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The Derivation of Secondary Forms of Consciousness,
with Reference to the Emergence of Tort Law in England

by

Daniel M. O'Connor

A thesis
presented to the University of Manitoba
in fulfillment of the
thesis requirement for the degree of
Master of Arts
in
Department of Sociology

Winnipeg, Manitoba

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THE DERIVATION OF SECONDARY FORMS OF CONSCIOUSNESS,
WITH REFERENCE TO THE EMERGENCE OF TORT LAW IN ENGLAND

BY

DANIEL M. O'CONNOR

A thesis submitted to the Faculty of Graduate Studies of
the University of Manitoba in partial fulfillment of the requirements
of the degree of

MASTER OF ARTS

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ABSTRACT

Sociological interpretations of Marx's work have traditionally focused on the development the structuralist element present in his thinking. The thesis which I present breaks with this established orthodoxy insofar as activity, rather than structure, is understood to be the basis of social formations. This thesis explores the relation between the 'active side' of consciousness and that which forms consciousness' primary objectivities, wealth, establishing activity as the principle of connection. The metamorphic forms of social activity, i.e. commodities, money and capital, define the primary content of consciousness. It is this content which stands as the material for consciousness' secondary reflections, and therefore circumscribes the development of these secondary, ideological formations. The emergence of contract and tort law, as secondary formations, and as derivations of the commodity and money forms respectively, are analyzed in their historical development as an illustration of this process. These specific legal normative systems, as products and forms of secondary consciousness, are therefore understood as socially determined.

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It might have been expected, ... that long ago Marxism would have formulated in a more theoretical way the fundamental findings of the sociology of knowledge concerning the relation between human thought and the conditions of existence in general, especially since its discovery of the theory of ideology also implied at least the beginnings of the sociology of knowledge. That this implication could never be brought out and theoretically elaborated, and at best only came partially into view, was due, however, to the fact that, in the concrete instance, this relation was perceived only in the thought of the opponent.... the tendency in Marxism to shy away from a general, sociological formulation may frequently be traced to a ... limitation which a given point of view imposes on a method of thinking (Mannheim, 1936:277).

INTRODUCTION

For Marx, the key to understanding the nature and structure of a society is the form of wealth which predominates in it. Marx's method of 'decoding wealth' reveals the material and social systems of human activity which receive objective expression in this basic phenomenal form. Understanding wealth in this way is also the key to understanding the subjective or conscious forms which these systems of human activity manifest, as well as providing the basis for the derivation of the corresponding secondary and more complex ideological formations.

The purpose of this thesis is to explain the emergence of legal norms from their economic basis by explaining the transformation of forms of wealth and consciousness into systems of ideology. Determination of the origin and development of contract and tort law in England will serve as a focus for the development of this theoretical and methodological perspective. The emergence of contract and tort law will be presented as an ideological manifestations of the historical development of wealth from commodity form to money form. Wealth, in the form of capital proper (i.e. industrial capital) appears later than commodities and money, both logically and historically, and is, therefore, beyond the scope of this thesis.

The interpretation of Marx's texts I employ in this thesis will appear in sharp contrast to structuralist interpretations. The distinguishing feature of structuralist Marxism is its assumption that

society, at its basis, is structured according to economic classes, defined in accordance with the extent of ownership or control of the means of production. Economic power, i.e. control over the means of production, conceptualized as an interest of the dominant class appropriate to the maintenance of control, becomes transformed into state policy and legal norms. The influence of the dominant class on the state is either direct "through the manipulation of state policies" or pressure upon the state (Gold et al., 1975:34), or indirect, whereby the state transcends the interests of factions within the class to ensure the legitimate accumulation of wealth, thus serving the interests of that class in the long run. The divergence of interests within the class structure means that those with power have their interests served, through the preservation of the equilibrium of the system, to the exclusion of the "real interests" (Lukes, 1974) of the subordinate classes. The interests of the subordinate classes become mystified through the hegemonic control of the dominant class which asserts control, again either directly or indirectly, over the major socializing institutions within society, so that these institutions serve to rationalize the status quo, through the perpetuation of ideas which foster the same.

Structuralist Marxism, as a distinct theoretical and methodological orientation, has its origins in the French anthropological tradition, most notably in the structural anthropology of Levi-Strauss (see Althusser, 1970:108), and was later focused on Marx's work, which was adapted to it, by Althusser (1970).¹ In later structuralist derivations,

¹ See, for example, Reading Capital (pp. 91-118) where the logic of "the dominance of structure" and its relatively autonomous levels, is developed and employed not only in Althusser's reading of Marx, but in

(eg. Milliband, 1969 and Poulantzas, 1974) the explication of contradictions, conceived of as oppositions developed within or as a result of the class structured nature of society, stands as the basic premise from which analysis proceeds.

The interpretation of Marx presented here does not deny the structural implications of Marx's work, nor the ease with which, in any of Marx's texts, one will find sufficient evidence to support the development of a class based theory of society. Althusser's reading of Capital was successful in abstracting² the structuralist element in Marx's thinking, establishing structuralism as orthodox Marxism, and leaving the remainder as inconsequential. The perspective I present breaks with this orthodoxy in order to determine what is consequential for sociological theory, and consciously suspends the structuralist interpretation, focusing instead on those elements of the logic which fall outside that orientation.

This thesis is based on Marx's original texts and the work of several leading Marxist scholars. Following Lukács (1968), who saw orthodox Marxism as method, Ilyenkov (1977, 1982) and Mamardashvili (1970, 1986) have further distilled Marx's logic and, in turn, offer a distinctive orientation to his texts. The perspective offered by these individuals perhaps owes its existence to their willingness to yield to

his reading of Hegel as well. In contrast, the thesis which is presented in the following pages focuses on 'activity' rather than structure.

² Throughout this thesis, the term abstraction is used to denote the process of 'drawing away from', or the removal of something from its original (concrete) unity. Concrete is used to denote a "unity of diverse aspects", or "unity in diversity" (see Ilyenkov's The Dialectics of the Abstract and Concrete in Marx's Capital, for an elaboration of this usage.).

Marx's warning against treating Hegel as a "dead dog" (Marx, 1978:302).

As Marx states:

I therefore openly avow myself the pupil of that mighty thinker, and even here and there, in the chapter on the theory of value, coquetted with the modes of expression peculiar to him. The mystification which dialectic suffers in Hegel's hands by no means prevents him from being the first to present its general form of working in a comprehensive and conscious manner (Marx, 1978:302).

Marx's work in many ways parallels that of Hegel, especially in the development of his methodological orientation which is a direct result of his transformation of Hegel's logic. While preserving the general form of Hegel's dialectic in his work, its idealist content was, in Marx's hands, replaced with a materialist content, so creating a materialist dialectic. From Marx's point of view, this transformation stood Hegel's logic right side up, for with Hegel it was "standing on its head" (Marx, 1978:302).

CATEGORIES OF FORM AND CONTENT

For Marx, the content of history which replaces Hegel's Absolute Spirit, or God, is humanity, or, more specifically, the activity of 'free individuals'. Free individuality is the 'true' unity of particularity and universality in individual activity, or the particular activity of the individual projected in accordance with the knowledge or consciousness of its universal (species) character. As Marx states: "The whole character of a species - its species character - is contained in the character of its life- activity; and free, conscious activity is man's species character." The universality of human activity is premised on the fact that:

an animal produces only under the dominion of immediate physical need, whilst man produces when he is free from physical need and only truly produces in freedom therefrom.... An animal forms things in accordance with the standard and need of the species to which it belongs, whilst man knows how to produce in accordance with the standard of every species (Marx, 1978:76).

Universal knowledge, or consciousness of self as species being and therefore universal in character, is not, however, realized by any purely cognitive operation. This content is only realized in and through the process of objectification, i.e., in the very real forms of human sensuous activity (labour, practice). It is in this process of "creating an objective world by his practical activity in working up inorganic nature, [that] man proves himself a conscious species being" (Marx, 1978:76). Free individuality is only manifest in the movement of actually transforming reality, which is the process of realizing this ideal character of human activity.

The process of human history is the objectification, or realization, of this content in ever higher forms. The stage at which the simultaneous subjective-objective manifestation (form or mode) of human activity is adequate to this content is reached is free individuality, or human society. Human society is the unity of form and content, but not a static unity; free individuality is an infinite movement of becoming. Previous formations in the development of content (e.g. the commodity, money and capital forms), are expressed as, and appear both in reality and in consciousness, as metamorphic forms. Content is expressed in a form alien to itself, in the form of estranged labour, in which labour, or human sensuous activity (sensuous is defined as that side of reality which is perceived by the senses), appears divided (i.e. abstract). This division appears, on the one hand, in a particular form, separated and opposed to (estranged or alienated from), what appears on the other hand as its general or social form.³ As a result, the social character of activity appears merely as a means to private ends, rather than an end in itself. Thus, the process of creating an objective world by practical activity, the process of materializing or realizing content, is the process of the estrangement of the species life-activity from humanity. The form of estranged labour transforms "man's species being, both nature and his spiritual [social] species property, into a being alien to him" (Marx, 1978:77). And, at the same time forms consciousness "in such a way that the species life becomes for him a means" (Marx, 1978:77).

³ In the commodity, for example, this division is manifest as the internal contradiction of these mutually exclusive, and mutually necessary forms, that is, in the form of an abstract unity.

The expression of labour in an alien form is its materialization in the specific forms of wealth, commodities, money and capital. Wealth, being the simultaneous subjective-objective form of human sensuous activity, is both product and form of this content in both its natural and spiritual, or social properties. As a content-bearing phenomenon, or the phenomenal form of social sensuous activity, wealth manifests in itself both general and particular forms of human activity. In its estranged form, wealth appears, and therefore consists of, this twofold (abstract) manifestation.

The substance⁴ of all wealth consists in the fact that it is the product and material form of human interaction with nature (productive force) and human social relations (relations of production). At any particular level of development of productive forces, there corresponds a particular social relation. In combination, these two aspects stand as the form of human sensuous activity, or mode of production, the manifestation of which is a particular form of wealth. Human interaction with nature stands as the basis from which social forms of activity are manifest, and so stand as the substance of all wealth independent⁵ of its social configuration.

⁴ i.e., that which is expressed in a phenomenal form, or the essence of phenomena.

⁵ All wealth necessarily contains a social component. Human activity is not 'fixed' in any one form or relation by nature, and therefore requires the transmission of this knowledge from the activity of others. Thus, relation with nature is only presented as an abstraction for the purposes of analysis.

THE PRODUCTION OF WEALTH

Interaction with nature is the basis of all human life. As Marx puts it, Nature is humanity's 'inorganic body' (i.e. not belonging to the immediate structure of the organism) which requires continual transformation for the reproduction of human existence. Nature serves not only as a means to human life, but also serves as the necessary medium for its expression, the natural medium for the objectification⁶ of human activity. The result of this transformative activity is its objectification in material form, in the form of an object of utility, or use-value.

Use-Value

The production of use-values is a process in which both human and natural forces participate. The setting in motion of human (productive) forces requires the adaptation and use of natural material in accordance with, and by means of, natural forces. In the process of transforming nature, humanity is itself transformed in the expansion of its active capacities, through the acquisition of knowledge of natural forces. The process of transforming nature, or the "working-up of the objective world", is the process of humanizing nature, which includes both an objective transformation of nature and the subjective appropriation of this transformation, as knowledge. This appropriation does not appear

⁶ i.e. The creation of an objectively human world or environment is the process of humanity giving itself objective existence in the world.

after the fact, but is an aspect of the process itself:

The object of labour is, therefore, the objectification of man's species life: for he [i.e. man] duplicates himself not only as in consciousness, intellectually, but also actively, in reality, and therefore he contemplates himself in a world that he has created (Marx, 1978:76).

The object of labour and the subjective idea of it are not two separate existences but two sides, aspects or moments, of the same labour process. The active transformation of nature results in the production of an object of utility, or use-value.

A use-value is, in the first place, a material thing capable of fulfilling a human need, and is always the result of transformative activity in a particular form. To particular productive activity Marx ascribes a natural character, in that the result, or product, always comprises a natural element (Marx, 1977b:37). The product, however, does not owe its character as use-value to nature, but to activity in its particular form as it appropriates natural material; it is this content which gives such objectivities their character as use-values.

Nature stands as the material medium for the expression, or materialization, of sensuous activity in all of its particular manifestations. The material body of the thing, i.e. that which owes its existence to nature, acts as the material bearer for the objectification of the substantial relation between human and nature. The material body of the product, while required for the realization, or actualization, of particular activity, serves only to represent, in the form of a material object, activity's utility.

Every element of material wealth...must invariably owe [its] existence to a special productive activity exercised with a definite aim, an activity that appropriates particular nature-given materials to particular human wants. (Marx, 1978:389)

The utility of activity does not, and cannot, manifest itself in any way other than a material form, and then only 'really' manifests itself in the process of decomposition, i.e. in the activity consuming its use in one form or another.

Commodity Form

In the forms of wealth which will now be considered, the commodity and money forms, the social or general aspect of human activity appears as abstracted from particular activity, as a transformed form⁷ of this material basis. Marx begins his analysis of capital with analysis of the commodity form, which is the genetic basis of capital.

The wealth of those societies in which the capitalist mode of production prevails, presents itself as an 'immense accumulation of commodities', its unit being a single commodity. (Marx, 1978:303)

The social forms of both money and capital have their basis in the commodity form, which, therefore, contains the secret of the development of these later forms. It is also through the analysis of the commodity form that Marx's sociological standpoint becomes apparent.

Wealth, in its particular historical form as a commodity, manifests a twofold character; it is a thing "sensible, supra-sensible or social" (Marx, 1977b:37). The sensible character of the commodity form, as has been shown previously, is a result of humanity's transformation of nature, a process which is expressed in a material form. This aspect of human activity, that is, use-value, constitutes "the substance of all wealth, whatever may be the social form of that wealth" (Marx, 1978:

⁷ Marx's conception 'transformed' or 'metamorphic' form also appear in some translations as 'converted' form (e.g. Marx, 1977b).

p.303). The commodity, then, being a form of wealth must be a use-value, i.e., it must embody or represent, in its materiality, the utility of a particular sort of labour, and, therefore, be an object of specific utility. The aspect of human activity which manifests itself as wealth's social character is the supra-sensible aspect of the commodity and is the result of human interaction, not with nature, but with other humans, i.e. relations of production. This supra-sensible character proves itself to be distinct and yet indistinct from the sensible form of the commodity.

