

Karl Marx's dialectics and the Marxist criticism of law

A dialética de Karl Marx e a crítica marxista do direito

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Abstract

The article seeks to understand in depth the peculiarities of Karl Marx's materialistic dialectic, as opposed to the idealistic, Hegelian dialectic. Grounded in *Capital*, it highlights the absence of more accurate methodological concerns within the Marxist critique of law, which leads to the adoption of discrepant and contradictory premises, methods and viewpoints. The conclusions indicate the urgency of the debate on the Marxian-dialectical method and the importance of its rigorous incorporation into the Marxist critique of law.

Keywords: Marxism and law; Dialectics of Karl Marx; Evgeny Pashukanis.

Resumo

O artigo busca compreender de modo aprofundado as peculiaridades da dialética materialista, de Karl Marx, em oposição à dialética idealista, hegeliana. Com fundamento em *O capital*, ressalta a ausência de preocupações metodológicas mais acuradas no interior da crítica marxista do direito, o que redundava na adoção de premissas, métodos e conclusões discrepantes e contraditórias. As conclusões indicam a urgência do debate sobre o método dialético-marxiano e a importância de sua incorporação rigorosa à crítica marxista do direito.

Palavras-chave: Marxismo e direito; Dialética de Karl Marx; Evgeni Pachukanis.

"Although this is no more than a mere repetition of the production process on the same scale, this mere repetition or continuity imprints upon the process certain new characteristics or, rather, dissolves the apparent characteristics which it exhibited when it proceeded in isolation."

Karl Marx.

Introduction

One of the great merits of Pachukanis, recognized by almost all of those who have gone into *General theory of law and Marxism*, is the methodological rigor with which he proceeded the critical analysis of the main categories that form the general theory of law.¹ This characteristic can be detected, evidently, already in the essential nucleus of his thought, which consists in the original approximation between the form of law and the form of the commodity.² Thus, instead of placing its analysis in the relatively abstract context of the relations between infrastructure and superstructure, understanding law as a mere *ideological* expression³, or introducing juridical form, abruptly, in the context of *class* struggle, Pachukanis follows the methodological steps of Marx and associates the law to the commodity, that is, to the elementary form of wealth in the capitalist mode of production. With this, he unveils the mythical figure of the legal subject, central element to the general theory of law, discovering its concrete origin in the "guardians of the commodities", that is to say, in the *people* urged to take their values of use to the market to make the exchange.

Besides a *substantial* concern with methodological problems, which led him to the critical analysis of the categories that form the general theory of law in the light of the Marxian presentation in *Capital*, Pachukanis demonstrates a formal concern as well, as he reserves a chapter of his work for the presentation of the *methods of constructing*

¹ Cerroni compares Pachukanis' work to that of Stutchka in the following terms: "But two elements at least, profoundly differentiate his perspective from that of Stutchka. The first refers to a sharper accentuation of the *objective* (extraconscial) character of the whole *juridical problematics* (...) The second element concerns a *greater methodological acumen*, which is inserted in a deeper philosophical culture and a very *penetrating meditation on the method of Capital*. It is not by chance that Pachukanis is perhaps the first Marxist scholar to work on the basis of the 1857 *Introduction*, a text by Marx that for a long time stood aside in the tradition of Marxist exegesis"(CERRONI 1976, 65, my emphasis).

² In the preface to the 2nd edition, Pachukanis notes: "Comrade P. I. Stutchka has quite well defined my approach to the general theory of law as 'an attempt to approximate the form of law to the form of the commodity'. As far as I can judge from the comments, this idea, notwithstanding occasional reservations, was recognized in its foundations as accurate and fruitful "(PACHUKANIS, 2017, p.60; 2003, p. 36).

³ As does, for example, Reisner. Cerroni explains: "In 1912, Reisner gives this definition of law: it is an ideology that 'relies, within our consciousness, mainly on the concept of truth, justice and equality in the distribution and equalization of men and things' (Cerroni, 1976, p.51).

*the concrete in the abstract sciences.*⁴ Based on the *Contribution to the Critique of Political Economy*, a Marx's text rarely used at the time, the Russian author points out three fundamental questions: first, the importance of starting from the simple to the complex, from the pure form to the more concrete, so that, in the case of the juridical science, the State is a point of arrival and not of departure; second, the need of considering that the concepts that the social science uses have a history, that is to say, they are not forms of thought created by the human mind, but correspond to precise and historically delimited social relations – as, for example, the concept of value, of law, etc. ; and finally, the Marxian observation that the understanding of the meaning of past social formations is given through the analysis of later, and therefore more developed, configurations, such as capitalist society.⁵

Although Pachukanis's work has meant a monumental advance in methodological concerns within the Marxist critique of his time⁶, there is now a certain "paradox." Curiously, even the Marxist tradition that was formed in the wake of *General Theory of Law and Marxism*, failed in making significant progress on methodological issues. The notes drawn up by the Russian author were taken as correct, adequate, and above all, sufficient, and no further notes were made. Thus, central categories of the Pachukan apparatus, such as the figure of the subject of law, the pre-eminence of private law vis-à-vis the public, the extinction of juridical form, etc., are taken in a relatively uncritical⁷ way, without any major concern with regard to a necessary and indispensable *critical-methodological evaluation of Pachukanis's own theory*. The result could not be more disheartening: the Marxist approaches to law have entered a vicious circle, within which they remain "spinning" about aspects constantly reiterated and ruminated to exhaustion.

The purpose of this article is to draw attention to this problem which has been overlooked by the Marxist critique of law: questions concerning the elucidation of the "method" used by Marx, and which require a necessary analysis of the particular

⁴ Chapter 01 of *The General Theory of Law and Marxism* (PACHUKANIS, 2017, pp. 81-86; 2003, pp. 63-70).

⁵ Pachukanis points out: "Only in this case will we conceive law not as an accessory to an abstract human society, but as a historical category that corresponds to a defined social environment, built by the contradiction of private interests" (PACHUKANIS, 2017, p.86, 2003, 70) - ("Apenas nesse caso conceberemos o direito não como acessório de uma sociedade humana abstrata, mas como categoria histórica que corresponde a um ambiente social definido, construído pela contradição de interesses privados")

⁶ The first edition of *The General Theory of Law and Marxism* was published in 1924.

