

"Private and Public aspects of Trespass : Problems of  
Theorising Law"

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### Abstract

The need for the concrete analysis of Trespass is dictated by current struggles over the conditions of land possession in the conjuncture. Whilst only a Marxist approach is capable of accounting for the complexity of the totality of Trespass and related law, the principal general theories of law and the State are prevented from doing justice to this task by their common rationalist conception of the abstract/concrete relation and their consequent inability to satisfactorily ground concrete socio-legal analysis. The proper understanding of Marx's method of investigation in Capital, however, can provide the basis for such analysis, through the specification of a concrete-abstract-concrete methodological trajectory which respects the specificity of the particular object of study. The point of departure for the analysis of Trespass is its simplest and most irreducible expression in concrete social practice : The equal right to exclude the world from interference with the possession of land. The concrete particular is analyzed through scientific Abstraction, which further accompanies the movement from simple to ever more complex aspects of the object until the concrete totality of law securing relations of ownership, possession and separation is

explained in its complex form and function. Finally the broadest Concrete Totality of Trespass and related law is revealed in the full context of its political and socio-economic determinations in the conjuncture : The fundamental pre-condition of the transformation of Trespass in the 1970's is the crisis of capital accumulation, as mediated through domestic and industrial crises and the phenomena of squatting and factory occupations which have threatened existing relations of possession and the institutions of exclusive property right. Law is ultimately revealed as a terrain of struggle that has enabled the greater possessors to resolve the legal and socio-economic crisis to their own advantage at the expense of lesser possessory interests.

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## Introduction

The immediate impetus for this study was the debate over the criminalisation of trespass that occurred in the wake of the squatting boom in the early and mid 1970's, and the urgent need to explain both it and the changes that were ultimately effected in Part II of the Criminal Law Act 1977 : What was the nature of this transformation ; by what means was it accomplished ; how far did its generally accepted purpose correspond with its real function ; and why did it occur at the precise moment it did? Trespass was therefore constituted as an object of study by the concrete conditions of struggle over the relations of land possession and separation obtaining in the current conjuncture. The larger task then became the complete explanation of this area of law in the totality of its Private and Public, Civil and Criminal aspects, in the broadest context of its socio-economic and political determinations.

The decision that only a basically Marxist approach would be adequate to the complexity of this purpose signalled the appearance of a variety of theoretical and methodological problems, whose essence lay in that whilst Marxism proclaimed a superiority over other theoretical systems in the adequacy of its explanations of current phenomena, here it appeared quite unable to provide even the foundations of a proper detailed and concrete socio-legal analysis. Not only did the 1970's debate on the "General Theory" of Law and the State remain pre-dominantly at a highly abstract level, but there was no evidence to

suggest that the attempted resolution of general theoretical problems would ever produce the mediating categories and concepts essential for concrete analyses in particular fields of law.

Confronted with this problem, none of the available options - to persevere with one or other of the principal theoretical approaches, to drastically limit the scope of the analysis, to descend into empirical description, or to abandon Marxism altogether - were considered acceptable. On the other hand, the possibility of a genuinely Marxist solution to the "post-Althusserian" dilemma seemed to exist in the detailed examination of the question of Marx's Method: this was an area generally ignored by Theoreticians of law and the State, who had universally attributed to Marx an abstract > concrete methodological trajectory based on a highly problematic reading of Marx's method of investigation grounded, not in Capital and the later works, but in the 1857 Introduction to the Grundrisse.

The original contribution of this Thesis is to develop the implications of a "non-continuity" reading of Marx's Method for both the on-going debate on Law and State and the problem of the paucity of socio-legal analysis. It will be suggested that the principal theoretical approaches share a rationalist conception of the "abstract" and the "concrete" and their relation which is fatal for the analysis of concrete phenomena, and that the only way forward in the socio-legal field now is the detailed study of particular areas of law - no less theoretical for being grounded in a definite method of inquiry whose general principles may be specified in advance but whose particular trajectory must always respect the specificity of the



phenomena under consideration. The concrete analysis by these means of the totality of Trespass and related law, and of the process of its transformation during the conjuncture, will be shown to have yielded an understanding of the role of law as a terrain of struggle in the present crisis that could not have been provided within either of the principal theoretical traditions. Despite the rejection of general considerations on law and the State as the basis for concrete research, theoretical reflections of a general nature will ironically have emerged quite legitimately in the course of the concrete analysis.

The reasons for the basically descriptive presentation of the legal history of Trespass and its recent development in the opening two chapters are indicated in the Introduction to Chapter 1, but will become fully apparent only in the course of the argument of Chapter 4. Marx's method proceeds by way of the critique of Appearances - of the categories expressing phenomenal forms "with a certain validity" - so this is a methodological device rather than a concession to empiricism. Chapter 3 examines a variety of Marxist and "post-Althusserian" approaches to the problem of theorising law, and finds them wanting, on the grounds either of internal coherence, incompleteness or inability to provide the means of explanation of the phenomena already described. Chapter 4 then questions the assumption of continuity in the development of Marx's method of inquiry between 1857 and *Capital*, and presents a case against such an interpretation, concluding by demonstrating the rationalist methodological foundations of general theoretical approaches, and indicating the prospects for the Marxist analysis of Trespass based on a quite different method of

inquiry, beginning with the concrete (concrete particular) and ending with the concrete (Concrete Totality). Chapter 5 considers the point of departure for the analysis of Trespass, the equal right to exclude, explaining this concrete particular through Abstraction and ultimately locating it within the broader context of the totality of Trespass and related law securing relations of possession and separation in modern Britain. Chapter 6 then examines the socio-economic determinations of the Concrete Totality in the conjuncture in a movement from Phenomenal to Essential relations, culminating with the complete explanation of the form and function of Trespass and the reasons for its transformation in the 1970's ; these findings are resumed and some of their implications considered in the Order of Presentation of the results of the method of inquiry which follows in Chapter 7. The final Chapter further develops the insights of the concrete analysis, in relation both to Trespass and Law more generally, emphasizing their foundation in the methodological conditions of their production, but recognizing the continuing importance of the "politician" tradition in contributing to the theorisation of law as a terrain of struggle ; and concludes with a brief examination of the possibilities for socialist intervention in the field of Trespass and related law opened up by the concrete analysis.

## Ch. 1. The Legal History of Trespass.

### (1) Introduction

One of the fundamental pre-suppositions of this thesis is that legal categories of thought correspond to phenomenal forms of Appearance expressing real social relations: "The totality as it appears in the head, as a totality of thoughts, is a product of a thinking head, which appropriates the world in the only way it can".<sup>1</sup> The change and development of legal categories of thought, such as "possession", "ownership", "exclusion" and "interference", corresponds to changing social relations, which are historically specific and constitutive of those categories: the analysis of the determinations composing legal categories provides the explanation of the social relations they express.<sup>2</sup> A full Marxist analysis of Trespass might therefore seek to explain this legal phenomenon by indicating the real economic and social relations that have produced its surface categories, showing the historical conditions through which the totality of real relations/phenomenal categories has changed and developed. But this would be to pre-judge the crucial question of the role of history in

1. Marx: Introduction to Grundrisse, Pelican Books, (1973) p. 101; see also pp. 102, 104, 105, 106. This fundamental premise informs Marx's mature Theoretical development, and remains a valid aspect of the 1857 Introduction whatever its other methodological weaknesses, recognized and rectified by Marx after 1858 (see infra Ch. 4.)

2. Hence the analysis begins, not with "the real", but with the categories and articulations of categories reflecting it "with social validity". Contrary to Althusser, however, we assert the absolute capacity of knowledge ultimately to correspond with "reality", as a necessary presupposition of Marx's Scientific Materialism (infra Ch. 4.)

the explanation, which must be considered before any such ambitious undertaking could be justified.<sup>3</sup>

Following Marx's argument in the Introduction, the concrete totality of Trespass is "Concrete" because it is the concentration of many determinations, hence "unity of the diverse", appearing in thought as the result of a process of concentration, not as a point of departure, even though it is the point of departure in reality and hence also the point of departure for observation and conception. The reconstruction of abstract determinations leading towards the reproduction of the concrete by way of thought is "obviously the scientifically correct method".<sup>4</sup> But if we begin our analysis of Trespass with the simplest category expressive of its social relations, say "possession", what then is the relation of the order of appearance of this category in the analysis to the real historical process of the birth and development of Trespass? Of course it is not possible to speak of "possession" as an immutable historical relation, neither does its development follow a linear trajectory; like "money" and "exchange", this is a very simple category, which "makes a historic appearance in its full intensity only in the most developed conditions of society. By no means does it wade its way through all economic relations".<sup>5</sup> Feudal "seisin", as a form of "possession", indicates a set of economic and social relations quite different from those implied in the modern legal terminology of "possession"; and other simple categories comprising Trespass, such as "exclusion" and "intrusion",

3. Again, the detailed reference to the Introduction in relation to this question is not compromised by the various subsequent methodological criticisms of the 1857 text in Ch. 4.

4. Introduction p. 101; but consider the different meanings of "concrete" and "abstraction" developed after 1857, discussed infra . Ch. 4.

5. *ibid.* p. 103

similarly have different connotations depending on the epoch under consideration.

The claim that "possession" appears in its full intensity only in the most developed conditions of society implies a qualitative distinction between this and previous forms expressing different social relations.

Compare Marx on "Labour":

"This example....shows strikingly how even the most abstract categories, despite their validity - precisely because of their abstractness - for all epochs, are nevertheless, in the specific character of this abstraction, themselves likewise a product of historic relations, and possess their full validity only for and within these relations".<sup>6</sup>

Labour has of course always existed in some form in Society. But the modern category "labour", which enhances the comprehension of that labour which has always existed, is a product of a real abstraction (the real abstraction of Labour) created in the midst only of "the richest possible concrete development, where one thing appears as common to many, to all. Then it ceases to be thinkable in a particular form alone".<sup>7</sup> The modern category "labour" required as a condition of its genesis indifference towards specific labours, "corresponding to a form of society in which individuals can with ease transfer from one labour to another, and where the specific kind is a matter of chance for them, hence of indifference".<sup>8</sup> Similarly, real relations of possession have always existed, yet it is the specific relations of possession of and separation from land characterizing modern bourgeois production that have given rise to the developed category of "possession" and its incarnation in equal

6. *ibid.* p. 105

7. *ibid.* p. 104

8. *ibid.*

exclusive possessory right. This historic form of possessory right, indifferent towards specific individuals by virtue of its abstract universality, contrasts with the particularity of feudal possessory and proprietary rights based on the various forms of "seisin". The simple abstraction, "possession", which expresses an immeasurably ancient relation valid for all forms of society, nevertheless (like "labour") "achieves practical truth as an abstraction only as a category of the most modern society".<sup>9</sup>

It follows from this that the more developed and complex legal form cannot regard the previous ones merely as steps leading up to itself; neither can it be imputed to earlier societies. Because bourgeois society is the most developed and complex historic organization of production, whose social relations have moulded the simplest categories in their fullest intensity through real abstraction, this must however constitute the initial object of study:

"The categories which express its relations, the comprehension of its structure, thereby also allows insights into the structure of the relations of Production of all the vanished social formations out of whose ruins and elements it built itself up, whose partly still unconquered remnants are carried along within it, whose mere nuances have developed explicit significance within it, etc. Human anatomy contains a key to the anatomy of the ape. The intimations of higher development among the subordinate animal species, however, can be understood only after the higher development is already known. The bourgeois economy thus supplies the key to

9. *ibid.* p. 105. These questions are fully considered (*infra*) Ch. 4. Section I; the limited purpose here is to justify, by brief reference to the Introduction, the manner of presentation of the legal history of Trespass and its recent development in Chapters 1. and 2.

the ancient, etc".<sup>10</sup>

Hence the legal history of Trespass cannot inform its present structure and organization; the knowledge of its present structure and organization can, however, provide insights into its history. The specificity of the historical function of Trespass in securing the conditions of possession of and separation from land is recognizable through the knowledge of its operation in a highly developed form. In analyzing Trespass through the movement from its simplest to most combined categories the initial point of reference must therefore be contemporary socio-legal organization.<sup>11</sup> The historical element does not play a genealogical role in the explanation but enters it only as a resource for illustration and comparison.<sup>12</sup> The legal categories with which we are concerned are those created and sustained in bourgeois society, and not those evident at the "beginnings" of recorded history.

The brief "history of Trespass" which follows in this chapter therefore makes no claim to scientific adequacy, its purpose rather being two-fold: to provide a descriptive account, which may later be subjected to critique, but which serves as an adequate introduction to the historical aspects of Trespass that may be referred to in the course of the concrete analysis; and to emphasize that Marx's method proceeds by way of Critique of existing partialized accounts - which abstract from the existence of real essential relations and re-produce the phenomenal forms of Appearance which give rise to merely "spontan-

10. *ibid.* p. 105. (emphasis supplied)

11. The methodological trajectory from simple to complex centrally informs the concrete analysis of Trespass; what is rejected, however, (*infra* Ch. 4. Section IV) is the conflation of the abstract with the simple and the concrete with the complex.

12. *infra*. Ch. 4. Section IV (2) (a)

eous" and "ideological" consciousness.<sup>13</sup> These considerations also determine the "innocent" presentation of the "Modern law and its recent development" in Chapter 2. Scientific knowledge consists in the re-organization and re-interpretation of the untheorised categories of bourgeois commentators such that they adequately reflect, not merely forms of Appearance in isolation, but those forms in their existence as part of a broader Totality comprising also the real social relations that give rise to them:

"In the succession of the economic categories, as in any other historical, social science, it must not be forgotten that their subject - here, modern bourgeois society - is always what is given, in the head as well as in reality, and that these categories therefore express the forms of being, the characteristics of existence, and often only individual sides of this specific society, this subject....."<sup>14</sup>

## (2) The legal History of Trespass<sup>15</sup>

For methodological reasons, then, the scope of the introductory history section will be limited to the barest account, corresponding so far as is possible to that contained in the standard legal Histories and modern textbooks.<sup>16</sup> For convenience of presentation, Holdsworth's rough periodisation will be adopted: the "medieval Common law" from 1066 - 1485 and the "common law and its rivals" from 1485 -

13. The problematic of "Essence and Appearance" underpins the concrete analysis, and is more fully discussed and developed (infra) Ch. 4. Section IV.

14. (1973) p. 106

15. The period considered here will be from the 11th to the 20th Century.

16. - although even this limited aim is rendered difficult by the heterogeneity of Trespass as an object and the absence of any unified treatment of it, even of a descriptive "legal historical" nature.



1700.<sup>17</sup>

In the period 1066 - 1485 trespass is a generic term for Wrong.<sup>18</sup> The wrongful act may be indicted at the instance of the Crown as a Felony or Misdemeanour<sup>19</sup>, or an individual may seek redress for it in the local or Royal Courts depending on the circumstances.<sup>20</sup>

Our immediate concern is with that particular form of Trespass - the basis of the modern law - developed as a remedy in the King's Courts early in the reign of Henry III.<sup>21</sup> The pre-requisite for the issue of the Writ was that a wrong should have been done to the Plaintiff, in his body, goods or land, by force and arms and against the King's Peace - hence the general name Trespass vi et armis. The form of the writ was an order from the king to his sherriff to summon the defendant to show why ("ostensurus quare") he has caused damage to the Plaintiff in the manner alleged;<sup>22</sup> why he has insulted, beaten, wounded and endangered the Plaintiff's life, imprisoned him until a ransom is paid or an oath given not to sue for a wrong, abducted his wife, apprentice or a monk, attempted to poison, way-lay or kill him, driven off his cattle, threatened his tenants, caused his land to become uncultivable, put a cat in his dove-cot, removed his

17. "A History of English Law" (1966). Other central historical sources are Pollock and Maitland: "History of English Law" (1968); Milsom: "Historical Foundations of the common Law" (1969); Maitland: "The Forms of Action at Common Law" (1968); and Plucknett: "Concise History of the Common Law" (1956). For more recent developments we draw upon Manchester: "Modern legal history of England and Wales 1750-1950" (1980)

18. see : Holdsworth: (1966): Bk III, Ch. 2. Pollock & maitland: (1968) : Ch. VIII Milsom, S.F.C. : (1969): Ch. 11.

19. see: Plucknett (1956) pp. 371 -372 Milsom (1969): p. 256.

20. "Misdemeanour" replaced "Trespass" as a category of the Criminal law denoting lesser offences, to reduce confusion with Civil Trespass.

21. ....according to Pollock & Maitland : "uncommon in 1250 but quite common in 1272" (1968) p. 526

22. see Plucknett (1956) pp. 366 - 372

landmark, destroyed his sea-wall, laid-waste his fields or besieged his house, and so on.<sup>23</sup>

Where the Crown does not itself initiate proceedings, then, it is concerned with wrongs complained of by individuals only insofar as they involve a breach of the King's Peace. Here the award of compensation may be accompanied by punishment in the form of imprisonment and fine or outlawry.<sup>24</sup> Other classes of wrong that do not involve a threat to public order, concerning patients badly treated by surgeons, the negligent shoeing of horses, minor theft, false imprisonment and other forms of interference with person or property where force and arms are not used, remain within the Jurisdiction of the sheriff in the local courts. Yet the area of private wrong in which the Royal Courts take a direct interest is increasingly broadened by the extension of the King's Peace beyond particular and personal privilege, and by the enlargement of the scope of its protection. In a case of 1317, the artificiality of "vi et armis" and "contra pacem regis" as passwords to Royal Justice has become apparent: The Plaintiff counts that he bought a tun of wine from the defendants and left it with them for safe-keeping until transportation. The Defendants, however, "with force and arms, to wit with swords, bows and arrows, drew off much of the wine and replaced it with salt water so that the wine was wholly spoilt to the Plaintiff's great damage, and against the King's

23. see Holdsworth (1966) Bk III p. 370

24. Only gradually do conceptual distinctions between Criminal and Civil wrongs emerge. For a long time "private" wrong is punishable because of the Threat to Public order. The better distinction is between cases where proceedings are undertaken by or on the part of the individual, and those where indictment is at the instance of the crown.

Peace".<sup>25</sup>

Similarly the defendants in many actions of Trespass vi et armis turn out to be Smiths. In each case the incantations "vi et armis" and "contra pacem regis" are plainly fictions inserted to secure a better remedy in the King's Court to that available locally from the Sheriff. The removal of this artificiality, marked by the Farrier's Case of 1372, sees the birth of Trespass upon the Special Case as distinct from general or common writs of Trespass vi et armis.<sup>26</sup> A writ demanding that a Smith show cause why ("ostensurus quare cum") he drove nails into a horse's hoof so that it died was upheld, without allegation of force and arms and breach of the Peace. Now the King's Courts would hear Trespasses even though they could not be justified as Pleas of the Crown by reason of the threat to public order, and the severity of the outcome for a wrongdoer who had usually been only negligent was modified since the semi-criminal sanctions attendant upon Trespass vi et armis no longer applied. Every Action on the Special Case had to be specially drafted, the "cum" clause being a preamble setting out the particular source of duty alleged to have been breached where this was not obvious. This residuary form of action, itself an early progeny of Trespass, thus provided the basis for Slander, Libel, Deceit, Trover, and later Assumpsit and Negligence to develop in the Royal Courts; hence Maitland's famous description of Trespass as "fertile mother of all actions".

Insofar as it is possible to distinguish Civil and Criminal aspects of Trespass during this period, the former come to dominate the latter.

25. quoted in Milsom (1969) p. 248

26. *ibid.* pp. 250-1

The Criminal law develops and hardens categories of Treason, Felony and Misdemeanour indictable by the Crown, whilst Trespass becomes increasingly associated with the Civil law, denoting a "private" dispute litigated by the victim of the wrong.<sup>27</sup> Even in respect of the general form of Trespass vi et armis, the requirement of force and arms and breach of the peace becomes increasingly notional and the punitive sanctions diminish in extent and importance, as the specifically Criminal law takes over the function of maintaining public order. And finally, Case comes to pre-dominate in situations where the injury complained of is consequential rather than direct and wilful, having no connection with the criminal law other than through its progenitor Trespass.

If the complaint of a wrong is one of the cornerstones of developed legal systems, then another, of equal if not greater importance, must be the demand for the enforcement of a Right.<sup>28</sup> Such demands in feudal society predominantly concerned land, the principal form of Wealth, and the King's Courts became involved in disputes over landed property and other Rights before interesting themselves in claims for the redress of Wrongs. The heterogeneity of Trespass as an object and the problems of treatment caused by it are a direct result of the mixture of its origins and development in these two aspects of

27. see n. 19. above. As part of this process, the old Appeal of Felony (undertaken by the victim but carrying serious Criminal Consequences) declines in importance, overtaken on the one hand by Criminal indictment, and on the other by semi-criminal Trespass - its twin if not its direct descendant.

28. see Milsom (1969) pp. 211 - 213

law.<sup>29</sup>

Trespass "quare clausum fregit", alleging "vi et armis" and "contra pacem regis", would provide a remedy in damages for wrongs to land such as the cutting of timber, the mowing and carrying off of crops and the trampling of grass, and thus functioned to protect possession. But from late in the reign of Edward I, in the form of the writ "de ejectione firmæ", Trespass could also be used by a lessee for a term of years displaced from land in order to recover damages from his ejector, and ultimately, by the end of the 15th Century, to recover lands and Tenements specifically. Importantly the writ protected the possession of the Termor, who did not have recourse to the Freeholders' actions, and who previously had a personal action for specific recovery only against the grantor, through the writ of covenant, or against one claiming to have purchased from him, through Raleighs Writ "quare ejecit infra terminum".<sup>30</sup>

But even though specific recovery of the term has become possible, and the lessee has a claim-right enforceable against the world, the basis of the claim remains Personal rather than Real, in that it arises from interference with the chattle-interest of the lessee in his term and

29. Here we shall only indicate the complexity of the debate concerning the Origins of Trespass and Case. The question of genealogy in this sense is misleading in the explanation of the modern law (see Introduction to this section). Briefly, did Trespass arise from Appeals of Felony, Novel Disseisin, or from procedures in local courts, and did Roman law play any part in its development? see Milsom (1968) select Bibliography: in particular Woodbine (1924 & 1925), Dix (1937), Milsom (1954) and Hall (1957).

30. for detailed discussion of these Writs see: Maitland (1968) p. 43; Milsom (1969) pp. 127-132; Holdsworth (1966) Bk. III Vol 3. pp. 213-216

does not attach to the land.<sup>31</sup> What results at the end of the Medieval period comes to be seen as an intolerable legal inconsistency: The *termor*, who has supposedly only a limited right of possession falling short of feudal *seisin*<sup>32</sup>, has a better and more expeditious remedy in the event of displacement than the *Freeholder*, who cannot use "de ejectione finae" but must rather proceed by the cumbersome Writs of Right and Entry or the possessory Assizes of *Mort d'Ancestor* or *Novel Disseisin*.<sup>33</sup> The lessee has succeeded in establishing an enforceable right of Recovery by appropriating to his own ends a device intended principally as a remedy for the redress of a wrong: he charges that wrong was committed because of interference with possession; all that need be cited in the writ is the mere existence of the lease and ejection from the term and specific recovery ensues without any mention of proprietary Rights in the land, yet it is precisely such rights that are vindicated in the successful claim.

In the period 1485-1700 Trespass makes increasing incursions into the

31. Later Law would have been simpler if the scope of the Possessory Assizes had expanded to cover the lessee. The subsequent classification of the leaseholder's interest as personalty (chattels-real) is to last until 1925. However, as a chattel-interest in the 13th Century, the lease could be bequeathed, whereas Realty could not. It does not matter at this time if the action is personal against the lessor and sounds only in damages, because damages may be adequate compensation where land is beginning to be conceived as a primitive form of Capital investment through the Lease. See Holdsworth (1966) Bk III, Vol 3, pp. 213 - 216.

32. *Seisin*, *Right*, *Possession* are considered in later chapters. Neither leaseholder nor villein tenant are "seised" in fee, and have no freehold interest. However they do have a form of possession, coming to be protected by the writ of Trespass. See Maitland (1968) p. 43; Milsom (1969) pp. 103-106. Holdsworth Vol 3. Bk 3. pp. 88-99; Pollock & Maitland (1968) [Vol II] pp.2-46

33. To be considered in later Chapters. For detailed discussion of the Real Actions see Milsom (1969) pp. 106-127; Pollock & Maitland (1968) pp. 46-76; Maitland op cit; Sutherland (1963) esp. on *Novel Disseisin*. The freeholder (seised in fee) claiming land must bring a Writ of Right or Entry; and upon ejection (because he was seised) the Assize of *Novel Disseisin*.

law of Real Property. The writ "de ejectio firmæ", already significantly detached from "quare clausum fregit" in giving specific relief as well as damages, becomes enlarged in scope to benefit the Freeholder and later the Copyholder, in the form of the Action of Ejectment.<sup>34</sup> By 1601 Coke could pronounce that all Titles for Land were for the greatest part tried by this means. In this development the fusion of Tortious and Real actions is becoming apparent; claim-rights of Title are being cast in the form of the complaint of a Wrong—the ejectment of the plaintiff by the defendant.

The importance of the delictual element is evident in the complex fiction necessary in order for the Freeholder to acquire the Termor's remedy. For the correct form of action for one out of possession of freehold land in the 14th Century remained technically Real rather than Personal — the Assize of Novel Disseisin or Mort d'Ancestor, or one of the Writs of Entry. None of these remedies were so hazardous as the oldest Real action, the writ of Right, anachronistic even by Medieval standards. Yet the pitfalls for a litigant with a just cause were numerous: the correct choice of writ was essential; minute accuracy was necessary in wording and pleading; the plaintiff must win on each of several issues — the complications of any of which might frustrate the entire claim; the tenant might cast many essoins where the writ permitted them, and so on. However, the advantages of Trespass as an action in its own right were also

34. see Holdsworth (1966) Vol VII Ch I; Milsom (1969) pp. 132-140 Maitland (1968) pp. 46-47; Pollock & Maitland (1968) pp. 106-117.

considerable<sup>35</sup>: there was no need to select a writ exactly suited to the nature of the case, and the courts were concerned with substantial justice rather than minute verbal accuracy in pleading; the action could be brought either in the King's Bench or the Exchequer, whilst the Real Actions were the monopoly of the Court of Common Pleas; the whole case rested on a single issue, the question of the ejection of the plaintiff by the defendant; and, because of the Tortious nature of the action, mesne process was speedy and the collection of damages easier than with proceedings through the Assize. A defendant on losing the case was automatically held to have broken the King's Peace (because the Writ alleged "vi et armis contra pacem regis"), whether violence had actually occurred or not, and was therefore ordered to prison; to have the order rescinded, or to be released if actually committed, he must satisfy the Plaintiff for his costs and damages, and pay a Fine to the King. With the Assize of Novel Disseisin the enforcement of damages was more difficult because imprisonment was only awarded where the defendant was judged expressly to have disseised the plaintiff with Violence. Whilst the semi-Criminal aspects of Ejection declined in importance in line with developments in other species of Trespass, the advantage of more expeditious and certain legal process and procedure remained, sealing the fate of the

35. It is a moot point among legal Historians to what extent its phenomenal rise was on this account rather than due to the mishandling of its only effective Real competitor in cases of ejection, the Assize of Novel Disseisin. Sutherland (1973) emphasizes the improvements brought about by Trespass; Maitland (in Pollock & Maitland [1968]), the internal deterioration of the Assize.



Real Actions for all but a limited type and number of cases.<sup>36</sup>

At the beginning of the 15th Century, however, the freeholder could look only with envy upon the Termor's remedy. Only gradually does a procedure evolve by whose means the Action of Ejectment can become generally available for the recovery of possession of Land. The plaintiff Freeholder must somehow persuade the court that the basis of his claim is the infringement of a personal leasehold interest in possession of the land, through his ouster by the defendant. This he can do only with the assistance of an elaborate legal fiction<sup>37</sup>: As the tenant in fee simple (the true owner) of the land he has in general a right to enter<sup>38</sup>. He enters in fact and makes a lease for years to a third person, John Doe, who stays on the land until ousted by the defendant and then brings an action of Trespass in Ejectment or Ejectment; To succeed in this action he must prove (1) the owner's right to enter, (2) the lease, (3) his entry under the lease and (4) his ouster by the defendant. When all this is established he recovers his term with damages, and, in reality, the displaced owner resumes possession of his Freehold.<sup>39</sup> The action thus appears in the records as Doe d. (i.e. on the demise of) Smith v. Saunders. This peculiar procedure, which according to Maitland well expressed "the Englishry of English law", became increasingly fictitious, until the only issue of importance that remained was the question of the claim-

36. see Holdsworth (1966) Vol VII p. 19. and N. 21 below

37. for the best detailed account see Holdsworth (1966) Vol VII pp. 11-16 ; also Milsom (1969) pp. 136-138; Maitland (1968) pp. 47-48. Here the element of "direct physical force" constitutive of Trespass becomes even more tenuous.

38. The Right of entry may be "toll'd by descent cast", in which case the Plaintiff will be thrown back on one of the Real Actions - see Holdsworth (1966) Vol VII p. 19.

39. for the variation in which a fourth party, the "casual ejector", is involved, see Maitland (op cit)

ants' right through his title to enter and make the lease. By the mid 18th Century Wilmot CJ. could state, with some justification, that Ejectment had been "licked into the form of a real action".<sup>40</sup>

Yet the uneasiness of the marriage of principles of Tort and Real Property Law continued to manifest itself in a specific problem.<sup>41</sup> Because Ejectment was only a personal action in Trespass, a verdict for the Defendant did not, contrary to the rules governing the Real actions, prevent further litigation by the same plaintiff on the same issue of Title; a previous verdict of the courts on identical facts was not even admissible as evidence in the retrial. All that a decision against the Plaintiff settled in an action of Ejectment was the fact that the Defendant was not guilty of the trespass of which he was accused. The plaintiff might then immediately bring a further and vexatious action, claiming quite correctly according to the principles of Trespass that the basis of his case is the alleged wrong committed, and continuing to be committed, by the defendant - displacing the question of Title and emphasizing that of the alleged Tort. Such reasoning of course frustrated the purpose of settling disputes as to Title by means of Trespass, and the Court of Chancery made Injunctions available to remedy the abuse from the end of the 17th Century.

In Ejectment, the form of action has evolved in a manner so peculiar that the relationship to Trespass vi et armis has become virtually obscured. Yet this development is quite consistent with the general tendency during the period for Trespass to concern itself less and

40. in Goodtitle v. Tombs [1770] quoted in Holdsworth (op cit) p. 9.

41. see Holdsworth (op cit) p. 16

less with violent breaches of the peace. The basis of the action remains the wrongful application of physical force to the plaintiff's land, goods or person, distinguishing it from Case in which the injury is indirect or consequential and no force is used, but the degree of force required is becoming so slight that the merest step on land or wrongful touch will suffice to ground a successful claim.

By the middle of the 19th Century Trespass "vi et armis" and Ejectment have acquired most of the features by which their modern counterparts are recognized today, and further developments are in form rather than substance. The Real Property Limitation Act 1833 abolished most of the Real Actions leaving Ejectment the supreme Writ for Recovery of interests in Land, and the Common Law Procedure Act 1852 finally abolished all fictitious procedure, allowing the real claimant to sue in his own name. By the Judicature Acts 1873 and 1875 the old forms of Action were abolished completely and Ejectment assumed its modern form as the Action for Recovery of Land.<sup>42</sup> The Law of Property Act 1922 reduced in importance the distinction between Realty and Personalty by assimilating insofar as was practicable the law of Real Property and chattels Real, and creating a new classification of legal Estates (having abolished Copyhold) as Freehold or Leasehold.

Even in the by now consolidated sphere of Tort in its pure form, Trespass has but a small part to play in the further development of the Law, being increasingly circumscribed by the offshoots of Case: Trover, Nuisance, Assumpsit and Contract, and Negligence. The distinction between Trespass and Case on the basis of the direct

42. considered in detail in Ch. 2.

forcible or consequential harm attaching to the wrongful act became hard to sustain with the increase in personal injuries resulting from traffic accidents (the "running-down" cases) at the end of the 18th Century and dangerous technological developments thereafter. Whilst such harm plainly arose out of the immediate application of force, and ought therefore to be remedied in Trespass, the greater flexibility of Case in situations where there was no previous relationship between the parties proved sufficiently attractive for a rule to evolve in 1833 to the effect that a Plaintiff could waive the force and sue in Case, provided only that the injury complained of was not wilful as well as direct.<sup>43</sup> The result was that Trespass became increasingly associated with wilful injuries, leaving more and more to Case incidents of negligence, which then had to be expressly pleaded and proved. This was the most appropriate legal device for handling problems of litigation arising from the Industrial Revolution and the development of the Railways. By the end of the 19th Century Negligence cases had constituted an independent category in the Law of Tort, and Beven could entitle his textbook in 1889: "Principles of the Law of Negligence".

Hence today the law in respect of Trespass to Land - the specific object of this Thesis - may be categorized in terms of a division between pure Trespass "quare claisum fregit" and its historical progeny, the Action for Recovery of Land. The tortious basis of both is unlawful interference with possession.

Because the emphasis is on possession, it is not the primary function

43. William v. Holland [1833] 10 Bing 112.

of the Tort to protect ownership as such, however, owing to its peculiar historical development, where the owner is in possession the purpose of a suit in Trespass may not be the recovery of damages so much as the settlement of disputed rights over land; and similarly, where the owner is out of possession, the purpose of the Action of Recovery is the repossession of land on the basis of superior Title. The former claim may be logical enough. The latter, however, where the Plaintiff does not appear to have any "possession" capable of being infringed, illustrates the artificiality of the inclusion of this Action within the category of Tort; what is really claimed here is not interference with possession but better Title, only the Real basis of the suit has been obscured by an historical accident which continues to leave its mark in contemporary law.<sup>44</sup>

44. If, however, "possession" is defined in terms of degrees of legal right (see infra: Chs. 2 & 5 ) the logical problem does not appear so acute.