The social relation which gives rise to the commodity form is exchange. The production of commodities presupposes the division of labour into 'independent' units of production, and that the product formed by labour in its particular aspect, i.e. the specific use-value, is not intended for direct consumption on the part of the producer, but, rather it is intended to be a use-value for others. For exchange to take place, one producer must provide the other with an object of utility for the other to desire its appropriation, and vice versa, such that exchange encompasses two qualitatively different objects of utility. The process of producing for exchange, rather than for direct personal consumption, requires the production of an object to fulfill a social need, the manifestation of which is a 'socialized use-value'. This particular form of value is only realized in exchange, and appears as a commodity's "exchange-value".

In order for the exchange of 'commodities' to take place, i.e. in order for two producers to appropriate the use-value of each other's labour, the qualitatively different character of their activities, as

manifest in the form of their objects, must somehow be equated. For both objects to be made equivalent, it would appear that both must share some common characteristic in addition to their uncommon differences. That which makes these commodities different, and stands as the material premise of exchange, is the particular variety of labour embodied in the object (labour in its particular form as use-value). Therefore, that which makes them equivalent, and exchangeable, must be a third thing that stands as distinct from the object as use-value. If, in trying to determine or isolate this common substance, both commodities are analyzed independently from the process of exchange, either before or after, no matter which vantage point is taken, as objects of use-value only differences are evident. In fact, that substance which is expressed as a commodity's exchange-value, is the opposite of that which forms its materiality; "not an atom of matter enters into its composition" (Marx, 1978:313). The exchange-value of a commodity is a non-material, or supra-sensible, substance.

The only way in which commodities can be reduced to a common denominator is to make abstraction from the different varieties of labour embodied in them. The only quality left to the commodity, having undergone such a transformation, is the fact that it is a product of human activity 'in general'. The fact that this form of value, exchange-value, is only manifest in exchange, attests to the fact that this supra-sensible property of commodities is a social substance, i.e., a manifestation of a social relations. This social substance appears in the commodity form as a complete abstraction from particularity, as the division of labour into a general character (exchange-value), on one

hand, and a particular character (use-value) on the other, both existing in the commodity form as abstract moments.

In the exchange of two commodities, Commodity A and Commodity B, Commodity A is equated with Commodity B, or $A=B$. While outside this relationship these two objects cease to be commodities, in that they express only qualitative differences, they become commodities when they stand in a relation to one another. In this relationship one commodity expresses its exchange-value relative to another, making the other stand as the measure of its equivalence. The fact that exchange-value is a purely⁸ social relation, and that this is not self-apparent in commodity exchange, is due to the form the expression of value takes. The demystification of this social character lies in the understanding of value's 'relative' and 'equivalent' forms.

Equating two commodities, as commodities, in abstracting from the different varieties of labour embodied in them, means their reduction to a quantity of simple human (abstract) labour, measured in time. The useful property of the commodity is independent of the amount of labour (time) required to appropriate its useful qualities (Marx, 1978:303). Labour-time is a quantitative determination, and is independent of its qualitative, or useful, characteristics. Exchange-value is the general form human labour expressed abstractly, and while it does not express the utility of labour, neither is it a metaphysical property, or 'thing of air'. As Marx (1978:316) puts it, abstract labour only becomes value "in its congealed state, when it is embodied in the congealed form of some object;" it must be expressed "as having objective existence", but

⁸ Pure is used in this context to refer to something which is abstract.

its objective existence can only be expressed, or manifest, in exchange, when one commodity gives itself this objective existence as value by means of its transformation of the material form of the other. A commodity can only express its exchange-value in a 'relative form.' Relative to itself, in the equation $A=A$ (e.g. iron=iron or corn=corn), what is expressed is only use-value.

Continuing the example, considered from the standpoint of Commodity A, Commodity B plays the passive role of equivalent to A, serving as the material medium whereby the value of Commodity A receives objective existence. Commodity B, in this relation, stands as the 'form of value' (representing value), while at the same time, retaining its character as a material palpable thing (use-value). Thus, in relation with Commodity B, Commodity A transforms the value in use, B, "into a substance in which to express its, A's, own value" (Marx, 1978:317). Accordingly, Commodity B acts like a mirror which reflects the value of Commodity A, officiating as A's equivalent while remaining a qualitatively different thing. The two forms of value are both mutually exclusive and mutually necessary for the exchange of commodities. No single commodity can serve both in the same expression, for it is not possible to express the value of Commodity A in Commodity A. The value of A can be expressed only relatively, presupposing the existence of another which will serve as A's equivalent. Conversely, for B to express its value in A, Commodity A, in turn, must assume the opposite pole of the expression and become B's equivalent.

In the course of exchange, the particular objects undergo a metamorphosis, where, as in the above example, Commodity A expresses its

value only in the transformed form of Commodity B. In this relation Commodity B is transformed from a mere use-value into a form for the expression of the value of A, a process within which its use-value, is sublated.⁹ Thus, for Marx, the commodity appears as an object which is both sensible and supra-sensible, expressing value as distinct and yet indistinct from its sensible form.

It is in this social relation of exchange that the labour-power (labour independent from its particular manifestation) of the individual is determined as an aliquot part of the labour power of society. The extent to which the labour-power of an individual counts toward the labour-power of the whole, is determined by the extent to which her products express their value relative to the products of others, which stand as equivalents forms of hers. Emerging from this social relation, those products which assumed the role of equivalent, once again manifest their particular character as objects of utility, and are therefore capable of fulfilling particular needs, aims, and purposes.

Because the social character of individual labour, the extent to which it contributes to the aggregate labour-power of society, is manifest in the interaction of material things, the relation between producers becomes in their eyes, a social relation between things. The relation of producers to the sum total of the labour of society is only

⁹ Sublate is a translation of the German word aufheben (to put by, or set aside). Hegel defines its double meaning as: "... (1) to clear away, or annul: thus, we say, a law or regulation is set aside; (2) to keep, or preserve,: in which sense we use it when we say: something is well put by. This double usage of the language, which gives the same word a positive and negative meaning, is not an accident, and gives no ground for reproaching language as a cause of confusion. We should rather recognize in it the speculative spirit of our language rising above the mere 'either-or' of understanding" (1975:142).

given objective existence in the commodity form, so that Commodity B, by its character as a material thing, seems naturally qualified to express Commodity A's value. The social power of labour carried on in private thus appears in an alien form; in the form of a supra-sensible property of things endowed with a life of their own. This is the 'fetishism' which attaches itself to the commodity form, such that relation between producers are reduced to material relations, while their social relation is transformed into relations between things.

The social character of men's labour appears to them as an objective character stamped on the products of that labour; because the relations of the producers to the sum total of their labour is presented to them as a social relation, existing not between themselves, but between the products of their labour. (Marx, 1978: p.320)

As a result of the social character of labour appearing only in the metamorphic form of a thing, the social relation of exchange appears only as a means to the private appropriation of the material form of the labour of others.

Money Form

In the simple exchange of commodities, the value of the commodities is determined within their autonomous relation, where one stands forth as value by reason of its relation to the other. Removed from this relation, upon completion of exchange, each object loses its character as a commodity, and again becomes merely use-value to its new owner. The actual expression of value is a disappearing moment in the process. That is, at the same time that the commodity assumes a metamorphic form, it comes into the hands of the other as a mere use-value. Each exchange witnesses this process of sublimation.

Because neither commodity can assume both forms of the expression of value at the same time, but must assume either one or the other forms, each commodity could, in a given proportion, assume the role of equivalent, and therefore express the value of all others. For example, (w) amount of Commodity A could be expressed as the equivalent of (x)B, (y)C, or (z)D. With increases in the volume and circulation of commodities, one commodity becomes singled out for just such a role. This is the genesis of the money form of value.

With the emergence of the money form of value, one commodity is set aside as the 'universal equivalent', that is it takes the form of equivalent to all other commodities, such that the value of commodities B, C, and D can all be expressed in the form of A. The result of this transformation is instead of exchanging Commodity B for C, B is exchanged for Commodity A in order to be exchanged for C, (or $B = A = C$), and the original process of exchange appears split into two separate relations, i.e. buying and selling.

The process of selling appears in the form of $B = A$, (or commodity transformed into money; C-M), whereas the process of buying appears as $A = C$ (or money transformed into commodity; M-C). Taken in its entirety, the process appears as: commodities transformed into money and money transformed back into commodities (or C-M-C). Though it appears as two relations separated by time, it is in fact the same relation of simple exchange (or C-C), with the exception that the social relation which then appeared as a disappearing moment in simple exchange, now appears in a phenomenal form, which gives this relation

itself an independent existence.¹⁰

Money is a commodity which has undergone a further metamorphosis as a result of the circulation of commodities. As a commodity, it must, therefore, embody use-value, the capacity to be put to use. Be it in the form of livestock, fashioned stones, coins of precious metal, or paper etc., money manifests this quality. However, as the one commodity which stands as the measure of the value of all others, its significance as use-value becomes transformed such that it loses its significance as a value-in-use except in its capacity to play the role of equivalent. This is attested to by the fact that it is not consumed after its appearance in the exchange relation, but rather, it is exchanged again for another commodity which is then consumed.

The impetus of money is always toward further circulation, whereas the impetus of the commodity, while produced for exchange, is toward an exit from the circulation process to its realization as use-value. Money's use is limited to its capacity to reflect the value of commodities. Thus, money is not itself value, as value is only manifest in the relation of commodities. Value is incarnated in a material form, as money, yet it remains distinct from its form as a material thing. Money is a purely symbolic form of a specific social relation.

The symbolic property of the money form, as with all symbols, owes its significance to something other than what it is itself. In the case of money, it is social labour-power, which it reflects as its 'other being', its being other than its material body. The form of money can

¹⁰ Thus, as Marx puts it, those who possess money really do carry social relations around in their pocket.

assume the role of equivalent to any commodity and thus possesses the power to determine the extent to which any individual's labour counts as a part of the social (abstract) labour-power of society. Money embodies the social character of labour in a pure form.

Summary of Wealth

Both commodities and money are phenomenal forms of social relations; they are the objective forms of a relation between producers. As a result of the process of production being carried on in private, the labour process is manifest dividentally. In its manifestation in a particular form, a use-value, its objective existence is in the form of a material thing. The expression of the social character of production appears not as a relation between people but as a relation between things; in the metamorphic form of commodities and money. In the commodity form, this social character appears as as a supra-sensible property, or attribute of, a specific qualitative thing, and is both distinct and indistinct from this material form. In the form of money, one commodity undergoes a further metamorphosis such that its qualitative character, as a particular form of labour, is transformed, such that the phenomenal form appears purified of this, its original content. Money stands as the form of mediation of antithesis of quality and quantity (as expressed in the commodity form) and symbolizes the suspension of this antithesis,¹¹ in the form of a general 'measure', or universal equivalent -- the one commodity to which all others must measure or express their value.

¹¹ The contradiction of the commodity form is not resolved in the money form, it is merely suspended in a higher form.

The process of the objectification of the social character of labour is its realization in an alien form, where the social appears in the form of socialized wealth. Exchange-value and money correspond to particular systems of social relations, the former to simple-exchange, the latter to circulation. The metamorphic form of the expression of these relations has important implications for the corresponding formation of consciousness. It is to this subjective side of reality which this discussion must now turn.

THE PRODUCTION OF CONSCIOUSNESS

One of the basic premises of Marx's theory is that human activity differs in one fundamental way from the activity of other natural creatures, in that "man, and only man, ceases to be 'merged' with the form of his life-activity; he separates it from himself and, giving it his attention, transforms it into an idea." (Ilyenkov, 1977:278). In producing this distinction, "man makes his life-activity itself the object of his will and his consciousness." (Marx, 1978:76) It is in this sense that human activity is the product of a 'thinking being' capable of transforming activity into a subjective image, in consciousness as an 'ideal' form of that activity.

What distinguishes the most incompetent architect from the best of bees, is that the architect has built a cell in his head before he constructs it in wax. The labour process ends in the creation of something which, when the process began, already existed in the worker's imagination, already existed in an ideal form (Marx, 1978:344).

The ideal (knowledge) is an 'active faculty' of humanity, expressed as consciousness (ideal forms) of the real forms of human activity. The ideal, therefore, does not exist solely in the mind, as a thing, but with the help of mind's creativity vis-a-vis the process of production. As Ilyenkov puts it: "the ideal ... is engendered and exists not in the head but with the help of the head in the real objective activity of man as the active agent of social production" (Ilyenkov, 1977:261). The process of production is one in which consciousness necessarily participates.

Because humans do not directly merge with their forms of activity, that is, they do not directly inherit forms of activity along with their bodily capacity to act, the presence of the individual in a developed system of social-material relations is a necessary and irreducible condition of existence. Forms of human activity are passed on from generation to generation not as physiological or psychological structures but as a set of historically created relations of individual to individual and individual to nature in the form of objects, i.e. in the form of objective, sensibly perceived phenomena, or wealth.

The fundamental distinction between man's activity and the activity of animals is this, that no one form of activity, no one faculty, is inherited together with the anatomical organization of the body. All forms of activity (active faculties) are passed on only in the form of objects created by man for man. (Ilyenkov, 1977:277).

In order to master the forms of activity embodied in these material objects, the object must be transformed into an image of the activity which produced it. The activity itself must be "transformed into a special object, into an object of special activity" (Ilyenkov, 1977:277), i.e. thought. Then, having constructed an ideal image of the thing, it can then be reproduced in reality, through the active process of objectification. Without the transformation of the object in an ideal form, humans could not operate with objects; they could not transform nature or the objects of previous transformations into objects of utility or exchange.