⁷ In the context of the Marxist debate, of course. When compared to the traditional theory of law, the Marxist critique emerges at the forefront of all analysis in vogue.

contours of his dialectic, have not yet been duly solved in other "fields" of Marxism, such as philosophy, economics, politics, etc., to be given as definitively "solved" and set aside. On the contrary, this work is still ongoing and the Marxist approaches in the ambit of law can not afford to simply ignore it. For this reason, the object of this analysis comprises a part of the set of researches that have been developed around the Marxian dialectic, with the aim of identifying certain elements that are peculiar to it. The hypothesis maintained is that the Marxist critique of law needs to incorporate into its field of interests the problematics of the *Marxian method*, otherwise it will be stuck in constantly reiterated categories, or, worse still, it will lose itself in a radical eclecticism of premises, methods and conclusions so disparate that they approach dangerously the postmodern approach, so in vogue in traditional theory. Therefore, an analytical clipping of Book I of *Capital* was established, which consists precisely of the presentation of the *conversion of the laws of mercantile property into laws of capitalist appropriation*. In the light of this passage, the conceptual meaning of the form of private capitalist property in Pachukanis was analyzed, in order to testify to what extent his point of view approaches more or less the Marxian perspective. The conclusion points to a certain methodological insufficiency of the Pachukanian analysis. Finally, the method used can be none other but Karl Marx's dialectical-materialist one, whose fundamental features are incorporated in *Capital*.

1. (Ancient) Problems of Marx's dialectics

The problems related to Karl Marx's dialectic are ancient. Already in the afterword to the second edition of his great work, in 1873, the author affirmed: "The method applied in *Capital* was little understood, as already shown by the contradictory interpretations that were presented about the book" (MARX, 2013, p. 88, 1962, p.25). Equally ancient are the attempts to approximate his method to that of Hegel. At the same occasion, in a tone of complaint, he remarks: "The German commentators naturally cry out against the Hegelian sophistry" (MARX, 2013, p.88; 1962, p.25). Since always, however, the author struggles to claim the autonomy of *his dialectical method*. After mentioning extracts from a critique of *Capital*, he observes: "In describing so correctly *my true method*, as

well as the *personal application* I make of the latter, what else did the author do but describe the *dialectical method*?" (MARX, 2013 , p.90, 1962, p27, my italics).

After a period of relative "disinterest," in which strictly "economic" debates over Marx's work prevailed, "philosophical" subjects returned to the scene, especially through the substantial studies elaborated by Karl Korsch (2008) and Georg Luckács (2003), published in the 1920s⁸. However, if, on the one hand, they were engaged in the rescue of the dialectics, especially with regard to a necessary reincorporation of Hegel into the Marxist debate, on the other, they failed in facing, in a detained and rigorous way, the complex issues posed by the challenge of unraveling the conceptual contours of a *specifically Marxian dialectic*. This one, in turn, far from antagonizing or repelling the analysis of economic forms, presupposes them as constitutive elements of its own way of being. In this sense, it doesn't seem like an exaggeration to affirm the important role played by Isaak Illich Rubin (1987), in presenting, also in the 1920s, the Marxian theory of value in a non-autonomous way.

However, a few years would have to pass, still, so that a more accurate rescue of the relations between economics and dialectics in Marx's thought would come to light. In the mid-1950s, Roman Rosdolsky (2001) focuses on the *Grundrisse* (MARX, 2011) to extract from there important indications of how the *Marxian method* is structured, especially with regard to the intimate relations it maintains with Hegel's *Logic*.⁹ In doing so, Rosdolsky deals with specifically "economic" themes (money, capital, etc.), which are, after all, the very object of Marx's "draft." However, it is only from the 1960s onwards, perhaps due to a welcome departure from academic studies in relation to the political vicissitudes of the time, that emerges in the intellectual Marxist scene a "new reading" of Marx, whose objective is to face certain challenges linked to the interpretation of the Marxian work in a relatively autonomous way, without giving the "official" interpretations until then established an account.

This "new horizon" gave rise to a more direct confrontation with the problems concerning the *dialectical method* that Marx "applied" to the economic questions. Helmut Reichelt, one of the exponents of this "new reading", captured the problem in a perspicacious way:

⁸ Check out: (ANDERSON, 2004), mainly chapter 03.

⁹ "There is no theme treated more carelessly by commentators of Marx's economic theory than that of his method and, particularly, of his relation to Hegel" (ROSDOLSKY, 2001, p.15). A current approach to the issue is found in: (ARTHUR, 2016), in the whole work, especially in chapter 05 (Capital of Marx and the Logic of Hegel).

In the meantime the interest has been turning more and more to Marx's late work, but it seems that not one step closer to the expected clarification of methodological problems has been reached. Neither did Rosdolsky's commentary change much in this regard. Although he says that exactly the *Draft* shows us how much the "structuring of Marx's *Capital* is dialectical from beginning to end," it is, after all, nothing more than an assertion. One of the weaknesses of his book consists especially of the fact that it only draws attention to the use of Hegelian categories and, in the same breath, reproduce almost without commentaries whole passages that are distinguished by their highly speculative formulations and, therefore, extremely lacking in interpretation. This naturally gives rise to the question if Rosdolsky would not have equally incurred the superficiality he censured; if – although he affirms this – he has really abandoned the position he sees in the dialectics present in *Capital* only a stylistic ingredient that remains external to the subject treated (REICHELT, 2013, p.24).

According to this "new reading", the more precise understanding of the dialectical elements of the Marxian exposition necessarily passes through the *internal scrutiny* of his work, that is, through the *revelation* of the dialectical determinations of the categories by means of which the critique of political economy is structured and presented. In other words, it is not enough to delimit the contours of this or that concept, or to point it out as the precise origin in the Hegelian dialectics;¹⁰ it is, much more, to catch the *internal logic of the exhibition* and, from this capture, to understand its constitutive categorical nexus in such a way that this logic itself signifies the *object* of the presentation, that is, *the capitalist mode of production and its corresponding laws of production and circulation*, which, from there, can then be apprehended as *concrete thought*.

