

LEGAL FORM, COMMODITIES AND REPRODUCTION: READING PASHUKANIS

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Abstract

This chapter offers a feminist reading of Pashukanis's legal theory as a contribution to critical evaluation of the relationship between legality, commodification and gender. Contemporary feminist interests in the relationship between legal and non-legal norms, in the role of commodification, and in the limits of gender as a category of analysis, make a re-engagement with Pashukanis timely. For Pashukanis, legal form constitutes subjects as if they have property rights over objects, generates exchange value, and represents differently situated subjects as if they are equal. Here I develop an account of legal form analysis that recuperates Pashukanis's distinction between legal form and technical regulation, his theorisation of the subject of commodification, and his historical method of form/content analysis. Drawing on this critical reading of Pashukanis, I argue for the development of legal form analysis so as to accommodate the roles of social reproduction and consumption in the generation of care value and use value in commodity-exchanging societies. I illustrate this method by providing a legal form analysis of a conflict in consent rights over the use of genetically related embryos. Such an analysis asks how consent rights would extract care value from the subject's reproductive wishes, recognise contributions to the development of the embryo, and recognise investments in the future use of that embryo. In this way, legal form analysis provides a reading of legal contributions to the generation of value from human reproductive activities without making assumptions about their gendered content.

Ruth Fletcher

Legality, commodification and gender

Critical reflection on feminist engagement with law has expressed concern about the limits of law's particular dimensions and about law's relationship with other forms of normative ordering. Some have responded by developing legal critique through revisiting core legal values such as respect (Munro, 2007). Others have called for the further distancing of critique from reform in order to interrogate the regulatory capacities of legalism (Brown and Halley, 2002). Hunter, Rackley and McGlynn (2010) focus on generating the content of gender-sensitive arguments in the aspiration that law will change through the adoption of new content. Others have addressed 'legal technicalities', such as jurisdiction, in order to consider the critical resources which they may offer (Drakopoulou, 2006; Valverde, 2009). Here, I respond to these insights by reading them as a collective invitation to reconsider the relationship between legal form and content from a materialist perspective.

More particularly, I suggest that the critique of commodity form continues to offer resources for thinking through this relationship. I argue that a feminist re-reading of Pashukanis is timely because it responds to a number of feminist concerns. His theorisation of the connection between commodity form and legal form helps with feminist interest in legality and the relationship between legal and non-legal forms of

regulation. Similarly, his focus on the relationship between law and commodification provides a springboard for thinking through a critical method of legal analysis, one which asks how formal law contributes to the generation of value from human activities. And finally, Pashukanis's method also provides a valuable resource for feminist critique because it offers a way of thinking about gender as a concept which changes through the expansion and contraction of its form and content. Through this critical reading of Pashukanis I go on to develop legal form analysis in light of more recent work on social reproduction and consumption.

Legal form analysis draws on and contributes to feminist work on commodification, the process of turning entities into commodities by giving them exchange as well as use value in the marketplace, in two distinct ways. On the one hand, feminists are interested in the ways in which gender relations are interpreted and changed if and when they are commodified (Bakker and Silvey, 2008; Adkins, 2009). This strand of work allows us to see that gender relations are not always commodified and that commodification cannot explain everything about gender (Radin, 1987). Rather, a critical engagement with commodification enables understanding of the relationship between commodified and non-commodified processes and how this relationship changes over time. Adkins for example critiques the argument (made by some scholars of immaterial labour) that productive labour is increasingly like socially reproductive labour in its service qualities and its affective, cognitive and communicative dimensions (2009). Her critique is that this argument relies on a Fordist conception of social reproduction where care of men and children was done without pay in the home. Now that most women work in the paid

marketplace, the labour of social reproduction has been increasingly commodified, as it is performed by paid domestic workers (see further Bakker and Gill, 2003; Bakker, 2007: 545). On the other hand, feminists are interested in the ways in which gender is integral to the form of commodification processes. In this second sense, gender may work through and contribute to these processes, and is not external to them (Wilson, 2010; Cooper, D., 2008). Desire and care, for example, are key gendering practices, which may contribute to commodification by motivating exchange. Investigating the role of law in generating value from human activities can contribute to these feminist interests in the effects of commodification on gender relations and in the working of gender through commodification.

As feminism's key concept, gender has been subjected to extensive scrutiny, both in terms that question its relation with sex and its relation with other dimensions of human experience (Halley, 2006; Grabham et al, 2008; Samuels, 2009). Arguably, the scrutiny of the sex/gender relation has produced two kinds of critique. The first considers that feminist sex/gender analysis has ceded too much conceptual power to gender as it relates to sex. In moving beyond an assumed focus on women and examining the relational categories of femininity and masculinity, post de Beauvoirian gender analysis adopted an understanding of sex and physical materiality as that upon which gender works or imprints itself (Scott, 1986; Butler, 1993: 18). For some critics, this has contributed to an under-theorisation of the sexed body as an active force, or to women as agents, rather than objects, of feminism. The second kind of critique argues that gender continues to be over-determined by sex as a natural dichotomy. Delphy for example has argued that "we

have continued to think of gender in terms of sex: to see it as a social dichotomy determined by a natural dichotomy. We now see gender as the *content* with sex as the *container*” (Delphy, 1996: 33; see also Leonard and Adkins, 1996: 16). These two kinds of critique appear to contradict each other by attributing too much analytical power to different sides of the sex/gender distinction. I suggest that this problem may be overcome by reading the sex/gender distinction from a materialist perspective as one of form/content.

