Limits to the Politics of Subjective Rights: Reading Marx after Lefort

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Abstract:
In response to critiques of rights as moralistic and depoliticising, a literature on the political nature and contestability of rights has emerged. In this view, rights are not merely formal, liberal and moralistic imperatives, but can also be invoked by the excluded in a struggle against domination. This article examines the limits to this practice of rights-claiming and its implication in forms of domination. It does this by returning to Marx's blueprint for the critique of subjective rights.
This engagement with Marx will, however, take a particular form. I will read Marx first *through* the eyes of Claude Lefort and thereafter *against* Lefort. The latter's critique of Marx still constitutes the strongest case against the dismissal of subjective rights. Introducing a reading of Lefort into the argument allows us to discover what is dead and what is well alive in the Marxist theory of rights. What is dead, I will argue, is Marx's early conception of subjective rights as ideology and illusion. However, the more mature Marx developed a theory and critique of the legal *form* that is able to explain why the politics of rights – despite its undeniable advances – has not been able to overcome certain forms of domination.

Keywords:
Karl Marx; Claude Lefort; Subjective Rights; Legal Form; Domination

Introduction

Modern citizenship knows many forms, but one can also distinguish a few constants. The most prominent of these constants is that all forms of modern citizenship have a juridico-political aspect. To be a modern citizen is to have access to universal rights. These rights cannot be denied to you on the basis of class, gender or race (or, for that matter, any other particular characteristic). Therefore, it is this juridico-political aspect that is most commonly associated with the emancipatory side of citizenship. To *have* rights is to *be* emancipated.

Nonetheless, three critiques have often been levelled against rights. First, there is the assertion that rights-talk (and specifically, liberal rights discourse) is formalistic and abstracts from structural forms of domination (Marion Young 1989; Brown 1995: 96-134). Second, there is the claim that rights are based on a liberal political anthropology. In this sense, rights are taken to promote a specific view (atomist, abstract, yet gendered and racialized) of what it means to be a human being (Douzinas 2000: 235-245; Tully 2008: 249-267). And third, rights-talk is seen as depoliticizing: when rights are seen as ahistorical moral imperatives we overlook the contested character of rights, the possibility of conflicts between rights and their implication in structures of power (Geuss 2001: 146-152).

In response to these critiques, a literature on the political nature and contestability of rights has emerged. Against the critique of formalism, they raise the argument that, instead of being an insurmountable problem, the gap between the abstract ideal of universal rights and the reality of existing forms of domination gives rise to a politics of claims-making. And against the critiques of the liberal anthropology of rights and their moralism, they claim that excluded or dominated subjects can contest the interpretation and application of rights and, in a same movement, transform the political anthropology underlying rights-discourse (Baynes 2000; Ingram 2006; Colliot-Thélène 2011; Zivi 2012; Lacroix 2013; Ingram 2013; Aitchison 2017). Rights – these thinkers claim – are not merely formal, liberal and moralistic imperatives, but can also be invoked by the excluded in a struggle against domination.

In this paper I want to explore not only the limits to this practice of rights-claiming, but also explore how these limits feed back into the forms of domination that rights are partly constitutive of. Therefore, I return to Karl Marx's blueprint for the critique of subjective rights (in both his earlier and later works). The claim I want to defend in this article is that this critique is still relevant. To be clear: I am not interested in whether Marx assigns a role to rights in communist society.[1] What I'm interested in is why Marx thought that the politicization of rights wouldn't get you beyond capitalism and its manifold forms of domination in the first place.

My engagement with Marx will, however, take a particular form. I will read Marx first *through* the eyes of Claude Lefort and thereafter *against* Lefort. The latter's critique of Marx still constitutes the strongest case against the dismissal of subjective rights (Baynes 2000; Colliot-Thélène 2011; Lacroix 2013). Introducing a reading of Lefort into the argument should

[1] Therefore, I will not engage with David Leopold's argument that the young Marx, to the extent that he formulated a theory of human flourishing, held onto a concept of human rights (Leopold 2007; also see Lacroix and Pranchère 2012). Even if this argument is convincing, I believe it doesn't tell us enough about the role rights might play in the *transition* towards this more ideal society.

allow us to discover what is dead and what is well alive in the Marxist theory of rights. What is dead, I will argue, is Marx's early conception of subjective rights as ideology and illusion. However, the more mature Marx developed a theory and critique of the legal *form* that can explain why the politics of rights – despite its undeniable advances – has not been able to overcome certain forms of domination.

Reading *On the Jewish Question* Twice Over

Before we start, I should introduce a conceptual clarification: Why subjective rights? It is tempting to read Marx as a critic of human rights *avant la lettre*. But as Samuel Moyn has repeatedly pointed out, the *droits de l'homme* that were the object of Marx's blistering critique are different in nature from our contemporary human rights. More precisely, '[t]he one implied a politics of citizenship at home, the other a politics of suffering abroad' (Moyn 2010: 12). *On the Jewish Question* should be read as a critique of the politics of rights within the nation state, then, rather than a critique of a global human rights regime that at this point did not yet exist (Moyn 2014: 153). Therefore, when Marx opposes the rights of man to the rights of the citizen, we should interpret this as an opposition between different *citizenship rights* (civil rights – e.g. the right to private property – and political rights – e.g. the right to vote – respectively).

On the other hand, the strict link between citizenship rights and the nation state is loosening. Citizens see their rights protected by institutions that are not necessarily nation states and are equally capable of making claims against these institutions (Cohen 1999). This means that if we want to adapt Marx's analysis to fit the present conjuncture, we must take these evolutions into account.

Luckily Marx's thought at times operates at a high level of theoretical abstraction. This entails, I believe, that we can read him as a critic of subjective rights and bracket the question of whether citizens are claiming these rights at home or against international institutions. To define this concept of subjective right: it 'starts from some particular individual subject, attributes to that subject a power and/or warrant, and then moves out from there to the relation of that subject to others subjects and other features of the world' (Geuss 2001: 134). Without wanting to deny the differences between citizenship rights and human rights, we can argue that they both derive from this more fundamental category of subjective right (Yeatman 2014: 206).