There is, however, a paradoxical element in the effort undertaken by the "new reading". The impulse to overcome the limitations that are found, for example, in Rosdolsky, that is, the merely *external* apprehension of the dialectical elements of the Marxian exposition, instead of leading to the "dive" in the *internal logic* of the presentation which is *Capital*, led to another object, which is, the *Grundrisse*, that is to say, the *draft* of the critique of political economy, and not this criticism considered itself. Reichelt is clear in this regard:

This conception is suggested exactly by the *Draft of Capital*. While from *Capital*, if necessary, individual theorems can still be extracted and discussed

¹⁰ "Even generally careful researchers, like Vorländer, believed they could demonstrate that Marx 'in reality had only flirted with Hegelian concepts in two parts' (though they soon added a third). They failed to advise that decisive categories of their method, repeatedly used, come directly from Hegel's Logic. It is enough to recall the Hegelian origin and the methodological importance of a fundamental differentiation for Marx, between mediation and immediacy"(ROSDOLSKY 2001, p.16).

on the horizon of specialized science without being soon caught in flagrant violation of the whole conception, in the *Grundrisse of the critique of political economy*, in the *Draft of Capital*, this is no longer possible. In them it appears much more clearly than in *Capital* that the "Hegelian way of expressing, difficult to understand", is an integral component of Marxian criticism. In them, the intertwinement of themes traditionally attributed to economic science with a form of exposition of these themes oriented in the Hegelian logic is so narrow that it becomes unfeasible to approach the thing separately (REICHELT, 2013, p.25).

But the presented paradox is precisely this: would it not be an *essential* aspect of the *Marxian* dialectics to *conceal* the traces of methodological rules? Would the hiding of the "Hegelian way of expressing, difficult to understand", that is verified in *Capital*, not be a *specific* element of Marx's dialectics, a *particularity* just to *distinguish* it from Hegel's dialectic? In the preface of 2001, Reichelt observes:

During the preparation of this research on the logical structure of the concept of capital in Marx, presented in the form of a dissertation as the first attempt to reconstruct Marx's dialectical method in *Capital*, I did not realize a central indication: soon after the publication of the writing *A Contribution to the Critique of Political Economy*, in the year 1859, Marx wrote to Engels, saying that the continuation would be "much more popular and method better hidden than in Part I" (III.3 / 49). That is, Marx did not make it easy for his readers: on the one hand, he presents a work with a high level of scientific exigence; on the other hand, he "hides" precisely the method by which his scientificity is defined. Gerd Göhler has already noted that dialectics has suffered a "reduction" in *Capital*, and indeed it is possible to prove that, already in the second edition of *Capital*, Marx simply scratched out methodological passages that are essential to the understanding of his procedure. Reasons, amplitude and meaning of this "reduction" have not yet been clarified. However, if we want to investigate it and reconstruct the method, evidently it is needed to stick to the writings in which it presents itself, so to speak, "not hidden", namely, in the directly preparatory works for *Capital*, that is, especially in the so-called *Draft of Capital* and in the *original text* of the writing *Contribution to the Critique of Political Economy* (REICHELT, 2013, p.11).

So, the construction of the meaning of the Marxian dialectic does not pass, precisely, by presupposing as an essential element of its method precisely the requirement that it remains "hidden"? Or, as Reichelt points out, would Marx "scratch" entire passages with important methodological references simply due to "carelessness"? Hard to believe. Would it not be urgent, then, to begin the confrontation with the questions related to the "reasons, amplitude, and meaning of this 'reduction'", which "have not yet been clarified"?¹¹

¹¹ About this "concealment", also see: (REICHELT, 2011).

In this way, what is proposed in this article is a kind of "inversion" regarding the presuppositions of the "new reading", that is, the extraction of the *Marxian method* from the rigorous reading of *Capital*. And not only that, but also the consideration of what fundamental element of his dialectic consists precisely in "hiding" the method, causing methodological determinations to "spring" from the very exposition of content, without engaging with an explicit presentation of this or that methodological rule.¹²

This does not mean, of course, to suggest a contempt, underestimation, or apartness from the monumental theoretical advances produced by the "new reading." Rather, the opposite. It is a matter of incorporating them into the analysis of the questions about the peculiarities of the Marxian dialectic present in *Capital*, but "making the way back," that is, by introducing the acute methodological observations extracted from the analysis of the *Grundrisse* and the *Contribution to the Critique of Political Economy* to the apprehension of the method by which Marx presented his masterpiece. It is, therefore, a matter of interpreting the *Draft* in the light of *Capital*, and not this in the light of that one.

What is sought is, in short, a deeper understanding of the *particular* characteristics of Marx's dialectic, that is, the scope of the *specific* categorical forms and contents of his "method", especially in opposition to the idealistic, Hegelian dialectic. It is not, however, a matter of asserting, as is usually done, that the author of *Capital* simply "inverted" Hegel's dialectic, thereby removing the "idealist" features present in there. It is a matter, as Jorge Grespan suggests, of acknowledging that they are *two distinct, opposing dialectics*, with their own presuppositions and particular characteristics:

According to this known and, undoubtedly, crucial text, it is not the case of merely depurating the "rational" dimension of the Hegelian dialectic in order to obtain what is maintained from it in Marx. *These are two distinct dialectics. Moreover, "not only diverse" but also directly "opposite"*. Thus, the procedure of obtaining the "rational core" is defined as an "inversion", by which what is "upside down" assumes its true position (GRESPLAN, 2002, p.30, emphasis mine).

¹² It is worth remembering that an essential part of Marx's dialectic consists in a *circumstantial* presentation of methodological elements at strategic moments, such as, for example, the classic paragraph that concludes Chapter 17 of Book I of *Capital*: "Moreover, with the form of manifestation 'value and price of labor' or 'wage', in contrast to the essential relation that manifests itself, that is, with the value and the price of labor power, the same occurs as with all forms of manifestation and its hidden background. *The former reproduce themselves in an immediately spontaneous way, as ordinary forms and currents of thought; the second has to be first discovered by science.* Classical political economy comes very close to the true relation of things, but without formulating them consciously. She can not do it while she is covered with her bourgeois skin"(MARX, 2013, p.612, 1962, 564, emphasis mine).

2. The conversion of the laws of mercantile property into laws of capitalist appropriation

Obviously, the approach to methodological problems present in *Capital* is Herculean work, to be done collectively and over a long period of time. The limits of this article do not allow a more extensive and systematic analysis of the subject. Precisely for this reason, it is necessary to establish a "cut" within which the problem can be placed more precisely and the issues more adequately faced.