The second challenge to gender has come from those who deem class, ethnicity, disability and other dimensions of human experience to have been significant forces in constituting the meaning of gender or the value of gendered subjects. At least since Crenshaw argued that the experience of African American women was not being accommodated by discrimination law, feminist legal theory has struggled with the problem of ‘intersectionality’ (Crenshaw, 1989, 1991; Grabham et al, 2008). In addition, critics of processes ranging from globalisation to colonialism have shown how gender may be a constituent, but not necessarily the primary, variable in producing conditions of gendered inequality in particular circumstances (McClintock, 1995). These critiques have identified the need to conceive of gender as an open category whose form and content will vary depending on its material relationship with other social forces. It is my contention that a critical reading of Pashukanis’s method of form/content analysis enables such a rethinking of gender.

Some feminists would question the usefulness of an approach like Pashukanis's on the grounds that a materialist focus on the relations of exchange cannot explain gender relations. But as Leonard and Adkins (1996: 10-11) argued some time ago, this kind of critique relies upon a particular understanding of the 'material'. If the material is understood according to the Marxist feminism version defended by Barrett in the 1980s, in terms of the capital/labour contradiction as part of the economic mode of production, then it is easier to understand why this version of materialism could not explain gender relations except in ideological terms. However, other feminists, such as O'Brien (1981) and Delphy (1984), who engaged with Marxist historical materialism, developed a different conception of the 'material' in their analyses of sexual relations. They separated out Marx's method from the object of his analysis i.e. capitalism, and developed concepts to explain the sexual division of labour (see also Mackintosh, 1981; Tabet, 1996). The understanding of the 'material', which Delphy, for example, advocated, stems from the contradictions between 'men' and 'women' as social categories within marriage, whereby women and men are located in different relations of production and women's labour appropriated through non-capitalist processes (see also Jackson, S. 2001). Materialist approaches today continue to be interested in the relationship between human activities and the conditions in which they occur (Klotz, 2006; Hennessy and Ingraham, 1997; Gibson-Graham, 1996; 2006; Bakker, 2007). By reading Pashukanis through more contemporary contributions on the significance of consumption and social reproduction, we can avoid some of pitfalls of his original conception of the legal form/content analysis.

In arguing that a critical recuperation of Pashukanis contributes to feminist analysis of the relationship between legality, commodification and gender, I next identify key relevant features of Pashukanis' thought. I focus in particular on his distinction between legality and technical regulation, his account of legal subjectivity, and his method. I argue for a non-teleological reading of Pashukanis's historical method so that this legal form will change as it accommodates different content, but in a manner which allows for a fragmented, non-linear history. The next section, on legal form and reproductive carers, draws on earlier work on the legal form of reproductive responsibility (Fletcher, 2003). It shows how Pashukanis' legal form analysis may be developed in order to account for the contribution of non-commodified care to commodity-exchanging societies. Legal forms of care obligations contribute to social reproduction by implying the exercise of will over reproduction and enabling the transferability of care after birth. By way of illustration, I discuss how legal form analysis of care obligations during pregnancy highlights the gap between law's formal attribution of gestational obligations and its limitation of the possibilities of exiting or earning from gestational labour. In the final section, I consider how a focus on consumption as an aspect of commodification enables a further modification of Pashukanis's concept of legal form. Consumption takes legal form by constituting the subject as a 'user' with individual rights to use goods and services, rather than as a property owner per se. I consider further how legal forms of user rights are having an impact in relation to embryo use for reproductive purposes.

Pashukanis and legal form analysis

Pashukanis developed a general theory of law from a Marxist perspective through a critique of fundamental juridical concepts (Pashukanis, 1989). His contribution is usually acknowledged by socio-legal scholars as an interesting non-functionalist Marxist account of law (Balbus, 1977; Fletcher, 2003: 219; Head, 2008). His account of legal form investigates the socio-legal relation by analysing the particular contribution of legality to commodity-exchanging societies. For Pashukanis, law develops alongside commodification to regulate affairs as if they were conflicts of private interests (Pashukanis, 1989: 72). Law constitutes the subject as a bearer of rights over commodities, so that these commodities can be exchanged. Accordingly, law is not just an effect of other social relations; it has an autonomous role in constituting subjects as those who have control over commodities. His theory has been criticised for over-generalising from exchange relations and for wrongly predicting the withering away of law in a socialist future (Hunt, 1985: 24; Warrington, 1983: 256; Fudge, 1999). However, even if he was wrong in his generalisation and his prediction of the future, his approach to legality, legal subjectivity, and his method of form/content analysis, have something to offer.