Reading 'On the Jewish Question'

On the Jewish Question is Marx's opening salvo in a series of attacks on subjective rights. Although the text presents itself as an intervention in the debate on the political emancipation of Jews, Marx eventually develops the argument in a direction that transcends the questions of secularism and religious toleration that initially animate it. The opening pages of the text present a critique of Bruno Bauer's take on Jewish emancipation. Cursorily summarized, Bauer argues that Jews must be emancipated from religion before they can become equal citizens. Or, rather, their political emancipation requires the subordination of their religious identity. Marx, in contrast, responds that this kind of secularization of the state and citizenship does not necessarily entail the abolition of religious identity. On the contrary, he argues, 'in the land of complete political emancipation [that is, North America,] we find not only that religion exists but that it exists in a fresh and vigorous form' (Marx 1992: 217).

This simple observation quickly turns out to have wider implications. The takeaway is that you can be liberated by the state (through the granting of equal rights) but remain unliberated or oppressed. This is so because the state only emancipates in 'an *abstract* and *restricted* manner' (Idem: 218). In Wendy Brown's pointed restatement of the argument, political emancipation frees the individual from 'politicized identity – the treatment of a particular social identity as the basis for deprivation of suffrage, rights, or citizenship', but fails to liberate 'the individual from the conditions constitutive or reiterative of the identity' (Brown 1995: 105). In other words, then, the state emancipates the fictive double of an individual that remains 'a plaything of alien powers' in civil society (Marx 1992: 220).

The initial critique of political emancipation is thus that it is a limited form of emancipation. It *is* a form of emancipation because to be recognized as equally deserving of rights is preferable to being seen as an inferior being. But it is *limited* as it ultimately remains illusory: the *citoyen* is emancipated, but the *bourgeois* remains subjected to forms of domination in civil society. And this is where the limits to political emancipation turn out to constitute a form of subjection. By claiming that our particular position in civil society is irrelevant to our citizenship, political emancipation depoliticizes the social relations of domination that make these particular positions problematic in the first place. To give one of Marx's own examples: we can abolish property qualification for election rights, but this does not mean that private property – and the division it creates between the capitalist and the labourer – cannot assert its power in civil society (Idem: 219).

If political emancipation is an illusion, then, it is an illusion that exercises a real material force. To understand this seeming inconsistency, we must elucidate the idea of the state as an

"abstract" entity. As David Leopold notes, in the context of Marx's earlier works the adjective "abstract" has two meanings. On the one hand, it points to the other-worldly character of the state. And on the other hand, it refers to the modern separation of state and civil society (Leopold 2007: 66). These two meanings, while distinct, must be seen in their interconnectedness: by relegating emancipation to an ideal realm, the forces of civil society are freed from the demands of universality. Or, to put it in different terms, *illusory* emancipation gives way to a *real* separation of state/universality and civil society/particularity. 'Political emancipation', in Marx's words, 'was at the same time the emancipation of civil society from politics' (Idem: 233).

It is at this point that a remarkable volt-face takes place. As it turns out, the depoliticization of civil society gives rise to the dominance of civil society over state and right. In a rudimentary exegesis of the different modern constitutions, Marx discloses how the subject of civil society – the bourgeois or egoistic man – 'is now the foundation, the presupposition of the *political* state' (Idem: 233). [2] The modern constitutions acknowledge this figure by privileging civil rights. These are rights that protect negative liberties (the rights to property, freedom of speech and freedom of religion), rights 'to do and perform everything which does not harm others' (Idem: 229). The victim of this prioritization are the rights of the citizen, the political rights that guarantee the citizen's '*participation* in the *community*' (Idem: 227). This unacknowledged hierarchy between civil rights and political rights results in a circumscription of the latter by the former. Hence, what we have here is a struggle between two concepts of citizenship, an individualist liberal one and a communitarian republican one, which ends in the defeat of the latter as 'the citizen […] is proclaimed the servant of egoistic man' (Idem: 231).

To summarize, Marx's early critique of subjective right is threefold. First, right emancipates in an abstract way that leaves the relations of domination in civil society untouched. Second, this abstract emancipation is not without content: it privileges a certain conception of citizenship and a specific political ideology – that is, citizenship as possessive individualism (Kouvélakis 2005: 709-711). And third, as it depoliticizes civil society and naturalizes its egoism, it reinforces *and* obscures its worst tendencies. To be more precise, the ideological

[2] As many commentators have pointed out, Marx's reading of the modern declaration of the rights is very selective at this point in his intellectual formation (e.g. Fine 2002: 83; Balibar 2010: 35-65). Nonetheless, I think it is more productive to adopt Justine Lacroix and Jean-Yves Pranchère's suggestion that Marx may have recognized the heterogeneity of the declarations but denounced the lexical prioritizing of civil rights and particularly the right to private property (Lacroix and Pranchère 2012: 52).

illusion of a community of equal citizens hides the fact that the members of civil society are engaged in a *bellum omnium contra omnes* (Isaac 1990: 476).[3]

Reading Lefort on Marx

In his famous reading of *On the Jewish Question*, Claude Lefort targets the accusation that subjective rights are depoliticizing. On the contrary, he argues, rights are political and this entails that the other critiques of rights – that they are formal and that they are ideological – lose some of their self-evidence as well (see infra). Rights, he writes, do 'no longer seem to be formal, intended to conceal a system of domination; they are now seen to embody a real struggle against oppression' (Lefort 1986: 240-241).

As an opening remark, it should be noted that Lefort was a sympathetic reader of Marx. Against the latter's detractors, Lefort argues that in some respects Marx's analysis was quite astute. No one, he argues, can read these founding documents of modern rights and deny the presence of 'the image of a sovereign individual, whose power to act or to possess, to speak or to write, is limited only by the power of other individuals to do likewise' (Idem: 248). Moreover, he continues, 'it is not arbitrary to regard the right to property […] as the only right which can be characterized as sacred and as the one on which all the others are based' (Idem).