## Ch. 2. The Modern Law & its recent development

For the Methodological reasons indicated this section must also take the form of a bare account, limited to the legal sphere in abstraction from other aspects of the Totality. Here the purpose is to reproduce the categories of Trespass in the order of their appearance in contemporary legal commentaries, and to basically describe recent developments that have taken place in the Criminal Law.

Trespass "quare clausum fregit" is committed by "intentionally or negligently entering or remaining on, or causing any physical matter to come into contact with, land in the possession of another".<sup>1</sup> The basis of the Tort is therefore unjustifiable interference with possession of land:

"Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of Trespass commanding the defendant to show cause 'quare clausum querentis fregit'. For every man's land is in the eye of the law enclosed and set apart from his neighbour's; and that either by a visible or material force, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins another's in the same field".<sup>2</sup>

In the majority of cases Trespasses to land are self-evidently intentional, but a negligently unintentional invasion may also be accounted a Trespass, provided the injury complained of is direct rather than consequential (a requirement of all trespass actions). Thus to cause

1. Street, H. (1976) : p 63.

2. Blackstone, Commentaries: Vol 3. p. 209.

foreign matter to come into contact with the Plaintiff's land<sup>3</sup>, to fire a gun into his soil<sup>4</sup> or drive nails into his wall<sup>5</sup>, to encourage a dog to run into his garden<sup>6</sup>, or to remove the doors and windows from his tenements<sup>7</sup> are all Trespasses, and as such actionable without proof of damage. Where on the other hand the injury complained of is the indirect result of the defendant exercising his own property rights, such as allowing the branches<sup>8</sup> or roots<sup>9</sup> of his trees to spread over his boundary, suffering his privy to be out of repair such that filth flows into his neighbour's cellar<sup>10</sup>, or fixing a spout on his roof whereby rainwater is discharged onto the Plaintiff's land<sup>11</sup>, the proper action is on the Case in Nuisance, and the claimant must establish the existence of appreciable damage.

It is the fact that Trespass is actionable per se without proof of damage that enables it to be used for settling questions of Title (though today there is growing scope for the issue to be decided by way of declaratory judgement<sup>12</sup>). The merest direct invasion is sufficient to ground the action: "If the defendant place a part of his foot on the plaintiff's land unlawfully, it is in the law as much a

3. "perhaps anything having size or mass, including gases, flame, beams from searchlights and mirrors, but not vibrations", per Street (op. cit.) p. 64 n.3.

4. Pickering v. Rudd [1815] 4. Camp. 219.

5. Simpson v. Weber [1925] 133. L.T. 46.

6. Beckwith v. Shordike [1767] 4. Burt. 2092.

7. Lavender v. Betts [1942] 2. All. ER. 72.

8. Smith v. Giddy [1904] 2. KB. 488.

9. Butler v. Standard Telephones Ltd. [1940] 1. KB. 399

10. Tenant v. Goldwin [1704] 2. Lord Raym. 1089.

11. Reynolds v. Clarke [1725] 2. Lord Raym. 1399.

12. as in Acton Corporation v. Morris. [1953] 2. ALL ER. 932. see Clerk & Lindsell (1975) para. 1317; Street (op. cit.) p. 63. n. 1.

trespass as if he had walked half a mile on it".<sup>13</sup>

**(a) What Constitutes "Possession"**

Trespass is actionable as the suit of the person in possession; the test of possession of land is the nature of its occupation or the degree of physical control exercised in respect of it.<sup>14</sup> However, the type of conduct necessary to constitute "Possession" must vary according to the type of land. In the case of vacant or unenclosed land not under cultivation there is little that can be done to indicate possession,<sup>15</sup> other than through acts of enjoyment of the land itself.<sup>16</sup> Where there are tenements on the land, possession is evidenced by occupation or, if the buildings are unoccupied, by possession of the key or other method of obtaining entry.<sup>17</sup> This "de facto" custody or detention may be defined as:

"any power to use the thing and exclude others.....if accompanied by the animus possidendi, provided that no-one else has the animus possidendi and an equal or greater power".<sup>18</sup>

In order to found a claim in Trespass, possession must be exclusive. Thus pasturing cattle on strips of grass by the side of a private road does not give possession of the land, because the right of passage exercised by other persons prevents the possession from being exclu-

13. Ellis v. Loftus Iron Co. [1874] L.R. 10 per Coleridge C.J. at p. 12.

14. No consistent theory of possession exists in English law. The concept is considered in greater detail below: see Pollock & Wright "possession in the common Law" (1888) ; Harris D.R: "The concept of Possession in English Law". (1961)

15. Ocean Estates v. Norman Pinder [1969] 2. A.C. 19.

16. Jones v. Williams [1837] 2. M & W 326.

17. Jewish Maternity Society's Trustees v. Garfinkle [1926] 95 LJKB 766.

18. Terry, "Principles of Anglo American law" ; cited in Pollock & Wright (op. cit.), quoted in Winfield & Jolowicz (1979) p. 336.



sive.<sup>19</sup> If there is a dispute as to which of two competing claimants has de facto possession, the presumption is in favour of the person who can show title to the land.<sup>20</sup> Once established, de facto possession gives a right of undisturbed enjoyment against all wrongdoers except the lawful owner. It is no answer for a defendant to show that Title and right to possession vest in someone other than the plaintiff bearing allegedly inferior Title, if that other person is not himself; jus tertii is no defence unless he can prove that he committed the act complained of on the authority of the true owner.<sup>21</sup>

It would seem an inevitable consequence, therefore, that where at the time of the commission of a trespass to land a plaintiff owner happens to be out of possession, either through neglect to enter on the accrual of Title or through having been wrongfully ousted, he is without remedy in Trespass. However, here as in other areas of the Law<sup>22</sup>, the courts have been willing to extend the protection afforded the bare possessor to the legal owner, and this has been accomplished with the development of the doctrine of "Trespass by rela-

19. Coverdale v. Charlton [1878] 4. Q.B.D. 104.

20. "If there are two persons in a field, each asserting that the field is his, and each doing some act in assertion of possession, and if the question is, which of those two is in actual possession, I answer the person who has the title is in actual possession and the other is a trespasser". per Maule J. in Jones v. Chapman [1849] 2. Exch. 803, 821.

21. Graham v. Peat. [1801] 1. East. 244.

22. see supra: Ch. I.

tion"<sup>23</sup>: once a plaintiff entitled to immediate possession actually enters upon the land, he is deemed to have been in possession from the moment his right to it accrued, enabling him to recover damages for a trespass committed during the intervening period. Whilst the law stops short of equating the right to possession with de facto possession, only the slightest entry upon any part of the land is necessary to vest in the plaintiff possession of the whole.<sup>24</sup>

### (b) Who may sue in Trespass

Although in general actual or constructive possession is essential to an action in Trespass, an exception is the case of the Reversionary interest, where the plaintiff has no immediate right to possess but may nevertheless recover damages for permanent injury to the land without waiting for the future estate to fall into possession.<sup>25</sup> Here however a claimant must prove appreciable damage - an exception to the rule that Trespass is actionable per se - and there is no remedy for bare invasion.<sup>26</sup>

That the tests of "exclusive occupation" and "physical control" do not exhaustively define possession is illustrated by the case of a servant given temporary control of his master's premises. In the absence of any intention on the part of an owner to treat the occupier as a tenant, the mere exclusive control of the property is not sufficient to constitute "possession", which remains with the owner in spite of

23. see Clerk & Lindsell (op. cit.) para, 1330.

24. Ocean Estates v. Norman Pinder (op. cit) The law develops this fiction to avoid having to admit, again, that it is ownership that is really being protected rather than possession. See also action for Mesne profits (infra).

25. Jones v. Llanrwst U.D.C. [1911] 1. Ch. 393.

26. Baxter v. Taylor [1832] 4 B & Ad. 72.

his physical absence.<sup>27</sup> Some commentators therefore distinguish de facto possession from "possession in law"; whilst in the vast majority of cases the two coincide, it is specifically the latter aspect which is necessary to found a claim in Trespass.<sup>28</sup>

Similarly neither guest nor lodger can bring Trespass because possession remains in the landlord:

"A lodger in a house - although he has the exclusive use of rooms.....is not in exclusive occupation, because the landlord has retained to himself the occupation..... such a lodger could not bring Ejectment, or Trespass quare clausum fregit, the maintenance of the action depending on possession".<sup>29</sup>

Here the basis of the occupation is contractual, and no estate interest is conferred in the land itself. On the other hand, tenants and lawful sub-tenants do have such an interest, and have legal possession sufficient to bring Trespass even against the landlord, unless his entry was effected in accordance with the provisions of the lease.<sup>30</sup> The lessor of land gives up possession in law as well as in fact to the Tenant, and can himself only bring Trespass during the term if a wrongful act has caused permanent damage to his Reversionary interest.<sup>31</sup>

Whether or not a trespasser has possession and can maintain an action for subsequent invasions by others depends on the circumstances. In principle, "even wrongful possession, such as that acquired by a squatter, will be protected except against the owner of the land or

27. Bertie v. Beaumont. [1812] 16. East. 33.

28. see Winfield & Jolowicz (op cit) pp. 337-338.

29. Allan v. Liverpool [1874] L.R. 9. QB 180. per Blackburn J.; Appah v. Parncliffe Investments Ltd. [1964] 1. WLR. 1064.

30. Lane v. Dixon [1847] 3. CB. 776.

31. supra.

someone acting lawfully on his behalf".<sup>32</sup> A trespasser who expels one already in possession does not himself thereby gain possession, in the absence of submission and the expiry of a reasonable time:

"A mere trespasser cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession".<sup>33</sup>

Since in such cases the Trespasser has not gained possession, it follows that the use of force by the real possessor in order to re-enter will be treated as if it were merely a forcible resistance to an intrusion upon a possession which he had never lost.<sup>34</sup>

### (c) What constitutes "Interference"

The category "Interference" requires definitions of certain types of acts<sup>35</sup> and their subject-matter. The subject of Trespass - what may be interfered with - includes not only land itself but in principle all that lies below and rises above it.<sup>36</sup> Anything attaching to the

32. Winfield (op. cit.) p. 337.

33. Browne v. Dawson. [1840] 12. Ad & E. 624. per Lord Denman. What is a "reasonable time" depends on all the circumstances of the case; here 10 days was considered reasonable.

34. Hemmings v. Stoke Poges Golf Club [1920] 1. KB. 720 see also Adeyinka Oyekan v. Musendiku Adele [1957] 1. WLR. 876. Whether or not a trespasser has "possession" carries important consequences in respect of the protection afforded by the Criminal law. McPhail v. Persons Unknown [1973] 3. WLR 71. (considered fully below)

35. see supra: notes 3-7 for example of direct invasion.

36. according to the old maxim: "cujus est solum ejus est usque ad coelum". (from the centre of the earth to the utmost reaches of the sky.)

soil, such as herbage<sup>37</sup>, turnips<sup>38</sup>, trees or underwood, and similarly the subsoil and minerals beneath it, may be the subject of invasion. Usually land is divided horizontally such that its different levels are separately possessed: The owner of a manor may be in possession of pasturage on the surface of the waste, whilst another person possesses the peat immediately beneath it<sup>39</sup>, and yet a third has an interest in minerals further underground ; and this last possession may again be subdivided as between the upper and lower seams of the minerals.<sup>40</sup> Where a public highway is used in a manner beyond what is reasonable for the purpose of passing along it, trespass may be committed against the person in possession of the soil on which the highway rests.<sup>41</sup>

In the absence of any specific provision to the contrary, the party in possession of the surface is presumed also to possess what lies beneath it. The same may not be said however of air-space above land, and in this respect the old dictum<sup>42</sup> has been embarrassed ; it is only Trespass to invade that portion of air-space which is requisite for the full use and enjoyment of the land.<sup>43</sup> The flight of an aircraft several hundred feet above a house is not trespass at common

37. Richards v. Davies [1911] 1. Ch. 90.

38. Wellaway v. Courtier [1918] 1. KB. 200

39. Wilson v. Mackreth [1766] 3. Burr. 1824

40. Butterley Co. v. New Hucknall Colliery [1910] A.C. 381.

41. at common law the person whose land abuts the highway. Hickman v. Maisey [1900] 1. QB. 752.

42. see n. 36.

43. Kelsen v. Imperial Tobacco [1957] 2. QB. 334.

law<sup>44</sup>, and the Civil Aviation Act 1949 expressly provides that aircraft flying at a reasonable height, having regard to wind, weather, and all the circumstances of the case, do not commit trespass.<sup>45</sup>

#### (d) Remedies

Once the elements of unlawful interference with possession are established, the plaintiff may seek a remedy appropriate to the circumstances. Provided that he acts without delay against squatters or Trespassers, one in possession may resort to self-help and use a reasonable degree of force to eject an intruder without giving grounds for any civil action.<sup>46</sup> Otherwise damages are recoverable according to the degree of harm caused, and may also be claimed even though no substantial loss has occurred, although here the award is likely to be nominal. In such a case the plaintiff will generally attempt to secure an injunction to prevent the continuance of an interference.<sup>47</sup>

#### (e) Infringement of the Right to possess ; the Action for Recovery

The action for Recovery of Land, as distinct from pure Trespass "quare clausum fregit", cannot be said to have its legal foundation in "interference with possession" in the strict sense in which this term has been considered. Here the plaintiff is "out of possession" and

44. Bernstein v. Skyviews Ltd. [1977] 3. WLR. 136.

45. S. 40 (1). However an action in Nuisance remains available.

46. Hemmings v. Stoke Poges. (op. cit.) but see n. 34.

47. as in Kelsen v. Imperial Tobacco (op. cit.) where a mandatory injunction was granted for the removal of an advertizing sign projecting some four inches into the plaintiff's air-space. see also Halsbury's Laws of England, Vol 38. p. 749.

establishes a claim against the person in possession on the basis of superior Title. The court may decide on applicataion that the claimant has a greater right than the defendant, whose continued de facto possession thereby becomes a wrongful infringement of the plaintiff's possessory right, but only by construing the Action for Recovery in this convoluted way can it logically be brought within the ambit of the Tortious principle ; in contemporary law it continues to display the birth-marks of its peculiar historical origin as an offshoot of Trespass, long since licked into the form of a Real action, and yet subsumed, somewhat uncomfortably, within the modern category of Tort.

The Action may be brought either in the High Court or the County Court.<sup>48</sup> A writ enforcing an order of possession cannot be issued without leave of the Court, for which every person in actual possession must have had notice of the proceedings.<sup>49</sup> A special summary "squatters procedure" has, however, been devised to enable a plaintiff to obtain an order for possession, and a writ for its enforcement, against persons in occupation of his land if they entered or remained there without licence or consent, irrespective of whether all or any of those persons have been identified.<sup>50</sup>

In an Action for Recovery the plaintiff must win by the strength of

48. see Halsbury Vol 32 p. 371.

49. Rules of the Supreme Court (RSC) Ord. 44 rule 3. (2).

50. RSC ord 113. County Court Rules (CCR) ord. 26.

his own Title and not by the weakness of the defendants,<sup>51</sup> but it remains an open question whether proof of absolute right is necessary and whether therefore "jus tertii" is a good defence.<sup>52</sup> If the Plaintiff must show an absolutely good Title, then the defendant may defeat his claim by indicating the existence of one better;<sup>53</sup> If however all that is required is a relatively better Title, then the Plaintiff will win despite this by showing a de facto possession prior to that of the defendant.<sup>54</sup>

To an Action for Recovery may be joined a claim for Mesne Profits, another species of Trespass lying for damage suffered by the Plaintiff through having been out of possession.<sup>55</sup> Where however the action for Mesne Profits is brought separately, because all Trespass actions other than Ejectment require possession in the strict sense, the plaintiff must enter the land before he sues ; then, by the fiction of Trespass by Relation, he is deemed to have been in possession during the whole period for which mesne profits are claimed.<sup>56</sup>

#### (f) Justification of Trespass

If the interference complained of can be legally justified it cannot

51. Danford v. McAnulty [1883] 8 App. Cas. 456.

52. it is clear (supra.) that jus tertii is no defence in a pure action of Trespass.

53. proponents of this view are Holdsworth (op. cit.) Vol VII pp. 57-67 and 56 L.Q.R. 479; Salmond: Torts (16th ed.) p. 46. Winfield (op. cit) p. 350. The principal authority is doe d. Carter v. Barnard [1849] 13 QB. 945.

54. the view taken by Clerk & Lindsell (op. cit.) para. 1360. see: Asher v. Whitlock [1865] LR 1 QB. 1. Allen v. Roughley [1955] 94. C.L.R. 98.

55. R.S.C Ord. 15 Rule 1. The plaintiff may claim not only profits taken by the defendant during his occupancy, but also damages for deterioration and reasonable costs of recovering possession.

56. supra.



be Trespass. Acts which would otherwise be Trespass may be prevented from being so through the existence of some specific legal provision : a person entering land under arrangements made by a Local authority for the public to have access to open Country is not a Trespasser provided that the specified conditions are complied with<sup>57</sup> ; a bailiff commits no Trespass if he enters private premises for the purpose of executing a court order<sup>58</sup>, nor does a landlord if he distrains for Rent<sup>59</sup> ; a policeman may enter premises for the purpose of investigating a disturbance<sup>60</sup> ; and again, licence is given by law to enter adjoining land to abate a Nuisance or to prevent the spread of fire,<sup>61</sup> or to return goods that have been deposited on the defendants premises by the plaintiff.<sup>62</sup>

Similarly, a person who enters land with the express or implied permission of the possessor has a licence, and cannot be a Trespasser. However, a gratuitous licence may be revoked at any time by notice, so that if the licensee remains on the land he becomes a Trespasser. Even a contractual licence, given in return for valuable consideration, can normally be revoked at the election of the licensor although he may be liable for breach of contract<sup>63</sup> ; whether a contractual licence is legally revocable is a question of construction of the contract in the light of all relevant and admissible

57. National Parks and Access to Countryside Act 1949 S. 60.  
Countryside Act 1968 ss. 16-19.

58. Southam v. Smout [1964] 1. QB. 308.

59. see Clerk & Lindsell (op. cit.) Ch. 16.

60. R. V. Smith [1833] 6. C & P. 216.

61. Cope v. Sharpe (No. 2) [1912] 1. KB. 496.

62. Rea v. Sheward [1837] 2. M & W. 424.

63. Thompson v. Park [1944] K.B. 408.

circumstances.<sup>64</sup>

(g) Developments in the Criminal law.

Trespass today remains pre-dominantly a category of Private Law. The punitive sanction which originally attached to violations of possession "with force and arms and in breach of the peace" was formally abolished in 1694 and obsolete in legal practice long before that date.<sup>65</sup> Nevertheless, specific forms of Trespass have been made Criminal by Statute, as where particular property is<sup>66</sup> involved, such as Railways<sup>67</sup>, certain enclosed gardens in public places, or the premises of Foreign Missions<sup>68</sup>; or where a particular crime is intended such as Theft<sup>69</sup> or the pursuit of Game<sup>70</sup>; or where there are other special circumstances, as where the Trespasser is in possession of a firearm<sup>71</sup> or other weapon of offence.<sup>72</sup> Additionally, Trespass is a Crime with certain

64. see Hurst v. Picture Theatres Ltd. [1915] 1. K.B. 1. Winter Garden Theatre Ltd v. Millenium Productions. [1948] AC 173. also Clerk & Lindsell (op. cit.) paras. 1345-1349.

65. Exemplary damages may be awarded only where the wrong is an oppressive, arbitrary or unconstitutional action by servants of Government, or where the wrongdoers' conduct has been calculated on a profit exceeding the compensation payable to the plaintiff. (see Clerk & Lindsell [op. cit.] para 1357).

66. Railway Regulation Act 1840 s. 16. British Railways Act 1965 s. 35. (6).

67. Town Gardens Protection Act 1863 s. 5.

68. Criminal Law Act 1977 (Part II) s. 9.

69. Theft Act 1968 S. 9.

70. Game Act 1831 S. 30.

71. Firemans Act 1968 S. 20. (1)

72. Criminal Law Act 1977 (Pt. II) S. 8.

exceptions where violence is used for securing entry to premises<sup>73</sup>, or where the Trespasser fails to leave after being asked to do so by a "Displaced Residential Occupier" or a "Protected Intending Occupier",<sup>74</sup> or where court officers are obstructed in the execution of process for possession.<sup>75</sup> Otherwise, however, the familiar notice "Trespassers will be prosecuted" is no more than a "wooden falsehood".

#### (h) Conclusions

Trespass can certainly boast an illustrious History, yet in its most important aspects appears to have become something of a legal back-water, its Criminal role long since absorbed into a separate category of law, and its function of conflict resolution definitively overshadowed by actions on the Case in Nuisance and Negligence. Even as a means of testing Title to Land it can be expected to lose ground to the increasingly popular Declaratory Judgement. Only the Action for Recovery, whose real connection with Trespass aside from historical accident is dubious, continues to play a crucial yet subterranean role in the Modern Law.

73. *ibid.* S. 6.

74. *ibid.* S. 7.

75. *ibid.* S. 10.

### Ch. 3. Theoretical Approaches to Law

The explanation of the historical and conjunctural, civil and criminal dimensions of Trespass requires the theoretical analysis of this area of Law and its relation to the state. Existing theoretical approaches to Law and State<sup>1</sup> will be judged according to their internal coherence, the possibilities they offer for historical and concrete analysis, and their political implications for Law as a field of struggle. Finally the prospects for the adequate theoretical and concrete analysis of Trespass will be considered.

The necessary pre-conditions for an adequate historical-materialist account of Law (specified conceptions of Totality and of determination by the Economic) are established in two principal approaches, on the one hand in the theory of "state derivation" ("staatsableitung"), and on the other in the work of Althusser and Poulantzas. Three secondary approaches of more limited scope may be identified, the "post-Althusserian" current of Hindess and Hirst, the "Gramscian" Approach of Hall et. al., and the tradition of Marxist Historiography

1. The analysis of Law cannot but take some account of the State because of the close historical and conjunctural associaton. The precise nature of the relation remains however problematic (see: Poulantzas's concept of the "juridico-political", infra.)

represented by E.P. Thompson.<sup>2</sup>

The principal approaches were developed in the 'sixties in reaction against humanistic, economistic and voluntaristic conceptions of the State. Both reject the theoretical separation of the political from the economic which leads to the neglect of their formal institutional relation and to the conception of State activity as manipulated and determined by dominant class Will.<sup>3</sup>

The secondary approaches were developed in reaction against one or other aspect of the principal debate. Both Hirst and Thompson, from widely divergent traditions and positions, have recently produced critiques of Althusserian rationalism<sup>4</sup>, whilst Hall and his

2. The work of Bernard Edelman will also be considered; "Althusserian" in some respects, "post-Althusserian" in others, it defies easy classification. In his review of Marxist Theories of Law, Jessop (1980) discusses it with that of Hirst: "On Interpellation and legal subjectivity" pp 361-363. Epistemologically, however, it belongs to the Althusserian tradition: (infra.). Here it will be considered "secondary" in relation to the principal approaches because of its extreme specificity and limited focus compared to the breadth of the work of e.g. Poulantzas. Jessop places Thompson in a "Gramscian" category with Hall et. al. (pp 363-365) Here however Marxist Historiography will be considered separately. In other respects, Jessop's general framework is unexceptionable.

3. In "Stamocap" Theories, the general concepts of contradictions and laws of motion tend to produce unproblematic responses at the level of the State through monetary control, expenditure, Law etc. see: Glyn & Sutcliffe (1972); Gough (1975); Yaffe & Bullock (1975). For a general account of Fundamentalist and Neo-Ricardian positions see Holloway & Picciotto (1975) pp 10-15; For a more detailed account and critique see Fine & Harris (1979). Neither approach adequately grasps the specificity of the political. For a more traditional Marxist-Leninist position which arguably (see Jessop p. 340) tends in the same direction, see Balibar's (1977) defence of the concept "Dictatorship of the Proletariat" against its abandonment by the 22nd Congress of the PCF.

4. Hirst and Hindess broke decisively with the Althusserian approach of "Pre-Capitalist Modes of Production" in "Mode of Production and Social Formation" (1977), its auto-critique. Subsequently (see Cutler et. al. 1977) the reasons for this break have been made more explicit, involving the rejection not only of Althusserian rationalism/essentialism, but of "epistemological discourse" tout court. (see infra). Thompson's critique of "Althusserian structuralism," embryonic in (1975) pp. 258-269, has been fully developed in "The Poverty of Theory" (1978).

collaborators have developed a Gramscian form of conjunctural analysis which attempts to transcend the Theoreticism inherent in the dominant general approaches.<sup>5</sup> In neither case is the way forward seen to lie on the terrain of the principal theoretical debate.

This however raises a further problem, concerning the extent to which Thompson and Hirst particularly, and Hall et. al. to a lesser degree, have abandoned or ignored crucial distinguishing features of the fundamental Marxian problematic, and in so doing raised again the spectre of Voluntarism in their conceptions of Law and State.<sup>6</sup>

### I. The State Derivation Approach<sup>7</sup>

The methodological point of departure for the "Staatsableitung" analysis of the state is the category of Form. Bourgeois social relations have given rise to historically specific separated Economic and Political Forms. The investigation of the relation between the economic and the political therefore begins by asking what is the basis of the particularization (Besonderung) of Capitalist Society into apparently autonomous spheres of State and Society: "What is it about social relations in bourgeois society that makes them appear in

5. See Hall et. al. (1978 a); Hall: (1979); (1980 c.); (1980 d.).

6. This argument will be elaborated in the course of the chapter.

7. This term has been adopted by Holloway and Picciotto (1977), (1978) in introducing the West German Staatsableitung debate to Britain. They emphasize the inadequacy of the designation "Capital logic" for all but a minority of the contributions: see (1978) p. 180 n.20; (1977) p. 99 n.11. See Balbus (1977) for good example of the Capital logic approach.

separate forms as economic relations and political relations?"<sup>8</sup> Why, in the words of Pashukanis,

"....does class rule not remain what it is, the factual subjugation of one section of the population by the other? Why does it assume the form of official state rule, or - which is the same thing - why does the machinery of State Coercion not come into being as the private machinery of the ruling class; why does it detach itself from the ruling class and take on the form of an impersonal apparatus of public power, separate from society?"<sup>9</sup>

If Law, State and Economy are historical forms of the capital relation, then their fetishized appearance as separate spheres cannot be unproblematically constituted the starting point of analysis<sup>10</sup> since it is precisely this division that must be explained. The logical and historical derivation of the relation between these forms will indicate the function, limits and possibilities of State and Legal activity at the various stages of development of the CMP. The basis of the critique of Voluntarist positions thus becomes clear:

"For by explaining and criticizing state institutions as the instruments of manipulation of the ruling class, it is not possible to discover the limits of that manipulation. These can only be revealed by an analysis which shows in detail the needs for and limits to state intervention arising from the contradictions of the capitalist process of production as a labour-process and a valorization process."<sup>11</sup>

The unity of the German Debate is therefore given in the derivation,

8. Holloway & Picciotto (1978) p. 18.

9. Pashukanis, EB. (1978) (emphasis supplied). The conception of Totality through the category of Form should not be confused with the problematic of Phenomenal forms of Appearance/Real essential relations, however, a close relation exists between them: see Holloway & Picciotto (1978) p. 179 n.10; Blanke et. al. (1978) p. 194 n.21.

10. as in Poulantzas, e.g. - according to Holloway & Picciotto (1978) p. 4.

11. Muller & Neususs, in Holloway & Picciotto (1978) p. 33. Their contribution began the West German Debate. Compare Hirsch, J. (ibid) p. 56: "The basic assumption of (voluntarist) Theories is that there is an "autonomous" political apparatus....which is subject to the dictates of the political decision-making process."

from Capitalist social relations, of the necessary form of the State as a separate institution. The specific point of departure remains however open to dispute. Whilst there is general agreement that Essential Relations should take precedence in the analysis over Surface Appearances<sup>12</sup>, two distinct approaches are discernible within this position, one associated with Berlin and drawing on Pashukanis's starting-point in the circulation of commodities, and the other identified with Frankfurt and beginning with the form of exploitation of Labour by Capital in the CMP. The former will be represented in this exegesis by Blanke, Jurgens and Kastendiek<sup>13</sup>, and the latter by Hirsch<sup>14</sup> and the main British contributors to the debate, Holloway & Picciotto.<sup>15</sup>

**(a) Blanke, Jurgens and Kastendiek:**

For Blanke et. al. the point of departure is commodity - circulation and the economic form through which this movement is secured.<sup>16</sup> The material - economic nexus of Value is the precondition of a type of Societization free from personal, physical force, governed through the institutions of Exchange, Price and Money. The value - nexus incorporates both a relation between things and a relation between people:

12. the exception being Flatow & Huisken, who begin with the "community of interest" on the surface of society: see Reichelt, H. in Holloway & Picciotto (1978) pp. 43-56.

13. Blanke et. al., in Holloway & Picciotto (1978), develop Pashukanis's "General Theory of Law and Marxism" (1978); this latter work will not be directly considered here, but its methodological premises will be examined in Ch. 4 (infra).

14. also in Holloway & Picciotto (1978).

15. For a discussion of other currents within the approach, e.g. Sauer D. and Tuschling B, see Jessop (1980), where work not available in English is considered (see n.89 infra). Jessop does not, however, discuss Holloway & Picciotto; this is a peculiar omission since Picciotto particularly (1979), in the field of Law, has attempted to render the approach concretely applicable to Britain's National conjuncture: (see infra)

16. op. cit. p. 122.



on the one hand, value is the "reified form of the sociality of labour," and the worker is represented in it as nothing more than an impersonal abstract quantity; on the other hand, the realization of Value in the act of Exchange requires a conscious act of will on the part of the commodity owner: "Commodities cannot themselves go to market and perform exchanges in their own right."<sup>17</sup> Just as in Exchange unequal concrete labours and use-values are rendered commensurable according to an abstract measure ("a quantity of gold representing labour-time"), so the exchanging parties, in reality concretely different beings with different needs and capabilities, require "the formation on this plane of action of an abstract point of reference making this commensuration possible. This point of reference is man as the subject of exchange."<sup>18</sup> By these means the parties acquire an identical social and formal quality:

"The social quality is that they have a Will which relates to the act of Exchange and this to all other subjects of Exchange. The relationship is expressed in the form of a mutual recognition as private property owners.... and in freedom of contract."<sup>19</sup>

At the moment that relations of Will are agreed and fixed they give rise to a system of legal relations: "At the same time that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights."<sup>20</sup> The expression of the joint act of Will founded on mutual recognition is the category of contract, the "original modus of law", which presupposes constraint or the compulsion to perform

17. Capital I. p. 178.

18. Blanke et. al. (op. cit.) p. 123.

19. ibid. (emphasis supplied).

20. Pashukanis (op. cit.) p. 112

contracts: pacts sunt servanda:<sup>21</sup>

"What arises, however, is no one-sided disposition over the Will of another, but mutual obligation based on common agreement. With the ever-broadening nexus of exchange and thus of legal relations, the rules of exchange must be made more general so as to provide for the Equality essential to the conditions by which exchange and its law of equivalent operates. The implementation of the law of value constitutes the implementation of the rule of law."<sup>22</sup>

From the commodity-form is derived the function of coercive Force, providing certainty in the formulation of Law and its enforcement. The next step in the derivation is "the development of certain principles of form which this coercive force must observe if it is to conform adequately to the form of the commodity."<sup>23</sup> The Law becomes increasingly impersonal and public, an instance separated from Civil Society through the development of the Norm and the generality of its application. So, in Law:

"...there emerges, on the side of the subjects, the adequate form of a reified social cohesion, and the fixed, positive norms find a material sanctioning instance analogous to the function of Money vis a vis prices: The extra economic force of Coercion."<sup>24</sup>

"Coercion....has to appear as emanating from an abstract collective person, exercised not in the interest of the individual....but in the interest of all parties to legal

21. Blanke et. al. (op. cit.) p. 123. The basis of this position is Marx's argument in ch. 2 Vol. I. of Capital: "The Process of Exchange," (see p. 178), as it is appropriated by Pashukanis in his Ch. 4. "Commodity and Subject." (see p. 113)

22. Blanke et. al. (op. cit.) (emphasis supplied). Compare Marx: "The content of the juridical relation is determined by the economic relation" (op. cit.) p. 178.