In explaining legality, Pashukanis drew a distinction between law and technical regulation. Technical regulation governed with one purpose, whereas law was concerned with adjudicating a conflict of private interests (Head, 2008: 296). Running the railways was an example of technical regulation as far as Pashukanis was concerned. He thought that the promotion of communal good was sufficiently single-purpose enough to avoid

conflict in such situations. This distinction between the legal and the technical does not map neatly onto a distinction between the market and the state, but is more of a distinction between conflict and consensus as modes of regulation. Legal form and technical form are no longer exclusive in the way Pashukanis implied, if indeed they ever were (see further Baldwin and Black, 2008). Regulatory forms which rely on consensus and collaboration are a key means of promoting commodity exchange, particularly in an era of public-private partnerships (see further Lewis, 2005; Bignami, 2010). And the potential for conflict between rights-holders has been mitigated by the public provision of goods and services, so that law is often about ensuring fair process in that regard rather than about adjudicating on conflicts (Hunt, 1993: 14). As a result, legal form analysis ought not exclude those forms of regulation which work through legal institutions in order to achieve common goals. Such regulatory forms may attribute property rights as part of a communal effort to enlist subjects in the promotion or support of commodity exchange. Indeed much contemporary analysis of legal governance and regulation assumes the erosion of an opposition between conflict and consensus (Bignami, 2010; Black, 2010). In light of the use of consensus to support commodity exchange, we should update Pashukanis's legal form analysis in order to include "technical" regulation, and analyse communal forms which attribute property rights to subjects.

Pashukanis's analysis is also useful because it takes subjectivity seriously. He argued that law itself constituted a distinct subjectivity in response to the need to exchange things and produce commodity value out of them. In order for exchange to proceed and to be legally enforceable someone has to be identified as the owner of the thing. Commodities cannot

exchange themselves. Law bequeaths property rights in an individual as part of the task of ensuring that exchange of the thing is possible. “At the same time, therefore, that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and the bearer of rights” (Pashukanis, 1989: 112). The legal subject as the bearer of property rights is not simply a passive reflection of socio-economic conditions. Socio-economic conditions might have provided the backdrop for such a subject, but legal form is doing work in bringing that subject into being. The constitution of the subject as the bearer of rights produces a legal fiction that individuals are formally equal, a fiction which is revealed as such when actual property ownership patterns are examined.

Pashukanis over-generalised his concept of legal subjectivity in three related ways. He extrapolated his conception of legal form from exchange relations, but did not acknowledge that other kinds of relations in bourgeois commodity-producing society could generate alternative legal forms (Fine, 1979: 43; Fudge, 1999: 163). Secondly, he insisted that the subject as bearer of property rights was the primary subject in all legal realms including that of coercive state action. In other words he applied his conception too generally. Thirdly, his theory could not, and indeed did not try to, account for failures to recognise women and other human beings as property owners and therefore legal subjects. In other words he could not explain the effects of non-commodified relations. His theory was singular in its approach to legal subjectivity; it could not articulate other non-property based routes to legal subjectivity and rights-bearing status, such as duty-imposing relations. In order to be able to use legal form as a method of critical analysis

(which reveals power struggles at work through law), we need to abandon the idea that legal form *only* calls the property-owning subject into being. In critically adapting his conception, the challenge is to re-specify his legal form as a contractual one, and to extrapolate other legal forms from other social relations. We need therefore to recuperate legal form analysis as a relational activity which investigates legal form's representation of the social relations it captures, and considers how this representation actively contributes to commodity-exchanging societies.

Pashukanis's account of legal form lends itself to this kind of recuperation because of the materialist approach that he adopted. Pashukanis distinguished his materialist approach to legal concepts from two influential schools of thought at the time. He criticised the idealists, Kelsen (2005) for example, for speculating on the basis of abstract concepts of freedom and subjectivity (Pashukanis, 1989: 76; 110). He was also critical of Marxist sociological and psychological approaches to law. In his view they had the merit of working empirically, but sought to apply pre-existing concepts to law and did not take legal concepts seriously enough. Pashukanis worked with a materialist methodology, like his psychological and sociological peers, but unlike the sociologists and more like the idealists, he wanted to understand the particularity of legal norms, relations and subjects. Yet, unlike the idealists he wanted to analyse legal categories as they developed historically (Head, 2008: 71). So for him, a materialist approach "sets itself the task of elucidating those historically given material conditions which brought this or that category into being" (Pashukanis, 1989: 111).

