire social structure must be altered on the basis of reciprocal contract.' (Pierre Joseph Proudhon, *Idée générale de la Révolution au XIXe siècle: Choix d'études sur la pratique révolutionnaire et industrielle*, Paris, 1851, p. 138). Yet he is forced to add shortly after this: 'The norm according to which the contract shall be fulfilled will not be based exclusively on justice, but also on the common will of people living together. This will shall ensure the fulfilment of the contract, even by force if necessary.' (Ibid., p. 293.)

[83] Josef Karner (pseudonym of Karl Renner), *The Institutions of Private Law and their Social Functions*, edited by O. Kahn-Freund, translated by A. Schwarzschild, London: Routledge & Kegan Paul Ltd., 1949, pp. 266-267.

[84] Ibid., p. 268.

[85] Ibid.

This entire passage is a misconception from beginning to end. Karner is here re-creating that old favourite – the paradigm of Robinson Crusoe. Yet one wonders what point there is in two Robinsons, of whom one does not know the other exists, conceiving of their relationship to objects *in a legal fashion*, when it is an exclusively *factual relationship*. This law of the isolated individual merits comparison with the proverbial value of the 'glass of water in the desert'. Both value and property law are engendered by one and the same phenomenon: the circulation of products which have been transformed into commodities. Property in the legal sense did not arise because it occurred to people to invest one another with this legal capacity, but because they were able to exchange commodities only in the guise of property-owners. 'The unlimited power of disposal over objects' is nothing but the reflection of unlimited commodity circulation.

Karner states that the property-owner 'is quick-witted enough to cultivate the legal aspect of his right. He alienates the object'.[84] It does not occur to Karner that the 'juridical' only begins with this 'cultivation'; without it, appropriation does not transcend the limits of natural, organic appropriation.

Karner admits that 'sale and purchase, loan, deposit, rent existed previously, yet their range was very small, with regard to the *persona* as well as to the *res*'.[85] Indeed these various legal forms of the circulation of goods were in existence at such an early date that we have a precise formulation of lending and borrowing even before the formula for property itself had been elaborated. This fact alone is enough to provide the key to a correct understanding of the legal nature of property.

Yet Karner believes that people were property-owners even prior to buying and selling or pawning things. The relations we have mentioned appear to him merely as 'quite secondary, makeshift institutions, stop-gaps of petty bourgeois property'. In other words, he proceeds from the assumption of totally isolated individuals who have hit on the idea (one knows not why) of creating a 'common will', and – in the name of this

common will – of ordering everyone to refrain from assaults on objects belonging to someone else. Later – when they have realised that the property-owner cannot be regarded as entirely self-sufficient, either as a labourer or as a consumer – these isolated Robinsons decide to supplement property through the institutions of buying and selling, borrowing, lending and so forth. This purely rational scheme of things stands the actual development of things and concepts on its head.

Karner is here quite simply reproducing the so-called Hugo-Heysian system of interpretation of law. This too starts out in just the same way, from man subjugating the objects of the external world (law of objects), thence proceeding to the exchange of services (law of obligations), to arrive ultimately at the norms which regulate man's situation as member of a family and the fate of his assets after his death (family law and law of inheritance). Man's relationship to the things produced by him, or acquired by conquest, or forming, as it were, part of his personality (weapons, jewellery), has undoubtedly been a factor in the historical development of private property. This relationship represents property in its primitive, crude and limited form. Private property first becomes perfected and universal with the transition to commodity production, or more accurately, to capitalist commodity production. It becomes indifferent to the object and breaks off all ties with organic social groupings (family, tribe, community). It appears in its most universal sense as the 'external sphere of freedom',[36] that is, as the practical manifestation of the abstract capacity to be the subject of rights.