Consider, for example, the relation between consciousness and its object in the relation of production to consumption. Marx argues that rather than being split into two separate relations, first producing,

then consuming, consumption itself is an inner moment of the process of production -- an ideal moment.

If it is clear that production offers consumption its external object, it is therefore equally clear that consumption ideally posits the object of production as an internal image, as a need, as a drive and as purpose. (Ilyenkov, 1977:260)

In the process of production, the material thing or external object, is established ideally, as purpose, aim, need, etc., i.e. as an object of consumption (use) as well as a product and form of human activity. Materially the product is a thing of sense certainty, a particular formation and combination of natural material. Ideally the product is the activity which produces it as well as puts it to use; all of which is 'encoded' in the form of a material-objective thing.

The ideal, then, is both result and form of human activity. It is a process whereby human activity is transformed into a special object, objectified and manipulated in the mind first, and, through setting the sensuous bodily forces in motion, is objectified and materialized in reality, as an object of sensuous contemplation. Activity requires material for its realization, which it finds in the body of nature, and actively transforms it by this process, into an objective material form of its subjective existence. Activity, as such, stands not only as the basis of the human sensuous world, but also forms the basis of human subjectivity. In the reverse transformation, these objective forms of human activity, wealth, can be 'decoded', whereby the sensibly perceived is transformed into an idea of the activity necessary to either reproduce or use the object, which is then realized by reproducing or using the object in reality.

Pre-Marxian materialism had maintained a distinction between thought-objects and material-sensuous objects in that it conceived of sensuousness (material reality) only as an object of contemplation (intuition), i.e. passively: "Hence it happened that the active side, in contradiction to materialism, was developed by idealism (e.g. Hegel)," (Marx, 1978:143). But idealism developed this active side only abstractly, conceiving the ideal as a special substance (as Mind, or Spirit) counterpoised to the human, material world, in which, and through which it objectified itself. In Marx's transformations, this substance was not conceived of as counterpoised to the world, but, rather, as human sensuous activity (labour, practice) containing in its movement both moments of reality and ideality.

For Marx, the ideal is a form of activity which necessarily corresponds to the form of sensuous objects. "The ideal is nothing other than the material when it has been transposed and translated in the human head." (Ilyenkov, 1977:252). It exists as a subjective image of the process of transforming objective reality as an idea, or ideal form. It exists in the object, not as its material being, but as its being other than its material being, its being as a form of human activity. The material being of the object is the phenomenal form of the ideal which is contained in it (encoded) yet is distinct from it. The materiality of the thing is supplied by nature, which in itself does not think. It is the relation between human and nature itself which forms thought's object. As Marx argued, in isolation from this active relation, humanity could think as much as the brain could if it was separated from the human body.

Though the ideal is realized through the particular activity of the individual, it is not an individual psychological fact. Action presupposes the individual in a relation with other individuals incorporating forms of action already found in existence and determined by their social relation. The ideal form or consciousness is not understood naturalistically, as in the anthropological constitution of the subject. The relation in which humans transform nature, is a 'human' relation with nature, not the relation of an abstract individual to nature. As Marx argues: "the human essence is no abstraction inherent in each individual. In its reality it is the ensemble of social relations" (Marx, 1978:145).

Consciousness is a social phenomenon, as product and form of the socially determined relations of humans to one another and nature. It is an attribute of social systems of human activity. Consciousness (the ideal form) cannot be studied simply in accordance with what takes place in the head of any one individual because consciousness is not merely an attribute of the abstracted individual, but rather an attribute of activity (its movement and relations). It is, therefore, this social being which forms the categories¹² of human consciousness. The formation of consciousness is not brought about by the sensation of external things in the body of the individual: "it is not restricted simply to the reflection of an object in the perception of the subject" (Mamardašvili, 1986:103). Between the object and human subjectivity there exists the indispensable mediating link of social production, without which the identity between the thing thought and its sensible

¹² Such as those posited by Kant as a priori categories of reason, eg. quality, quantity, property. (Ilyenkov, 1982:42-43).

form could not be explained. For Marx, the object of perception is, in its reality, the objective form of human subjectivity, in which the "form of the external thing involved in the labour process is sublated in the subjective form of objective activity" (Ilyenkov, 1977:265).

Marx understood the nature and development of consciousness as different from its psychological experience in the individual in the various forms of self-assessment and self-understanding (Mamardašvili, 1986:104). The development of the meaningful objects of consciousness (its products), he found, could not be traced back to the activity of the individual, to the "self-conscious work of the individual thinking about himself and about the world" (Mamardašvili, 1986:104). Instead, consciousness was to be studied according to its objectivities, or meaningful objects which were not simply the products of the individual, but were seen as generated in and by social systems of activity taken as a whole, forming the content of consciousness.

Use-Value

A use-value is a product of the human transformation of nature into an object of use, and is only realized as such when it is actively put to use, that is, when it fulfills an aim, urge, need, or purpose. The utility of the object is not given to it by nature, though in its coarse materiality it is always natural. It becomes a use-value because its materiality can be consciously conceived as merging with another object, which is distinct from it. This other object is that which actively puts it to use, and gives to it purpose and aim. This object is the active transformation of the thing by labour as it is conceived in an ideal form.

Separated from this relation of activity, through which it gains this ideal character, it ceases to be a human value-in-use. It is not, therefore, nature as it is in itself, as materiality, which posits itself as a value (as need, urge, aim or purpose) to human existence. It is labour in the process of its transformation which creates such values. Labour as objective activity creates both the object of use, and the subject in a position to use or consume the object. From this standpoint, the distinction between object and human subjectivity, real and ideal, the sensible thing and its conception in consciousness, is dissolved. Labour is the substance, or content, which transforms the body of nature into an object of thought, and thought into the body of nature.

In the form of an object of utility, labour is always bound up with the natural material through which it works, and in the form of which it is objectified. As use-value, therefore, it always comprises a natural element (Marx, 1977b:36). As consciousness, as ideal form, labour is always bound up with the necessity of its transformation of nature. In the production of use-values, labour appears in the form of consciousness as it is in reality, as the immediate unity of labour and nature, in that, labour appears only in the 'form of nature', as an attribute or property of nature. The result, as in feudalism for example, is that wealth in the form of use-values, appears as the product and form of nature, as land, soil, etc. Thus, land appears as the source of all wealth and labour appears inextricably bound to it.

Exchange-Value

The activity of exchange presupposes production carried on in private, which still requires the transformation of nature and therefore the production of use-values, but use-values of a particular sort, i.e. use values for others, or social use-values. Exchange, therefore, is always the exchange of use-values in that each producer ideally posits the other's labour, as it is embodied in its particular material form, as use-value. This fact, in and of itself, i.e. the fact that two particular forms of labour are exchanged, does not explain the exchange relation, but merely stands as its material premise. It is the transmission and transformation of these values-in-use, i.e. the exchange relation itself, which is of importance.

Central to the exchange of use-values is the idea of proportionality. One tonne of cotton, for example, bears no natural resemblance to 20 sacks of wool. They are the products of different forms of labour, exercised in a particular way. In order to be exchanged, therefore, abstraction must be made from particularities of their material manifestations as use-values. The equation of two qualitatively different things means that they must both be equal to a third thing, which exists simultaneously in both things, as their common substance, yet is not immediately manifest in either of their forms. Making abstraction from the particular forms in which the labour is manifest, Marx finds only one common property left, that being simple human labour-power; labour considered independently of the particular needs, aims, or purposes to which it is exercised - i.e. abstract labour, or human labour in general - measured purely in quantitative units as labour-time.

The proportion of exchangeability of the objects involved in exchange is determined by the extent to which the labour-power, or abstract labour, embodied in each forms an 'aliquot part' (Marx, 1977c:968) of the total labour-power socially necessary for their production. "The value of commodities has a purely social reality, and they acquire this reality only insofar as they are expressions or embodiments of one identical social substance, viz., human labour" (Marx, 1978:313). This totality of social, pure or abstract, labour, which is expressed as exchange-value, is no more than the sum of its parts. What must now be considered is how and by what mechanisms the transformation from labour as use-value to labour as exchange-value takes place. The abstraction which is exchange-value is not simply a result of theoretical reflection on the matter, but is a practical abstraction which takes place in the process of production itself.

Production for exchange presupposes that the product be ideally posited as exchange-value in the process of production.

From the point of view of the commodity owner, each of the commodities appear in different, and namely directly opposed forms: the commodity he owns is only exchange-value and by no means use-value -- otherwise he would not alienate, that is exchange it. The other commodity is, on the contrary, only use-value for him, with regard to him only the equivalent of his own commodity. (Ilyenkov, 1982:256)

Though ideally posited as exchange-value, the product of the commodity owner's activity is not in itself exchange-value, that is to say, exchange-value does not exist in its immediate form. Considered in its immediacy, the labour embodied in the material form, or product, could only be useful labour, i.e. concrete labour, and by no means abstract, social labour.¹³ For example, the expression: 20 tonnes of iron is equal

¹³ Considered 'in itself', i.e. not in relation to another, itself the

to 20 tonnes of iron, merely expresses iron as iron, or iron as use-value. Thus, that which is expressed as a commodity's exchange-value, exists only relative to another commodity, and only really exists in that relation.

That which is ideally posited as the exchange-value of the products of production is, in its reality, a relation between producers to the sum total of their labour-power. Owing, however, to the particular form that this social relation takes, i.e. exchange between private producers, the social character of private labour appears in the form of a relation between things.

The relation of the producers to the sum total of their own labour is presented to them as a social relation existing not between themselves, but between the products of their labour.
(Marx, 1978:321)

Thus, the products of labour come to mediate the relation between producers, and as a result come to possess qualities which they would not otherwise have.

The producer of Commodity A, for example, because she produces for exchange, hopes to "realize" the exchange-value (social character) of her labour and part with its use-value, in exchange for what is ideally posited as a use-value in the hands of commodity owner B. In the process of exchange, what is posited as the exchange-value of Commodity A is realized in the form of Commodity B as use-value, which stands as A's equivalent. The sensuously perceived, material body of Commodity B thus serves to represent the ideal image of A, as a supra-sensible property of its sensible form. Commodity B, or what is conceived only

'totality' of labour-power which is embodied in the product is only the labour of this or that individual in its particular form.

as use-value, is thereby converted, or transformed, into a substance for the expression of the magnitude of A's value (social labour-time). In relation to Commodity A, B undergoes a metamorphosis wherein it appears to embody this character as an attribute of its materiality. However, in removing it from this relationship, upon the culmination of exchange, it ceases to be a material bearer of this social relation, and functions only as use-value (as an object of use, or consumption, fulfilling some particular purpose, aim, need) in the hands of its new owner.

Production for exchange presupposes consciousness of the product of particular labour as possessing this supra-sensible character, that is, for exchange to take place the producer must have already ideally posited the product as exchange-value, or, have consciousness of the product as a commodity. Considering the commodity as a particular objectivity of consciousness, its exchange value is "only the mode of expression, the phenomenal form, of something contained in it, yet distinguishable from it." (Marx, p.304) Thus, in the commodity form there is present to consciousness something which cannot be encompassed by the sense perception of the individual, while remaining a significant attribute of this objective form.

The crucial point here is that consciousness is not simply the product of the individual's mind nor is there some external agency which presents things to consciousness. Rather, consciousness is itself a 'form' of human activity. In the case of a commodity, it is a system of social relations which accounts for the supra-sensible or social character of the commodity, and its expression in consciousness. The commodity, as commodity, becomes a meaningful object to consciousness as

a result of the social relation within which it is involved. The 'content' of this phenomenal form is the systemic links between individuals. This content, however, is expressed in consciousness as a metamorphic form, as the exchange-value of a thing.

The transformations which the products of labour undergo is itself a disappearing moment in exchange. That one product stands as the relative form of value and the other as equivalent, that neither can assume both roles at the same time, but always must assume one or the other for exchange to take place, and that commodities exhibit this mutual exclusivity, and mutual necessity of their moments only as a result of their interaction, is the secret which remains hidden in the relation itself. Because it is only through this mediated systemic link that reality defines this phenomena of consciousness, and provides its 'social meaning', it hides at the same time both the reality of the relation and the transformatory mechanisms through which it works.

The result is that the commodity itself, as an object of consciousness, appears to possess what is a purely social reality, as an attribute of its materiality, and emerges as a thing sensible, supra-sensible, as possessor of both use-value and exchange-value (a social relation) simultaneously, in its thingness. This fetishistic character which attaches itself to commodities means that a purely social relation appears, in consciousness as it is in reality, as a thing, and leads to the confusion of social meaning with the sensible properties of its bodily form. What fetishism registers is the only results of human activity, not human activity itself, so that it embraces not the ideal itself but only its estrangement in external objects -- as a property of the commodity.

The reason for this fetishistic form of consciousness, as Mamardašvili (1986) explains, is that:

between the real relation of things as they are, and how they are present in consciousness, there is a field not covered by individual perception and is completed by the social mechanism which provides the individual with some sort of perception of reality. p.109

This field is itself the action of the products of labour as they are placed in relation to one another in the activity of exchange; the relation which connects one individual's labour to that of the rest. Through exchange the products of particular forms of labour acquire "one uniform social status" (Marx, 1978:321).

A producer of commodities is thereby forced to take into consideration this social status of her product, to make it an object of her will and consciousness, if she hopes to satisfy her want of use-values. The character of possessing value, once impressed on these objectivities, "obtains fixity only by reason of their acting and reacting upon each other as quantities of value. These quantities vary continually, independently of the will, foresight and action of the producer" (Marx, 1978:323). It is the action of the products of labour which determines the proportion of exchangeability.

Durkheim (1982), though possessing a logic different from Marx, understood this category of social facts. He states: "they consist of manners of acting, thinking and feeling external to the individual, which are invested with coercive power by virtue of which they exercise control over him" (p. 52). Their coercive power was due to their externality and in their externality they were to be treated as things.

