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The Subject of Law

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This paper is part of a larger piece of work on juridical discourse in which I try to elaborate a general description of the discursive and interdiscursive structures of the law and to specify some of the central doctrinal categories of contemporary law. The category of legal subject has an exemplary status in such a project for a number of reasons: it is constructed, in historically differential ways, through a diversity of overlapping positions in legal and para-legal practices and languages; it covers both human and non-human entities; it is formed in direct relation to the juridical-/economic concept of property; and it is closely linked, as both foundation and effect, to the philosophical category of subject. My account here is necessarily cursory, but it should be apparent that it has implications, in part, for the broader debate that has taken place in recent years around the concept of the subject.

When the French jurist Bernard Edelman speaks of the “juridical production of the real” he defines it as “something that can fall under juridical categories, hence also under the juridical category of the real, that is, the real as object in law, susceptible to appropriation, sale and contracts”. (1979: 37) Edelman’s language alludes precisely to the etymology of the word “real”. Webster has this entry:

real [ME, *real*, relating to things (in law), fr. ML, LL; ML *realis*, relating to things (in law), fr. LL, *real*, fr. L *res*, thing, fact; akin to Skt *rai*, property] 1.: of or relating to fixed, permanent, or immovable things (as lands or tenements) ...

The elemental categorical structure of any developed legal system, the nucleus from which all other categories can be derived, is the relation between a subject in law and an object in law (that is, property). The structure of the relation between *persona* and *res*

yields a basic scheme of subject-object relations and of relations between subjects. By further describing the qualifications and the acts of subjects, we can derive from it the entailed categories of rights and obligations; of acts and intentions; and of grievances and remedies. Even those areas of law (such as constitutional, international, and corporate law) which do not deal with persons or personal property nevertheless operate by analogy with the concept of person.

The surface structure of the relation between *persona* and *res* is, however, misleading. Pashukanis argues that the relation of a person to a thing has no legal significance. (1978: 122) Its real form is therefore that of a relation between subjects, but conceived negatively, as a relation of exclusion from the use and disposition of an object. This is the structure of the distinction between the two fundamental forms of actions in Roman law, and of rights in modern civil and common law: rights in *rem* and rights in *personam*.

Rights in *personam* are singular, imposing an obligation against a particular person; rights in *rem* are general, asserting an entitlement to exclude all other persons, or a determinate set of other persons, from my property. In this categorical system *persona* and *res* are not entities but relational structures. Thus a "person", *persona*, is constituted by the possession of a bundle of rights (or, in Roman law, causes of action) and obligations, and conversely what is owned is not a material entity but an aggregate of rights defined within a legal system. I own, not a piece of land, but a set of rights of use and exclusion over the land; and my status as a legal subject is constituted in this instance by the rights to which I am entitled and the obligations I incur.

Both of these categories are thus defined within the sphere of circulation, where the alienation and acquisition of property take place under the sign of the formally equal status of subjects. (Marx, 1973: 241 and 243) This description is not true of feudal law, where the creation of the fee depends upon an essential inequality of status - although even here it is the free acceptance of status that constitutes the essence of the feudal gift; but for both Roman law and for bourgeois civil and common law systems it is the apparently autonomous "form of the subject in law that fixes social relations and allows the real to be put into circulation as an object-in-law". (Edelman, 1979: 92) Classical Marxist theory adds two corollaries to this. First, it opposes to the hypostatized sphere of circulation - the

sphere of production, where quite different relations between agents obtain. Second, it argues that the originary mode of legal possession is self-possession - that is, as Edelman puts it, "in its very structure the subject in law is constituted on the concept of free ownership of itself". (1979: 69) This free ownership of oneself (which contrasts with the slave's inability to dispose of him or herself on the market) is the foundation of the freedom of ownership in general. Pashukanis thus (unlike Hegel) accords the category of the subject logical priority over that of property, because "property becomes the basis of the legal form only when it becomes something which can be freely disposed of in the market. The category of the subject serves precisely as the most general expression of this freedom". (1978: 110)

This repetition of the commodity relation by the legal relation does not, however, diminish the active force of the latter in the constitution of the legal subject. One of the forms this takes is an active invocation and identification of complexly constituted subjects as legal subjects through the use of particular grammatical forms. Daube, for example, comments on the transition in early Roman legislation from the form "If a man murders another man, he shall be put to death", to the later, more abstract, less narrative and more categorical form "whoever murders a man shall be put to death". (1956: 6) This "whoever" corresponds, I think, to Michel Pecheux's description of the "empty" relative clause ("celui qui"), often in conjunction with a future anterior, as a primary mode of interpellation of the legal subject. (1982: 110) Another manifestation of the specificity of the juridical constitution of the subject form is the simple disjunction between human being and person, and between "natural" and "legal" forms of the person. These disjunctions hinge on the differential distribution of rights (for example, citizenship rights). The core of the argument is this:

A person is such, not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes ... Every full citizen is a person; other human beings, namely, subjects who are not citizens, may be persons. But not every human being is necessarily a person, for a person is capable of rights and duties, and there may well be human beings having no legal rights, as was the case with slaves in English law. (Black's Law Dictionary, 1968: entry

under “person”)