Property in this purely legal form has little logical connection with the organic natural principle of private appropriation resulting from personal expenditure of energy, or as the precondition for personal use and consumption. The fragmentation of the economic totality in the market renders the bond between the property-owner and his property just as abstract, formal, qualified and rationalistic, as the relationship of a person to the product of his labour (for example to the plot of land he cultivates himself) is elementary and accessible even to the most primitive turn of mind.[37] Whilst there is a direct

[36] Hegel's *Philosophy of Rights*, ed. cit., section 41ff. [Ed.]
[37] It is for precisely this reason that the apologists of private property are particularly fond of appealing to this primitive relation, for they know that its ideological force far outweighs its economic significance for modern society.

morphological connection between these two institutions: private appropriation as the precondition for unlimited personal usage, and private appropriation as the condition for subsequent alienation in the act of exchange, nonetheless, logically speaking they are two different categories, and the word 'property' used to describe both, creates more confusion than clarity. Capitalist landed property, for example, does not presuppose any kind of organic bond between the land and its owner. On the contrary, it is only conceivable when land changes hands with complete freedom.

The concept of landed property itself emerges simultaneously with individually alienable landed property. The common land of the *Allmende* was originally in no way the property of a legal person – such a concept did not even exist – but was for the usage of Mark-community members as a collective.[38]

Capitalist property is basically the freedom to transform capital from one form to another, the transfer of capital from one sphere to another for the purpose of gaining the highest possible unearned income. This freedom of disposition inherent in capitalist property is inconceivable without the existence of propertyless individuals, in other words, of proletarians. The legal form of property is not at all incompatible with the fact of the expropriation of a large number of citizens, for the capacity to be a legal subject is a purely formal capacity. It qualifies all people as being equally 'eligible for property', but in no way makes property-owners of them. Marx's *Capital* illustrates this dialectic of capitalist property brilliantly, both when it is absorbed by 'fixed' legal forms, and when it explodes these forms by the direct use of violence (in the period of primitive accumulation). Karner's analysis, which we have been discussing, has very little to offer in this respect which is new as compared with volume one of *Capital*. Where Karner does try to be original, he only creates confusion. We have already drawn attention to his attempt to abstract property from that aspect which constitutes it as juridical, that is, from exchange. This purely formal conception carries yet another misconcep-

[38] Cf. Gierke, *Genossenschaftsrecht*, ed. cit., vol. II, p. 146.

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tion in its wake: in analysing the transition from petty bourgeois to capitalist property, Karner declares:

> The legal institution of property . . . has undergone an extensive development in a relatively short period. It has suffered a drastic transformation which has not, however, been accompanied by noticeable modifications of its legal structure.

and directly after this concludes:

> The legal institution remains the same, as regards its normative content, but it no longer retains its former social functions.[39]

One wonders which institutions Karner means. If he is referring to the abstract formula of Roman law, then of course there is nothing in that which could be changed. But this formula has governed petty property only in the epoch of developed bourgeois capitalist relations.

However, if we consider guild trade and the peasant economy in the epoch of serfdom, then we shall find quite a number of norms limiting property right. A possible counter-argument is, of course, that these limitations are all of a public-law nature and do not affect the institution of property as such. But in that case the entire argument is reduced to the assertion that a particular abstract formula is identical to itself. Nonetheless, even feudal and guild – in other words, limited – forms of property revealed their function to be one of absorbing other people's unpaid labour. The property arising from simple commodity production, with which Karner contrasts the capitalist form of property, is an abstraction as bald as simple commodity production itself. For the transformation of even a portion of products into commodities, and the emergence of money, together create the conditions for the appearance of usurer's capital which, as Marx puts it,

> belongs together with its twin brother, merchant's capital, to the antediluvian forms of capital, which long precede the capitalist mode of production and are to be found in the most diverse economic formations of society.[40]

[39] Karner, *Institutions of Private Law*, ed. cit., pp. 252 and 257.
[40] Marx, *Capital*, vol. III, ed. cit., p. 580.

Hence we can reach a conclusion diametrically opposed to Karner's, namely: norms vary, but their social function remains unchanged.