In this sense, there is a passage from Book I of *Capital* that can be considered one of those fundamental moments in which Marx explicitly presents a canon of his method. This is the beginning of Section VII (The Process of Capital Accumulation), specifically Chapters 21 (Simple Reproduction) and 22 (Transformation of surplus value into capital), where the exposition of the *conversion of property laws that govern the production of commodities in laws of capitalist appropriation* is. In item 01 of this last chapter, Marx observes:

Insofar as the surplus value of which is composed the additional capital n. 1 resulted from the purchase of the labor force for a part of the original capital, a purchase which obeyed the laws of the exchange of goods and which, from the legal point of view, presupposes only, on the worker's part, the free disposition of his own capacities, and on the part of the possessor of money or goods, the free disposition of the values that belong to them; insofar as the additional capital n. 2 etc. is no more than the result of additional capital n. 1 and, therefore, the consequence of that first relation; as every single transaction is continually obeys the law of commodity exchange, according to which the capitalist always buys the labor power and the worker always sells it – and, we suppose here, for its real value - *it is clear that the law of appropriation or law of private property, founded on the production and circulation of commodities, changes, obeying its own internal and inevitable dialectic, into its direct opposite.* The exchange of equivalents, which appeared as the original operation, twisted (gedreht) to the point that now the exchange is effective only in appearance, for, first of all, the very part of the capital exchanged by labor force is nothing more than a part of the product of other people's work, appropriated without equivalent; secondly, its producer, the worker, not only has to replenish it, but also has to do so with a new surplus. *The relation of exchange between worker and capitalist thus becomes mere appearance belonging to the process of circulation, in a mere form, foreign to the content itself and which only mystifies it.* The continuous buying and selling of the workforce is the form. The content is in the fact that the capitalist continually exchanges a part of the already objectified work of others, which he does not cease appropriating without equivalent, by a greater quantity of other people's living labor. *Originally, the right of property appeared before us founded on the work itself.* At the very least, this supposed had to be admitted, because only the possessors of goods with equal rights confronted with each other,

but the means of appropriating the goods of others was only the alienation of their own merchandise, and this could only be produced through labor. *Now, on the contrary, property appears on the side of the capitalist, as the right to appropriate other people's unpaid labor or its product; on the side of the worker, as the impossibility of appropriating his own product. The division between property and labor becomes a necessary consequence of a law that apparently derived from the identity of both.* Therefore, however much the capitalist mode of appropriation appears to violate the general laws of commodity production, it does not derive at all from the violation, but, rather, from the observance of these laws (Marx, 2013, p.658-659, 1962, p.609-610, my emphasis).¹³

The reproduction of capital means nothing more than the *repetition* of the production process, that is, the *reiteration* of the movement carried out by the amount of value initially thrown into circulation and converted into means of production, raw materials, and labor power. Once the commodities resulting from the first act of production gave their "back flip", that is, they were converted into cash, the capitalist has in hand that amount originally invested, plus an addition, which consists of the surplus value. The continuation of this movement means a "new" production, but, *in the same terms*, that is to say, by *reiterating* the initial presuppositions - which configures, therefore, a *reproduction of capital*.

If the amount related to the produced surplus value is entirely consumed by the capitalist, not returning to the productive circuit, occurs what Marx calls *simple reproduction*; if, on the other hand, this surplus value or part of it is *reintroduced* into the production process, occurs the so-called *enlarged reproduction* or *accumulation of capital*. In both cases there is a reiteration of the presuppositions of existence of the capital: private ownership of the means of production in the hands of the capitalists; "freedom" of the worker in two senses, that is, separation in relation to the means of production and free availability of his labor power; integration of the worker into the means of production through a juridical contract "freely" agreed with the capitalist in the sphere of circulation.

From the point of view of the categorial presentation of the laws that govern capitalist production, the exposure of the *reproduction of capital* introduces an

¹³ In a footnote to this passage, Marx notes: "The property of the capitalist over the product of the labor of others" is the strict consequence of the law of appropriation, whose fundamental principle was, on the contrary, the exclusive property title of each worker over the product of his own work', Cherbuliez, *Richesse or pauvreté*, cit, p. 58, where, however, this *dialectical conversion* (dialektische Umschlag) is not properly developed "(MARX, 2013, p.659, note no. 23, 1962, p.610, note no. 23, emphasis mine). In the French edition Marx's comment appears like this: "L'auter sent le *contre-coupe dialectique, plus l'explicique faussement*" (MARX, 1971, p.27, note no. 01, my emphasis).

important element. If the first moment of production still allows the presupposition that capitalist and labourer are freely in the market and exchange *equivalents*; therefore, that the original adjustment involves parts whose properties have their origin in the work itself (a "perfect" juridical transaction, based on equality of positions); the *repetition of production*, that is, the *reproduction of capital*, insofar as it implies the continuous extraction of surplus value, results in the inexorable result that, from a certain point of time on, the *total amount of value* inserted in the circuit came from the *work of others appropriated without equivalent*. A relation of *exploitation* is characterized, so that the initial assumption of equivalence can no longer be sustained autonomously.¹⁴

3. Dialectical twist as interversion: critic

The central point lies in the way in which this "conversion" should be apprehended, that is to say, its *specific categorial sense* and, from this apprehension, in inquiring what consequences it entails, from the methodological point of view, to the general understanding of the Marxian dialectical exposition. In other words, an *objective modification* of the laws that govern the capitalist production should be affirmed; or, on the contrary, the *dissolution* of the supposedly essential character of that phenomenon, in such a way that it starts being apprehended as mere *appearance* motivated by the movement of the circulation when captured in an isolated way? Certain readings see in this "conversion" a genuine *inversion*, relying, therefore, on the first of the points of view mentioned above. Ruy Fausto, by the way, points out:

This change of perspective, which in reality represents an objective change in the meaning of the process, constitutes what Marx calls the interversion of the law of appropriation or of property, interversion whose two moments could be summarized as follows: a return of capital or each return of capital obeys the law of appropriation or of property of the mercantile economies, law according to which the appropriation of the products is made by the