They assume a shape, a tangible form peculiar to them and constitute a reality sui generis vastly distinct from the

individual facts which manifest that reality. (Durkheim, 1982:54)

Thus arose Durkheim's axiom "social phenomena are things and should be treated as such." (1982:69) Awareness of these social phenomena (facts) was not directly attainable but were made apparent only through the 'real phenomena' through which they were expressed. "They must be studied from the outside, as external things, because it is in this guise that they present themselves to us" (1982:70). Thus, Durkheim's analysis of social facts corresponds closely to Marx's analysis of the fetishism of commodities. For Marx, however, fetishistic forms of consciousness, in which the social is manifest only in an external (or alien) form, correspond to a particular form of social interaction. With the advent of the money form of value, the fetishism of the social gives way to the "symbolization of the social" (Mamardašvili, 1986:110).

Money Form

The dynamics of the exchange of commodities, based upon the contradiction contained in the form itself, i.e. the contradiction between its relative and equivalent forms, eventually leads to the apparent separation of the two forms of value into two discrete objects. This occurs where one commodity is singled out to play the role of equivalent to all other commodities.¹⁴ In the process of exchange, the continued action and reaction of things upon one another, transforms one

¹⁴ Hegel presents the money form as follows: "... if we consider the concept of value, we must look on the thing itself only as symbol; it counts not as itself but as what it is worth. A bill of exchange, for instance, does not represent what it really is -- paper; it is only a symbol of another universal -- value. But if you want to express the value of a thing not in the specific case but in the abstract, then it is money which expresses this (1967:240).

commodity into the representative of the value of any other. This commodity does not directly enter into the exchange relation, but rather mediates the relation between other commodities, "serving as the general measure of the value of the commodities really exchanged." (Ilyenkov, 1977:269)

As money, this third commodity stands as the symbolic form of the exchange relation, which is to say, the commodity's value is transformed into a form which symbolizes its existence objectively, the utility of which is only relevant insofar as it facilitates the former transformation. Gold could be use-value, but in its transformation into money or generalized equivalent, there is no intention of putting to use its material characteristics.

The corporeal, sensuously perceived 'body' of the symbol is quite unessential, transient and temporary for its existence as a symbol; the 'functional existence' of such a thing completely 'absorbs...its material existence', as Marx put it (Ilyenkov, 1977:272).

When it is removed from the relation in which it serves to represent symbolically the social character or value, of human labour, it loses its symbolic status, and appears only as sensibly perceived thing. "The properties attaching to it from nature therefore have no relation to its existence as a symbol" (Ilyenkov, 1977:273).

Money, like all symbols, has an objective character which it owes to something other than itself. In the case of money, its significance is its capacity to mediate the social relation of labour. Standing as equivalent to both Commodity A and Commodity B in which both can express their value relatively, in the same equivalent, which is external to them both. Therefore, once the money commodity (or money form) is

established in reality, all commodities can be ideally posited as money; that is, all commodities can be regarded as money in the mind, though not as the product of a social process which transforms it, but as pure exchange-value. It is not at all apparent on its face that its character of being money is merely the result of social processes; it is money.

since its immediate use-value for the living individual stands in no relation whatever to this role, and because, in general, the memory of use-value, as distinct from exchange value has become entirely extinguished in this incarnation of pure exchange-value (Marx, 1973:239-40)

Thus, the fact that money is a metamorphic form of a commodity, having undergone this transformation as a result of its involvement in the social relation, is not made apparent to consciousness.

Money, as distinct from commodities, appears only as a social phenomenon, completely devoid of its primitive content as use-value. "As soon as the commodity is exchanged for money its use-value disappears" (Marx, 1973:254). Exchangeability leads a double existence, now as a commodity, now as money, so the act of exchange appears split into two different acts, commodity for money - money for commodity. Since these have now achieved a spatially and temporally separate and mutually indifferent form of existence, the immediate identity of the two forms of value present in the commodity form ceases. Money appears as the external embodiment of the commodity's exchange-value. The commodity's property as exchange-value appears as an object distinct from it, as a form of its social existence separated from its natural existence. As such money represents something other than it is in itself. In itself it does not appear as a commodity, as the result of a

given quantum of labour time, but in its materiality it stands as a "symbol of the commodity" (Marx, 1973:145).

In social fetishism, a material thing, a product of the transformation of nature, appears embodied with a life of its own; the capacity to express and measure the social form of labour as exchange-value. Thus, to the producers of commodities, "their own social action takes the form of the action of objects." (Marx, 1978:323) With the advent of money (universal equivalent) the commodity's essence, its being as a product of the social form of human activity, is expressed as an externally perceived objectivity.

Once the commodity has been transformed into money in reality, it is also established as money in the mind, in an ideal form,¹⁵ as price. Price is the nominal transformation of the commodity into universal equivalence, and, therefore, is the expression of exchange-value as nominally distinct from the commodity form. What is ideally established, in consciousness, as price is really established in practice, as money. Thus, "things appear ... as what they really are." (Marx, 1978:321)

What was in exchange a disappearing moment in the process of exchange, and therefore appeared only in the form of a thing (as fetishism), now appears as an objective, symbolic form of what has already been posited, (due to fetishism), as a natural attribute of commodities, or as money. Money, as a metamorphic form of commodities, is the symbolic expression of the fetishism of the commodity form, thus

¹⁵ Money, like the commodity is present only as a conscious form of the ideal. The ideal itself is the activity which stands behind these objective/subjective forms of its expression.

mystifying the content of these objectivities as product and forms of human social relations, still more.

Summary of Consciousness

In the case of commodities and money, the activity of social beings is manifest, both in its results and in the form of consciousness (ideal form), as stripped of this content and is realized only in these, its metamorphic forms, as things (fetishism), as money (symbolism). These metamorphic forms of the expression of this content define the figures of consciousness, present them as sense and meaning, in the forms of relatively stable phenomena.

In his analysis of commodity and money forms, Marx dispenses with the traditional mechanistic view of consciousness which supposes that perception of separate and discrete objects causes subjective images (ideal forms).

Dropping this presupposition, Marx derives the formation of consciousness not from the immediate content of separate objects, brought from causation into consciousness, but from relations arising among the objects in the system. (Mamardašvili, 1986:106)

Thus Marx introduced the idea of 'system causality' where the active relations between people and between people and nature, has a simultaneous effect on both subject and object. However, the form in which this system of interrelations is manifest "serves to represent (or replace) then in consciousness and individual thought is not able to grasp this representativity" (Mamardašvili, 1986:107). The metamorphic forms of commodity and money represent the inner relations occurring within the system in an indirect manner, i.e. as metamorphic forms of

these essential relations. As a result, direct reflection of the content (as product and form of human activity) in the phenomenal form (commodities and money) is ruled out (Mamardašvili, 1970:2-3). Thus, the products of the system of interrelation, while gaining their existence, sense, and meaning from these practical connections, at the same time exist in the system as separate "qualitatively integral phenomena", as things, with no apparent connection to human activity. As in the case of the commodity, for example, here a thing appears to possess a life of its own.

The form of wood, for instance, is altered, by making a table out of it. Yet, for all that, the table continues to be a common, everyday thing, wood. But as soon as it steps forth as a commodity, it is changed into something transcendent. It not only stands with its feet on the ground, but in relation to all other commodities, it stands on its head, and evolves out of its wooden brain grotesque ideas, far more wonderful than 'table turning' ever was. (Marx, 1978:320)

This "sham existentiality" (Mamardašvili, 1970:1) which characterizes the commodity form, its capacity to represent relations between people as an objective quality of its thingness, is the secret of commodity fetishism.

Because the social relations between producers is mediated by the products of their labour, these products become endowed with a social significance which compensates for their amputated connections, in the form of a conscious relation to the form of mediation.

This observable form of the actual relations, although distinct from their inner connection, at the same time plays - owing precisely to its separateness and existentiality - the role of an independent mechanism in the regulation of the real processes on the surface of the system (Mamardašvili, 1970:2)

The commodity producer exchanges in order to realize sufficient use-value to fulfill her needs, aims, purposes etc. The determination of her share in the distribution of the social produce is made in the process of her production (as labour-time embodied in the form of her product) yet only realized in and through the interaction of commodities. Thus if the individual wishes to retain her share of the social produce she is forced to pay close attention to the exchange-value of her product, for it is only relative to the other commodity (here posited as use-value for her) that the social labour-power exercised in her production is determined as an aliquot part of the total labour-power. The exchange-value of her product depends on the extent to which the other product stands as equivalent to her own, i.e. embodies the same proportion of labour-power as her own.

The relative value of commodities varies continually, quite independently of the determination of the individual's will. It is the action (relation) of objects in the system which makes this determination and thereby regulates the activity of producers. "To them their own social action takes the form of the action of objects which rule the producers instead of being ruled by them" (Marx, 1978:323). With no direct social intercourse taking place between producers, the relations which form the content of conscious activity are systematically reduced to thing-relations. Consequently, consciousness, which draws its contents (ideas, images) from these systemic links, through the process of actively constructing ideas of its relations (ideal forms of social-material activity), is formed in accordance with the indirect forms in which these relations are manifest.

Commodities and money, though they form significant objects (phenomena) of conscious consideration, their origin cannot be traced back to individual activity (an individual relation). These specific phenomena are the result and form (i.e. Being) of a social relation, thus it is social being which conditions consciousness. Both fetishism and symbolism flow from this social being-consciousness pairing, such that the ideal forms of human activity are the result and form of these metamorphic forms. It is upon this primary basis that secondary, reflective, or ideological forms of consciousness emerge and are conditioned.

SECONDARY FORMS OF CONSCIOUSNESS

It was Marx's contention that ideological systems such as legal and political systems arose upon a foundation which was constituted by the system of productive relations and corresponded to the forms of social consciousness which arose therein. It would be incorrect to suppose, however, that such ideological forms were a simple mechanical reflex of this basis, simply brought from sensation into consciousness. Ideological systems are the product and form of conscious reflection, and thinking is of course active and creative precisely because it is not merged with any form of activity or relation in particular.

Thought, however, is never 'pure-thought' but draws its content from the very real relations in which it enters into, as a necessary aspect, or moment, in those relations. The reflective thought forms which characterizes ideology are indirectly determined by the forms of intercourse which take place between people (relations of production), and it has for its content those ideal forms of consciousness which Marx defined as "intertwined in the immediate language of real life", or "ordinary consciousness" (Mamardašvili, 1986:115). And, as has been shown, this ordinary consciousness corresponds to the distortion or metamorphosis the products of labour undergo in their interrelation.

Secondary formations are circumscribed by these primary forms, which provides to logical thought, material reality already posited as ideas, i.e. consciousness' objectivities, as formed in the 'language of

real-life' (e.g. commodity exchange and the circulation of commodities). These secondary forms of consciousness are termed 'ideological' precisely because they are logical re-presentations of the ideal 'forms' of activity, and, therefore, do not represent activity (practice) itself, but only the results of its movement and relations. Without this practical basis, systems of ideology serve only to rationalize existing social formations (i.e. its fetishistic and symbolic expressions).

The primary forms of consciousness, as fetishism and symbolism, have their primitive content "suspended" in the form of appearance, or phenomenal form through which the ideal is realized. The ideas which form the primary material of logical thought, through which it establishes linkages (e.g. syllogistic reasoning and reasoning based on the hypothetical relation or correlation of conceptual forms alone), presuppose this other object, activity, which is "not directly expressed as the analytic object of thought" (Mamardašvili, 1986:115). Thus, ideology makes theoretically intelligible that which exists because of its indirect dependency on objective appearance, that is, consciousness' phenomenal forms. But it is an existence which it cannot explain due to the metamorphic expression of the actual systemic linkages.

Ideology is best explained as a rationalized form of consciousness which elaborates the content of consciousness, its primary phenomenal form (i.e. that which already exists as "intentional objects of consciousness"; Mamardašvili, 1986:117), establishing connections which, in their appearance have lost all traces of their origin, and mediation, as "formal factors liberated from all content" (Lukács p.126). Such

formal logic, never gets beyond what is, and establishes what is as inert facticity (i.e. as adequate ideas of these objectives as taken from the standpoint of the judgmental capabilities of the isolated individual or "dispassionate observer", rather than from the point of view of systemic determination). Thus ideology takes for the content of its systemizations that which is only formal (abstract) and derived; activity after it has undergone its metamorphic expression.

In reflection, i.e. in considering the products and forms of mental activity (ideal forms), something general is revealed, from within the multiformity of "sensual objectivities of consciousness, "a result that is fundamentally inexplicable from limited personal experience" (Ilyenkov, 1982:41), as something not given in sensuous contemplation. The general in the isolated facts of perception appears as abstraction from their particularity. In the designation of this apparent common property (that which is abstractly general) with a name (label) it becomes a concept.

To abstract empiricism, concepts (the idea of generality or general ideas) are viewed to be the development of the cognitive work of the individual.

it is assumed that the individual first experiences isolated sensual impressions, then inductively abstracts something general from them, designates it by a word, then assumes an attitude of 'reflection' toward this general... (Ilyenkov, 1982:41)

Through this perspective, the abstractly general is a product of the psychological consciousness of the individual, as the general induced from the sum of or as the sum of separately perceived experiences. Thus,

the term 'concept' is taken to mean any verbally expressed 'general', any terminologically recorded abstraction from the sensually given ... any notion of what is common to many objects of direct contemplation. (Ilyenkov, 1982:41).

In this sense, the abstractly general is a reduction of the general to mere nominalism.

In contrast, Marx views the abstractly general, the appearance of commonality of mutually exclusive phenomena, as a real (practical) abstraction resulting from the movement of commodities (as exchange and circulation) and expressed in an ideal form in ordinary consciousness. In ordinary, or unreflective consciousness, the abstractly general (social) appears, however, as a thing or as a symbol of things, thus passing through (or being actualized through) individual consciousness but never registering in any other way. Thus, what reflection registers as concept or category is the social nature of sensuality (in the form of the abstractly general) established a priori as ideal form from the movement of these objectivities within the system of social relations.