As the capitalist mode of production develops, the property-owner gradually rids himself of technical production functions, thereby losing absolute legal sway over capital. In a joint-stock company, the individual capitalist is merely the bearer of a title to a certain quota of unearned income. His economic activity as a proprietor is almost totally limited to the sphere of unproductive consumption. The main bulk of the capital becomes an utterly impersonal class force. To the extent that this mass of capital participates in market transactions – which presupposes that its individual constituent parts are autonomous – these autonomous components appear as the property of legal persons. In reality, the whole bulk of the capital is controlled by a relatively small group of the largest capitalists, who act, moreover, not in person, but through their paid representatives or authorised agents. At this point, the juridically distinct form of property no longer reflects the real state of affairs, since, by means of share participation and control and so forth, actual dominance extends far beyond the purely legal framework. Here we come close to that moment when capitalist society is ready to turn into its opposite, the indispensable precondition for which is the class revolution of the proletariat.

Long before this revolution, however, the development of the capitalist mode of production based on the principle of free competition results in this latter principle being turned into its opposite. Monopolistic capitalism creates the preconditions for an entirely different economic system, in which the momentum of social production and reproduction is effected, not by means of individual transactions between autonomous economic units, but with the help of a centralised, planned organisation. This organisation is brought into being by trusts, combines, and other monopolistic associations. The Great War witnessed an embodiment of these tendencies when private capitalist and state organisations interlocked to form a powerful system of bourgeois state capital. This practical modification of the legal fabric could not leave theory untouched. In the rosy dawn of its evolution, industrial capitalism surrounded the principle of legal subjectivity with a halo by elevating it to the level of an

absolute attribute of the human personality. Nowadays people are beginning to regard this principle rather as a purely technical determinant, which is well-suited to distinguishing risks and liabilities' or, alternatively, they pose it simply as a speculative hypothesis lacking any material basis. Since this latter approach directed its fire at legal individualism, it won the sympathies of various Marxists, who were of the opinion that it contained the elements of a new, 'social' legal theory corresponding to the interests of the proletariat. Obviously such an evaluation demonstrates a purely formal attitude to the problem. In any case, the theories mentioned do not provide any criteria whatever for a genuine sociological interpretation of the individualistic categories of bourgeois law, which they criticise, not from the point of view of the proletarian conception of socialism, but from the standpoint of the dictatorship of finance capital. The social significance of these doctrines is that they justify the modern imperialist state and its methods, particularly those employed in the last War. It should therefore come as no surprise to us that an American jurist draws similar 'socialist'-sounding conclusions precisely on the strength of the lessons of the World War, that most reactionary and rapacious of wars in recent history.

> The individual's rights to life, freedom and property have no absolute or abstract existence; they are rights which exist, from the legal standpoint, only because the state protects them, and which are, as a result, entirely subject to the authority of the state.[41]

Seizure of political power by the proletariat is the fundamental prerequisite of socialism. Nevertheless, experience has shown that planned production and distribution cannot replace market exchange and the market as the link between individual economic units overnight. Were this possible, then the legal form of property would be historically absolutely done for. It would have completed the cycle of its development and returned to its point of origin, to objects of direct, individual use; that is, it would in practice once more have become a primitive relation. And as a consequence of this the legal form as such would also be condemned to death.[42] So long as the task of building a unified planned economy has not been completed, so long as the market-dominated relationship between individual enterprises and groups of enterprises remains in existence, the legal form too will remain in force. It is hardly necessary to make specific mention of the fact that the form of private property which corresponds to the means of production in the economy of small farmers and craftsmen remains almost entirely unchanged during the transition period. But even in nationalised large-scale industry, application of what is called the principle of 'economic calculation' means the formation of autonomous units whose relationship to other economic units is mediated through the market.

To the extent that state enterprises are subject to the conditions of circulation, transactions between them take on the form, not of technical co-ordination, but of legal transactions. As a result, the purely legal, or juridical, regulation of relations becomes both possible and necessary. In conjunction with this, direct, or administrative, technical management is likewise preserved, and is undoubtedly strengthened over time through being subjected to a general plan of the economy.