In light of more contemporary historical materialist critique, we might want to distinguish between different kinds of historical approaches. Some are more teleological in their narration of progressive modernization, whereas others are more multi-dimensional in their accommodation of multiple power struggles through history (Bakker, 2007: 542-6; Waldby and Cooper, 2008: 65). Waldby and Cooper draw on Boutang to argue that it is not inconsistent to find the co-existence of severe forms of bodily indebtedness, normally associated with master/slave relations, and capitalist strategies of accumulation. Rather it is possible to avoid a teleological reading of primitive accumulation and coercive labour as the pre-history of capital, and identify it rather as a recurrent necessity of capitalist accumulation. They say: “There is no simple progression from slavery to the freely engaged wage contract, but rather a continuum that shifts in accord with the history of power struggles” (2008: 65).

In predicting that law would wither away with the death of capitalism, Pashukanis adopted a more teleological approach to history (Pashukanis, 1989: 61). He did not think it was possible for law to change towards non-capitalist ends, or at least he thought that law would cease being law if it did so. He also thought that embryonic legal forms were important to study because of what they would reveal about the full development of law as such. But it is possible to reinterpret his method so that it does not adopt a teleological approach to history and does allow instead for the co-existence of different systems of organisation in history, which exercise contradictory and unpredictable pulls on legal relations. In other words, there is no singular legal form which moves from an embryonic version to a full-grown one (Hunt, 1985: 25; Gavigan, 1999: 130). Rather, there are co-existing diverse legal forms which constitute subjectivity by suggesting that

the subject can extract value from and exercise will over social objects in different ways, as I will show in relation to reproduction and consumption below.

The other aspect of his method that is useful for critical and feminist perspectives is his use of a form/content distinction. His interest in the historical development of legal concepts and what they could tell us about changes in society as a whole, led to his emphasis on the form as well as the content of legal relations. In this way he spoke to a concern in critical scholarship for the mode of representation. Attention to form enabled identification of the particular shape which social or legal relations took in a given moment, and critique of how that shape might contribute something particular to the content. The legal form of property right responded to a desire to exchange commodities, but contributed something particular to commodity exchange by making ownership exclusive and individual. The distinction between form and content meant that sometimes they would be in harmony with each other, while at other times they would be in tension with each other. The legal regulation of common or shared goods as if they are private, individualised entities is one example of such a tension. Sometimes such a form/content tension could contribute to the development of more individualised production, so that content became more harmonious with form. On other occasions, legal forms of common or shared ownership were developed or re-asserted in order to better accommodate the content of such practices (Petchesky, 1995). This movement between harmony and tension makes change possible and discernible. In the following sections I consider how legal form analysis works when it is applied to the traditionally non-

commodified relations of reproduction, and secondly to the increasingly commodified relations of consumption.

Legal form and reproductive carers

Traditional legal form analysis needs modification because it fails to capture significant aspects of social reproduction (Fudge, 1999; Gavigan, 1999; Fletcher, 2003). Feminists have developed the concept of social reproduction in order to frame analysis of the relationship between care labour and bourgeois commodity-exchanging societies (Engels, 1972). During the 1970s and 1980s Marxist feminists drew on the concept of domestic labour and argued that unpaid caring activities played a key role in the maintenance of capitalist commodity-exchanging societies and needed to have their value recognised (Barrett and McIntosh, 1982; Kuhn and Wolpe, 1978). The context of neoliberal globalization and retrenching welfare states has produced a renewed engagement with the costs and contributions of social reproduction (Bakker and Silvey, 2008; Bakker and Gill, 2003; Rai, Hoskyns and Thomas, 2010). Definitions of social reproduction vary, but it is generally acknowledged to have three interacting dimensions: 1) species reproduction, including the provision of the sexual and emotional services that maintain the intimate relationships within which species reproduction occurs; 2) unpaid provision of goods and services to meet needs in the home and community, including different forms of care; and, 3) the generation and maintenance of consciousness which mediate existing social relations. These activities all contribute to the generation of value in commodity-exchanging societies, but are not themselves commodified. Legal forms of social reproduction are unlikely to interpellate the legal subject as the bearer of property rights,

because they do not work with exchangeable commodities. However, legal forms of social reproduction may share some of the characteristics of legal forms of commodified exchange, as they play a role in generating, caring for and enculturating those engaged in commodified exchange.

Historically, reproduction has been opposed to commodification and represented as a gift relationship where sustenance and care are freely provided to their receivers. In this sense, reproduction was thought to generate obligations of care that could not be exchanged in the marketplace. The idea that reproduction is antithetical to commodification however, has been subjected to a two-fold critique. On the one hand, critics of gift relations have identified commodity-like aspects of gifting, such as origin and detachability (see further Strathern, 1992). Gifts, including reproductive ones, are forms of non-monetised exchange which may be provided in the expectation of reciprocity or future gain (Waldby and Mitchell, 2006; Skeggs, 2010: 32). As O'Brien identified, non-commodified reproduction entails an element of calculation in regards to reproductive process (1981: 38). Reproducers spend energy on directing their care to certain ends, even if they know they are not in complete control of reproductive outcomes. If commodified exchange requires the recognition of a subject who has will over commodities, reproductive exchange also requires a consciousness of control over care. In this way, reproduction and commodification are not conceptually antithetical, though they are distinct.