All general images that arise in the human head are not, in contrast to empiricism, the result of passive contemplation of the isolated individual dispassionately observing things and inductively realizing their general form. Rather, before the abstractly general is realized in a concept, it has already been idealized as a form of the sensually given, as a supra-sensible property of things. It is in this sense that the primary forms of consciousness "include and outline" the secondary forms which merely develop what is already inherent as properties of the special objects of consciousness - i.e. the rational elaboration of the content of consciousness. (Mamardašvili, 1986:118)

Activity (practice) forms a necessary mediating link between consciousness, as formed in the immediate language of real life, and its ideological manifestations, but, considering activity only from the point of view of its results (i.e. formally) it apparently plays no part in this transformation, and the categories of secondary consciousness appear solely as its work and its reality. As previously stated, ideology supposes an identification of the abstract concept with reality (ideal with real, and, hence, the indivisibility of object and knowledge; Mamardašvili, 1970:8). but cannot deduce this identity from its source, instead reducing it merely to conscious observation or contemplation. Whereas, from a Marxian point of view, the abstract identity of the general and particular is a metamorphic expression of a specific form of human activity. It is expressed in ordinary consciousness as a direct identity of general and particular, as fetishism. Thus, reflective thinking conceptually isolates what is already unreflectively present as the socially determined (general) form of specific phenomena.

It is in this sense that reflective thinking is limited by ordinary consciousness, by the form of social relation's appearance (as abstraction from its sensible form) and indirectly realizes appearance in the form of a concept. At the same time, however, secondary forms of consciousness are viewed unconditioned by reality, in that determination of the essential (abstract) features of phenomena is the product of the isolated subject of cognition confronted with the object to be conceived. Hegel points out on numerous occasions that if the process of cognition is considered from the psychological standpoint, that is,

in the form in which it goes on in the head of an isolated individual, "one can stick to the tale that we begin with sensations and contemplation and that intellect abstracts something general from the diversity of the latter" (Ilyenkov, 1982:45)

This is, however, how the general appears to reflective thinking, because the specific form of mediation, primary consciousness, between objective appearance and the reflective subject is 'sublated' in the form of reflection itself. The immediate identity of the sensible and social with the thing (commodity) is destroyed in the process of reflection, and preserved in the form of an abstract quality of the array of sensible forms. Thus, in the secondary transformations of primary consciousness reality is conceived as it 'really is,' as it is presented in the primary form of consciousness but remains 'unrecognized.' This secondary form (ideology) can be said to mirror reality, but does so only indirectly. It is dependent on the distorted forms of consciousness which is determined by the particular system of social relations. Ideology masks these primary forms of consciousness, and at the same time "systematically explains and makes theoretically possible and intelligible ... that which already exists as intentional objects of consciousness, what this object 'dissimulates' and what is already affirmed by it." (Mamardašvili, 1986:117) It does not, however, explain the origins of these objective forms.

The Production of Legal Norms

The conceptual forms of reflective thought have their basis in the primary, socially determined forms of consciousness, and are a further transformation of this basis. Such ideological formations indirectly realize the form, or appearance, of a system of social activity, in the form of relatively stable conceptions. These concepts form the basis for further deduction, classification and reasoning, thereby providing determinate conceptual ordering to the world of objective appearance. It is in this sense that ideology determines the 'norms' or 'laws' of the social formation.

Owing to the metamorphic form in which social activity is realized, systems of social relations are replaced by a 'quasi- things', commodity, money and capital, which appear to contain in themselves these social qualities. These objectivities act as both mediating and compensating forms of these relations. This activity provides the ideal basis of reflective understanding which logically discloses the laws and functioning of these metamorphic expressions.

Legal norms form part of the broad context of ideology yet flow from the same processes as norms of political, religious, and intellectual life, that is, from forms of social production. Legal conceptions and their logical formation indirectly realize processes which do not originate within the legal ideological form itself, though the ordering of society appears as its work and its reality, that is, as the rule of law. Legal thinking transforms the socially determined forms of primary consciousness into normative conceptual structures, and thereby indirectly realizes the laws of the commodity exchange and circulation.

It is also in this process of secondary transformation that the materialized results of secondary consciousness (verbal, written clarifications) acquire their legitimacy as rational expressions of the formal aspects of activity. As Lukács puts it: "the legitimate origin of law cannot be written into the concept of law as one of its conditions." (1968:109). The transformation of primary consciousness is the origin of legal thought's capacity to legitimately determine the norms of the systems of relations, as deductions from abstractly conceived form of consciousness' primary objectivities. This primary determination, therefore, persists as the unquestionable 'factual' basis of abstract thinking which it transforms in the process.

Presenting the case against abstract empiricism, Hegel argues that:

Empiricism ... labours under a delusion, if it supposes that, while analyzing the object (in Marx's sense the phenomenal forms consciousness, or ideal form), it leaves them as they were: it really transforms the concrete into an abstract. And as a consequence of this thing the living thing is killed: life can only exist in the concrete and one. Not that we can do without this division if our intention be to comprehend....The error lies in forgetting that this is only one half of the process, and that the main point is the reunion of what has been parted. (Logic p.63)

In Marx's analysis, however, the abstraction which is 'reflected' by secondary consciousness is a real abstraction which takes place in the process of production itself. Abstract thinking only re-cognizes, and interprets reality as it is manifest. The reunion of what has been parted can only be made determinate practically.

In order to illustrate the convergence of legal ideological manifestations with forms of social production, the emergence of two specific systems of legal norms, namely contract law and tort law, will

be subject to analysis. The basis for this analysis is the assumption that legal norms are the product of thinking individuals, and that thinking is a creative process which takes place within a system of social activity and is, through the process previously described, conditioned by this context. The formation of these secondary forms of consciousness is a process and is treated as such.

To explain and understand any process requires the reconstruction of the process of formation. In the product of any process, the process itself ceases to be, or is sublated in the form of its objective expression. Expressing an adequate idea of the product of a process means, for Marx, following Spinoza, the capacity to recreate what has been created, through the process idealizing its becoming (its essence), and not merely abstracting more or less accidental (unessential) properties of its objective form (see Ilyenkov, 1977:263-64) and thereby establishing formal definitions of what seems self-sufficient or 'existentialized'.

The idea of grasping the processes which underlie what is apparent is central to Marx's logic.

Marx starts from what seems self-sufficient and independent, and arrives at reconstructed consciousness, these reconstructions being undertaken with the help of the objectivities of consciousness, which are generated by the mechanisms of social relations in the system. (Mamardašvili, 1986:116)

The 'decoding' of wealth, i.e. uncovering the processes (the movement and relations of human activity) which result in its particular formation as commodities, money, and later as capital, is the key to the reconstruction of complex systems of ideology such as legal norms.

This analysis of the emergence of contract and tort law is derived from the standpoint of this logic. The task will be to deduce these secondary forms from their basis, i.e. the commodity and money forms respectively, and to show why these phenomena appear in their particular form and not in some other way. This analysis proceeds, then, from the assumption that the movement from production based on use-values to the emergence of exchange-value and money was a manifestation of a fundamental transformation in the character of social relations, and that the legal forms of thought indirectly reflect these emergent socio-economic formations. It is further assumed that the logical progression from use-value to exchange-value to money is also an historical development and, therefore, the emergence of legal norms must be viewed in an historical context.

Contract Form

The context for this historical analysis is England from about the thirteenth to seventeenth centuries, for it is in this era that the transformation from a society dominated by feudal relations, to one dominated by capital, takes place. The dissolution of feudal relations gave rise to the production of commodities in ever increasing numbers, the subsequent predominance of money, and correspondingly new legal conceptions of these relations. These emergent legal conventions reveal not only different conceptions of 'property,' but new ideas of 'right' vis-a-vis not only the particular form of the individual's activity (its use), but its general or social form (its value) as well.

The transition from feudal proprietorship to commodity ownership marked not only a distinctive transformation in the nature of productive relations but also of property relations, which, as Marx states, "is but a legal expression for the same thing" (Marx, 1978:4). It was Hegel, however, who was to draw out the distinctions between possession and ownership which resonate, after a fashion, in Marx's work.

In noting the distinction between having particular temporary use of a thing and ownership of the thing itself, Hegel states:

A thing in use is a single thing determined quantitatively and qualitatively and related to a specific need. But its specific utility, being quantitatively determined, is at the same time comparable with [the specific utility of] other things of like utility. Similarly, the specific need which it satisfies is at the same time need in general and thus is comparable on its particular side with other needs, while the thing in virtue of the same considerations is comparable with things meeting other needs. This, the thing's universality, whose simple determinate character arises from the particularity of the thing, so that it is eo ipso abstracted from the thing's specific quality, is the thing's value, wherein its genuine substantiality becomes determinate and an object of consciousness. As full owner of the thing, I am eo ipso owner of its value as well as its use (1967:51).

As owner of the thing in its entirety, the possibility exists for its alienation (i.e. exchange), for if, as Hegel argues, the use or employment of the thing were the thing in its entirety; "over and above its use, there is nothing left of the thing which could be the property of another (1976:50). Ownership of the thing in its entirety is the factor which distinguishes private property from the property of the feudal tenant. "The distinctive character of the property of a feudal tenant is that he is supposed to be the owner of the use only, not of the value of the thing" (1967:51).

In the Marxian sense, what Hegel expresses is the 'form' of a particular set of social relations. The 'value of the thing' which becomes an 'object of consciousness' describes what Marx calls the fetishistic character of commodities. It is this form which is expressed in legal terms as the right to private property. And, therefore, it is also clear that such a conception of private property expresses a relation, since value (as exchange-value) is only manifest in a relative form, or in ordinary consciousness, as a property of the product of production created for exchange.

The realization of private property is its movement in the relation between commodity producers themselves, or, properly speaking, the relation between producers as mediated through the social relation of their products. It is the movement of commodities which expresses, in an abstract form, the commensurability of the particular manifestation of labour. In the relation of exchange, two qualitatively different phenomena appear as equal, and the relation as the exchange of equivalents. The subjects, then, who produce the commodities and place them in relation to one another, stand in a relation in which distinctions between them, their particular interest, needs, aims, etc., appear momentarily suspended in the form of a 'common will'.

The essence of the legal notion of 'contract' is contained in the idea of the equality of different subjects in a relation. What is posited in the contractual relation is a common interest which mediates the particular interests of the two, and which both parties necessarily play a part in. Both parties appear, therefore, as subjects of the common will which is posited as distinct and yet indistinct from the

particularity of their wills (as expressed in the particular objectivities). The equation of differences is realized through the abstraction of what is determined to be common within their differences, i.e. their right to private property. In this right, both parties are equal, and their relation is one of equal bearers of this right.

Through exchange producers prove their equivalence to one another in that they are possessors of equivalent things. Outside of this relation, the only thing established is the difference between the producers, as manifest in the qualitatively different forms of their products. This difference, however, which stands as the basis for their relation and their equation within this relation, is itself negated in the form of equation, only to re-emerge on the other side.

The content which stands as the basis for exchange is, as Marx argues: "(1) The natural particularity of the commodity being exchanged, (2) The particular natural need of the exchangers, or, both together, the different use-values of the commodities being exchanged." (Marx, 1973:242) It is this content, however, which stands outside of the exchange relation.

As subjects of exchange, their relation is therefore that of equality. It is impossible to find any trace of distinction, to speak of contradiction, between them; not even a difference. (Marx, 1973:241)

The equivalence which is posited and realized in exchange is a formal quality which attaches itself to the products of exchange, and indirectly to the subjects of exchange who appear as endowed with the quality of equality. In the particulars of their specific relation only difference is manifest, while, at the same time, in their relation itself something

general is posited to which any trace of distinction is irrelevant. This general something appears to the reflective understanding as a commonality which is inherent in the particular wills of both parties and is expressed in their interrelation.

The basis of the legal form of contract is the mutual recognition of commodity producers as related to one another reciprocally¹⁶ as owners. In legal thought this reciprocal action is realized as the "juridical moment of the person" (Marx, 1973:243). As persons, the discrete parties to the relation are endowed with the quality of equality, as equal in their possession and alienation of property posited as value in itself.

Insofar as equality is posited as the temporary negation of differences, or the positing of the equality of the one in the difference of the other, necessity does not enter into the relation. As equal persons there is no force on either side of their relation, and each, therefore, "divests himself of his property voluntarily." (Marx, 1973:243) The character of equality, transforms the necessary character of the relation into a form of its expression, thereby temporarily negating the necessity which stands as the real ground of the relation. The particular interests of the individuals involved in this relation, are manifest only in form of equality.

¹⁶ Reciprocity characterizes the relation of commodities; "the one side is cause, is primary, active passive, etc., just as the other side is. Similarly the presupposition of another side and the action upon it, the immediate primaryness and dependence produced by the alteration, are one and the same on both sides ... thus the nullity of distinctions is not only potential, or a reflection of ours" (Hegel, Logic, p.218), it is also actual.

Individual A serves the need of individual B by means of Commodity A only insofar as and because individual B serves the needs of individual A by means of Commodity B. Each serves the other in order to serve himself; each makes use of the other, reciprocally as his means (Marx, 1973:243).

The other stands as the means by which the one realizes her equivalence, and at the same time realizes her own interests. Thus the reciprocal positing of the other as equal and equally as means, results in the realization of their particular needs, aims, or interests, in the form of an equality of self-seeking interests.

Out of the act of exchange itself, the individual, each one of them, is reflected in himself as its exclusive and dominant subject ... the other is also recognized and acknowledged as one who likewise realizes his self-seeking interest, so that both know that the common interest exists only in the duality, many-sidedness, and autonomous development of the exchanges between self-seeking interests (Marx, 1973:243).

If either individual is determined, or forced, by her particular needs it is only her own nature which exerts this force and, as such, falls outside their specific relation, for in their relation necessity is itself posited (and realized, albeit indirectly) as equal in both parties, that is, needs and interests take on the form of equality (actually undergoing this transformation through the exchange of their commodities).