In Roman law, the *paterfamilias* “is the only full person known to the law. His children, of whatever age, though they are citizens and therefore have rights in public law, are subject to his unfettered power of life and death. Again, only he can own property, and anything which his children acquire belongs to him alone”. (Nicholas, 1962: 65)

The slave is understood in Roman law as an *instrumentum* rather than a person (although the slave is differentiated from animals as an *instrumentum vocale* rather than an *instrumentum mutum*). Roman citizens captured into slavery entered the limbo state of *postliminium*, in which their civil rights were suspended during the period of their captivity. If a prisoner returned, these rights

revived automatically and retrospectively; if he died in captivity his death was deemed to have occurred at the moment of his capture. This principle applied to rights, but not to “facts”, i.e., to legal relationships which required for their existence some physical manifestation. Such relationships did not revive automatically, but had to be physically resumed. Thus possession ended on capture and if resumed on return was a new possession dating from that moment; similarly the captive’s marriage came to an end and did not revive unless and until a married relationship was by agreement resumed. (Nicholas, 1962: 71-2)

Finally, the insane have an ambivalent status in both ancient and modern law, with the criterion of autonomous will - of “self-possession” - tending to deprive them of the status of person. It is possible to plot back from this exclusion to reconstruct the particular doctrines of responsibility and causality which give it its force. Thus Goodrich writes that

the legal individual or legal subject is a very specialized and distinct rhetorical person ... a unity constructed upon the basis of its past actions. The legal subject cannot revoke or renounce its deeds, the legal subject is the straightforward cause of its deeds (acts) and it is morally and legally responsible for those deeds - utterances, actions and omissions. The legal

subject is a static unity in the sense that it cannot avoid the legal imputation of a causal relation between past acts and present responsibility. (Goodrich, 1986: 204)

Horwitz has traced the shift from an individualizing doctrine of “objective causality” in nineteenth century tort law, based on the metaphors of a distinction between “remote” and “proximate” causes and of objective “chains of causation”, to the probabilistic twentieth century doctrine of “foreseeable consequences”. The two ideologies imply different forms of legal subject in each case, but both suppose as absolute particular forms of causality and responsibility. (Horwitz, 1982: 201-13)

In addition to “natural” persons, the concept of person is applied in modern legal systems to certain non-human entities - in particular, and subject to certain conditions of registration and jurisdiction, to corporations and to governmental associations. In his classic paper of 1938 Wolff distinguishes four main doctrines on the nature of the juristic person. The first is the Fiction Theory, according to which only human beings can be persons and so the subjects of rights; as a consequence, “corporations, States, foundations are not persons, but they are treated as if they were”, by a legal fiction. (1938: 496) The second theory is that enunciated by Bekker, Brinz, and Demelius, which “declares that a so-called juristic person is no person at all, but is *subjectless property destined for a particular purpose (subjektloses Zweckvermogen)*, that there is ownership but no owner. This theory, too, is based upon the assumption that only human beings can have rights. As corporations and foundations are not humans, no subject exists in which the right can be vested”. (Wolff, 1938: 496) The third theory, developed in particular by Jhering, treats institutions in terms of the individuals (the members or shareholders of corporations, the beneficiaries of foundations) which make them up. Wolff argues that this account is unable adequately to explain the unity of will and the specificity of institutions vis-a-vis these individual agents. Finally, there is the organism doctrine, according to which

a legal person is a real personality in an extra-judicial, pre-judicial sense of the word. In contra-distinction to the others, this theory assumes that the subjects of rights need not be human beings, that every being which possesses a will and a life of its own may be the subject of rights and that States, corporations,

foundations are beings just as alive and just as capable of having a will as are human beings. They are - so it says - social organisms just as humans are physical organisms. Their will ("common will") is different from the will of the founder. Their actions are their own, not carried out by agents or representatives like those of incapables (infants, lunatics), but in the same way as those of normal adults. Man uses his bodily organs for the purpose. Corporations use men. (1938: 498)

In some sense, of course, the endowment of a non-human entity with rationality is always a fiction, an artifice. But the distinction between "legal" persons and "natural" persons cannot be mapped onto a simple dichotomy of nature and culture, because the status of the "natural" person is itself constituted by a juridical demarcation of the problematic boundaries of the human: boundaries between foetus and child; between the living, the comatose, the braindead and the dead; between the bodies of Siamese twins; between the normal and the subnormal. Moreover, "natural" persons are not necessarily coextensive with their bodies. They may, for example, be represented by an agent, acting as a legal extension of their status as person and able to create rights and incur duties on their behalf.

Both this constructedness of the natural person, then, and the distinction between legal and natural persons mean that the general concept of "person" ("legal subject") has no necessary or unified form. (Hirst, 1979: 13-14) Processes of registration and certification control the "recognition" of the status of both corporations and human beings; but specific ideological processes of "recognition" (in the sense of "self" - recognition: recognition of the always-already subject) apply to the latter. The natural person has distinct conditions of constitution (specific institutional and practical conditions), and distinct forms of circulation in the different juridical domains (it underpins distinct juridical realities). It is a fully discursive category.

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