Some feminists have long argued that reproducers would benefit from the recognition of reproduction's economic value (Rai *et. al.*, 2010). Putting a price on the cost of care can facilitate explicit recognition of care contributions and generate compensation for care labour. As Waldby and Cooper (2008) note, those who seek to prohibit commodification in favour of a gift from one woman to another, end up institutionalising the self-sacrifice of the providing woman. This has the added disadvantage of setting the reproducer apart as a non-labourer in conditions where labour is a key means of generating income.

Securing reproductive exchange requires a subject to exercise will over the reproductive process and to direct care to those who need it. In directing care, reproducers respond to care deficits or grow new caring arrangements, and contribute to the sustenance of societies as they actually exist. In this sense then, reproductive relations are not conceptually excluded from generating legal forms. They provide an important site for investigating the role of legality in commodity-exchanging societies given the reproductive needs of those societies. Legal form analysis of social reproduction then will be interested in the legal generation of subjectivities which bear reproductive responsibilities as they participate in commodity-exchanging societies.

At a more empirical level it is obvious that the bearer of care obligations is an important and contested form of legal subjectivity. Law holds out the idea that parents have legally enforceable responsibilities to care through child welfare principles, but reserves the power to enforce those responsibilities differentially. The extent to which reproductive responsibilities should be compensated for and accommodated has been the subject of extensive commentary on the costs of childcare and the regulation of work/family

balance (e.g. Conaghan and Rittich, 2005; Folbre, 1994; Perrons et al, 2006). These debates illustrate that the legal attribution of reproductive responsibility performs an important role for commodity-exchanging societies. Parents continue to be the default bearers, but reproductive responsibility may be transferred between individuals, and public bodies regulate and compensate reproductive labour to varying degrees. We can say that legal form analysis of reproduction invites critique of the way that legal subjectivity is generated through the attribution of reproductive responsibility and care obligations. Subjects are called into legal being as the bearers of care obligations towards children and other dependents. This creates the idea that everyone is equally capable of bearing reproductive responsibilities, but this legal form may be at odds with actual differential reproductive contributions. Subjects bear reproductive responsibilities not to promote commodity exchange but to support the free provision of care to those who need it. Conflicts may arise between reproductive subjects if they seek more or less reproductive responsibility. But the public as a collective subject is also called into being as the common goal of ensuring (quality) social reproduction is sought through legal form.

One of the key recent changes in reproductive process is that women and couples are planning and spacing their children in order to balance economic security with the desire to reproduce. Some countries are using incentive measures to encourage child-bearing out of a concern that there will not be enough young people to support the economy, but the falling birth rate in the countries of the Economic North show that women are largely ignoring state encouragements to have more children (Bakker and Silvey, 2008; Waldby

and Cooper, 2008). Some women's efforts to limit their reproduction have ended up before the courts as failed sterilisation measures give rise to claims of professional negligence. Yet the courts are reluctant to recognise the birth of a child as a harm requiring compensation (Priaulx, 2007). This kind of legal thinking is an illustration of the traditional legal form of reproduction. It responds to a conflict over care obligations by representing reproduction as a benefit to the reproducer, making the mother responsible for childcare and denying care's monetary value. Compensation for reproductive labour is left to technical forms of regulation which provide child benefit, or is privatised as an aspect of the 'family wage'. The legal form of reproductive responsibility thus has an impact on people's reproductive decision-making, and they in turn challenge the formal legal characterisation of reproduction as natural and beneficial for the reproducer. The legal form extracts care value out of social reproduction processes by legally constituting the subject as she who has will over reproductive process by giving her responsibility for it, even if the possibility of exercising that will to exit reproduction is limited.

Two issues in particular have been much contested and have contributed to the uneven development of this legal form: the legal capacity of reproducers to opt out of or modify gestational reproduction and the legal capacity of reproducers to earn money from the provision of gametes, embryos or gestational services. From a legal form perspective the legal capacity of reproducers to opt out of or modify their gestational reproduction involves recognising their provision of gestational care and their right to withdraw that care. Conflict over women's provision of gestational care usually arises in the context of

abortion, medical treatment during pregnancy, or drug or alcohol consumption by the pregnant woman. Abortion, for example, is usually legally restricted so that a woman has this option when particular grounds are met, such as the minimisation of risks to her health. In such circumstances, a conflict between pregnant woman and community becomes legally represented as a conflict between woman and foetus. At the moment that the foetus is legally constituted as a subject in conflict with the pregnant woman, legal subjectivity is reconstituted as a potentiality. Reproductive responsibilities are not just owed to existing people, but to future people. Thinking about the legal regulation of pregnancy and abortion through the lens of legal form makes gestation visible as a kind of care provision that has gift-like value. Moreover, legal form analysis also shows us how legal subjectivity is expanded by making the subject the bearer of care obligations towards an entity that is not yet born. Legal forms of 'foetal rights' deny women property in their own reproduction, extract future-oriented generative value from pregnancy, and consolidate the community as a legal subject.