What is ideally posited in this relation, and forms the logical ground of the juridical notion of contract, is the reciprocal recognition of equality, which, in this regard, both parties are of one mind. As Marx states:

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. The content of this juridical relation (or relation of two wills) is itself determined by the economic relation. Here the persons exist for one another merely as representatives and hence owners, of commodities. As we proceed to develop our

investigation, we shall find, in general, that the characters who appear on the economic stage are merely personifications of economic relations; it is as the bearers of these economic relations that they come into contact with each other (Marx, 1977c:179).

When this ideal expression of the commodity relation makes its debut in the realm of legal thinking, it emerges as the principle of bona fides.

Tort Form

The circulation of commodities is the realization of exchange value in a form external to commodities. Rather than expressing their equivalence in the particularity of another commodity, with money, as the general equivalent of all commodities, each can express their value in this one pure (purely social) form. Money, as such, stands as the phenomenal manifestation of the indifference to particularity which commodities, considered as bearers of value, express. Money is the formal suspension of already posited negated differences (equality) in a general form. In the exchange relation mediated by money "indifference and equal worthiness are expressly contained in the form of a thing." (Marx, 1973:246)

On each side of this relation, now as buying and selling (exchanging commodities for money for commodities), each commodity is exchanged not for another posited as use-value, but for a commodity which has lost its particular utility (or whose particular utility has been transformed into a general form; i.e., as need made abstractly general). Money stands as the representative of any product of labour (ideally posited as money, i.e. as price) which, in exchange, is realized as pure value

(purified of all traces of particular distinctions, needs, aims purposes, etc.).

In circulation each producer appears as the owner of potential money, or as the bearer of money not yet realized. Thus, that which is expressed as the equivalent to her own commodity bears no relation to the object of particular interest or need to which the exchange is oriented. Instead, in this mediated form, all traces of such particular distinction are replaced or represented in an abstractly general phenomenal form. Money stands as the transformed form of the commodity which symbolizes this particular character on one uniform social substance. Money, therefore, establishes the universal equality of all particular interests by representing these differences in such a way as to negate them in the form or appearance. Insofar as money, through this process, stands as the symbolic expression of all human wants, needs, desires, etc., the money form stands as the material embodiment of the all-sided equality of exchangers (It manifests universality in an abstract form). All are equal when money is made the object of exchange.

When money becomes established as the general commodity of the contractual relation all distinctions between the contracting parties are extinguished in an external form (see Marx, 1973:246). The complete abstraction from the distinctions of all parties in this relation of money, is both the negation of the contractual relation (juridical person) and its transcendence in a general form. This process is manifest in the development of the legal form of tort law.

The basis of the tort system of legal relations is a conception of persons which posits their all-sided-equality and freedom as purely abstract. This abstraction is not merely a product of pure thought, but is a real (practical) abstraction which is manifest in and through the circulation (social relation) of commodities, and is expressed in the palpable form of money. The circulation of commodities presupposes the positing of the commodity as money in the mind (as price) of the producers, and its ideal form which stands as the basis of reflection which "merely raises this basis to a higher power" (Marx, 1973:245). When the money form of social relations is expressed in legal terms, it appears as the principle 'reasonable man'.

The legal conception of reasonable man stands as the basic norm of relations characterized by money, that is, it reflects what is normal within this relation itself. Herbert provides an apt portrayal of this abstract individual when he writes

Devoid...of any human weakness, with not a single saving vice, sans prejudice, procrastination, ill nature, avarice, and absence of mind, this excellent but odious creature stands like a monument in our courts of justice, vainly appealing to his fellow citizens to order their life after his own example. (cited in Fleming 1968:30)

Fleming's (1968) rationale for this imperative is that it avoids

the invidious task of having to scrutinize each specific defendant's subjective capacity--temperamental and moral no less than physical being,--content instead with adjusting merely his external manifestations of conduct by whether or not it is measured up to the norm set by the reasonable man (p.27-28).

This conception which comprises the normative juridical relation is not merely a product of thought unrelated to reality, but has for its subject matter a specific (ideal) form of a system of human productive activity.

Summary

In the course of historical development, Marx argues that "increasingly abstract ideas hold sway" (see Marx, 1974:65), reflecting what is present in ordinary consciousness (as social determination) and representing the same as both logically and universally valid. The transformation from production based on simple exchange to the development of the production of money, represents such a shift in the ideal forms of the production process. The basis of this transformation in ordinary consciousness is the fact that it is formed in, as Marx terms it, the language of real life. In this Marx introduces a unique notion of consciousness, the forms of which are determined by the 'language' (forms of social interaction) of the products of production. Ideological formations, such as the juridical personality of contract law and the reasonable man of tort law, as seen as indirect manifestations (i.e. reflections) of these formal aspects of the system of social production, and, therefore, as its logical elaboration. Legal norms, as one ideological expression, provide these systems of social interaction with both their logical rationale, and serve as a means of regulating interaction in accordance with its surface appearance.

Having thus far developed the logical processes to explain the emergence the specific normative forms of commodity exchange and circulation, this discussion will now turn to the specific historical illustration of such ideological formations.

HISTORICAL ILLUSTRATION

In writing the history of English law, most historians tend to confine themselves to the sphere of law itself. Jenks (1949) for example, argues that: "As a matter of historical fact, the simple contract and ordinary tort spring from the same stock", which have "subsequently split off by a process of specialization" (p.133). This form of analysis presents the emergence of contract and tort law in a genus to species relationship, with the genus conceived of as a trans-historical set of principles, or eternal values", standing as the common ancestor of later forms. Such a perspective posits the determination of specific legal norms from a reality *sui generis*, which is itself posited as the general norm. Following the logic of Marx, however, what is posited as the determination of a specific legal form, is a content which falls outside the jurisprudential purview.

The common stock which Jenks refers to are the laws of Debt, Detinue and Covenant; the major forms of litigation in the thirteenth century, in the court of Common Pleas. Each of these forms of legal 'action' required a writ to be issued specifying the nature of the dispute and the particular action to be taken. As Baker (1971) argues, these writs were not derived from general principles, nor did they form a comprehensive system of justice, "but were the responses to individual suitors seeking royal justice." (p.78) Such writs were derived from specific situations and relations, and reflected the narrow nature of

disputes which could be pursued at Common Pleas, which was itself a result of the particular system of relations which characterized the feudal system.

The Court of Common Pleas was established by the royal Charter of 1215 which granted it jurisdiction over the local manorial and feudal courts, and for the most part enacted forms of dispute settlement already existent in these systems. The Common Pleas was granted virtual autonomy in dealing with disputes which were beyond the concern of the monarch (Jenks 1949:134). Only those affairs which were seen as a 'threat to the King's peace' were outside of the Common Pleas jurisdiction. For example, in a Writ of Trespass, where disputes over land title (as between nobility) was at issue, and not merely the proprietary right of a tenant, the higher court of King's bench had jurisdiction (Radcliffe and Cross, 1977:82). From the point of view of the central authority, the jurisdiction of the Common Pleas was limited to matters among particular statuses whose disputes were of only local, and not general concern.

Both the Writs of Debt and Detinue were actions designed to order a defendant to give to the plaintiff property which the defendant had unjustly detained. A writ of debt was issued for the recovery of a specific object, usually moveable property, which was owed to the plaintiff. The writ of debt was, however, considered a "personal action" which was brought to "enforce an obligation or to recover compensation for a breach of an obligation." (Jenks p.120) This form of action usually centered around the obligation of reality either in the form of surplus product or "workdays of service on the lords demesne"

(Trevlyan, 1946:6). The grounds of the duty expressed in the writ of debt is tied to the specific property relation of tenure and service. As such, a writ of debt could be brought by anyone of a higher status against any who were directly sub-infeudinated.

A writ of detinue was a similar action to debt in the sense that it called for the return of a specific good unjustly detained by a defendant. The action of the detinue, however, was considered a real action in that it called for the restitution of a specific chattel which had "come into the possession of the defendant with the plaintiff's consent" (Radcliffe and Cross, 1971:164). For the action to be considered a proper case of detinue, the object in question must have been delivered into the hands of the defendant voluntarily. If any "words of felony" were uttered, i.e. an implication of theft or robbery, the plaintiff was likely to be met with the argument that the proper action in the case was not of detinue but an "appeal of larceny" which used battle as a mode of trial (Beckerman, 1977:12)

If, on the other hand the action of detinue were to succeed, the recovery of property was limited to specific restitution, i.e. to the recovery of a specific object. If the specific object was destroyed, lost, or removed from the jurisdiction the plaintiff was without recourse in detinue.

The bailee who returned the goods in a damaged state, or who starved an animal to death, or who rode a horse further than agreed, was not liable in detinue; the essence of detinue being wrongful detention, not damage. (Baker, 1971:217)

Writs of covenant formed another mode of recovery at Common Pleas. An action of covenant specified a breach of an agreement "made under seal" (Radcliffe and Cross, 1971:86). The agreement in question had to be specified before the Chancery Clerks who would make the agreement with the royal seal (The Lord Chancellor having control over the Great Seal). The action of covenant was usually brought by a lord against a bailiff, the lord's agent on the manor responsible for its management (Radcliffe and Cross, 1971:68).

In practice, the wording of the covenant was appropriate to compel the performance of the stated agreement but the writ was not applicable to compensate for imperfect or tardy performance of the prescribed obligation. In contemporary terms, the writ of covenant covered only non-feasance, that is, the failure to take action on the agreement, and did not cover mis-feasance, or the carrying out of the act but doing it badly. For example:

Suppose for instance that a man covenanted to build a house to certain specifications and he did so but made the joints so badly that the house collapsed. (Baker, 1971:77)

In such an instance, a writ of covenant would be inapt.

These three main forms of civil action at Common Pleas reflect the particular form of property relations characteristic of the feudal epoch. In each of these legal forms, distinctions of status form the basis of personal obligations, and obligations were derived from the hierarchical relations of direct personal dependence. The particular form of property disputes characteristic of this period centered around the specific character of the object in question, be it land or moveable property, such that what was recoverable by lawsuit was limited to

specific restitution, or enforcement of a specific obligation, and not the value of the thing or act.

The end of the thirteenth and early 14th centuries witnessed an increase in the number of distinct writs which could be presented at Common Pleas. The Statute of Westminster II (1285) allowed for the modification and framing of new writs to deal with the circumstances of the times. The major innovation introduced was the extension of earlier notions of trespass to include actions of "Trespass on the case" (Baker, 1971:181), which introduced into the realm of personal actions the notion of Assumpsit.

The early writ of trespass include the clause "with force and arms" which implicated the defendant in a direct forcible action which resulted in some loss or harm being sustained by the plaintiff, and that this action thus threatened the king's peace. The action of "trespass on the case" was the gradual acknowledgement that "force and arms" was no longer necessary, and could instead be replaced by the plea that a defendant "assumpsit super se" (i.e. voluntarily took it upon themselves) to do something, and did it badly to the damage of the plaintiff.

The major feature of the assumpsit was that it included a new notion of wrong not covered in the previous civil pleas nor in criminal affairs. The assumpsit plea was not limited to the enforcement of non-feasance (failure to act) as in the writ of Debt, Detinue or Covenant, but introduced the concept of mis-feasance (performing the act but performing it badly).

The first known case which imposed liability on a person for mis-feasance was the Humber Ferry case of 1348. In this case

the plaintiff complained by bill of trespass in the King's Bench that the defendant, a ferry man, had received his mare to carry across the River Humber and had overloaded the ferry, that it sank and the mare perished. (Baker, 1971:183)

The judge in the case ruled that in overloading the ferry, the defendant was guilty of trespass. This particular action, though reflecting a more extensive notion of right and duty, was still limited in its scope. For the case to be one of assumpsit proper a specific undertaking had to be recognized; there was no liability for simply acting negligently. In another case at common law in 1601, one judge was to proclaim that:

Here [i.e. the case of Bradshaw vs. Nichollson] is nothing alleged except negligence, and I have never known an action to lie for negligence unless where one is retained to do something and does it negligently. (Baker, 1971:227)

The Humber Ferry case was not, however, merely a specific undertaking between two parties, or at least this was not the rationale for finding for the plaintiff. The logic which held in the Humber case was not simply the assumption of voluntary undertaking, but, rather the fact that specific statuses were subject to "customs of the realm".¹⁷

The assumpsit case of the fourteenth and fifteenth centuries imposed a "duty to care" on those who pursued specific "callings" such as the carrier, ferriers and inn-keepers who provided means of transportation and shelter. These particular statuses could be sued for losses suffered by the plaintiff without any formal agreement (i.e. covenant) nor even an expressed consensual agreement. The obligation of defendants was linked to their economic and political status within the

¹⁷ The case of Beaulieu vs. Flingham (1401) is another manifestation of the imposition of 'the custom of the realm' which posited strict liability for common carriers rather than negligence proper.

feudal order. What the Humber Ferry case determined was that the mis-feasance of common carriers was not simply a function of their negligent action but that they were held 'strictly liable'.

It was not until 1676 that a legal action based solely on negligence succeeded at common law. The case of *Mitchill vs. Alestree* reflects the imposition of a normative principle which closely resembles the contemporary tort of negligence.

In the case of *Mitchil vs. Alestree*...an action was brought against a master and a servant who had broken horses in London's Inn Fields, where many people were walking about, including the plaintiff who was kicked and injured. It was alleged that the defendant had acted *improvidē et incaute* [headless and carelessly] without consideration for the danger of breaking horses in a public place. (Baker, 1971:230)

The writ in this case was successful in its quest for damages even though there was no 'undertaking,' no 'custom of the realm', no 'force and arms', and no 'covenant', in fact no direct political relation between the parties.

The changes which arose in the common law in the 17th century were not, however, a result of changes internal to the tradition itself. The common law both emerged in and reflected the specific character of, the feudal era. It was not until the dissolution of the feudal system that a system of legal norms, such as the tort of negligence, emerged, or rather was incorporated into common law. The basis for this emergent normative system was located not with the feudal countryside but in the towns.