23. Blanke et. al. (op. cit.) p. 124

24. *ibid.* ; the important point being the extra-economic nature of the coercion.

transactions."<sup>25</sup>

By these means equal legal subjects are constituted and set free in a separate sphere of Politics. The resulting interactions "take the form of struggles to establish, or disagreements on how to interpret, rights; their content, however, is economic, i.e., dictated by movements of production and value-realization."<sup>26</sup>

The separation of the direct producers from the conditions of Production provides the basis for the development of Money into Capital and Labour into Wage-Labour, and requires a decisive functional change in the extra-economic coercive force. With the emergence of Capital, the principle of Equivalence in Exchange is undermined, and exchange relations become unequal in content whilst continuing to appear equivalent in form. Labour-power exchanges at its value as a commodity, but produces a higher value by virtue of its use-value, appropriated in Production and realized in Circulation by the Capitalist, whilst in appearances all labour is duly rewarded and profit thereby justified as the return of Capital. The function of extra-economic force now becomes specifically the protection of private property in the form of the Capital-relation: the "equal right" of Capital and Wage-Labour, the right of ownership of labour-power as a commodity, and the right of Capital to the proceeds of production.<sup>27</sup>

In this manner the rule of Capital is secured through a change in the coercive function which leaves no mark on the form of Law. At the same time the dual structure of capitalist rule is expressed in the separation between "Private Law", which continues to govern the production process, and "Public Law" relating to the abstract and

25. Pashukanis (op. cit.) p. 143. See also Neumann, F. (1957).

26. *ibid.*

27. *ibid.* p. 125.

general form of Public Authority. This division of bourgeois law into apparently autonomous spheres enhances and consolidates the apparent externality of the relationship of economics to politics.<sup>28</sup> The objective nature of this development now requires that the analysis "pursue the mode in which the forms affect each other as external and trace the general features of their effect as class relations within production."<sup>29</sup>

The further development of the concept of the particularization of the state defines the character of extra-economic coercive force as class-coercion: On the one hand, the conditions of existence of capital-in-general are secured in the appearance of class power as a neutral separated force standing above the exchanging parties through the general norms that constitute the form of law, whilst on the other, the operation of individual capitals is made possible because the extra-economic coercive force guarantees not just the possibility but the necessity for the sale of labour-power, as a result of the separation of the direct producers from the conditions of production. By this analysis Blanke et. al. claim:

"...to have shown why the "state" (as a concrete structure) constitutes in essence a general force of coercion which confronts even the individual bourgeois (individual competing capital) as a separated, neutral instance, but which, at the same time and only through this separation is, by virtue of its existence as a central force guaranteeing the law, a class force. Precisely in order to be a class force, the state must dissociate or 'particularize' itself (sich besondern)

28. *ibid.* p. 126

29. *ibid.* p. 127.

from the ruling class."<sup>30</sup>

Because material-economic relations present themselves as monetary relations, and relations between the subjects of exchange take on the form of legal relations, extra-economic interventions are mediated through Money and Law, and limited by those forms. The use of Law as a medium of State intervention is constrained by its externality in establishing standards or norms of behaviour that can only indirectly regulate the Wills of legal subjects in the exercise of their rights. Similarly Monetary Policy is limited insofar as it affects subjects only as abstract "money-owners" whose function in the reproduction process is beyond immediate State control.

The limits of State activity also depend on whether the intervention is directed against Capital or Wage-labour. Where the State attempts to curtail the controlling freedom of Capital, as for example by imposing Price and Monetary controls, Capital may retaliate by withholding investment, withdrawing capital, removing production to other countries, decreasing production, demanding compensation or reducing wages. Where on the other hand the State intervenes to facilitate Capital accumulation and reproduction, as by attempting to force the working-class to sell labour-power at a certain price or legislating in the field of industrial relations, the limit of State activity depends upon the organization of the working class and the historical

30. *ibid.* p. 129.

phase of "class constellations."<sup>31</sup> The mere defence of existing rights in situations of economic crisis may constitute a threat to capital accumulation. Irrespective of this degree of organization, further limits may be imposed where an intervention mediated through the regulation of working class rights affects also the system of capital reproduction, as where working class mobility is restricted (e.g. in Fascism) with consequences dysfunctional for the efficient allocation of labour resources in production.

**(b) Hirsch:**

The Frankfurt Approach derives the necessary Form of the State as a separate institution, not from commodity-circulation, but from the specifically Capitalist mode of social labour, "the appropriation of the surplus-product and the resulting laws of reproduction of the whole social formation, which objectively give rise to the particular political form."<sup>32</sup> Because the establishment of Capitalist relations of production is the condition for the fullest development and generalization of commodity - production, Hirsch criticizes the point of departure in:

"a concept of commodity producing society which disregards the existence of Capital (and which) is therefore an inadmissible abstraction, both logically and historically. Rather the antagonism of wage-labour and Capital, exploitation and surplus-value, is contained in the fully developed concept of commodity-producing Society: the exchange of equivalent commodities merely mediates.....the production and appropriation of surplus-value, the exploitation of living labour-power

31. *ibid.* p. 141.

32. Hirsch (*op. cit.*) p. 58.

and the valorization of capital."<sup>33</sup>

The emphasis at the outset is therefore on the coercive class-character of the State, in the Berlin current subordinated to the function of organization of antagonistic isolated Capitals in circulation through the institutionalization of general over private interests: here the function of extra-economic coercive force, as guarantor of the meeting of independent wills in Contract, is derived from the inability of individual subjects to provide the conditions for their own economic intercourse. According to Hirsch, however, this merely derives the form of the separate juridico-political instance from a functional deficiency, whereas function should be derived from form:

"One cannot make statements about the way in which the state apparatus functions, and about the conditions and possibilities of the political management of the system, before one has worked out consistently from the analysis of the basic laws of the social reproduction process what are the conditions for the constitution of the social form of the bourgeois State and the resulting determinants of its functions."<sup>34</sup>

Since here the State is not an institutionalization of the interests of "Capital in General", the question of the limits of its activity is integrally posed at an earlier stage in the development of the argument.

In the production process, each individual transaction conforms to the principle of equivalence, the worker selling labour-power and the Capitalist buying it at its value. However, the capital exchanged for labour-power is in reality merely a portion of the product of the labour of others which has been appropriated without equivalent,

33. *ibid.* p. 59.

34. *ibid.* p. 58.

moreover, not only must this capital be replaced by the producer, but replaced together with an added surplus.<sup>35</sup> The constant sale and purchase of labour-power is the mere form of the exploitation of Labour by Capital, and this process constantly reproduces itself, behind the backs of individuals, through the "blind operation of the law of value."<sup>36</sup>

The conditions for the constitution of the Form of the bourgeois state may now be logically derived: (1) The appropriation of surplus-value does not depend in bourgeois society on direct relations of force but is secured through the operation of hidden laws of reproduction. (2) Because this form of social reproduction requires the free disposal by the worker of labour-power and the capitalist of surplus-value in equivalent exchange, an essential element in the establishment of Capitalist Society is the abolition of direct relations of force and dependence. The manner in which the social nexus is established:

"necessarily requires that the direct producers be deprived of control over the physical means of force and that the latter be localized in a social instance raised above the economic reproduction process: the creation of formal bourgeois freedom and equality and the establishment of a State Monopoly of force."<sup>37</sup>

Thus the particularization of the bourgeois state "can not be understood as the institutionalization of a 'general will', but means rather the separation of the political apparatus of bourgeois

35. *ibid.* p. 59.; see also: Marx: Capital Vol. I. p. 729.

36. Hirsch (*op. cit.*) p. 60.

37. *ibid.* p. 61.



society from real individual and common interests."<sup>38</sup> The Capitalist State is first and foremost the expression of a particular historical form of class rule and not simply a bearer of social functions. Such functions are limited by the externality of the political instance to the social process of production and reproduction. However, the autonomy of the State as the authority guaranteeing the rules of equal exchange and commodity circulation is undermined when the conditions of the reproduction and self-expansion of Capital are threatened. The appearance of generality and class neutrality, determined by its separate form, is shattered by the necessity to intervene directly and with force:

"Freedom, equality and the rule of Law therefore only represent one side of bourgeois rule, which is based in the last analysis on the direct physical use of force. Likewise, the rule of general laws turns out to be constantly breached by executive measures which become necessary in certain situations to guarantee the general material conditions of production and reproduction and to suppress the working class."<sup>39</sup>

The bourgeois State is therefore caught in a contradiction arising from the form of its particularization, between the abstract-generality of its rules and the concreteness of its interventions in specific situations: the protection of market principles goes hand in hand with the direct exercise of force "for the specific and particular purposes of ensuring the reproduction and self-expansion of capital and the domination of the bourgeoisie."<sup>40</sup> Having derived the form of the State from the Capital-Labour relation, therefore, the necessity of the function of State intervention ultimately results from the fact that the capitalist process of reproduction structurally presupposes social functions which cannot be performed by individual

38. *ibid.* p. 62.

39. *ibid.* p. 65.

40. *ibid.*

Capitals.<sup>41</sup>

Only at this stage in the derivation of the form and function of the autonomized bourgeois State is it obvious that its apparatus can and must clash not only with the working class or sections of it, but also with the interests of individual Capitals and groups of Capitals as determined by the requirements of valorization. But even here the representation of the interests of "Capital in General" is only secondary and subordinated to the fundamental contradiction, and there is no guarantee within the formal articulation of State and Society that such a functional relationship will in practice be secured.<sup>42</sup>

The fundamental content of state activity is determined according to developments in the process of Capital reproduction, which must take place on an ever-expanding scale as a process of accumulation: "the permanent reconversion of surplus-value into Capital is imposed on the individual Capitalist as an external coercive law through competition."<sup>43</sup> Accumulation takes place in accordance with transformations in the composition of capital, allocated as Constant capital (buildings, raw materials, auxiliary products) and Variable capital (that which is spent in the purchase of labour-power and the process of creation of surplus-value).<sup>44</sup> The greater the Organic Composition of Capital (the ratio of "living" to "dead" objectified labour), the lower the rate of surplus-value and therefore of Profit. Given the basis of the Capitalist system, however, the competitive development of the productivity of social labour through technical

41. *ibid.* p. 66.

42. This point is in explicit opposition to the Berlin tendency; (see Blanke et. al. *supra* p ).

43. Hirsch (*op. cit.*) p. 67.

44. see Mandel, E. (1977) p. 167.

transformations of the labour process and development of the productive forces appears as the pre-condition of further accumulation. By the very requirements of its own reproduction, capital is therefore forced to introduce changes which tendentially destroy its basis through rendering living labour superfluous: The increasing organic composition of Capital (more "dead", less "living" labour) results in the tendency of the average rate of profit to fall:<sup>45</sup> "In this tendency lies the absolute necessity of that which is contained only as a possibility in the circulation of money: the manifest crisis of Capitalism."<sup>46</sup>

However, with the expansion of Total Capital in periods of rapid accumulation, through the introduction of new machinery, the increasing division of labour and development of the world market, the variable constituent may also increase (although in constantly decreasing proportions) as an ever-greater amount of capital is required to employ the same or a growing number of workers. Thus the unemployed "reserve army" of living labour, whilst always latent, becomes manifest only with the stagnation of the accumulation process, which may be avoided through successful mobilization of counter-tendencies: "The same influences which produce a tendency in the general rate of profit to fall, also call forth counter-effects, which

45. *ibid.* p. 166.; Hirsch (*op. cit.*) p. 68 ; hereafter T.R.P.F.

46. Hirsch (*op. cit.*) p. 70.

hamper, retard and partly paralyze this fall."<sup>47</sup> Thus the increasing productivity of labour may reduce capital expenditure by cheapening the elements of Constant capital and increasing the economy of their use, consequently curbing the rise in organic composition. Similarly Constant capital costs may be reduced by increasing the rate of turn-over through progressive techniques of organization, planning and management, or the improvement of means of communication. The technological transformation of the labour-process therefore gives rise both to the TRPF and to consequences which weaken its effect.<sup>48</sup> Crisis erupts with the failure of the countervailing influences, when the amount of surplus-value appropriated by individual capitals is no longer sufficient to maintain the necessary rate of accumulation, and hence the existing mass of surplus-value can no longer be profitably capitalized. Here:

"accumulation has reached a point where the profits associated with it are no longer large enough to justify further expansion. There is no incentive to invest and because there is no new, or no substantial new investment of capital, the demand for all commodities declines."<sup>49</sup>

The ensuing crisis functions as the vehicle for the mobilization of the counter-tendencies, as part of the process of "re-organization of an historical complex of general social conditions of production and relations of exploitation, which can proceed (however) only in a

47. Marx: Capital III p. 233. Ch.14.

48. Hirsch (op. cit.) p. 72.

49. Mattick, P. (1959) p. 43. (quoted in Hirsch p. 75)

crisis-ridden manner."<sup>50</sup> This reorganization involves: changes in the form of Capital itself, through concentration and centralization, Monopolies, extension of the credit system and transformation of relations of property and control through joint-stock companies; the expansion of Capital in external fields of production and the creation of a world market; and the accelerated development of the productive forces and scientific-technical progress.<sup>51</sup> At any given moment the limits and possibilities of Capital expansion are

"determined by general social conditions, which include the level of Technology, the size of the already accumulated capital, the availability of wage-labour, the possible degree of exploitation, the extent of the market, political relations, recognised natural resources and so forth. It is not the market alone but the whole social situation in all its ramifications which allows for, and sets limits to, the accumulation of Capital."<sup>52</sup>

The modern Interventionist State is therefore to be understood as a form of organization of social relations, peculiar to Capitalism, within which the contradiction between the growing socialization of production and the private nature of appropriation can temporarily move. The investigation of state functions must proceed by categorical analysis of the historical process of capitalist reproduction and accumulation, through a frame of reference incorporating three basic moments. Firstly, the increasing economic and political strength of the working class which accompanies the progressive extension of the Capitalist system leads to the necessary function of social pacification, exercised through Welfare-State intervention. This mode of bourgeois domination depends, however, upon the undisturbed progress of Capital accumulation and continuous economic growth,

50. Hirsch (op. cit.) p. 74.

51. see *ibid.* pp. 76-81.

52. Mattick (1969) p. 74. (quoted in Hirsch p. 74).

"the preconditions, in the long run impossible to satisfy, for the relative latency of the terrorist use of force and for the maintenance of the peaceful, civilized, formally legal and democratic form of appearance of bourgeois rule."<sup>53</sup>

Secondly, the "normal course of accumulation" is increasingly threatened by the TRPF, and by frictions and disturbances in the reproduction process associated with the progressive monopolization of Capital. Under monopoly conditions, the law of value operates less efficiently as a mechanism for regulating the distribution of social labour and imposing proportionality between the various spheres of production than under conditions of competitive Capitalism, and the state apparatus must intervene in specific situations, in favour of individual capitals, by influencing the conditions of valorization through subsidies, currency and taxation measures, or direct redistribution of revenue. As the productive forces develop, the process of accumulation requires the exercise of functions of capital organization that can no longer be supplied by individual capitals, and must therefore be realized through the intervention of the State. These processes lead to the consolidation of an extensive state or state-controlled finance and credit apparatus, which in turn requires a largely centralized banking system and the foundation of large-scale insurance and investment funds.<sup>54</sup> Beyond these general and structurally determined interventions, the state performs the function of global economic management, instrumentally controlling and regulating the sphere of circulation against the tendency to cyclical crises of over-production. In this respect fiscal policies may be supple-

53. Hirsch (op. cit.) p. 85.

54. *ibid.* p. 87.

mented by forms of wage-regulation through incomes policy, "concerned explanations" and moral appeals, the total effect of which is to reduce in absolute or relative terms the real income of the working class. Such interventions necessarily give rise to social conflicts across a broad spectrum of different interests, generating opposition from organized labour and disfavoured monopoly or non-monopoly

Capitals:

"The contradictions of the process of Capitalist reproduction reproduce themselves in intensified form on the political level in conflicts over tax-rates and quotas and over the extent or allocation of state expenditure - with the struggle of the working class to maintain and improve the material conditions of its reproduction being of necessity increasingly directed against the state. These conflicts must increase all the more as the process of capital accumulation slows down and comes to a standstill....This means that the material conditions of production and the development of the productive forces of society become a central area of the functions of the bourgeois state which at the same time must thereby reveal ever more clearly the limits of its possibilities, limits determined by its form."<sup>55</sup>

The third aspect of State Function is derived from the inability of individual capitals to provide the conditions for the continuous revolutionization of the productive infrastructure, made necessary by intensifying competition on the world market, and essential to the increase or stabilization of the rate of profit. Increasingly the material conditions of production are provided by the state through nationalization or quasi-nationalization since "because of their specific technological peculiarities and the character of their use-value (these essentials) cannot - or only to a limited extent or in an inefficient manner - be produced even by highly monopolized individual

55. *ibid.* p. 90 (emphasis added).

capitals."<sup>56</sup> As the process of accumulation advances, Capital's requirement for comprehensive research and development is increasingly satisfied by the State in its organization of Science and Technology. This function leads ultimately to direct State Intervention in individual industries with the provision of finance for technological development.

Several consequences as to the nature and limits of State activity follow this analysis of Form and Function. The first concerns the capacity of the State apparatus to manage the economic and social reproduction process. The production and appropriation of a mass of surplus-value sufficient in relation to the stage of accumulation reached cannot be essentially affected, but only modified, by State intervention, which remains merely a form of the contradictions of Capital within which they can temporarily move whilst nevertheless continuing to be historically determining. The State apparatus and Capital cannot therefore be conceived in a mechanical relation of opposition. The reproduction of Capital is conditioned by an instance formally separate from the ruling class, but not "detached from the movement of Capital, as though Capital had a pivot outside itself."<sup>57</sup>

Secondly, "to speak of the management capacity of the State apparatus

56. *ibid.* p. 93.

57. *ibid.* p. 99. : hence the critique of Voluntarism.



is to commit an error from the very beginning",<sup>58</sup> rather the bourgeois State must be conceived as the functional unity of a heterogeneous conglomerate of only loosely linked part-apparatuses.<sup>59</sup> The fragmented structure of the political - Administrative apparatus is a result of the fundamental contradiction under Monopoly conditions of its having to simultaneously consider the interests of competing individual capitals and secure the political domination of the bourgeoisie as a class:

"It is impermissible to claim abstractly for the State Apparatus as a presupposed whole the function of 'guaranteeing the general external conditions for the reproduction of Capital'. It has always had to, and increasingly it must, secure the quite particular profit interests of dominant Monopolies and monopoly groups, which brings it into serious difficulties and conflicts in the performance of its function of assuring the minimal conditions for the reproduction of capital as a whole and keeping the class struggle latent."<sup>60</sup>

Thirdly, since analysis of the laws of motion of Capital accumulation has shown that the fall in the rate of profit cannot be prevented in the long term and hence that the process of accumulation must tend towards stagnation, the State Apparatus is "ever more strongly drawn directly into intense economic struggles and is thereby forced to confront the proletariat as a barely disguised apparatus of repression."<sup>61</sup> In order to defend the profit of Capital the State intervenes to secure the reduction of real mass incomes through wages policy, tax exploitation and the direct redistribution of revenue, assisted by the ravages of inflation. At the same time, resources for the pacification of Labour become scarce, and past policies "rebound on the State apparatus when substantive reforms prove to be

58. *ibid.* p. 100.

59. The functional definition of the State bears an interesting resemblance to that of Althusser (1971) and Poulantzas (1968).

60. Hirsch (*op. cit.*) p. 101.

61. *ibid.* p. 103.

unrealizable, leading to a dismantling of Welfare-State illusions."<sup>62</sup>

The effect of these developments is:

"a tendency to destroy the basis of bourgeois domination, namely the illusion of the State's 'neutrality' and 'dedication to the common weal', and to put in question its ability to guarantee the material and ideological conditions of capital reproduction."<sup>63</sup>

### (c) Holloway and Picciotto

Holloway and Picciotto, in introducing the Staatsableitung debate into Britain, have stressed the importance of historical and concrete analyses of the State and Law.<sup>64</sup> Their critique of the German State derivation approach centres on the tendency within the Berlin school to reduce history to a logical category of Capital.<sup>65</sup> This failure is connected, as for example in the case of Blanke et. al., with the point of departure in commodity circulation: The effect of the absence at this earliest analytical stage of the coercive class character of the State is to render the approach fundamentally a-historical, because here the motive power of Capitalist development must logically lie in relations of conflict between individual capitals or commodity producers, rather than in antagonistic relations between Capital and Labour - in capital accumulation seen as a process

62. *ibid.* p. 104.

63. *ibid.*

64. Holloway & Picciotto (1977) ; (1978). Picciotto (1979).

65. Holloway and Picciotto cite the work of Altvater, Muller & Neuss and Blanke et. al. as prone to 'capital-logic' tendencies. (1977) p. 99. (n. 11)

of class struggle.<sup>66</sup> At the same time a distinction emerges between Logic and History such that historical analysis, whilst admitted to be of great importance, becomes external and secondary to the abstract derivation of Form from Function:

"On this level of abstraction (Form analysis), however, we can give only the general points of departure for the development of 'functions' of the process of reproduction....The question of how this formation takes place in detail, how it is transposed into structure, institution and process of the State, can no longer be answered by form analysis. It would have to be made the subject of historical analysis. Indeed the exact delimitation of form analysis raises difficult problems. It depends on how one determines the historical character of Marx's concept of Capital in general."<sup>67</sup>

Holloway and Picciotto retort: "If form analysis is to be understood as purely logical, and historical analysis as empirical, this will not help us to develop an historical - materialist theory of the development of the State."<sup>68</sup> On the contrary, the Capital relation must be conceived as an historical - materialist and not just a logical category.<sup>69</sup> In this respect the most adequate position is considered to be that adopted by Hirsch.<sup>70</sup> The initial derivation of the form of the State from the nature of the Capital relation enables a historical analysis of the development of its functions<sup>71</sup> which is:

"based on the categorical analysis of....the process of capital reproduction and accumulation; it must be borne in mind, however, that this is not a question of the logical deduction of abstract laws, but of the conceptually informed understanding of an historical

66. *ibid.* (1978) p. 22.

67. Blanke et. al. (*op. cit.*) p. 119.

68. Holloway & Picciotto (1978) p. 22.

69. *see; ibid* (1977) p. 85.

70. *ibid.* p. 99. n. 18. But for criticisms see (1978) pp. 27-28.

71. here function is derived from form, rather than form from function as in the Berlin current (*supra*).

process."<sup>72</sup>

The initial moment in the historical formation of the Capitalist State is the generalization of commodity production and the establishment of the preconditions of accumulation.<sup>73</sup> The crucial function of the Mercantile State is to guarantee exchange as the mediation of the separation of Production and Consumption. Feudal systems of communal property are replaced by institutions of private property through the constitution of individuals as legal subjects, bearers of rights and duties enshrined in definite legal procedures,<sup>74</sup> as labour is separated from the land and left with only its labour-power to sell. The particularization of the State as a separate form is thus beginning to be established through the dissolution of feudal bonds and the creation of exchange-rights and a "free" market in labour, however, until the commodification of Labour itself is achieved on a universal scale with developed commodity production, "social relations and State forms are by no means dominated by equal exchange but rather by its opposite, compulsion."<sup>75</sup> In this period unequal relations of appropriation must be backed by authority and force, and "free" labour is organized and controlled through "bloody legislation against the expropriated,"<sup>76</sup> vagabondage laws, statutes of Labourers, Laws of Settlement and Houses of Correction. Similarly the structuring of the Mercantile State around trade privileges, monopolies and regulations of commerce, indicates the essential inequality of social relations, overlain nevertheless by a developing legal framework of

72. Hirsch (op. cit.) p. 82. (emphasis supplied). Holloway & Picciotto's sensitivity to this problem distinguishes their contribution.

73. Holloway & Picciotto (1977) p. 86.; see Marx: Capital I. Part VIII: "So called Primitive Accumulation."

74. see Picciotto (op. cit.) p. 172.

75. Holloway & Picciotto (1977) p. 87.

76. see Marx: Capital Vol. I Ch. 28.

individual freedoms, rights and duties.

The second and "Liberal" moment of the State is characterized by the completion of the process of separation of labour from the means of production and subsistence, such that capital appears as naturally belonging to the buyer of labour-power and the worker enters production, not because of direct political or social coercion, but on the basis of the "dull compulsion of economic relations." Circulation now becomes the sphere of realization of surplus-value created in the exploitation of Labour, where commodity-capital becomes Money-capital and must be returned to the sphere of Production in the shortest possible time in the process of accumulation. Social relations are thus secured on the basis of free and equal exchange in the sphere of Circulation, however, the principle of equivalence, embodied in the contract of Employment, operates only in this sphere,

"within whose boundaries the sale and purchase of labour-power goes on, the very Eden of the innate rights of Man. It is the exclusive realm of Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, let us say of labour-power, are determined only by their own free will. They contract as free persons, who are equal before the Law. Their contract is the final result in which their joint Will finds a common legal expression. Equality, because each enters into relation with the other as with a simple owner of commodities, and they exchange equivalent with equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to his own advantage.....When we leave this sphere of simple circulation or the exchange of commodities.....a certain change takes place in the physiognomy of our dramatis personae. He who was previously the money owner now strides out in front as a Capitalist; the possessor of

labour-power follows as his worker."<sup>77</sup>

The particularization of the State as a separate instance with a Monopoly of Force raised above the economic reproduction process is an essential precondition of the appearance of equality in the exchange-relation, and enables exploitation to take place through the "dull compulsion" of economic laws. Legally this movement is accomplished by the removal of restrictions on labour mobility<sup>78</sup> and the alienability of labour-power through the contract of employment, and by the generality of application of the Law, which provides certainty and calculability in transactions between legal subjects: "the law must be general in its formulation, its generality must be specific, and it must not be retroactive."<sup>79</sup> However, there is a contradictory tension between the need for generality of application and precision in formulation, "which can be traced back to the contradiction between the formal equality of exchanges and their actual (unequal economic) content."<sup>80</sup> This primary contradiction of the Liberal moment of the State derives from the need of Capital to extract Absolute surplus-value from living labour in the process of accumulation; because if allowed to do so Capital will physically exhaust Labour, the Law cannot continue to operate solely on a general level, guaranteeing liberal self-regulation and providing procedures for the recuperation of market transactions that have failed, but must increasingly intervene in production specifically, through the activities of bodies of State officials who can selectively impose conditions of exchange - equivalence where these have broken down or

77. *ibid.* Ch. 6 p. 280; see Holloway & Picciotto (1977) p. 88.

78. by for example the Truck Act (1831) and the Master and Servant Act (1830); for a discussion of this aspect see Kinsey. R. (1979).

79. Neumann, F. (1957) p. 28.

80. Picciotto, S. (1979) p. 174.

cannot be provided through the free operation of the market. Thus Factory, Social Welfare, Education and Poor Law reforms, effected through specific codes of legislation, are necessary in order to moderate the thirst of capital for absolute surplus-value, and to maintain the appearance of equality in the sphere of Circulation essential for the containment of the initial contradictions of accumulation.<sup>81</sup>

The third moment of the State is defined by the exploitation of Labour in the form of Relative rather than Absolute surplus-value,<sup>82</sup> which expels living labour from Production and thus tendentially undermines Capital's conditions of valorisation, a contradiction expressed in the Tendency of the Rate of Profit to Fall.<sup>83</sup> Ensuing periodic crises involve continual economic, political and legal restructuring of the capital relation, as the State apparatus struggles to restore the conditions of accumulation through the mobilization of counter-tendencies. This requires the lowering of the organic composition of capital and the raising of the rate of surplus-value, the redistribution of resources from unproductive areas to the centres of accumulation, and the increasing exploitation of Labour. The outcome of the crisis, however, depends on class struggle at every level, and cannot be deduced from the formal requirements of "Capital in General." The present attempt by British Capital to raise the rate of surplus-value:

"does not simply mean the introduction of new Technology or the announcement of wage-cuts by individual employers, what is involved is rather a very long and complex struggle conducted at all levels, embracing such elements as the repeated attempt to restructure relations between

81. see Marx: Capital I. Ch. 10. "The Working Day" pp. 340-417.

82. see abid. Part IV.

83. see Hirsch (op. cit.) supra: p.

Trade Unions and the State and within the Trade Unions themselves (Donovan Commission, In place of strife, Industrial Relations Act, Social Contract), massive ideological campaigns (on productivity, inflation, etc), changes in State expenditure and taxation, the complex interplay of political parties, plans to introduce worker directors, etc."<sup>84</sup>

In this context, the first and most general limitation on the effectiveness of State activity is the nature of surplus-value production, whose contradictions can never be abolished but only modified by external State intervention. Secondly, it cannot be assumed that Law and State will function "rationally" in the interests of Capital in general. Whilst ever-closer ties must necessarily be created between individual capitals and the State, making the economy more planned and organized, the anarchy and competition of Capitalism is not thereby overcome but rather reproduced within the State Apparatus itself. This means an inevitable dislocation between State activity and the interests of Capital in general. The third and most important limitation on juridico-political intervention results from the separation of the Political and the Economic. Whilst the State must promote the accumulation of Capital, it must also:

"by reason of its very form, remain external to that process. Its action is essentially of a mediate nature - mediated basically through the forms of Law and Money. This imposes a certain bluntness on State measures to restructure Capital. The lack of specificity of the effects of the restriction of Credit and the money supply in the present crisis situation in Britain provides a good illustration of this."<sup>85</sup>

Here the particularization of the State, as a necessary precondition of developed surplus-value production, is increasingly undermined through direct intervention, not only in exchange relations, but in

84. Holloway & Picciotto (1977) p. 94.

85. *ibid.* p. 96. The conception of the "mediate" nature of State activity is indebted to the analysis of Blanke et. al. (*op. cit.*) (*supra*).



the conditions of valorisation in production. Increasingly the State contradicts its formal generality with selective and specific measures in particular fields (industrial aid, tax concessions etc) and gives rise to intensified political competition between favoured and disfavoured sections of Capital, whilst at the same time the State Apparatus as an instrument of force and repression becomes visible as the struggle between Capital and Labour intensifies.<sup>86</sup> Similarly the generality of Law is increasingly undermined by the modification of the legal apparatus and its supplementation by new forms:

"the general codes for the liberal form of law have become the overblown regulatory systems which increasingly require an elaborate bureaucratic apparatus. The old contradiction between generality of application and specificity becomes the conflict between legal certainty and administrative discretion."<sup>87</sup>

The general jurisdiction of courts of law is complemented by specific Tribunals, which can work more closely with the bureaucratic apparatus. Even central aspects of Private Law (liability, individual responsibility) are undermined by the increasing socialization of the means of production and the need for its legal containment. Finally there is the drift towards open coercion which tendentially threatens the autonomisation of Law, "the outlawing and forcible suppression of non-permitted labour struggles, the repressive use of the law relating to foreigners and restrictions on the freedom of demonstration and

86. This aspect is more fully developed by Hirsch (op. cit.) p. 106. (supra).

87. Picciotto (op. cit.) p. 176.

opinion."<sup>88</sup>

#### (d) Conclusions

The State Derivation approach represents a significant advance over crude economism (reduction to the material base) and instrumental voluntarism (reduction to dominant Class Will). However, the suspicion of economic reductionism persists, in the theoretical consequence of the derivation of Law and State from commodity relations.<sup>89</sup> The question of "how the contradictions of Capital express themselves in political form and what is the relation between the tendency of the rate of profit to fall and the dynamic of political development"<sup>90</sup> is not adequately answered in the analysis of the juridico-political. Most serious is the failure to recognise specific variations in forms of legal right and subjectivity through their subsumption within a unitary category of economic subject,<sup>91</sup> and the tendency to reduce the State to its constitutional legal

88. Hirsch (op. cit.) p. 106. Given Holloway & Picciotto's general acceptance of Hirsch's problematic (supra) the under-representation in their analyses of the directly coercive aspects of Law and State is surprising. Hirsch's analysis is certainly the more prescient in this respect.

89. All currents within the approach begin with some aspect of commodity relations, e.g. the circulation of commodities (Pashukanis, Blanke et. al.) the exploitation of Labour by Capital (Hirsch), the commodification of labour-power and its exchange with Capital (Tuschling), the contradiction between the production of use-values and the realization of surplus-value through exchange (Sauer); see Jessop's discussion (op. cit). At this level of criticism we are not concerned with the merits or otherwise of Pashukanis's specific contribution, for which see Jessop pp. 349-351.

90. Holloway & Picciotto (1977) p. 92.

91. This point will be developed in the discussion of Hirst's contribution (infra sections III & IV.)

aspect.<sup>92</sup>

Marxist Theory should also be judged by its capacity to enable historical research and concrete analysis of the current situation, and the prospects of the theories considered are not good in either respect. The highly abstract nature of the analysis of form and function of Law in the Rechtsstaat at the level of the Mode of Production:

"ignores their historical constitution and periodization as well as their possible overdetermination through other social forms and/or forces. This entails a certain theoretical indeterminacy at more concrete and complex levels of analysis and raises important questions about how a research project should move to lower levels richer in determinations without denying the shift by treating these levels as mere instances of the abstract and/or without abandoning previous analyses in favour of a surface description of empirical phenomena."<sup>93</sup>

The contributions of Holloway and Picciotto on the State, and of Picciotto specifically on Law, represent a less than successful attempt to provide Hirsch's programmatic "conceptually informed understanding of the historical process."<sup>94</sup> They recognise that the problem:

"is to analyse social developments not simply in terms of the form of class struggle (for this tends to an over-determinist view of social development), nor simply in terms of its content, but to see that social development is determined by a dialectical interaction of form and

92. This tendency exists even in the best examples such as Hirsch. Poulantzas on the other hand is more sensitive to the State's rate as functional unity of legality and illegality (infra ).

93. Jessop. (op. cit.) p. 348 (emphasis supplied).

94. Hirsch (op. cit.) p. 82.

content."<sup>95</sup>

Thus "concrete" analyses should be seen not as a departure from the State Derivation debate "but as a development of it, the content of class struggles (being) analyzed in a relation of dialectical tension to their form."<sup>96</sup> However, their actual analyses of the development of the form and functions of State and Law remain at a high level of generality and abstraction, which indicates incoherence and ambiguity in the "dialectical" research programme. At this point a theoretical economism may be asserting itself in the form of an irreconcilable opposition between the abstract and logical on the one hand, and the concrete and historical on the other, the latter becoming mere instances of the former in the absence of the proper development of mediating theoretical determinations. This enables certain crucial reductions, with definite political consequences, to enter the argument. The very question of the limits of State and Legal activity, whilst validly posed and adequately answered at the most general level, in its more concrete application acquires an essentialist dimension. From the separation of the Political and the Economic is derived the necessity of the State, by reason of its form, to remain external to the process of accumulation : "Its action is essentially of a mediate nature - basically mediated through the forms of Law and Money."<sup>97</sup> The crisis demands that this generality be continually "undermined" and contradicted by selective and specific State interventions in the process of valorization, and by increasing particularity in legal relations with the administration of specific bureaucratic codes through Tribunals. The effect of these developments is "a tendency to destroy the basis of bourgeois

95. Holloway & Picciotto (1978) p. 30.

96. *ibid.* p. 31.