Another way in which legal form has constituted biological reproduction as a set of care obligations, is by preventing its direct commodification. In the context of pregnancy, legal rules often stop a woman from earning income from the gestation and birth of a child for another. In so doing they characterise women's gestational care as a non-commodity and deny them the right to monetary compensation for such care. Legal interventions in the context of gamete donation have also been known to inhibit commodification as they attempt to restrain a free market in reproduction. Restrictions on

paying gamete donors have maintained the legal categorisation of reproduction as a gift-like relationship: a non-monetised, voluntary contribution to social relations.

Denying gamete providers the means to earn income from their donations institutionalises their self-sacrifice and takes advantage of their contributions in conditions where the life sciences are highly capitalised (Cooper, M., 2008). The need to recognise the economic value of gamete production is becoming more urgent with the development of stem cell technologies. As stem cell research develops, tissue is becoming valuable for its regenerative as well as its reproductive qualities. Regenerative tissue creates the possibility that individuals could be cared for by repairing and adapting body parts that no longer work as well as they might. Women constitute the primary tissue donors in the new stem cell industries, which use human embryos, oocytes, foetal tissue and umbilical cord blood. Waldby and Cooper note that women providers of oocytes are in demand by a neoliberalism which seeks to make available “a surplus of reproductivity, a reserve of low-cost suppliers of reproductive services and tissues who perform unacknowledged reproductive labour within the lowest echelon of the bioeconomy” (Waldby and Cooper, 2008: 60; see also Cooper, M., 2008: 129-151; Dickenson, 2001). When law prevents donors from earning through the provision of gametes, they are compelled to be self-sacrificing gifters and care contributions are devalued. Legal form analysis identifies the tension between the legal representation of gamete donors as carers whose contributions cannot be commodified, and the practice of generating care value for others through gamete donation.

Legal form and reproductive users

Legal form analysis also needs to be developed in order to accommodate the role of consumption in commodity-exchanging societies. Along with many Marxists of his era, Pashukanis neglected the role of consumption as an aspect of commodification.

Consumption was assumed to be a passive process that finally used up the product, simply revealing its use value (Warde, 1992; Fletcher, 2006). Consumers were important legal subjects for Pashukanis, but he thought of them as buyers and therefore as kinds of owners. He did not consider whether consumption played a distinct role in generating legal subjectivities. More contemporary analysis of consumption practices has analysed the role of taste in displaying cultural capital and cultivating middle-class sensibilities (e.g. Bourdieu, 1987). Consumption has also assumed a more important role in the expansion of late capitalism as knowledge economies and communication technologies proliferate the means and ends of consumption (Lury, 2011). Skeggs has argued that concepts of exchange and circulation are key to understanding the new subjectivities that are being generated through communication technologies and the management of affective labour (2010: 31-3). Legal form analysis of the relationship between subjectivity and commodification needs to address these conceptual and historical gaps.

Spending power accrues to consumers through wages, insurance, credit and loans, and not necessarily from property ownership, although the latter obviously may play a role in generating credit. Spending power makes a consumer a key market actor in securing the exchange of goods and services for money. As a result, consumer preferences become key to manufacturers and advertisers as they pitch their products and brands (Miller and

Rose, 2001). Consumer desire to enhance quality of life is a goal which gives individuals power in the market and is an attribute traders seek to cultivate and direct. Thrift has argued that we need to appreciate changes in the commodity form as a result of the impact of consumers as they “co-create” commodities and leave them in a constant state of experimentation (2006). Legal form analysis would benefit from consideration of consumption also because gender may motivate consumption in numerous ways. Caring for dependents necessitates the purchase of goods, and people meet their affective and sexual needs through accessing services.

The formal legal sphere provides key opportunities to observe and critique the generation of subjectivities who want access to goods and services. Law has participated in the development of consumer capitalism by expanding the protection of consumer rights beyond the context of contract law (Scheiderman, 1998). Anti-discrimination law has moved beyond the scope of employment to that of access to goods and services, so that providers cannot deny consumers the use of a good or service on irrational grounds. Equality in the consumer market has become as contested as equality in the labour market. This development has been driven by civil society demands for equality and fairness as much as by businesses that want to open out their provision. The legal right of access to goods and services has become a key signifier of legal equality at the same time as self-fulfilment through consumption intensifies. In the process, law contributes to consumer practices and consumer subjectivities.