Lex Mercatoria

Concurrent with the dominion of the feudal order there emerged pockets of developing townships which, in maintaining a degree of independence from the rest of the country, developed a fundamentally different set of relations and, concomitantly, a different legal normative order. The legal system which developed in the towns, the *lex mercatoria* (law merchant) had its basis in the relation of commodity exchangers.

In the early mediaeval period, merchant exchange was carried out primarily in and through borough towns. These boroughs, operating on charters and franchises conferred by the English rulers (Radcliffe and Cross, 1971:241), were witness to the first relatively routinized system of commodity exchange, in the fairs and markets held at regular intervals throughout the year.

Between the years 1199 and 1438 some 2,800 enfranchised boroughs were established, with more than half of these granted between the reigns of John and Henry III, in a span of about 70 years (1199 to 1272) (Bewes, 1923:134). The first recorded franchise was granted to the Bishop of Worcester by William I (c. 1070). With the enfranchisement came the right to hold court over matters pertaining to merchant affairs which arose within the boundaries of the borough, thereby conferring on the subject of the franchise an exclusive, private jurisdiction at times of fair or market.

Having exclusive jurisdiction over those who came to exchange goods, the legal norms which emerged, as manifest in Law Merchant, obtained a

distinctive flavour. During the twelfth and following centuries, these boroughs began to record legal rules which everywhere differed from those of Common Law (Mitchell, 1904:27). By the middle of the thirteenth century the boroughs were already highly developed and densely populated and a fierce inter-municipal trade rivalry was already in full swing (Rich, 1934:4).

While maintaining a high degree of independence from the feudal order of the countryside, the towns were, at least early on, dominated by the quasi-feudal independent production unit of the guild, and the inter-guild organization. The guild masters were responsible for the appointment of the "consules mercatorum", responsible for mediating disputes between merchants.

With the guilds exercising governance over the relations between merchants, all of the rights and privileges offered the merchant were inextricably intertwined with membership in the guild. Foremost among these privileges was the right to be judged by the Law Merchant, as based on merchant custom and administered by the merchants themselves. The borough court had the power to expel members from the association who ignored its claim to its jurisdiction or it could forbid any form of trade or intercourse with them (Mitchell, 1904:42).

The necessity of belonging to such a political association also meant that fellow townspeople were corporately responsible for the debts incurred by its members in other boroughs or foreign markets. Before the Statute of Westminster (1275) it was "generally considered sufficient that goods detained in lieu of debt should belong to the men

of the same lordship of the debtor" (Lloyd, 1982:16). Though the Statute forbade such practices, ruling that: "no native should have his goods detained for debt except where he himself was the principle debtor or surety,..." (Lloyd, 1982:17) in practice what the statute provided was only protection from the debts of other towns in the same lordship or shire. When the central authority did get involved in merchant affairs, when such matters were brought before the King's Bench, the usual requirement was to call a group of merchants "to attest to what the law was in that particular case" (Mitchell, 1904:44).

Part of the confidence to accept an exchange of goods for credit was based on the custom of 'reprisal' (which was also the basis for the issuance of letters of marque). In the case of a merchant's default on a debt, "all of his fellow-citizens upon whom hands could be laid were responsible (Rich, 1934:30), thereby making the corporation responsible.

Statutes such as Westminster II, offered little protection for the foreign merchant in England. Alien owned property was continually seized for debts which were not incurred by the particular merchant whose goods were detained. For example, in 1306 a writ was issued to two English merchants authorizing them to arrest a quantity of Flemish goods at Boston Harbour to compensate for the robbery at sea of their goods by Flemish pirates (Lloyd, 1982:20). Insofar as mediaeval merchants were combined and organized in guilds and corporate boroughs, they were afforded a degree of protection of their interests and the monopoly of trade in their area. Foreign merchants were endowed with less status and were often unprotected by the laws due to this lack of status. The same often held for merchants from other English boroughs.

Security for the foreign merchant in an English market most often required placing themselves under the protection of someone with the status of merchant within the town. The foreign merchant was obliged to "go to host", that is, he was required to lodge with a host appointed by the town or guild magistrate "who would then be responsible for his actions within the town and market-place" (Mitchell, 1904:87). Within the town foreign merchants could only sell their goods to those who were enfranchised and could not sell to other foreign merchants. And, within the city of London, the sale of foreign goods was limited with "Londoners having the first chance to buy, next citizens of Oxford, then those of Winchester and, finally, all others equally" (Lloyd 1982:10). Alien goods could also not be re-exported if not sold, rather, they had to be stored with host until the merchant returned from his homeland.

In spite of the problematic character of relations between merchants from different areas of the land, the courts of law merchant offered several advantages to the merchants different from and not contained in the common law. Those concerned with common law recognized this difference, their view being that "'law merchant' was a system independent of their own and [they] made no serious attempt to claim or administer it" (Radcliffe and Cross, 1971:242). The law merchant, for example, recognized that a document, a bill of exchange, if properly framed, could create an obligation for individual A that could be employed against him by anyone (i.e. any other merchant) who was in possession of it. The idea of such a negotiable bond, payable to the bearer, existed in the law merchant courts several centuries before it was adopted by common law. In contrast, a common law writ of covenant

was an obligation between named and definite persons, and was therefore not transferable. The legal privileges of the merchant, as they were encoded in the law merchant, remained theirs alone until the end of the 17th century:

In 1613 the plea that an acceptor of a bill of exchange was not a merchant was held by the the court to be a good defence to a claim on the bill. (Mitchell, 1904:84)

But in 1692 the English courts began to ignore the exclusivity of the law merchant courts by deciding that "if gentlemen accepted bills they ought to pay them" (Mitchell, 1904:82). This extended the legal relationship, long confined to members of closed corporations, to all engaged in exchange.

What is manifest in the bill of exchange is the idea that 'property' in the thing exchanged could pass to the purchaser without the actual physical exchange of goods, and, conversely, that the seller of the 'commodity' could part with its ownership without necessarily parting with its possession. This form of legal entitlement had its basis in the principle of bona fides possession. The general rule which applied to all merchant transactions in 'market overt' was the assumption of 'good faith' between exchangers in their informal executory agreements. Transaction in the open market, i.e. conducted openly and in "the usual resorts of merchants" (Mitchell, 1904:102), was usually sufficient to ensure title to property, as evidenced by the records of the court of the town of St. Ives (c.1291):

The practice of merchants, is not based upon the supposition of fraud....Credit, not distrust, is the basis of commercial dealings. (Mitchell, 1904:102)

By the 13th century the practice of recording the agreements reached in 'good faith' was already highly developed. The duty of recording transactions, bonds for debt, and tallies of exchange was the market, or fair broker's, an individual selected from among the merchants themselves and who was therefore familiar with the norms of exchange. The initial function of the broker was to document the exchanges so that the "right of taking toll," or the right of the fair holder to take a fee from every exchange could be ensured (Bewes, 1923:87). The customary right to levy a toll on market and fair transactions was a valuable source of revenue to feudal lords such as the Abbot of St. Ives (c.1291); the Bishop of Winchester, who was lord of the St. Gilles fair; and the prior of the monastery at St. Bartholomew (c.1133) (Mitchell, 1904:97). Fairs were even granted on occasion to towns, the revenue generated thereby "enabling them to recover from the effects of war and other disasters" (Bewes, 1923:135). The broker's book also came to be regarded at law merchant as official documentation of the 'contract' established in merchant transactions, and an essential part of the legal proceeding of the law merchant, indicative of its distinct logic of proof and trial.

At Common Pleas, as well as the earlier manorial courts from whence the former was derived, the major form of proof or 'trial' was compurgation¹⁸ Justice in the common law tradition was, in simple terms, the result of a clear conscience:

¹⁸ By the early 13th century the ordeals of water and fire had for the most part been banned. In 1219 the King's Bench overturned a ruling by a lower court which sent three men to the ordeal of water and then forced them to abjure the realm (Beckerman, 1977:11).

If an accused person were of good character, he could swear formally to his lack of guilt or obligation, and this oath of denial could be verified by the formal oaths of reputable oath-helpers. (Beckerman, 1977:13)

The plaintiff required oath-helpers to verify his accusation, the number of oath-helpers being dependent on the severity of the accusation but usually not amounting to more than one or two. The defendant was required to bring as suit two or three times the number of oath-swearers brought by the plaintiff, and so "waging one's law" was most often done by "swearing three- or six-handed" (Beckerman, 1977:16).

The formal ceremony of this form of trial began with the plaintiff's suit, which included his oath-swearers acting as complaint-witnesses, "whose function it was to uphold and confirm the justness of the plaintiff's claim" (Beckerman, 1977:15). The defendant would then answer with suit (secta), and the success of his defence depended largely on the faultless execution of his oath and those of his oath-helpers:

A defendant could suffer an adverse judgement from a mistake at any stage of the proceedings. If he withdrew his hand from the gospel book while he made his oath, or used the wrong hand; if he neglected to kiss the book afterwards; if he did not say the words clearly enough; if the form of oath varied from the enrollment of his earlier denial; if any of the oath-helpers were disqualified for any reason; or if any oath-helper made a mistake--then the principle lost his case. (Beckerman, 1977:12-13)

The person who was either known to be guilty, or who was simply notorious, would be unlikely to find enough oath-swearers to answer suit, i.e. wage his law, because "the man who perjured himself put himself in jeopardy of eternal damnation" (Beckerman, 1977:13).

In contrast, the law merchant did not allow a wager of law against a tally (Bewes, 1923:32), and the broker's book was regarded as correct

"unless there was definite proof to the contrary" (Mitchell, 1904:91). The method of proof used in the merchant courts was not based on the repute of the persons involved, for in this regard they were equal, i.e. bona fides was the legal premise of the merchant relation. Proof was, instead, dependent on evidence as to whether the relation as specified by the plaintiff had been established. The broker's book (sign manual) or a tally was, for the most part, considered sufficient proof of a merchant transaction.¹⁹ The only form of proof which could override the written record was the evidence of witnesses to the event and, when transactions occurred in market overt, witnesses were usually plentiful (Rich, 1934:36). Rather than acting as compurgators, the witness role was limited in most cases to the presentation of material evidence, and it was up to the plaintiff to make proof of his claim, that is, the onus was not on the defendant (Rich, 1934:35). When the plaintiff "supported his claim by either[sic] script, tally, or suit of witnesses" the law merchant forbade the defendant the right of compurgation (Rich, 1934:35). This provision against compurgation as a defence was of great benefit to both the itinerant and the foreign merchant:

He was often a stranger and could collect witnesses to a definite bargain, whilst he was powerless against local feeling and common repute which the process of compurgation embodied. (Rich, 1934:35)

A defence by compurgation depended on the esteem that the defendant had among long standing neighbours, but by the end of the 13th century merchant activity had already transcended the local boundaries of feudal communities and the social relations characteristic of such.

¹⁹ By the end of the 13th century it was common for a merchant to keep proof of a large debt in writing or by tally. Witnesses were often called to attest to the authenticity of the record, for example, two witnesses for a tally (Rich, 1934:33).

Law merchant had its basis in the exchange of commodities and reflected the ideas generated within this system in its jurisprudential postulate, bona fides. From this basis, law merchant both rationalized and countenanced the relations of exchangers in the form of a contract between equal juridical personalities, in whatever form their specific relation manifest itself, i.e., whether a simple verbal agreement,²⁰ tally, written record, bill of exchange, or fair bond. Any such relation which took place within the confines of law merchant was buttressed with the norms of legality derived therefrom.

Admiralty Law

The convergence of the logic of law merchant with the common law tradition, at the end of the seventeenth century, was more than an inclusion of the principles of law merchant in a broader system of justice. On the contrary, the dogma and practices of common law quickly became subordinated to the developing law merchant tenets. This transformation also usurped the jurisdiction of the Admiralty courts whose jurisdiction and volume had grown so substantially by the middle of the century, that its jurisdiction had become a highly coveted prize.

As early as 1570 the Queen had received "complaints ... as to the 'encroachment' of the common law courts upon the Admiralty jurisdiction" (Marsdon, 1897:xii) in the city of London. In response, she writes to the common law judge, mayor, and sheriffs of the city that they

²⁰ In the court rolls (records) of the fair of St. Ives there are several cases of disputed 'contracts' but in no case is there any reference to any written document (see Mitchell, 1904:105)

hear and determyn all manner of causes and sutes rising or contracts and other thinges happeninge aswell uppon as beyond the seas, the knowledge whereof doth proprelye and speciallye appertain unto our Courte of Admiralltie, feigning the same, contrarye to the trowthe, to have been done within some parishe or ward of that our cittie of London ... (Marsdon, 1897:xii).

and she forbids them to take upon themselves cognizance of such matters. In a subsequent agreement (1575) between the judge of the Admiralty and the Lord Chief Justice of Her Majesty's Bench, the common law justices agree to limit themselves to their respective jurisdiction (Marsdon, 1897:xiv).

Prior to the creation of the High Court of Admiralty (c.1357; the first Admiral was appointed in 1295), special maritime courts existed in many seaport towns.

When Gervase Alard was appointed admiral of the Ports [i.e. Cinque Ports] in 1300 the local court was already in existence ... administering the law maritime with the assistance of a jury of merchants and mariners" (Marsdon, 1897:xxi).

As early as the reign of Henry II. (1154-1189) there is evidence of a similar court at Newcastle-upon-Tyne.

The jurisprudence of these local courts centered round the laws and customs of the sea as well as trade. Due to the obvious connection between sea travel and overseas, as well as local, trade and commerce, and the markets located in port areas such as; Boston Harbour, Cinque Ports along England's southeast coast, and London, law merchant and law maritime necessarily overlapped.

Concurrent with increases in trade in the fourteenth centuries and beyond, were increased levels of depredation of merchant vessels by pirates (themselves usually merchants), increases in the number of ships

lost at sea as well as collisions between vessels both at sea and in harbour and, in general, greater contact among both foreign and local merchants united for commercial purposes. As a result of the increased levels of piratical depredations by his own subjects, and having to pay out of his own purse for "spoils committed upon his Genoese and other allies" (Marsdon, 1894:xiv), Edward III. (1327-77) instituted the High Court of Admiralty whose prerogatively sanctioned purpose was to keep the king's peace on the seas.