Where does Marx's analysis go awry then? Ultimately, Lefort argues, he falls into a trap that he was normally so adept at taking apart – namely, that of *ideology*. He becomes a prisoner to the ideological version of rights and thus oblivious to what 'appears on the margins of ideology' (cit. Lefort 1986: 248; Lefort 1988: 23). He is so blinded by the liberal formulation of these rights that he fails to observe how they are subverted in practice. To give one of Lefort's own examples: the right to freedom of opinion might appear as a negative liberty but in practice enables citizens to form relationships. Consequently, this right is a right to public speech and thought. It is a right that allows citizens to leave the world of their private thoughts and enter the public domain (Lefort 1986: 250; Lefort 1988: 32; Lefort 2007a: 412-413).[4]

[3] This does not mean that Marx has a fully worked out conception of the implication of state and right in capitalist domination. On the contrary, as Bob Fine notes, Marx still 'portrayed the relation between civil society and state as an antagonistic one, based on their mutual opposition. Civil society appeared as the sphere of pure egoism and slavery, while the rational state appeared as the sphere of pure universality and freedom' (Fine 2002: 85). Consequently, and this is very important, 'Marx was not yet able connect form and content, freedom and exploitation' (Idem).

[4] As Samuel Moyn notes, this might not be Lefort's strongest argument. The problem with this reasoning is that it leaves the individualist social ontology of rights in place: public debate is still the result of an interaction among *individuals*. In this sense Lefort merely replicates the liberal proposition that an aggregate of individual actions creates a public benefit (Moyn 2012: 298). I would like to add to this argument that Marx himself would probably not deny that the right to freedom of opinion establishes relations. What's salient in this case is that this right

More importantly, however, Marx's captivity has a more fundamental origin: his inability to 'grasp the meaning of the historical mutation in which power is assigned limits and right is fully recognized as existing outside power' (cit. Lefort 1986: 254; Lefort 1988: 32). In the Ancien Régime power, law and knowledge where still joined in the figure of the king. Because of the modern democratic revolution(s), however, the place of power – once occupied by the king – became disincorporated. After all, the key legitimating principle of a democracy is that the place of power can be occupied by anyone and – conversely – cannot be consubstantial with one person or group (Cohen 2013: 129-131; Lefort 2007b: 1031). Therefore, Lefort states, political emancipation is not an illusion, but an unprecedented event in which the principles of power, law and knowledge – once joined in the figure of the king – became separated. After this event, rights can no longer be controlled by power. No power, whether it is of a religious, monarchical or popular nature, can take a hold of them. Moreover, as a result of this separation rights are deprived of a fixed anchor point and consequently 'go beyond any particular formulation which has been given of them' (Lefort 1986: 255-258, cit. 258).

Therefore, subjective rights – and this is an important distinction – are not ideological but *symbolic* (Idem: 259; also see Flynn 2005: 166-167). According to the ideological view of rights, the mismatch between their supposed universality and the realities of domination can only be explained as a cover-up operation by those in power. If, on the other hand, we conceive of rights as symbolic, the gap between the universal aspect of rights and unjustifiable circumstances gives rise to a politics that tests these formulations. Therefore Lefort, Kenneth Baynes argues, has a more dialectical conception of rights than Marx who was working with a rigid opposition between abstract right and the concrete relations of civil society (Baynes 2000: 459).

The fact that rights are bereft of an ahistorical essence and thus demand their continuous reformulation explains how rights give rise to democratic struggles (Lefort 1986: 258; Lefort 1988: 21). Even more so, because rights constitute an exteriority of society to itself, they are a condition of possibility for society's perpetual self-questioning. On the basis of subjective rights 'a whole history [developed] that transgressed the boundaries within which the state claimed to define itself, a history that remains open' (Lefort 1986: 258). Not only are rights not set in stone, they are also not – as Marx seems to claim – what keeps society's hierarchies in place. On the contrary, without subjective rights we would be stuck in an end of history (Colliot-Thélène 2010: 53).

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establishes these relations in a field that is already structured by unequal relations of power and, at the same time, abstracts from these relations of power.

Let's take a moment to take stock of this critique. I believe that any sophisticated Marxist theory of subjective rights should take on board three of Lefort's points. First, subjective right is not reducible to a liberal ideology that simply disguises relations of domination in civil society. Second, subjective rights are not merely an instrument of the oppressor but can also be appropriated by the oppressed. And third, rights are not set in stone, but can be challenged, questioned and reformulated. Given the history of rights struggles, I believe these propositions are more than plausible. Nevertheless, recently we have been seeing a backlash to the optimistic, leftist appropriation of rights-discourse. As one observer starkly puts it, 'the capacity of rights claims to fundamentally "shatter" the existing political situation, as Lefort once hoped, has proven limited' (McLoughlin 2016: 319).

More fundamentally, however, Lefort's thought shares some blind spots with the thought of – what Ben Golder calls – redemptive critics of (human) rights. The redemptive critique of (human) rights is a three-step process: first, they are criticized as Eurocentric, liberal and capitalist; in a second movements these characteristics are shown to be contingent and historical characteristics; and in a third, and final movement, it is shown that these rights, which in the end do promise universal emancipation, are endlessly generalizable (Golder 2014: 106-108). Hence the adjective "redemptive": what was once a problematic construct, contains the promise of a brighter future. However, this discourse is beset by a few lacunae: it is blind to the limits of contingency, on the one hand, and the limits to the legal form, on the other (Idem: 108).

The first lacuna has been most effectively dissected by Susan Marks. Her article *False Contingency* is constructed as a savvy recuperation of the concept of false necessity (the *bête noire* of post-foundational political, legal and social theory). Political and social theorists, Marks argues, are trained to uncover the contingency of political, social or cultural constructs that present themselves as necessary, as givens that are not up for debate or contest (Marks 2009: 3-4). However, as a consequence they often tend to replace one problematic form of reasoning (that is, reasoning from false necessity) with another one (that is, reasoning from false contingency). To be more precise, the critique of false necessity has been accompanied by a suspicion towards 'the idea of determination as the setting of limits and the exertion of pressures' (Idem: 8). But, Marks notes, determination is not the same as determinism: the first involves claims about the direction and dynamics of historical change, while the second claims to predict the progression of history starting from its hypothesized end-state (Idem: 9). An

inability to acknowledge determination can, however, lead to an overestimation of the openness of history. Consequently, false contingency is a form of reasoning that abstracts from historical tendencies and ends up in voluntarist fantasies.