The derivation of a right to receive services from the right to provide services in the law

regulating free movement is a particularly interesting case because it illustrates clearly the contribution of legal form to service use. Legal provisions, which were understood to protect the right to provide and receive services offered for remuneration in the marketplace, have been interpreted so as to apply to publicly funded services such as those supplied by the UK's National Health Service (NHS) (Hervey and McHale, 2004; Harrington, 2009). Rights derived from the ability to pay for a good or service in the marketplace have imposed qualified obligations on public authorities to use tax based funds on behalf of service consumers in a cross border EU context. The courts have said that what matters is the simple fact of a payment for the service, even if the reimbursement is to be sought from tax funds. The formal presence of a single market transaction (e.g. the purchase of a treatment) in the absence of substantive market relations (e.g. where a reimbursement is being claimed from the National Health Service) has allowed the courts to maintain the fiction that public services are private. The general legal form of consumption has developed so as to erode the distinction between public and private insurance, and, apparently between tax funds and private funds. In other words, a specific socio-economic right to a healthcare service has become enforceable against the state because legal form has interpellated the subject as a market consumer in spite of the fact that the claim is being made against a public health system funded from the tax base and managed by state mechanisms. The effect is to re-commodify welfare services which were originally provided in order to, as Esping Andersen famously argued, decommodify the status of individuals vis-a-vis the market (1990: 21, see further Newdick, 2008; and Gibson-Graham, 1996).

The demand for the legal form of healthcare consumption has come from ordinary patients (Newdick, 2006). Individuals get recognised as the bearers of rights to access healthcare services, and contribute indirectly to the privatization of public healthcare services. Law plays a role in these processes by recognising the consumer's rights and positing an equivalence between the receiver and the provider of the commodity. The legal subject of the consumer differs from that of the exclusive property-owner in the sense that it is the subject's spending power rather than ownership per se which is significant. The legal form of consumption invokes the subject as the chooser of commodities, thus bequeathing a right of use, rather than a right to own. This legal form is similar to Pashukanis's legal form in the sense that market exchange is key, but it emphasises the significance of the user rather than the owner per se.

The legal form of user rights could also have an impact on the legal regulation of biological reproduction, just as property rights has had an influence. Rights to use reproductive components and reproductive technologies have been legally recognised, even if conditions on such use have also been imposed (Jackson, E., 2001). User rights have the potential to challenge and change legal forms of care obligations as those who participate in reproduction come to play the role of consumer in relation to reproductive processes. The capacity of gamete-donors to opt out of or modify their engagement in collaborative reproduction is an interesting example in circumstances where they have been given consent rights over the use of their gametes. Some have referred to these consent rights as quasi property rights (Ford, 2005: 272). But here I want to focus on the effect of the legal form of consent rights on the understanding of production and use in

relation to embryos for assisted reproduction. In recognising consent rights, legal form constitutes the producer of sperm or eggs as a subject who has will over gametes and can exchange them as donations, not as commodities. The producers cannot sell their gametes, but they can transfer care obligations in relation to them. The fact that someone may then go on to use the gametes in order to conceive and reproduce a child has the legal effect of strengthening the transfer powers of the gamete producer by giving them veto rights over subsequent use.

As the Evans case¹ illustrates, a conflict may arise between gamete donors and potential users over the fate of an embryo to which both donors have contributed. In Evans, the woman who had contributed her eggs towards the generation of the embryos in question wanted to use them in order to reproduce. The man who had contributed his sperm did not want the embryos to be used as he did not want to father children. The Human Fertilisation and Embryology Act 1990 gave each consent rights over the use of the embryo, which meant that he had the legal power to veto her use of the embryos. She ultimately failed in her human rights challenge to the clinic's decision to destroy the embryos in light of his veto (see further Sheldon, 2004; Morris and Nott, 2009). In legal terms, both parties were in an equivalent position because they were each bearers of a genetic interest in the embryo. In circumstances where such equivalent interests clash, the negative right to avoid reproduction trumps the positive right to reproduce. As a result, the absence of the sperm donor's consent to the future use of the resulting embryo decided the issue. In this instance legal form refuses to compel reproduction against his will and associates care value with voluntariness.

Some feminist commentators have criticised the reasoning which informs the decision on the grounds that it misrecognises her greater interest in using the embryo to become a mother. Their critiques rely on either her past greater contribution to the production of the embryo (e.g. Donchin, 2008), or on her greater investment in future parenting (e.g. Scott-Harris, 2010). In other words, they imply that the legal representation of genetic connection as the basis for the deciding interest unjustifiably renders both reproductive contributors equivalent. The legal form of consent rights over one's genetically related embryo does not take account of the differences between past contributions through egg production and sperm production. Nor does it take adequate account of differences in the emotional, psychological or financial investment in future parenting between the parties. By asking whether and how the legal form of consent rights fits with and extracts value from the content of the parties' past contributions and future use, legal form analysis helps differentiate between these different moments in the generation of care value from reproductive processes.