¹⁴ Here is the starting point for the answer to the question formulated by Edelman: "Seeing things closely, we do not know very well how and under what precise legal forms the extraction of surplus value operates. And this semi-ignorance blinds us to the very force of these forms, these techniques, to their concrete and ideological effectiveness. For example, do we really know that the labor contract is linked to the capital and how the right to property is linked to the labor contract? We know nothing at all, except the banalities with which we are cumulate: the labor contract introduces a 'false' equality between the parties, the will of the worker is a 'fiction' ... trivialities with which we are lazily contented because of the lack of going see in practice how things really happen"(Edelman, 2016, p.27).

exchange of equivalents and depends, in the last instance, of the proper work. But the repetition of capital returns - and therefore the repeated fulfillment of the law of appropriation by labor and by the exchange of equivalents - interverses (*interverte*) this law in the law of capitalist appropriation, appropriation without equivalent of the work of others (FAUSTO, 2015, p. 76).¹⁵

Well then, two problems come up right away. Firstly, to what extent is it correct to assert that "a return of capital or every return of capital obeys the law of appropriation or of property of the mercantile economies", "according to which the appropriation of the products is done by the exchange of equivalents"?

Well, in chapter 5 of Book I of *Capital*, Marx presents the *production of absolute surplus value*, in which he makes explicit the difference between the labor process that results in the *formation of value* and that which results in the *valorization of value*. In that one, the process continues until the moment in which the value of the labor force is replaced by an *equivalent* of what was paid by the capitalist to the worker; in the second, the process lengthens to such an extent that the value produced *exceeds* the value of the labor force, *surpassing* that initial relation of equivalence and giving rise to the absolute surplus value, the "hard core" of the capitalist mode of production.¹⁶ Furthermore, in chapter 14 of Book I, Marx observes:

The extension of the working day beyond the point at which the worker would have produced only an equivalent of the value of his labor power, accompanied by the appropriation of this surplus labor by capital - in this consists the production of the absolute surplus value. *It forms the general basis of the capitalist system and the starting point of the production of the relative surplus value.* In this last one, the working day is from the beginning divided in two parts: necessary work and surplus work. In order to prolong the surplus work, the necessary work is reduced by methods which permit to produce the equivalent of the salary in less time. The production of the absolute surplus value revolves only around the duration of the working day; the production of relative surplus value fully revolutionizes the technical processes of labor and social groupings (MARX, 2013, p.578, 1960, pp. 532/533, my emphasis).

¹⁵ "The denial of the law of appropriation of the simple circulation, and of its foundation, the exchange of equivalents, is then consummated. The law of appropriation for own work and the exchange of equivalents becomes the law of appropriation without exchange of the work of another. This is what Marx calls the "interversions of the laws of the property of the production of commodities into laws of capitalist appropriation" (W. 23, K. I, page 605. Oeuvres, Économie I. Op. Cit., P 1081). And what is important in this inversion - and that is why there is strictly inversion - it is that the inversion is made by the very application of the laws of simple circulation"(FAUSTO, 2015, p.276, emphasis mine).

¹⁶ "Well, if we compare the process of value formation with the valuation process, we will see that the latter is nothing more than a process of value formation that extends beyond a certain point. If such a process does not exceed the point at which the value of the labor force paid by capital is replaced by a new equivalent, it is simply a process of value formation. If it goes beyond this point, it becomes a process of valorization "(MARX, 2013, p.271; 1960, p.209).

And, at the beginning of Section VII, the author explains:

The transformation of an amount of money into means of production and labor power is the first move made by the amount of value that must function as capital. It acts in the market, in the sphere of circulation. *The second phase of the movement, the production process, is completed as soon as the means of production are converted into commodities whose value exceeds the value of their constituent parts and, thus, contains the originally advanced capital plus a surplus value.* Then, these goods have, in their turn, to be thrown back into the sphere of circulation. The goal is to sell them, accomplish their value in cash, convert that money into capital again, and so on. This cycle, always going through the same successive phases, constitutes the circulation of capital (MARX, 2013, p.639; 1960, p.589, my emphasis).

It becomes clear that the first "act" of production, that is, the first "return" of capital, or every "return" of capital, produces, in an *autonomous* way, that is, independently of so many other returns, the *surplus labor*, thus, the substance of surplus value. In this way, the overcoming of the equivalence relation, that is, the violation of the law of mercantile appropriation, occurs immediately, in the *production* of capital, and not in its *reproduction*.

Secondly, it does not seem appropriate to state, as Fausto does, that the reproduction of capital makes the law of appropriation by self-labor and exchange of equivalents *become* the law of appropriation without exchange of the work of others. Because this law, it is worthy to say, the *law of capitalist appropriation*, is already operating since the moment when the first amount of value, in the form of money, is exchanged for means of production, raw materials, and labor power to initiate productive process of increase of value.¹⁷ *It is not reproduction that "violates" the law of equivalence; the production of capital does so.* Therefore, it seems more appropriate to affirm that that, the reproduction, instead of printing on the process "certain new characteristics", actually *"dissolves the apparent characteristics that it had when it passed in isolation"* (MARX, 2013, p.642, 1960, p.592).

Thus, it is to be considered that the sortal sense of the *dialectical torsion* by which the *law of mercantile property* "changes" into its direct opposite, that is, into the *law of capitalist appropriation*, must not be understood as an *interversion* in the sense of a *essential* modification of the process, but rather as a conversion in the *materialistic sense*, that is to say, a modification by which the *phenomenon* projected by the sphere

¹⁷ Even though this amount of money *appears* simply as money and not as capital.

of circulation, that is, the relation of equivalence between capitalist and worker, is perceived as *inverted appearance of the exploratory productive moment*, this one of an *essential nature*.¹⁸⁻¹⁹

4. Dialectical torsion and juridical form: capitalist private property

Chapter 22 of Book I of *Capital*, in which the transformation of surplus value into capital is presented, introduces some important questions to the Marxist critique of law, which, however, have passed relatively unnoticed. The conversion of the property laws that govern mercantile production into laws of capitalist appropriation imposes upon the law of the society of capital certain fundamental characteristics. The way in which this *conversion* is apprehended, in turn, produces an impact on the analysis of juridical relationships, sloping it (the analysis) in the idealistic or materialistic sense, as the case may be.