To bring the analysis back to rights: the fact is that a certain formulation and institutionalization of rights can be contingent without necessarily being open to challenge by certain subjects. You can perfectly well acknowledge that rights are contingent and thus in principle open to contestation *and* maintain that, given existing power relations, it is very unlikely that oppressed subjects can actually do so. Now, this in itself would not result in a decisive blow to Lefort's argument. He never states that any subject can invoke rights in just any circumstance (Lefort 1986: 259).[5] What is needed then, is an argument that proves that the limits to contingency apply to certain emancipatory projects due to a *structural feature* of the *form* of subjective right. In more direct terms: we need to explain how certain emancipatory projects are restrained (rather than helped) by subjective rights for reasons internal to their form. This leaves us with a more specific question. Which exclusions and forms of domination are not soluble 'in the internal dialectics of the founding utterances of citizenship […] *as* founding utterances of *rights* [emphasis added]' (Kouvélakis 2005: 714)?

Revisiting Marx on Subjective Right: No Longer Ideology, but Still Domination

From Ideology to Fetishism

Before we return to Marx, we should briefly re-examine Lefort's claim that rights cannot be reduced to ideology. More precisely, we should reveal how he understands the Marxist concept of ideology. 'Marx', Lefort writes, 'did not treat bourgeois ideology as a product of the bourgeoisie; rather, he leads us to relate it to social division and to link its origin to that of a particular historical formation, which he describes as the capitalist mode of production' (Lefort 1986: 1984). What this quote shows, is that Lefort's understanding of these concepts is

[5] Nonetheless, it can be argued that Lefort's thought is marked by a certain blindness towards the (important) fact that the invocation of rights is dependent on an array of practical factors: the make-up of the legal apparatus, the disposition of and ideological notions shared by legal experts, media framing of rights struggles in civil society, etc. This could be a consequence of his innovative (but limited) conceptualization of power and the state. More specifically, as Antoon Braeckman argues, Lefort proposes an epistemic-ontological view of the state in which it figures both as 'the expression and materialization of society's instituting principles and the prism through which these principles may be hermeneutically disclosed' (Braeckman 2017: 9). Therefore, he remains blind to the internal setup of the state (the different functions it performs) and the relations between the different state apparatuses (Idem: 1, 9-10).

restricted to the earlier phase of Marx's work. In this phase, ideology is seen as the product of class division in which the ideas of the dominant class (including those of subjective right) are presented as universal ideas. Under this interpretation, ideology critique would reveal how these "universal" ideals are merely a sublimation of particular interests and hide a reality of oppression (Balibar 2017: 47-48). The problem with this concept of ideology, as Lefort in some way shows, is that the epistemological concept of ideology – at least as applied to law – is not entirely convincing (Basso 2015: 22). Namely, what makes capitalism as a social system so particular is that it is the first society in which its members are no longer bound to a particular structure of belief. As Jason Read argues, '[w]hereas prior to capitalism [domination] is lived through the coded structures of belief and personal subjugation, in capitalism it is lived through abstract operative rules, which are not necessarily believed or even grasped' (Read 2003: 71). In other words: Marx's early conception of right as a product of bourgeois ideology and cognitive delusion is indeed, as Lefort argues, misguided (also see: Miéville 2005: 80-82). However, the mature Marx developed a different conception of subjective right that focuses less on the *content* of rights (on whether or not they embody particular ideals) than on the *form* of right and its relation to subjectivity.[6] Perhaps the question of right sooner belongs to Marx's taxonomy of the masks, roles and characters available in capitalist society, than to the realm of great ideological ideas (Neocleous 2003; Mezzadra and Neilson 2013: 258-264; Basso 2015: 40-48).

If you want to understand modern right, Christoph Menke writes, you have to understand its form. You have to comprehend the way in which it effects a radical transformation of the ontology of right and its relation to normativity (Menke 2015: 9-10). Pre-modern conceptions of right enable claims to what is by right already yours, that is, claims to what the community and its ethical order have already apportioned you (also see Colliot-Thélène 2010: 27). Modern right, on the other hand, enables claims to something that is outside of and prior to right. And once modern right takes the specific form of subjective right it becomes clear what this entails: rights allow a person to make a claim on the freedom and power to engage in any activity that he or she wants to engage in (Idem: 57).[7] This enabling by right should, however, be understood

[6] The word "developed" should be taken with a pinch of salt. The young Marx – still heavily occupied with Hegel's philosophy – wrote extensively on modern right, but the later ruminations on right (in *Grundrisse*, *Capital* and *Critique of the Gotha Program*) are fragmentary to say the least. However, taking Marx's own method and these fragments together should allow us to develop a more coherent concept of right.

[7] I should clarify that Menke distinguishes between modern right, as a more general category, and subjective right as one specific instance of modern right. In Menke's argument, subjective right (or bourgeois right) is both the most prominent – if not the only actually existing – actualization of modern right *and* a betrayal of the concept of modern right. Subjective right blocks modern right's self-reflection: by naturalizing the modern bourgeois subject,

correctly: not as the enabling of an already autonomous subject, but as the formation of an autonomous subject (Idem: 17). As Menke clarifies: 'Empowerment by subjective rights means *empowerment of the subject's own* […] – the constitution of the unethical, apolitical, nonmoral private will of the individual' (Menke 2017: 131). And, of course, the first freedoms granted to the modern citizen are the right to self-ownership, the freedom to own property and the right to enter into contracts (Mezzadra 2007; Tully 2008: 251; Menke 2015: 207).