On the one hand, therefore, we have economic life functioning in terms of the categories of natural economy, with a social link between units of production which appears in a rational, undisguised form (that is to say, not in commodity form). The method corresponding to this involves direct, or technically-determining prescriptions in the form of programmes, plans for production and distribution, and so forth. Such prescriptions are concrete, and are continually being modified in accordance with changing conditions. On the other hand, we have a relationship between economic units expressed in the form of the value of commodities in circulation and consequently in the form of legal transactions. Corresponding to this relationship, we have the creation in turn of more or less fixed and unchanging formal limitations on, and regulations for, legal inter-

[41] E. A. Harriman, 'Enemy Property in America', in *The American Journal of International Law*, 1924, vol. I, p. 202.

[42] The subsequent process of transcending the legal form would be reduced to a gradual transition from equivalent distribution (a specific quantity of social products for a given quantity of labour) to the formula of developed communism: 'from each according to his abilities, to each according to his needs'.

course between autonomous subjects (civil code, perhaps also a commercial code), and of organs which help to sort out tangles in such transactions by means of judgments in lawsuits (courts, arbitration committees, and so on). Obviously the first of these tendencies offers no long-term prospects for the legal profession. The victory, by degrees, of this tendency means the gradual withering away of the legal form altogether. One can, of course, argue that a production programme, for example, is also a public-law norm, since it emanates from the state authority, has binding force, creates rights and obligations, and so on. It is true that, so long as the new society comprises elements of the old, that is, of people who conceive of the social relation purely as a means to their private ends, even simple, rational, technical instructions will necessarily assume the form of a supra-individual, external force. To quote Marx, political man will still be 'abstract, artificial man'. The more radically relations based on commodity exchange and the huckstering mentality have been overcome (in the realm of production), the sooner the day of final liberation will come, about which Marx said, in his article 'On the Jewish Question':

> Only when the real, individual man re-absorbs in himself the abstract citizen, and as an individual human being has become a *species-being* in his everyday life, in his particular work, and in his particular situation, only when man has recognised and organised his *'forces propres'* as *social forces*, and consequently no longer separates social power from himself in the shape of *political* power, only then will human emancipation have been accomplished.[43]

These are the perspectives for the unknown future. In dealing with our transition period, we must draw attention to the following. Whilst in the epoch of dominance by impersonal finance capital conflicts of interest continue to exist between individual groups of capitalists (who have their own and other people's capital at their disposal), under proletarian dictatorship, contrary to this, conflicts of interest are abolished within nationalised industry, despite the continuance of market exchange. The distinction between, or autonomy of, individual

[43] Marx, 'On the Jewish Question', in Marx and Engels, *Collected Works*, vol. III, 1975, pp. 167-168.

economic organisms (on the model of the autonomy of private production) is *retained as a method only*. In this way, those *quasi* private-enterprise relations which arise between state industry and small economic units, as well as amongst individual enterprises and groups of enterprises within state industry itself, are confined within strict limits, determined at any given moment by the successes achieved in the sphere of the planned direction of the economy. Hence, in our transition period, the legal form as such does not contain within itself those unlimited possibilities which lay before it at the birth of bourgeois-capitalist society. On the contrary, the legal form only encompasses us within its narrow horizon for the time being. It exists for the sole purpose of being utterly spent.

The task of Marxist theory consists of verifying this general conclusion and of following up the concrete historical material. Development cannot proceed evenly in all areas of social life. That is why painstaking labour in observation, comparison and analysis is absolutely indispensable. Only when we have closely examined the tempo and form of transcending value relations in the economy and, simultaneously, of the withering away of private-law aspects of the legal superstructure and, finally, the progressive dissolution of the legal superstructure itself, conditioned by these fundamental processes, only then shall we be able to say that we have clarified at least one aspect of the process of building the classless culture of the future.