The fundamental Marxist conception of law is found, evidently, in *Capital*²⁰. At the beginning of chapter 02 (*The process of exchange*), of the Book I, Marx remarks:

The commodities cannot go to market and make exchanges of their own account. We must, therefore, have recourse to their guardians, who are also their owners. Commodities are things and therefore without power of resistance against man. If they are wanting in docility, he can use force; in other words, he can take possession of them. In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in these things, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of act done by mutual consent. They must, therefore, mutually recognize in each other the right of private proprietors. *This juridical relation, which thus expresses itself in a contract, whether such contract, be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economical relation between the two. It is this economical relation that determines the subject matter comprised in each*

¹⁸ The analysis follows that of Grespan: "The proposition of the formal principles of the simple circulation does not imply for Marx, therefore, that in fact exists, has existed or will exist a society established solely on them. On the contrary, the development of its determinations necessarily leads to the conditions in which, in the exchange between capital and labor force, these principles are '*twisted*' and inverted. Thus, their conservation in the sphere of circulation and their denial of valorization are distinct and equally valid moments in the Marxian reconstitution of capitalist production. This production, taken as a whole, involves both the determinations of the circulation of goods and those that reverse it "(GRESPLAN, 1999, p.117).

¹⁹ It can be seen, then, that the answer to Edelman's pertinent inquiry goes beyond simply "going seeing in practice how things really happen." It inexorably includes a rigorous "dip" in critical-theoretical analysis and an absolutely necessary incorporation of the "questions of method" that make up Marxian work.

²⁰ By the way, check out: (CASALINO, 2016).

such juridical act. (MARX, 2013, pp. 159-160, 1962, pp. 99-100, my emphasis).

For Marx, the Law is a *social relation* characterized by the equivalence of positions, that is to say, by the reciprocal consideration of equality, freedom and property, which qualifies the possessors of commodities when they are in the market. The relative autonomy that their wills extract on the occasion of the exchange - in the sense of being able to discuss prices, forms of payment, etc. under close limits. - gives rise to the *appearance* that they move the mercantile circuit, when, in fact, they are moved by it. The possessors appear as *persons*, beings endowed with "natural rights": freedom, equality, autonomy of the will and private property based on the exchange of equivalent values, derived from their own work.

The first author of the Marxist camp to grasp the peculiarity of the sense of juridical form in Marx was, as we have said, Pachukanis. In his work *General theory of law and Marxism*, the Russian associates, for the first time, the figure of the *possessor of the commodity* to that of the *subject of law*, central category for the traditional theories of law. In these, however, the genesis of the *person* is found in idealistic presuppositions, such as the "natural right" or the "norm" positivated by the State. Pachukanis is the pioneer in demonstrating the material-economic conditioner of that juridical figure:

In this way, the social bond between people in the production process, reified in the products of labor and which takes the form of an elementary principle, requires for its realization a particular relationship between people as individuals who have products, as subjects "whose will resides in these things "(...) Therefore, at the same time that a product of labor acquires property of commodity and becomes a value holder, man acquires a value of subject of right and becomes holder of rights (PACHUKANIS, 2017, p.120; 2003, p.112).²¹

Nevertheless, although there are divergences in the field of Marxist researches²², it can be affirmed, with some confidence, that conception of law in Marx

²¹The author notes: "After Marx the fundamental thesis, namely, that the juridical subject of the theories of law is in a very intimate relationship with the owner of the goods, it did not need not be demonstrated again" (PACHUKANIS, 1988, p. .08; 2003, p.36) - "Depois de Marx a tese fundamental, a saber, de que o sujeito jurídico das teorias do direito se encontra numa relação muito íntima com o proprietário das mercadorias, não precisava uma vez mais ser demonstrada".

²² For Márcio Naves, for example, there would be a homology between Pachukanis's analysis and Marx's analysis: "We can say that Pachukanis's conception corresponds entirely to the reflections that Marx develops, especially in the *Grundrisse* and in *Capital*, related to the central place that the analysis of the form occupies to understand the capitalist social relations "(NAVES, 2000, p.48).

advances far beyond Chapter 02 of Book I of *Capital*. In fact, the specific meaning of the juridical form for the German can only be fully attained at the end of Book III when the relations of production and circulation of capital are fully developed. The analysis of Pachukanis, on the other hand, accompanies the Marxian conception present, above all, at the beginning of Book I, that is, in the presentation of the phenomena of exchange and circulation. Thus the Pachukanian point of view of *private capitalist property*, although departing from the circulation of commodities, does not fully develop the dialectical potentialities of the concept, that is, it does not adequately present the way in which the *appropriation of surplus value*, which essentially consists in a relation of *exploitation*, not only coexists, but also comes to the surface, that is, it is *constituted* by means of a social relation marked by the *equivalence* of values. In other words, the absence of proper development grounded in the Marxian presentation of *dialectical conversion* gives the Pachukanian analysis some weakness as regards the explanation of the form of private property under the regime of capitalist accumulation. See, for example, the following passage:

Capitalist property is, in essence, the freedom to transform capital from one form to another and to transfer it from one sphere to another in order to obtain maximum easy profit. This freedom to dispose of capitalist property is unthinkable without the presence of individuals deprived of property, that is, of proletarians. *The juridical form of property is in no way at odds with the expropriation of large numbers of citizens. This is because the capacity of being a subject of law is a purely formal capacity.* It qualifies all people as equally "worthy" of being proprietaries, but by no means makes them proprietaries. The dialectic of capitalist property is magnificently represented in Marx's *Capital*, either in what it assumes the "immutable" form of law, or when it opens its way through violence (period of primitive accumulation) (PACHUKANIS, 2017, pp. .132-133; 2003, p.127, my emphasis).

It can be seen that the Pachukanian exposition is in accordance with Marx's presentation, and, however, it remains *insufficient*. The juridical form of capitalist property does not really contradict the fact of expropriation, as Pachukanis asserts. However, it is necessary to go further and demonstrate *for what reason* this does not occur, that is, to accurately present precisely the *dialectical torsion* that translates the passage from the laws of mercantile property to the laws of capitalist appropriation.²³

²³ The *essence* of capitalist property is not simply the "freedom to transform the capital from one form into another and to transfer it from one sphere to another." This "freedom" is an *essential* characteristic of the form of mercantile *property*. *Capitalist property preserves* this freedom and *adds* to it the extraction of surplus value, that is, the relation of *exploitation* (*Aufhebung*, but in the materialist sense). Now, where

This development is absent, in general, from the Pachukanian exposition, what leads to the opening of certain theoretical "flanks" that allow either the frontal attack to his theoretical position, or the insufficient and "deviant" interpretation of his strictly Marxist point of view.