97. *ibid.* (1977) p. 96.

domination, the illusion of the State's neutrality, and to put in question its ability to guarantee the material and ideological conditions of capital reproduction"<sup>98</sup>

This analysis cannot provide, without distortion, adequate understanding of the complexity of contemporary juridico-political developments. The successful articulation by the New Right of an "Authoritarian Populism"<sup>99</sup> is enough to cast doubt on the apocalyptic tone of the analysis : (1) The emphasis on the "mediate" and external nature of State activity through Law and Money does not take sufficient account of repressive aspects of law or of direct State coercion in the drift towards a fundamentally more authoritarian society. (2) If this drift can be secured nevertheless with a degree of popular consent, despite the dismantling of Welfare State functions and the specificity of political interventions, then the "contradiction" supposedly "destroying the basis" of bourgeois domination and questioning the ability of the State to manage the crisis is revealed as essentialist.<sup>100</sup> If the limitations on State activity can properly be described only as tendential, then the value of the approach in analyzing the complex content of the current situation must be doubtful. (3) Similarly in respect of Law, the category of "contradiction" between generality and specificity, certainty and administrative discretion is essentialized, and employed at a level so abstract as to be virtually meaningless in the face of

98. Hirsch (op. cit.) p. 104. (emphasis supplied).

99. the term is Hall's refinement of Poulantzas's "Authoritarian Statism." These aspects will be considered below : see Section III and Ch. 8. S. II.

100. The effect of this essentialism is "apocalypticism" - the underestimation of the resourcefulness of the State in managing the crisis.

the diversity of current legal struggles. The theoretical determinations necessary for the adequate analysis of different forms of right and subject embodied in legal institutions and legislation are absent.

Consequently, at the level of political practice, only the vaguest prescriptions are offered, centring on the limitations of "bourgeois right",<sup>101</sup> and ignoring the specificity of various contemporary legal struggles. Law as a Terrain of struggle, a form of the capital-relation within which real political and social advances may be made, is not properly theorized, and in this absence an essentialist economic determination asserts itself.

The preceding criticisms may be briefly resumed as :a tendency to reduce Law to the Economic; and a tendency to reduce the State to Law and constitutional legality.

## II The Althusserian Approach: Poulantzas

The Althusserian approach is characterized by the systematic definition of a field of concepts - Mode of Production, Social Formation, determination in the last instance and overdetermination, Relative Autonomy - distinguishing a scientific dialectical and historical Materialism from bourgeois ideology. Its specific targets are the distortions of Stalinism and the humanist reaction to Soviet theory and practice. The motor of History is class struggle, its conditions determined fundamentally by economic contradictions between the forces and relations of production; history is therefore a process without a

<sup>101</sup>. see Picciotto. (op. cit.) ; Arthur, C. (1978).

human or class subject.<sup>102</sup> In this process, individuals function as bearers (trager) of the social relations entailed in the reproduction of a complex structured whole (the Mode of Production), comprising several Relatively Autonomous regions (economic, juridico-political, ideological) with specific effectivities, whose articulation is determined in the last instance by the economic - which assigns to one or other of these levels the dominant role.<sup>103</sup>

For Poulantzas, the foremost representative of the Althusserian approach in theorizing Law and State,<sup>104</sup> the homology in the CMP between relations of Property and of real appropriation<sup>105</sup> (the Capitalist separation of the direct producer from possession of the means of Production) determines a specific autonomy of the political and the economic:

"This autonomy has theoretical consequences for the object of study. It makes possible a regional Theory (in the very strict sense) of an instance of this Mode, e.g. a theory of the Capitalist State; it permits us to constitute the political into an autonomous and specific object

102. Althusser, L. (1976) p. 52.

103. abid. (1969). (1970).

104. Althusser's own contribution is primarily at the level of Philosophy [see however "Ideology and Ideological State Apparatus" in Althusser (1971)], which in his self-criticism (1976) becomes "Class Struggle in Theory", replacing the definition "Theory of Theoretical Practice."

105. Poulantzas, N. (1973) begins with the "invariant-elements" of "production in general": labour, means of production, non-labourer, relation of real appropriation, relation of property. [The structuralist tendency in the approach is most fully realized in Balibar's "combinatory of elements" (1970).] The question of Poulantzas's structuralism will not be considered in this brief account. Jessop has stressed the continuity in Poulantzas's treatment of Law from 1968-1978 (op. cit.) and this substantive content will also be emphasized here. Methodologically, however, a definite shift is apparent, and "structuralist" terminology is entirely absent from "State, Power, Socialism" (1978).

of Science"<sup>106</sup>

The "juridico-political" must therefore be studied in terms of its historically determined place and function within the complex totality of structures and practices involved in the reproduction of the CMP. The existence in bourgeois society of a "separation" between economic and juridico-political relations is thus constitutive of the point of departure for analysis, and the question of the source of this "particularization" does not immediately arise.<sup>107</sup> The investigation of Law and State in specific Modes of Production leads to their analysis in actual Societies through the concept of the articulation of Modes of Production in concrete Social Formations.

The close relation between Law and State enables the analysis to proceed in terms of the specific effectivity of the "juridico-political" instance and its corresponding ideology at the economic, political and ideological levels. The designation "juridico-political superstructure of the State" nevertheless spans two relatively autonomous levels, "namely the juridical structures (the law) and the political structures (the State).....whose concrete combination depends on the mode of production and the social formation under consideration."<sup>108</sup> The problem of this articulation is thus displaced from the abstract to the concrete analysis, and the use of the common term is considered "legitimate in so far as the Marxist classics have effectively established the close relation between these

106. *ibid* (1973) p. 29.

107. this is the basic methodological point on which Poulantzas is criticized by Holloway & Picciotto (1978).

108. Poulantzas (1973) p. 42 n.



two levels."<sup>109</sup>

Firstly, in respect of socio-economic relations and the economic class struggle, the juridical structures of the Capitalist State have as their effect the isolation of agents in the Mode of Production such that the antagonistic nature of class relations is concealed. This isolation effect "is terrifyingly real; it has a name: competition between the wage-earning workers and between the Capitalist owners of private property"<sup>110</sup> and covers the "whole ensemble of socio-economic relations." The historical function of the juridico-political instance is to dissolve restrictive feudal relations secured through mystical and religious ideologies by setting up political individuals-persons as free and equal subjects of Law, instituting a system of rules which organizes Capitalist exchanges, including the sale and purchase of labour-power, and providing the "framework of cohesion" in which commercial encounters can take place.<sup>111</sup> The institutional fixing of "private" State-subjects is accompanied by the development of rules of "public" Law, presenting the characteristic abstraction, generality and formality of the modern juridical system and regulating the relations of the subjects of the State to the central power.<sup>112</sup>

Secondly, however, in relation to the organization of the State and the political class struggle, the effect of the juridico-political is

109. *ibid.* This conflation is one of the weaknesses in Poulantzas's analysis: see *infra* : conclusion to this section.

110. *ibid.* pp. 130-131 (emphasis in original).

111. *ibid.* p. 53.

112. *ibid.* p. 163.

to constitute a factor of cohesion.<sup>113</sup> Public unity is accomplished at the same time as private individuation, such that the State "represents the unity of an isolation which, because of the role played by the ideological, is largely its own effect."<sup>114</sup> The State strives to overcome economic isolation within dominant classes and class functions, through their organization at the political level; its class character is thus refracted through the universality of the isolation effect:

"The institutionalized power of the Capitalist class State presents its own class unity, precisely insofar as it can pose as a national-popular State, i.e. as a State which does not represent the power of one or several determinate classes, but which represents the power of the political unity of private agents, given over to economic antagonisms which the State claims to have the function of surmounting by unifying these agents within a 'popular-national' body."<sup>115</sup>

A certain "Relative Autonomy" vis-a-vis the politically dominant classes is thus inscribed in the institutional Materiality of the State Hence also the critique of Voluntarist and instrumentalist conceptions:

"State Power is not a machine or an instrument, a simple object coveted by the various classes; nor is it divided into parts which, if not in the hands of some, must automatically be in the hands of others: rather it is an ensemble of structures."<sup>116</sup>

Similarly the modern bureaucratic apparatus presents itself "as the unity, the organizing principle and incarnation of the 'general

113. *ibid* p. 44.

114. *ibid*. p. 134.

115. *ibid*. p. 276.

116. *ibid*. p. 288.

interest' of Society."<sup>117</sup> It is correlative with the "axiomatization of the juridical system into rules/laws which are abstract, general, formal and strictly regulated and which distribute the domains of activities and competences."<sup>118</sup> This formal-rationality is a precondition of the systematic masking of knowledge and of secrecy within the bureaucracy, and is "possible only where political class domination in particular is absent from the bureaucratic apparatus, being supplanted by this ideology of organization."<sup>119</sup>

The Capitalist State therefore presents this peculiar feature, that nowhere in its actual institutions:

"does strictly political domination take the form of a political relation between the dominant classes and the dominated classes. In its institutions everything takes place as if the class 'struggle' did not exist. The State is organized as a political unity of a society of divergent economic interests and these are presented not as class interests but as the interests of 'private individuals', economic subjects: this is connected to the way in which the State is related to the isolation of socio-economic relations, an isolation which is partly the State's own effect."<sup>120</sup>

The Relative Autonomy of this State is possible through its double function of isolation (of all economic subjects) and unification (of the dominant classes through their political organization). The relation between the national-popular class State and the dominant classes is secured through their hegemonic leadership within the

117. *ibid.* p. 216.

118. *ibid.* p. 349.

119. *ibid.* p. 216; p. 350; The question of the materiality of knowledge and the structures through which it is expressed is taken further in the "Foucauldian" aspects of "State, Power, Socialism" (1978).

120. *ibid.* (1968) p. 85.

power bloc.<sup>121</sup> The class struggle in a Capitalist formation:

"makes it possible for a 'power bloc', composed of several politically dominant classes or fractions to function. Amongst these dominant classes and fractions one of them holds a particular dominant role, which can be characterized as a hegemonic role....The hegemonic class is the one which concentrates in itself, at the political level, the double function of representing the general interests of the people/nation and of maintaining a specific dominance among the dominant classes and fractions."<sup>122</sup>

The paradoxical character of class power resides in the State's maintenance of a relative autonomy with regard to the dominant classes, at the same time as it constitutes, through the hegemonic power bloc, their "unambiguous and exclusive political power."<sup>123</sup> Thus it is the political rather than directly economic interests of the dominant classes that are represented in the Capitalist State, which may therefore intervene against the long-term economic interests of one or other fraction of the dominant classes where this is necessary for the realization of their political class interests. In this sense the State has "inscribed in its very structures a flexibility which concedes a certain guarantee to the economic interests of certain dominated classes, within the limits of

121. These are Poulantzas's key political concepts, enabling the mediation of the structure by "class struggle." As with Althusser, the position of class struggle within the analysis and its relation to the "structure" of the Mode of Production is problematic, leading to charges of Theoreticism. Poulantzas's appropriation of "hegemony", "historic bloc" etc, is indebted to Gramsci. The question of Poulantzas's reading of Gramsci cannot be considered here; see however Hall, Lumley & McLennan in "Cultural Studies 10" (On Ideology) (1977)

122. *ibid.* p. 141. (emphasis in original).

123. *ibid.* p. 288 (emphasis supplied)

the system."<sup>124</sup>

Thirdly, the effect of the juridico-political at the level of Ideology is specified according to the central role played by juridico-political ideology in the CMP. The function of ideology in general is to insert agents, through their practical activities, into a given structure as it supports, thus

"hiding the real contradictions and reconstituting on an imaginary level a relatively coherent discourse which serves as the horizon of agents' experience....by moulding their representations of their real relations and inserting these in the overall unity of the relations of a formation."<sup>125</sup>

The relation between the dominant ideology and the politically dominant class is secured through the constitution of the ideological as a regional instance within the unity of a structure which has as its effect the dominance of a given class : "The dominant ideology, by assuring the practical insertion of agents in the social structure, aims at the maintenance (cohesion) of this structure, and this means above all class domination and exploitation."<sup>126</sup> The ideological instance is itself divided into various regions : moral, juridical, political, aesthetic, religious, economic, and philosophical, the dominance of one over the others reflecting the unity of the broader structure. In the CMP, where the economic generally plays the dominant role, "we see the dominance of the juridico-political

124. *ibid.* p. 190.

125. *ibid.* p. 207. (following Althusser (1969) (1971)).

126. *ibid.* p. 209.

region in the ideological."127 Thus:

"Liberty, equality, rights, duties, the rule of law, the legal state, the Nation, individuals/persons, the general will, in short all the catchwords under which bourgeois class exploitation entered and ruled in history, were directly borrowed from the juridico-political sense of these notions."128

This particular ideology is in the "best position" to fulfil the role of ideology in the CMP, penetrating every layer of the social structure and securing the effect of isolation : "It is the best placed to hide the real index of determination and dominance of the structure, and to cement the cohesion of social relations by reconstituting their unity on an imaginary plane."129 It is also the framework for the rational-legal legitimation of bourgeois class domination, enabling the class state to be represented as the unity of the people-nation.

Poulantzas can then characterize various forms of State, "Normal", "Exceptional", and "Authoritarian." The "Normal" State is defined according to the organic regulation of forces within the power bloc and between the power bloc and the masses under conditions of Representative Democracy, Universal suffrage, and competition between political parties, securing a stable hegemony based on "constitution-alized Violence" and the rule of law, the abstraction and formality of legal procedures, and the separation of powers. The "Exceptional" State, on the other hand, is characterized by a crisis in the

127. *ibid.* p. 211.

128. *ibid.*

129. *ibid.* p. 215. Poulantzas's analysis of ideology in (1973) is heavily couched in the structuralist terminology of "dominance", "subordination", "effects of the structure", "place", "position", "region", "level", "insertion", "agents" and so on. Most of these terms are absent in his analysis of Law and legal ideology in (1978). Their use tends towards "abstract-formalism" at the expense of more concrete content. (see *infra*: Ch. 4.)

restructuring of the power bloc and its relation to the people that cannot be resolved "organically" because of the breakdown of conditions of representative democracy, the suspension of elections, and the banning of organized political opposition, leading to a pervasive hegemonic crisis and a corresponding drift towards coercion and physical repression, the decline in the separation of powers and the rule of Law, and increased bureaucratism and arbitrariness in State activity. In such conditions the precise organization of the power bloc will determine either a Fascist State or a Military dictatorship, neither of which political forms can secure the organic and hegemonic domination possible in bourgeois democracies.<sup>130</sup>

Of more direct relevance to Western democracies is the development of an "Authoritarian Statism", characterized by "intensified State Control over every sphere of socio-economic life combined with radical decline of the institutions of political democracy and with draconian and multiform curtailment of so-called 'formal' liberties."<sup>131</sup> This State form, whilst having roots in the "Normal" State, nevertheless permits the incorporation of increasingly exceptional features without however thereby becoming a fully "Exceptional" State. The generality and abstract-Universality of the juridical system is challenged in this moment through State intervention in increasingly significant areas:

"It can no longer be confined to the mould of general, formal and Universal norms essentially adapted to State involvement in maintaining and reproducing the 'general conditions' of production. The economic role of the State is modelled on specific acts of regulation, corres-

130. see Poulantzas: "Fascism and Dictatorship" (1970) and "The crisis of the Dictatorships" (1976).

131. "State, Power, Socialism" (1978) p. 204.

sponding to clearly defined conjunctures, situations and interests. The multiplicity of socio-economic problems tackled by the State also requires more and more elaborate concretization of these general norms."<sup>132</sup>

A number of aspects of this process may be identified: (1) The power to fix norms and enact rules is shifting from the Legislature to the Executive and the State Administration. The Universal rationality of Parliamentary Legislation is giving way to the instrumental rationality of bureaucratic efficiency. Moreover, the initiative in proposing laws now belongs not to elected representatives but to the Executive Civil Service: "Such laws are no longer inscribed in the formal logic of the juridical system but are entered in the account book of concrete, day to day economic policy embodied by the administrative apparatus."<sup>133</sup>

Correspondingly, social control through general and universal norms defining "right" and "wrong" is now "combined with individualized regulation that starts out from the 'mentality' (the presumed intention) of each member of society considered as a potentially guilty subject."<sup>134</sup> The movement is from the punishable offence laid down by Universal and General act of Parliament "towards the suspicious circumstance whose contours are administratively defined by supple, malleable and particularist regulation."<sup>135</sup> If law is not actually in decline, it is certainly undergoing a retreat.

132. *ibid.* p. 218.

133. *ibid.* p. 218.

134. *ibid.* p. 220.

135. *ibid.*



(3) The "Irresistible Rise of the State Administration"<sup>136</sup> is coupled with the dislodging of parties of power from their traditional positions and a loosening of the "ties of representation" between them and the power bloc, such that the functions of organizing the political interests and ensuring the hegemony of the dominant classes devolves upon the Executive and the State Administration:

"No longer is it a question of striking political compromises in the political arena - that is, of publicly elaborating the hegemonic interests in the form of a National Interest. The various economic interests are now directly present as such within the administration. More precisely, the massive hegemony of Monopoly Capital is everywhere realized under the aegis of the administration and the Executive."<sup>137</sup>

With the breakdown of ties of Representation, political parties cease to operate as centres engaged in the political elaboration and the working out of compromises and alliances around a more or less precise programme, and become increasingly mere "transmission belts for executive decisions."<sup>138</sup>

(4) The need for "professional secrecy" within the administrative apparatus triumphs over demands for public accountability, involving a "considerable restriction of political liberties, understood as forms of Public Control over State activity."<sup>139</sup>

(5) Accompanying the curtailment of democratic liberties, the "separation of powers" between the Legislative, Executive and Judiciary, always of a more or less fictitious character, is subject

136. see *ibid.* Part 4. Ch. 2.

137. *ibid.* p. 224.

138. *ibid.* p. 229.

139. *ibid.* p. 227.

to final elimination.<sup>140</sup>

Crucially, the context of the decline of the "Normal" state and bourgeois political freedoms and its replacement by authoritarian control penetrating all levels of society, is given by developments in the juridico-political instance and declining juridical ideology. At the stage of State Monopoly Capitalism, where the dominant role is played by the Political rather than the Economic (as is the case in the pure CMP), the juridico-political region in the ideological "gives way to economic ideology (of which Technocratism is only one aspect) which tends to become the dominant region of the dominant ideology."<sup>141</sup>

This approach too represents a significant advance over crude economism and voluntarism, but again, the question arises whether a sophisticated form of reductionism has not been substituted in their place. The theoretical development of political concepts such as power bloc, hegemony, dominant and dominated classes, is possible because the specific separation of the political and the economic in the CMP is considered to permit the constitution of the "Political" as an autonomous and specific object of science. The investigation of the relation between the various instances can then proceed within the framework given in the Marxist Topography<sup>142</sup> of base and superstructure, Relative Autonomy, specific effectivity and

140. *ibid.*

141. (1968) p. 211.

142. For Althusser this conception remains essential to Materialism: "The position of the Marxist Topography protects the dialectic against the delirious idealist notion of producing its own material substance" (1976) p. 140. The structuralist charge is denied; formalism, theoreticism, Spinozism are confessed, leaving the Marxist Topography intact (see (1976) "Elements of self-criticism" 4. "On Spinoza".)

determination in the last instance, pre-empting the question of why social relations in bourgeois society should assume separate economic and political forms. This conception of Totality is vulnerable to the charge that it "only grasps the surface, that is the manner in which 'economy' and 'politics' appear as separate entities and not specifically related."<sup>143</sup> The result is a "Politician" tendency to ignore the effects of economic contradictions, such as the tendency of the rate of profit to fall, arising from the process of capital accumulation in concrete social formations.<sup>144</sup>

The recurrent problem of the relation of abstract Theory (Mode of Production) to Concrete analysis (Social Formation), in this case not accompanied by the "Logic/History" dilemma because of the Althusserian anathematization of History,<sup>145</sup> is manifest in the tendency towards "structuralist-abstractionism" and "abstract-formalism" (the increasing predominance of form over content).<sup>146</sup> The temptation is to foreclose opportunities for more detailed investigation at lower levels of analysis by appealing to the principles of structural causality and determination "in the last

143. Wirth, M. (1977) p. 313 n.; see McDonnell & Robins (1980) p.159. For epistemological reasons, Althusserianism can countenance neither the category of Form nor the problematic of Essence and Appearance (see Ch. 4. infra.)

144. see Holloway & Picciotto (1978) p. 18.; also Jessop (1980) p. 358.

145. Because of Althusserian epistemology (real-concrete/concrete-in-thought) "diachrony" is a category not of the concrete but of knowing, located entirely within knowledge: "logic/history" is therefore a "banal opposition" (see: Althusser: (1970) pp.108-9). This question and that of Althusser's reading of Marx's 1857 Introduction will be considered in Ch. 4. (infra). Here it can be noted that the problem of concrete analysis is not resolved by Althusser's highly abstract/philosophical observations.

146. see Laclau's (1977) appraisal of Poulantzas and of the "Poulantzas - Miliband" debate (in Blackburn. ed. 1972). Despite his criticisms of Poulantzas, Laclau remains definitely an Althusserian (see pp. 78-79) and therefore vulnerable to broader epistemological objections to the general position.

instance", or worse, to attempt to explain concrete phenomena by the illegitimate extension of concepts engendered at too high a level of abstraction. The attitude of Poulantzas, when faced with a complex reality,

"is to react with taxonomic fury, and his taxonomy is set at a level of abstraction so high that the symbolic functions of the concepts necessary tend to predominate; These symbols enter into relationship with each other and create in turn symbols of these relations, and all contact with the original meaning is lost."<sup>147</sup>

This theoretical indeterminacy, and the general structuralist position within which it is located, have effects on the concrete analyses, which, where they succeed, do so "in spite rather than because of his method."<sup>148</sup> (1) There is a tendency, particularly in the earlier work, to over-emphasize the inscription of political class domination within the institutional structure of the Capitalist State, at the expense of more concrete analyses of political struggles, within the power bloc and between it and the masses.<sup>149</sup> In the structuralist approach, class struggle is absent in the consideration of the abstract Mode of Production, and exists only in the concrete economic, political and ideological conditions of actual Social Formations, hence the systematic tendency towards its neglect.<sup>150</sup>

(2) The analysis of ideology assumes that social classes have necessary or paradigmatic ideologies, and that ideologies are there-

147. Laclau (1977) p. 70.

148. *ibid.* p. 71.

149. see Jessop. (1980) p. 358.

150. see Althusser (1976): "The question of class struggle in ideology did not appear. Through the gap created by this 'Theory' of ideology slipped theoreticism: Science/Ideology". p. 141 (still denying "structuralism").

fore composed of elements ('Nationalism', 'Militarism', 'Imperialism', 'abstract legal universalism') with definite class belongings.<sup>151</sup>

The importance of non-class interpellations and movements (gender, ethnic, youth) in the struggle for hegemony and the constitution of political parties is missed, despite the possibilities for such analysis provided by the concepts of isolation effect and individuation.<sup>152</sup>

(3) The treatment of "Authoritarian Statism", an inadequately specified hybrid of "Normal" and "Exceptional" elements under the dominance of the former, does not account for new forms of democratic participation and representation that accompany the decline of "representative democracy". The general depiction of Authoritarian Statism in terms of the growing economic role of the State and the permanent instability of ruling hegemony:

"is essentially descriptive in character and does not elaborate either principle of explanation in any detail. This reflects the need, in part, to abstract from particular conjunctures to present a general account of Authoritarian Statism but it also lends itself to the unfortunate technique of subsuming a large number of disparate contradictory and unevenly developed tendencies under one loosely specified concept."<sup>153</sup>

Here the dangers of adopting a still highly abstract analysis in the explanation of the British national conjuncture are particularly clear.

(4) The reductionist/politician tendency is exacerbated in the case of Law by its conflation with the State in the concept of the

151. see Laclau (1977) p. 94.; Jessop (1980) p. 359.

152. these possibilities have been investigated by Laclau (1977) in his analysis of class and popular-democratic interpellations; see also Hall, (1978 b); (1980 d).

153. Jessop (op. cit.) p. 360. (emphasis supplied).

"juridico-political superstructure", such that the question of the specific effectivity of concrete legal institutions and practices is never properly addressed<sup>154</sup> but subordinated to that of the juridico-political instance in general. The account of the decline in the abstraction and generality of the "rule of law" and its subversion by particularistic State intervention does not specify, other than in very general terms, the conditions and characteristics of the development of new legal-administrative forms of regulation; The decline in the bourgeois "rule of law" does not necessarily imply the complete demise of Law, but requires rather consideration of other, still legal (not merely technocratic), forms of organization. Similarly the corresponding decline in classical bourgeois juridical ideology cannot be supposed unproblematically to be accompanied by the irresistible rise of "economic ideology" which "tends to become the dominant region of the dominant ideology"; this ignores the specificity of new forms of legal ideology that cannot be reduced to "economic" organization or mere technocratism. The question of the limitations and possibilities of particular areas of Law as fields of struggle is never adequately posed, and the resulting "concrete" analysis is even more impoverished than that of the State Derivation school.

On the other hand, the strengths of the Poulantzian analysis are co-

154. it is neutralized by the infamous footnote on p. 42. of (1973).

extensive with its weaknesses, deriving from the same source.<sup>155</sup>

"Law in general" is successfully located within a Totality of forms of bourgeois domination - economic, juridico-political and ideological - and the State is not reduced to the constitutional legality of the Rechtsstaat : "The activity, role and place of the State stretch a very long way beyond law and judicial regulation, a fact which cannot be grasped by a juridical-legalistic conception."<sup>156</sup> The concrete functioning of the State does not invariably take the form of law-rules since many of its practices escape juridical systematisation and order.<sup>157</sup> However, "the State often transgresses law rules of its own making by acting without reference to the law ..... in the higher interests of the State (raison d'Etat)"<sup>158</sup>, and further, because the State, as the practitioner of legitimate violence and physical repression, takes precedence over Law, "the activity of the State always overflows the banks of Law, and it can, within certain limits, modify its own law."<sup>159</sup> Again, the institutional materiality of bourgeois domination extends beyond the legal sphere and incorporates techniques of knowledge and Power managed through the "irresistible rise of the State Administration".<sup>160</sup> At a general level, then, the account of the decline in the rule of law accompanying the rise of Monopoly Capitalism and of its substitution by juridico-political and administrative particularism may be considered adequate.

155. It must be stressed that Poulantzas is not concerned with specific aspects of Law, but with its general tendencies and development in the broader context of the State. These criticisms remain pertinent however insofar as a basis for theorising and concretely analyzing Law is sought in his work.

156. Poulantzas (1978) p. 84.

157. *ibid.*

158. *ibid.* (emphasis supplied).

159. *ibid.* p. 85. (The "limits" may depend on the particular National Constitution).

160. *ibid.* pp. 54, 217.

The preceding criticisms may be resumed as : a tendency to reduce Law to the State in the concept of the "juridico-political super-structure"; and a "politician" tendency to isolate this instance from the conditions of its economic determination.



### III Other Approaches

Four further approaches to Law and/or the State will be considered only briefly, because of their relatively limited focus.

#### (a) Edelman

Bernard Edelman demonstrates the juridical constitution and transformation of the individual as a legal subject through the ideological mechanism of Interpellation, on the basis of changes in the conditions of capital accumulation and class struggle.<sup>161</sup> The interpellation : "You are a subject in law" permits the individual legal subject a concrete practice : "Since you are a subject in law, you are capable of acquiring and selling (yourself)."<sup>162</sup> The double-speculary structure of ideology assures the functioning of juridical ideology:

"On the one hand, the subject in law exists in the name of the law, that is, the law gives him his power. Better, law gives right the power to give itself a power. On the other hand, the power law has given right returns to Law. The power of right is none other than the power of subjects in law. The subject recognizes itself in the subjects. The power, ownership, recognizes itself in the power, the State .....The constitution of a State subject in Law assures the functioning of juridical

161. The general framework and concept of Totality are implicitly Althusserian. Insights from Pashukanis are however also incorporated: Edelman, B. "Ownership of the Image". (1979).

162. *ibid.* p. 32.

ideology."163

By assuring and fixing the sphere of circulation in the CMP as a "natural given", the law makes production possible:

"Circulation abolishes differences. Every subject in Law is the equal of every other subject in Law. If one contracts, it is because the other has wished to contract too. The ultimate cause of the contract is the very will to contract. The subject in law possesses himself as object in law. He therefore realizes the most developed form of the subject, namely self-ownership. He realizes his freedom in the very power to sell himself that is accorded him."164

In the sphere of Circulation the law stamps Property, Freedom and Equality on the face of exchange-value, but in the secret realm of Production these marks are read as exploitation, slavery, inequality and sacred egoism: "The 'other place' (Production) is abolished by the very form of the subject."165

Edelman's technique is to then take highly concrete examples of how the organization of juridical categories and legal reasoning are "caught out" by class struggle and changing conditions of accumulation, and to observe the process of resolution of ensuing contradictions and inconsistencies at the level of juridical

163. *ibid* pp. 32-33.; see Althusser "Ideology and I.S.A's" in (1971) pp 121-173.

164. Edelman (*op. cit.*) p. 107; see pp. 93-108.

165. *ibid.* p. 108.

ideology.<sup>166</sup> Thus the Law is only gradually extended to Photography and the Cinema as a result of struggle, leaving the status and existence of author's right in the product of the new technology initially ambiguous.<sup>167</sup> Similarly, the State is observed in the process of re-drawing the juridical distinction between political rights and private ("social") rights when a number of Algerians - who according to the Evian agreements had the same rights as French Nationals "with the exception of political rights" - stood as candidates in elections to work committees. Ultimately, the Law defined these elections to institutions of staff representation as "occupational" in nature, not constituting the exercise of "political" rights and not therefore violating the terms of the agreement.<sup>168</sup>

Whilst undeniably producing valuable empirical studies of particular conjunctural aspects of bourgeois law, and rendering operational in this field some of Althusser's abstract and programmatic formulations, Edelman adds little in his discussion of "Elements for a Marxist Theory of Law" to what already exists in Pashukanis and his recent interpreters. The very specificity of the concrete analysis at the level of juridical ideology excludes the broader question of the relation between the development of the legal-totality and changes in the economic and political conditions of advanced Capitalism. Moreover, the criteria for the selection of those particular aspects of law which are considered are not made explicit. From the Marxist point of view the analysis is still more fragmentary than it is in Althusser ; larger questions, concerning the limits, form and function

166. hence the original Title: "Le Droit saisi par la photographie".

167. this example is not directly relevant to Britain because of the different principles governing the law of Copyright.; see Hirst's Introduction to Edelman (1979).

168. Edelman (op. cit.) Appendix I: pp. 115-141.

of law are ignored, and in respect of them the "last instance", as with Poulantzas, never comes.

(b) Hirst

Paul Hirst and his collaborators have broken decisively with Marxism by denying : (1) the subject-object "problem of knowledge" and "epistemological discourse"; (2) the "rationalist" conception of objects as ("expressive") Totalities ; (3) processes of real contradiction and determination such as can be grasped in theory ; and (4) the Marxist-Leninist conception of the relation between Theory and Practice. Instead, the "real" can only ever be "known" in the form of its discursive constitution.<sup>169</sup> Aspects of social relations in concrete social formations ("Mode of Production" having been abolished) are given to study by pre-eminent criteria of "Political Calculation", and analyzed in terms of their "conditions of existence".

The consequence for Law is that it cannot be said to represent anything outside itself. The "means of representation" have complete autonomy in defining the nature and extent of Law (the "represented" do not determine the "means of representation"). The subject interpellated in legal ideology has no point of origin outside juridical practices themselves : the legal subject cannot be explained

169. This position is considered by some commentators the logical consequence of Althusser's neo-Kantian distinction between "real concrete" and "concrete in thought". McDonnell & Robins (1980) thus indict Althusser for Hindess and Hirsts' deformation of Marxism: the problem is his epistemology, and related conception of Totality. (pp. 157-213).

prior to and independently of the process of legal definition.<sup>170</sup>

Hirst's critique of Marxist approaches to Law deriving from Pashukanis<sup>171</sup> centres on their failure to problematize non-human forms of the legal subject : Law is a realm of equivalent human subjects in contest, Law is the relation between those subjects. But whilst they may be equal, contends Hirst, subjects in Law are not identical or homogeneous, neither are the relations of dispute between them : obligations and responsibilities vary considerably with different types of subject - Public bodies, Corporations, Companies, Partnerships, Trusts, and "Private" Individuals. Moreover the effectivity of institutions and practices of the Law is denied in the conception of Law as a relation between subjects ; legislation, the courts, judges and legal interpretation are secondary and derived effects of that relation. Law becomes resolved into the economic (human) subject. The legal form/legal subject is the expression of the commodity-form/commodity subject, the outgrowth of the prior relationship of possession between the economic subject and things (a determination conceived in an expressive totality). Thus: Law is the sphere in which subjects enter into contest over rights (which they possess). The "possession form" is independent and determinative of the legal form (its expression) ; Right "recognizes" Possession, Possession is the foundation of Right. This treatment of Law presupposes the ontological privileging of the prior-possessory subject with certain attributes, and must therefore be inadequate insofar as forms of subject and legal right embodied in Public law are different in kind from Private law forms and cannot be reduced to them

170. Hirst: (1979); (1980); Hirst and Kingdom (1979)

171. *ibid*: Critique of Pashukanis and Blanke et. al. in (1979) of Edelman in Introduction to "Ownership of the Image" (1979).

by analogy.