Sperm generation and egg generation are not equivalent processes in labour terms as they make different demands on their generators. For Waldby and Cooper, oocyte generation is a form of clinical labour which entails "giving clinics access to the productivity of [women's] in vivo biology, the biological labour of living tissues and reproductive processes" and involves "second-order tasks; compliance with often-complex medical regimes of dosing, testing, appointments and self-monitoring" (2008: 59). Donchin comments: "Only she undergoes the risks and rigors of IVF including treatment with

hyperovulatory drugs, frequent monitoring to avoid complications, and surgery to extract her ova. He need only ejaculate into a cup” (2008: 36). Legal form analysis enables critics to identify the gap between the legal representation of the gamete donor (as one who has a veto over the use of the gamete), and the actual labour which gave rise to that gamete. This responds to feminist concerns that women’s clinical and generative labour is not being adequately recognized as the value of different contributions to gamete production is rendered equivalent by consent rights derived from genetic relatedness.

Secondly, legal form analysis allows critics to identify any gaps between the contribution of genetic relatedness and the contribution of actual investments into future parenting.

For feminist commentators such as Scott-Harris (2010), law should be reluctant to accept the veto rights of the male gamete donor when this would have the effect of denying the female gamete donor the opportunity to mother a child to whom she is genetically related. Her right to use the embryo should be given more weight than his right not to use it because she has a lot invested in that future use, not because of her greater past contribution. This approach has the merit of giving weight to emotional and practical investment in future parenting; it helps us identify the need for legal form to accommodate these investments as well as the genetic connection itself. In thinking about the different dimensions of care value captured by legal forms of reproduction, we need to think about the way in which individuals make social contributions by anticipating and preparing for future care obligations. There is a problem however with the way that this point - about accommodating the actual investment in future parenting – has been made by those such as Scott-Harris. She argues that women are more likely than men to have

such an investment because women's value has historically been cultivated through motherhood. The problem is that the critique ends up making general assumptions about women as a group, and men as a group, when it would be possible to focus on the actual investment individuals have made in a future reproductive role. In other words, Scott Harris's feminist critique ends up giving more weight to women's contributions because they are women, and not because of the actual material role played by investment in future care roles. This is problematic because it re-asserts sexed status rather than the 'doing of caring' as a key signifier for gender. This has the effect of negating the investment which the non-user in this instance may also have made in certain reproductive outcomes. Legal form analysis however would ask whether the legal assumption that both parties have made equal investments in future reproductive, or non-reproductive, roles, adequately accommodates the actual investments that they have made in their anticipation of future parenthood. On this view, a party's investment in not becoming a genetic parent merits accommodation as well, and the question of how to accommodate such investment becomes more of an empirical one.

Conclusion

Feminist critiques of the relationship between legality, commodification and gender could benefit from a renewed engagement with Pashukanis and the concept of legal form. Legal form analysis show us how legal forms - property rights, care obligations, user rights – contribute to the generation of value in commodity-exchanging societies. Pashukanis showed us how legal forms play a distinct role in ensuring the generation of exchange value from the production of things through the constitution of the legal subject

as the bearer of property rights over those things. Pashukanis's conception of legal form can serve as a touchstone for feminists interested in negotiating a pathway beyond a dichotomous relationship between reproduction and commodification, and towards a greater appreciation of the way that reproduction and commodification work on and through each other. The problems with Pashukanis' legal method do not in themselves render legal form analysis devoid of critical value. Just as Marxist materialist frameworks have been developed in order to address conceptual inadequacies and historical changes (Hennessy and Ingraham (1997)), so legal form analysis can be developed. By reading Pashukanis' method through a more contemporary, non-teleological lens, we can adapt his method of legal form analysis to take account of neglected and new dimensions of commodity exchanging societies.

The limits of Pashukanis's legal form analysis have long been obvious to feminists who have shown how it fails to capture relations of reproduction. However, feminist work on social reproduction has shown us how non-commodified reproductive care labour makes a distinct contribution to commodity-exchanging societies, and how care labour has been more intensely commodified in recent times. Legal disputes over care obligations illustrate that legal form plays a role in securing reproductive exchange. In developing legal form analysis in light of the legal regulation of reproduction, the question becomes one about the role of the legal attribution of reproductive responsibility in order to generate care value. In this way legal form analysis offers us a method of looking behind the formal attribution of reproductive responsibility to carers such as pregnant women or gamete donors, and ask how value is generated in these processes.

Changes to the commodity form under advanced capitalism suggest a second reason for the modification and updating of legal form analysis. The development of consumer capitalism means that the subjectivity of the consumer is increasingly given legal form. As the consumption of goods and services becomes such a central activity the legal form of use right is becoming more distinct from the legal form of property right. The regulation of reproductive components and technologies shows us how legal subjects have been brought into being as the bearers of user rights in relation to those components and technologies. Legal form analysis asks us to look behind law's attribution of equivalence to the bearers' of consent rights on the basis of genetic connection. Instead, legal form analysis suggests that we ask whether that legal form accommodates past care contributions which have made reproductive exchange possible, and the effects of future care obligations arising from reproductive exchange. In this way, legal form analysis provides a reading of legal contributions to the generation of value from human reproductive activities without making assumptions about their gendered content.

¹ *Evans v United Kingdom* (Application no. 6339/05), European Court of Human Rights

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