Thus, the central problem revolves around the *specific form of the relation of capitalist property*, whose adequate presentation of the conceptual elements depends on the way in which the dialectical connection between the spheres of circulation and production is apprehended. If this connection is apprehended in an abstract way, shutting one's eyes to the dialectical peculiarity of its constitutive nexus, then, as Marx affirms, the perception that the parts that are in the market are legitimate owners of their respective value-forms (labor power and money) assumes an *essential* character, so that the *law of commodity exchange* remains intact and the bonds of equality, freedom and property based on labor itself are respected. If, however, the relation between capital and labor is observed from the point of view of the production of the surplus value (retained, *before the reproduction of capital*), the *negation* of the equivalence relation is reaped, its merely *apparent* nature, and, therefore, the *essentially* exploratory character of capitalist production. The juridical form of the capitalist property relation is constituted precisely through that *dialectical conversion*, so that its mode of being consists precisely in projecting the appearance of a relation of law based on the equivalence of positions, while keeping obscure, however, the *essential* relation, exploratory, of extraction of surplus value.

5. The critique of the Marxist criticism of Law

Pachukanis's approximation, between legal and mercantile forms, opened the flank for the claim that his theory could be described as "circulationist", as it would have made the law derive from forms produced by *circulation*, not by production, as indicate Marx's observations. The accusation of "circulacionism", however, was answered, at least in

there is freedom there is no exploitation and where there is exploitation there is no freedom, *except* if the expropriation not only coexist, but also be *consisted* of that freedom. Thence the richness of the Marxian presentation of *dialectical conversion*, which allows us to grasp, at once, both the *appearance* and the essence of capitalist property.

Brazil, with a formulation that takes root in the work of Althusser. In fact, it prevails on the national scene today an interpretation of Pachukanis's work based on the Althusserian paradigm of fierce criticism to the "Hegelian inheritance" supposedly present in Marx's dialectic. By the way, Márcio Naves sustains:

"It is true that there is, for Pachukanis, a relation of immediate determination between juridical form and form of the commodity, as we have seen, but the determination in Pachukanis is, in fact, an *overdetermination*. The sphere of circulation, which directly determines the forms of law, is in turn determined by the sphere of production, in the precise sense that only the specific process of capitalist organization of labor allows the production of commodities as such, that is, as a result of a work that is limited to pure undifferentiated expenditure of labor-power"(NAVES, 2000, p.72).²⁴

Although the answer seems convincing, it is marked, however, by a problem of "birth": its foundation is related to the concept of *overdetermination*, presented by Althusser in *For Marx*:

This *overdetermination* becomes inevitable and thinkable, as long as is recognized the real existence, largely specific and autonomous, irreducible to a pure *phenomenon*, of the forms of superstructure and the national and international conjuncture. We must then go to the end, and say that this overdetermination does not confine itself to the seemingly singular or aberrant situations of history (for example, Germany), but that it is *universal*, that economic dialectic never acts *in a pure state*, that never in history one sees those instances which are the superstructures, etc., respectfully depart when they have done their work or dissipate as their pure phenomenon to let advance in the real path of the dialectic His Majesty the Economy because the Times would have arrived. Neither in the first nor in the last moment does the solitary hour of the "last instance" ever sound (ALTHUSSER, 1979, p.99).²⁵

This notion of *overdetermination*, by which is recognized the *real, largely specific and autonomous existence of the forms of superstructure*, when applied to the analysis of Pachukanis's theory, does not fail to suggest a *section*, that is, a *rupture*, between economic relations of production and juridical relations.²⁶ Thus, instead of highlighting

²⁴ In a note, the author explains the origin of the concept of *overdetermination*, foreign to Marxism: "This concept, of Freudian origin, was used by Louis Althusser in *Pour Marx*, Paris, Maspero, 1977" (ibid., Note 39). It should be noted that the opening to an "ashamed structuralism" is clear.

²⁵ Ahead, he remarks: "(...) it must first be said that the *theory of the specific efficacy of superstructures and other 'circumstances' remains largely to be elaborated*; and before the theory of its efficacy, or at the same time (because it is by the observation of its effectiveness that its *essence* can be attained) *the theory of the essence proper to the specific elements of the superstructure*"(ALTHUSSER, 1979, pp.99/100)".

²⁶ The situation is such that François Dosse does not succeed in locating Althusser in the context of French *structuralism*: "Althusser replaces the mechanistic vulgate of the theory of reflex with a structured totality in which meaning is a function of the position of each of the instances of the mode of production. Thus, Althusser recognizes an efficacy of the superstructure, which in some cases may be in a dominant position

the *dialectical torsion* presented by Marx (that is, the *specific link* through which property based on self-labor *becomes* the appropriation of the work of others), it proceeds precisely to its *concealment*.

Now, insofar as the juridical form is determined in the "last instance" by the productive sphere; that the relations of law, therefore, have a "relative" *autonomy*; the perception that mercantile property laws, based on positions of equivalence, are in fact *essential laws*, is intensified, that is, *the only existent in the actual reality of capitalism*. Thus, the whole effort of Pachukanis, who attempts to reconcile the *equivalence* of circulation with the *exploitation* of production (although in not very dialectical way, by the way) ends up simply ignored, since a "deviation" is made, that is, "eludes" the confrontation of the problem by suggesting a second-degree juridical derivation.