Instead, according to Hirst, "rights" must be conceived as specific capacities sanctioned by laws:

"Legal rights reflect no inherent ontological attributes; rather, they serve certain socially determined policy objectives and interests. The rights sanctioned in law need not correspond to the forms of consistency demanded by ontological doctrines of the subject ; they have no inherent unity or single point of reference."<sup>172</sup>

Moreover, Legislation need not create "rights" in the legal sense at all:

"It may secure interests by assigning tasks to personnel or agencies ; it would be idle to think of this assignment as the creation of 'rights': the determination of the legality of an abortion is not a doctor's right, but a task he is deemed competent to perform by reason of status. Social policy objectives can be served without endowing subjects with legal 'rights' and also without grounding in ontological doctrines."<sup>173</sup>

Furthermore, the position and capacities/rights of non-human legal subjects cannot result from their interpellation in the circular form of specular recognition which is claimed to operate in the case of human individuals. Ideological Interpellation, in the absence of other forms of subject-grounding produced by specific legislation, cannot generate all the subjects of possession necessary to Capitalist relations of production : "Interpellating individual humans as subjects of the commodity-form cannot serve to produce all the agents necessary for Capitalist production. Legal subjects and rights of property corresponding to certain crucial forms of possession

172. *ibid.*: (1980) p. 104.

173. *ibid.*: p. 100.

(Corporations) are excluded."<sup>174</sup>

This approach provides a valuable reminder of the dangers of reducing Law to its Private form, and of conceiving of legal subjectivity solely in terms of specular Interpellation, however, these criticisms of reductionist tendencies may be made without abandoning Historical Materialism : Science/Ideology, Subject/object of knowledge, Theory/Practice, Totality and determination by the economic. On this basis Hirst et. al. openly proclaim the redundancy of Marxism. The consequence is theoretical and epistemological relativism, political pragmatism, and the reduction of Socialism to an ethical postulate. Hirst emphasizes the importance of Abortion, Company and Corporation Law in current struggles on the Left, and this possibility must indeed be recognized. However, such objects are here given to analysis, not through a concept of Totality governed by determination and contradiction, but according to unspecified criteria of "political calculation". Within this approach there can be no coherent theoretical basis for abstracting these aspects of bourgeois legal relations from the existence of others. The selection is arbitrary and the consequence a tendency to Voluntarist and reformist political practice.

Despite the epistemological and theoretical gulf that separates them, Hirst and Edelman are on similar ground in having produced concrete analyses of the legal conditions of existence of various aspects of the economic whilst failing to consider adequately the economic conditions of existence of the legal order. As Jessop has concluded,

174. *ibid.* (1979) p. 14; see Hirst's critique of Althusser's theory of Ideology, which centres on its failure at a general level to resolve the problem of the subject in Marxism (in Hirst: 1980).

"there is certainly insufficient attention paid to the effectivity of legal discourse in other traditions (but) Edelman and Hirst themselves are guilty of neglecting the extra-legal conditions that shape the development and operation of an autonomous legal order."<sup>175</sup>

(c) Hall et. al.

Stuart Hall and his collaborators have developed a "sui generis Gramscian approach"<sup>176</sup> which locates Law as one of a plurality of social forces and ideologies involved in the articulation of bourgeois hegemony and the exercise of State Power in a definite conjuncture.<sup>177</sup>

The economic background to the hegemonic crisis emerging in the 'seventies is the "synchronization of Capitalist recession on a global scale, and the crisis of Capital accumulation specific to Britain",<sup>178</sup> but the emphasis is on the crisis as a political and ideological field of struggle, constituted the terrain of the "conjunctural" by the organization of social forces in

175. op. cit. p. 363.

176. Jessop (ibid). This approach is also however indebted to Althusser via Poulantzas (in whom there is a strong Gramscian element); whilst the analyses are highly concrete, the Althusserian framework is evident in the use of concepts of "articulation", "levels", "instances", "overdetermination", "Relative Autonomy", "Interpellation", "condensation", etc.

177. Hall et. al. (1978 a); Hall: (1979), (1980 c), (1980 d).

178. ibid. (1979) p. 15.



opposition.<sup>179</sup> Hall's recent work recognizes the value of Poulantzas's formulation of "Authoritarian Statism" but stresses

"the steady and unremitting set of operations designed to build or construct a popular consent into these new forms of Statist Authoritarianism. It is this element (which introduces into the equation the pivotal issue of 'popular' versus 'populist' democracy) which would lead us to rename the present process as a movement towards "Authoritarian Populism".<sup>180</sup>

The theoretical basis of the analysis of the New Right in its struggle for hegemony is Laclau's extension of Althusser's theory of ideological interpellation, with its critique of the Poulantzian ascription of ideological elements to necessary class origins<sup>181</sup>; what is crucial instead is the particular manner in which these elements are organized together within the logic of different discourses, and the articulation of these discourses to and by different class practices.<sup>182</sup> The conception of ideological discourses operating by recruiting concrete social individuals through their interpellation as "disursive subjects" is employed in the analysis of Thatcherism, which is able to re-work themes of Law and Order elaborated from the beginning of the 1970's with elements of the "Social-Democratic solution" of 1974-1979, and neutralize the people/power bloc contradiction<sup>183</sup> effectively in the direction of an

179. see Gramsci (1971) p. 178. Hall's (1980 d) draws extensively on the Prison Notebooks.

180. Hall (1980 d) p. 161. (emphasis supplied).

181. see Laclau (1977) discussed supra.

182. Hall (1980 d) p. 174.

183. In Laclau, The "class contradiction" is dominant at the abstract level of the Mode of Production, whilst the "people/power bloc" contradiction is dominant at the level of the Social Formation. Non-class interpellations are overdetermined by the class struggle. (see (1977) On "Fascism and Ideology" pp. 108-111) Laclau's Althusserianism is apparent in the language of "dominance" and "overdetermination"; also in "condensation", "fusion", "rupture", "ruptural unity" (see pp. 92-94); cf. Althusser's flirtation with psychoanalytic concepts in (1971); cf. also Hall's formulations (infra)

### Authoritarian Populism:

"The monopoly by Social Democracy of the bureaucratic State has enabled the discourses of Thatcherism to condense at the negative pole Statism/Bureaucracy/social democracy/"creeping collectivism". Against this representation of the power bloc are counterposed various condensations of possessive individualism/personal initiative/Thatcherism/Freedom, on the positive pole. It is possible, then, to represent Labour as part of the 'big battallions', ranged against the 'little man' (and his family) oppressed by an inefficient state bureaucracy. Thus, Social Democracy is aligned with the power bloc, and Mrs. Thatcher is out there 'with the people' .....neutralizing the people/power bloc contradiction."<sup>184</sup>

Thus in the arena of Law and Order, Thatcherism has established a moral-social leadership long neglected by social democracy, making strategically effective interventions in a broad field of popular conceptions concerning "the people", "the Nation", "our culture and way of life", the "instincts of the ordinary British people", etc. <sup>185</sup> : Under the right conditions, 'the people' in their traditionalist representation can be condensed as a set of interpellations in discourses which systematically displace political issues into Universal Moral absolutes."<sup>186</sup> In this context Crime is articulated within a broader conception of moral degeneration and the crisis of authority and social values, and "there is no mystery as to why ordinary people should be actively recruited into crusades for the restoration of 'Normal times' - if necessary through a more-than-normal imposition of moral-legal force".<sup>187</sup> Similarly in the field of education, Thatcherism has established itself positively as a guardian of the 'return to standards' against the indiscipline, permissiveness and frustration of individual potential to 'get on and compete' which accompanies the policies of Social Democratic Statism.

184. Hall (1980 d) p. 177.

185. *ibid.* p. 179.

186. *ibid.*

187. *ibid.*

Again, the Welfare State is presented as spendthrift and wasteful, undermining the personal initiative of the less fortunate to "help themselves". And on the theme of race, the interpellations of 'Nation', of 'National cultures/alien cultures', of 'our people', are merely "the respectable signifiers of a more overt racism".<sup>188</sup>

This approach is valuable in rendering concrete within the British national conjuncture some of the abstract-formal insights developed by Poulantzas through the use of concepts of 'National' and 'Exceptional' State, 'Authoritarian Statism', etc., concerning the nature of the hegemonic crisis and the incohesiveness of the power bloc. As with Poulantzas, however, Law remains only vaguely specified and located within a complex of strategies adopted by the State in its efforts to contain the crisis. The underlying assumption is that "legal discourses and practices are indeterminate and that their actual implementation is overdetermined by other political and ideological discourses and practices".<sup>189</sup> The tendency is for Law to be dissolved into Culture in a general consideration of the 'super-structure'. This breadth of focus suggests that whilst the approach may provide the indispensable context for conjunctural legal analysis, it cannot engage with the specificity of concrete material developments within the institutions and practices of Law. Furthermore, the emphasis on the global constitution of hegemony (Ideology) tends to neglect, in other areas as well, the material changes that accompany the articulation of Authoritarian Populist discourse, and the extent to which the principal ideological figure of the "possessive individual" is established, not only

188. *ibid.* p. 182.

189. Jessop (*op. cit.*) p. 364.

discursively, but concretely through the offloading of State functions onto the private sector in the fields of Industry, Education and Welfare.<sup>190</sup>

(d) E.P. Thompson

A final approach, the tradition of Marxist Historiography prominently represented by E.P. Thomson, must also be mentioned. Historical analyses of the 18th Century, when customary rights of common are increasingly threatened by the Whig private property consensus, and the product of labour is becoming something distinct and separated from the control of the worker who has only his labour-power to sell, are of value in highlighting the conflicts over different conceptions of property right accompanying the radical transformation of class society. In this context the Black Act of 1723 was just one of a number of 18th Century statutes making Capitally punishable relatively minor property offences, plainly in the service of dominant whig property interests.<sup>191</sup> Even during this period, however, Thompson points to the inhibitions on ruling class despotism imposed by the rule of law, and to situations where the law provided a genuine forum within which certain kinds of class conflict were fought out. One of the greatest cultural achievements of the 17th Century Agrarian and Mercantile bourgeoisie was to have passed down to the 18th the framework of a juridical system quite different from the arbitrary and extra-legal exercise of class power. Furthermore:

190. It is the very concreteness of "possessive individualism", i.e. the (now increasing) material reality of private property in the "property owning democracy", that constitutes one of the principal questions for consideration in this thesis.

191. Thompson (1977); Hay et. al. (1975) consider conflicts over customary rights of Wreckage, Poaching & Smuggling.

"The notion of the regulation and reconciliation of conflicts through the rule of law - and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal - seems to me a cultural achievement of universal significance ..... The rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from powers' all-intrusive claims, seems to me to be an unqualified human good."<sup>192</sup>

The assumption is that contemporary legal relations may be adequately understood on the basis of an examination of their empirical genealogy and development, and further that such analysis enables the derivation of universal conclusions as to the nature of the "rule of law". The methodological foundation of this position is clarified in Thompson's polemic against Althusserian structuralism : the problems of a particular theoretical tradition are considered to impugn the status of Marxist Theory as such, and what is offered in its place is libertarian-socialist Historiography. This approach is unable to inform theoretically, other than in vague and general terms, the analysis of concrete legal institutions and practices in the conjuncture, with the result that the limits and possibilities of Law as a terrain of progressive and defensive struggles are not considered. Neither are the coercive aspects of the Law, or of the State in traversing the boundaries of "legality", taken into account.<sup>193</sup> The eternization of Law also pre-empt important theoretical questions concerning the role of law in the transition to

192. Thompson (1977) pp. 265-266 (emphasis supplied)

193. see Poulantzas (1978), discussed supra.

socialism and in future Communist Society.<sup>194</sup> Here Society cannot be conceived scientifically as governed by objective relations of contradiction and determination, because present in Thompson's conception of Totality is a historicist/humanist Class subject "making history" in accordance with the determining category of its experience. This has definite effects in the field of politics : "No-one can fail to see that when, in the midst of the class struggle, the litanies of Humanism hold the theoretical and Ideological stage, it is economism which is quietly winning."<sup>195</sup>

194. this question remains important for Marxists, despite Thompson, and Hirst's dismissal of it as "essentialist". It has only been addressed, however, in very general terms (e.g. Arther (1978); Picciotto (1979). The concrete analysis of Trespass provides specific insights in this respect (infra: Ch. 8.)

195. Althusser (1976) p. 85. Althusser's anti-humanist thesis is one of his lasting contributions to Marxism.

#### IV Conclusions; Prospects for the historical-materialist analysis of Trespass

From this brief survey it is evident that the Althusserian and State Derivation approaches are most adequate in posing the general and fundamental problems of historical-materialism, concerning the conception of Society as Totality and the theorization of determination within it. Because these problems are thought at the highly abstract level of the Mode of Production, however, the concrete analysis of Law and State - in their historical development and their precise location and role in the current conjuncture - takes second place, and is subject to distortions arising from the insufficiency of mediating determinations. This inadequacy is manifested in different forms in the various theories : in Blanke et. al., in the inability to engage with historical reality, which is separated from "form analysis" ; in Holloway and Picciotto, in the failure to concretize, other than at a still very general level, the analysis of the limits of the form and function of Law and State in the British National conjuncture ; and in Poulantzas, in an extreme abstract-formalism which leads to the predominance of purely symbolic elements within the analysis and results in an insensitivity to specific aspects of the conjuncture. Behind these problems lie reductionist tendencies which must have deleterious effects on such empirical analyses as are produced.

The prospects for the analysis of particular historical and concrete aspects of Law are therefore not promising within the dominant theoretical positions. On the other hand, where specific attention is accorded legal institutions and practices, as in Thompson, Edelman

and Hirst, this tends to be at the expense of precisely those broader considerations that define Marxism and distinguish it from other approaches : Thompson's humanism excludes the scientific conception of an objective Totality and its real conditions of determination ; Edelman represents an outpost of Althusserianism which is so far removed from its mainstream that the question of determination in the last instance is still further postponed ; and Hirst has explicitly broken with Marxism by abandoning Epistemology, Science, Theory, Totality and determination. Thus otherwise interesting analyses of law relating to Abortion, Companies and Corporations, Photography and the Cinema, are of limited value as Marxist analyses because they have not been undertaken on the basis of a specified conception of the legal-totality and its conditions of determination which would enable the location of these aspects of law within a broader framework of legal institutions and practices. The concern to avoid reduction to the commodity-form and the private human legal subject leads Hirst, for example, to consider the specificity of public bodies, Trusts, Corporations, Companies and partnerships, and the effectivity of legislation, the courts, judges and legal interpretation, however, their operation within a society which produces and is reproduced on the basis of commodity forms of calculation within and between productive enterprises and units of consumption, and the legal conditions of existence (Private, Public, Administrative) of such a form of economic organization, are ignored.

Hence the focus of attention must be returned to the principal



theoretical debate.<sup>196</sup> Here all contributors are agreed that there is "much work to be done"<sup>197</sup> and that "the Marxist Theory of Law is still in its early stages".<sup>198</sup> The assumption is that persistent theoretical work within one or other position will ultimately enable adequate historical and empirical research. Thus Jessop recognizes the problem of the theoretical indeterminacy of the State Derivation Approach at complex and concrete levels of analysis, and the dangers of treating these levels as mere instances of the abstract or lapsing into surface description of empirical phenomena, but the criticism of this aspect is to be suspended "in the absence of methodological solutions or actual mediating concepts".<sup>199</sup> A similarly optimistic but more general statement regarding the theorisation of Law is made by Jessop in the Conclusion to his review of the field:

"Analyses at this level of abstraction ....will inevitably be relatively indeterminate in their implications for specific conjunctures. This relative indeterminacy, or under-determination, can be progressively eliminated through the concretization and /or complexification of the theoretical object and its conditions of existence and effectivity. This means a progressive shift from the primacy of form to an emphasis on the content of law and the legal order."<sup>200</sup>

But the problem remains of precisely how this shift from abstract to concrete levels of analysis is to be accomplished without distortion or lapsing into empiricism. There is no sign that the "relative indeterminacy" of either dominant theoretical position is being

196. Hall's Gramscian approach is inadequate as a framework for legal research because of its generality (supra)

197. see Jessop. (op. cit.) p. 366.

198. Edelman (op. cit.) p. 23.

199. Jessop. (op. cit.) p. 349. (emphasis supplied)

200. *ibid.* p. 366. See also Laclau's formulation: "The possibility of thinking the specificity of modes of production depends on carrying to its logical conclusion the task which Balibar and Poulantzas set themselves, but have only partially carried out: to eliminate descriptive categories and replace them by truly theoretical categories". ; see also p. 10.

"progressively eliminated". The record suggests, on the contrary, that mediating concepts and theoretical solutions are not forthcoming, and that the principal approaches have in fact encountered problems of an order that cannot be resolved within their respective problematics. Indicative of this failure are the decline in the fortunes of Althusserianism and the virtual stagnation of the State Derivation debate, and the rise of approaches of more limited scope that avoid the broader issues of historical materialism.

These problems are further emphasized when the question of the prospects for the historical-materialist analysis of Trespass is specifically posed, for to be adequate here a Theory would have to take account of the historical and conjunctural aspects of the development of the law, and simultaneously explain its Civil/Private and Criminal/Public dimensions without reduction. But this is precisely the kind of highly specific and concrete research that current Theory is most ill-equipped to undertake. Confronted with this situation, the available alternatives would then appear to be:

(1) to adopt one or other of the principal approaches and attempt to provide mediating theoretical determinations in the concrete analysis, avoiding making this an instance of the abstract or reverting to empirical description. Given the sheer technicality and juridical complexity of the heteromorphous law of Trespass, however, the twin temptations of Rationalism and Empirism would be difficult to evade.

(2) to forsake the concrete object and concentrate instead on the General Theory of Law and the State. This would be unacceptable for two immediate reasons, firstly because the theoretical development of

existing approaches has been limited, despite the concentration of recent Marxist research in general theoretical areas, suggesting that their potential is not great, and the development of an alternative and more adequate "General Theory" does not seem likely ; and secondly because the principal task of Marxist Theory is or should be the concrete analysis of the current situation, and Trespass is given as an object of study in the concrete conditions of struggle around the transformation of the Law by the "Criminal Trespass " Act 1977.

(3) to restrict the focus of analysis and avoid the broader questions of historical-materialism by examining the specific nature, content, and form of particular juridical discourses. This alternative too is unacceptable, since it is precisely the consideration of the broader questions of Totality and determination in respect of material legal institutions that would constitute an adequate Marxist analysis of Trespass.

(4) to locate the law in the context of a plurality of social forces struggling to maintain hegemony in the conjuncture, and examine its role in the overall articulation of bourgeois domination. As with the focus on general theory, however, here the specificity of Trespass and its institutional materiality would be lost.<sup>201</sup>

The better solution is to avoid completely the terrain of the principal theoretical debate (whilst nevertheless maintaining the fundamental principles of historical-materialism) by questioning the very status of general theory and its relation to the concrete. Here the deficiencies in the "General Theory of Law" and the paucity of concrete research are seen as due, not to the "early stages of

201. This applies also to the Historiographic approach (supra)

development" of this Theory, or to the neglect of an area in which there is "still much work to be done", but to the rationalism and theoreticism implicit in the very concept of a "general theory" of one or other aspect of the superstructures<sup>202</sup>. In proposing instead Marxism as a method, which cannot be given in advance of its particular concrete object of study, but whose general principles are nevertheless specifiable upon a re-reading of Marx's later works, we would be opposing the tendency to theoreticism and reductionism that has beset the attempt to secure Marxism on a scientific basis from della Volpe to Althusser. If this position can be established, and if a highly concrete research programme for the analysis of legal institutions and practices can be produced, with successful results, then a more adequate foundation may at least have been laid for the better understanding of the complex nature and function of law in modern society.

202. The suggestion is that the opposition of "abstract theory" to "concrete/empirical reality" is a rationalist conception. (Alternative conceptions of "abstraction", "Theory", "Theoretical determination" etc. are developed below.) The tendency is for general theoretical elements at the abstract level of "Mode of Production" to be elaborated in essentialist paradigms, which are then brought to bear on the "concrete" at the level of the Social Formation. The assumption that concrete research programmes can be realized through the "progressive elimination" of "relative indeterminacy" (see Jessop, Laclau, supra) depends upon a particular (rationalist) conception of the abstract/concrete relation. This is most apparent in Balibar's (op.cit) "structuralist combinatority", but evident also in the "Capital-logic" approaches. The problem of rationalism has been "resolved" by Hirst (by abolishing the concept "Mode of Production") but only at the expense of abandoning Marxism. This thesis attempts to re-establish Marxism as an "empirical" Science - beginning and ending with the concrete - avoiding empiricism and theoreticism (but being no less "theoretical" for this). The first stages of this argument are developed (infra) in Ch. 4.

#### Ch. 4. Marx's Method

The specific question of the implications of Marx's method for the concrete analysis of Law<sup>1</sup> is subordinated, in the order of exposition of this chapter, to the general consideration of that method. Such a vast topic cannot be exhaustively examined here, therefore it will be structured by the identification of several crucial issues, all of which involve the interpretation of The 1857 Introduction<sup>2</sup>, concerning:

(1) The question of continuity in Marx's methodological and theoretical development. How adequate a statement of Marx's method of Inquiry is the 1857 Introduction? Is Capital the result of this logic of investigation, or of some other, unspecified because the promised "materialist dialectic" was never written?

(2) The corresponding question of the starting-point and the relation of Capital, Wage-labour and Landed property. Marx resolves the problem of the point of departure at the end of the Grundrisse; what does the replacement of Value by the Commodity imply for the development of the logic of Investigation? How does this affect the status of the Introduction?

(3) The corresponding question of the nature of Marx's method of abstraction. Is the conception of scientific abstraction employed in Capital equivalent to that specified in 1857? If it has changed, is this in a manner consistent with the earlier text, or does it

1. see Part V, *infra*.

2. Marx: Introduction to the Grundrisse ("Foundations of the Critique of Political Economy") [Rough Draft] Pelican (1973)

indicate a break?

(4) The corresponding question of the epistemological foundations of Marx's work. What does the change in starting point, method of abstraction and conception of science between 1857 and Capital imply (if anything) for the development of Marx's materialist dialectic? Does Marx resolve the problem of his relation to Hegel by a break or a re-appropriation? What is the status of Lenin's cryptic assertion that it is impossible to understand Capital without having thoroughly studied Hegel's Logic?

The "problem of method" stems from Marx's failure to consider systematically the question of his method of Inquiry. Marx indicated to Engels in 1858<sup>3</sup> his intention to produce an account of the materialist dialectic, and again in a letter to Dietzgen in 1876 stated: "when I have shaken off the burden of my economic labours, I shall write a dialectic".<sup>4</sup> Whilst this wish was never fulfilled, the recent re-discovery of the 1857 General Introduction has been assumed by the majority of commentators to provide an adequate substitute.<sup>5</sup> The acceptance of part or all of the methodological observations contained in this text is the foundation of the theoretical positions of both Althusser and Pashukanis, and hence of the principal approaches to the

3. Letter to Engels 14th January 1858 (Selected Correspondence).

4. quoted in Echeverria (1978 b) p. 333

5. The manuscript of the "Seven Notebooks" was lost in circumstances unknown. A limited edition appeared in Moscow in 1939, but the first effective publication was in the original German in 1953. French and Italian editions appeared in the 'sixties. Fragments were published in English in 1904, 1964 and 1972, Nicolaus's complete translation becoming available in 1973. The impact of the Grundrisse on European Marxism is thus relatively recent. [see Tribe, K. (1974) p. 180; Nicolaus (Foreward to 1973 translation) p. 7.]

analysis of Law and the State.<sup>6</sup> Echeverria<sup>7</sup> considers that Lukacs, Colletti, Mandel, Vygodski, Della Volpe, Kosik, Zeleny, Ilienkov, Rosdolsky, Luporini, Rovatti, Carver and Cutler et. al. also treat the 1857 Introduction uncritically as Marx's position on his logic of investigation.<sup>8</sup> Against this tendency must be set more recent interpretations of Marx's Method sharing in common a revived interest in Capital<sup>9</sup>, which might broadly be said to follow Lenin's reasoning that "If Marx did not leave behind him a 'Logic' (with a capital letter), he did leave the logic of Capital, and this ought to be utilized to the full in this question."<sup>10</sup> The most systematic and extensive contributions in this field, those of Echeverria and Sayer,<sup>11</sup> distinguish the method of investigation from the logic of exposition of Capital and consider the former, and its relation to the latter, through a methodological reading of Marx's later works.

Because of the centrality of the 1857 Introduction to the debate on Method, a brief resume of this text will be provided in part I, as a necessary means of contextualizing the subsequent discussion. Section II describes developments in the structure and content of the original plan after 1857, universally acknowledged by all commentators. The third section examines the assumption of continuity in three interpretations representative of this position, whilst Part IV develops

6. This contention is supported (infra.) in Section V.

7. Echeverria, R. (1978 a)

8. *ibid.* Ch. 6 pp. 197-214; (1978 b) N. 4. p. 365. Zeleny, Colletti and Althusser are considered below in part III. Ilienkov, Kosik, Rovatti, della Volpe and Luporini are not available in English. (see Echeverria's bibliography op. cit.)

9. Echeverria (1978 a,b); Sayer (1979 a, b); Cleaver (1979); Clarke & Fine (1978); Mephram (1977) (1979); Fine & Harris (1979).

10. quoted in Echeverria (1978 b).

11. considered in Part IV. (infra).

the case against continuity<sup>12</sup> by considering inconsistencies in the Introduction and between 1857 and *Capital*, and proposing an alternative conception of Marx's logic of Inquiry. The final section relates conclusions as to the nature of Marx's method to the theoretical problems discussed in chapter 3., and considers again the prospects for the concrete analysis of Trespass Law.

## I The 1857 Introduction.<sup>13</sup>

### (1) Production;

Marx distinguishes his initial object, material production, from the presupposed independent and isolated individual of the "eighteenth Century Robinsonades" and contemporary Economists such as Bastiat and Carey.<sup>14</sup> Production by an "isolated individual" outside Society - as posited by Smith and Ricardo - "is as much of an absurdity as is the development of language without individuals living together and

12. This terminology is adopted because whilst there is a systematic "case" against continuity, the contrary position tends to be merely assumed rather than rigorously argued.

13. The full title of the Introduction (Notebook M) is "Production, Consumption, Distribution, Exchange (Circulation)." The first two sections analyze this totality, whilst the third, generally agreed by commentators to be the most significant, examines in the light of these observations "The Method of Political economy". This section is also the most controversial, commonly considered as authority for the abstract > concrete conception of Marx's method of Inquiry. Sections (1) & (2), by contrast, have attracted little attention. The purpose of resuming them at some length is to convey the overall structure of Marx's argument in the introduction; they form the indispensable basis of any materialist Marxist position, which must establish the primacy of Production, and are included also for this reason.

14. (1973) p. 83.



talking to each other."<sup>15</sup> Rather Production is always "production at a definite stage of social development - production by social individuals."<sup>16</sup> Here it is clear that Production must either be specified according to the particular historical epoch (e.g. modern bourgeois production), or the entire process of historic development pursued through its different phases. Nevertheless, all epochs share certain common characteristics: "Production in general is an abstraction, but a rational abstraction insofar as it really brings out and fixes the common element and thus saves us repetition."<sup>17</sup> Thus no production is possible without instruments of production or some form of stored past labour. The error of Carey, however, having correctly conceived of Capital as an instrument of production and objectified labour, is then to make Capital a general and eternal relation of nature, leaving out just that specific quality which makes "instrument of production" and "stored labour" into Capital.<sup>18</sup>

The inadequacy of the general concept of Production is evident, according to Marx, in its use by contemporary economic and political theorists such as J.S. Mill. Here the effect of the generalization of production is "the crude tearing-apart of production and distribution and of their real relationship",<sup>19</sup> the former being presented as distinct from the latter,

"as encased in eternal natural laws independent of history, at which opportunity bourgeois relations are then quietly smuggled in as the inviolable natural laws

15. *ibid.*

16. *ibid.* p. 85.

17. *ibid.*

18. *ibid.* p. 86.

19. *ibid.* p. 87.

on which society in the abstract is founded."<sup>20</sup>

Whilst it is true that all production is appropriation of nature on the part of individuals within and through a specific form of society, to say that Property is therefore a precondition of Production is merely tautologous. To then conclude that Property is inevitably private property, requiring its protection by the courts, police etc. is to "bring things which are organically related into an accidental relation, into a merely reflective connection."<sup>21</sup> The fact that every specific form of production creates its own legal relations and form of government (the real organic connection) is obscured by an a-historical method which eternalizes bourgeois relations. Marx's conclusion as to the usefulness of the conception of "Production in general" is therefore cautious and reserved:

"There are general characteristics which all stages of production have in common and which are established as general ones by the mind; but the so-called general preconditions of all production are nothing more than these abstract moments with which no real historical stage of production can be grasped."<sup>22</sup>

## (2) The general relation of Production to Distribution, Exchange, Consumption.

According to Marx, the economists have established some coherence in their analysis of the relations between Production, Distribution, Exchange and Consumption: in Production, members of society appropriate nature in accordance with human needs; Distribution determines the proportion in which individuals share in the product; Exchange enables particular desires to be satisfied by converting the portion of the product already assigned by Distribution in accordance with individual

20. *ibid.*

21. *ibid.* p. 88.

22. *ibid.*

will; and finally in Consumption, the product becomes the object of individual gratification. Production is the generality, Distribution and Exchange the particularity, and Consumption the singularity in which the whole is joined together.<sup>23</sup> But whilst this is admittedly a coherence, it remains a shallow one, the result of "barbarically tearing apart things which belong together."<sup>24</sup> The totality of these different moments is more adequately grasped in the following manner:

**(a) Consumption and Production:**

Firstly, there is an immediate identity between Production and Consumption. Production is not only production, but also immediately Consumption. In the process of production, the individual consumes, expends and develops his abilities and capacities. Similarly the means of production are consumed in their deployment, machinery and tools are worn out and raw materials lose their natural form and composition by being used up; hence the economists' shorthand, "Productive Consumption."<sup>25</sup> Similarly, Consumption is not only consumption, but also immediately Production: the consumption of sunlight and chemical substances produces the plant, the consumption of food produces the human being; hence "Consumptive Production."<sup>26</sup>

Secondly, however, a mediating movement takes place between Production and Consumption, establishing within the relation of externality a mutual dependence: "Production creates the material, as external object, for Consumption; Consumption creates the used, as material

23. *ibid.* p. 89.

24. *ibid.* p. 89.

25. *ibid.* p. 90

26. *ibid.* p. 91

object, as aim, for Production. Without Production no Consumption; without Consumption no Production."<sup>27</sup> And thirdly, in addition to this immediate and mediate identity, a relation of internal connection exists such that each of Production and Consumption "creates the other in completing itself, and creates itself as the other."<sup>28</sup>

Consumption is the final form of Production, it completes the product by dissolving it, by consuming its independently material form. The product becomes fully a product, and the producer fully a producer, only in the concluding act of consumption. A railway on which no trains run is a railway only potentially and a garment becomes a real garment only in the act of being worn.<sup>29</sup> Similarly Production produces Consumption "by creating the specific manner of consumption; and, further, by creating the stimulus of consumption, the ability to consume, as a need."<sup>30</sup> In this manner Production also gives Consumption its specific "finish".

The "socialist belletrists" and "prosaic economists" (e.g. Say) therefore commit a fatal error in positing Production and Consumption as simply identical. To say of a nation that "its production is its consumption" is to miss the fact that "a people does not consume its entire product, but also creates means of production, fixed Capital

27. *ibid.* p. 93

28. *ibid.*

29. *ibid.* p. 91

30. *ibid.* p. 93.

etc."<sup>31</sup> The crucial point to emphasize is that:

"Production is the real point of departure and hence also the predominant moment. Consumption as urgency, as need, is itself an intrinsic moment of productive activity. But the latter is the point of departure for realization and hence also its predominant moment; It is the act through which the whole process again runs its course. The individual produces an object and, by consuming it, returns to himself, but returns as a productive and self-producing individual. Consumption thus appears as a moment of Production."<sup>32</sup>

In Society, however, the producer's relation to the product is external "and its return to the subject depends on his relation to other individuals; he does not come into possession of it directly."<sup>33</sup> Distribution mediates Production and Consumption, determining the producer's share in the total social product. In what relation does this sphere stand to Production?

### (b) Distribution and Production:

As might be expected, in the standard works of Economics Distribution appears outside Production as an autonomous sphere. Everything is here "posited doubly": ground-rent, wages, interest and profit figure under Distribution, whilst land, labour and Capital figure under Production, without the comprehension of their proper relation. In fact, Interest and Profit as forms of distribution presuppose

31. *ibid.* p. 94

32. *ibid.*

33. *ibid.*

capital as agent of Production<sup>34</sup>; the wage as a form of distribution presupposes wage-labour; and ground rent, by means of which landed property is accorded a share in the product, presupposes large-scale landed property. The relations and modes of Distribution are the obverse of the agents of Production, not something existing separately from them:

"The structure (Gliederung) of distribution is completely determined by the structure of production. Distribution is itself a product of production, not only in that only the results of production can be distributed, but also... in that the specific kind of participation in production determines the specific forms of distribution, i.e. the pattern of participation in distribution. It is altogether an illusion to posit land in production, ground rent in distribution, etc."<sup>35</sup>

In what sense may Distribution therefore be said to structure Production? Marx emphasizes that "to examine Production whilst disregarding the internal distribution within it is obviously an empty abstraction."<sup>36</sup> Distribution is : (1) the distribution of the instruments and means of production, (2) ("a further specification of the same relation") the distribution of members of society among the different branches of Production in determinate relations<sup>37</sup>, and (3) the distribution of products: "Production does indeed have its determinants and preconditions, which form its moments."<sup>38</sup> However, it is always the mode of Production at a given stage in historical development that determines the distribution that already exists, or which arises as a result, for example, of conquest or revolution. Whatever the new regime of distribution that is imposed in such circumstances, "it is itself a product of Production, not only of historical product-

34. *ibid.* p. 95.