Subjective right is, as Marx himself notes, essential to the functioning of capitalism. 'Commodities', he writes, 'cannot themselves go to the market and perform exchanges in their own right' (Marx 1976: 178). Commodities need guardians, the possessors of commodities, and if an exchange of commodities is to take place these 'guardians must […] recognize each other as owners of private property' (Idem). Consequently, abstract legal personhood is not merely an illusion that hides the relations of power in civil society, but a condition of possibility of the relations of exchange. Once commodity exchange becomes dominant, the legal form gains prominence as well. After all, in commodity exchange individuals confront each other as possible antagonists and the legal form guarantees a smooth conclusion to the exchange. The legal form is, as Sonja Buckel points out, therefore both a form of subjectification (it produces abstract legal subjects) and productive of cohesion (it brings these subjects together in a new societal composition) (Buckel 2008: 119).

Things become problematic, however, once the most important commodity in a capitalist society, namely labour-power, enters into the equation. Legal personhood not only allows the modern subject to dispose of the objects that he owns, but also his most immediate possession – his labour-capacity. After all, whereas in feudal society labour was subjected to all kinds of regulations, the modern revolutions created a mass of persons "free" (*vogelfrei*) to sell their labour to whomever could pay for it (Marx 1976: cit. 897; Marx 1973: 502-512). However, it is a strange kind of freedom: it is the liberty to let another person use and control your labour power. While the labourer does not sell himself and is thus not a slave, he does give his employer a right to dominate him (Menke 2017: 121).

This domination of labour is made up of three moments. The first (structural) moment of domination derives from the fact that in a society in which wage is the only consistent form of income, most workers cannot but sell their labour (Gourevitch 2015: 106-109). The right to self-ownership is thus immediately (and cruelly) inflected: the mass of labourers, as Marx observes, are 'thrown onto the labour market […] free from old relations of clientship, bondage

it obstructs modern right's inherently self-revolutionizing character. It is, Menke adds, a post-revolutionary right (Menke 2015: 165).

and servitude' but also 'free of all belongings and possessions [and thus] free of all property' (Marx 1973: 507).

This gives rise to domination's second moment: once they enter the marketplace they are left to the whims of market. While the market does not impair the agency of its participants, it does affect their freedom as it dominates their decision making. The parameters of market transactions are not freely chosen but are established by a multitude of other transactions that preceded them (Roberts 2017: 95, 102).[8] In the case of labour this entails that the workers have little control over the terms under which they sell their labour-power (Gourevitch 2015: 109-111). Again, in Marx's own words, this time at his most visceral: the owner of labour-power enters into this negotiation 'timid […] like someone who has brought his own hide to the market and now has nothing else to expect but – a tanning' (Marx 1976: 280).

In turn, this transaction gives way to a third moment of domination: the more personal form of domination by the employer (Idem: 111-115).[9] Once the labourer sells his labour time to a boss, he becomes subject to different forms of arbitrary authority in the workplace (Roberts 2017: 146-186). As Elisabeth Anderson notes, we are not nearly as critical of private forms of government as we are of public ones. Even more so, we often do not even recognize the authority exercised in the workplace as a form of government. But most labourers *are* subjected to the arbitrary will of their workplace superiors: they may be prescribed to dress in certain ways, their workplace conversations might be monitored, they may be forbidden to speak certain languages and may even be forbidden to engage in certain (political) activities off the work floor (Anderson 2017: 37-38). Since it can be checked by public government, arbitrary private power might be a matter of degree. But nonetheless, it remains an undeniable feature of our capitalist economies (Idem: 45).

It is at this point, then, that Marx locates the central contradiction of the modern legal form. The sphere of commodity exchange and its relations of legal equality – 'the exclusive realm of

[8] This is a rough sketch of William Clare Roberts's convincing reinterpretation of the concept of commodity fetishism. Instead of seeing commodity fetishism as a phenomenon that sees human beings becoming subject to the movement of commodities (and thus *objects*), Roberts defines it as a form of *impersonal* domination of individuals by the 'changing relations of interdependency' between *people* (Roberts 2017: 93). The force that is exercised by a market might look like a force exercised by objects, but any clear-eyed account should see it for what it is, namely the force of human actions mediated by an impersonal mechanism (Idem: 92). The rationale for rejecting the first interpretation (fetishism as domination by the movement of objects) is that domination – even impersonal domination – can only make sense as a relation between human beings. This is the only way in which it can be considered as a problem with political traction.

[9] As my more concrete description will show, we shouldn't take the word "personal" too literally. The relations of personal subordination are also – and increasingly so – mediated by impersonal techniques (e.g. algorithms determining employee schedules). On top of that, domination in the workplace is also mediated by a type of subjection to machines. The increased centrality of machines to the modern production process, as James Tully notes, can generate a sense of passivity and powerlessness in the modern worker (Tully 1993: 253-261).

Freedom, Equality, Property and Bentham' (Marx 1976: 280) – permit the domination of labour.[10] It is important to see that for the Marx of *Capital* the legal form and domination are no longer at odds, but are actually compatible (Rehmann 2008: 39-41).[11] Nonetheless, the spectre of ideology still haunts this formulation of the problem: we are confronted with a social form that promises freedom and equality, but enables the domination of the majority of persons. In the end, Bob Fine notes, Marx was never able to overcome his ambivalence towards right: on the one hand, he viewed it as a deceptive semblance and, on the other hand, he recognized that an illusion that both capitalist and worker accepted, and thus formed an essential component of their relationship, was more reality than semblance (Fine 2002: 120).

We can find a way out of this deadlock, I believe, in the notion of legal fetishism as a companion to commodity fetishism (Pashukanis 2003 [1924]; Buckel 2010; Mezzadra and Neilson 2013: 259-261). As we noted above, the whole notion of commodity exchange makes no sense without the possibility of a contract among equal partners. In other words, exchange is not possible without the availability of a juridical mask that abstracts from the concrete characteristics of persons and enables a transaction between these persons as equals. And just like commodity fetishism – the seemingly independent movement of commodities – influences and constrains the behaviour of those participating in the market, legal fetishism – 'the juridical "masks" which individuals have to assume to be able themselves to be "bearers" of commodity relations' (Balibar 2017: 73) – exercises a formative influence over the modern capitalist subject.