In this context, Faust's criticism of Balibar's Althusserian interpretation (1980)²⁷ regarding the analysis of the *reproduction of capital* could help us to confront the reading that is seen in Pachukanis's work the presence of the so-called "overdetermination":

In fact, Balibar *does not present the relation between the two moments (the moment of an isolated return and that of reproduction) as a relation of contradiction, or, if one wishes, it does not present the passage in terms of an interversion. It will be searched uselessly in his text – which is explained – the presentation of the interversion of the laws of appropriation in terms of contradiction*. The concept that presupposes the analysis of Balibar is not that of contradiction, but that of *rupture* or *cut* (...) Who says contradiction (dialectic) says "tension", separation, but also union between two terms. Whoever says rupture, cut, says "separation": each term "outside" the other. In fact, if the relation between the two moments is a rupture, there can be no position of the passage - a cut a break is an emptiness - and that there is no position of the passage means that the first moment is out of the second, the second can only appear as a *result* (in an abstract sense), which *replaces* the first (...) Well, it is only if the second moment, even though contradicting the first, *retains it as a denied moment* (or, if one wishes, it is only if the contradiction is thought in terms of *Aufhebung*) that one could say that the working class loses its product. If all the continuity between the two moments is broken, even the continuity in the discontinuity that characterizes the *Aufhebung*, only the *inverted appropriation* will be apprehended and not the *interversión of appropriation*. It is finally the only result that Balibar obtains. An inverse error to the one who incurs the anthropologist reading of the interversion, which makes the first moment

and, in all cases, appear in a relation of relative autonomy in comparison with the infrastructure "(DOSSE, 2007, p. .394-395, emphasis mine).

²⁷ The passage that Faust sees is: "These analyzes are, therefore, those in which Marx shows us the transition movement (*but this transition is a rupture*, a radical innovation) from a concept of production as an act, objectification of one or more subjects, to a concept of production without subject, which determines in certain classes as their own functions "(BALIBAR, 1989, p.230).

the *foundation* of the second - what is absolutely not supposed here - and of the interversion not a negation (also in the logical sense), but a simple real inversion (in a weak sense, without implying a logical negation) of the founding movement (FAUSTO, 2013, p.77 / 78, *passim*).

Faust's criticism, however, though it seeks to offer a dialectical answer to the problem, fails to adequately solve it, since he spares, to some extent, the *materialistic* elements that characterize the Marxian presentation. Assuming, as we have seen, that "interversion" occurs only at the moment of *reproduction*; that, therefore, the "dialectical torsion" to which Marx refers only takes place in the "second return" of capital, Fausto makes imperfect the Marxian presentation of the *production* of absolute surplus value, that is, precisely the moment at which capital draws from the worker *more work* than the one that simply restores the value of his workforce. *Now, the dialectical torsion occurs on the occasion of the production of capital, and not of its reproduction.*

From the perspective of Faust, however, the sphere of circulation, which sustains the autonomous existence of the law of mercantile property, ends up retaining some *essentiality*, that is, some level of *disconnected reality of the productive moment* (this one a fundamental element through which approach you take the *apparent* character of that law). Thus, if Fausto's point of view, on the one hand, generates a gain, that is to say, it avoids the isolated apprehension of *inverted appropriation*; on the other hand, it *reifies the interversion of appropriation*, since it diminishes the importance of the *production* of capital in the Marxian presentation, transferring this *enlightening* status (in the sense of thinning the appearances), at the time of reproduction.

Thus, it is necessary to reiterate some decisive points: firstly, to remember that the *dialectical conversion* by means of which the law of mercantile property is transmuted into a law of capitalist appropriation still operates at the moment of the *production* of capital (of its "first return"), in the way that exposition of the reproduction of capital only *consummates* the dialectical presentation of this *torsion*; secondly, Fausto's point of view, insofar as he locates this "interversion" at the moment of *reproduction*, attributes to the law of mercantile property some *essentiality*, therefore, an existence to some extent disconnected from the moment of production; finally, the answer to the circulationist critique to Pachukanis's theory, because it is founded on the notion of *overdetermination*, in addition to making not viable a dialectically adequate

argument, produces inverse effect, that is to say, conceals the rational node of the dialectic, through which a response based on the materialist conception could be adequately formulated.

Conclusion

To the question "what method did Marx conceal?",²⁸ one must answer: *his own*. The meaning of this "concealment" still needs to be unraveled, but the suggestion that the object of concealment would have been the Hegelian dialectic does not make much sense, unless one intends to be "more realistic than the King." In fact, in a letter to Kugelmann, concerning a "well-known" figure of Marxism, Marx clarifies:

I can now understand the curiously embarrassed tone of Herr Düring's criticism. He is usually a very presumptuous and impudent individual who presents himself as a revolutionary in political economy. He did two things. He first published (starting with *Carey*) a *Critical Fundament of Political Economy* (about 500 pages) and then a new *Dialectic of Nature* (against the Hegelian). My book burned him from both sides. He reported this because of his aversion to Roscher etc. For the rest, partly intentionally and partly for lack of insight, he makes mistakes. *He knows very well that my method of development is not Hegelian, since I am materialist and Hegel is idealistic. Hegel's dialectic is the basic form of all dialectics, but only after it was extirpated from its mystical form, and this is precisely what distinguishes my method* (MARX, 2002, p.228-229, my emphasis).

Pachukanis elevated the Marxist critique of law to another level when he incorporated to the analysis of juridical relations a more accurate methodological preoccupation. He undoubtedly worked in the light of Marx's "method", therefore, from the Marxian dialectic. However, by the time that *General theory of law and Marxism* was published, in the mid-1920s, Marxism was only beginning to break away from a certain "economicist" tradition, so that the debate over the status of "dialectical method" within Marxian thought was beginning to take more substantial steps. Paradoxically, the Marxist critique that followed the footsteps of the Russian author renounced the discussion of methodological questions, considering them as closed and being content with working with the categories already solidified by Pachukanis, especially the already reiterated figure of the subject of law.

²⁸ (REICHELTL, 2011).

What is involved, therefore, is a double work: not only to *reincorporate* into the Marxist critique of the law the concern and debate related to the Marxian dialectic, but also to promote an openness to other fields of Marxism to assist in the difficult work of delimitation and elaboration of more precise parameters which permit to identify the particular contours of the *Marxian dialectical method*, as opposed to Hegel's idealistic method. Considering that *Capital* is *par excellence* the object of any analysis that is intended to be serious, and that the presentation of *forms of law* and *private property* are found there as constituted and constituent elements of the movement of production, circulation and accumulation of capital, one should not be surprised, at all, at the relevant contribution that the Marxist critique of law has to offer. It should be recognized that the task is arduous; it is also, however, absolutely necessary.

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