35. *ibid.*

36. *ibid.* p. 96

37. *ibid.*

38. *ibid.* p. 97

ion generally, but of the specific historic mode of production."<sup>39</sup> Even pillage as a form of distribution must be determined by the mode of production: "A stock-jobbing nation cannot be pillaged in the same manner as a nation of cowherds."<sup>40</sup> Similarly the influence of Law as an instrument of distribution, for example in relation to the conditions of perpetuation of landed property in certain families, is structured and limited by the prevailing mode of production.

**(c) Exchange and Circulation;**

Circulation may be considered as Exchange regarded in its totality.<sup>41</sup> Again, this sphere is either already directly comprised in Production, or else is determined by it: (1) The exchanges of activities and abilities that takes place in Production is essentially constitutive of that process, and cannot be separated from it; (2) The exchange of products in the making of the final commodity is similarly comprised within Production; (3) The exchange between dealers is itself a part of production and entirely determined by it<sup>42</sup>; and (4) Exchange achieves its greatest independence in the final phase where the product is exchanged directly for consumption. But even here private exchange presupposes the division of labour and private production, and its intensity, extent and manner is determined

39. *ibid.* p. 98

40. *ibid.*

41. *ibid.*

42. *ibid.* p. 99

by the development and structure of Production.<sup>43</sup>

Marx's conclusion to this section is therefore "not that Production, Distribution, Exchange and Consumption are identical, but that they all form the members of a totality, distributions within a unity."<sup>44</sup> Within this whole, Production may indeed be determined by the other moments: expansion in the sphere of Exchange causes growth in the quantity of Production and a deepening of divisions between its different branches, similarly changes in Distribution, e.g. in the concentration of Capital or in the population between town and country, also effect changes in Production: "Mutual interaction takes place between the different moments, (as is) the case with every organic whole."<sup>45</sup> However, the final conclusion is that:

"Production predominates not only over itself, in the antithetical definition of production, but over the other moments aswell. The process always returns to production to begin anew.....A definite production thus determines a definite consumption, distribution and exchange, aswell as definite relations between these different moments".<sup>46</sup>

### (3) The Method of Political Economy

According to Marx, there are two basic methodological trajectories in the politico-economic analysis of a given country: (1) The economists of the 17th Century always begin with the "living whole",

43. *ibid.*

44. *ibid.*

45. *ibid.* p. 100

46. *ibid.* p 99



the "real and concrete"<sup>47</sup>, e.g. Nation, State, several States, or the precondition of the entire social act of Production, Population. From here the movement is towards "evermore simple concepts (Begriff), from the imagined concrete towards ever Thinner abstractions until (arrival) at the simplest determinations." Thus increasingly abstract determinations and relations are revealed, such as division of labour, money, value etc. But here the starting-point is a "chaotic conception (Vorstellung) of the whole"; Population is itself (ironically) an "abstraction", since its simple and abstract relations (classes, wage-labour, capital, exchange, division of labour, prices) are left out of account, and there is no guarantee that this methodological trajectory will reveal adequately the increasingly simple determinations necessary to the explanation of the concrete object.<sup>48</sup> (2) Only by moving analytically in the opposite direction, Marx contends, can the concrete whole adequately be grasped, "not as a chaotic conception, but as a rich totality of many determinations and relations." It is "obviously the Scientifically correct Method"<sup>49</sup> to ascend from abstract and simple relations, such as labour, division of labour, need and exchange-value to the concrete and complex level of the State, Population, exchange between nations and the world market. Rather than the "full conception" being evaporated to yield an abstract determination, then, the "abstract determinations lead towards a reproduction of the concrete of way of

47. *ibid.* p. 100

48. *ibid.*

49. *ibid.* p. 101

thought".<sup>50</sup> This concrete:

"is concrete because it is the concentration of many determinations, hence unity of the diverse. It appears in the process of thinking, therefore, as a process of concentration, as a result, not as a point of departure, even though it is the point of departure in reality and hence also the point of departure for observation (Anschauung) and conception".<sup>51</sup>

The method of rising from the abstract to the concrete is the way in which thought must necessarily appropriate the concrete, reproducing it as the "concrete in the mind". But this does not mean (contra Hegel) that the real is "the product of thought concentrating itself, probing its own depths, and unfolding itself out of itself, by itself."<sup>52</sup> The simplest economic category, e.g. exchange-value, always exists only as an abstract and one-sided relation within a concrete, living whole. The movement of the conceptual categories is not to be confused with the real process of production.

Having determined the respective positions of abstract and concrete categories in the order of analysis, Marx then consider the extent to which this path, rising from the simple to the more combined, corresponds to the real historical process. Money and the exchange which determines it are amongst the simplest of categories, but this does not mean that their existence is presupposed in all complex forms of social organization: In Peru there existed the highest forms of economic co-operation and a developed division of labour, but without any kind of money; the foundation of the Roman Empire remained taxes and payment in kind, monetary relations developing fully only in the army. Exchange/Money cannot therefore be considered a historically original

50. *ibid.*

51. *ibid.*

52. *ibid.*

and constituent element of Society: "This very simple category makes a historic appearance in its full intensity only in the most developed conditions of Society".<sup>53</sup> Similarly, Labour is a simple abstraction, but neither does this category wade its way progressively through all social development; it too "achieves practical truth as an abstraction only as a category of the most modern society". Only under bourgeois conditions does Labour cease to be thinkable in its particular form. The abstraction of "labour", as it appears in the head, "corresponds to a historic form of society in which individuals can with ease transfer from one labour to another, and where the specific kind is a matter of chance for them, hence of indifference".<sup>54</sup>

Since the analytical ascent must be from the simple to the complex, and since simple categories achieve their fullest form only within the most developed historic relations, then the present social organization of production (rather than any prior historical epoch) must be the primary focus of attention: "Human anatomy contains a key to the anatomy of the ape.....The bourgeois economy this supplies the key to the ancient. etc."<sup>55</sup> The categories which express bourgeois relations allow insights into the structure and relations of production of previous social formations. The example of Money and exchange have already shown, however, that the latest term cannot regard the previous ones merely as steps leading up to itself. The "truth" which the categories of bourgeois economics possess for previous societies

53. *ibid.* p. 103

54. *ibid.* p. 104

55. *ibid.* p. 105; This is the fundamental point emphasized (*supra.*) in the Introduction to Chapter I.

is to be taken always "only with a grain of salt".<sup>56</sup>

The problem remains of the order and sequence of categories within the analytical method so far specified, concerning which of the abstract and simple categories expressing bourgeois social relations is to be the particular point of departure. Having established in section (2) the predominance of Production over the other moments within the whole, Marx observes that it now seems natural "to begin with ground rent, with landed property, 'since this is bound up with the earth, the source of all production and of all being, and with the first form of Production in more or less all societies - agriculture".<sup>57</sup> This however would be erroneous, because in all forms of society there is one specific kind of Production which predominates over the rest,

"whose relations thus assign rank and influence to the others. It is a general illumination which bathes all the colours and modifies their particularity. It is a particular ether which determines the specific gravity of every being which has materialized within it".<sup>58</sup>

Thus in the feudal order, industry and even capital itself assume a landed-proprietary character, whilst in bourgeois Society it is the opposite, Agriculture increasingly becoming merely a branch of industry entirely dominated by Capital. In conclusion,

"It would therefore be unfeasible and wrong to let the economic categories follow one another in the same sequence as that in which they were historically decisive. Their sequence is determined, rather, by their relation to one another in modern bourgeois society, which is precisely the opposite of that which seems to be their natural order or which corresponds to historical development. The point is not the historic position of the economic relations in the succession of different forms of society. Even less is it their sequence 'in the idea' (Proudhon).....Rather, their

56. *ibid.* p. 106.

57. *ibid.*

58. *ibid.* p. 107.

order within modern bourgeois society".<sup>59</sup>

The correct order, then, is: (1) The general and abstract determinants of all forms of society "but in the above explained sense".<sup>60</sup> (2) The fundamental categories of bourgeois society: Capital, Wage-labour, landed-property; Town and Country; the three social classes; Exchange; Circulation; credit system. (3) The State; taxes; the population; colonies. (4) The international relation of production and division of labour; international exchange. (5) The world market and crises.<sup>61</sup>

## II Developments in structure and content of the Plan after 1857

Marx completed the Introduction in mid-September 1857, but delayed beginning the Work which it was intended to introduce and instead spent the next year on the Grundrisse, a roughly drafted collection of manuscripts never meant for publication. In the process of the working-out of the seven notebooks, a number of important developments in the structure of the Plan take place, concerning principally the point of departure for the systematic exposition and the logical relation between capital, landed-property and wage-labour.<sup>62</sup>

As regards the former, the Second Notebook, written in November 1857, demonstrates the superiority of Value as a starting point over Labour,

59. *ibid.* p. 108. This line of argument is further developed in Ch's 4 & 5 (*infra.*) to justify the point of departure for the analysis of Trespass.

60. *ibid.* (referring to section (1) on "Production in general")

61. *ibid.* There follows a brief fourth section consisting of "Notabene in regard to points to be mentioned here and not to be forgotten"

62. It is useful to distinguish structure from theoretical content; selective examples of changes in the latter are given below. (see Nicolaus *op. cit.*; Echeverria (1978 b). )

at this stage the only other serious contender: "To develop the concept of Capital it is necessary to begin not with labour but with Value, and precisely, with exchange-value in an already developed movement of Circulation".<sup>63</sup> This involves beginning the analysis at the level of Circulation rather than Production (as must be the case with labour), without however denying that Production is the determinant moment of Circulation, Exchange and Distribution.<sup>64</sup> At the same time, the crucial importance of the Commodity for the analysis of the concept of Value is also increasingly recognized:

"It is commodities which form the presupposition of circulation; they are the realization of a definite labour-time and, as such, values; their presupposition, therefore, is both the production of commodities by labour and their production as exchange-values".<sup>65</sup>

But it is not until June 1858, in the Seventh Notebook, that the commodity itself becomes the point of departure for the exposition:

"The first category in which bourgeois wealth presents itself is in that of the commodity. The commodity appears as the unity of two aspects. It is use-value, i.e. object of the satisfaction of any system whatever of human needs.....Now how does use-value become transformed into commodity? Vehicle of exchange-value. Although directly united in the commodity, use-value and exchange-value just as directly split apart".<sup>66</sup>

It is the Commodity, then, which becomes the starting point of the 1859 "Contribution to the Critique of Political Economy", the work for which the 1857 Introduction had originally been intended; it remains the point of departure for Capital, with minor modifications in the first edition of Volume I (Part I) of 1867, and in the second German

63. Grundrisse p. 259

64. as demonstrated in the first two sections of the Introduction.

65. Grundrisse p. 255.

66. *ibid* p. 881

edition of 1872.<sup>67</sup>

As to the question of the order and succession of the categories of Capital, wage-labour and landed property, the Second Notebook departs from the sequence envisaged in the Introduction by locating landed property in second place and wage-labour in the third.<sup>68</sup> By February 1858, the first and most abstract section proposed in the Introductory Plan is to be incorporated within the general concept of Capital, the whole work being divided into six books: (1) Capital ("contains some introductory chapters"); (2) Landed Property; (3) Wage-Labour; (4) The State; (5) International Trade; (6) World Market".<sup>69</sup> In a letter to Kugelman of October 1866,<sup>70</sup> however, Marx repudiates the independent treatment of the three fundamental categories, and subsumes them within the global analysis of Capital. Wage-labour is now recognized as an integral part of fully developed Capital, and Capital itself is considered to determine the specific nature of landed property in bourgeois society. Hence the final Plan, which is that realized in Capital, is: Book I, the Production process of Capital; Book II, Circulation process of Capital; and Book III, the process of Capitalist production as a whole. The structural change between the first and final outlines consists, therefore, in the embodiment of the original Book on Landed property in Volume III of Capital; the embodiment of the Book on Wage-labour in Volume I; and the embodiment of sections (b) - (d) of the Book on Capital in Volume

67. see Echeverria (1978 b) p 353

68. Grundrisse p 264

69. letter to Lassalle, 22 Feb 1858 MESC p. 96

70. 13th Oct. 1866 MEW Vol. 31 (referred to in Echeverria (op. cit.)).

III, and of section (a) in Volumes I and II.<sup>71</sup>

In accordance with this development of a final logic of presentation, several transformations in the substantive content of Marx's theoretical analysis also take place.<sup>72</sup>

(1) Volumes I and II of Capital share with the Rough Draft an emphasis on the abstract study of the phenomenon of the formation of Capital, conducted at the level of "Capital in general". Whereas, however, the Rough Draft remains at this level, considering Profit for example as "profit in general" or "profit of the capitalist class," Volume III of Capital proceeds to the level of "many capitals in competition", progressively approximating to the form in which capitals appear on the surface of society, and enabling analysis of the transformation of values into prices of production and the division of surplus-value into business profit, interest, etc:

"At this point the limits of "capital in general" - as the concept had been elaborated by Marx in the Rough Draft - are far exceeded. Problems can now be dealt with, which could only be hinted at in the earlier stages of the inquiry".<sup>73</sup>

(2) In the course of the period between the writing of the Grundrisse and Capital, the conceptual couple "fixed and circulating capital" is replaced by "constant and variable capital". The former distinction pertains to the sphere of circulation, fixed capital having a slower rate of depreciation than its counterpart, whilst the latter refers to

71. see Rosdolsky (1977) for the most comprehensive account. Rosdolsky's useful diagramme (p. 53) is reproduced in Appendix A. (see Appendices).

72. only three such changes will be indicated here to illustrate Marx's development in this respect; (see Rosdolsky op. cit).

73. *ibid.* p. 51 Rosdolsky instances the development of the concept of "socially necessary labour" (fn. p 51)



Production, denoting the respective parts of capital accorded means of production and living labour. In the movement from Circulation to Production, Marx is breaking with the classical temporal conception of capital, and the first couple is ultimately abandoned completely.<sup>74</sup>

(3) In the later pages of the Rough Draft, the concept "labour capacity" or "labour power" begins to be substituted for the classical politico-economic concept of "labour". This development is Marx's solution to a dilemma that had beset classical economics, concerning the question of the "value of labour": To argue that the value of labour was expressed by the worker's wages tended to suggest that the source of Value lay jointly in the "factors of production", land, labour and capital, and thus destroy the basis of a labour theory of value; and to argue, on the other hand, that the value of labour was expressed in the value of the product implied that the worker was not paid the "value of his labour", and was cheated of a part of it, contradicting the principle of equivalent exchange. Marx shows that the question is badly posed; the commodity exchanged for the wage is not a thing (labour) but rather a right of disposition over labour-power. The principle of equal exchange in the labour theory of value is upheld, but at the same time an explanation is provided for the accumulation and expansion of capital in the theory of surplus-value. The value of labour-power is then, like any other commodity, determined by the labour time socially necessary for its production and

74. see Roldolsky (op. cit) pp. 351-365; Tribe, K. (1974) pp. 191-194.

reproduction.<sup>75</sup>

Given that these developments in structure of presentation and theoretical content are plainly evident in Marx's work, the problem concerns the extent to which the "method of Inquiry" laid down in 1857 can be said to have sustained these changes whilst retaining its integrity. The argument for a continuity between 1857 and Capital must defend the Introduction as Marx's logic of Investigation, despite other developments that may have taken place. The argument against, on the other hand, must demonstrate the inconsistencies in this text and between it and Capital, and provide an alternative account of Marx's Method.

### III The assumption of Continuity

There is no particular unity amongst those writers who argue explicitly, or assume implicitly, a relation of continuity between 1857 and Capital, other than that constituted precisely by the adoption of this position. The principal concerns of commentators may be variously epistemological, methodological or theoretical, and involve a greater or lesser degree of attention to the intricacies of Marx's argument in the Introduction.<sup>76</sup> In "The Making of Marx's Capital", Rosdolsky's purpose is the detailed exegesis and comparison of passages from the Notebooks and Capital, and the demonstration of their relation. The question of method is not extensively considered, and the assumption that "the Outline (as did Capital later) follows the path from

75. see Nicolaus (op. cit) pp. 44-46; Sayer (1979 a) pp. 43-74; Echeverria (1978 a) pp 274-280

76. all without exception draw almost exclusively on a single passage in section (3) pp. 100-101

abstract definitions to the concrete"<sup>77</sup> is based on only a brief discussion of the Introduction. The nature of the scientific method of abstracton is not discussed, and the movement from "capital in general" in Volumes I and II to "many capitals" in Volume III is assumed to be a development from abstract to concrete levels.<sup>78</sup>

Having broadly described the scope of the change in the Outline, the question is asked: "how can it be explained?...what motives lay behind it?" The answer is superficial:

"The change in the Outline can be explained by reasons already touched upon.....namely, that once Marx had accomplished the most fundamental part of his task - the analysis of industrial capital - the former structure of his work, which had served as a means of self-clarification, became superfluous".<sup>79</sup>

Capital is thus considered the logic of presentation of the method of Inquiry contained in the Introduction, the status of this text being treated as unproblematic.

Zeleny, Colletti and Althusser, on the other hand, refer more extensively to the 1857 Introduction specifically in order to ground their epistemological and theoretical positions. Here the various interpretations of this text are fundamental and integral to the respective conceptions of Marxism, and therefore merit more detailed consideration.

77. Rosdolsky op cit. p 53.

78. see Mephram's critique of Rosdolsky (1979), in which the latter is indicted on three counts for assuming (1) that the Grundrisse and Capital are identical in method, (2) that Capital constitutes a unified and homogeneous discourse, and (3) that two discourses, one philosophical and the other economic, can be conceptually identical. (pp. 145-171)

79. Rosdolsky op cit. p. 53. The failure to consider the question of method is surprising given Rosdolsky's claim in Part 7: "The main aim of this work has been of a methodological nature. We set out from the question that previous research was excessively concerned with the material content of Marx's economic work, and exhibited far too little interest in his specific method of investigation". (p. 445)

(a) Zeleny

According to Zeleny<sup>80</sup>, the purpose of Marx's Capital is to analyze capital in its basic structure, presenting the inner organization of the mode of production, and to lay bare the economic "laws of motion" of modern society. This simultaneously "structural" and "genetic" analysis involves no contradiction, and does not result in parallel or sequential treatment: "Marx was concerned with presenting the capitalist mode of production as a self-developing, self-generating, self destroying structure. Theoretical analysis which strives towards this goal is a unified structural-genetic analysis".<sup>81</sup> The problem of the starting-point for such a systematic analysis is considered to have been resolved by Marx in the 1857 Introduction. Firstly, the point of departure depends on the level of development of the science under consideration. The small number of abstract and general relations discovered by 17th century economics form the basis of the developed economic systems which ascend from simple and abstract relations, such as labour, need and exchange-value, to the concrete level of the State, exchange between nations and world market.<sup>82</sup> This latter trajectory, "obviously the scientifically correct

80. (1980) "The Logic of Marx". Part I. examines Marx's Analysis in Capital, Part II "the Marxian Critique of Hegel", and Part III, "Being, Praxis and Reason".

81. *ibid.* p. 9.

82. *ibid.* p. 32. (see the Introduction pp 100-101)

method",<sup>83</sup> is only possible on the basis of the results achieved at an earlier stage in the development of economic science.

Secondly, within the limits of the correct scientific method, different approaches and theories are still possible. Thus Ricardo proceeds from a simple determination understood as a fixed essence<sup>84</sup>, phenomenal forms being explained in a scientific system which moves in "a straight line, from appearance to essence and from essence to appearance".<sup>85</sup> Marx's method, on the other hand,

"oscillates between appearance and essence, and has a continuous circular pattern from appearance to essence and from essence to appearance, advancing beyond a genetic-structural level to the comprehensive conceptual knowledge of the object".<sup>86</sup>

Where Ricardo attempted the explanation of phenomenal forms by their simple subsumption within an essential definition, "Marx on the other hand usually abstracts phenomenal forms through so-called 'mediation'".<sup>87</sup> This new mode of abstraction enables the investigation of "aspects of the inner structure of the object in isolation from one another and from complex (concrete) forms".<sup>88</sup> Thus Marx's analysis in Chapter I of Capital begins with historical forms (Commodity, Value) which constitute the essence of Capitalist relations; then Value is investigated independently of its phenomenal form (exchange-value), so that a new investigation of exchange-value as value-form is necessary:

"One advances from the establishment of distinctions and

83. Introduction p. 101

84. Zeleny op. cit. p. 32.

85. *ibid.* p. 103.

86. *ibid.* At this stage it may be noted that whatever the value of the notion of "oscillation" as a characteristic of Marx's method (see Echeverria *infra*) there is no basis for it in the Introduction.

87. *ibid.* p. 104

88. *ibid.* p. 105.

the existence of antitheses to an analysis of their polarities, to the relations of the object, to an understanding of the contradictions in its essence, and finally to an understanding of particular external objects (commodity-money) as a necessary form for expressing an internally contradictory essence".<sup>89</sup>

The oscillating pattern of this circular "spiral form"<sup>90</sup> analysis in the first Chapter is reproduced in the structure of Capital in its entirety: Volume I represents the essence of capitalist society, Volume III the phenomenal forms of the essence, and Volume II the mediating element of this structure.

Zeleny then considers the question of the specific starting-point for structural-genetic analysis. Obviously this depends on the level of development of the reality (aswell as the science) under investigation, which here determines the commodity as the elementary seed-like unity of opposites, the cell-form of the capitalist economy, and therefore the correct point of departure:

"The cell, the elementary form in the capitalist economy, is for Marx the commodity, the value-form of the product. Through all the alterations of his plans he stuck to the solution which he had worked out in the first years of his economic studies, that the secret of the capitalist production of commodities is hidden in the commodity as a specific economic form".<sup>91</sup>

Not only is the commodity recognized as the appropriate starting-point, but its concreteness is also acknowledged:

"(Marx) proceeds with the reproduction in ideas of a complex reality rich in determinations, not from the analysis of abstract concepts, but from the analysis of

89. *ibid.* p. 103.

90. *ibid.* p. 104. Zeleny does not further specify this "circular spiral" movement. As with "oscillation", there is no foundation for it in the Introduction. The possibility suggests itself that what may well prove to be accurate observations of the methodological trajectory of Capital are being imputed to the earlier text (see *infra*. Section IV).

91. *ibid.* p. 32

some other simple reality, the elementary concrete as cell, whose determination is abstract compared to the determination of the complex whole".<sup>92</sup>

Here the acknowledged concreteness of the commodity would appear to contradict the claim that the abstract > concrete trajectory is "obviously the scientifically correct method". This logical problem can be resolved only by assuming that, in relation to the complex concrete whole, the commodity is itself "abstract". With this reduction of the concrete to the abstract "the previous important recognition that the commodity is concrete is completely dissolved".<sup>93</sup>

#### (b) Colletti

In Colletti's interpretation of the Introduction, "the essential argument of interest is contained in one page",<sup>94</sup> where Marx refers to Hegel's illusion of conceiving the real as a product of thought concentrating itself and probing its own depths. Marx recognizes that the concrete can be understood only through thought (*pensiero*) and that it is in this sense a product of thinking and knowing. But, and in contrast to Hegel, he upholds together with the irreplaceable logico-deductive process a process of reality: "The passage from the abstract to the concrete is only the way in which thought appropriates reality, it is not to be confused with the way in which the concrete

92. *ibid.* p. 34

93. Echeverria (1978 a) p. 357 Zeleny's contradiction can properly be resolved only by recognizing the problematic nature of the Introduction as an exploratory text rather than a definitive statement of method (*infra*. Section IV.)

94. Colletti (1973) "Marxism and Hegel". p. 121. The reference is to p. 101 of the Introduction.

itself originates".<sup>95</sup> Marx provides an example

"The simplest economic category, e.g. exchange-value, presupposes population, moreover a population producing in specific relations; as well as a certain kind of family, or commune, or State etc. It can never exist other than as an abstract, one-sided relation within an already given, concrete, living whole. As a category, by contrast, exchange-value leads an antediluvian existence".<sup>96</sup>

Thus whilst in reality categories of thought presuppose "population", in logic "population" presupposes a series of categories without which it remains an "abstraction" having little meaning.<sup>97</sup>

Colletti is then in a position to expound the interrelation between the logico-deductive process and the inductive process (or "process of reality") with reference to the structure of Capital. The inductive process (method of inquiry corresponding to process of reality) begins with a particular historically concrete whole, the Capitalist mode of production. The commodity-form as the form of value is the final link in the inductive chain<sup>98</sup> which has begun within the concrete object; it is the most generic, secondary and subordinate (hence final) phenomenal form of bourgeois relations; it is "the last element which has been related in the course of the inquiry or the analytic dissection of the object".<sup>99</sup> There is almost nothing in bourgeois society which does not have the form of value and does not present itself as a commodity. It is from this point that the logico-deductive process (method of presentation) proceeds. From the "form of value" or commodity-form is derived the "form of money" and from this the "form of capital", a movement from the universal (Value) to

95. *ibid.* p. 121

96. Introduction p. 101 (emphasis supplied)

97. Colletti *op. cit.* p. 125

98. *ibid.* see pp. 126-127

99. *ibid.* p. 127



the particular (Money) to the individual (Capital). Whilst it may appear that the links in the deductive chain are suspended from a logical "prius" in the form of a mere "a priori" construction, what prevents any "a priorism" is the production of the initial category (the simplest feature of a complex object) as a result of the process of induction:

"All of which means that the work develops, together with the deductive process descending from the commodity to money and from the latter to capital, as an inductive process going back from the generic or secondary features of the object in question to its specific or primary ones, from subordinate elements to dominant ones - in short, from the particular phenomenal forms of commodity and money to capital itself, which is their basis and which alternately assumes those forms in the course of its life cycle".<sup>100</sup>

Thus the logical process is related to the process of reality in an "inverse order".<sup>101</sup> This understanding is crucial, according to Colletti, if a rigorous meaning is to be given Marx's concept of history.<sup>102</sup> Whilst it remains true that the logical deduction of capital from money represents the essence of the historical movement which preceded the birth of modern capital, it is no less important to grasp the differentiation of the two processes together with this unity, and "in short, to hold fast more than ever to the idea that deduction is not induction, nor the logical process the process of reality itself".<sup>103</sup> Once the foundations of the Capitalist mode of production are established,

"The cause of the entirety is to be sought in the real premiss itself, i.e. in the present datum that is and exists, and not in the historical premisses which by now no longer exist and have disappeared. The cause, the foundation in reality, is, in short, capital, and

100. *ibid.*

101. *ibid.*

102. *ibid.* p. 130

103. *ibid.* p. 129.

not the commodity or money, which appear rather at its pre-requisites from a logical point of view".<sup>104</sup>

The "historical premisses" of Capital imply that it does not yet exist, but that it will; as capital becomes established as a reality, however, the historical pre-requisites appear, "not as a condition of its coming into being, but as the result of its existence".<sup>105</sup>

Thus the commodity and money form the starting-point, not because they preceded Capital historically and were the "first in time", but because they constitute the most general and abstract expression of the capitalist mode of production. The order and sequence of categories must be determined by the relations and meaning they have within modern bourgeois society, rather than according to the succession of the various forms of society.<sup>106</sup> Marx observes in the Grundrisse that:

"It is not necessary, in order to analyze the laws of bourgeois economy, to write the actual history of production relationships.....The deduction of them as historically developed relationships....leads us to draw comparisons (Gleichungen) based on the past history of this system; it is precisely these allusions or comparisons which, together with a correct grasp of the present day, also offer a key to the understanding of the past".<sup>107</sup>

Colletti's principal concern in examining that "one page" in the 1857 Introduction is therefore the critique of Hegelian idealism, and more generally the question of the relation between Kant, Hegel and

104. *ibid.*

105. *ibid.* p. 130 (emphasis supplied)

106. see *ibid.* p. 132. The relevant passage in the Introduction (not explicitly acknowledged by Colletti) is on p. 107

107. in McLellan (1970) pp. 109-110; quoted by Colletti p. 133.

Marx<sup>108</sup> ; the methodological problem of the starting-point is not a central issue. Zeleny's primary focus, by contrast, is precisely the "logic of Marx" in *Capital*, and only in Part II of his work does he consider "The Marxian Critique of Hegel".<sup>109</sup> Given this difference of emphasis, the interpretations of the Introduction are broadly similar, for example in the treatment of the problem of logic and history<sup>110</sup>, and most importantly in the assumption that the passage from abstract to concrete is "obviously the scientifically correct method"; in both cases the structure of *Capital* is explained by reference to this logical trajectory.

However, whilst the problem with Zeleny's explanation of the starting-point lay in the contradictory claim that the commodity constituted a "concrete cell" at the same time as forming the first moment in the "scientifically correct" ascent from abstract to concrete, Colletti acknowledges no such "concreteness" in the commodity, which here is considered the correct point of departure because it is the most superficial, "general and abstract form of the capitalist mode of production".<sup>111</sup>

### (c) Althusser

Like Colletti, Althusser is concerned less directly with the problem of method than with epistemological and philosophical questions. Drawing on the same passages in section (3) of the Introduction, he arrives, however, at conclusions radically different from those of

108. see Colletti op. cit. Ch. 8. pp. 113-138.

109. see Zeleny op. cit. pp. 115-192.

110. see Zeleny op. cit. Ch. 5. "Theory and History" pp. 35-46 Again p. 107 of the Introduction is crucial (ibid p. 38)

111. Colletti op. cit. p. 31; see also p. 126.

either of the two writers previously considered.

The basis of Hegel's confusion, according to Althusser, is the identification of the real object with the object of knowledge, the real process with the knowledge process.<sup>112</sup> In the case of Hegel, reality itself is produced and reproduced in the movement of the Idea, but Feuerbach's empiricism is based on the same erroneous epistemological conception, here expressed in the assumption that there is an "immediate reality" which must be the foundation of knowledge. Historical Materialism, on the other hand, is grounded in an epistemological break with the idealist/empiricist problematic of identification, after which Science can no longer be conceived as a process of extraction/abstraction of the "essential" from the "inessential" real, and the "problem of knowledge" (the guaranteeing of the correspondence of concepts to reality) is dissolved:

"Knowledge working on its 'object'.....does not work on the real object but on the peculiar raw material, which constitutes, in the strict sense of the term, its 'object' (of knowledge), and which, even in the most rudimentary forms of knowledge, is distinct from the real object".<sup>113</sup>

Thus "abstract" and "concrete" moments are distinguished and developed entirely within thought. Scientific knowledge is the concrete thought-product (Generalities 3) resulting from the action of the concepts of a scientific problematic (G2) on existing more or less ideological and

112. Althusser: Reading Capital (1970) p. 40

113. *ibid.* p. 43

therefore "abstract" notions (G3).<sup>114</sup> It is the functional position of the concepts within the knowledge process that assigns them their abstract or concrete character.<sup>115</sup> Truth asserts itself entirely within the theoretical system, rather than in the relationship between thought and the supposedly external "real".<sup>116</sup>

It then follows that Marx's observations in the Introduction concerning the "identity" or "non-identity" of the logical and historical orders are framed within an ideological problematic; they merely provide answers "without any explicit question: they therefore pose for us the question of their questions, i.e. they impose on us the task of formulating the unformulated question which these answers answer".<sup>117</sup> The price of ignoring the distinction between the real object and the object of knowledge is the provision of "solutions" to a "problem" (of the "relation" between the two orders) which scientifically does not exist:

"whether this relation is imagined as one which brings the terms featured in the two orders of development into direct one-to-one correspondence ; or whether the same relation is imagined as one which brings the terms of the two orders into inverse correspondence (the basis of the thesis of Della Volpe and Pietranera) there remains the hypothesis of a relation where no relation exists ..... and it is never possible to solve a problem that does not exist."<sup>118</sup>

The contention that the "direct" or "inverted" correspondence between the terms of the two orders has nothing to do with the real problem is supported, according to Althusser, by Marx's conclusion to section (3)

114. Althusser (1977) "For Marx" ; see pp. 190-191 ("On the Materialist Dialectic")

115. see Echeverria (1978 a) pp. 205-208.

116. Althusser (1970) p. 59.

117. *ibid.* p. 46.

118. *ibid.* p. 115 (emphasis in original).

of the Introduction:

"It is not a matter of the connexion which is established historically between economic relations in the succession of different social forms ..... but of their Gliederung (articulated combination) within modern bourgeois society."<sup>119</sup>

It is precisely this Gliederung that has to be produced in knowledge as an object of knowledge in order to reach an understanding of the real articulated-totality which constitutes the existence of bourgeois society. The "synchronic" is then :

"nothing but the conception of the specific relations that exist between the different elements and the different structures of the structure of the whole, it is the knowledge of the relations of dependence and articulation that make it an organic whole, a system."<sup>120</sup>

Once synchrony has been correctly located, diachrony ("history") loses its concrete sense and becomes a category of knowing:

"Diachrony is then merely the false name for the process, or for what Marx called the development of forms. But here too we are within knowledge, in the process of knowledge, not in the development of the real-concrete."<sup>121</sup>

If, as suggested above, Colletti (but not Zeleny) tends to disregard Marx's discovery in June 1858 of a concrete starting point, Althusser appears still less moved by this development. The problem confronting Marx in 1857, of whether the point of departure should be concrete (Population, Nation, State) or abstract (Value, division of Labour etc) is dissolved, since all these concepts are considered as having the same theoretically "abstract" status.

119. *ibid.* p. 48. Compare this, Althusser's rendering (via Brewster's translation) with Nicolaus's translation pp. 107-8 (quoted *supra.*)

120. Althusser (1970) p. 107

121. *ibid.* p. 108.