The thing with fetishism, however, is that it is not merely an illusion: as Marx famously noted, under the condition of fetishism 'social relations […] appear as what they are' (Marx 1976: 166). If you experience the movements of the market as an arbitrary constraint on your actions this is probably not an illusion on your part, but an accurate assessment of your predicament. Intellectually you might know that the movement of the market is not an alien force but rather the result of human actions. But this does not change the fact that you are forced to act as if it is such a force. Similarly, if the capitalist subject in certain situations understands his or her freedom in terms of the formal categories of subjective right (abstract, individual,

[10] However, this is not to suggest that the domination of wage labour is the only form of domination in capitalist society. As Nancy Fraser argues, we should develop an expanded conception of capitalism that not only highlights the domination of wage labour, but also of unpaid labour (as, for example, housework) (Fraser 2014).

[11] Already in Grundrisse, Marx responds in a similar manner to Proudhon's claim that the equality and freedom inherent in exchange were perverted by money and capital. On the contrary, Marx replies, 'the money system is in fact the system of equality and freedom, and […] the disturbances which they encounter in the further development of the system are disturbances inherent in it, are merely the realization of equality and freedom, which prove to be inequality and unfreedom' (Marx 1973: 248).

based on private will) this is not an illusion, but a practical necessity. If you want your claims to be heard, establish certain relations (e.g. marriage) or resolve conflicts (e.g. appeal a dismissal) it makes sense to resort to the modern legal instrumentarium (Buckel 2010: 141-142). While it would be inaccurate to claim that this form of subjectivity is the only one present to the modern subject, it does make sense to argue that it exercises a structuring effect on the self-understanding of modern subjects and their reciprocal relations. Again, intellectually you may know that human beings are not natural legal subjects, but you may often find that there are good practical reasons to conceive of both yourself and other people in this way.

To conclude this section, we will note some of the advantages of the critique of the legal form and address some possible difficulties. The main advantage of this shift in focus from the content of law to the legal form is that it allows us to avoid some of the difficulties that are involved in two other versions of the Marxist critique of law: one that reduces law to an *ideological fiction* and another that reduces law to an *instrument*. The problem with the first version is that it overemphasises the importance of ideological fictions and underemphasizes the ways in which law regulates, organizes and shapes everyday life (Miéville 2005: 80-82). The instrumentalist version, on the other hand, reduces law to an instrument in the hands of the ruling class that allows it to suppress working class organization and resistance (Pashukanis 2003 [1924]: 40; Hunt 1985: 23-24). A first problem with this version is that it 'neglects the partial independence of the state from ruling class control in capitalist societies' (Anderson and Greenberg 1983: 69). To be more precise: it fails to see that if law is to perform its functions, it cannot be perceived as an instrument of a single ruling class. Moreover, as Alan Hunt notes, it is also too simplistic as it reduces the existence of law to a single dominating function (Hunt 1985: 28). As we noted in our reflections on Lefort, this position is untenable as rights *can* become a weapon in the hand of the oppressed in their struggle against domination.

Nonetheless, there are some possible dangers that accompany an analysis that starts from the legal form. The first danger is that of economic reductionism: legal form analysis might create the impression that the legal form is simply derived from the economic base. [12] As Bob Jessop argues, this danger can be avoided if one does not equate the correspondence between legal form and economic base with a *causal necessity* (Jessop 1980: 350; also see Buckel 2010: 140). A second possible problem is that it posits the existence of a *single* legal form for capitalist

[12] This critique was, for instance, formulated by Nicos Poulantzas in his take on Evgeny Pashukanis' derivation of the legal form from the sphere of exchange (Poulantzas 2008 [1964]: 28). For a defence of Pashkunis' concept of the legal form against Poulantzas see: (Elbe 2008 and Buckel 2011: 162-165). On the broader question of the relative autonomy of law in capitalist society see: (Tomlins 2007).

society and therefore papers over historical and geographical variations in the legal regimes of capitalist societies. Here, we can follow Alan Hunt's suggestion that when we speak of *the* legal form we are only speaking at the highest level of abstraction in which only the most general characteristics of the legal order in capitalist society are denoted (Hunt 1985: 25; Jessop 1980: 349). Legal form analysis might thus be an indispensable mode of analysis but does not tell the whole story. A third question follows from the previous one: if there is such a thing as *the* legal form, what are its characteristics? Here I would point to at least three characteristics. First, the legal form is characterized by the *legal subject* – a 'human or organizational entity vested with legal rights' (Hunt 1985: 25). Second, it is characterized by *abstraction*: as we noted above, the juridical mask abstracts from the concrete characteristics of and unequal relations of power between persons (Buckel 2010: 140). The third, and final, characteristic is that of *formalism*: this refers to the self-referential and self-contained nature of the legal form which precludes extra-legal (political, social or moral) forms of reasoning from entering (Poulantzas 2008 [1964]: 36; Horwitz 1975; Buckel 2013: 163-164).

From Fetishism to Domination

As of now, we have a few elements that hint at a connection between rights (or legal fetishism) and domination, but still need to connect the dots. It seems that right is implicated in different forms of domination, but implication is not the same as constitution. That is, arguing that right is in some way connected to forms of domination is not the same as saying that it is in itself a form of domination. In this context, I believe, we should keep in mind Foucault's suggestion that we find a non-juridical conception of power in Marx's *Capital*. Whereas the Occidental tradition of political theory has always theorised power in terms of right, Marx was one of the first to conceive of power in its multiplicity (Foucault 2001 [1981]: 1005; Read 2003: 86-87). In *Capital* we find different analyses of the specific and local forms of power exercised in workshops and the army neither of which is reducible to a juridical type of power (Idem: 1006). Therefore, we should draw the conclusion that this kind of power is itself extra-juridical. For example, right in itself tells us very little about the force exercised by the movements of the market: as Sandro Mezzadra and Brett Neilson put it, [b]ehind the mask of the legal person, there is a mix of variegated and historically differentiated circumstances that compel embodied subjects to commodify their labour power' (Mezzadra and Neilson 2013: 263). And neither does it tell us much about the way, as Marx writes, '[t]he technical subordination of the worker to the uniform motion of the instruments of labour, and the peculiar composition of the working

group […] gives rise to a barrack-like discipline (Marx 1976: 549). That is, the link between rights and the methods through which workers are disciplined in a negative sense (what they can and cannot do) and a positive sense (how they are trained to execute their jobs) is obscure.