Prior to the establishment of the High Court, a claim of spoil of a non-aligned merchant vessel had to be presented at common law. In 1314, for example,

an answer given to petition by French merchants who had been spoiled, and who were petitioning the king for redress, is that they must sue at common law (Marsdon, 1894:xiv).

Such piracy claims were directed to either the common law courts, the Lord Chancellor, the Royal Council itself, or in the case of aligned merchants, a special commission of jury moiety (i.e. a panel of judges and arbitrators appointed under treaty with the foreign power).

The frequent failure of the common law courts to do justice²¹ in such cases lead to the statute of 1354, which provided that: "Foreign merchants who have been spoiled of their goods at sea shall have restitution of their goods without having to sue at common law" (Marsdon, 1894:xl). In a case brought before a maritime court (1383),

²¹ A commonly used instrument of gaining justice for local merchants against foreign merchants was the 'letter of marque', which allowed the merchant to, in turn, pirate a vessel of the same country which had pirated his. The rationale for the institution of this practice can be traced to the law merchant practice of holding fellow countrymen of a debtor responsible for the debt. The result of letters of marque was, however, to merely increase depredation by merchants.

the mayor and burgesses of a port borough, assisted by a jury of mariners and merchants, awarded a plaintiff 200 marks damages for a spoil suffered at sea. The judgement in this case was, by writ of appeal, put before the King's Bench which overturned the decision, arguing that the mayor and burgesses had no jurisdiction in the matter (Marsdon, 1894:xliv). The jurisdiction in such cases belonged to the admiralty alone.

In 1406, however, at the request of a group of town merchants, the 'custody of the sea' was granted to them; an admiral who was nominated by them was royally appointed to hold courts on matters pertaining thereto. Later, in 1414, a statute was instituted which enabled the admiral to appoint officers to act in the same capacity in other seaport towns (Marsdon, 1894:li). The expansion of the admiralty into seaport towns followed hand in hand with its incorporation of the principles of the law marine as well as law merchant under its jurisdiction, trying cases in accordance with "the law and custom of the land and the law merchant" (Marsdon, 1894:xxii).

By the later fifteenth and early sixteenth centuries the jurisdiction of the admiralty had expanded to include the

hearing and terminating complaints of all contracts between owners and proprietors of ships and merchants or any other persons whomsoever, and the same owners and proprietors of ships and all other vessels concerning anything to be done on the sea of beyond the sea, of all singular contracts to be performed beyond the sea, and also in England, and of all other things that concern the office of the Admiral (Marsdon, 1894:lviii).

In some case the Council gave special direction as to how such cases were to be dealt with, but this interference was of a limited nature,

dealing mainly with spoil cases, which, as the Admiralty records of the 1530's and 40's show, were far less numerous than the disputes involving merchant shipping and commercial matters (Marsdon, 1894:lxvii).

The business of the Admiralty in the sixteenth century had grown to include:

all contracts made abroad, bills of exchange, commercial agencies abroad, charter-parties [i.e. contractual hiring of vessels for transport], insurance, average, freight, non-delivery or damage to cargo ... breaches of warranty of seaworthiness, and every other kind of shipping business (Marsdon, 1894:lxvii).

All of the above categories of dispute handled in the admiralty courts were administered in accordance with the rules and procedures of the law merchant, which the admiralty took cognizance of far more fully and earlier than the courts of common law (Marsdon, 1894:lxvii).

The expanded jurisdiction of the admiralty meant, on the one hand, that the central authority, in the form of the Royal Council (the Admiral was a member of Council), had a direct connection with merchant affairs, and therefore could (but seldom did) give special direction to the Admiral in dealing with cases in his courts. On the other hand, Admiralty jurisdiction meant that merchants matters would be tried according to the logic and practices which had been established by the intercourse of merchants, and be reflective of their particular forms of activity. One important development in the law merchant, under admiralty jurisdiction, was the appearance and trial of negligence cases, the logic of which was to stand as the basis for the common law 'tort of negligence' which appeared much latter -- the common law followed the Admiralty in many of its decisions (Mardson, 1897:lxxx).

In the Admiralty courts of the sixteenth and seventeenth centuries many determinations of negligence arose out of cases of collision among merchant vessels. Though relatively rare in the sixteenth century, collision cases in the Admiralty records of the seventeenth century abound. The resolution of these disputes among both merchants and shippers manifests the determination of legal norms different from those which surrounded disputed contractual relations, which is a manifestation of the sharp increases in trade or commodity circulation of the period not only locally but internationally. The development of commodity exchange on such a massive scale witnessed not only a quantitative increase in simple exchange, but, beyond a definite magnitude, introduced a qualitative transformation into the nature of these relations, namely the predominance of money as the main form of intercourse. The ideological manifestations of this movement is indicated by the nature and resolution of the collision cases brought before the admiralty, which indicate the emergence and reproduction of a particular normative principle.

Plaintiffs in such cases sought justice in the form of compensation for a specific form of harm done. The liability of the defendant had its basis not in an act of deliberate maliciousness or trespass by 'force and arms', nor in the breach of a specific promise or contractual relation, or any form of specific undertaking. Also, there was no custom of the realm which imposed strict liability on ship captains or navigators. In fact, the determination of liability was, in collision cases, based solely on the legal determination of negligence or fault.

A determination of negligence or fault is based on the extent to which a defendant failed to 'take proper care' in his actions, independent of his specific intentions or relation to the other party. The possibility of an action of negligence being successful thus presupposes an external standpoint which stands as the standard, or norm of responsibility, to which the specific actions of this or that individual are measured against and judged.

Prior to 1614, collision cases in which the actions of the defendant were determined to be negligent usually resulted in the defendant's liability for the full damages claimed by the plaintiff. In a case in 1614, on the other hand, the defendant was deemed liable for only half of the damages claimed by the plaintiff because "the precise cause of the loss suffered was uncertain" (Marsdon, 1897:lxxx). Later, in 1643, a plaintiff's claim for ship and cargo damage to the extent of 1,800 pounds resulted in an award damages for only 400 pounds. The loss incurred by the plaintiff was the result of:

the defendant letting go of his anchor, and breaking or fouling that of the plaintiff's ship, 'whereby she drove ashore with her cargo and was damaged' (Marsdon, 1897:lxxxiv).

In the court's sentence, the words '*per crassum suam negligentiam*' appear but are crossed out. No reason for this is given in the record, but it can be presumed to be due to the utilization of more precise measures to determine not only whether the defendant was negligent, but to what extent he was negligent, and therefore, to what extent he should be liable. Support for this assertion can be found in the later admiralty court records. In 1673, for example, witnesses expert in nautical matters (*consilium artis nautice peritorum*) were called by the

court to concur with a sentence which found a defendant wholly at fault in a collision case (Marsdon, 1897:lxxxxv).

These collision or tort cases in the Admiralty courts mark a distinctive turning point in the determination of the norms of human interaction, and what would become, in common law cases, a generalized duty to take care. The standard or norm upon which the determination of negligence depends, precludes the attributes particular to the individual from entering into legal purview. Such a standard is therefore external to the specific situation to which it is applied, or, more properly, from which this standard is reconstructed.

As a means of measuring responsibility and duty in the relations between private, particular individuals, the standard which is imposed upon these relations appears as a reconstruction of the specific case in accordance with how the ideal typical individual would have behaved. Central to such an ideal conception is that it accentuates its object one-sidedly or abstractly, raising to the level of concept what is apparently common among all members of its class, thereby negating particular differences in what has been drawn away from (abstracted from) particularity.

In legal terms, determination of this abstract character would have to be made in each and every case, as each case brought before it would necessarily manifest a unique character, and unique individuals involved in a unique context. Precedent in negligence cases would be alone insufficient to determine what 'the law' should be. In its indifference to particularity, the determination of this norm could only be external

to the specific case, and not some abstraction inherent in each individual brought before the court, which over time empirically abstracted this common essence and codified its existence. Rather, the origin of this normative principle is product and form of a particular system of social relations brought to conscious reflection in legal thought, and manifesting the abstract character of social relations, or its appearance in the form of abstract generality. Tort law, in this way expresses the abstract character of social relations, transforming its ideal expression, in form of the law of commodity circulation.

Summary

The forms of legal action of the early common law courts did not provide an adequate means of legal redress for merchant endeavors. The exchange of commodities is a specific form of social relation, different from the social formation of feudalism. Systems of social relations develop forms of consciousness peculiar to them, and express this development in unique ideological formations. The development of law merchant is one such example of this difference. Law merchant expressed the legitimate principles of commodity exchange, principles which were antithetical to the smooth functioning of the feudal order which had its basis in hierarchy and privilege, rather than equality posited by exchangers. The principle of bona fides and the procedural rules of evidence of the law merchant courts, therefore, stand in stark contrast to the principles and procedures of the common law courts, and, in that the law merchant was afforded a degree of independence from these feudal courts, it expressed the logic of the commodity form.

The law of tortious negligence, on the other hand, reflected a further transformation of the system of commodity exchange. The abstraction which forms the norm of responsibility of tort law is a result of the secondary elaboration of the content of socially determined forms of consciousness which posited the product of production as money. The form of legal thinking adopted and transformed under the jurisdiction of the Admiralty, in the fifteenth and following centuries, rationalized and systematized the developing form of the social character of money relations. Money, the symbolic expression of the power of social relations, possessing within itself the capacity universal equivalence, and therefore acting as a mediator of the relations between the products of labour, expresses the capacity to make abstraction from all particular forms of labour.

In the legal context, the secondary elaboration of the money form of social relations expresses the social, and therefore abstract, character of this relation as a norm (i.e. external standard) to which the actions of equal juridical personalities (as expressed in the contractual relation based on simple exchange) are measured. In tort cases, legal reflection merely posits and consciously elaborates what is already present (i.e. in an unreflected form in ordinary consciousness) as the 'law' of relations mediated by money, and upon this basis develops a normative standard which appears as one abstract juridical personality against which all other persons and their relations are measured. The Admiralty courts first developed this principle and the legal procedures for its determination. In the collision cases of admiralty law, a jury of merchants and mariners, combined with the testimony of expert

witnesses, were called upon to make determinate the standard of responsibility which should be imposed in each case.

It was not until the middle of the seventeenth century that the common law courts began to incorporate the principles and procedures developed by the Admiralty. In the dissolution of feudal relations and the resulting domination of social relations manifest as money, the principles of the Admiralty courts had become the legitimate means for the determination the disputes which arose within such transactions. The incorporation of the principles of the Admiralty courts into the common law was the direct result of this movement. From the middle of the seventeenth century onward, the common law courts slowly incorporated not only Admiralty jurisprudence, but the Admiralty's jurisdiction as well.

CONCLUSION

On the level of structure, legal thinking mirrors the development of the commodity form and money; the emergence of commodity exchange parallels the emergence of equal juridical personalities and the money form parallels the development of the abstraction, reasonable man. Balbus (1978:77), for example, following Pashukanis (1951), is correct in his argument that; "the logic of the legal form and the logic of the commodity form are one and the same", but stops short of developing the principle of their connection and to locate the origin of the legal ideological form. In formulating the problem of the legal form, he does not make a distinction between the legal form as it applies to commodities, money, and capital, instead he confuses the commodity form with capital by not following the logical process of the metamorphosis of the one into the other. The legal form is presented only as 'false' consciousness, and therefore is not granted it legitimacy as a 'correct' (though not 'true') interpretation of the very real forms of social relations. His task consists mainly in the delegitimation of the legal form, taking the idealist standpoint that the legal form "creates a fetishized relationship between individuals" (Balbus, 1978:83), rather than merely elaborating what is already present. These facts notwithstanding, Balbus acknowledges that his argument is limited only to the demonstration of the "structural or synchronic homologies" of the commodity and legal forms. From this standpoint, only the parallel development of the real and ideal forms is manifest.

While the specific example of the emergence of contract and tort law presented here is intended as an illustration of simultaneous development of specific forms of social relations and forms of legal consciousness, the central purpose of this paper has been to develop, not simply the parallel development of legal thought with its social basis but to elaborate the the principles of the connection between forms of human activity and forms of consciousness.

The production of legal ideology has, at its basis, socially determined phenomenal forms of consciousness as 'material' for its reflective thinking. What reflective thought does, and why it is a logical manifestation of the forms of commodity and money, is to raise the abstract categories already present in unreflective consciousness (ordinary consciousness, or consciousness formed in the language of real life) to the level of a concept, isolates them, and on this conceptual level, normalizes them. The tendency for ideology is to develop the norms of the the specific form of social relations upon which it is based.

In systems of social activity mediated by things, and through the metamorphosis which these things undergo, they stand as the primary objective phenomena of consciousness. It is not however to be understood that it is consciousness which is at all objectified. Rather, it is human activity (its movement and relations) which forms the process of objectification -- though in this process consciousness necessarily participates. Activity forms consciousness' primary object, that is, activity contains consciousness as its ideal moment. In the activity which is ideally posited as bringing the products of particular forms of

labour into relation (a social relation of products of labour) there is a simultaneous effect both on the product (or the objectivity involved in a relation), and the active subject who ideally posits the product of this process. Therefore, relative to the form of activity, and its simultaneous effect on both subjective and objective forms, "it is senseless to distinguish object from consciousness" (Mamardašvili, 1986:107) or real from ideal. Because systems of human relations are mediated by things, such that it is things which become involved in a social relation, they become endowed with, and consciously represent, social meaning.

The real social relations which take place within the system, i.e. relations of commodities, money, and later, capital, define the figures and phenomena of consciousness, and present themselves as relatively stable embodiments of sense and meaning. These objectivities of consciousness therefore act as the ultimate point of reference and regulation in the social formation as a whole. It is, however, the content of such objectivities (as products and forms of social sensuous activity) which gives them their degree of stability in the regulation of the system. Determining the origin of these objectivities makes it possible to both derive, and make sense of, the complex secondary forms of consciousness such as the emergence and development of the legal ideas of contract and tort.

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