Because the concept of Population is not Population itself, Althusser denies its concrete character, "introducing a problematic distance between the real and the concept which designates it, and transforming Marx into a Kantian he never was."<sup>122</sup> On the contrary, Marx insists on the full capacity of thought to apprehend reality, and on a relationship of correspondence between categories of thought and real relations, ideologically mediated by phenomenal forms of appearance; for him, "science reproduces the real concrete at the level of thought, this being its first test of objectivity."<sup>123</sup>

In this section, the 1857 Introduction has been used as a focal point for examining the assumption of continuity in Marx's methodological development ; three different Marxist positions have been considered solely in terms of their interpretation of it. Whilst this brief survey has therefore necessarily been extremely partial, it has sought to demonstrate that the relation of continuity between 1857 and Capital has been assumed (and used as the basis for epistemological and philosophical considerations) rather than rigorously argued. Even Zeleny, who most discusses specific methodological problems, does not justify his interpretation of the "logic of Marx" in Capital with a detailed examination of the developments in the structure and content of the Plan after 1857, rather imputing Marx's later conclusions to

122. Echeverria (1978 a) p. 208

123. *ibid.* see also (1978 b) p. 359; Section IV (*infra*).

the earlier text.<sup>124</sup> The acknowledgement of the concreteness of the commodity then results in inconsistency, avoided by the other commentators who do not document Marx's discovery of June 1857, since a forced reconciliation is effected between this point of departure and that advocated in the Introduction.

The assumption that the 1857 Introduction holds the key to the understanding of Marx's mature method of Inquiry may now be critically assessed by examining the case against continuity.

#### IV The case against Continuity

The argument against methodological continuity between 1857 and Capital might begin with the biographical observation that the Work which the Introduction was intended to preface was postponed until 1859, whilst Marx determined the point of departure and the order and sequence of categories in the course of the Rough Draft. The development of the structure and theoretical content of the Outline during this period is significant, according to this interpretation, for the question of the method of Inquiry, and it is precisely changes in this method that enable Marx to adequately develop his mature economic theory in the "Contribution" and Capital. Moreover, Marx himself decided in 1859 that the "Contribution" would be introduced, not by the 1857 text originally intended for it, but by a new Preface:

"A general introduction, which I had drafted, is omitted, since on further consideration it seems to me confusing to anticipate results which still have to be substantiated, and the reader who really wishes to follow me will have to decide to advance from the particular to the

124. see notes 86 & 90 above.



general".<sup>125</sup>

The case against continuity further requires, however, that: (1) The deficiencies and inconsistencies in the 1857 Introduction and in its relation to the later works be demonstrated; (2) an alternative conception of Marx's method of Inquiry be proposed; and (3) the theoretical effects of the continuity - reading be considered.<sup>126</sup>

### (1) Inconsistencies in the Introduction, and between 1857 and Capital

The question of methodological inconsistency in the Introduction primarily concerns Marx's contradictory usage of different conceptions of the "concrete", the "abstract" and "abstraction", indicating an uncertainty which Echeverria takes to be symptomatic of a transition between two opposing conceptions of Science.<sup>127</sup> In the first section, Marx stresses that Production must always be defined by the determinations of a definite stage of social development, but that, nevertheless, the concept of "Production in general" does retain some value:

"All epochs of production have certain common traits, common characteristics. Production in general is an abstraction, but a rational abstraction insofar as it really brings out and fixes the common element and this

125. (1971) p. 19. ; on this point see Sayer (1979 a) p. 98, Echeverria (1978 b) p.335. See also (supra.) Marx's later observations on the need for a Materialist Dialectic.

126. The first two are addressed here in section IV, the last in section V (infra)

127. On the one hand, Feuerbachian empiricism, according to which Theory should correspond to what is immediately observable (abstraction being defined as a deficiency), and on the other hand, the mature Marxist conception of Science, producing concepts without immediate referents through Scientific abstraction. (infra)

saves us repetition".<sup>128</sup>

Here the concept of "Production in general" is constructed according to generalization from features common to all forms of production, and "abstraction" is therefore understood within an empiricist framework. Moreover, "despite Marx's acceptance of abstraction, he assigns it an insignificant role in its capacity for explanation of distinct historical stages".<sup>129</sup>

In the third section, Marx criticizes the 17th Century economists who began with concrete wholes, such as Population, Nation, State, and argues that the opposite movement, from abstract and simple relations to the concrete totality, is "obviously the scientifically correct method":

"The population is an abstraction if I leave out, for example, the classes of which it is composed. These classes in turn are an empty phrase if I am not familiar with the elements on which they rest, e.g. wage-labour, capital, etc. These latter in turn presuppose exchange, division of labour, prices etc."<sup>130</sup>

The passage from which this quotation is taken has generally been accepted uncritically as providing the key to Marx's method of Inquiry<sup>131</sup>, yet two points should be noted in respect of it: firstly, the ascension from abstract to concrete here merely endorses the classical economy of Smith and Ricardo, by criticizing only the

128. Introduction p. 85 (see Section I supra)

129. Echeverria (1978 b) p 358

130. Introduction p. 100 (emphasis supplied) [supra Section I]

131. as demonstrated above in Zeleny, Colletti and Althusser

method of seventeenth century economists<sup>132</sup>; and secondly, the argument contains two contradictory conceptions of abstraction, referring on the one hand to Population as an "abstract" (because a concrete "chaotic" conception of the whole), and on the other hand to the necessary ascension from abstract and general definitions to the concrete totality.<sup>133</sup> Whilst abstraction here appears to be considered an indispensable recourse of scientific work, Marx's failure to rigorously define its methodological status at this stage impedes his theoretical development.

According to this interpretation, the resolution of the problem of (for example) the point of departure in the course of the Rough Draft reflects the development of a mature conception of scientific abstraction. By the end of 1858 the commodity is recognized as the proper starting-point, most importantly because of its concrete character, and this has implications for the conception of the "abstract" and "abstraction" in relation to it. In 1879, Marx was to criticize Herr Wagner precisely for failing to see that use-value and exchange-value were derived (through scientific abstraction) not from the concept of Value, but "from a concretum (Konkretum), the commod-

132. see Echeverria (1978 b) p. 340. In fact, Marx can resolve problems in the theory of value encountered by classical economy only by transcending its limitations, through the use of a different method, which eventually produces the concept of labour-power. (infra Part IV (2) ).

133. *ibid.* But see Carver (1980), who argues that this contradiction is only apparent (see n. 207 *infra.*)

ity:"<sup>134</sup>

"In the first place, I do not start out from 'concepts', and do not have to 'divide' these in any way. What I start out from is the simplest form in which the labour-product is presented in contemporary society, and this is the commodity. I analyze it, and right from the beginning, in the form in which it appears."<sup>135</sup>

But this "concrete" is not the same as the concrete whole, the "chaotic conception" (Population) referred to in the Introduction, since the concrete totality is still understood as a "concentration of many determinations and relations", and unsuitable as a starting-point for this reason; rather it is a simple concrete, whose choice as starting-point is determined precisely by this elementary concreteness. In contrast to Marx's position in the Introduction, the concrete is no longer reduced to the concrete/complex whole, and the abstract no longer exclusively identified with the simple and elementary determination; this allows for the possibility that a concrete may also be simple and constitute the point of departure for this reason.<sup>136</sup> Hence the importance of Marx's observation in the 1859 Preface that "the reader who really wishes to follow me will have to decide to advance from the particular to the general."<sup>137</sup> The path of Marx's mature method of presentation in Capital may therefore be described as a movement from the concrete Particular to the Concrete Totality.<sup>138</sup>

Once the concrete has been re-defined in this manner, "abstraction"

134. (1975) "Notes on Adolf Wagner". p. 189.

135. i.e. as a concrete; *ibid* p. 198

136. see Echeverria (1978 b) pp. 355-356

137. (1971) p. 19 (emphasis supplied)

138. Echeverria (*op. cit.*); Sayer also acknowledges the concreteness of the commodity and the novelty of its discovery (1979 a) pp112-113. It will be argued (*infra*) that the method of Inquiry is expressed in the logic of presentation, whilst nevertheless remaining distinct from it.

takes on a dimension entirely absent from the Introduction:

"While the concrete alludes to real objects constituted by social practice, the abstract refers to objects which, not being alien to that practice and in that sense being real, are only recognized through scientific practice .....Abstraction is defined as an adequate recourse of the knowledge of the real, first in its capacity to be derived from the objects constituted by social practice and directly expressed in the consciousness generated by such practice. Second, in its capacity to reproduce the concrete in thought, to explain its actual movements, which spontaneous consciousness cannot account for .....It is the problematic distance between the appearance of the movement of social practice and its essence which justifies the necessity of scientific practice."<sup>139</sup>

Therefore the movement from concrete particular to concrete totality, from the simple commodity to the complex surface dynamic of the capitalist mode of production, includes within its trajectory the necessary recourse of abstraction. The correct scientific method "starts from the concrete in order to deduce from it abstract concepts with which to explicate the concrete in its totality".<sup>140</sup> This reinforces the choice of the commodity as the point of departure, because of its peculiar capacity "to extend to basic abstract categories through which the movement of capitalist production can be theoretically reconstructed"<sup>141</sup>; it is specifically this concrete, practically constituted as the simplest and most elementary form of bourgeois social relations, that contains within it the possibility of the development of abstract concepts necessary to the explanation of the determinate object of study. Hence the recognition in the final pages of the Grundrisse of the two-fold nature of the commodity, use-value and exchange-value; concrete labour and abstract labour; and

139. *ibid.* p 358 (emphasis supplied)

140. Echeverria (1980) "Reply to Terrell Carver" p. 213

141. Echeverria (1978 b) p. 360

the secret of the fetishism of commodities.<sup>142</sup> This fundamental anti-empiricism also characterizes, according to Echeverria, Marx's resolution of the problem of the order and sequence of the basic categories in the 1860's:

"Whereas in 1857 the project adopted a more empirical, and thus vulgar perspective, to the extent that it was largely influenced by the expressions of immediate reality, conferring upon its forms an independent nature, the later project demonstrates a greater distance with respect to phenomena, with the domination of an essential dimension which results in the totalising nature of the analysis of 'capital'.<sup>143</sup>

If this argument regarding the transformation in Marx's conceptions of the "concrete", "abstract" and "scientific abstraction" is correct, then the movement from abstract to concrete can be considered "obviously the scientifically correct method" only in relation to the logic of presentation, and then only in a restricted sense (from "capital in general" in Volume I. to "many capitals in competition" in Volume III.)<sup>144</sup> Since the logic of exposition must differ from the method of Inquiry<sup>145</sup>, the precise logic of investigation underlying capital remains problematic, requiring an excavatory methodological reading of this text<sup>146</sup>:

"The adequate logic of investigation of a determinate object of study is only realized at a later stage of the investigation and must express itself in the logic of exposition. It follows that the logic of exposition is the perfected and superior expression of the logic of the

142. This position is developed (infra) in sub-section (2)

143. Echeverria (1978 b) p. 362. "It should also be recognized that this is consistent with the direction registered in the transformation of Marx's concept of science, particularly after the re-appropriation of Hegel in 1858" (ibid) On the latter point, see infra Section (2) (a)

144. cf Sayer (1979 a) p. 102. This is the limited sense in which Roldolsky's account is adequate (supra. Section II).

145. see Marx's Postface to the 2nd German edition of Capital (January 1873), reprinted in Capital I. (1976) p. 102

146. hence Lenin's remark (supra.) that Capital ought to be utilized to the full in the question of method.

whole investigation".<sup>147</sup>

The negative conclusion on the question of method to be drawn at this stage, therefore, is that the 1857 Introduction does not "anticipate" Capital, which cannot simplistically be considered its "realization".<sup>148</sup> An alternative conception of Marx's logic of Inquiry must now be presented.

## (2) Marx's logic of Inquiry:

### (a) Echeverria.<sup>149</sup>

Echeverria begins his examination of method by defining the ultimate object of Marx's scientific analysis as History, within which grand design "Capital" provides the study of the capitalist mode of production.<sup>150</sup> This requires an understanding of the relation between

147. Echeverria (1978 b) p. 364. Hence Marx's distinction between method of exposition and method of investigation need not represent "an obstacle to the deciphering of his logic of investigation on the basis of the exposition of Capital, i.e. the path proposed by Lenin" (ibid) p. 365

148. cf. Mepham's (1979) critique of Rosdolsky's account of the continuity-relation between the Grundrisse and Capital: "Since on Rosdolsky's assumption the Grundrisse is the origin of Capital, and Capital is the truth or telos of the Grundrisse, this allows him to dispel any obscurities in the earlier text by referring to the latter one." p. 153. As has been demonstrated, the same teleological conception is at work in the assumption of continuity between 1857 and Capital, enabling Zeleny in particular to "read into" the Introduction "Circular", "Spiral" and "oscillating" movements which we shall argue are characteristic only of the later work.

149. This account follows Echeverria's Ch. 5. (1978 a) [pp. 136-178] in simplified form, substituting the new Pelican translations of passages from Capital Vols. I & II where Echeverria has used the Lawrence & Wishart edition.

150. This object (History) is considered by Marx both in the 1857 Introduction and the 1859 Preface. The critique (supra) of the methodological inconsistencies in the Introduction does not of course deny its many insights on this and other questions (for this reason it was resumed in its entirety in section I). On the relation between it and the Preface (1971) see Echeverria (1978 b) pp. 346-349. On Marx's concept of History see Cohen (1978) "Marx's Theory of History: A Defence", Shaw (1978), Arthur (1979 b), all of which extrapolate from Marx's highly compressed remarks in the Preface.

historically constituted social practice (objective movement) and theoretically constituted scientific practice (theoretical movement):<sup>151</sup>

(1) The theoretical understanding of history does not coincide with its actual movement. The determinant role of Production in society, for example, is recognized only under certain conditions of development of the forces and relations of production, involving the extension and dominance of capitalism and the homogenisation of labour, whose concrete qualitative features are erased with its abstraction and mobility in the production process. One of the objective conditions of possibility for the explanation of the movement of history is thus the development of economic science, enabled by the real abstraction<sup>152</sup> of labour and the autonomisation of production; a second such condition is the manifestation of the contradictions of Capitalism in economic crises and the struggle between wage-labour and Capital.<sup>153</sup> Therefore the theory of history must begin, not with the first historical stages, but with that which renders them comprehensible, the capitalist mode of production.<sup>154</sup>

(2) Once the restricted object of study has thus been defined, the theoretical movement does reproduce the objective movement:

"Theoretical connections are the adequate expressions within thought

151. Echeverria (1978 a) p. 138

152. "real abstraction" occurs in the real as a process of the homogenisation of labour, and must be distinguished from scientific abstraction taking place entirely within thought. (see Introduction p. 104).

153. Echeverria (op. cit) p. 141

154. This conclusion ("Human anatomy contains the key to the anatomy of the ape" - see Introduction p. 105 and supra) is also shared by Zeleny, Colletti and Althusser. Here the value of the Introduction is apparent.



of actual connections in objective reality".<sup>155</sup>

(3) There remains the problem of the relation between the logical order of categories within the analysis of the restricted object and their order of historical emergence. Here there can be no coincidence between the theoretical and historical dimensions: whilst the category of Rent historically precedes that of Capital, it cannot have priority in the logical analysis, since categories must be analyzed in accordance with their function in the capitalist mode of production, and Capital itself therefore here takes precedence.<sup>156</sup>

Having established the general methodological presuppositions of Capital, Echeverria then problematizes its apparent organization as a movement from Production (Vol.I) through Circulation (Vol.II) to the consideration of capitalist production as a whole (Vol.III). Whilst Production continues, as in the Introduction, to be the determining moment of Exchange, Circulation and Distribution, the first two parts of Volume I ("Commodities and Money" and "the transformation of Money into Capital") pertain to the sphere of Circulation:

"it is at the level of Circulation that the capitalist system presents its most characteristic appearance and its most outstanding features, and the analysis must develop from this. It is this level which poses the problems which necessitate the transition to the sphere of production in the search for explanations of its

155. Echeverria (op. cit) p. 142

156. ibid. p. 145; cf Introduction p. 107

movements."<sup>157</sup>

Marx had recognised by November 1857 that Value was a better point of departure than Labour, and this necessitated beginning the analysis at the level of Circulation, in the logical movement Circulation - Production - Circulation.<sup>158</sup> Similarly Volume II only partially refers to the sphere of Circulation in isolation from Production. Hence the titles of the three Volumes of Capital refer only to the most general character of the logical trajectory, concealing its complexity.

A crucial distinction is then made between the "apparent" and "essential" movements within the restricted object of study.<sup>159</sup> The levels of Appearance and Essence imply different forms of conscious apprehension of objective reality, spontaneous consciousness failing to grasp the essential movement, which can be understood only through scientific theoretical activity questioning the immediate apprehension of reality. To this appearance-essence relation corresponds a concrete-abstract relation : the point of departure for science is what is directly given in a determinate social practice, providing a starting-point simultaneously concrete and located at the level of appearances. Because the essential movement is concealed from the agents of this social practice, theoretical practice must produce abstract concepts by a process of scientific abstraction, revealing the essence of what would otherwise be grasped only as appearance. This scientific abstraction is developed through a specifically scientific practice in a problematic relationship to

157. *ibid.* p. 147 (emphasis supplied)

158. see Grundrisse pp. 225-259; also *supra* p. 11

159. Echeverria (*op. cit*) p. 148

immediate reality, nevertheless, "science must always reach a point where the level of abstraction should be abandoned, the level of the concrete confronted, and the scientific results prove their capacity to account for all the phenomenal forms".<sup>160</sup> The terminal point of analysis must therefore be the concrete, no longer however the concrete particular with which the investigation began, but now the concrete totality, revealed as the unity of many determinations and relations. Both concrete particular and concrete totality are directly given within a specific and determinate social practice, whilst the abstract revelation of essential relations occurs as a product of scientific practice.<sup>161</sup>

The logical trajectory may therefore be represented as a movement from (1) to (3) :

(1)	(2)	(3)
Appearances/Immediate reality	Essences/essential reality	Appearances + Essences
CIRCULATION	PRODUCTION	PRODUCTION AS WHOLE
(Vol.1 Ch. 1-6		
<u>Concrete Particular</u>	<u>Abstraction</u>	<u>Concrete Totality</u>
(social practice)	(scientific practice)	(social practice)
 <u>The Commodity</u>		 <u>Many capitals</u>
		(competition)

This position is distinguished from that of 1857 by (1) the separation of immediate from essential reality through the questioning of the former, and (2) the acceptance of abstraction as a legitimate recourse of knowledge. These developments mark a break, according to Echeverria, with Marx's previously Feuerbachian Philosophy, which had

160. *ibid.*

161. *ibid* p. 153

claimed (contra Hegel) that essence should be located at the level of immediate reality and therefore defined abstraction as an inadequate recourse of knowledge. Thus in 1845, in his critique of Hegelian idealism and assertion of the active role of consciousness and practice, Marx had tended to adopt an empiricist position on the nature of knowledge, limiting the role of science to providing an account of what was directly observable; since theoretical knowledge was here affirmed as arising directly from observation and experience, it was unnecessary to criticize the level of the immediate. Elements of the resulting conception of abstraction, together with other and contradictory ones, are evident in the 1857 Introduction.<sup>162</sup>

In 1858, however, Marx re-read and was greatly impressed by Hegel's "Science of Logic",<sup>163</sup> and this, according to Echeverria, led to a critical rectification of Hegelian philosophy and to the recognition that Hegel had given a more satisfactory explanation of the process of theoretical knowledge than that provided by the empiricists. In January Marx wrote to Engels:

"The fact that by mere accident I again glanced through Hegel's *Logik*...has been of great service to me as regards the method of dealing with the material.....If there should ever be time for such work again, I should like to make accessible to ordinary human intelligence... what is rational in the method which Hegel discovered but

162. supra: section IV (1) ; also see Echeverria (1978 b) pp. 340-341: "The population is first considered to be concrete because it is real in Feuerbachian terms; and then it is considered to be abstract because it is still theoretically indetermined, in Hegelian terms....the 1857 Introduction oscillates between a Feuerbachian and a Hegelian position, without being able to conciliate both epistemological perspectives". (ibid p. 341)

163. - one of a number of Bakunin's books sent to Marx by Freiligrath. There is no doubt that the Introduction is also (in 1857) influenced by the "Science of Logic"; the question is, how important was its re-reading? Echeverria's interpretation is disputed by Carver (1980) pp. 197-198.

at the same time enveloped in mysticism".<sup>164</sup>

The claim to have "inverted" Hegel's dialectic is made only from 1858 onwards, testifying to the importance of the discovery. Whereas in Hegel, however, the questioning of immediate reality leads to the conception of its theoretical expression as the essence of reality, such that the real is transferred to the consciousness which "supercedes" the immediate, for Marx, the irreducibility of material reality to the process that conceives it leads to a re-definition of the relation between the immediate and the essential, the former exhibiting the appearance of reality and constituting the spontaneous consciousness of the agents of production, and the latter referring to the theoretical constitution of concepts without immediate referents through abstraction, and in a problematic relationship to the phenomena.<sup>165</sup> It now becomes the work of Science "to resolve the visible, merely external movement into the true intrinsic movement".<sup>166</sup> Were it not for the problematic distance between the immediate and the essential, there would be no need for science: "all science would be superfluous if the outward appearance and the essence of things directly coincided".<sup>167</sup> These conceptions of science, abstraction, the abstract and the concrete, essence and appearance are developed by Marx only after 1857.

The three basic moments of the logical trajectory, from Concrete Particular through Abstraction to Concrete Totality, may now be more rigorously defined:

164. MESC p. 93; quoted in Echeverria p. 85 (1978 a).

165. see Echeverria (1978 a) pp. 84-92, 243 - 250.

166. Capital III p. 213 (quoted in Echeverria op. cit. p.92)

167. *ibid.* p. 817 (quoted *ibid.*).

(i) the Concrete Particular

The starting-point is the concrete commodity, the most simple and elementary cell-form of bourgeois relations, directly given and practically constituted in immediate reality in the sphere of Circulation and at the level of Appearances: "The commodity represents a non-problematic concept, recognized and constituted by a determinate social practice".<sup>168</sup> The great theoretical advantage of the commodity lies in its capacity to provide the basis for the development of abstract concepts which will ultimately reveal the essence of Capital:

"In this sense, the analysis of the commodity permits the initial transition from apparent movement to essential movement which, from the point of view of the concepts required by analysis, simultaneously implies the transition from concrete to abstract concepts".<sup>169</sup>

Thus having recognized the dual nature of the commodity as use-value and exchange-value, Marx demonstrates that the latter is the relative expression of Value and that this, in its turn, is the expression of social Labour. Both Value and Labour are here abstract concepts connoting essential relations, and are of a different theoretical status to those, such as Price and concrete Labour, that refer directly to immediate reality.<sup>170</sup>

The abstract concepts necessary for the scientific understanding of the commodity are not, however, available to spontaneous consciousness, which conceives its object only partially as it is given in those appearances which conceal its essential character. As it

168. Echeverria (op. cit) p. 153.

169. *ibid.* p. 154

170. *ibid.*

appears in immediate reality, the commodity is a useful thing, establishing on the basis of its specific usefulness relations with other useful things of similar nature. The disjunction between this immediate appearance and the essence of the commodity is the basis of commodity fetishism. The mystical character of the commodity does not arise from its use-value, but rather "consists in that the commodity reflects the social characteristics of mens own labour as objective characteristics of the products of labour themselves, as the socio-natural properties of these things".<sup>171</sup> In reality, the commodity acquires value to the extent that it embodies homogeneous social labour, Value then being expressed as exchange-value, but this cannot be recognized in spontaneous consciousness, which reverses the order of determination according to the fetishism of commodities:

"Men do not therefore bring the products of their labour into relation with each other as values because they see these objects merely as the material integuments of homogeneous human labour. The reverse is true: by equating their different products to each other in exchange as values, they equate their different kinds of labour as human labour. They do this without being aware of it. Value, therefore, does not have its description branded on its forehead; it rather transforms every product of labour into a social hieroglyphic. Later on, men try to decipher the hieroglyphic, to get behind the secret of their own social product".<sup>172</sup>

"If commodities could speak, they would say this: our use-value may interest men, but it does not belong to us as objects. What does belong to us as objects, however, is our Value. Our own intercourse as commodities proves it. We relate to each other merely

171. Capital I. p. 165 (not quoted in Echeverria, but included here for clarification).

172. *ibid.* p. 167. "Value does not stalk about with a label describing what it is", according to the original translation p. 79.

as exchange values".<sup>173</sup>

If the essential nature of the commodity was difficult to perceive when socially abstract labour was simply expressed in Value, this becomes still more the case when Value achieves an independent incarnation in Money: "From this moment, the appearance of the commodity erases any possible trace that could directly lead to its essential dimension".<sup>174</sup> With this development, heterogeneous concrete labours producing different concrete use-values are represented in appearances merely as differences in the Price of commodities; in the process, a specific inversion occurs, further concealing the real relation of commodities to Money:

"Although the movement of money is merely the expression of the circulation of commodities, the situation appears to be the reverse of this, namely the circulation of commodities seems to be the result of the movement of money".<sup>175</sup>

### (ii) Abstraction

Marx's analysis thus demonstrates that abstract concepts, such as Value and (later) Surplus-Value, are simultaneously realized and perverted in the immediate and concrete sphere of Appearances, where they assume the forms of Price, Money and Wages. Whilst priority is accorded the abstract as a means of penetrating forms of appearance, the concrete is never completely abandoned in this process but remains constantly present within it. According to Echeverria, there are three distinguishable forms of presence of the concrete within the process of abstraction: (1) where the concrete assumes the role of

173. Capital I p. 177 (not quoted in Echeverria).

174. Echeverria (1978 a) p. 157

175. Capital I. p. 212



historical presupposition but does not form an integral part of the analysis, as for example in section 8. of Capital Volume I. on "Primitive Accumulation", which is not strictly part of the investigation of the capitalist mode of production<sup>176</sup>; (2) where the concrete is that which theory is attempting to explain, in other words the capitalist mode of production, and where it therefore "assumes the form of an essential buttress for the course of the analysis".<sup>177</sup> Here the theoretical movement must correspond to the real movement and constantly refer to it, as is the case for example in Marx's analysis of the passage from commodity to money and from money to Capital<sup>178</sup>; and (3), where the concrete "is simply an auxiliary recourse for the clarification and exemplification of the law of operation established by the analysis",<sup>179</sup> as in those chapters dealing with the working day, modern industry and the general law of capitalist accumulation.

Nevertheless, it is necessary to emphasize the dominance of the abstract over the concrete movement, and thus the restrictions on the use of the concrete, particularly where it is understood in the sense of an "essential buttress" for the abstract development; the presence of the concrete is not continuous and unbroken, but implies "the recognition of certain suspensions, postponements and restrictions within the analysis".<sup>180</sup> Having examined the commodity, further concrete objects are not then analyzed independently by the same process of abstraction starting again from the concrete in isolation, but depend on the abstract results already attained:

"Marx proceeds by developing further these initially

176. Echeverria (op cit.) p. 160

177. *ibid.* p. 161

178. *ibid.* (emphasis supplied)

179. *ibid.* p 162 (emphasis supplied)

180. *ibid.* p. 160

abstract dimensions to explain the emergence and nature of the new objects and processes under examination. Their essential dimensions, disclosed by the analysis, are not the result of an independent theoretical endeavour, different from what had already been disclosed as essential in a previous moment. The process of theoretical development is not only the increasing extension of analysis to new elements, but also the simultaneous development of the initially attained abstract dimension and its application to new concrete situations. The analysis of the objective movement therefore gives rise to a theoretical movement which develops abstraction as a distinct dimension from the apparent movement".<sup>181</sup>

An example of the dominance of the abstract over the concrete is contained in Marx's assertion of a direct relation between the magnitude of variable capital employed and the mass of surplus-value produced:

"This law clearly contradicts all experience based on immediate appearances. Everyone knows that a cotton spinner, who, if we consider the percentage over the whole of his applied capital, employs much constant and little variable capital, does not, on account of this, pocket less profit or surplus-value than a baker, who sets in motion relatively much variable capital and little constant capital".<sup>182</sup>

Because appearances contradict this law, and question not only its validity but also the theory of Value from which it was deduced, Marx must favour either the abstract or the concrete dimension if the analysis is to proceed. Rather than compelling the theory to submit to appearances and account for them at this stage, however, Marx's solution is to postpone this moment by provisionally privileging the abstract. Only when the analysis of capital moves beyond Production and incorporates Circulation can the apparent contradiction between the immediate and the essential movements adequately be resolved, and the validity of the abstract law, held in abeyance until this moment

181. *ibid.* pp. 162-163

182. *Capital I* p. 421 (Echeverria, unfortunately, has "banker" instead of "baker")

finally be confirmed.<sup>183</sup>

The insistence on a problematic distance between the apparent and essential movements is therefore fundamental to Marx's logic of investigation. The recognition of this dimension is absent from empiricist accounts which consider abstraction as either a process of partialization of the concrete (the "abstraction" of part from the whole), or the mere theoretical apprehension of common features in the concrete.<sup>184</sup> The production of the concept of surplus-value, for example, is the result of theoretical abstraction working in a problematic relation with the immediate expression and realization of this concept in Profit; as an abstract category (the product of scientific practice) it does not exist ready constituted in the concrete (as do Price, Money, Profit, Commodity) and cannot therefore be the result of generalization or partialization of this concrete.<sup>185</sup>

### (iii) the Concrete Totality

In the final moment of analysis, those suspensions and postponements of the concrete necessary for the development of theoretical abstraction are abandoned and the concrete totality confronted in all its complexity, this movement accounting for full spectrum of phenomena present in the immediate appearances of the restricted object of study. Volume III of Capital is thus the culmination of a process of gradual, if constantly restricted and interrupted, approximation to-

183. Echeverria (op cit) p. 165. Echeverria also instances the resolution of problems concerning the theorisation of the labour-process in Ch. 7. Vol I (ibid pp. 163-164)

184. Echeverria considers Zeleny to tend to such a conception: ibid. pp. 167-168.

185. ibid. Hence the charge of the empiricist use of abstraction in the Introduction (supra).

wards the concrete totality of capitals "in the form they assume on the surface of society in the action of different capitals upon one-another, in competition and in the ordinary consciousness of the agents of production themselves".<sup>186</sup> This volume represents "the final transition of essential movement to apparent movement, the descent from the already conquered realm of abstraction to the globality of the realm of the concrete".<sup>187</sup>

In this process, the reasons why appearances and hence spontaneous consciousness should assume the forms they do are explained in the theory of capital-fetishism. The categories of Profit and Wages appear as distorted representations of the essential movement in the sphere of Circulation, which compels the value of the product to be realized in the market in accordance with the law of competition and thus determines a price which does not correspond to the value determined in the production process. This enables the Capitalist to conceive Profit merely as the difference over the cost-price of the product obtained through free competition, concealing its real existence as a form of surplus-value generated through the exploitation of wage-labour; hence also the Wage appears as the price of labour required by production, and not as the price of labour-power. The real source of surplus-value is thus occluded, and Labour appears as just another factor of production, subordinate to the driving-force of Capital. The essential character of capital is still further obscured with the distinction between Interest and Profit of enterprise. In the simple category of Profit there had remained "a recollection of its origin, which is not only extinguished in interest, but also

186. Capital Volume III Introduction, p. 25.

187. Echeverria (op. cit.) p. 172.

placed in a form thoroughly antithetical to this origin".<sup>188</sup> Interest-bearing capital becomes the form of capital par excellence (just as in commodity-fetishism Money succeeded exchange-value as the superior expression of abstract labour) since it appears to be able to create profit without the involvement of labour simply by offering itself as loan and charging interest:

"It is in interest-bearing capital - in the division of profit into interest and (industrial) profit - that capital finds its most objectified form, its pure fetish form, and the nature of surplus-value is presented as something which has altogether lost its identity".<sup>189</sup>

The complete explanation of the concrete totality of phenomena within the determinate object of study is therefore, for Echeverria, the basic test of truth to which the scientific theory must submit. But this unity between theory and objective reality is not the ultimate criterion of scientific verification:

"The final criterion is at the level of objective reality itself, in the active unity of its transformation, in social practice. The validity of a scientific theory can only be proven in its effective capacity to reproduce the concrete in objective reality, and not only in thought".<sup>190</sup>

188. Capital III. p. 829

189. Theories of Surplus Value p. 498; see Echeverria (op cit) pp. 168-178. Echeverria here considers parts of Theories of Surplus-Value superior to similar sections in Capital III, and suggests that Engels was at fault in not including them in Capital.

190. Echeverria (op cit) p. 169 (emphasis supplied) see Ch. 8. "The problem of a revolutionary Science" pp. 265-297. In this discussion of method we have emphasized the first criterion of validity; the second is no less important for Echeverria's thesis.

(b) Sayer<sup>191</sup>

Sayer also considers that changes in Marx's Plan after 1857 are significant for the question of the method of Inquiry. The decision to begin with a historical particular, the commodity, rather than with general and abstract determinants obtaining in all forms of society, implies that the logical ascent from abstract to concrete can be considered an adequate description of the method of Presentation only (and then only in certain sense). The latter is also conceived by Sayer as an ascent from essential relations to phenomenal forms, organised on the basis of a hierarchy of "conditions of possibility".<sup>192</sup> These conditions must have been unearthed in their entirety and their "inner connection" established before the logical presentation could commence, thus the question of the method of Inquiry remains open.<sup>193</sup>

Sayer argues that this method can be characterized specifically as a Critique<sup>194</sup> of categories expressing phenomenal forms of appearance; assuming a relation of correspondence between categories of thought and the phenomenal forms they apprehend, then "the conditions of validity of the former will strictly co-incide with the conditions

191. see "Marx's Method: Ideology, Science & Critique in Capital" (1979 a) ; "Science as Critique: Marx vs. Althusser" (1979 b) Sayer's contribution is neither so broad nor ambitious in scope as Echeverria's and will be discussed more briefly. An essential congruence between the two positions will be suggested in the Conclusion to this section.