But would this then entail that the forms of discipline and domination in the workplace are completely unconnected to right? Of course, we shouldn't underestimate the extent to which, for instance, the right to private property gives employers a license to exercise these kinds of power. But, as we already argued, right in itself does not explain how domination operates or why it is exercised in a certain way. Therefore, I would locate the connection between right and domination somewhere else. Right intervenes in the way subjects relate to and deal with the different moments of domination in capitalism. This is the takeaway from our discussion of legal fetishism: with the expansion of the contractual form, modern subjective right and legal personality become dominant elements of our practical subjectivity. I suggest, then, that right constitutes a form of domination because it presents itself as a form of protection against domination, but once exercised either fails to perform this function, or worse imbricates its claimants in structures of domination – even those they might be trying to escape. This applies to the day-to-day exercising of our rights: when we exercise the right to sell our labour power, for example. However, it also applies to the deliberate invocation of rights against domination. This latter aspect is particularly important given our discussion with Lefort: rights, I contend, affects the trajectory and unfolding of these political actions.

But how does it perform this operation? Once again we have to turn to the form of right: the fact that rights claims have to be presented in a certain way has a decisive impact on the content of these claims (Knox 2009: 429-432).[13] Let's look at the first way in which the form of subjective right shapes the content of claims. The legal form, Robert Knox argues, is both too abstract and too precise to gain traction on the background conditions that shape and produce a particular dispute. It is too abstract in the sense that it focuses on the actions of the concerned actors (e.g. the dismissal of an employee or an act of discrimination), without considering – and

[13] Of course, we could also invert the terms of the question: we could ask not how the modern legal form prevents emancipatory movements from achieving their aims, but how it allows problematic subjects to do so. Lefort only sees promises in the indeterminacy of the "man" of rights which, he argues, gives it 'a basis which, despite its name, is without shape' and therefore 'eludes all power' (Lefort 1986: 258). The blind spot in this argument is that the legal form also allows for the appearance of things as non-human legal persons. To give an example, the Fourteenth Amendment to the US Constitution, initially adopted to protect the rights of former slaves, was instrumental in the creation of corporate personhood. However, corporate personhood – the assigning of rights to corporations as if they were natural persons – leads to all kinds of unwanted consequences. To give an example, because of the Burwell v. Hobby Lobby landmark court decision, corporate personhood grants US corporations the right to be exempt from regulations they religiously object to. Conceding corporations this right to religious freedom, however, enables them to curtail the rights of their employees in turn (Lütticken 2017: 121). The flexibility of legal personhood often has, as this case shows, problematic consequences (also see Neocleous 2003).

thus "abstracting from" – the background conditions that gave rise to these actions (Idem: 430-431). For the law to do its work a process of complexity reduction has to take place first. Consequently, a host of politically significant circumstances simply cannot enter into (or, cannot be translated into) a legal argument without disrupting the smooth functioning of the legal system (Christodoulidis 1998: 102-115). However, as a result of this abstraction, this specific form of conflict resolution is also too precise: it resolves specific disputes but does not touch upon their background conditions (Knox 2009: 430-431). We could apply this critique to an example that Lefort himself uses: workers claiming the right to work in response to impending redundancies. This particular struggle, he argues, shows how right can be used to shatter social power (Lefort 1988: 262). But what this example really shows, I would argue, is that the foregrounding of a particular conflict (whether or not some workers can be fired) leaves the background conditions to the conflict untouched. It does nothing to change the fact that the employer is subject to market imperatives and might repeat his or her actions. Neither does it change the fact that the workers have little alternative to wage-labour. In short, these rights struggles hardly point beyond capitalist society and therefore do little to help overcome the 'abstract compulsion characteristic of capitalism' (Postone 1993: 368-369, cit. 389; also see Garo 2008).[14]

On its own, however, this argument is not enough to decisively criticize Lefort. After all, he simply holds that rights are a *necessary* condition for social transformation, not that they are a sufficient one (Lefort 2015: 13; also see Pranchère 2019: 115). As both Justine Lacroix and Jean Cohen note, the strength of Lefort's analysis is, first, that he shows that the formal freedoms of speech, of movement and of association are generative of a democratic space and democratic dialogue that is open and unpredictable. And, second, that he demonstrates that the new demands that arise from this unpredictable democratic dialogue can be formulated as rights-claims around which oppressed individuals can mobilise (Lacroix 2012: 684-686; Cohen 2013: 128; also see Lefort 2007a: 418). Jean-Yves Pranchère further extends this logic and argues that it is the nature of subjective rights to give rise to a dynamic in which new social demands are formulated and forms of domination are contested. The revindication of social rights by the oppressed against their domination are not an accidental consequence of the dynamic of subjective rights, but an extension of these rights (Pranchère 2019: 141; also see Lefort 2007a: 419; Lefort 2007b: 1032). In other words, while it is true that subjective rights

[14] This being said, I agree with Wendy Brown that it is possible to both see the limits to these rights struggles and, nonetheless, perceive their necessity. In a world in which rights are currency, the advice to not fight redundancies or acts of discrimination with rights could be irresponsible (Brown 1995: 123).

are not a sufficient condition for social transformation, they are its necessary condition as they enable the mobilisation of oppressed individuals around social demands – they are central to the *politicization* of social demands.

However, our forgoing analysis of the legal form can show why this is not self-evident. First, while it might be true that rights can establish relations among oppressed individuals in the sense that they function as symbols that unite these individuals in a common struggle, the act of transforming a rights-claim into positive law tends to break up this initial solidarity. As Sol Picciotto, in a reflection on working class rights struggles, writes: '[S]ubstantive gains are achieved through collective struggles building up class solidarity: the channelling of such struggles into the *form* of claims of bourgeois legal right breaks up that movement towards solidarity, through the operation of legal procedures which recognize only the *individual subject* of rights and duties [my emphasis] (Picciotto 1979: 171; also see Christodoulidis 2017: 135-137;). A similar dynamic is noted by Wendy Brown: 'at the moment a particular "we" succeeds in obtaining rights,' she observes, 'it loses its "we-ness" and dissolves into individuals' (Brown 1995: 98). The Lefortian analysis, focused as it is on the symbolic and mobilizing aspect of rights-claims, plays down the individualizing results of the redemption of these rights.