192. this commodity before money, money before capital etc, according to a deductive chain of reasoning (1979 a) p. 101; cf. Colletti supra.

193. Sayer (op cit) p. 102; see Marx's Postface to the 2nd German edition of Capital, reproduced in (1976) p. 102.

194. so much, but no more, Sayer takes from Kant (op cit) pp. 105-110. It should be noted that Echeverria also conceives of Marx's logic of Investigation as Critique (of the method of Political Economy) - see (1978 a) Ch 6. pp. 179-214.

of existence of the latter".<sup>195</sup> Thus the starting-point lies not in abstractions, but rather in "a concrete social form, the commodity, as, moreover, it presents itself phenomenally".<sup>196</sup> Given this point of departure in a particular phenomenal form, the structure of Marx's analytic cannot be deductive, since there are no abstract or "transhistorical" general laws from which the essential relations of phenomenal forms could be inferred, but neither can it be inductive, since it is of the nature of phenomenal forms that they are misleading and general laws could not therefore validly be inferred from the existence of broad empirical regularities. Instead, Marx's object is the explanation of empirical and phenomenal correlations established on the surface of society, through the discovery of the mechanisms which bring them about, and behind these mechanisms the conditions that are required for their operation:

"to this extent Marx held what modern philosophers of science term a realist conception of explanation. This means that the 'logic' of Marx's analytic is essentially a logic of hypothesis formation, for what he basically does is to posit mechanisms and conditions which would, if they existed, respectively explain how and why the phenomena we observe come to assume the forms they do."<sup>197</sup>

The process of scientific reasoning may therefore be described as "a

195. Sayer (op cit) p. 110

196. *ibid.* p. 112 (emphasis supplied) cf Echeverria (supra) Sayer quotes extensively (as does Echeverria) from Marx's Notes on Wagner, where the concreteness of the commodity is emphasized. The recognition of this concreteness would appear to be a pre-condition for the adequate understanding of Marx's method.

197. *ibid.* p. 114 ; this conception accords with the positions of Bhaskar (1978) and Keat and Urry (1976).

posteriori" and "retroductive"<sup>198</sup> in character, moving from phenomenal (surface) explananda to provisional (essential) explanans, and incorporating exhaustiveness, independence and consistency as definite criteria of adequacy.<sup>199</sup>

The inadequacy of Ricardo's explanation of the phenomenal forms of Price and Profit, for example, derives from his failure to properly account for the mechanisms of their production in his theory of value. Because of the initial theoretical identification of value with "Price of production and surplus-value with Profit, Ricardo is led, when confronted with the manifest fact that this coincidence does not occur in reality except for capitals of average composition, to explain the empirical deviations as exceptions to the law of value, and ultimately to postulate determinants of value other than labour-time:<sup>200</sup>

"Ricardo commits all these blunders, because he attempts to carry through the identification of the rate of surplus-value with the rate of profit by means of forced abstractions. The vulgar mob has therefore concluded that theoretical truths are abstractions which are at variance with reality, instead of seeing, on the contrary, that Ricardo does not carry true abstract thinking far enough and is therefore driven into false abstraction".<sup>201</sup>

In other words, the mechanisms by means of which the alleged essences are supposed to have caused the phenomena to assume the forms they do have not been adequately specified. Scientific abstraction is complete "only when the residuum resisting explanation has been thoroughly expunged; precisely when, in other words, the criterion of

198. here Sayer draws on Hanson, discussed (ibid) pp. 113-135

199. ibid. p. 117

200. ibid. pp. 126-130

201. Theories of Surplus Value II. p. 437 (emphasis supplied).



exhaustiveness has been satisfied".<sup>202</sup>

Once the mechanisms explaining phenomena have been successfully re-produced, the conditions which explain why such mechanisms should themselves exist may be identified as the real essential relations underlying the forms of appearance. The explanation of how the value-form, for example, can exist, is given in the mechanism which renders commodities commensurable as repositories of abstract labour, while the explanation of why this process should occur depends on the demonstration of exploitative relations of surplus-value extraction peculiar to developed commodity production.<sup>203</sup> From the critique of more or less adequate historical categories, then, has resulted the reconceptualization of phenomenal forms "in terms of their precise historical conditions of existence, as forms of manifestation of historically specific essential relations."<sup>204</sup>

Having ascertained, in the process of this analytic procedure, the boundaries within which economic categories can properly be applied, Marx's dialectic then consists of the identification and criticism of transgressions of these boundaries, resulting in the wholesale reformulation of the categories of Political Economy :

"What is at stake .... is not just conceptual precision as an end in itself ; it is the provision of categories capable of grasping the historicity of the phenomena they describe. Marx systematically and consistently reformulates the categories of his predecessors as unambiguously trans-historical or historical concepts, the former on the basis of his analysis of production in

202. Sayer (op cit) p. 122 (emphasis supplied) c.f. Echeverria's conception of the submission of the abstract to the concrete totality (supra). For a discussion of the further criteria of "independence" and "consistency", see Sayer (op cit) pp. 130-135.

203. Sayer (1979 b) p. 44.

204. *ibid.*

general and the latter on the basis of the conclusions of his analysis."<sup>205</sup>

Thus the apparently simple category of Labour, whose different dimensions Ricardo failed to grasp in his Theory of Value, does not exist in this form in Capital. From the end of the Grundrisse, the concept of "useful labour" is used to refer to that "immeasurably ancient relation valid in all forms of society", whilst "abstract labour" is specifically defined as obtaining as a category only of the most modern relations; and the commodity exchanged in the wage-transaction ceases to be regarded as a thing (labour), and becomes instead the right of disposition over labour-power. Another example of the transgression of proper categorial boundaries is the Trinity formula of vulgar economy, which links three elements of production in general (land, labour and means of production) with three historically determinate economic forms (rent, wages and interest); this subsumption of historical under transhistorical categories also results in the eternization of specifically bourgeois relations, through the spurious generalization of particular historical characteristics.<sup>206</sup>

### (3) Conclusions; Marx's Method

Were this thesis concerned specifically with the question of Marx's method, it would be necessary, in order to do justice to the "continuity" interpretation, to attempt a detailed reading of the 1857 Introduction and its comparison with the later works, with the purpose of reconciling the apparent contradictions between different periods in Marx's development and demonstrating through close textual

205. Sayer (1979 a) p. 146.

206. *ibid.* pp. 147-149

analysis the validity of the conception of an abstract > concrete logical trajectory; the basically philosophical concerns of Zeleny, Colletti, Althusser and others have dwarfed the particular question of method and resulted in teleological interpretations of the 1857 text which fail to even acknowledge its problematic character.<sup>207</sup> It would also be necessary, in making a proper case against continuity, to define Marx's method of Inquiry in Capital and illustrate this interpretation with a greater rigour and closer respect of the complexity and detail of the argument than has so far been provided. But since our particular object is Law (and moreover a specific aspect of Law) rather than the capitalist economy, this undertaking is considered, for present purposes, unnecessary (and possibly even misleading) since the implication of the argument above is that the finer points of the materialist method must be developed in relation to the particular object and not "a prioristically" determined in advance of it. Therefore the question of Marx's method of inquiry in Capital must remain open, and only preliminary and tentative observations here offered by way of conclusion.

As the debate currently stands, the conclusion that a definite break separates the early parts of the Grundrisse from Capital is inescap-

207. A "prima facie" case has been made out against continuity, controvertible only through a similarly rigorous argument. Carver (1980) has contested the conclusions of Echeverria's published extract on the 1857 Introduction, arguing that the different concepts of abstraction employed there are only apparently contradictory; that there is no "break" in 1859 through a re-appropriation of Hegel; and that Echeverria's account of method is "obscure and inaccurate". Here it can only be noted that Carver's five sides hardly do justice to the complexity of Echeverria's argument, as the latter makes clear in his reply (1980); that (whatever its other defects) Echeverria's account can hardly be called "obscure", particularly in the context of his broader thesis; and that other currents in Marxist thought, besides Echeverria, (eg Mephram, Sayer, Tribe op. cit.) have arrived at similar conclusions in similar studies (although by slightly different paths), and the breadth of this movement should be considered in its critique.

able; the latter cannot adequately be conceived as the realization, the truth of, the former which "anticipates" it. Only in a superficial sense does the Rough Draft provide the key to the anatomy of the mature economic works. Neither can the method of investigation informing Capital be considered the same as that laid down in the 1857 Introduction.

The framework for a more adequate conception of Marx's method of Inquiry is provided in two alternative accounts, different but not fundamentally contradictory. Echeverria emphasizes the inconsistencies in the use and meaning of abstraction in the Introduction; the break with Feuerbachian empiricism and the "critical re-appropriation" of Hegel; the distinction between concrete social practice and abstract scientific practice; and the characterization of Marx's method as a trajectory from concrete particular through abstraction to concrete totality. Sayer on the other hand stresses the element of Critique in Marx's method; the analytic and dialectic moments of this process; the distinction between violent and scientific abstraction; the transgression of "categorical boundaries" and the subsequent process of re-formulation; and most importantly the "retroductive" and "a posteriori" basis of Marx's reasoning in a Realist epistemology, postulating mechanisms and conditions underlying forms of appearance. The principal deficiencies of each interpretation may be considered in the light of the other: In Echeverria, the process of abstraction that constitutes scientific practice is well described but its epistemological basis, the logical structure of reasoning that produces the correct results, nowhere properly specified. Sayer's accounts on the other hand, whilst adequate in this respect, fails to grasp the

dynamic character of Marx's method as a continuous movement from concrete to abstract to concrete (but now a broader concrete), from the particular to the general.

Nevertheless, the common ground of assumptions between these two writers is considerable, concerning the role of Science as penetration of Appearances and revelation of essential relations; the correspondence of categories of thought to phenomenal forms expressing real relations; the starting-point in a simple phenomenal concrete, the commodity; and the empirical foundation of Marx's method (yet its non-empiricist conception of scientific abstraction). It is possible therefore to characterize the basic principles of Marx's method as a synthesis of these two positions (with significant additional insights from other sources), and to illustrate the resulting conception in general terms by examining the basic structure of Capital.

(1) The methodological trajectory may be represented by the figure of an inverted cone<sup>208</sup>, its circular surface plane denoting the totality of practically constituted social practice, and its conical form reaching down to its "apex" expressing the process of scientific abstraction. The former plane constitutes the realm of Appearances and phenomenal Forms, whose objects are the concentration of many determinations and relations, unity of the diverse; this is also the sphere of Circulation and Exchange, and the foundation of bourgeois ideology accounting for the spontaneous consciousness of the agents of production. The latter dimension on the other hand is distinguished by its non-appearance at the level of social practice and by its revelation of Essences and Real relations, the determinations that constitute the concrete as unity of the diverse; this is also the sphere of Production and of Marxist Science. This representation of the basic elements of Marx's logic conceives scientific knowledge as the result of a process of excavation, beginning with concrete social forms and revealing what lies beneath them, rather than as the result of a procedure "rising above" the concrete and then descending to that level in order to account for it.<sup>209</sup>

(2) At the centre of the circular surface plane of this figure,<sup>210</sup> and extending down to its "apex" in a straight line, is represented the dimension of simplicity; the further the analysis moves away from this central axis, the less simple and more complex it is becoming. Hence whilst the abstract may certainly be simple, the simple is not reduced to the abstract, since after 1857 Marx recognizes that the

208. see Appendix B. fig 1.

209. see Sayer (1979 b) p. 31

210. see Appendix B. fig. 2.

concrete may also be simple. Thus one plane of the logical trajectory is the movement from concrete particular to concrete totality, from the particular to the general, expanding in a "spiral" movement across the surface of the figure and eventually encompassing its outer boundaries; but the second and indispensable dimension that makes this trajectory possible is the constant oscillation between the concrete and the abstract. What must finally be explained is the Concrete Totality and the place and function of the Concrete Particular within it, the reasons why they should assume the forms they do, and why therefore the spontaneous consciousness of agents should be as it is. Only the constant resort to abstract determinations through a scientific process of abstraction can satisfy these requirements.<sup>211</sup>

(3) Marx's restricted object of study in Capital is the capitalist mode of production<sup>212</sup>, represented by the circular surface of the figure. Within the restricted object, the most elementary and simple cell-form given in social practice is the concrete commodity,<sup>213</sup> which therefore occupies a position at the centre of the surface plane. Marx begins Capital with a critique of this form and its corresponding categories which operates through abstraction, constantly analyzing surface forms and breaking them down into their constituent elements, and returning the results in a process of synthesis to

211. Echeverria makes fragmentary reference to "spiral" and "oscillating" movements, these notions originating most probably in Zeleny (who incorrectly attributes their basis to Marx in the Introduction) (supra). These metaphors grasp the dynamic element in Marx's method (underemphasized by Sayer); we have interpreted them here (not necessarily in the same way as other writers) as part of a coherent broader visual metaphor. It must be remembered that this figurative representation is merely a guide to thinking the problem of method, which must not then assume an independent existence and impose its structure on the complexity of the object.

212. see Appendix B. fig. 3.

213. see the opening paragraph to Capital 1 p. 125.

the level of the concrete as explanation. Having analyzed the twofold nature of the commodity, what has to be explained is exchange-value, the form of appearance of Value. The question of how such a social form is possible is answered by postulating the existence of a mechanism which renders distinct commodities commensurable as repositories of abstract labour. Exchange-value is then analyzed in its Simple, Expanded, General and ultimately Money forms (section 3), but always in relation to the results already produced by scientific abstraction. The spiral movement outwards from the most elementary to increasingly complex forms is subject to constant interruptions and suspensions, as the oscillating movement between abstract and concrete gives priority to the former, however, the analysis is fully submitted to the concrete in section 4, where commodity fetishism, and hence the spontaneous consciousness of the agents of production, is explained in the context of the results obtained in the previous three sections. From here the spiral expands in consideration of Exchange (Ch.2), Circulation (Ch.3), the transformation of Money into Capital and the sale and purchase of labour-power (part 2), before leaving the sphere of simple circulation completely and descending into the realm of the production of Absolute and Relative surplus-value (parts 3-5), examining the real relations of exploitation (the conditions of the mechanisms) from which the phenomenal forms ultimately derive. The process of approximation to the concrete totality is gradually developed in the analytical progress of the three Volumes, the most abstract categories of capital-in-general (surplus-value, labour-power) giving way to those of the analysis of many capitals in competition (Price, Profit, Wages). The exhaustive explanation of the restricted object of study culminates in the account of the totality



of its forms and of agents' corresponding consciousness through the theory of capital-fetishism.<sup>214</sup>

214. This description is of course extremely schematic. An adequate examination of Marx's logic in *Capital* would have to trace the development of the analysis in detail, in constant reference to the text.

## V Prospects for the Marxist analysis of Law

### (1) Method and Theory

The assumption that the logical trajectory from abstract to concrete characterizes Marx's method of Inquiry results in a definite conception of the nature of Marxist "Theory" and of the "concrete" in relation to it : once the simplest and most abstract theoretical elements of the object under investigation have been isolated, progress can begin towards the reproduction of the concrete whole as a concentration of many determinations and relations by a smooth process of "concretization". The concrete itself is reached only when sufficient mediating determinations have been provided in the development of the initially abstract theory.<sup>215</sup> Whilst at a high level of abstraction,

"analyses will inevitably be relatively indeterminate in their implications for specific conjunctures. This relative indeterminacy, or underdetermination, can be progressively eliminated through the concretization and/or complexification of the theoretical object and its conditions of existence and effectivity. This means a progressive shift from the primacy of form to an emphasis on content..."<sup>216</sup>

The dominant approaches thus acknowledge the existence of an embarrassing disjunction between Theory and the concrete, but promise that concrete and historical analyses will ultimately be forthcoming, if at the end of a difficult period of theoretical development. But whilst the method of presentation of Capital may arguably be characterised as a movement of gradual approximation towards the

215. The tendency is to oppose the "abstract" Mode of Production to the "concrete" Social Formation.

216. Jessop (op cit) p. 366 (referring to theories of Law and the State).

concrete object,<sup>217</sup> there is no adequate basis for the assumption that this trajectory constitutes Marx's logic of Investigation, and it is precisely this problem of research that most concerns us here. It has been argued that the method of inquiry informing Capital begins with the concrete and ends with the concrete : the starting-point is given in practically constituted social organization, not in abstract and general a priori definitions ; and that, moreover, the process of inquiry is characterized by two distinct but inter-related movements, the spiral expansion from simple to complex and the oscillating movement between the concrete and the abstract, involving breaks, suspensions, digressions and interruptions in the analysis, which cannot therefore adequately be described as a gradual descent from the abstract to the concrete and complex whole.

The conceptions of theory, the concrete, the abstract and abstraction that define the dominant approaches have significant effects when attention is turned from the exposition of Marx's logic in the economic works to the theorization of other aspects of the totality. Even assuming that Zeleny, Colletti, Althusser or Carver, as examples, were correct in their interpretation of Marx's method, the question of the specific nature of the superstructure<sup>218</sup> and therefore of the possibly different method that might be required to appropriate it would still need to be posed, and the particular object of study rigorously defined, before the assumption that the same method was applicable in both cases could be justified. However, when theorists of Law and the State have considered the problem of method, authority has generally been sought in the 1857 Introduction, supposed to embody

217. (supra) Section IV

218. (here this term is used merely as descriptive shorthand, having a metaphorical rather than theoretical status).

"obviously the scientifically correct method" for the analysis of any aspect of the totality whatsoever. The consequences of this allegiance may be illustrated by reference to the methodological foundations of the two principal approaches to Law and the State, as represented by Pashukanis and Althusser.

Pashukanis<sup>219</sup> refers extensively to that same section of the Introduction considered by all commentators who assume continuity between 1857 and Capital. The purpose of Theory is the reproduction of the concrete as a rich totality of many determinations and relations, avoiding chaotic and blurred conceptions that leave out of account the constituent elements of the object.<sup>220</sup> Marx's observations are :

"directly pertinent to the general theory of law. The concrete reality - society, the population, the State - must in this case, too, be the conclusion and the end result of our deliberations, but not their starting-point. By moving from the most simple to the most complex, from the process in its purest form to its more concrete manifestations, one is following a course which is methodologically more precise and clearer, and thus more correct, than if one were to feel one's way forward with nothing more in mind than a hazy and unarticulated picture of the concrete whole."<sup>221</sup>

Here a problematic assumption is made concerning the "direct pertinence" of Marx's methodological remarks to the field of law, and the "simple", as might be expected, is reduced to the "abstract", both of which terms are logically opposed to the concrete totality.

Pashukanis concludes his brief discussion of method thus :

219. Pashukanis (op cit) is discussed here because of his obvious influence on the State Derivation school; the close methodological relation to Zeleny and Colletti should also be noted.

220. (op cit) "The Methods of constructing the concrete in the abstract sciences", pp. 65-72.

221. *ibid.* p.66 (emphasis supplied)

"Applying these methodological considerations to the theory of law, we must start with an analysis of the legal form in its most abstract and pure shape and then work towards the historically concrete by making things more complex."<sup>222</sup>

Chapter 4 then identifies the "subject" as the purest, simplest and most irreducible atom of legal form, and therefore the correct point of departure for the theory of law. The legal State as a social organization with the means of coercion at its disposal is "the concrete totality which we must arrive at after first comprehending the legal relation in its purest and simplest form."<sup>223</sup>

Here abstraction is conceived, consistently with Marx's basic position in the Introduction, as a practice decomposing the real concrete into its most basic constituents, "abstracting from" the existence of the diverse and chaotic whole in order to find the starting-point, before the restriction on the concrete is relaxed and the analysis gradually approximates to the concrete totality.<sup>224</sup> The theoretical effects of this position, involving the reduction of the State to constitutional legality and the essentialization of different forms of right and subjectivity in the commodity-form, have been detailed in Chapter 3.<sup>225</sup> The purpose here is to demonstrate the possibility that these theoretical deficiencies are rooted in a methodological inadequacy - in a particular conception of the abstract/concrete relation and of the nature and role of scientific abstraction. Thus the "contradiction" supposedly undermining bourgeois domination, postulated at an abstract theoretical level but purporting to explain

222. *ibid.* p. 71

223. *ibid.* p. 99.

224. see Echeverria (1978 a) p. 167.

225. see Conclusion to discussion of Blanke et. al., Hirsch, and Holloway & Picciotto, *supra* Ch. 3.

conjunctural developments in Law and the State, merely imposes essentialist definitions on the complexity of concrete reality.<sup>226</sup> This tendency to rationalism, implicit in the a priori development of abstract theoretical constructs and the subsequent attempt to bring them into relation with the concrete, also explains the almost complete absence of concrete and historical analyses within this tradition, which has remained at an abstract and general level despite the recent efforts of the State derivation school.

The suggestion of rationalism in the Althusserian tradition is compounded by the rigorous distinction of the real object from the object of knowledge.<sup>227</sup> Since the Essence/Appearance conception of the structure of reality is abandoned, scientific knowledge cannot result from the excavation and extraction of the "essential" from the "phenomenal", but is produced rather by the action of the concepts of a scientific problematic (G.2.) on existing more or less ideological notions (G.1.). The adequacy of theoretical concepts is not then judged according to the "idealist/empiricist problem of knowledge", but by internal criteria governing the process of concept formation within the theoretical system. By these means the problem of the concrete and of the relation between the logical and historical orders (which Althusser identifies in Della Volpe and Colletti but which exists also in the tradition of Pashukanis) is dissolved into a consideration of the "synchronic" and "diachronic" entirely within the

226. ....and is responsible for the "apocalypticism" referred to (supra) in Ch. 3.

227. for Marx this is a "prosaically commonsensical distinction made in a specific context: against Hegel's speculative habit of making the concept the demiurge of reality". (Sayer 1979 b p. 29). As has been extensively demonstrated, Marx assumes a relation of correspondence between categories and the real (supra)

knowledge process.<sup>228</sup> The nature of "Generalities 2" as means of analysis absolved of the requirement of producing results in "conformity" with the real enables, in its extreme form, Balibar's attempt to generate the concepts of all possible modes of production by permutating five "formal invariants".<sup>229</sup> Hence also Poulantzas's concern with the "invariant elements of the economic in general",<sup>230</sup> labourer, means of production and non-labour, combined in specific relations of property and real appropriation. It has been shown, however, that Marx accorded only a limited role to transhistorical categories (e.g. Production in general), and that the 1857 plan beginning with "the general and abstract determinants obtaining in more or less all forms of society" was abandoned in favour of a concrete starting-point given specifically within the social practice of the capitalist mode of production.

Even where "a priorism" does not take this extreme form, there remains a tendency, for example in Poulantzas, to avoid detailed analysis at the most concrete levels either by invoking instead the principles of structural causality, relative autonomy, over-determination and determination "in the last instance", or by subsuming empirical phenomena within general and abstract concepts; thus the concept of "Authoritarian Statism", because it abstracts from the existence of particular national conjunctures in order to present the general features of the "exceptional" form of the "normal" State, lends itself to "the unfortunate technique of subsuming a large number of disparate, contradict-

228. see supra. Section III (c); of course the problem is not thereby resolved; Poulantzas confronts it as unsuccessfully as does Pashukanis.

229. see Althusser (1970) Part 3: "Basic concepts of Historical Materialism".

230. (1968) p. 26.

ory and unevenly developed tendencies under one loosely specified concept".<sup>231</sup> In relation to Law, general conceptions of "decline" substitute for detailed and concrete analysis of specific conjunctural changes in form and function. Law is reduced to the State and the political instance in the abstract-formal concepts of the "juridicopolitical" and "Authoritarian Statism", and where the concrete (but still relatively abstract) analyses do succeed, this is in spite rather than because of the method employed.<sup>232</sup> The problem of concrete research is thus no more adequately resolved by this theoretical approach, Althusser's intervention having succeeded merely in re-casting it in terms foreign to Marx's epistemology, which moreover increase the possibility of the distortion of material reality.

It is now clear that the reductionism of the dominant theoretical approaches, detailed in the previous chapter,<sup>233</sup> is a function of their particular conception of the nature of theoretical practice and its relation to the concrete, theory having its point of departure in the abstract and counterposed in its initial development to the concrete. Yet no single abstractly determined theory can possibly grasp the complexity of the concrete totality of a given object without distortion and reduction. The pervasiveness of the reductionist tendency, and the failure of theorists of Law to produce an alternative conception that does not suffer from this defect, is indicative of the bankruptcy of the abstract > concrete methodological trajectory informing the dominant theoretical approaches. Thus tendencies to

231. Jessop (op cit) p. 360

232. see Conclusions to Ch. 3, section II (supra) for further examples.

233. (supra) Ch. 3. Section IV.



rationalism, essentialism, theoreticism and reductionism are linked indissolubly to particular conceptions of the abstract, concrete, theory and scientific abstraction, these in turn depending on the implicit or explicit assumption of an abstract point of departure and the gradual approximation of theory to the concrete. Here the promise of concrete analysis adequate to the complexity of the object is delusory. Only a different understanding of method, which enables theoretical determinations to be developed in close relation to the specificity of Law, can break the deadlock of the existing theoretical debate and open up new directions in Marxist research.

The critique of "General Theory", therefore, emphasizes the inadequacy of this conception in respect of its claims both to be grounded in Marx's method of investigation and to provide the conditions for concrete and detailed analysis of the object of study. The specificity of Law is lost in general theories of Law and the State, which fail inevitably to account exhaustively for its diversity: for its private and public forms of right and subjectivity, its consensual and coercive functions, and its broader relation to the repressive State apparatus. This argument should not, however, be extended to the complete denial of general theory and its achievements; insights into the role and function of the juridico-political in general may be provided only at a high level of abstraction, and could not possibly be "retroduced" from the concrete: Poulantzas's conception of "Authoritarian Statism" and Holloway and Picciotto's notion of the "restructuring of the capital relation" are examples. Nevertheless, the fact remains that the limitations of the conception of general theory, in its methodological basis and its capacity to account fully

for the concrete, have not been properly recognized. The belief that research projects can move eventually to lower levels of abstraction through complexification and concretization of abstract determinations provided within one or other of the dominant theoretical positions is a complacent illusion that must be resisted.

## (2) Prospects for the concrete analysis of Trespass Law

It follows that the failure of the dominant theoretical approaches to provide the conditions for the adequate concrete analysis of Trespass law, indicated in the Conclusion to Chapter 3,<sup>234</sup> is a result of methodological deficiencies in the conception of a "General Theory" of Law and the State. An abstract > concrete logical trajectory is wrongly attributed to Marx's Capital, and then applied without justification in the field of the juridico-political".<sup>235</sup>

The prospects for the concrete analysis of Trespass Law in accordance with the methodological observations of this chapter may now be considered:

(1) There can be no question of the advance formulation of a general dialectical method applicable to all social phenomena. Marx's method provides, on the contrary, "a liberation from any such formalization .....established a priori to the scientific inquiry. Scientific thought is defined as a free movement of thought only bound to the

234. ibid.

235. "juridico-political", "superstructure" etc, are here used merely descriptively (see note 218 supra).

objective movement being analyzed".<sup>236</sup> The method of inquiry is expressed and realized in the particular concrete analysis<sup>237</sup> (in this case of Trespass law), therefore observations at this stage must remain schematic.

(2) The implications of the difference between Trespass as an object of study and Marx's object in Capital must be worked out in the course of the analysis. Here it may be noted that it is of the very nature of Law (particularly in its relation to the State) that it is conjunctural, to adopt Gramsci's terminology, as opposed to organic; occasional, immediate and ephemeral, "almost accidental", rather than structurally long-term and relatively permanent<sup>238</sup>; it is one element within a totality of practices, ideological, religious, philosophical, political and juridical, "that form the terrain of the conjunctual (upon which) the forces of opposition organize".<sup>239</sup> This does not imply that Law is not in some fundamental respects "organic", rather it suggests that law cannot be exhaustively defined other than in conjunctural terms - precisely because in modern bourgeois society it is constitutive of the conjuncture: Thus it is the conditions of struggle around the proposed changes in Trespass law in the mid-seventies that give this object to Marxist analysis. The point of departure is in a definite historically and nationally specific social formation, with whose complexity the concrete-abstract-concrete methodological trajectory appears well-equipped to

236. Echeverria (1978 a) p. 254. (emphasis supplied); see *ibid.* ch. 7. "The Materialist Dialectic" pp. 214-264.

237. see Echeverria (1978 b) pp. 364-365; and (*supra*)

238. Gramsci: "Prison Notebooks" (1971) pp. 177-178.

239. *ibid.* p. 178.

deal.<sup>240</sup> (3) Certain distinguishing features of the analysis of Trespass may be anticipated, deriving from the particular nature of the object. Whilst the history of Trespass is subordinated to the analysis of the present structure, role and function of the law ("the anatomy of man provides the key to the anatomy of the ape"), the place of history in the explanation of Trespass is not directly comparable to its role (as identified by Echeverria<sup>241</sup>) in Capital. Here it will be used above all as a resource for comparison and contrast. Similarly, "determination" assumes a dimension given entirely by the specificity of the object and for which there is no precedent in Capital. Again, the problems posed for analysis by the level of Appearances of Law require explanations of a different order from those provided by Marx in Capital, necessarily of a more dynamic character because of the starting-point (which must be "explained") in the conjuncture and the Social Formation; thus the explanatory "mechanisms" and "conditions", and the criterion of "exhaustiveness", may be given different meanings from those already attributed to Marx's method of inquiry in Capital. Nevertheless, Marx's discoveries can be expected to provide the foundation and presupposition of the analysis of Trespass law.

(4) The prospects for the concrete analysis of Trespass law may now

240. The suggestion is that whilst Marx's Capital can be understood as providing a "general theory" (distinguished from the General Theory criticized above by its concrete-abstract-concrete method) of the tendential laws of motion of the capitalist economy, given at the level of the mode of production and applicable across national boundaries, there can be no such "general theory" of law, even in this limited sense, because of its constitutive role in the conjuncture and the social formation. Thus the same basic methodological trajectory produces very different results depending on the nature of the object of analysis. (Note that even in Capital this trajectory ensures that "Mode of Production" is derived from the concrete and not rationally opposed to the social formation as in abstract > concrete conceptions).

241. Section IV (2) supra.

be regarded as good. The starting-point is the concrete particular, given in the determinate social practice of the restricted object at the level of Appearances and in the sphere of Circulation, derived from the critique of phenomenal forms as they are apprehended "with social validity" in the categories of legal commentators, and consisting of the simplest, most elemental and irreducible expression of this aspect of legal practice : The right to exclude the world from interference with possession of land. This starting-point is given literally in current social practice (in 1977 or 1981) constitutive of the conjuncture, as the simplest element of the restricted object, the basic atom of both its Private and Criminal aspects. The obligation to the State not to infringe another person's property right, embodied in the 1977 Act, depends for its coherence on the pre-existing definition of exclusive property right. "Private Law" (as it is defined in Appearances) is therefore the point of departure, but it is not the essence of all other aspects of the law which need not thereby become merely its expressions, since the starting point has not been "logically deduced" within an abstract and essentialist general theoretical system.

This concrete particular is then analyzed in its specificity, broken down into its constituent elements through the scientific practice of abstraction, before being returned to Appearances now revealed as the synthesis of many determinations and relations. At this stage the analysis will have provided a provisional explanation of why the form of appearance (the equal right to exclude) assumes the form it does, through the retroduction of both the mechanisms that might explain it, and further the conditions and real relations essential to

these mechanisms.<sup>242</sup> Here the exposition is frequently interrupted with digressions into the history of the law, serving as a resource for contrast and comparison with its present form. The oscillation between concrete (social practice) and abstract (scientific practice) will also suggest, because of the essential relations uncovered beneath the phenomenal appearance of the concrete particular, new aspects of the concrete to be submitted to analysis, which does not therefore begin completely afresh with an entirely novel object. By this process the object of study is broadened beyond what was suggested in immediate appearances to include all law relating to the conditions of possession of and separation from Land both as a factor of Production and a scarce resource in Consumption. The expanding spiral trajectory from simple to complex social practice gradually embraces Conspiracy, Forcible Entry, Landlord and Tenant and Property Law, whose appearance as "Private" or "Public", "Civil" or "Criminal" is now revealed as a result of the phenomenal organization of categories in legal reasoning. Constantly the results of analysis suggest the reformulation of legal categories and their articulation in more scientifically adequate frameworks, which explain the real role and function of this area of Law.

The first aspect of the concrete totality, whose appearances and constituent forms must be exhaustively explained and accounted for, is thus the concrete totality of law relating to the conditions of possession of and separation from land. Complementing this "synchronic" dimension, however, is a "diachronic" analysis of the

242. The explication of these conditions (real relations) has its foundation in Capital, in the discoveries already made by Marx principally in the "economic" region.

concrete totality of law in the context of its real history, as its elements are developed and re-articulated in the pervasive struggles that form the terrain of the conjunctural.<sup>243</sup> The final stage of the analysis comprises the complete and exhaustive account of the different forms of legal right and subjectivity through which relations of possession are secured in the Capitalist formation, including the historical and conjunctural analysis of the relation of this aspect of the law to the activity of the State in its mobilization in ever-more repressive forms. Law is not reduced to the commodity-subject, failing to account for its links with the State apparatus, but neither is it reduced to the State, ignoring its specific quality as Law. The result is a total explanation, rich in theoretical determinations developed through scientific abstraction, yet firmly located in the concrete and the current situation. Moreover, in the process of this investigation of Trespass, further objects will have been suggested for analysis. It is above all in respect of the promise of such concrete analysis that the approach developed here is considered to transcend the sterility of existing debates and to open up new possibilities for the Marxist understanding of Law.

243. hence the redefinition of "concrete totality", given in the nature of the object.