The legal form also depoliticizes in a second way: through its formalism. That is, by translating political conflict into a language amenable to the legal system, this conflict is depoliticized (Buckel 2011: 163-165). As Emilios Christodoulidis notes – in terms not directed at, but certainly applicable to Lefort's thought: '[i]n republican theory, law is always-already the stage that will host conflict over normative understandings. What disappears as contested in this "always-already" is the conflict over the mode of staging the conflict' (Christodoulidis 1998: 139). Hence, once a political claim is transmogrified into the language of rights, the conflict it is supposed to provoke is already tamed. To translate a political conflict into the language of right involves a process of disciplining this conflict. It involves cutting down on the possible answers to the question of what the conflict is about. This argument can be further divided into two elements. First, and on a more general level, formalism prevents political arguments from entering a juridical dispute. One example that Christoudolidis himself gives is that of a workplace occupation that contests managerial organisation in the name of democratic workplace control and a series of solidarity strikes and occupations it evokes. The legal system, he continues, cannot but break up these political concepts ("democratic control" and "solidarity") into a binary that is agreeable to the legal system – the distinction between legal work-related and illegal political claims. As a result, the broader political conflict – of workers acting in solidarity against domination in the workplace – is cut up, classified and pacified in

the terms that facilitate the legal unfolding of the conflict (Idem: 188-189). Second, formalism entails the centrality of legal procedures that are the terrain of juridical experts because of the kinds of arguments they require (Buckel 2013: 164). Karl Klare has perhaps best documented the anti-participatory and depoliticizing consequences of this aspect of juridical formalism. Law-making, he argues, is an alienating process in which the "product" of a procedure can no longer be recognized as having been created by their purported authors. Therefore it has the effect of *deradicalizing* a political movement (Klare 1978; Klare 1979: 132-134; also see Knox 2017). Again, to reconnect with our argument with Lefort: whereas the process of claiming rights might initially involve politicization, the process of realizing these rights obstructs further politicization as the formalism of this process *disciplines* the initial political claim and *deradicalizes* the political movement that initiates the process.

A third way, and final way, in which form transforms content is the way in which this legal form presupposes contractual relationships. As Radha D'Souza argues, rights claims do not challenge the idea of social relations as contractual relations, but rather take the form: 'we are entitled to own this thing, not you' (D'Souza 2017: 59). This poses serious problems for emancipatory movements that want to challenge proprietary models of social relations. It is, for instance, a perennial problem for Indigenous struggles against colonization. Indigenous people that contest their dispossession are, as Robert Nichols argues, confronted with a particular dilemma. Either they claim prior possession of the land, but this entails a rewriting of their own history (in which their relation to the land was never proprietary) and thus resigning to the possessive logic of colonialism. Or, they disavow possession and undermine the claim of dispossession. This dilemma derives from the fact that colonial dispossession takes a recursive form: it is the creation of property rights through an expropriation of an Indigenous population that only in hindsight can appear as the original proprietor (Nichols 2017). Hence, even in cases were these movements win recognition of their land claims, they still must resign to proprietary models of social relations that they might not accept. This explains why subjective right is inadequate to deal with these kinds of problems (also see Lindahl 2013: 60-64). Here the depoliticizing aspect resides in the *delimitation* of the kinds of claims that can be made. The radical content of certain claims – such as those that are made in indigenous struggles against proprietary models of social relations – simply cannot appear in the form of law.

To conclude this segment: legal form analysis highlights the depoliticizing aspect of rights-claims. It does not, to be clear, deny that rights can have a mobilizing aspect. Rather, what it shows is that the process of the redemption of rights – their transformation into actual legal

entitlements – is a process of depoliticization.[15] In the end, this can only mean that any politics that aims to abolish capitalist relations of domination cannot limit itself to struggles within this legal form but will also have to move *beyond* the legal form.

Conclusion

We started this chapter with a challenge to the critique of rights. If we see rights as both the instrument and object of a conflictual politics of claims-making, most critiques of rights – as moralistic, consensus-oriented and ideological – lose their self-evidence. In what followed I tried to answer this challenge. By reading Marx first *through* the eyes of Claude Lefort and thereafter *against* Lefort, I developed a conception of subjective right that is able to (partly) undermine Lefort's theory of right.

My first conclusion is that the secret to right's implication in domination does not lie in its ideological character – in the ideas it represents. Pointing to the overlap between the founding documents of subjective right and liberal ideology (and its political anthropology of possessive individualism) is a cul-de-sac. On this point I agree with Lefort. The ideological theory of subjective rights fails on different levels. First, it is unable to account for the ideological dissonance of the founding documents of modern subjective right. Second, it also unable to explain the historical effectivity of the different emancipatory rights movements. And third, on a legal-theoretical level it cannot explain why domination takes the specific form of right. That is, if the function of right is simply to hide the reality of oppression from the oppressed, there is no reason to assume that another ideological notion couldn't perform this function equally well.

Therefore, I proposed to shift the attention to Marx's later theory that focuses on the legal form and on the phenomenon of legal fetishism. This theory can explain right's implication in domination without resorting to the problematic concept of ideology. Moreover, it allows us to explain how right is both open to contestation and limits this political conflict at the same time. The latter point is, I believe, particularly important: it allows Marx to turn the tables on Lefort. In other words: Lefort criticizes Marx for underestimating subjective right's potential for

[15] In this sense there is an overlap with Jürgen Habermas' analysis of the process of juridification (Habermas 1987: 356-373). The difference, however, is that my analysis does not restrict the nefarious influence of the legal form to the fourth wave of juridification (namely, that involving social rights) (Tweedy and Hunt 1994: 308) but also includes the earlier ones.

politicization, but the latter could respond that the politicization of the legal form hinges on a fatal circumscription of political conflict. The fact that political rights-claims must be presented in a certain way – have to assume the guise of the legal form – in order to be *redeemed* explains why they are unable to shatter critical forms of social domination.

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